

66868-4

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NO. 66868-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

UNITED STATES MISSION CORPORATION,

Appellant,

v.

KIRO TV, INC.,

Respondent.

UNITED STATES MISSION'S CONSOLIDATED REPLY BRIEF OF
APPELLANT AND BRIEF OF CROSS-RESPONDENT

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A. INTRODUCTION

When a report contains a mixture of true and false statements, a false statement affects the “sting” of the report only when “significantly greater opprobrium” results from the report containing the falsehood than would result from the report without the falsehood. *Herron v. KING Broadcasting Company*, 112 Wn.2d 762, 769, 776 P.2d 98 (1989). The “sting” of a report is the gist or substance of a report when considered as a whole. *Id.* To be actionable, the allegedly false statements here must lead to a distinct and separate damaging implication not otherwise conveyed in the rest of the report. *Id.* at 774.

The defamatory “sting” inflicted by KIRO’s news articles was caused by the allegation that the United States Mission *deliberately* sought out felons to live in their housing facility, and *deliberately* used them as door-to-door funds solicitors. The sting of the allegation was that the jailhouse was “used” to find people who had criminal records, and that the employment of convicted criminals by the Mission was *not an accident*. KIRO’s broadcast said that the Mission “has been sending a bevy of historically violent felons, burglars and robbers to your house to collect money,” and that this practice was the result of “the tactics of the United States Mission.” CP 63. As further proof of the fact that “the self-proclaimed church recruits felons” to “go panhandling as a group into

your neighborhoods,” CP 67, the articles stressed the point that the operators of the Mission “typically load up a van-full of recent transients and known criminals” to go panhandling, and that “plenty of felons” had lived at the Mission’s housing facility. CP 63.

KIRO argues that the “gist” of its articles was simply that there had been two convicted sex offenders who had lived in the Mission’s housing facility, and that some neighbors had safety concerns about having residents of that facility come to their homes to solicit funds. *Brief of Respondent* [“BOR”], at 21-22. KIRO notes that it was *true* that Demry and Wilson, convicted sex offenders, did live in the Mission’s facilities for brief periods of time in 1998 and 2004, and that a records check of 69 names of Mission residents tentatively indicated that 7.5% had criminal records. According to KIRO, it simply isn’t relevant to the Mission’s claim of defamation that (1) the Mission was *unaware* that some of the people it accepted as residents in their facilities had been convicted of violent felonies, (2) that some criminals got accepted despite a conscientious effort by the Mission to screen them out and reject them, and (3) that the Mission never asked the county jail to refer people to them and never went to the jail to recruit recently released criminals. KIRO’s position is that even if the accusation of *deliberate recruitment of criminals* had never been made, and even if KIRO had reported “that [the]

Mission does not ‘deliberately’ house criminals” and that its residents are “typically not felons,” that would not have materially changed the “sting” of their articles. *BOR*, at 22. According to KIRO, the sting would have been the same because whether the Mission intended it or not, at least two convicted criminals did get into their program and live in their housing facility for a few months.

This is obvious nonsense. The “sting” of an accusation that a business *deliberately* hires people it knows to be felons convicted of violent crimes is quite different from the “sting” of an accusation that despite its best efforts to weed them out, a business *accidentally* hires a few such people.

According to a March 2011 report of the National Employment Law Project, in this country one in every four adults has a criminal record.¹ Given this fact, even though most employers make an effort through criminal history background checks to make sure that they are not hiring dangerous felons, virtually every employer will unknowingly and unintentionally hire a few such individuals who manage to conceal their criminal record. No doubt KIRO itself has, on occasion, *unknowingly* employed a few convicted felons.

¹ http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf

Intention is important. As Oliver Wendell Holmes wrote, “Even a dog distinguishes between being stumbled over and being kicked.”² In the present case, KIRO’s articles were written by Chris Halsne, a reporter who clearly has reason to know the importance of this distinction, since he had previously been held liable for an article which made the exact same type of defamatory statement. The decision in *Mitchell v. Griffin Television and Chris Halsne*, 60 P.3d 1058 (Okla. Civ. App. 2002), *cert. denied*, 538 U.S. 1013 (2003), shows that the defamatory sting of Halsne’s articles about a veterinarian was *not* related to statements of what the veterinarian *did*, but rather to what the veterinarian knew and intended to do. Halsne reported that the vet administered a pain block to a horse. The vet admitted that was a truthful statement. But Halsne’s articles went further and stated that the veterinarian acted knowing that the horse was in an unsound physical condition and that he administered the medicine with the intention of concealing that fact from others. The jury found that the accusation of acting with such an intention was a false accusation because the veterinarian did not even know of the horse’s injury. The false sting of his article about the veterinarian was that he acted knowingly as part of a deliberate plan. The false sting of his articles about the Mission were the

² From “Early Forms of Liability,” Lecture 1, *The Common Law* (1909).

same: that the Mission acted knowingly as part of a deliberate plan to recruit people who were dangerous felons. Here, as in *Mitchell*, a TV station broadcast news stories written by Halsne where the sting of the defamatory articles was the false attribution of a deliberate intent when in fact no such intent existed.

KIRO contends that its articles never explicitly said that the Mission was doing this deliberately. But it is apparent from the words themselves that this is not true. The articles *did* expressly make such an accusation. And even assuming, *arguendo*, that the articles merely implied such a deliberate intent, a jury could easily find the omission of true facts made the articles defamatory and actionable. Assuming all the statements made in the complaint to be true, *Northwest Animal Rights Network v. State*, 158 Wn. App. 237, 241, 242 P.3d 891 (2010); and taking all the “inferences” that can be drawn from those facts, “both real and hypothetical,” “in the light most favorable to the plaintiff[],” *Davenport v. Washington Educ. Ass’n*, 147 Wn. App 704, 706, 197 P.3d 686 (2008); it is not possible for any court to say that the Mission could not prove any set of facts that would entitle it to relief. *Animal Rights*, 158 Wn. App. at 241. Therefore, the Superior Court erred in dismissing the complaint.

B. ARGUMENT IN REPLY

1. THE DEFAMATORY CHARACTER OF KIRO'S ARTICLES IS "APPARENT FROM THE WORDS THEMSELVES." THE "WORDS THEMSELVES" ARE EXPRESSLY FALSE BECAUSE THEY LITERALLY ATTRIBUTE A DELIBERATE INTENTION TO USE CONVICTED FELONS AS FUNDS SOLICITORS.

Quoting from a case where the plaintiff conceded that all the statements made by the defendant were true,³ KIRO argues that "the defamatory character of the language must be apparent from the words themselves." *BOR*, at 13, quoting *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 826 P.2d 217 (1991).

Lee is obviously distinguishable, because the Mission does *not concede* that all the statements made by KIRO were true and in fact explicitly plead that several were false. Moreover, *Lee* is no longer good law, since the *Lee* court's rejection of claims of implied defamation came 13 years before the Supreme Court's *Mohr* decision which *expressly* recognized the viability of such claims. Putting aside these points, even if the viability of claims of implied defamation had never been recognized in Washington, the Mission's claim for defamation would still be viable because the defamatory character of KIRO's broadcasts *is* apparent from the words themselves. As noted in the Mission's opening brief, the words "used,"

³ The opinion in *Lee* states: "Remarkably, Lee argues that the May 6, 1988 headline and lead sentence were false and capable of defamatory meaning, even while conceding that they were true on their face." *Id.* at 538.

“sends,” “tactics,” “motives,” and “recruits,” all convey the assertion that the Mission was acting purposefully. Similarly, the words “typically,” “van-full,” “bevy,” and “plenty” unambiguously convey the point that the Mission’s desire to find and use convicted felons was successfully implemented because the norm was to send a significantly large number of convicted felons out to collect funds. *Brief of Appellant*, at 27-31.

2. THIS COURT AND THE SUPREME COURT HAVE BOTH EXPLICITLY RECOGNIZED THE EXISTENCE OF A CAUSE OF ACTION FOR IMPLIED DEFAMATION.

Assuming, *arguendo*, that this Court concludes that KIRO’s articles merely contained false implications, the Mission’s lawsuit still should not have been dismissed because Washington appellate courts – including this Court – have explicitly recognized the viability of a claim of implied defamation based on omitted facts.

Inexplicably KIRO contends that in *Corey v. Pierce County*, 154 Wn. App. 752, 225 P.3d 367 (2010), this Court did not “directly confront[] whether implication claims exist,” *BOR*, at 15. And yet the *Corey* opinion clearly did directly confront this issue, for in the course of affirming a jury verdict in favor of a verdict for the plaintiff this Court said this:

Corey’s claims of defamation, *defamation by implication*, and false light went to the jury. Defamation is concerned with compensating the injured party for damage to reputation. [Citation]. Defamation requires that a plaintiff prove falsity, an unprivileged communication, fault and

damages. *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). ***Defamation by implication occurs when “the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts.”*** *Id.* at 823, 108 P.3d 768 (quoting PROSSER AND KEETON ON THE LAW OF TORTS 116, at 117 (W. Page Keeton, ed. 5th ed. 1984, Supp. 1988). ***For defamation by implication, a plaintiff must prove all elements of defamation, including that a statement is provably false – either because it is a false statement or leaves a false impression.*** *Id.* at 825, 108 P.3d 768.

Corey, 154 Wn. App. at ¶ 15 (emphasis added).

In *Corey* the false implication of the defendant’s statements was created by the omission of relevant facts. The defendant stated that Ms. Corey was under investigation for mishandling funds, but omitted the fact that an investigator had already concluded that the case against Ms. Corey was not viable. *Id.* at ¶ 17. This Court concluded that the evidence was sufficient to allow all Ms. Corey’s claims, including her claim for defamation by implication, to go to the jury, and upheld the jury verdict in her favor on that claim. *Id.* at ¶ 18. Thus, this Court *did* “directly confront” the viability of claims for defamation by implication.

Even more inexplicable is KIRO’s failure to mention the Supreme Court’s holding in *Mohr v. Grant*, 153 Wn.2d 812, 108 P.3d 768 (2005).⁴ In *Mohr* the Washington Supreme Court opinion expressly stated that *it*

⁴ KIRO’s counsel was also counsel for several *amici* in the *Mohr* case.

had already recognized the viability of claims of defamation by implication and expressly disapproved of a Court of Appeals statement that suggested that this issue had not been decided:

Defamation by implication occurs where “the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts.” [Citation]. ***Although the Court of Appeals stated that “[i]n]o Washington case directly addresses the problem of material omissions,” this Court has recognized instances of defamation by implication.***

Mohr, 153 Wn.2d at ¶ 20 (emphasis added)(footnote omitted). The Supreme Court went on to discuss three separate cases in which it had recognized the existence of claims of defamation by implication, and one U.S. Supreme Court case that implicitly acknowledged the actionability of such claims. *Id.* at ¶¶ 21-23, discussing *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 515 P.2d 154 (1973); *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 445, 546 P.2d 81 (1976); *Herron v. KING Broadcasting, Co.*, 112 Wn.2d 762, 776 P.2d 98 (1989). The Supreme Court concluded that a plaintiff could prove a claim of defamation by implication so long as he could prove that the defendant’s statement was *either* false, “*or because it leaves a false impression.*” *Mohr*, 153 Wn.2d at ¶ 24.

