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

STEPHEN CLAPP and SEQUIM VALLEY RANCH,

Plaintiffs-Appellants,

v.

OLYMPIC VIEW PUBLISHING CO., LLC,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

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I. STATEMENT OF ISSUES

- A. **Whether the fair report privilege applies to court documents filed and available for public inspection.**
- B. **Whether a newspaper article accurately describing the contents of court documents filed in support of a petition for a protective order, and disclaiming any endorsement or substantiation of the alleged facts related to that petition and its supporting documents, is protected by the fair report privilege.**
- C. **Whether an appeal, arguing for the first time that “unconfirmed” documents in the public record are not subject to the fair report privilege, and raising unsupportable factual arguments about the accuracy of a newspaper article fairly describing court filings in the public record, violates RAP 18.7 and RAP 18.9 and warrants an award of attorneys’ fees.**

II. STATEMENT OF THE CASE

Plaintiffs Stephen Clapp (“Clapp”) and Sequim Valley Ranch (“Ranch”) (collectively, “Sequim Valley”) sued Olympic View Publishing Company, LLC (“Olympic View”), the publisher of the *Sequim Gazette* (“*Gazette*”), alleging defamation arising from an article the *Gazette* published in September 2004 describing documents filed in Clallam County district court. CP 71-73. These documents were filed as part of a petition for protection from harassment brought by a Ranch employee against Clapp. They include the petition, an affidavit from the petitioner, and correspondence regarding employer/employee issues at the Ranch. CP 36-55.

A. District Court Filings.

On September 22, 2004, Marie Barnett, an employee at the Sequim Valley Ranch who had just turned in her letter of resignation, filed a petition for a protective order in Clallam County superior court against Stephen Clapp, the owner of the Ranch, on behalf of herself and her two children. CP 44-46.¹

Her petition alleged that Mr. Clapp had “bombardded” [sic] her with faxes, meetings and phone calls in an attempt to intimidate her into committing perjury, and that she feared Mr. Clapp’s potentially violent response to her resignation. CP 45-46. It also alleged that in April 2004, Mr. Clapp “stormed” into Ms. Barnett’s office, “slamm[ed] the door open into the wall[,] scream[ed] profanity,” threw a fax at her and “trampled” her 11-month-old son. *Id.* According to Ms. Barnett, during this incident, Mr. Clapp “was violent, scre[a]ming, shaky, sweating and had a set of keys held up in his hand that [Ms. Barnett] thought he was going to throw” at her. *Id.* Ms. Barnett also alleged he had similarly forced his way into an employee’s home after that employee quit his or her job, and that he had attacked a valet who, believing Mr. Clapp was too drunk to drive, refused to give Mr. Clapp his car keys. *Id.* She informed the court that

¹ Ms. Barnett had filed a similar petition in the superior court two days prior, which was denied without prejudice and sent to the district court because it did not involve allegations of domestic violence. Ms. Barnett then filed the petition at issue in district court on September 22. CP 36-46.

she was “in fear of his reaction to [her] resignation for refusing to commit [perjury,]” given her experience with his verbal assaults and her fear that he could become violent. *Id.*

Ms. Barnett attached a series of documents to her petition, which included correspondence between Ms. Barnett and Mr. Clapp, in which Barnett encouraged Clapp “to see about getting help,” and discussed her fear of him and her discomfort with the incident. CP 48. Ms. Barnett also attached a resignation letter from five Ranch employees to Mr. Clapp, which alleged constructive discharge based on Mr. Clapp’s attempts to coerce the employees into supplying “damaging evidence” and testifying favorably on behalf of the Ranch in a pending case. CP 49. The letter stated that “[b]y asking us to commit perjury or be fired,” Clapp constructively discharged them. The letter also indicated that the resigning employees feared for their “well-being and safety due to [Mr. Clapp’s] past violent temperamental rage” and prior violence. *Id.*

Finally, the petition included copies of two letters from Mr. Clapp to Ranch staff, dated September 2004, addressing the pending case which gave rise to the allegations of coercion and pressure to commit perjury. CP 50-55. These letters outlined the facts of that case, which involved a neighboring business’s pressurized pumping of sewage onto its land, and

contained heavy-handed exhortations encouraging the employees to support the Ranch's litigation effort, under threat of termination. *Id.*

B. The Article in the *Gazette*.

The *Gazette* ran an article regarding the contents of this filing on October 27, 2004. CP 34. The headline read, "Lavender farm employees quit," with a sub-headline stating, "Allege owner strong-armed them to commit perjury." *Id.* The article described each of the documents filed by Ms. Barnett, drawing most of the information directly from the documents themselves and quoting them extensively.² *Id.*

The article carefully noted that the material facts appearing in the documents, including the April incident, the coercion, and even Clapp's identity as the author of the letters to Ranch staff, were allegations, rather than settled facts. *Id.* ("the employees allege Clapp had asked them to lie"; "states the petition"; "according to court papers"; "stated Barnett's affidavit"; "[c]orrespondence attributed to Clapp"; "Clapp reportedly wrote"; "the employees allege"; "stated the resignation letter"). On the same page, the *Gazette* also printed two articles, one explaining the litigation which gave rise to the employees' complaints, and another describing another litigation matter involving the Ranch. *Id.*

² The only statements in the article *not* drawn from the public records in Ms. Barnett's case were (1) a statement that telephone calls to Mr. Clapp and his attorneys were not returned and (2) a statement that two employees confirmed that the documents appearing to be from Clapp were, in fact, from him. CP 34.

