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**SUPREME COURT
OF THE STATE OF WASHINGTON
COURT OF APPEALS NO. 309029-III**

MICHAEL HENNE,

Plaintiff/Respondent,

v.

CITY OF YAKIMA, a Municipal Corporation,

Defendant/Petitioner.

**DEFENDANT/PETITIONER CITY OF YAKIMA'S
RESPONSE TO BRIEF OF AMICUS CURIAE
WASHINGTON EMPLOYMENT LAWYERS
ASSOCIATION AND AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON**

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A. INTRODUCTION

The brief filed by amicus curiae American Civil Liberties Union of Washington (ACLU-WA) and Washington Employment Lawyers Association (WELA) raises no arguments that resist application of RCW 4.24.525 to the City in this case. Amicus's attempt to redefine unambiguous statutory terms is confusing at best, and untenable. The proper interpretation of RCW 4.24.525 is the broad interpretation warranted by the plain language of the statute, which clearly defines the term "person" as including "any . . . legal entity." There can be no doubt the City, a municipal corporation, fits within that broad definition. To suggest otherwise and construe the statute as excluding governmental entities requires feats of linguistic gymnastics.

Amicus's constitutional challenges also fail. The City is aware of no case that has held an anti-SLAPP statute in violation of the Noerr-Pennington doctrine. Indeed, the purposes of the Noerr-Pennington doctrine and anti-SLAPP statutes in general are parallel. The doctrine at most is a shield against liability. Its attempted use here, as a sword to enable persons to file meritless lawsuits against governmental agencies, is inappropriate and unsupported by the doctrine. Likewise, there are no separation of power concerns. The issues Amicus raised have already been addressed and rejected by numerous courts.

B. ARGUMENTS IN RESPONSE TO BRIEF OF AMICUS CURIAE

1. THE CITY IS ENTITLED TO ANTI-SLAPP PROTECTIONS UNDER THE PLAIN LANGUAGE OF RCW 4.24.525

Amicus's argument that the City is not a "person" under RCW 4.24.525 ignores the statute's plain language. RCW 4.24.525(1)(c) defines "moving party" as "a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim." The term "person" is broadly defined as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity." RCW 4.24.525(1)(e).

The City is a municipal corporation. A municipal corporation is a legal entity. Bates v. Sch. Dist. No. 10 of Pierce County, 45 Wash. 498, 499 (1907). The Legislature knows how to distinguish between "governmental" and "nongovernmental" entities when it so chooses. See, e.g., RCW 9A.82.010(8); RCW 28B.117.050(2); RCW 42.52.010(9)(d); RCW 90.71.230(1)(e). It made no such distinction in RCW 4.24.525(1)(e).

Amicus urges that the fact RCW 4.24.525 separately defined the term "government" indicates that it is excluded from the term "person." That argument is only tenable by ignoring the broad statutory definition of "person." The definition of "person" in RCW 4.24.525(1)(e) unambiguously extends to "any . . . legal . . . entity." It is difficult to

conceive of a broader definition than the one the Legislature chose.

That RCW 4.24.525(4)(e) speaks to the intervention by “any governmental body” in a motion to strike does not remove governmental entities from the definition of “person.” RCW 4.24.525(4)(e) simply provides a mechanism to allow a “government body” to become a party if it is not already involved in the case (unlike here where the City has been a party from the beginning). This construction is consistent with RCW 4.24.525 and harmonizes the statute’s provisions by not constricting the intentionally broad definition of “person.” See Ballard Square Condo. Owners Ass’n v. Dynasty Const. Co., 158 Wn.2d 603, 610, 146 P.3d 914 (2006) (“[A] court may not construe a statute in a way that renders statutory language meaningless or superfluous.”).

Amicus also argues that the legislative purpose of RCW 4.24.500-.520 should be used to interpret the later-enacted RCW 4.24.525. This argument is legally irrelevant given the statute’s clear language. “The intent behind the language of an enactment becomes relevant only if there is some ambiguity in that language.” W. Petroleum Importers, Inc. v. Friedt, 127 Wn.2d 420, 424, 899 P.2d 792 (1995). “Statutory policy statements do not give rise to enforceable rights and duties” and do not control specific statutory provisions. Bailey v. State, 147 Wn. App. 251, 262-263, 191 P.3d 1285 (2008) (RCW 4.24.510 prevails over general

findings and purposes in RCW 4.24.500). Moreover, in statutory construction, where two statutes are in conflict and cannot be harmonized, the newer, more specific statute prevails. State v. J.P., 149 Wn.2d 444, 454, 69 P.3d 318 (2003) (“more recent provision prevails if it is more specific than its predecessor.”). Unlike RCW 4.24.510 (which immunizes only the “person who communicates”), the protections of RCW 4.24.525 apply to “any claim” “based on” certain communications relating to executive or other governmental proceedings, and is not limited to claims against the “communicator.”