KIRO fails to mention any of these portions of the *Mohr* decision, and limits its discussion of *Mohr* to the statement in a footnote that any

language in *Mohr* which is contrary to the decision in *Yeakey v. Hearst Communications, Inc.*, 156 Wn. App. 787, 793, 234 P.3d 332 (2010) is simply dicta. *BOR*, at 13, n. 3. But it clearly *isn't* dicta, because the issue in *Mohr* was whether the plaintiff's claim for defamation by implication should have survived a summary judgment motion. The *Mohr* Court expressly recognized the actionability of claims of defamation by implication, and *then* went on to hold that the plaintiff had failed to present sufficient evidence to survive a summary judgment motion because he had not presented proof that omitted facts, if they had been included, would have decreased the defamatory sting of the article. *Mohr*, 153 Wn.2d at ¶ 31 (“Here, the omitted information would not have negated the asserted defamatory implication in its entirety.”) The *Mohr* court also cited examples of other cases where defamation by implication *was* established by showing that omitted facts would have changed the sting of the article. *Id.* at ¶ 30. The lengthy discussion in *Mohr* regarding the actionability of claims of defamation by implication is not dicta. The viability of such claims is firmly established in this State.⁵

⁵ Almost thirty years *before* *Mohr* was decided, in *McNair v. Hearst Corp.*, 494 F.2d 1309, 1310-11 (9th Cir. 1974), the Ninth Circuit held that Washington law recognized actions for defamation by implication. In a footnote KIRO quietly *admits* that the *McNair* Court “did allow for defamation by implication,” but asserts that *McNair* is outdated.” *BOR* at 29, n.7. The only reason KIRO gives in support of this claim is that at the time *McNair* was decided falsity was presumed and a defamation defendant had to prove the truth of his statement. *Id.* While *this* aspect of *McNair* is no longer good law, (Footnote continued on next page.)

3. ASSUMING, ARGUENDO, THAT KIRO'S ARTICLES DO NOT CONTAIN EXPRESSLY FALSE ASSERTIONS, AT THE VERY LEAST THEY CONTAIN IMPLIEDLY FALSE ASSERTIONS WHICH WOULD NOT HAVE BEEN MISLEADING HAD KIRO NOT OMITTED OBVIOUSLY RELEVANT FACTS THAT WOULD HAVE MATERIALLY DECREASED THE STING OF THE ARTICLES.

Even assuming, *arguendo*, that several statements contained in KIRO's articles are not express assertions that the Mission *intentionally* sought to put convicted criminals in its housing facilities and deliberately sought to use them as funds solicitors, at the very least the articles clearly *imply* such a deliberate intention. Thus, the only remaining issue is whether the defamatory sting of these articles would have been eliminated or reduced if certain omitted facts had been included. The answer is obvious. Clearly, the defamatory sting of the articles would have been greatly diminished, if not eliminated altogether, if KIRO had included the following facts in their articles:

- (1) The Mission never asked to be put on the King County Jail's housing referral list;
- (2) The very same documents which KIRO was relying upon to show that the Mission was "sending" "plenty" of felons door-

the holding of *McNair* acknowledging the viability of claims of defamation by implication has never been overruled. On the contrary, this aspect of *McNair* has been continuously reaffirmed over the years, as evidence by *Mohr* and *Corey*. *McNair* held that whether "the articles as a whole can be said to have effectively eliminated the impact of any false impression created at the outset," was not something that a court could determine as a matter of law and was instead "a question for the jury." 494 F.2d at 1311. This is entirely consistent with *Mohr* and *Corey*.

to-door to solicit funds showed, at best, that a mere 7.5% of the people on the list collected by KIRO had criminal convictions;

- (3) That Demry and Wilson, the two featured sex offenders mentioned in KIRO's news articles, had only lived in the Mission's facilities for brief periods of time in 1998 and 2004;
- (4) That *neither* Demry nor Wilson came to the Mission after being released from the King County Jail; and
- (5) That *none* of the people who were residing in the Mission's housing facilities at the time KIRO's articles were broadcast were convicted felons.⁶

4. KIRO'S STATEMENTS WERE NOT PRIVILEGED. A WEBSITE OPERATED BY THE SHERIFF'S OFFICE IS NOT AN "OFFICIAL PROCEEDING." AND IN ANY EVENT, THE DEFAMATION CLAIM IS NOT BASED ON THE REPORT THAT DEMRY ONCE LIVED AT A MISSION FACILITY IN 2004.

KIRO claims that the Superior Court's dismissal of the Mission's suit can be affirmed on the alternate ground that the statements made in the

⁶ While KIRO claims that this case is like *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981), where the sting of the article was that the plaintiff was a thief, and that sting was not materially altered by reporting that the amount stolen was more than \$300,000 when it was really \$200,000. But the better analogy is to *Herron* where the Court noted that there was a big difference between stating that the majority of the candidate's campaign contributions came from bail bondsmen, when in truth only 2% came from them. In this case, the express accusation was that the operators of the Mission "typically load up a van-full of recent transients and known criminals" to go panhandling. CP 63. But if a fairly sizable sample of the Mission's residents shows that only 7.5% of them are felons, and if there were none at all among those who were residents at the time KIRO's broadcasts aired, then the sting of the accusation of deliberate recruiting is materially altered. After all, if a policy of deliberate recruiting was being followed, how come the proportion of convicted felons was so low? The word "typically" literally means in most cases. The word "typically" means more than 50% of the time. Here, as in *Herron*, the omitted fact (there aren't very many convicted felons living in their Mission's facility) dramatically undercuts the accusation that "typically" the Mission is sending a "van-full" of known criminals into the neighborhoods.

broadcasts were privileged. *BOR*, at 22. KIRO correctly states that the fair reporting privilege shields publishers from liability when a broadcaster attributes a statement to an official proceeding. *BOR*, at 22, citing *Clapp v. Olympic View Publ'g Co.*, 137 Wn. 470, 475-76, 154 P.3d 230 (2007). In *Clapp* the official proceeding was a petition for a protection order filed in Clallam County District Court. *Id.* at 472. KIRO glosses over the fact that *Clapp* involved a newspaper's report of what was going on in a court proceeding and then goes on to state – inaccurately – that “most of the statements” in KIRO's articles were based upon information it gathered from a county website. *BOR*, at 23. Without identifying what information it is talking about, KIRO also states it gathered other information from police records, a State Patrol website, and unspecified “court records.”

Statements made in a posting on a website operated by the county sheriff, or by the State Patrol, are *not* statements made in an “official proceeding.” Presumably KIRO is referring to the fact that the county website listed Demry as a person who was living at a Mission housing facility. Of course the Mission has never contended that Demry never lived at the Mission facility, and has never based its defamation claim on the contention that no felon ever lived there. Instead, the Mission's defamation claim is based on the simple fact that it never deliberately

sought out convicted felons, it never “used” the jailhouse to find Demry or any other convicted felon, it never “recruited” felons, and in fact it did its best to *prevent* convicted felons from entering their program.

The cases cited by KIRO hold that if a publisher accurately summarizes what occurred in an “official proceeding,” such as a civil suit for a protection order, (*Clapp, supra*), or a Superior Court civil action for copyright infringement (*Alpine Industries Computers v. Cowles Publishing Co.*, 114 Wn. App. 371, 57 P.3d 1178 (2002), or for recall of a public officer (*Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 736 P.2d 249 (1987)), then the publisher has a privilege against liability for defamation. In this case the King County Sheriff’s website is *not* an “official proceeding,” and thus the entire concept of the official proceeding privilege does not apply.

Even if it did apply to this case, it would have no application to the defamatory statements regarding the Mission’s *intention* to recruit felons. Neither the county sheriff’s website, nor any other website, nor any government agency engaged in conducting any “official proceeding,” ever said anything about the *intent* of the Mission to seek out convicted felons. Accordingly, the privilege has no application to this case.

5. A JURY COULD EASILY FIND THAT THE ACCUSATION THAT THE MISSION DELIBERATELY SEEKS VIOLENT FELONS TO SERVE AS FUNDS SOLICITORS WAS LIBEL

PER SE. THIS IS NOT THE EXTREME CASE WHERE A JURY COULD NOT FIND THAT THE PUBLICATIONS MET ANY OF THE THREE ALTERNATE DEFINITIONS OF LIBEL PER SE. THE BROADCASTS OBVIOUSLY HAVE A CAPACITY TO HOLD THE MISSION UP TO PUBLIC HATRED AND CONTEMPT, TO DEPRIVE THE MISSION OF PUBLIC CONFIDENCE, AND TO INJURE THE MISSION IN ITS BUSINESS.

KIRO claims that the dismissal can be affirmed on the alternate ground that the Mission's complaint did not plead its damages with sufficient particularity. KIRO recognizes that special damages need not be plead at all if the defendant's publication is libel *per se*, citing to *Purvis v. Bremer's, Inc.*, 54 Wn.2d 743, 344 P.2d 705 (1959). KIRO never bothers to offer any definition of libel *per se*, and never explains why its broadcasts should not be classified in that matter. Instead, KIRO simply assumes, without any explanation, that its articles were *not* libelous *per se*, and further assumes that this determination can be made by a court rather than by a jury. Based on these assumptions, KIRO simply concludes that the Mission's failure to plead special damages is a fatal defect.

KIRO's citation to *Purvis* is particularly bizarre since there the Supreme Court *reversed* the dismissal of a defamation claim holding that the trial court *should have let a jury decide* whether the published words constituted libel *per se*. First, the *Purvis* opinion defines libel *per se* as a publication which either exposes the plaintiff to hatred, contempt, ridicule

or obloquy, *or* deprives him of the benefit of public confidence or social intercourse, *or* injures him in his business, profession, or occupation. *Id.* at 751. Second, the Court explained that when the issue is whether words constitute libel *per se*, the first question is, “Are the words capable of a defamatory meaning? And this is the question for the judge to determine.” *Id.* at 752-53. If the judge decides they are capable of such a construction, then “[t]he jury determines whether a communication capable of a defamatory meaning was so understood by its recipient.” *Id.* at 753.

