

66868-4

66868-4

NO. 66868-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

UNITED STATES MISSION CORPORATION,

Appellant/Cross-Respondent,

v.

KIRO TV, INC.,

Respondent/Cross-Appellant.

REPLY BRIEF OF CROSS-APPELLANT KIRO TV, INC.

Bruce E.H. Johnson
Ambika Kumar Doran
Davis Wright Tremaine LLP
Attorneys for Respondent KIRO TV, Inc.

1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Phone: (206) 622-3150
Fax: (206) 757-7700

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR 15 PM 4:04

ORIGINAL

DWT 19161930v2 0721090-000058

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	3
A. This Lawsuit is Subject to the Anti-SLAPP Statute.	3
1. The broadcasts are an exercise of KIRO’s constitutional free speech rights.....	3
2. Mission waived its argument that its operations are not a matter of public concern, and in any event, they are.	7
B. Mission Failed to Show a Probability of Prevailing on the Merits by Clear and Convincing Evidence.	8
1. Mission failed to show the statements are false.....	9
2. Mission waived its arguments that KIRO’s broadcasts are unprivileged, and in any event failed to show they are.....	11
3. Mission waived the bulk of its arguments that KIRO acted negligently, but even so, did not show negligence.	12
4. Mission failed to show that the statements caused it any injury.	13
5. Mission failed to show the headline “Jailhouse Used to Find Door-to-Door Solicitors” is defamatory.....	15
C. The Anti-SLAPP Statute is Constitutional.	17
1. The anti-SLAPP statute does not violate the right of access or separation of powers by creating a standard more stringent than summary judgment.....	17
2. Mission lacks standing to challenge the anti-SLAPP statute’s discovery stay.	20
3. The anti-SLAPP statute’s penalties do not violate equal protection or separation of powers.	21
D. The Court Should Reverse the Trial Court’s Anti-SLAPP Decision and Impose the Statute’s Mandatory Penalties.	22

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Batzel v. Smith</i> , 333 F.3d 1018 (9th Cir. 2003)	19
<i>Castello v. City of Seattle</i> , 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010)	4, 6
<i>Condit v. Nat’l Enquirer, Inc.</i> , 248 F. Supp. 2d 945	7, 8, 17
<i>Dorr v. United States</i> , 195 U.S. 138 (1904).....	16
<i>Engel v. Falk</i> , 2006 WL 2435003 (W.D. Wash. Aug. 22, 2006).....	14
<i>Kaelin v. Globe Communications, Corp.</i> , 162 F.3d 1036 (9th Cir. 1998)	17
<i>Lane v. Wash. Daily News</i> , 85 F.2d 822 (D.C. Cir. 1936).....	16
<i>Morning Journal Ass’n v. Duke</i> , 128 F. 657 (2d Cir. 1904).....	16
<i>Phoenix Trading, Inc. v. Kayser</i> , 2011 WL 3158416 (W.D. Wash. July 25, 2011)	4, 5
OTHER CASES	
<i>Campbell v New York Evening Post, Inc.</i> , 245 N.Y. 320, 157 N.E. 153 (1927).....	16
<i>Caruso v. Local Union No. 690 of Int’l Bhd. of Teamsters</i> , 100 Wn.2d 343, 670 P.2d 240 (1983).....	14
<i>Carver v. Bonds</i> , 135 Cal. App. 4th 328, 37 Cal. Rptr. 3d 480 (2005).....	4

<i>Chase v. Daily Record, Inc.</i> , 83 Wn.2d 37, 515 P.2d 154 (1973).....	9
<i>Chavez v. Mendoza</i> , 94 Cal. App. 4th 1083, 114 Cal. Rptr. 2d 825 (2001).....	5
<i>Christian Research Inst. v. Alnor</i> , 148 Cal. App. 4th 71, 55 Cal. Rptr. 2d 443 (2007).....	18
<i>Conroy v. Spitzer</i> , 70 Cal. App. 4th 1446, 83 Cal. Rptr. 2d 443 (1999).....	18
<i>Corey v. Pierce Cnty.</i> , 154 Wn. App. 752, 225 P.3d 367 (2010).....	9
<i>Damon v. Ocean Hills Journalism Club</i> , 85 Cal. App. 4th 468, 102 Cal. Rptr. 2d 205 (2000).....	6
<i>Haueter v. Cowles Publ'g Co.</i> , 61 Wn. App. 572, 811 P.2d 231 (1991).....	11
<i>Herron v. Tribune Publ'g Co.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987).....	11
<i>Hometown Props., Inc. v. Fleming</i> , 680 A.2d 56 (R.I. 1996).....	19
<i>Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.</i> , 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (1995).....	6
<i>Las Vegas Sun, Inc. v. Franklin</i> , 74 Nev. 282, 329 P.2d 867 (1958).....	17
<i>Lee v. Columbian, Inc.</i> , 64 Wn. App. 534, 826 P.2d 217 (1991).....	10
<i>Maranatha Corr., LLC v. Dep't of Corr. & Rehab.</i> , 158 Cal. App. 4th 1075, 70 Cal. Rptr. 3d 614 (2008).....	6
<i>Mark v. Seattle Times</i> , 96 Wn.2d 473, 635 P.2d 1081 (1981).....	18

