RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Nov 10, 2014, 3:36 pm
BY RONALD R. CARPENTER
CLERK

Nos. 89961-4 and 89820-1

RECEIVED BY E-MAIL

SUPREME COURT
OF THE STATE OF WASHINGTON

JASON DILLON,

Respondent,

v.

SEATTLE DEPOSITION REPORTERS, LLC, *et al.*,

Petitioners.

SCOTT AKRIE, *et al.*,

Petitioners,

v.

JAMES GRANT, *et al.*,

Respondents.

BRIEF OF SEATTLE DEPOSITION REPORTERS, LLC, JAMES GRANT, *et al.*, IN RESPONSE TO COURT'S ORDER OF OCTOBER 9, 2014

Ralph E. Cromwell, WSBA #11784
BYRNES KELLER CROMWELL LLP
1000 Second Avenue, Suite 3800
Seattle, Washington 98104
Telephone: (206) 622-2000
Facsimile: (206) 622-2522

Michael B. King, WSBA #14405
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Bruce E.H. Johnson, WSBA #7667
Stephen M. Rummage, WSBA #11168
Ambika K. Doran, WSBA #38238
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
Telephone: (206) 622-3150
Facsimile: (206) 757-7069

Michael E. Kipling, WSBA #7677
Marjorie A. Walter, WSBA #40078
Timothy M. Moran, WSBA #24925
Kipling Law Group, PLLC
3601 Fremont Ave N, Suite 414
Seattle, Washington 98103
Telephone: (206) 545-0345
Facsimile: (206) 545-0350

Attorneys for Seattle Deposition Reporters, LLC, James Grant, et al.

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. The Court Presumes Statutes to Be Constitutional, and a Challenger Bears a Heavy Burden to Invalidate a Statute. 3

B. The Court Should Reject All of the Constitutional Challenges Mentioned in *Dillon*, *Akrie* and *Davis*. 5

1. The Anti-SLAPP Act Preserves Jury Trial Rights. 5

2. The Anti-SLAPP Act Permits Discovery and Does Not Violate Separation of Powers or Court Access. 7

3. The Anti-SLAPP Act's Standard for Showing a Probability of Prevailing by Clear and Convincing Evidence Is Constitutional. 10

4. The Anti-SLAPP Statutory Damages Do Not Infringe the Right of Petition or the Eighth Amendment Excessive Fines Clause 11

III. CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Akrie v. Grant,
178 Wn. App. 506, 315 P.3d 567 (2013) ..... *passim*

Bakay v. Yarnes,
2005 WL 2454168 (W.D. Wash. Oct. 4, 2005) 13

Bernardo v. Planned Parenthood Fed'n of Am.,
115 Cal. App. 4th 322, 9 Cal. Rptr. 3d. 197 (2004) 14

Bill Johnson's Rests., Inc. v. NLRB,
461 U.S. 731 (1983) 13

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 15, 16, 17

Britts v. Superior Court,
145 Cal. App. 4th 1112, 52 Cal. Rptr. 3d 185 (2006) 9

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,
492 U.S. 257 (1989) 16

Crowell v. Benson,
285 U.S. 22 (1932) 4

Davis v. Cox,
180 Wn. App. 514, 325 P.3d 255 (2014) ..... *passim*

Dillon v. Seattle Deposition Reporters, L.L.C.,
179 Wn. App. 41, 316 P.3d 1119 (2014) 5, 6

Dixon v. Superior Court,
30 Cal. App. 4th 733, 36 Cal. Rptr. 2d 687 (1994) 5

Equilon Enters., L.L.C. v. Consumer Cause, Inc.,
29 Cal. 4th 53, 52 P.3d 685 (2002) 14

In re Estate of Fitzgerald,
172 Wn. App. 437, 294 P.3d 720 (2012) 8, 9

In re Pers. Restraint of Matteson, 142 Wn.2d 298, 307, 12
P.3d 585 (2000) 4

State ex rel. Faulk v. CSG Job Ctr.,
117 Wn.2d 493, 816 P.2d 725 (1991) 4, 7

Ford Motor Co. v. Barrett,
115 Wn.2d 556, 800 P.2d 367 (1990) 13

Garcia v. Wyeth-Ayerst Labs., 385 F.3d 961 (6th Cir. 2004) 10

Garment Workers Ctr. v. Superior Court,
117 Cal. App. 4th 1156, 12 Cal. Rptr. 3d 506 (2004) 9

Gig Harbor Marina, Inc. v. City of Gig Harbor,
94 Wn. App. 789, 973 P.2d 1081 (1999) 13

Guam Greyhound, Inc. v. Brizill,
2008 WL 4206682 (Guam Sept. 11, 2008) 15

Hometown Props., Inc. v. Fleming,
680 A.2d 56 (R.I. 1996) 6

Island Cnty. v. State,
135 Wn.2d 141, 955 P.2d 377 (1998) 4

Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.,
37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (1995) 5

LaMon v. Butler,
112 Wn.2d 193, 770 P.2d 1027 (1989) 5

Lee v. Pennington,
830 So. 2d 1037 (La. Ct. App. 2002) 6

Ludwig v. Superior Court,
37 Cal. App. 4th 8, 43 Cal. Rptr. 2d 350 (1995) 7

Nexus v. Swift,
785 N.W.2d 771 (Minn. Ct. App. 2010) 1

Perez-Farias v. Global Horizons, Inc.,
175 Wn.2d 518, 286 P.3d 46 (2012) 16, 17, 18