In *Purvis* the Court decided that two of the statements⁷ in the publication at issue *were* capable of a defamatory meaning and thus the complaint “was sufficient to raise a jury question.” *Id.* at 753. Since “a jury might, under the allegations of the complaint, determine that the” publication was, at least in part, libel *per se*, “the trial court erred in dismissing the action” on the defendant’s demurrer. *Id.* at 755.

The Supreme Court has adhered to the *Purvis* definition of libel *per se*. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 353, 670 P.2d 240 (1983). Quoting from *Purvis* the Court held that when the question of

⁷ The publication stated that the plaintiff was seeking re-election so that he “can milk the taxpayers of additional thousands.” The Court held, “A jury could find that a dishonesty of purpose is attributed to the plaintiff as a candidate for the legislature.” *Id.* The statement that in the past the plaintiff served his masters “slavishly” was also found to be one that a jury could find libelous *per se* because it was susceptible of conveying the idea that the plaintiff had betrayed the public trust. *Id.* at 753-54.

what is libel *per se* gets into the “nebulous area of what exposes a person to hatred, contempt, ridicule or obloquy, or deprives him of public confidence or social intercourse, the matter of what constitutes libel *per se* becomes in many instances, a question of fact for the jury.” *Caruso*, at 354, quoting *Purvis*, at 752. The *Caruso* Court cautioned trial court judges: “In all but extreme cases the jury should determine whether the article was libelous *per se*.” *Caruso*, at 354. *Accord Maison De France, Ltd. v. Mais Oui!*, 126 Wn. App. 34, 43, 108 P.3d 787 (2005); *Amsbury v. Cowles Publishing Co.*, 76 Wn.2d 733, 740, 458 P.2d 882 (1969).⁸

The present case is not an “extreme case” where the words are not capable of being construed by the jury as libelous *per se*. On the contrary, this is a case where it is obvious that a jury could make that determination very easily. The articles are capable of being read as accusing the Mission of deliberately recruiting violent convicted felons to act as their funds solicitors, thereby endangering the residents of the neighborhoods in which they operate. Obviously this accusation *does* expose the Mission to

⁸ The *Caruso/Amsbury* rule that dismissal is proper only in the extreme case where no jury could possibly find libel *per se* had been proved is completely consistent with the general rule that no complaint should be dismissed under CR 12(c) unless it is clear that the plaintiff cannot possibly prove any set of facts which would entitle him to relief. *Animal Rights*, 158 Wn. App. at 241.

hatred and contempt; it *does* deprive the Mission of public confidence; and it *does* injure the Mission in its business of gathering charitable donations.

Cyclohomo Amusement Co. v. Hayward-Larkin Co., 93 Wash. 367, 160 P. 1051 (1916) clearly illustrates the point that an allegation that a company employs undesirables constitutes libel *per se*. In that case, a company operating a movie theater business brought a defamation claim against the publishers of a poster which stated in part:

“Do you know that a theater that employs incompetent operators endangers your life?” Do you know that the theaters that employ competent help display this card in the box office. . . . Do you know that the Arcade and Majestic Theaters *cannot* show this card?

Cyclohomo Amusement, 93 Wash. At 368. Not surprisingly, the Supreme Court held, “These posters were clearly libelous *per se* . . .” *Id.* at 369.

In *Cyclohomo* the allegation was that the business employed people who were incompetent, and thus maintained a theater that endangered its customers. In the present case the tendency of the publication to injure the Mission in its business is even clearer. KIRO’s articles accused the Mission of deliberately recruiting violent convicted felons. Obviously, an organization accused of using dangerous felons to solicit charitable donations is going to be injured, because people are not going to want to

open their doors when dangerous felons come knocking.⁹ And, in fact, the record contains the declaration of Leon Leftwich, who states that when he was soliciting funds for the Mission he knocked on the door of man who stated that he had seen KIRO's TV story about the Mission. CP 444. The man told Leftwich "to leave his house immediately or he would call the police." CP 444. Clearer and more concrete evidence that KIRO's broadcasts tended to excite hatred against the Mission, to deprive the Mission of public confidence or social intercourse, and to injure the Mission's business, is hard to imagine. Since a jury could find the broadcasts constitute libel *per se*, under *Caruso* the Superior Court's dismissal of the Mission's complaint cannot be affirmed on the alternate ground that the Mission failed to plead special damages.¹⁰

6. THE WASHINGTON SUPREME COURT AND THE UNITED STATES SUPREME COURT HAVE BOTH RULED THAT A HEADLINE CAN BE LIBELOUS.

KIRO erroneously states that the Mission failed to cite a single case that states that a defamatory headline, in and of itself, can support an action for

⁹ For another case recognizing the obvious – that accusations of associating with criminals causes harm to a business – see *People v. McKinnon*, 7 Cal.3d 899, 914, 103 Cal. Rptr. 897 (1972), where the Court acknowledged that "injury to [United Airlines'] reputation and business which could well ensue from public knowledge that it permits its facilities to be used by criminals . . ."

¹⁰ If a publication is libelous *per se* then the plaintiff need not produce any evidence of actual damage, but may instead recover substantial damages because under such circumstances the law presumes damage. *Arnold v. National Union of Marine Cooks and Stewards*, 44 Wn.2d 183, 187, 265 P.2d 1051 (1954).

defamation. *BOR*, at 28. Apparently KIRO missed the Mission's citation to the following cases on pages 32-34 of the Mission's opening brief: *Black v. Nashville Banner Publ'g Co.*, 24 Tenn. App. 137, 144, 141 S.W.2d 908 (1939) (headline "may itself inflict serious injury upon a person . . . and may even justify a court or jury in regarding the publication as libelous when the body of the article is not necessarily so."); *Reardon v. News-Journal Co.*, 53 Del. 29, 32, 164 A.2d 263 (1960) ("the sting of a libel may sometimes be contained in a word or a sentence used in a headline to the body of the article, even though the facts are correctly set forth in the body"); *Landon v. Watkins*, 61 Minn. 137, 142, 63 N.W. 615, 617 (1895) ("headlines are an important part of the publication, and cannot be disregarded, for they often render a publication libelous on its face which without them might not necessarily be so."); *Empire Printing Co. v. Roden*, 247 F.2d 8 (9th Cir. 1957) ("headlines alone may be enough to make libelous per se an otherwise innocuous article."¹¹ Moreover, there are many more such cases which the Mission did not

¹¹ For other cases where the court recognized that liability for defamation could rest solely on a defamatory headline, *see, e.g., Morning Journal Ass'n v. Duke*, 128 F. 657 (C.C.A. 1904) (contention jurors should have been allowed to read the text of the article rejected, judgment for plaintiff based solely on "headings" affirmed); *Norfolk Post Corporation*, 140 Va. 735, 739, 125 S.E. 656, 657 (1924) ("the law is that unsupported headlines may be in themselves libelous"; judgment for plaintiff affirmed).

previously cite. For example, in *Las Vegas v. Franklin*, 74 Nev. 282, 329

P.2d 867, 869-70 (1958) the Court said this:

Appellants contend that the headlines and tag-line cannot be considered apart from the context in which they were used. Thus, ***they contend, the headline must be qualified by and read in the light of the article to which it referred*** and the tagline must be qualified by and read in the light of the subsequent article to which it referred.

This is not so. The text of a newspaper article is not ordinarily the context of its headline, since the public frequently reads only the headline. [Citations omitted]. The same is true of a tag-line or leader since the public frequently reads only the leader without reading the subsequent article to which it refers. ***The defamation of Franklin contained in the headline was complete upon its face. It was not necessary to read the article in order that the defamatory nature of the statement be understood or connected with Franklin.*** The same is true of the tag-line.

(Emphasis added).

Similarly, over a century ago the United States Supreme Court affirmed a judgment for criminal libel based solely upon headlines. In *Dorr v. United States*, 195 U.S. 138, 24 S. Ct. 808 (1904), a judgment of libel was affirmed where the judgment rested solely on the basis of headlines, one of which read “Traitor, Seducer, and Perjurer.” *Id.* at 149. The Court acknowledged that the entire text of the following article was privileged and could not be the basis for the judgment, but nevertheless affirmed the judgment “these headlines were not privileged matter at the common law, and were libelous remarks . . .” *Id.* at 153.

The Washington Supreme Court has also recognized that headlines may be libelous when examined in light of the entire article. Although KIRO cites to the *Purvis* decision, that case actually *supports* the Mission's position. There the Court examined both the headline and the accompanying text of a political advertisement:

If, instead of limiting our consideration to the various specific statements, we consider the advertisement as a whole, we find that *in the headline* it is charged that the plaintiff "is trying to put his hand in your [the taxpayer's] pocket." In the text, plaintiff is described as a zealot who has "cost Kitsap county taxpayers thousands of dollars . . . Furthermore, it is charged that the plaintiff's motive in seeking reelection to the legislature is "to fix up the PUD laws" so that he could "mile the taxpayers of additional thousands,"

54 Wn.2d at 748, 754. The Court held that because a jury could find that that the headline and the text together constituted libel *per se*, the Superior Court judge should *not* have dismissed the complaint:

A jury could well find the advertisement to constitute a charge of want of official integrity and of lack of those ethical principles that the public rightly expects to find in one who follows the profession of the law. If so, it tended to deprive the plaintiff of the benefit of public confidence and to injure him in his standing in his profession, and was, therefore, libelous per se.

Purvis, 54 Wn.2d at 754 (emphasis added).¹²

¹² Similarly, in *Graham v. Star Publishing Co.*, 133 Wash. 387, 233 P. 625 (1925) the Court reversed the dismissal of a criminal charge of libel and in so doing examined both the text of the article and the two headlines to the article which read "Officers Involved in
(Footnote continued on next page.)

In *Condit v. National Enquirer*, 248 F.Supp.2d 945 (E.D. Cal. 2002), the wife of a Congressman brought three claims of defamation against a newspaper for an article that it published, one of which was exclusively based on the contention that the headline was defamatory. The headline read: “Cops: Condit’s Wife Attacked Chandra.” *Id.* at 948. The newspaper did exactly what KIRO did in this case: brought both a motion to dismiss for failure to state a claim and a special motion to strike pursuant to California’s anti-SLAPP statute, Calif. Code of Civil Procedure § 425.16. The District Court denied both motions, holding specifically that the headline was susceptible of a meaning that was libelous *per se*, and that it was for a jury to decide whether the headline would be understood in that manner:

Defendant contends that the verb “attacks” in the cover page headline “carries a broad range of possible meanings,” some of which are not defamatory. [Citations]. Even assuming, *arguendo*, there are non-defamatory readings of the word “attacks” in the context of the headline, all that

Crime -- Records Show Booze is Cause of Trouble,” and “Some of Accused Are Back Again on Force, Doing Duty Here.” *Id.* at 388.

