

71706-5

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NO 71706-5-I.

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

ANN RULE,

Appellant,

v.

RICK SWART, et al.,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Laura Inveen

OPENING BRIEF OF APPELLANT

James E. Lobsenz, WSBA # 8787
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Anne M. Bremner, WSBA #13269
Jason D. Anderson, WSBA #38014
FREY BUCK, P.S.
1200 Fifth Avenue, Suite 1900
Telephone: (206) 486-8000
Facsimile: (206) 902-9660

Attorneys for Appellant

ORIGINAL

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A. ASSIGNMENT OF ERRORS

Appellant assigns error to the Superior Court's

1. decision to grant the respondents' motion to strike;
2. imposition of a \$10,000 statutory penalty per defendant, thereby imposing a total of four such penalties; and to its
3. entry of judgments dismissing the appellant's suit and awarding the respondents their attorney fees and costs, as well as the statutory penalty awards.

B. STATEMENT OF ISSUES

1. Is a private newspaper a public forum for purposes of Washington's anti-SLAPP statute, RCW 4.24.525(2)(d)?
2. Does RCW 4.24.525(2)(e) apply to a defamatory written statement
 - (a) even though making or submitting a written statement is not "other" conduct since the making of a written statements is already covered by the four preceding subsections of the statute; and
 - (b) even though making a written statement is not conduct "in furtherance of" making a written statement; and
 - (c) defamation is not "lawful" conduct.
3. *On its face* does RCW 4.24.525 violate the state constitutional right to a jury trial?
4. *As applied* in this case, did the Superior Court violate the constitutional right to jury trial by dismissing Ann Rule's suit without applying a "summary judgment-like" analysis and without finding that she had failed to raise a genuine issue of material fact which a jury might determine in her favor?
5. Assuming, *arguendo*, that RCW 4.24.525 is constitutional in all respects, did the Superior Court err in granting the motions to strike because Rule met her burden of establishing a probability of prevailing on her defamation claim?

6. Does RCW 4.24.525 violate the First Amendment right to petition by penalizing a litigant who files a nonfrivolous lawsuit? Is it overbroad because it sweeps within its scope a substantial amount of protected First Amendment activity?
7. Does RCW 4.24.525 violate the state constitutional doctrine of separation of powers?
8. Does RCW 4.24.525 violate the state constitutional right of access to the courts?
9. In a multiple defendant case, when the defendants prevail on a motion to strike pursuant to RCW 4.24.525, does that statute require the imposition of \$10,000 per defendant? If so, is the statute unconstitutional either because it violates the Due Process Clause of the 14th Amendment or because it violates the Excessive Fines Clause of the 8th Amendment?

C. STATEMENT OF THE CASE

1. Procedural History

On July 13, 2013, Ann Rule filed a complaint seeking damages for defamation arising out of an article published in the *Seattle Weekly* in 2011. CP 1-5, 25-31. On September 20, 2013, Defendant Rick Swart filed a special motion to strike the complaint pursuant to RCW 4.24.525 (an “anti-SLAPP motion”). CP 35-68. The remaining Defendants – Seattle Weekly LLC, Village Voice Media Holdings LLC, and Caleb Hannan (collectively referred to as “the media Defendants”) – filed an anti-SLAPP motion as well. CP 75-271. Rule opposed both motions and argued that (1) the anti-SLAPP statute did not apply; (2) that even if it did

apply she had met her burden to survive a motion to strike, and (3) that the statute was unconstitutional. CP 277-314.

After a non-evidentiary hearing on February 24, 2014, the trial court granted the media Defendants' motion to strike. CP 375-76. The next day, the trial court granted Swart's motion to strike and ruled that although "the tort defamation by implication or omission" is recognized in Washington, the "Plaintiff has not satisfied her burden of establishing falsity under either analysis." CP 377-78. The effect of the orders was to dismiss the complaint and award Defendants their attorney's fees and the statutory penalty of \$10,000 per defendant.

On March 6, 2014, Rule filed a timely motion for reconsideration. CP 379-412 (supporting declarations), CP 455-504 (additional declarations), CP 505-35 (motion), CP 580-603 (supplemental declaration), CP 643-87 (same). On April 10, 2014, the trial court denied the motion for reconsideration. CP 695-96. Rule timely filed notice of appeal. CP 688-94; 697-705.

2. Statement of Material Facts

a. Background: Ann Rule and Her Book *Heart Full of Lies*

Rule has written 34 "true crime" – in other words, nonfiction – books. CP 300, ¶ 2. Each has been a *New York Times* Bestseller. *Id.* In 2002, Rule wrote and published *Heart Full of Lies*. The book chronicles

the gruesome murder of an airline pilot at the hands of his wife, Liysa Northon, during a camping trip in rural Oregon. CP 506.¹ Rule's investigation showed that Northon had a long record of telling soap opera-quality stories, including claiming amnesia to a man she was dating. CP 382 ¶¶ 14-15. After pleading guilty to the murder, Northon filed bar complaints against every attorney involved in her prosecution (including her own lawyers) and to gain an edge in child custody proceedings, falsely claimed that her husband's aging father was a child molester. CP 506-07.

b. *The Seattle Weekly* Article About Ann Rule

In July 2011, the *Seattle Weekly* published an article written by Rick Swart entitled "Murderer, She Wrote: How Seattle's Queen of True Crime Turned a Battered Wife Into a Killer Sociopath." CP 47-54 (hereafter "the article"). The article was placed on the front page and spread over seven additional pages. *Id.* Presented without context (such as why a decade-old murder in rural Oregon was suddenly worthy of front-page treatment), the article explains very little about Northon and her crime (other than statements sourced from Northon herself), and instead made many statements accusing Rule of fabricating facts about Northon. *Id.* Professor R. Thomas Berner, an experienced journalist with over three decades of experience, reviewed the article and concluded that it "violates

¹ The details of the crime are located at CP 506-07.

untold numbers of generally accepted journalism” principles and that “it is simply not possible to read the article without coming to the conclusion that Ann Rule lies to further her career or book sales.” CP 313 ¶¶ 43-44. John Hamer, veteran journalist of over four decades and executive director of the Washington News Council, agreed with nearly all of Professor Berner’s assessments, adding that each Defendant breached several codes of ethics in publishing the article. CP 458-62.

Almost immediately after the article was published, it was revealed that Swart was not, as he claimed, an independent journalist; in fact, he was engaged to Northon when he wrote the story. CP 278. Worse, Swart admitted that he concealed his engagement to Northon because he had learned that whenever he disclosed that fact, the editors of other publications refused to publish the article. CP 278-79, 312 ¶¶ 40-41.²

For example, Ted Kramer, former editor of Oregon newspaper *La Grande Observer*, did exactly what the media Defendants should have done. After Swart submitted the article to Kramer, Kramer performed due diligence on it and learned that Swart was engaged to Northon. When he confronted Swart about the conflict of interest, Swart lied about the

² Instead of revealing his relationship with Northon, Swart wrote that “curiosity got the better” of him, so he mailed a letter to Northon who then “granted” him an interview. CP 312.

relationship. CP 401-03 ¶¶ 5-7. As a result, Kramer did not publish the article and “lost all respect for Rick Swart as a journalist.” *Id.* at ¶ 8.

In publishing the article, the editor of the *Seattle Weekly* “failed to meet the basic generally accepted standards of journalism” and was “reckless” in failing to perform even rudimentary due diligence on the article or its author. CP 307-10, 313 ¶ 45 (Berner Decl.).

c. Rule’s Lawsuit

The article seriously damaged Rule’s reputation as a careful writer of nonfiction books. It damaged her book sales, and was emotionally damaging to Rule herself. CP 301, ¶¶ 6-9. Rule filed this lawsuit solely to “recover reasonable damages;” she did not seek to force a retraction or to prohibit publication of any material. CP 30. Instead, Rule is now required to pay over \$120,000 in attorney’s fees and \$40,000 in penalties for filing this lawsuit. Supp. CP 706-707, 708-710, 711-712, 713-715, 716-718.

D. STANDARDS OF APPELLATE REVIEW

De novo review applies to appellate review of orders granting or denying an anti-SLAPP motion to strike, and to questions involving the proper statutory construction of the anti-SLAPP statute. *Dillon v. Seattle Deposition Reporters*, 179 Wn. App. 41, 70 (2014), *rev. granted*, 180 Wn.2d 1009 (2014). *Accord Davis v. Cox*, ___ Wn. App. ___, 325 P.3d

255, 263 (2014); *City of Seattle v. Egan*, 179 Wn. App. 333, 337 (2014); *Spratt v. Toft*, ___ Wn. App. ___, 324 P.3d 707, 711 (2014).

E THE STATUTORY DEFINITION OF ACTS OF “PUBLIC PARTICIPATION AND PETITION” SET FORTH IN RCW 4.24.525.

Under RCW 4.24.525 a party may bring a special motion to strike any claim that is “based on an action involving public participation and petition.” *Dillon*, 179 Wn. App. at 67 (quoting RCW 4.24.525(4)(a)). When deciding an anti-SLAPP motion to strike, a court must follow a two-step process. *Id.* The moving party has the initial burden of proving by a preponderance of the evidence that the claim targets activity “involving public participation and petition” as that term is defined in RCW 4.224.525(2). *Id.* (citing *U.S. Mission Corp. v. KIRO TV, Inc.*, 172 Wn. App. 767, 782-83, *rev. denied*, 177 Wn.2d 1014 (2013)). If the moving party meets this burden, the burden then “shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim.” RCW 4.24.525(4)(b). *Id.* at 68. If the responding party fails to meet this burden, the court must grant the motion, dismiss the claim, and award the moving party statutory damages of \$10,000 in addition to attorney fees and costs. *Id.*

The statute defines “an action involving public participation and petition” as follows:

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

RCW 4.24.525(2) (emphasis added).

