69300-0

69300-0

No. 69300-0-I

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

JASON DILLON, an individual,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case arises out of Appellant Jason Dillon's ("Dillon") participation in an attempted multi-million dollar fraud in a civil action pending in the United States District Court for the Western District of Washington (the "Federal Action"). After Dillon had a falling out with his co-conspirators, and in an attempt to gain leverage over them, Dillon contacted Respondents James Grant and Davis Wright Tremaine ("DWT"), who were representing T-Mobile, the defendant in the Federal Action and targets of the scam. Dillon, a former employee of NetLogix, the plaintiff in the Federal Action, told Grant he wanted to clear his conscience and tell the truth about the claims being asserted by NetLogix.

Dillon eventually recounted in detail that he and his co-conspirators had fabricated and destroyed evidence on a massive scale so as to falsely manufacture a multi-million dollar claim against T-Mobile. Dillon also stated that he had contacted coworkers who likewise wanted to come forward and tell the truth; that he wanted defendants to wait a few days before telling his former boss and co-conspirator so he could first collect money owed him; and that he was willing to sign a declaration repeating the matters discussed during the witness interview.

Verbatim notes of Dillon's statements during these voluntary witness interviews were taken down by a deposition reporter, Respondent

Seattle Deposition Reporters ("SDR").

Grant and DWT then drafted a declaration summarizing the interview which Dillon reviewed and agreed to sign with minor changes. Instead of signing, however, Dillon shared the declaration with his former boss and co-conspirator, Scott Akrie, in what the federal court later found to be an attempt to extort money based on a threat that Dillon would sign the declaration and expose the fraud. When his co-conspirators apparently acquiesced, Dillon recanted the statements made in the witness interview and refused to sign the declaration, claiming it was a blatant lie. Respondents Grant and DWT then brought the matter to the attention of the federal court (United States District Judge Martinez) and ultimately submitted to the court the verbatim notes of Dillon's witness statements.

When Dillon disputed the truthfulness of his statements, Judge Martinez ordered an evidentiary hearing and ultimately found that Dillon had told the truth in his statements to the Respondents, as reflected in the notes of the interview, but had repeatedly lied during the evidentiary hearing in his attempts to disavow those statements in court. *See* CP 168:13-17. Notably, during the hearing, Dillon testified that he did not dispute the accuracy of Respondents' notes of the witness interviews, claiming only that his statements were exaggerated because he was upset at the time.

Following Dillon's testimony in court, Judge Martinez dismissed the entire Federal Action as a sanction for the fraud in which Dillon was complicit, and found, among other things, that Dillon had repeatedly lied to the court in his testimony and declarations in an effort to salvage his anticipated profit from the fraud. *See* CP 164-171. In so holding, Judge Martinez specifically ruled that Dillon had no expectation of privacy in giving witness statements to the lawyers for the victim of the fraud, and that no violation of RCW 9.73.030 had occurred. *See* CP 170 n.7.

After Judge Martinez's ruling, Dillon filed this action to retaliate against Respondents, claiming that he was a hapless victim ensnared by the transcript, which he alleged was an illegal "recording" of the witness interviews he volunteered. Applying the law to the admittedly accurate notes of the witness' interviews, the trial court granted summary judgment and dismissed Dillon's Privacy Act claims under RCW 9.73 on the same reasoning adopted by Judge Martinez, specifically, that two required elements—(1) a manifest subjective expectation of privacy (2) that was objectively reasonable—were lacking based on Dillon's own statements.

Applying the express statutory language of RCW 4.24.525, the trial court also held that Dillon's claim was a prohibited anti-SLAPP action because it arose from lawful conduct of the Respondents in connection with a judicial proceeding. Accordingly, the trial court

awarded the mandatory statutory sanctions against Dillon and in favor of each of the Respondents.

Dillon's wild assertions in this appeal, that the trial court (1) ignored triable issues of fact, (2) created a common law exception to RCW 9.73.030, (3) held the provisions of RCW 9.73.030 do not apply to attorneys, (4) failed to follow the procedures of RCW 4.24.525, and (5) mistakenly applied RCW 4.24.525 to a private dispute, are all without basis in fact or law. More broadly, Dillon repeated claims that he is a victim because he got caught in perpetrating a fraud and trying to lie his way out of it are the height of chutzpah. The trial court's rulings should be affirmed in all respects.

II. STATEMENT OF THE CASE

A. The Federal Action.

Dillon is a former employee of a company called Volcan Group, Inc., d/b/a/ NetLogix ("NetLogix"). *See* CP 156:3. In the Federal Action, NetLogix was the plaintiff. It sued T-Mobile USA ("T-Mobile") for breach of contract, claiming T-Mobile failed to pay the agreed contract price. NetLogix sought damages of over $28 million. *See* CP 155. Dillon had been a vice president of NetLogix, was the employee primarily responsible for the work with T-Mobile, and was a key witness in the Federal Action. *See* CP 248:23-25. T-Mobile was represented by DWT, with Grant acting as lead

counsel. Dennis Moran, counsel for Dillon in this action, represented plaintiff NetLogix in the Federal Action.

B. Grant Arranges to Have Verbatim Notes Taken of Dillon's Offer to Provide Beneficial Information for Use in the Federal Action.

On August 24, 2011, as discovery in the Federal Action proceeded, Dillon voluntarily emailed T-Mobile's counsel (DWT attorneys Grant and Cassandra Kennan) to inform them that he had recently resigned from NetLogix. CP 175. DWT and Grant did not solicit or prompt Dillon's email. *See* CP 272:13-16. In the email, Dillon said he believed "it would be beneficial to T-Mobile/DWT if we had some time to talk about the facts in this case." CP 175; CP 271-74.

In response to Dillon's email, DWT arranged a telephone interview with Dillon for the afternoon of August 25, 2011. *See* CP 194 ¶ 44. Pursuant to arrangements made by Grant, a deposition reporter from Respondent SDR went to DWT's offices and took down verbatim notes of the telephone interview of Dillon. At the outset of the call, Grant told Dillon that he was on the speaker-phone, that Kennan was in the room, and that an assistant, "Thad," would be "writing stuff down" so that Grant and Kennan would not have to worry about taking notes. CP 205 at 2:8-15. Thad was the stenographer. In response, Dillon stated: "Okay." *Id.*

Grant then explicitly told Dillon that he should not discuss any legal

advice from or conversations with NetLogix's attorneys, and that he only wanted to discuss "the facts," "who did what," and "what happened." CP 205 at 2:18-25. Grant also explained that he could not act as Dillon's lawyer, CP 206 at 7:17-20, could not make any commitments to Dillon in exchange for the interview, CP 206 at 8:22-23, and that Dillon should get his own attorney if he had any concerns about the reaction of his former employer to his confessing the truth. CP 206 at 9:9.

C. Dillon Repeatedly References His Expectation That Grant Would Use Information from the Witness Interview in the Federal Action.

In the ensuing interview, Dillon repeatedly referenced his expectation that Grant would use the information being given in the interview to defend the Federal Action. First, Dillon said his purpose in contacting Grant was to provide information that would "resolve" the Federal Action. CP 205 at 3:22-4:1 ("[T]he entire team [is] . . . on board with . . . giving you [ ] guys the information you need, which I think would be beneficial to resolve this thing pretty quickly."). In particular, Dillon repeatedly mentioned his expectation that Grant would promptly inform NetLogix's owner, Scott Akrie, about Dillon's communications with Grant, and that when Akrie found out that Grant had learned the truth (about the fraud) from Dillon, NetLogix would drop the Federal Action:

> [I]f you guys tell Scott, you know, next week on Monday

> or Tuesday that you guys represent me on this T-Mobile case, and he'll – maybe if you did that, he would just drop the case immediately because if he knows, you know, you're involved in things--

CP 206 at 7:12-16.