<i>Mohr v. Grant</i> , 153 Wn. 2d 812, 108 P.3d 768 (2005).....	10
<i>Moloney v. Tribune Publ'g Co.</i> , 26 Wn. App. 357, 613 P.2d 1179 (1980).....	11, 12
<i>Navellier v. Sletten</i> , 29 Cal. 4th 82, 124 Cal. Rptr. 2d 530 (2002).....	5
<i>Norfolk Post Corp. v. Wright</i> , 140 Va. 735, 125 S.E. 656 (1924).....	16
<i>Nygaard, Inc. v. Uusi-Kettula</i> , 159 Cal. App. 4th 1027, 72 Cal. Rptr. 3d 210 (2008).....	8
<i>Purvis v. Bremer's, Inc.</i> , 54 Wn.2d 743, 754, 334 P. 2d 705 (1959).....	15
<i>Schmalenberg v. Tacoma News, Inc.</i> , 87 Wn. App. 579, 943 P.2d 350 (1997).....	14
<i>Seelig v. Infinity Broad. Corp.</i> , 97 Cal. App. 4th 798, 119 Cal. Rptr. 2d 108 (2002).....	6
<i>Silverhawk, LLC v. KeyBank Nat'l Ass'n</i> , 165 Wn. App. 258, 268 P.3d 958 (2011).....	7
<i>Stewart v. Rolling Stone LLC</i> , 181 Cal. App. 4th 664, 105 Cal. Rptr. 3d 98 (2010).....	18
<i>Vern Sims Ford, Inc. v. Hagel</i> , 42 Wn. App. 675, 713 P.2d 736 (1986).....	14
<i>Wash. Escrow Co. v. McKinnon</i> , 40 Wn.2d 432, 243 P.2d 1044 (1952).....	3
<i>Weinberg v. Feisel</i> , 110 Cal. App. 4th 1122, 2 Cal. Rptr. 3d 385 (2003).....	6
<i>Yeakey v. Hearst Commc'ns, Inc.</i> , 156 Wn. App. 787, 234 P.3d 332 (2010).....	10

Zhao v. Wong,
48 Cal. App 4th 114, 55 Cal. Rptr. 2d 909 (1996)..... 6

OTHER STATUTES

CAL. CIV. PROC. CODE. § 425.16..... 18

RCW 4.24.510 22

RCW 4.24.525 passim

RULES

CR 11 2, 19, 21, 22

CR 12 20

CR 56 1, 19

ER 404 13

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. I..... 19

OTHER AUTHORITIES

95 A.L.R.3d 660 (2011)..... 16

I. INTRODUCTION

In its response to KIRO's cross-appeal, Mission raises several new arguments the Court should decline to consider. But even if it does not, it should still find the trial court erred by failing to impose the anti-SLAPP statute's mandatory remedies after ruling that Mission did not have a chance—let alone a probability—of prevailing on its claims. Several principles require this result.

First, the anti-SLAPP statute applies to this lawsuit because Mission's claims target KIRO's exercise of its free speech rights on a matter of public concern: Mission's admitted practice of requiring its residents, including some criminals, to perform door-to-door solicitations. The statute is *not* limited to communications made to the government (an argument Mission has wisely abandoned) or to those made in public fora (one that is new). Nor is it limited to conduct other than speech, a claim California courts have rejected. Even if there were *any* doubt about the statute's applicability, the legislature mandated it be construed broadly.

Second, Mission has failed to prove a probability of prevailing on the merits by clear and convincing evidence. Much like CR 56, the anti-SLAPP statute requires Mission to show there is no genuine issue of material fact as to each of four libel elements. In the trial court, Mission attempted to make this showing only as to *two* elements: falsity and fault.

It now claims that KIRO's statements were unprivileged because a sheriff's website is not an "official proceeding" and that it need not show damages because the broadcasts were libelous per se. But even these new arguments fail. The fair report privilege applies to *all* statements made by public officials, and a plaintiff must show damages in any libel lawsuit alleging negligence. Moreover, Mission has still failed to identify statements it claims are false, or that were made negligently.

