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SUPREME COURT OF THE STATE OF WASHINGTON

JASON DILLON, an individual,

Plaintiff/Respondent,

vs.

SEATTLE DEPOSITION REPORTERS, LLC, a Washington company;
DAVIS WRIGHT TREMAINE, LLP, a Washington company;
JAMES GRANT and "JANE DOE" GRANT, individually and the marital
community composed thereof, if any,

Defendants/Petitioners.

BRIEF OF AMICUS CURIAE
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the proper interpretation and application of RCW 4.24.525, one of Washington’s “anti-SLAPP” statutes, and whether this statute can be construed consistent with the Washington Constitution.¹

II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents the Court with another opportunity to address RCW 4.24.525 (§525), including the motion to strike procedure under subsections (4) and (5) of the statute. Jason Dillon (Dillon) sued Seattle Deposition Reporters, LLC, Davis Wright Tremaine, LLP, and James and

¹ The acronym “SLAPP” refers to “strategic lawsuits against public participation.” See Henne v. City of Yakima, 177 Wn. App. 583, 584 n.1, 313 P.3d 1188 (2013), *review granted*, 179 Wn. 2d 1022 (2014). Henne is the first case arising under RCW 4.24.525 to reach the Court, and is awaiting decision.

“Jane Doe” Grant (collectively SDR). The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Dillon v. Seattle Deposition Reporters, LLC, 179 Wn. App. 41, 316 P.3d 1119, *review granted*, 180 Wn. 2d 1009 (2014); Dillon Br. at 8-22; SDR Br. at 4-19; SDR Pet. for Rev. at 3-8; Dillon Ans. to Pet. for Rev. at 3-7.

For purposes of this amicus curiae brief, the following facts are relevant: Dillon was formerly employed as vice president of a company that filed a federal court lawsuit against another company for breach of contract. Dillon emailed the lawyers for the other company, and stated that he would like to discuss the lawsuit. Thereafter, he had two telephone conversations with the lawyers, and provided incriminating information about his former employer, including information about spoliation of evidence. Court reporters were present in the lawyers’ office during both of the conversations and transcribed them using stenographic equipment. Transcripts of the conversations were subsequently filed in the federal court by the lawyers, in support of a motion to dismiss the lawsuit. After conducting an evidentiary hearing, the federal court concluded that spoliation of evidence had occurred and dismissed the lawsuit.

Dillon then sued SDR in state court alleging violations of the Privacy Act, Ch. 9.73 RCW, related to the telephone conversations with

the lawyers. In response, SDR filed a motion for summary judgment and a motion to strike pursuant to §525. The trial court dismissed the Privacy Act claim on summary judgment on grounds that the conversations between Dillon and the lawyers were not private. The court also granted the motion to strike, awarding SDR \$30,000 in statutory damages and \$40,000 in attorney fees and costs.

The Court of Appeals reversed summary judgment on the Privacy Act claim, finding a question of fact whether Dillon's conversations with the lawyers were private within the meaning of the Privacy Act, and rejecting SDR's argument that the federal court decision on the motion to dismiss had collateral estoppel effect.

The Court of Appeals also reversed the order in favor of SDR on the motion to strike, holding that SDR failed to meet its initial burden to show that Dillon's Privacy Act claim is based on an action involving "public participation and petition" under the first step of the anti-SLAPP motion procedure in §525(4)(b). SDR invoked the definitions of public participation and petition under subsections (2)(a) and (b), involving oral statements made or written documents submitted in, or in connection with, a judicial proceeding. However, the Court of Appeals held that the acts of transcribing telephone conversations with Dillon, which it considered to

be the “gravamen” of Dillon’s claim, do not constitute “statements” within the meaning of these definitions. See Dillon, 179 Wn. App. at 71-73 & n. 25. The court rejected SDR’s argument that filing the transcripts with the federal court was the gravamen of Dillon’s claim. See id.

SDR also invoked the definition of public participation in §525(2) (e), regarding “[a]ny other lawful conduct . . . in furtherance of the exercise of the constitutional right of petition.” The Court of Appeals declined to address Dillon’s argument that the alleged violations of the Privacy Act rendered SDR’s conduct unlawful, but held that the acts of transcribing the telephone conversations with Dillon are not in furtherance of the state constitutional right of petition.²

Following its discussion of SDR’s initial burden on the motion to strike, the Court of Appeals went on “to clarify the scope and manner of analysis to be used by trial courts in ruling on the inquiry presented in the second step of the anti-SLAPP motion procedure.” Dillon at 86. Under the second step of §525(4)(b), “the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on

² In reaching this decision, the court held that the constitutional right of petition referenced in §525(2)(e) is that found in Wash. Const. Art. I §4, which, unlike its federal counterpart, does not include a right of access to courts. See Dillon at 74-86. The court noted that the state constitutional right of access to courts is found in Wash. Const. Art. I §10. See Dillon at 79.

the claim.” The court stated that this step requires the plaintiff to produce evidence of a prima facie claim sufficient to satisfy the clear and convincing (i.e., highly probable) standard of proof, along with evidence sufficient to overcome applicable defenses by the same standard of proof.