Dillon also repeatedly acknowledged his expectation that DWT would immediately discuss the information learned from Dillon with counsel for NetLogix in the Federal Action. For example, Dillon believed he was owed money by NetLogix and was concerned about the reaction of NetLogix's owner, Akrie, when Grant went to NetLogix's attorneys with the information shared in the interview. Accordingly, Dillon asked that Grant wait a few days before contacting opposing counsel so he could collect money he was owed by NetLogix:

> Yeah, and I don't have a problem writing a declaration for you guys. You know, I would just ask if you guys could just wait to even speak with Scott's attorneys, *and tell them next week.*

CP 213 at 36:25-37:3 (emphasis added); *see also* CP 211 at 27:10 ("Scott's going to be pissed. . . .").

Dillon also repeatedly volunteered to Grant that he had already spoken with other NetLogix employees about his plans to talk with DWT and had arranged that the other NetLogix employees would likewise volunteer truthful information that would be helpful to T-Mobile:

> So Kris just asked me–I was talking to him. I told him that, you know, I quit, and I am probably going to get an

> attorney and go to you guys and tell you guys exactly what happened from a truthful–you know, not from being guided or coached from the other people. And he said, yeah. He said, I think–you know, I want to do the same thing.

CP 212-13 at 33:23-34:4. Similarly, Dillon's initial email stated that he knew that "most of my old team would like to speak with you [Grant/DWT] as well." CP 273:11-12. For example, Dillon explained that he had spoken to Roger Gonzalez:

> Q. Had you talked to him about talking to T-Mobile's lawyers?
>
> A. Previously, yes.

CP 273:13-17. Indeed, Dillon told Grant that he had already spoken with the "entire team" of NetLogix employees volunteering information to DWT/T-Mobile and that everyone was "on board." Specifically:

> I spoke with Roger, Kris Kirkwood, Alfonso, Diana, Christine, pretty much the entire team, and they're all on board with--you know, with talking with you guys . . . .

CP 205 at 3:21-23. Thus, rather than a confidential discussion, Dillon told the Respondents he already had told numerous other witnesses about his intent to tell Respondents the truth and had affirmatively solicited their cooperation to do likewise.

Dillon also agreed to put the information he shared with Grant into a declaration for use in the Federal Action. CP 213 at 36:25-37:1 ("Yeah, and I don't have a problem writing a declaration for you guys."). Likewise, Dillon agreed to copy the hard drive on his personal computer and give it to DWT

for use in the Federal Action. CP 221 at 67:7-10 ("I'll do an exact image of it and send it back to you. . . ."); CP 197:10-18 (hard drive copied).

There was then a second telephone interview with Dillon on September 16, 2011, to review with Dillon the draft declaration that DWT had prepared based on the first interview. CP 253; *see* CP 224-33. Like the first interview, DWT arranged for a stenographer to take verbatim notes of the second interview. *See* CP 224-33. By this point, Dillon had reviewed a draft declaration prepared by Grant summarizing the first interview. CP 224. Dillon told Grant that one change needed to be made, but otherwise the draft declaration was accurate and that he would immediately sign it for use in the Federal Action. CP 224 at 4:15-19. Grant then changed the declaration as Dillon requested and sent it to him the next day.

However, instead of signing the declaration, Dillon emailed Grant and Kennan that, after "carefully reading the incomplete declaration your law firm prepared I am unable to sign it." CP 235. Dillon copied Akrie on this email and later discussed the declaration with Akrie. *Id.*; *see also* CP 448 ¶ 4. Dillon also then sent an email to Akrie claiming that Grant had "completely changed our conversation to solely benefit T-Mobile and put blatant lies in the declaration and asked me to sign it." CP 237; *see also* CP 81:10-16. In response, Akrie told Dillon he would "not forget" what Dillon had done for NetLogix (by not signing the declaration). CP 87:15-16;

CP 237.

D. Dillon's Account of Widespread Fraud and the Destruction and Fabrication of Evidence.

During the two witness interviews, Dillon explained that he had been instrumental in bribing a lower-level T-Mobile employee to give the contract at issue in the Federal Action to NetLogix. CP 205-06 at 5:25-6:1 ("Because when I actually took the money—I'm the one who took the money to [T-Mobile]."). Nevertheless, shortly after NetLogix began work under the contract, T-Mobile objected that the per-project prices NetLogix charged were too high. Akrie then came up with a scheme to accept the lower pricing proposed by T-Mobile, but to sue for the higher pricing at the close of the contract if certain additional contracts were not awarded per the bribe. CP 208 at 14-16.

To implement this plan, Akrie directed that NetLogix maintain two sets of project files and financial records, one set reflecting the actual prices agreed upon and charged during the contract and another set at the higher, fraudulent prices. CP 209 at 19:11-12 ("Well, we kept two sets of books, two sets of--we had two filing cabinets."). When Akrie decided to sue T-Mobile, he directed Dillon and other NetLogix employees to destroy any documentation reflecting the lower contract pricing:

> Scott gave us directions to—we had to hire extra people to help out, start going through their files, merging them

> together and throwing out the lower pricing. That's when he decided he was going to file the lawsuit.

CP 210 at 24:15-19. Simultaneously, Dillon and other employees were directed to create invoices to support the claims of higher contract pricing:

> [W]e did create invoices at the end once it was done, and it was–and what Scott asked me to do was create a template, which I probably still have, create a template that matched the contract so it was very easy . . . .

CP 217 at 52:1-5.

To further this wholesale manufacture of evidence, Dillon also explained in the interviews that he was "coached" by NetLogix's attorneys to say things that were not true, CP 213 at 34:18-20; had been promised 10 percent of any recovery in the Federal Action to "support" NetLogix's position as a witness, CP 215 at 43:12-14; and that, in addition to creating evidence to support higher contract pricing for work actually done, approximately half of NetLogix's $28 million claim was simply fabricated for work that was "just made up," CP 219 at 58:3-7.

E. Judge Martinez Holds an Evidentiary Hearing.

After Dillon refused to sign a declaration, and disavowed these statements, T-Mobile (through its counsel, DWT and Grant) brought his statements to the attention of Judge Martinez in the Federal Action, filing relevant portions of the verbatim notes of Dillon's witness interviews in support of a motion to dismiss on grounds of spoliation and fraud on the

Court. At that point, Dillon claimed to be "outraged" that his interview had been "illegally recorded." He later provided a declaration in the Federal Action, averring that the transcripts did not "accurately depict the conversation" with Grant and Kennan. CP 242 ¶ 9.

In response, Judge Martinez ordered that Dillon appear at an evidentiary hearing to give sworn testimony about the interviews. At the hearing, Dillon was represented by counsel. CP 250:7-9. In his sworn testimony, Dillon then acknowledged that the transcripts were, in fact, accurate accounts of his statements:

> Q. . . . You cannot identify any statements in the transcript attributed to you that you know you did not say?
>
> A. That's correct.

CP 252:10-12; CP 252:25-CP 253:3; *see also* CP 253:7-22; CP 261:2-5; CP 160:12-19. Likewise, in contrast to his present assertions that some six minutes of discussion are missing from the transcript, Dillon's sworn testimony to Judge Martinez was that he was aware of nothing that was missing:

> Q. Is there anything that was exchanged between you and the lawyers during the transcribed conversation that is not in the transcript?
>
> A. Not that I'm aware.

