

66868-4

66868-4

16

NO. 66868-4-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

---

UNITED STATES MISSION CORPORATION,

*Appellant,*

v.

KIRO TV, INC.,

*Respondent.*

---

BRIEF OF APPELLANT

---

James E. Lobsenz  
Lydia A. Zakhari  
Attorneys for Appellant

Carney Badley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104-7010  
(206) 622-8020

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2011 JUL 20 PM 4:21

ORIGINAL

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	vii
A. <u>INTRODUCTION</u> .....	1
B. <u>ASSIGNMENTS OF ERROR</u> .....	3
C. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u> .....	3
D. <u>STATEMENT OF THE CASE</u> .....	5
1. <u>PROCEDURAL HISTORY OF THE CASE</u> .....	5
2. <u>STATEMENT OF FACTS PERTAINING TO THE MISSION’S DEFAMATION CLAIM</u> .....	5
a. <u>KIRO’s First News Story, Entitled “Jailhouse Used to Find Door-to-Door Solicitors,” Accuses Mission of Employing the Tactic of Sending Known Criminals To Solicit Funds</u> .....	5
b. <u>KIRO’s Second News Story Asserts That The Mission Recruits Felons to Live in Its Transitional Housing</u> .....	8
c. <u>The Goals of the Mission and The Efforts Made by Its Operators to Make Sure That It Did Not Allow Felons To Live In Its Facilities</u> .....	8
d. <u>KIRO’s Own Statistics, Which it Purports to Have Relied Upon, Show That a Very Small Proportion of the Mission’s Residents Had Criminal Records</u> .....	16
e. <u>Reporter Halsne’s History of Reckless False Reporting</u> .....	20
(1) <u>False Accusation Against Washington’s Secretary of State Sam Reed That He Permitted Thousands of Convicted Felons to Vote</u> .....	20
(2) <u>Oklahoma Libel Verdict Against Halsne For Libeling a Veterinarian</u> .....	21
(3) <u>Pierce County Defamation Suit Brought By Tacoma Dentist</u> .....	23
E. <u>STANDARDS OF APPELLATE REVIEW</u> .....	23
F. <u>ARGUMENT</u> .....	24

1. THE MISSION’S DEFAMATION CLAIM IS NOT PREMISED UPON THE JUXTAPOSITION OF TRUTHFUL STATEMENTS. IT WAS EXPLICITLY PREMISED ON STATEMENTS ALLEGED TO BE FALSE.....	24
a. <u>Washington Recognizes Claims of Defamation By Implication</u> .....	25
b. <u>The Complaint Explicitly Alleged That KIRO Had Published False Statements.</u> .....	25
c. <u>This Case is Not Like <i>Yeakey</i> Because There the Plaintiff Conceded That All the Statements Made Were True.</u> .....	26
d. <u>Unlike the Plaintiff in <i>Yeakey</i>, the Mission Never Alleged That the Defamatory Statements Merely Had Negative “Implications.” In This Case KIRO Expressly Alleged The Mission “Used” the Jailhouse, “Recruits Felons,” and that KIRO Had Gone “Undercover” To “Reveal” the Mission’s “Motives” and “Tactics,” Behind Its Practice of “Sending a Bevy of Historically Violent Felons, Burglars and Robbers to Your House to Collect Money.”</u> .....	27
e. <u>Headlines are Properly Considered When Deciding Whether an Article Is Reasonably Susceptible of Being Construed as Defaming the Plaintiff.</u> .....	31
(1) Whether a Headline is Defamatory is a Question for a Jury .....	32
(2) Review of The Totality of the Circumstances Is Necessary To Determine Whether An Article “Clears Up” a Defamatory Headline.....	33
(3) Unless The Defamatory Sting of a Headline Is Dispelled By The Following Language of the Article, The Defendant Is Properly Held Liable. In a Case Applying Washington State Law, The Ninth Circuit Held That This Determination Must Be Made By The Jury .....	34
f. <u>Taking All Inferences in Favor of the Mission, The Allegations Pleaded in the Complaint Do State a Permissible Claim for Defamation.</u> .....	37

2. BECAUSE A DISMISSAL MAY BE AFFIRMED ON ANY GROUND WITHIN THE PLEADINGS AND PROOF, THIS COURT MUST DECIDE WHETHER THE DISMISSAL OF THE COMPLAINT IS PROPER UNDER RCW 4.24.525 EVEN THOUGH THE SUPERIOR COURT DID NOT RULE UPON THIS QUESTION .....	38
3. ANTI-SLAPP STATUTES IN WASHINGTON STATE.....	39
a. <u>Anti-SLAPP Statutes in Washington Declare Their Purpose Is to Protect Those Who Make Communications to Government</u> .....	39
(1) RCW 4.24.500 .....	39
(2) RCW 4.24.510.....	39
(3) RCW 4.24.520.....	41
b. <u>The Enactment of 4.24.525 Clarified the Procedure for Making An Early Motion For Dismissal of a SLAPP suit, But It Did Not Change the Fact that the anti-SLAPP Statutes Only Apply To Suits Brought As A Result of Earlier Communications Made to Government And Designed to Influence Government Decision Making.</u> .....	42
4. RCW 4.24.525 PROVIDES NO LIABILITY PROTECTION TO KIRO BECAUSE THE MISSION’S DEFAMATION CLAIM IS NOT BASED ON AN ACTION INVOLVING PUBLIC PARTICIPATION AND PETITION. THUS, THE STATUTE DOES NOT APPLY TO KIRO’S ARTICLES.....	45
a. <u>KIRO’s Contention That RCW 4.24.525 Was Intended to Extend Immunity From Civil Action to Statements That Were Not Made to Government Agencies Is Based on a Misreading of Subsections (2)(d) and (2)(e), and Is Inconsistent With the Entire History of Anti-SLAPP Legislation.</u> .....	45
b. <u>Washington Courts Consistently Have Held That Anti-SLAPP Statutes Were Designed to Prevent People From Being Intimidated Into Not Communicating to Their Government Agencies and Officers.</u> .....	46

c. <u>Here, as in <i>Skimming v. Boxer</i>, The Anti-SLAPP Statutes are Inapplicable</u> .....	48
d. <u>This Lawsuit Does Not Fall Under Subsection (2)(d) of RCW 4.24.525 Because KIRO’s Statements Were Not Made in a Place Open to the Public</u> .....	49
e. <u>This Lawsuit Does Not Fall Under Subsection (2)(e) Because it Does Not Involve Conduct Other Than the Making of Oral or Written Statements, and Does Not Involve the Right of Petition.</u> .....	50
5. THE MISSION EASILY MEETS THE STANDARD OF SHOWING THAT IT IS LIKELY TO PREVAIL BY CLEAR AND CONVINCING EVIDENCE .....	51
6. LIKE THE STATUTE HELD UNCONSTITUTIONAL IN <i>PUTMAN v. WENATCHEE VALLEY MEDICAL CENTER</i> , RCW 4.24.525 IS UNCONSTITUTIONAL BECAUSE IT REQUIRES A SHOWING OF A PROBABILITY OF PREVAILING BEFORE THE PLAINTIFF HAS HAD THE OPPORTUNITY TO CONDUCT DISCOVERY, THEREBY VIOLATING THE DOCTRINE OF SEPARATION OF POWERS AND THE RIGHT OF ACCESS TO COURTS. ....	55
7. BY PUNISHING A LITIGANT FOR EXERCISING HIS FIRST AMENDMENT RIGHT TO PETITION, AND BY NOT REQUIRING ANY FINDING OF FRIVOLOUSNESS, RCW 4.24.525 VIOLATES THE FIRST AMENDMENT .....	59
a. <u>The Right to Petition Includes the Right to Bring a Lawsuit.</u> .....	59
b. <u>Punishing a Litigant for Exercising His Right to Petition By Means of Bringing a Lawsuit Violates the First Amendment</u> .....	60
c. <u>The Mandatory \$10,000 Penalty and the Attorneys’ Fees Award Provided for By RCW 4.24.525(6)(a) Violate the First Amendment Because it Punishes The Litigant Who Files A Suit and Then Fails to Make An Immediate Showing That He is Likely to Win That Suit</u> .....	62

8. **RCW 4.24.525(6) ALSO CONFLICTS WITH CR 11, AND THEREBY FURTHER VIOLATES THE DOCTRINE OF SEPARATION OF POWERS, THE RIGHT OF ACCESS TO COURTS, AND THE EQUAL PROTECTION CLAUSE, BY DISPENSING WITH THE REQUIREMENT OF FRIVOLOUSNESS WHEN THE *MOVING PARTY* SEEKS SANCTIONS AFTER *PREVAILING* ON A MOTION TO STRIKE, BUT BY REQUIRING A SHOWING OF FRIVOLOUSNESS BY THE *NONMOVING PARTY* WHO SEEKS SANCTIONS AFTER *SUCCESSFULLY SURVIVING* A MOTION TO STRIKE ..... 64**

**G. CONCLUSION ..... 67**

## TABLE OF AUTHORITIES

<u>Washington State Cases</u>	<u>Page</u>
<i>Bailey v. State</i> , 147 Wn. App. 251, 191 P.3d 1285 (2008) .....	47
<i>Bay v. Jensen</i> , 147 Wn. App. 641, 196 P.3d 753 (2008) (2004) .....	66
<i>Bender v. City of Seattle</i> , 99 Wn.2d 582, 599, 664 P.2d 492 (1983) .....	52
<i>Chase v. Daily Record</i> , 83 Wn.2d 37, 515 P.2d 154 (1973).....	25
<i>City of Redmond v. Moore</i> , 151 Wn.2d 664, 668, 91 P.3d 875 (2004).....	24
<i>Corey v. Pierce County</i> , 154 Wn. App. 752, 225 P.3d 367 (2010).....	25
<i>Cosmopolitan Eng. Group, Inc. v. Ondeo Degremont, Inc.</i> , 159 Wn.2d 292, 149 P.3d 666 (2009).....	24
<i>Davenport v. Washington Educ. Ass’n</i> , 147 Wn. App. 704, 197 P.3d 686 (2008).....	24, 37
<i>Doe v. Puget Sound Blood Center</i> , 117 Wn.2d 772, 819 P.2d 370 (1991) .....	56-58
<i>Gontmaker v. City of Bellevue</i> , 120 Wn. App. 365, 85 P.3d 926 (2004) .....	47
<i>Hauter v. Cowles Publishing Co.</i> , 61 Wn. App. 572, 811 P.2d 231 (1991) .....	52
<i>In re Restraint of Addleman</i> , 139 Wn.2d 751, 991 P.2d 1123 (2000) .....	61-62
<i>Lee v. Columbian</i> , 64 Wn. App. 534, 826 P.2d 217 (1991) .....	30

<i>Mark v. Seattle Times,</i> 96 Wn.2d 473, 635 P.2d 1081 (1981) .....	52
<i>Moe v. Wise,</i> 97 Wn. App. 950, 989 P.2d 1148 (1999) .....	52
<i>Moses Lake v. Grant County,</i> 39 Wn. App. 256, 693 P.2d 140 (1984).....	24, 37
<i>North Coast Enterprises, Inc. v. Factoria Partnership,</i> 94 Wn. App. 855, 974 P.2d 1257 (1999).....	23-24, 37
<i>Northwest Animal Rights Network v. State,</i> 158 Wn. App. 237, 242 P.3d 891 (2010).....	23-24, 37
<i>Parilla v. King County,</i> 138 Wn. App. 427, 157 P.3d 879 (2007).....	23
<i>Powell v. Sphere Drake Ins.,</i> 97 Wn. App. 890, 988 P.2d 12 (1999) .....	38
<i>Progressive Animal Welfare Soc’y v. Univ. of Washington,</i> 125 Wn.2d 243, 884 P.2d 592 (1994) .....	24
<i>Putman v. Wenatchee Valley Medical Center,</i> 166 Wn.2d 974, 216 P.3d 374 (2009) .....	2, 4, 56-58
<i>Right-Price Rec. v. Connells Prairie Community Council,</i> 146 Wn.2d 370, 46 P.3d 789 (2002) .....	46
<i>Skimming v. Boxer,</i> 119 Wn. App. 748, 82 P.3d 707 (2004) .....	48-49
<i>Stansfield v. Douglas County,</i> 107 Wn. App. 20, 26 P.3d 935 (2001) .....	52
<i>State v. J-R Distributors, Inc.,</i> 82 Wn.2d 584, 590, 512 P.2d 1049 (1967).....	24
<i>State v. Regan,</i> 97 Wn.2d 47, 640 P.2d 725 (1982).....	63

<i>Tropiano v. City of Tacoma</i> , 105 Wn.2d 873, 718 P.2d 801 (1986) .....	38
<i>Tunstall ex rel Tunstall v. Bergeson</i> , 141 Wn.2d 201, 225-26, 5 P.3d 691 (2000) .....	66
<i>Yeakey v. Hearst Communications</i> , 156 Wn. App. 787, 792, 234 P.3d 332 (2010).....	25-27
<i>Yurtis v. Phipps</i> , 143 Wn. App. 680, 181 P.3d 849 (2008) .....	65

**Other States**

<i>Beaumont v. Basham</i> , 205 S.W.2d 608 (Tex. Ct. App. 2006) .....	54
<i>Black v. Nashville Banner Publ'g Co.</i> , 24 Tenn. App. 137, 141 S.W.2d 908 (1939).....	33
<i>Cross v. Guy Gannett Publishing Co.</i> , 151 Me. 491, 121 A.2d 355, 358 (1956).....	32
<i>Landon v. Watkins</i> , 61 Minn. 137, 63 N.W. 615, 617 (1895).....	33
<i>Mitchell v. Griffin Television and Chris Halsne</i> , 60 P.3d 1058 (Okla. Civ. App. 2002), cert. denied 538 U.S. 1013 (2003).....	22, 54
<i>Reardon v. News-Journal Co.</i> , 53 Del. 29, 32, 164 A.2d 263, 265 (1960) .....	33
<i>Schermerhorn v. Rosenberg</i> , 73 A.D.2d 276, 426 N.Y.S.2d 274, 283 (1980).....	32
<i>Sprouse v. Clay Comm'n, Inc.</i> , 211 S.E.2d 674 (W. Va. 1975).....	36

**Federal Cases**

*BE & K Construction Company v. NLRB*,  
536 U.S. 516 (2002) ..... 59-60

*Bill Johnson's Restaurants, Inc. v. NLRB*,  
461 U.S. 731 (1983) .....59

*Brotherhood of Railroad Trainmen v. Virginia State Bar*,  
377 U.S. 1 (1964) ..... 60-61

*California Motor Transport, Co., v. Trucking Unlimited*,  
404 U.S. 508 (1972) .....60

*Clark v. Community for Creative Nonviolence*,  
468 U.S. 288 (1984) .....50

*Eastwood v. Nat'l Enquirer, Inc.*,  
123 F.3d 1249, 1256 (9th Cir. 1997) .....34

*Empire Printing Co. v. Roden*,  
247 F.2d 8 (9th Cir. 1957) .....34

*Kaelin v. Globe Communications Corp.*,  
162 F.3d 1036 (9th Cir. 1998) ..... 33-34

*McDonald v. Smith*,  
472 U.S. 479 (1985) .....59

*McNair v. Hearst Corp.*,  
494 F.2d 1309 (9th Cir. 1974) ..... 34-36

*NAACP v. Button*,  
371 U.S. 415, 428-431 (1963) .....60

*New York Times v. Sullivan*,  
376 U.S. 254 (1964) .....52

*Porous Media Corp. v. Pall Media Corporation*,  
173 F.3d 1109 (8<sup>th</sup> Cir. 1999) .....54

<i>Professional Real Estate Investors v. Columbia Pictures,,</i> 508 U.S. 49 (1993) .....	60, 65
<i>Real Estate Bar Ass'n v. Nat'l Real Estate Inform. Services,</i> 608 F.3d 110, 124 (1 <sup>st</sup> Cir. 2010) .....	66
<i>Sharon v. Time, Inc.,</i> 575 F. Supp. 1162 (S.D.N.Y. 1983).....	30
<i>Thomas v. Collins,</i> 323 U.S. 516 (1945) .....	60
<i>Tinker v. Des Moines,</i> 393 U.S. 503 (1969) .....	50
<i>United States v. Cruikshank,</i> 92 S.Ct. 542, 552 (1876) .....	59
<i>United States v. O'Brien,</i> 391 U.S. 367 (1968) .....	50
<i>United Mine Workers v. Illinois Bar Ass'n,</i> 389 U.S. 217 (1967) .....	59
<i>United Transportation Union v. State Bar,</i> 401 U.S. 576 (1971) .....	60
<i>Zablocki v. Redhail,</i> 434 U.S. 374 (1978) .....	66

**Statutes and Court Rules**

CR 8 .....	66
CR 11 .....	65-66
CR 12(c) .....	1, 3-5
CR 50 .....	25
RCW 4.24.500 .....	39, 41, 42, 46

RCW 4.24.510 .....	39-42, 46, 48
RCW 4.24.520 .....	41, 46
RCW 4.24.525 .....	<i>passim</i>
RCW 7.70.150 .....	5, 57
Webster's Ninth New Collegiate Dictionary .....	28-30

**A. INTRODUCTION**

KIRO published two news stories which focused on the type of people that the United States Mission “recruits” to live in their transitional housing facilities for the homeless. KIRO claimed that these recruits included “a bevy of historically violent felons,” and that the county jail was “used” to find such criminals in order to use them as door-to-door solicitors of funds. KIRO claims that it never actually said that the Mission intentionally recruited felons, and never actually said that the Mission deliberately used the county jail as a source of homeless recruits. KIRO contends that its articles merely “implied” such a recruitment tactic, and that because Washington State does not recognize a cause of action for defamation by implication, that the Mission’s suit for defamation was properly dismissed on a motion for judgment on the pleadings.

