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SUPREME COURT
OF THE STATE OF WASHINGTON

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JASON DILLON, an individual,
Respondent,

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,

Petitioners.

APPEAL FROM KING COUNTY SUPERIOR COURT
THE HONORABLE BRUCE HELLER

SUPPLEMENTAL BRIEF OF PETITIONERS

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I. INTRODUCTION

This dispute concerns two state court lawsuits filed against attorneys and a court reporting service¹ because they created and then filed accurate transcripts of interviews with Respondent Jason Dillon revealing that Dillon and his boss had destroyed and fabricated evidence to manufacture a multimillion dollar federal lawsuit against DWT's client, T-Mobile. When the Superior court dismissed the first suit as a Strategic Lawsuit Against Public Participation ("SLAPP"), Dillon filed yet another. The trial court correctly dismissed this suit as a SLAPP, as well. But the Court of Appeals disagreed, disregarding established law interpreting the anti-SLAPP law, the Privacy Act, and collateral estoppel.

First, by finding this lawsuit is not a SLAPP, the Court of Appeals eviscerated the anti-SLAPP law. The court misapplied the first step of the anti-SLAPP process, when a movant must make a *prima facie* showing that the suit targets public participation or petition. Rather than consider the circumstances and context of Dillon's suit, as the law directs, the court merely accepted Dillon's self-serving allegations.

Second, the Court of Appeals misinterpreted the Privacy Act. Petitioners did *not* "record" anything; taking verbatim notes is not "recording." The decision also contradicts this Court's precedents construing the Act to protect only *private* communications, ones that are secret and not to be conveyed to others. The interviews were not private.

¹ Petitioners (defendants in the Superior Court) are Seattle Deposition Reporters, Davis Wright Tremaine LLP ("DWT"), and James Grant, a DWT partner.

Finally, the Court of Appeals relied on a declaration from Dillon that the federal court rejected as untruthful. Under principles of collateral estoppel and summary judgment, the court manifestly erred by relying on the perjured declaration and refusing to respect the federal court judgment.

This case is a SLAPP, a retaliatory lawsuit targeting the lawyers who uncovered and disclosed fraud on the federal court. The Superior Court properly dismissed, and this Court should reinstate that judgment.

II. SUPPLEMENTAL ARGUMENT

A. The Court of Appeals Misinterpreted the Anti-SLAPP Law, Effectively Rendering It Meaningless.

In deciding the anti-SLAPP law does not apply, the Court of Appeals disregarded the statute's text and ignored the Legislature's mandate that the law "shall" be "construed liberally" to protect constitutional rights. S.B. 6395, 61st Leg., Reg. Sess. (2010).

1. The Anti-SLAPP Law Encompasses Federal Constitutional Rights.

The Court of Appeals erroneously held that "public participation and petition" under the anti-SLAPP law does not include *federal* constitutional rights, including the right to petition a court for redress. *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 74-80, 316 P.3d 119 (2014). Petitioners addressed this point before and need not repeat the analysis here. *See* Pet. for Review at 9-12. This Court and others have consistently interpreted the anti-SLAPP law to protect *both* state and federal rights, as the Legislature intended. *See* Laws of 2002, ch. 232, § 1; House Bill Report SSB 6395; *Segaline v. State*, 169 Wn.2d 467,

473, 238 P.3d 1107 (2010); *City of Seattle v. Egan*, 179 Wn. App. 333, 337 & n.5, 317 P.3d 568 (2014). Recently, in *Davis v. Cox*, — Wn. App. —, 325 P.3d 255 (2014), the Court of Appeals agreed, noting that, given the Legislature’s intent, “this court looks to First Amendment cases.” *See also id.* at 364-65 (finding defendants’ conduct protected “because ... boycotts are protected by the First Amendment”). The same court’s contrary interpretation in this case is unsupported and simply wrong.

2. The Court Misapplied the Anti-SLAPP Process by Crediting Dillon’s Allegations Rather Than Determining the Gravamen of the Suit.