CP 252:25-253:3; *see* CP 253:14-18. Dillon nevertheless insisted that, although he had actually made the statements documented in the verbatim

transcripts, the statements regarding spoliation and fraud were not true, but rather were "exaggerated" or made because he was a "frustrated" or "upset" former employee. *E.g.*, CP 256:17-19; CP 259:24-CP 260-5; CP 278:14-21.

F. Judge Martinez Finds That Dillon Repeatedly Lied in Disavowing His Earlier Statements and That the Witness Interviews Were Part of a Plan by Dillon to Extort Money.

In a written order following the evidentiary hearings, Judge Martinez found that Dillon "was telling the truth" when he spoke to Grant and Kennan in the interviews, and that, in later attempting to disavow those statements, Dillon "has not told the truth during his subsequent testimony before the Court." CP 164:7-9. Indeed, Judge Martinez concluded "Dillon has deliberately and repeatedly lied to both Defendant's counsel [Respondents here] and the Court in the form of informal communications, sworn declarations, and in-court testimony." CP 168:13-15.

With regard to NetLogix's fraudulent claims in the litigation before him, Judge Martinez found that Dillon and his boss, Akrie, were "complicit" in a "pattern of dishonesty" involving "willful spoliation of evidence." CP 168:19-22. Moreover, he determined that Dillon's lies were motivated by the fact that he had a personal stake in the outcome of the case. Specifically, Judge Martinez concluded there was "no serious dispute" that Akrie "promised to pay Dillon a portion of the litigation proceeds in exchange for his 'support' throughout the case." *Id.* Thus, while Dillon "had numerous

opportunities to cure his misconduct, [he], with the cooperation of Akrie, has instead elected to continue spinning a web of lies, entangling himself and the Plaintiff along the way." CP 169:19-21.

With regard to Dillon's purpose in contacting Grant and Kennan, Judge Martinez concluded that it was an attempt to extort money from his former employer, NetLogix. In particular, Judge Martinez ruled "there is an inescapable inference that when Dillon reached out to Defendant's counsel, he did so as part of a misguided effort to obtain leverage over his former boss" in a dispute over money that Akrie owed him. CP 165:5-11. Prior to speaking with T-Mobile's counsel, "Dillon informed Akrie of his intention to do so," and after the interviews, "Dillon informed Akrie not only that he had done so, but also that Defendant's counsel had asked him to sign the declaration." *Id.* Judge Martinez then found:

> The threat underlying these communications was clear: unless Akrie came to terms with Dillon, he ran the risk that Dillon would sign the declaration, expose [NetLogix's] various discovery abuses, and effectively end the instant litigation. The scheme initially worked: Immediately after Dillon declined to sign the declaration—in an email he copied to Akrie—Akrie responded by telling Dillon what he clearly expected to hear: that Akrie "will not forget" what Dillon had done.

CP 165:11-16. Thus, rather than being victimized by the Respondents as he now claims, Judge Martinez found that Dillon's offer to give interviews to the Respondents was an affirmative attempt to manipulate Grant and DWT in

order to extract money from his former employer.

G. Judge Martinez Dismisses the Federal Action, Finding That Dillon's Statements Are Not "Private" and No Violation of RCW 9.73.030 Occurred.

In the end, Judge Martinez credited the interview transcripts, CP 164:9, and found that they were a significant part of the "overwhelming evidence of spoliation" and other misconduct, CP 166:12-17. Accordingly, Judge Martinez dismissed NetLogix's claims for $28 million and the Federal Action with prejudice. CP 171:17-18.

In reaching this result, Judge Martinez had to decide the same issue that is on appeal here, namely, whether the interviews with Dillon were "private" communications and thus subject to RCW 9.73.030. In particular, when T-Mobile moved to dismiss as a sanction for spoliation, NetLogix argued that the verbatim notes of Dillon's witness interviews were inadmissible under RCW 9.73.030 as illegal "recordings," the same argument that Dillon makes here. *See* CP 338-40; CP 351-52; CP 240 ¶¶ 3-4; CP 361 ¶ 3.

On this point, Judge Martinez specifically held that Dillon's statements to T-Mobile's attorneys did not constitute "private" communications under RCW 9.73.030 and thus were admissible:

> Dillon clearly understood that Defendant's counsel intended to use the information he was providing in connection with these [the Federal] proceedings, and Dillon

> even offered to provide them with a sworn declaration regarding his statements. As such, those statements were not intended to be, and were not in fact, "private."

CP 170 n.7. As a result, the court concluded that T-Mobile's counsel (Grant and Kennan) had not violated RCW 9.73.030. CP 170.

H. Judge Andrus Dismisses the Second Action Under RCW 4.24.525.

Before Judge Martinez dismissed the Federal Action (and ruled that no violation of RCW 9.73.030 had occurred), NetLogix and Akrie filed suit in King County Superior Court against DWT, Grant, Kennan, and SDR, claiming that they had unlawfully recorded Dillon's witness interviews in violation of RCW 9.73.030. *Akrie v. Grant*, King County Superior Court No. 11-2-37695-8SEA (the "Second Action"). The defendants filed a motion to dismiss under the provisions of RCW 4.24.525, Washington's anti-SLAPP statute. Judge Andrus held that RCW 4.24.525 applied, and summarily dismissed the claims. CP 422:18-CP 423:3; CP 429-30.

In particular, Judge Andrus held that "civil liability under [RCW] 9.73 only extends to the recordings themselves and not to the dissemination of the recordings even if the recordings are illegal under the statute." CP 423:24-CP 424:4. Because NetLogix and Akrie had not been parties to the allegedly "recorded" interview with Dillon, they had no claim for the recording itself.

In addition, Judge Andrus imposed the $10,000 anti-SLAPP statutory

penalty against the plaintiffs for bringing a retaliatory action against defendants. *See* CP 424:5-10; CP 429-30. In this regard, Judge Andrus held that, under RCW 4.24.525, "filings [of the transcripts] in Federal Court are immune" and cannot provide the basis for civil liability. CP 423:11-14.

I. The Trial Court Dismisses Dillon's Privacy Act Claims in This Action and Awards the Mandatory Anti-SLAPP Sanctions Under RCW 4.24.525.

Before the Second Action was dismissed, Dillon attempted to join the action as a plaintiff to cure the standing issue under RCW 9.73. *See* CP 432-45. However, Judge Andrus dismissed the lawsuit with prejudice and without leave to amend. *See* CP 429-30.

Not to be deterred, and despite that Judge Martinez had by then ruled that RCW 9.73 did not apply, Dillon filed this action, again seeking damages from Respondents DWT, Grant, and SDR on the theory that, by taking verbatim notes of the interviews, Respondents had unlawfully "recorded" Dillon's allegedly "private" witness statements, in violation of RCW 9.73.030. The trial court below, Judge Heller, dismissed Dillon's Complaint on summary judgment for the same reason Judge Martinez had previously also done so: based on the verbatim notes of Dillon's witness interviews, the contents of which Dillon did not dispute, Judge Heller held that Dillon did not have a subjective expectation of privacy in his witness interviews and that any such expectation would be unreasonable. *See* 6/15/12

VRP 44:6-45:10; CP 807-08.

