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NO. 97734-8

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

ROGER LEISHMAN,

Respondent,

v.

OGDEN MURPHY WALLACE PLLC and
PATRICK PEARCE,

Petitioners.

RESPONDENT ROGER LEISHMAN'S SUPPLEMENTAL BRIEF

Respondent Roger A. Leishman
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INTRODUCTION

This lawsuit shines a spotlight on an increasing societal problem:

what happens when lawyers start lying, and then won't stop?

The appeal itself presents two purely legal questions. The primary issue before the Court is “When it enacted the ‘Brenda Hill Bill,’ RCW 4.24.500 *et seq.*, did the Legislature intend to grant absolute immunity from civil liability for injuries caused by government vendors who are paid to communicate with their agency customers as part of their contractual engagements?” Answer to Petition for Review (“Ans.”) at 4; *see also* OMW’s¹ Corrected Petition for Review at 3. The Court will find Plaintiff Roger Leishman’s briefing on this **government vendor issue**, including the significance of this Court’s decision in ***Segaline v. Dep’t of Labor & Indus.***, 169 Wn.2d 467, 238 P.3d 1107 (2010), in [Appellant’s Opening Brief](#) (“Br.”) at 19-24; [Reply](#) at 15-19; and [Ans.](#) 13-17.

The Court may also rely on Division I’s careful legal analysis regarding the government vendor issue. However, in contrast with the Court of Appeals, this Court is a policy-making rather than an error-correcting tribunal. Rather than repeating Leishman’s extensive prior

¹ This brief refers to Defendants collectively as “OMW,” and to the individual defendants as “Ogden Murphy Wallace” and “Pearce.”

briefing, this Supplemental Brief instead provides additional policy arguments and legal authority regarding the relationship between OMW's vendor status, its conduct and litigation tactics, and the Legislature's intent in enacting RCW 4.10.510.

When trial court dismissed Leishman's suit under CR 12(c), it also committed a **second** fundamental legal error: the court ignored multiple causes of action that on their face were **not** based on OMW's alleged communication to a government agency in April 2016. Ans. 3. For example, Leishman's Complaint asserted claims based on fraudulent interactions between Pearce and Leishman that occurred **six weeks before OMW drafted its Report**. ¶¶ 44-54.² This Court cannot reverse the Court of Appeals without addressing this second independent basis for reinstating Leishman's Complaint. RAP 13.7(b). The Court will find briefing on the **nexus issue** in Br. at 25-27 and Reply at 19-20.³ *See also*

² Citations to paragraph numbers refer to the Complaint, CP 1-13. Additional citations, including references to the Clerk's Papers, may be treated as presenting "hypothetical facts" for purposes of CR 12. ***FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.***, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). Leishman is not asking the Court to rule on the merits of any legal claim, bar grievance, or Executive Ethics Board complaint, but rather to determine whether the trial court misapplied CR 12(c) and RCW 4.10.510.

³ Given the inordinate delay in resolving this appeal, in the event this Court reverses the Court of Appeals' ruling on the government vendor issue, the Court should address the nexus issue under RAP 13.7(b) rather than subjecting Leishman to another round of litigation in the Court of Appeals.

In re Discipline of Schafer, 149 Wn.2d 148, 167-68, 66 P.3d 1036 (2003) (RCW 4.10.500 *et seq.* does not protect communications with parties other than government agencies); *Skimming v. Boxer*, 119 Wn. App. 748, 82 P.3d 708 (2004) (RCW 4.24.510 inapplicable when tortious statements are made to someone outside the agency); *cf. Segaline*, 169 Wn.2d at ¶ 41 (Johnson, J., dissenting) (“RWC 4.24.510 does not provide immunity for any other acts”) (citation omitted).

SUPPLEMENTAL ARGUMENT

A. Courts resolving a CR 12(c) motion must presume the truthfulness of each allegation in the Complaint.

The Court will find Leishman’s Statement of the Case in his [Answer to the Petition for Review](#). Ans. 5-12; *see also* Br. 5-18; Reply 3-7. The Court of Appeals opinion correctly stated the standard of review, acknowledging “We take the facts alleged by Leishman as true for purposes of our review of OMW’s motion to dismiss.” *Leishman v. Ogden Murphy PLLC*, 10 Wn. App.2d 826, ¶5 n.2, 451 P.2d 1101 (2019) (citing *Becker v. Cmty Health Sys., Inc.*, 184 Wn.2d 252, 257-58, 359 P.3d 746 (2015)). Nevertheless, as often happens with legal writing, the Court of Appeals began its opinion by valiantly attempting to summarize the factual background of the case in a succinct and theoretically neutral manner:

In November 2015, Leishman's physician diagnosed him with post-traumatic stress disorder (PTSD) and serious codependency. Leishman informed the AGO of his new diagnosis and ultimately submitted a formal request for reasonable accommodation of his disability in February 2016. In March 2016, Leishman, an openly gay man, also filed a [sexual orientation discrimination] complaint with the AGO[.]; ~~alleging that his supervisor, Kerena Higgins, made homophobic comments towards him. Leishman felt that his PTSD was triggered by Higgins's comments and her micromanagement of his work. During a meeting with Higgins to discuss Leishman's disability accommodation and Higgins's comments, Leishman became aggressive, raised his voice, and pounded his fists.~~

~~Higgins complained to the AGO about Leishman's inappropriate conduct and [T]he AGO placed Leishman on home assignment. The AGO retained OMW to conduct an independent investigation into Leishman's sexual orientation discrimination claim against Higgins, and Higgins's allegation that Leishman was inappropriate during their meeting.~~

OMW drafted a report (OMW Report) concluding that "Leishman has not established support for his complaint of discrimination against him based on sexual orientation as prohibited by Attorney General's Office policies." The OMW Report also concluded that "Mr. Leishman's conduct during the March 1 meeting [with Higgins] violated expected standards of conduct for his position as reflected in his job description." The AGO terminated Leishman on May 7, 2016.

10 Wn. App.2d at ¶¶5-7 (strikeout added). A careful examination of the Court of Appeals' short narrative highlights some of the systemic problems exemplified by this case.

First, Leishman's March 2016 sexual orientation discrimination complaint did not merely object to Higgins' homophobic overreaction to

a casual conversation that occurred in September 2015. Leishman submitted a formal complaint under his employer’s written anti-discrimination policy because he discovered – months after the original conversation – the AGO disciplined him based on Higgins’s previously-undisclosed homophobic criticism. ¶25. As detailed in Leishman’s written sexual orientation discrimination complaint and corroborated by other documents Leishman provided to OMW at Pearce’s request, the AGO’s adverse employment action was part of a continuing pattern of explicit and implicit workplace homophobia. ¶¶ 28, 33, 47, 49.⁴

Second, Leishman objects to the Court of Appeals’ dismissive description that he “felt that his PTSD was triggered by Higgins’s comments and her micromanagement of his work.” 10 Wn. App.2d at ¶5. Leishman’s physician diagnosed him with PTSD in November 2015 based on painful objective symptoms. ¶¶ 18, 21. Although other misconduct by the State and OMW further exacerbated his injuries, ¶¶ 39, 76, Leishman’s healthcare providers concluded Higgins’s conduct was an important contributor to his distress.⁵ Regardless, the Court of Appeals should not have implicitly questioned the reality of Leishman’s disability.

⁴ See <https://www.rogerleishman.com/2020/01/TooGay.html>.

⁵ See <https://www.rogerleishman.com/2019/07/UnrighteousDominion.html>.

Third, Higgins, not Leishman, engaged in “inappropriate conduct” during their meeting on March 1, 2016. ¶ 6. Leishman raised his voice only after Higgins accused him of faking his disability. ¶ 32. Leishman’s response to her offensive statement was typical for individuals living with Post-Traumatic Stress Disorder. CP 322. Leishman and Higgins continued to work closely together as colleagues during the following week. Neither Higgins nor anyone else from the AGO alerted Leishman to his employer’s purported safety concerns about this incident – until the AGO gave Leishman and his attorney copies of the final OMW investigation report ten weeks later, and the State wrongfully terminated Leishman’s employment. ¶¶ 35, 48, 55-57.

Fourth, contrary to the Court of Appeals’ suggestion, Leishman’s “home assignment” was not the consequence of an allegedly inappropriate interaction with Higgins. 10 Wn.App.2d at ¶ 6. On March 7, 2016, the AGO placed Leishman in an abusive home assignment in retaliation for his efforts to seek a nondiscriminatory workplace. ¶¶ 35, 37-40. The AGO never informed Leishman or his employment attorney this punishment was based on Leishman’s encounter with Higgins a week earlier. ¶ 48. In particular, Deputy Attorney General Christina Beusch’s detailed home assignment memo did **not** refer to this purported

rationale. *Id.* During his *ex parte* interrogation by Pearce, Leishman informed OMW he believed the AGO isolated him in retaliation for whistleblower conduct protected by the Washington Law Against Discrimination. ¶ 46. Tellingly, as with the other evidence Leishman identified in support of his sexual orientation discrimination complaint, Pearce intentionally omitted the Beusch memo when he prepared the OMW Report. ¶ 63.

Fifth, as documented by the State as part of its rigorous public contract procurement process, the AGO retained OMW **solely** to conduct an investigation into Leishman's sexual orientation discrimination claim. ¶¶ 41-42; *see also* Appendix at 16-23. The State and OMW never amended the scope of the original Work Order. *Id.* And no one ever informed Leishman or his attorney that OMW had transformed its taxpayer-funded discrimination investigation into an *ultra vires* employee hatchet job. ¶¶ 41-44.

Finally, the Court of Appeals' bland characterization of Pearce's two employer-whitewashing conclusions implies a false equivalency between (1) Leishman's well-documented sexual orientation discrimination complaint, and (2) the State's trumped-up criticisms about Leishman's unrelated workplace conduct. In doing so, the court

disregarded both the plain language of the Complaint as well as the undisputed factual record.

For example, the OMW Report barely mentioned Leishman's actual sexual orientation discrimination complaint – the **only** issue OMW was legally authorized to investigate, and the **only** subject the State's top employment lawyers and their taxpayer-paid attorney-investigator were permitted to interrogate Leishman about without obviously violating RPC 4.2. *See* Appendix 16-23. Substantively, Pearce included zero analysis of homophobia and implicit bias. He failed to address any of the specific evidence identified by Leishman. ¶ 59; *see also* CP 197-215. On the sole occasion when Pearce asked the AGO for a copy of evidence identified by Leishman regarding workplace homophobia, the AGO apparently didn't bother to locate the identified email. Appendix at 29-21. In any event, this evidence of the AGO's "closet-y" workplace environment is not included among the materials Pearce considered. CP 198-99. Instead, the bulk of OMW Report breathlessly parrots immaterial, unfounded, and prejudiced criticisms from the same co-workers who'd already decided to

get rid of an openly gay and disabled employee because he didn't fit into their repressive office culture. ¶¶ 55, 58-62.⁶

B. When the Legislature enacted RCW 4.24.510, it did not intend to immunize government vendors from civil liability for injuries they cause during their paid assignments.

The Legislature's stated purpose in enacting the "Brenda Hill Bill" was to protect "citizens who wish to report information to federal, state, or local agencies" from the "threat of a civil action for damages." RCW 4.24.500. See also *Emmerson v. Weilep*, 126 Wn. App. 930, 110 P.3d 214 (2005) (courts look to the provisions of RCW 4.24.500 in order to construe the plain language of RCW 4.24.510); Laws of 2002, ch. 232 § 1 (SLAPP suits "intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution" by targeting "advocacy to government"); Appendix 14 n.2 (Northwest Justice Project letter to Court).

In construing a particular statutory provision, courts seek to "ascertain and carry out the intent of the legislature considering the statute as a whole." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Like RCW 4.10.500 *et seq.*, numerous

⁶See <https://www.rogerleishman.com/2018/12/ConfirmationBias.html>.

other Washington statutes treat private citizens or unpaid volunteers differently from fulltime public servants, and differently from commercial businesses. *See, e.g.*, RCW 4.24.300 (Good Samaritan statute recognizing the difference between volunteer and commercial services); RCW 4.24.670 (limiting the potential liability of volunteers of nonprofit or governmental entities in enumerated circumstances); RCW 43.10.030 (authorizing Attorney General to represent “any state officer or employee acting in his official capacity”); RCW 42.40.050, RCW 42.52.410(3) (specific whistleblower protections for state employees).

The Massachusetts Supreme Judicial Court previously addressed the specific legal question that is now before this Court: whether a citizen whistleblower protection anti-SLAPP statute applies to commercial “vendors of services” who enter into contracts with government agencies. *Cardno ChemRisk, LLC v. Foytlin*, 476 Mass. 479, 68 N.E.3d 1180, 1189 (Mass. 2017) (citing *Kobrin v. Gastfriend*, 443 Mass 327, 332, 821 N.E.2d 60 (2005)). Like Leishman, the plaintiff in *Kobrin* sued a defendant who had been hired by a government agency “under contract and was paid to assist in its investigation” regarding plaintiff. 443 Mass 327, 332, 821 N.E.2d 60 (2005); Appendix 1-12. Massachusetts’ highest court held that the state’s broadly-worded anti-SLAPP

whistleblower protection statute, Mass. G.L. c. 231, §59H, was “not intended to apply to those performing services for the government as contractors.” 443 Mass at 332.

As with the government contractor in *Kobrin*, OMW’s legal “analysis ignores the history that led to adoption of the statute, misconstrues the statutory language, and in doing so, fails to effectuate the legislative intent.” *Id.* This Court should embrace the approach of the Court of Appeals and the Massachusetts Supreme Judicial Court, and hold that RCW 4.10.510 does **not** immunize government vendors from civil liability for injuries they cause during course of their paid engagement.

C. Paid commercial vendors are not among the category of persons identified by the Legislature as needing anti-SLAPP whistleblower protection.

The Washington Legislature enacted RCW 4.24.510 in 1989 as part of the “Brenda Hill Bill.” *Johnson v. Ryan*, 186 Wn. App. 562, ¶ 16, 346 P.3d 789 (2015). During the 1980s, Brenda Hill and her husband bought a home in Vancouver, Washington, from a real estate developer. When the Hills tried to refinance their mortgage in 1987, they discovered the developer had not paid any excise tax for two years, imperiling the title to homes purchased by the Hills and three hundred other families.

According to the House of Representatives committee report, “Mrs. Hill reported this violation to the Department of Revenue”:

As a result of the disclosures made to state officials, the Hills were sued by the developer. Mrs. Hill asked that the state defend her, but was told that the state had no authority to do so. The cost of defending the developer's suit has forced the Hills into bankruptcy.

Appendix 62 (emphasis added); *see also* Laws of 1989, ch. 234

(Governor’s message regarding the specific whistleblower problem targeted by the Brenda Hill Bill).

Government agencies, State officials, and agency employees all can count on a public legal defense if they are sued for damages as a result of their official conduct. *See, e.g., State v. Herrmann*, 89 Wn.2d 349, 354, 572 P.2d 713 (1977). In contrast, the Washington Constitution and its implementing statutes forbid lawyers from the Attorney General’s Office from representing private individuals like Brenda Hill and her husband. *Id.*; RCW 42.52.150(1).⁷ That’s why the Legislature enacted RCW

⁷ The Attorney General’s Office is also barred from representing government employees in their *private* capacity, including individuals who are accused of ethical misconduct before the Judicial Conduct Commission, the Washington State Bar Association, or the Executive Ethics Board. *See, e.g., Sanders v. State*, 166 Wn.2d 164, 207 P.3d 1245 (2010); RCW 42.52.530(7) (authorizing Attorney General to represent wrongly accused public employees in specific circumstances identified in the Ethics in Public Service Act); *see also* RCW 10.01.150 (identifying narrow circumstances under which the Attorney General may represent state employees charged with crimes).

4.10.510: so citizen whistleblowers would not be deterred or harmed by the prospect of well-heeled opponents and crushing legal expenses.

Beyond this lawsuit, there are other situations where RCW 4.10.510 would potentially immunize Pearce and his Ogden Murphy Wallace colleagues from civil liability. For example, if Pearce had observed a government employee committing procurement fraud and reported her to the appropriate authorities, that disclosure would constitute “advocacy to government,” rather than being part of OMW’s paid assignment to investigate allegations of sexual orientation discrimination. Laws of 2002, ch. 232 § 1. In contrast, injuries caused by OMW during the course of its vendor assignment are beyond the intended scope of RCW 4.10.510’s protections. Instead, as explicitly required by OMW’s contract with the state, Ogden Murphy Wallace obtained ample commercial insurance policies covering both OMW’s defense costs and its liability for personal injuries. CP 131, 480.

Government contractors like OMW do **not** need the special citizen whistleblower protection of RCW 4.10.510 in order to motivate them to conduct business in an honest, ethical, and safe manner. Instead, ordinary Washington tort law applies to claims based on deceptive tactics employed by outside human resources investigators – regardless of

whether the accused investigator was hired by a public agency employer, or by a private business employer.

D. Washington courts should not weaponize RCW 4.24.510.

RCW 4.10.510 includes an unusual attorney's fee provision. In a departure from typical Washington law, only successful anti-SLAPP *defendants* are eligible for an award of attorney's fees and costs. The Legislature adopted RCW 4.10.510's mandatory one-way attorney's fee provision to encourage citizen whistleblowers, and to deter abusive tactics by thin-skinned but deep-pocketed litigants.

Political commentators use the term "swiftboating" to describe the tactic of twisting an opponent's strength into a vulnerability.⁸ Like the original inspiration of the Brenda Hill Bill, Leishman is a bona fide citizen whistleblower. In addition to seeking systemic relief through litigation and in other proceedings, Leishman engages in vigorous public education on numerous topics of public concern.⁹ Despite years of official stonewalling and the challenges of living with a disability, Leishman

⁸ See James Fallows, "On 'Swiftboating' Mitt Romney, *The Atlantic* (7/15/12) <https://www.theatlantic.com/politics/archive/2012/07/on-swiftboating-mitt-romney/259847/>.

