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Washington State Supreme Court

SEP - 9 2014 *bjh*

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No. 89961-4

SUPREME COURT OF THE STATE OF WASHINGTON

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JASON DILLON,

Petitioner,

v.

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SEATTLE DEPOSITION REPORTERS, LLC; DAVIS WRIGHT

TREMAINE, LLP; and JAMES GRANT,

Respondents.

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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ORIGINAL

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I. INTRODUCTION

This appeal can and should be resolved on the ground that a lawyer cannot secretly record a telephone conversation with an opposing witness unless the witness consents. Washington law does not allow the recording of private conversations without the informed consent of the parties. It, therefore, follows that Washington's anti-SLAPP statute, RCW 4.24.525, does not apply to the plaintiff's claim in this case. This conclusion, in turn precludes the need for the Court to consider whether summary judgment standards could be superimposed onto the anti-SLAPP statute. If the Court reaches that issue, it should reject the reasoning of the Court of Appeals. The anti-SLAPP statute as written compromises the right to trial by jury, and the statute cannot be saved by a judicial rewrite. The motion to strike procedure in the statute is incompatible with the procedures governing summary judgment. To that end, even if this Court believes that the plaintiff's conversations were not private, the statute cannot be constitutionally applied to dismiss his claim.

II. INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy, free speech, and the right to petition. The ACLU strongly supports the Privacy

Act, chapter 9.73 RCW, which protects private conversations against wiretapping, eavesdropping, and recording. The ACLU has participated in numerous privacy-related cases both as *amicus curiae* and as counsel to parties. The ACLU also supports laws protecting individuals exercising free speech and petition rights from SLAPP¹ suits, but not at the expense of denying meritorious suits to vindicate civil rights and liberties.

III. ISSUES TO BE ADDRESSED BY *AMICUS*

- A. Whether telephone conversations between attorneys and a potential witness are private, where the attorneys do not disclose that the conversations are being recorded nor does the witness consent to the recording.
- B. Whether constitutional flaws in RCW 4.24.525, such as conflict with the right to a jury trial, should be considered if the Court finds the statute applied here.

IV. STATEMENT OF THE CASE

Jason Dillon was a potential witness in a civil commercial litigation case. He contacted James Grant, an attorney with the law firm

¹ “A strategic lawsuit against public participation—otherwise known as a ‘SLAPP’ suit—is a meritless suit filed primarily to chill a defendant’s exercise of First Amendment rights.” *City of Seattle v. Egan*, 179 Wn. App. 333, 337, 317 P.3d 568 (2014).

of Davis Wright Tremaine (DWT), which represented one of the parties in that litigation. Dillon and Grant engaged in two telephone conversations to discuss the facts of the case. Unbeknownst to Dillon, Grant arranged to have the conversations transcribed verbatim by Seattle Deposition Reporters. Eventually, Dillon learned about the transcription, and he subsequently filed this action against Grant, DWT, and Seattle Deposition Reporters (collectively SDR), alleging violation of the Privacy Act, which prohibits recording of a “private conversation,” RCW 9.73.030(1)(b).

SDR filed motions both for summary judgment and to strike Dillon’s claims pursuant to the procedures in Washington’s anti-SLAPP statute in RCW 4.24.525. The trial court ruled that the telephone conversations were not “private,” and granted both of SDR’s motions. The Court of Appeals reversed, holding that Dillon may be able to prove the conversations were private, and that the transcription of the conversations was outside the scope of the anti-SLAPP statute; thus Dillon’s suit could proceed on remand. *See Dillon v. Seattle Deposition Reporters*, 179 Wn. App. 41, 51, 316 P.3d 1119 (2014).

In reversing the trial court, the Court of Appeals also stated that standards governing summary judgment under CR 56 apply when deciding a special motion to strike under RCW 4.24.525. *Dillon*, 179 Wn. App. at 89. In so doing, the Court of Appeals looked to Minnesota law.

See Dillon, 179 Wn. App. at 87-88. The Court of Appeals reasoned that it was necessary to import summary judgment standards into the anti-SLAPP statute to prevent the statute from running afoul of Washington's constitutional guarantee of trial by jury, Const. art. I, § 21. *Id.* at 89. SDR petitioned for review, which this Court granted. *Dillon v. Seattle Deposition Reporters*, 180 Wn.2d 1009, 325 P.3d 913 (2014).