The court construed subsection (4)(b) as requiring an analysis similar to that performed by a court on summary judgment:

The role of the trial court in determining whether the plaintiff has met his or her burden under the second step of the anti-SLAPP motion to dismiss analysis is akin to the trial court’s role in deciding a motion for summary judgment. The trial court may not find facts or make determinations of credibility. Instead, “the court shall consider pleadings and supporting and opposing affidavits stating the facts” and may permit additional discovery upon a motion for good cause. RCW 4.24.525(4)(c), (5)(c). CR 56(e) similarly allows parties to submit affidavits in connection with motions for summary judgment, and the court may permit parties to submit “depositions, answers to interrogatories, or further affidavits” in support of the motion or response to the motion. Thus, when considering a motion to strike under the anti-SLAPP statute, the court should apply a summary judgment-like analysis to determine whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits in analyzing whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits, the trial court may not find facts, but rather must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff.

Dillon at 88-90 (citations omitted; ellipses added).³

The court indicated that construing §525 in this manner is necessary for the statute to be constitutional, applying the rule that a statute must be construed to uphold its constitutionality wherever possible:

Such an approach is necessary in order to preserve the plaintiff's right to a trial by jury.³³ Indeed, one purpose of the anti-SLAPP statute is to “[s]trike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern.” Laws of 2010, ch. 118, § 1(2)(a). The right to trial by jury is inviolate under the state constitution. Wash. Const. art. I, § 21. “The right to have factual questions decided by the jury is crucial to the right to trial by jury.” *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (citing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989)). The summary judgment standard does not offend the constitutional right to trial by jury because “it was not the purpose of [article I, section 21] to render the intervention of a jury mandatory ... where no issue of fact was left for submission to, or determination by, the jury.” *In re Brandon v. Webb*, 23 Wn.2d 155, 159, 160 P.2d 529 (1945); *see also Nave v. City of Seattle*, 68 Wn.2d 721, 725, 415 P.2d 93 (1966). Accordingly, the anti-SLAPP statute does not violate the right to trial by jury where the court utilizes a summary judgment-like standard in deciding the motion to strike.

³³“Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality.” *In re Pers. Restraint of Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000) (internal quotation marks omitted) (quoting *Addleman v. Bd. of Prison Terms & Paroles*, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986));

³ The court stated that “this same summary judgment-like standard also applies to the trial court’s analysis under the first step of the anti-SLAPP motion to dismiss procedure.” Dillon at 90.

accord Lummi Indian Nation v. State, 170 Wn.2d 247, 264, 241 P.3d 1220 (2010).

Dillon at 89 & n.33.

This Court granted SDR's petition for review of the Court of Appeals decision on several issues, including:

Proper Inquiry Under Anti-SLAPP Law. Whether the Court of Appeals erred by accepting the plaintiff's allegations rather than considering the evidence, as the anti-SLAPP law requires, undercutting the act's protection for constitutional rights.

SDR Pet. for Rev. at 3.

III. ISSUES PRESENTED

1. In construing the anti-SLAPP motion to strike procedure under §525(4)(b) as being akin to summary judgment proceedings, did the Court of Appeals properly apply the rule that a statute must be construed to uphold its constitutionality wherever possible? And, is it possible to construe §525 as consistent with the right to trial by jury?
2. If §525(4)(b) can be construed as constitutional, what is the nature of the relationship required between a moving party's public participation and petition conduct and the plaintiff/responding party's claim in order to trigger the motion to strike procedure? In particular, should the Court reject the Court of Appeals' "gravamen" analysis of the plaintiff/responding party's claim?

IV. SUMMARY OF ARGUMENT

The Court of Appeals erred in applying the rule of constitutional construction and imposing a summary judgment-like analysis upon the

anti-SLAPP motion to strike procedure under §525(4)(b) to resolve an acknowledged conflict with the right to trial by jury. If a statute is ambiguous and more than one construction is possible, only one of which is constitutional, courts are obligated to adopt the constitutional construction out of deference to the authority and role of the Legislature. However, courts do not have the institutional competency to rewrite an unambiguous statutory provision in order to render it constitutional without violating separation of powers. Instead, they should declare the provision unenforceable, and leave it to the Legislature to cure its defects.