⁹ See <https://www.rogerleishman.com/p/my-story-so-far.html>.

successfully documented serious misconduct by high-level government lawyers and their hired attorney-investigators. *See, e.g.*, Appendix 16-23. In particular, Leishman uncovered a pattern of lawyer dishonesty, and then an illegal taxpayer-financed cover-up. *See, e.g.*, ¶¶ 52-66; Appendix 16-28. Yet the trial court “swiftboated” Leishman at OMW’s request. By dismissing this suit under CR 12(c) and RCW 4.10.510, the court celebrated OMW as a protected whistleblower, and subjected Leishman to exactly the kind of ruinous litigation expense that bankrupted Brenda Hill.

Leishman’s swiftboating experience with RCW 4.10.510 is not unique. In its reply brief in support of its CR 12(c) motion, OMW informed the trial judge that one of his King County Superior Court colleagues “recently granted a Motion to Dismiss under identical circumstances in *Jones v. Bellevue School District 405, et. al,*” including a mandatory attorney’s fees award under RCW 4.24.510. CP 368-69. The earlier judge applied the same statutory provision to dismiss the vendor law firm co-defendants in an untidy public accountability case brought by a *pro se* couple. Although OMW neglected to mention the prior case in its CR 12(c) motion papers, careful inspection reveals that OMW’s attorneys plagiarized their entire log-rolling RCW 4.24.510 argument directly from

the lawyer-defendants' successful motion to be dismissed from the *Jones* litigation a few months earlier.¹⁰

When the Legislature enacted RCW 4.24.510, it did not immunize government contractors and lawyer-defendants from ordinary tort law. And when this Court adopted CR 12(c), it did not create a shortcut for judges to get rid of *pro se* litigants, or to dispose of messy factual disputes without a jury. This Court should use this case to provide clear guidance to courts, attorneys, and litigants regarding the proper application of CR 12 and RCW 4.24.510.

CONCLUSION

Leishman's Answer to OMW's Petition for Review characterized this case as involving "***two vexing perennial issues***: the systemic challenges faced by under-resourced *pro se* litigants, and the decline in professionalism by members of the bar." Ans. 18. Let us cease mincing words. Hand-wringing over a "decline in professionalism" is a too-polite euphemism for the trouble caused by the increasing proportion of lawyers who cannot or will not distinguish between zealous advocacy and plain old ***lying***.

¹⁰ Compare Lawyer Co-Defendants' Motion to Dismiss at 9-12, Appendix 40-43, with OMW's CR 12(c) Motion, CP 310-14.

In “Gaslighting in Litigation,” Alyson A. Foster described a common experience today, particularly for women and diverse attorneys:

More often than I’d like to admit, I have found myself standing in court dumbfounded by opposing counsel’s recitation of facts and events. As a newer attorney, I often felt uncertain how to respond to these more seasoned attorneys who spoke with such authority. I knew that what they said was not exactly what happened, but they spoke in a way that sounded right. For example, an opposing attorney might tell the court a story about our discovery process and what led to the motion to compel he filed. He tells a story about how I did not return his calls, or refused to cooperate, or took a position that was untenable. And it is not true. But he tells it with such force and calmness, I begin to wonder if I’m wrong, if perhaps I made a mistake and did not conduct the process correctly.

There is so much pressure to be right—felt so keenly at all stages of our careers—and so much potential to make a mistake, it becomes easy to doubt ourselves and wonder if we did screw up.

We didn’t screw up. We got gaslit.

A. Foster, “Gaslighting in Litigation,” ABA LITIGATION SECTION (5/25/2017).¹¹

In this case, the collective tragedy of the Attorney General’s Office, Ogden Murphy Wallace, Western Washington University, and Roger Leishman began with a few boneheaded Human Resources mistakes by the State’s top employment attorneys. Appendix 16-20. Implicit and explicit bias made things worse along the way. But the saga

¹¹ See <https://complexdiscovery.com/gaslighting-litigation-manipulation-and-projection/>.

became a disaster only *when lawyers started lying, and then wouldn't stop*. *Id.*; Appendix 21-28. The legal system is simply not equipped to handle this many lies from members of the bar.

In his new book, Malcolm Gladwell focuses on “one of the biggest puzzles in human psychology”:

why are we so bad at detecting lies? You'd think we would be good at it. Logic says that it would be very useful for human beings to know when they are being deceived. Evolution, over many millions of years, *should* have favored people with the ability to pick up the subtle signs of deception. But it hasn't.

M. Gladwell, *TALKING TO STRANGERS* 72 (2019). According to Gladwell, humans generally benefit from defaulting to credulity, both as individuals and as a society.

Nevertheless, truthfulness still matters. Fortunately, lawyers and judges can rely on powerful truth-revealing tools, including the adversary system itself. Unfortunately, these traditional protections become increasingly ineffective when most ordinary people lack access to legal resources; when so many cases involve at least one *pro se* litigant, often from a marginalized community; when there is an overwhelming asymmetry between *pro se* parties and members of the gilded class with access to effective counsel; when too many lawyers fail to display candor to the tribunal, or to anyone else; and when too many tribunals lack the

resources or the stomach to do anything in response to a plague of dishonest lawyers.

Honestly criticizing one's own tribe is among the hardest tasks for any social species. It's hard for lawyers and judges, too. But someone has to do it. Leishman respectfully requests that this Court affirm the Court of Appeals' decision.

DATED March 18, 2020.

/s/ Roger A. Leishman
Roger A. Leishman, WSBA # 19971
Pro se

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KOBRIN v. GASTFRIEND

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Supreme Judicial Court of Massachusetts, Bristol.

Kennard C. KOBRIN v. David R. GASTFRIEND.

Decided: January 20, 2005

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ. George C. Deptula, Boston, for the plaintiff. William J. Dailey, Jr., Boston, for the defendant. Thomas F. Reilly, Attorney General, Peter Clark & David R. Marks, Assistant Attorneys General, & John H. Walsh, Boston, for the Commonwealth, amicus curiae, submitted a brief.

This case has its origin in disciplinary actions brought against a psychiatrist (the plaintiff here) by the Board of Registration in Medicine (board). The defendant, also a psychiatrist, was hired by the board to assist in its investigation of the complaints. After he was exonerated by the board on all charges, the plaintiff sued the defendant for statements made in the form of an affidavit. The defendant's special motion to dismiss pursuant to G.L. c. 231, § 59H (the "anti-SLAPP" statute), was allowed by a Superior Court judge. The plaintiff appealed from the dismissal of the suit to the Appeals Court, and we transferred the case to this court on our own motion.

The question before us is whether G.L. c. 231, § 59H, immunizes the defendant physician from liability for statements made in his affidavit. We hold that, in the circumstances of this case, the defendant's activities fall beyond the scope of the anti-SLAPP statute's protections. Accordingly, we vacate the dismissal of the complaint and remand the case for further proceedings.

Background. The plaintiff, Kennard C. Kobrin, is a licensed psychiatrist who owned and operated a psychiatry practice in Fall River and was also a contracted mental health and substance abuse service provider with the Massachusetts Medicaid Assistance Program. The defendant, David R. Gastfriend, is a licensed psychiatrist with a subspecialty certification in addiction psychiatry and has served as a director of addiction services at Massachusetts General Hospital since 1991, where he treats patients for substance abuse and conducts research.¹

In 1993, the State police began investigating the plaintiff's prescription practices after several of his patients died in circumstances involving the overuse of various drugs. The State police retained the defendant to assist with the criminal investigation. Meanwhile, in 1994 and 1996, three complaints were filed against the plaintiff with the board concerning his alleged improper prescription of benzodiazepines to his patients.² Pursuant to G.L. c. 112, § 5, the board is granted authority to "investigate all complaints relating to the proper practice of medicine by any person holding a certificate of registration" to practice medicine within the Commonwealth. The defendant was retained by the board under contract and was paid to assist in its investigation of these complaints and to render an expert opinion concerning the plaintiff's medical practices. See G.L. c. 112, § 5 ("the board shall hire such attorneys and investigators as are necessary").

On request of the counsel assigned to the disciplinary case (complaint counsel), the defendant reviewed and evaluated numerous medical records and reports relating to the plaintiff's prescription practices and executed an affidavit. The defendant's seven-page affidavit set forth his professional opinion that the plaintiff deviated from the proper standard of care and was "engaged pervasively in illegitimate prescribing and . widespread misconduct," and concluded that the plaintiff's "continued practice of medicine . represents a serious and immediate threat to his patients and to the public health, safety and welfare."

Relying in part on the defendant's opinions and findings as set forth in his affidavit, complaint counsel filed with the board a motion for summary suspension of the plaintiff's license pursuant to 243 Code Mass. Regs. § 1.03(11)(a) (1993). A statement of allegations was filed against the plaintiff, see 243 Code Mass. Regs. § 1.01 (1993); the board summarily suspended his registration to practice medicine and referred the matter to the

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division of administrative law appeals (DALA). At the DALA hearing, the defendant, who was subpoenaed by the plaintiff's attorney, testified concerning the contents of his affidavit.³ The administrative magistrate concluded that the plaintiff did not illegally prescribe benzodiazepines or otherwise render substandard care to his patients, and the board dismissed the charges against the plaintiff.⁴

The plaintiff filed suit in the Superior Court asserting claims against the defendant for "expert witness malpractice/negligence," defamation, malicious prosecution, and interference with contractual relations. All counts are based on the defendant's preparation and submission of the affidavit to the board, "knowing the information contained therein [was] false, misleading and fraudulent and was maliciously included therein with the intention to injure" the plaintiff.⁵ In response to the complaint, the defendant filed a special motion to dismiss pursuant to G.L. c. 231, § 59H, commonly referred to as the "anti-SLAPP" statute.⁶ The judge allowed the motion and subsequently awarded the defendant attorney's fees.

In his appeal, the plaintiff asserts that the anti-SLAPP statute is not applicable to the defendant because the latter was not petitioning the government, but rather was providing paid assistance to the government in its case. The defendant maintains that dismissal of the suit against him pursuant to the anti-SLAPP statute was appropriate because he was engaged in "petitioning activities" before the board within the meaning of G.L. c. 231, § 59H.⁷ We conclude that the defendant's activities are governed neither by the letter nor by the purpose of the anti-SLAPP statute. Because the defendant was not seeking from the government any form of redress for a grievance of his own or otherwise petitioning on his own behalf, he was not exercising his "right of petition under the constitution" within the meaning of the statute. G.L. c. 231, § 59H. We would alter considerably the Legislature's intent were we to interpret the statute so as to expand its scope to protect the statements of a disinterested paid witness.

Discussion. We review the Superior Court judge's decision to grant the defendant's special motion to dismiss to determine whether there was an abuse of discretion or other error of law. See *Baker v. Parsons*, 434 Mass. 543, 550, 750 N.E.2d 953 (2001); *McLarnon v. Jokisch*, 431 Mass. 343, 348, 727 N.E.2d 813 (2000).

1. **Applicability of the anti-SLAPP statute.** The anti-SLAPP statute, G.L. c. 231, § 59H, inserted by St.1994, c. 283, § 1, was enacted by the Legislature to provide a quick remedy for those citizens targeted by frivolous lawsuits based on their government petitioning activities. See preamble to 1994 House Doc. No. 1520. See also *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 161-162, 691 N.E.2d 935 (1998). The statute employs a number of mechanisms to protect the rights of those providing information to the government, including a special motion to dismiss and expedited hearing on the motion, a stay of discovery proceedings pending the motion's disposition, and the award of attorney's fees and costs to successful moving parties. See G.L. c. 231, § 59H. It applies to matters of both public and private concern, *McLarnon v. Jokisch*, supra at 347, 727 N.E.2d 813; *Duracraft Corp. v. Holmes Prods. Corp.*, supra at 164, 691 N.E.2d 935; and encompasses petitions brought before governmental agencies. See G.L. c. 231, § 59H; *Office One, Inc. v. Lopez*, 437 Mass. 113, 122-123, 769 N.E.2d 749 (2002) (applying anti-SLAPP statute to one defendant's communications with Federal Deposit Insurance Corporation).

In determining whether the defendant's statements to the board fall within the scope of the anti-SLAPP statute, we apply the general rule of statutory construction that a statute is to be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Triplett v. Oxford*, 439 Mass. 720, 723, 791 N.E.2d 310 (2003), quoting *Board of Educ. v. Assessor of Worcester*, 368 Mass. 511, 513, 333 N.E.2d 450 (1975).

Accordingly, we turn first to the language of the anti-SLAPP statute to determine the legislative intent. The statute, in pertinent part, provides:

"In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss."

G.L. c. 231, § 59H. The statute then defines a "party's exercise of its right of petition" as:

"[A]ny written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government."

Id. We read the phrase "based on said party's exercise of its right of petition under the constitution" as restricting the statute's coverage to those defendants who petition the government on their own behalf. In other words, the statute is designed to protect overtures to the government by parties petitioning in their status as citizens. It is not intended to apply to those performing services for the government as contractors.⁸

“None of the words of a statute is to be regarded as super-fluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute.” *Commonwealth v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth.*, 352 Mass. 617, 618, 227 N.E.2d 357 (1967), quoting *Bolster v. Commissioner of Corps. & Taxation*, 319 Mass. 81, 84-85, 64 N.E.2d 645 (1946). The statute explicitly extends protection to a party based on “said party’s exercise of its right of petition” (emphasis added). G.L. c. 231, § 59H. Moreover, the right of petition protected in the anti-SLAPP statute is that right enumerated in the First Amendment to the United States Constitution (“Congress shall make no law . abridging . the right of the people . to petition the Government for a redress of grievances ” [emphasis added]) and in art. 19 of the Massachusetts Declaration of Rights (“The people have a right . to request of the legislative body . by the way of . petitions . redress of the wrongs done them, and of the grievances they suffer ” [emphasis added]). See G.L. c. 231, § 59H (protecting against lawsuits “based on said party’s exercise of its right of petition under the constitution of the United States or of the commonwealth” [emphasis added]). The right of petition contemplated by the Legislature is thus one in which a party seeks some redress from the government. See Webster’s Third New Int’l Dictionary 1690 (1993) (defining “petition” as “a formal written request addressed to an official person or organized body” and as “a formal written request addressed to a magistrate or court praying for . relief” [emphasis added]).

Here, the defendant was not exercising his right to petition or to seek any redress from the board (a government body), but rather was acting solely on behalf of the board as an expert investigator and witness. The Superior Court judge thus erred in concluding that the defendant’s activities “[e] within the letter and spirit of the petitioning activities enumerated in G.L. c. 231, § 59H.”

The dissent suggests that our interpretation today departs from the literal construction of the statute and states that a broad construction of the statute more accurately reflects the statutory language. See post at 343-345, 821 N.E.2d at 71-72. The dissent maintains that we need not speculate about the meaning of the language nor depart from it unless the language would produce an absurd result. See post at 345-346, 821 N.E.2d at 72-73.

Because the language obviously produces no absurd result here, the dissent continues, all we need consider is the statute’s plain language. As the dissent interprets that statutory language, every statement ever made to a government body is protected. Unfortunately, this analysis ignores the history that led to adoption of the statute, misconstrues the statutory language, and in doing so, fails to effectuate the legislative intent.

While the dissent makes much of the fact that the Legislature’s choice of words was deliberate, see post at 344, 821 N.E.2d at 72, it overlooks the important fact that the Legislature explicitly used the phrase “right of petition under the constitution” in the statute, thus expressly implicating the term’s constitutional meaning. See G.L. c. 231, § 59H. The constitutional “right of petition” is a term of art that the Legislature did not adopt casually or accidentally. The Legislature’s decision to refer to the right of petition secured in the Federal and State Constitutions must be accorded significance in order to effectuate the legislative intent.⁹ See *id.*

Relying on a broad definition of a “party’s exercise of its right of petition,” the defendant similarly argues that the judge’s determination was correct because he submitted a “written . statement” to a government “body” in connection with an issue that was “under consideration,” see G.L. c. 321, § 59H, and that nothing in the statute requires a party to commence or initiate a proceeding himself or herself. Like the flawed analysis in the dissent, this argument fails to account for the statute’s use of the term “right of petition under the constitution” and the additional language indicating that it is the petitioner’s own interests and statements directed thereto that are the subject of protection.

The defendant attempts to bolster his argument by pointing to cases that acknowledge the breadth of the statute’s wording. See *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 162, 691 N.E.2d 935 (1998) (“the Legislature intended to enact very broad protection for petitioning activities”); *Milford Power Ltd. Partnership v. New England Power Co.*, 918 F.Supp. 471, 489 (D.Mass.1996) (“the Court recognizes that the statute’s definition of the ‘right to petition’ is very broad”). The *Milford* case is of little help to the defendant, as the court in *Milford* declined to rule on the scope of the statute and denied the motion to dismiss without prejudice. See *id.* at 489. Likewise, the *Duracraft* case does not help the defendant because there we did not construe the meaning of “right to petition,” and we declined to give an expansive reading to the statute. See *Duracraft Corp. v. Holmes Prods. Corp.*, supra at 167-168, 691 N.E.2d 935. We reasoned that an over-broad construction of the anti-SLAPP statute would compromise the nonmoving party’s right to petition—the same right the statute was enacted to protect. See *id.* at 166, 691 N.E.2d 935 (“By protecting one party’s exercise of its right of petition, unless it can be shown to be sham petitioning, the statute impinges on the adverse party’s exercise of its right to petition .”).

The legislative history of the anti-SLAPP statute further supports our holding. “Statutes are to be interpreted not based solely on simple, strict meaning of words, but in connection with their development and history, and with the history of the times and prior legislation.” *Quincy City Hosp. v. Rate Setting Comm’n*, 406 Mass. 431, 443, 548 N.E.2d 869 (1990) (adopting narrower interpretation of statute based, in large part, on legislative intent as gleaned from legislative history). See *Bynes v. School Comm. of Boston*, 411 Mass. 264, 267-269, 581 N.E.2d 1019 (1991) (determining legislative intent through examination of legislative history in conjunction with plain language of statute). The Legislature passed the anti-SLAPP statute partly in response to a lawsuit initiated by a developer against citizens of Rehoboth who signed a petition challenging proposed development out of a concern about endangering wetlands. *Duracraft Corp. v. Holmes Prods. Corp.*, supra at 161, 691 N.E.2d 935. In enacting the statute, the Legislature expressed concern over a “disturbing

increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances” (emphasis added). Preamble to 1994 House Doc. No. 1520.

