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**SUPREME COURT NO. 89820-1**

Court of Appeals No. 68345-4-I

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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SCOTT AKRIE, et al.,

Petitioners,

v.

JAMES GRANT, et ux, et al.,

Respondents.

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**SUPPLEMENTAL BRIEF OF RESPONDENTS**

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 ORIGINAL

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## I. INTRODUCTION

In the midst of a federal court lawsuit against T-Mobile, Netlogix and its COO, Scott Akrie, filed this state court lawsuit against five defendants, including: T-Mobile (the opposing party in federal court); its lawyers at Davis Wright Tremaine; and a court reporting service that the attorneys had retained to help them prepare pleadings for the federal court matter.<sup>1</sup> All five defendants moved to dismiss the claims pursuant to the Anti-SLAPP statute (RCW 4.24.525). King County Superior Court Judge Andrus granted the Anti-SLAPP Motion as to each of the defendants, but failed to follow the legislative mandate in RCW 4.24.525(6)(a), which provides that a court “shall award” \$10,000 in statutory damages “to a moving party who prevails” on an anti-SLAPP Motion.

Plaintiffs appealed the trial court’s decision and Defendants cross-appealed this narrow legal issue. Plaintiffs then abandoned their appeal. Pursuant to RAP 2.4(a), this Court should not consider any issues other than the one designated in Defendants’ Notice of Cross-Appeal, i.e., whether RCW 4.24.525(6)(a)(ii) mandates an award of \$10,000 in statutory damages to each of the five Defendants, rather than a single award to the group. *See* Clerk’s Papers (“CP”) 189.

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<sup>1</sup> Petitioners in this Court, Volcan Group, Inc. d/b/a Netlogix (“Netlogix”) and Scott Akrie, were plaintiffs in the trial court. The defendants (Respondents herein) were: James Grant (and his marital community); Cassandra Kennan (and her marital community); Davis Wright Tremaine, LLP; Seattle Deposition Reporters, LLC; and T-Mobile USA, Inc. For clarity, we will refer to the parties by the designations used in the trial court. RAP 10.4(e).

The unambiguous language of the statute makes it clear that *each* moving party that prevails on an Anti-SLAPP motion “shall” be awarded statutory damages of \$10,000. As discussed below, the context of the claims and the legislative history of the statute support this result. Indeed, at least five other courts have interpreted this statute the same way.

## II. STATEMENT OF THE CASE

Because Plaintiffs did not appeal the decision of the trial court, they cannot seek affirmative relief that modifies that decision. RAP 2.4(a). The trial court decision resolves many of the issues that Plaintiffs now contest, as the Court of Appeals properly concluded. *Akrie v. Grant*, 178 Wn. App. 506, 514-15, 315 P.3d 567 (2013). In particular, the trial court found that each of the moving parties had shown that the claims against it were based on an action involving public participation and petition. “At no point did the trial court differentiate between the defendants.” *Id.* This undercuts the premise of the Petition for Review, which is that the Court of Appeals “award[ed] penalty damages to defendants that as a matter of law did not engage in protected activity under the SLAPP statute.” Petition for Review, p. 1.

Even if the Court were to ignore its own procedural rules and entertain a challenge to the trial court’s decision, the key facts cannot be disputed. The claims in this matter arose in the context of a federal lawsuit brought by Akrie’s company, Netlogix, against T-Mobile: *Volcan Group, Inc. d/b/a Netlogix v. T Mobile USA, Inc.*, 2:10-cv-00711 RSM

(W.D. Wash) (“the Federal Litigation”). Defendants Grant and Kennan of Davis Wright Tremaine LLP (“DWT”) represented T-Mobile in the Federal Litigation.