In this regard, for a recorded conversation to be "private," (1) the parties must "manifest" a subjective intention that the communication is private and (2) their expectation of privacy must be reasonable. *State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d 789 (2004). Here, the trial court noted that Dillon "certainly knew that he was talking to lawyers who would be taking notes," that "he also had reason to believe that the lawyers would be talking to other people about what they heard in the meeting," that Dillon "had indicated to others that he was going to have the meeting," and had "told others after the meeting . . . what had occurred." 6/15/12 VRP 44:6-21. The court also observed that "it was clear" that Dillon "never asked that Mr. Grant . . . keep the conversation confidential." Accordingly, the court held "there was no expectation of privacy with respect to what was said in that meeting." *Id.* 44:16-25. Indeed, the trial court specifically concluded that "there's simply no hint at all [in the record] that Mr. Dillon had that expectation." *Id.* 45:2-4.

Based on this holding that Dillon never manifested a subjective expectation of privacy, the trial court initially concluded that "I don't really even think I need to get to the second prong of the analysis about whether his expectation was reasonable, because I--I find that he did not have an expectation of privacy." *Id.* 45:5-8. Ultimately, in denying Dillon's Motion

for Reconsideration, the trial court did reach the second prong, holding that Dillon not only "knew" that the witness interviews were not private and that his statements would be used in the Federal Action, but also that he "should have known" as much. *See* CP 964-67. In holding that Dillon "should have known" that the interviews were not private, the trial court necessarily found that any alleged expectation of privacy on the part of Dillon was not reasonable under the undisputed facts.

Like Judge Andrus, Judge Heller then held that Washington's anti-SLAPP statute applied. Accordingly, he awarded Respondents a portion of their fees and imposed the mandatory statutory penalty against Dillon. *See* CP 807-08; CP 1155-57. Judge Heller specifically found that RCW 4.24.525 mandated the $10,000 in favor of each Respondent. *Id.*

III. ARGUMENT

A. The Trial Court Properly Dismissed Dillon's Privacy Act Claims on Summary Judgment.

1. The Trial Court Properly Ruled That Dillon's Privacy Act Claim Failed as a Matter of Law.

a. RCW 9.73 Only Prohibits the Recording of "Private" Conversations.

All of Dillon's claims in this action were asserted under Washington's Privacy Act, RCW 9.73.030. It is settled law in Washington that the protections of RCW 9.73.030 "apply only to *private* communications or conversations." *State v. Clark*, 129 Wn.2d 211, 224,

916 P.2d 384 (1996). Whether a particular communication is private "may be decided as a question of law where the facts are undisputed." *State v. Christensen*, 153 Wn.2d at 192. Here, based on the undisputed statements made by Dillon during the witness interviews, no reasonable trier of fact could find that the interviews were "private" communications, and the trial court correctly so held. In doing so, the trial court did not create any "common-law exception" to RCW 9.73.030, but rather applied the well-established principle that non-private communications are not encompassed within the statute.

A conversation or communication is "private" under RCW 9.73.030 only if it is intended to be "secret," where the information imparted is "intended only for the persons involved" in the conversation, or where a "secret message" is communicated. *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002). The plaintiff must prove both that (1) the parties *manifested* a subjective intention that the communication be private, and (2) that the expectation of privacy is reasonable. *State v. Modica*, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008). In particular, "[b]ecause any [party] will contend that his or her conversation was intended to be private," the reasonableness of the expectation is measured against objective factors such as duration and subject matter of the conversation, the location and presence of third parties, and the role of the

non-consenting party and his relationship to the consenting party. *Clark*, 129 Wn.2d at 225.

Thus, "[a] person has no reasonable expectation of privacy in a conversation that takes place at a meeting where one who attended could reveal what transpired to others." *Id.* at 226. For example, where a private investment club kept minutes of its meetings and a member of the club secretly tape recorded one of the meetings, the court held there was no violation of RCW 9.73.030 as a matter of law because all participants in the meetings knew that minutes were kept which summarized the meetings and which were available to others. *See State v. Slemmer*, 48 Wn. App. 48, 52, 736 P.2d 281 (1987). Likewise, witness interviews relating to public judicial proceedings are not private where the witness is aware that the statements may be used in court. *State v. Mankin*, 158 Wn. App. 111, 118-19, 241 P.3d 421 (2010), *review denied*, 171 Wn.2d 1003, 249 P.3d 182 (2011). This is true even where counsel's interview notes would not have to be disclosed during pretrial discovery. *See id.* at 118.

b. The Trial Court Should Be Affirmed That the Undisputed Facts Show the Interviews Were Not Private Conversations.

Here, the relevant facts are undisputed in that Dillon admitted under oath in the Federal Action that the verbatim notes taken were accurate and complete. *See* CP 252:10-12; CP 252:25-CP 253:22. Based on the

undisputed notes of Dillon's witness interviews, Judge Heller's rulings that Dillon did not manifest an expectation of privacy and that any such expectation would be objectively unreasonable were correct and should be affirmed.

First, there is no way to interpret the statements made by Dillon himself during the witness interviews as manifesting an intention or expectation that the interviews would be kept secret and confidential. Dillon voluntarily approached Grant and Kennan, who were strangers, with the stated purpose of providing information that they could use in the Federal Action. He said in his email that he wanted to "talk about the facts in this case" and that doing so would be "beneficial to T-Mobile/DWT." CP 175. Likewise, at the outset of the first interview on August 25, Dillon reiterated he wanted to talk with Grant and Kennan in order to give "you [ ] guys the information you need" that "would be beneficial to resolve this thing pretty quickly." CP 205 at 3:22-4:1 (emphasis added). There is no way to volunteer beneficial information to the attorney for an adverse party to resolve a case if the information is secret and cannot be used.

During the interview, Dillon likewise repeatedly manifested an understanding that the information he gave would be revealed to NetLogix and its attorneys. In particular, he specifically asked that the Respondents "wait to even speak with Scott's [NetLogix's] attorneys, and tell them next

week" about what Dillon had said so that he could collect money he expected NetLogix would pay him. CP 213-14 at 36:25-37:3. Dillon also expressly agreed to give a written declaration summarizing his statements for use in the Federal Action. CP 213 at 36:25-37:1. Again, there is no objectively reasonable meaning that can be given to this request to briefly delay talking to opposing counsel and Dillon's expressed willingness to sign a declaration other than that Dillon expected that content of the witness interviews would be used in the Federal Action rather than being kept secret.

Nor did Dillon himself treat the information that he was providing as "private" or "secret." Rather, he told Grant and Kennan that he had spoken to his "entire team" about his intent to tell Grant and Kennan the real facts about the case, and that his entire team was "all on board" with likewise talking to Grant and Kennan "and giving you [] guys the information you need" to resolve the case. CP 205 at 3:24-25. In addition to speaking with his "entire team," prior to speaking with T-Mobile's counsel, "Dillon informed Akrie of his intention to do so" and after speaking with T-Mobile's counsel, "Dillon informed Akrie not only that he had done so, but also that Defendant's counsel had asked him to sign the declaration." CP 87:6-11. Indeed, Dillon then telephoned Akrie to discuss the witness interviews and the draft declaration with him. CP 448 ¶ 4.

Finally, as Judge Heller noted, during the course of the interviews

Dillon never "manifested" any request for or expectation of privacy. For example, Dillon did not make any statements during the interview about an expectation of privacy. *E.g.,* CP 205, 221, 224. Indeed, rather than manifesting an expectation that the interviews be secret and limited to the participants, Dillon agreed to note taking, volunteered that the interviews would be used by Grant to "resolve" the litigation, would be shared with counsel for NetLogix, would be put in a declaration, and already had been shared by Dillon with numerous NetLogix employees. This is the opposite of a secret or private conversation. Indeed, as Judge Martinez observed, Dillon's scheme to leverage Akrie for money would have been ineffective if the information Dillon provided had been kept secret. The whole point of Dillon's scheme was to make sure that NetLogix knew he was talking to T-Mobile's attorneys, who undoubtedly would use the information, so that NetLogix or Akrie would pay him to stop and recant his statements.