But even the most cursory examination of the text of KIRO’s articles shows that the allegation of deliberate recruitment was explicitly made, and that the articles went well beyond mere “implication.” Trumpeting their own investigative achievement at having revealed the “motives and tactics” of the Mission, KIRO explicitly accused the Mission of “using” the county jail to find felons that it could employ as funds solicitors. Accordingly, the Mission’s suit for defamation should not have been dismissed on a CR 12(c) motion for judgment on the pleadings.

Although the Superior Court never addressed KIRO’s alternate motion to strike the complaint pursuant to RCW 4.24.525, KIRO will contend that the judgment below can be affirmed upon that alternate ground. However, RCW 4.24.525 only applies to actions that involve “public participation

and the right to petition” where the speech which is the basis for the suit was communication to a governmental agency made for the purpose of influencing government action. Since KIRO’s news articles were not communications to a government agency, and were not designed to influence government action, RCW 4.24.525 is not applicable to the Mission’s defamation claim.

Moreover, even if RCW 4.24.525 were applicable to the Mission’s defamation claim, the evidence presented by the Mission is easily sufficient to satisfy the statutory requirement of showing a probability of prevailing on the claim at trial. Finally, even if this Court were to conclude that RCW 4.24.525 is applicable to this case and that the Mission cannot meet its requirements, under the reasoning of the Supreme Court’s recent decision in *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009), RCW 4.24.525 is blatantly unconstitutional because it violates the state constitution’s separation of powers doctrine and the state constitutional right of access to the courts. In addition, by punishing a plaintiff for exercising his right to petition the government for redress of grievance, RCW 4.24.525 also violates the Petition Clause of the First Amendment by requiring imposition of a \$10,000 penalty upon a plaintiff for bringing a lawsuit which is dismissed on a motion to strike. Lastly, by mandating imposition of such a penalty upon a losing plaintiff *without* requiring the defendant to make any showing that the plaintiff’s lawsuit was objectively baseless, and yet simultaneously requiring a plaintiff who survives a motion to strike to

recover a \$10,000 penalty against the defendant only if he makes a showing that the motion to strike was frivolous, the statute violates the Equal Protection Clause.

For all six of these independent reasons, the dismissal entered below cannot be affirmed on the alternate ground that a dismissal is warranted under RCW 4.24.525. There being no basis to affirm, the dismissal should be reversed and the case remanded for further proceedings.

**B. ASSIGNMENTS OF ERROR**

1. Appellant assigns error to the Superior Court's order dismissing appellant's complaint pursuant to CR 12(c).

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Were the allegations of the plaintiff's Complaint sufficient to state that the defendant made false statements such that the complaint should not have been dismissed on a motion for judgment on the pleadings?
2. When deciding whether a viable claim for defamation has been stated, may a court consider the headline of an article?
  - a. Can a false statement in a headline, in and of itself, provide the basis for a valid claim of defamation, regardless of whether or not the text of the article is defamatory?
  - b. If the text of an article fails to dispel the false allegation of a headline, can the headline and the article taken together provide the basis for a valid claim of defamation?
3. Does RCW 4.24.525 apply to communications which were *not* made to a government agency and were *not* designed to influence any governmental action?
4. Assuming, *arguendo*, RCW 4.24.525 applies to the news stories in this case, did the Mission show by clear and convincing evidence, as required by that statute, that there was a probability that it would prevail at trial on its defamation claim?
5. Like the statute held unconstitutional in *Putman*, does RCW 4.24.525

violate the state constitutional doctrine of separation of powers because it requires “plaintiffs to submit evidence supporting their claims before they even have an opportunity to conduct discovery and obtain such evidence”? (169 Wn.2d at 983).

6. Like the statute held unconstitutional in *Putman*, does RCW 4.24.525 violate the state constitutional right of access to the courts by requiring plaintiffs to produce such evidence before they have had any chance to conduct discovery?
7. Does RCW 4.24.525 violate the Petition Clause of the First Amendment because it requires the imposition of \$10,000 penalty against a litigant who cannot demonstrate with clear and convincing evidence that there is a probability that he will prevail on his claim?
8. Does RCW 4.24.525 violate the Equal Protection Clause, by requiring the nonmoving party, but not the moving party, to show that the opposing party’s position was frivolous as a requirement for the imposition of a \$10,000 penalty against the opponent?

**D. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY OF THE CASE**

On August 25, 2010, the United States Mission (hereafter “the Mission”), a nonprofit corporation registered in Washington as a religious organization, filed suit for defamation against KIRO TV, Inc. CP 1-12. KIRO filed an answer on October 6. CP 13-18. On October 25, KIRO filed a motion which it entitled a *Special Motion to Strike the Complaint Under Washington’s Anti-SLAPP Statute (RCW 4.24.525)*. CP 19-35. Within the body of that motion, in its statement of the issues KIRO also raised the question of “Whether, in the alternative, CR 12(c) bars the Mission’s claims.” CP 25.<sup>1</sup> On November 29, the Mission filed a response in opposition as well as cross-motions to strike KIRO’s motion

---

<sup>1</sup> No mention of any CR 12(c) motion was made either in the Conclusion section of KIRO’s *Special Motion to Strike* or in the proposed order which accompanied its motion. CP 35.

to strike, to declare RCW 4.24.525(6)(a) unconstitutional, and to impose CR 11 sanctions against KIRO. CP 154-177.

The Superior Court heard oral argument on all these motions on January 28, 2011. On February 4, 2011, the Court granted KIRO's alternative Motion to Dismiss Under Civil Rule 12(c). CP 407. The Superior Court found it unnecessary to make any ruling on KIRO's motion to strike made pursuant to RCW 4.24.525 and thus did not make any ruling on that motion. CP 407.

On February 14, 2011, the Mission filed a timely motion for reconsideration seeking reversal of the Court's order granting a CR 12(c) dismissal. CP 409-420. At the Superior Court's direction, KIRO filed a response to the reconsideration motion on March 2, and the Mission filed a reply in support of reconsideration on March 7. CP 445-460, 461-466. On March 10, 2011, the Superior Court denied the Mission's reconsideration motion. CP 467-469. The Mission filed timely notice of appeal on March 28, 2011. CP 470-479.

## **2. STATEMENT OF FACTS PERTAINING TO THE MISSION'S DEFAMATION CLAIM**

### **a. KIRO's First News Story, Entitled "Jailhouse Used to Find Door-to-Door Solicitors," Accuses Mission of Employing the Tactic of Sending Known Criminals To Solicit Funds.**

On February 2, 2010, on its website KIRO posted a news article about the Mission. KIRO broadcast the same news story on February 4<sup>th</sup>. Exh. B to *Declaration of Halsne* (converted from sub no. 9A to an exhibit). As "updated" on February 5<sup>th</sup>, the first eight paragraphs of the article read as

follows:

### **Jailhouse Used To Find Door-to-Door Solicitors**

Chris Halsne

KIRO 7 Eyewitness News Investigative Reporter

Posted 2:36 pm PST February 2, 2011 Updated 8:30 PST  
February 5, 2010

SEATTLE -- A transitional housing service in Seattle *has been sending a bevy of historically violent felons*, burglars and robbers to your house to collect money – and there isn't a thing you can do about it.

KIRO Team 7 Investigative Reporter Chris Halsne goes undercover to reveal *the motives and tactics* of the United States Mission.

For years, when a criminal was kicked loose from the King County Jail, he was handed a flyer that lists places to live.

However, just this week, the county axed the United States Mission from that referral list after our investigation exposed how operators of the mission have a pay-to-stay plan that requires door-to-door panhandling.

Most families might feel a little leery if a felon like Level Two Sex Offender Ray Dale Demry showed up on their porch, asking for money.

Police records show that after getting out of prison for raping and kidnapping a stranger, Demry moved into the U.S. Mission's Seattle home in late 2004 and lived there a full month.

Mission insiders tell Team 7 Investigators everyone who resides there must solicit money, usually six days a week.

*Operators typically load up a van-full of* recent transients and *known criminals*, then drop them off in various neighborhoods. They are required to collect cash and checks to keep a roof over their heads.

CP 63 (Appendix A) (emphasis added).

The article cast doubt on the Mission's claim to be operating as a

religious organization:

*United States Mission operators call their solicitors “emissaries of Christ”.* Homeowners in this neighborhood say nobody mentioned religion.

A stay at home mom who heard the pitch told Team 7 Investigators. “I’ve had several people come in the door and ask for donations to help them get on their feet and it’s basically, I feel it’s a threat.

*That raises the question if this organization might be shrouding their panhandling in religious free speech.* That prevents them from being regulated like other businesses going door to door.

CP 63 (Appendix A) (emphasis added).

After suggesting that the Mission might not be a truly religious organization, the article asserted that Demry was not the only felon who had lived at the Mission’s facility:

Using public records, KIRO Team 7 Investigators did a routine address match and found plenty of felons who have lived at the Mission house in north Seattle.

On top of two sex offenders, we found guys with burglary, robbery, attempted arson, drug manufacturing, assault, and domestic violence convictions.

CP 63 (Appendix A).

The article went on to state that Brian Jones, the Secretary-General of the Mission, could not explain how it was that two sex offenders had lived at the Mission facility:

Jones tells us that sex offenders are prohibited from living at the United States Mission houses, but couldn’t explain how we found two who obtained rooms at the Seattle location.

In addition to Ray Demry, police records show convicted rapist Willie Edward Wilson registered to live at the

mission house in late 1998.

“Well, that’s a good question. I don’t really have an answer for that. We certainly do our very best to check each one to make sure they are not registered sex offenders,” Jones told Halsne during an on-camera interview.

CP 64 (Appendix A).

**b. KIRO’s Second News Story Asserts That The Mission Recruits Felons to Live in Its Transitional Housing.**

On March 2, 2010, KIRO published a second news article; in the second paragraph KIRO reasserted the contention that the Mission recruited criminals to come live in its facility:

Last month, we revealed how the self-proclaimed church *recruits felons*, some with violent criminal histories, *to live in their transitional housing program*, and then go panhandling as a group into your neighborhoods. . . .

CP 67 (emphasis added).

The second news story also reiterated the statement that typically the people the Mission sent to solicit money were people with criminal records who had just been released from jail:

KIRO’s Team 7 investigators discovered *the kinds of guys coming to your door are basically the kind right out of jail*. Public records show house guests with records for assault, rape, kidnapping, attempted arson, and residential burglary.

CP 68 (Appendix B).

**c. The Goals of the Mission and The Efforts Made by Its Operators to Make Sure That It Did Not Allow Felons To Live In Its Facilities.**

Following publication of these articles, the Mission brought suit for defamation against KIRO. CP 1-5. KIRO responded by filing a *Special*

*Motion to Strike the Complaint.* CP 19-35. In opposition to KIRO's motion, the Mission submitted the declarations of Brian Jones and Curtis Rosas, and they attested to the following facts, *none* of which were disputed by KIRO.

The Internal Revenue Service has recognized the Mission as a nonprofit Section 501(c)(3) corporation since 1966. CP 124, ¶ 2. Continuously since 1982 the IRS has recognized the Mission to be a tax exempt organization because it is a church. CP 124-25, ¶¶ 3-4.

The Mission operates transitional housing facilities for homeless people in several cities in the United States. CP 125, ¶ 6. Until quite recently, the Mission operated two houses in Seattle. CP 125, ¶ 7. The first, located at 8720 Third Avenue NW, was opened in 1993. CP 125, ¶ 7. The second, located at 128 NW 81<sup>st</sup> Street, was opened in either late 1993 or early 1994. CP 125, ¶ 7.<sup>2</sup> Jones and Kerns set up both of the Seattle houses. CP 126, ¶ 9. The Mission "is a religious *service* organization. Its mission is to help the homeless." CP 126, ¶ 10.

The Mission believes that performing good works is the manifestation of faith and that without such works faith is an empty shell. At the same time, the Mission makes no effort to proselytize or to convert anyone to any particular set of beliefs. The Mission merely seeks to give the homeless an opportunity to improve themselves through honesty, reliability, and hard work. By providing this type of opportunity, we believe the Mission serves God.

As a religious *service* organization, one of the key beliefs upon which the organization is based is that we have an

---

<sup>2</sup> This second house was recently closed and as of November 2010 the Mission was looking to buy a larger house that would increase the number of homeless people it can accommodate. CP 125, ¶ 7.

obligation to take care of the poor and the homeless. For many of the officers and members of the Mission, that belief is based on the teachings of Christ. But for many others it is not based on the teachings of Christ. There is no requirement that any member of the Mission, or any resident of any Mission facility, have any particular religious belief.

The U.S. Mission as an organization seeks to further the Social Gospel of the Book of Matthew: "I was hungry and you gave me food, thirsty and you gave me drink, a stranger and you took me in." When our residents go door-to-door soliciting funds to support our operation (and thus to support them by giving them food and a home), they are engaged in evangelizing this Social Gospel. But the residents themselves are free to believe, or not to believe, in the Gospel of Matthew, or any other gospel or any other religion, or no religion at all.

CP 126, ¶ 10-12.<sup>3</sup>

KIRO accused the Mission of "recruiting" people from the county jail to come live in its houses. CP 67. But Jones unequivocally stated: "This is false. The Mission has never recruited people from the King County Jail to come live at either of their houses. CP 127, ¶ 14. KIRO reported that the Mission was on a referral list which the jail distributed to inmates when they were released. Jones stated that "the Mission never asked King County to put the Mission on that referral list," and that "until [he] heard the KIRO broadcasts and read the on-line KIRO news articles in February and March of 2010, [he] was unaware that any such referral list existed." CP 128, ¶ 17. As Jones noted, given the large numbers of homeless people in Seattle, after making a few initial contacts with charitable

---

<sup>3</sup> If KIRO's reporter had looked at the Mission's website, he would have seen this statement written there: "While the United States Mission is a religious organization, it is strictly service oriented. The Mission respects the beliefs of all of its members and would not presume to instruct anyone in matters of faith or ritual." CP 127, ¶ 13.

organizations, it simply was unnecessary to ask anyone to refer homeless people to the Mission:

When we first opened up the transitional housing facility in Seattle in 1993, we went to places like Pioneer Square and the Morrison Hotel on Third Avenue. Many homeless people congregate in Pioneer Square and the Morrison Hotel housed the Downtown Emergency Services Center where homeless people could sleep. We talked with homeless people we met there and told them about the Mission's new facility. We made contact with community service organizations that served the homeless, such as the Lutheran Social Services and Catholic Charities, and we made them aware of our existence. Mr. Kerns and I also put a few flyers in the offices of other missions, such as the Union Gospel Mission and the Salvation Army. In a very short period of time our facility was full.

The United States Mission never asked King County or the King County Jail to refer released inmates to either of its transitional housing facilities, and never asked to be placed on any county referral list. It is not as if there is a shortage of homeless people that make it necessary for us to go and "recruit" homeless people from the county jail. Unfortunately, there are thousands of homeless people in Seattle, and our facilities only have space for a very limited number of people to live there. The 3<sup>rd</sup> Avenue house and the 81<sup>st</sup> Street house together could accommodate about 14 people.

Contrary to what is said in KIRO's first article, the Mission has never "used" the "jailhouse" in order "to find door-to-door solicitors." This statement is false. We have never "used" the jailhouse for anything.

CP 128, ¶¶ 18-20.

Contrary to KIRO's statement that the Mission "recruits felons, some with violent criminal histories, to live in their transitional housing program," Jones explained how the Mission made conscious efforts to screen out such people. He also candidly admitted, however, that occasionally people lied to the Mission and concealed their criminal history:

KIRO's articles assert that such recruitment of violent felons is part of "motives and tactics" of the Mission. In both articles KIRO claims credit for "revealing" these tactics. These assertions are false and are particularly hurtful and harmful.

We do not seek out people with criminal histories. We do not seek out people with histories of engaging in acts of violence. ***On the contrary we screen the applicants who seek to live in our facility, and we attempt to screen out people with a history of violence whom we think would be dangerous to others.***

But we also do not shun all people who have criminal records. We will accept some people who have criminal records, provided we are confident that they are not dangerous. This approach follows from the teaching of Christ. Christ did not shun criminals either. On the contrary, Jesus said to one of the thieves who was crucified with him, "I tell you the truth, today you will be with me in paradise." Luke 23:42. And although Jesus was criticized for hanging out with sinners and prostitutes, he told the Pharisees they would enter the kingdom of heaven before them. Matthew 21:31.

The Mission does not contend that it never makes mistakes, or that its screening process always works. For one thing, the Mission relies on the information furnished to it by the applicants. ***If the applicants lie to the Mission, and falsely conceal the fact that they have a violent criminal history, the Mission may be deceived and will not be aware of that fact. But for KIRO to assert that the Mission pursues a "tactic" of recruiting violent, dangerous people, such as predatory sex offenders, to come live at its facilities is a bald faced lie.***

CP 129, ¶¶ 22-25 (emphasis added).

Similarly, Curtis Rosas, the House Manager for one of the Mission's two Seattle homes, explained in detail how he conducted the application process in a manner designed to screen out dangerous criminals. CP 151-152. Like Jones, he admitted that occasionally an applicant would lie and conceal his criminal record. CP 152-153. He also acknowledged that the Mission

would sometimes accept an applicant who only had a conviction for a very minor, nonviolent offense:

I am the one who interviews and screens people who apply to live in a Mission house in Seattle. Unless they are telephone call-ins, the first interview happens on the street where I first meet the person. If they are call-ins then I interview them on the phone.