See *Duracraft Corp. v. Holmes Prods. Corp.*, supra; *Stuborn Ltd. Partnership v. Bernstein*, 245 F.Supp.2d 312, 314 (D.Mass.2003) (noting that anti-SLAPP statute was designed to protect right to petition for redress of grievances). The Legislature intended the statute to encourage “full participation by persons and organizations and robust discussion of issues before legislative, judicial, and administrative bodies.” Preamble to 1994 House Doc. No. 1520. *Duracraft Corp. v. Holmes Prods. Corp.*, supra. Based on this legislative history, this court concluded that “[t]he typical mischief that the legislation intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects.” *Office One, Inc. v. Lopez*, 437 Mass. 113, 121-122, 769 N.E.2d 749 (2002), quoting *Duracraft Corp. v. Holmes Prods. Corp.*, supra.

Although the statute was aimed primarily at protecting citizen protest in the area of land development, we recognize that the application of the anti-SLAPP statute has not been limited to this arena. See *Baker v. Parsons*, 434 Mass. 543, 549, 750 N.E.2d 953 (2001) (“our review of the legislative history . led us to conclude that the Legislature intended to go beyond the ‘typical’ case”). At the same time, we have recognized that the scope of the statute has its limits. See *Duracraft Corp. v. Holmes Prods. Corp.*, supra at 162-163, 691 N.E.2d 935 (“We are dubious that the Legislature intended to create an absolute privilege. We also see no evidence that the statute was intended to reach suits such as this one between two corporate competitors involved in other ongoing litigation .”).¹⁰

The legislative history reveals that the anti-SLAPP statute had its genesis as a legislative attempt to protect private citizens when exercising their constitutional right to speak out against development projects or other matters of concern to them and their communities and to seek governmental relief. “SLAPP suits [are] ‘generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.’” *Duracraft Corp. v. Holmes Prods. Corp.*, supra at 161, 691 N.E.2d 935, quoting *Wilcox v. Superior Court*, 27 Cal.App.4th 809, 816-817, 33 Cal.Rptr.2d 446 (1994).¹¹ Nothing in the legislative history suggests any intention to protect a government-retained investigator acting on behalf of an administrative agency. The board contracted with the defendant to engage in investigative activities in aid of the board’s case against the plaintiff,¹² and he was compensated for his services. He had no other connection to, or interest in, the allegations against the plaintiff.

The dissent, in its broad interpretation of the statute, totally disregards this legislative history. This statutory context, when combined with the Legislature’s use of the phrase “petition under the constitution” as discussed above, produces an entirely different construction than that proposed by the dissent. Our opinion today does not distort the language of the statute, but rather gives it its intended meaning by taking account of these two important considerations. As is our obligation, we have given meaning to all of the statute’s words in the context of the legislative history in order to effectuate the intent of the Legislature. See *Triplett v. Oxford*, 439 Mass. 720, 723, 791 N.E.2d 310 (2003); *Quincy City Hosp. v. Rate Setting Comm’n*, 406 Mass. 431, 443, 548 N.E.2d 869 (1990).¹³

The defendant argues that his enlistment by government officials to engage in petitioning activities does not disqualify him from protection under the anti-SLAPP statute. Our holding in this case does not suggest that all parties solicited by the government to participate in petitioning activities will necessarily be disqualified from the anti-SLAPP law’s protections. While there is no statutory requirement that petitioning parties directly commence or initiate proceedings, in protecting those petitioning activities guaranteed under the State and Federal Constitutions, see G.L. c. 231, § 59H, the statute requires that the protected party have more than a mere contractual connection to the proceedings that are the basis of the petitioning activity. The defendant asserts no such connection to the proceedings in the case at hand.¹⁴

The defendant’s case is distinguishable from the facts in *Baker v. Parsons*, 434 Mass. 543, 750 N.E.2d 953 (2001), where we affirmed the dismissal of a SLAPP suit against two defendants whose comments on a proposed development had been solicited by the government. In that case, the plaintiff landowner sought permits from State and Federal regulatory agencies to construct a pier on land he owned on an island that was also the nesting habitat for several species of aquatic birds. *Id.* at 545, 549, 750 N.E.2d 953. In the course of their review, the permitting agencies sought comment on the impact of the proposed development on the island habitat from other environmental agencies. *Id.* at 545, 750 N.E.2d 953. One of those agencies, in turn, solicited comment from Parsons, a senior scientist for an environmental group (Manomet Bird Observatory), who had studied bird populations on the island for fifteen years. *Id.* at 544-545, 750 N.E.2d 953. Her comments were based on observations she had personally made while a researcher on the island, to the effect that the plaintiff’s development on the island had already “diminished and perhaps decimated a once robust and viable heronry.” *Id.* at 546, 750 N.E.2d 953. She concluded her comments by calling on the responsible Federal and State regulatory agencies to halt the continued degradation of the site. *Id.* The second defendant, the Manomet Bird Observatory, was an environmental organization that had once owned the plaintiff’s land, *id.* at 544-545, 750 N.E.2d 953; had used it for research, *id.* at 545, 750 N.E.2d 953; and, along with Parsons, even before the permit application was filed, had been seeking to have the area classified as an “area of critical environmental concern.” *Id.* Thus, prior to the solicitation of their comments by the government, these defendants had an independent interest in the controversy and in the preservation of the land that was at the center of the dispute. They were never hired by the government, nor did they serve on

behalf of the government to further its interests rather than seek redress for their grievances. These factors supported our determination that the suit against Parsons and the Manomet Bird Observatory was a “typical” SLAPP suit,” targeting the defendants for “petition[ing] the government.” *Id.* at 549 n. 12, 750 N.E.2d 953.¹⁵ Although their petitioning activity was solicited by State and Federal government officials, *id.* at 549, 750 N.E.2d 953, the defendants in *Baker v. Parsons*, *supra*, were nonetheless also engaged in constitutional petitioning activity in their own right and seeking some redress from the government based on their grievances.¹⁶

Because we hold that this case is beyond the anti-SLAPP statute's reach, we need not resolve the parties' dispute whether the defendant's affidavit contained the requisite factual basis to support dismissal pursuant to the anti-SLAPP statute. See G.L. c. 231, § 59H; *Baker v. Parsons*, *supra* at 551-552, 553-554, 750 N.E.2d 953.

2. Applicability of qualified immunity pursuant to G.L. c. 112, § 5. General Laws c. 112, § 5, which grants the board authority to investigate and prosecute disciplinary complaints against licensed physicians, also provides qualified immunity for those who participate in board investigations of physician misconduct. The immunity provision reads:

“No person filing a complaint or reporting or providing information pursuant to this section or assisting the board at its request in any manner in discharging its duties and functions shall be liable in any cause of action arising out of the receiving of such information or assistance, provided the person making the complaint or reporting or providing such information or assistance does so in good faith and without malice.”

Id. The defendant claimed qualified immunity pursuant to G.L. c. 112, § 5, in his special motion to dismiss. The judge, having dismissed the case based on the anti-SLAPP statute, did not reach the issue. We address it briefly.

The parties, relying on various canons of statutory interpretation, ask this court to decide whether the anti-SLAPP statute or G.L. c. 112, § 5, is “controlling.” This question is based on a fundamental misunderstanding of the two statutes. Neither statute “controls” because there is no relationship between the two. The anti-SLAPP statute and G.L. c. 112, § 5, address different situations and thus represent two separate and independent defenses potentially available in proceedings of this nature. As discussed above, the anti-SLAPP statute applies to parties exercising their “right of petition under the constitution.” Nothing in G.L. c. 112, § 5, either enlarges or restricts this protection.

Where, as in the present case, the defendant files a special motion to dismiss pursuant to the anti-SLAPP statute and also asserts qualified immunity as an alternative basis for dismissal, the judge first should decide, as he did here, whether to grant the special motion to dismiss. See, e.g., *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 168, 691 N.E.2d 935 (1998) (affirming denial of special motion to dismiss and remanding for further proceedings on other potential bases of immunity). This sequence is dictated by the anti-SLAPP statute, which automatically stays discovery (subject to certain exceptions) and directs the judge to consider the merits of the special motion to dismiss on an expedited basis. See G.L. c. 231, § 59H (“court shall advance any such special motion so that it may be heard and determined as expeditiously as possible” and “[a]ll discovery proceedings shall be stayed upon the filing of the special motion . provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted”). If the anti-SLAPP statute applies, the case will be dismissed without any consideration of qualified immunity. It is only when the special motion is denied that the judge shall consider the issue of qualified immunity as an independent basis for dismissal. For a judge to proceed otherwise would frustrate the procedural design of the special motion and the intent of the Legislature. See preamble to 1994 House Doc. No. 1520 (statute designed by Legislature to ensure SLAPP suits will be “resolved quickly with minimum cost”). See also *Fabre v. Walton*, 436 Mass. 517, 521-522, 781 N.E.2d 780 (2002), S.C., 441 Mass. 9, 802 N.E.2d 1030 (2004) (“protections afforded by the anti-SLAPP statute . are in large measure lost if the petitioner is forced to litigate a case to its conclusion before obtaining a definitive judgment through the appellate process”).

Because the anti-SLAPP motion was improperly allowed here, we consider the application of G.L. c. 112, § 5, to this case. The plain language of the statute applies to the defendant's statements to the board and neither party directly contends otherwise. The relevant inquiry on remand is, therefore, whether the defendant's conclusions were made “in good faith and without malice.” G.L. c. 112, § 5.¹⁷

For the foregoing reasons, we vacate the dismissal of the plaintiff's complaint and remand the case to the Superior Court for further proceedings consistent with this opinion.

So ordered.

If the Legislature had not provided its own definition of “a party's exercise of its right of petition,” G.L. c. 231, § 59H, the various limitations on that term imposed by today's decision might represent a plausible interpretation of the statute. We are not, however, called on to craft our own definition, or to interpret the statute based on our own understanding of what a party's “exercise of its right of petition” ought to entail, because the Legislature has defined the term for us. The statute provides that “a party's exercise of its right of petition” means, *inter alia*, “any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding.” *Id.* Here, the claims against Gastfriend are expressly based on Gastfriend's having submitted a “written . statement,” in the form of an affidavit, to an “executive .

body,” the Board of Registration in Medicine (board), see G.L. c. 13, § 10, in connection with a “proceeding,” a disciplinary proceeding against Kobrin. The conduct for which Gastfriend has been sued thus comes within the literal meaning of the term “a party’s exercise of its right of petition,” as that term is defined in the statute.

The court today sidesteps this straightforward application of the statutory definition by emphasizing the words “its right” in the term “a party’s exercise of its right of petition,” and claims that the protections of § 59H must be limited in order not to render those words “superfluous.” Ante at 332-333, 821 N.E.2d at 64. However, the statute provides us with the Legislature’s definition of the entire term “a party’s exercise of its right of petition.” We should look to that definition, not our own assessment of what the words “its right” might connote, if we did not have a definition from the Legislature. The definition itself unambiguously applies to the present case, and no component of the definition is rendered “superfluous” by that application. Apparently discomfited by the broad scope of the definition (for fear that it would protect “every statement ever made to a government body,” ante at 333, 821 N.E.2d at 64), the court ignores the definition and reads its own limitation into the words being defined. The court then seeks to justify that limitation by suggesting, without citation to any authority, that one’s constitutional right of petition is limited to petitioning on one’s “own” behalf in pursuit of one’s “own interests,” and that the additional phrase “under the constitution” therefore connotes the Legislature’s desire to limit the protections of § 59H in the same fashion. See Ante at 330, 332-334, 821 N.E.2d 62, 64-65.

“[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” (Citations omitted.) *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992), quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981). “Courts are not free to read unwarranted meanings into an unambiguous statute even to support a supposedly desirable policy not effectuated by the act as written.” 2A N.J. Singer, *Sutherland Statutory Construction* § 46:1, at 129 (6th ed.2000).

There are, of course, occasions when we depart from the literal wording of a statute, despite the unambiguous nature of that literal wording. However, such departures from the Legislature’s straightforward wording are rare, reserved for those instances where application of the literal meaning would result in “absurd or unreasonable” consequences, *Champigny v. Commonwealth*, 422 Mass. 249, 251, 661 N.E.2d 931 (1996), quoting *Attorney Gen. v. School Comm. of Essex*, 387 Mass. 326, 336, 439 N.E.2d 770 (1982), or would “defeat [the] purpose” of the legislation, *Champigny v. Commonwealth*, supra, quoting *Lehan v. North Main St. Garage*, 312 Mass. 547, 550, 45 N.E.2d 945 (1942). We should be especially leery of narrowing the literal meaning of this particular definition, as the breadth of the definition was repeatedly criticized by the Governor at the time the statute was being enacted, and the Legislature deliberately chose to reject that criticism and to maintain the definition in its extremely broad form.¹

Today’s opinion acknowledges that history, but concludes that it stands for nothing more than the fact that “the Legislature rejected the Governor’s position.” Ante at 337 n. 11, 821 N.E.2d at 67. What this history signifies is that the Legislature’s attention was drawn to the fact that the statute’s definitions were very broad indeed, and that they went well beyond the prototypical SLAPP suit. The Legislature’s decision to keep the statute’s broad definitions in the face of the Governor’s repeated objections indicates at a minimum that the breadth of those definitions was not the product of inartful draftsmanship or legislative inadvertence. Given the attention that was paid to the definitions at the time of enactment, we should be even more inclined to interpret the definitions consistent with their literal wording—their breadth is not some drafting error that we need to correct to make the statute comport with the Legislature’s ostensible intent.

Today’s opinion makes no claim that according the protections of G.L. c. 231, § 59H, to this particular defendant would result in “absurd or unreasonable” consequences, or that doing so would “defeat the purpose” of § 59H. *Champigny v. Commonwealth*, supra. Rather, the court takes it upon itself to narrow the protections of § 59H to a smaller class of persons that the court finds to be more deserving than expert witnesses who are paid by the government, rather than accept the literal statutory mandate that such protections are to be accorded to all persons—paid or unpaid, expert or lay, private or officially retained—submitting “written or oral statement[s]” to governmental bodies in connection with pending proceedings. Before tampering with the Legislature’s definition of “a party’s exercise of its right of petition,” we should consider whether it would be “absurd or unreasonable” to protect all such persons.

There is nothing “absurd or unreasonable” about protecting all witnesses from lawsuits based on the statements they give during the course of agency proceedings. To the contrary, absolute immunity from suit has long been accorded to witnesses in judicial proceedings, even if their testimony is knowingly false. See *Correllas v. Viveiros*, 410 Mass. 314, 319-320, 572 N.E.2d 7 (1991); *Aborn v. Lipson*, 357 Mass. 71, 72-73, 256 N.E.2d 442 (1970); *Mezullo v. Maletz*, 331 Mass. 233, 236-237, 118 N.E.2d 356 (1954); *Sheppard v. Bryant*, 191 Mass. 591, 592, 78 N.E. 394 (1906); *Hoar v. Wood*, 44 Mass. 193, 3 Met. 193, 197 (1841). The privilege is grounded in the view that “it is more important that witnesses be free from fear of civil liability for what they say than that a person who has been defamed by their testimony have a remedy.” *Aborn v. Lipson*, supra at 72, 256 N.E.2d 442. Massachusetts law recognizing such absolute immunity accords with well-established law across the country. See *Briscoe v. LaHue*, 460 U.S. 325, 330-334, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), and cases cited; *Blevins v. Ford*, 572 F.2d 1336, 1338 (9th Cir.1978); *Brawer v. Horowitz*, 535 F.2d 830, 836-

837 (3d Cir.1976); Sacks v. Stecker, 60 F.2d 73, 75 (2d Cir.1932) (absolute immunity for witnesses “is the practically universal rule in this country”). This immunity is accorded not merely for statements made as part of a witness’s testimony at trial, but for statements made “in the context of a proposed judicial proceeding.” Correllas v. Viveiros, supra at 321, 572 N.E.2d 7. See Dolan v. Von Zweck, 19 Mass.App.Ct. 1032, 1033, 477 N.E.2d 200 (1985), quoting Sullivan v. Birmingham, 11 Mass.App.Ct. 359, 361, 416 N.E.2d 528 (1981) (“absolute privilege applies to defamatory statements made ‘in the institution or conduct of litigation or in conferences and other communications preliminary to litigation’ ”); Frazier v. Bailey, 957 F.2d 920, 932 (1st Cir.1992); Leavitt v. Bickerton, 855 F.Supp. 455, 458 (D.Mass.1994); Restatement (Second) of Torts § 588 (1977) (“A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding”). This absolute privilege applies not only to oral testimony in court, but also to statements or testimony given in written form. See Mezullo v. Maletz, supra (absolute privilege protected physician who signed certificate in commitment proceeding certifying that plaintiff was insane); King v. Hildebrandt, 331 F.2d 476, 478 (2d Cir.1964) (immunity accorded psychiatrist who signed affidavit that launched commitment proceeding, noting “well-established rule that statements in pleadings and affidavits made in the course of judicial proceedings are absolutely privileged so long as they are relevant to the issues involved in the proceeding”); Williams v. Williams, 169 F.Supp. 860, 862 (D.D.C.1958) (statement in affidavit); Todd v. Cox, 20 Ariz.App. 347, 348, 512 P.2d 1234 (1973) (affidavit); Overman v. Klein, 103 Idaho 795, 800, 654 P.2d 888 (1982) (immunity applicable to witness who filed affidavit in child custody proceeding, noting that witness immunity extended “as to virtually any statement in documents which have been filed in a judicial proceeding”); Resciniti v. Padilla, 72 A.D.2d 557, 558, 420 N.Y.S.2d 759 (1979) (affidavit); Jarman v. Offutt, 239 N.C. 468, 472, 80 S.E.2d 248 (1954) (affidavit); Vieira v. Meredith, 84 R.I. 299, 301, 123 A.2d 743 (1956) (statement in pleadings).