In addition, as the trial court here held on reconsideration, because the undisputed transcript shows that Dillon knew he was talking to opposing counsel and agreed that his interviews would be taken down in notes conveyed to others and used in court, any expectation that Dillon had that his statements would be kept a secret is simply not objectively reasonable. *See Slemmer*, 48 Wn. App. at 52 (meeting not private where all participants knew that minutes were kept which summarized the meetings and which were

Accordingly, and as a matter of law, Dillon could not have had any reasonable expectation that the interviews were private. Moreover, the facts on this point – that Dillon knowingly confessed a massive fraud to the lawyers for the victim – are undisputed and do not depend on Dillon's alleged expectation that his statements would not be kept private.

3. Dillon Relies Heavily on a Declaration That He Contradicted in Testimony and Which Judge Martinez Found to Be Untruthful.

Dillon does not directly dispute any of the foregoing or deny the accuracy of the statements made in the transcripts of the witness interviews. Instead, Dillon points to other evidence which he claims is contradictory and creates a triable issue of fact.

First, although he barely mentioned it in the trial court, Dillon relies heavily on a declaration he filed in the Federal Action to defeat T-Mobile's sanctions motion. In that declaration, quoted at pages 9-10 of his brief, Dillon states that he had a subjective expectation of privacy based on assurances from T-Mobile's attorneys that the interviews would be private, confidential, and not part of the public record. *See* CP 580-83. This declaration was, in part, the reason Judge Martinez ordered an evidentiary hearing wherein Dillon testified.

However, in the evidentiary hearing, when pressed specifically as to whether DWT had assured him that the interviews would be private and

confidential, Dillon said something different. He testified that Respondents "never mentioned that," but instead agreed only that the interview would be informal and that Dillon would have an opportunity to talk to an attorney before giving a declaration or deposition:

> Q. She [DWT attorney Keenan] says in her next declaration, in her next paragraph of her declaration that she never told you that either call would be private or confidential?
>
> A. She never mentioned that. I made it very clear that I did not want to do anything formal. If I did, I needed an attorney, and they needed to take my deposition or declaration.

CP 319:15-21.[1]

Agreeing that a discussion will be informal suggests that one may not be exacting about the choice of words or details, but says nothing about whether you expect to have a secret or a private conversation. Many informal conversations—meeting someone in a bar, talking to the person next to you at a sports event, asking a stranger for directions—are informal but not at all secret or private. Here, it is undisputed that Dillon himself told numerous others about his informal discussions with defendants and, in fact, solicited his co-workers to likewise talk to DWT/Grant about the truth. Thus, regardless of whether these discussions were formal or informal, they were

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[1] Elsewhere, Dillon dodged questions about the specifics of his discussions with Grant/DWT by saying "I don't know word for word what I said," CP 252:4-5; that "I do not recall what they (Grant/DWT) said," CP 254:1; and "I can't go back and tell you what I was thinking at that time," CP 275:12-13.

not private. Dillon is not entitled to defeat summary judgment by relying on a conclusory declaration that is contrary to his sworn testimony before Judge Martinez, contrary to his own actions in telling others about the witness interviews, and contrary to the undisputed transcript of his own statements to defendants. *See, e.g., Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn. App. 203, 227, 242 P.3d 1 (2010) (cannot create triable issue by submitting a declaration which contradicts prior sworn testimony).

Moreover, Judge Martinez specifically found that the declarations Dillon submitted in the Federal Action were lies, holding that the evidentiary record "already reflects that Dillon has deliberately and repeatedly lied both to Defendants' counsel and the Court in the form of informal communications, ***sworn declarations***, and in-court testimony." CP 168:13-15 (emphasis added). Dillon cannot create an issue of fact in this proceeding based on declarations from another proceeding that have been rejected by that court as false.

4. T-Mobile's Assertion of a Work Product Privilege for the Verbatim Notes Says Nothing About Whether the Subject Matter of the Notes Was Private or Public.

Dillon also argues that Grant/DWT must have considered the interviews private because T-Mobile asserted a work product privilege over the verbatim notes of the two witness interviews in the Federal Action. However, this argument confuses an attorney's notes or impressions of an

event, which are protected, with the event itself which may be very public. A simple example demonstrates the point: if an attorney went to a meeting where a potential witness was speaking to a large, public audience, any notes that the attorney took, including verbatim notes of the witness' public statements, would be protected by the work-product doctrine even though the subject matter of the notes are clearly public and not private.

Similarly, here, that T-Mobile asserted that notes taken by its attorneys of an interview were work product, says nothing about whether the subject of the notes—Dillon's communications and the parties' reasonable expectations about them – were or were not private. Dillon's argument to the contrary simply confuses the attorney's notes about the event with the underlying event itself.

5. Dillon's Speculation About Grant's Motivations Does Not Change the Outcome.

Dillon argues that Grant did not tell him that the witness interviews were being "recorded" and lied about "Thad" being Grant's "assistant." Appellant's Br. at 28. From the premise that Grant was not forthright, Dillon then speculates that Grant must have known Dillon believed the conversations were private, and thus must have concluded that if he had been more forthright, Dillon would stop talking. *See id.*

However, Respondent Grant's motivations or beliefs about Dillon's

possible reaction to being told different information is pure speculation that is insufficient to raise any material issue of fact. *Roger Crane & Assocs. v. Felice*, 74 Wn. App. 769, 779, 875 P.2d 705 (1994). Moreover, the legal standard for privacy focuses on the parties' objective manifestations, not on their unexpressed motivations. Here, the objective manifestations of the parties' expectations make clear that Dillon contemplated that the information he provided would not be kept private. Argumentative speculation about what Respondent might have been thinking does not change that undisputed fact.

6. Whether It Is Reasonable to Believe an Attorney Would Not Lie to You Has Little to Do with Whether a Discussion with the Attorney Is Private.

Dillon argues at various points that it is professional misconduct for an attorney to make a "clandestine recording" of a witness interview and that it is unethical for an attorney to lie to a witness. From this premise, Dillon concludes that everyone reasonably believes that all discussions with attorneys are private unless otherwise stated.

First, civil liability cannot be premised upon a violation of ethical rules. *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992). Moreover, whether it is reasonable to expect that an attorney will tell you that verbatim notes are being made of a discussion has no direct bearing on whether the discussion is private. If Dillon gave an identical interview to

Respondents with the only difference being no note taking, his offers to help resolve the case, to sign a declaration, and his reporting the conversation to others, would still mean the discussion was not private, even though no note taking occurred. In short, any alleged ethical breach regarding the failure to disclose "verbatim" note taking (as opposed to just note taking) says nothing about whether Dillon's voluntary confessions of a fraud to the lawyers for the victim were private under RCW 9.73.

7. Dillon's Alleged Discovery of a Missing Six Minutes Proves Nothing.

Dillon raises for the first time on appeal a supposed "missing six minutes" from the August 25, 2011, "recording" of Dillon's interview. Referencing the Nixon White House, Dillon then speculates about what might be on the supposed missing six minutes. However, this theory is based on incorrect math. When added up, the phone records on which he relies, and the length of the transcript, are virtually identical. Dillon's math is just wrong. *See* Appellant's Br. at 16 (2:15 p.m. to 3:36 p.m. is 81 minutes, not 76).