The anti-SLAPP law creates a procedure to weed out and deter meritless claims brought “primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” S.B. 6395, 61st Leg., 2010 Reg. Sess. (2010). The law creates a special motion to strike with a two-step process. First, the moving party must show “by a preponderance of the evidence that the claim is based on an action involving public participation and petition.” RCW 4.24.525(4)(b). Second, if the movant makes this showing, “the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim.” *Id.* The Legislature designed these steps to protect parties exercising constitutional rights by providing them immunity from retaliatory suits and a way to resolve such suits promptly. 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, 497 (2012).

The Court of Appeals misinterpreted the first step of the anti-SLAPP procedure, which requires “an initial *prima facie* showing that the claimant’s suit arises from an act in furtherance of the right of petition or free speech.” *Spratt v. Toft*, — Wn. App. —, 324 P.3d 707, 712, 709 (2014). This “threshold” issue focuses on whether a suit targets speech or conduct “within the realm of protected activity.” *Id.* 324 P.3d at 712. A court cannot merely accept a plaintiff’s characterizations of his claims because plaintiffs will always claim they challenge something other than protected acts. The statute therefore applies “to any claim, *however characterized*, that is based on an action involving public participation and petition.” RCW 4.24.525(2) (emphasis added). It directs courts to look beyond the pleadings, stating they “*shall* consider ... supporting and opposing affidavits stating the facts upon which the liability or defense is based.” RCW 4.24.525(4)(c) (emphasis added).

To decide if an action targets protected activity, courts focus on “the principal thrust or gravamen” of the suit, a settled proposition the Court of Appeals recited but failed to apply. 179 Wn. App. at 71-72; *accord Davis v. Cox*, 325 P.3d at 264. This too obligates a court to pierce the pleadings and consider a suit’s context to assess whether it is “based on” public participation or petition. A claim need not expressly attack public participation; rather, such acts need only be a “starting point or foundation of the claim.” *Dang v. Ehredt*, 95 Wn. App. 670, 685 n.25, 977

P.2d 29 (1999). If a claim “targets conduct that advances and assists’ the defendant’s exercise of a protected right, then [it] targets the exercise of that protected right.” *Davis v. Cox*, 325 P.3d at 264 (quotation omitted).

The burdens for the anti-SLAPP law’s two steps differ. In the first, a party moving to strike must show a claim targets protected activity “by a preponderance of the evidence,” while in the second, the non-movant must show “a probability of prevailing on [his] claim” “by clear and convincing evidence.” RCW 4.24.525(4)(b). While the second step is akin to summary judgment, *Dillon*, 179 Wn. App. at 89, the first imposes a less onerous burden on the movant. The first step thus creates a “minimal standard,” while the second “increases the standard of proof.” *Spratt*, 324 P.3d at 713, 715. The Legislature created this two-tiered burden by design because “[t]raditional pleading-based motions ... are ineffective in combatting” SLAPPs. *Wilcox v. Sup. Ct.*, 27 Cal App. 4th 809, 821, 33 Cal. Rptr. 2d 446 (1994), *rev’d on other grounds*, *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 52 P.3d 685 (2002).

The Court of Appeals failed to apply these principles. The court mentioned the “gravamen” test, 179 Wn. App. at 72, then disregarded it, on the premise that the court would “view the facts and all reasonable inferences therefrom in the light most favorable to the non-moving party.” *Id.* at 90. It ignored the facts and context of *Dillon*’s suit and instead accepted his characterization that the suit concerned “acts of transcribing the telephone calls” rather than “submission of the transcripts ... to the

federal court.” *See, e.g., id.* at 73 (noting this is what Dillon “alleged in his complaint”); *id.* (“Dillon’s complaint does not even mention that the transcripts were filed in federal court”); *id.* at 82, 84 (accepting Dillon’s assertion that his suit was “based on the acts of recording telephone conversations, not on SDR’s use of the transcripts”). Moreover, the court opined that the analysis for the first anti-SLAPP step is the same as for the second, *id.* at 90, defeating the law’s protections and making it effectively no different than a motion to dismiss under CR 12(b)(6).