C. The Complaint.

More than a year later, Mr. Clapp and the Ranch filed a complaint for defamation against Olympic View, alleging that the article was “false, misleading, malicious, and defamatory,” and that the “overall impression of the article was not fair, balanced, or accurate.” CP 72 at ¶ 5. Specifically, the Complaint asserts that the article, rather than Ms. Barnett, “alleged” that Mr. Clapp had “trampled” the son of an employee and that the article “quoted selectively” from Ranch “proprietary” documents. *Id.*

D. The Grant of Olympic View’s Motion to Dismiss.

Olympic View filed a motion to dismiss on the grounds that the article was protected by the fair report privilege. The superior court granted the motion and entered a memorandum opinion, in which the court held that the article “clearly covers an official proceeding” and “is scattered throughout” with conditional words indicating to the reader that the article was “referring to the allegations being made” without substantiating those allegations. CP 10-11. The court also held that “the overall purpose of the publication in question was to advise the reader of the complaints and charges being made by the disgruntled employees of the plaintiff’s lavender farm, and in particular to set forth the allegations made in the petition for protection,” and that the article “was clearly not designed to provide a complete analysis of the merits of the claim. Its

purpose was to present only what had been ‘alleged’ and the publication made that obvious to the reader.” CP 11-12. The court accordingly held that the article “is a fair abridgement of the allegations being made by the former employees of the plaintiff.” CP 12.

On January 26, 2006, the superior court entered its order granting Olympic View’s motion to dismiss. CP 8-9.

This appeal followed.

III. ARGUMENT

Clapp and the Ranch raise two arguments on appeal. The first, that the fair report privilege does not protect publication of “unconfirmed” allegations appearing in court records, is raised for the first time on appeal and should not be considered by this Court. RAP 2.5(a). In any case, it runs contrary to well-settled Washington law establishing that “documents filed and available for public inspection” fall within the privilege’s scope. *Herron v. Tribune Publ’g. Co.*, 108 Wn.2d 162, 179, 736 P.2d 249 (1987). The second, that the article is not a substantially fair and accurate abridgement of the court documents it describes, likewise fails, as even the most cursory reading of the documents and article makes plain.

Appellants’ case boils down to this: Olympic View merely reported on a pending lawsuit, and was sued for doing so. Given long-established case law in Washington applying the public records privilege

and a host of Washington cases directly rejecting appellants' theory of liability, it is obvious that their appeal is directly contrary to settled law and that Sequim Valley has no viable legal basis for challenging the dismissal order.

Therefore, this appeal is frivolous, and Olympic View should be awarded its fees incurred in defending the dismissal on appeal.

A. The Fair Report Privilege Protects Publication of Information Appearing in Court Documents Filed and Available for Public Inspection.

1. Sequim Valley Failed to Challenge Before the Superior Court the Applicability of the Fair Report Privilege to the Filings at Issue.

For the first time on appeal, and despite well-settled law to the contrary, Sequim Valley argues that the fair report privilege does not protect any "unconfirmed" allegations appearing in documents filed in judicial proceedings, placed in the record, and made available for public inspection. Because Sequim Valley did not provide the superior court with an opportunity to assess this argument, this Court should decline to review it.

"Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. This rule affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *New Meadows Holding Co. by Raugust v. Wash. Water Power*

Co., 102 Wn.2d 495, 498, 687 P.2d 212 (1984) (citations omitted); *see also* RAP 2.5(a) (allowing parties to raise for the first time on appeal only claims of jurisdiction, failure to establish facts giving rise to a claim, and manifest errors affecting constitutional rights); *Citizens For Fair Share v. State Dep't of Corrections*, 117 Wn. App. 411, 422 n.14, 72 P.3d 206 (2003) (“Generally, we do not consider an argument raised for the first time on appeal.”), *review denied*, 150 Wn.2d 1037, 84 P.3d 1229 (2004); *Hernandez v. Dep't of Labor and Indus.*, 107 Wn. App. 190, 199, 26 P.3d 977 (2001);(refusing to entertain arguments not raised before the trial court); *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996) (“[A]n argument that was neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.”); *Woodcreek Land Ltd. P'ships I, II, III and IV v. City of Puyallup*, 69 Wn. App. 1, 11, 847 P.2d 501 (1993) (argument never argued “cannot be raised for the first time on appeal”); *Smith v. Shannon*, 100 Wn.2d 26, 37-38, 666 P.2d 351 (1983) (litigant precluded from raising on appeal arguments not raised before the trial court).

Before the superior court, Sequim Valley did not challenge the applicability of the fair report privilege to the underlying court documents; its argument simply was that the article was not a fair abridgement of those documents. CP 28-30. It cannot now raise a challenge to the

privilege's applicability. *Sneed*, 80 Wn. App. at 847; *Woodcreek*, 69 Wn. App. at 11; *Shannon*, Wn.2d at 37-38.

2. The Fair Report Privilege Covers All Documents Filed in Court and Available for Public Inspection, Including the Filings at Issue Here.

Even if this argument were properly before this Court, it lacks merit. As the Supreme Court ruled in *Herron v. Tribune Publishing*, the fair report privilege applies “not only to statements made in the course of the proceeding but also to documents filed and available for public inspection.” 108 Wn.2d at 179 (citing *Mark v. Seattle Times Co.*, 96 Wn.2d 473, 488, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124, 102 S. Ct. 2942, 73 L. Ed. 2d 1339 (1982)). The privilege, which “rests upon the idea that any member of the public, if he were present, might see and hear for himself, so that the reporter is merely a substitute for the public eye,” W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts*, § 115, at 836 (5th ed. 1984), is often referred to as the “public records privilege.” *Gaylord Entm't v. Thompson*, 1998 OK 30, 958 P.2d 128, 144 n.60 (1998); D. Gillmore, J. Barron, T. Simon & H. Terry, *Mass Communication Law* 250 (5th ed. 1990); 1 *Sack on Defamation* § 7.3.2.2.1, at 7-16 (2006).

