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No. 69300-0  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JASON DILLON, an individual,  
*Plaintiff-Appellant,*

v.

SEATTLE DEPOSITION REPORTERS, LLC, a Washington company;  
DAVIS WRIGHT TREMAINE, LLP, a Washington company, JAMES  
GRANT and Jane Doe Grant, individually and the marital community  
composed thereof if any,  
*Defendants-Respondents.*

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APPEAL FROM KING COUNTY SUPERIOR COURT  
THE HONORABLE BRUCE HELLER

---

BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR  
FREEDOM OF THE PRESS, ALLIED DAILY NEWSPAPERS OF  
WASHINGTON, AND WASHINGTON NEWSPAPER PUBLISHERS  
ASSOCIATION IN SUPPORT OF DEFENDANTS-RESPONDENTS

Filed <sup>E</sup>  
Washington State Supreme Court  
SEP - 9 2014 <sup>bjh</sup>  
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ORIGINAL

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## **INTEREST OF *AMICI CURIAE***

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that has worked since 1970 to defend the First Amendment rights of the news media.

Allied Daily Newspapers of Washington is a Washington not-for-profit association representing 24 daily newspapers serving Washington, as well as the Washington bureaus of the Associated Press. Allied Daily Newspapers was a key supporter of the legislation that led to the Washington anti-SLAPP statute.

Washington Newspaper Publishers Association is a not-for profit association representing 105 community newspapers in Washington, most serving rural or suburban communities.

## **SUMMARY OF THE ARGUMENT**

1. Lawyers and journalists routinely take notes during important telephone conversations. It would be unprofessional for them not to take notes; relying on memory may even lead to libel or malpractice liability. And when a reasonable person calls a lawyer or a journalist to offer key facts about a case, he should expect the recipient will take notes—possibly very good notes, because the recipient knows shorthand or has someone who knows shorthand sitting in on the call.

Moreover, recording and note-taking in the process of creating First-Amendment-protected speech and petitioning are themselves presumptively protected by the First Amendment. Constitutional protection for speech would mean little if such protection could be circumvented by banning the acts necessary to creating that speech, whether moving one's lips, writing on a notepad, typing on a keyboard, or turning on a tape recorder.

To be sure, the right to record, like other First Amendment rights, may be subject to some limitations. For example, unauthorized electronic recording of communications that are reasonably expected to be private may well be unprotected. But manual note-taking during a conversation to which Defendants themselves were parties, under circumstances objectively suggesting no reasonable expectation of privacy, must be protected.

2. The Court of Appeals' narrow reading of Washington's anti-SLAPP provision, RCW 4.24.525, is inconsistent with that law's purpose. Dillon has, at best, a weak case that he had a reasonable expectation of privacy in communications with opposing counsel. And anti-SLAPP laws are intended to dispose of weak cases as early and cost-effectively as possible to ensure that parties do not use litigation as a tool for deterring public discourse.

To this end, RCW 4.24.525 mandates that a plaintiff show a likelihood of prevailing by "clear and convincing evidence" in order to withstand a

motion to strike—a standard Dillon cannot meet. Thus, properly interpreted, the anti-SLAPP statute should lead to dismissal of plaintiff’s claim.

## ARGUMENT

### **I. Defendants’ Note-Taking Was Legal and Constitutionally Protected.**

“It is firmly established that the First Amendment’s aegis extends further than the text’s proscription on laws ‘abridging the freedom of speech, or of the press,’ and encompasses a range of conduct related to the gathering and dissemination of information.” *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (citations omitted). “As the Supreme Court has observed, ‘the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.’” *Id.* (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978)).

The Court of Appeals justified its decision on the ground that “[t]he act of recording”—here, by taking verbatim notes—“is not itself protected speech or petitioning activity.” *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 82, 316 P.3d 1119 (2014). Reasoning that “[t]he act of transcription does not express anything” and is not “intended to convey any sort of message,” the court analogized the note-taking to “sitting.” *Id.* at 72 (citation omitted).

But, unlike sitting, note-taking is necessarily connected to speech. First, it involves writing or typing that creates a document, which is itself activity protected by the First Amendment. The United States Supreme Court has repeatedly held that speech or conduct is protected even when the speaker serves only as a conduit for the messages of others and does not intend to convey any message in particular. *See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569-70 (1995) (holding that “First Amendment protection” does not “require a speaker to generate, as an original matter, each item featured in the communication”); *Turner Broad. Sys., Inc. v. Fed. Commc’ns Comm’n*, 512 U.S. 622, 636 (1994) (holding that a cable operator engages in First-Amendment-protected activity by receiving and transmitting television programming created by other speakers). *A fortiori*, gathering the messages of others to create one’s own message in the future is likewise constitutionally protected.