V. ARGUMENT

The recordings taken of Dillon's private conversations without his consent violated the Privacy Act, and as a matter of law the Washington anti-SLAPP statute does not apply under such circumstances. This Court may so hold and avoid any other issues raised on review. If, however, this Court addresses the question of the procedural standards that apply under RCW 4.24.525, it should not follow the Court of Appeals' application of CR 56 standards to the statute. Those standards are fundamentally inconsistent with the face of the statute and cannot be reconciled with the legislation as written. *Amicus* agrees with the Court of Appeals that statutes should be construed, where possible, to avoid constitutional issues — and there are serious constitutional issues with RCW 4.24.525. But here, such a construction is simply not possible. This is evidenced by the fact that the Minnesota decision upon which the Court of Appeals relied has already been overruled by the Minnesota Supreme Court. Moreover,

attempting to impose such a construction on the statute would only further the current *ad hoc* manner in which it is being applied.

A. Dillon's Conversations with Grant Were Private.

As a preliminary matter, *amicus* recognizes that the recordings² at issue in the present case were made at the direction of Grant, one of the participants in the conversation. This fact, however, does not render the surreptitious recordings lawful. The Privacy Act allows recording of conversations only with “the consent of all the persons engaged in the conversation.” RCW 9.73.030(1)(b). As such, Grant’s consent to, and actual implementation of, the recordings is immaterial, since Dillon did not consent to the recordings himself. It is appropriate, therefore, to view the case as if the conversations had been recorded by a third party with a wiretap, without knowledge or consent of either participant.

Viewed through this lens, it seems obvious that the conversations were protected by the Privacy Act. The Act makes clear that third

² Throughout the course of this litigation, the stenographic transcription of the conversations has been assumed to be a recording. “Here, only the first element, whether the conversation was private, is at issue.” *Dillon*, 179 Wn. App. at 60. When petitioning this Court, SDR for the first time raised the question of whether stenographic transcription is covered by the Privacy Act, Petition for Review at 18 n. 4, but advanced no argument until review was granted, Supp. Br. Of Pet. at 11-13. This is a question that needs further factual and legal development before it can be decided; *amicus* expresses no opinion on the subject, but instead adopts the same assumption used by the lower courts. In any event, this Court need not decide the question now, since Dillon alleges that some or all of the conversations were also tape recorded. *See, e.g.*, Appellant’s Opening Brief at 11-13.

parties—including opposing parties and counsel—are not free to wiretap conversations between attorneys and potential witnesses, and record and disseminate them at will. Yet that would be the inescapable result if one accepts SDR’s argument that the conversations between Dillon and Grant were not private.

Such a result is facially incompatible with the Privacy Act’s recognized status as “one of the most restrictive in the nation.” *State v. Kipp*, 179 Wn.2d 718, 724, 317 P.3d 1029 (2014). *Amicus* respectfully urges the Court to reaffirm its recent unanimous and straightforward holdings that “the privacy act is implicated when one party records a conversation without the other party’s consent,” *Id.*, and “the statutory analysis favors privacy unless it is shown differently,” *Id.* at 729; *see also State v. Modica*, 164 Wn.2d 83, 89, 186 P.3d 1062 (2008) (“we will generally presume that conversations between two parties are intended to be private”). All conversations should fall within the scope of the Privacy Act’s protection against surreptitious recording unless they are patently public in nature.

SDR wrongly claims that the Privacy Act only protects “secret” conversations. *E.g.*, Petition for Review at 16-17. This claim is based on a misunderstanding of the statute, which does, in fact, protect only “private” conversations. RCW 9.73.030(1)(b). The Privacy Act does not

define the term “private,” so our courts have determined that it should “be given its ordinary and usual meaning.” *E.g., Kipp*, 179 Wn.2d at 729. In the context of conversations, that meaning is “intended only for the persons involved.” Webster’s Third New International Dictionary (1969).³ Thus, the primary question is whether the participants intend the conversation—not the subject matter, but the actual conversation—to be limited to themselves, or open to all. Many conversations are private that are not secret, and the Privacy Act is intended to protect them.