Perez-Farias v. Global Horizons, Inc.,
499 F. App'x 735 (2012) 17

Pitzer v. Union Bank of Cal.,
141 Wn.2d 539, 9 P.3d 805 (2000) 9

Putman v. Wenatchee Valley Med. Ctr., P.S.,
166 Wn.2d 974, 216 P.3d 374 (2009) 8, 11

Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15 (2000) 11

Satkar Hospitality Inc. v. Cook Cnty. Bd. of Review,
2011 WL 4431029 (N.D. Ill. Sept. 21, 2011) 15

Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State, 170 Wn.2d 599, 244 P.3d 1 (2010) 3

Shroeder v. Irvine City Council,
97 Cal. App. 4th 174, 118 Cal. Rptr. 2d 330 (2002) 13, 14

Sofie v. Fibreboard Corp.,
112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989) 10

Sony BMG Music Entm't v. Tenenbaum,
660 F.3d 487 (1st Cir. 2011) 17

Spratt v. Toft,
180 Wn. App. 620, 324 P.3d 707 (2014) 9

St. Louis, Iron Mountain & S. Ry. Co. v. Williams,
251 U.S. 63 (1919) 16, 17, 18

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 16

State v. Dang,
178 Wn.2d 868, 312 P.3d 30 (2013) 4

State v. Frodert,
84 Wn. App. 20, 924 P.2d 933 (1996) 16

State v. WWJ Corp.,
138 Wn.2d 595, 980 P.2d 1257 (1999) 15

Tellevik v. Real Property,
120 Wn.2d 68, 838 P.2d 111 (1992) 9

United States v. Salerno,
481 U.S. 739 (1987) 4

Vargas v. City of Salinas,
200 Cal. App. 4th 1331, 134 Cal. Rptr. 3d 244 (2012) 14

Wash. State Republican Party v. Pub. Disclosure Comm'n,
141 Wn.2d 245, 4 P.3d 808 (2000) 4

Wender v. Snohomish Cnty.,
2007 WL 3165481 (W.D. Wash. Oct. 24, 2007) 15

Wolfe v. George,
486 F.3d 1120 (9th Cir. 2007) 15

Zomba Enters., Inc. v. Panorama Records, Inc.,
491 F.3d 574 (6th Cir. 2007) 16

Statutes

RCW 4.24.525 ..... *passim*

RCW 4.24.525(4)(b) 5

RCW 4.24.525(5)(c) 7, 10

RCW 4.24.525(6)(a) 11, 12

RCW 4.84.370 13

RCW 9.73.060 19

RCW 9A.82.100(4)(g) 16

RCW ch. 11.96A 8

RCW 11.96A.115 8

RCW 19.30.170(2) 17

RCW 19.118.100(3) 13

Other Authorities

CR 12(b)(6) 6

CR 26(c) 7

CR 56 6

CR 56(f) 8

RAP 2.5(a)(3) 12, 15

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, 502 (2012) 1

Thomas R. Burke, ANTI-SLAPP LITIGATION § 2.9 (2014) 1

In its October 9, 2014 Order, the Court observed that some briefing and argument in these appeals concerned the constitutionality of the anti-SLAPP statute, RCW 4.24.525. The Court noted it had accepted review in *Davis v. Cox*, which also raises constitutional challenges to the statute. The Court invited the *Dillon* and *Akrie* parties to provide supplemental briefing. Defendants in the two cases[1] submit this combined brief.

I. INTRODUCTION

Twenty-eight states, the District of Columbia and Guam have enacted anti-SLAPP statutes. *See Dillon*, Resp. to Amici WSAJF and ACLU, at 3-4 & n.2. Plaintiffs have challenged these laws dozens of times, but no court has struck down ***any*** of them as unconstitutional on ***any*** ground. *See id.* at 5-6 & n.4.[2] Instead, courts consistently recognize that anti-SLAPP laws ***protect*** constitutional rights of free speech and petition, and it is well within legislatures' authority to do so.

The Court need not and should not address constitutional issues in *Akrie* or *Dillon*. Plaintiffs did not raise or preserve ***any*** such challenges.

---

[1] In *Akrie v. Grant, et al.*, No. 89820-1 ("*Akrie*"), the Respondents-Defendants are James Grant, Cassandra Kennan, Davis Wright Tremaine LLP ("DWT"), Seattle Deposition Reporters, LLC ("SDR"), and T-Mobile USA, Inc. In *Dillon v. Seattle Deposition Reporters, LLC, et al.*, No. 89961-4 ("*Dillon*"), the Petitioners-Defendants are SDR, DWT and Grant. This brief refers to these parties collectively as "Defendants."

[2] *See also Nexus v. Swift*, 785 N.W.2d 771, 778-79 (Minn. Ct. App. 2010) (the "anti-SLAPP statutes that have been challenged have been upheld"); Thomas R. Burke, ANTI-SLAPP LITIGATION § 2.9 (2014) (cataloging cases rejecting challenges to California statute); 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, 502 (2012).

Constitutional issues have arisen in these cases only because of arguments by amici in *Dillon* and *dicta* from the Court of Appeals' opinion in *Akrie*. The *Davis* plaintiffs have advanced still other challenges, but no one asserted those challenges in *Akrie* or *Dillon*. Even if Plaintiffs preserved a constitutional issue, they could assert only a facial challenge, as they have no basis to complain the act was unconstitutional as applied to them.