Third, the Court should reject Mission's constitutional challenges to the anti-SLAPP law. Almost all of Mission's arguments—which are also new—rest on the false assumption that the statute mandates a more stringent showing than at trial. To the contrary, the statute merely requires Mission to set forth enough evidence to defeat a motion for summary judgment, i.e., to provide clear and convincing evidence of each libel element. Its lopsided penalties are also valid. Mission fails to cite any authority for its claim that the legislature may not discriminate against plaintiffs, and if that were true, all immunities would unconstitutionally favor defendants. Nor can it explain how the statute conflicts with CR 11 when a court may apply both that rule and RCW 4.24.525 to any case.

The Court should find that the trial court erred by failing to impose the anti-SLAPP statute's mandatory sanctions while at the same time finding this lawsuit lacks merit, and award it its fees on appeal.

II. ARGUMENT

A. This Lawsuit is Subject to the Anti-SLAPP Statute.

Recognizing that the Washington Legislature unquestionably intended the anti-SLAPP statute to apply to speech about all matters of public concern, Mission has dropped its misguided argument that the law encompasses only communications made to the government. Instead, it claims that KIRO's broadcasts were not made in a public forum and that its statements are not "conduct" protected by the statute, despite a wealth of contrary authority. And, for the first time in this lawsuit, it claims that its operations are not a matter of public concern. Not only has Mission waived this argument, but it relies for it on a single federal decision interpreting the California statute that later cases have explicitly rejected.¹ The anti-SLAPP statute applies here.

1. The broadcasts are an exercise of KIRO's constitutional free speech rights.

Mission devotes several pages to its argument that section 2(d) of the anti-SLAPP statute does not apply to this lawsuit because KIRO's statements were not made in a public forum. Cr.-Resp. Br. at 25-30. Although this is incorrect, *see infra* at 5-7, it is irrelevant because KIRO's

¹ California cases are persuasive in interpreting Washington's anti-SLAPP statute not only because federal courts have so held, but also because Washington courts presume statutes borrowed from another jurisdiction have the same meaning as in that jurisdiction. *See Wash. Escrow Co. v. McKinnon*, 40 Wn.2d 432, 436, 243 P.2d 1044 (1952).

conduct falls within section 2(e), which expressly protects certain statements and “[a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern.” RCW 4.24.525(2)(e). Mission claims that KIRO’s statements are not “other lawful conduct.” This interpretation of the anti-SLAPP statute contravenes the legislature’s mandate that it be construed broadly, and defies common sense and precedent.

Construing “conduct” to include only “symbolic speech,” Cr.-Resp. Br. at 31, would render the word “other” meaningless and is inconsistent with Washington and California law. The California Court of Appeal rejected the argument that “‘conduct’ ... refers only to actions such as picketing or demonstrations” because “neither this court nor others have given [the ‘other conduct’ provision] the narrow interpretation plaintiff urges.” *Carver v. Bonds*, 135 Cal. App. 4th 328, 342-43, 37 Cal. Rptr. 3d 480 (2005) (collecting cases). Further, two federal courts applying Washington law have already applied section 2(e) to speech. *Phoenix Trading, Inc. v. Kayser*, 2011 WL 3158416, at *8 (W.D. Wash. July 25, 2011) (declining to decide whether statements were made in a public forum because they fell “within the ... catch-all provision of RCW 4.24.525(2)(e)”; *Castello v. City of Seattle*, 2010 WL 4857022, at *5

(W.D. Wash. Nov. 22, 2010) (statements in e-mails qualified as “conduct” under the statute’s “catch-all” provision).

Moreover, Mission’s claim that section 2(e) only applies to “lawful” non-defamatory speech—another new argument—would require the Court to assess the validity of the plaintiff’s claims *before* applying the anti-SLAPP statute.² But “a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary.” *Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1089, 114 Cal. Rptr. 2d 825 (2001). “Otherwise, the second step would become superfluous in almost every case, resulting in an improper shifting of the burdens.” *Id.* See also *Navellier v. Sletten*, 29 Cal. 4th 82, 94-95, 124 Cal. Rptr. 2d 530 (2002) (declining to interpret preamble of California statute, which suggests its purpose is to promote the “valid” exercise of free speech, to apply only to “valid” speech).

Even if the Court accepts Mission’s interpretation of section 2(e), its lawsuit falls within section 2(d), which protects statements made “in a place open to the public or a public forum.” RCW 4.24.525. The only two Washington courts to confront this question have found that news outlets are public fora. *Phoenix Trading*, 2011 WL 3158416, at *7;

² The term “unlawful” does not suggest otherwise, and merely renders the anti-SLAPP statute inapplicable to criminal charges.