For other cases reversing the dismissal of defamation claims based on headlines and remanding for trial so that a jury could decide whether the headline was defamatory, see *Lane v. Washington Daily News*, 85 F.2d 822 (D.C. Cir. 1936)(headline read: “Auto Crash Reveals Cache of Weapons”); *Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211 (Ind. App. 1978)(headline read “Percy Takes Personal Control of Grand Jury in Brothel Quiz”); *Campbell v. NY Evening Post*, 245 N.Y. 320, 157 N.E. 133 (1927) (headline read: “Healer and Inventor Face Swindle Charge. Mrs. Elizabeth Nichols Says They Took \$16,000 from Her Through Fraud”).

the law requires is that the headline is reasonably susceptible to one defamatory meaning. [Citations].

Condit, 248 F.Supp.2d at 965. The newspaper contended that the text of body of the article negated the implication that Mrs. Condit had committed a crime by assaulting Chandra, but again the District Court ruled that as in *Kaelin*, it was for the jury to decide whether the text of the article dispelled the defamatory sting of the headline. *Id.* at 966.

In sum, as the Ninth Circuit stated in *Kaelin v. Globe Communications*, 162 F.3d 1036, 1040 (9th Cir. 1998), “headlines are not irrelevant, extraneous, or liability free zones. They are essential elements of a publication.” In this case KIRO’s headline told the world: “Jailhouse Used to Find Door-to-door Solicitors.” A jury must decide whether this headline (as well as several other statements contained in the text of the articles) was libelous.

C. ARGUMENT IN RESPONSE TO CROSS-APPEAL

1. NEITHER SUBSECTION (2)(d) NOR (2)(e) OF WASHINGTON’S THE ANTI-SLAPP STATUTE APPLY BECAUSE A TV NEWS BROADCAST IS NOT “A PUBLIC PARTICIPATION ACTION.”

As the moving party, KIRO “has the initial burden of showing by a preponderance of the evidence that the [plaintiff’s] claim is based on an action involving public participation and petition.” RCW 4.25.525(4)(b). KIRO cannot carry that burden because the Mission’s claim is *not* based

on any statement “submitted, in a place open to the public or a public forum. . . .” Thus, subsection (2)(d) of RCW 4.24.525 is *not* applicable. Nor can KIRO prove that the action was *not* based upon “any oral statement made, or written statement,” but was instead based upon some “other lawful conduct.” Therefore, subsection (2)(e) of RCW 4.24.525 is also *not* applicable. These are the only two subsections of RCW 4.24.525 which KIRO bases its motion to strike upon. Since neither applies, the motion to strike is not statutorily authorized and KIRO cannot show that the Mission’s claim “is based on an action involving public participation and petition.” RCW 4.24.525(4)(b).

a. A Privately Owned TV Station Is Not a Public Forum.

Relying on a pair of unpublished U.S. District Court opinions, KIRO contends that a TV news broadcast is a “public forum,” and that consequently KIRO’s defamatory broadcast falls within the definition of an action involving public participation which is covered by RCW 4.24.525(2)(d). *BOR*, at 35, citing *Castello v. City of Seattle*, 2010 WL 4857022 (W.D. Wash.) and *Phoenix Trading v. Kayser*, 2011 WL 3158416 (W.D. Wash.). In *Castello* the District Court purported to rely on an analogous California anti-SLAPP statute which also provided immunity from suit for defamation for statements made in a “public forum.” The *Castello* Court noted that one California Court had construed California’s

statute as providing complete immunity for defamatory statements made in a newspaper because it viewed a newspaper as a “public forum.” According to that California Court, any news publication was a “public forum” so long as “it is a vehicle for discussion of public issues and is distributed to a large and interested community.” *Castello*, at *6, quoting *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1161, 15 Cal. Rptr.3d 100 (Cal. App. 4 Dist. 2004). Seeing no distinction between a newspaper and a TV news broadcast, the *Castello* Court simply stated, “the Court finds that a major television network’s local news broadcast constitutes a ‘public forum’ within the meaning of [RCW] 4.24.525(2)(d).” *Castello* at *6.¹³

But in *Condit v. National Enquirer*, 248 F.Supp.2d 945 (E.D. Cal. 2002), another District Court, in a case *also* involving the California anti-SLAPP statute, flatly *rejected* the notion that a newspaper was a “public forum.” There the District Court succinctly held: “A newspaper should not be deemed a ‘public forum’ for purposes of [Cal. Code Civ. Proc.] §425.16.” *Id.* at 953.

¹³ In *Phoenix Trading* the District Court simply relied on *Castello* and came to the same conclusion without engaging in any independent analysis. *Phoenix Trading*, at *7. The *Phoenix Trading* opinion simply cites the *Castello* opinion.

In First Amendment law, a “public forum” refers to property *owned by government* -- such as a sidewalk, street, or park – which has historically been associated with open public debate, or to government owned property which has been designated for expressive activity. *See Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 358, 96 P.3d 979 (2004) (“Traditional public forums are public properties that have “time out of mind” been used for the purpose of assembly and communicating thoughts between citizens, not public properties that have been used illegally.”) A privately owned and operated TV station is not a public forum simply because it is not owned and operated by government. Consequently, the public has no right to use the property of a private TV station for expressive purposes, and thus KIRO cannot possibly be a “public forum.” Like a private newspaper, which cannot be compelled to grant access to third parties, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 2831, 41 L.Ed.2d 730 (1974), neither can KIRO TV be compelled to grant public access to its news broadcasts. KIRO does *not* allow the public to use its facilities to broadcast news stories, and since KIRO is a private corporation, it cannot possibly be a public forum because that doctrine applies only to publicly owned properties.¹⁴

¹⁴ Indeed, normally, not even a *publicly* owned and operated TV station can be forced to
(Footnote continued on next page.)

Citing to *Nygaard, Inc. v. Uusi-Kerttula*, 159 Cal. App.4th 1027, 1042, 72 Cal. Rptr.3d 210 (2008), which involved a Finnish magazine alleged to be defamatory, KIRO asserts that “[c]ases interpreting the California anti-SLAPP statute, after which Washington’s was modeled, are consistent” with the holding of *Castello* that a TV broadcast is a “public forum.” But this assertion is seriously misleading. Although it is true that the *Nygaard* Court held that a magazine was a public forum for purposes of the California statute, KIRO ignores the fact that various divisions of the California Court of Appeals are seriously split on the issue of what constitutes a “public forum,” and the greater weight of California case authority actually goes the other way.

For example, in *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal. App.4th 855, 44 Cal. Rptr.2d 46 (1995), Division 5 of that Court derided as “somewhat dubious” the San Francisco Chronicle’s contention that statements made in a newspaper were covered by the “public forum” subsection of California’s anti-SLAPP statute:

No authorities have been cited to us holding a newspaper printing allegedly libelous material is a “place open to the public or a public forum.” Newspaper editors or publishers customarily retain the final authority on what their newspapers will publish in letters to the editor, editorial

allow public access. *See Ark. Educ. TV Comm’n v. Forbes*, 523 U.S. 666, 675, 118 S. Ct. 1633, 140 L.Ed.2d 875 (1998) (“in most cases the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming”).

pages, and even news articles, resulting at best in a controlled forum, not an uninhibited ‘public forum.’”

Lafayette, 37 Cal. App.4th at 863 n.5.¹⁵

Similarly, Division 3 of the California Court of Appeals flatly rejected the contention that a private newsletter could ever be a public forum for purposes of the California anti-SLAPP statute:

The third [statutory] category embraces statements made “in a place open to the public or a public forum in connection with an issue of public interest.” (§ 425.16, subd. (e)(3).) A public forum is a place open to the use of the general public for purposes of assembly, communicating thoughts between citizens, and discussing public questions. [Citations and internal quotation marks omitted]. ***Means of communication where access is selective, such as most newspapers, newsletters, and other media outlets, are not public forums.***

Weinberg v. Feisel, 110 Cal. App.4th 1122, 1130, 2 Cal. Rptr.3d 385 (2003) (emphasis added), citing *Arkansas Educ. TV v. Forbes*, 523 U.S. at 678-80.¹⁶

¹⁵ KIRO is clearly aware of the *Lafayette* decision, since KIRO cites to it as support for a different proposition. See *BOR*, at 41. Yet KIRO ignores that portion of *Lafayette* which rejects its argument that a newspaper or a TV station is a “public forum.”

¹⁶ The *Weinberg* decision properly pointed out that other California courts that had accepted the “newspaper is a public forum” argument had had erred by “overlook[ing] a fundamental rule of statutory construction, i.e., when, in a statute, the Legislature employs a word or phrase that has a well-defined and judicially established meaning, then absent a clear indication of legislative intent to the contrary, that is the meaning which must be given to the word or phrase. [Citations]. The concept of a public forum was developed in, and has sole reference to, First Amendment cases. ***Those cases establish beyond doubt that a private selective-access newsletter is the very antithesis of a public forum.***” *Weinberg*, at 1131 n.4, refusing to follow *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 102 Cal.Rptr.2d 205 (2000).

Finally, in *Zhao v. Wong*, 48 Cal.App.4th 1114, 55 Cal. Rptr.2d 909 (1996), disapproved on other grounds, *Briggs v. Eden Council*, 19 Cal.4th 1106, 81 Cal. Rptr.2d 471 (1999), the First District of the California Court of Appeals *also* rejected the contention that a statement made in a newspaper article was made in a public forum and therefore covered by the California anti-SLAPP statute. The *Zhao* Court found “the potentially elastic term ‘public forum’ . . . can most reasonably be construed in the sense found in First Amendment jurisprudence. This analysis leads to a narrow definition of the term which strictly limits the scope of the [the] phrase . . .” 48 Cal.App.4th at 1125-26. The *Zhao* Court agreed with the *Lafayette* Court that “private newspaper publishing falls outside the scope of a public forum.” *Id.* at 1126.¹⁷

The Mission respectfully submits that the better reasoned authority of *Lafayette*, *Weinberg* and *Zhao* demonstrates that neither newspapers nor TV stations are public fora, because they are *not* generally open to the public for the public’s use. If KIRO TV really was a public forum to

¹⁷ The *Zhao* Court went on to note that “constitutional considerations indicate that the [California] Legislature never contemplated that the statute would apply ‘broadly’ to First Amendment rights. An important strand of due process doctrine guarantees meaningful access to judicial protection. [Citation]. The right of access to the courts may be compromised if a defendant is deprived of the opportunity to conduct the discovery necessary to prove his or her case.” 48 Cal.App.4th at 1129. “The [California] Legislature, in our view, never intended that the [anti-SLAPP] statute would apply ‘broadly’ to defamation actions. If it had acted on such an intent, we would expect to find some statutory recognition of this constitutional dilemma.” *Id.* at 1130.

which the public had free access, then the Mission could use its broadcasting station to broadcast its own story rebutting the false allegations of KIRO's news stories about the Mission. But the Mission has no such right to use KIRO's TV station in that manner, and thus the TV station is *not* a public forum and RCW 4.24.525(2)(d) does not apply.

b. KIRO Ignores the Fact That Subsections (2)(a) Through (2)(d) Cover Oral and Written Statements, While Subsection (2)(e) Covers "Other Conduct." Since the Basis of the Mission's Claim Is That KIRO Made Defamatory Oral and Written Statements, Subsection (2)(e) Doesn't Apply to This Case.