It is not possible to construe §525(4)(b) as being consistent with the right to trial by jury. Unlike the summary judgment rule, which is constitutional only because it reserves genuine issues of material fact for the jury, the motion to strike procedure plainly requires the weighing of evidence and resolution of factual disputes by the judge on a written record in the context of a motion hearing. Furthermore, equating §525 with summary judgment does not eliminate the statute's burden shifting and heightened standard of proof, which engender the risk that meritorious claims will be dismissed before they ever reach the jury. Even giving the Legislature every benefit of the doubt under the rule of constitutional construction, the motion to strike procedure cannot be saved.

If the Court upholds the constitutionality of §525, it should clarify that a claim “is based on an action involving public participation and petition” when the moving party shows that its conduct satisfies the definition of public participation and petition in §525(2)(a)-(e) *using the same facts* that the plaintiff/responding party relies on to establish liability on the underlying claim. This is consistent with the text and purpose of §525, and avoids the imprecision and unpredictability of the Court of Appeals’ “gravamen” analysis.

V. ARGUMENT

A. **Overview Of §525 And The Motion To Strike Procedure, With Its Burden Shifting And Heightened Standard Of Proof.**

Section 525 is the second of two anti-SLAPP laws adopted in Washington. The first, which was adopted in 1989, generally confers immunity on citizens who provide information to appropriate government agencies, and provides for recovery of statutory damages, attorney fees and costs. See Laws of 1989, Ch. 234 (codified as amended at RCW 4.24.500-.520). The 1989 law is not at issue in this case.

Section 525, adopted in 2010, expands the scope of anti-SLAPP protection beyond the provision of information to government agencies, creates an expedited procedural framework for resolving anti-SLAPP

claims, and contains its own remedies provision. See Laws of 2010, Ch. 118 (codified as RCW 4.24.525).⁴ At the heart of §525 is the summary motion to strike procedure delineated in subsections (4) and (5).⁵ Subsections (1) and (2) define terms used in the statute. Subsection (3) clarifies that the motion to strike procedure does not apply to actions brought by the attorney general or a local prosecutor. Subsection (6) describes the remedies available on a motion to strike, and subsection (7) states that the remedies are not exclusive.

Subsection 525(4)(a) provides: “[a] party may bring a special motion to strike any claim that is based on an action involving public participation and petition[.]” (Brackets added.) The phrase “public participation and petition” is defined by a list enumerating five categories

⁴ RCW 4.24.525 and Laws of 2010, Ch. 118, which contains an uncodified statement of legislative findings, rule of construction and severance clause for the statute, are reproduced in the Appendix to this amicus curiae brief.

⁵ Concern regarding the ability to obtain early dismissal of SLAPP suits was foreshadowed in the legislative findings for an amendment to the 1989 law. See Laws of 2002, Ch. 232, § 1 (stating the 1989 “law has, in practice, failed to set forth clear rules for early dismissal [and] review”). The 1989 law has no mechanism for expedited court consideration of claims of immunity, see RCW 4.24.500-.520, and parties tried unsuccessfully to have courts rule on motions to dismiss in an accelerated fashion, see Right-Price Rec. v. Connells Prairie, 146 Wn. 2d 370, 374-75, 46 P.3d 789 (2002) (treating motion to dismiss under RCW 4.24.510 as CR 12(b)(6) motion); Bailey v. State, 147 Wn. App. 251, 259-60, 191 P.3d 1285 (2008) (treating motion to dismiss as motion for summary judgment). In enacting §525, the Legislature declared that “expedited judicial review would avoid the potential for abuse” resulting from SLAPP suits, and stated that one of the purposes of the law is to “[e]stablish an efficient, uniform and comprehensive method for speedy adjudication of strategic lawsuits against public participation[.]” Laws of 2010, Ch. 118, §1(1)(e) & (2)(b).

of conduct. See §525(2)(a)-(e). While the use of the word “includes” to introduce the list typically indicates that a definition is non-exclusive, the breadth of the enumerated conduct in subsection (2)—in particular the catch-all definition in subsection (2)(e), regarding any lawful conduct in furtherance of the exercise of the constitutional rights of speech or petition—makes it difficult to imagine any additional items that could be included in the definition consistent with the statutory text and legislative intent.⁶

The moving party “has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition.” §525(4)(b). Presumably, the reference to “preponderance of the evidence” is intended to incorporate the common law meaning of the phrase as “more probably than not true.”⁷ The moving party’s evidence must establish a relationship (“based on an action involving”) between the underlying claim and the conduct amounting to public participation and petition by this standard of proof.⁸

⁶ In this case, SDR does not appear to claim that its conduct falls within an unenumerated category of public participation and petition.

⁷ See Mohr v. Grant, 153 Wn. 2d 812, 822, 108 P.3d 768 (2005) (defining preponderance of the evidence); see also New York Life Ins. Co. v. Jones, 86 Wn. 2d 44, 47, 541 P.2d 989 (1975) (stating “[i]f the legislature uses a term well known to the common law, it is presumed that the legislature intended it to mean what it was understood to mean at common law”).