In fact, the record shows Dillon’s suit was a SLAPP. Dillon’s claims arose from interviews DWT conducted and filed to support T-Mobile’s motion to dismiss the federal action. *See* Pet. for Review at 4-5. Not long after DWT filed that motion, Akrie and Netlogix sued in state court, and Dillon tried to recant his statements. *Volcan Group, Inc. v. T-Mobile USA, Inc.*, 940 F. Supp. 2d 1327, 1332 (W.D. Wash. 2012). Akrie and NetLogix admit they filed in state court because they had “little hope” of prevailing in federal court. *Akrie v. Grant*, No. 68245-4-1, Pet. for Review at 5-6. When the *Akrie* defendants (including Petitioners) moved to dismiss under the anti-SLAPP law, Dillon sought to intervene. The Superior Court properly refused to allow this and dismissed that case as a SLAPP. CP 429-30. Dillon then filed this suit, asserting the same claims based on the same premise. His complaint differed from Akrie’s only in that it omitted references to filing the transcripts in the federal action, which was the basis for the prior ruling that *Akrie* was a SLAPP.

But Dillon's suit was a SLAPP, just as surely as was Akrie's. Like Akrie, Dillon sued while the spoliation issue was pending in the federal action. His aim was not the \$200 in damages he might recover under RCW 9.73.060, but rather to get a ruling from another court that the transcripts were inadmissible. Throughout, Dillon and Akrie colluded with one another, *Volcan Group*, 940 F. Supp. 2d at 1337, and were represented by the same counsel who represented NetLogix, Mr. Moran.

The Court of Appeals' interpretation and application of the anti-SLAPP law's first step is an outlier. In *Spratt*, Division I held that a movant need only make a *prima facie* showing and meet a "minimal standard" on the first step. 324 P.3d at 713. In *Davis v. Cox*, the same court (in an opinion written by the same judge as *Dillon*) rejected the plaintiffs' characterization of their suit and held the case was a SLAPP. The plaintiffs, members of a food co-op, challenged the co-op board's decision to boycott Israeli products. They claimed they sought to "correct corporate malfeasance," but the court found the suit's "principal thrust" was to stop the boycott, "activity protected by the First Amendment." 325 P.3d at 264. "[A] court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis" because its role "is limited to determining whether the [defendant's] activity was illegal as a matter of law." *Id.* at 264-65. "[W]hen a defendant's assertedly protected activity *may or may not be* criminal activity, [it] may invoke the anti-SLAPP statute *unless the activity is criminal as a matter of*

law.” *Id.* (quoting *Gerbosi v. Gaims, Weil, West & Epstein, LLP*, 193 Cal. App. 4th 435, 446, 122 Cal. Rptr. 3d 73 (2011) (emphasis supplied by *Davis* court)). Otherwise, the second step “would become superfluous . . . , resulting in an improper shifting of the burdens.” *Id.* (quotation omitted).

The Court of Appeals took an entirely different approach in this case. It did not determine (or consider) whether taking verbatim notes of witness interviews was illegal or criminal as a matter of law. Instead, it accepted Dillon’s allegation that “[t]he act of recording is not itself protected speech or petitioning activity.” 179 Wn. App. at 82.²

The Court of Appeals contradicted the law by segregating “acts of transcribing” from the purpose and use of the interview calls. DWT conducted the interviews to gather evidence and filed the transcripts to show that Dillon, Akrie and NetLogix had committed fraud on the court. “[C]ommunications that are intimately intertwined with, and preparatory to, the filing of judicial proceedings qualify as petitioning activity for the