If the Court does address constitutional challenges here (and to the extent it will do so in *Davis*), it should reject them, just as courts have upheld anti-SLAPP laws across the country. Given the Court's strong presumption in favor of statutes' constitutionality, it should interpret RCW 4.24.525 according to its plain terms and reject strained readings designed merely to concoct a constitutional flaw. RCW 4.24.525 respects and preserves jury trial rights, separation of powers, due process, and access to courts, as well as the right of petition for meritorious claims.

II. ARGUMENT

Four constitutional issues have been mentioned in *Akrie*, *Dillon*, and *Davis*: (1) RCW 4.24.525 allegedly infringes jury trial rights, based on the mistaken premise that it requires courts to weigh evidence and resolve fact disputes (an argument raised only by amici in *Dillon*); (2) the statute's provisions concerning discovery—initially staying discovery but allowing it for good cause—allegedly violate separation of powers and the right of access to courts (raised by plaintiffs and rejected in *Davis* but never raised in *Akrie* or *Dillon*); (3) the burden of proof for the second step

of the anti-SLAPP motion procedure—requiring the non-moving party to show by clear and convincing evidence a probability of prevailing—supposedly also violates separation of powers and the right of access (again, raised and rejected in *Davis* and not advanced in *Akrie* or *Dillon*); and (4) the statutory damages provision of the Act—awarding $10,000 for each defendant who prevails on a motion to strike—"may be unconstitutional as applied in a case involving a large number of defendants" (a question posed in *dicta* by the Court of Appeals in *Akrie*, but which Akrie improperly advanced for the first time in his petition for review to this Court).

Because none of these challenges is properly before the Court in *Akrie* or *Dillon*, the Court should not address them here. Regardless, all of these challenges are meritless.

A. The Court Presumes Statutes to Be Constitutional, and a Challenger Bears a Heavy Burden to Invalidate a Statute.

For several reasons, this Court has often said it will strike down a statute as unconstitutional only in extraordinary cases.

First, "it is well established that statutes are presumed constitutional"; "[a] challenger has a heavy burden to overcome that presumption" and "must prove that the statute is unconstitutional beyond a reasonable doubt." *Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). The Court will not strike down a statute unless it is "fully convinced, after a searching legal

analysis, that the statute violates the constitution." *Island Cnty. v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

Second, a party's burden is greater still when asserting a facial constitutional challenge rather than an "as applied" challenge. "[A] facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied." *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000). The same principle applies under the U.S. Constitution. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Third, "[w]herever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality." *State v. Dang*, 178 Wn.2d 868, 878, 312 P.3d 30 (2013) (quoting *In re Pers. Restraint of Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000)). Put differently, it is "a cardinal principle" that the Court should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *accord State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn.2d 493, 500, 816 P.2d 725 (1991) ("where a statute is susceptible of more than one interpretation, ... the court will adopt a construction which sustains the statute's constitutionality, if at all possible" (footnotes omitted)).

B. The Court Should Reject All of the Constitutional Challenges Mentioned in *Dillon*, *Akrie* and *Davis*.

1. The Anti-SLAPP Act Preserves Jury Trial Rights.

The *Dillon* defendants briefed this issue at length, *see Dillon*, Resp. to Amici WSAJF and ACLU at 9-19, and so provide only a summary here.

The anti-SLAPP act does not infringe jury trial rights because the second step of the motion to strike procedure parallels summary judgment, as the Court of Appeals correctly recognized. *Dillon v. Seattle Deposition Reporters, L.L.C.*, 179 Wn. App. 41, 89, 316 P.3d 1119 (2014). The requirement that a plaintiff must "establish by clear and convincing evidence a probability of prevailing on the claim," RCW 4.24.525(4)(b), means he must present a prima facie case, but it does not call for the court to decide fact issues. If the plaintiff shows there are disputed issues of material fact, the court should deny the anti-SLAPP motion. On the other hand, if a defendant shows the plaintiff's claim fails as a matter of law—either because the plaintiff cannot establish an element of his claim or because there is a preclusive defense—the motion should be granted.

This Court long ago held that "summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial." *LaMon v. Butler*, 112 Wn.2d 193, 199 n.5, 770 P.2d 1027 (1989). Consistent with that settled principle, courts have regularly rejected claims that anti-SLAPP laws violate jury trial rights. *See, e.g.*, *Dixon v. Superior Court*, 30 Cal. App. 4th 733, 746, 36 Cal. Rptr. 2d 687 (1994); *Lafayette*

Morehouse, Inc. v. Chronicle Publ'g Co., 37 Cal. App. 4th 855, 867, 44 Cal. Rptr. 2d 46 (1995); *Lee v. Pennington*, 830 So. 2d 1037, 1043 (La. Ct. App. 2002); *Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 60 (R.I. 1996).