In the context of court proceedings, the application of this settled rule holds that the privilege attaches at the commencement of those

proceedings: the privilege covers reports of “charges made in pleadings on the ground that the filing of a pleading is a public and official act in the course of judicial proceedings.” *O’Brien v. Tribune Publ’g Co.*, 7 Wn. App. 107, 117, 499 P.2d 24 (1972), *cert. denied sub nom. O’Brien v. Franich*, 411 U.S. 906, 93 S. Ct. 1531, 36 L. Ed. 2d 196 (1973); *see also Herron*, 108 Wn.2d at 185 (citing *O’Brien*); *Mark v. Seattle Times*, 96 Wn.2d at 488-89 (citing *O’Brien*).³ Or, as the Supreme Court has held, again in the judicial proceedings context, “[a]ny information reported by [the media] that reiterate[s] material of record in the proceedings [i]s privileged.” *Mark v. Seattle Times*, 96 Wn.2d at 488-89 (emphasis added) (citing *O’Brien*, 7 Wn. App. at 117); *see also Gaylord Entm’t*, 958 P.2d at 144 n.60; *Prosser & Keeton* § 115, at 836.

The privilege is to be construed liberally, *Mark v. Seattle Times*, 96 Wn.2d at 488 (citing and affirming *Mark v. KING Broad. Co.*, 27 Wn. App. 344, 349-50, 618 P.2d 512 (1980)), in accordance with the

³ Ms. Barnett’s petition for an order of protection is a pleading. *Beckman ex rel. Beckman v. State, Dep’t of Social and Health Servs*, 102 Wn. App. 687, 691-92 & n.2, 11 P.3d 313 (2000) (“Pleadings are written allegations of what is affirmed on one side, or denied on the other, disclosing to the court or jury having to try the cause the real matter in dispute between the parties.”). Even if it were not, as the document that commenced the court proceedings, it falls within the protection of the privilege. *See Herron*, 108 Wn.2d at 184-88 (discussing scope of the privilege in terms of “when in the initiation of legal proceedings” the privilege is triggered, and holding that in the recall petition context, as in the judicial context, the privilege “arises at the time the recall petition is filed”); *see also Newell v. Field Enters, Inc.*, 91 Ill. App. 3d 735, 746-49, 415 N.E.2d 434 (1980) (holding that “the common law privilege to report on judicial proceedings attaches not at the point of judicial action, but rather when the complaint is filed”); *Solaia Tech., LLC v. Specialty Publ’g Co.*, ___ Ill. 2d ___, ___ N.E.2d ___, 2006 WL 1703487 (Ill., June 22, 2006) (explicitly approving *Newell*.)

longstanding recognition that “[i]n the First Amendment area, summary procedures are . . . essential. For the stake [in such cases] is free debate The threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself” *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011, 87 S. Ct. 708, 17 L. Ed. 2d 548 (1967); *see also Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768 (2005) (“Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms.”) (quoting *Mark v. Seattle Times*, 96 Wn.2d at 485 (quoting *Tait v. KING Broad. Co.*, 1 Wn. App. 250, 255, 460 P.2d 307 (1969); citing *Keogh*, 365 F.2d at 968)).⁴

⁴ As the United States Supreme Court has explained:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491-92, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975). Thus, respondent’s accurate publication of newsworthy information was

3. Court Filings Are Covered by the Fair Report Privilege Regardless of Whether Judicial Actions Are Taken Regarding Them, or Whether They Are “Confirmed” by Public Officials or Independent Parties.

Sequim Valley attempts to evade settled law by ignoring or misstating these cases and crafting a whole-cloth theory, according to which reporting on preliminary court proceedings is protected by the fair report privilege only when those court filings are somehow confirmed by official or “independent” sources. App. Br. at 7-10. This theory is both unsupported and erroneous, for myriad reasons.

First, as noted, settled law rejects the theory by protecting as privileged both preliminary filings and all other documents made part of the public record of judicial proceedings. *O’Brien*, 7 Wn. App. at 117; *Mark v. Seattle Times*, 96 Wn.2d at 488-89; *see also Crane v. Arizona Republic*, 729 F. Supp. 698, 703-08 & n.4 (C.D. Cal. 1989), *aff’d in relevant part*, 972 F.2d 1511, 519-20 (9th Cir. 1992) (newspaper reported a summary of defamatory allegations about the plaintiffs made by two witnesses to congressional investigators; the article was privileged under

protected by the First Amendment to the United States Constitution. *See Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979) (holding that a statute punishing publication of juvenile names lawfully obtained from court records was an invalid infringement on the freedom of the press); *Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989) (statute punishing publication of rape victim’s name lawfully obtained from public records invalid infringement on the freedom of the press under the principles of *Daily Mail*).

California’s codification of the fair report privilege, “which is virtually identical to” the common law privilege); *Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1436-37 (9th Cir. 1992) (applying privilege to protect report of out-of-court statements made by party and her private investigator that detailed the basis for her in-court allegations); *White v. Fraternal Order of Police*, 909 F.2d 512, 515-16, 527-28 (D.C. Cir. 1990) (reports of allegations raised in letters to city mayor, and reported on before actions were taken or the allegations were substantiated, privileged).

Sequim Valley’s reference to the fact that here, “[n]o hearing had been conducted and no review of the [Barnett] allegations had been made,” App. Br. at 8, and that the allegations had not been “tested by the adversarial court process” when the article was written, App. Br. at 10, simply echoes the former, obsolete Restatement approach (which posited that prior to some sort of judicial action, court filings are not protected by the privilege) that Washington courts have **repeatedly** rejected. “The privilege attaches to pleadings which have been filed in court and is not contingent upon judicial action being taken.” *Mark v. KING*, 27 Wn. App. at 349, *aff’d*, 96 Wn.2d 473; *O’Brien*, 7 Wn. App. at 117 (“We agree with those decisions which uphold the claim of privilege to report charges made in pleadings on the ground that the filing of a pleading is a public