In the present case, the Defendants argued that the publication of Swart's article was an act of "public participation and petition" covered by both subsections (2)(d) and (2)(e). They persuaded the Superior Court that subsection (2)(d) applied because a private newspaper is "a public forum." They also maintained that subsection (2)(e) applied because publication of Swart's article was "other lawful conduct" in furtherance of the exercise of the right of freedom of speech.

As set forth below, Appellant Rule submits that neither subsection applies and that the Court below erred by misconstruing these two provisions of the statute which define acts of “public participation and petition.” Subsection (2)(d) does not apply because a private newspaper is not a “public forum.” Some federal courts have mistakenly relied upon decisions of California state courts construing the California anti-SLAPP statute for the proposition that a privately owned media company can be a public forum. But California law defining the term “public forum: is radically different from Washington law. Although California has long recognized that private property can constitute a public forum for speech *under the California state constitution*, the Washington Supreme Court has expressly rejected that proposition and has adhered to the principle that only governmentally owned property can constitute a public forum.

For three independent reasons, subsection (2)(e) does not apply either. First, the publication of a “written statement” is not “other lawful conduct,” because written statements are already covered in subsections (a) through (d), none of which apply here. Subsection (e) addresses conduct “other” than written statements, and thus does not apply. Second, (2)(e) applies to *nonverbal* acts of expression, such as picketing or burning draft cards, which are committed “in furtherance of” verbal expression. It makes no sense to treat verbal expression, as “conduct” that

is “in furtherance of” verbal expression. Speech is not something that “furthers” speech; speech *is* speech. And third, defamatory speech is not “lawful” conduct in furtherance of the exercise of the constitutional right of free speech, because it is *un*lawful to engage in defamation.

F. ARGUMENT

1. **A Private Newspaper Is Not a Public Forum for Purposes of Washington's Anti-SLAPP Statute, So Subsection (2)(d) Does Not Apply.**
 - a. **For First Amendment Purposes Property Cannot Be a Public Forum Unless it is Governmentally Owned.**

RCW 4.24.525(2)(d) covers any written statement submitted “in a *place open to the public* or a *public forum* in connection with an issue of public concern.” (Italics added). The Defendants never contended that the *Seattle Weekly* is a “place open to the public.” Obviously it is not. It is a privately-run newspaper and its pages are not “place[s] open to the public.” But they do contend that the *Seattle Weekly* is a “public forum.”

The Legislature did not define the phrase “public forum.” However, in First Amendment law the phrase “public forum” has a well-defined meaning. It has been settled for decades that the term “public forum” refers to property owned by government – such as a sidewalk, a street, or a park – which has historically been associated with open public debate, or to government-owned property which has been designated for expressive activity. *See Perry Education Ass’n v. Perry Local Educators’*

Ass'n, 460 U.S. 37, 45 (1983); *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 358 (2004) (“Traditional public forums are public properties that have ‘time out of mind’ been used for the purpose of assembly and communicating thoughts between citizens, not public properties that have been used illegally.”).³ Consequently, a private newspaper is not a public forum simply because it is privately owned. It is neither owned nor operated by government.⁴ Indeed, the First Amendment protects a newspaper against any coercive effort to force it to grant access to third parties. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“A newspaper is more than a passive receptacle for news, comment, and advertising.” Held unconstitutional for state to compel a newspaper to print “reply” from a candidate for office.).

As Justice O’Connor later noted, in *Tornillo* the Court flatly held it was unconstitutional for government to force a privately owned newspaper to serve as a public forum:

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), for instance, we invalidated a

³ Thus, the fact that property is government-owned is a necessary prerequisite for public forum status, but it is not sufficient by itself. In addition, there must be history of using such public property for expressive purposes. *See Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 813 (1984) (public utility poles are not public forums); *Mighty Movers*, 152 Wn.2d at 360 (“We follow *Vincent* and hold that utility poles are not a public forum.”).

⁴ Even where private property is seemingly implicated, a government property interest is still required. *See Sanders v. City of Seattle*, 160 Wn.2d 198, 216 (2007) (finding Westlake Center a nonpublic forum despite the presence of a government easement).

Florida statute that required newspapers to allow, free of charge, a right of reply to political candidates whose personal or professional character the paper assailed. ***We rejected the claim that the statute was constitutional*** because it fostered speech rather than restricted it, ***as well as a related claim that the newspaper could permissibly be made to serve as a public forum.*** [Citation omitted].

Denver Area Educ. Telcoms. Consortium v. FCC, 518 U.S. 727, 813 (1996) (O'Connor, concurring in part and dissenting in part).

A newspaper is not a public forum in Washington. When a term of art is used in a statute, that term is given its technical meaning. *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 581 (2013). Thus, “public forum” refers to the constitutional jurisprudence concerning that phrase, which requires that government property be implicated. When deciding whether something is a public forum for state constitutional purposes, Washington requires that the property be publicly owned:

Generally, when a free speech challenge arises in regard to activity ***on property owned and controlled by the government***, a court will engage in a “forum analysis” to determine the level of judicial scrutiny that applies. ***We have adopted the federal analysis for determining whether public property is a public forum***

Bradburn v. N. Cent. Reg'l Library Dist., 168 Wn.2d 789, 813 (2010). *Accord Mighty Movers*, 152 Wn.2d at 352 (Washington has “adopted the federal analysis to determine whether a *particular class of public property* is a traditional public forum under our state constitution”) (italics added). In sum, the privately-held *Seattle Weekly* does not meet the definition of “public forum” under Washington law.”

b. The Idea That California Anti-SLAPP Law Is Persuasive Authority When Interpreting the Washington Anti-SLAPP Statute Is Highly Suspect. All Washington State Court Cases That Endorse This Idea Are Traceable to One Sentence In One Federal Case, Without Any Supporting Authority.

Lawyers for defendants bringing anti-SLAPP motions to strike have been quite successful in persuading Washington courts to look to California decisions construing the California anti-SLAPP law for “guidance” as to how to construe the Washington anti-SLAPP statute. Several Washington State court opinions have endorsed this idea. But it turns out that *all* the state court decisions are traceable to a single sentence written by one federal magistrate without citation to any authority. The provenance of all such state court decisions originates with one sentence in *Aronson v. Dog Eat Dog Films*, 738 F.Supp.2d 1104, 1109 (W.D. Wash. 2010) which states that the 2010 amendments to Washington’s anti-SLAPP act were “patterned after California’s Anti-SLAPP Act.” But no authority is cited in support of that statement. The only thing cited by the Magistrate is the chapter in the Session Laws where the amendments appear, but the Session Law contains no reference to any legislative history and no reference whatsoever to California’s statute.

All subsequent case law can ultimately be traced to this one insupportable sentence in *Aronson*. As set forth in the footnote below, while several courts have repeated the mantra that California case law is

particularly relevant to Washington anti-SLAPP law analysis, absolutely *nothing* supports this assertion. All these cases are built upon the foundation of *Aronson* and *Aronson* is built upon nothing at all.⁵

In fact, as some Washington decisions are beginning to point out, there are significant differences between the California and Washington statutes.⁶ And as noted below, there are also extremely significant

⁵ One month after *Aronson*, in *Castello v. City of Seattle*, 2010 WL 4857022 at *4 (W.D. Wash. 2010) another federal judge, in an unpublished decision, relied *solely* upon *Aronson* as a basis for looking to California's anti-SLAPP statute for guidance regarding Washington's anti-SLAPP statute. Eight months after *Castello*, another federal judge sitting in Western District of Washington issued another unpublished decision, in which it relied solely upon *Castello* for the proposition that it should look to California case law about the California statute when interpreting the Washington statute. *Phoenix Trading, Inc. v. Kayser*, 2011 WL 3158416 (W.D. Wash. 2011). Two and a half years after *Aronson* was decided, in *City of Longview v. Wallin*, 174 Wn. App. 763, 776 n.11, *rev. denied*, 178 Wn.2d 1020 (2013), Division Two relied solely upon *Aronson* as a basis for looking to California law to decide what appellate standard of review to use when reviewing a trial court decision on a motion to strike and decided to follow California's approach of applying *de novo* review. Later that year, in November of 2013, Division III relied *solely* upon *Aronson* as support for the idea that California cases were persuasive authority on the issue of whether a city was a legal entity that could bring a motion to strike under Washington's anti-SLAPP law. *Henne v. City of Yakima*, 177 Wn. App. 583, 589 n.2 (2013). In early 2014 Division I joined the bandwagon and relied solely upon *Aronson* and *Wallin* (which relied solely on *Aronson*) for the proposition that California anti-SLAPP case law was persuasive authority when deciding how to interpret the Washington act. *Dillon*, 179 Wn. App. at 69 n. 21. The *Dillon* Court relied on California precedent to support its conclusion that a trial court errs if it fails to stay a pending motion for summary judgment when the defendant filed a motion to strike. *Id.* In *Davis v. Cox*, 325 P.3d 255, 264 n.4 (2014), Division I simply relied on its decision in *Dillon*, issued four months earlier, as support for the proposition that California anti-SLAPP law was persuasive authority. And finally, two weeks after *Davis*, on April 21, 2014, Division I relied upon the *Aronson* and *Phoenix Trading* and *Wallin* as support for the idea that the Washington statute is patterned after the California statute, thus making the analysis contained in California case law relevant to Washington courts. *Spratt*, 324 P.3d 707, 712 n. 11 & n. 12.