Finally, of particular relevance to the distinction that today’s decision reads into § 59H, common-law immunity from suit extends to witnesses who are employed by or working for the government—it is not limited to private persons giving evidence in such proceedings. See *Briscoe v. LaHue*, supra at 335-336 & n.15, 103 S.Ct. 1108 (common law provided absolute immunity for all witnesses, “governmental or otherwise,” and “drew no distinction between public officials and private citizens”; 42 U.S.C. § 1983 did not override witness immunity for police officers who allegedly testified falsely); *Overman v. Klein*, supra (witness immunity extended to social worker employed by government agency). See also *LaLonde v. Eissner*, 405 Mass. 207, 211-212, 539 N.E.2d 538 (1989) (absolute immunity for court-appointed experts). Indeed, “to the extent that traditional reasons for witness immunity are less applicable to governmental witnesses, other considerations of public policy support absolute immunity more emphatically for such persons than for ordinary witnesses.” *Briscoe v. LaHue*, supra at 342-343, 103 S.Ct. 1108.

From this vast body of precedent supporting absolute immunity for statements made by any kind of witness in connection with judicial proceedings, the anti-SLAPP statute takes the modest step of extending a more limited degree of immunity to all persons submitting statements in connection with other types of governmental proceedings. There is nothing remarkable, let alone “absurd or unreasonable,” about protecting all persons who provide government agencies with information in the course of agency adjudications, including those who have been sought out and paid by the government. What is being protected is not merely the “rights” of the person submitting such information, but the interests of the government agency in acquiring information germane to the proceedings before it. See preamble to 1994 House Doc. No. 1520 (purposes of anti-SLAPP legislation include encouragement of “robust discussion of issues before legislative, judicial, and administrative bodies”). As with immunity from suit for a witness’s participation in judicial proceedings, immunity for witnesses in agency proceedings removes what might otherwise be a powerful disincentive against participation, a disincentive that would operate to rob the agency itself of the benefit of those witnesses’ information, views, and expertise.² The agencies themselves are best served by having witnesses and participants of all types protected from lawsuits stemming from their testimony and participation. Indeed, that such agencies are the functional equivalent of courts, requiring comparable protection for those involved, has long been recognized. See *Butz v. Economou*, 438 U.S. 478, 512-517, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (absolute immunity accorded to administrative law judges and to agency attorneys presenting case, as they are equivalent of court judges and prosecutors); *Bettencourt v. Board of Registration in Med.*, 904 F.2d 772, 782-785 (1st Cir.1990) (absolute immunity for board and staff members in connection with disciplinary proceedings against physician).

Whereas the common law made witnesses in judicial proceedings absolutely immune from suit, the anti-SLAPP statute, protecting persons making statements in connection with government proceedings, extends a form of protection that is slightly less than absolute immunity. Under G.L. c. 231, § 59H, the suit against the person who made the statement will be dismissed unless it can be shown that the person’s statement “was devoid of any reasonable factual support or any arguable basis in law,” the burden being on the plaintiff to demonstrate that the participant’s statement lacked such support or basis. The statute also establishes a procedural mechanism to enforce this immunity in a pragmatic way at the outset, before the defendant has been subjected to the expense and anxiety of protracted litigation. See *Fabre v. Walton*, 436 Mass. 517, 520-522, 781 N.E.2d 780 (2002), S.C., 441 Mass. 9, 802 N.E.2d 1030 (2004) (allowing interlocutory appeal from denial of motion to dismiss under § 59H). Extending such protection to persons who submit information to government agencies, whether they do so on their own personal initiative or as witnesses retained by the government, is an extremely modest extension of the law of witness immunity.³ It is hardly “absurd or

unreasonable” to include all such persons within the scope of this protection, and I therefore see no reason to depart from the literal language of § 59H and carve out an exception merely because the witness’s participation was not in pursuit of “a grievance of his own” or “on his own behalf.” Ante at 330, 821 N.E.2d at 62.

Beyond the troubling ramifications today’s decision has for government agencies seeking to obtain opinions from private experts, the case introduces a new and somewhat amorphous argument with which to defeat special motions to dismiss under § 59H, namely, the argument that the defendant who made the statement to a government agency did not have his or her “own interests” at stake, was not acting on his or her “own behalf,” or lacked the requisite “interest in” the subject of the proceedings. See Ante at 330, 332, 334, 337, 821 N.E.2d at 62, 64, 65, 67. Even where the suit in question is unabashedly based on a person’s “statement” to a government agency in connection with a pending matter, the motives and relationships underlying the person’s decision to give such a statement must apparently be examined to make sure they are sufficiently pure to come within the ambit of the narrower version of § 59H outlined in today’s decision.

While the precise contours of this evaluation of what caused the person to submit a statement to the government agency are unclear, it is apparent that affiliation with the government, or the receipt of filthy lucre, or perhaps a combination of the two, may suffice to taint the person making the statement, such that the person is no longer acting in his or her “status as citizen []” or exercising a “constitutional” right and should therefore be deprived of the quasi immunity and procedural protections of § 59H. Ante at 332, 334-335, 338, 821 N.E.2d at 64, 65-66, 68. The court today posits that there may be persons who are “solicited by the government” to participate in proceedings, but who nevertheless could be protected by § 59H, as long as that solicitation did not result in “performing services for the government” or “a mere contractual connection to the proceedings.” Ante at 332, 338, 821 N.E.2d at 64, 68.4 The court cites no authority for the proposition that either receipt of compensation for one’s time or agreement to provide the government with information or expert advice deprives someone of the “status” of “citizen” or otherwise curtails someone’s “constitutional” rights. Yet, according to today’s opinion, such persons are not deserving of protection and must therefore somehow be excluded from the unambiguous definition of § 59H. Recognizing the ambiguity inherent in its own (as opposed to the Legislature’s) definition, the court acknowledges that “some difficult factual situations will have to be assessed on a case-by-case basis.” Ante at 332 n.8, 821 N.E.2d at 64. The court then muses whether § 59H would be available to “a government ‘whistleblower,’” apparently torn between the fact that a whistleblower may have “personal knowledge and concern” about the matter being reported and the fact that such a whistleblower, working for the government, might just be pursuing the government’s interest. Ante at 340 n.16, 821 N.E.2d at 69.

Today’s decision casts a pall of uncertainty over the status of many persons who make statements to the government. What if an expert is hired by a petitioner—will the petitioner’s “own interests” in the matter allow us to extend the protections of § 59H to the petitioner’s disinterested expert, ante at 334, 821 N.E.2d at 65, or does the fact that the individual expert has no “grievance of his own,” ante at 330, 821 N.E.2d at 62, deprive the expert of those protections? What about lobbyists or lawyers? They are customarily making statements to government officials on behalf of their clients, not on their own behalf, and are compensated for doing so. Is their connection to the proceeding also a “mere contractual connection” that deprives them of protection? See ante at 338, 821 N.E.2d at 68. What about persons who testify before agencies after being subpoenaed (by either the agency or by any of the parties)—such persons submit “statement[s]” in connection with the agency proceeding, but if they did not want to make statements of their own volition, are they pursuing their “own” grievances, or exercising their “right of petition under the constitution”? See ante at 330, 821 N.E.2d at 62.

In my view, such questions are irrelevant, as the straightforward definition provided by the Legislature does not require us to consider the person making the statement works for, whether the statement was a product of the declarant’s “own interests,” ante at 334, 821 N.E.2d at 65, or what other constellation of factors may have influenced the person to submit a statement to the agency. The definition of “a party’s exercise of its right of petition” contains no reference to the motives or affiliations of the person making the “statement . . . to a legislative, executive, or judicial body,” and special motions to dismiss under § 59H should not be bogged down by such considerations.

The elusive nature of the additional element that the court has inserted into § 59H is best illustrated by the difficulty the court has in conjuring some distinction between the present case and *Baker v. Parsons*, 434 Mass. 543, 750 N.E.2d 953 (2001). There, as here, a government agency solicited the views of an outside expert in order to assist the agency, and that expert was then sued for the statements she had made in rendering her opinion.⁵ There, as here, the plaintiff argued that the anti-SLAPP statute was not applicable. Rather than engage in any analysis of the expert’s “independent interest in the controversy” that predated the government’s solicitation of her input, ante at 339, 821 N.E.2d at 68, the court in *Baker* reasoned that “the plain language of the statute . . . squarely encompasses the facts of this case.” *Baker v. Parsons*, supra at 549, 750 N.E.2d 953. The case came within that “plain language” because “Parsons, a biologist, responded to inquiries from State and Federal environmental officials, in connection with government agency reviews of Baker’s application to develop property by constructing a pier on an island that has historically been a home for many aquatic birds. As a result of her responses, Baker eventually sued Parsons and the nonprofit organization for which she works, thus, according to the defendants, ‘chilling’ any further participation by the defendants in assisting

State and Federal agencies gathering information on the merits of Baker's application." Id. That same "plain language" analysis can be applied to the present case using the exact same reasoning: Gastfriend, a physician, responded to inquiries from the board, in connection with the board's review of Kobrin's fitness to practice medicine. As a result of his responses, Kobrin eventually sued Gastfriend, thus, according to the defendant, "chilling" any further participation by him in assisting the government in any proceeding against Kobrin.⁶

In attempting to craft some distinction between Gastfriend's status in the present case and Parsons's status in Baker v. Parsons, supra, the court claims that Gastfriend was "serv[ing] on behalf of the government to further its interests," whereas Parsons was "seek[ing] redress for [her] grievances." Ante at 339, 821 N.E.2d at 68. That Parsons was pursuing her "own" grievance was demonstrated by the fact that she had "personally" conducted research on the island site at issue, and thereby had an "interest" in the preservation of the island that was formed "prior to the solicitation of [her] comments by the government." Id. Gastfriend, by comparison, only articulated his views after he was "hired by the government." Id.

This proffered distinction between Parsons and Gastfriend assumes that an expert who starts out as a neutral, disinterested expert solicited (and paid) by an agency cannot thereafter become a genuine petitioner who, having become familiar with the facts and circumstances, develops his "own" desire to see the government take a particular action. To the extent that it was Parsons's sincere view about the undesirability of the proposed pier construction that made her a viable candidate for protection under § 59H, how can we tell that, by the time he submitted his affidavit, Gastfriend was not equally sincere in his view that Kobrin should not be allowed to practice medicine? May not an initially neutral physician, who starts out with no knowledge of the physician being disciplined, review the information made available to him and then become indignant at what he views as dangerously substandard medical practice, and thus intensely desirous that the offending physician's license be revoked? While Gastfriend did not have such views at the time the board first contacted him, because he at that time knew nothing of Kobrin or the deaths of his patients (that ignorance, in the court's view, being a feature that makes him distinguishable from Parsons, ante at 338, 821 N.E.2d at 68), who is to say that he had not developed an "interest" in the outcome of the matter by the time he submitted his affidavit?

Having learned about Kobrin's practice, may not Gastfriend have developed his "own" concern for the image of his profession, or his "own" compassion for patients who were, in his opinion, at risk of dying from Kobrin's improper practices, and thus have his "own" interest in seeing Kobrin's license suspended? If he had developed the requisite desire that the government take action against Kobrin, why would his agreement to review the records and render an opinion diminish his "constitutional" right as a "citizen" to express his views to the governmental body that had the power to suspend Kobrin's license? The court today cynically assumes that Gastfriend, having begun as a "hired gun," would forever be a "hired gun" and would not actually care about the outcome of the disciplinary proceedings against Kobrin, whereas Parsons, because she had already studied the island habitat in question, subconsciously cared about the outcome of the pier permit proceedings before she even knew about them. There is nothing in this record to suggest that, at the time he submitted his affidavit, Gastfriend actually had no preference as to what the board did with Kobrin's license. Indeed, it is insulting to suggest that, for money, Gastfriend was simply saying whatever "the board" or "the government" wanted him to say, and thus merely acting "on behalf of the board" or "the government." See ante at 333, 339, 821 N.E.2d at 64, 68. If, as today's decision states, § 59H will not apply if the person making the statement to the governmental body lacks some "interest" in the matter, there is no basis on which to conclude that Gastfriend ultimately lacked such an "interest" in the matter before the board.

I see nothing to be gained, and much to be lost, in requiring such parsing of motives as part of a special motion to dismiss under § 59H. In my view, nothing in § 59H suggests that its protections hinge on the manner in which the person making the statement came to know or care about the agency proceedings in question. Only by reading such irrelevant considerations into the statute, and then assuming that Gastfriend cannot satisfy those irrelevant considerations, does the court deny him the protections of § 59H. Gastfriend, and the many other expert witnesses who assist a wide array of government agencies, are entitled to those protections under the unambiguous wording of the statute's definition, and it is in the best interests of both the witnesses and the agencies that such witnesses be accorded those protections in the prompt manner that § 59H envisions. I see no indication that the Legislature intended to deny such witnesses those protections, and therefore respectfully dissent.

FOOTNOTES

1. There is a dispute as to the defendant's precise position at Massachusetts General Hospital, but it is of no import to our analysis.
2. According to the record, benzodiazepines are narcotics used to treat anxiety and are sometimes abused by those with drug addictions.
3. The plaintiff called the defendant as a witness in order to demonstrate that his affidavit was "replete with error."
4. The DALA magistrate found the defendant's opinions to be "unfounded." We render no opinion as to the contents of the affidavit.
5. The defendant asserts that he was sued during the pendency of the plaintiff's criminal trial and that the

suit would chill the defendant's likely participation in that trial. The record reveals that the defendant was not sued based on his involvement in the pending criminal case, but only as a result of his "act of preparing and submitting to the [b]oard . [his] affidavit."

6. The acronym "SLAPP" stands for Strategic Lawsuit Against Public Participation. See *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 160 n. 7, 691 N.E.2d 935 (1998).

7. We recognize the amicus brief filed by the Attorney General on behalf of the Commonwealth supporting the defendant's position.

8. No definition of the phrase will encompass every case that falls within the statute's reach, and some difficult factual situations will have to be assessed on a case-by-case basis. What we seek to do is to limit the statute's protection, in accordance with the legislative intent, to the type of petitioning activity the Constitution envisions in which parties petition their government as citizens, not as vendors of services. See discussion *infra*.

9. The dissent argues that "the statute provides us with the Legislature's definition of the entire term 'a party's exercise of its right of petition.'" Post at 343, 821 N.E.2d at 71. The dissent glosses over the fact that the statutory definition of "said party's exercise of its right of petition" remains modified by the phrase "under the constitution." See G.L. c. 231, § 59H (entire phrase is "said party's exercise of its right of petition under the constitution" [emphasis added]). The legislative intent to limit the scope of the "right of petition" in the statute is further evidenced by the last phrase of the definition (which the dissent also overlooks): "or any other statement falling within constitutional protection of the right to petition government" (emphasis added). *Id.*

10. The anti-SLAPP statute was enacted as 1994 House Doc. No. 1520 and sent to Governor Weld for his signature. See 1994 House J. 1118; 1994 Senate J. 1294. Governor Weld returned the bill to the House of Representatives for amendment in order to narrow the definition of "right of petition." See 1994 House Doc. No. 5570. The Legislature rejected the Governor's recommendations, and passed the bill unamended. See 1994 House J. 1247; 1994 Senate J. 1418. Governor Weld then vetoed the legislation, arguing that the bill, as written, protected too broad a range of activities. See 1994 House Doc. No. 5604 ("The bill's proponents are concerned with retaliatory lawsuits brought by developers. [However,] [e]ffectively, the bill covers any statement on a policy issue"). The Legislature passed the anti-SLAPP statute over the Governor's veto. 1994 House J. 1306. 1994 Senate J. 1491-1492. Both the defendant and the dissent, post at 344-345 & n.1, 821 N.E.2d at 72, cite Governor Weld's veto message and this legislative action as support for a broad interpretation of the anti-SLAPP statute. All that is revealed by this legislative history, however, is that the Governor believed that the anti-SLAPP statute should apply to a narrower range of communications than the Legislature did. That disagreement does not assist us in identifying where the line should be drawn. The Legislature's rejection of the Governor's position, to the extent it has meaning at all, does not illuminate the case presently before us. No more can be drawn from the legislative override of the Governor's veto than that the Legislature rejected the Governor's position.

11. See *Weld Vetoes a Bill Targeting Developers Who File Libel Suits*, *Boston Globe*, Dec. 24, 1994, at 15 (need for anti-SLAPP legislation, as explained by bill's sponsor, is "to stop the practice of developers filing lawsuits against environmentalists and members of neighborhood groups who testify at public hearings against proposed developments"); *Brewer Blasts SLAPP Suits*; *Barre Legislator Backs Cohen Bill*, *Worcester Telegram and Gazette*, Dec. 29, 1993, at B4 (paraphrasing State Representative's description of SLAPP suits as those "used with increasing frequency to discourage citizens from participating in government and punishing those who do").

12. Although the plaintiff claims that the defendant "caused the complaint to be initiated," the record does not support this assertion.

13. The dissent has also made clear its approval of a much broader protection than that which the Legislature crafted in the anti-SLAPP statute. See post at 347-348, 354, 821 N.E.2d at 74, 79 ("agencies themselves are best served by having witnesses and participants of all types protected from lawsuits stemming from their testimony and participation," and "it is in the best interests of both the witnesses and the agencies that such witnesses be accorded those protections"). However, such policy rationales cannot justify disregard of the Legislature's intent. We do not decide what the Legislature should have done, but rather we must implement what it has chosen to do. See *Commonwealth v. Leno*, 415 Mass. 835, 841, 616 N.E.2d 453 (1993) ("Whether a statute is wise or effective is not within the province of courts").

14. The dissent expresses concern that this distinction introduces a "new" and "amorphous" argument into the anti-SLAPP analysis, which requires courts to "pars[e] motives" regarding how and why parties came to make allegedly protected statements. See post at 349, 354, 821 N.E.2d at 75, 79. The dissent misconstrues today's holding. We care not whether a defendant seeking dismissal under the anti-SLAPP statute is "sincere" in his or her statements; rather, our only concern, as required by the statute, is that the person be truly "petitioning" the government in the constitutional sense.

15. The dissent, post at 352, 821 N.E.2d at 77, asserts that in *Baker v. Parsons*, 434 Mass. 543, 750 N.E.2d 953 (2001), the court relied on the plain language of the statute in finding the anti-SLAPP statute applicable.