2. ANTI-SLAPP PROTECTIONS ARE NOT DEPENDENT ON WHETHER AN ENTITY HAS FREE SPEECH RIGHTS

Amicus questions the City’s entitlement of anti-SLAPP protections by claiming the City lacks free speech rights, citing Segaline v. State of Washington, 169 Wn.2d 467, 238 P.3d 1197 (2010). Reliance on Segaline is misplaced.

Segaline involved an immunity statute, RCW 4.24.510, which contained the “ambiguous” and undefined term “person.” Id. at 473. Segaline addressed the “narrow issue . . . whether a government agency that reports information to another government agency is a ‘person’ under RCW 4.24.510.” Id. at 473. It did not address RCW 4.24.525, which is a procedural statute enacted in 2010 after the Segaline case was heard. Due

to the absence of a definition of the term “person” in RCW 4.24.510, and noting “varied” treatment of the term “person” “within the RCW,” Segaline held that RCW 4.24.510 does not extend to government agencies because the “purpose” of that statute was to protect “individual” speech rights. Id. at 473-474. Segaline has no significance here, where the term “person” is defined in the broadest possible way.

More fundamentally, Amicus’s argument is logically irrelevant. The argument misstates the scope of the statute. Nothing in RCW 4.24.525 limits anti-SLAPP protections to free speech rights. The statute encompasses any “claim . . . based on action involving public participation and petition” which is broadly defined to include “any oral statement made, or written statement or other document submitted” “in” or “in connection with an issue under consideration or review by” an “executive . . . or other governmental proceeding authorized by law,” (RCW 4.24.525(2)(a), (b), and “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.” RCW 4.24.525(2)(e). The first two definitions of “public participation and petition” in RCW 4.24.525(2)(a)-(b) do not *per se* implicate constitutional speech rights at all, and are much broader than those rights.

The California Supreme Court has similarly rejected a plaintiff's argument that California's anti-SLAPP protections (worded similarly to Washington's) are limited to nongovernmental entities or constitutionally protected rights. Vargas v. City of Salinas, 46 Cal. 4th 1, 17, 205 P.3d 207, 216 (2009) (noting the California statute (as does Washington's) describes protected categories of communications in addition to constitutional rights of petition and free speech, Cal. Code. § 425.16(e)(1)-(4). Compare RCW 4.24.525(2)(a)-(e)).

This is because anti-SLAPP statutes recognize governmental entities have a "freedom to speak" (if not a right to speak). Vargas v. City of Salinas, 200 Cal. App. 4th 1331, 1347, 134 Cal. Rptr. 3d 244 (2011) (a governmental entity "certainly has the freedom to speak"), "Indeed, it is not easy to imagine how government could function if it lacked this freedom." Id. As the Vargas court noted,

If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed. In short, regardless of its source, the government's right to speak is a substantial interest to be protected.

Id.

Anti-SLAPP statutes protect that freedom by providing protection from liability to reports of misconduct of public employees which are clearly matters of public concern.

3. APPLICATION OF RCW 4.24.525 HERE WOULD NOT LEAD TO ABSURD RESULTS; ONLY MERITLESS CLAIMS ARE SUBJECT TO A MOTION TO STRIKE

Amicus urges a non-literal reading of the anti-SLAPP statute to avoid what it calls “absurd results.” (Am. Br. of ACLU-WA 8). Amicus suggests the City’s position will allow it to defeat any claims against it by means of special motion to strike. This slippery-slope argument is untenable, and fails to address why the same “absurd results” argument does not apply with equal vigor to private SLAPP defendants. The logical extension of Amicus’s argument is the invalidation of the statute for any defendant, private or public. Amicus’s argument in this regard is more properly directed to the legislature for amendment of the statute. It is not an argument bearing upon the application of the unambiguous, broad language of the statute.