Second, note-taking involves “the gathering . . . of information,” *Glik*, 655 F.3d at 82, which is a necessary part of creating other speech, including petitions for redress of grievances. To offer an analogous example, a person likely does not intend to convey a message simply by placing a flyer or a complaint in a photocopy machine. Yet a ban on the “act” of photo-

copying would interfere with the production and dissemination of protected speech and thus thwart the freedoms of speech, press, and petition.

For the same reason, courts have held that the act of recording, whether manually or through the use of an electronic device, must also be presumptively constitutionally protected:

The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected . . . [B]anning photography or *note-taking* at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio or audiovisual recording.

*Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir. 2012) (third emphasis added); *see also Glik*, 655 F.3d at 83 (likewise as to filming); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (likewise as to photography); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (likewise speaking of a "First Amendment right to film matters of public interest").

And if using an electronic device to produce a verbatim reproduction of another's words, tone of voice, and inflection is protected, then *a fortiori*, manually writing another's words on a piece of paper must also be. Indeed, note-taking has long been a primary tool for journalists to gather

news and information. Nor is it adequate for a journalist to take notes *after* the conclusion of an interview, or after the observation of a historical event. The ability to write down one's perception contemporaneously with the events being recorded is necessary to ensure accurate note-taking, and, in turn, accurate reporting.

Indeed, contemporaneous note-taking is practically required by journalists' and lawyers' professional standards, precisely because note-taking is so essential to ensuring the accuracy and effectiveness of speech and petitioning activity. Courts, for instance, entrust parties to create and present an accurate evidentiary record, and no one would suggest that parties could or should prepare motions and briefs through reliance on memory alone.

And very good note-takers who can transcribe a conversation verbatim must be as protected as ordinary note-takers. Many journalists, many legal secretaries, and some lawyers are themselves skilled at shorthand of one type or another; surely they cannot be required to take less efficient notes in order to avoid illegality. Moreover, any distinction between acceptably mediocre note-taking and excessively good note-taking would be either unadministrably vague or arbitrary.

Nor does the interest in protecting private conversations against clandestine electronic recording apply in this case. This case involves note-

taking (albeit extremely accurate note-taking), not electronic recording, and it involves a conversation that a reasonable person in Dillon's shoes could not have expected to be private.

To be sure, the constitutional protections afforded to recording may be subject to some limitations aimed at protecting reasonable expectations of privacy. *See, e.g., Alvarez*, 679 F.3d at 605-06 (reasoning that electronic recording of conversations “that carry privacy expectations” may be barred). But the act of recording—and of note-taking—is treated as presumptively protected First Amendment activity, even if that presumption can at times be rebutted. Though the precise scope of this constitutional protection remains unresolved, it clearly covers at least the note-taking at issue here.

When a reasonable person calls someone else's lawyers to give them important information, that person should expect the lawyers to take notes. This is especially so when—as in this case—the lawyers have interests adverse to the caller's, the caller is a sophisticated businessperson (such as Dillon, who had been the vice president of a company), and the caller's express purpose is to supply “facts” that will be “beneficial” to opposing counsel's case against the caller's ex-employer. CP 175, 271-74. Indeed, Dillon said that he wanted to “clear his conscience” and that he thought

his confessions would cause NetLogix's CEO, Scott Akrie, to "drop the case." CP 205 at 3:25-4:1; CP 206 at 7:12-16; CP 211 at 27:6-9.

Any reasonable caller who voluntarily offers such valuable evidence would expect that the receiving lawyers will have someone taking very good notes of that conversation. (Indeed, the receiving lawyers might violate professional standards if they *failed* to take accurate notes.) And this conclusion is even more obvious where, as here, the lawyer expressly states—at the very start of communications with the caller—that someone will be taking notes. CP 205 at 2:8-15.

Moreover, during these conversations, defendants asked and received permission from Dillon to use the information Dillon shared to create a "declaration," which Dillon would sign, and which would be submitted to the court. CP 213 at 36:25-37:1. It is unclear how Dillon could have expected Respondents to create an accurate declaration unless they were taking notes. Thus, Dillon must have known, and consented to, the note-taking at issue in this case.

Indeed, Dillon did not object to the note-taking that he now alleges was unlawful when he viewed the first draft of Respondents' declaration, which contained verbatim statements from the phone conversations. *See* CP 224 at 4:15-19. Rather, only after Dillon changed his mind and pur-

ported to retract all statements made to Respondents did Dillon claim that he thought his phone conversations with opposing counsel were “private.”

Thus, for two independent reasons—because note-taking is itself the creation of speech, and because it is often integral to creating other protected speech—a finding that note-taking violates RCW 9.73.030 would raise a serious question as to the constitutionality of that law. Section 9.73.030 therefore should be construed not to apply to note-taking during conversations to which the note-taker is a party.