See id. at 549, 750 N.E.2d 953. While we relied, in part, on the language of the statute, we also looked to the legislative history of the anti-SLAPP statute in construing that language, a consideration that the dissent completely discounts. See id. (“In addition to its legislative history, the plain language of the statute squarely encompasses the facts of this case.”). There is thus nothing inconsistent between our analysis in *Baker v. Parsons*, supra, and our analysis today.

16. Similarly, the defendant’s activities are distinguishable from those of a government “whistleblower,” who petitions a government body regarding activities or actions based on personal knowledge and concern. We do not address whether a whistleblower would be protected under the anti-SLAPP statute.

17. The defendant asserts in addition that he has absolute immunity under the common law and that the complaint should have been dismissed for that reason. The dissent focuses extensively on the application of absolute common-law immunity for witnesses, apparently hoping to transfer such immunity to the anti-SLAPP context, where it does not apply. See post at 345-347, 821 N.E.2d at 72-74. That the common law may provide a witness with absolute immunity says nothing at all about whether the Legislature intended to grant a lesser form of immunity to the defendant under the anti-SLAPP statute. Our examination of the legislative history revealed nothing that would suggest the Legislature looked to common-law witness immunity in crafting the anti-SLAPP statute.

1. Specifically, when the first enactment of the bill was sent to the Governor, he vetoed it, explaining that the bill as drafted “applies to a broad group of potential claims, sweeping in cases that are far beyond the types of lawsuits which the bill’s proponents wish to control,” and noting the stringent consequences for any claim “falling within its broad definition.” Letter from Governor William F. Weld to House of Representatives and Senate (Jan. 13, 1994). When the Legislature passed another bill using the same “broad definition” (see 1994 House J. 1118; 1994 Senate J. 1294), the Governor again articulated his concern about the ostensible overbreadth of the bill and recommended an amendment to narrow its scope. 1994 House Doc. 5570. When the bill passed again without amendment (see 1994 House J. 1247; 1994 Senate J. 1418), the Governor again expressed the view that it was too broad and, for that reason, vetoed it. See 1994 House Doc. No. 5604. The Legislature proceeded to override the Governor’s veto. 1994 House J. 1306; 1994 Senate J. 1491-1492.

2. The amicus brief of the Attorney General points out that the Board of Registration in Medicine (board), like many other government agencies, regularly needs the assistance of outside experts in order to perform its functions.

3. With specific reference to the board, it is also an extremely modest modification of the earlier statute that gave qualified immunity to persons filing complaints, reporting or providing information, “or assisting the board at its request in any manner in discharging its duties and functions.” G.L. c. 112, § 5. That statute precludes imposition of liability as long as the person complaining, reporting, or assisting did so “in good faith and without malice.” Id. The anti-SLAPP statute substitutes a more stringent qualification of the immunity that is granted, i.e., the immunity is lost only if the person’s statement “was devoid of any reasonable factual support or any arguable basis in law.” G.L. c. 231, § 59H. And, to give teeth to that immunity, the anti-SLAPP statute makes available a procedural vehicle ensuring that the immunity issue will be addressed promptly. Given that the Legislature had already extended some degree of immunity to persons “assisting the board,” it cannot be “absurd or unreasonable” for the Legislature to tighten that immunity somewhat, create procedures to enforce it, and extend it to all persons who are “assisting” government agencies by giving “oral or written statement [s]” to those agencies. Today’s decision correctly holds that, notwithstanding G.L. c. 112, § 5, persons exercising their “right of petition” before the board are entitled to the protections of G.L. c. 231, § 59H. Ante at 340-341, 821 N.E.2d at 69-70. That this defendant would also be covered under G.L. c. 112, § 5, does not preclude him from claiming the more rigorous protections of the anti-SLAPP statute if the suit against him is “based on” his having made a “statement” to the board. G.L. c. 231, § 59H.

4. This suggests that retained expert witnesses, who are compensated for their time, will not be protected, unless perhaps they can show that they had some interest in or connection to the matter prior to entering that contractual arrangement. Ordinarily, when seeking an expert’s opinion, one purposely seeks out an expert who does not have some prior involvement or interest in the matter, as that deliberate detachment is viewed as important to the neutrality and validity of the resulting expert opinion. Under today’s ruling, biased experts who are compensated by agencies can perhaps claim the protection of § 59H when they are sued for rendering faulty opinions, because they can demonstrate that they had their “own” interest in the outcome of the matter before they were retained. However, neutral experts—the only kind of experts worth hiring—cannot claim that protection.

5. More specifically, the United States Army Corps of Engineers had itself solicited comment from other government agencies, including a unit within the Massachusetts division of fisheries and wildlife (division), with respect to a pending application to construct a pier on an island. The division, in preparation for its own response to the Federal agency, in turn sought input from Parsons, a scientist who had conducted research on the island where the proposed pier would be located. Parsons provided her written opinion, opining that the value of the island as a nesting habitat for aquatic birds made it an inappropriate site for the pier. That opinion allegedly caused others (not Parsons herself) to petition the Executive Office of Environmental Affairs for an environmental impact review of the proposed pier. Baker, the applicant seeking permission to construct the pier, then sued Parsons for the damages allegedly incurred as a result of the delay in issuance of

the permit for the pier. *Baker v. Parsons*, 434 Mass. 543, 545-546 & n. 6, 750 N.E.2d 953 (2001).

6. Inexplicably, today's decision treats as irrelevant the fact that Gastfriend was a potential witness in a pending criminal case against Kobrin at the time Kobrin filed this lawsuit. Ante at 330 n.5, 821 N.E.2d at 62. Gastfriend would not view the pendency of this lawsuit as irrelevant to his consideration whether he would be willing to assist the prosecutor, nor would it be viewed as irrelevant by the prosecutor, who would have to consider whether the lawsuit would make Gastfriend appear biased. Of course, whether the lawsuit was intended to "chill" Gastfriend's participation in either the disciplinary proceedings or the criminal prosecution, the effect of today's decision will unquestionably "chill" any neutral expert's willingness to provide an opinion to any State or Federal agency.

COWIN, J.

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The Honorable Theresa B. Doyle
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CASE NUMBER: 16-2-22028-2 SEA

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

PATRICK JONES, individually,

Plaintiff,

v.

BELLEVUE SCHOOL DISTRICT 405, a public
school district; WASHINGTON
INTERSCHOLASTIC ACTIVITIES
ASSOCIATION, a nonprofit corporation;
KINGCO CONFERENCE, a nonprofit
Corporation, and SEA-KING DISTRICT 2 OF
THE WIAA, a nonprofit corporation;
YARMUTH & WILSDON, PLLC, a
Washington Professional Limited Liability
Company, BOB WESTINGHOUSE and CARL
BLACKSTONE, in their individual capacities,

Defendants.

No. 16-2-22028-2 SEA

THE YARMUTH DEFENDANTS’
MOTION TO DISMISS

I. INTRODUCTION

Plaintiff Patrick Jones was an assistant football coach at Bellevue High School. According to his Complaint, in May 2016, the Bellevue School District (“BSD”) concluded that Jones had received improper payments from the Bellevue High School’s football booster club. As a result, BSD decided not to renew Jones’ annual contract to coach football. Jones has now sued BSD. However, he also sued other defendants who had no power to take any employment action against Jones.

Included among the defendants are the Seattle law firm of Yarmuth Wilsdon, PLLC and two of its attorneys, Carl Blackstone and Robert Westinghouse (“Yarmuth

1 Investigators”). The Yarmuth Investigators had been hired by the Washington Interscholastic
2 Activities Association (“WIAA”), the entity that oversees high school sports, to investigate
3 various allegations that the Bellevue High School football program had violated WIAA
4 regulations. Following an extensive investigation, the Yarmuth Investigators issued a 68-page
5 report on March 22, 2016. Based on their months-long investigation, they concluded that the
6 program had violated WIAA rules. Most of the allegations investigated and reported on are
7 not at issue in this suit. In particular regard to the allegations in Jones’ lawsuit, although the
8 report concluded that BHS coaches had received excessive payments from the booster club,
9 that report did not make any conclusion that Jones had violated any WIAA regulation.

10 WIAA then provided the investigative report to BSD. BSD conducted its own
11 investigation into the allegation that its football coaches had received excess payments. And
12 it investigated several other rules violation allegations. As a result of that independent
13 investigation, BSD decided not to renew Jones’ coaching contract.

14 The Complaint gives virtually no information regarding why the Yarmuth
15 Investigators are being sued, let alone pled any facts that provide a *cognizable legal basis* for
16 suing them. The Yarmuth Investigators did not take any employment action against Jones,
17 nor could they. In fact, the Complaint alleges that BSD imposed “internal remedies.” Am.
18 Compl. ¶ 3.8 (Dkt. 23). There is an allegation that the reports the Yarmuth Investigators
19 prepared and submitted to WIAA were an “initiative for the collective new mindset” at BSD
20 and WIAA. *Id.* ¶ 3.19. There also is a conclusory allegation that the investigators were
21 biased, conflicted, did not follow “protocols,” and came to the wrong conclusion, a common
22 protest when persons hold a different opinion than the investigators. But, taking those
23 allegations as true for purposes of this motion, those allegations do not state a cognizable
24 cause of action. Simply stated, the Yarmuth Investigators are being sued for the preparation
25 and content of the reports they submitted to WIAA, but that conduct is not actionable and is
26 immune from civil liability based on the facts that Jones alleges.

1 As a threshold matter, all of the claims against the Yarmuth Investigators should be
2 dismissed because Washington law grants immunity from civil liability to persons such as
3 investigators who conduct an investigation and report their view. As explained below,
4 plentiful Washington case law, as well as a directly applicable Washington statute, recognize
5 and apply the strong public policy that supports granting immunity to those who undertake the
6 role of assisting public function investigations into matters of public concern. This protection
7 is paramount so that investigations of public functions, such as the activities of the Seattle
8 Police Department, the Washington DSHS, Western State Hospital, the Washington
9 Department of Corrections, the State Auditor’s Office, and other public functions, can be
10 conducted without the enormous chilling effect that would exist if investigators, instead of
11 going where the facts take them, were tempted to shade or tilt their opinions out of fear of
12 facing civil damage claims from those who disagree. If suits like this are not dismissed, the
13 utility of such investigations will be voided and the ability to examine and report on potential
14 wrongdoing silenced.

15 Additionally, each of the four causes of action fails as a matter of law regardless of
16 immunity. The first cause of action seeks a “Mandatory Injunction Regarding False
17 Statements and Violations/Defamation.” Tellingly, the Yarmuth Investigators are not even
18 referenced in this cause of action. The Complaint only references statements allegedly made
19 by BSD regarding coaches, including Jones. Am. Compl. ¶¶ 4.2-4.6.

20 The second cause of action is an attempt to assert a “False Light” claim. *Id.* ¶¶ 4.8-
21 4.12. Again there is no reference to the Yarmuth Investigators. Even if there were, this claim
22 fails because: (i) Washington does not recognize a false light claim, *Hoppe v. Hearst Corp.*,
23 53 Wn. App. 668, 677 n.5, 770 P.2d 203 (1989); and (ii) the claim suffers from the same fatal
24 legal deficiencies as the first cause of action.

25 The third cause of action, entitled “Abuse of Authority/Deprivation of Rights,”
26 complains about a “letter of restrictions” BSD allegedly issued dated June 16, 2016. Am.

1 Compl. ¶ 4.14. It also does not refer to the Yarmuth Investigators. It is fatally deficient
2 because there was no employment action against Jones taken by the Yarmuth Investigators.

3 The final cause of action, which is labeled “Appearance of Fairness Doctrine
4 Violation,” fares no better. Am. Compl. at 15. This is the only cause of action that
5 specifically references the Yarmuth Investigators. *Id.* ¶ 4.20. It fails for several reasons.
6 First, the appearance of fairness doctrine is generally limited to land use decisions. Second,
7 Jones can only seek damages against the Yarmuth Investigators, and Washington law is clear
8 that damages are not a remedy even if there is a proven appearance of fairness claim. Finally,
9 this cause of action alleges, without identifying the source or basis, that the Yarmuth
10 Investigator defendants “owed a duty to plaintiff.” Whether a duty is or is not owed is a legal
11 issue that can be, and often is, decided on a Rule 12(b)(6) motion. Under Washington law,
12 the Yarmuth Investigators, retained by and reporting to WIAA, did not owe a duty of “due
13 care,” or any other actionable duty, to plaintiff Jones. Professionals like the Yarmuth Wilsdon
14 PLLC law firm, and its individual attorneys, owe duties *only* to the client that retains them
15 (here WIAA), not to others. Indeed, Washington courts, fully in line with other jurisdictions,
16 have recognized again and again that professionals cannot serve two masters at once, and
17 must only be answerable to the client that retains them, which here was WIAA.

18 **II. RELIEF REQUESTED**

19 The Yarmuth Investigator defendants (Yarmuth Wilsdon, PLLC, Robert
20 Westinghouse and Carl Blackstone) move for dismissal under Rule 12(b)(6).

21 **III. STATEMENT OF FACTS**

22 **A. The Yarmuth Investigators Were Hired by WIAA in 2015.**

23 In August 2015, the Seattle Times published a story entitled “*Bellevue High’s Success*
24 *Aided by Diploma Mill.*”¹ That story raised a number of questions about the Bellevue High
25

26 ¹ <http://www.seattletimes.com/sports/high-school/bellevue-highs-football-success-aided-by-diploma-mill/>.

1 School football program. In response to the story, BSD requested that WIAA conduct an
2 investigation into the BHS football program. WIAA retained the Yarmuth Investigators to
3 conduct an investigation regarding whether the Bellevue High School football program had
4 violated any WIAA rules that govern interscholastic athletics. Am. Compl. ¶ 3.19.

5 WIAA is a non-profit organization that is authorized by the Washington Legislature
6 to, among other things, supervise school district sponsored athletics. RCW 28A.600.200.
7 Among the statutorily granted powers, WIAA is specifically authorized to impose penalties
8 for violations of its rules upon “coaches, school district administrators, school administrators
9 and students.” RCW 28A.600.200(3); *see also*, Am. Compl. ¶ 2.2. Plaintiff alleges that
10 WIAA received the subject reports as “a quasi-judicial body.” Am. Compl. ¶ 4.10 (13:18-
11 22).² He alleges that defendants KingCo Conference (“KingCo”) and Sea-King District 2 of
12 WIAA (“Sea-King”) are sub-units of WIAA that regulate interscholastic athletics. *Id.* ¶¶ 1.5,
13 1.6. Plaintiff also alleges that these defendants are state actors. *Id.* ¶ 4.14 (14:23-26).³

14 **B. The Yarmuth Investigators Report to WIAA in March 2016.**

15 The Yarmuth Investigators completed their investigation and provided WIAA with a
16 68-page report dated March 22, 2016. Am. Compl. ¶ 3.19; Declaration of Bradley S. Keller
17 in Supp. of Mot. to Dismiss (“Keller Decl.”), Ex. 1. That report contained summations of a
18 number of interviews, set out the investigators’ findings and included their opinion that, based
19 on the factual information in the reports, there had been violations of several WIAA rules,
20 including improper payments to BHS coaches. Keller Decl., Ex. 1. The bulk of the issues
21 involved allegations of recruitment violations; allegations related to students using phony

22 _____
23 ² For purposes of this motion, plaintiff’s allegations of quasi-judicial capacity are taken as
24 true. Whether WIAA or other defendants agree with that characterization is not relevant or
25 pertinent to this motion. The Complaint is vague as to whether the allegation relates to the
26 BSD report or the Yarmuth Investigators’ reports, or both. For purposes of this motion it is
assumed to apply to both.

³ In certain capacities, WIAA has been delegated authority by the school districts. RCW
28A.600.200. The districts are “political subdivisions of the state.” RCW 28A.315.005(2).
For purposes of this motion, plaintiff’s allegations are taken as true regardless of whether any
of the defendants agree or disagree with the allegation.

1 residence addresses; allegations of eligibility; and allegations regarding certain players getting
2 improper financial assistance at an alternative school. *Id.* None of those issues or those
3 portions of the Yarmuth Investigators’ reports appears to be challenged by Jones in this
4 lawsuit.

5 **C. After Its Own Investigation, BSD Self-Reports a Violation Regarding Jones.**

6 BSD conducted its own investigation after March 2016, and BSD ultimately admitted
7 on May 23, 2016 that there had been some violations of WIAA rules and it recommended
8 certain sanctions and “internal remedies.” *Id.* ¶¶ 3.7, 3.8 and 3.18; Keller Decl. Ex. 3.⁴ One
9 of the WIAA rules at issue in the investigations and self-report was Rule 23.1.1. Rule 23.1.1
10 provides: “Coaching stipends and all gifts to a coach exceeding a total of \$500 in a season
11 must be approved by the school’s board of directors.” *See* Keller Decl., Ex. 3 at 16. BSD
12 reported violations of this rule involving coaches Goncharoff and Jones. *Id.* at 16-20.⁵ As to
13 other violations, the WIAA process also enabled BSD to, within WIAA, further challenge
14 WIAA’s conclusions that there had been other rules violations, which BSD unsuccessfully
15 did. Am. Compl. ¶¶ 3.7 n.2, 3.14.

16 Jones’ Complaint argues for his view of a strict and narrow interpretation of Rule
17 23.1.1, focused on the words “in a season.” Am. Compl. ¶¶ 3.14-3.17. Jones’ Complaint
18 acknowledges that in contrast to his opinion on how to interpret Rule 23.1.1, BSD and WIAA
19 both have a different, contextual interpretation focused on what the coach is doing, whenever
20 it is that he or she happens to be doing it, for a particular school sport program. *Id.* ¶¶ 3.16-
21 3.18. In particular, Jones alleges: “The WIAA opined, ‘Rule 23.1.1 has been written,
22 consistently interpreted and, intended as a year round control system to support schools and
23 insure that all programs are under the direct guidance and oversight of school

24 _____
25 ⁴ BSD made two self-reports. The one at issue in Jones’ Complaint is the May 23, 2016 BSD
self-report. Am. Compl. ¶ 3.18; Keller Decl., Ex. 3.