During discovery in the Federal Litigation, DWT discovered a massive scheme by Akrie and Netlogix to destroy key evidence, to manufacture other evidence to support their claims, and to offer improper incentives to influence a key fact witness (former Netlogix employee Jason Dillon).<sup>2</sup> In August 2011, Dillon contacted DWT by email, stating that he had resigned from Netlogix and that he wanted to talk with DWT because he felt it “would be beneficial to T-Mobile/DWT if we had some time to talk about the facts of the case[.]” CP 28 (Grant Decl., ¶ 4). There were two lengthy phone calls between DWT and Dillon in which Dillon admitted, among other things, that Netlogix had destroyed evidence that was unfavorable to its claims. *Akrie*, 178 Wn. App. at 509; CP 28 (Grant Decl., ¶¶ 5, 7). Thereafter, DWT filed a motion on behalf of its client, T-Mobile, to dismiss the Federal Litigation based on spoliation by Netlogix and Akrie. *See* CP 1 – 12 (Summons and Complaint); CP 15 – 26 (Motion); CP 177 – 78 (Order). In support of the motion, DWT filed substantial evidence of spoliation, including an unsigned, unsworn transcript of the phone calls with Dillon that had been prepared

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<sup>2</sup> The evidence of spoliation is outlined in more detail in the Declaration of James Grant in Support of the Anti-SLAPP Motion. CP 27-30

contemporaneously by Seattle Deposition Reporters.<sup>3</sup> On March 14, 2012, Judge Martinez dismissed the Federal Litigation with prejudice, concluding that Akrie and Dillon were “complicit in [a] pattern of dishonesty,” engaged in “willful spoliation of evidence” and “elected to continue spinning a web of lies.” *Volcan Group*, 940 F. Supp. at 1337. The Ninth Circuit has since affirmed the dismissal. *Volcan Group, Inc. d/b/a Netlogix v. Omnipoint Communications, Inc., dba T-Mobile; T Mobile USA, Inc.*, 552 Fed. Appx. 644, 2014 U.S. App. LEXIS 451 (9th Cir. 2014).

While the spoliation motion was pending in the Federal Litigation, Netlogix and Akrie filed this suit. They chose to sue not only Seattle Deposition Reporters, which had prepared the transcript, but also DWT, the two individual attorneys (and their spouses) and T-Mobile. Their Complaint specifically alleged that it was the *filing of the transcript* “through the federal court ECR [sic, ECF] and PACER system” that caused harm to the reputations of Mr. Akrie and Netlogix. CP 8 (Complaint, ¶ 3.12).

Although Plaintiffs purported to also allege “privacy” claims under RCW 9.73.060, no such claims were available to *these plaintiffs* because they were not involved in the conversations at issue. It is well established

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<sup>3</sup> The Court found that the admissions regarding spoliation in the Transcripts were credible, but made it clear that the other evidence of spoliation was compelling, as well. “[E]ven if the Court did not credit the statements made in the Transcripts, it would still come to the conclusion that spoliation of evidence has occurred.” *Volcan Group, Inc. d/b/a Netlogix v. Omnipoint Communications, Inc., dba T-Mobile; T Mobile USA, Inc.*, 940 F. Supp. 2d 1327, 1336 (W.D. Wash. 2012).

that “[t]he right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded.” Restatement (Second) of Torts, § 652I cmt a. “The cause of action is not assignable, and it cannot be maintained by other persons ....” *Id.*; *see also Jeckle v. Crotty*, 120 Wn. App. 374, 382, 85 P.3d 931, 936 (2004). The only conceivable injury to these Plaintiffs, in the context of this case, arose when the transcripts were filed and used in the Federal Litigation and this act undeniably involves public participation and petition. “[P]etition includes ... any oral statement made, or written statement or other document submitted, in a legislative, executive *or judicial proceeding* or other governmental proceeding authorized by law.” RCW 4.24.525(2) (emphasis added).

All five of the Defendants moved to strike the SLAPP claims pursuant to RCW 4.24.525(4)(a). CP 177 (Order on Anti-SLAPP Motion). The trial court found that all of the “Defendants have shown by a preponderance of the evidence that the claims herein are based on an action involving public participation and petition.” *Id.* As such, the Anti-SLAPP statute applied to the claims against each of the Defendants in this Court. CP 177-78 (Order), RP 51 (Judge Andrus’ ruling from the bench).