Castello, 2010 WL 4857022, at *6. Numerous California courts have reached the same conclusion, moreover, including the two district appellate courts³ that Mission alleges have not. See *Maranatha Corr., LLC v. Dep't of Corr. & Rehab.*, 158 Cal. App. 4th 1075, 1086, 70 Cal. Rptr. 3d 614 (2008) (Third District) (local newspaper is public forum); *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 807-08, 119 Cal. Rptr. 2d 108 (2002) (First District) (broadcast was made in public forum).

By contrast, two of the cases upon which Mission heavily relies—*Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (1995), and *Zhao v. Wong*, 48 Cal. App. 4th 114, 55 Cal. Rptr. 2d 909 (1996), Cr.-Resp. Br. at 28-30—“predate the 1997 [legislative] amendment requiring a broad interpretation” of the California anti-SLAPP statute, pursuant to which “the Legislature *expressly* intended to *overrule* *Zhao*’s narrow view of the statute.” *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 478, 102 Cal. Rptr. 2d 205 (2000) (emphasis added). A third case, *Weinberg*, is equally unpersuasive because, like *Zhao*, it relies on the First Amendment’s definition of “public forum.” *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1131 n.4, 2

³ The California Court of Appeal is divided into districts, and *some* districts are divided into divisions. Thus, *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (1995), was not decided by the Court’s “Division 5,” Cr.-Resp. Br. at 28, but by the First District. Nor is it accurate to state that the “greater weight” of California authority “goes the other way,” Cr.-Resp. Br. at 28, while pointing to cases in just *two* of the *six* districts.

Cal. Rptr. 3d 385 (2003). Mission's last case, *Condit v. Nat'l Enquirer, Inc.*, Cr.-Resp. Br. at 26, is a federal decision that offers no analysis and no authority for its holding. 248 F. Supp. 2d 945, 953 (E.D. Cal. 2002).

2. Mission waived its argument that its operations are not a matter of public concern, and in any event, they are.

For the anti-SLAPP statute to apply, the statements must also be of public concern. Mission now claims that KIRO's broadcasts do not meet this test. "An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Silverhawk, LLC v. KeyBank Nat'l Ass'n*, 165 Wn. App. 258, 265, 268 P.3d 958 (2011).

Even if the Court considers this argument, "public concern" includes a broadcast about an organization listed by a county as a place for recently released criminals that requires its residents to solicit from frightened homeowners. Mission argues that KIRO's interpretation of "public concern" would allow "newspapers and broadcasters the power to self-immunize themselves ... for defamation." Cr.-Resp. Br. at 34. But the anti-SLAPP statute provides *no unqualified immunity* for any statements, let alone defamatory ones. Instead, it requires the plaintiff to show that it has a legal basis for its claim at the outset. If it does, the lawsuit proceeds.

To support its narrow interpretation, Mission relies almost entirely on *Condit*, a federal decision finding that the anti-SLAPP statute did not apply to an article in the *National Enquirer* about former Congressman Gary Condit's alleged involvement in the disappearance of intern Chandra Levy. 248 F. Supp. 2d at 954. But California's Second Appellate District flatly rejected *Condit's* narrow definition of "public interest" because it relied on cases before the 1997 amendment of the anti-SLAPP statute, in which the Legislature "expressly rejected this limited view of the anti-SLAPP statute." *Nygaard, Inc. v. Uusi-Kettula*, 159 Cal. App. 4th 1027, 1044, 72 Cal. Rptr. 3d 210 (2008). The same liberal construction principle applies here, and defeats Mission's argument.

B. Mission Failed to Show a Probability of Prevailing on the Merits by Clear and Convincing Evidence.

Because KIRO showed the anti-SLAPP statute applies, Mission must show a probability of prevailing by clear and convincing evidence. It has not. KIRO does not base this argument *only* on Mission's failure to show negligence. Cr.-Resp. Br. at 39-42. Rather, dismissal is appropriate from the face of the Complaint, as the trial court found. If this Court agrees, it need not look any further: a complaint that fails to state any basis for relief necessarily would fail to overcome a summary judgment motion.

Further, Mission failed to make a *prima facie* showing on *any* of the four defamation elements, that is, to show KIRO's statements are false, unprivileged, were made negligently, or caused it any damage. A failure to show any *one* element required dismissal of the libel claim.

1. Mission failed to show the statements are false.

Ignoring the bulk of KIRO's arguments, Mission doggedly insists that its claim is not one for libel by implication because it "explicitly plead [sic] that several [statements] were false." Cr.-Resp. Br. at 6.

Significantly, its brief fails to identify a verbatim statement that it claims is false. Instead, Mission *again* claims the broadcasts "*convey the assertion,*" i.e., *imply*, that it "was acting purposefully" and had a "desire to find and use convicted felons." Cr.-Resp. Br. at 6-7. Mission also fails to dispute that the inclusion of Mr. Jones's statements in the broadcasts negates any "implication" that its intentions were deliberate. In short, it makes *no* effort to dispute what its Complaint makes obvious: it does not claim the statements are literally false.