In its opening brief, the Mission noted how the four definitions of an "an action involving public participation and petition" in subsections (2)(a) through (d) were all limited to actions based upon "any oral statement made, or written statement or other document submitted" in connection with some kind of governmental proceeding. Only subsection (2)(e) is concerned with something other than an oral or written statement. The Mission argued that because subsection (2)(e) refers to "other lawful conduct," that it must be a reference to conduct *other than* speech or writing, and that consequently it refers to symbolic speech (such as flag burning, armband wearing, etc.).

KIRO makes no answer to this argument. KIRO offers no alternative explanation as to what the legislature might have been referring to when it

mentioned “other lawful conduct.” Instead, KIRO pretends that “other lawful conduct” can include the oral statements it made in its broadcasts, and the written statements made on its website. But this ignores the meaning of the word “other,” and would render subsection (2)(e) meaningless. Since the Mission’s defamation claims are based on oral and written statements, and since those statements are already covered by subsections (a) through (d), subsection (e) simply doesn’t apply at all.

Rather than confront the conflict between the statute’s literal language and its position, KIRO simply pretends that its “conduct” in broadcasting oral statements and posting written statements is governed by subsection (e), even though that subsection is explicitly limited to conduct “other” than the making of oral or written statements.

- c. **Unlike Subsection (e)(4) of the California Anti-SLAPP Statute, Which Covers “Other Conduct,” Subsection (2)(e) of the Washington Anti-SLAPP Statute Covers “Other Lawful Conduct.” Even Assuming, *Arguendo*, That Subsection (2)(e) Also Covers the Making of Oral and Written Statements, the Making of Defamatory Statements Is *Not Lawful*.**

Although KIRO claims that the Washington and California anti-SLAPP statutes are “nearly identical,” *BOR*, at 37, there are actually several important differences between the statutes, all of which KIRO blithely ignores. For one thing, Subsection (2)(e) of RCW 4.24.525 is *not* identical to Subsection (e)(4) of the California statute. The Washington Legislature

added the word “lawful” between the words “other” and “conduct.” KIRO offers no explanation as to why this was done. But it is a “well-settled principle of statutory construction is that “each word of a statute is to be accorded meaning.” *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005); *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). “[T]he drafters of legislation ... are presumed to have used no superfluous words and [courts] must accord meaning, if possible, to every word in a statute.” *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000), quoting *Greenwood v. Dept. of Motor Vehicles*, 13 Wn. App. 624, 628, 536 P.2d 644 (1975)).¹⁸

Assuming, *arguendo*, that subsection (2)(e) is applicable to oral and written statements (even though the preceding four subsections specifically state that *they* govern oral and written statements), then the word “lawful” restricts the scope of this portion of the anti-SLAPP statement to oral and written statements which are “lawful.” And yet it is axiomatic that “*defamatory* statements are not constitutionally protected speech.” *Rickert v. Public Disclosure Comm’n*, 161 Wn.2d 843, 848-49, 168 P.3d 826 (2007). As the Supreme Court noted in *Bose Corp. v. Consumers Union*, 466 U.S. 485, 504, 104 1949, (1984): “[T]here are

¹⁸ This is particularly true where, as here, the Legislature chose to *depart* from the wording of the California statute.

categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend. . . . Libelous speech has been held to be one such category.” Since libelous speech is *not* protected, the making of libelous statements is *not* “lawful” conduct. Consequently, KIRO’s broadcasting of libelous, false statements about the Mission does not constitute “other *lawful* conduct,” and thus its statements are *not* covered by subsection (2)(e) of RCW 4.24.525.

d. If Accepted by the Courts, KIRO’S Proffered Construction of Subsection (2)(e) Would Give Newspapers and Broadcasters the Power to Self-Immunize Themselves From Any Liability for Defamation Simply by Publishing Statements on Any Subject Which They Deem to Be of Public Concern. The *Condit* Court Wisely Rejected This Kind of Construction of the California Anti-SLAPP Statute.

Moreover, even assuming, *arguendo*, that subsection (e) does apply to oral and written statements, KIRO’s argument *still* fails because its defamatory statements were not connected to an issue of public concern. The *National Enquirer* made the exact same argument which KIRO makes here, and yet the District Court in *Condit* rejected it and ruled that the *Enquirer’s* defamatory article was *not* covered by similar language contained in the California anti-SLAPP statute. The *Condit* Court noted that the *Enquirer’s* statutory construction, if adopted, would allow any

newspaper (or any TV broadcaster) to immunize itself from civil liability simply by publishing (or broadcasting):

It would be absurd to suppose that a newspaper can generate a public issue by the mere fact of printing a story, even when it expects lively interest among its readers. If that were the case, a newspaper could bring itself, and others, within the statute by its own decision to cover a controversy even if the public has no interest in it.

Condit, 248 F.Supp.2d at 953-54.

Instead of allowing the defamation defendant to immunize itself by simply publishing and asserting that the subject of its article was connected to the public interest, the *Condit* Court examined that claim and concluded that there was *not* a sufficient connection to the public interest because the plaintiff was not a public official, not a public figure, and she was not attempting to stifle political debate or to silence the opposition on a public issue. Even though the newspaper story in *Condit* concerned the disappearance of an intern who had worked for a Congressman, and the possibility that the intern had been murdered, the *Condit* Court still rejected the contention that these facts transformed the article into one on a matter of public interest that was covered by the subsection of the California anti-SLAPP statute:

Although [the statute] is to be construed broadly, [citation], *it does not appear Defendant is being sued for making statements related to a “public issue” or “issue of public interest” within the meaning and intent of California’s*

anti-SLAPP statute. [Citation]. Even assuming arguendo that Plaintiff [the Congressman's wife] is a "public figure" for First Amendment purposes, not all speech concerning her necessarily bears on a "public issue" or "an issue of public interest" for purposes of [the statute]. [Citation]. Plaintiff is not a public official. The disappearance of Ms. Levy does not concern the public duties by Mr. Condit in his capacity as a public official. The criminal investigation of the disappearance of NMs. Levy is not necessarily a political or community issue in which public opinion and input is inherent and desirable, although it is arguable that there is a law enforcement purpose that underlies efforts to keep the case in the media and before the public to assist in efforts to locate a missing person. This lawsuit concerns disputed claims over defamation, not the type of meritless case brought to obtain a financial or political advantage over or to silence opposition from a defendant, which California's anti-SLAPP statute is designed to discourage. The Complaint appears to be an attempt to vindicate Plaintiff's legally cognizable right in reputation not to be falsely accused of attacking Ms. Levy shortly before her disappearance or of hiding information about a missing person from the investigating criminal authorities. In the context of the Complaint, Defendant seeks to utilize the anti-SLAPP law to gain immunity from alleged defamation, not to be free of a wrongfully intimidating meritless lawsuit designed to stifle political or public speech.

Condit, 248 F.Supp.2d at 954 (emphasis added).

Here, as in *Condit*, the Mission is *not* a public figure and *not* a public official. Although Carolyn Condit was *married* to a public official, that was *not* enough to bring the article within the protective ambit of the "public issue" subsection of the California anti-SLAPP statute. Here the Mission does not even have such an indirect tie to any public official or

agency. There was *never* any contact between the King County Jail and the Mission. In *Condit*, at the time of publication there was a pending criminal investigation into the disappearance of the intern who had been working for Condit's husband. But there was *never* any criminal investigation of the Mission in this case. And while it was "arguable" in *Condit* that the newspaper article might "assist" law enforcement "in efforts to locate a missing person," there is no room for any such argument in this case. KIRO cannot claim that it made its defamatory statements in an effort to help prevent the Mission from doing anything, because KIRO explicitly told its listeners that even though the Mission was "sending a bevy of historically violent felons" to their homes to collect money, *there isn't a thing you can do about it.*" CP 63 (italics added).

To paraphrase *Condit*, in this case the plaintiff's lawsuit "concerns disputed claims over defamation, not the type of meritless case brought to obtain a financial or political advantage over or to silence opposition from a defendant," and is instead "an attempt to vindicate [the Mission's] legally cognizable right in reputation not to be falsely accused of" deliberately "recruit[ing] felons, some with violent criminal histories, to . . . go panhandling as a group in your neighborhoods." *Condit*, 248 F.Supp.2d at 954; CP 67. Even if subsection (2)(e) were applicable to defamatory oral and written statements, it still would not apply to this case

because the Mission's suit is not the type of "intimidating meritless lawsuit designed to stifle political or public speech" (Condit, at 954) which RCW 4.24.525 was designed to cover.

2. EVEN IF RCW 4.24.525 APPLIES, THE MISSION HAS ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT IT *IS* LIKELY TO PREVAIL.

Assuming, *arguendo*, that this Court concludes that either subsection (2)(d) or (2)(e) of RCW 4.24.525 does apply and that the lawsuit is based on a claim involving "public participation and petition," then the burden shifts to the Mission to show by clear and convincing evidence that there is a probability that it will prevail on its defamation claim. Since the Mission *can* and *has* shown this, the dismissal of its claim cannot be upheld on the alternate ground that KIRO's motion to strike should have been granted.