Moreover, Dillon did not argue to the trial court that any material portion of the transcript was missing, and he should not be allowed to raise this issue for the first time on appeal. RAP 2.5. In addition, Dillon himself testified under oath in the Federal Action that the transcripts of his witness

interviews were complete and were missing nothing of significance. *See* CP 252:25-253:3; CP 253:14-18. He cannot be allowed to defeat summary judgment by raising an argument not made in the trial court, which is unsupported by the record, and which is contrary to his prior sworn testimony.

8. There Is No Evidence That the Interviews Were Private on the Theory Dillon Was Trying to Use DWT as a Messenger for a Private Message.

Finally, Dillon argues that a conversation can be private, even where there is an expectation that the information discussed will later be made public or passed on to another. Appellant's Br. at 32-33. Relying on *State v. Modica*, Dillon argues that simply because "a portion of the conversation is intended to be passed on" does not mean the conversation is not private, which is a determination that must be made from the totality of the circumstances. *Id.* at 35 (quoting *Modica*, 164 Wn.2d at 89-90).

In *Modica*, the plaintiff, an inmate, spoke with his grandmother by telephone, and asked her to pass messages to his wife. *See* 164 Wn.2d at 88-89. The Supreme Court assumed that plaintiff subjectively intended his call to be private, but held that any such expectation was unreasonable. *Id.* Nevertheless, the court rejected the argument that the conversation was not private merely because plaintiff intended his grandmother to pass along messages to his wife. *Id.* at 89. Instead, whether "the content of

the call is intended to be passed on to another may be relevant to whether it is private," although it may not be determinative. *Id.*

Here, unlike *Modica*, there is no evidence that Dillon was attempting to use DWT/Grant as a private messenger to convey a secret message to another. Dillon expressly gave information so that Respondents could use it to "resolve" the Federal Action, not so that they could secretly tell some third party. Nor is there any evidence that the existence of the interview, the source of the information, or any other aspect of interview was intended to be kept secret while the information itself was made public. To the contrary, Dillon himself told multiple co-workers and his former boss that he was talking to T-Mobile's attorneys. In short, even if it is possible to have a conversation that is private to impart information for public use, there is no evidence of that here.

B. This Court May Independently Affirm the Trial Court's Ruling Under the Doctrine of Collateral Estoppel.

Finally, this Court can affirm the trial court's summary judgment ruling on the independent ground that Dillon is collaterally estopped to relitigate Judge Martinez's findings.[2]

"Collateral estoppel promotes judicial economy and prevents

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[2] *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 202, 11 P.3d 762 (2000) (there is no need to file a notice of cross-appeal to raise an additional ground for affirmance, even if rejected by the trial court).

inconvenience, and even harassment, of parties." *Reninger v. Dep't of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). The doctrine applies when (1) the issues decided in the prior adjudication are the same as the ones presented in the subsequent case; (2) the prior adjudication ended in a final judgment on the merits; (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine does not work an injustice. *See id.* Here, on the factual issues of whether Dillon lied in the declarations he relies on, and whether Dillon had a reasonable expectation of privacy in confessing to Respondents, all the elements are met.

1. The Issues Are Identical.

The issue that Dillon had to prove here—that his witness interviews were "private" conversations—is the identical issue Judge Martinez decided in the Federal Action. When T-Mobile moved to dismiss the Federal Action based on the fraud and spoliation recounted by Dillon, NetLogix opposed dismissal on the ground that the transcripts of Dillon's witness interviews were illegally recorded in violation of RCW 9.73.030, and therefore inadmissible. Based on an evidentiary hearing where Dillon testified, while represented by counsel, Judge Martinez expressly rejected the assertion, holding that Dillon repeatedly lied and that he had no reasonable expectation that the interviews were "private." CP 170 n.7. The issue here is identical.

2. Final Judgment Was Entered.

Based on the verbatim notes of Dillon's witness interviews, and on his weighing of Dillon's credibility, Judge Martinez issued written findings and ultimately dismissed the Federal Action with prejudice and final judgment was entered. *See* CP 463. The fact that the judgment has been appealed does not suspend or negate the collateral estoppel effect of that judgment. *Nielson ex rel. Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 264, 956 P.2d 312 (1998). Accordingly, the element of finality is met.

In addition, where an issue depends on whether a litigant is telling the truth regarding events, and a court has already once ruled that he is not, collateral estoppel is particularly appropriate. *See Robinson v. Hamed*, 62 Wn. App. 92, 99, 813 P.2d 171 (1991). Here, Judge Martinez rejected Dillon's testimony that he intended the conversations to be private. CP 170. Dillon was represented by counsel at the evidentiary hearing where he testified. CP 250:7-9. In rejecting Dillon's explanations and dismissing the action, Judge Martinez found not only that Dillon had "repeatedly lied" to counsel and the Court, but that Dillon's lies had undermined the truth-finding function of the Court beyond repair. CP 169:1-3. Dillon should not be able to put the parties and the court to the expense and inconvenience of relitigating issues that depend on his prior testimony which a competent court

rejected as being untruthful. The issue has been previously decided and should stay that way.

3. Dillon Was in Privity and Is Complicit with NetLogix.

Although Dillon was not a party in the Federal Action, he is bound by collateral estoppel because of his numerous relationships with a party, NetLogix. For purposes of collateral estoppel, privity is sufficient to establish the "party" element. *Kuhlman v. Thomas*, 78 Wn. App. 115, 121, 897 P.2d 365 (1995). One is in privity with a non-party "if that party adequately represented the nonparty's interests." *Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis LLP*, 161 Wn.2d 214, 224, 164 P.3d. 500 (2007).

An agency relationship, such as "the employer/employee relationship is sufficient to establish privity." *Kuhlman*, 78 Wn. App. at 121. Likewise, "[c]o-conspirators are considered to be in privity" for purposes of preclusion. *McIver v. Jones*, 434 S.E.2d 504, 506 (Ga. App. 1993). Additionally, "[p]rivity is also established when a nonparty is in actual control of the litigation ***or substantially participates in it***." *Stevens County v. Futurewise*, 146 Wn. App. 493, 504, 192 P.3d 1 (2008) (emphasis added). Under the doctrine of "virtual representation," a nonparty will be deemed to have had his "vicarious day in court" when "the nonparty in some way participated in the former adjudication, for instance as a witness," when: (1) the issue has

been fully and fairly litigated, (2) "the evidence and testimony will be identical to that presented in the former adjudication," and (3) some manipulation or tactical maneuvering may have taken place. *Garcia v. Wilson*, 63 Wn. App. 516, 521, 820 P.2d 964 (1991). Not all of these factors are necessary to bind a nonparty and preclude his claims. For example, a witness with a stake in the outcome of the litigation will be bound:

> One who was a witness in an action, fully acquainted with its character and object and interested in its results, is estopped by the judgment as fully as if he had been a party.

Hackler v. Hackler, 37 Wn. App. 791, 795, 683 P.2d 241 (1984).

Here, Dillon was in privity with NetLogix both as an employee and by virtue of the agreement that NetLogix would pay him ten percent of any recovery in return for his "support" as a witness. Moreover, as an employee of NetLogix, Dillon actively participated in the fraud on which NetLogix's claims were based. Finally, after he gave the interviews at issue, he then actively participated with Akrie and NetLogix to continue the fraud on the court by trying to recant his statements. Judge Martinez specifically found that Akrie and Dillon were "complicit" in the "pattern of dishonesty" practiced on the court and the parties in the litigation. CP 168:19-22. The court concluded that the "collective dishonesty" of Dillon and Akrie had undermined the truth-finding function of the court beyond repair, CP 169:2-3, and that while Dillon had had numerous opportunities to cure his misconduct,

"Dillon, *with the cooperation of Akrie*, has instead elected to continue spinning a web of lies, entangling himself and the Plaintiff along the way." CP 169:19-21 (emphasis added).