Moreover, amici's argument about jury trial rights amounts to a pure facial challenge, which is refuted by the circumstances of *Akrie* and *Dillon*. The Superior Court dismissed Dillon's claims ***both*** on summary judgment and under the anti-SLAPP act, rejecting the claims as a matter of law because Dillon could not have had any reasonable expectation of privacy. *See Dillon*, 179 Wn. App. at 56 (quoting Superior Court ruling). In *Akrie*, the Superior Court rejected Akrie's claims as a matter of law because he and NetLogix had no standing to assert a Privacy Act claim (when they were not parties to the conversations), and Defendants' filing of the transcripts in federal court was immune under the litigation privilege. *See Akrie v. Grant*, 178 Wn. App. 506, 510, 315 P.3d 567 (2013). Neither court required Plaintiffs to ***prove*** their cases or imposed a higher burden—they applied traditional analyses (under CR 12(b)(6) and CR 56) to hold Plaintiffs' claims ***failed as a matter of law***. Amici's attempt to create a constitutional challenge on the basis that a court ***might*** interpret the anti-SLAPP act to impose some different process is not only wrong, but purely hypothetical. It also violates this Court's precedent, which requires courts to reject strained readings offered to invalidate a

statute when a logical reading avoids any constitutional defect. *See Faulk*, 117 Wn.2d at 500.

2. The Anti-SLAPP Act Permits Discovery and Does Not Violate Separation of Powers or Court Access.

When a party files a motion to strike, the anti-SLAPP act provides that discovery is stayed but may be allowed "on motion and for good cause shown." RCW 4.24.525(5)(c). The *Davis* plaintiffs contend the stay is unconstitutional, claiming it conflicts with CR 26(c) and violates separation of powers and the right of access to courts. The Court of Appeals properly rejected this challenge. *See Davis v. Cox*, 180 Wn. App. 514, 542-44, 325 P.3d 255 (2014). Dillon and Akrie have not made this argument, perhaps because it would have no bearing on these cases.

The discovery stay is an important component of the anti-SLAPP statute. "[T]he purpose of the statute would be frustrated if the plaintiff could drag on proceedings ... by claiming a need to conduct additional investigation." *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 16, 43 Cal. Rptr. 2d 350 (1995) (interpreting California anti-SLAPP act); *see also* RCW 4.24.525 (findings and purpose of anti-SLAPP law, 2010 c. 118, include preventing "reprisal through abuse of the judicial process" and the "costs associated with defending [SLAPP] suits"). For this reason, the Legislature designed the act to impose a presumptive stay of discovery, while giving courts discretion to allow discovery whenever a plaintiff establishes a ***need*** for discovery to respond to a motion to strike.

The anti-SLAPP process does not conflict with and is fully consistent with the Civil Rules. It follows the approach of CR 56(f), which allows a party facing a summary judgment motion to request and obtain discovery upon a showing of need—"a rule applied without constitutional controversy for many years." *Davis*, 180 Wn. App. at 543. The process also does not conflict with *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 979-80, 216 P.3d 374 (2009), on which the *Davis* plaintiffs principally rely. *Putman* held a Washington statute requiring plaintiffs to submit a medical expert's "certificate of merit" before filing malpractice complaints was unconstitutional because it effectively required evidence supporting plaintiffs' claims before discovery. 166 Wn.2d at 983. In contrast, the anti-SLAPP law imposes ***no*** preconditions to filing suit and ***permits*** rather than precludes discovery.

In this respect, the anti-SLAPP act's temporary discovery stay is similar to discovery protections under the Trust and Estates Dispute Resolution Act, RCW ch. 11.96A ("TEDRA"), which the Court of Appeals upheld in *In re Estate of Fitzgerald*, 172 Wn. App. 437, 449-50 & n.8, 294 P.3d 720 (2012). Like the anti-SLAPP act, TEDRA provides an expeditious procedure for resolving estate claims and permits discovery only in limited circumstances, including "on a showing of good cause." RCW 11.96A.115. Unlike the law in *Putman*, TEDRA does not mandate a decision before discovery can be had, but gives trial courts discretion to permit it if needed to decide whether creditors' claims are time-barred.

This process does not unconstitutionally limit access to courts. *Fitzgerald*, 172 Wn. App. at 449 n.8. The Court of Appeals properly reached the same conclusion in *Davis*, upholding the analogous discovery provisions of the anti-SLAPP act. *Davis*, 180 Wn. App. at 543-44; *see also Spratt v. Toft*, 180 Wn. App. 620, 635-36, 324 P.3d 707 (2014) (same); *Britts v. Superior Court*, 145 Cal. App. 4th 1112, 1129, 52 Cal. Rptr. 3d 185 (2006) (rejecting separation of powers challenge to California's similar anti-SLAPP law).

But a challenge to the constitutionality of the discovery stay has no bearing on *Akrie* and *Dillon*. Akrie did not request discovery at all. Dillon propounded discovery requests unrelated to the dispositive issue, *i.e.*, that he could not have had a reasonable expectation of privacy in the interview calls. The Superior Court in *Dillon* did not abuse its discretion in granting summary judgment and denying Dillon's request for irrelevant discovery. *See Tellevik v. Real Property*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992) (decision whether to allow discovery under CR 56 is reviewed for abuse of discretion; a court may deny discovery when the requesting party does not state what evidence it will establish or the desired evidence will not raise a genuine issue of material fact); *Pitzer v. Union Bank of Cal.*, 141 Wn.2d 539, 556-57, 9 P.3d 805 (2000) (court does not abuse discretion by refusing to allow irrelevant discovery); *see also Garment Workers Ctr. v. Superior Court*, 117 Cal. App. 4th 1156, 1162, 12 Cal. Rptr. 3d 506 (2004) (under California anti-SLAPP act, trial court was obligated to rule on legal issue

"before permitting what may otherwise turn out to be unnecessary, expensive and burdensome discovery proceedings").