² The Court of Appeals purported to rely on California cases, 179 Wn. App. at 83-84, but conduct falls outside the California anti-SLAPP statute only when a “defendant *concedes*, or the evidence *conclusively establishes*, that the assertedly protected . . . activity was illegal as a matter of law.” *Flatley v. Mauro*, 39 Cal. 4th 299, 320, 139 P.3d 2 (2006) (emphasis added). Thus, in *Gerbosi*, the case the Court of Appeals relied on most, *see* 179 Wn. App. at 83, the court refused to apply California’s anti-SLAPP act only because the defendant’s wiretapping was admittedly and conclusively illegal. *See Gerbosi*, 193 Cal. App. 4th at 446. The court also cited *Malin v. Singer*, 217 Cal. App. 4th 1283, 1302, 159 Cal. Rptr. 3d 292 (2013), *see* 179 Wn. App. at 84, but that case has been interpreted the same way. *See Stenehjem v. Sareen*, 226 Cal. App. 4th 1405, 1919 n.11, 173 Cal. Rptr. 3d 173, 183 (2014) (describing *Malin* as holding that court should not have denied anti-SLAPP motion because pre-litigation demand letter was neither admittedly nor conclusively extortion). Here, both the Superior Court and the federal court held Petitioners’ conduct was *legal as a matter of law*. *See* Section II.B, *supra*.

purposes of the anti-SLAPP statute.” *Cabral v. Martins*, 177 Cal. App. 4th 471, 482-83, 99 Cal. Rptr. 3d 394 (2009). Moreover, as *Dang* held, applying RCW 4.24.510 (Washington’s original anti-SLAPP law), “no meaningful distinction can be drawn between the cause of action based on the [defendant’s] communication [and] the method of arriving at the content of the communication.” 95 Wn. App. at 683.

In fact, *Dang* rejected the same argument the Court of Appeals accepted. There, the plaintiff sued Seafirst when bank personnel detained her and reported to police she had tried to cash a potentially counterfeit check. 95 Wn. App. at 674-75. The trial court granted Seafirst’s summary judgment motion under RCW 4.24.510.³ 95 Wn. App. at 681. The plaintiff claimed the statute applied only to the call to the police and not other conduct (*e.g.*, her detention). The court disagreed because separating the communication from the conduct “would thwart the policies and goals underlying the immunity statute”; if someone could sue an individual for the acts leading to an official report, “the policy of assuring utmost freedom of communication between citizens and public authorities ... would be seriously compromised.” *Id.* (internal quotation omitted).

The litigation privilege also protects DWT’s and Grant’s conduct. The privilege confers absolute immunity on attorneys for acts taken in

³ RCW 4.24.510 provides in relevant part: “A person who communicates a complaint or information to any branch or agency of federal, state, or local government ... is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.”

litigation. See *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980); see also *Jeckle v. Crotty*, 120 Wn. App. 374, 386, 85 P3d 931 (2004). The immunity is “based upon a public policy of securing to [attorneys] as officers of the court the utmost freedom in their efforts to secure justice for their clients.” *Id.*; see also *Kearney v. Kearney*, 95 Wn. App. 405, 412, 415, 974 P.2d 872 (1999) (Privacy Act not violated by filing transcripts of conversations; questioning whether liability could exist under litigation privilege). It also recognizes that “[l]awsuits against litigation lawyers by their clients’ adversaries primarily seek vengeance.” T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons For Litigation Lawyers*, 31 Pepp. L. Rev. 915, 916 (2004). This is an apt description of Dillon’s suit.

DWT conducted the interviews and SDR took accurate notes to make sure the federal court would have a reliable record of what Dillon said. Dillon would not have sued if DWT and Grant had not disclosed his damning statements in the federal action. The two acts cannot be separated. The Court of Appeals erred here again.⁴

⁴ Dillon characterizes this case as being about “taping,” “secretly recording a witness interview,” and “standard[s] of lawyer conduct.” Ans. to Pet. for Rev. at 1-2. It should come as no surprise that a party caught in a fraudulent scheme would attack those who exposed it. But Dillon cannot assert a Privacy Act claim by repeatedly asserting the calls were “taped” or “recorded,” when they weren’t, or by accusing opposing counsel of “pushing the bounds of ethical conduct.” *Id.* at 2. Taking notes does not violate the Privacy Act, even if a plaintiff alleges an attorney failed to describe how accurate the notes would be. Dillon’s hyperbole about “misconduct” is equally unpersuasive, given Grant’s statements in the interviews that: (1) someone other than the lawyers was present and taking notes; (2) DWT would use the statements in the federal action; and (3) cautioning Dillon not to provide potentially privileged information. The Court should disregard Dillon’s attempts to distract, speculation about Petitioners’ intentions or conduct,

B. The Court of Appeals Misinterpreted the Privacy Act as Applying to Notes of Conversations Intended to Be Disclosed to Others.