⁸ In analyzing the relationship, the Court of Appeals has developed a “gravamen” test, see e.g. Dillon, 179 Wn. App. at 71-72, which is criticized infra.

If the court determines that the moving party satisfies the initial burden/showing, then “the burden shifts to the responding party [i.e., the plaintiff] to establish by clear and convincing evidence a probability of prevailing on the claim.” §525(4)(b) (brackets added). Presumably, the reference to “clear and convincing evidence” is intended to incorporate the common law meaning of the phrase as “highly probable.” Dillon, 179 Wn. App. at 86-87. This refers to evidence that is “weightier and more convincing than a preponderance of the evidence[.]” Id. (quotation omitted). However, while the “clear and convincing evidence” standard of proof is familiar, the conjunction of the standard with “a probability of prevailing on the claim” is not. It seems to represent an amalgam of the clear and convincing *and* preponderance of the evidence standards,

resulting in a completely new standard.⁹ At any rate, the evidence must establish that the plaintiff/responding party will prevail “on the claim” by the requisite standard. Prevailing on the claim would necessarily entail overcoming all defenses to the claim raised by the moving party. See Dillon at 88. Section 525 does not otherwise describe the nature of the showing required of either the moving party or plaintiff/responding party.

The determination whether the moving and responding parties have satisfied their respective burdens is made in summary fashion on an abbreviated record. The court must hold a hearing within 30 days after service of the motion, and render a decision within seven days afterward.

⁹ In Davis v. Cox, 180 Wn. App. 514, 547-48, 325 P.3d 255 (2014), *review pending*, the Court of Appeals rejected a void for vagueness challenge to the hybrid standard of proof, reasoning that “[s]ince both standards are well known, there seems to be little risk that, when considered together, confusion will abound.” This reasoning is non-sequitur because clarity of the combination does not follow from the clarity of each standard individually. In actuality, combining the two standards of proof is problematic, if not unworkable. The reference to clear and convincing evidence seems to raise the standard of proof. However, the combination of this standard with the probability of prevailing/preponderance standard seems to lower the overall standard of proof. This can be illustrated by translating the standards of proof into mathematical terms. If the clear and convincing standard of proof can be equated with 75% confidence that a proposition is true, and the preponderance standard can be equated with anything more than 50% confidence, see Anderson v. Akzo Nobel Coatings, Inc., 172 Wn. 2d 593, 608, 260 P.3d 857 (2011) (equating preponderance standard with “more than 50 percent”), then the combination of these standards would represent anything more than 37.5% confidence that a proposition is true (i.e., $75\% \times 50\% = 37.5\%$). Whatever percentage is equated with the clear and convincing standard, the combination with the preponderance standard will act to reduce it. It seems unlikely that this is what the Legislature intended, and it evokes Yogi Berra’s comment about baseball that “ninety percent of this game is half mental.” Yogi Berra & Dave Kaplan, What Time Is It? You Mean Now?: Advice for Life from the Zennest Master of Them All, at 45 (2003).

Although case law often traces §525 to California’s anti-SLAPP statute, the clear and convincing standard of proof, and the combination of standards is unique to §525. See Cal. Code Civ. P. §425.16(b)(1).

See §525(5)(a)-(b). “[T]he court shall consider pleadings and supporting or opposing affidavits stating the facts upon which the liability or defense is based.” §525(4)(c). Discovery is automatically stayed upon filing a motion to strike, and no discovery is allowed to respond to the motion except upon court order for good cause shown. See §525(5)(c).

With this background regarding §525 in mind, the question is whether the Court of Appeals correctly interpreted and applied the statute.

B. The Court Of Appeals Erred In Applying The Rule Of Constitutional Construction To Save §525(4)(b) Because The Motion To Strike Procedure Plainly And Unambiguously Violates The Right To Trial By Jury, And Any Fix Is Beyond The Institutional Role Of The Court Under The Separation Of Powers Doctrine.

The Court of Appeals recognized that §525(4)(b), as written, conflicts with the right to trial by jury, and applied the rule of constitutional construction to remedy the constitutional infirmity by imposing a “summary judgment-like standard” on the anti-SLAPP motion procedure. See Dillon at 88-90 & n.33. The court erred in its application of this rule of construction, and, while its discussion is partly dicta, this Court

will have to confront the same issues in interpreting and applying the statute.¹⁰

If a statute is ambiguous and more than one construction is possible, but only one of which is constitutional, the court is obligated to adopt the constitutional construction out of deference to the authority and role of the Legislature. See State ex rel. Dept of Fin., Budget & Bus. v. Thurston Cnty., 199 Wash. 398, 404, 92 P.2d 234 (1939); State v. Strong, 167 Wn. App. 206, 212-13, 272 P.3d 281, *review denied*, 174 Wn. 2d 1018 (2012). However, “in construing an otherwise unconstitutional statute in such a manner as to render it constitutional, courts are not free to rewrite the statute as if there were no such thing as the constitutional doctrine of separation of powers.” In re Parentage of L.B., 121 Wn. App. 460, 475, 89 P.3d 271 (2004), *aff’d in part & rev’d in part*, 155 Wn. 2d 679, 122 P.3d 161 (2005). “[A] court may not strain to interpret the statute as constitutional: a plain reading must make the interpretation reasonable.”