The discovery procedures in RCW 4.24.525(5)(c) are not unconstitutional in any respect, and especially not in *Akrie* or *Dillon.*

3. The Anti-SLAPP Act's Standard for Showing a Probability of Prevailing by Clear and Convincing Evidence Is Constitutional.

The *Davis* plaintiffs also claim the burden the anti-SLAPP act places on a non-moving party—to show by clear and convincing evidence a probability of prevailing—violates separation of powers and the right of access to courts. The Court of Appeals rejected this argument as well. *Davis*, 180 Wn. App. at 545-46.

"It is entirely within the Legislature's power to define parameters of a cause of action and prescribe factors to take into consideration in determining liability." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 666, 771 P.2d 711, 780 P.2d 260 (1989). This includes the power to establish or revise burdens of proof. "'The argument that a state statute stiffens the standard of proof of a common law claim does not implicate' the right of access to courts." *Davis*, 180 Wn. App. at 546 (quoting *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 968 (6th Cir. 2004)). The process and burdens of the anti-SLAPP act do not conflict with the Civil Rules, as the *Davis* plaintiffs contend. Even if they did, creating a defense to meritless lawsuits that chill speech or petition rights is a substantive legislative decision that trumps procedural rules. *See Davis*, 180 Wn. App. at 545

(burden of proof is a substantive aspect of a claim, which prevails in event of conflict with procedural rules) (citing *Putman*, 166 Wn.2d at 980; *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20-21 (2000)).

Plaintiffs in *Akrie* and *Dillon* have not advanced these arguments either. And it would be ironic for Akrie and Dillon to claim the anti-SLAPP process restrained their access to courts. After the Superior Court dismissed *Akrie* under the anti-SLAPP act and awarded statutory damages and fees, Dillon filed his suit reasserting essentially the same claims. The anti-SLAPP statute did not deter Dillon from accessing the court again.[3]

4. The Anti-SLAPP Statutory Damages Do Not Infringe the Right of Petition or the Eighth Amendment Excessive Fines Clause.

In *Akrie*, the Court of Appeals concluded the plain language of RCW 4.24.525(6)(a) dictates a $10,000 statutory damage award for each "person on whose behalf the motion [to strike] is filed" and who prevails on the motion. *Akrie*, 178 Wn. App. at 513. It held the Superior Court erred in awarding $10,000 total rather than $10,000 to each of the five defendants Akrie sued. *Id.* at 514-15. In *dicta*, the court went on to ask "whether the mandatory statutory damage award may be unconstitutional as applied in a case involving a large number of defendants" but ultimately

[3] The *Davis* plaintiffs also contend the anti-SLAPP law's burden of proof is unconstitutionally vague. In this regard, Defendants also rely on the forthcoming brief of the *Davis* respondents, and agree with the Court of Appeals' conclusion that both the "clear and convincing" standard and the "probability" standard are well established and understood. 180 Wn. App. at 548.

concluded *Akrie* did not present this question, which was best left "for another day." *Id.* at 513 n.8.

Although the Court of Appeals expressed no concerns about the $50,000 anti-SLAPP damages award, Akrie argued for the first time in his petition for review that the award violates his right to petition under the First Amendment and the Washington Constitution, and constitutes an excessive fine under the Eighth Amendment. *Akrie*, Pet. for Review at 12-19. In contrast, the Superior Court in *Dillon* awarded $30,000 in statutory damages ($10,000 to each of three defendants), and Dillon did ***not*** appeal that ruling or contend it was excessive or unconstitutional.[4] Given the total awards and the circumstances in these cases, Akrie and Dillon cannot plausibly claim the statutory damages required by RCW 4.24.525(6)(a)(ii) are unconstitutionally excessive as applied to them, and they have no basis to challenge hypothetically some other award in some other case.

If the Court decides to consider Akrie's arguments (though raised for the first time on appeal in violation of RAP 2.5(a)(3)), they fall well short of establishing beyond a reasonable doubt that the anti-SLAPP act's statutory damage and fee provisions are unconstitutional in every case. First, the constitution does not give parties an unfettered right to file ***any***

[4] Indeed, while Akrie contends a total award of $70,000 in fees and statutory damages amounts to a "penalty" that "shock[s] the conscience," *Akrie*, Pet. for Review at 17-18, Dillon raised no complaint about the total award of fees and statutory damages in his case of $70,000 ($30,000 in statutory damages and $40,000 for attorneys' fees). *See Akrie* CP 1155-56.

suit, no matter how meritless. "Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (citations omitted); *accord Bakay v. Yarnes*, 2005 WL 2454168, at *7 (W.D. Wash. Oct. 4, 2005) ("No one has an absolute right to sue under all circumstances.").[5]

The constitution also does not invalidate statutes assessing attorneys' fees, costs or statutory damages against a losing party. Statutes providing remedies of that nature are common and have long been upheld in Washington and elsewhere. *See, e.g.*, *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 561-70, 800 P.2d 367 (1990) (provision in Washington's "lemon law," RCW 19.118.100(3), awarding attorneys' fees and statutory damages of $25 per day against an auto manufacturer if it unsuccessfully appeals (and fails to provide a loaner car) has a rational basis, does not impose an unconstitutional penalty for exercising appellate rights, and does not violate equal protection or due process); *Gig Harbor Marina, Inc. v. City of Gig Harbor*, 94 Wn. App. 789, 799-800, 973 P.2d 1081 (1999) (upholding imposition of fees and costs under RCW 4.84.370 against party