Instead, Mission focuses on the minority of Washington cases that suggest the state recognizes claims for libel by implication. Significantly, not a *single* one allowed such a claim to proceed when each individual statement was true. See KIRO Ans. Br. at 15-16 (distinguishing *Corey v. Pierce Cnty.*, 154 Wn. App. 752, 225 P.3d 367 (2010) and *Chase v. Daily*

Record, Inc., 83 Wn.2d 37, 515 P.2d 154 (1973)). By contrast, several cases applying Washington law refuse such claims. *Id.* at 12-16. KIRO cited **four** decisions, *id.*, **none** of which Mission attempts to distinguish, other than to claim that one, *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 826 P.2d 217 (1991), is “no longer good law.” Cr.-Resp. Br. at 6.

Mohr v. Grant did not change the legal landscape. There, the Washington (not United States, Cr.-Resp. Br. at 9) Supreme Court found the trial court had **properly** granted summary judgment to a defendant facing a libel-by-implication claim. 153 Wn. 2d 812, 108 P.3d 768 (2005). Although it **did** discuss certain implication claims, it did **not** “expand[] the defamation tort to include defamation by implication through juxtaposition of truthful statements.” *Yeakey v. Hearst Commc’ns, Inc.*, 156 Wn. App. 787, 793, 234 P.3d 332 (2010). As the Court of Appeals found, “Washington courts have not recognized such claims.... *Lee* remains the law.” *Id.*

For the first time on appeal, Mission identifies five facts that would have allegedly removed the false implications present in KIRO’s stories. Cr.-Resp. Br. at 11-12. Although this Court should decline to consider this new argument, it does not change the proper result. Some of the “omitted” facts are actually in the broadcasts (e.g., that Wilson lived at Mission in 1998), and the rest have no support in the record. Even if they

did, their inclusion would *not* have changed the thrust of the broadcast, i.e., that Mission (whether it wanted to or not) attracted criminals (irrespective of how many, how soon after their convictions, and whether any were present the day of the broadcasts) to live on its property, and that it required all of its residents (including, undisputedly, some criminals) to perform door-to-door solicitations.

2. Mission waived its arguments that KIRO's broadcasts are unprivileged, and in any event failed to show they are.

For the first time on appeal, Mission argues that the statements in the broadcast are unprivileged because the website of a sheriff's office "is not an 'official proceeding.'" Cr.-Resp. Br. at 12-14. Even if the Court considers this claim, it, too, is without merit.

The fair report privilege is not limited to "official proceedings." Washington courts have broadly applied it to a range of public records and public officials' statements. *See, e.g., Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 179, 736 P.2d 249 (1987) (applying privilege to charges in a recall petition); *Haueter v. Cowles Publ'g Co.*, 61 Wn. App. 572, 586-87, 811 P.2d 231 (1991) (statement by Attorney General); *Moloney v. Tribune Publ'g Co.*, 26 Wn. App. 357, 362, 613 P.2d 1179 (1980) (verbal statement by sheriff's spokesperson and sheriff's investigation report).

There is no material difference between a verbal statement by the sheriff's office and one on its official website, meaning the latter are privileged.

Even so, KIRO relied on more public records than the sheriff's website. Significantly, that King County jail was "used" to find door-to-door solicitors is based on a county website listing Mission as a place to live for recently released criminals. FE 9A, Ex.D. Although Mission contends it did not "use" the jail house for anything, the site suggests otherwise, and even if that is *false*, the fair report privilege bars any liability. Similarly, that Mission previously housed two sex offenders is also privileged because that information derived not only from the sheriff's website but also from a Seattle Police Department Certificate of Probable Cause. *Id.*, Ex. F. Finally, that five more of Mission's prior residents were *also* felons is absolutely privileged. *See id.*, Exs. K, M-P.

3. Mission waived the bulk of its arguments that KIRO acted negligently, but even so, did not show negligence.

In the trial court, Mission's argument that KIRO acted negligently consisted of inadmissible evidence that its reporter, Chris Halsne, had previously been found liable for defamation in an Oklahoma lawsuit. *See* CP 45-46. Mission has relegated this argument to a footnote in its brief, arguing that the prior case is admissible because it is subject to judicial notice. Cr.-Resp. Br. at 41 n.20. KIRO does not dispute that the decision

is subject to judicial notice, but instead contends that (1) the Court may not consider Mission's counsel's description of a case about which he has no personal knowledge, and more importantly, (2) evidence of a prior libel verdict is utterly inadmissible character evidence under ER 404(b). Mission fails to dispute the latter conclusion.