¹⁰ The summary judgment gloss is dicta with respect to the court’s discussion of the second step of the anti-SLAPP motion procedure, but not as to its analysis of the first step. See Dillon at 90 (indicating summary judgment-like standard applies to first step).

Although it does not appear that Dillon challenged §525 based on the right to trial by jury under Wash. Const. Art. I §21, the Court of Appeals raises the issue, along with the separation of powers issue inhering in its application of the rule of constitutional construction. See Harris v. Dep’t of Labor & Indus., 120 Wn. 2d 461, 467-68, 843 P.2d 1056 (1993) (addressing issue first raised by amicus curiae when necessary to reach a proper decision).

Washington St. Republican Party v. Washington St. Pub. Disclosure Comm'n, 141 Wn. 2d 245, 281, 4 P.3d 828 (2000) (quotation omitted).

It is not possible to construe the anti-SLAPP motion to strike procedure as being akin to summary judgment. Section 525(4)(b) is written in terms of “burden,” “showing,” “establish,” “preponderance of the evidence,” “clear and convincing evidence,” and “probability of prevailing,” all of which connote the weighing of evidence and resolution of factual disputes. See §525(4)(b). The judge is required to determine whether the moving and responding parties have satisfied their burdens of proof on a written record in the context of a motion hearing. See §525(4)-(5). This contrasts with summary judgment, which forecloses the weighing of evidence and resolution of factual disputes. The role of the judge on summary judgment is instead limited to determining whether there are genuine issues of material fact, or whether the moving party is entitled to judgment as a matter of law. See CR 56(c).¹¹

Under the Washington Constitution, “[t]he right of trial by jury shall remain inviolate[.]” Wash. Const. Art. I §21.¹² Summary judgment proceedings comport with this constitutional right only because genuine

¹¹ The full text of the current version of CR 56 is reproduced in the Appendix to this brief.

¹² The full text of Wash. Const. Art. I §21 is reproduced in the Appendix to this brief.

disputes regarding material facts, inferences to be drawn from the facts, and issues of credibility are all reserved for the jury. See Dillon at 89. Section 525(b)(4) is unconstitutional precisely because it does not reserve these issues for the jury.

Even if one could construe the parties' respective burdens under §525(4)(b) as being satisfied by the mere proffer of evidence sufficient to create genuine issues of material fact—as opposed to requiring findings of fact—the shifting burden and heightened standard of proof imposed on the plaintiff/responding party engenders the risk that otherwise meritorious claims will never reach the jury. In most civil cases, the plaintiff would have the burden to prove the elements of its claim by a preponderance of the evidence. See e.g. Anderson, 172 Wn. 2d at 608. However, the standard of proof that the plaintiff must meet in responding to a motion to strike under §525(4)(b) is raised to the level of clear and convincing evidence, even though the underlying standard of proof remains unchanged. See §525(4)(d)(ii).¹³ This means a higher quantum of proof is required to survive the motion to strike than is necessary to submit the case to the jury or support a verdict in the plaintiff's favor.

¹³ As noted above, the chimera resulting from the combination of the clear and convincing and preponderance standards of proof is unworkable. See supra at 12-13 & n. 9.

Additionally, in most civil cases the defendant would have the burden to prove its affirmative defenses by a preponderance of the evidence, and the plaintiff would not have any burden to disprove such defenses. However, in responding to a motion to strike under §525(4)(b), not only must the plaintiff provide clear and convincing evidence regarding the elements of the claim in responding to a motion to strike under §525(4)(b), the plaintiff must also produce such evidence to disprove the defendant/moving party's affirmative defenses in order to establish a probability of prevailing on the claim. In essence, the plaintiff is required to prove more to withstand the motion to strike than is required to prevail at trial. In these ways, §525(4)(b)'s burden shifting and heightened standard of proof further undermine the right to trial by jury.