***I ask everyone who wants to be considered whether they have any criminal record. I also ask everyone if they are a sex offender.***

***If they have any serious crimes on their record, I simply tell them the Mission cannot help them. For example, if someone says they have a conviction for robbery I tell them I am sorry and there is nothing the Mission can do for them. If they have a criminal record but it for something that is not as serious, I tell them it will be up to the House Administrator whether they are acceptable to the Mission.***

For example, I myself have two criminal convictions for DUI. I got the second DUI when I was 25 years old and that was over twenty years ago. I was allowed to live in the Portland home run by the Mission even though I have these two old DUI convictions, and I was made a House Manager in 2007.

***If the people I interview say that they have no criminal record, or sometimes if they say they only have a record for what seems like a minor offense, like possession of marijuana, then they are invited to ride with me back to the Mission house.***

At the Mission house I interview them again. I ask them again about their criminal record. ***Assuming they confirm again that they do not have any convictions, they are eligible to become members of the house.*** The Administrator, Mr. Philip Kerns, always has to give his final approval in every case before anyone is accepted and can move in.

Sometimes people may lie to me. ***On very rare occasions I have found that someone has lied to me.*** For example, about a year ago several residents went on a trip to Medina with our field supervisor. At that time Medina was asking

that we get permits from the City for each of our members. Before they left I told the residents that Medina would be running background checks on them. When they got back from Medina *I learned that one of our house members had admitted that he did have a prior criminal conviction. It was for something very serious. I am not sure, but I think he said it was for arson. As soon as he admitted this, I told him he could not be in the house anymore and he left the Mission home.* Over the last two years, he is the only person I can think of who I discovered had deliberately lied by telling me[he] did not have any convictions.

*I understand that KIRO accused the Mission of deliberately trying to find people with felony convictions to come live in the Mission homes. That is not true. Moreover, the opposite is true. We try to make sure that we do not have any people convicted of felonies living in our home.*

When we have an open bed in the home, I am the one who rides in the van around downtown Seattle and stops and speaks with homeless people on the street to see if they want to apply for the open spot. *I never go to the jail to look for applicants. I never ask the jail for help in finding people who might want to apply. That would be a waste of my time since the people coming out of jail would generally be the types of people I would screen out and reject.*

CP 151-53, ¶¶ 3-11 (emphasis added).

As Jones stated in his declaration, *contrary* to KIRO's assertion that the Mission houses "plenty of felons" and sends a "bevy of historically violent felons" out to solicit charitable donations, "the truth is that a very small percentage of the people who have lived in [the Mission's] Seattle facilities have criminal records, and an even smaller percentage have felony convictions." CP 130, ¶ 30. KIRO's broadcasts referred to two particularly dangerous people who appear to have lived at one of the Mission's houses for brief periods of time in 1998 and 2004. CP 131, ¶ 31. One of them, Willie Edward Wilson, has not lived in a Mission house for more than ten years. CP 131-132, ¶¶ 33-39. Although KIRO

reporter Halsne originally told Jones that Wilson had lived at the Mission house “recently,” he based this assertion on the fact that a King County website listing the addresses of known sex offenders had not been updated, and erroneously showed Wilson as still living at the Mission house even though King County Superior Court records show that Wilson was charged with failing to register his residence during a ten year period from 1999 to 2009 and even though a county detective’s sworn declaration on file in that case asserts Wilson was known to be in the Los Angeles area in 2005 and had a California ID card. CP 131-132, ¶¶ 35-36.<sup>4</sup>

Moreover, while it appears that Wilson may have lived at a Mission house for a month in 1998, it is clear that Wilson was *not* referred to the Mission by the King County Jail, but was instead referred by another resident of the Mission house. CP 132-133, ¶¶ 40-41.<sup>5</sup>

---

<sup>4</sup> “The certificate of probable cause on file in that case (Exhibit D) states that Wilson was convicted of second degree rape in King County Superior Court in 1986. In the certificate of probable cause Detective Mac Gordon states under penalty of perjury that the King County Sheriff’s records “show the defendant last registering with the King County Sheriff’s Office on 6/10/98, listing a current address of 8720 3<sup>rd</sup> Avenue N.W. He no longer resides there.

Detective Gordon’s certificate of probable cause states that Wilson was arrested and charged for failure to register in 1998, and that after being told by a county prosecutor to re-register, Wilson’s “*whereabouts became unknown on 7/14/98.*” (Italics added). It further states that he never did re-register, that the Los Angeles Police Department reported to the Seattle Police Department that Wilson was in their area in 2005, that there were outstanding California arrest warrants for Wilson, and that Wilson ‘currently’ (as of March 23, 2009) had a California ID card with a Los Angeles address on it. Wilson’s California ID card expires on July 31, 2011. (Certificate of Probable Cause attached as Exhibit D).”

<sup>5</sup> “Eventually the Mission was able to locate an application from Willie Wilson dated December 17, 1997. His application states that he was referred to the Mission by “Santman.”

“Mr. Santman was a Swiss national who lived [at] the NW 81<sup>st</sup> Street house for a lengthy period of time. So our records indicate that Wilson came and applied to live in a

The other dangerous individual referred to by KIRO is Ray Demry, a sex offender who lived in a Mission house in 2004 for a month. CP 133, ¶ 42. *KIRO's own article* stated that Demry did *not* come to the Mission house from the King County Jail. The article said simply that Demry came to live at the Mission "after getting out of prison," but its own documents submitted in this case show that this was more than three years after he got out of prison. CP 133, ¶ 43.<sup>6</sup> Moreover, whatever prison Demry was released from (KIRO's article did not say), he was released from a prison, *not* from the King County Jail. Thus, as Jones pointed out:

KIRO used Demry and Wilson to support its allegation that the Mission recruits felons out of the King County Jail. Based on the allegation that these two men had lived at one of the Mission's houses at some point in the preceding 12 years, one (Wilson) in 1998, and the other (Demry) in 2004, KIRO accused the Mission of knowingly recruiting "plenty of felons" from the King County Jail, (even though *neither* of the two named men came to the Mission from the county jail.

CP 134, ¶ 46.

**d. KIRO's Own Statistics, Which it Purports to Have Relied Upon, Show That a Very Small Proportion of the Mission's Residents Had Criminal Records.**

KIRO attempted to support its assertion that the Mission deliberately recruited felons by pointing to the computer search with Accurant which was performed by reporter Halsne. *Decl. Halsne*, ¶ 11 (converted to exhibit). To begin with, Accurant, a commercial data provider, cautions that its data is *not*

---

Mission house not because the county jail told him of our facility, but because Mr. Santman told him about the Mission."

<sup>6</sup> The prosecution's certificate of probable cause, which reporter Halsne attached to his own declaration, attests to the fact that Demry got out of prison in March of 2001 and that Demry did not indicate he was living in a Mission facility until more than three years later in November of 2004. CP 133-134, ¶ 44.

reliable:

The accurint search which Halsne obtained states at the very top of it that it may not be accurate and that it is based on public records many of which are incorrect or inaccurate. At the top of what is entitled a "Comprehensive Address Report" it says this:

Important: The Public Records and commercially available data sources used on reports *have errors. Data is sometimes entered poorly, processed incorrectly and is generally not free from defect. This system should not be relied upon as definitely accurate.*

CP 135, ¶ 51 (See Appendix A and sub no. 9A, converted to exhibit).

The Mission determined that from 1993 to 2010 approximately 2,600 homeless people came to live in one of the two Mission houses in Seattle. CP 135, ¶ 50. Halsne's own sworn declaration asserts that from Accurint he got a list of 69 people who possibly lived at the 3<sup>rd</sup> Avenue NW Mission home during some unspecified period of time. Halsne claims that 7 of these 69 people had a criminal conviction, and that 5 of these 7 had a felony conviction. CP 134-135, at ¶¶ 48-49, 51-54; *Decl. Halsne*, ¶¶ 11-18 (converted to exhibit).

As Jones noted, even if one assumed that Accurint's list of "possible" residents was entirely accurate *and* that Mr. Halsne's identification of all the people on that list with criminal convictions was both totally accurate and complete, that would mean that 7.5% of the people who lived in Mission's houses -- a remarkably *small* percentage -- had a felony conviction:

The [accurint] address list itself had two categories. The first, entitled "**Possible** Current Residents" and the second entitled "**Possible** Previous Residents." Halsne gives no explanation as to why he assumes that this list of "possible" current and former residents is accurate, and does not suggest

that he did anything at all to check to see if any of these people actually ever lived at the Mission house in question.

The total number of names listed on Halsne's Exhibit I is 69.

Out of this total of 69 names, Mr. Halsne identifies seven people who he has determined have criminal convictions. He says he has determined this by consulting a Washington State patrol website. In his declaration Mr. Halsne asserts that five of these seven individuals have prior felony convictions.

If one made the following *assumptions*: (1) that the accurate list of "possible" residents was actually accurate and that all these "possible" residents *really* did reside at the Mission house on 3<sup>rd</sup> Avenue N.W. at some point; and (2) that the accurate list was a *complete* list of all the people who lived at that address during whatever time period it was that Mr. Halsne used as the period for his accurate search; and (3) that the records posted on the Washington State Patrol's website was also entirely accurate and that Mr. Halsne has *accurately identified which of the 69 people had prior felony convictions*, then one could say this: About 7.5% of all the residents during this time period had a felony conviction.

CP 135-136, ¶¶ 52-55.<sup>7</sup>

Consequently, as Jones noted, the reporter's own research contradicted the assertion of his articles that the Mission was "using" the jail to "recruit felons," as a "tactic" for recruiting people with violent criminal histories:

But even assuming that 7.25% of all Mission residents had prior felony convictions, this in itself shows that KIRO's news articles were false. ***If the Mission had a "tactic" of "recruiting" felons and a practice of "sending a bevy of historically violent felons" to people's houses to solicit money, surely it could have done a better job of "recruitment." Since Mr. Halsne's own research indicates that 93% of the Mission's residents did not have***

---

<sup>7</sup> Moreover, an even *smaller* (and unknown) percentage would have felony convictions for "violent" offenses. Some unknown percentage of them would be for nonviolent felonies such as forgery, possession of more than 40 grams of marijuana, or shoplifting of more than \$250 worth of property. In addition, the age of these felony convictions is unknown. As Jones noted, reporter Halsne "does not indicate how old these felony convictions are. Some may be recent and others may be one, two, or three decades old." CP 136, ¶ 57.

*these felonious characteristics, his own research shows that the assertions he has made against the Mission are false.*

CP 136-137, at ¶ 58 (emphasis added).

In order to “prove” there was a solid basis for the allegation that the Mission had a tactic of deliberately recruiting violent felons from the King County Jail, KIRO drew attention to two convicted felons who appeared to have lived at one of the Mission’s houses at some point over the preceding 12 year period of time.<sup>8</sup> Yet neither one, however, appears to have come to the Mission’s transitional housing facilities from the county jail.

In an effort to look at a smaller sample, Jones looked at the “applications of the ten residents who were living in the two Seattle Mission houses on the date when KIRO’s first news story about the Mission was broadcast,” and he found this: “None of them list the King County Jail as the referent.” CP 137, ¶ 61. Similarly, in the spring of 2010, at the request of Mr. Jones, Mr. Rosas interviewed the current house residents “to find out where they had been living right before they came to live in the Mission house.” CP 153, ¶ 12. Mr. Rosas interviewed ten people. *Id.* “Not one of them said that he had been living in either the jail or in a prison.” *Id.*

In sum, KIRO asserted that the jailhouse was “used” to find people to do their door-to-door soliciting, and that this was a “tactic” designed to maximize collections by recruiting people with violent criminal histories.

---

<sup>8</sup> Given this country’s rate of incarceration of adults as felons, it would be surprising if a charitable organization that temporarily housed over 2,000 people during that period of time did not house at least two people with a felony conviction for a violent offense.

Although KIRO explicitly stated that the funds solicitors who were going door to door were “basically the kind right out of jail,” CP 68, KIRO failed to identify even one person who went directly from the King County Jail to live at one of the Mission’s transitional housing facilities.

e. **Reporter Halsne’s History of Reckless False Reporting.**

**(1) False Accusation Against Washington’s Secretary of State Sam Reed That He Permitted Thousands of Convicted Felons to Vote.**

KIRO’s stories about the Mission were based on “investigation” conducted by reporter Chris Halsne. This is not the first time that Halsne’s reporting has proved to be woefully inaccurate. In October and November of 2008, KIRO TV ran two stories about illegal voting in Washington State. CP 179, ¶ 2. Just as Halsne’s stories about the Mission contained gross inaccuracies about convicted felons being recruited to live at the Mission houses, his voting stories contained gross inaccuracies about the incidence of illegal voting by convicted felons. John Hamer is a former Seattle Times editor, and the President and co-founder of the Washington News Council, a nonprofit dedicated to media accuracy and fairness. CP 179, ¶ 1. He explains the defects in Halsne’s stories which alleged massive amounts of illegal felon voting:

In the first story KIRO alleged that although convicted felons are not allowed to vote in Washington, about 24,000 convicted felons had been issued ballots. Halsne interviewed a woman who supposedly was a convicted felon but had voted in the election anyway.

In the second story KIRO alleged that more than 100 dead voters were still on Washington’s active voter rolls and that 15 of them had actually cast “ghost” ballots. Halsne

interviewed the widow of a man who supposedly had “voted” even though he had been dead since 1996.

In December of 2008 we received a complaint from Washington State Secretary of State Sam Reed. Attached is a true and correct copy of that complaint. Secretary Reed alleged that KIRO’s stories were grossly inaccurate.

The Washington News Council investigated Reed’s complaint and found that Reed’s complaint was well founded.

The woman voter whom Halsne had identified as having a felony conviction turned out not to have a felony conviction. She had a prior misdemeanor conviction and thus she was an eligible voter. There was nothing improper about her vote.

As to the dead man that KIRO said had been voting after his death, it turned out that KIRO was wrong about this as well. The person who cast a vote was actually the *son* of the dead man. The son had the same name as his dead father.

CP 179-180, ¶¶ 3-8. The Secretary of State’s complaint shows that Halsne has a pattern of doing incomplete and shoddy investigation into the subject of who has a felony conviction.

**(2) Oklahoma Libel Verdict Against Halsne For Libeling a Veterinarian.**

Halsne wrote another inaccurate story which led to KIRO being successfully sued for libel in Oklahoma. CP 69-71, ¶¶ 3-8. The Oklahoma Court of Civil Appeals upheld a jury verdict that Halsne and his then employer, Griffin Television, libeled a horse veterinarian by falsely accusing him of (1) deliberately trying to conceal an injury that one racehorse had sustained; and (2) giving another horse a prohibited medication that led directly to that horse’s death. *Mitchell v. Griffin*

*Television and Chris Halsne*, 60 P.3d 1058 (Okla. Civ. App. 2002), *cert. denied* 538 U.S. 1013 (2003). Halsne defended his articles by asserting that he got his facts out of a complaint on file in a U.S. District Court. But the Oklahoma appeals court held that the complaint did not support Halsne's allegations that the veterinarian had acted with the motive of concealing an injury:

***The complaint in the federal suit did not say Mitchell knew the horse was hobbling before the horse show. While it did accuse the trainer of acting with the purpose of disguising, or masking, the horse's lame condition, it did not allege Mitchell acted with that purpose. It alleged Mitchell told the buyer he blocked the horse. It alleged the block is a veterinary technique to numb pain, so that the horse will not appear unsound, but it did not allege that Mitchell intended it for the purpose of masking the horse's unsoundness. The complaint did not accuse Mitchell of concealing the horse's condition when he did the prepurchase exam; rather it alleged the horse's condition was concealed from Mitchell by the silicone pad on the mare's left hoof.***

***Halsne's statements do not truly and fairly report the allegations in the complaint. . . . The complaint itself, when compared with Halsne's statements, is evidence from which the jury could find Halsne made false and defamatory statements to third parties about Mitchell and that the statements tended to injure Mitchell in his profession. Halsne's own admission he was familiar with the complaint is clear and convincing evidence from which the jury could find he made the statements with reckless disregard as to their falsity.***

*Mitchell*, 60 P.3d at ¶¶ 12-13 (emphasis added).

Thus, Halsne also has a pattern of falsely attributing "motive and tactics" to people who had no such motive. He accused the Mission of deliberately recruiting homeless people who have felony convictions, and he previously accused Dr. Mitchell of deliberately trying to conceal the

fact of a horse's injury. But in both cases the target of his accusation was actually unaware of the true facts. The horse's injury was concealed from Dr. Mitchell, just as those few residents with serious criminal convictions concealed their convictions from the Mission. CP 152, ¶ 9. But it makes for a better story to accuse the target of acting deliberately.

### **(3) Pierce County Defamation Suit Brought By Tacoma Dentist.**

Halsne and KIRO TV were both sued for defamation by a Tacoma dentist who alleged that Halsne falsely accused him of criminally assaulting children. CP 71-72, ¶¶ 9-14 (*Brain v. Halsne*, Pierce County Cause No. 07-06234-9). After the Superior Court denied Halsne's motion for summary judgment, and after Division Two of the Washington Court of Appeals denied discretionary review of this ruling, Halsne and KIRO then settled this lawsuit for an undisclosed amount of money. CP 72, ¶¶ 13-14. Just a few months after the *Brain* case settled, KIRO aired Halsne's defamatory articles about the Mission. CP 72, ¶ 14.