and official act in the course of judicial proceedings.”) (citing *Campbell v. New York Evening Post*, 245 N.Y. 320, 157 N.E. 153 (1927); *Am. Dist. Tel. Co. v. Brink’s, Inc.*, 380 F.2d 131 (7th Cir. 1967); *Johnson v. Johnson Publ’g Co.*, 271 A.2d 696 (D.C. 1970)); *Herron*, 108 Wn.2d at 185 (citing *O’Brien* with approval and noting that *O’Brien* represented a rejection of the old Restatement approach);⁵ *Mark v. Seattle Times*, 96 Wn.2d at 488-89 (citing *O’Brien*); see also 1 *Sack on Defamation* § 7.3.2.2.4, at 7-24 (noting the “modern” rule that the privilege applies at the commencement of suit, and recognizing that it “is almost certainly now also the majority rule,” and collecting cases); *Newell*, 91 Ill. App.3d at 746-48 (holding that “the common law privilege to report on judicial proceedings attaches not at the point of judicial action, but rather when the complaint is filed”); *Solaia*, ___ Ill. 2d ___, 2006 WL 1703487 (approving *Newell*); n. 3, *supra*.⁶

⁵ The court in *Herron* also noted that the concern motivating the old Restatement approach was not with third-party republications, such as the one at issue here, but rather with “preventing the would-be defamer from filing defamatory pleadings only in order to privilege their republication.” 108 Wn.2d at 184-85.

⁶ The *Newell* decision includes a lengthy discussion of the reasons why the privilege attaches at the commencement of judicial proceedings: first, the public’s interest in knowing what occurs in the judicial system requires that the entire process be exposed to public scrutiny; second, the reasoning to the contrary articulated in states adopting the contrary view—that requiring judicial action before attachment of the privilege reduces the potential for defamation—was unconvincing because, *inter alia*, the mere fact that “a suit has proceeded to the point where judicial action of some kind has taken place does not necessarily mean that the suit is less likely to be groundless and brought in bad faith”; third, today’s society is aware of the one-sidedness of a complaint and has the requisite cynicism to evaluate the information contained therein fairly; fourth, the filing of a pleading is an official act, by virtue of its inclusion in the public record. 91 Ill. App.3d at 746-48.

Accordingly, Sequim Valley is wrong to claim that the superior court created a new “expansion of the privilege,” for which “some additional reason” for that supposed expansion is required.⁷ App. Br. at 9. Per settled case law, the Barnett filings were “made in the course of an official proceeding” and thus lie directly within the ambit of the fair report privilege. In point of fact, Sequim Valley is the party seeking to create an exception.

Second, were this confirmation theory applied, it would exclude from the privilege’s protection media reports on a wide variety of actions taken in early court proceedings, including the filing of nearly all complaints, answers, pre-hearing motions, and affidavits filed by parties other than the government. A report on Barry Bonds’ lawsuit against Gotham Books and the authors of *Game of Shadows*, for example—

⁷ Indeed, Sequim Valley is even wrong to characterize the cases it cites—and *Herron* in particular—as requiring some “additional reason” to extend the privilege to a novel circumstance. App. Br. at 9. That language never actually appears in *Herron*, and at no point in its discussion of the privilege (and the cases articulating it) does it even imply that anything “additional” is required for the privilege to apply in a given context. The only mildly comparable discussion is *Herron*’s articulation of why a recall petition is different from reporting on the contents of campaign literature (an unprivileged endeavor). There, the court stated that because campaign-literature reporting was unprivileged, “recognition of a conditional privilege in the recall context must be based on something more than the fact that an election is at issue.” 108 Wn.2d at 181. That “something more,” in the recall context, was (1) the fact that a recall petition is a filed public document, (2) the fact that persons submitting such petitions do so under an oath (which, incidentally, parallels the standards for filing court documents), and (3) “most importantly,” the fact that “the filing of a recall petition sets in motion a chain of statutorily mandated procedures, *see* RCW 29.82, which, if reported on, would be protected” by the fair report privilege. *Id.* Notably, this “something more” precisely parallels elements at play when a private citizen files a motion for a protective order in a Washington court.

whether that report discussed his initial complaint, the defendants' responses, or his eventual motion to withdraw the suit, or all of the above—would not be privileged. Nor would reporting on the filing of civil lawsuits against military contractor/interrogators at Abu Ghraib by Iraqi victims and their families be privileged.

Such an exception has not only been repeatedly rejected by Washington courts, but if applied, it would swallow the rule. In addition, such an exception would favor the government in perverse ways *vis-à-vis* private citizens, by allowing the government to self-verify its public filings, particularly in court proceedings, which then would be easily disseminated via the press, while at the same time discouraging the press from reporting quickly—or at all—on similarly-postured private court filings, for fear of being subject to actions for defamation.

Third, Sequim Valley mischaracterizes the cases on which it attempts to rely to support its argument. *Mark*, for example, did not “extend” the fair report privilege to affidavits and a suspect information report filed in that case “because” those documents were “(1) instrumental in the commencement of a criminal prosecution, (2) matters of public record, and (3) verified by the prosecutor.” App. Br. at 8. (The language quoted by Sequim Valley to this effect is *Mark*’s summary of the Court of Appeals decision.)

To the contrary, the Supreme Court held that the documents were privileged only because they (1) supported the allegations contained in the charging documents and (2) were officially filed court documents open to public inspection. The Court *specifically excluded from its reasoning* the fact that the affidavit and suspect information were “verified by the prosecutor.” *Mark v. Seattle Times*, 96 Wn.2d at 488-89 (citing *O’Brien*, 7 Wn. App. at 117; *Campbell*, 245 N.Y. at 328; L. Eldredge, *The Law of Defamation* 427-31 (1978)).⁸ The documents here, filed in support of the allegations contained in the Barnett protective order petition and made part of the public record, land squarely within the holding of *Mark*. As such, as in *Mark*, “[a]ny information reported by [Olympic View], therefore, that reiterated material of record in the proceedings was privileged.” *Mark v. Seattle Times*, 96 Wn.2d at 488.