The Court cannot enforce §525(4)(b) consistent with the constitutional right to trial by jury, nor can it re-interpret the anti-SLAPP motion to strike procedure as being akin to summary judgment without violating separation of powers. The constitutional infirmity is facial in nature because no set of circumstances exists in which the anti-SLAPP statute, as currently written, can be constitutionally applied. See McDevitt v. Harborview Med. Ctr., 179 Wn. 2d 59, 73-74, 316 P.3d 469 (2013)

(distinguishing facial and as-applied constitutional challenges).¹⁴ Moreover, while the legislation enacting §525 contains a severance clause, see Laws of 2010, Ch. 118, §5, it is not possible to sever subsection (4)(b) from the balance of the statute and still carry out the Legislature’s intent without creating an entirely new procedure for resolving anti-SLAPP motions, which would itself violate separation of powers. See State v. Abrams, 163 Wn. 2d 277, 289, 179 P.3d 1021 (2008) (applying severance clause on grounds that “[n]o new procedure needs to be created, and the balance of the statute can clearly carry out the legislative intent”).¹⁵

C. If §525(4)(b) Is Enforceable, The Court Should Reject The Court Of Appeals’ “Gravamen” Analysis And Instead Simply Require The Moving Party To Show That Its Conduct Satisfies The Applicable Definition Of Public Participation And Petition Using The Same Facts That The Plaintiff/Responding Party Relies On To Establish Liability On The Underlying Claim.

In determining whether SDR satisfied its initial burden to show that Dillon’s Privacy Act claim is based on an action involving public

¹⁴ This is especially so with respect to the weighing of evidence and resolution of factual disputes. However, even with respect to the burden shifting and heightened standard of proof, it is not possible at the beginning of litigation, without the benefit of discovery, to distinguish between the cases that would and would not be screened out for purposes of determining constitutionality on an as-applied basis.

¹⁵ Although the violation of the right to trial by jury is dispositive, the burden shifting and heightened standard of proof also implicate the right of access to courts under Wash. Const. Art. I §10. See Putman v. Wenatchee Vly. Med. Ctr., 166 Wn. 2d 974, 979, 216 P. 3d 374 (2009) (discussing the right of access to courts); see also Laws of 2010, Ch. 118, §1(2)(a) (stating purpose to “balance ... *the rights of persons to file lawsuits and trial by jury and the rights of persons to participate in matters of public concern*”; ellipses & emphasis added).

participation and petition, the Court of Appeals first determined that the “principal thrust” or “gravamen” of Dillon’s claim was the transcription of the telephone calls by the court reporter, not the subsequent filing of the transcripts with the federal court, as contended by SDR. See Dillon at 71-72. On this basis, the court determined that SDR’s transcription did not constitute a “statement” within the meaning of §525(2)(a) or (b), defining public participation and petition to include statements made in or in connection with judicial proceedings, see Dillon at 71-74 & n.25; further, the transcription did not implicate the federal constitutional right of petition to the extent required to satisfy the definition of public participation and petition in §525(2)(e), see Dillon at 82, 84-85.

However, the court’s “gravamen” analysis seems to be a label used to distinguish what it considers to be the essential aspects of the claim from the incidental, without providing any meaningful guidance for bench and bar regarding how to make the distinction. For example, in Dillon, the court seemed to determine the gravamen of the claim based upon the facts serving as the basis for the asserted liability. See 179 Wn. App. at 82. However, in another case relying on Dillon, the court stated that the gravamen of a claim includes the potential effects of the claim on speech or petition activity, and determined the gravamen of the claim based on the

remedy sought.¹⁶ In still other cases, the court seems to have determined the gravamen of the claim based on the source of the rights asserted.¹⁷

The Court of Appeals' approach adds an extra layer of analysis to §525 and is untethered to the text of the statute, which should be the focus. The gravamen analysis is imprecise and will lead to unpredictable results. It threatens to extend the reach of §525 beyond the protected acts of public participation and petition enumerated in the statute, and go beyond the legislative intent to address "lawsuits brought *primarily* to chill the exercise of the constitutional rights of [speech and petition]." Laws of

¹⁶ See Davis, 180 Wn. App. at 530 (holding gravamen of claim regarding corporation's authority to adopt boycott resolution included protected speech because plaintiffs sought to permanently enjoin boycott).

¹⁷ See City of Seattle v. Egan, 179 Wn. App. 333, 338, 341-42, 317 P.3d 568 (2014) (holding gravamen of preemptive declaratory judgment claim under Public Records Act did not include protected speech or petition, even though it was in response to threats of suit), *review pending*; Alaska Structures v. Hedlund, 180 Wn. App. 591, 323 P.3d 1082 (2014) (holding gravamen of employer's claim for breach of confidentiality agreement against former employee did not include protected speech where employee posted employer information on a public website), *review pending*; see also Bevan v. Meyers, 2014 WL 4187803, at *4 (Wn. App., Aug. 25, 2014) (discussing Egan; holding that gravamen of claim for quiet enjoyment of property encompassed reports to county agency regarding allegedly improper well). But see Spratt v. Toft, 180 Wn. App. 620, 324 P.3d 707 (2014) (not explicitly addressing gravamen of claim).

2010, Ch. 118, §1(1)(a) (emphasis & brackets added).¹⁸ The gravamen analysis should be rejected.