KIRO makes two arguments as to why the Mission supposedly failed to carry its burden. First, KIRO notes that the trial court found that the complaint fails to state a claim upon which relief can be granted" – because Washington allegedly doesn't recognize actions for defamation by implication. Therefore KIRO argues that "by definition [the] Mission did not have any chance, let alone a probability, of prevailing on the merits." *BOR*, at 36-37. But this argument fails because (1) KIRO's statements were *explicitly* defamatory, and (2) even if they were only impliedly

defamatory, Washington *does* recognize actions for defamation by implication. *Brief of Appellant*, at 25; *infra* at 6-9. Since the CR 12(c) dismissal for failure to state a claim was *erroneous*, that ruling cannot supply the basis for an alternate ruling that the dismissal was proper under RCW 4.24.525(4) on the theory that claims of defamation by implication are not recognized in this State. Such claims *are* recognized in this State, and thus the Mission's complaint *did* state a viable claim (regardless of whether the defamation was express or implied). Accordingly, the erroneous CR 12(c) ruling provides no basis for any independent alternate ruling that dismissal would have been proper under the statute because the Mission cannot show that it is likely to prevail on its defamation claim.

Second, KIRO maintains that "the Mission does not attempt to provide any evidence of negligence. The fourth element" of a claim of defamation. *BOR*, at 37. Therefore, KIRO argues the Mission cannot carry its burden of establishing by clear and convincing evidence that it is likely to prevail on its defamation claim. But KIRO ignores the compelling evidence of its reporter's negligence which KIRO itself put in the record. The declaration of KIRO's own reporter states that he gathered documentary evidence about former Mission residents, and those records show that a remarkably *low* percentage of the people whom the Mission's residents and funds solicitors had felony convictions. *At best* reporter Halsne's own data

showed that only 7.5% of these people had felony convictions. CP 136, ¶ 58. Thus, the assertion that the Mission deliberately recruited violent felons, and used the county jail to find them, was contradicted by Halsne's own data. As Brian Jones noted,

If the Mission had a "tactic" of "recruiting" felons and a practice of "sending a bevy of historically violent felons" to people's houses to solicit money, surely it could have done a better job of "recruitment." Since Mr. Halsne's own research indicates that 93% of the Mission's residents did not have these felony characteristics, his own research shows that the assertions he made against the Mission are false.

CP 136-37, ¶ 58. Thus KIRO's reporter was grossly negligent, because he should have been aware of the contradiction between his statements and his own data. (Or worse, he was aware of the contradiction and decided to simply ignore it, in which case he intentionally made false statements.)

Other assertions made by KIRO's reporter were also contradicted by his own data. Halsne told Jones that Willie Edward Wilson had lived at the Mission house "recently" even though the court records, which Halsne had collected, included a detective's declaration stating that Wilson had been living in the Los Angeles area since 2005 and had a California ID card. CP 131-132, ¶¶ 35-36. Similarly, KIRO pointed to another sex offender, Ray Demry, as an example of someone whom the Mission recruited from the King County Jail, and yet Halsne's own documents

showed that Demry did *not* come to the Mission from King County Jail. CP 134, ¶ 16.¹⁹ Halsne failed to interview the House Manager of the Mission's facility, and thus failed to learn that (1) the Mission screens applicants in a deliberate effort to *reject* those people who have felony convictions; (2) the Mission *never* goes to the county jail to recruit residents; (3) that the Mission never asked the county jail to list its facility on its housing referral list and was unaware of the fact that it was on that list; and (4) *none* of the ten residents living in the Mission's facility in the spring of 2010 had been referred to the Mission by the King County Jail. CP 151-153, ¶¶ 3-11, CP 128, ¶¶ 18-20; CP 153, ¶ 12.²⁰

¹⁹ Halsne attached the prosecutor's certificate of probable cause in Demry's case to his own declaration, and yet that certificate shows that Demry did *not* come to the Mission until three years after his release from prison, thus contradicting Halsne's statements that the Mission's residents who were going door to door to solicit funds "are basically the kind right out of jail." CP 133, ¶ 44; CP 68.

²⁰ KIRO pretends that the "only evidence" of negligence that the Mission offered related to reporter Halsne's negligent conduct in other cases where he made defamatory statements, and further argues that this evidence is not admissible. KIRO claims that evidence of the Oklahoma judgment against Halsne for libel was not admissible because the Mission's counsel had no personal knowledge of the facts set forth in the reported decision of the Oklahoma Court of Civil Appeals in *Mitchell v. Griffin Television and Chris Halsne*, 60 P.3d 1058 (Okla. Civ. App. 2002), *cert. denied*, 538 U.S. 1013 (2003). But the decision was offered to show that Halsne was found liable for defamation by a jury in a judicial proceeding in which it was determined from the evidence that he was not only negligent, he was reckless. It is proper to take judicial notice of facts that are "not subject to reasonable dispute" and which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). In the present case, it cannot reasonably be disputed that (1) an Oklahoma jury found Halsne liable for recklessly defaming someone, and (2) the judgment against Halsne was affirmed by the Oklahoma appellate court. Nor can the accuracy of these facts reasonably be questioned since they are reported by the Oklahoma appellate court.

In sum, the Mission presented strong evidence of negligence, and thus *can* establish by clear and convincing evidence a probability that it would prevail on its defamation claim in a trial. Accordingly, the dismissal of the Mission's claim cannot be sustained on the alternate ground that the Mission cannot meet the requirements of RCW 4.24.525(4)(b).

3. RCW 4.24.525 IS UNCONSTITUTIONAL.

Even if this Court concluded (1) that RCW 4.24.525 *does* apply to the Mission's defamation claim; and (2) that the Mission *failed* to meet the statute's requirement of establishing, by clear and convincing evidence, a probability of prevailing on its claim, the dismissal of its defamation claim *still* could not be upheld on statutory grounds because RCW 4.24.525 is unconstitutional in several respects. It violates the doctrine of separation of powers, the right of access to courts, the First Amendment right to petition, equal protection, and the right to jury trial.

- a. **Unlike the California Anti-SLAPP Statute, Which Authorizes the Dismissal of Frivolous Lawsuits Where the Plaintiff Is Unable to Make Even a *Prima Facie* Showing That He Has a Chance of Prevailing, Washington's Anti-SLAPP Statute Purports to Authorize the Dismissal of Nonfrivolous Claims. KIRO Ignores This Distinction, and Thus Ignores the Fact That the Washington Statute Violates the Right of Access to the Courts and the Right to Petition.**

KIRO correctly states that "courts routinely 'punish' litigants for bringing meritless or frivolous lawsuits." *BOR*, at 45, citing CR 11. Similarly, KIRO

correctly states that “RCW 4.84.185 allows the prevailing party to recover attorneys’ fees where a defense or claim was ‘frivolous and advanced without reasonable cause.’²¹ The Mission *agrees* with KIRO that the constitutional right of access to the courts does *not* include any right to bring a frivolous lawsuit, BOR, at 39, or to be free from sanctions if a frivolous lawsuit is brought.

But KIRO attempts to dismiss the Mission’s constitutional challenge to RCW 4.24.525 by *falsely* implying that this statute merely authorizes Washington courts to strike “frivolous” claims, and is therefore no different than CR 11 and RCW 4.24.525. This is clearly not true. Not all cases where a plaintiff fails to “establish by clear and convincing evidence” that there is a probability he will prevail on his claim are also cases where the plaintiff’s claim is “frivolous.” There are plenty of *nonfrivolous* cases where the plaintiff cannot meet satisfy the “clear and convincing” threshold

²¹ In *Reid v. Dalton*, 124 Wn. App. 113, 100 P.3d 349 (2004), cited by KIRO, an attorney fee award granted pursuant to RCW 4.84.185 was affirmed. In *Reid* the plaintiff *conceded* that he knew his action was frivolous when he brought it. *Id.* at 354. Citing to *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L.Ed.2d 277 (1983), this court rejected Eugster’s argument that RCW 4.84.185 violated his right to petition because that right does not extend to filing frivolous lawsuits: “[W]hen . . . litigation is based on intentional falsehoods and knowingly frivolous claims,” the right to petition is not implicated because “sham litigation by definition does not involve bona fide grievances, [and therefore] does not come within the First Amendment right to petition.” *Id.* Since a dismissal under RCW 4.24.525 is *not* based on any finding that the plaintiff’s suit is frivolous or a sham based on knowing falsehoods, but is instead based on a ruling that the plaintiff cannot show by clear and convincing evidence that he is likely to prevail, such a dismissal *does* violate the First Amendment right to petition.

requirement. Indeed, if the plaintiff can only show by a simple *preponderance* of the evidence – but not by clear and convincing evidence -- that there is a probability that he will prevail, then under RCW 4.24.525(4)(b) his suit is stricken, even though he has shown everything that he needs to show in order to prevail at trial.²² A suit that a plaintiff is more likely than not to *win at trial* cannot, by any stretch of the imagination, be classified as a “frivolous” lawsuit. KIRO ignores this obvious distinction between CR 11 and RCW 4.84.185 on the one hand, and RCW 4.24.525(4)(b) on the other.

Moreover, KIRO attempts to seduce this Court into believing that Washington’s anti-SLAPP statute is no different from California’s, which has been upheld against the constitutional attack that it violates the right of access to the courts. But California’s anti-SLAPP statute *doesn’t* require a “clear and convincing evidence” threshold showing of a likelihood of prevailing. California *doesn’t* even require that the plaintiff establish a probability of prevailing *by a preponderance* of the evidence. Instead, California’s statute only requires a “prima facie” showing that there is “a

²² In an analogous situation the U.S. Supreme Court rejected a heightened pleading standard for plaintiffs pleading a claim of employment discrimination and noted: “It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-12, 122 S. Ct. 992, 152 L.Ed.2d 1 (2002).

probability that the plaintiff will prevail on the claim.” Cal. Code Civ. Proc. § 425.16(b)(1). The California Supreme Court described this *prima facie* standard in *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811, 821, 123 Cal.Rptr.2d 19 (2002):

Put another way, the plaintiff must demonstrate that the complainant is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence by the plaintiff is credited.

When deciding whether the plaintiff’s evidence is “legally sufficient” to defeat the motion, the trial court is *prohibited* from weighing the defendant’s evidence against the plaintiff’s evidence. *Rowe v. Superior Court*, 15 Cal.App.4th 1711, 1723, 19 Cal.Rptr.2d 625 (1993);²³ *accord Nygard*, 159 Cal.App.4th at 1044.²⁴ Thus a motion to strike pursuant to the California anti-SLAPP statute is “like a demurrer or motion for summary judgment in reverse.” *College Hospital, Inc. v. Superior Court*, 8 Cal.4th 704, 718-19, 34 Cal.Rptr.2d 898, 882 P.2d 894 (1994). So long as the plaintiff shows that he has sufficient evidence from which a jury *could* find for him, the defendant’s motion to strike *must* be denied and the case allowed to proceed to trial. This construction of California’s anti-SLAPP statute was found to be

²³ “In making this judgment, the trial court’s consideration of the defendant’s opposing affidavits does not permit a weighing of them against plaintiff’s supporting evidence, but only a determination that they do not, as a matter of law, defeat that evidence.”