### **E. STANDARDS OF APPELLATE REVIEW**

"A trial court's dismissal of a claim pursuant to CR 12(c) is reviewed de novo." *Northwest Animal Rights Network v. State*, 158 Wn. App. 237, 241, 242 P.3d 891 (2010). *Accord Parilla v. King County*, 138 Wn. App. 427, 431, 157 P.3d 879 (2007). An appellate court "examine[s] the pleadings to determine whether the plaintiff can prove any set of facts consistent with the complaint that would entitle the plaintiff to relief." *Animal Rights*, 158 Wn. App. at 241; *North Coast Enterprises, Inc. v. Factoria Partnership*, 94 Wn.App. 855, 859, 974 P.2d 1257 (1999); *Moses*

*Lake v. Grant County*, 39 Wn. App. 256, 258, 693 P.2d 140 (1984). “The factual allegations contained in the complaint are accepted as true.” *Animal Rights*, at 241; *North Coast*, 94 Wn. App. at 859; *Moses Lake*, 39 Wn. App. at 258. “[T]he facts and inferences, both real and hypothetical, are taken in the light most favorable to the plaintiffs.” *Davenport v. Washington Educ. Ass’n*, 147 Wn. App. 704, 706, 197 P.3d 686 (2008).<sup>9</sup>

## F. ARGUMENT

### 1. THE MISSION’S DEFAMATION CLAIM IS NOT PREMISED UPON THE JUXTAPOSITION OF TRUTHFUL STATEMENTS. IT WAS EXPLICITLY PREMISED ON STATEMENTS ALLEGED TO BE FALSE.

In the court below KIRO erroneously stated that “Washington does not recognize claims for defamation by implication, particularly where, as here, the plaintiff does not allege any of the statements are false.” CP 27. Inexplicably, KIRO maintained that, “The Mission does not allege that the story contains any literally false statements.” CP 24, *l.* 6. See also CP 27,

---

<sup>9</sup> With respect to the series of issues pertaining to KIRO’s contention that RCW 4.24.525 bars the Mission’s defamation claim, the Superior Court did not make any rulings so there are no trial court rulings for this court to review. But even if the Superior Court had made rulings on these issues, they would all be subject to *de novo* review: (1) “Construction of a statute is a question of law which an appellate court reviews *de novo*.” *Cosmopolitan Eng. Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 298, 149 P.3d 666 (2009); (2) Whether a trial court believes there is sufficient evidence to submit an issue to a jury is a question of law which is reviewed *de novo*. *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 590, 512 P.2d 1049 (1967). Moreover, whenever a trial court decision is made entirely on the basis of written materials and no live testimony is considered, an appellate court reviews both the law and the facts under a *de novo* standard, *Progressive Animal Welfare Soc’y v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994), and therefore a trial court determination as to whether documentary proof satisfied the requirement of demonstrating a probability of prevailing at trial would be reviewed under a *de novo* standard of review; and (3) Whether a statute is unconstitutional is a question of law which is always subject to *de novo* review. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

l. 12 (“the plaintiff does not allege any of the statements are false.”). Building on these erroneous legal and factual premises, KIRO then purported to rely on cases such as *Yeakey v. Hearst Communications*, 156 Wn. App. 787, 792, 234 P.3d 332 (2010).

**a. Washington Recognizes Claims of Defamation By Implication.**

To begin with, as a legal matter it is not accurate to say that Washington does not recognize the claim of defamation by implication. In fact, in *Corey v. Pierce County*, 154 Wn. App. 752, 225 P.3d 367 (2010), this Court affirmed a judgment for the plaintiff on a claim of defamation by implication. The Court *rejected* the defendant county’s argument that the judge should have granted a CR 50 motion and should not have allowed that claim to go to the jury. *Id.* at ¶¶ 13, 18.<sup>10</sup> Similarly, in *Chase v. Daily Record*, 83 Wn.2d 37, 44-45, 515 P.2d 154 (1973), the Supreme Court reversed a summary judgment in favor of a newspaper and remanded a claim of defamation by implication for trial.<sup>11</sup>

**b. The Complaint Explicitly Alleged That KIRO Had Published False Statements.**

More importantly, KIRO’s contention that the Mission “does not allege any of the statements are false,” was simply a blatant

---

<sup>10</sup> This Court held that “[d]efamation by implication occurs when ‘the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts.’ [Citation]. For defamation by implication, a plaintiff must prove all elements of defamation, including that a statement is provably false – either because it is a false statement, or leaves a false impression.” *Corey*. 154 Wn. App. at ¶ 15.

<sup>11</sup> “The article, taken as a whole, leaves the reader with the clear *implication* of defalcation of public port monies by a public official,” and the “use of the word ‘repayment’ carries *a possible implication* of an improper receipt and use of public funds and subsequent repayment.” (Emphasis added).

misrepresentation of the record. In fact the Mission's Complaint *explicitly* alleged that statements in the two articles were false. The Complaint identified the statements in the articles that

- “the United States Mission deliberately recruited violent criminals to solicit donations to the organization,” CP 3, ¶ 3.17;
- “the United States Mission deliberately employs known criminals to solicit donations as a tactic because use of such people to solicit donations is an effective means of threatening people with harm if they do not contribute,” CP 3, ¶ 3.18;
- “a significant proportion of its solicitors have criminal records as violent felons,” CP 4, ¶ 3.19;
- “the United States Mission falsely pretends to have a religious mission in order to escape government regulation,” CP 4, ¶ 3.20.

After identifying each of these statements the Complaint unambiguously asserts: “*This assertion is false.*” (Emphasis added). Similarly, the Complaint unequivocally alleges falsity in ¶¶ 3.24 & 3.26:

- “*The assertion* that the United States Mission “recruits” felons *is false.*” CP 4.
- “*The assertion* that these individuals were “right out of jail” *is false.*” CP 4.

(Emphasis added).

c. **This Case is Not Like *Yeakey* Because There the Plaintiff Conceded That All the Statements Made Were True.**

Although KIRO purports to rely on *Yeakey*, that case is obviously distinguishable. In *Yeakey* the defamation defendant published articles about a construction tower crane which killed a person when it collapsed while plaintiff *Yeakey* was operating it. The article never said that the collapse was caused because *Yeakey* was under the influence of drugs at

the time of the incident, but did say – truthfully – that Yeakey had prior drug convictions and noted that the Department of Labor & Industries did not perform drug tests on crane operators as a matter of routine. Yeakey “concede[d] that all the statements in the articles are true.” 156 Wn. App. at ¶ 6. Although Yeakey did not allege that any statement in any article was false, he “argued that the juxtaposition of the article’s statements with a photograph of the damage” done by the collapsed crane “falsely implied that Yeakey’s drug use” was the cause of the accident. *Id.*

Unlike plaintiff Yeakey, the Mission did not concede that all of the statements in KIRO’s articles were true. Unlike Yeakey, the Mission alleged that several of the statements made were false.

- d. **Unlike the Plaintiff in *Yeakey*, the Mission Never Alleged That the Defamatory Statements Merely Had Negative “Implications.” In This Case KIRO Expressly Alleged The Mission “Used” the Jailhouse, “Recruits Felons,” and that KIRO Had Gone “Undercover” To “Reveal” the Mission’s “Motives” and “Tactics,” Behind Its Practice of “Sending a Bevy of Historically Violent Felons, Burglars and Robbers to Your House to Collect Money.”**

The Mission never made any such argument and never alleged that KIRO’s articles merely “implied” false facts. Instead, the Mission relies on the *express* words of the articles which unambiguously conveyed the accusation that the Mission *deliberately* recruited criminals from the county jail to live in their homes and solicit funds for them. The words “used,” “recruits,” “find,” “sends,” “motives,” and “tactics” are all terms which unambiguously convey the meaning of deliberate intention.

One does not accidentally or unintentionally “recruit” people. One

does not unknowingly “use” a facility to find people. The accusation was that the Mission “has been sending a bevy of historically violent felons, burglars and robbers to your house to collect money.” There was no suggestion in the words used, such as “recruits felons,” that the practice of sending violent felons was a mere accidental or unintentional practice.

KIRO did not merely imply that it was possible that the Mission deliberately chose to send violent criminals door-to-door. KIRO stated that its reporter had gone “undercover to reveal the motives and tactics” of the Mission. A “motive” is “something (as a need or desire) that causes a person to act.” *Webster’s Ninth New Collegiate Dictionary* 774 (1983). Thus, in this case KIRO’s article asserted that the Mission had a need or desire to employ felons and dangerous criminals, which caused it to act.<sup>12</sup> The assertion that the Mission had a “desire” or “need” to use criminals as funds solicitors explained what caused the Mission to “recruit felons.”

Similarly, “tactics” are not unintentional actions; tactics are *purposeful* methods and are defined as “the art or skill of employing available means to accomplish an end.” *Id.* at 1201. A “tactic” is something chosen to “accomplish an end,” and is thus a strategic and deliberate choice.

---

<sup>12</sup> The trial court judge misread the use of the phrase “motives and tactics” and simply failed to understand *whose* “motives and tactics” were being referred to. In his oral ruling he said “KIRO reporter Chris Halsne, quote, ‘went undercover to reveal the motives and tactics of the United States Mission.’ CP 427. But then the judge inexplicably stated, ‘It is almost self-evident that that is true because we are sort of talking about his motives and why he went undercover.’ CP 427. But that is clearly wrong, the article unambiguously referred to the “motives and tactics *of the United States Mission.*” (Emphasis added). While KIRO claimed that Halsne “revealed” these “motives and tactics” by going undercover, the revealed motives referred to were not Halsne’s motives. He did not need to go “undercover” in order to reveal his own motives and tactics.

To “recruit” is “to seek to enroll,” or to “secure the services of” another. *Id.* at 985. Thus the articles alleged that the criminal conviction records of those in the county jail was what caused the Mission to “seek” to “secure the services” of felons. One does not unintentionally “seek” something.

Similarly, the headline of the first article drove home the message that the Mission was engaged in the intentional recruitment of criminals by asserting that the Mission “used” the jailhouse to “find” such people. The verb to “use” means “to put into action or service,” and “to carry out a purpose or action by means of.” *Id.* at 1299. The subject of the verb “used” was the “jailhouse”; thus the headline stated that the jailhouse was put into service to “carry out a purpose” of the Mission.

And one of the common meanings of the word “find,” is “To come upon by searching or effort.” *Id.* at 463. Thus, like the words “recruit,” “used,” “motive,” and “tactics,” the word “find” conveyed to the reader the message that it was the Mission’s deliberate intent to obtain the services of criminals.

The word “bevy” means “a large group or collection.” *Webster’s, supra*, at 147. Thus KIRO conveyed the message that the Mission did not just occasionally have a felon going door to door to solicit funds; instead KIRO reported that the Mission had been “sending” a “bevy” -- a large number of such people -- out to do its soliciting. This again reinforced the contention that this practice was deliberate.

The assertion that the Mission “*typically* load up *a van-full* of recent

transients and known criminals,” also reinforced the assertion that the use of criminals was not simply occasional or sporadic. Inexplicably, the trial judge stated that the news article did not use the phrase “van-full,” but it is undisputed that the article did use this phrase.<sup>13</sup>

Finally, one only goes “undercover”<sup>14</sup> when one needs to hide one’s identity in order to learn a secret which someone else is trying to keep. In this case the alleged secret was that the Mission wanted to use the jail as a recruitment source because it wanted to recruit people with criminal records.<sup>15</sup>

In *Yeakey* this Court held that “the ‘defamatory character of the language must be apparent from the words themselves,” and cannot be extrapolated “by innuendo or by the conclusions of the pleader.” 156 Wn. App. at ¶ 11, citing *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 538, 826 P.2d 217 (1991). In this case the defamatory character of the articles’ language *is* apparent from the words themselves. This is not a case of defamation arising from innuendo extrapolated from admittedly true statements. This is a case of using words explicitly alleged to be false, where the words unambiguously accused the Mission of using the tactic of

---

<sup>13</sup> “Now I think it is fair to say that – let me put it this way, in the briefing, the Mission refers to this as a van full of criminals, but that is not what it says.” CP 429, l. 9-12. However, *that is exactly what it says*. CP 7.

<sup>14</sup> “Undercover: . . . acting or executed in secret; *specif*: employed or engaged in spying or secret investigation.” *Webster’s Ninth New Collegiate Dictionary* 1285 (1983).

<sup>15</sup> Similarly, in *Sharon v. Time, Inc.*, 575 F.Supp. 1162, 1165 (S.D.N.Y. 1983), the Court held that the magazine’s reference to governmental Commission’s “appendix kept secret” was likely to be construed by a reasonable reader as suggesting that the Commission had reached the conclusion that the plaintiff, General Sharon, had condoned the massacre of civilians, and thus supported a claim of defamation.

deliberately recruiting dangerous criminals from the county jail and deliberately employing the tactic of using people with violent criminal records because they made effective funds solicitors.

e. **Headlines are Properly Considered When Deciding Whether an Article Is Reasonably Susceptible of Being Construed as Defaming the Plaintiff.**

In this case the headline on KIRO's first article unequivocally conveyed the message that the Mission deliberately sought out criminals from the jail in order to use them as solicitors: "Jailhouse Used To Find Door-to-Door Solicitors." CP 63. The trial judge, however, refused to consider the headline as something which could trigger defamation liability. He also completely misread the headline, treating it as if it said "Jail's Referral List Used to Find Housing":

The story ran under the headline "Jail House Used to Find Door-to-Door Solicitation." I think that is an accurate characterization. *It was a headline. I think that people understand that headlines are abbreviated.* In this case, the undisputed facts indicate or the factual record, which isn't in conflict, indicates that *the jail had*, at least before March, *a list of housing referrals* that they gave out, and in some cases, apparently, *that was what some people who were released from jail used to find the Mission.* I don't think that there is anything false about saying that the jail house was used to find door-to-door solicitors, *considering the fact that that is the headline* and everything that comes after that which explains in more detail what was intended by that.

CP 426 (emphasis added).

Apparently, the trial judge believed that what KIRO *meant* to say was that the released inmates of the jail used the jail's list to find the Mission. Given the following text of the article, it simply makes no sense to

conclude that that is what KIRO *meant* to say. But in any event, that is not what KIRO actually said. The headline conveyed the message that the jail was used to find released inmates to use as solicitors; it did not say released inmates used the jail's list to find housing.

Moreover, the notion that a headline, either alone or in conjunction with the following text of an article, cannot give rise to defamation liability, has been consistently rejected. Courts generally take one of two approaches. Some hold that a defamatory headline, in and of itself, can support an action for defamation, even though the body of the article diffuses the defamatory nature of the headline, or sufficiently explains the headline to eliminate the defamation altogether. Others hold that a defamatory headline will support an action for defamation if the following article fails to dispel the false allegation made in the headline. Under either approach, the Mission's complaint should not have been dismissed.

**(1) Whether a Headline is Defamatory is a Question for a Jury**

"[M]any people in a hurried and busy society are headline readers." *Cross v. Guy Gannett Publishing Co.*, 151 Me. 491, 496-97, 121 A.2d 355, 358 (1956). Although "the defamatory meaning of the headline may be dispelled by a reading of the entire article . . . , [a] headline is often all that is read by the casual reader and therefore separately carries a potential for injury as great as any other false publication." *Schermerhorn v. Rosenberg*, 73 A.D.2d 276, 287, 426 N.Y.S.2d 274, 283 (1980).

As one court rightly pointed out:

*The headline of an article* or paragraph, being so

conspicuous as to attract the attention of persons who look casually over a paper without carefully reading all its contents, ***may in itself inflict very serious injury upon a person***, both because it may be the only part of the article which is read, and because it may cast a graver imputation than all the other words following it. There is no doubt that in publications . . . claimed to be libelous, the headlines directing attention to the publication may be considered as a part of it, ***and may even justify a court or jury in regarding the publication as libelous when the body of the article is not necessarily so.***

*Black v. Nashville Banner Publ'g Co.*, 24 Tenn. App. 137, 144, 141 S.W.2d 908 (1939) (citations omitted) (emphasis added).<sup>16</sup>

**(2) Review of The Totality of the Circumstances Is Necessary To Determine Whether An Article “Clears Up” a Defamatory Headline.**

Other courts have analyzed the actionability of a headline by asking whether the text following the headline “clears up” its defamatory sting. In *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998), a case arising out of the highly publicized O.J. Simpson prosecution for the murder of Nicole Simpson, the Ninth Circuit, applying California law, employed this approach. There the newspaper article carried a headline stating: “Cops Think Kato Did It.” Below that a subheading read: “. . . he fears they want him for perjury, say pals.” That was, however, the extent of the article that appeared on the front-page. The rest of the story gave a non-defamatory elaboration of the statement made in the headline. The “it” to which the headline referred was clarified with language suggesting

---

<sup>16</sup> See also *Reardon v. News-Journal Co.*, 53 Del. 29, 32, 164 A.2d 263, 265 (1960) (“the sting of a libel may sometimes be contained in a word or sentence used in a headline to the body of the article, even though the facts are correctly set forth in the body.”); *Landon v. Watkins*, 61 Minn. 137, 142, 63 N.W. 615, 617 (1895) (“headlines are an important part of the publication, and cannot be disregarded, for they often render a publication libelous on its face which without them might not necessarily be so.”).

that the headline was not referring to murder, but only to perjury and to the concern “they want him for perjury, say pals.” *Id.* at 1038.