In fact, if the Privacy Act were limited to protecting only “secret” conversations, it would have little meaning, and fail to provide much protection at all to Washingtonians. There is really no such thing as a “secret” conversation, as one always runs the risk of the other party to a conversation repeating the substance to another. Rather than being limited to a few instances of secret conversations, the Act is clearly intended to apply to the vast majority of ordinary conversations—all those in which the participants intend and believe they are talking amongst themselves.

³ Courts have often used a different and longer quotation from Webster’s. *See, e.g., Kipp*, 179 Wn.2d at 729. That quotation, however, does not accurately state the definition of the adjective “private;” it includes a section from the etymology, an obsolete definition of the noun “private,” and a section of a definition for the adverbial phrase “in private.” *Amicus* respectfully asks the Court to use the correct quotation, which will help the lower courts properly focus on whether a conversation is private or public, rather than being distracted by determining whether a conversation is secret.

Even if two friends are simply discussing recipes, including published recipes, the ordinary and usual meaning of “private” shows that the Privacy Act protects those friends from a fear of being recorded without their knowledge or consent.

In determining whether the parties to the conversation intended it only for themselves, versus the public at large, this Court has determined that the entire context of the conversation must be examined, using several factors: duration, subject matter, location, presence of third parties, and the relationship between the parties to the conversation. *See, e.g., Kipp*, 179 Wn.2d at 729. Since that examination begins with a presumption of privacy, *Id.*, the proper question is not whether the context shows a reasonable intent to have a private conversation; it is whether the context shows a reasonable intent to have a public conversation—unless the intent to be public is clear, the conversation must be deemed private for purposes of the Act.

Amicus has previously suggested that the factors to determine privacy *vel non* of a conversation should be reconsidered.⁴ *Amicus* continues to believe the only truly relevant factors to be considered are the actual visible presence of one or more third parties, the number of those

⁴ See Brief of *Amicus Curiae* American Civil Liberties Union of Washington, *State v. Kipp*, No 88083-2.

outsiders, and whether those outsiders are strangers to the participants in the conversation; these factors best show whether the participants intended to include the public in the conversation. Here, Dillon was entirely unaware of the presence of any outsiders on the call; at most, he knew of an “assistant” in the first call, which would not qualify as either an outsider or stranger. *Dillon*, 179 Wn. App. at 51-52. There is simply no evidence to show that Dillon intended the calls to be public.

SDR’s only argument to the contrary is based on its improper conflation of “private” and “secret;” it contends that the conversations could not have been private because Dillon knew that Grant would disclose the substance of the conversations to others.⁵ Supp. Br. of Pet. at 14-17. Such a contention was recently flatly rejected by this Court: “Here, the State contends that a person who confesses to child molestation should expect this information to be reported to the authorities, and therefore it is unreasonable to expect the conversation to remain private. While this may be true, it has little relevance to whether the recording itself is proper.”

Kipp, 179 Wn.2d at 731; *see also Modica*, 164 Wn.2d at 89-90 (“But the

⁵ The Court of Appeals considered the relationship of the participants in the conversation to weigh against a finding of privacy. *See Dillon*, 179 Wn. App. at 62. That determination was made prior to this Court’s clarification that the relationship of the participants only points towards a lack of privacy in a few instances, involving either strangers or police officers. *See Kipp*, 179 Wn.2d at 732. Not surprisingly, SDR does not continue to press this argument.

mere fact that a portion of the conversation is intended to be passed on does not mean a call is not private and must be determined from the totality of the circumstances.”)

This concept—that a conversation may be private even though its content will be repeated to others—is easily illustrated. For example, a boy with a crush on a girl may well confide in a friend and ask that friend to approach the girl and let her know of his interest. That boy intends the subject of the conversation to be disclosed to another—that is the entire point of talking to the friend—but would doubtless be mortified to have the actual conversation recorded and replayed. Or consider a marriage proposal. Assuming the proposal is accepted, both parties are probably thrilled to share the news. But they may well want to keep the actual moment private, and not want it replayed to the public on YouTube. In other words, each of these conversations is private, although the subject of the conversations is far from secret. Similarly, Dillon’s conversations with Grant were private, even though Dillon expected some parts of the conversations to be disclosed to others.