Nor does *Herron* assist Sequim Valley’s argument. Not only does *Herron* fail to support the notion that the courts articulate “additional

⁸ Even if the “verified by the prosecutor” language of the court’s description of the prior court of appeals decision had some relevance to whether the filings here fell within the ambit of the privilege—it does not—it still fails to support Sequim Valley’s argument that such “verification” need be by an “official or other independent source.” The identity of the verifying party was irrelevant to the decision of the court of appeals: the court held that affidavits and criminal information are subject to the privilege because, analogizing them to pleadings under the Civil Rules, both are covered by the “same aura of responsibility” that applies to pleadings and gives rise to the privilege’s protections under *O’Brien*. *Mark v. KING*, 27 Wn. App. at 349-51. (This same aura of responsibility clearly applies to the Barnett filings here.) In any case, the decision of the court of appeals was primarily rooted not in the similarities between civil and criminal preliminary proceedings and filings, but rather in the public’s interest in receiving information about judicial proceedings, and the attendant responsibility of the press to disseminate that information. *Id.* at 350 (quoting *Cox*, 420 U.S. at 491-92).

reasons” for purportedly “expanding” the privilege (*see* n. 7, *supra*), but Sequim Valley mischaracterizes its holding. It is not the fact that recall petitions are “supported by more than a sole individual,” App. Br. at 9, that render them subject to the privilege. *Herron* does not even mention this aspect of recall petitions. Rather, the “nature of the recall process” subjects petitions to the privilege because, as noted, n. 7, *supra*, (1) a recall petition is a filed public document, (2) persons submitting such petitions do so under an oath, and (3) “the filing of a recall petition sets in motion a chain of statutorily mandated procedures, *see* RCW 29.82, which, if reported on, would be protected by the public proceedings conditional privilege.” 108 Wn.2d at 180-81. These dynamics are equally at play in the court-filing context here. N. 7, *supra*. Moreover, in *Herron* the court specifically held that “[t]he critical element” in its inquiry into the scope of the privilege “is the public interest, not whether a government actor has taken a particular affirmative step.” 108 Wn.2d at 187.

Moloney v. Tribune Publishing Co., 26 Wn. App. 357, 613 P.2d 1179 (1980), *review denied*, 94 Wn.2d 1014 (1980), *disapproved of on unrelated grounds*, *Bender v. Seattle*, 99 Wn.2d 582, 590, 664 P.2d 492 (1983), is likewise unhelpful to Sequim Valley. That decision simply holds that republication of government reports is privileged, without providing significant commentary on the reasons for the privilege’s

application, except to say that “[t]he reason underlying the privilege is the interest of the public in receiving information concerning official action or proceedings and public meetings.” 26 Wn. App. at 361.

The law is clear: the fair report privilege attaches to reports of judicial proceedings at the commencement of those proceedings, regardless of whether any judicial action has taken place, and regardless of whether any filings have been “confirmed,” either by government or by any other source apart from the party submitting such filings. *Herron*, 108 Wn.2d at 179. Sequim Valley’s arguments to the contrary simply lack merit.

B. The Article at Issue Is Privileged Because It Is a Fair Abridgement of the Public Record.

1. Substantially Accurate Abridgements of the Public Record Are Absolutely Privileged.

In *Alpine Industries, Computers, Inc. v. Cowles Publishing Co.*, 114 Wn. App. 371, 57 P.3d 1178 (2002), *as amended*, 64 P.3d 49 (2003), Division III of this Court held that the privilege to report what happens in official proceedings is absolute. Thus, “so long as the publication is attributable to an official proceeding and is an accurate report or a fair abridgement thereof, it is privileged.” 114 Wn. App. at 385. “Broader in scope” than simple conditional privileges, *id.* at 384, the fair report privilege is “not subject to the same abuse analysis” as other “conditional”

privileges: it protects the publisher “even if the publisher does not believe” statements in the public record, “or even knows [them] to be false.” *Id.* at 384-85. As such, so long as it is a fair and accurate report, it is absolutely privileged. *Id.* at 385. This case presents the same issue as in *Alpine Industries*: “Here, the challenged statements are easily traceable to the ... court proceedings” and, therefore, under controlling authority, Olympic View cannot be held liable for defamation as a matter of law. *Id.*

“For a report to be a fair abridgment of an official proceeding, surgical precision is not required so long as the report is substantially accurate and fair.” *Id.* at 386. As such, “[i]t is not necessary that it be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings.” *Id.* (quoting *Restatement (Second) of Torts* § 611, cmt. f.); see also *Murray v. Bailey*, 613 F. Supp. 1276 (N.D. Cal. 1985) (report is fair if it captures the substance of the proceeding, as measured by the probable effect on the mind of the average reader). Nor should “the language used therein . . . be dissected and analyzed with a lexicographer’s precision.” *Holy Spirit Ass’n v. N.Y. Times*, 49 N.Y.2d 63, 68, 424 N.Y.S.2d 165, 399 N.E.2d 1185 (1979); *Proctor & Gamble Co. v. Quality King Distributors, Inc.*, 974 F. Supp. 190, 196 (E.D.N.Y. 1986)

(citing *Holy Spirit Ass'n*).⁹ Nor does a report need to satisfy the sentence-by-sentence editorial preferences of interested parties, such as those plaintiffs attempt to impose here.

Rather, the publication “as a whole,” *Alpine Industries*, 114 Wn. App. at 386, need only provide a “substantially correct account of the proceedings.” *Restatement (Second) of Torts* § 611, cmt. f. This sensible standard ensures that members of the media can serve the public by reporting on public proceedings without worry that dissatisfied readers can haul them into court with nitpicking quibbles about minor details in the report. *Alpine Industries*, 114 Wn. App. at 384, 386 (noting that “[t]he purpose of the fair reporting privilege is to serve the public’s interest in obtaining information as to what transpires in official proceedings” and that “surgical precision is not required”); *Cox*, 420 U.S. at 491-92; *Solaia*, __ Ill. 2d __, 2006 WL 1703487 (“[F]reedom of the press is illusory if a cloud of defamation liability darkens the media’s reports of official proceedings.”).

