NO. 1040822

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 868462 – Division I

Kitsap County Superior Court No. 23-2-00048-1

M.G., SAMANTHA GERLACH, AND SUZANNE GERLACH,

Petitioners,

v.

BAINBRIDGE ISLAND SCHOOL DISTRICT, #303, WASHINGTON STATE HOSA, NASZYA BRADSHAW, AND ELEANOR WILSON,

Respondents.

NASZYA BRADSHAW'S AMENDED ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners M.G., Samantha Gerlach and Suzanne Gerlach[1] fail to demonstrate any basis for this Court to grant their petition for review. The Court of Appeals properly affirmed the dismissal of their claims against Respondent Naszya Bradshaw under the Uniform Public Expression Protection Act (UPEPA), RCW 4.105.020, *et. seq*. M.G. makes no showing that this decision should be reviewed under any provision of RAP 13.4(b).

M.G.'s lawsuit against Bradshaw was based on conclusory allegations related to postings M.G. alleged Bradshaw made on social media. The Court of Appeals noted that M.G. presented no evidence as to what the social media posts said; he cited only a

[1] Although there are three petitioners, Bradshaw will refer to them collectively as "M.G." for ease of reference, unless referring to testimony from Samantha or Suzanne Gerlach. Because of their shared surname, for clarity, when referring to Samantha or Suzanne Gerlach, Bradshaw will refer to each petitioner by their first name only. No disrespect is intended.

single "colorful, defiant social media post in response to being confronted with a possible defamation lawsuit."[2]

The Court of Appeals affirmed the dismissal of M.G.'s claim because that single social media post was not defamatory as a matter of law and M.G. lacked any evidentiary support for any other allegation of defamation against Bradshaw:

> Samantha's and M.G.'s assertion that Bradshaw posted "false, malicious and defamatory" comments or allegations about M.G. are conclusory statements and do not assert specific, material facts. And Bradshaw's social media post after being confronted with a possible defamation lawsuit did not assert M.G., let alone any named individual, had committed sexual assault. In short, plaintiffs fail to establish a statement made by Bradshaw . . . that is provably false.

Slip. Op. at 22–23. Because M.G. did not present evidence to support his defamation claim, the Court of Appeals held that "plaintiffs failed to establish that the trial court erred in

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[2] *M.G. et al. v. Bainbridge Island School Dist. No. 303 et. al.*, No. 86848-2-I, 566 P.3d 132, Slip Opinion at 5 (March 24, 2025) https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=868462MAJ (referred hereafter as "Slip Op."), attached as Appendix A.

dismissing the claims against Bradshaw and Wilson under UPEPA."[3] Slip Op. at 27. The Court of Appeals affirmed the dismissal of all other claims against Bradshaw because M.G. "either fail[ed] to assign error or fail[ed] to sufficiently present argument and citations to the record to warrant review." Slip Op. at 3.

This Court should deny M.G.'s petition for review for four reasons. First, M.G. fails to address the applicable grounds for accepting discretionary review under RAP 13.4(b). His arguments are a jumble of unsupported factual allegations, supposed constitutional defects, and accusations of judicial bias. He presents no issue in a concise and intelligible manner as required by RAP 13.4(c). The Court should deny the petition.

Second, M.G. appears to raise a constitutional challenge to the UPEPA, but the Court of Appeals declined to address this

[3] The Court of Appeals also awarded Bradshaw attorney's fees under RAP 18.1 and RCW 4.105.090. Slip Op. at 39. Her motion to establish the amount of the attorney fee award is currently pending in the Court of Appeals.

claim on the merits because M.G. failed to preserve the error for appeal. Slip Op. at 17. M.G. did not challenge this legal ruling in their petition for review. He also does not explain how the Court of Appeals' waiver ruling under RAP 2.5 (a) presents a legal ground for granting discretionary review under RAP 13.4(b).

Third, although M.G. challenges the Court of Appeals' ruling that the UPEPA applies to this case, he does not refute the Court of Appeals' conclusion that he failed to present sufficient admissible evidence to establish a prima facie claim of defamation against Bradshaw. This case-specific holding is not an issue of "substantial public concern" warranting Supreme Court review.

Finally, the Court of Appeals' conclusion that the trial court did not exhibit bias toward M.G. or his counsel is based on well-established law and a review of the record specific to this

case. It presents no issue of significance warranting Supreme Court review.[4]

This Court should deny review and grant reasonable attorney's fees, costs and expenses pursuant to RAP 18.1(j).