Plaintiffs filed a notice of appeal shortly after entry of the judgment (CP 181-87), and Defendants filed a notice of cross-appeal on February 29, 2010 (CP 188-96). Plaintiffs filed an amended notice of appeal on March 13, 2012 to correct the caption (CP 197-203), but *subsequently withdrew their appeal*. By letter dated April 9, 2012 from

Court of Appeals Administrator/Clerk Richard D. Johnson, the cross-Appellants (Grant, et al.) were re-designated as Appellants.<sup>4</sup>

### III. ARGUMENT

#### A. The Scope Of Review Is Limited To A Narrow Legal Issue (RAP 2.4(a))

Plaintiffs did not seek review of the trial court's decision by a timely notice of appeal in the Court of Appeals. Therefore, they cannot seek affirmative relief modifying the decision in this Court. RAP 2.4(a).<sup>5</sup>

Plaintiffs simply ignore RAP 2.4, offering no explanation as to why they should now be able to challenge the trial court decision notwithstanding that they did not timely appeal from that decision. But the rule is clear. "The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only [...] if the respondent also seeks review." RAP 2.4(a).

This Court should not disregard the rule, because RAP 2.4 (and related rules of appellate procedure) is essential to the proper functioning of the appellate process, as this Court has frequently recognized:

In order to promote finality, judicial economy, predictability, and private settlement of disputes, and to ensure vigorous advocacy for appellate review, we prohibit

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<sup>4</sup> On May 17, 2014, Akrie filed a Voluntary Petition under Chapter 7 of the United States Bankruptcy Code (Bankruptcy Case No. 14-03880-LT7 in the United States Bankruptcy Court for the Southern District of California). As a result, any further activity as to Akrie's Petition is automatically stayed pursuant to 11 U.S.C. § 362. *See* 6/27/14 Letter from Susan L. Carlson, Washington Supreme Court Clerk.

<sup>5</sup> There are no "necessities of the case" that would justify the Court to award affirmative relief at this stage. *See, generally*, Reply Brief at Court of Appeals, p. 1-2.

review of separate and distinct claims that have not been raised on appeal.

*Clark County, et al. v. The Western Washington Growth Management Hearings Board, et al.*, 177 Wn. 2d 136, 139, 298 P.3d 704 (2013).

Here, Plaintiffs could easily have challenged the trial court's decision that the SLAPP Statute applies to all of the moving parties (i.e., to all five Defendants). But they abandoned that challenge when they chose to withdraw their appeal. The issue presented by Defendants' appeal is narrowly drawn:

The sole portion of both the January 20 Order and the Final Judgment as to which Defendants seek review is the decision to award \$10,000 in statutory fees, pursuant to RCW 4.24.525(6)(a)(ii), to Defendants as a group, rather than to award \$10,000 in statutory fees to each of the five Defendants.

CP 189 (Defendants' Notice of Appeal). This Notice raises a narrow legal issue regarding the meaning of RCW 4.24.525(6)(a). The arguments Plaintiffs purport to raise in their Petition are separate and distinct from the issue raised by Defendants' Notice and therefore have not been preserved for review by the Court.

**B. The Court Of Appeals Properly Concluded That RCW 4.24.525(6)(a) Requires An Award To Each "Moving Party" Who Prevails On An Anti-SLAPP Motion**

The Petition for Review does not even address the issue that is presented, which is whether RCW 4.24.525(6)(a)(ii) mandates an award of statutory damages to each moving party that prevails in an anti-SLAPP

motion. Plaintiffs' silence on this point may be due to the fact that every court that has addressed the issue has reached the same conclusion.

As the Court of Appeals found, the language of RCW 4.24.525(6)(a)(ii) is plain and unambiguous. First, the award of statutory damages is mandatory. Relying on a number of decisions of this Court, the Court of Appeals held that the use of the word "shall" in RCW 4.24.525(6)(a) ("The court shall award to a moving party who prevails ...") imposes a mandatory requirement on the trial judge. *Akrie*, 178 Wn. App. at 512, quoting from *Erection Co. v. Department of Labor and Industries*, 121 Wn. 2d 513, 518, 852 P.2d 288 (1993).