[5] The Court of Appeals suggested the Legislature's authority to impose fees or statutory damages might be limited to frivolous claims, *see Akrie*, 178 Wn. App. at 513 n.8, but there is no such limit. *See, e.g.*, *Gig Harbor Marina*, 94 Wn. App. at 793, 799-800 (finding plaintiffs' claims were not frivolous and reversing award of attorneys' fees on that basis, but upholding fee award under RCW 4.84.370, designed to discourage meritless appeals); *Shroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 197, 118 Cal. Rptr. 2d 330 (2002) (concluding that mandatory attorneys' fee provision of California anti-SLAPP act is not unconstitutional, and "frivolousness is not an invariable perquisite to ... constitutional validity").

unsuccessfully appealing local land use decision, finding the statute was rationally related to a legitimate state interest of discouraging meritless appeals and "does not unconstitutionally deny access to the courts" or right of petition).

Courts in other states have consistently held their anti-SLAPP acts do not infringe the right of petition. For example, in *Equilon Enterprises, L.L.C. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 52 P.3d 685 (2002), the California Supreme Court rejected a challenge to that state's anti-SLAPP law, finding it "does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning," but rather "subjects to dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits." 29 Cal. 4th at 63. Thus, the anti-SLAPP law "provides an efficient means of dispatching, early on in a lawsuit, [and discouraging, insofar as fees may be shifted,] a plaintiff's meritless claims." *Id.* (bracketed text in original). Nothing about this approach transgresses the constitution, the court found, because "[t]he right to petition is not absolute, providing little or no protection for baseless litigation." *Id.* at 64 (internal quotation omitted).[6]

---

[6] Other cases reach the same conclusion. *See, e.g.*, *Vargas v. City of Salinas*, 200 Cal. App. 4th 1331, 1348, 134 Cal. Rptr. 3d 244 (2012) ("[T]he general right of persons to file lawsuits ... does not confer the right to clog the court system and impair everyone else's right to seek justice") (internal quotation marks omitted)); *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App. 4th 322, 358, 9 Cal. Rptr. 3d. 197 (2004) ("The anti-SLAPP statute did not prevent [plaintiff] from bringing a meritorious claim; it properly prevented her from continuing to prosecute her meritless SLAPP suit."); *Shroeder*, 97 Cal. App. 4th at 196 (finding California's anti-SLAPP act constitutional "because it seeks to achieve a

Akrie argues the award of $50,000 of statutory damages in his case violates due process under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and the Excessive Fines Clause of the Eighth Amendment. *See Akrie*, Pet. for Review at 17-18. Put simply, he cites the wrong law.[7]

---

substantial government interest that is content neutral" by "deterring unmeritorious lawsuits," particularly ones that "chill the defendant's exercise of First Amendment rights"); *Satkar Hospitality Inc. v. Cook Cnty. Bd. of Review*, 2011 WL 4431029, at *3 (N.D. Ill. Sept. 21, 2011) (Illinois anti-SLAPP law does not violate petition rights because it grants immunity for certain claims and thus "curtails the substantive viability of causes of action against parties engaged in First Amendment activity, [but] does not bar [plaintiff] or anyone else from accessing the courts to enforce rights they possess"); *Guam Greyhound, Inc. v. Brizill*, 2008 WL 4206682, at *7 (Guam Sept. 11, 2008) (Guam anti-SLAPP act "does not prevent [plaintiff] from petitioning the court by filing a complaint, ... Instead, the [act] under certain qualifying circumstances will not allow [plaintiff's] claims to go forward.").

Also, contrary to the Court of Appeals' supposition that the anti-SLAPP act may be subject to strict scrutiny, *see Akrie*, 178 Wn. App. at 513 n.8, courts have applied rational basis review to anti-SLAPP acts and other statutes designed to deter meritless litigation. *See, e.g.*, *Wender v. Snohomish Cnty.*, 2007 WL 3165481, at *3-4 & n.2 (W.D. Wash. Oct. 24, 2007) (upholding Washington malicious prosecution law, RCW 4.24.350, on rational basis review, because the statute "does not proscribe speech" or "target a particular viewpoint," and "[t]he First Amendment provides no immunity from liability for bringing baseless claims."); *Wolfe v. George*, 486 F.3d 1120, 1125 (9th Cir. 2007) (applying rational basis review to uphold California vexatious litigant statute).

[7] In *State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999), the Court assumed without deciding that *BMW* and the Excessive Fines Clause applied to a $500,000 award of statutory damages. 138 Wn.2d at 603-04 & n.6, 606 n.8. But the Court refused to consider the challenges, raised for the first time on appeal, because defendants failed to show manifest error under RAP 2.5(a)(3). *Id.* at 603, 607. As noted previously, Akrie and Dillon likewise have failed to show manifest error "truly of constitutional magnitude," *id.* at 602, and the Court should not consider their newly-minted constitutional arguments in these appeals either. *See Akrie*, Answer to Pet. for Review, at 7-10.

First, the Eighth Amendment addresses ***government*** abuse of prosecutorial powers; it does not apply to damages awards in lawsuits between private parties. "The [Excessive Fines Clause] does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989); *see State v. Frodert*, 84 Wn. App. 20, 30, 924 P.2d 933 (1996) (civil damages under Criminal Profiteering Act, RCW 9A.82.100(4)(g), not subject to Excessive Fines Clause).