Amicus ignores that the basic principle of anti-SLAPP statutes such as RCW 4.24.525 is to preclude only meritless claims. RCW 4.24.525 allows a private or public defendant to make a special motion to strike. Once shown a claim “is based on an action involving public participation and petition,” the claimant must establish by “clear and

convincing evidence a probability of prevailing on the claim.” RCW 4.24.525(4)(b); City of Longview v. Wallin, ___ Wn. App. ___, 2013 WL 1831602 *11. In this manner, the anti-SLAPP special motion to strike is similar in operation to a summary judgment motion. Both serve the similar purpose of expeditiously weeding out of meritless claims before trial regardless of whether the defendant is public or private. See CR 56.

Contrary to Amicus’s fears, RCW 4.24.525 does not absolutely bar claims against the City, or any other “person.” The anti-SLAPP statute does not bar a claimant from litigating meritorious actions. The anti-SLAPP statute “poses no obstacle to suits that possess . . . [the required] merit.” Navellier v. Sletten, 29 Cal.4th 82, 52 P.3d 703, 712 (2002). The City submits that allowing for the early dismissal of meritless claims is not a legal absurdity, but the result of prudent and perspicacious legislation.

Amicus also suggests that application of the anti-SLAPP statute to the City will chill the ability of government employees to report discrimination claims. This is a false dilemma. Anti-SLAPP statutes (as well as discrimination and whistleblower statutes) protect the reporting of discrimination claims to the government should someone bring a lawsuit claiming the reporting was improper.

In the discrimination context, reporting of harassing misconduct to a government agency or employer is protected from lawsuits by the

subject of the report. An employee who sues an employer for not responding to reports of discrimination is not subject to a motion to strike by the employer because the employer is not being sued for the report made, but for violation of anti-discrimination laws for lack of proper response to the report. In the anti-SLAPP context, the critical point is whether the plaintiff's claim itself was based on protected communication (versus unprotected conduct or actions). E.g., *McErlain v. Park Plaza Towers Owners Ass'n*, C-13-4384 MMC, 2014 WL 459777 (N.D. Cal. Feb. 3, 2014) (discrimination claims which reference prior protected communications are not based on the communications, even though the communications may be evidence of discrimination). Here, Plaintiff sued the City for the reports of misconduct made by fellow officers. Amicus cites no authority for the proposition that application of RCW 4.24.525 under these facts poses a risk to enforcement of anti-discrimination laws.

4. APPLICATION OF RCW 4.24.525 HERE WOULD NOT VIOLATE THE NOERR-PENNINGTON DOCTRINE; THAT DOCTRINE APPLIES EQUALLY AS A SHIELD TO PROTECT THE CITY

A. *The Noerr-Pennington Doctrine Does Not Provide Plaintiffs with A Sword; It Provides A Shield from Liability for Those Who Petition Government, and Applies To Protect Municipalities and Their Employees*

Amicus argues that Plaintiff's filing of the lawsuit is protected under the Noerr-Pennington doctrine. Amicus misunderstands and

misapplies that doctrine. Under the Noerr-Pennington doctrine, those who contact the government are generally immune. Manistee Town Ctr. v. City of Glendale, 227 F.3d 1090, 1092 (9th Cir. 2000). The doctrine does not create a cause of action, and does not act as a sword allowing private citizens to initiate meritless lawsuits against governmental agencies.

The dual principles underlying the Noerr-Pennington doctrine are the constitutional right to petition under the First Amendment and the importance of open communication in representative democracies. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). As the Noerr Court explained:

In a representative democracy such as this, [the legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act[].

E. R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961).

Thus, the Noerr-Pennington doctrine applies equally to and protects government entities and their employees. Manistee, 227 F.3d at

1092 (doctrine protects municipalities and their employees). Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18 (2d Cir. 1980) (same); Sanghvi v. City of Claremont, 328 F.3d 532, 543 (9th Cir. 2003) (same); Mariana v. Fisher, 338 F.3d 189, 200 (3d Cir. 2003) (same):

B. *The Noerr-Pennington Doctrine Does Not Protect Plaintiffs from Application of the Anti-SLAPP Statute*

The Noerr-Pennington doctrine has no bearing on whether a party can bring a defensive motion to dispose of a lawsuit already filed. Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim, 784 N.W.2d 834, 840 n.7 (Minn. 2010) (“[T]he *Noerr-Pennington* doctrine does not broadly protect plaintiffs from application of the anti-SLAPP statutes.”).