⁶ See e.g., *Dillon*, 179 Wn. App. at 87 ("California's anti-SLAPP statute does *not* utilize a clear and convincing evidence standard. Therefore, we do not find California law to be persuasive on this issue.") (Italics added). Similarly, the word "lawful" appears
(Footnote continued next page)

differences between California and Washington law regarding what constitutes a “public forum.”

c. The Definition of a “Public Forum” For Purposes of the California Anti-SLAPP Law Is Not Applicable Because California Has a Different State Constitutional Definition of “Public Forum.”

First, any reference to California law is inapplicable here. Unlike the Washington and United States constitutions, the California state constitution uses a broader and more liberal definition of “public forum.” *See Kuba v. I-A Agriculture Ass'n*, 387 F.3d 850, 856 (9th Cir. 2004). Over thirty years ago, the California Supreme Court rejected the federal constitutional approach to the definition of public fora in *Robbins v. Pruneyard Shopping Center*, 23 Cal. Rptr. 899, 910, 592 P.2d 341 (1979), *affirmed*, 447 U.S. 74 (1980) (“California Constitution protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.”). Relying on the free speech and petitioning clauses of the California State Constitution, the California court held that private property can constitute a public forum and thus private property owners can be forced to permit speech and petitioning activity in and on their property even though they do not wish to. *Accord Fashion Valley Mall v. NLRB*, 42 Cal.4th 850, 857-58, 172 P.3d 742 (2007) (“Nearly 30

in RCW 4.24.525(2)(e) as a modifier in the phrase “other lawful conduct,” but it does *not* appear in the California anti-SLAPP statute (Cal. Civ. Proc. Code § 425.16).

years ago, in [*Pruneyard*], we held . . . that a shopping mall is a public forum in which persons may exercise their right to free speech under the California Constitution.”⁷

d. When Deciding What Qualifies as a Public Forum, Washington Courts Follow the Federal First Amendment Approach. The Washington Supreme Court Explicitly Rejected the California Approach to Public Forum Analysis.

In sharp contrast, the Washington Supreme Court rejected the California approach and refused to hold that the Washington Constitution grants free speech rights that can be exercised against private property owners. *Southcenter Joint Venture v. Nat'l Democratic Policy Committee*, 113 Wn.2d 413, 431-32, 780 P.2d 1282 (1989) (noting the “United States Supreme Court expressly declined to extend the ‘public function’ doctrine to a privately owned shopping mall” and finding no “persuasive reason why this doctrine should apply any differently under our state constitution”). Instead, the Washington Supreme Court has deliberately chosen to adhere to the federal constitutional definition of a public forum. *Bradburn*, 168 Wn.2d at 813; *Mighty Movers*, 152 Wn.2d at 352.

Given Washington State’s explicit *rejection* of California law on the subject of what constitutes a “public forum” it is especially

⁷ “[E]ven though [the expressive activity] may harm the shopping center’s business interest,” the mall owners “must permit peaceful speech activity, including speech that advocates a boycott.” *Id.* at 864.

inappropriate to look to California court decisions construing the phrase “public forum” for purposes of deciding how to interpret that phrase as it is used in RCW 4.24.525. It is extremely unlikely that the Washington Legislature used the term “public forum” with the California definition of that term in mind. “[T]he Legislature is presumed to be familiar with judicial decisions of the Supreme Court construing existing statutes and the state constitution.” *Snohomish County v. Anderson*, 123 Wn.2d 151, 156 (1994). If the Legislature meant to give the phrase “public forum” a meaning that conflicted with the meaning employed by the Court in *Southcenter* it could easily have said so by providing a statutory definition of the phrase. Instead, it failed to define the phrase. Under these circumstances, it would be utterly illogical to assume that the Legislature silently rejected Washington law and embraced California law.

e. Even in California, the State Appellate Courts are Split on The Question of Whether a Privately Owned Newspaper Is a “Public Forum”. The Defendants Failed to Bring This Split of Authority to the Attention of the Superior Court, Cited Only the California Decisions Which Went Their Way, and When Challenged Erroneously Represented That The Majority of California Courts Went Their Way.

In the court below, in support of his contention that in California a newspaper was a “public forum,” defendant Swart initially cited only one case, *Castello*, a federal district court case, which in turn relied solely upon *Annette F. v. Sharon S.*, 119 Cal. App.4th 1146, 1161, 15 Cal.

Rptr.3d 100 (Cal. App. 4 Dist. 2004). In response, Rule pointed out that three other California Courts disagreed with *Annette F.* Those courts *rejected* the contention that a newspaper was a “public forum” for purposes of California’s anti-SLAPP law.⁸ In reply Swart cited one more California case that supported his view (*Nyard, Inc. v. Uusi-Kerttula*, 159 Cal. App.4th 1027, 1038-39 (2008))⁹, and two obviously distinguishable cases involving websites which were “accessible free of charge to any member of the public and persons who chose to do so could post their own opinions there.” CP 327.¹⁰ The media defendants responded by acknowledging the split of California authority and confined themselves to representing that “[t]he majority of California courts” supported their position. CP 349-50. Even this representation seems inaccurate, however,

⁸ See *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal. App.4th 855, 44 Cal.Rptr.2d 46 (Cal. App. 5 Dist. 1995) (newspaper is not a “place open to the public” nor is it a “public forum”); *Weinberg v. Feisel*, 110 Cal. App.4th 1122, 1130, 2 Cal.Rptr.3d 385 (Cal. App. 3 Dist. 2003) (private newsletter is not a public forum: “Means of communication where the access is selective, such as most newspapers, newsletters, and other media outlets, are not public forums”); *Condit v. National Enquirer*, 248 F.Supp.2d 945 (E.D. Cal. 2002), (rejecting the notion that a newspaper is a “public forum” under California anti-SLAPP law). See also *Zhao v. Wong*, 48 Cal. App.4th 1114, 1131, 55 Cal.Rptr.2d 909 (Cal. App. 1 Dist. 1996), disapproved of on other grounds in *Briggs v. Eden Council*, 19 Cal.4th 1106, 1124, 81 Cal.Rptr.2d 471, 969 P.2d 564 (1999).

⁹ *Nygaard* explicitly acknowledges the split of authority in the California state courts: “The Courts of Appeal have *disagreed* whether a newspaper or magazine is a ‘public forum’ within the meaning of [California’s anti-SLAPP statute].” (Emphasis added).

¹⁰ Moreover, one of those website cases, *Wilbanks v. Wolk*, 121 Cal.App.4th 883, 897, 17 Cal. Rptr.3d 497 (Cal. App. 1 Dist. 2004) states in dicta that “we agree that [defendant’s] website – and *most newspapers – are not public forums in and of themselves.*” (Emphasis added).

since the First, Third, and Fifth Divisions of the California Court of Appeals have held newspapers generally are not public fora, and only the Fourth Division has sided with the defendants.

In sum, most California courts take the position that a newspaper usually is *not* a public forum.¹¹ Generally, they limit the circumstances under which it can be a public forum to cases where the newspaper is only one source of information on the issue in question and other sources are easily accessible to members of the public who wish to express another view on the same issue. *Wilbanks*, 121 Cal.App.4th at 897. Thus, even under California's radically different definition of a public forum, and even in those judicial districts which take the most expansive view of California's definition, the *Seattle Weekly* still would *not* be a public forum because there are *not* several other newspapers that are easily

¹¹ The complexity of California "public forum" law highlights the problem with a Washington State court relying on a single federal district court decision, in a diversity jurisdiction case, for the proposition that a newspaper is a public forum for anti-SLAPP purposes. Federal district court judges are generally familiar with the local law of the State in which they sit. Thus, it is appropriate for federal circuit courts to defer to their judgment on questions of local law. *Washington v. Seattle Sch. Dist. 1*, 458 U.S. 457, 480 (1982); *Kovacs v. Sun Valley Co., Inc.*, 499 F.2d 1105, 1106 (9th Cir. 1974). But federal district court judges are *not* generally familiar with the law of the other 49 states. Thus, it is somewhat understandable that the district court judge who wrote the unpublished decision in *Castello* appears *not* to have known that California state constitutional law on what constitutes a public forum is in stark conflict with Washington State constitutional law on the same issue, and she clearly was unaware of the split of authority amongst the California Courts of Appeal when she relied on just one of those California state court opinions (*Annette F.*).

accessible by members of the public who wish to publish their differing views on the subject of Ann Rule's journalism.

In sum, whatever the law may currently be in California, and whatever it may come to be if the California Supreme Court resolves the split of authority in that State, in this State under Washington law, a newspaper is not a public forum. Consequently, RCW 4.24.525(2)(d) is simply inapplicable to this case.

2. Subsection (2)(e) Also Does Not Apply to this Case.

- a. Making a written statement cannot be construed as "other" conduct for purposes of subsection (2)(e). If (2)(e) were construed in that fashion, it would cover "conduct" which is already covered by the preceding four subsections of the statute. Such a construction would render the preceding subsections superfluous and would fail to give any meaning to the word "other."**

Subsections (2)(a) through (2)(d) all begin: "Any oral statement made, or written statement or other document submitted..." By contrast, (2)(e) covers "any other lawful conduct," which is by definition not oral statements, written statements, or submitted documents. This is not a catch-all; the statute must be read as written. Thus, (2)(e) does not cover "any lawful conduct," but rather covers "any other lawful conduct." This is not merely an academic distinction.