It is hard to imagine a scenario where a nonparty could be any more aligned with a party, any more involved in the litigation, and any more interested in its outcome. Under these circumstances, Dillon is sufficiently connected to the Federal Action to be treated as a party for purposes of collateral estoppel. *See Hackler*, 37 Wn. App. at 795.

4. <u>There Is No Injustice in Precluding Relitigation</u>.

The final element of collateral estoppel is also met here—application of the doctrine would not work any injustice on Dillon. Indeed, it would be an injustice if he was not bound by Judge Martinez's ruling. In finding that Dillon had actively participated in fraud and had "deliberately and repeatedly lied to both Defendant's counsel and the Court," the court observed that "Dillon has exhibited a breathtaking lack of respect for his business partners, the law, this Court, and the judicial process." CP 168:13-17. It is hard to imagine how Dillon could claim any "injustice" under the circumstances.

Accordingly, this Court can and should affirm summary judgment on the independent basis that Dillon is collaterally estopped to relitigate Judge Martinez's holding that the declarations he relies on are lies and that his witness interviews were not private.

C. The Trial Court Correctly Applied Washington's Anti-SLAPP Statute, RCW 4.24.525.

Dillon also appeals the trial court's ruling that his claims constituted a prohibited "Strategic Lawsuit Against Public Participation" ("SLAPP") action under RCW 4.24.525. However, the trial court's ruling was correct and should be affirmed.

1. Washington's Anti-SLAPP Act.

Washington's anti-SLAPP statute was enacted in 1989 to ensure that Washington citizens could freely participate in the workings of government, *including judicial proceedings*, without threat of civil liability for doing so. *See* RCW 4.24.500. In 2010, the legislature added broad new protections, redefining and expanding the conduct that fell within the statute's protections, and providing specific procedural mechanisms to enforce them. *See* RCW 4.24.525. By its terms, the 2010 enactment "vastly expand[ed] the type of conduct protected by the Act." *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1109 (W.D. Wash. 2010). In particular, RCW 4.24.525 gives a defendant a right to bring "a special motion to strike any claim that is based on an action involving public participation and petition," as defined in the statute. RCW 4.24.525(4)(a).

In their motion before the trial court, Respondents set forth why Dillon's claim clearly constituted strategic litigation against public participation, *i.e.*, a prohibited SLAPP action. Specifically, by its terms,

RCW 4.24.525 applies to "any claim, however characterized" that is based on an "action involving public participation and petition." RCW 4.24.525(2). Here, Dillon's claims attacked Respondents' public participation and petition under at least three separate sections of the statute: (a) statements made or documents submitted "in" a judicial proceeding; (b) statements made "in connection with" a judicial proceeding; and (c) any "lawful conduct" in furtherance of a right to petition a governmental entity, such as a court.

a. Dillon's Claims Were Based on Statements Made and Documents Submitted "in" a Judicial Proceeding.

RCW 4.24.525(2)(a) provides that one form of a SLAPP is any claim based on statements made, or documents submitted, "in" a judicial proceeding. In an attempt to avoid Judge Andrus' prior ruling, Dillon claimed here that he was not seeking damages relating to the disclosure of the transcripts or their submission in the Federal Action; rather, he contends his claims were based "specifically and narrowly" on the "*act of recording*" the interviews, and nothing more. CP 46:19-47:2 (emphasis in original). However, Dillon's complaint was not so limited as he claims.

The complaint broadly sought unspecified "actual" damages, without identifying what those damages allegedly were and without providing any allegation as to how they were caused. CP 6 ¶ 6.1. To make out any claim for damages under RCW 9.73.030, Dillon had to

establish that a violation of the act injured his business, person or reputation. RCW 9.73.060. It is hard to imagine how Dillon could prove any injury or damages based *solely* on the fact that the interviews were transcribed and not based on how the transcripts were disclosed and used, *i.e.*, in the Federal Action. To the extent Dillon's claims sought damages or other relief directly or indirectly based on the submission of the witness transcripts in the Federal Action, his claims necessarily fell within RCW 4.24.525(2)(a).[3] Necessarily, therefore, Dillon's claims fell under the prohibitions of RCW 4.24.525(2)(a).

b. Dillon's Claims Were Based on Statements Made "in Connection with" a Judicial Proceeding.

Next, statements made "in connection with" a judicial proceeding also fall within the statutory protections. RCW 4.24.525(2)(b). The difference in the language between RCW 4.24.525(2)(a), discussed above, and (2)(b) is important. Subsection (2)(a) relates to statements made "in" a judicial proceeding, whereas (2)(b) encompasses statements made "in connection with" a judicial proceeding. The distinction demonstrates the legislature's intent to encompass out-of-court statements that have some relationship or "connection with" judicial proceedings. This language is broad and easily

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[3] This is precisely what Judge Andrus had already held prior to Dillon bringing this action. CP 422:13-CP 423:14; CP 429-30. *See also Kearney v. Kearney*, 95 Wn. App. 405, 412, 974 P.2d 872 (1999) (no claim under RCW 9.73 for disseminating recordings).

encompasses the two witness interviews at issue here.[4]

Dillon's express purpose for contacting T-Mobile's attorneys was to provide them information that he believed would be helpful to resolve the Federal Action. As Grant reiterated several times during the interviews, the discussions focused on the facts of the case, "who did what," and "what happened." CP 205 at 2:24-25. During the course of the interviews, Dillon described in detail that he and NetLogix had destroyed and discarded evidence, created evidence after the fact, and entered into an arrangement to pay him 10 percent of the proceeds of the case. Dillon promised to sign a declaration for use in the Federal Action. Thus, the interviews indisputably were "in connection with" a "judicial proceeding," and Dillon's claims now are based on the interviews.

c. Dillon's Claims Were Based on "Lawful Conduct" in Furtherance of the Right of Petition.

Third, RCW 4.24.525(2)(e) applies the anti-SLAPP protections to any "lawful conduct" in furtherance of the right of petition. Thus, there need not even be a statement for the anti-SLAPP provisions to apply. Certainly, gathering information from potential witnesses is conduct in furtherance of

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[4] *See, e.g., Sipple v. Found. for Nat'l Progress*, 71 Cal. App. 4th 226, 237-38 (Cal. App. 1999) (article about deposition and trial testimony is in connection with judicial proceeding); *Dove Audio, Inc. v. Rosenfeld, Meyer Susman*, 47 Cal. App. 4th 777, 784 (Cal. App. 1996) (statements in anticipation of legal action fall within SLAPP statute).

the right to submit information in judicial proceedings. Similarly, taking verbatim notes to ensure accuracy and fairness is in furtherance of the right to submit information to the court. The only question then is whether Respondents' conduct, in transcribing Dillon's witness interviews, was lawful, which it was, as discussed above. Accordingly, RCW 4.24.525(2)(e) applies to the conduct giving rise to Dillon's claims.

Finally, the legislature has expressly directed that RCW 4.24.525 is to be "construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." *See* RCW 4.24.525 Notes, Application-Construction-2010 c 118. Dillon's claims in this action constitute an attempt to attack and punish the Respondents for their exposing in a judicial proceeding the fraud and lies Dillon perpetrated on T-Mobile and the federal court. Dillon's lawsuit was a SLAPP, and the procedures of RCW 4.24.525 therefore applied.