The Court of Appeals also misinterpreted the Privacy Act, ignoring this Court's precedents and relying on Dillon's perjured declaration to find a disputed issue about whether the interviews were private. Note-taking is not "recording" under the Privacy Act; in any event, the interviews were not private. This is important here because conduct falls outside the anti-SLAPP law only if it is *illegal as a matter of law*, meaning *all elements* of a violation must be admitted or conclusively established. See Section II.A.1, *supra*. Petitioners did not violate the Act as a matter of law.

1. The Interviews Were Not "Recorded."

Throughout this litigation, Dillon has assumed taking verbatim notes of a conversation is a "recording" under the Privacy Act, offering no case law or other support. The court accepted this flawed premise, stating that, of the four elements of a Privacy Act violation, "[h]ere, only the first element, whether the conversation was private, is at issue." 179 Wn. App. at 60. But Petitioners have never conceded the other elements.

The Privacy Act states it is a violation to "intercept, or record" a "[p]rivate communication transmitted by telephone, telegraph, radio, or other device ... by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is

or conclusions with no support in the record. See, e.g., 179 Wn. App. at 61-62 (concerning Mr. Hovilla's presence during the second call).

powered or actuated” RCW 9.73.030(1)(a). Elsewhere, the act refers to recording by a “device electronic or otherwise designed to record or transmit” a conversation, *id.* (1)(b), and to “the recording or transmitting device,” *id.* (4). Considering these terms in context, and applying this Court’s “plain meaning” rule of statutory interpretation, “recording” and “record” refer to *audio* recordings, not writing down what someone says. *See also* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, at 1898 (2002) (defining the verb “record” as “to cause (sound, visual images) to be transferred to and registered on something (as a phonograph disc, magnetic tape) by mechanical usu. electronic means in such a way that the thing so transferred and registered can ... be subsequently reproduced”).

The statute’s historical context supports this interpretation. The Legislature enacted RCW 9.73.03 in 1967 amid public concern about electronic eavesdropping and wiretapping. *See State v. Roden*, 179 Wn.2d 893, 910, 321 P.3d 1183 (2014) (Wiggins, J., dissenting). The year before, the U.S. Supreme Court held “the Fourth Amendment ... does not protect against undercover agent interceptions or recordings of private communications.” 179 Wn.2d at 911. The rationale of these cases was that, “[c]oncededly, a police agent ... may write down ... his conversations with a defendant and testify concerning them,” and the result is “no different” if an agent “instead of ... transcribing his conversations” “records them with electronic equipment.” *United States v. Caceres*, 440 U.S. 741, 750 (1979) (quoting *United States v. White*, 401

U.S. 745, 749 (1971)). In response, the Legislature passed the Privacy Act, as other states passed similar laws to address wiretapping and audio recording, *Roden*, 170 Wn.2d at 912, yet it did not prohibit writing down conversations, only *recording* in certain circumstances.

Dillon has never cited any authority for the proposition that taking notes or transcribing statements is a “recording” under the Privacy Act, and Petitioners know of no such authority.⁵ It would be absurd to interpret the Act in this way, for if taking good notes violated the law, every journalist conducting phone interviews would risk criminal prosecution, as would every attorney interviewing a witness and anyone taking verbatim notes of anything anyone said. It would also be absurd to suggest a device “electronic or otherwise designed to record and/or transmit said communication” means the computer of a fast typist, the pen of someone who takes shorthand, or stenographic equipment of someone trained in its use. Such overbroad interpretations would raise significant First Amendment problems. *See, e.g., People v. Clark*, 379 Ill. Dec. 77, 6 N.E.3d 154 (2014) (Illinois eavesdropping statute unconstitutional because it unnecessarily burdened speech). But the Court need not address these problems, because the Privacy Act applies to *audio recordings*, not notes.