It is settled that courts must attempt to give meaning to every word in a statute. *State v. Rogenkamp*, 153 Wn.2d 614, 624(2005). *Accord In*

re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767 (2000); *Greenwood v. DMV*, 13 Wn. App. 624, 628 (1975) (“The drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute....”). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. J.P.*, 149 Wn.2d 444, 450 (2003). Thus the word “other” must be given effect.

The modifying word “other” in subsection (2)(e) separates the category of conduct that follows it from all the types of conduct which came before. Courts have recognized that this is the function of the word “other.” For example, in *State v. Plastino*, 87 Wash. 374, 121 P. 851 (1912) the Court has occasion to consider the meaning of the word “other” as it was used in a statute pertaining to delinquent children. The statute referred to “the parent or parents or persons having custody of such child, ***or any other person***, responsible for, or by any act encouraging or contributing to the delinquency or neglect of such child” Although the Superior Court interpreted the words “any other person” as limited by the preceding language to parents or persons in loco parentis, the Supreme court disagreed and held that the word “other” compelled the conclusion that the second class of persons was entirely separate from the first class of persons that included parents:

[W]here the particular words exhaust the class, the general words must be construed as embracing something outside of that class. [Citations]. While the rule of ejusdem generis is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. ***Therefore where the particular words exhaust the class, the general words must be construed as embracing something outside that class. . . In such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless,*** and thereby sacrifice the general to preserve the particular words. . . . The words “parent or parents or persons having custody of such child” exhaust the class. They embrace all persons in whose charge, keeping or custody the child may be. No other words are needed to embrace all of such persons. They refer to persons, custodians, and all who stand in loco parentis. The class being exhausted by the special words, ***the general words “or any other person” must be held to have been intended to refer to some other class of persons. And we must go outside of the class included in the special words to find this second class of persons enumerated.*** This second class embraces persons, neither parents nor custodians . . . a clear and separate classification from the first class

Plastino, 67 Wash. At 376-77 (emphasis added).

This construction of the word “other” has full application to this case. If, as the Defendants maintain, the words “other conduct” are construed to refer to the making of a written statement, then subsections (2)(a) through (2)(d) become completely superfluous and they serve no purpose whatsoever. For if (2)(e) was construed as applying to written statements, then it would completely consume and replace (2)(a) through (2)(d) ***because there would be no scenario under which (2)(a) – (2)(d) would apply and 2(e) would not apply.*** If “lawful conduct” refers to the making of a written statement then subsections (2)(a) through (2)(d) are

completely superfluous. For this reason, any interpretation allowing (2)(e) to apply to oral or written statements would cause the word “other” to be deleted from the statute. Therefore, *by* enacting subsection (2)(e) the Legislature “must be held to have been intended to refer to some other class of [conduct]. And we must go outside of the class included in the special words [subsections (2)(a) through (2)(d)] to find this second class of [conduct]” which is protected by the right of freedom of speech. *Plastino*, 67 Wash. at 376.

This Court has already held that subsection (2)(e) must be construed so as not to render any of the preceding subsections superfluous. In *Dillon* this Court held that (2)(e) could *not* be read as encompassing the act of recording telephone conversation in order to submit evidence of the recorded conversation in a judicial proceeding because such a construction would render subsections (2)(a) and (2)(b) superfluous:

If “[a]ny other lawful conduct . . . in furtherance of the exercise of the constitutional right of petition” encompassed all actions that occurred in or in connection with a judicial proceeding, ***the portions of RCW 4.24.525(2)(a) and (b) would be rendered superfluous. We should not read a statute in such a manner. Accordingly, we do not read RCW 4.24.525(e) to encompass SDR’s actions*** of recording telephone conversations, even though the transcripts (or portions thereof) of those conversations were later filed in court in connection with a judicial proceeding.

Dillon, 179 Wn. App. at 80 (emphasis added). This portion of *Dillon* is dispositive of the same statutory construction issue in this case. Here, as

in *Dillon*, RCW 4.24.525(e) simply does not apply.

- b. Subsection (2)(e) encompasses conduct “other” than speech and petitioning, which is “in furtherance of” the rights of freedom of speech and petitioning. Thus, (2)(e) encompasses nonverbal expressive conduct which is neither oral or written, such as symbolic speech and picketing.**

The term “other lawful conduct” set forth in subsection (2)(e) refers to “symbolic speech,” or to other forms of nonverbal expression, such as the acts of wearing black armbands, burning draft cards, sleeping in public parks, or picketing.¹² Construing (2)(e) to cover such nonverbal conduct renders the statute internally consistent by following the ordinary canons of statutory construction set forth above. Moreover, this Court has already properly applied and interpreted RCW 4.24.525(2)(e) in this manner in two cases.

In *Davis* this Court considered the conduct of boycotting Israeli-made products. A boycott involves expressive conduct (communicating disapproval by refusing to purchase something) that is protected by the First Amendment. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In *Davis* a Food Co-op decided to refuse to buy products made in Israel in order to express disapproval of Israel’s actions. Two individual Co-op members brought an action to declare that the directors

¹² *See, e.g., Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *United States v. O’Brien*, 391 U.S. 367 (1968); *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 294-95 (1997); *Police Department v. Mosley*, 408 U.S. 92, 99 (1972).

of the Co-op had breached their fiduciary duties and had acted ultra vires by approving the boycott. This Court properly recognized that their shareholder derivative suit was targeted at an act of public participation because the suit sought a court order directing the Co-op “to cease activity protected by the First Amendment.” *Davis*, 325 P.3d at 261. This court held that “because the nonviolent elements of boycotts are protected by the First Amendment . . . the [plaintiffs’] desired remedy reveals that the principal thrust of their suit is to make the Directors cease engaging in activity protected by the First Amendment.” *Id.* at 264-65. This Court agreed with the Co-op’s Directors’ assertion that their boycott was covered by subsection (2)(e) of the anti-SLAPP statute:

[T]he boycott is “an action involving public participation” because it is “*lawful* conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of *public concern*.”

Davis, 325 P.3d at 265, *citing RCW 4.24.525(2)(e)* (italics in original).

In the present case, Rule’s defamation claim was based upon the publication of a written statement – an article which she asserts defamed her. It was not based upon “other” types of expressive conduct. Consequently, RCW 4.24.525(2)(e) does not apply to Rule’s claim and this Court should hold that her suit does not target an act of public participation or petition covered by subsection (2)(e).

- c. **To construe the making of a written statement as conduct “in furtherance of the exercise of freedom of speech” would render subsection (2)(e)’s “in furtherance” requirement tautological. It makes no sense to say that speech is “conduct” that is “in furtherance of” the right of speech.**

Defendants contend that the publication of a written statement on a topic of public concern is an act of “public participation” which fits within the subsection (2)(e) of RCW 4.24.525. But upon reflection it is evident that such a construction of this statute is at odds with the text of the statute. Certainly the publication of a written statement is an act that falls within the scope of “the exercise of the constitutional right of free speech.” But this subsection only covers “*conduct in furtherance of the exercise of the constitutional right of free speech.*” RCW 4.24.525 (italics added). If the publication of a written statement were to be considered as such “conduct” then this subsection would cover “the exercise of the constitutional right of free speech in furtherance of the exercise of the constitutional right of free speech.” Such a construction of the statute is a meaningless tautology. It makes no sense to speak of speech in furtherance of the right of free speech. In order to be something that is “in furtherance of” speech that something must be something *other* than speech. The phrase “in furtherance of” makes sense if the phrase “other lawful conduct” is construed as encompassing nonverbal expressive acts such as burning draft cards, picketing and wearing black armbands. But

the phrase “in furtherance of” makes no sense at all if the subject “other lawful conduct” is construed as encompassing verbal expression.

d. Unlike the California anti-SLAPP statute, RCW 4.24.525(2)(e) applies only to “lawful” conduct. Subsection (2)(e) is not applicable to this case because engaging in defamation is not a lawful exercise of the right of free speech.

Subsection (2)(e) applies only to “other *lawful* conduct” in furtherance of “free speech.” Significantly, the word “lawful” does **not** appear in the California anti-SLAPP statute (Cal. Civ. Proc. Code § 425.16). Meaning must be given to “every word in a statute.” *Greenwood*, 13 Wn. App. at 628. Therefore, since meaning must be given to the word “lawful” subsection (2)(e) simply has no application to **un**lawful conduct.

It is well settled that defamatory speech is *not* “lawful” and it is *not* protected as free speech. *Rickert v. Pub. Disclosure Comm’n*, 161 Wn.2d 843, 848 (2007), quoting *Rickert v. PDC*, 129 Wn. App. 450, 461, 119 P.3d 379 (2005) (“defamatory statements are not constitutionally protected speech.”).¹³ RCW 4.24.525’s burden-shifting requires the Defendants to prove their conduct was “lawful” before the burden shifts to Ann Rule – this has not been done.

¹³ *Accord Duc Tan v. Le*, 177 Wn.2d 649, 666, 300 P.3d 356 (2013) (“There is no First Amendment protection for the type of false, damaging statements uttered here; indeed, the purpose of the law of defamation is to punish such statements.”).