No known jurisdictions have held that anti-SLAPP statutes conflict with Noerr-Pennington. Other courts confronted with the constitutionality of anti-SLAPP statutes have found them valid. Anderson v. Tobias, 116 P.3d 323, 338 (Utah 2005) (bill of attainder); Equilon Enterprises v. Consumer Cause Inc., 29 Cal.4th 53, 24 Cal.Rptr.2d 507 (2002) (petition); Hometown Properties Inc. v. Fleming, 680 A.2d 56 (R.I. 1996) (numerous grounds, including separation of powers and access); Sandholm v. Kuecker, 405 Ill. App. 3d 835, 942 N.E.2d 544 (2010) (guarantee to a remedy); Lee v. Pennington, 830 So.2d 1037 (La.Ct.App. 2002) (equal protection and due process).

No decisions have been found finding anti-SLAPP statutes unconstitutional. Nexus v. Swift, 785 NW.2d 771, 778-779 (Minn. App. 2010) (referencing 24 state anti-SLAAP statutes).

Several courts have in fact specifically rejected claims that state anti-SLAPP statutes offend Noerr-Pennington. See, e.g., Magic Laundry Servs., Inc. v. Workers United Serv. Employees Int'l Union, CV-12-9654-MWF AJWX, 2013 WL 1409530 (C.D. Cal. Apr. 8, 2013) (plaintiff's assertion that the Noerr-Pennington doctrine bars a defendant's anti-SLAPP motion was "meritless" because the plaintiff faced no liability (*i.e.*, had no claims asserted against it); Kearney v. Foley & Lardner, LLP, 590 F.3d 638, 643-645, 648 (9th Cir. 2009) (rejecting plaintiff's argument that "the doctrine was meant to protect a citizen's right to petition the government, and never intended to bar suit by a private citizen against government officials," affirming application of the California anti-SLAPP statute); John v. Douglas Cnty. Sch. Dist., 125 Nev. 746, 750, 219 P.3d 1276 (2009) (Nevada anti-SLAPP statute protected communications between school district employees and school district regarding reported misconduct of the plaintiff, rejecting Noerr-Pennington as a defense to the anti-SLAPP motion).

C. *The Purposes of the Noerr-Pennington Doctrine Parallel the Purposes of State Anti-SLAPP Statutes, Including Washington's Statute*

It is not surprising that courts have repeatedly found that state anti-SLAPP statutes do not violate the Noerr-Pennington doctrine. As the John court recognized, the purposes of the Noerr-Pennington doctrine parallel the purposes of state anti-SLAPP statutes and are not in conflict. John, 125 Nev. at 573. See also Sandholm v. Kuecker, 405 Ill. App. 3d 835, 844, 942 N.E.2d 544 (2010) rev'd, 2012 IL 111443, 962 N.E.2d 418 (comparing the Nevada Anti-SLAPP statute's purpose to that of the federal *Noerr-Pennington* doctrine); Adelson v. Harris, 12 CIV. 6052 JPO, 2013 WL 5420973 (S.D.N.Y. Sept. 30, 2013); Kearney v. Foley & Lardner, 553 F. Supp. 2d 1178, 1181 (S.D. Cal. 2008) ("Thus, the *Noerr-Pennington* doctrine is analogous to California's anti-SLAPP statute."); John, 125 Nev. at 753 ("[T]he purpose of Nevada's anti-SLAPP statute is similar to the purpose behind the *Noerr-Pennington* immunity doctrine."); United States v. Hempfling, 431 F. Supp. 2d 1069, 1084 (E.D. Cal. 2006) ("[T]he *Noerr-Pennington* doctrine is a cousin to modern Anti-Slapp statutes."); Hometown Properties, Inc. v. Fleming, 680 A.2d 56, 61 (R.I. 1996) ("Like the *Noerr-Pennington* doctrine, the anti-SLAPP statute was adopted in order to protect valid petitioning activities.").