26 ⁵ The BSD investigation was not a rubber stamp or repeat of the Yarmuth investigation. As
its report indicates, BSD had access to additional documents, interviews and personnel and
came to its own conclusions.

1 administration.”” *Id.* ¶ 3.16. Jones’ internal quote is from WIAA’s May 9, 2016 statement
2 found in Ex. 3 at 16.

3
4 **D. Prior to the BSD Self-Report, the Yarmuth Investigators’ Reports Had Not
Named Jones Regarding a Violation of Rule 23.1.1.**

5 There were three reports that the Yarmuth Investigators ultimately prepared and
6 submitted to WIAA. Am. Compl. ¶ 3.19. The reports of March 22, 2016 and May 18, 2016,
7 do not name Jones as a Bellevue coach who received funds in violation of WIAA Rule
8 23.1.1.⁶ Nor does the Complaint allege that those reports specifically mention plaintiff Jones
9 in regard to Rule 23.1.1. Instead, the Complaint only alleges that in light of the March 22
10 report BSD met with Jones, interviewed him, and that BSD thereafter for itself determined
11 that Jones “had received a high school coaching stipend or gift,” in violation of Rule 23.1.1.
12 *Id.* ¶ 3.7; Keller Decl., Ex. 3 at 19-20. Plaintiff alleges that BSD then took an adverse
13 employment action against him. Am. Compl. ¶¶ 3.4, 3.7, 3.9-3.12, 3.18.

14 In summary, the first letter or report that references Jones by name in connection with
15 Rule 23.1.1, according to the Amended Complaint, was internal to BSD (Am. Compl. ¶ 3.4)
16 and the first external report was the May 23, 2016 BSD self-report. *Id.* ¶¶ 3.7, 3.18; Keller
17 Decl., Ex. 3 at 19-20. Likewise, the employment actions and letter of June 16, 2016 were
18 BSD actions. *Id.* ¶¶ 3.1-3.12.

19 Later, there were three lawsuits filed in Superior Court by persons disgruntled that the
20 High School football program had been found by BSD and WIAA to have violated WIAA
21 rules. This case is one of them, but this case is the only one where the Yarmuth Investigators
22 were named as defendants. A Bellevue High School football booster club sued WIAA and
23 the school district. The Yarmuth Investigators were not sued in that case, and the case was

24
25 ⁶ The March 22 report refers to then head Coach Goncharoff, and references coaches (plural)
26 but made no allusion to any particular other coach in its discussion regarding Rule 23.1.1. Ex.
1 at 4, 57-59. The May 18 report is submitted herewith as Keller Ex. 2. Keller Ex. 4 is a May
25, 2016 report made subsequent to BSD’s May 23 self-report. Each of these is referenced in
the Complaint at ¶ 3.19.

1 dismissed on a 12(b)(6) motion by Judge Parisien. *Bellevue Wolverine Football Club v.*
2 *WIAA*, King Cnty. No. 16-2-20266-7 SEA, Dkt. Nos. 29 & 30. Another case, brought by the
3 Head Coach, “Butch” Goncharoff, is pending before Judge Rogers. *Goncharoff v. WIAA*,
4 King Cnty. No. 16-2-28318-7 SEA. Again, the Yarmuth Investigators are not named as
5 defendants in that case either.

6
7 **IV. STATEMENT OF ISSUES**

8 Does RCW 4.24.510 provide the Yarmuth Investigators with immunity from civil
9 damage claims based on the allegations in the Amended Complaint? Answer: Yes.

10 Does Washington common law also provide the Yarmuth Investigators with immunity
11 from civil damage claims based on the allegations in the Amended Complaint? Answer: Yes.

12 Regardless of the immunities, does the Amended Complaint state a claim against the
13 Yarmuth Investigators? Answer: No.

14 **V. EVIDENCE RELIED ON**

15 This motion relies on the Amended Complaint and the written documents referenced
16 therein, which form a part of the Complaint. Those select exhibits are attached to the
17 Declaration of Bradley S. Keller submitted herewith. These documents are considered part of
18 the Complaint because the Complaint references and springs from their contents. *Jackson v.*
19 *Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487, *rev. denied*, 184 Wn.2d
20 1011 (2015); *see also, Sebek v. City of Seattle*, 172 Wn. App. 273, 275 n.2, 290 P.3d 159
21 (2012) (“Where a plaintiff, however, founds allegations in a Complaint on specific
22 documents, but does not physically attach those documents to the Complaint, said documents
23 may be considered in ruling on a CR 12(b)(6) or CR 12(c) motion....”).

24 **VI. AUTHORITIES**

25 A claim should be dismissed if it fails to state a claim upon which relief may be
26 granted. CR 12(b)(6). A trial court should grant a motion to dismiss when it appears from the
face of the Complaint that the plaintiffs would not be entitled to relief even if they prove all

1 the alleged facts supporting the claim. *Citizens for Rational Shoreline Planning v. Whatcom*
2 *Cnty.*, 172 Wn.2d 384, 389, 258 P.3d 36 (2011). Dismissal is warranted if the court concludes
3 that the plaintiffs cannot prove any set of facts which would meet the elements of the claim.
4 *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717-18, 189 P.3d 168 (2008) (citing *Tenore*
5 *v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)).

6 **A. Immunity Under RCW 4.24.510 Requires Dismissal of All Claims.**

7 The Yarmuth Investigators are entitled to protection from suit under Washington law.
8 There are several overlapping immunities that spring from the strong public policy that
9 protects them from suits that would chill their efforts and expressions.

10 First is an immunity provided by statute. Persons who report on potential wrongdoing
11 are immune from suit under Washington statutory law. Accepting Jones' allegations as true
12 for this motion, Washington's whistleblower protection plainly applies to the Yarmuth
13 Investigators.

14 RCW 4.24.510 provides:

15 Communication to government agency or self-regulatory organization—
16 Immunity from civil liability.

17 A person who communicates a complaint or information to any branch
18 or agency of federal, state, or local government ... **is immune from civil**
19 **liability** for claims based upon the communication ...⁷ regarding any matter
reasonably of concern to that agency or organization.

20 (Emphasis added.)

21 Jones alleges that BSD, WIAA and the districts are "public entities" and that their
22 "actions constitute state action." Am. Compl. ¶ 4.14. Thus, taking those allegations as true,
23 the Yarmuth Investigators' reports to such defendants fall within the plain language of this
24 statute. Jones alleges that WIAA regulates interscholastic activities (*id.* ¶ 1.3) and thus

25 ⁷ The statute provides for an award of expenses and attorney's fees for defending against such
26 a suit and additionally for statutory damages of \$10,000. However, for purposes of dismissal
under this motion, the moving defendants are not seeking the ten thousand dollar statutory
award.

1 concedes that the subject matter of the reports was a matter of concern to WIAA. Moreover,
2 Jones alleges BSD undertook its own investigation in part because of the reports (*id.* ¶ 3.19),
3 which also shows that the reports were a matter of concern to the Bellevue School District.

4 Washington cases show the broad immunity this statute provides. In *Gontmakher v.*
5 *City of Bellevue*, 120 Wn. App. 365, 85 P.3d 926 (2004), an employee with the City of
6 Bellevue reported to the State Department of Natural Resources that Gontmakher had clear
7 cut land in Bellevue. Gontmakher sued the city for making its report, claiming loss in
8 property value and lost profits because DNR issued a stop-work order. The trial court applied
9 immunity under RCW 4.24.510, and the Court of Appeals affirmed. *Id.* at 371. As the court
10 summarized: “The legislature enacted RCW 4.24.510 to encourage the reporting of potential
11 wrongdoing to governmental entities. One who provides information to a governmental entity
12 is immune from civil liability based on that communication.” *Id.* at 366.

13 Similarly, in *Bailey v. State*, 147 Wn. App. 251, 191 P.3d 1285 (2008), the Court of
14 Appeals, on interlocutory appeal, reversed a trial court’s refusal to apply the immunity and
15 dismissed the action based on RCW 4.24.510. In that case Ms. Lindholdt, upset with the
16 advocacy of Ms. Bailey at meetings of the Spokane County Air Pollution Control Authority,
17 communicated to Ms. Bailey’s employer, Eastern Washington University, about Ms. Bailey’s
18 conduct and her past criminal record. *Id.* at 255-257. Eventually Ms. Bailey was terminated
19 by EWU and she sued everyone in sight, including Ms. Lindholdt. *Id.* The allegations in the
20 Bailey complaint, as recited in the opinion, have many parallels with Jones’ Complaint here,
21 including that the defendant made allegedly false allegations against the plaintiff. *Id.* at 257-
22 58. The Court of Appeals stated that regardless of ill-intent, immunity applied:

23
24 In summary, immunity applies under RCW 4.24.510 when a person (1)
25 “communicates a complaint or information to any branch of federal, state or
26 local government, or to any self-regulatory organization” and that is (2) based
on any matter “reasonably of concern to that agency.”

1 Former RCW 4.24.510 (1999) contained a good faith requirement.
2 This phrase was deleted by amendment. Laws of 2002, ch. 232 § 2; *see*
3 *Segaline v. Dep't of Labor & Indus.*, 144 Wn. App. 312, 325, 182 P.3d 480
4 (2008).

5 *Id.* at 261. The court explained that there was no longer a “good faith” complaint component
6 of the immunity and held that “her communication falls squarely under the immunity
7 provided by RCW 4.24.510.” *Id.* at 262-63.

8 Further, the immunity extends not just to the communication itself, but also to the
9 “events surrounding the communication.” *Dang v. Ehredt*, 95 Wn. App. 670, 683, 977 P.2d
10 29 (1999). In particular, the immunity extends to “the method of arriving at the content of the
11 communication.” *Id.* at 683. The *Dang* court specifically held that a claim alleging someone
12 negligently performed the acts that led to a report to authorities was within the scope of the
13 statutory immunity. *Id.*⁸ These rulings thus fully encompass any claims regarding the
14 Yarmuth Investigators. As in these cases, immunity exists “as a matter of law.” *Id.* at 686.

15 The Ninth Circuit also has affirmed and applied Washington’s immunity statute.
16 “Defendants are entitled to immunity even if the statements in question were made in bad
17 faith or are defamatory per se.” *Akmal v. Cingular Wireless Inc.*, 300 Fed. App’x 463 (9th
18 Cir. 2008) (affirming *Akmal v. Cingular Wireless Inc.*, No. C06-748JLR, 2007 WL 1725557,
19 at *5 (W.D. Wash. June 8, 2007)).

20 The Washington Supreme Court’s 2015 decision in *Davis v. Cox* does not impact the
21 validity or application of RCW 4.24.510. In *Davis*, the Court addressed the special
22 evidentiary motion and burden-shifting found only in RCW 4.24.525. Section 525 was a
23 much more recent and broader-scoped alternative to the narrower and older Section 510. *See*
24 Laws of 2010 ch. 118 § 2. In contrast to Section 525, Section 510 does not rely on any
25 special motion or evidentiary burden-shifting. *Davis* only addressed Section 525. “This case

26 ⁸ In *Dang*, bank personnel falsely asserted to police that Dang was attempting to cash a forged
check. Based on the bank’s report, she was arrested by the police and hauled off to the police
station. It later was determined that the check was legitimate. *Id.* at 672-73. The court of
appeals affirmed the trial court ruling that the bank was immune under RCW 4.24.510.

1 requires us to decide the constitutionality of the Washington Act Limiting Strategic Lawsuits
2 Against Public Participation (anti-SLAPP statute). Laws of 2010, ch. 118 (codified at RCW
3 4.24.525).” *Davis v. Cox*, 183 Wn.2d 269, 274, 351 P.3d 862 (2015). The Court was clear in
4 stating it was only addressing the new standard found in the new Section 525: “This statute is
5 unique from its predecessor [§ 510] in that it creates an entirely new method for adjudicating
6 SLAPPs, separate from the rules of civil procedure. The new statute did not amend or repeal
7 the prior statute and instead codifies its new procedures in one new statutory section.” *Id.* at
8 276. It could not be more clear that RCW 4.24.510 was not amended or repealed by Section
9 525 and that each stands on its own. Further, there can be no doubt but that the “rules of civil
10 procedure” survive after *Davis*. *Id.*

11 Here, defendants are not relying on the special evidentiary burden-shifting under
12 Section 525 that the Washington Supreme Court found objectionable. Instead, the motion is
13 simply a CR 12(b)(6) motion predicated entirely on a different statute, Section 510, that in no
14 way was impacted by the *Davis* decision.

15 Taking the allegations in the Amended Complaint as true, under the plain operative
16 language of RCW 4.24.510 the Yarmuth Investigators are entitled to dismissal under CR
17 12(b)(6).

18 **B. Persons Who Investigate and Perform Witness Functions in Judicial or Quasi-**
19 **Judicial Settings Are Granted Absolute Immunity Under the Common Law.**

20 Jones alleges that “Defendants[] . . . report[ed] a violation to a quasi-judicial body.”
21 Am. Compl. ¶ 4.10. And that “WIAA had a . . . quasi-judicial capacity.” *Id.* ¶ 4.20. The
22 Yarmuth Investigators’ role was to make reports to WIAA. *See id.* ¶ 3.19. Those reports are
23 absolutely privileged from suit under the common law. For example, in *Hill v. J.C. Penney,*
24 *Inc.*, 70 Wn. App. 225, 852 P.2d 1111 (1993), the court summarized the common law as
25 follows:

26 Penney made the statements to Employment Security in the context of an
official Department proceeding to determine whether Hill was entitled to an

1 award of unemployment benefits. “Statements made during the course of and
2 relevant to the proceedings of an administrative agency acting in a quasi-
3 judicial manner are absolutely privileged.” *Hurst v. Farmer*, 40 Wn. App. 116,
4 117, 697 P.2d 280, *review denied*, 103 Wn.2d 1038 (1985). An absolute
5 privilege absolves the defendant of all liability for defamatory statements.
6 *Bender v. Seattle*, 99 Wn.2d 582, 600, 664 P.2d 492 (1983).

7 *Id.* at 238-39. The *Hill* court cited to *Hurst*, and *Hurst* states:

8 Statements made during the course of and relevant to the proceedings of an
9 administrative agency acting in a quasi-judicial manner are absolutely
10 privileged. *Engelmohr v. Bache*, 66 Wn.2d 103, 104-05, 401 P.2d 346, *cert.*
11 *dismissed*, 382 U.S. 950, 86 S. Ct. 431, 15 L.Ed.2d 463 (1965). **The**
12 **statements of Johnson, Priestly and Brown which were provided to the**
13 **Commission are absolutely privileged and cannot support a defamation**
14 **action.** See *Medina v. Spotnail, Inc.*, 591 F.Supp. 190, 196 (N.D. Ill. 1984);
15 *Thomas v. Petruilis*, . . . 465 N.E.2d 1059, 1061-64 (1984).

16 *Hurst v. Farmer*, 40 Wn. App. 116, 117-18, 697 P.2d 280 (1985) (emphasis added). *Hurst* is
17 particularly instructive because it involved the submission of written reports to a “quasi-
18 judicial” body. *Id.* at 117-18. Such submissions were given absolute immunity. *Id.* Under
19 Jones’ own allegations, the Yarmuth Investigators were essentially witnesses giving written
20 testimony via their reports.

21 It makes no difference whether the Yarmuth Investigators are viewed as being
22 somewhat like fact witnesses, or whether they are viewed as being somewhat like expert
23 witnesses who have reviewed a set of in-the-field conditions and made a report of what they
24 observe and conclude, *i.e.*, a typical expert witness.⁹ Washington has the strongest common
25 law protection for witnesses, including experts. In Washington, an expert witness cannot be
26 sued, even by the party that hires him or her, and certainly not by a party claiming to be on the
other side and harmed by the expert. The leading case is *Bruce v. Byrne-Stevens & Assocs.*
Engr’s, Inc., 113 Wn.2d 123, 125-26, 776 P.2d 666 (1989). The Supreme Court’s opinion is
not subtle:

⁹ There is no meaningful difference for purposes of the analysis between asking an investigator expert witness to “examine and report on the condition of the Toyota” and “examine and report on the condition of the Bellevue football program.”

1 The *Bruce* Court held that the immunity extended to all imaginable causes of action:

2 [T]here is nothing in the policy rationale underlying witness immunity which
3 would limit its applicability to defamation cases. Witness immunity is
4 premised on the chilling effect of the threat of subsequent litigation. The threat
5 of subsequent litigation is the same regardless of the theory on which that
6 subsequent litigation is based.

7 *Id.* at 132.

8 Likewise, in *Bader v. State*, 43 Wn. App. 223, 716 P.2d 925 (1986), the court ruled
9 that an expert retained to advise the tribunal was immune from suit for allegedly negligently
10 performing her investigation.

11 Private parties who assist in an investigation alongside alleged state actors enjoy
12 common law immunity. This was the unanimous holding of the U.S. Supreme Court in
13 *Filarsky v. Delia*, 566 U.S. 377 (2012). There, a private practice attorney was retained to help
14 the local fire department investigate an employee suspected of wrongdoing. The plaintiff-
15 employee in that case asserted he could sue the attorney because the attorney was a private
16 party who could not fall under the umbrella of government employee immunity. The
17 Supreme Court rejected that claim holding that those who assist a government function are
18 entitled to the same immunity that government employees enjoy. The Court ruled that the
19 immunity should apply in order to “avoid[] ‘unwarranted timidity’ on the part of those
20 engaged in the public’s business.” *Id.* at 390. The Court observed: “Affording immunity not
21 only to public employees but also to others acting on behalf of the government similarly
22 serves to ensure that talented candidates [are] not deterred by the threat of damages suits from
23 entering public service.” *Id.* (internal quotes omitted). Quite pertinent to the facts alleged in
24 the Amended Complaint here, the U.S. Supreme Court said that “it is often when there is a
25 particular need for specialized knowledge or expertise that the government must look outside
26 its permanent work force to secure the services of private individuals.” *Id.* Although *Filarsky*
is a Section 1983 case, the centuries-old common law immunities it discusses are not specific
to Section 1983 claims.