Likewise, the statute is unambiguous in its command that "[t]he court shall award [statutory damages] to a *moving party* who prevails" in a motion brought pursuant to the statute. RCW 4.24.525(6)(a) (emphasis added). A "moving party" is defined as "a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim." RCW 4.24.525(1)(c).<sup>6</sup>

In this case, Plaintiffs do not (and cannot) deny that the anti-SLAPP motion was filed on behalf of each of the five Defendants and that all five Defendants prevailed when the suit was dismissed. *Akrie*, 178

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<sup>6</sup> The legislative history of RCW 4.24.525 also supports the Court of Appeals Opinion. In drafting the statute, Senator Adam Klein, Chair of the Senate Judiciary Committee who sponsored the bill, incorporated suggestions from a WSTLA article that included a recommendation that when defendants prevail, each plaintiff should be liable for fines and fees, and any award should be *per defendant*. See Bruce E.H. Johnson and Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 Wash. L. Rev. 495, 517 – 18 (2012).

Wn. App. at 514; CP 177-78. Indeed, the trial court made this abundantly clear in both its oral ruling and its written Order granting the SLAPP claims. *Id.* at 514-15; CP 178; RP 51. Thus, the trial court’s order repeatedly refers to all of the Defendants; *see, e.g.*, “Defendants’ motion is granted in its entirety.” CP 178. As the Court of Appeals correctly noted, “[a]t no point did the trial court differentiate between the defendants.” *Akrie*, 178 Wn. App. at 514-15.

At the time of the COA Opinion, four federal court judges had reached the same conclusion as to the meaning of RCW 4.24.525(6)(a)(ii). In each case, the court found that the statute mandates an award of statutory damages to *each* moving party that prevails on an anti-SLAPP motion. *Castello v. City of Seattle*, 2010 U.S. Dist. LEXIS 127648, 2010 WL 4857022 (W.D. Wash. 2010) (Judge Pechman; *Eklund v. City of Seattle*, 2009 U.S. Dist. LEXIS 60896, 2009 WL 1884402 (W.D. Wash. 2009) (Judge Zilly; *Phoenix Trading, Inc. v. Kayser*, 2011 U.S. Dist. LEXIS 81432, 2011 WL 3158416 (W.D. Wash. 2011) (Judge Robart); and *AR Pillow, Inc. v. Maxwell Payton, LLC*, 2012 U.S. Dist. LEXIS 172015 (W.D. Wash. 2012) (Judge Jones).

Since the Court of Appeals Opinion in this case, Division One has reiterated its decision in another case, *Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014). There is no contrary authority.

**C. Plaintiffs' Newly-Asserted Constitutional Arguments Should Not Be Considered By The Court**

The general rule is that this Court will not consider an issue that is raised for the first time on appeal. RAP 2.5(a); *see also State v. WWJ Corp.*, 138 Wn. 2d 595, 980 P.2d 1257 (1999). While the same rule includes an exception for manifest errors that affect a constitutional right, the Court “construe[s] the exception narrowly by requiring the asserted error to be 1) manifest and 2) truly of constitutional magnitude.” *Id.* at 602. Here, it is clear that none of the new constitutional arguments involves “manifest error,” nor are these arguments “truly of constitutional magnitude.” *See Answer to Petition for Review*, pp. 7-10.<sup>7</sup> Moreover, even if this Court were inclined to entertain arguments that are raised for the first time in the Petition for Review, these arguments have no merit.

Plaintiffs would bear the burden of showing that the statute is unconstitutional, and that burden is a high one.<sup>8</sup> This Court has stated that “statutes are presumed constitutional and that a statute’s challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt.”<sup>9</sup>

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<sup>7</sup> To avoid repetition, Respondents will not repeat those arguments in their entirety but respectfully incorporate them herein by this reference.

<sup>8</sup> *See N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 17, 108 S. Ct. 2225, 101 L.Ed.2d 1 (1988).

<sup>9</sup> *Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn. 2d 599, 605, 244 P.3d 1, 4 (2010) (citing *Wash. Fed’n of State Emps. v. State*, 127 Wn. 2d 544, 558, 901 P.2d 1028 (1995)); *see also Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–40, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985)) (presuming that statutes are constitutional).

[T]he ‘beyond a reasonable doubt’ standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. . . . Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.<sup>10</sup>

None of Plaintiffs’ new “constitutional” arguments comes remotely close to meeting this heavy burden.