²⁴ “[T]he trial court . . . does not weigh the credibility or comparative strength of competing evidence . . .”

constitutionally necessary to avoid the problem of creating “the potential deprivation of the right to jury trial that might result were [the California anti-SLAPP] statutes construed to require the plaintiff to *prove* the specified claim to the trial court.” *Rosenthal v. Great Western Fin. Securities Corp.*, 14 Cal.4th 394, 412, 58 Cal.Rptr.2d 875 (1996).²⁵

A prima facie showing requires considerably *less* than a showing by a preponderance of the evidence. *Cf. Johnson v. California*, 545 U.S. 162, 125 2410, (2005) (“‘more likely than not’ standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case”; all that is required are facts sufficient to support a reasonable inference); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510, 122 992 (2002) (prima facie case of violation of Title VII only requires evidence that supports an inference of discrimination).

If a plaintiff cannot even make a prima facie showing of a probability of prevailing, then by definition his suit is *frivolous* because he has not even

²⁵ KIRO’s attempt to rely on *Equilon Enterprises, Inc. v. Consumer Cause, Inc.*, 29 Cal.4th 53, 124 Cal.Rptr.2d 507 (2002) is similarly misplaced. The *Equilon* court reaffirmed the *Rosenthal* holding that a case could be dismissed under the California anti-SLAPP statute *only* if the plaintiff could not show that he had a legally sufficient claim. Thus California’s statute merely provided a means of dispatching “a plaintiff’s meritless claims.” *Id.* at 63. Given that the statute only applied to “meritless claims,” the Court rejected the contention that it violated the First Amendment right to petition since “[t]he right to petition is not absolute, providing little or no protection for *baseless litigation*.” *Id.* at 63-64 (italics added). But in sharp contrast to California’s anti-SLAPP statute, dismissals under RCW 4.24.525 are *not* limited to instances of “baseless litigation,” and thus the protection of the First Amendment right to petition *does* apply.

generated an inference that the facts necessary for liability are present. In sum, the California anti-SLAPP statute authorizes the granting of a motion to strike, and the imposition of attorneys' fees on the plaintiff, *only* if the plaintiff's suit is frivolous. Thus, California cases upholding the constitutionality of California's anti-SLAPP statute provide no support for KIRO's contention that Washington's statute is also constitutional. The Washington statute has a *much* greater reach than the California statute. It is *not* limited to frivolous actions.²⁶ On the contrary it authorizes the granting of a motion to strike, and the imposition of attorneys' fees, and a \$10,000 fine, even in cases where the plaintiff shows by a preponderance of the evidence that he is likely to win, simply because he cannot show by clear and convincing evidence that he is likely to win. Thus, the Washington statute *does* violate the constitutional right of access to the courts.

²⁶ KIRO also purports to rely on *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996), a case in which the Rhode Island Supreme Court upheld that state's anti-SLAPP law against a constitutional attack. But KIRO simply ignores the fact that Rhode Island's statute is explicitly limited to "objectively baseless" litigation. Its statute states that petitioning activity, such as filing a lawsuit, is conditionally protected by the First Amendment "except if said petition or free speech constitutes a sham." *Id.* at 61. The statute further defines "sham petitioning" as litigation that is "objectively baseless." *Id.* The Rhode Island Supreme Court applied the *Noerr-Pennington* rule for determining whether an action was "objectively baseless" and limited the statute's applicability to instances where no reasonable person could realistically expect success on the merits. *Id.* at 60, citing *Professional Real Estate Investors, Inc. v. Columbia Pictures*, 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L.Ed.2d 611 (1993). Unlike the Rhode Island Legislature, the Washington Legislature did *not* limit the reach of its anti-SLAPP statute, RCW 4.224.525, to lawsuits which are "objectively baseless" under the "sham petitioning" test set down by the U.S. Supreme Court. And for that very reason, the Rhode Island Supreme Court undoubtedly would find Washington's statute to be unconstitutional.

(Footnote continued on next page.)

b. Washington’s Anti-SLAPP Statute Violates the Doctrine of Separation of Powers by Purporting to Require the Courts to Disregard the Civil Rules on a Matter of Procedure by Precluding Pretrial Discovery.

As noted above, RCW 4.24.525 is utterly *unlike* California’s anti-SLAPP statute, which has been construed by the California courts as a type of “motion for summary judgment in reverse.” *College Hospital, Inc. v. Superior Court*, 8 Cal.4th 704, 718-19, 34 Cal.Rptr.2d 898, 882 P.2d 894 (1994). Under California’s statute, the plaintiff’s only burden is to show that he can present a prima facie case – a case in which, without weighing his evidence against the defendant’s evidence, he can show has a chance of succeeding. *Wilson*, 28 Cal.4th at 821; *Rowe*, 15 Cal.App.4th at 1723. But Under Washington’s statute, in order to survive a motion to strike, a plaintiff must make a clear and convincing showing that he is likely to prevail, even though that is *much* more than the showing a party needs to survive a motion for summary judgment under CR 56(c). Under the Rule, a motion for summary judgment will be denied if the opposing party simply demonstrates the existence of “a genuine issue as to any material fact” and that the moving party is not “entitled to judgment as a matter of law.”

The conflict between the statute -- which compels Superior Court judges to strike a plaintiff’s claim if he cannot meet the higher “clear and

convincing evidence” standard -- and the court rule -- which authorizes dismissal of the plaintiff’s case only if he cannot meet the far lower standard of demonstrating the existence of a genuine issue of fact – creates a clear separation of powers problem. If the statute and the court rule are both directed towards a matter of procedure -- and they clearly are in this case -- then the statute must be found unconstitutional because it invades the power and prerogative of the judicial branch to determine the rules of judicial procedure.

As the Supreme Court stated just a few weeks ago:

“[T]he power to prescribe rules for procedure and practice” is an inherent power of the judicial branch, *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974), and flows from article IV, section 1 of the Washington Constitution. *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975).

State v. Gresham, 2012 WL 19664, at *9. When there is a conflict between a statute and a court rule, “the court rule will prevail in procedural matters and the statute will prevail in substantive matters.” *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). The *Gresham* Court struck down RCW 10.58.090 because it mandated the admission of evidence notwithstanding the fact that such evidence was inadmissible under ER 404(b). Similarly, in *State v. Smith, supra*, the Court struck down RCW 10.73.040 because it conflicted with CrR 3.2(h) on a matter of criminal procedure.

The conflict between RCW 4.24.525(4) and CR 56 could not be starker. The rule requires that the plaintiff be allowed to prosecute his claim unless he cannot show a genuine issue of fact, and yet the statute allows the plaintiff's claim to survive only if he can show by clear and convincing evidence that he has a probability of prevailing. Moreover, as noted previously, the statute requires the plaintiff to make a greater showing to survive the motion to strike than he must make at trial in order to prevail. *Cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. at 511-12 (“incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits . . .”).

c. Washington's Anti-SLAPP Statute Violates the Plaintiff's Art. 1, Section 21 Right to a Jury Trial.

As the California Supreme Court noted, if the threshold showing needed to survive a statutory anti-SLAPP motion to strike is set any higher than the standard that must be met to survive a summary judgment motion, then it violates the constitutional right to jury trial. *Rosenthal*, 14 Cal.4th at 412. That is why the California courts have said the *same* low summary judgment standard also applies to motions to strike. And that is also why the *higher* standard imposed by RCW 4.24.525 *violates* the Washington state constitutional right to jury trial, which must be preserved “inviolable.” *Washington Const.*, article 1, Section 21.

As stated in *Lamon v. Butler*, 112 Wn.2d 193, 198 n.5, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989), “when there is no genuine issue of material fact, summary judgment proceedings do not infringe upon a litigant’s constitutional right to a jury trial.” Thus, when a plaintiff meets the summary judgment threshold, but cannot meet the RCW 4.24.525(4) “clear and convincing evidence” threshold, any order granting the defendant’s motion to strike violates art.1. § 21, in addition to violating the separation of powers doctrine.

d. Washington’s Anti-SLAPP Statute Is Unconstitutional Because it Violates the Right of Access to Courts.

As in *Putman*, RCW 4.24.525 violates the constitutional right to access to courts by restricting a plaintiff’s right to engage in discovery. KIRO acknowledges that the statute infringes upon this constitutional right, but claims that the Mission lacks standing to raise this argument because the Mission never asked the trial court to make a finding that there was good cause to permit discovery. This argument is legally incorrect.²⁷

²⁷ It is also somewhat factually misleading. First, it is not entirely accurate to state that the Mission never asked for leave to conduct some discovery. KIRO initially conceded that the Mission was not a public figure and agreed that the Mission need only prove that KIRO acted negligently. KIRO contended that the Mission had not provided any evidence of negligence. CP 33. Then in a reply brief KIRO attempted to switch gears and tried to argue that the Mission was a public figure, that therefore the “actual malice” standard applied, and that the motion to strike should be granted because the Mission could not meet that higher standard which requires evidence of reckless conduct. CP 226. The Mission objected to KIRO’s attempt to change its position, and strenuously disagreed with the late contentions that the Mission was a “public figure” and that the actual malice standard applied. At the
(Footnote continued on next page.)

KIRO claims that when this Court considers the Mission's claim that RCW 4.24.525 is unconstitutional, it should "consider[]" only whether the statute is sufficiently definite *as applied* to the defendant's particular conduct." *BOR*, at 39. KIRO asserts that the Mission has no standing to make a facial challenge to the statute because "the anti-SLAPP statute does not chill a substantial amount of protected speech," and because there is "no constitutional right to bring a meritless lawsuit." *Id.* But as noted above, the Mission's defamation was never found to be "meritless" or "baseless" or "frivolous." The Superior Court never ruled on KIRO's motion to strike. On appeal, KIRO's argument is merely that the Mission failed to meet the statutory requirement of establishing by "clear and convincing evidence" that it was likely to prevail, not that it was frivolous. Therefore, the Mission's defamation suit *is* protected by the constitutional rights to petition and to access to the courts. Since its defamation claim *is* protected, RCW

hearing on KIRO's motion to strike, the Mission complained that if the Superior Court allowed KIRO to switch gears like that, then the Mission should be given the opportunity to depose KIRO's reporter in order to develop the evidence of actual malice. Judge Hilyer *agreed* with the Mission's lawyer that *if* the actual malice standard applied, then he would find good cause to allow the Mission to conduct discovery. But Judge Hilyer found it unnecessary to make that finding because he decided to dismiss the suit on CR 12(c) grounds without ever reaching the issues regarding the constitutionality of RCW 4.24.525. Thus, it is inaccurate to say that the Mission never asked for leave to conduct discovery. The Mission did ask, but the Superior Court thought it unnecessary to rule on that request. Now, on appeal, KIRO suggests that the dismissal can be affirmed on the alternate ground that its RCW 4.24.525 motion to strike should have been granted. But if that issue is to be reached by this Court, then this Court must acknowledge that the Mission *did* ask for leave to conduct discovery if KIRO was going to be permitted to argue that proof of actual malice was required.