Because Dillon’s conversations with Grant were private, and were recorded without his consent, RCW 4.24.525 is simply inapplicable to the current case. First, SDR has not met its burden to show that its actions involved public participation. RCW 4.24.525(4)(b). Even if one accepts

that “the constitutional right of petition” encompasses all litigation, SDR’s act of recording the conversation was not “lawful conduct” supporting its litigation. RCW 4.24.525(2)(e) (emphasis added). Instead it was conduct specifically prohibited by the Privacy Act—recording of a private conversation without the consent of all parties. Second, Dillon has met his burden to establish “a probability of prevailing on the claim.” RCW 4.24.525(4)(b). Dillon has presented evidence of a violation of the Privacy Act, and the only serious defense SDR has raised to Dillon’s claim is not a dispute over the facts, but instead an argument that the conversations were not private. Since that argument fails—the conversations were, in actuality, private—Dillon’s claim should prevail under any standard of proof. As such, this Court does not need to decide the exact contours of the protection afforded by RCW 4.24.525; under any interpretation, SDR’s motion fails.

B. The Anti-SLAPP Statute Conflicts with the Right to Trial by Jury.

If the Court does not agree that Dillon’s conversations were private, it must then address the second prong of RCW 4.24.525, the standard of proof to show a probability of prevailing on the claim.

Amicus concurs with the Court of Appeals that RCW 4.24.525, as written, conflicts with the right to trial by jury.⁶ *Dillon*, 179 Wn. App. at 89. The role of the jury must be held “inviolable” under our constitution. Const. art. I, § 21. The right to have factual questions decided by the jury is at the heart of the right to trial by jury. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). “To the jury is consigned under the constitution ‘the ultimate power to weigh the evidence and determine the facts.’” *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (quoting *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). Thus, only where there is no genuine dispute of material fact are summary proceedings in compliance with the right to trial by jury. *LaMon v. Butler*, 112 Wn. 2d 193, 199, 770 P.2d 1027 (1989) (“When there is no genuine issue of material fact, as in the instant case, summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial.”) (emphasis added) (citing *Nave v. Seattle*, 68 Wn.2d 721, 725, 415 P.2d 93 (1966)).

When a defendant seeks summary judgment under CR 56, the burden of persuasion and burden of proof lie with the moving party.

⁶ *Amicus* maintains strong concerns about the constitutionality of the anti-SLAPP statute on other grounds as well, including the First Amendment, separation of powers, and procedural due process. See Brief of Amici Curiae WELA and ACLU of Washington, in *Henne v. City of Yakima*, No. 89674-7 (filed May 7, 2014).

Klossner v. San Juan County, 21 Wn. App. 689, 693, 586 P.2d 899 (1978) (“One who moves for summary judgment has this burden of proof irrespective of whether he or his opponent has the burden of proof at trial.”); *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000) (“A moving party without the ultimate burden of persuasion at trial—usually, but not always, a defendant—has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment.”). The moving party must demonstrate its entitlement to judgment as a matter of law, and the absence of any genuine dispute of material fact. CR 56(c); *Young v. Key Pharm., Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182 (1989). In other words, if there is a disputed issue of material fact, summary judgment must be denied. All reasonable inferences are drawn in favor of the non-moving party. *Young*, 112 Wn.2d at 226. Thus, the purpose of summary judgment is “to examine the sufficiency of the evidence behind the plaintiff’s formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists.” *Id.* (citing *Zobrist v. Culp*, 18 Wn. App. 622, 637, 570 P.2d 147 (1977)).