⁹ In evaluating reports of public proceedings for privilege, “accounts of legislative or other official proceedings must be accorded some degree of liberality. When determining whether an article constitutes a ‘fair and true’ report, the language used therein should not be dissected and analyzed with a lexicographer’s precision. This is so because a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author. Nor should a fair report which is not misleading, composed and phrased in good faith under the exigencies of a publication deadline, be thereafter parsed and dissected” without considering context. *Holy Spirit Ass’n*, 49 N.Y.2d at 68.

2. The *Gazette* Article Was More Than Substantially Accurate, and Is Therefore Privileged.

The *Gazette* article was without question a “fair abridgement” of the public record, and is much more than “substantially accurate and fair.” The Barnett filings reveal that five employees of Sequim Valley Ranch resigned, alleging in their resignation letter that they were pressured to “commit perjury or be fired,” accused of resistance when they did not provide favorable testimony and evidence, and subjected to an unstable, unhealthy and dangerous work environment. CP 49. They also show that Marie Barnett sought for a protective order against Stephen Clapp and in her petition alleged Mr. Clapp “trampled” her son in a frightening altercation. CP 44-46. Finally, they confirm that Mr. Clapp sent his staff two strongly worded letters, pressuring employees to cooperate with the Ranch’s litigation efforts or face the threat of termination. CP 50-55.

The article reported these facts without embellishment. CP 34. In fact, the article was exceedingly careful to be accurate: it declined to attribute authorship of the letters to Mr. Clapp without verification, and repeatedly noted that the Barnett filings contained allegations, rather than facts. *Id.* (“the employees allege Clapp had asked them to lie”; “states the petition”; “according to court papers”; “stated Barnett’s affidavit”; “[c]orrespondence attributed to Clapp”; “Clapp reportedly wrote”; “the

employees allege”; “stated the resignation letter”). Viewed as a whole, the *Gazette* article was without question “substantially accurate and fair.” The employees’ allegation was that Mr. Clapp was pressuring employees to perjure themselves on behalf of the Ranch, and this was the “gist” of the article. As the superior court properly determined, the article “was clearly not designed to provide a complete analysis of the merits of the claim. Its purpose was to present only what had been ‘alleged’ and the publication made that obvious to the reader.” CP 11-12; *compare* CP 34 with CP 44-55.

3. Sequim Valley’s Complaints About the Article Are Factually Insubstantial and Legally Meritless.

Indeed, the only aspects of the article plaintiffs complain about are (1) the article’s headline, (2) the fact that the article repeated Ms. Barnett’s allegation that Clapp “trampled” her son, and (3) a single ellipsis in a quotation from one letter referenced in the article.

The first two of these complaints are utterly without merit. The *Gazette* article reported, without endorsement, allegations from employees that Clapp strong-armed them to commit perjury. The employees made precisely this allegation. CP 46, 49 (stating that Clapp asked the employees “to commit perjury or be fired”). Likewise, the article reported, without endorsement, Ms. Barnett’s “trampling” allegation. She

made precisely this allegation. CP 45-46. (That she slightly modified the allegation after the fact—she said Clapp did not actually touch the child, but still stood on her characterization that the incident amounted to “trampling” (CP 24)—is, of course, irrelevant.) The *Gazette*’s republication of these allegations was both accurate and privileged.

Regarding the ellipsis, it bears noting at the outset that as to the letter in question, the *Gazette* quoted only parts of a highly coercive discussion that was clearly designed to pressure Ranch employees to give, in Clapp’s words, “full, unequivocal and affirmative testimony,” CP 53, and which included an explicit threat of termination if the employees did not provide such testimony. *Id.*¹⁰ Other aspects of this heavy-handed missive, including Mr. Clapp’s coercive discussion of the legal costs, his forceful discussion of what would be “expected” of the Ranch employees, and his narrow delineation of what statements his employees could be accountable for making (“You can only be held accountable (and rarely are) for statements that you know as a fact to be untrue at the time you made the statement.”), are not mentioned in the article. *Compare* CP 34

¹⁰ The most explicit portion of the threat reads:

If we find that you, being the witnesses the court would expect the most affirmative and full testimony from, that your equivocation or unwillingness to become involved on behalf of Sequim Valley Ranch damages the case our legal team has worked hard to build, then I will have to make the determination whether it is workable for me to run the ranch with staff that can’t be counted on when the ranch really needs them.

CP 53.

with CP 53. In any case, even if this ellipsis were arguably misleading, it is far from material, and certainly does not render the article “as a whole” anything but substantially accurate and fair.

Mr. Clapp’s and the Ranch’s arguments to the contrary do not advance their cause. They make much, for example, of the fact that the article was not published in the police blotter, even going so far as to claim that by frequently describing legal activities in a police blotter, the *Gazette* somehow established a standard for itself, against which this article should be measured. App. Br. at 4, 13-14. Whatever the *Gazette*’s practices generally are—or, for that matter, whatever any newspaper’s practices are—they do not dictate that Sequim Valley’s editorial preference here should have been followed. In any case, the standard for whether an article is protected by the fair report privilege looks to its substantial accuracy, and not to journalistic practices, real or (as here) imagined. *Alpine Industries*, 114 Wn. App. at 386.