The Ninth Circuit reversed a summary judgment that had been granted in favor of the newspaper. The court held that a reasonable person reading the front-page might have concluded that the “it” referred to the murders. *Id.* at 1140. The newspaper argued that even if the headline could be found to be false and defamatory standing alone, the text of the story cleared it up, but the Court *rejected* this argument. *Id.* at 1041. The Court approved the idea “that a defamatory meaning must be found, if at all, in a reading of the publication as a whole,” but held that whether the story “cleared up” the headline was a question for the jury. *Id.* at 1040-41.<sup>17</sup>

**(3) Unless The Defamatory Sting of a Headline Is Dispelled By The Following Language of the Article, The Defendant Is Properly Held Liable. In a Case Applying Washington State Law, The Ninth Circuit Held That This Determination Must Be Made By The Jury.**

Another Ninth Circuit case illustrates the point that the actionability of a libelous headline is normally a jury question which a court may not decide for itself. In *McNair v. Hearst Corp.*, 494 F.2d 1309 (9th Cir. 1974), an attorney brought a diversity jurisdiction suit for libel against a newspaper. The Ninth Circuit applied Washington law to decide the case. *Id.* at 1311. The article in question was headlined “The High Cost of

---

<sup>17</sup> The *Kaelin* Court relied on several other cases. In *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1256 (9th Cir. 1997), cited with approval in *Kaelin*, the court recognized the powerful effect that headlines often have on “those who merely glance at the headlines” and then read no further. *Kaelin* also relied on *Empire Printing Co. v. Roden*, 247 F.2d 8 (9th Cir. 1957), for the proposition that “headlines alone may be enough to make libelous *per se* an otherwise innocuous article.” *Id.* at 1041, quoting *Empire*, 247 F.2d at 14.

Divorce,” and was followed by text which discussed the lawyer’s compensation. *Id.* at 1310. The lawyer claimed that the headline and the first two paragraphs falsely stated that he had been paid \$55,000 to \$65,000 for representing the woman in the divorce action. *Id.* at 1311. The trial court granted summary judgment for the newspaper, but the Ninth Circuit reversed holding that the mere fact that later parts of the article contained language that explained away the defamatory meaning of the headline and the first two paragraphs did *not* automatically cure the preceding defamatory language. Rather, it would depend on “whether the article as a whole can be said effectively to have eliminated the impact of any false impression created at the outset,” a question that was for the jury to answer. *Id.* at 1311. The Court held that whether a publication is “true” depends on:

how it would ordinarily be understood by persons reading it. . . . The question here, as we view it, is whether the article as a whole can be said effectively to have eliminated the impact of any false impression created at the outset. In our judgment this question cannot here be answered as a matter of law ***and remains a question for the jury.***

*McNair*, 494 F.2d at 1311 (emphasis added).

The *McNair* Court went on to hold:

The question as we view it is whether appellee, knowing of the falsity of the impression the headline and first two paragraphs would make upon the reader, actually intended that the article should leave that impression. In our judgment an inference to this effect is available to the jury. After all, ***what a newspaper regards as newsworthy usually makes its appearance in the headline and lead paragraph. This is what is intended to compel the reader’s attention.*** A jury, we feel, might well conclude that this was the impression that appellee intended should prevail.

*McNair*, 494 F.2d at 1311 (emphasis added).<sup>18</sup>

In the present case, the headline and the initial text of the first article read as follows:

**Jailhouse Used to find Door-to-Door Solicitors**

A transitional housing service in Seattle *has been sending a bevy of historically violent felons*, burglars and robbers to your house to collect money – and there isn't a thing you can do about it.

KIRO Team 7 Investigative Reporter Chris Halsne goes undercover to reveal *the motives and tactics of the United States Mission*.

CP 63. Nothing in the first two paragraphs dispelled the idea that the Mission was deliberately recruiting criminals to be door-to-door solicitors. The first paragraph's reference to a practice of "sending a bevy of historically violent felons" to solicit funds only *reinforced* the idea that this practice was deliberate. The comment that "there isn't a thing you can do about it," further suggested that the Mission was going to continue this practice notwithstanding any opposition to it because the Mission desired to employ criminals in this manner. And it would be entirely reasonable for a jury to conclude that the second paragraph's reference to the "motives and tactics of the United States Mission" *further reinforced* the false assertion made in the headline that the Mission's use of recent

---

<sup>18</sup> The case of *Sprouse v. Clay Comm'n, Inc.*, 211 S.E.2d 674, 686 (W. Va. 1975), also exemplifies this type of analysis: "[W]here oversized headlines are published which reasonably lead the average reader to an entirely different conclusion than the facts recited in the body of the story, and where the plaintiff can demonstrate that it was the intent of the publisher to use such misleading headlines to create a false impression on the normal reader, the headlines may be considered separately with regard to whether a known falsehood was published."

jailhouse inmates was deliberate. Certainly the language of the first two paragraphs did nothing to “eliminate” the accusation that the “use” of criminals was deliberate, and did not “clear up” or “dispel” the headline’s false assertion.

In sum, under either approach to the actionability of headlines, a jury could find that the headline in this case was false. At the very least, the headline was reasonably susceptible to the reading that KIRO was accusing the Mission of deliberately seeking out criminals recently released from the county jail because it wanted to employ criminals as door-to-door solicitors. Accordingly, the complaint should not have been dismissed because it is for a jury to decide whether that is the message that headline conveyed.

**f. Taking All Inferences in Favor of the Mission, The Allegations Pled in the Complaint Do State a Permissible Claim for Defamation.**

Since the trial court dismissed this case on a motion for a judgment on the pleadings, this Court’s *de novo* review must be conducted by considering simply the allegations made in the complaint. All of the factual allegations of the complaint must be taken as true. *Animal Rights*, at 241; *North Coast*, 94 Wn. App. at 859; *Moses Lake*, 39 Wn. App. at 258. In addition, all the “inferences” that can be drawn from those facts, “both real and hypothetical,” must also be “taken in the light most favorable to the plaintiff[.]” *Davenport*, 147 Wn. App. at 706. When these standards are applied to the Mission’s complaint it is clear that this is *not* a case of impermissible defamation by implication, that the complaint *does*

state a claim, and that the dismissal order entered below must be reversed.

**2. BECAUSE A DISMISSAL MAY BE AFFIRMED ON ANY GROUND WITHIN THE PLEADINGS AND PROOF, THIS COURT MUST DECIDE WHETHER THE DISMISSAL OF THE COMPLAINT IS PROPER UNDER RCW 4.24.525 EVEN THOUGH THE SUPERIOR COURT DID NOT RULE UPON THIS QUESTION.**

KIRO's principal argument below was that the Mission's complaint should be dismissed because it was barred by RCW 4.24.525(b)(4)(a). That statute provides that "[a] party may bring a special motion to strike any claim that is based on an action involving public participation and petition. . . ." The Superior Court explicitly declined to decide this question, and the associated questions of whether the statute applied to the news articles in this case, and whether the statute was unconstitutional.

Nevertheless, it is settled that a trial court judgment can be affirmed upon any ground within the pleading and proof. *Tropiano v. City of Tacoma*, 105 Wn.2d 873, 876, 718 P.2d 801 (1986); *Powell v. Sphere Drake Ins.*, 97 Wn. App. 890, 899, 988 P.2d 12 (1999). Therefore, even though the Superior Court did not rule on these issues, the Mission must address KIRO's proffered alternate ground that the Superior Court should have granted KIRO's Special Motion to Strike its complaint.

The Mission has three separate responses to this contention. First, the statute isn't applicable to this case because the KIRO articles about the Mission were not communications to a governmental body. Second, even if the statute is applicable, the Mission can and did satisfy the statute's requirements, because it made the requisite showing that it very likely will

prevail on its defamation claim. And third, even if the statute does apply and even if the Mission did not make the showing required by the statute, the statute is unconstitutional because it violates the state constitutional doctrine of separation of powers and the right of access to courts.

### 3. ANTI-SLAPP STATUTES IN WASHINGTON STATE

#### a. Anti-SLAPP Statutes in Washington Declare Their Purpose to Protect Those Who Make Communications to Government

##### (1) RCW 4.24.500

The Legislature first enacted “anti-SLAPP”<sup>19</sup> legislation in 1989. RCW 4.24.500 (Laws of 1989, ch. 234 § 1). The declared purpose of this law is to protect citizens who provide information to “governmental bodies” regarding potential wrongdoing:

Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish *to report information to federal, state or local agencies*. The costs of defending against such suits can be severely burdensome. *The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.*

RCW 4.24.500 (emphasis added).

##### (2) RCW 4.24.510

RCW 4.24.510 reiterated the point that the legislature was providing protection against civil liability to people who provided information to governmental agencies:

A person who in good faith communicates a complaint or

---

<sup>19</sup> “SLAPP” stands for Strategic Lawsuits Against Public Participation.

information *to any agency of federal, state, or local government* regarding any matter reasonably of concern *to that agency* shall be immune from civil liability on claims based upon the communication *to the agency*. A person prevailing upon the defense provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense.

RCW 4.24.510 (Laws of 1989, ch. 234, § 2) (emphasis added).

In 1999, RCW 4.24.510 was amended to add language which extended immunity from civil liability so that it also covered persons who communicated to organizations that had been delegated authority by federal, state or local government agencies, and which were subject to oversight by the delegating government agency, such as securities and futures exchanges. Laws of 1999, ch. 54, § 1.

In 2002, the Legislature amended the statute and reiterated that the law was intended to protect people whose communications were “made to influence” government action:

NEW SECTION. Sec. 1. Strategic lawsuits against public participation, or *SLAPP suits, involve communications made to influence a government action or outcome* which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.

Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States supreme court has made it clear that, *as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected* and the case should be dismissed. This bill amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution *protects advocacy to government*, regardless

of content or motive, *so long as it is designed to have some effect on government decision making.*

Laws of 2002, ch. 232, § 1 (emphasis added).

To strengthen the protection given to communications made to government to influence government action, the Legislature's 2002 amendments also deleted the requirement that the communication be shown to have been made in good faith. The 2002 amendments also added a provision stating that in addition to being entitled to recover reasonable attorneys' fees, a person sued for making such a communication to government was also entitled to an award of \$10,000 in statutory damages. Since 2002, the statute has read as follows:

A person who in good faith communicates a complaint or information *to any agency of federal, state, or local government, or to any self-regulatory organization* that regulates persons involved in securities or futures business and *that has been delegated authority by a federal, state or local government agency and is subject to oversight by the delegating agency*, 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. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

RCW 4.24.510 (emphasis added).

**(3) RCW 4.24.520**

RCW 4.24.520, enacted along with 4.24.500 in 1989, has never been amended. It provides that government agencies may intervene in anti-SLAPP suits in order to defend the citizen who was sued as a result of his

or her communication to a government agency. This statute, like .500 and .510, unambiguously discloses a legislative intent to protect people who make statements *to government*:

*In order to protect the free flow of information to their government*, an agency receiving a complaint or information under RCW 4.24.510 may intervene in and defend any suit precipitated by *the communication to the agency . . .*

RCW 4.24.520 (emphasis added).

- b. **The Enactment of 4.24.525 Clarified the Procedure for Making An Early Motion For Dismissal of a SLAPP suit, But It Did Not Change the Fact that the anti-SLAPP Statutes Only Apply To Suits Brought As A Result of Earlier Communications Made to Government And Designed to Influence Government Decision Making.**

RCW 4.24.525 was enacted by Laws of 2010, ch. 118, § 2 and was effective June 10, 2010. The “Background” section of the Senate Bill Report explains that the bill is designed to protect citizens against Strategic Lawsuits Against Public Participation which it defined as suits seeking damages resulting from a communication made to government agencies:

**Background.** Strategic lawsuits against public participation, or SLAPPs, are initiated to intimidate or retaliate against people who speak out about a matter of public concern. *Typically, a person who institutes a SLAPP suit claims damages for defamation or interference with a business relationship resulting from a communication made by a person or group to the government or a self-regulatory organization that has been delegated authority by the government.* A 2003 Gonzaga law review article describes most SLAPPs as occurring in the commercial context with the lawsuits being filed against people or groups alleging environmental or consumer protection violations.

In 1989, the legislature addressed the use of SLAPPs by creating immunity from civil liability for people who in good faith communicate a complaint or information *to an agency of the federal, state, or local government or to a self-regulatory organization that has been delegated authority by a government agency. In 2002 the anti-SLAPP statutes were amended* to remove the requirement that the communication be in good faith and *to allow statutory damages of \$10,000 to a person who prevails against a lawsuit based on a communication to a government agency or organization.* The 2002 legislation also included a policy statement recognizing the constitutional threat of SLAPP litigation.

Senate Bill Report, SSB 6395 (italics added).

Similarly, the House Bill Report on SSB 6395 explains that anti-SLAPP legislation like SSB 6395 is designed to prevent people from using lawsuits as a means of discouraging other people from seeking redress for their grievances from the government:

**Background.** The First Amendment to the United States Constitutional [sic] provides the right “to petition the government for a redress of grievances.” *The right to petition covers any peaceful, legal attempt to promote or discourage governmental action* at any level and in any branch. *All means of expressing views to government are protected* including: filing complaints, reporting violations of law, testifying, writing letters, lobbying, circulating petitions, protesting and boycotting.

House Bill Report, SSB 6395 (emphasis added).

Section (2) of RCW 4.24.525 has five subsections. The first four subsections explicitly refer to oral and written statements made *to government, or in a government forum.* The last subsection, instead of referring to oral or written statements, refers to “other lawful conduct” and explicitly refers to the right of petition. RCW 4.24.525(2) provides:

This section applies *to any claim*, however characterized, that is based on an action involving public participation

and petition. As used in this section, an “action involving public participation and petition” includes:

- (a) Any oral statement *made, or* written statement or other document *submitted, in a legislative, executive or judicial proceeding or other governmental proceeding* authorized by law;
- (b) Any oral statement *made, or* written statement or other document *submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding* authorized by law.
- (c) Any oral statement *made, or* written statement or other document *submitted*, that is reasonably likely to enlist public participation *in an effort to effect consideration of an issue in a legislative, executive or judicial proceeding or other governmental proceeding* authorized by law.
- (d) Any oral statement *made, or* written statement or other document *submitted, in a place open to the public or a public forum* in connection with an issue of public concern, *or in furtherance* of the exercise of the constitutional *right of petition*.
- (e) *Any 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 constitutional right of petition*.

RCW 4.24.525(2) (emphasis added).

Pursuant to subsection (4)(b), the party seeking to have a claim dismissed under RCW 4.24.525 carries the burden of proof on the issue of whether the claim is of the type covered by the statute:

A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing 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). In this case, KIRO cannot meet that burden.

**4. RCW 4.24.525 PROVIDES NO LIABILITY PROTECTION TO KIRO BECAUSE THE MISSION'S DEFAMATION CLAIM IS NOT BASED ON "AN ACTION INVOLVING PUBLIC PARTICIPATION AND PETITION." THUS, THE STATUTE DOES NOT APPLY TO KIRO'S ARTICLES.**

**a. KIRO's Contention That RCW 4.24.525 Was Intended to Extend Immunity From Civil Action to Statements That Were Not Made to Government Agencies Is Based on a Misreading of Subsections (2)(d) and (2)(e), and Is Inconsistent With the Entire History of Anti-SLAPP Legislation.**

KIRO contends that RCW 4.24.525(2), enacted in 2010, effected a radical extension of the scope of civil immunity from suit. KIRO claims that the newest anti-SLAPP statute, RCW 4.24.525, provides protection against the Mission's defamation suit, even though KIRO's defamatory statements were *not* made to government agencies or government officials. KIRO makes no argument that the Mission was trying to punish or retaliate against KIRO for trying to influence a government proceeding or a government decision. Nevertheless, KIRO claims RCW 4.24.525 applies and affords it protection from civil liability for the lies it told about the Mission. A SLAPP suit is a "strategic lawsuit against public participation." KIRO claims that the Mission's suit is a SLAPP suit *even though KIRO's publication of its stories did not involve any public participation in any governmental proceeding.* The public was not involved in making KIRO's news broadcasts and KIRO did not ask any government agency to take any action in either news story. Yet KIRO claims that RCW 4.24.525 is applicable to this case because its news broadcasts constituted "action involving public participation and petition."

The term "action involving public participation and petition" is

statutorily defined in RCW 4.24.525(2) in subsections (a) through (e). KIRO makes no claim that the present lawsuit falls under one of the first three subsections of RCW, §§ 2(a) through 2(c).<sup>20</sup> Instead, KIRO relies upon subsections 2(d) and 2(e).

**b. Washington Courts Consistently Have Held That Anti-SLAPP Statutes Were Designed to Prevent People From Being Intimidated Into Not Communicating to Their Government Agencies and Officers.**

Because RCW 4.24.525 is so new (effective in June of 2010), there are no reported appellate court decisions construing it. However, there are several cases which discuss RCW 4.24.510, an earlier anti-SLAPP statute. All of these cases recognize that SLAPPs are suits brought to retaliate against people who communicated *to government*.<sup>21</sup> For example, in *Right-Price Rec. v. Connells Prairie Community Council*, 146 Wn.2d 370, 382, 46 P.3d 789 (2002), the plaintiff sued a community council and a rural citizen's association for slander and commercial disparagement based "on allegations that the citizens' groups made defamatory statements *to the Pierce County Council*." The Supreme Court held that because the suits targeted speech made in good faith to this local government agency, the suit should have been dismissed pursuant to RCW 4.24.510. *Id.* at 383-84.

---

<sup>20</sup> This is not surprising. KIRO cannot possibly make any such claim because these subsections explicitly apply only to "oral" or "written" statements made in a "governmental proceeding authorized by law" (subsection (a)); or in connection with an issue "under consideration or review" in a "governmental proceeding" (subsection (b)); or in a document likely to enlist public participation to effect "consideration or review of an issue" in some "governmental proceeding" (subsection (c)).