II. RESTATEMENT OF ISSUES

A. M.G. failed to address the applicable standards for discretionary review or present "a concise statement of the issues presented for review" as required by RAP 13.4(c). Do these failures preclude review by this Court?

B. The Court of Appeals held that M.G. waived any constitutional challenge to the UPEPA and failed "to make any attempt to establish that the alleged error was manifest or any attempt to satisfy RAP 2.5(a)(3)."[5] M.G. does not challenge this holding. Does M.G.'s constitutional challenge on the merits implicate any basis for review under RAP 13.4(b)?

C. The Court of Appeals held the UPEPA applied to M.G.'s claims against Bradshaw because the targeted speech was a "matter of public concern," under RCW 4.105.010(2)(c).[6] Does M.G.'s disagreement with that holding implicate any basis

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[4] Bradshaw takes no position on M.G.'s arguments relating to Washington State HOSA.

[5] Slip Op. at 17.

[6] Slip Op. at 19.

for review under RAP 13.4(b)?

D. The Court of Appeals rejected M.G's contention that the trial court mocked or displayed bias toward him or his attorney. Does the Court of Appeals' holding implicate any basis for review under RAP 13.4(b)?

E. The Court of Appeals awarded Bradshaw attorney's fees and expenses for prevailing on appeal. Should Bradshaw be awarded attorney's fees pursuant to RCW 4.105.090(1) and RAP 18.1(j) for the preparation and filing of this answer to the petition for review?

III. STATEMENT OF THE CASE

The undisputed material facts, as laid out by the Court of Appeals, are briefly summarized here.[7]

[7] M.G.'s statement of facts in his petition is a tangle of misstatements, sweeping conclusory allegations, and irrelevant narrative, much of which is unsupported with evidence. For example, M.G. argues that "Petitioners were forced to file a First Amended Complaint ("FAC") after a curious and wary "random assignment" to [federal district court judge] SETTLE, who allegedly violated federal laws (CP 225, 708)." Petition at 5. This type of unfounded conspiracy theory and/or accusation, completely immaterial to the issues M.G. raises on appeal, is difficult to address in any meaningful fashion. He also claims that "FORBES prevented discovery which prevented Petitioners from defending motions to dismiss the FACs' … causes of action." Petition at 6. First, the trial court did not prevent M.G. from conducting discovery. RCW 4.105.030(4) allows a plaintiff

M.G. was a Bainbridge Island high school student between 2018 and 2021. In 2023, he filed this lawsuit, along with his sister Samantha, and his mother, Suzanne, alleging he was targeted on the Internet by classmates who alleged he had sexually assaulted female students while in high school. Slip Op. at 4–5. Bradshaw and Wilson attended the same high school as M.G., but graduated a year before he did, in 2020. *Id.* M.G. never had any interaction with either of them during high school. Slip Op. at 4.

According to Wilson, while in high school, she was a victim of sexual harassment, and the school had handled it poorly. Slip Op. at 4. In 2017, she and other residents of

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to conduct limited discovery if he demonstrates to the court that "specific information is necessary to establish whether a party has satisfied or failed to satisfy a burden under RCW 4.105.060(1) and the information is not reasonably available unless discovery is allowed." M.G. never asked the court to permit discovery or made the requisite showing before responding to Bradshaw's UPEPA motion and thus had no adverse ruling on discovery to appeal. Second, the record to which M.G. cites for this alleged denial of discovery, CP 657, is his own motion for reconsideration, and not a citation to any decision rendered by the trial court.

Bainbridge Island attended a Women's March advocating for women to speak freely about their experiences as victims of sexual harassment or assault. Slip Op. at 4.

In 2021, Wilson noticed an uptick in social media posts from women who felt the school district was not responding to their complaints and became aware that these women posted the names of the "perpetrators," including M.G. *Id.* Wilson offered on social media to document the stories of the victims. *Id.* M.G. alleged that he and his sister, Samantha, saw Wilson's posts and claimed that she had defamed M.G. by calling him a rapist. *Id*.

M.G. and Samatha also testified that they saw postings from Bradshaw on Instagram. Slip Op. at 5. As the Court of Appeals stated, "[M.G. and Samatha] aver that the postings were viewable from 2021 through 2023 and characterize the postings as 'false, malicious and defamatory comments about [M.G.] on the Internet.' They never assert what the posts actually said." Slip Op. at 5. M.G. produced a single social media entry by Bradshaw after she was confronted about possible defamation lawsuits.