#### **1. Excessive Fine**

Plaintiffs make a brief argument, in a single paragraph at the end of their Petition, that the Court of Appeals’ decision implicates the Excessive Fines Clause of the Eight Amendment to the United States Constitution. Petition for Review, p. 17. But the Eighth Amendment was enacted to curtail government abuse of its prosecutorial powers; it does not apply to damages awards in lawsuits between private parties. Indeed, the U.S. Supreme Court has held that “[t]he [Excessive Fines Clause] does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.” *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989).

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<sup>10</sup> *Sch. Dists. Alliance*, 170 Wn. 2d at 605–06, 244 P.3d at 4 (alterations in original) (quoting *Island Cnty. v. State*, 135 Wn. 2d 141, 147, 955 P.2d 377 (1998)).

## 2. Due Process

Similarly, Plaintiffs' last-minute argument that the award of statutory damages would violate their due process rights is without merit. In the first instance, "[d]ue process principles do not limit statutory damages." *Akrie*, 178 Wn. App. at 513 n.8 (*dicta*), citing *Perez-Farias v. Global Horizons, Inc.*, 175 Wn. 2d 518, 533-34, 286 P.3d 46 (2012). Plaintiffs' reference to *BMW v Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), is unavailing. *Gore* involved a punitive damages award of \$4,000,000 (which the appellate court had reduced to \$2,000,000); this matter involves statutory damages of \$50,000 (\$10,000 of which Plaintiffs do not even dispute; see Petition for Review at p. 13 ("Petitioners must accept that the \$10,000 penalty . . . [was] paid as a lesson learned . . .")).

*Verizon California Inc. v. OnlineNIC, Inc.*, 2009 U.S. Dist. LEXIS 84235 (N.D. Cal. 2009) is instructive as to the limits of a due process challenge in this context:

[I]t is highly doubtful whether *Gore* and *Campbell* apply to statutory damages awards at all. Like the Sixth Circuit, this Court 'know[s] of no case invalidating . . . an award of statutory damages under *Gore* or *Campbell*.' Under binding authority decided before *Gore*, 'only where the [statutory] penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable' will it violate a defendant's due process rights.

2009 U.S. Dist. LEXIS 84235 at \* 20 (internal citations omitted). There is simply no support in the record that the award of statutory damages here

would be “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” *Id.* To the extent there is a record that informs this issue, it compels the opposite conclusion. It is clear that Defendants incurred over \$32,000 in fees and costs in connection with the anti-SLAPP motion alone. CP 178.<sup>11</sup> These amounts do not include all of the “damage” inflicted by this SLAPP suit, such as the other fees and costs incurred by Defendants in defending the lawsuit, nor the value of the time spent by the Defendants themselves in that process.<sup>12</sup> On this limited record, there is no way that an award of \$50,000 in statutory damages, as mandated by RCW 4.24.525(6), could be found to be “wholly disproportioned to the offense.”<sup>13</sup>

### 3. Plaintiffs’ Right of Petition

Finally, Plaintiffs argue that an award of statutory damages to each moving party would “foreclose the court” to Plaintiffs and therefore would chill *Plaintiffs’* constitutional right to petition. Petition for Review, p. 17; *cf. Akrie*, 178 Wn. App. at 513 n.8. There is nothing in this record that

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<sup>11</sup> The Court awarded slightly more than \$20,000 in its fee-shifting order. CP 178.

<sup>12</sup> The legislative history reveals that the remedies in the Anti-SLAPP Statute were intended to address this type of harm. The Legislature found that SLAPP suits chill the valid exercise of constitutional rights by subjecting individuals and entities to “great expense, harassment, and interruption of their productive activities [...]”. The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues.” S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wa. 2010).

<sup>13</sup> Other courts have awarded more than \$50,000 in statutory damages pursuant to this statute without raising any due process concerns. Thus, Division One upheld a trial court’s award of \$10,000 in statutory damages for each of sixteen defendants. *Davis v. Cox*, 180 Wn. App. 514, 548-49, 325 P.3d 255, 273-74 (2014).

supports Plaintiffs' new foreclosure argument. *See* Answer to Petition for Review, pp. 7-10. Therefore, any putative error is not "manifest," and the Court should not consider the issue. *WWJ*, 138 Wn.2d at 602. Moreover, the premise of this argument is incorrect.