If the Court finds §525 enforceable under the rule of constitutional construction, it should clarify that a claim “is based on an action involving public participation and petition” when the moving party establishes that its conduct satisfies the applicable definition of public participation and petition *using the same facts* that the plaintiff/responding party relies on to establish liability on the underlying claim. In other words, a claim “is based on an action involving public participation and petition” if, and only if, the facts on which the claim is based also satisfy the definition of public participation and petition as set forth in §525(2)(a)-(e). This approach is in accordance with legislative intent, and fulfills the legislative purpose to “[s]trike a balance between the rights of persons to file lawsuits and to

¹⁸ For example, SDR asks the Court to look beyond Dillon’s claim to the larger “context” and states that “[a] claim need not expressly attack public participation.” SDR Supp. Br. at 4. To support this argument, SDR relies on language from Davis, 180 Wn. App. at 530, that the necessary relationship between the moving party’s public participation and petition conduct and the plaintiff/responding party’s claim is satisfied if the underlying claim “targets conduct that advances and assists” public participation and petition conduct. See SDR Supp. Br. at 4-5. SDR also cites a case decided under the 1989 anti-SLAPP law, Dang v. Ehredt, 95 Wn. App. 670, 685 n.25, 977 P.2d 29, *review denied*, 139 Wn. 2d 1012 (1999), for the proposition that public participation and petition must merely be the “starting point or foundation of the claim.” See SDR Supp. Br. at 4-5. SDR’s argument and these cases illustrate the lack of any meaningful limits on the reach of the anti-SLAPP statute under a gravamen-type analysis.

trial by jury and the rights of persons to participate in matters of public concern.” Laws of 2010, Ch. 118, §1(2)(a) (brackets added).¹⁹

Applying this approach to Dillon’s Privacy Act claim against SDR, the result would appear to be the same as that reached by the Court of Appeals. Dillon’s Privacy Act claim rests upon allegations that SDR recorded private conversations without consent, in violation of RCW 9.73.030(1)(b). Dillon limits his claim, including his request for damages, to the acts of recording. See Dillon Br. at 17 n.11; Dillon Reply Br. at 21; Dillon Supp. Br. at 2.²⁰ In order to meet its burden to show that this claim is based on an action involving public participation and petition, SDR invokes the definitions in §525(2)(a) and (b), which require proof of an oral statement or written submission in, or in connection with, judicial proceedings; and subsection (2)(e), which requires proof of lawful conduct in furtherance of the constitutional rights of speech and petition. The Court

¹⁹ Section 525 is subject to a rule of construction that “[t]his act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abuse of the courts.” Laws of 2010, Ch. 118, §3. The language referring to “protecting participants in public controversies” suggests that the rule is applied only *after* the moving party satisfies its burden to prove that the claim is based on an action involving public participation and petition under step one of the anti-SLAPP motion procedure in §525(4)(b).

²⁰ SDR’s counter-argument that any request for damages necessarily rests upon “how the transcripts were disclosed and used”—i.e., the fact that they were filed in federal court—is difficult to reconcile with Dillon’s express disclaimer of any reliance upon how the transcripts were used. SDR Br. at 41-42. In any event, neither liability nor recovery under the Privacy Act appears to hinge upon disclosure of private information. See RCW 9.73.030 & 9.73.060.

of Appeals properly held that SDR failed to meet its burden because the act of recording is not a “statement” within the meaning of subsections (2)(a) or (b), i.e., “[t]he act of transcription does not express anything, nor is it intended to convey any sort of message.” Dillon at 72.²¹ In addition, to the extent there is a question of fact regarding Dillon’s Privacy Act claim,²² SDR cannot meet its burden of proving that its conduct was “lawful” under subsection (2)(e),²³ even though the Court of Appeals did

²¹ Only those who engage in *communicative activity*, e.g., by making statements, are protected by the anti-SLAPP statute. The purpose of the statute is to avoid chilling the exercise of constitutional rights of speech and petition. See Laws of 2010, Ch. 118, §1(1)(a). Each of the five categories of conduct that comprise the definition of “public participation and petition” refer to communicative activity. §525(2)(a)-(e). Subsections (2)(a)-(d) are phrased in terms of oral statements made or written statements or other documents submitted in, or in connection with, various fora. Subsection (2)(e) lacks the statement or submission language but incorporates the constitutional rights to speech and petition.

²² Under the Court of Appeals’ summary judgment-like standard, “when deciding whether the moving party has shown, by a preponderance of the evidence, that the claim was based on an action involving public participation and petition, the court must also view the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party.” Dillon at 90.