Consistent with that purpose, even when a claim must be proven by clear and convincing evidence at trial, the procedure for summary judgment does not change. Thus, “the clear and convincing evidence

standard involved in defamation cases does not materially alter the normal standard for deciding motions for summary judgment. While the issue turns on what the jury could find, and while the court must keep in mind that the jury must base its decision on clear and convincing evidence, the evidence is still construed in the light most favorable to the nonmoving party and the motion is denied if the jury could find in favor of the nonmoving party.” *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768-69, 776 P.2d 98 (1989) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513-14, 91 L. Ed.2d 202 (1986)). Here, in contrast, the pretrial burden is even more daunting because the non-moving party (the plaintiff in the action) bears the heightened burden of clear and convincing evidence, even though the standard at trial is a “preponderance of the evidence.”⁷

Specifically, when a defendant moves to strike under the second prong of RCW 4.24.525, the non-moving party (plaintiff) bears both the burden of proof and the burden of persuasion. The non-moving party

⁷ The creation of a heightened burden of “clear and convincing evidence” pretrial will result in the dismissal of cases that can ultimately succeed under a “preponderance of the evidence” standard, which continues to apply at trial. Insofar as a non-moving party is denied the opportunity to satisfy the applicable trial standard, he is denied the right to trial by jury. It is fundamental that the same standard applied at summary judgment must be applied at trial. *See Anderson*, 477 U.S. at 252 (“we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits”).

must establish the probability that it will prevail by clear and convincing evidence. RCW 4.24.525(4)(b). As a result, the non-moving party may well establish genuine disputed factual issues, but since the non-moving party also bears the burdens of proof and persuasion, it must carry those burdens regardless of disputed facts.

Despite these conflicts, and although the issue was not directly before it, the Court of Appeals articulated that the standard for deciding a motion for summary judgment must be engrafted on to the motion to strike procedure outlined in RCW 4.24.525. *Dillon*, 179 Wn. App. at 89. The Court stated that “[s]uch an approach is necessary in order to preserve the plaintiff’s right to a trial by jury.” *Id.* The Court of Appeals’ adoption of the summary judgment standard has since been adopted in at least one subsequent decision (for which review is also sought before this Court). *Davis v. Cox*, 180 Wn. App. 514, 528, 325 P.3d 255 (2014) (citing *Dillon*, 316 P.3d at 1143).

Amicus does not fault the Court of Appeals for attempting to address this serious constitutional issue inherent in RCW 4.24.525. But courts “will not rewrite a ... law to conform it to constitutional requirements.” *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884-85, 117 S. Ct. 2329, 2351, 138 L. Ed. 2d 874 (1997). A court may construe a statute to avoid constitutional infirmities, but only if the statute is

susceptible to such a construction, and the construction is consistent with the purpose of the statute. *See In re Estate of Duxbury*, 175 Wn. App. 151, 160, 304 P.3d 480 (2013) (citing *In re Restraint of Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993)). Here, the Court of Appeals' use of CR 56 standards cannot stand based on grounds of constitutional avoidance, because the construction directly conflicts with the plain language of the statute.

Furthermore, the sole authority that the Court of Appeals cited in support of importing the summary judgment standard has since been overruled. The Court of Appeals relied on Minnesota law, and in particular the Minnesota Court of Appeals decision in *Nexus v. Swift*, 785 N.W.2d 771, 781 (Minn.App.2010). The crux of the decision in *Nexus* was as follows:

[U]ltimate determinations of fact are *not* required by the clear-and-convincing standard set forth in Minn.Stat. § 554.02, subd. 2(3). These standards require that reasonable inferences be drawn in favor of the nonmoving party, which is unchanged by the anti-SLAPP statute. The test is merely whether, in light of those inferences and the view of evidence mandated by the standard for granting judgment on the pleadings or summary judgment, the plaintiff has shown that the defendant's speech or conduct was tortious or otherwise unlawful.

Nexus, 785 N.W.2d at 782 (emphasis in original).

Since the Court of Appeals decision in the present case, the Minnesota Supreme Court has overruled *Nexus* on this exact issue. *Leiendecker v. Asian Women United of Minnesota*, 848 N.W.2d 224, 233 (Minn. 2014). *Leiendecker* involved an anti-SLAPP motion under the same Minnesota statute relied upon by the Court of Appeals. The party opposing the motion invoked and relied upon the portion of the holding of *Nexus* cited above. The Minnesota Supreme Court held that the summary judgment standard could not be reconciled with the standard on the face of the anti-SLAPP statute:

While *Nexus* suggests that the summary-judgment standard should apply to some anti-SLAPP motions, the summary-judgment standard and the statutory framework for evaluating an anti-SLAPP motion are mutually inconsistent. For summary judgment motions, a court evaluates the evidence to determine whether there are any genuine issues of material fact and whether either of the parties is entitled to judgment as a matter of law. An anti-SLAPP motion, by contrast, requires the court to make a finding about whether “the responding party has produced clear and convincing evidence that the acts of the moving party” are not immune.