This Court addressed the issue of whether expressive conduct was “lawful” for purposes of RCW 4.24.525(2)(e) in *Davis*. There the plaintiffs contended that directors of a nonprofit food co-op acted unlawfully when they adopted a boycott of Israeli goods. This Court considered whether the boycott was lawful or not and held, “[W]e conclude that the Directors’ adoption of the boycott was ‘lawful’ under the first step of the anti-SLAPP statute.” *Davis*, 325 P.3d at 265. Since the conduct *was* lawful, it *was* covered by subsection (2)(e).

In the present case, if the Defendants’ article was defamatory, then its publication was *not* lawful, and if it was not lawful then subsection (2)(e) does not apply. For purposes of the anti-SLAPP statute and a motion to strike, the burden is on the Defendants to prove by a preponderance of the evidence that the Plaintiff’s claim targets an act of public participation or petition. *U.S. Mission*, 172 Wn. App. at 782-83. Therefore, the burden is on the Defendants (at this stage of the proceedings, not at trial) to prove by a preponderance that the article was not defamatory. In other words, Defendants had the burden of proving that the article was *true*. In this case, the Defendants did not even attempt to prove that the article was true. Most significantly, the defendants never even attempted to prove that the article was written by an unbiased journalist, because it is undisputed that Swart misrepresented himself in

that fashion. He concealed the fact that he was engaged to marry the person that he accused Ann Rule of misrepresenting in her book.

In sum, the Defendants' conduct was not "other" conduct because it was not something "other" than the making of a written statement. Similarly, it was not conduct "in furtherance of the right of free speech" because it was simply speech, and it makes no sense to say that it was speech in furtherance of the right of speech. Finally, publication of the article was not "lawful" conduct because it was defamatory. For all of these reasons, subsection (2)(e) is inapplicable to this case.

3. RCW 4.24.525 Violates the Right to a Jury Trial

No appellate court has yet decided whether RCW 4.24.525 violates the state constitutional right to trial by jury.¹⁴ Although the issue was *not* raised by the appellant in *Dillon*, this Court recognized that a potential problem existed, and in dicta suggested that the right-to-jury-trial problem could be avoided by applying an "analysis [that] is akin to the trial court's role in deciding a motion for summary judgment." 179 Wn. App. at 88.

The trial court may not find facts or make determinations of credibility. [Citations]. Instead, "the court shall consider pleadings and supporting affidavits stating the facts" and may permit additional discovery upon a motion for good cause. RCW 4.24.525(4)(c). . . [W]hen considering a motion to strike under the anti-SLAPP statute, ***the court should apply a summary judgment***

¹⁴ The issue was raised by the appellant in *U.S. Mission* but the Court found it unnecessary to decide the issue. 172 Wn. App. at 783.

like analysis to determine whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits.

Such an approach is necessary to preserve the plaintiff's right to a trial by jury. Indeed, one purpose of the anti-SLAPP statute is to “strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern. Laws of 2010, ch. 118, Sec. 1(2)(a). ***The right to trial by jury is inviolate under the state constitution. WASH. CONST. art. I, Sec. 21.*** “The right to have factual questions decided by the jury is crucial to the right to trial by jury.” [Citations]. The summary judgment standard does not offend the constitutional right to trial by jury because “it was not the purpose of [article 1, section 21] to render the intervention of a jury mandatory . . . where no issue of fact was left for submission to, or determination by, the jury.” [Citations].

Accordingly, the anti-SLAPP statute does not violate the right to trial by jury where the court utilizes a summary judgment-like standard in deciding the motion to strike. . . .

Dillon, 179 Wn. App. at 88-89(emphasis added).

While this attempt to “solve” the right-to-jury-trial problem is a valiant effort to save the statute, for several reasons the effort fails and the statute must be held unconstitutional on its face.

- a. It is impossible to save the statute by construing it in the manner suggested in the *Dillon* dicta. The statute's explicit use of the “clear and convincing evidence” standard is incompatible with a standard “akin” to that used to decide a summary judgment motion.**

RCW 4.24.525(4)(b) provides that if the moving party shows that the claim against it is based upon an act of public participation, then “***the burden shifts to the responding party 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.” (Emphasis added). The statute makes no mention of summary judgment motions and no mention of CR 56.

The standard for granting a summary judgment motion, however, is governed by an entirely different standard. A summary judgment motion is to be granted if the moving party “show[s] there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c). Thus a party opposing a summary judgment need only show that “there *is* a genuine issue of fact” and that the moving party is *not* entitled to judgment as a matter of law.

A party opposing a motion for summary judgment need *not* “establish” a “probability” that he will prevail at trial. *To defeat a motion for summary judgment she need not “establish” any factual proposition by any standard.* A party opposing summary judgment need only show that reasonable minds might differ. *Smith v. Safeco Insurance Co.*, 150 Wn.2d 478, 486 (2003). If that is shown, then summary judgment is not appropriate. *Id.* In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably to the nonmoving party and, when so considered, if reasonable men might reach different conclusions the

motion should be denied.” *Balise v. Underwood*, 62 Wn.2d 195, 199 (1963). *Accord In re Estate of Black*, 153 Wn.2d 152, 161 (2004).¹⁵

Thus, the standard for surviving a summary judgment motion is *much* lower than the “clear and convincing evidence” standard that must be met to survive a motion to strike.¹⁶ Despite these differences, in *Dillon* this Court said that a standard “akin” to the summary judgment standard also applied to motions to strike. The Court interpreted RCW 4.24.525(4)(b) in this manner because it recognized that if it did not read a “summary judgment-like” standard into the statute, the statute would violate the right to jury trial. *Dillon*, 179 Wn. App. at 89.

But an appellate court cannot simply rewrite a statute in order to save it from unconstitutionality when the terms of the statute are clearly not susceptible to such a construction:

Courts do not amend statutes by judicial construction, nor rewrite statutes ‘to avoid difficulties in construing and applying them.’” *Millay v. Cam*, 135 Wn.2d 193, 203, 955 P.2d 791 (1988) (citations omitted). “[T]here is a difference between adopting a **saving construction and rewriting legislation altogether.**”

¹⁵ “Only where . . . reasonable people could reach ‘but one conclusion’ from all of the evidence is summary judgment appropriate.”

¹⁶ It is for this reason that the statute also violates the separation of powers doctrine. Since RCW 4.24.525(4) conflicts with CR 56, the statute is an infringement on the judicial power to control judicial procedure. See *Intercon Solutions, Inc. v. Basel Action Network*, 969 F.Supp.2d 1026, 1051-52 (N.D. Ill. 2013) (Washington’s anti-SLAPP statute RCW 4.24.525, many not be applied in a diversity action in federal court, because it conflicts with Rules 12 and 56 of the Federal Rules of Civil procedure. Cf. *Verizon Delaware, Inc. v. Covad Communications, Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (California’s anti-SLAPP statute conflicts with Fed.R.Civ.P. 56);

Laurence H. Tribe, *American Constitutional Law* § 12–30, at 1032 (2d ed.1988). We show greater respect for the legislature by preserving the legislature's fundamental role to rewrite the statute rather than undertaking that legislative task ourselves. ***Therefore we hold the statute unconstitutional in its entirety.***

In re Parentage of C.A.M.A., 154 Wn.2d 52, 69 (2005) (emphasis added).

In the case of RCW 4.24.525(4), the statute simply cannot be judicially rewritten in the fashion that *Dillon* suggests. The words “establish,” “clear and convincing evidence,” and a “probability of prevailing” cannot be written out of the statute with a judicial pen. Here, as in *Parentage of C.A.M.A.*, the court must “hold the statute unconstitutional in its entirety” because it violates the Plaintiff’s state constitutional right to a jury trial.

b. The California anti-SLAPP statute does *not* violate the right to jury trial precisely because it does *not* contain language using the “clear and convincing” evidence standard. California avoided the infringement of the right to jury trial by requiring only a prima facie showing that a jury could return a verdict in his favor.

Once again, contrary to fallacious assertion that Washington’s anti-SLAPP statute is modeled after California’s, in *Dillon* this Court acknowledged that “California’s anti-SLAPP statute does not utilize a clear and convincing standard.” *Dillon*, 179 Wn. App. at 87. In fact, California courts, recognizing the problem of interfering with the right to jury trial, have held that to defeat a motion to strike a plaintiff need only establish a *prima facie* case in support of his claim.

The California Supreme Court described this prima facie standard for surviving a motion to strike under California's anti-SLAPP law in *Wilson v. Parker, Covert and Chidester*, 28 Cal.4th 811, 821, 123 Cal. Rptr.2d 19 (2002):

Put another way, the plaintiff must demonstrate that the complainant is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence by the plaintiff is credited.

A prima facie showing requires considerably *less* than a showing by a preponderance of the evidence. *Cf. Johnson v. California*, 545 U.S. 162, 166 (2005) (all that is required to make a prima facie showing are facts sufficient to support an inference). Since a prima facie showing is less than a preponderance of the evidence, *a fortiori* it is far less than a showing made by clear and convincing evidence. Thus, it is far easier for a California plaintiff to survive a motion to strike under California's anti-SLAPP statute than it is for a Washington plaintiff to survive such a motion under Washington's statute. A California plaintiff need only show that he has a chance of succeeding. *Wilson*, 28 Cal.4th at 821; *Rowe v. Superior Court* 15 Cal.App.4th 1711, 1723 19 Cal.Rptr.2d 625 (1993). For this exact reason, a motion to strike under the California anti-SLAPP statute is "like a demurrer or motion for summary judgment in reverse." *College Hospital, Inc. v. Superior Court*, 8 Cal.4th 704, 718-19, 34 Cal.Rptr.2d 898 (1994). So long as the plaintiff shows that he has

sufficient evidence from which a jury *could* find for him, the motion to strike must be denied. This construction of California’s anti-SLAPP statute was found to be constitutionally necessary to avoid the problem of creating “the potential deprivation of the right to jury trial that might result were [the California anti-SLAPP] statutes construed to require the plaintiff to *prove* the specified claim to the trial court.” *Rosenthal v. Great Western Fin. Securities Corp.*, 14 Cal.4th 394, 412, 58 Cal. Rptr.2d 875 (1996). But the language of the Washington anti-SLAPP statute does require him to prove his claim – it requires him to “establish” by clear and convincing evidence that he will most likely prevail. And if a Washington plaintiff fails to establish this, the motion to strike must be granted.