Finally, the Court of Appeals held that *any* act of recording, public or private, through electronic or manual means, is constitutionally unprotected. *See Dillon*, 179 Wn. App. at 82 (“The act of recording is not itself protected speech or petitioning activity.”). This rule is fundamentally unsound, unconstitutionally overbroad, and merits reversal.

## **II. The Court of Appeals’ Opinion Undermines the Anti-SLAPP Statute’s Policy of Protecting First-Amendment-Protected Activity Against Meritless Lawsuits.**

Plaintiff’s claim is thus, at best, weak. The anti-SLAPP statute is intended to dispose of weak claims early. Yet the Court of Appeals’ decision would remand this case for a potentially long and costly litigation process, something the anti-SLAPP statute is aimed to prevent.

The Washington Legislature meant the anti-SLAPP statute to provide broad protection. The Legislature expressly stated that the law should “be

applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.” Laws of 2010, ch. 118, § 1. The Legislature adopted a heightened “clear and convincing” evidentiary standard for plaintiffs seeking to resist a motion to strike. RCW 4.24.525(4)(b). And the Legislature modeled its law on the broadly protective California anti-SLAPP statute.<sup>1</sup> (Courts, including the lower court here, have therefore often viewed California cases as persuasive authority for interpreting RCW 4.24.525.<sup>2</sup>) Yet the opinion below fails to provide the broad protection that the Legislature intended.

**A. The Court of Appeals wrongly denied anti-SLAPP protection to First-Amendment-protected activity involved in the creation of a document later filed in court.**

First, the Court of Appeals’ opinion largely reduces subsection (2)(a) to a pleading rule by holding that the statute protects a defendant only when a plaintiff pleads a claim based on the defendant’s act of *filing* a document in court, and not when the plaintiff pleads a claim based on note-taking the lawyer *uses to create* that filed document. *See Dillon*, 179 Wn. App. at 73 (“Dillon . . . alleged in his complaint that the violations of

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<sup>1</sup> See Kathryn W. Tate, *California’s Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 Loy. L.A. L. Rev. 801, 812, nn.53-54 (2000) (comparing California’s anti-SLAPP law to several other states’ more “typical” statutes and concluding that California’s is substantially broader).

<sup>2</sup> See, e.g., *Dillon*, 179 Wn. App. at 71-73, 76; see also *Davis v. Cox*, 180 Wn. App. 514, 529-30, 539-43, 325 P.3d 255 (2014); *City of Seattle v. Egan*, 179 Wn. App. 333, 340, 317 P.3d 568 (2014).

the privacy act were [Defendants'] acts of transcribing the telephone calls without his knowledge. Dillon's complaint does not even mention that the transcripts were filed in federal court."). But the anti-SLAPP analysis requires a court to consider not the precise action pled, but rather (as the Court of Appeals acknowledged) whether the "principal thrust or gravamen of the plaintiff's cause of action" is "based on an action involving public participation and petition." *Dillon*, 179 Wn. App. at 72 (quoting *Martinez v. Metabolife Int'l, Inc.*, 113 Cal. App. 4th 181, 188, 6 Cal. Rptr. 3d 494 (2003)). Indeed, *Martinez* held that "a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as [for example] a garden variety breach of contract [or] fraud claim when in fact the liability claim *is based* on protected speech or *conduct*." *Martinez*, 113 Cal. App. 4th at 187 (emphasis added; internal quotation marks omitted).

Thus, what matters under RCW 4.24.525 is whether the defendant is being sued because he engaged in protected speech, petitioning activity, or "conduct that advances and assists the defendants' exercise of a protected right." *Davis v. Cox*, 180 Wn. App. 514, 530, 325 P.3d 255 (2014) (citation omitted). If that is why the defendant is being sued, "then the cause of action targets the exercise of that protected right," *id.*, and is subject to the anti-SLAPP statute. Indeed, plaintiffs often cloak SLAPP claims as a

“garden variety breach of contract [or] fraud claim,” *see Martinez*, 113 Cal. App. 4th at 187, and courts must pierce through such pleadings to focus on the substance of the plaintiff’s lawsuit.

Applying these principles here—and keeping in mind the Legislature’s stated intent that the anti-SLAPP law should “be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts,” Laws of 2010, ch. 118, § 1—the “principal thrust” of Dillon’s claim falls well within the scope of subsection (2)(a). Dillon’s cause of action is premised on Petitioners’ production (by taking notes) of a written transcript (constitutionally protected speech) for use in a judicial proceeding. And, as argued in Part I, the right to *create* constitutionally protected speech is necessarily covered by the right to transmit such speech to others, including to a court.