²³ As used in §525(2)(e), the word “lawful” is not defined. Undefined statutory terms are given their plain and ordinary meaning, as discerned from common dictionaries. See AllianceOne Receivables Mgmt., Inc. v. Lewis, 180 Wn. 2d 389, 395, 325 P.3d 904 (2014) (relying on Black’s Law Dictionary). The ordinary meaning of “lawful” is “[n]ot contrary to law; permitted by law.” Black’s Law Dictionary, s.v. “lawful” (9th ed. 2009). As it pertains to this case, a violation of the Privacy Act is a gross misdemeanor. See RCW 9.73.080; see also Dillon at 59 (stating “[v]iolation of the privacy act is a gross misdemeanor, and is also actionable in tort”).

It should be noted that the “lawful conduct” requirement is not included in the corresponding portion of the California anti-SLAPP statute. See Cal. Code Civ. P. §425.16(e)(4).

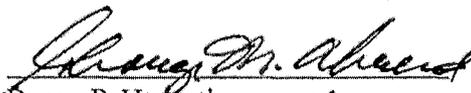
not find it necessary to reach this issue.²⁴ If the acts of recording on which Dillon relies to establish his Privacy Act claim do not meet at least one of the applicable definitions of public participation and petition under §525(2)(a)-(e), SDR cannot meet its burden under the first step of the motion to strike procedure in §525(4)(b), and the motion must be denied.

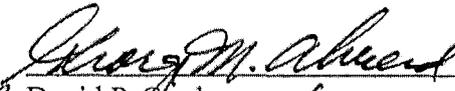
VI. CONCLUSION

The Court should conclude that §525 cannot be saved under the rule of constitutional construction and declare it unenforceable. However, if it determines that the statute can be constitutionally construed, the Court should disapprove of the Court of Appeals' gravamen approach and adopt the analysis proposed in this brief, grounded in the language of the statute.

Respectfully submitted this 29th day of August, 2014.


George M. Ahrend


FOR Bryan P. Harrietiaux, w/ AUTHORITY


FOR David P. Gardner, w/ AUTHORITY

On behalf of WSAJ Foundation

²⁴ Although Dillon raised the issue of lawfulness, the Court of Appeals did not address the issue in light of its discussion of the constitutional right of petition. See Dillon at 74. To the extent there is a question of fact on Dillon's Privacy Act claim, it is not necessary for this Court to reach the petition issue.

APPENDIX

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 21

§ 21. Trial by Jury

Currentness

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Credits

Adopted 1889.

2010 Wash. Legis. Serv. Ch. 118 (S.S.B. 6395) (WEST)

WASHINGTON 2010 LEGISLATIVE SERVICE

61st Legislature, 2010 Regular Session

Additions are indicated by Text; deletions by
Text .

CHAPTER 118

S.S.B. No. 6395

CLAIMS--CONSTITUTIONAL AMENDMENTS--PETITIONS

AN ACT Relating to lawsuits aimed at chilling the valid exercise of the constitutional rights of speech and petition; adding a new section to chapter 4.24 RCW; creating new sections; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** (1) The legislature finds and declares that:

(a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities;

(c) 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;

(d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and

(e) An expedited judicial review would avoid the potential for abuse in these cases.

(2) The purposes of this act are to:

(a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and

(c) Provide for attorneys' fees, costs, and additional relief where appropriate.

NEW SECTION. **Sec. 2.** A new section is added to chapter 4.24 RCW to read as follows:

<< WA ST 4.24 >>

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) 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;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) 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.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6)(a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

NEW SECTION. Sec. 3. This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.

NEW SECTION. Sec. 4. This act may be cited as the Washington Act Limiting Strategic Lawsuits Against Public Participation.

NEW SECTION. Sec. 5. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Approved March 18, 2010.

Effective June 10, 2010.

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KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted **Limited on Preemption Grounds by** Intercon Solutions, Inc. v. Basel Action Network, N.D.Ill., Aug 28, 2013

West's Revised Code of Washington Annotated

Title 4. Civil Procedure (Refs & Annos)

Chapter 4.24. Special Rights of Action and Special Immunities (Refs & Annos)

West's RCWA 4.24.525

4.24.525. Public participation lawsuits--Special motion to strike
claim--Damages, costs, attorneys' fees, other relief--Definitions

Effective: June 10, 2010

Currentness

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) 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;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) 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.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after

the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6)(a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

Credits

[2010 c 118 § 2, eff. June 10, 2010.]

Notes of Decisions (64)

West's RCWA 4.24.525, WA ST 4.24.525

Current with 2014 Legislation effective on June 12, 2014, the General Effective Date for the 2014 Regular Session, and other 2014 Legislation effective through October 1, 2014

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West's Revised Code of Washington Annotated
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
7. Judgment (Rules 54-63)

Superior Court Civil Rules, CR 56

RULE 56. SUMMARY JUDGMENT

Currentness

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or

as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

Credits

[Amended effective September 1, 1978; September 1, 1985; September 1, 1988; September 1, 1990; September 1, 1993.]

Notes of Decisions (821)

CR 56, WA R SUPER CT CIV CR 56

Current with amendments received through 5/1/14