Faced with its failure to fully argue its case in the trial court, Mission now claims that KIRO's negligence is evident by the "remarkably *low* percentage of the people whom the Mission's residents and funds solicitors had felony convictions." Cr.-Resp. Br. at 39. Neither of KIRO's broadcasts purported to discuss the *percentage* of Mission residents who were felons, and Mission does *not* dispute that KIRO's public records search yielded *five* felons who had lived at Mission's house. *See* FE 9A, Exs. K, M-P. The broadcasts also did not state that Mission had a "tactic" of "recruiting" felons or that Mission "recruited" felons Ray Demry and Willie Edward Wilson from jail, let alone that they had "recently" lived at Mission, Cr.-Resp. Br. at 40. KIRO cannot have negligently done anything with respect to statements it never made.

4. Mission failed to show that the statements caused it any injury.

Mission makes *no* effort to prove any damages at all, instead focusing on an outdated branch of law requiring nearly all libel claims to

go to the jury. More recent cases express little reluctance to require evidence of damage before allowing a libel claim to proceed. *See, e.g., Engel v. Falk*, 2006 WL 2435003, at *2 (W.D. Wash. Aug. 22, 2006) (letter was not defamatory per se because there was “no evidence that any statements ... ‘injured [plaintiff]’”).

Further, as KIRO argued in its opening brief, Mission cannot recover “for damage that would have occurred even without the false part.” *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 598, 943 P.2d 350 (1997). Mission makes no effort to distinguish *Schmalenberg* or any of the other cases KIRO cited for this proposition, KIRO Ans. Br. at 20-21, nor to dispute that the allegedly false parts of the broadcasts did no more damage than the admittedly true ones.

Finally, even if the statements were defamatory *per se*, Mission’s failure to show any damages or actual malice also dooms its claim. Well-established law forbids any “presume[d] damages when liability [is] based on negligence, not actual malice.” *Caruso v. Local Union No. 690 of Int’l Bhd. of Teamsters*, 100 Wn.2d 343, 354, 670 P.2d 240 (1983) (trial court “did exactly what” the U.S. Supreme Court forbade: “it permitted the jury to presume damages when liability was not based on actual malice”). *Cf. Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675, 681, 713 P.2d 736 (1986) (affirming presumed damages award where plaintiff had shown

actual malice). Mission has failed to show KIRO acted negligently, let alone with actual malice, meaning that its failure to show actual damages required dismissal of its claim.

5. Mission failed to show the headline “Jailhouse Used to Find Door-to-Door Solicitors” is defamatory.

Mission devotes significant attention to its argument that a headline can be defamatory alone, one that it first made in a motion for reconsideration. But even assuming this were correct (and it is not), Mission has failed to dispute that the headline is both true and privileged. *First*, the jailhouse was “used” to find door-to-door solicitors, whether Mission *intended* to so use it or not. KIRO Ans. Br. at 25-26. *Second*, that statement is a fair summary of the King County website listing Mission as a place to go after leaving jail. *Id.*

Further, even if the headline, read in isolation, were defamatory, the trial court properly considered the remainder of the broadcast, which dispels any libelous implication. Notably, Mission does *not* dispute this and instead argues that “the Washington Supreme Court and the United States Supreme Court have both ruled that a headline can be libelous.” Cr.-Resp. Br. at 19. This is false. KIRO Ans. Br. at 26-30. In *Purvis v. Bremer’s, Inc.*, the Washington Supreme Court found it proper to “consider the advertisement *as a whole*” to decide whether it was

defamatory, *not* the headline alone. 54 Wn.2d 743, 754, 334 P.2d 705 (1959) (emphasis added). In *Dorr v. United States*, decided *more than a century ago*, the United States Supreme Court did not find that a headline, when read alone, can be libelous; instead, it found that a headline is not privileged merely because the text that follows is. 195 U.S. 138 (1904).

Nor do the remaining cases Mission cites support its position. KIRO already distinguished most of them in its Answer Brief, KIRO Ans. Br. at 28-30, yet Mission, rather than attack that analysis (or *any* of the cases KIRO cited), merely parrots its opening brief and cites a string of cases collected in an annotation. Cr.-Resp. Br. at 20. Donald M. Zupanec, “Libel by newspaper headlines,” 95 A.L.R.3d 660 (2011). These cases, which Mission does not discuss in any detail, also fail to support its position. *See, e.g., Morning Journal Ass’n v. Duke*, 128 F. 657 (2d Cir. 1904) (headlines and article both imputed crime to plaintiff); *Norfolk Post Corp. v. Wright*, 140 Va. 735, 125 S.E. 656 (1924) (headline was not libelous where article supported it) (portion Mission quotes is *dicta*); *Lane v. Wash. Daily News*, 85 F.2d 822, 824 (D.C. Cir. 1936) (*not* reversing based on headline alone, instead stating that “the *whole* item, including display lines, should be read and construed together”) (emphasis added); *Campbell v New York Evening Post, Inc.*, 245 N.Y. 320, 157 N.E. 153