They also claim, without any citation, and again ignoring the actual standard applicable here, that “the standard expected of [the *Gazette*] is to scrupulously provide a balanced account of both sides of the issues and to include a statement from the accused.” App. Br. at 14. Setting aside the fact that the *Gazette* did, in fact, attempt to include a statement from Mr. Clapp in its article, *see* CP 34, the law regarding privilege is not

concerned with the article's "balance" as to the underlying controversy. See *Glendora v. Gannett Suburban Newspapers*, 201 A.D.2d 620, 608 N.Y.S.2d 239 (N.Y. App. Div. 1994) (the "accuracy of [a newspaper] report was not altered merely because the article did not contain the plaintiffs 'side'" of the story), *leave to appeal denied*, 83 N.Y.2d 757, 639 N.E.2d 416, 615 N.Y.S.2d 875 (N.Y. June 14, 1994). Its only concern, satisfied here, is that the description of the proceedings be substantially accurate and fair. This article more than met that standard. Any purported imbalance of the article results not from the *Gazette*, but from the inherently one-sided nature of the filings, which one-sidedness the *Gazette* took great pains to articulate, and which its readers were more than capable of discerning. *Newell*, 91 Ill. App. 3d at 748; *Murray*, 613 F. Supp. at 1284 (report is fair if it "captures the substance" of the proceeding, as measured by the effect on the mind of the average reader); n. 6, *supra*. As the superior court aptly wrote, the article "was clearly not designed to provide a complete analysis of the merits of the claim. Its purpose was to present only what had been 'alleged' and the publication made that obvious to the reader." CP 12.

Sequim Valley's attempts to distinguish the facts of *Alpine Industries* (rather than the standard announced therein) are similarly misguided. For example, appellants' attempt to draw a distinction

between the judicial opinion there and the preliminary filings here (App. Br. at 12) is meaningless. The law does not draw this distinction: it only cares whether the source for statements republished in a given article is an official proceeding or a document made public in the course of such a proceeding. *Herron*, 108 Wn.2d at 179; *Mark v. Seattle Times*, 96 Wn.2d at 488-89.

Appellants also note that in *Alpine Industries*, the “minor inaccuracies contained in the story did not materially add to any purported damage Alpine suffered,” 114 Wn. App. at 377, and attempt to argue that the article here was somehow different. Clearly, it was not. The “sting” of the story—that Clapp was accused of violent behaviors and subject to a restraining order petition, and that his employees accused him of pressuring them to commit perjury under threat of termination—was in no way materially affected by the use of an ellipsis in a single quotation from an otherwise damning coercive letter.¹¹ And whatever were the facts

¹¹ “Sting” is relevant to the damages inquiry in defamation, not to privilege—though many jurisdictions have incorporated the concept into both inquiries. *See, e.g., Crane*, 972 F.2d at 1519 (Ca. law); *Lavin v. N.Y. News, Inc.*, 757 F.2d 1416, 1419-20 (3d Cir. 1985) (N.J. law); *ELM Med. Lab., Inc. v. RKO Gen., Inc.*, 403 Mass. 779, 532 N.E.2d 675, 678 (1989). Regardless, the “sting” analysis confirms the futility of Sequim Valley’s arguments. As in the privilege context, the “sting” inquiry looks at the publication as a whole, rather than piecemeal. *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 771-72, 776 P.2d 98 (1989). Accordingly, a publication is defamatory only if false statements contain therein affect the “sting” of the report such that “‘significantly greater opprobrium’ results . . . than would result from the report without the falsehood.” *Id.* at 769 (quoting *Mark v. Seattle Times*, 96 Wn.2d at 496). Thus, “[t]he question is whether the false statement has resulted in damage which is distinct from that caused by true

presented in *Alpine Industries*, courts have routinely held that articles both similar to and far less accurate than the *Gazette* article here are privileged. *See Dorsey*, 973 F.2d at 1437 (tabloid “did not exceed the degree of flexibility and literary license accorded newspapers in making a ‘fair report’” by reporting that petition filed against entertainer stated that entertainer had AIDS, despite entertainer’s denial); *Solaia*, ___ Ill. 2d ___, 2006 WL 1703487 (report of civil antitrust proceedings erroneously implying that plaintiff had committed and had been charged with a crime privileged); *McDonald v. East Hampton Star*, 10 A.D.3d 639, 781 N.Y.S.2d 694 (N.Y. App. Div. 2004) (news report of dismissal of complaint, alleged by plaintiff to have implied that his complaint was frivolous, which report failed to include the fact that the court granted plaintiff leave to amend, substantially accurate and privileged); *Koniak v. Heritage Newspapers, Inc.*, 198 Mich. App. 577, 499 N.W.2d 346 (1993) (statement that plaintiff allegedly assaulted his stepdaughter 30 to 55 times when the charge was only that he had committed eight assaults was substantially accurate: “[W]hether plaintiff assaulted his stepdaughter

negative statements also contained in the same report. If it has not, then whatever damage the plaintiff has suffered does not amount to defamation because it is not solely attributable to the falsehood.” *Id.* at 771. The article here contains no falsehoods. Plaintiffs nonetheless complain about a single ellipsis which clearly did not affect the “sting” of the article as a whole. Certainly, that single ellipsis did not create “significantly greater opprobrium” towards Clapp and the Ranch than did the other allegations in Ms. Barnett’s filings.

once, eight times, or thirty times would have little effect on the reader.”); *Grab v. Poughkeepsie Newspapers, Inc.*, 399 N.Y.S.2d 97 (N.Y. Sup. Ct. 1977) (article falsely stating that convicted robber was sentenced to serve time in state prison, as opposed to in juvenile offender program, privileged); *Dudley v. Farmers Branch Daily Times*, 550 S.W.2d 99 (Tex. Civ. App. 1977) (statement that plaintiff had been charged with theft of \$168,000 worth of materials, when true value was only \$6,600, immaterial); *Walker v. Globe-News Publ’g Co.*, 395 S.W.2d 686 (Tex. Civ. App. 1965) (article erroneously stating that a majority of stolen goods were recovered from the plaintiff, rather than another member of a crime ring, protected by the privilege); *see also Riley v. Harr*, 292 F.3d 282, 296 (1st Cir. 2002) (report need only be a “rough-and-ready” summary).