<sup>21</sup> In RCW 4.24.500 the Legislature specifically declared that "[t]he purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate *governmental bodies*." (italics added).

Virtually all Washington appellate court decisions pertaining to anti-SLAPP statutes involve fact patterns where a suit was brought against someone who had complained to or communicated with a government agency. *See, e.g., Bailey v. State*, 147 Wn. App. 251, 257-58, 191 P.3d 1285 (2008) (plaintiff, former state university employee, sued defendant who had complained about plaintiff's conduct to the state university); *Gontmaker v. City of Bellevue*, 120 Wn. App. 365, 366, 85 P.3d 926 (2004) ("The legislature enacted RCW 4.24.510 to encourage reporting of potential wrongdoing to governmental entities.")

Since anti-SLAPP statutes are designed to protect against chilling citizens from communicating with their government agencies and officers, these statutes have no application at all to statements made to other people. In the present case, KIRO did not communicate its defamatory statements about the Mission to a government agency. Nor can it be implied that KIRO was seeking to influence any governmental action which was under consideration. Indeed, the first defamatory article reported that governmental action had already taken place: "just this week the county axed the United States Mission from that referral list" of places where the homeless could find shelter. CP 63, ¶ 4 (Appendix A). Thus KIRO's defamatory statements were *not* communicated to government and were *not* designed to influence governmental action. Moreover, the article explicitly stated that although the Mission was "sending a bevy of historically violent felons" to the doors of their homes, "there isn't a thing you can do to stop it." CP 63, ¶ 1 (Appendix A).

c. **Here, as in *Skimming v. Boxer*, The Anti-SLAPP Statutes are Inapplicable.**

In this respect, this case is identical to *Skimming v. Boxer*, 119 Wn. App. 748, 82 P.3d 707 (2004). Boxer, the Spokane County Chief Executive, investigated a suspicious signature on a warranty deed and concluded that the signature had been forged. Skimming, the county employee who had notarized the signature, was charged and prosecuted for two offenses, but he was acquitted of both. Boxer told a newspaper that she was disappointed with the verdict and the newspaper printed her comment. When Skimming demanded an apology from Boxer, she refused to give one. Skimming then sued Boxer for defamation. Boxer successfully moved for summary judgment, Skimming's suit was dismissed, and Boxer moved for an award of attorneys fees under the anti-SLAPP statute, RCW 4.24.510. The Superior Court denied the motion for fees under the statute and the Court of Appeals affirmed that ruling holding that the anti-SLAPP statute simply *did not apply* because Boxer's allegedly defamatory statements were *not made to a government officer*:

Former RCW 4.24.510 [FN omitted] grants immunity from civil liability ***for those who complain to their government*** regarding issues of public interest or social significance. [Citation]. The act is primarily intended to prevent SLAPP lawsuits – Strategic Lawsuits Against Public Participation. [Citation]. The immunity under the statute is ***for communications to a public officer who is authorized to act on the communication.*** [Citations].

On its face, ***the statute does not apply here*** for a number of reasons. First, ***the alleged defamatory comments were Ms. Boxer's communications to a newspaper not to a public officer.*** Second, ***the communication could not have been intended to influence government action or outcome.*** Ms. Boxer complained about the outcome of a

prosecution but she complained post-prosecution. . . .

Accordingly, former RCW 4.24.510 simply does not apply as a matter of law.

*Skimming*, 119 Wn. App. at 758 (emphasis added).

The present case is controlled by *Skimming*. There the allegedly defamatory statement was made to a newspaper, and was then republished in the newspaper to the public at large. Here the defamatory statements were made by a news broadcaster to the public at large. Here, as in *Skimming*, KIRO's statements were *not* made to a government officer or agency, and they were not intended to influence pending government action. Here, as in *Skimming*, the anti-SLAPP statute in question, RCW 4.24.525, "simply does not apply as a matter of law" to KIRO's statements about the Mission. For these reasons, KIRO's motion to strike the Mission's complaint should be denied.

**d. This Lawsuit Does Not Fall Under Subsection (2)(d) of RCW 4.24.525 Because KIRO's Statements Were Not Made in a Place Open to the Public.**

Nor is subsection (2)(d) of RCW 4.24.525 applicable. KIRO's broadcasts and its website postings of its two articles were not "made" or "submitted in a place open to the public or a public forum." KIRO does not allow the public to broadcast statements over KIRO's TV channel. KIRO's news broadcasting studio is not a place open to the public and its news broadcast is not a public forum. KIRO broadcasts its own news stories, it does not run an "open mike" news hour and does not allow the public to broadcast over its channel.

e. **This Lawsuit Does Not Fall Under Subsection (2)(e) Because it Does Not Involve Conduct Other Than the Making of Oral or Written Statements, and Does Not Involve the Right of Petition.**

All of the first four subsections of RCW 4.24.525(2) begin with these same words: “Any oral statement made, or written statement or other document submitted . . .” The only subsection which does not begin with these words is subsection (2)(e), which instead begins with the phrase “all other lawful conduct.” Thus, this subsection clearly refers to something *other than* oral or written speech. Since the Mission’s defamation lawsuit is *not* based on something other than oral or written speech, this last definition of “an action against public participation and petition” simply does not apply to this case.

Subsection (2)(e) goes on to refer to “other lawful conduct in furtherance of the exercise of free speech in connection with an issue of public concern or in furtherance of the constitutional right of petition.” In addition to communication by the written and spoken word, the First Amendment also protects nonverbal symbolic speech. For example, without using words, people can communicate their displeasure with government actions by wearing black armbands or burning their draft cards, as ways of expressing opposition to a government war, or by holding a “sleep-in” in a public park in order to call government’s attention to the plight of the homeless.<sup>22</sup>

These symbolic, nonverbal modes of expression are frequently

---

<sup>22</sup> See, e.g., *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *United States v. O’Brien*, 391 U.S. 367 (1968), and *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984).

connected to the right to petition the government for a redress of grievances. Thus, RCW 4.24.525 expressly included such nonverbal modes of communication within the scope of protection from civil liability which a plaintiff might seek to impose by bringing suit against the person who spoke symbolically to the government. But the Mission's suit is not based on any symbolic speech made by KIRO in the exercise of the right to petition the government, and thus this subsection also has no application to this case.

Since none of the subsections of RCW 4.24.525 apply to the Mission's lawsuit, KIRO cannot carry its burden under RCW 4.24.525(4)(b) to show that the defamation claim is based on an action involving public participation and petition. Thus, KIRO's attempt to rely on this statute is misplaced, and consequently the dismissal of the Mission's suit cannot be upheld on the alternate ground that its suit is precluded by RCW 4.24.525.

**5. THE MISSION EASILY MEETS THE STANDARD OF SHOWING THAT IT IS LIKELY TO PREVAIL BY CLEAR AND CONVINCING EVIDENCE.**

Assuming, *arguendo*, that this Court were to agree with KIRO and were to conclude that KIRO had carried its burden of proving that the Mission's defamation claim was based on an action involving public participation and petition, dismissal of the Mission's defamation claim would still be improper because the Mission can and has carried its burden of establishing a probability of prevailing on its defamation claim:

If the moving party meets [its] burden, the burden shifts to the responding party [the Mission] to establish by clear and convincing evidence a probability of prevailing on the

claim. If the responding party meets this burden, the court shall deny the motion.

In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

RCW 4.24.525(4)(b) & (c).

Thus, to defeat KIRO's motion to strike the Mission need only demonstrate by clear and convincing evidence that there is a probability that it will prevail on its defamation claim. The facts previously set forth in Section D(2) of this brief demonstrate that the Mission has easily made this showing.

To prevail on its defamation claim the Mission must show falsity, unprivileged communication, fault and damages. *Mark v. Seattle Times*, 96 Wn.2d 473, 485, 635 P.2d 1081 (1981). To show fault, the Mission must show that KIRO acted negligently in making this statement.<sup>23</sup>

The essence of the Mission's claim is that falsely KIRO stated that as a "tactic" the Mission deliberately "recruits" and "used" "historically violent felons" who were "right out of jail" to collect money for it. There is abundant evidence that KIRO's accusation is false and that KIRO acted

---

<sup>23</sup> The Mission need not show that KIRO acted with reckless disregard of the probable truth of its statements because that standard only applies to public figure/public official plaintiffs. "If the plaintiff is a private individual, a negligence standard of fault applies." *Bender v. City of Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983); *Stansfield v. Douglas County*, 107 Wn. App. 20, 33, 26 P.3d 935 (2001). The Mission is not a public figure, having never sought publicity, and thus the *New York Times v. Sullivan*, 376 U.S. 254 (1964) "actual malice" standard does not apply to its claim. Although there is an abundance of evidence that shows that KIRO's reporter Halsne once again actually acted with reckless disregard for the truth, as a private figure the Mission need only show by a preponderance of the evidence that Halsne acted negligently. *Moe v. Wise*, 97 Wn. App. 950, 957, 989 P.2d 1148 (1999); *Hauter v. Cowles Publishing Co.*, 61 Wn. App. 572, 811 P.2d 231 (1991).

negligently in making this accusation.

To begin with Halsne's own declaration shows that KIRO had no evidentiary support for this false accusation. Since the allegation is an assertion as to what was going on in the minds of people running the Mission, in order to provide *direct* support for this accusation KIRO would have to have evidence in the form of an admission from Mission personnel that this is indeed their strategy or tactic. No such admissions have ever been alleged. *Indirect* support for the allegation that the Mission deliberately recruits convicted felons from the jail might flow from evidence showing that a disproportionately high percentage of the people whom the Mission accepted as residents in its transitional housing were convicted felons recently released from the King County Jail. But no such circumstantial evidence exists. In fact, the only evidence that KIRO offered was Halsne's declaration which shows that a very *low* percentage of the Mission's residents can be shown to have felony convictions, and that *none* of the people identified by KIRO as having felony convictions came to the Mission directly from the county jail. Thus, KIRO's "evidence" actually supports the Mission, for it is inconceivable that an organization that was deliberately trying to "use" the "jailhouse" to recruit felons from the county jail to come live at its facilities could have done so poor a job as to recruit so few felons.

On the other hand the Mission has presented the declarations of two individuals who have flatly denied the existence of any such recruitment technique. CP 127-29, ¶¶ 14, 17, 20, 21; CP 153, ¶ 10. In fact, both have

expressly attested to the opposite goal by explaining that the Mission deliberately tries *to screen out* people with criminal histories. CP 129, at ¶ 23; CP 152-53, at ¶¶ 4-8, 10 (“We try to make sure that we do *not* have any people convicted of felonies living in our home.”).

So KIRO is left with nothing except the bald claim that Jones and Rosas must be lying, and that given their obviously poor rate of success in attracting convicted felons to be Mission house residents, they are not only lying, they are also hopelessly inept. With the hundreds of homeless people on the streets, KIRO would have the Court believe that the Mission’s attempt to deliberately recruit those who have serious felony convictions has failed miserably, since they only seem to be able to find such people about 7.25% of the time according to Halsne’s own calculations. CP 136, at ¶ 58.

Finally, it is noteworthy that the Mission can show a consistent pattern of false reporting by Halsne. Indeed, an Oklahoma appellate court has already found that on a prior occasion that there was “clear and convincing evidence from which the jury could find [Halsne] made the statements with reckless disregard as to their falsity.” *Mitchell*, 60 P.3d at ¶ 13.<sup>24</sup>

---

<sup>24</sup> Although ER 404(b) provides that evidence of other wrongful acts may be admitted to show ‘*proof of motive, . . . intent, . . . plan . . . or absence of mistake or accident.*’ Evidence that a defamation defendant has engaged in other acts of defamation is admissible to show absence of mistake, *see, e.g. Beaumont v. Basham*, 205 S.W.2d 608 (Tex. Ct. App. 2006) (plaintiff libeled by her employer permitted to introduce evidence that defendant instructed other employees to libel the town mayor), or to show a common scheme or plan, *see, e.g., Porous Media Corp. v. Pall Corporation*, 173 F.3d 1109, (8<sup>th</sup> Cir. 1999) (prior disparaging statements admissible to show that subsequent false statements about competitors product were made deliberately). In this case, Halsne’s prior defamatory conduct in Oklahoma is clearly admissible to show that Halsne’s false allegations about the Mission were not the product of a “mistake or accident” but were

Since the record on appeal contains clear and convincing evidence of the probability that the Mission will prevail on its defamation claim, the dismissal of the complaint cannot be sustained on the alternate ground that the Mission cannot meet the requirements of RCW 4.24.525(4)(b).

**6. LIKE THE STATUTE HELD UNCONSTITUTIONAL IN *PUTMAN v. WENATCHEE VALLEY MEDICAL CENTER*, RCW 4.24.525 IS UNCONSTITUTIONAL BECAUSE IT REQUIRES A SHOWING OF A PROBABILITY OF PREVAILING BEFORE THE PLAINTIFF HAS HAD THE OPPORTUNITY TO CONDUCT DISCOVERY, THEREBY VIOLATING THE DOCTRINE OF SEPARATION OF POWERS AND THE RIGHT OF ACCESS TO COURTS.**

Even if this Court concluded that RCW 4.24.525 *did* apply to the Mission's defamation claim; and even if this Court further concluded that the Mission could *not* meet this statute's requirement of showing a probability of prevailing in the suit before it could conduct any discovery, the dismissal of the claim *still* could not be upheld on the ground that RCW 4.24.525 bars the claim because RCW 4.24.525 is unconstitutional. It violates both the doctrine of separation of powers and the right to access to courts.

RCW 4.24.525(5) states that a motion to strike may be brought "within sixty days of the service of the most recent complaint or, in the court's discretion at any later time the court deems proper." The Senate Bill Report on the law which became RCW 4.24.525 notes that special motion to strike procedure was created "for the speedy resolution" of cases alleged to be SLAPP suits. In the present case, the suit was filed on August 25, 2010 and

---

the result of a "plan" to sensationalize his story by portraying the Mission as a Machiavellian entity bent upon using dangerous felons to solicit money because people would likely be afraid of a van full of known criminals."

was served on KIRO's registered agent the next day. Although normally an answer is due within 20 days, KIRO took 42 days to file an answer. Then, a mere 18 days after filing its answer, KIRO filed its special motion to strike, before any discovery had been conducted in this case. Indeed, Mr. Johnson, one of the lawyers now representing KIRO, and one of the principal authors of the statute, testified before the House Judiciary Committee that the whole purpose of the statute was to provide a mechanism for dismissal of suits *before* any discovery can take place.<sup>25</sup> And to achieve that purpose, RCW 4.24.525(5)(c) specifically prohibits any discovery from taking place once a motion to strike is filed:

All discovery . . . ***shall be stayed*** upon the filing of a special motion to strike under subsection (4) of this section. ***The stay of discovery shall remain in effect until the entry of the order ruling on the motion.***

(Emphasis added).

But recently the Supreme Court ruled that a similar statute which required a plaintiff to make a showing that his lawsuit had merit -- before he had the chance to conduct any discovery -- violated both the constitutional right of access to the courts and the doctrine of separation of powers. *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009). Putman holds that "the right of access to the courts includes the right of discovery authorized by the civil rules." *Id.* at 979. *Accord Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991). "It is common

---

<sup>25</sup> "All this bill is designed for and all we're asking to do is look at these claims up front before people have born the huge expense of discovery...and see what really is designed to punish people for exercising their rights of free speech and rights of petition." Sub No. 19A, ¶ 3, converted to an exhibit.

knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense." *Id.* at 782. The right of access to courts is "the bedrock foundation upon which rest all the people's rights and obligations." *Id.* The *Putman* Court held RCW 7.70.150 unconstitutional because it required a medical malpractice plaintiff to submit a certificate from an expert attesting to his belief that "there is a reasonable probability that the plaintiff's case had merit." The statute violated both the right of access to the courts and separation of powers. *Id.* at 979, 983. By requiring "plaintiffs to submit evidence supporting their claims before they even have an opportunity to conduct discovery and obtain such evidence," the statute conflicted with the court's Civil Rules, *id.* at 983, and "violates their right to access to the courts." *Id.* at 985.

The statute at issue here, RCW 4.24.525, is even more blatantly unconstitutional than the statute struck down in *Putman*. There a plaintiff only had to offer one witness' threshold opinion that there was a reasonable probability that the suit had merit. Here the plaintiff must, according to the statute, "establish by clear and convincing evidence a probability of prevailing on the merits." Thus, in order to even bring such a lawsuit, the plaintiff must have to show at the outset that he is likely to win it, even before he has had the chance to conduct any discovery. This is a much greater burden than that which RCW 7.70.150 imposed upon medical malpractice plaintiffs, and thus is even more blatantly unconstitutional.

Moreover, RCW 4.24.525 also violates the constitutional doctrine of separation of powers in the same manner that the statute in *Putman* did. In

order simply to *maintain* his suit, RCW 4.24.525 requires a plaintiff to meet a *higher* burden of proof than he needs to meet in order to *win* his suit at the end of the day. Although the Mission, as a private plaintiff, need only persuade a jury by *a preponderance of the evidence* that it has been the victim of defamation, under RCW 4.24.525 the Mission must establish by “clear and convincing evidence” the probability that he will later prove his defamation claim by a preponderance of the evidence. In this respect, the statute simply purports to trump the burden of proof rules for defamation claims established by the judiciary.