2. Dillon's Arguments That the Anti-SLAPP Statute Does Not Apply Are Unavailing.

Dillon makes several arguments as to why RCW 4.24.525 does not apply. None of these are availing.

First, Dillon argues that the trial court improperly "reversed the order" of the anti-SLAPP procedure. *See* Appellant's Br. at 37. Dillon's argument is that the trial court was not permitted to hear and rule on Respondents'

Summary Judgment Motion, and dismiss Dillon's Privacy Act claim, before hearing Respondents' anti-SLAPP Motion. Dillon cites no authority for this proposition, and there is none. Moreover, Dillon fails to show how the outcome would have been any different, or how he was prejudiced.[5] Dillon's procedural argument fails.

Next, citing to RCW 4.24.525(4)(b), Dillon argues that Respondents failed to prove that his claims were "based on an action involving public participation and petition." Appellant's Br. at 38. However, what Dillon fails to mention, much less argue, is that the statute specifically defines the term "action involving public participation and petition." Specifically, Respondents moved under three separate statutory sections that broadly defined "action involving public participation and petition"—i.e., RCW 4.24.525(2)(a) (statements submitted "in" a judicial proceeding); (2)(b) (statements made "in connection with" a judicial proceeding); and (2)(e) (any "lawful conduct" in furtherance of the right of petition). Dillon fails to address any of these specific definitions, or the related facts on which Respondents moved under each of them.

Third, the broad generalizations that Dillon argues fail. For example,

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[5] Indeed, the statute expressly permits the court to review affidavits and evidence, RCW 4.24.525(4)(b), and the procedure is intended to operate as "early motions for summary judgment." Bruce E.H. Johnson & Sarah K. Duran, A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy, 87 Wash. L. Rev. 495, 518 (2012).

without discussing the facts or citing to the record at all, Dillon broadly and vaguely argues that his claims were not based on an action involving public participation, but instead on an attorney's "lying" to a witness, and "breaking the law and rules of professional ethics" by secretly recording the conversation.

This argument not only ignores the specific statutory definitions on which Respondents moved, but also ignores the elements of his claim under the Privacy Act. Lying to a witness or violating the Rules of Professional Conduct are not elements of a Privacy Act claim. Likewise, the Privacy Act does not merely prohibit "recording" of any conversations. The Act applies only to conversations that are intended and reasonably expected to be "private." This necessarily involves proof of the content of the conversation, the parties involved, the role of the parties involved, the purpose of the conversation and whether the information conveyed is intended to be passed on to others, used publicly, and the like. Thus, Dillon cannot divorce his claims from the elements of the Privacy Act, nor isolate the alleged "recording" from the statements themselves or the circumstances generally. Because Dillon's claims arose from and were based on statements that indisputably were made "in connection with" a judicial proceeding, the anti-SLAPP statute necessarily applied.

Dillon also argues that RCW 4.24.525 only applies to

constitutionally-protected "free speech" and that not just any statement in connection with a judicial proceeding is protected. The authority Dillon cites for this proposition, *Saldivar v. Momah*, 145 Wn. App. 365, 387, 186 P.3d 1117 (2008), however, was decided long before the enactment of the 2010 statutory amendments under which Respondents moved and upon which the court made its ruling. For that reason, *Saldivar*, and Dillon's argument in general, are inapposite. Under the express language of the amended statute, the argument fails.

Finally, Dillon's argument that the SLAPP analysis is conducted solely with respect to the "allegations" of the Complaint—and that a mere "allegation" of criminal conduct is sufficient to avoid the strictures of the statute—is directly contrary to the language of RCW 4.24.525(4)(b), which expressly states that the court is not limited to the plaintiff's allegations but shall consider "affidavits stating the facts."

Instead, and in contrast to the express language of the Washington statute, Dillon's remarkable interpretation of RCW 4.24.525 is based exclusively on a single California case, *Gerbosi v. Gaims*, 122 Cal. Rptr. 3d 73 (Cal. App. 2011). However, even *Gaims* does not support Dillon's interpretation of how the first prong of the SLAPP analysis is conducted.

Gaims interpreted California's SLAPP statute as providing that the first prong of the SLAPP statute cannot be satisfied "by a defendant whose

assertedly protected activity is illegal as a matter of law," thus not protected by the first amendment. 122 Cal. Rptr. 3d at 82. However, *Gaims* then goes on to explain what it means to be "illegal as a matter of law":

> [T]he [California] Supreme Court observed that an activity could be deemed criminal as a matter of law when a defendant concedes criminality, or the evidence conclusively shows criminality.

Id. at 82. Dillon completely jumps over this step of the *Gaims* analysis. Here, Respondents are rather clearly not "conceding" that their conduct was criminal. To the contrary, Respondents moved for summary judgment that RCW 9.73.030 did not apply on the undisputed facts and the trial court so held. Likewise, Dillon did not and cannot show that "the evidence conclusively shows criminality." In *Gaims*, the court found "[u]nder no factual scenario offered by Gaims is such wiretapping activities" a protected activity. 122 Cal. Rptr. 3d at 82. Here, in contrast, the trial court below and a respected federal judge have both already held that the same evidence does not show criminality. In short, Dillon's argument here also fails.

3. Dillon Concedes That the Trial Court's Award Under RCW 4.24.525(6)(a) Was Proper.

The trial court awarded Respondents a portion of their fees and costs, as well as an additional statutory amount of $10,000 each, as mandated by RCW 4.24.525(6)(a). Although Dillon argues that the anti-SLAPP statute should not be applied at all, Dillon does *not* argue, and apparently concedes,

that if the anti-SLAPP statute applies (it does), then the *amount* of the award was proper. Accordingly, if this Court finds, as it should, that Dillon's claim was a prohibited anti-SLAPP action, then the Court should also affirm, without more, the amount of the award made by the trial court.

In any event, the trial court's award was correct. Dillon's only argument apparently is that the $10,000 statutory sanction should not have been awarded in favor of each Respondent. However, the express statutory language requires that the court award a statutory sanction to "a moving party who prevails" under the statute. Here, each of the Respondents was "a moving party" under the statute and entitled to the statutory award.

In addition, although there are no reported Washington State court decisions interpreting RCW 4.24.525(6)(a)(ii), all three federal judges in the Western District of Washington who have examined the language of the statute have determined that it mandates an award of $10,000 to *each* moving party. *See Castello v. City of Seattle*, No. C10-1457MJP, 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010); *Eklund v. City of Seattle*, No. C06-1815Z, 2009 WL 1884402 (W.D. Wash. June 30, 2009), *rev'd on other grounds*, 410 Fed. App'x 14 (9th Cir. 2010); *Phoenix Trading, Inc. v. Kayser*, No. C10-0920JLR, 2011 WL 3158416, at *16 (W.D. Wash. July 25, 2011). Accordingly, the amount of the trial court's award was proper.

D. Respondents Are Entitled to Their Fees and Costs on Appeal.

Pursuant to RAP 18.1, and as mandated by RCW 4.24.525(6)(a), Respondents are entitled to and should be awarded their fees and costs on appeal.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 18th day of January, 2013.

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By Ralph E. Cromwell Jr.
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Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 18th day of January, 2013, a true copy of the foregoing pleading was served on each and every attorney of record herein via email:

Dennis Moran
William A. Keller
Moran & Keller
5608 – 17th Avenue NW
Seattle, Washington 98107

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED in Seattle, Washington, this 18th day of January, 2013.

Ralph E. Cramwell Jr.