Second, *BMW v. Gore* concerned common law ***punitive*** damages, and the Supreme Court's views about proportionality in that case and in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), have not been extended to ***statutory damages*** awards. *See Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 531, 286 P.3d 46 (2012); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007) ("We know of no case invalidating ... an award of statutory damages under *Gore* or *Campbell*."). The constitutionality of statutory damages is instead governed by *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63 (1919). Under *Williams*, a statutory damage award violates due process only "where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." 251 U.S. at 66- 67 (affirming award of statutory damages 113 times greater than plaintiffs' actual losses); *see also Zomba Enters.*,

491 F.3d at 588 (affirming statutory damages 44 times greater than actual damages). "[I]n [*BMW v.*] *Gore*, the Supreme Court did not overrule *Williams*" and "to date [has not] suggested that the *Gore* guideposts should extend to constitutional review of statutory damage awards." *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 513 (1st Cir. 2011).

In *Perez-Farias*, this Court also held that statutory damage awards do not violate due process under the Washington Constitution. Responding to certified questions from the Ninth Circuit, the Court held that when awarding statutory damages under the Farm Labor Contractors Act, RCW 19.30.170(2), a court has no discretion but must award $500 per plaintiff per violation. 175 Wn.2d at 520. As the Court noted, the "legislature can and does provide for fixed statutory damages awards in an array of statutory provisions, many of which create awards that are nondiscretionary and 'automatic.'" *Id.* at 533. This Court rejected defendants' arguments that the total damages award was disproportionate to any actual losses suffered by the plaintiffs, holding that "no state public policy or due process principles require reduction in the total damages mandated by statute." *Id.* at 533-34. After this Court answered the certified questions, the Ninth Circuit held plaintiffs were entitled to statutory damages totaling $1,998,500, and the award did "not violate federal due process law" under *Williams*. *Perez-Farias v. Global Horizons, Inc.*, 499 F. App'x 735, 737 (2012).

Akrie has offered no showing that the $50,000 statutory damages award in his case is "so severe and oppressive" that it is "obviously unreasonable"—and Dillon has not challenged statutory damages at all. On one hand, the anti-SLAPP statutory damages are akin to liquidated damages, *see Perez-Farias*, 175 Wn.2d at 530, designed to serve the statute's purpose to end SLAPPs early. If a defendant victimized by a SLAPP suit instead had to prove actual damages, that would prolong burdensome litigation, defeating the law's purpose.

Moreover, the anti-SLAPP statutory damages are not intended solely to compensate for private harms. The act aims to prevent and deter meritless suits that chill public participation. The Legislature has "wide latitude" to prescribe damages to address "public wrong[s]." *Williams*, 251 U.S. at 66. When SLAPPs threaten free speech and petition, the injury to the public is real, albeit difficult to quantify. The Legislature is entitled to remedy and seek to prevent that harm with statutory damages.

An award of $10,000 per defendant in *Akrie* (as called for by the express terms of the anti-SLAPP act) is neither excessive nor disproportionate. Akrie ***chose*** to sue seven defendants (including the two DWT lawyers, their marital communities, DWT's client T-Mobile, and even the court reporting company DWT retained), yet has since claimed on appeal that everyone but DWT was only a "nominal" defendant. *See Akrie*, Pet. for Review at 12. In contrast, when Dillon decided to persist with the same claims after the Superior Court dismissed *Akrie* as a SLAPP, he sued

only four defendants (though again including Grant, his marital community and SDR, despite the admission they are nominal defendants). In short, Akrie's (and Dillon's) exposure to anti-SLAPP statutory damages depended entirely on their strategic choices of which (and how many) defendants to sue. A plaintiff may conclude he can create more leverage to deter lawful speech and petitioning activity if he sues more people. Awarding statutory damages for each defendant furthers the Legislature's express purpose to deter SLAPP suits and such tactics designed to punish people for protected conduct.[8]

III. CONCLUSION

Akrie and Dillon preserved no constitutional challenges to the anti-SLAPP act. Given how the courts below applied the law to Akrie and Dillon, they have no basis for any constitutional challenges.

Under any analysis, RCW 4.24.525 is not facially unconstitutional. The Court should reject all of the constitutional challenges mentioned in *Dillon*, *Akrie*, and *Davis*, as every court considering similar anti-SLAPP laws has done before.

---

[8] In the context of the anti-SLAPP act, it also makes no sense to suggest SLAPP plaintiffs (such as Akrie and Dillon) can complain that statutory damages are disproportionate to damages ***they*** have claimed. The point of a SLAPP suit is not to recover damages but to intimidate or deter another party from exercising First Amendment rights. These cases illustrate the point: the only damages Akrie and Dillon could claim would be statutory damages of $100 for each of the two interview calls, RCW 9.73.060; their purpose instead was to intimidate their adversaries in the federal action against T-Mobile. To suggest a SLAPP plaintiff can limit exposure to statutory damages by bringing a damage claim for only *de minimis* damages would be absurd.

Respectfully submitted this 10th day of November, 2014.