Thus, if RCW 4.24.525(2)(a) protects from frivolous SLAPP suits “statements” filed in a judicial proceeding, it necessarily must also protect the antecedent act of *creating* those statements, or else the protection would mean little. And the Court of Appeals’ argument that “SDR’s acts of transcribing Dillon’s telephone calls cannot reasonably be categorized as protected ‘statements,’” *Dillon*, 179 Wn. App. at 72, is unsound for the same reason: for “statements” to be protected under the First Amendment, the creation of those statements must also be protected.

**B. The Court of Appeals wrongly treated the “right of petition” as excluding access to courts.**

Second, the Court of Appeals wrongly concluded that the “right to petition” under subsection 2(e) does not include bringing (or defending) lawsuits. The Court of Appeals reasoned that, because subsection (2)(e) uses the article “the” preceding “right to petition,” that subsection must be referring to a single right: either the right provided under the Washington state constitution *or* the one provided under the federal constitution. *Dillon*, 179 Wn. App. at 74-75. The opinion then concludes that the Legislature must have been aware that Washington courts have interpreted the Washington Constitution’s right to petition as *not* including “a right to access the courts,” and that the Legislature must have meant to refer to this definition of “petition” when drafting subsection (e). *Id.* at 75-81.

Yet the Legislature expressly directed that RCW 4.24.525 be liberally construed, and under any such liberal construction, “petition” must be understood as covering lawsuits. *E.g.*, *Petition*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/petition>, defn. 2(a) (last visited July 25, 2014) (defining “petition” to include “a formal written request made to an official person or organized body (as a court)”). That the Legislature was using this normal definition of “petition”—which is also the way “petition[ing]” has been understood under the United States Constitution—is

far more likely than that it was deliberately (but tacitly) incorporating only the more limited meaning ascribed to the Washington provision by some court decisions.

**C. The Court of Appeals wrongly treated RCW 4.24.525(2)(a)–(e) as an exclusive list, rather than as examples of covered activities.**

Third, the Court of Appeals erred by treating the items listed in RCW 4.24.525(2)(a)–(e) as an exclusive list, rather than as examples of the *types* of activities to which the Legislature intended anti-SLAPP protection to apply. RCW 4.24.525 applies broadly “to any claim, *however characterized*” “based on an action involving public participation and petition,” defined to “*include*” “(a) [a]ny oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding” and “(e) [a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.” RCW 4.24.525(2)(a), (e) (emphases added).

As the term “include” indicates, the definitions listed within RCW 4.24.525(2)(a)–(e) are not meant to be exhaustive or exclusive. Thus, even if subsections (a) and (e) do not themselves apply to Defendants’ note-taking, the creation and preparation of the evidentiary record in a “judicial

proceeding” is “include[d]” as an activity “involving . . . petition” within the meaning of RCW 4.24.525(2).

**D. The Court of Appeals’ decision cannot be defended on the grounds that Defendants’ activity is illegal as a matter of law.**

Finally, anti-SLAPP legislation does not apply where the assertedly protected activity is illegal as a matter of law. *See, e.g., Malin v. Singer*, 217 Cal. App. 4th 1283, 1291, 1293-94, 159 Cal. Rptr. 3d 292 (2013); *Gerbosi v. Gaims, Weil, West & Epstein, LLP*, 193 Cal. App. 4th 435, 445-46, 122 Cal. Rptr. 3d 73 (2011). An activity may “be deemed criminal as a matter of law when a defendant concedes criminality, or the evidence conclusively shows criminality.” *Gerbosi*, 193 Cal. App. 4th at 446.

But there is nothing even close to a conclusive showing of criminality here. The Court of Appeals itself acknowledges that there is a “triable issue of fact”—not a conclusive showing—as to whether the transcribed conversations were private and therefore could not legally be recorded. *See Dillon*, 179 Wn. App. at 64. Indeed, for the reasons set forth in Part I, the note-taking here was not illegal, and indeed could not be illegal even if the conversation were found to be private.

Defendants have therefore met the threshold requirement of showing that Dillon’s case is based on conduct protected by RCW 4.24.525. Thus, Dillon can defeat a motion to strike only by “establish[ing] by clear and

convincing evidence a probability of prevailing on the claim.” RCW 4.24.525(4)(b). Dillon cannot make such a showing, and the Court of Appeals should have therefore affirmed the trial court decision granting Defendants’ motion to strike.

### CONCLUSION

The Court of Appeals misconstrued both the Washington recording statute and the Washington anti-SLAPP statute. *Amici* ask this Court to correct these errors, which have the potential to criminalize and thus chill a broad spectrum of routine behavior by journalists, lawyers, and others.

Respectfully submitted this 29th day of August, 2014.

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**CERTIFICATE OF SERVICE**

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

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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 in Seattle, Washington, this 29th day of August, 2014.

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