4.24.525 is unconstitutional “as applied to the defendant’s particular conduct.”

Moreover, even if this Court *were* to find that the statute is constitutional as applied to the Mission’s defamation suit, the Mission would *still* have standing to raise a facial claim because the statute *does* chill a substantial amount of protected speech. *Any litigant* who has a triable claim – a claim that would survive a summary judgment motion – a claim for which he can present a *prima facie* case – but who nevertheless fears that he will not be able to make a showing by “clear and convincing evidence” that he is likely to prevail, *will* be chilled from bringing suit by the threat of an award of attorneys’ fees and a \$10,000 punitive damage award. Since there are *many* cases where plaintiffs can clear the hurdle of frivolousness without being confident that they can also clear the hurdle of “clear and convincing evidence,” the anti-SLAPP statute *does* chill “a substantial amount” of constitutionally protected petitioning protected by the First Amendment. And in First Amendment cases, if a party can show that a statute is overbroad because it chills a substantial amount of protected speech, then the litigant has third party standing to raise the First Amendment issue and to make a facial attack on the statute, even if the statute is perfectly constitutional as applied to his own conduct. *State v. Glas*, 147 Wn.2d 410, 419, 54 P.3d 147 (2002) (statute “may be invalidated for overbreadth where

it would be unconstitutional as applied to others, even if not as applied to the litigant”); *Tacoma v. Luvene*, 118 Wn.2d 826, 840, 827 P.2d 1374 (1992) (same). Consequently, the Mission *does* have standing, *both* because the statute *is* unconstitutional as applied to its own defamation claim, *and* because the statute chills a substantial amount of protected First Amendment activity and violates the rights of other would be litigants, thus giving the Mission *third party standing as well*.

In sum, even if this Court thinks that the Mission has failed to make the statutorily required showing of the probability that it will prevail at trial, it still cannot affirm the dismissal of the Mission’s complaint for failure to meet the requirements of RCW 4.25.525 because that statute violates the Washington State Constitution (separation of powers, access to courts and right to jury trial) *and* the First Amendment to the U.S. Constitution.

- e. **RCW 4.24.525 Also Violates Equal Protection Because it Requires a Plaintiff Seeking Fees to Prove That the Defendant’s Motion to Strike Was Frivolous But it Does Not Require Defendants Seeking Fees to Prove That the Plaintiff’s Claim Was Frivolous. It Also Violates Separation of Powers Because it *Mandates* the Imposition of Sanctions Against Plaintiffs With *Nonfrivolous* Claims, Whereas CR 11 Merely *Permits* Sanctions, But *Only* Against Parties Who Have Brought *Frivolous* Claims.**

KIRO simply ignores the fact that the language used in subsection (6)(a) and in subsection (6)(b) is strikingly different. KIRO pretends that *both* a moving party and a nonmoving party are entitled to an award of

fees and a \$10,000 penalty if they show that their opponent's position was "frivolous." *BOR*, at 45. But that is simply false. RCW 4.24.525(6)(b) does require a plaintiff (the nonmoving party) to show that the defendant's motion to strike was frivolous in order to obtain an award of fees and \$10,000. But RCW 4.24.525(6)(a) does *not* require a defendant (the moving party) to show that the plaintiff's claim was frivolous in order to obtain an award of fees and \$10,000. The word "frivolous" appears in subsection (6)(b). The word frivolous does *not* appear in subsection (6)(a). For a defendant to get fees and the penalty it need only "prevail, in whole or in part" on its motion to strike. And under subsection (4) the defendant *always* prevails whenever the plaintiff fails "to establish by clear and convincing evidence a probability of prevailing" on his claim. A defendant need *not* show that the plaintiff's claim is frivolous in order to "prevail." Thus the statute is skewed in favor of defendants, and it penalizes plaintiffs who exercise their constitutional right of access to the courts.

In its opening brief, the Mission pointed out that RCW 4.24.525 conflicts with CR 11, and thus creates another separation of powers violation. CR 11 *only* authorizes sanctions against a party who asserted a frivolous claim or defense. But together subsections (4)(b) and (6)(a) of RCW 4.24.525 *mandates* the imposition of sanctions against plaintiffs

who have asserted nonfrivolous claims, but who cannot clear the “clear and convincing evidence” hurdle. Sanctions are permissive under CR 11, but mandatory under RCW 4.24.525. Since the imposition of sanctions is a procedural matter, it is within the power of the judicial branch to make the rules regarding sanctions. Thus RCW 4.24.525 invades the prerogatives of the judicial branch and violates separation of powers, just like the statute in *Gresham*. KIRO attempts to ignore this issue by ignoring the differences between the scope of the statute and the scope of the court rule. KIRO simply pretends that they cover the same ground.

KIRO cites to a number of cases which hold that statutes which allow prevailing *plaintiffs* to recover attorneys’ fees, but not prevailing defendants, do not violate equal protection because they satisfy the rational basis test. *BOR*, at 45, citing *Ford Motor Credit Co. v. Barrett*, 115 Wn.2d 556, 800 P.2d 367 (1990); *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 948 P.2d 1264 (1997); *Seattle Sch. Dist. V. Dept. Labor & Industries*, 116 Wn.2d 352, 804 P.2d 621 (1991). But KIRO simply ignores the fact that in all of these cases the statutes favored plaintiffs over defendants, whereas RCW 4.24.525 favors defendants over plaintiffs. *Plaintiffs*, by virtue of the fact that they initiate lawsuits, are exercising their state and federal constitutional rights of access to courts and the right to petition. Defendants, since they do *not* initiate court actions, but instead

are hauled into court by plaintiffs, are *not* exercising their state and federal constitutional rights of access to courts and the right to petition. Thus “one way” fees statutes that *favor* plaintiffs (people who buy lemon cars, insureds whom insurers refuse to cover, injured workers) do *not* implicate the fundamental rights of petition and access to courts, and therefore do not trigger strict scrutiny. Since *none* of these cases cited by KIRO involve fee shifting statutes which discriminate against plaintiffs and in favor of defendants, none of them are relevant to the issue raised in this case. But RCW 4.24.525 does discriminate *against* plaintiffs, and thus it does trigger strict scrutiny. By making it very hard for plaintiffs to get fees (they have to show frivolousness) and not so hard for defendants (they don’t have to show frivolousness), RCW 4.24.525 violates equal protection because there is no compelling governmental interest that is narrowly served by such a discriminatory statute.

KIRO also ignores the fact that none of the statutes in the cases they cited involved the imposition of *punitive* sanctions (an automatic award of \$10,000). They all involved compensatory awards of attorneys’ fees. RCW 4.24.525 not only authorizes the imposition of fee awards against plaintiffs, in order to make defendants whole, but authorizes in *addition* a \$10,000 penalty, the sole purpose of which is to chill other plaintiffs from

having the temerity to exercise their constitutional rights to petition and to have access to the courts for redress of grievances.

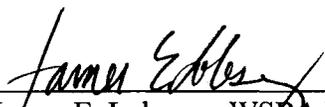
One final observation: KIRO quotes language from *Ford Motor* as support for its contention that only minimum scrutiny applies to distinctions made in statutes which authorize fee shifting because “access to the courts is not . . . a fundamental right . . .” BOR, at 46, quoting *Ford Motor*, 115 Wn.2d at 562. But this quoted passage from *Ford Motor* is obviously no longer good law in light of the Supreme Court’s express recognition of such a constitutional right in *Addleman*, 139 Wn.2d 751, 513, 991 P.2d 1123 (2000); *Putman*, 166 Wn.2d at 985; and in *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 782, 819 P.2d 370 (1991).

D. CONCLUSION

The dismissal order enter below cannot be affirmed upon any ground. Accordingly, the Mission asks this Court to vacate the Superior Court’s dismissal order and to remand this case with directions to allow the plaintiff to proceed with its defamation claim.

DATED this 13th day of February 2012,

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz, WSBA No. 8787
Lydia A. Zakhari, WSBA No. 41249
Of Attorneys for Appellant

APPENDIX A

WASHINGTON STATE LEGISLATURE

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[RCWs](#) > [Title 4](#) > [Chapter 4.24](#) > [Section 4.24.525](#)

[4.24.520](#) << [4.24.525](#) >> [4.24.530](#)

RCW 4.24.525

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

(1) As used in this section:

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

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

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

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

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

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

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

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

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

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

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

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[2010 c 118 § 2.]

Notes:

Findings -- Purpose -- 2010 c 118: "(1) The legislature finds and declares that:

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

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

(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

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

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

(2) The purposes of this act are to:

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

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

(c) Provide for attorneys' fees, costs, and additional relief where appropriate." [2010 c 118 § 1.]

Application -- Construction -- 2010 c 118: "This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." [2010 c 118 § 3.]

Short title -- 2010 c 118: "This act may be cited as the Washington Act Limiting Strategic Lawsuits Against Public Participation." [2010 c 118 § 4.]

APPENDIX B

C

Effective: January 1, 2011

West's Annotated California Codes Currentness

Code of Civil Procedure (Refs & Annos)

Part 2. Of Civil Actions (Refs & Annos)

Title 6. Of the Pleadings in Civil Actions

Chapter 2. Pleadings Demanding Relief (Refs & Annos)

Article 1. General Provisions (Refs & Annos)

→ → § 425.16. Anti-SLAPP actions; motion to strike; discovery; remedies

(a) The Legislature finds and declares that there has been 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. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, 11130.5, or

54690.5 [FN1].

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

CREDIT(S)

(Added by Stats.1992, c. 726 (S.B.1264), § 2. Amended by Stats.1993, c. 1239 (S.B.9), § 1; Stats.1997, c. 271 (S.B.1296), § 1; Stats.1999, c. 960 (A.B.1675), § 1, eff. Oct. 10, 1999; Stats.2005, c. 535 (A.B.1158), § 1, eff. Oct. 5, 2005; Stats.2009, c. 65 (S.B.786), § 1; Stats.2010, c. 328 (S.B.1330), § 34.)

[FN1] So in enrolled bill. Probably should be "54960.5".

Current with all 2011 Reg.Sess. laws; all 2011-2012 1st Ex.Sess. laws; and Gov.Reorg.Plan No. 1 of 2011.

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