In sum, Washington law is not modeled after California law, it is far more draconian, it is not susceptible to a California-like “saving” construction, and thus it *does* violate the Plaintiff’s state constitutional right to a jury trial.

c. This Court’s Opinion in *Dillon* Is Internally Contradictory. *Dillon* Simultaneously Requires and Forbids a Summary Judgment Type of Analysis at the Same Time.

Finally, Appellant Rule notes that the *Dillon* opinion is internally contradictory. On the one hand, the opinion purports to save the constitutionality of the anti-SLAPP statute by suggesting that a summary judgment-like standard applies when the trial court judge takes the second

step and determines whether the plaintiff has established, by clear and convincing evidence that he will likely prevail at trial. On the other hand, earlier in the opinion this Court says that “the trial court erred by failing to stay [a pending] motion for summary judgment pending determination of the merits of the anti-SLAPP motion.” *Dillon*, 179 Wn. App. at 69. But the trial court cannot be *both* required to apply a summary judgment standard of judicial review to a motion to strike, and also at the same time be prohibited from deciding a summary judgment motion until it has first decided a motion to strike. If the deciding the motion to strike encompasses a summary judgment inquiry into the plaintiff’s ability to establish his claim, then it is not possible to defer deciding a summary judgment motion until after the motion to strike is decided. And yet the language of the statute unambiguously requires that the summary judgment decision be deferred until after the motion to strike is decided. Once again, this shows how the statute is impervious to a “saving” construction. The *Dillon* Court’s suggestion, in dicta, that RCW 4.24.525(4)(b) be rewritten so as to employ a “summary judgment-like” standard is simply inconsistent with the express language of the statute.

For these reasons, Appellant Rule submits that RCW 4.24.525(4)(b) is unconstitutional on its face, and that therefore the decision below must be reversed.

4. As Applied by the Superior Court in this Case RCW 4.24.525 Violated Appellant Rule's Right to a Jury Trial Because the Superior Court Did Not Apply an Analysis "Akin" to a Summary Judgment Motion Analysis. Nor Did It Find That Rule Had Failed to Demonstrate the Existence of a Genuine Issue of Fact. This Court's decision in *Dillon* Was Not Cited to Her in the Briefing – Which Closed Before *Dillon* Was Decided.

Even if this Court determines that RCW 4.24.525(4)(b) is not unconstitutional on its face, the judgment below must still be reversed because the statute was surely applied in an unconstitutional manner. The Superior Court judge cannot be said to have applied a judicial standard that is "akin" to the summary judgment standard, and thus, even if the statute can be "saved" by judicial construction, that saving judicial construction was not applied in this case.

It is important to note that the Superior Court cannot be blamed for failing to apply the saving construction suggested by this Court in *Dillon*. The *Dillon* opinion was not called to her attention and it is unlikely that she knew about it.

The *Dillon* opinion was issued on January 21, 2014. All of the briefing in the court below was filed before that date. Briefing closed when Swart and the media defendants filed their reply briefs on January 14, 2014. CP 322, 344. Thus, the *Dillon* opinion was not issued until a week *after* the last briefs were filed. The opinion was not published in the green sheets until May 6, 2014.

The Superior Court heard oral argument on February 24, 2014, and issued its rulings on February 24 and 25. CP 275-76, 377-78. Thus, it is conceivable that the Superior Court could have read the *Dillon* opinion if someone had called it to her attention. But while the media defendants did file a statement of supplemental authority on February 14th calling the Court's attention to the decision in *U.S. Mission v. KIRO TV, Inc., supra*, (CP 363), there is no indication that anyone brought the *Dillon* decision to the Court's attention.

In sum, there is nothing to indicate that the Superior Court applied a "summary judgment-like" standard to the Defendants' motions to strike. When considering the facts set forth in the parties' affidavits she did not make "all reasonable inferences therefrom most favorably to the nonmoving party" and did not consider whether "reasonable men might reach different conclusions" from the evidence submitted. *Balise*, 62 Wn.2d at 199. Nor is there anything to indicate that the Court granted the motions to strike after determining that "reasonable people could reach 'but one conclusion' from all of the evidence." *Black*, 153 Wn.2d at 161.

Since the Superior Court did not apply the *Dillon* "summary judgment-like" standard, the orders granting the motions to strike were not made after applying the correct legal standard. Therefore they must be set aside, because *as applied to this case*, RCW 4.24.525(4)(b) deprived Rule

of her constitutional right to a jury trial.

5. Assuming, Arguendo, (a) That the Anti-SLAPP Statute is Constitutional In All Respects, and (b) That Swart’s Article Was “An Act of Public Participation or Petition,” Nevertheless It was Error to Grant the Motions to Strike Because Appellant Rule Met Her Burden of Proving That There was a Probability That She would Prevail on Her Defamation Claim.

Even if RCW 4.24.525 is fully constitutional, and even if the statute is applicable to Rule’s defamation claim against the respondents, the Superior Court *still* should have denied the motions to strike because Rule met her burden of establishing “a probability” that she would prevail at trial. Logically, the evidence required to establish “a probability” of prevailing is *less* than the evidence required to actually prevail. *Cf. Young v. Davis*, 259 Ore. App. 497, 314 P.3d 350 (2013).¹⁷ No one suggests that Rule is required to actually prove her case before the Defendants have even filed an answer, and indeed, the statute itself unequivocally states that it “does *not* affect the burden of proof or standard of proof that is applied in the underlying proceeding.” RCW 4.24.525(4)(d)(ii) (italics added). Even if California anti-SLAPP law was persuasive authority when construing the Washington statute, California case law clearly holds that the plaintiff’s burden is extremely low:

¹⁷ Applying Oregon’s anti-SLAPP statute, the court recognized that “it would make little sense to require a plaintiff facing a special motion to strike to carry a heavier burden to get to trial than he or she would face *at trial*) (italics in original).

The plaintiff's burden of establishing a probability of prevailing is not high: We do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law. Only a cause of action that lacks "even minimal merit" constitutes a SLAPP.

Greene v. Bank of America, 216 Cal.App.4th 454, 457-58 (2013).

Moreover, under this Court's opinion in *Davis*, a Superior Court considering a motion to strike "must credit all the evidence presented by the plaintiffs." *Davis*, 325 P.3d at 273. Under *Dillon*, the trial court "must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff." *Dillon*, 179 Wn. App. at 90. When this low standard is applied to this case, it is evident that Rule carried her burden and the motions to strike should have been denied.

A defamation claim requires proof of four elements: (a) a false statement, (2) publication, (3) fault, and (4) damages. The Defendants asserted that Rule could not prove the element of falsity. A writing can be false, either because it expressly states a false fact, or because it falsely implies the existence of a fact. Defamation by implication occurs when a defendant "creates a defamatory implication by omitting facts." *Mohr v. Grant*, 153 Wn.2d 812, 822 (2005). *Accord Corey v. Pierce County*, 154 Wn. App. 752, 764 (2010) (affirming jury verdict of defamation by implication). "Falsity is established either when a statement is false or

when it leaves a false impression.” *Mohr*, 153 Wn.2d at 825.

This Court needs to look no further than Swart’s failure to disclose his engagement to Liysa Northon. Seeking to portray himself as an objective, independent journalist with no personal ties to Northon, Swart stated that Northon “granted” him – a journalist – an exclusive interview:

Last December my curiosity got the better of me, and I mailed a letter to Liysa. A few weeks later she replied and granted me the first interview she’d given to any journalist since being locked up at Coffey Creek Correctional Facility almost exactly 10 years ago. But after several months spent reviewing more than a thousand pages of court documents and interviewing Liysa and two dozen others with ties to the case, I’ve arrived at the conclusion that the title of Ann Rule’s book, *Heart Full of Lies*, better describes the author than the subject.

CP 49.

By concealing the fact that he was engaged to Northon, Swart left the reader with the false impression that Swart’s conclusion – that Ann Rule was the real liar – was based on a purely professional journalistic evaluation of Northon’s case. Respondent Caleb Hannan, the Editor of the *Seattle Weekly*, quickly *admitted* that Swart’s engagement to Northon was something every reader needed to know:

All along, he swore to . . . his true reason for writing Liysa’s story: he was just a curious journalist who’d found a great yarn. Had we known, as we now know, that Swart and Liysa were engaged that disclosure would have been made explicit in the story. This morning I contacted Swart by phone to ask him why he didn’t tell me about the enormous conflict of interest. This is how he explained his decision to withhold that information from us: “It’s a freelance piece first of all. I’m selling you a product . . .” *It*

should go without saying that this is not a satisfactory response. If you're writing about your fiancée, or anyone with whom you have a relationship, you tell the reader.