The Anti-SLAPP Statute does not foreclose any plaintiff from filing meritorious claims because it applies only to claims as to which the party cannot show a probability of prevailing. RCW 4.24.525(4)(b); *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 52 P.3d 685 (2002). Baseless or frivolous litigation is not entitled to Constitutional protection. *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). In *Equilon*, the Supreme Court of California rejected the same argument:

Contrary to *Equilon's* implication, [California's Anti-SLAPP Statute] does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning. It subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits, a provision we have read as 'requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim.' So construed, [the Anti-SLAPP Statute] provides an efficient means of dispatching, early on in a lawsuit, [and discouraging, insofar as fees may be shifted,] a plaintiff's meritless claims.' [...] *Equilon* fails to persuade that such a fee-shifting provision overburdens those who exercise the First Amendment right of petition by filing lawsuits. 'The right to petition is not absolute, providing little or no protection for baseless litigation.'

*Equilon Enterprises*, 29 Cal. 4<sup>th</sup> at 63-64 (internal citations omitted). California is not alone in rejecting constitutional challenges to Anti-SLAPP statutes; Division One of our Court of Appeals did so as recently as April of this year. *See Davis v. Cox*, 180 Wn. App. 514, 548-49, 325 P.3d 255, 273-74 (2014) (unsuccessful challenge to Anti-SLAPP Statute provisions regarding stay of discovery and burden of proof). In 2010, the Minnesota Supreme Court observed that at least 24 states had passed Anti-SLAPP statutes and, while a number of constitutional challenges had been leveled, the court found “no authority holding any of these statutes unconstitutional. Rather, the anti-SLAPP statutes that have been challenged have been upheld.” *Nexus v. Swift*, 785 N.W.2d 771, 778-79 (Minn. 2010); *see also* Johnson and Duran, *supra* n. 5.

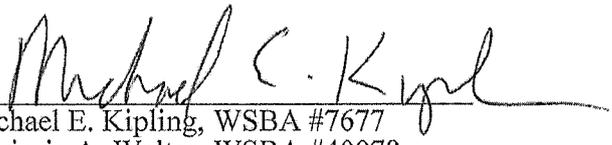
Defendants are aware that the Court of Appeals raised the possibility (in dictum) that constitutional issues might arise in another case in which there was “a cumulative award of statutory damages that is vastly out of proportion to the relief sought in the underlying lawsuit.” *Akrie*, 178 Wn. App. at 513 n.8. But the Court described this as “a question that we leave for another day.” For the reasons discussed herein, we respectfully submit that the Court of Appeals was correct to leave this question for another case in which, unlike here, the issue was preserved by the parties throughout the appeal and the record allows a reasoned analysis.

**D. Defendants Are Entitled to an Award of Attorneys' Fees Incurred in Connection with this Petition for Review**

The trial court properly awarded attorneys' fees to each of the Defendants pursuant to RCW 4.24.525(6)(a)(i). CP 178. Defendants are therefore entitled to fees on appeal, as well. RAP 18.1; *Ur-Rahman v. Changchun Dev., Ltd.*, 84 Wn. App. 569, 576, 928 P.2d 1149 (1997).

DATED this 29 day of July, 2014.

KIPLING LAW GROUP PLLC

By:   
Michael E. Kipling, WSBA #7677  
Marjorie A. Walter, WSBA #40078  
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*Counsel for Respondents  
James Grant, et ux, et al.*

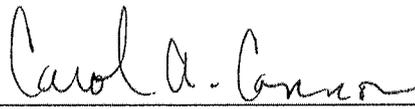
**CERTIFICATE OF SERVICE**

I do hereby certify that on this 29<sup>th</sup> day of July, 2014, I caused to be served a true and correct copy of the foregoing *Supplemental Brief of Respondents* by method indicated below and addressed to the following:

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\_\_\_\_\_  
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**To:** Carol Cannon  
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**Subject:** RE: Supreme Court No. 89820-1 - Scott Akrie, et al. v. James Grant, et ux., et al.

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Attached is the *Supplemental Brief of Respondents* for filing and service in the above-referenced matter.

Case Name:  
Scott Akrie, et al. v. James Grant, et ux., et al.

Case Number:  
89820-1

Person filing document:  
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Thank you!

*Carol*

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