1 What all of these cases have in common is the overriding public policy favoring the
2 unflinching reporting on matters of public concern in forums where a supervisory body is
3 deliberating on a controversy within its powers. That is what Jones alleges. Public policy
4 demands that there be no chilling effect on presentations to such bodies. The public policy
5 recognized in all these cases requires immunity to avoid undesired “timidity.” Private suits
6 for damages must give way to this overriding public policy, and that is what these cases hold.
7 For this reason, and given the massive weight of authority cited above, the claims against the
8 Yarmuth Investigators should be dismissed with prejudice because Jones alleges that the
9 supervising body defendants were state-actors acting in quasi-judicial roles.

10 **C. Regardless of Immunities, None of the Causes of Action State a Claim Against**
11 **the Yarmuth Investigators.**

12 **1. Jones’ Defamation Claim Fails to State a Claim Against the Yarmuth**
13 **Investigators.**

14 The Yarmuth Investigators are not referenced in the first cause of action, which is
15 titled “Mandatory Injunction Regarding False Statements and Violations/Defamation.” The
16 only allegedly defamatory statements referenced are statements made by defendant Bellevue
17 School District. Am. Compl. ¶¶ 4.2-4.5. The only statement alleged to be false is BSD’s
18 “May 23, 2016 letter and oral report to KingCo.” *Id.* ¶ 4.2; Keller Decl., Ex. 3. This is BSD’s
19 second self-report letter that, among other things, admits based upon BSD’s independent
20 investigation that two Bellevue coaches, Jones being one of them, violated WIAA Rule
21 23.1.1. Am. Compl. ¶ 3.18; Keller Decl., Ex. 3 at 16-20. Plaintiff Jones alleges that BSD’s
22 self-report that he and another coach violated Rule 23.1.1 “is false.” Am. Compl. ¶ 4.2.
23 Jones further alleges BSD was reckless in making this allegedly false statement (*id.* ¶ 4.4) and
24 that Jones sent BSD and only BSD a retraction demand. *Id.* ¶ 3.11.

25 Jones cannot sue the Yarmuth Investigators for a mandatory injunction regarding
26 BSD’s publication of an allegedly defamatory statement. None of the elements of a

1 defamation claim are pled against the Yarmuth Investigators, nor has he alleged compliance
2 with RCW 7.96.040.¹⁰

3 To adequately plead a defamation claim, the plaintiff must plead four elements
4 regarding a published statement of fact: “falsity, an unprivileged communication, fault, and
5 damages.” *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). The falsity must relate
6 to a statement of fact, not to an opinion. Notably, the defamation claim does not identify any
7 statement of fact *made by the Yarmuth Investigators*. Nor does it set out facts comprising the
8 other elements of a defamation claim as to them.

9 If in response it is asserted that the Yarmuth Investigators’ subsequent statement to
10 WIAA and its sub-units SeaKing and KingCo, that they concurred in BSD’s admission that
11 Jones and Goncharoff were two coaches for whom there was a Rule 23.1.1 violation, that
12 statement was a statement of opinion. Opinions are not actionable. The determination of
13 whether a communication is one of fact or opinion is a question of law for the court. *Camer*
14 *v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 39, 723 P.2d 1195 (1986).

15 Where what is conveyed is a deductive conclusion (*i.e.*, a conclusion of the
16 applicability of Rule 23.1.1) based on disclosed facts, the statement constitutes non-actionable
17 opinion. *See, e.g., Dunlap v. Wayne*, 105 Wn.2d 529, 532, 539-41, 716 P.2d 842 (1986)
18 (attorney’s letter to a bank stating that a person’s conduct “constitutes a solicitation for a
19 ‘kick-back’” was nonactionable opinion).¹¹ While the Yarmuth Investigators were not privy
20 to BSD’s interviews and investigation that led to BSD’s May 23 self-report, Ex. 3, they did
21 know that the Bellevue football program’s booster club’s tax returns showed the boosters
22 paying hundreds of thousands of dollars for “coaches stipends,” and the School Board
23

24 ¹⁰ “(1) A person may maintain an action for defamation or another claim covered by this
25 chapter only if: (a) The person has made a timely and adequate request for correction or
26 clarification from the defendant....” RCW 7.96.040. The statute also sets out requirements
for detailing the statement. *Id.*

¹¹ When the State Supreme Court announces what a statute means it does so by a court
“opinion.” When the Attorney General’s Office issues a statement of the meaning of a law, it
also does so by issuance of an “opinion.”

1 reported that they had not approved coaching payments even remotely approaching these
2 amounts. Ex. 1 at 57-58. Based upon their opinion as to how Rule 23.1.1 should be
3 interpreted, and these reported facts, the Yarmuth Investigators deduced and opined that rule
4 23.1.1 had been violated. They reported their opinion to WIAA. Ex. 1 at 4, 59.

5 Jones argues that Rule 23.1.1, in his opinion, in effect allows for payments so long as
6 the payment is made the day before a season starts or the day after the season ends. The
7 Complaint correctly alleges that WIAA has a different opinion, when it says, “The WIAA
8 opined, ‘Rule 23.1.1 has been written, consistently interpreted and, intended as a year round
9 control system....’” Am. Compl. ¶ 3.16 (emphasis added). BSD shared that same view as
10 WIAA. Ex. 3 at 16-20. In sum, even the statement by BSD that Jones alleges is false is a
11 statement of opinion and not fact. Even if that same opinion is re-alleged to be made by the
12 Yarmuth Investigators, it is non-actionable opinion.

13 **2. Common Interest Privilege Would Apply to the Facts Alleged.**

14 Even if any statement at issue is viewed as one of fact and not opinion, any defamation
15 claim still fails for additional reasons. Under the “common interest” privilege, there is no
16 liability for defamation when the communications (even if false) are for purposes of
17 disciplining constituent members. *Ward v. Painters’ Local Union No. 300*, 41Wn.2d 859,
18 865-66, 252 P.2d 253 (1953).

19 A qualified privilege exists “when the declarant and the recipient have a common
20 interest in the subject matter of the communication.” *Moe v. Wise*, 97 Wn. App. 950, 957-58,
21 989 P.2d 1148 (1999). “An occasion makes a publication conditionally privileged if the
22 circumstances lead any one of several persons having a common interest in a particular
23 subject matter to correctly or reasonably believe that there is information that another sharing
24 the common interest is entitled to know.” *Id.* “The existence of the privilege is a matter of
25 law for the court to decide.” *Id.* at 957.

1 Each of the defendants shared a common interest (within their sphere) in investigating,
2 hearing and determining matters within the jurisdiction of their statutory role in regulating
3 interscholastic athletics. *See, e.g., Ward*, 41 Wn.2d at 865-66. WIAA needed to know what
4 the investigators were reporting; Sea-King and KingCo needed to know what WIAA believed
5 had occurred; BSD needed to self-report and likewise had a shared interest with WIAA in
6 taking actions to protect its sports program and the reputation of high school sports in
7 Washington, which in turn was the subject of public interest. *See, e.g., Flotech, Inc. v. E.I.*
8 *Du Pont de Nemours & Co.*, 814 F.2d 775, 778-79 (1st Cir. 1987) (conditional privilege
9 applies to entity concerned with protecting its name and brand and seeking to erase public
10 tarnish). *See also, Palmisano v. Allina Health Sys., Inc.*, 190 F.3d 881, 884-85 (8th Cir. 1999)
11 (statements made for a legitimate purpose are privileged even if later proved to be false).

12 Plaintiff has not alleged any “publication” by the Yarmuth Investigators of an
13 allegedly defamatory statement of fact, nor that any such publication occurred outside of a
14 recognized “common interest” setting. Even if just for these reasons, the first count should be
15 dismissed as to the Yarmuth Investigators.¹²

16
17 **3. Jones’ False Light Claim Does Not State a Claim Against the Yarmuth**
Investigators.

18 The second count fares no better. It purports to be a “False Light” claim. Am. Compl.
19 at 13. It alleges that the sanctions imposed on Jones by BSD cast him in a false light.
20 Notably, the Amended Complaint does not allege that the Yarmuth Investigators imposed any
21 sanction on Jones. Nor could it. The Yarmuth Investigators have no power to and did not

22
23 ¹² Plaintiff’s prayer for relief also seeks to compel speech. This is a troubling invitation for
24 the Court to violate the First Amendment. The Court should decline the invitation. “The
25 United States Supreme Court has held that ‘the right of freedom of thought protected by the
26 First Amendment against state action includes both the right to speak freely and the right to
refrain from speaking at all.’ *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51
L.Ed.2d 752 (1977). The protection from compelled speech extends to statements of fact as
well as of opinion. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62,
126 S. Ct. 1297, 164 L.Ed.2d 156 (2006).” *State v. K.H.-H.*, 185 Wn.2d 745, 748-49, 374
P.3d 1141 (2016) (stating rule but applying narrow exception for criminal sentences).

1 sanction anyone. Indeed, Jones alleges that he only knows of what he calls “sanctions”
2 imposed by BSD. “Plaintiff has still not been notified as to whether Defendants BSD,
3 KingCo, Sea-King and/or WIAA have imposed sanctions on Plaintiff which extend beyond
4 what BSD imposed on June 16, 2016.” *Id.* ¶ 3.21. The Amended Complaint asserts that only
5 WIAA, KingCo and Sea-King regulate athletics and that it is these entities that have the
6 authority to sanction coaches. *Id.* ¶¶ 1.3, 1.5, 1.6, 2.2 and 4.11. *See also*, RCW
7 28A.600.200(3). On its face, Jones does not state a claim against the Yarmuth Investigators
8 for any supposed “false light.”

9
10 Regardless, Washington does not recognize a “false light” claim. *Hoppe v. Hearst*
11 *Corp.*, 53 Wn. App. at 677 n.5 (trial court could have properly dismissed plaintiff’s false light
12 claim on the basis that Washington has not recognized the tort).¹³ In any event, the claim
13 suffers the same deficiencies in regard to the Yarmuth Investigators as does count one and
14 likewise would also be subject to the same privileges and immunities addressed above.

15 **4. Jones’ Claim for Abuse of Authority/Deprivation of Rights Fails to State a**
Claim Against the Yarmuth Investigators.

16 The third cause of action, for “Abuse of Authority/Deprivation of Rights,” complains
17 about BSD’s letter of restrictions dated June 16, 2016. Am. Compl. ¶ 4.14. This letter came
18 after BSD’s independent review. The claim does not address or even mention the Yarmuth
19 Investigators. Instead, it is directed entirely to BSD’s letter of June 16, 2016. *Id.* ¶¶ 4.14,
20 4.18. BSD’s letter is described in more detail in ¶ 3.12 of the Amended Complaint. The
21 count specifically states that the “rules and restrictions” on Jones “are all mandated by
22 Defendants which are either public entities or entities whose members include public
23 entities.” *Id.* ¶ 4.14. These June 16 restrictions were instituted by BSD, not the Yarmuth
24 Investigators. The count does not set out a claim against the Yarmuth Investigators and

25 ¹³ While the Supreme Court discussed the Restatement’s rules on false light in *Eastwood v.*
26 *Cascade Broad. Co.*, 106 Wn.2d 466, 722 P.2d 1295 (1986), it pointedly side-stepped the
Id. at 473-74. issue of whether to recognize it as an independent tort given the duplication with defamation.

1 should be dismissed. The immunities discussed above would also require dismissal of the
2 claim.

3
4 **5. The “Appearance of Fairness Doctrine” Claim Also Fails in Regards to the Yarmuth Investigators.**

5 Similarly infirm is plaintiff’s claim for damages under the appearance of fairness
6 doctrine, the fourth cause of action. Here, for the first time in any cause of action there is a
7 reference to the Yarmuth Investigators. “Yarmuth & Wilsdon, Bob Westinghouse, Carl
8 Blackstone, BSD, WIAA, KingCo, and Sea-King owed a duty to plaintiff to investigate in an
9 independent manner without bias or conflict of interest.” Am. Compl. ¶ 4.20. The count
10 should be dismissed on multiple independent grounds as explained below.

11 **(a) The Appearance of Fairness Doctrine Does Not Apply.**

12 First, the appearance of fairness doctrine generally applies only in land use type
13 proceedings. The doctrine relates to proceedings before quasi-adjudicative land use hearing
14 boards. “The appearance of fairness doctrine requires that quasi-judicial land use decisions,
15 such a rezones, must be fair, and appear to be fair, in order to be valid.” *Alger v. City of*
16 *Mukilteo*, 107 Wn. 2d 541, 547, 730 P.2d 133 (1987); *see also*, RCW 42.36.010. There is no
17 allegation that the Yarmuth Investigators by themselves are a quasi-adjudicative board of any
18 sort. Nor could there be such an allegation.

19 **(b) There Is No Right to Make a Damages Claim Regarding the Appearance of Fairness Doctrine.**

20 Next, it is well established that there is no private claim *for damages* under the
21 appearance of fairness doctrine. *Alger*, 107 Wn.2d at 547. The Supreme Court stated that
22 “[i]t has never been suggested that the government entity would be liable in tort” for a
23 violation of the doctrine. *Id.* (affirming dismissal of the claim for money damages). The only
24 remedy is a voiding of the action the land use board takes. Voiding any sanction levied,
25 however, has no applicability to the Yarmuth Investigators as they had no power to sanction
26 anyone or to void any sanction now. By statute only the school boards and WIAA have that

1 power. RCW 28A.600.200(3). Thus, there is no claim for relief that can be granted under the
2 appearance of fairness doctrine as against the Yarmuth Investigators, and this count should be
3 dismissed as to them.

4
5 **(c) Yarmuth Investigators Owed No Duty to Jones.**

6 The fourth cause of action asserts, as a part of the appearance of fairness doctrine, that
7 the Yarmuth Investigators “owed a duty to plaintiff to investigate in an independent manner
8 and without bias or conflict of interest.” Am. Compl. ¶ 4.20. But, as a matter of law, there is
9 no duty in the law running from the Yarmuth Investigators to Jones. Indeed, as a matter of
10 law, the Yarmuth Investigators did not owe any duty to Jones, but instead only owed a duty to
11 WIAA.

12 The threshold determination in any negligence case, however, is whether the
13 defendant owed a duty of care to the plaintiff. Whether a defendant owes a
14 duty of care to a plaintiff is a question of law. When no duty of care exists, a
15 defendant cannot be subject to liability for negligent conduct.

16 *Webstad v. Stortini*, 83 Wn. App. 857, 865, 924 P.2d 940 (1996) (quotation marks and
17 citations omitted).

18 Under either a strict privity analysis, or Washington’s multi-factor balancing test, the
19 only duty of care the Yarmuth Investigators owed was to WIAA. They did not owe Mr. Jones
20 any duty as a matter of established Washington law.

21 Under a traditional privity analysis, an attorney can be held civilly liable only to the
22 attorney’s own clients for a failure to exercise reasonable care (*i.e.*, negligence). *Bohn v.*
23 *Cody*, 119 Wn.2d 357, 364-65, 832 P.2d 71 (1992) (citing *Stangland v. Brock*, 109 Wn.2d
24 675, 680, 747 P.2d 464 (1987)). Here, the moving defendants’ client was WIAA. There is no
25 allegation (nor could there be) that they agreed to work *for* Mr. Jones.

26 Absent such privity, the Washington Supreme Court uses a multi-factor balancing test
to determine whether an attorney owes a duty in an engagement to a non-client. *Trask v.*
Butler, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994). The first element of that test is “the

1 extent to which the transaction was intended to benefit the plaintiff.” *Trask*, 123 Wn.2d at
2 842-43. This threshold question is straight-forward and dispositive: was the non-client an
3 intended *beneficiary* of the attorney’s work. *Id.* Unless that condition is true (and here it is
4 not alleged that the engagement was to benefit Mr. Jones, nor could it be) then no further
5 inquiry need be made. *Id.* The analysis ends.

6 *Trask* noted that public policy disfavors finding a duty to a non-client because such a
7 duty would detract from the attorney’s obligation to his or her own client. *Id.* at 844. That
8 policy applies with particular force where the professional’s duty to his or her actual client
9 encompasses an investigation into the program in which the plaintiff participated.

10 Indeed, Washington courts consistently hold that dismissal is appropriate where a non-
11 client plaintiff sues. *See, e.g., Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wn.2d 561,
12 570, 311 P.3d 1 (2013) (law firm owed no duty to non-client insurer even though insurer’s
13 interests were aligned; neither attorney nor client *intended* insurer to benefit from the
14 attorney’s representation of the insured); *see also, West v. Thurston Cnty.*, 144 Wn. App. 573,
15 580, 183 P.3d 346 (2008) (affirming CR 12(b)(6) dismissal of breach of contract claim where
16 law firm owed non-client plaintiff no duty under *Trask*); *McKasson v. State*, 55 Wn. App. 18,
17 29, 776 P.2d 971 (1989).

18 The mere legal conclusion of “duty” alleged in a complaint does not save the
19 complaint from a motion to dismiss. Legal conclusions are not assumed true. “All facts
20 alleged in the plaintiff’s Complaint are presumed true. But the court is not required to accept
21 the Complaint’s legal conclusions as true.” *Rodriguez v. Loudeye Corp.*, 144 Wn. App. at
22 717-18. Neither in the fourth cause of action, nor anywhere else in the Amended Complaint,
23 does Mr. Jones assert a source of an alleged duty on the part of the Yarmuth Investigators
24 running to his benefit. As a matter of law, there is none.

25 That Jones may claim that the client (WIAA) took action based on information
26 provided by its “advisor” does not save his claim. An advisor gives his or her information

1 and analysis, but the client is the “actor” that takes any subsequent action. Washington law
2 recognizes that advisors enjoy a privilege to act without fear of needing to shade the
3 information and advice to favor others. This “advisor’s privilege” has been applied for
4 example by Washington courts where claims were predicated on a doctor’s advice to deny
5 liability coverage claims. *Koch v. Mut. of Enumclaw Ins. Co.*, 108 Wn. App. 500, 506-09, 31
6 P.2d 698 (2001) (affirming summary judgment); *see also, Havsy v. Flynn*, 88 Wn. App. 514,
7 520, 945 P.2d 221 (1997) (affirming CR 12(b)(6) dismissal).

