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No. 89961-4
SUPREME COURT OF THE STATE OF WASHINGTON

No. 69300-0

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

JASON DILLON, an individual;
Respondent,

vs.

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

On Appeal from King County Superior Court
The Honorable Bruce Heller

RESPONDENT'S SUPPLEMENTAL BRIEF

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ORIGINAL

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I. INTRODUCTION

Respondent Jason Dillon respectfully requests that this Court affirm the Court of Appeals in *Dillon v. Seattle Deposition Reporters LLC* 179 Wash. App. 41 (2014) in all respects. This court is going to send a message to the litigators with its opinion in this case, it is just a question of which message the Court wants to send: A) misleading a witness and clandestinely recording the interview, breaking the law without consequence, all to try to win a civil case, is a good and proper lawyer conduct, or B) lying, cheating and breaking the law just to win a case is bad lawyer conduct that will not be tolerated. With respect, this Honorable Court should think hard about this one, because whichever message is sent will shape attorney conduct in this state for a long time.

This case is about whether or not it is legal and constitutionally protected activity in Washington for attorneys to secretly record witness interviews, period. This case has nothing whatsoever to do with Mr. Dillon's conduct as a witness in a separate litigation. This is about whether lying to a witness, and recording a conversation without knowledge and consent, is protected activity when it is done by a lawyer. Congress did not provide a lawyer exception to the Privacy Act, RCW 9.73.030, and this Court should not create one by judicial fiat.

A. Petitioners Were Not Engaged In Protected Conduct Under

the Anti-SLAPP Statute.

The Court of Appeals made it clear that the Petitioners cannot present any feasible argument that would provide Anti-SLAPP protection for the act of secretly recording witness conversations. Petitioners seek to cloak their conduct as an act in furtherance of first amendment rights to petition, based upon the content of the recording they made. However, there are no content based exceptions to the Privacy Act statute applicable here. The legislature made two content based exceptions to the privacy act – conversations involving child molestation and drug trafficking. RCW 9.73.200, 210. The legislature did not write an exception for speaking with a lawyer. The Court should not create an exception to the Privacy Act that the legislature chose not to create?

B. The Court Should Decline Petitioners' attempt to re-write the Allegations of Dillon's Complaints In Order to Create an Anti-SLAPP statute.

Since Dillon's complaint does not trigger the Anti-SLAPP statute, the Petitioners are requesting that this Court accept the facts as they wish them to be as opposed to what was pled. The Complaint was very clear to not address anything having to do with court filings or witness testimony- it had nothing to do with the mechanism of the public judicial process. It dealt only with the act of the recording. Defendants, however, want to essentially rewrite the complaint, add facts and add claims, then turn

around and allege that those added claims are subject to anti-SLAPP.

The Court should look beyond the Petitioner's filings and see what it is that they are really asking for, which is a litigation exception to any laws regulating conduct. That is really what is at stake here. Does a litigation strategy which involves secretly recording witnesses after lying to them, get immunity from any and all civil redress?

C. The Undisputed Facts Demonstrated That Dillon Had Expectations That His Conversation with the Petitioners Would Be Private

The Petitioner's allege that their conduct is not actionable because Dillon knew he was speaking to a lawyer and knew that the lawyer would use the information in litigation. In short, Dillon should have no expectation that lawyers will engage in ethical conduct, follow the RPC's or the criminal or civil law. Dillon provided a undisputed statement of the facts in the Answer to the Petition for Review, and will not re-assert them here as the conduct in this case has been discussed at length. First, the proper conduct would have been for Mr. Grant to simply tell Dillon the truth, that he was having a verbatim recording done of the conversation. He didn't divulge this because he wanted Dillon to speak with him. Grant also claimed his recording was work product and would only be provided with a protective order because he wanted the contents of the conversation

private. This was litigation tactic pure and simple. A lawyer stretching the bounds of zealous advocacy beyond any bounds, and trying to get away with it.

D. The Anti-SLAPP Law Has Not Been Rendered Meaningless Because a Law Firm's Litigation Tactic Was Exposed

The Petitioner's argued below and presumably will continue the hyperbolic claims that the Court of Appeals decision destroyed the very fabric of the Anti-SLAPP statute. Nothing could be further from the truth. Merely requiring an attorney to be honest to a witness and to not secretly record a telephone conversation does not render the Constitutional protections of the statute moot. Every protection of the act remains in place, the only think different today is that lawyers will realize that they are not immune from laws everyone else must abide by. Washington's anti-SLAPP law does not protect a law firm and its attorneys, who transcribed telephone calls with an opponent's former employee without his knowledge, from possible liability for invasion of privacy. The court ruled that when lawyers surreptitiously record conversations to gather evidence that activity does not involve "public participation and petition" so as to be protected by the state statute that forbids "strategic lawsuits against public participation." "The anti-SLAPP statute does not operate to transform unprotected activity into protected activity simply because it is

undertaken during the course of a lawsuit," *See Dillon v. Seattle Deposition Reporters LLC*, 179 Wash. App. 41 (2014)

E. Collateral Estoppel Cannot Apply.

The correct statement of controlling case law on the doctrine of collateral estoppel is *McDaniels v. Carlson,* 108 Wn.2d 299, (1987). The four elements are 1) issues are identical; 2) final judgment on the merits; 3) same parties or privity; 4) absence of injustice. Id. at 303. The party seeking to apply collateral estoppel bears the burden of showing all four elements apply. As was the case in McDaniels, here there is neither an 1) identically of issues nor 3) privity of parties. The issue was briefed in the trial court and at the appellate level. There was not privity, and the issues were not identical. Calling Jason Dillon a liar and a perjurer does not create collateral estoppel, no matter how much the Petitioners wish it did.

CONCLUSION

The Petitioner's warped view of the Privacy Act and anti-SLAPP legislation runs contrary to the clear intention of Washington's Privacy Act to be the most protective in the nation and if upheld it will transform the Privacy Act into one of the least protective, least effective, privacy laws in the nation. If successful, Petitioners will essentially eliminate the Privacy Act as functional law that can protect a person's right to privacy in communications. It will authorize a brave new world of civil litigation

that permits, indeed even encourages, attorneys to make secret recordings of their conversations with witnesses, other attorneys, judges, etc. If upheld, it will send a message that anybody contemplating the exercise of their RCW 9.73.060 right to bring a claim under the Privacy Act will face the draconian anti-SLAPP penalties of RCW 4.24.525(6). The Court of Appeals Opinion should be upheld.

Signed and dated this 29th day of July, 2014.

/s/William A. Keller
William Keller, WSBA #29361

CERTIFICATE OF SERVICE

I swear under penalty of perjury that on July 29, 2014, I served a copy of Respondent's Supplemental brief on all parties of record.

/s/William A. Keller
WSBA #29361

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Subject: RE: Dillon v. Seattle Deposition Reporters, et al. (Supreme Court Case No. 899614): Supplemental Brief of Respondent

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