CP 240 (emphasis added).¹⁸

The omission of this critical fact constitutes defamation by implication. And the statement that he was “just curious” and that he was “granted” an interview constitutes express defamation. A jury could clearly find from these uncontested facts alone that the Respondents defamed Ann Rule, and therefore Rule met her burden of establishing “a probability” that she might prevail.

An Oregon case involving a claim of defamation by implication is instructive. In *Neumann v. Liles*, 261 Or. App. 567, 323 P.3d 521 (2014), a trial court granted a motion to strike and dismissed the plaintiff’s defamation claim. The plaintiffs, Carol Neumann and her husband, operated a wedding venue company. After attending one of their weddings, defendant Liles had made disparaging statements about them on a website. The trial court granted a motion to strike the defamation claim ruling that Neumann failed to show a probability of prevailing on it. But the Court of Appeals disagreed and held that she had met this burden:

¹⁸ Moreover, respondent Swart admits that “[i]n the beginning” “no one would publish” his article when he told them that he “had fallen in love with Liysa [Northon,” so he made the decision to conceal that fact. CP 479. He admits that he “systematically shopped a product” until he found a newspaper that he could dupe into publishing it by withholding the fact of his engagement. CP 479.

Defendant's statements reasonably could be understood to state facts or *imply the existence of undisclosed defamatory facts*. By stating that Neumann was rude to multiple guests, defendant, at a minimum, *implied* that Neumann engaged in conduct that breached the rules of decorum expected at a wedding. By stating that, in his opinion, Neumann will find a way to keep a wedding party's deposit and then charge more, defendant *implied* that that is, in fact, what happened at the wedding he attended.

Neumann, 323 P.3d at 528-29 (emphasis added). Thus the appellate court "conclude[d] that "the trial court erred when it struck Neumann's claim," pursuant to Oregon's anti-SLAPP statute.

This Court should reach the same conclusion in this case. The Superior Court erred when it ruled that Rule had "not established falsity" under a defamation by implication theory. CP 378. Rule *did* establish a probability that a jury could return a verdict in her favor on her claim of defamation. Swart omitted the fact of his engagement to Northon and portrayed himself as a "curious" journalist who had been granted an exclusive interview. A jury could easily find that this was defamation by implication. As in *Neumann*, the decision to grant the motions to strike should be reversed, and the defamation claim should be reinstated for trial.

6. **Because It Imposes Sanctions Upon a Plaintiff for bringing a Nonfrivolous Suit, RCW 4.24.525 Violates the First Amendment Right to Petition.**
 - a. **The Right to Petition Includes the Right to Bring a Nonfrivolous Lawsuit.**

The First Amendment right to petition is one of "the most precious of

the liberties safeguarded by the Bill of Rights,” *BE & K Constr. Company v. NLRB*, 536 U.S. 516, 524 (2002); *United Mine Workers v. Illinois Bar Ass’n*, 389 U.S. 217, 222 (1967). 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. v. NLRB*, 461 U.S. 731, 741 (1983) (italics added).¹⁹

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 Court held that punishing a person because he had exercised his right to bring a lawsuit violated the First Amendment.²⁰ Citing to *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 513 (1972), the *Addleman* Court noted: “The right of access to the courts is

¹⁹ *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) (“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”).

²⁰ There the Court ruled that the Indeterminate Sentence 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.

rooted in the petition clause of the First Amendment to the United States Constitution.” *Addleman* recognizes that “courts are wary of allowing state action that chills First Amendment activities.” *Addleman*, at 756.

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

RCW 4.24.525(6)(a) requires a court to do exactly what *Addleman* holds is constitutionally forbidden. It dictates that the Superior Court “shall” award \$10,000 to a party who prevails on a motion to strike.

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.

The First Amendment right to petition does *not* include the right to bring a frivolous lawsuit. *Bill Johnson Restaurants*, 461 U.S. at 743. But as this court has already recognized, the anti-SLAPP motion to strike statute is not limited to frivolous lawsuits. On the contrary, the mandatory \$10,000 penalty is also imposed upon those who file *nonfrivolous* lawsuits but fail to survive a motion to strike:

However, the anti-SLAPP statute does not sanction and frustrate only claims that are frivolous. Rather, the statute mandates dismissal of all claims based on protected activity where the plaintiff cannot prove by clear and convincing evidence a probability of prevailing on the merits. RCW 4.24525(4)(b). “A frivolous action is one that cannot be supported by any rational argument on the law or facts.” [Citations]. “But the fact that the complaint ultimately does not prevail is not dispositive” of frivolity. [Citations]. A claim may be dismissed on summary judgment without being frivolous. [Citations]. As the second step of the anti-SLAPP analysis is akin to summary judgment, [citation], ***a claim may thus also be dismissed on an anti-SLAPP motion without being frivolous.*** Indeed, analyzing whether the burden to prove the claim by “clear and convincing evidence” has been met is ***vastly different from an inquiry into frivolity.*** Accordingly, it is clear that ***the anti-SLAPP statute sweeps into its reach constitutionally protected first amendment activity.***

Akrie v. Grant, 178 Wn. App. 506, 513 n. 8 (2013)(emphasis added), review granted, 180 Wn.2d 1008 (2014) .

Since RCW 4.24.525(6)(a) requires punishing a losing plaintiff – even if his claim was *not* frivolous – the statute punishes protected First Amendment activity. Furthermore, since this Court noted in *Akrie*, the statute sweeps into its reach a substantial amount of constitutionally protected first amendment activity, the statute is also unconstitutional because it is overbroad. *See, e.g., State v. Immelt*, 173 Wn.2d 1, 8-9 (2011) (car horn honking statute held unconstitutionally overbroad).

In this case, the Superior Court held that Appellant Rule failed to establish by clear and convincing evidence the existence of a probability that she would prevail on her defamation claim. Even assuming,

arguendo, that this ruling was correct, the Superior Court did not rule that Ann Rule's defamation claim was frivolous. Without such a finding of frivolousness, the imposition (four times) of the mandatory \$10,000 statutory penalty violated Rule's First Amendment right to petition, by punishing her for exercising her right to file a nonfrivolous lawsuit.

d. Because RCFW 4.24.525(6) imposes sanctions without requiring a finding of frivolousness, it conflicts with CR 11, and thereby violates the separation of powers doctrine.

Strangely, although RCW 4.24.525(6)(b) does require a finding of frivolousness in order to penalize a defendant who makes a frivolous motion to strike, it does not require a finding of frivolousness in order to impose a penalty upon a plaintiff. This differential treatment conflicts with CR 11, which draws no distinctions between moving and nonmoving parties. Instead, CR 11 always requires a finding of frivolousness before sanctions can be imposed.

Due to this conflict between CR 11 and RCW 4.24.525(6), the statute violates the separation of powers doctrine. *See Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974 (2009) (statutes which conflict with court rules governing the procedures for filing lawsuits violate separation of powers).

7. **RCW 4.24.525 Violates the Right of Access to the Courts.**
8. **RCW 4.24.525 Violates the Separation of Powers Doctrine. A Petition for Review Is Pending in *Davis*. Appellant Rule Urges The Panel in this Case Not to Follow *Davis*.**

Relying on *Putman*, the *Davis* plaintiffs unsuccessfully argued that RCW 4.24.525 violates the state constitutional right of access to the courts and the constitutional doctrine of separation of powers. The *Davis* plaintiffs' petition for review is currently pending before the Washington Supreme Court. The *Davis* plaintiffs have continued to press the argument that RCW 4.24.525's limitations on discovery, and its heightened burden of proof, violate both the separation of powers doctrine and the right of access to courts guaranteed by article 1, section 10. Rather than repeat the arguments made by the *Davis* petitioners at length, Appellant Rule hereby endorses and incorporates the arguments made on pages 7-10 of the *Davis* petition for review,²¹ and urges the panel deciding this case not to follow the holding of *Davis* on this point.

9. **It was Error to Impose a Separate \$10,000 Penalty For Each Defendant. Such a Construction of RCW 4.24.525 Violates the Eighth Amendment, the Due Process Clause, and the State and Federal Constitutional Rights to Petition. Because A Petition for Review Has Been Granted, This Court Should Not Adhere to its Prior Decision in *Akrie*.**

The Supreme Court has granted review of this Court's decision in

²¹ For this Court's convenience those pages from the *Davis* petition for review are attached as Appendix A.

Akrie v. Grant, supra. The petitioners in that case have raised the issue of whether the anti-SLAPP statute, as applied in a multi-defendant case, violates the Excessive Fines Clause of the Eighth Amendment, or the Due Process Clause, or the right of access to the courts, by awarding each and every defendant a \$10,000 penalty when a successful motion to strike results in the dismissal of the plaintiff's claim against them. Rather than repeat the arguments made by the *Akrie* petitioners, Appellant Rule hereby incorporates all of the arguments made the *Akrie* petitioners, and urges the panel deciding this case not to follow the holding of *Akrie* on this point.

In addition, Rule notes the extreme unfairness and harshness of awarding a \$10,000 penalty to the Seattle Weekly Media Inc., a limited liability corporation, **and** to the Village Voice Media Holdings, Inc., the Arizona LLC that owns and operates the *Seattle Weekly*, **and** to Caleb Hannan, the Editor of the *Seattle Weekly*. Since corporations are fictional "persons," it cannot be said that they experienced any particular distress at being sued. Moreover, all three media defendants were represented by the same attorney. To award a \$10,000 penalty to the paper, **and** to its Editor, **and** to its parent corporation, is constitutionally excessive.²²

²² Finally, Appellant Rule notes that the rule of lenity applies to any penal statute, even in civil cases. *Kahler v. Kernes*, 42 Wn. App. 303, 308, 711 P.2d 1043 (1985). Therefore, because the Legislature has not made it clear that it was its intent to require a Superior Court to award a separate and cumulative statutory penalty to each defendant in a multi-defendant case, this court should resolve apply the rule of lenity and hold that
(Footnote continued next page)

G. CONCLUSION

For the reasons stated above Appellant asks this Court to reverse and remand with directions to reinstate her claims against all defendants.