In addition, the requirement that a plaintiff make such a showing without first having any opportunity to conduct discovery conflicts with the court rule governing notice pleading. In *Putman* the Court held that the statute conflicted with CR 8(a) and Washington’s system of notice pleading which requires only “a short and plain statement of the claim” and a demand for relief in order to file a lawsuit. *Putman*, 166 Wn.2d at 379. “Under notice pleading, plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims.” *Id.*, citing *Doe*, 117 Wn.2d at 782. Like RCW 7.71.150, RCW 4.24.525 “requires plaintiffs to submit evidence supporting their claims before they even have an opportunity to conduct discovery and obtain such evidence,” and “for that reason,” RCW 4.24.525(4)(b)’s requirement of a clear and convincing probability of prevailing at trial “fundamentally conflicts with the civil rules regarding notice pleading – one of the primary components of our justice system.” *Putman*, 166 Wn.2d at 983.

In sum, even if this Court thinks that the Mission has failed to make the statutorily required showing of the probability that it will prevail at trial, it still cannot affirm the dismissal of the Mission's complaint for failure to meet the requirements of RCW 4.25.525 because that statute violates the Washington State Constitution.<sup>26</sup>

**7. BY PUNISHING A LITIGANT FOR EXERCISING HIS FIRST AMENDMENT RIGHT TO PETITION, AND BY NOT REQUIRING ANY FINDING OF FRIVOLOUSNESS, RCW 4.24.525 VIOLATES THE FIRST AMENDMENT.**

**a. The Right to Petition Includes the Right to Bring a Lawsuit.**

The First Amendment right to petition is one of “the most precious of the liberties safeguarded by the Bill of Rights,” *BE & K Construction Company v. NLRB*, 536 U.S. 516, 524 (2002); *United Mine Workers v. Illinois Bar Ass’n*, 389 U.S. 217, 222 (1967). The right is implied by “[t]he very idea of a government republican in form.” *BE & K*, at 525, quoting *United States v. Cruikshank*, 92 S.Ct. 542, 552 (1876); accord *McDonald v. Smith*, 472 U.S. 479, 482 (1985). It extends not only to efforts to influence legislators and executive officials, but also to efforts to seek judicial redress for wrongs suffered by resorting to litigation. The Supreme Court has repeatedly “recognized that the right of access to courts is *an aspect of the First Amendment right to petition the Government for redress of grievances.*” *Bill Johnson’s Restaurants, Inc.*

---

<sup>26</sup> Finally, the Mission notes that even if the statute is otherwise constitutional, the \$10,000 statutory penalty award is unconstitutional because it violates the right of access to the courts and the First Amendment right to petition. This award can be denied, however, if the Court finds that the defendant acted in bad faith, a finding that is compelled in this case by evidence of the reporter Halsne's conduct.

v. *NLRB*, 461 U.S. 731, 741 (1983) (italics added). *Accord BE & K*, 536 U.S. at 536 (even losing retaliatory litigation is protected by Petition Clause unless it is also baseless); *Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49 (1993) (same); *California Motor Transport, Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“The right of access to the courts is indeed but one aspect of the right to petition”); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 6 (1964) (“It cannot be seriously doubted that the First Amendment’s guarantees of free speech, petition and assembly give railroad workers the right” to recommend lawyers to injured workmen wishing to bring lawsuits); *NAACP v. Button*, 371 U.S. 415, 428-431 (1963) (ban on solicitation of clients violates First Amendment right to seek “to vindicate the legal rights of members” through litigation and “vigorous advocacy”).<sup>27</sup>

**b. Punishing a Litigant for Exercising His Right to Petition By Means of Bringing a Lawsuit Violates the First Amendment.**

In *In re Restraint of Addleman*, 139 Wn.2d 751, 991 P.2d 1123 (2000), the Washington Supreme Court held that punishing a person because he had exercised his right to bring a lawsuit violated the First Amendment. There the Court ruled that the Indeterminate Sentence

---

<sup>27</sup> Nor is the Petition Clause right to resort to litigation for redress of grievances limited to suits “bound up with political matters of acute social moment, as in *Button* . . .”; it applies as well to small economic disputes. *United Mine Workers*, 389 U.S. at 356-57; *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 8 (1964) (rejecting dissenters’ view that personal injury litigation, is not constitutionally protected the way civil rights litigation is); *United Transportation Union v. State Bar*, 401 U.S. 576, 585-86 (1971); *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

Review Board (“ISRB”) had violated a prisoner’s First Amendment right of access to the courts when it denied him parole on the grounds that he had been an active litigator. Citing to *California Motor Transport*, 404 U.S. at 513, the Court noted: “The right of access to the courts is rooted in the petition clause of the First Amendment to the United States Constitution.” The record in *Addleman* showed that the ISRB denied Addleman parole after having been informed that Addleman had “hon[ed] his legal skills” and “used them to leverage personal and class-action motions in the forms of grievances and lawsuits against the State of Washington and the Washington Department of Social and Health Services and later, the Department of Corrections and the Sex Offender Treatment Program.” 139 Wn.2d at 752. Because the ISRB’s denial of parole was based, at least in part, on Addleman’s exercise of his constitutional right to petition by having filed lawsuits, the Court held that the Board had violated that right. “Clearly, the ISRB may not retaliate against a prisoner to punish an exercise of constitutional rights.” *Id.* at 754. The Court noted that anytime retaliation is permitted against the exercise of the right to petition, there is a danger that future exercise of that right will be chilled. Even though the Court acknowledged that there may have been other reasons why the ISRB denied him parole, because Addleman established that there was at least a partial causal connection between the denial of parole and his petitioning conduct, there had been a constitutional violation which entitled Addleman to a new parole hearing:

The appearance that Addleman was denied parole due to

his attempts to access the judicial system is itself troubling. The courts are wary of allowing state action that chills First Amendment activities. [Citations omitted].

We do not require that the adverse action was caused *solely* by the ISRB's response to Addleman's protected conduct. A partial causal connection is all that is required. Addleman has established a partial causal connection by demonstrating that the ISRB knew of his litigation activities. We hold the ISRB may not retaliate for the exercise of a constitutionally protected right. We therefore, remand this matter for a new hearing before the ISRB without consideration of constitutionally protected activities.

*Addleman*, 139 Wn.2d at 755-56.

- c. **The Mandatory \$10,000 Penalty and the Attorneys' Fees Award Provided for By RCW 4.24.525(6)(a) Violate the First Amendment Because it Punishes The Litigant Who Files A Suit and Then Fails to Make An Immediate Showing That He is Likely to Win That Suit.**

RCW 4.24.525(6)(a) purports to require a court to do exactly what

*Addleman* holds is constitutionally forbidden:

The court *shall* award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

- (i) *Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed.*
- (ii) *An amount of ten thousand dollars*, not including the costs of litigation and attorneys' fees; and
  - a. Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

RCW 4.24.525(6).

This punishment is inflicted on the plaintiff if the party who brings the

motion to strike prevails under RCW 4.24.525(4). And under that subsection, a defendant bringing a motion to strike will prevail on that motion unless the plaintiff, who exercised his First Amendment right to petition by filing a lawsuit, can prove by clear and convincing evidence that he is likely to win his lawsuit at the end of the day. If the plaintiff cannot meet this standard imposed by RCW 4.24.525(4), then the Superior Court must punish the plaintiff for having brought the suit not only by dismissing it, but by requiring him to pay not only the defendant's reasonable attorneys' fees, but also a statutory penalty of \$10,000.

It is hard to imagine a statute with a more chilling impact on the exercise of the First Amendment right to petition. Whereas the *Addleman* Court found a First Amendment violation whenever a government imposed sanction was *partially* caused by the exercise of the right to litigate, the sanctions required against a plaintiff who loses a motion to strike brought under RCW 4.24.525(6)(a) are *totally caused* by constitutionally protected conduct. Thus, the constitutional violation mandated by RCW 4.24.525(6)(a) is even more blatant.<sup>28</sup>

---

<sup>28</sup> The Mission has standing to bring this First Amendment challenge even though the Mission *can* and *has* made the requisite showing that it is likely to prevail. In the First Amendment context, when a law chills a substantial amount of protected speech it is overbroad and unconstitutional. Even if such a law did not deter the plaintiff before the Court from bringing suit, he has third party standing to bring an overbreadth challenge because without such third party standing the law will succeed in chilling protected First Amendment activity. *State v. Regan*, 97 Wn.2d 47, 52, 640 P.2d 725 (1982).

8. **RCW 4.24.525(6) ALSO CONFLICTS WITH CR 11, AND THEREBY FURTHER VIOLATES THE DOCTRINE OF SEPARATION OF POWERS, THE RIGHT OF ACCESS TO COURTS, AND THE EQUAL PROTECTION CLAUSE, BY DISPENSING WITH THE REQUIREMENT OF FRIVOLOUSNESS WHEN THE *MOVING PARTY* SEEKS SANCTIONS AFTER PREVAILING ON A MOTION TO STRIKE, BUT BY REQUIRING A SHOWING OF FRIVOLOUSNESS BY THE *NONMOVING PARTY* WHO SEEKS SANCTIONS AFTER SUCCESSFULLY SURVIVING A MOTION TO STRIKE.**

In a striking display of differential treatment, RCW 4.24.525(6) treats moving parties and nonmoving parties differently when it comes to imposing sanctions. If the nonmoving party *fails* to make the required “clear and convincing” showing that he is likely to prevail, then the moving party’s motion to strike must be granted. If that happens, then under RCW 4.24.525(6)(a) the moving party is automatically entitled to have the nonmoving party sanctioned with both an award of attorneys’ fees and a \$10,000 penalty. A moving party does ***not*** have to show that the nonmoving party’s claim or defense was frivolous in order to get such sanctions imposed.

But under RCW 4.24.525(6)(b), if the moving party *loses* his special motion to strike and the nonmoving party then seeks sanctions against the moving party for having brought the motion, the nonmoving party ***does*** have to show that the moving party’s motion to strike was frivolous:

This additional requirement, imposed only upon nonmoving parties, is set forth in subsection (6)(b) of the statute:

***If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in***

part or in whole, without regard to any limits under state law:

- (i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;
- (ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and
- (iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

RCW 4.24.525(6)(b) (emphasis added).

This differential treatment of the moving party and the responding party conflicts with the terms of CR 11, which draws no such distinction between moving and nonmoving parties. As a sanction for filing any kind of frivolous pleading, CR 11(a) authorizes the court to impose “an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.” The rule does not distinguish between moving parties and responding parties, and in *all* cases it requires a showing of frivolousness before sanctions can be imposed.<sup>29</sup> Moreover, CR 11 provides that a trial court “may” impose

---

<sup>29</sup> CR 11 requires a showing that the pleading is baseless or frivolous precisely because without such a requirement the imposition of sanctions would infringe upon the First Amendment right to petition. Only if a suit can be shown to be “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits” may a party be sanctioned, subjected to liability, or have its access to courts limited. *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993) (holding plaintiff did not lose Petition Clause immunity from an anti-trust counterclaim because plaintiff’s claim was not objectively baseless). *See also Yurtis v. Phipps*, 143 Wn. App. 680, 693, 181 P.3d 849 (2008) (“Washington trial courts have the authority to enjoin a party from engaging in litigation upon a specific and detailed

sanctions; RCW 4.24.525(6) goes beyond authorizing the imposition of sanctions and instead mandates that sanctions be imposed. Further, whereas CR 11 authorizes the sanction of litigation costs and attorneys fees, RCW 4.24.525(6) goes beyond that and mandates the imposition of an additional fixed penalty of \$10,000.

Like the conflict between RCW 7.71.150 and CR 8 found to be a violation of separation of powers and the right to access to courts in *Putman*, the conflict between CR 11 and RCW 4.24.526(6) also violates these state constitutional rights. Moreover, since both the state constitutional right to access to courts and the First Amendment right to petition are fundamental rights, the distinction between plaintiffs and defendants drawn by RCW 4.24.525(6) triggers strict scrutiny for purposes of the equal protection clause because the law burdens those fundamental rights. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 382 (1978) (statute which burdened fundamental right to marry triggered strict scrutiny and was found to violate equal protection because distinction drawn between people under a court order to provide child support and people not under such an order did not advance compelling governmental interest). *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 225-26, 5 P.3d 691 (2000) (“equal protection review

---

showing of a pattern of abusive and frivolous litigation.”). “Proof of mere litigiousness is insufficient to warrant limiting a party’s access to the court.” *Bay v. Jensen*, 147 Wn. App. 641, 196 P.3d 753 (2008) (trial court abused its discretion by requiring ex-husband to pay his ex-wife’s attorneys fees and other costs before he could file any further legal actions). *Cf. Real Estate Bar Association v. National Real Estate Information Services*, 608 F.3d 110, 124 (1<sup>st</sup> Cir. 2010)(recognizing long standing constitutional principles underlying the First Amendment right to petition “include the right to file lawsuits that are not baseless.”

focuses on whether the relevant law ‘infringes upon or burdens’ the individual’s fundamental right . . . infringement of a fundamental right is a legal requirement to applying strict scrutiny review”). Since there is no compelling governmental interest for treating the moving party and the responding party differently, RCW 4.24.525(6) fails strict scrutiny and therefore it also violates the equal protection clause of the Fourteenth Amendment. Since the statute is unconstitutional, the dismissal order below cannot be affirmed on the alternate ground that this Court should grant a motion to strike pursuant to the statute.

#### **G. CONCLUSION**

The dismissal order enter below cannot be affirmed upon any ground. The granting of the motion for judgment on the pleadings cannot be affirmed because taking the facts alleged in the complaint as true, and drawing all possible inferences in the plaintiff’s favor, it cannot be said that the Mission cannot prove any set of facts consistent with its complaint that would entitle it to relief.

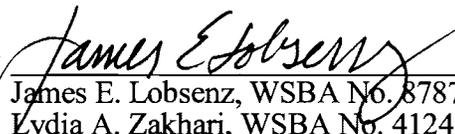
Nor can the judgment below be affirmed on the alternate ground that dismissal is warranted pursuant to RCW 4.24.525. That statute does not even apply to this case because KIRO’s news articles did not involve a communication to government for the purpose of influencing government. Even if the statute were applicable, the record shows that the plaintiff easily satisfies the statute’s requirement of making a showing of a probability that it will ultimately prevail. And even if this Court concluded that such a showing had not been made, RCW 4.24.525 is

unconstitutional because it violates the Petition Clause of the First Amendment, the Equal Protection Clause, the state constitutional right to access to courts and the state constitutional doctrine of the separation of powers.

For these reasons, appellant asks this Court to vacate the Superior Court's dismissal order and to remand this case with directions to allow the plaintiff to proceed with its defamation claim.

DATED this 18th day of July 2011,

CARNEY BADLEY SPELLMAN, P.S.

By   
James E. Lobsenz, WSBA No. 8787  
Lydia A. Zakhari, WSBA No. 41249  
Of Attorneys for Appellant

# APPENDIX A

More Related

## Jailhouse Used To Find Door-To-Door Solicitors

Chris Halsne  
KIRO 7 Eyewitness News Investigative Reporter

Posted: 2:36 pm PST February 2, 2010 Updated: 8:03 am PST February 5, 2010

SEATTLE – A transitional housing service in Seattle has been sending a bevy of historically violent felons, burglars and robbers to your house to collect money -- and there isn't a thing you can do about it.

KIRO Team 7 Investigative Reporter Chris Halsne goes undercover to reveal the motives and tactics of the United States Mission.

For years, when a criminal was kicked loose from the King County Jail, he was handed a flyer that lists places to live.

However, just this week, the county axed the United States Mission from that referral list after our investigation exposed how operators of the mission have a pay-to-stay plan that requires door-to-door panhandling.

Most families might feel a little leery if a felon like Level Two Sex Offender, Ray Dale Demry showed up on their porch, asking for money.

Police records show that after getting out of prison for raping and kidnapping a stranger, Demry moved into the U.S. Mission's Seattle home in late 2004 and lived there a full month.

Mission insiders tell Team 7 Investigators everyone who resides there must solicit money, usually six days a week.

Operators typically load up a van-full of recent transients and known criminals, then drop them off in various neighborhoods. They are required to collect cash and checks to keep a roof over their heads.

A mother of four asked we mask her identity. She recently gave a guy from the mission money fearing if she didn't, he'd "do something" in retaliation.

"I was concerned. I thought for all I know it could be a house of pedophiles; my biggest fear having young children. So, you know, it was a hard decision. I don't like to give money out when people come to my door, but if I feel concern for my families welfare, I thought it was worth 10 or 20 dollars just to get him to move on."

United States Mission operators call their solicitors "emissaries of Christ" Homeowners in this neighborhood say nobody mentioned religion.

A stay-at-home mom who heard the pitch told Team 7 Investigators, "I've had several people come to the door and ask for donations to help them get on their feet and it's basically, I feel it's a threat."

That raises the question if this organization might be shrouding their panhandling in religious free speech That prevents them from being regulated like other businesses going door to door. The mission also uses lawsuits to keep up free access to your houses. It has successfully sued Puyallup and Medina to make sure their church members don't have to go through things like background checks.

After Leigh Anne Freeman was approached by mission solicitors, we asked her what she thought.

"I don't know who came up with this idea, but I don't think it's fair to go into neighborhoods where there are kids and families and people just in everyday lives - then having felons? I have no idea what he was in prison for or in jail for. I don't know if he broke into houses or molested children for what he did but he's free to come to my door and ask me for money?"

Using public records, KIRO Team 7 Investigators did a routine address match and found plenty of felons who have lived at the Mission house in north Seattle.

On top of two sex offenders, we found guys with burglary, robbery, attempted arson, drug manufacturing, assault, and domestic violence convictions.

Brian Jones, Secretary-General of the United States Mission, confirmed that his organization accepts those with criminal pasts.

"People convicted of assault or another violent crime we might take them with the approval of their parole officer," Jones told Halsne.