D. *The Noerr-Pennington Doctrine Can Be Used To Support An Anti-SLAPP Motion*

Cases show that the Noerr-Pennington doctrine can in fact be used as a basis to support an anti-SLAPP motion. See, e.g., Kearney, 590 F.3d at 645 (“We find that a governmental entity or official may receive *Noerr-Pennington* immunity for the petitioning involved in an eminent domain proceeding *Noerr-Pennington* may therefore protect Defendants here.”); Magic Laundry, 2013 WL 1409530 * 3; Adobe Sys. Inc. v. Coffee Cup Partners, Inc., C 11-2243 CW, 2012 WL 3877783 (N.D. Cal. Sept. 6, 2012); Premier Elec. Const. Co. v. Nat’l Elec. Contractors Ass’n, Inc., 814 F.2d 358, 373-374 (7th Cir. 1987).

E. *Under Anti-SLAPP Statutes, Fee-Shifting Does Not Implicate the Noerr-Pennington Doctrine; the Public Has An Interest in Having the Government Avoid Unnecessary Lawsuits*

Amicus suggests that the Noerr-Pennington doctrine is implicated by RCW 4.24.525’s fee-shifting mechanism. This does not violate Noerr-Pennington. The Noerr-Pennington doctrine “immunizes legitimate petitioning activity from civil liability but fee shifting is not civil liability within the meaning of the *Noerr-Pennington* doctrine.” Vargas, 200 Cal. App. 4th at 1344. “[B]eing charged with the costs of a suit is not the same thing as being civilly liable for having filed the suit.” Id. (discussing fee-shifting under the California anti-SLAPP statute) (citing Equilon

Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 62, 52 P.3d 685 (2002) (the fee provision in California anti-SLAPP statute does not impermissibly chill free speech, because “[f]ee shifting simply requires the party that creates the costs to bear them.”)).

Washington’s anti-SLAPP statute likewise shifts the burden of paying attorney’s fees to the non-moving party if the moving party prevails, but does not impose civil liability. See RCW 4.24.525(6). Accordingly, the Noerr–Pennington doctrine has no application here.

Moreover, California Courts have held that a mandatory award of attorney fees in favor of a government defendant does not violate a plaintiff’s constitutional right of petition. City of Long Beach v. Bozek, 31 Cal. 3d 527, 538, 645 P.2d 137 (1982) cert. granted, judgment vacated, 459 U.S. 1095 (1983), “[W]hat *Bozek* teaches is that the individual’s right to sue the government does not come free of cost.” Vargas, 200 Cal. App. 4th at 1345. See also Premier, 814 F.2d at 373-374 (“The exercise of rights may be costly, and the first amendment does not prevent the government from requiring a person to pay the costs incurred in exercising a right.”). In Premier, the Seventh Circuit held that trebling a party’s fees and costs as a reward for resisting meritless litigation does not violate Noerr-Pennington constitutional principles. Premier, 814 F.2d at 373-74 (“Multipliers are common in fee-shifting.”).

Indeed, the statutory penalty and fee-shifting mechanism serve an important public interest:

There is no dispute that enactment of section 425.16, subdivision (c) was within the Legislature's constitutional power or that the subdivision is not a direct restriction upon the right to petition. And it is justified by two substantial governmental interests. One interest is the government's right to be reimbursed for the cost of defending meritless suits The government—and by extension, the taxpayer—has a substantial interest in avoiding unnecessary drains upon the public fisc occasioned by meritless lawsuits

Vargas, 200 Cal. App. 4th at 1346 (emphasis added).

In short, municipalities such as the City have an interest in reporting on issues of public concern and in being free of the costs of defending meritless lawsuits. RCW 4.24.525(6)(b) protects that interest by shifting the cost of defending such suits to the claimant. Allowing a claimant to file meritless lawsuits without the risks allocated by RCW 4.24.525(6)(a) would result in unnecessary drains on public finances and create a substantial burden on the public, whose interests are not served when municipalities such as the City expend significant public funds defending claims that should never have been asserted.

F. *Amicus's Interpretation Would Eliminate A Governmental Entity's Ability to Dismiss Meritless Lawsuits unless the Lawsuits Are A "Sham"*

For Amicus, the only way a lawsuit escapes the protection of Noerr-Pennington is if it is sham, (Am. Br. of ACLU-WA 14). A "sham" lawsuit is "baseless in the sense that no reasonable litigant could realistically expect success on the merits." White v. Lee, 227 F.3d 1214, 1231-32 (9th Cir. 2009). See also California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (no First Amendment protection to "a pattern of baseless, repetitive claims . . . [that lead] the factfinder to conclude that the administrative and judicial processes have been abused").