In the alternative, Appellant asks this Court to reverse in part, and to remand with directions to amend the judgment by awarding only one \$10,000 statutory penalty under RCW 4.24.525.

Respectfully submitted this 8th day of August, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By James E. Lobsenz
James E. Lobsenz, WSBA #8787

FREY BUCK, P.S.

ANNE BREMNER AND JASON D. ANDERSON by
By James E. Lobsenz
Anne Bremner, WSBA #13269
Jason D. Anderson, WSBA #38014

Attorneys for Appellant

only one \$10,000 statutory penalty is authorized. *Cf. State v. Villaneuva-Gonzalez*, WL 3537961 (July 17, 2014) (given uncertainty courts should apply the rule of lenity “until and unless the legislature indicates otherwise.”).

APPENDIX A

90233-0

No. 71360-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KENT L. and LINDA DAVIS; JEFFREY and SUSAN TRININ; and
SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD
COOPERATIVE,

Petitioners/Plaintiffs Below,

v.

GRACE COX; ROCHELLE GAUSE; ERIN GENIA; T.J. JOHNSON;
JAYNE KASZYNSKI; JACKIE KRZYZEK; JESSICAN LAING; RON
LAVIGNE; HARRY LEVINE; ERIC MAPES; JOHN NASON; JOHN
REGAN; ROB RICHARDS; SUZANNE SHAFER; JULIA SOKOLOFF;
and JOELLEN REINECK WILHELM,

Respondents/Defendants Below.

ERRATA *Amended*
APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

One Union Square
600 University, 27th Fl.
Seattle, WA 98101-3143
(206) 467-1816

McNAUL EBEL NAWROT &
HELGREN PLLC
Robert M. Sulkin, WSBA No. 15425
Avi J. Lipman, WSBA No. 37661

Attorneys for Petitioners/Plaintiffs
Below

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STATE OF WASHINGTON
DIVISION I
MAY 8 2014
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STATE OF WASHINGTON
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A. Constitutional Violations

1. Conflicts With *Putman* and Its Progeny

In 2009, this Court struck down a statute analogous to .525. *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). *Putman* held that: (1) “[r]equiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs’ right of access to courts,” *id.* at 979; and (2) “[i]f a statute appears to conflict with a court rule” and “cannot be harmonized” with it, “the court rule will prevail in procedural matters,” *id.* at 980-81. For the same reasons, .525 is unconstitutional. Washington’s unique Anti-SLAPP Act, however, is *more* constitutionally infirm than the statute in *Putman*, because it both restricts discovery and contains a heightened burden of proof to avoid dismissal.

a) Separation of Powers

Like the statute at issue in *Putman*, .525 conflicts with the pleading, amendment, dismissal, and evidentiary burdens of CR 8, 11, 12(b), 15, and 56, as well as the right to full discovery under CR 26–34 & 56(f). In short, it conflicts fundamentally with the manner in which the Civil Rules determine whether a claim may proceed to discovery and, eventually, to trial. 166 Wn.2d at 983.⁴

⁴ Petitioners also challenged the constitutionality of .525’s heightened burden of proof and discovery stay as applied to this case. See generally *City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004). The Court of Appeals erroneously rejected both arguments. Given the relatively recent enactment of .525 and the increasing frequency with which .525 is being asserted in Washington courts, these as-applied challenges present “significant question of law” under the Washington State Constitution.

Because the offending provisions of .525 are procedural, not substantive, the separation of powers requires that the Judicial Branch (and the Civil Rules) prevail and the statute be struck down. *See Putman*, 166 Wn.2d at 980; *see also Verizon Delaware, Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (California's anti-SLAPP statute results in "a direct collision" with procedural rules regarding discovery and Fed. R. Civ. P. 56). As one federal court has held regarding .525:

The Washington legislature could have granted immunity that could be invoked through [Fed. R. Civ. P. 12 or 56] motions, similar to the immunity the Act grants under [RCW 4.24.510] ... [It] has instead imposed upon plaintiffs a burden of proof heavier than prescribed by [Fed. R. Civ. P. 12 & 56] and imposed upon the courts an obligation to make preliminary determinations on the merits based on materials outside of the pleadings in a manner that runs in direct conflict with [Fed. R. Civ. P.] 12(d).

Intercon Solutions, Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1051-52 (N.D. Ill. 2013) (.525 may not be applied in diversity actions).⁵

Contrary to the Court of Appeals' decision, the availability under .525(5)(c) of a mechanism to request discovery "for good cause" does not save it from violating the constitutional right of access to the courts. Op. 23-24 ("[T]he anti-SLAPP statutory requirement that good cause be shown imposes no greater burden than does CR 56(f) ...").⁶ A party

⁵ *See also Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 119, 147 P.3d 1275, 1282 (2006) (CR 12(b) "mirrors" its federal counterpart).

⁶ Also, the burdens are different under CR 56 and step two of .525 (a "genuine issue as to any material fact" as compared to "clear and convincing evidence [of] a probability" of prevailing.). Unlike a motion for summary judgment, "wherein the court does not resolve the merits of a disputed factual claim," the procedure in .525 requires the trial court "to

opposing summary judgment is presumed to have full discovery rights, and 56(f) merely provides a mechanism to seek a continuance if the non-moving party has been unable to obtain “facts essential to justify his opposition.” The “primary consideration” in a trial court’s decision under CR 56(f) is “justice,” and a trial court abuses its discretion by applying “time limitations” in a “draconian” manner. *Coggle v. Snow*, 56 Wn. App. 499, 508, 784 P.2d 554, 560 (1990). By comparison, .525(5)(c) imposes a presumption of *no* discovery—despite the fact that the court is essentially charged under .525(4)(b) with resolving the merits of a plaintiff’s claims. *Opinion of the Justices*, 138 N.H. 445, 450-51, 641 A.2d 1012, 1015 (1994).

b) Access to the Courts

The Anti-SLAPP Act violates the right of access to the courts because it places a heightened evidentiary burden on a plaintiff before he becomes entitled to the broad discovery contemplated by the Civil Rules and protected by the Washington Constitution. As did the statute *Putman* struck down, it permits the dismissal with prejudice of meritorious claims. 166 Wn.2d at 979.

The Court of Appeals erroneously found .525 consistent with *Putman* based in part on its own decision in a TEDRA case, *In re Estate of Fitzgerald*, 172 Wn. App. 437, 294 P.3d 720 (2012), *review denied*, 177 Wn.2d 1014 (2013). *Fitzgerald* is not applicable and, in any event, not

do exactly that.” *Opinion of the Justices*, 138 N.H. 445, 450-51, 641 A.2d 1012, 1015 (1994) (proposed anti-SLAPP legislation in New Hampshire violates the right to a jury trial).

binding on this Court. TEDRA actions are “special proceedings” and thus only marginally subject to the Civil Rules. RCW 11.96A.090(1), (4); CR 81(a). Thus *Putman*—which held in part that the “right of access to courts includes the right of discovery authorized by the *civil rules*,” 166 Wn.2d at 974 (emphasis added), was irrelevant to the court’s conclusion in *Fitzgerald*.

2. Vagueness

The Court of Appeals erroneously dismissed as a “non-sequitur” Petitioners’ argument that the burden of proof in step two of .525 (“clear and convincing evidence of a probability”)—which is unprecedented in Washington law and unique among anti-SLAPP statutes nationally⁷—is unconstitutionally vague. Simply put, even if a standard of proof is clear on its own does not mean, as the court concluded, that it is clear when *combined* with another such standard; e.g., “proof beyond a reasonable doubt of clear and convincing evidence of a probability.”

B. The Anti-SLAPP Act Does Not Apply to This Case

1. Holding Corporate Misconduct Involves “Public Participation and Petition” Will Chill Petition Rights

Under step one of .525, the moving party bears the burden of establishing that the plaintiff’s case “is based on an action involving public participation and petition”— a phrase that refers primarily to matters presented to government entities, but includes “lawful conduct in

⁷ Minn. Stat. § 554.02 uses a “clear and convincing” standard, but limits the definition of “public participation” to “speech or lawful conduct ... genuinely aimed in whole or in part at procuring favorable [American] government action.”

NO 71706-5-I.

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

ANN RULE,

Appellant,

v.

RICK SWART, et al.,

Respondents.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a Citizen of the United States and over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.
3. On August 8, 2014, I caused to be served via US MAIL one copy of the following document on:

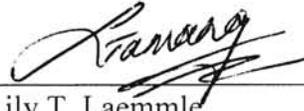
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COURT OF APPEALS
STATE OF WASHINGTON

Maren R. Norton
Margarita V. Latsinova
STOEL RIVES LLP
600 University Street Suite 3600
Seattle WA 98101-3197

Christopher C.S. Blattner
MOTSCHENBACHER & BLATTNER LLP
117 SW Taylor Street Suite 200
Portland OR 97204-3029

Entitled exactly: **OPENING BRIEF OF APPELLANT**

DATED: August 8, 2014.



Lily T. Laemmle
Legal Assistant to James E. Lobsenz