⁵ No Washington decision supports Dillon’s position. *Cf. State v. Corliss*, 123 Wn.2d 656, 662, 870 P.2d 317 (1994) (when informant tilted a telephone so a police officer could hear, “the conversation was not ‘intercepted’ by a ‘device’ designed to record or transmit”); *see also State v. Gonzalez*, 78 Wn. App. 976, 982, 900 P.2d 564 (1995) (no Privacy Act violation where police officer answered telephone in a suspect’s home while executing a search warrant as he “did not use a device or intercept a communication within the meaning of the statute”).

2. The Interviews Were Not “Private.”

For twenty-two years, this Court has defined the word “private” in RCW 9.73.030 as meaning “belonging to one’s self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.” *Kadoranian v. Bellingham Police Dep’t*, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992).⁶ The Court of Appeals quoted this definition, 179 Wn. App. at 60, but misapplied it by holding that the interviews, which Dillon knew and intended Petitioners *would* disclose, still could be “private.”

The Court of Appeals’ decision cannot be squared with this Court’s decisions. For example, in *Lewis*, this Court held audio recordings of drivers stopped for suspected DUI offenses were not private because it was “not persuasive that ... the drivers ... would expect the officers to keep their conversations secret,” and they should have “reasonably expect[ed] the officers would file reports and potentially would testify at hearings about the incidents.” 157 Wn.2d at 459. In *Clark*, the Court held recording defendants’ conversations with an informant did not violate the law because “[a] communication is not private where ... the recipient may disclose the information.” 129 Wn.2d at 227.

⁶ *Accord State v. Kipp*, 179 Wn.2d 718, 729, 317 P.3d 1029 (2014); *Roden*, 179 Wn.2d at 899; *State v. Modica*, 164 Wn.2d 83, 87, 186 P.3d 1062 (2008); *Lewis v. State, Dep’t of Licensing*, 157 Wn.2d 446, 458, 139 P.3d 1078 (2006); *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002); *State v. Christensen*, 153 Wn.2d 186, 192-93, 102 P.3d 789 (2005); *State v. Clark*, 129 Wn.2d 211, 224-25, 916 P.2d 384 (1996).

Moreover, the Court in *Clark* approvingly cited *State v. Bonilla*, 23 Wn. App. 869, 598 P.2d 783 (1979), *disapproved on other grounds*, *Christensen*, 153 Wn.2d at 196, and *State v. Slemmer*, 48 Wn. App. 48, 738 P.2d 281 (1987). *See Clark*, 129 Wn.2d at 225-26. *Bonilla* held a defendant's call to police confessing he had murdered his wife was not private because "a reasonable person would expect the conversation to be reported to other police officers." *Id.* at 225. *Slemmer* held a defendant's statements at an investment club meeting were not private (and so an audio recording did not violate the Privacy Act) because he knew someone was taking minutes. 48 Wn. App. at 52-53. As this Court described *Slemmer*: "A person has no reasonable expectation of privacy in a conversation that takes place at a meeting where one who attended could reveal what transpired to others." *Clark*, 129 Wn.2d at 226.

The Court of Appeals ignored these cases and the abundant evidence that the Dillon interview calls were not "secret" or "intended only for the persons involved." "The relevant time for assessing ... intent and reasonable expectations is at the time of the conversation," not after, when a party making a Privacy Act claim always "will contend that his or her conversation was intended to be private." *Id.* at 225, 228.⁷ Everything Dillon said in the calls and everything he did at the time shows he did not believe (nor could he have reasonably expected) they were private:

⁷ Oddly, the Court of Appeals said this principle "[s]ignificantly ... militat[ed] in Dillon's favor" as a basis to credit his *post hoc* declaration rather than his statements and conduct at the time of the interviews. 179 Wn. App. at 61 n.15.