In other words, Amicus asks the Court to rewrite the anti-SLAPP statute to allow all but frivolous lawsuits. That position would nullify the language of the statute, which applies to "any claim, however characterized, that is based on an action involving public participation and petition." RCW 4.24.525(2) (emphasis added). There is no basis for that interpretation in the statute or the case law, and the Court should reject it.

5. APPLICATION OF RCW 4.24.525 TO THE CITY DOES NOT VIOLATE SEPARATION OF POWERS

Amicus challenges the constitutionality of RCW 4.24.525 as applied to the City, arguing that some of the procedural provisions

implicate separation of powers concerns when used by governmental entities such as the City. The City has already briefed the separation of powers issue as applied to governmental entities and explained why such concerns are unwarranted under McDevitt v. Harbor View Med. Ctr., 179 Wn 2d 59, 316 P.3d 469 (2013) and Art. II, Sec. 26 of the Washington Constitution. It addresses here several arguments which were not fully addressed.

Amicus argues RCW 4.24.525's procedures conflict with several Civil Rules because they (1) require a higher burden of proof (clear and convincing), and (2) stay discovery, citing Putman v. Wenatchee Valley Med. Ctr., 166 Wn.2d 974, 216 P.3d 374 (2009). RCW 4.24.525's heightened burden does not violate separation of powers principles. "The legislature has the right to define the parameters of a claim and to set forth the factors that must be considered before liability can be established." Spratt v. Toft, ___ P.3d ___, 70505-9-I, 2014 WL 1593133 * 7 (Wash. Ct. App. Apr. 21, 2014). "If a statute and a court rule 'cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters.'" Davis v. Cox, ___ P.3d ___, 71360-4-I, 2014 WL 1357260 * 13 (Wash. Ct. App. Apr. 7, 2014) (RCW 4.24.525 does not violate separation of powers).

Burdens of proof are substantive, not procedural. Id. See also Spratt, 2014 WL 1593133 * 7. Davis addressed the same claims raised here and rejected them, holding that the heightened burden of proof does not violate separation of powers doctrine even if it were to conflict with CR 8, 11, 12, 15, and 56. Davis, 2014 WL 1357260 * 13.

The Davis court also explained that RCW 4.24.525's heightened burden does not restrict a claimant's right to access the courts, because it uses a summary judgment-like procedure for dismissing claims before trial. Id. * 14. See also Spratt, 2014 WL 1593133 * 7 ("The fact that a statute increases the standard of proof needed for a common law claim does not compromise the right of access to courts. It is within the realm of the legislature's authority to impose a heightened burden of proof.").

Amicus relies on Putman to argue the discovery stay and heightened burden are unconstitutional as applied to the City. However, Putman is inapposite because the certificate of merit statute Putman addressed did not allow medical malpractice claimants to even proceed unless they first had a certificate of merit.¹ Putman, 166 Wn.2d at 983.

¹ McDevitt swept away the separation of powers concerns relating to conflicts with court rules raised in Putman and Waples v. Yi, 169 Wn.2d 152, 234 P.3d 187 (2010) as applied to government defendants based on Art. II, Sec. 26, noting that facial challenges are disfavored. McDevitt, 179 Wn.2d at 72-75.

The anti-SLAPP statute, however, does not categorically prohibit discovery before the special motion to strike is heard. The statute provides for a stay of discovery once the motion is filed, but “[a]s in the context of a TEDRA proceeding, trial courts retain the discretion to permit discovery before ruling on an anti-SLAPP motion.” Davis, 2014 WL 1357260 * 13 (discovery provision does not conflict with CR 26). “The mere fact that discovery is limited does not in and of itself render a statute unconstitutional.” Spratt, 2014 WL 1593133 * 7 (anti-SLAPP statute constitutional). This issue was not raised below, as Plaintiff made no request for discovery.

C. CONCLUSION

Amicus curiae fails to raise any valid challenges to the application of RCW 4.24.525 to the City in this case. This Court should reverse the dismissal of the appeal, and remand this case for further proceedings consistent with this Court’s Opinion.

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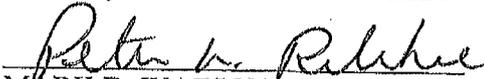
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RESPECTFULLY SUBMITTED this 15th day of May, 2014.

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