(1927) (reversing dismissal where “headlines ... read *in connection*” with article could be libelous) (emphasis added).⁴

Mission’s continued reliance on *Condit* is misplaced. Cr.-Resp. Br. at 23-24. In that case—as in *Kaelin v. Globe Communications, Corp.*, 162 F.3d 1036 (9th Cir. 1998)—the court found that the allegedly defamatory headline was separated from the article text by more than a dozen pages. *Condit*, 248 F. Supp. 2d at 967. As KIRO noted in its Answer Brief (and as Mission fails to dispute), subsequent courts have distinguished and limited *Kaelin* on this basis, and their analysis applies equally to *Condit*. KIRO Ans. Br. at 29-30.

C. The Anti-SLAPP Statute is Constitutional.

1. The anti-SLAPP statute does not violate the right of access or separation of powers by creating a standard more stringent than summary judgment.

Mission’s constitutional challenge rests on an entirely new and baseless claim: that the anti-SLAPP statute imposes a “higher standard” than the “low summary judgment” one applicable under California’s anti-SLAPP statute. But both statutes require the *same* showing: “a probability” that the non-moving party will “prevail,” a standard

⁴ Among the dozens of cases Mission cites, a couple *do* allow liability premised upon the headline alone. These cases—all decided more than fifty years ago—represent the minority position of a few states, *not* including Washington. See, e.g., *Las Vegas Sun, Inc. v. Franklin*, 74 Nev. 282, 329 P.2d 867 (1958).

California courts have construed to require a “prima facie” showing of facts sufficient to defeat summary judgment. RCW 4.24.525(4)(b); CAL. CIV. PROC. CODE. § 425.16(b)(1). *See Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 679, 105 Cal. Rptr. 3d 98 (2010).

That the Washington statute explicitly requires this showing to be made by “clear and convincing evidence” does not reflect any meaningful difference between the statutes. As KIRO already argued—and as Mission does not dispute—that is *already* the standard of proof for a Washington libel plaintiff seeking to defeat a summary judgment motion.⁵ *Mark v. Seattle Times*, 96 Wn.2d 473, 487, 635 P.2d 1081 (1981) (“a defamation plaintiff resisting a defense motion for summary judgment must establish a prima facie case by evidence of convincing clarity”). Similarly, California courts have applied that state’s standards of proof to libel claims sought to be struck under its anti-SLAPP statute. *Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 55 Cal. Rptr. 2d 443 (2007) (applying clear and convincing standard to actual malice element on anti-SLAPP motion); *Conroy v. Spitzer*, 70 Cal. App. 4th 1446, 1451, 83 Cal. Rptr. 2d 443 (1999) (same). The anti-SLAPP statute does not bar a claim “even though [a] plaintiff has shown everything that he needs to show ...

⁵ Mission also failed to dispute that the legislature may change even the common law. KIRO Ans’g Br. at 46 n. 15.

to prevail at trial”: it requires the plaintiff to satisfy only the “low summary judgment standard,” Cr.-Resp. Br. at 44 & n.22.

Mission repeatedly complains that the anti-SLAPP statute targets more than “frivolous” lawsuits, as if there were some distinction between the legislature’s ability to regulate “frivolous” and “non-frivolous” meritless claims. *See* Cr.-Resp. Br. at 44-47, 54-57. KIRO did *not* claim that the anti-SLAPP statute bars only “frivolous” claims within the meaning of CR 11, but rather that it is designed to deter *meritless* claims, like Mission’s, that target the exercise of First Amendment rights.

Moreover, Mission does not cite *any* authority suggesting that the legislature may create immunities only for “frivolous” claims, nor could it: as KIRO already noted, the legislature routinely enacts immunities, including *absolute* ones, which bar claims no matter what showing a plaintiff can make. KIRO Ans. Br. at 42-43.⁶ CR 56 does not preclude this result. RCW 4.24.525 creates a *substantive* immunity; it is not procedural. *See Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003)

⁶ Mission claims that the Rhode Island Supreme Court would find the Washington statute unconstitutional because it has construed the Rhode Island statute to apply only to “sham” litigation. Cr.-Resp. Br. at 47 n.26. That construction is *not* a result of constitutional concerns, but contained in the statute’s text. *Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 61-62 (R.I. 1996).

(finding that virtually identical California anti-SLAPP statute provides a “substantive immunity from suit”).⁷

2. Mission lacks standing to challenge the anti-SLAPP statute’s discovery stay.

KIRO does not “acknowledge” that the anti-SLAPP statute’s discovery stay “infringes” the right of access, Cr.-Resp. Br. at 51, but does argue that even if it *did* so infringe, Mission lacks standing to raise this argument because it did not even *attempt* to take discovery.⁸ Mission does not deny this but still claims that the discovery stay is unconstitutional as applied to its claims. It offers no reason for this odd proposition.