Before the interviews: (1) Dillon emailed DWT saying he wanted to provide information that “would be beneficial to T-Mobile/DWT,” CP 175; (2) he told other NetLogix personnel about his plans, CP 212-13 at 33:23-34:4; and they were all “on board with giving you guys the information you need ... to resolve this thing,” CP 205 at 3:21-4:1; *see also* CP 273 at 11-17, and (3) Dillon told Akrie he planned to call DWT, CP 211 at 27:10-13, *see Volcan Group*, 940 F. Supp. 2d at 1335.

During the interviews: Dillon: (4) never said he believed or wanted the calls to opposing counsel to be private; (5) said his purpose was to provide information for DWT to use in the federal action, CP 205 at 3:22-4:1, CP 175; (6) said he expected DWT would convey his statements to NetLogix’s counsel and Akrie, CP 213 at 36:25-37:6; CP 206 at 7:4-15, (7) said he expected Akrie was “going to be pissed” and might “try to sue me” CP 211 at 27:10-13, but wanted to talk because “it’s the right thing to do,” CP 221 at 68:24; (8) volunteered to sign a declaration attesting to his statements, CP 213 at 36:25-37:1; (9) reviewed a draft declaration and agreed it was accurate, CP 224 at 4:13-19; and (10) when asked if certain information he provided was “just between us,” (*i.e.*, that Akrie told him to lie), said his statements could be disclosed because he wanted to reveal “really what happened [and not just] the parts that we were kind of coached on telling you.” CP 231 at 30:23-31:2.

Immediately after the calls: (11) Dillon contacted Akrie and told him what he had said, CP 237 & 448 ¶ 4; and (12) Akrie thanked Dillon

when he indicated he would not sign the declaration, saying he would “not forget” what Dillon had done, CP 87 at 15-16; CP 237.

These facts show not just that Dillon knew his statements *might* be disclosed—which itself destroys any privacy claim—but that he *expected* them to be disclosed. Judge Martinez found it “inescapable” that Dillon contacted DWT to leverage Akrie by threatening to expose his fraud in court. *Volcan Group*, 940 F. Supp. 2d at 1335. Dillon’s threats could have effect only if his statements were to be made public in the federal action.

Based on any fair reading of the record, and given this Court’s precedents, the interviews were not private, as a matter of law.

C. The Court of Appeals Should Have Deferred to the Federal Court’s Judgment Rejecting Dillon’s Perjured Declaration.

The Court of Appeals found a triable fact based solely on Dillon’s declaration “asserting ... he intended for the conversations to be private.” 179 Wn. App. at 60-61. But the federal court previously rejected *the same declaration* as untruthful. *See Volcan Group*, 940 F. Supp. 2d at 1336-37.⁸ The Court of Appeals should have respected Judge Martinez’s decision concerning matters uniquely within his purview, *i.e.*, fraud on the

⁸ The Court of Appeals also pointed to Dillon’s statements that “he was concerned about protecting himself from Akrie” as “manifest[ing] a subjective intention that the conversations were private.” 179 Wn. App. at 60. But these are selective, out-of-context quotes. For example, the court quoted Dillon’s statement that, “[j]ust so I protect myself, maybe it’s better that I actually just get my own attorney,” *id.* at 52, but omitted Grant’s response: “That’s absolutely fine. [I]f you want to talk to a lawyer, you should do that,” CP 206 9:8-9. More generally, despite his purported concerns, Dillon proceeded, making clear he expected and wanted his comments conveyed to Akrie.

federal court. The Court of Appeals erred by failing to apply collateral estoppel and summary judgment principles.