Byrnes Keller Cromwell LLP
Attorneys for Petitioners-Defendants in *Dillon*

By Ralph E. Cromwell Jr.
Ralph E. Cromwell, Jr.
WSBA #11784

Kipling Law Group, PLLC
Attorneys for Respondents-Defendants in *Akrie*

By Ralph E. Cromwell Jr.
Michael E. Kipling per email authorization
WSBA #7677

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true copy of the foregoing pleading was served upon the following individuals via email:

Dennis M. Moran
Fishermen's Finest, Inc.
570 Kirkland Way
Kirkland WA 98033
dmoran@fishermensfinest.com

William A. Keller
Keller Law Firm
600 - 108th NE, Suite 650
Bellevue, WA 98004-5110
bill@wakellerlaw.com;
billkellerlaw@gmail.com

Michael King
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
king@carneylaw.com

Michael Kipling
Kipling Law Group PLLC
3601 Fremont Ave. N., Suite 414
Seattle, WA 98103-8753
kipling@kiplinglawgroup.com

Eugene Volokh
UCLA School of Law
405 Hilgard Avenue
Los Angeles, CA 90095
volokh@law.ucla.edu

Jessica L. Goldman
Katie Angelikis
Summit Law Group
315 5th Avenue S. Suite 100
Seattle, WA 98104-2682
jessicag@summitlaw.com
katiea@summitlaw.com

Matthew J. Segal
Pacifica Law Group
1191 2nd Avenue, Suite 2100
Seattle, WA 98101-2945
matthew.segal@pacificalawgroup.com

Sarah A. Dunne
Nancy Lynn Talner
ACLU of Washington Foundation
901 5th Avenue, Suite 630
Seattle, WA 98164-20008
dunne@aclu-wa.org
talner@aclu-wa.org

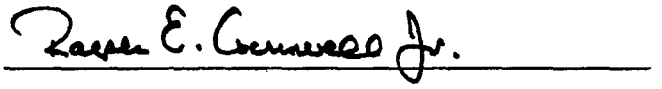
George M. Ahrend
Ahrend Albrecht PLLC
16 Basin St. SW
Ephrata, WA 98823
gahrend@trialappeallaw.com

David P. Gardner
Winston & Cashatt
601 W. Riverside Ave.
Spokane, WA 99201
dpg@winstoncashatt.com

Bryan P. Harnetiaux
Attorney at Law
517 E. 17th Ave.
Spokane, WA 99203
bryanphametiauxwsba@gmail.com

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 10th day of November, 2014.



OFFICE RECEPTIONIST, CLERK

To: Yoshinaga, Lori
Cc: Dennis Moran (dmoran@fishermensfinest.com); William Keller (bill@wakellerlaw.com); billkellerlaw@gmail.com; king@carneylaw.com; kipling@kiplinglawgroup.com; volokh@law.ucla.edu; jessicag@summitlaw.com; katiea@summitlaw.com; matthew.segal@pacificalawgroup.com; dunne@aclu-wa.org; talner@aclu-wa.org; gahrend@trialappeallaw.com; dpg@winstoncashatt.com; bryanphametiauxwsba@gmail.com; Cromwell, Ralph; brucejohnson@dwt.com; Stephen M. Rummage - Davis Wright Tremaine (steverummage@dwt.com); Doran, Ambika (AmbikaDoran@dwt.com); walter@kiplinglawgroup.com; moran@kiplinglawgroup.com
Subject: RE: Dillon v. Seattle Deposition Reporters, et al. AND Akrie, et al. v. Grant, et al. (Nos. 89961-4 & 89820-1): Br. of Seattle Deposition Reporters, Grant, et al., in Resp. to Court's Order of Oct. 9, 2014:

Received 11/10/14

From: Yoshinaga, Lori [mailto:lyoshinaga@byrneskeller.com]
Sent: Monday, November 10, 2014 3:34 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dennis Moran (dmoran@fishermensfinest.com); William Keller (bill@wakellerlaw.com); billkellerlaw@gmail.com; king@carneylaw.com; kipling@kiplinglawgroup.com; volokh@law.ucla.edu; jessicag@summitlaw.com; katiea@summitlaw.com; matthew.segal@pacificalawgroup.com; dunne@aclu-wa.org; talner@aclu-wa.org; gahrend@trialappeallaw.com; dpg@winstoncashatt.com; bryanphametiauxwsba@gmail.com; Cromwell, Ralph; brucejohnson@dwt.com; Stephen M. Rummage - Davis Wright Tremaine (steverummage@dwt.com); Doran, Ambika (AmbikaDoran@dwt.com); walter@kiplinglawgroup.com; moran@kiplinglawgroup.com
Subject: Dillon v. Seattle Deposition Reporters, et al. AND Akrie, et al. v. Grant, et al. (Nos. 89961-4 & 89820-1): Br. of Seattle Deposition Reporters, Grant, et al., in Resp. to Court's Order of Oct. 9, 2014:

Case Names: Dillon v. Seattle Deposition Reporters, et al.
Akrie, et al. v. Grant, et al.
Case No.: 89961-4 and 89820-1
Filed by: Ralph E. Cromwell, Jr., Bar No. 11784, email: rcromwell@byrneskeller.com

Lori Yoshinaga, Legal Secretary
Byrnes Keller Cromwell LLP
Tel: (206) 622-2000
The information contained in this e-mail message may be privileged, confidential and protected from disclosure. If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited. If you think that you have received this e-mail message in error, please e-mail the sender at lyoshinaga@byrneskeller.com.