Leiendecker, 848 N.W. 2d at 231 (comparing Minn. R. Civ. P. 56.03. with Minn.Stat. § 554.02, subd. 2(3)) (citations omitted) (emphasis added).

The Minnesota Supreme Court also recognized the concern that the Court of Appeals recognized here: namely, that failure to import summary judgment standards might result in the statute, as written, conflicting with

the right to trial by jury. But the Minnesota court rejected the premise that this concern gave it license to rewrite the statute;

The constitutional-avoidance canon provides a “presumption ... that a statute is constitutional, and we are required to place a construction on the statute that will find it so *if at all possible*. In this case, it is not “possible” to adopt a construction of the anti-SLAPP statutes that relieves those responding to an anti-SLAPP motion of the burden to produce evidence. As described above, the anti-SLAPP statutes unambiguously require the responding party to produce evidence and the district court to make a finding on whether “the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03.” It is neither reasonable nor “possible” to adopt any other construction of the statute.

Leiendecker, 848 N.W.2d at 232-33 (citations omitted, emphasis in original); *see also Al Bahlul v. United States*, No. 11-1324, 2014 WL 3437485 (D.C. Cir., July 14, 2014) (“The constitutional avoidance canon is an interpretive aid, not an invitation to rewrite statutes to satisfy constitutional strictures.”).

Aside from the above, the importation of summary judgment standards into RCW 4.24.525 will further complicate the already confounding analysis and results engendered by the statute.⁸ Trial courts

⁸ See, e.g., *Bevan v. Meyers*, __ Wn. App. __, P. 3d __, No. 69505-3-I, 2014 WL 4187803 (August 25, 2014) (anti-SLAPP statute applies to counterclaims to quiet title and for trespass); *Alaska Structures, Inc. v. Hedlund*, 180 Wn. App. 591, 594, 323 P.3d 1082 (2014) (anti-SLAPP statute does not apply to action for breach of contract regarding

will be required to somehow reconcile the inconsistent standards of the statute and those of CR 56. As a result, a non-moving party (plaintiff) subject to a motion to strike may be unable to establish a likelihood of success by clear and convincing evidence, but if the non-moving party (plaintiff) raises a material factual dispute, the motion to strike must apparently be denied. The Court of Appeals also concluded that summary judgment standards applied to both prongs of the statute. *Dillon*, 179 Wn. App. at 90. As a result, the question of whether a claim “is based on an action involving public participation and petition” under RCW 4.24.525(4) will be overlaid with the question of whether disputed material facts exist. The inquiry will no longer be based on the nature of the claim, but whether there are material factual disputes between the parties precluding a determination of the nature of the claim. This can hardly be squared with the legislative objective to “establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation....” Laws of 2010, ch. 118, § 1.

In sum, the Court of Appeals was correct that the anti-SLAPP statute violates the right of trial by jury, but incorrect in attempting to

online postings); *Davis*, 180 Wn. App. at 523 (anti-SLAPP statute did apply to corporate derivative action challenging board authority to boycott); *Egan*, 179 Wn. App. at 572 (declaratory action under Public Records Act not subject to anti-SLAPP statute).

rewrite the statute to avoid this issue. The statute, as written, cannot be constitutionally applied to bar Dillon's suit.

VI. CONCLUSION

Amicus respectfully requests the Court to hold that Dillon's conversation with Grant was private, and that he may pursue his lawsuit for a violation of the Privacy Act. If the Court reaches the Court of Appeals' application of summary judgment standards, it should reject that approach as incompatible with the statute and unworkable in practice. The statute cannot be applied to dismiss Dillon's claim. As the Court of Appeals recognized, such dismissal would violate the right to trial by jury.

Respectfully submitted this 29th day of August 2014.

ACLU OF WASHINGTON

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CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 29th day of August, 2014, I filed with the Supreme Court and caused a true and correct copy of the foregoing document to be served upon the following pursuant to agreement for electronic service:

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

DATED this 29th day of August, 2014.


Katie Dillon