1. The Court of Appeals Should Have Applied Collateral Estoppel.

The court refused to apply collateral estoppel based on its view that Dillon was not in privity with NetLogix, the party in the federal action. Here too the court ignored the record the ample evidence that Dillon, Akrie and NetLogix were in privity. NetLogix employed Dillon throughout the time at issue in the federal action, and “the employer/employee relationship is sufficient to establish privity.” *Kuhlman v. Thomas*, 78 Wn. App. 115, 121, 897 P.2d 365 (1995). Dillon was interested in NetLogix’s claims not just as a witness, but as “*the* key witness.” *Volcan Group*, 940 F. Supp. 2d at 1336. Indeed, Dillon had a financial interest, as Akrie “promised to pay Dillon a portion of the litigation proceeds in exchange for his ‘support’ throughout the case.” *Id.* at 1337; *see also* CP 215 43:13-22. In submitting declarations and testifying for NetLogix, Dillon acted in concert with Akrie and NetLogix, 940 F. Supp. 2d at 1337 (Dillon and Akrie were “complicit” and “cooperat[ed]” in a “pattern of dishonesty”). Dillon and Akrie were co-conspirators in both the original scheme to manufacture claims, and later in “spinning a web of lies” in the federal action. *Id.* To paraphrase *Hackler v. Hackler*, 37 Wn. App. 791, 795, 683 P.2d 241 (1984), because Dillon “was a witness in [the federal] action, fully acquainted with its character and object and interested in its results, [he] is estopped by the judgment as fully as if he had been a party.”

The Court of Appeals purported to apply the “virtual representation” doctrine and found privity lacking because “the separation of Dillon’s state court ... suit and the federal court suit was not the product of manipulation or tactical maneuvering.” 179 Wn. App. at 66. For the same reasons Dillon’s suit is a SLAPP, it is also a product of manipulation. See Section II.A.2 *supra*. Most notably, Akrie and Dillon filed their suits in state court expressly to avoid federal court. See *Akrie v. Grant*, Pet. for Review at 5-6. After the Superior Court dismissed Akrie’s complaint as a SLAPP, Dillon filed the same case, artfully pleading to avoid dismissal again by omitting reference to filing of the transcripts. Both suits in their entirety reflect manipulation and tactical maneuvering.

Even more troubling, the Court of Appeals credited the *same declaration* Judge Martinez rejected. After questioning Dillon under oath, Judge Martinez found Dillon “deliberately and repeatedly lied”; the declaration “contains statements which conflict with statements [he] made ... under oath”; Dillon continued to tell “an ever more elaborate series of lies” in “perjured [testimony] and a sworn declaration”; and Dillon “ha[d] been evasive and untruthful at every turn,” “patently dishonest,” and “continue[d] spinning a web of lies.” *Volcan Group*, 940 F. Supp. 2d at 1337 (quoting *Jackson v. Microsoft Corp.*, 211 F.R.D. 423, 432 (W.D. Wash. 2002), *aff’d*, 78 Fed. App’x 588 (9th Cir. 2003)).⁹

⁹ Dillon told Judge Martinez the DWT attorney who scheduled the interviews “never mentioned that [they] would be private or confidential.” CP 319: 15-21.

2. The Court of Appeals Erroneously Found an Issue of Fact Precludes Summary Judgment Based on Dillon's False Declaration.

Even if collateral estoppel did not bar Dillon's claims, the Court of Appeals erred by crediting Dillon's falsified declaration. A "court cannot consider inadmissible evidence when ruling on a motion for summary judgment." *Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 357, 287 P.3d 51 (2012); *see* CR 56(e). A party may not create an issue of fact by submitting a declaration contradicting his testimony. *Davis*, 171 Wn. App. at 357; *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999). So too, on a summary judgment motion, a court should reject a demonstrably false declaration. *Wilkinson v. Chiwawa Cmty. Ass'n*, 180 Wn.2d 241, 261, 327 P.3d 614, 2014 WL 1509945, at *10 (Apr. 17, 2014); *see also* *Edwards v. State Farm Lloyds*, 2005 WL 2600442, at *8-10 (S.D. Tex. Oct. 13, 2005) (rejecting false affidavit, finding plaintiff committed fraud in separate bankruptcy proceedings).

Whether under collateral estoppel, established summary judgment principles or comity, the Court of Appeals erred by not deferring to Judge Martinez's rejection of Dillon's perjured declaration.

III. CONCLUSION

The Court of Appeals' decision fundamentally misinterprets the anti-SLAPP law and the Privacy Act. Petitioners respectfully ask the Court to reverse the court's decision, reinstate the Superior Court's summary judgment, and award Petitioners fees on appeal under RCW 4.24.525(6)(b).

RESPECTFULLY SUBMITTED this 29th day of July, 2014.

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