8 The Oregon Supreme Court applied this “advisor’s privilege” to the situation of an
9 attorney acting on behalf of his client in *Reynolds v. Schrock*, 341 Or. 338, 348, 142 P.3d
10 1062 (2006). The *Reynolds* court stated that a lawyer acting on behalf of a client, within the
11 scope of the relationship, is protected by the advisor’s privilege and is not liable to a third
12 party for assisting the client in conduct that allegedly breaches *the client’s* duties to that third
13 party. *Id.* at 350. *See also, Fuentes v. Tillett*, 263 Or. App. 9, 27, 326 P.3d 1263 (2014)
14 (affirming CR 12(b)(6) dismissal of plaintiff’s claim where plaintiff alleged defendant
15 actively assisted the client’s breach of fiduciary duties). *Reynolds* relied on *Schott v. Glover*,
16 109 Ill. App. 3d. 230, 234-35, 440 N.E.2d 376 (1982).

17 There is no basis under Washington law for holding that the Yarmuth Investigators
18 owed any duty to Jones. Dismissal is warranted.

19 **VII. CONCLUSION**

20 Jones’ Complaint against the Yarmuth Investigators is misguided, and fails to state a
21 claim. He alleges beefs against his former employer. He alleges beefs with his WIAA
22 regulators. But, he cannot allege claims against the Yarmuth Investigators because (1) they
23 are not alleged to have taken, nor could it be alleged that they took, any employment action
24 against him, and (2) under the allegations of the Complaint they are within the zone of several
25 public policy privileges and immunities. Dismissal should be with prejudice because no
26

1 amendment will cure the Complaint's deficiencies. *See Durland v. San Juan Cnty.*, 175 Wn.
2 App. 316, 320, 305 P.3d 246 (2013), *aff'd*, 182 Wn.2d 55 (2014).

3 DATED this 27th day of March, 2017.

4 BYRNES KELLER CROMWELL LLP

5
6 By /s/ Bradley S. Keller

7 _____
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17 *Attorneys for Defendants Yarmuth Wilsdon*

18 *PLLC, Bob Westinghouse and Carl Blackstone*

19 **CERTIFICATION:** The above signature also certifies that this memorandum
20 contains 8,377 words, in compliance with the Local Civil Rules.

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22
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26
LEISHMAN APPENDIX - 56

PAGES 57 – 60
OF THE APPENDIX TO THE RESPONDENT'S SUPPLEMENTAL BRIEF
ARE STRICKEN PURSUANT THE ASSIGNMENT JUSTICE'S JUNE 5, 2020
RULING

HOUSE BILL REPORT

HB 1254

BY Representatives H. Myers, Beck, Morris, R. Meyers, G. Fisher, Peery, Winsley, Wang, May, Jones, P. King, R. Fisher, Sayan, O'Brien, Locke, Crane, Heavey, Inslee, Rector, Brough, Cooper and Brumsickle; by request of Governor Gardner and Attorney General

Providing immunity for communications to certain officials.

House Committee on Judiciary

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. (15)

Signed by Representatives Appelwick, Chair; Crane, Vice Chair; Padden, Ranking Republican Member; Belcher, Dellwo, Inslee, P. King, R. Meyers, Moyer, H. Myers, Schmidt, Scott, Tate, Van Luven and Wineberry.

Minority Report: Do not pass. (3)

Signed by Representatives Hargrove, Locke and Patrick.

House Staff: Regina Jones (786-7191)

BACKGROUND:

Litigation involving Brenda Hill, a resident of Vancouver, Washington, has given rise to concern regarding civil liability of individuals who report violations of local, state or federal law. Mrs. Hill and her husband purchased a home from a real estate developer and subsequently determined that the developer had failed to pay the excise tax due on the transaction. Mrs. Hill reported this violation to the Department of Revenue. The Department requested that she assist with some investigative work to confirm the developer's failure to pay taxes on her transaction and on real estate transactions involving others in her community. The Hills did so and, acting largely on the information provided by Mrs. Hill, the Department collected \$477,000 in unpaid taxes owed by the developer. As a result of the disclosures made to state officials, the Hills were sued by the developer. Mrs. Hill asked that the state defend her, but was told that the state had no authority to do so. The cost of defending the developer's suit has forced the Hills into bankruptcy.

Under current law, state employees are protected from retaliatory action if they, in good faith, report other state employees' violations of state law or improper governmental actions. This bill would extend immunity from civil liability to any person, including state employees, who in good faith reports violations of local, state, or federal law.

SUMMARY:

SUBSTITUTE BILL: The purpose of the act is to protect individuals who make good faith reports of potential wrongdoing to appropriate governmental bodies.

A person who, in good faith, communicates a complaint or information to a federal, state or local governmental agency is immune from civil liability based on the communication. The communication must be a matter reasonably of concern to the agency.

Individuals who prevail with the immunity defense are entitled to recover costs and attorneys' fees incurred in establishing the defense.

The agency receiving the complaint or information is entitled to intervene in and defend against any suit precipitated by the communication. If the agency intervenes in or defends against the suit and prevails, the agency is entitled to recover costs and attorneys' fees. If the agency fails to establish the immunity defense, the party bringing the action is entitled to recover costs and attorneys' fees incurred in proving the defense invalid or inapplicable. If a local governmental agency chooses not to intervene in and defend against a suit, the Office of the Attorney General may do so.

SUBSTITUTE BILL COMPARED TO ORIGINAL: The substitute clarifies that the communication must be made to an agency. The Attorney General's office may defend cases in which a local government chooses not to become involved.

If an agency intervenes in and defends a suit and fails to establish the immunity defense, the party bringing the suit is entitled to costs and attorneys' fees.

Fiscal Note: Not Requested.

House Committee - Testified For: Representative Holly Myers, Prime Sponsor; Mike McCormick, Department of Community Development; Maureen Hart, Office of the Attorney General; Brenda Hill, Citizen.

House Committee - Testified Against: None Presented.

House Committee - Testimony For: Testimony was given regarding disclosure made to the Department of Revenue by Brenda Hill and the circumstances surrounding a subsequent defamation action filed against Mr. and Mrs. Hill. This bill is prospective legislation to provide a defense of immunity for citizens who, in good faith, disclosure information to governmental agencies.

House Committee - Testimony Against: None Presented.

HOUSE BILL REPORT

SHB 1254

As Amended by the Senate

LEISHMAN APPENDIX - 63

BYHouse Committee on Judiciary (originally sponsored by Representatives H. Myers, Beck, Morris, R. Meyers, G. Fisher, Peery, Winsley, Wang, May, Jones, P. King, R. Fisher, Sayan, O'Brien, Locke, Crane, Heavey, Inslee, Rector, Brough, Cooper and Brumsickle; by request of Governor Gardner and Attorney General)

Providing immunity from civil liability.

House Committee on Judiciary

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. (15)

Signed by Representatives Appelwick, Chair; Crane, Vice Chair; Padden, Ranking Republican Member; Belcher, Dellwo, Inslee, P. King, R. Meyers, Moyer, H. Myers, Schmidt, Scott, Tate, Van Luven and Wineberry.

Minority Report: Do not pass. (3)

Signed by Representatives Hargrove, Locke and Patrick.

House Staff: Regina Jones (786-7191)

AS PASSED HOUSE MARCH 2, 1989

BACKGROUND:

There exists concern regarding the civil liability of individuals who report violations of local, state, or federal law to governmental officials. Under current law, state employees are protected from retaliatory action if they, in good faith, report other state employees' violations of state law or improper governmental actions. No similar protection of individuals who make good faith reports of potential wrongdoing to appropriate governmental bodies presently exists under law.

SUMMARY:

LEISHMAN APPENDIX - 64

A person who, in good faith, communicates a complaint or information to a federal, state or local governmental agency is immune from civil liability based on the communication. The communication must be a matter reasonably of concern to the agency.

Individuals who prevail with the immunity defense are entitled to recover costs and attorneys' fees incurred in

establishing the defense.

The agency receiving the complaint or information is entitled to intervene in and defend against any suit precipitated by the communication. If the agency intervenes in or defends against the suit and prevails, the agency is entitled to recover costs and attorneys' fees. If the agency fails to establish the immunity defense, the party bringing the action is entitled to recover costs and attorneys' fees incurred in proving the defense invalid or inapplicable. If a local governmental agency chooses not to intervene in and defend against a suit, the Office of the Attorney General may do so.

EFFECT OF SENATE AMENDMENTS: The Senate amendment broadens the scope of civil immunity. A person who makes a good faith communication to any governmental body of matters reasonably of concern to that body, is immune from civil liability arising from the communication of the information. Immunity was previously limited to claims based upon the communication to the agency.

Fiscal Note: Not Requested.

House Committee - Testified For: Representative Holly Myers, Prime Sponsor; Mike McCormick, Department of Community Development; Maureen Hart, Office of the Attorney General; Brenda Hill, Citizen.

House Committee - Testified Against: None Presented.

House Committee - Testimony For: Testimony was given regarding disclosure made to the Department of Revenue by Brenda Hill and the circumstances surrounding a subsequent defamation action filed against Mr. and Mrs. Hill. This bill is prospective legislation to provide a defense of immunity for citizens who, in good faith, disclosure information to governmental agencies.

House Committee - Testimony Against: None Presented.

VOTE ON FINAL PASSAGE:

Yeas 96; Excused 2

LEISHMAN APPENDIX - 65

Excused: Representatives Bristow and Schoon

SENATE BILL REPORT

SB 5336

BY Senators Pullen, Sutherland, Newhouse, McCaslin, Talmadge, Thorsness, Nelson, Rasmussen, Benitz, Johnson, Lee, Vognild, Sellar, Metcalf, Bauer, Smith and West; by request of Governor and Attorney General

Providing civil immunity for persons making reports to government officials.

Senate Committee on Law & Justice

Senate Hearing Date(s): January 16, 1989; January 24, 1989

Majority Report: That Substitute Senate Bill No. 5336 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pullen, Chairman; McCaslin, Vice Chairman; Hayner, Nelson, Newhouse, Niemi, Rasmussen, Rinehart, Talmadge, Thorsness.

Senate Staff: Ben Barnes (786-7465)

February 2, 1989

LEISHMAN APPENDIX - 66

AS REPORTED BY COMMITTEE ON LAW & JUSTICE, JANUARY 24, 1989

BACKGROUND:

Under current law, state employees who, in good faith, report violations of state law or other improper governmental actions by fellow employees are protected from retaliatory action. There is no similar statute which protects citizens who wish to report violations of local, state, or federal law by private citizens. The need for such a statute has been raised in regard to the experience of Mrs. Brenda Hill, a Vancouver, Washington resident.

Four years ago, Mrs. Hill and her husband purchased a home from the Robert John Real Estate Company, an Oregon corporation, on a real estate contract. Last year, the couple sought to refinance their home and discovered that the real estate excise tax had not been paid by the company and the contract had not been recorded. When officials of the company refused to pay the tax immediately, Mrs. Hill reported the violation to the Department of Revenue, who asked her to provide names of other homeowners in her community whose contracts had not been recorded. Acting largely on information that Mrs. Hill provided, Revenue Department officials assessed the Robert John Company \$477,000 in unpaid excise taxes. As a result of her disclosure to state officials, Mrs. Hill and her husband are currently being sued by the Robert John Company for \$100,000 in damages.

It is suggested that private citizens who, in good faith, report violations of local, state, or federal law be statutorily protected from any civil action for damages arising out of such disclosure.

SUMMARY:

Any person who, in good faith, communicates a complaint or information to a federal, state, or local governmental agency regarding a matter of reasonable concern to that agency is immune from civil liability based upon the communication.

A person prevailing upon the good faith immunity defense is entitled to reasonable attorneys' fees and court costs incurred in establishing the defense.

An agency which receives a complaint or information regarding a matter of reasonable concern to that agency may intervene in and defend against any suit arising from the communication.

EFFECT OF PROPOSED SUBSTITUTE:

LEISHMAN APPENDIX - 67

The office of the Attorney General is authorized to intervene in and defend against any suit arising from a good faith report of a complaint or other information to a local governmental agency regarding a matter of

reasonable concern to that agency.

Appropriation: none

Revenue: none

Fiscal Note: available

Senate Committee - Testified: Maureen Hart, office of the Attorney General (pro)

SENATE BILL REPORT

SSB 5336

BY Senate Committee on Law & Justice (originally sponsored by Senators Pullen, Sutherland, Newhouse, McCaslin, Talmadge, Thorsness, Nelson, Rasmussen, Benitz, Johnson, Lee, Vognild, Sellar, Metcalf, Bauer, Smith and West; by request of Governor and Attorney General)

Providing civil immunity for persons making reports to government officials.

Senate Committee on Law & Justice

Majority Report: That Substitute Senate Bill No. 5336 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pullen, Chairman; McCaslin, Vice Chairman; Hayner, Nelson, Newhouse, Niemi, Rasmussen, Rinehart, Talmadge, Thorsness.

Senate Staff: Ben Barnes (786-7465)

February 14, 1989

AS PASSED SENATE, FEBRUARY 10, 1989

BACKGROUND:

Under current law, state employees who, in good faith, report violations of state law or other improper governmental actions by fellow employees are protected from retaliatory action. There is no similar statute which protects citizens who wish to report violations of local, state, or federal law by private citizens. The need for such a statute has been raised in regard to the experience of Mrs. Brenda Hill, a Vancouver, Washington resident.

Four years ago, Mrs. Hill and her husband purchased a home from the Robert John Real Estate Company, an Oregon corporation, on a real estate contract. Last year, the couple sought to refinance their home and discovered that the real estate excise tax had not been paid by the company and the contract had not been recorded. When officials of the company refused to pay the tax immediately, Mrs. Hill reported the violation to the Department of Revenue, who asked her to provide names of other homeowners in her community whose contracts had not been recorded. Acting largely on information that Mrs. Hill provided, Revenue Department officials assessed the Robert John Company \$477,000 in unpaid excise taxes. As a result of her disclosure to state officials, Mrs. Hill and her husband are currently being sued by the Robert John Company for \$100,000 in damages.

It is suggested that private citizens who, in good faith, report violations of local, state, or federal law be statutorily protected from any civil action for damages arising out of such disclosure.

SUMMARY:

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Any person who, in good faith, communicates a complaint or information to a federal, state, or local governmental agency regarding a matter of reasonable concern to that agency is immune from civil liability based upon the communication.

A person prevailing upon the good faith immunity defense is entitled to reasonable attorneys' fees and court costs incurred in establishing the defense.

An agency which receives a complaint or information regarding a matter of reasonable concern to that agency may intervene in and defend against any suit arising from the communication.

The office of the Attorney General is authorized to intervene in and defend against any suit arising from a good faith report of a complaint or other information to a local governmental agency regarding a matter of reasonable concern to that agency.

Appropriation: none

Revenue: none

Fiscal Note: available

Senate Committee - Testified: Maureen Hart, office of the Attorney General (pro)

SENATE BILL REPORT

SHB 1254

BYHouse Committee on Judiciary (originally sponsored by Representatives H. Myers, Beck, Morris, R. Meyers, G. Fisher, Peery, Winsley, Wang, May, Jones, P. King, R. Fisher, Sayan, O'Brien, Locke, Crane, Heavey, Inslee, Rector, Brough, Cooper and Brumsickle; by request of Governor Gardner and Attorney General)

Providing immunity from civil liability.

House Committee on Judiciary

Senate Committee on Law & Justice

Senate Hearing Date(s): March 20, 1989

Majority Report: Do pass.

Signed by Senators Pullen, Chairman; McCaslin, Vice Chairman; Hayner, Madsen, Nelson, Newhouse, Niemi, Rasmussen, Rinehart, Talmadge, Thorsness.

Senate Staff: Ben Barnes (786-7465)

March 20, 1989

AS REPORTED BY COMMITTEE ON LAW & JUSTICE, MARCH 20, 1989

BACKGROUND:

LEISHMAN APPENDIX - 71

Litigation involving Brenda Hill, a resident of Vancouver, Washington, has given rise to concern regarding civil liability of individuals who report violations of local, state or federal law. Mrs. Hill and her husband purchased a home from a real estate developer and subsequently determined that the developer had failed to pay the excise tax due on the transaction. Mrs. Hill reported this violation to the Department of Revenue. The department requested that she assist with some investigative work to confirm the developer's failure to pay taxes on her transaction and on real estate transactions involving others in her community. The Hills did so and, acting largely on the information provided by Mrs. Hill, the department collected \$477,000 in unpaid taxes owed by the developer. As a result of the disclosures made to state officials, the Hills were sued by the developer. Mrs. Hill asked that the state defend her, but was told that the state had no authority to do so. The cost of defending the developer's suit has forced the Hills into bankruptcy.

Under current law, state employees are protected from retaliatory action if they, in good faith, report other state employees' violations of state law or improper governmental actions. This bill would extend immunity from civil liability to any person, including a state employee, who in good faith reports violations of local, state, or federal law.

SUMMARY:

The purpose of the act is to protect individuals who make good faith reports of potential wrongdoing to appropriate governmental bodies.

A person who, in good faith, communicates a complaint or information to a federal, state or local governmental agency is immune from civil liability based on the communication. The communication must be a matter of reasonable concern to the agency.

Individuals who prevail with the immunity defense are entitled to recover costs and attorneys' fees incurred in establishing the defense.

The agency receiving the complaint or information is entitled to intervene in and defend against any suit precipitated by the communication. If the agency intervenes in or defends against the suit and prevails, the agency is entitled to recover costs and attorneys' fees. If the agency fails to establish the immunity defense, the party bringing the action is entitled to recover costs and attorneys' fees incurred in proving the defense invalid or inapplicable. If a local governmental agency chooses not to intervene in and defend against a suit, the Office of the Attorney General may do so.

Appropriation: none

Revenue: none

Fiscal Note: none requested

LEISHMAN APPENDIX - 72

Senate Committee - Testified: Representative Holly Myers, original sponsor (pro); Maureen Hart, Attorney General's office (pro)

CERTIFICATE OF SERVICE

I certify that on this day I caused the foregoing document to be served
by email via the Court's electronic portal as follows:

Robert Sulkin: rsulkin@mcnaul.com, rlindsey@mcnaul.com

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DATED: March 18, 2020

/s/ Roger Leishman

Roger Leishman

March 18, 2020 - 4:16 PM

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