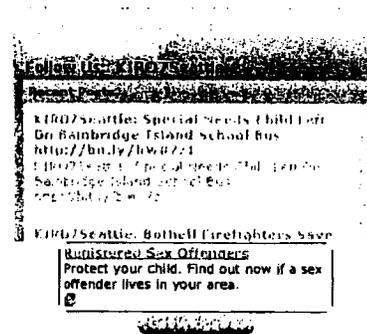
Jones oversees multiple houses in Seattle, Portland, Sacramento and San Jose. He says just because guys coming to your neighborhood are down and out on their luck, doesn't mean they are dangerous.

"We have never, think about it, never, had an incident involving one of our people at the doors doing any type of illegal act on a citizen."

[Kiteboarder Surrounded, Killed By Sharks](#)  
[UNCUT: High School Break-In Caught On Camera](#)  
[Townshend Defends Himself Ahead Of Super Bowl](#)  
[Most Popular](#)

- [Stories](#)
- [Videos](#)
- [Slideshow](#)

[Latest Teen Sexting Incident Involves Threats, Graphic Sex Photos](#)  
[Police Activity Locks Down 4 Puyallup Schools](#)  
[Tomatoes Thrown On I-5 After Semis Collide](#)  
[Man Kills Ex-Girlfriend, Himself In Bellingham](#)  
[Former Burlington Mayor Run Over By Bulldozer](#)  
[Full List »](#)



ADVERTISEMENT

## Health Information

### Ten Health Food Imposters

Many seemingly healthy foods are actually bad for your heart. Learn how to replace the imposters with nutritionally rich foods.

[Full Story »](#)

- [11 Tips for Healthy, Beautiful Teeth](#)
- [Control Diabetes By Losing Weight](#)
- [10 Surprising Things About Being Pregnant](#)
- [10 Tips For Better Sleep](#)

Jones tells us that sex offenders are prohibited from living at United States Mission houses, but couldn't explain how we found two who obtained rooms at the Seattle location.

In addition to Ray Demry, police records show convicted rapist Willie Edward Wilson registered to live at the mission house in late 1998.

"Well, that's a good question. I don't, I don't really have an answer for that. We certainly do our very best to check each one to make sure they are not registered sex offenders," Jones told Halsne during an on-camera interview.

Mission members tell KIRO Team 7 Investigators they are required to sign a waiver stating they aren't "renters," but if they don't bring in an average \$30 a day in solicitations to help cover room and board, they can be kicked out for failing to meet the goals of the program.

Some homeowners, who received the pitch on a day we followed the Mission van, tell us they wish King County wasn't helping promote this program

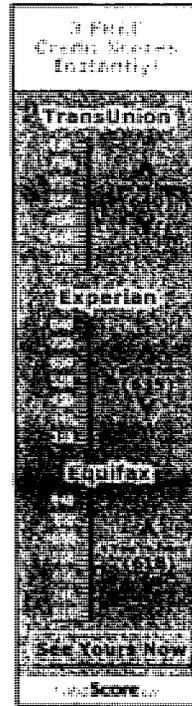
"Now you're just asking them to go out on the street. You're not giving them any skills to get a job, yet you're teaching them to go ask other people for money to get rent while on work release, then what do you do after that?" questions Freeman. "Do you become a panhandler because that's all you've learned from this city?"

Team 7 Investigators offer this advice, via a security specialist who is familiar with the United States Mission.

If you give money, make sure you get this receipt; dated and signed. That way, if you have questions of concerns, later, the Mission can trace who was in your area.

If you do not want members of the United States Mission to come to your house at all, the only thing you can do is put up a no solicitation sign. If they ignore that, call police.

Copyright 2010 by KIROTV.com. All rights reserved. This material may not be published, broadcast, rewritten or redistributed.



Email Print

## More Headlines

Twitter Facebook Digg Delicious Reddit

## Featured

### National/World

- [Chopper Crash Kills 2 US Men En Route From Haiti](#)
- [Obama Admits Health Overhaul May Die On Hill](#)
- [Police: Boy Found Dead In Luxury Hotel](#)
- [Police: Casino Crash Driver Prone To Blackouts](#)
- [Michael Irvin Sued Over Alleged Sex Assault](#)
- [Scam Busters: "Free Gas" Cards](#)

### CNN

- in partnership with [CNN.com](#)
- [CNNToyota Trouble Round-Up: What To Do Now](#)
- [CNNMarket Panic Returns -- Sort Of](#)
- [CNNThe Big Jobs Hole](#)
- [CNNQuestions Haunt Autism Parents](#)
- [CNNPoll: Tea Party Fails Impress Many](#)
- [Scam Busters: "Free Gas" Cards](#)
- [Whole House Carpet Install for \\$79](#)
- [Does Solar work in the Northwest?](#)

### Fun Slideshows

[Major Nominees Line Up For 2010 Oscars](#)  
The nominations are out for the 82 annual Academy Awards. Who made the cut? [View Images >>](#)

[2010 Grammy Arrivals, More Razzies Pick Worst Movies Of 2009](#)  
'Avatar,' Other Hits Vie For Expanded Oscar Field  
[Celebrity Mug Shots](#)

### Weird

[Weird Headlines Photos](#)  
Shake up your day with pictures of crazy antics, strange animals and more. [View Images >>](#)

[Student Arrested For Doodling On School Desk](#)  
[Restaurant Promotes Bathroom Sex For V-Day](#)  
[» More Weird Headlines](#)

ADVERTISEMENT

### Images In The News

[SLIDESHOW: Animals Escape Bothell Stable Fire](#)

 Firefighters are credited with helping save animals from a fire in a covered stable in Bothell Friday morning. [View Images >>](#)

### SeattleInsider

[SeattleInsider: ManBabies! Family Photos Don't Get Any Creepier](#)  
Man+Baby=ManBaby Get it? It's photoshop at it's best. Click here to see a collection of absolutely hilarious "ManBabies!"

[Full Story >>](#)

ADVERTISEMENT



Click here to WIN prizes!



Must-See Pics: Rocket Man



Come Audition For Amazing Race!



Healthy Snacks That Control Hunger



Celebrity Mug Shots

# APPENDIX B

kirotv.com

Current conditions for local cities

City Seattle
Current Temperature 39°
Sky Conditions Rain
Forecasted Temperatures
Time 8:00am 11:00am
Sky Condition Rain Rain
Temperature 42° 48°

ALERT

SEVERE WEATHER

5 Day Forecast | WX Alerts

- Facebook
Twitter
E-mail Alerts
Mobile

Broadcast
March 2, 2010

Site Web Keyword



SEARCH

- News: News Home, Live News, Broadcasts, Consumer, Team, National & World, Investigative, Team, News Video, Boeing News, Money News, Crime News, Video, Backstories, Technology, News, Weird, Headlines, RSS
Weather: Weather Home, Interactive Radar, Weather Blog, Rebecca, Stevenson, 5-Day Forecast, Severe Weather, Storm Tracker, Doppler, Tower, Cams, Marine, Forecasts, Mountain Pass, Reports
Sports: Sports Home, March Madness, Cougars, High School, Basketball, Huskies, Mariners, Seahawks, Sounders, FC
Traffic: Traffic Home, Jenni, Hogan, Puget Sound, Cameras, Drive Times, Ferry, Schedules, Bellevue Traffic, Seattle Traffic, Accident Alerts, Mountain Pass, Reports, 520 And I-90, Tacoma Traffic
Entertainment: Entertainment News, Weird, Headlines, Quizzes, Movie News, Reviews, Movie Times, Contests, Lottery, Numbers, Bored Room, Dating
SeattleInsider: SI Home, SI Slideshows, SI Video, SI Twitter, SI Facebook

KIROTV.com News

Story



3 Killed, 4 Injured In Anacortes Refinery Explosion

BREAKING NEWS: Three people have been killed and four others injured after an explosion at the Tesoro Refinery in Anacortes. Full Story >>

WATCH IT: Deadly Explosion Triggers Refinery Fire

UNCUT: Amateur Video Shows Fire After Blast

Eyewitness Accounts Of Anacortes Blast, Fire

Upload Video, Images To iSpot

Sign Up For Breaking News Alerts

Homeless Charity Mandates Panhandling, Takes Big Cut

From Our News Partners

Boy On Bike Killed By Disney Bus



Q. Enlarge Image

#### Related Stories/Links MORE INFO

- [Story: Jailhouse Used To Find Door-To-Door Solicitors](#)
- [Story: Homeless Charity Mandates Panhandling, Takes Big Cut](#)
- [Link: PDF: Probable Cause: Willie Wilson](#)
- [Link: Sex Offender Notification For Willie Wilson](#)
- [Link: PDF: Probable Cause: Rav Demry](#)
- [Link: PDF: US Mission Attorney Statement](#)
- [Video: WATCH IT: North Seattle Mission Residents Encouraged To Panhandle](#)

**Chris Halsne**  
KIRO 7 Eyewitness News Investigative Reporter

Posted: 11:49 am PST March 2,2010

A KIRO Team 7 Investigation into door-to-door fund raising by the United States Mission prompts King County to sever ties with the program. But the charity's troubles might not end there.

Last month we revealed how the self-proclaimed church recruits felons, some with violent criminal histories, to live in their transitional housing program, and then go panhandling as a group into your neighborhoods.

Investigative Reporter Chris Halsne uncovers Seattle police reports associated with the mission.

In the past 3 years, Seattle police have been to the United States Mission's Seattle house 13 times. Detectives investigated a fraudulent check complaint, an assault, a burglary, even a tenant that failed to register as a sex offender.

However, it's the multiple "disturbance" visits by police, dealing with the expulsion of house members, that really caught our attention.

If you have to live at the United States Mission in North Seattle, you better figure out how to make at least \$30 an evening going door-to-door, begging for cash.

Fail to nail down that figure a few nights in a row and you'll likely be back on the street against your will, according to "Ernesto," a former recruiter and top-earning solicitor for the US Mission.

"They were kicked out. If you don't make the money within the first week and they can tell that you can't cut the cheese, you're gone. You're out because you sign a waiver that you aren't a renter."

He says house operators keep up to 80 percent of the door-to-door "take" every night. Those who come up a little short in the Mission's financial goals were booted.

If they didn't want to leave, Ernesto says he witnessed the mission call Seattle police to settle the disturbance and force them out.

[Divers Find Minivan With Human Bones In Florida Canal](#)  
[Porn Star Quits Industry Because Of Tiger Woods](#)  
[Protesters Want Ronald McDonald To Retire](#)  
[106-Year-Old Woman Throws Out First Pitch At Spring Training Game](#)  
['Single Ladies' Toddler Becomes YouTube Sensation](#)  
[Man Runs Into Woman's Home To Escape Police](#)  
[Returning Soldier Finds Home Destroyed By Fire](#)  
[Mom, Boyfriend Charged In Toddler's Oxycodone Death](#)  
[600-Pound Food Thief: 'The Beef Jerky Got Me'](#)

## Celebrity Spotlight

[Where Are Former Final Four Stars Now?](#)



Players such as Christian Laettner, Ed O'Bannon and Bobby Hurley helped their teams reach the Final Four during their college careers. But what are these former NCAA standouts doing now? [View Images >>](#)

## Something Extra



[Shazam! Create Your Own Comic Book Cover](#)  
Kids love comic books, but they're fun for all – and an important form of American art. Take a look back at the history of comics, and create your own cover. [Full Story >>](#)

## Video You Can't Miss

[Raw Video: Car Break-In As Children Watch Police Accused Of Using Taser On 10-Year-Old Caught On Camera: Obama Trips On Camera: Volcano Fissure Spews Lava On Camera: Tires Damaged On Jet Landing](#)  
[Raw Video: Balloon Stomp Celebrates April 1](#)  
[Raw Video: Man Attacks Store Clerk With Taser](#)  
[Florida Pythons KO'd By Cold Winter](#)  
[Dog Saves Owner From Bullet, Disappears](#)  
[Twins Born One Week Apart](#)  
[Most Popular](#)

- [Stories](#)
- [Videos](#)
- [Slideshows](#)

[3 Killed, 4 Injured In Anacortes Refinery Explosion](#)  
[Powerful Storm Moving Into Western Washington](#)  
[Woman's Husband Fatally Shoots Her Boyfriend](#)  
[Bizarre 'Advertisement' Causes Evacuation Of Woodinville Post Office](#)  
[Waste Management: Best, Last and FINAL Offer](#)  
[Full List >](#)  
[Senior Suspended For Skimpy Prom Dress](#)  
[WATCH IT: Monroe Woman Talks About Surviving House Fire](#)  
[Dog Saves Owner From Bullet, Disappears](#)  
[Police Accused Of Using Taser On 10-Year-Old Caught On Camera: Obama Trips](#)  
[Full List >](#)  
[SLIDESHOW: Spraying Device Causes Hazmat Scare](#)  
[SeattleInsider: Which Celebrity Look-A-Like Is The Best?](#)  
[Funny Cat Photos, Even Funnier Captions](#)  
[Where Are Former Final Four Stars Now?](#)  
[SLIDESHOW: Car Flies Through Air In Burien 'Dukes Of Hazzard' Crash](#)

"The pressure was so high on us, so we wouldn't get thrown out, I would call it tyranny. It didn't matter what you did as long as you made that money and you find yourself at the door saying things that aren't true."

KIRO Team 7 Investigators discovered the kinds of guys coming to your door are basically the kind right out of jail. Public records show house guests with records for assault, rape, kidnapping, attempted arson, and residential burglary.

One United States Mission member, who approached our camera crew, was less than pleased with our attempts to tell the public these facts.

"You showed our pictures. We are not criminals. I have been in this program for a couple years. Without this program, I would have never had a chance to turn my life around. You're messing with the wrong people! You have no idea!"

Hopefully, that's not his sales pitch.

However, a number of homeowners did complain to us that they, too, felt threatened by the tactics of the church member solicitors.

Ernesto says that doesn't surprise him.

"Actually, none of it was religious. As far as I was there, none of us were religious. We were just there to make money. We were told we have to make money or they'd get somebody else to do it. There were no church services. No religious aspect any time the whole time I was there."

Because of our investigations, the King County jail decided to take US Mission off its transitional housing list. According to Major William Hayes, released inmates will no longer be guided to get housing at the mission.

"It's questionable that they would elicit the people who live there to knock on doors and solicit funds from neighbors in a neighborhood. I wouldn't want that and I don't think anybody in the department would want that."

Right now, the Mission says the government can't regulate their door-to-door solicitation because of religious free speech. Seattle's licensing division has reportedly opened an investigation anyway.

The Secretary General of the United States Mission, Brian Jones, declined an interview last week, but sent us an email in response to Seattle police reports. It says:

"After consulting with our attorney, I am replying to your enquiry. As far as the police activities report to which you referred, be advised that all such calls were initiated by the Mission in response to some infraction of Mission rules or behavior on the part of a resident/member. This should be considered evidence of our strong attention to enforcement of discipline and codes of conduct. As far as interviews are concerned, no one is available to be interviewed at this time. Please direct all further enquiries to James Lobsenz, Attorney at Law."

Copyright 2010 by KIROTV.com. All rights reserved. This material may not be published, broadcast, rewritten or redistributed.

### More Headlines

#### National/World

- [3 Dead, 4 Hurt In Blast At Wash. Refinery](#)
- [FBI Warns Extremist Letters May Encourage Violence](#)
- [Hospital Checklists Could Save Your Life](#)
- [Sounds Heard In China Mine Where 153 Trapped](#)
- [Judge To Rule On Release Of Militia Members](#)
- [Are Barcodes in Facebook's Future?](#)

#### Fun Slideshows

[World's Largest Auto Show Kicks Off In NY](#)  
One million people are expected to attend the New York International Auto Show and catch a glimpse of a slew of new cars. [View Images >>](#)

- [Funnv Cat Photos. Even Funnier Captions](#)
- [Somebody Screwed Something Up](#)
- [Funny To Freaky: See The People of Wal-Mart](#)
- ['Dancing With The Stars' Season 10 Cast](#)

#### Weird

#### CNN

- in partnership with [CNN.com](#)
- [CNNRNC's Bridge To Conservatives On Shaky Ground?](#)
- [CNNFeds Found Pfizer Too Big To Nail](#)
- [CNNApple Unveils Thousands Of iPad Apps](#)
- [CNNPentagon Faces Hurdles In 'Don't Ask' Study](#)
- [CNNExecution Of 'Sorcerer' Put On Hold](#)
- [Are Barcodes in Facebook's Future?](#)
- [Laminate Flooring for \\$.99 per Sq Ft!!!](#)
- [Does Solar work in the Northwest?](#)

#### Images In The News

[SLIDESHOW: Spraying Device Causes Hazmat Scare](#)  
A spraying device a man said was an advertisement caused a hazmat response and the evacuation of the Woodinville post office Thursday afternoon. [View Images >>](#)  
[Read Full Story](#)

#### SeattleInsider

[Full List >](#)



#### ADVERTISEMENT

### Caregiving

#### 10 Things To Consider In Your Will

As the centerpiece of any estate plan, a will is very important. Make sure you keep yours updated with these 10 tips. [Full Story >>](#)

- [What Are The Symptoms Of COPD?](#)
- [The Stages Of Alzheimer's Disease](#)
- [What Foods Can Help Fight Leukemia](#)
- [Find Out How Medicaid Works](#)

### Featured



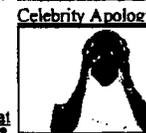
[Click here to WIN prizes!](#)



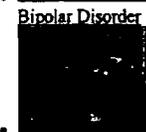
[Tax Season Bringing Out The](#)



[The Five Most Insincere](#)



[Signs And Symptoms Of](#)



[Which Twilight Saga Character](#)

[Are You?](#)