Mission also claims that the statute is overbroad—an argument, if true, that *any* litigant would have standing to make—because it penalizes movants who cannot prove a probability of prevailing. Cr.-Resp. Br. 53. This is an argument about the constitutionality of the anti-SLAPP statute’s penalties, *not* its discovery stay, and it (again) incorrectly assumes that the federal and state constitutions protect libel claims whose plaintiffs cannot prove a probability of prevailing by clear and convincing evidence.

⁷ Mission fails to apply rational basis scrutiny to the discovery stay, apparently believing that strict scrutiny applies. Cr.-Resp. Br. at 57-58. But none of the cases it cites for this proposition discuss this issue.

⁸ Mission now claims it would have moved for discovery should the actual malice standard apply. Cr.-Resp. Br. at 51 n.27. It also claims the trial court would have allowed discovery should it have reached that issue (which it did not, choosing instead to dismiss the claims under Rule 12), but cites nothing for this assertion. Nor has it stated what discovery it would have hoped to learn that would support a claim for actual malice.

3. The anti-SLAPP statute's penalties do not violate equal protection or separation of powers.

KIRO does not “pretend” that both a moving and non-moving party are entitled to their fees and a \$10,000 penalty upon showing that the other’s position is “frivolous.” Cr.-Resp. Br. at 55. The anti-SLAPP statute mandates that penalty for the prevailing movant and *allows* the penalty where a non-movant can show an anti-SLAPP motion is frivolous. This is no accident. The legislature, recognizing the unique threat posed by meritless claims targeting free speech, sought to deter those claims and encourage anti-SLAPP motions. Mission cites no authority—nor is KIRO aware of any—suggesting it is impermissible for a statute to penalize plaintiffs, but not defendants. Cr.-Resp. Br. at 55-56.

The anti-SLAPP penalties also do not impermissibly conflict with CR 11. Mission claims that CR 11 “only” authorizes sanctions against a party who asserts a frivolous claim or defense and thus the anti-SLAPP statute violates separation of powers. Cr.-Resp. Br. at 55. But Mission fails to dispute that numerous Washington statutes provide for an automatic award of attorneys’ fees to prevailing parties, none of which have been found to “conflict” with CR 11. KIRO Ans. Br. at 45. A more rational analysis recognizes that CR 11 does *not* conflict with these statutes, or with RCW 4.24.525. Courts can apply both to any case. CR

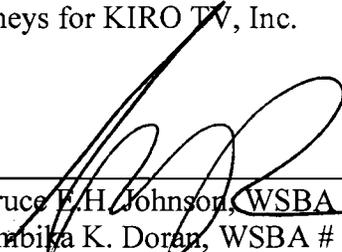
11 contains *no* prohibition on awarding fees or penalties when a plaintiff cannot defeat a summary judgment motion at the outset.⁹

D. The Court Should Reverse the Trial Court's Anti-SLAPP Decision and Impose the Statute's Mandatory Penalties.

Mission does not dispute that the anti-SLAPP statute mandates an attorneys' fee award to a successful movant. Nor does it dispute that these fees are available on appeal. This Court should affirm the trial court's dismissal, and award KIRO its attorneys' fees and a \$10,000 penalty.

RESPECTFULLY SUBMITTED this 15th day of March, 2012.

Davis Wright Tremaine LLP
Attorneys for KIRO TV, Inc.

By 

~~Bruce E.H. Johnson, WSBA # 7667~~

Ambika K. Doran, WSBA # 38237

1201 Third Avenue, Suite 2200

Seattle, WA 98101-3045

Telephone: (206) 622-3150

Fax: (206) 757-7700

E-mail: brucejohnson@dwt.com

E-mail: ambikadoran@dwt.com

⁹ Without citing any authority, Mission suggests the anti-SLAPP statute is different because it mandates a \$10,000 penalty. But the Washington Supreme Court has upheld the state's old anti-SLAPP statute, RCW 4.24.510, which contains an identical penalty.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2012, I caused to be served, via messenger, a true and correct copy of the following document filed in connection with the above-referenced matter:

REPLY BRIEF OF CROSS-APPELLANT KIRO TV, INC.

upon the following:

James E. Lobsenz
Carney Badley Spellman PS
701 Fifth Avenue, Suite 3600
Seattle, WA 98104

Declared under penalty of perjury under the laws of the state of Washington dated at Seattle Washington this 15th day of March, 2012.

Barbara J. McAdams
Barbara J. McAdams

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR 15 PM 4:05