As courts have often noted, defamation law is not designed to second-guess the media’s proper exercise of editorial discretion:

Courts must be slow to intrude into the area of editorial judgment, not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Accounts of past events are always selective, and under the First Amendment the decision of what to select must always be left to writers and editors. It is not the business of the government.

Janklow v. Newsweek, Inc., 788 F.2d 1300, 1306 (8th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 883, 107 S. Ct. 272, 93 L. Ed. 2d 249 (1986); *see also Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258, 94 S.

Ct. 2831, 41 L. Ed. 2d 730 (1974) (“It has yet to be demonstrated how governmental regulation of [editorial control and judgment] can be exercised consistent with First Amendment guarantees of a free press”), 418 U.S. at 261 (it is an “elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor.”) (White, J., concurring). Such judicial second-guessing is particularly inappropriate when a statement is alleged to be defamatory based on its omissions, rather than its affirmative statements. *See Mohr v. Grant*, 153 Wn.2d at 827-28 (stating that “[m]erely omitting facts favorable to the plaintiff or facts that the plaintiff thinks should have been included does not make a publication false and subject to defamation liability,” and holding that for an omission to be actionable in defamation, it must have “negated the asserted defamatory implication” of the statement at issue “in its entirety.”); *Green v. CBS Inc.*, 286 F.3d 281, 285 (5th Cir. 2002) (since “CBS accurately reported the facts, albeit not all the facts, whether or not the story painted [the plaintiff] in an attractive light is irrelevant”); *Peter Scalmandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 563 (5th Cir. 1997) (omission of footage that would have portrayed subject in a more favorable light insufficient to establish falsity because it “is common knowledge television programs . . . shoot more footage than

necessary and edit the tape they collect down to a brief piece”); *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 648 (8th Cir. 1985) (magazine not liable “for omission of those additional facts that [the plaintiff argued] should have been published, but whose omission did not make what was published untrue”), *aff’d on reh’g*, 788 F.2d 1300 (1986); *UTV of San Antonio, Inc. v. Ardmore, Inc.*, 82 S.W.3d 609, 613 (Tex. Ct. App. 2002) (no defamatory false impression where television report omitted facts favorable to plaintiff).

Given this need to ensure that the press has the necessary breathing room to perform its public reporting function, line-by-line editing is not a proper exercise for the court, and is accordingly rejected by the fair report privilege doctrine. *Alpine Industries*, 114 Wn. App. at 385-86 (report to be viewed “as a whole” for substantial fairness and accuracy). Yet this is precisely what Sequim Valley asks the Court to do, the obvious fairness and accuracy of the *Gazette* article notwithstanding. The Barnett filings contain a variety of allegations against Mr. Clapp and the Ranch that have clearly drawn their ire, and with this litigation they have attempted, without basis in law, to shoot the proverbial messenger. The *Gazette*, fully within its rights as a member of the press, reported on these allegations as they appeared in the public record, and did so accurately and fairly, declining to substantiate the allegations in favor of merely

describing them. The article is unquestionably privileged under the law, and the superior court properly dismissed Sequim Valley's complaint.

C. Brought Without a Justifiable Basis in Law or Fact, This Appeal Is Frivolous and Merits an Award of Attorneys' Fees to Olympic View.

Not only is Sequim Valley's appeal meritless, but because it runs contrary to settled law, and because it challenges a dismissal without any viable basis in fact for so doing, it is frivolous. As such, it has been brought in violation of both CR 11 (which is made applicable to this appeal by RAP 18.7) and RAP 18.9. *See* CR 11; RAP 18.9 (providing for compensatory damages to be paid by parties bringing frivolous appeals); *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 580-82, 754 P.2d 1243 (1988) (stating that CR 11 is made applicable to appeals by RAP 18.7; awarding fees for a frivolous appeal from dismissal of a defamation complaint), *review denied*, 111 Wn.2d 1025 (1988), *cert. denied*, 490 U.S. 1015, 109 S. Ct. 1736, 104 L. Ed. 2d 174 (1989); *Fidelity Mort. Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 473-74, 128 P.3d 621 (2005) (appeal from dismissal about which reasonable minds could not differ and brought without basis in law frivolous); *Andrus v. Dep't of Transp.*, 128 Wn. App. 895, 900-901, 117 P.3d 1152 (2005) (appellant "asserted arguments that lack[ed] any support in the record or [were] precluded by well-established and binding precedent that he [did] not distinguish");

State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 905, 969 P.2d 64 (1998) (an appeal is frivolous under RAP 18.9 if it raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal). Olympic View therefore respectfully requests an order requiring Sequim Valley to pay Olympic View's reasonable attorneys' fees incurred in defending this appeal.

IV. CONCLUSION

For the foregoing reasons, the order of the superior court dismissing appellants' complaint with prejudice should be AFFIRMED, with fees awarded to respondent Olympic View.

RESPECTFULLY SUBMITTED this 23rd day of June, 2006.

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DECLARATION OF MAILING

I, Donna Spaulding, the undersigned, hereby certify and declare Donna Spaulding
under penalty of perjury that the following statements are true and correct:

1. I am over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Davis Wright Tremaine LLP. My business and mailing addresses are both 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington 98101-1688.
3. I am familiar with my employer's mail collection and processing practices; specifically, that said mail is collected and deposited with the United States Postal Service on the same day it is deposited in interoffice mail, and that postage thereon is fully prepaid.
4. Following said practice, on June 23, 2006, I served a true copy of the document to which this declaration is attached, by placing it in an addressed sealed envelope and depositing it in regularly maintained interoffice mail to the following:

Rodney Q. Fonda
Cozen O'Connor
1201 Third Avenue, Suite 5200
Seattle, WA 98101

Melissa O'Loughlin White
Cozen O'Connor
1201 Third Avenue, Suite 5200
Seattle, WA 98101

Executed this 23rd day of June, 2006, at Seattle, Washington.

Donna S. Spaulding
Donna Spaulding