The Court of Appeals described her response as a "colorfully direct"[8] "pronouncement that one need not be fearful to speak out if you speak the truth, even when facing threats of litigation:"[9]

> [f]irst of all: idgaf bout any threats of defamation suits. It's not defamation if you've committed these heinous actions on camera. Dumbass hoe.
>
> Second: idgaf if the abuser is your homie, sister, brother, whateva. They're an abuser. They can learn or rot. I'm not ruining lives, they ruined their own. Eat my black ass.

Slip Op. at 19–20.[10]

The Court of Appeals held that Bradshaw's and Wilson's speech was made "in the context of an on-going concern about sexual assault of young women on Bainbridge Island and [the

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[8] Slip Op. at 20.

[9] *Id.* at 21.

[10] The Court of Appeals further noted, "[i]t is unclear as to how Attorney Gerlach, M.G. and Samantha have personal knowledge that Bradshaw was confronted about possible lawsuits and who did the confronting, as plaintiffs did not include that information in the record. Even though Bradshaw's post did not include any names, M.G. stated he believed 'Bradshaw targeted me-a white, male Section 504 student because of Naszya Bradshaw's alleged black privilege.' " *Id*. at 8, n.11

high school's] response to reports of such assaults. Slip Op. at 21. It rejected M.G.'s defamation claim because "Bradshaw's social media post after being confronted with a possible defamation lawsuit did not assert M.G., let alone any named individual, had committed sexual assault." Slip Op. at 23. It concluded that, "[i]n short, plaintiffs fail to establish a statement made by Bradshaw or Wilson that is provably false." *Id.*

Although M.G. claimed he was the victim of cyber harassment, fraud, and discrimination—all statutory exceptions to the UPEPA under RCW 4.105.010(3)—the Court of Appeals held that "[M.G.] fail[s] to cite to any substantive evidence anywhere in the record to support this claim that M.G. was the victim of cyber harassment specifically by Bradshaw and Wilson," M.G. "cite[s] to nothing in the record to support their claim of fraud," and did not cite "to any asserted facts in the record to show how Bradshaw or Wilson committed a [Washington Law Against Discrimination] WLAD violation." Slip Op. at 25–26. The Court of Appeals concluded that M.G.

"failed to establish that the trial court erred in dismissing the claims against Bradshaw and Wilson under the UPEPA." Slip Op. at 27.

M.G. moved for reconsideration and was summarily denied. He now seeks review of the Court of Appeals decision. Petition for Review at 4. This answer addresses M.G.'s arguments presented in his petition.

IV. ARGUMENT

A. Standard for Granting Discretionary Review

RAP 13.4(b) establishes the grounds for discretionary review:

> Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(Emphasis added.)

For the reasons set out below, M.G. fails to present any basis to justify accepting review by this Court.

B. M.G.'s failure to address the standards for discretionary review or to advance a concise and intelligent basis for granting review required by RAP 13.4(c) preclude review by this Court.

This Court should deny the petition for review because it lacks a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b) [of RAP 13.4], with argument," as required by RAP 13.4(c).

In fact, M.G. does not cite any provision of RAP 13.4(b) in his petition. Instead, he argues the Court of Appeals misstated the record or misapplied the law to the facts in his case. RAP 13.4(b) does not allow review simply to correct isolated instances of perceived injustices from the application of law to a particular case. 2 Washington Appellate Practice Deskbook § 18.3, Grounds for Accepting Review (2016). Rather, this Court grants review only if the case falls under one of the four enumerated

bases for review in RAP 13.4(b). M.G.'s failure to invoke any of these bases to justify review should preclude review.

Moreover, the issues M.G. identifies for review are a potpourri of alleged factual errors, challenges to witness credibility, constitutional defects, and accusations of judicial bias. He fails to explain how any of the issues relate back to the standard for accepting review under RAP 13.4(b) or to make any attempt to analyze the issues under the RAP 13.4(b) standard. The Court should deny the petition for this reason alone. *See Clam Shacks of America v. Skagit County*, 109 Wn.2d 91, 98, 743 P.2d 265 (1987) (court may refuse to review issues that are not concisely stated).

To the extent the petition can be liberally construed to reflect an argument that the decision conflicts with a published decision of the Court of Appeals or the Supreme Court, that the decision presents a significant question of law under the state or federal constitution, or that the decision presents an issue of

substantial public interest that this Cout should resolve, M.G. is wrong on all counts.

C. M.G. waived any challenge to the constitutionality of UPEPA and his attempt to raise a constitutional challenge in a petition for discretionary review is not justified under RAP 13.4(b).

M.G. contends that the UPEPA violates Article I, section 5 of the Washington State Constitution because it "directly contradict[s] the Constitution," and the Court of Appeals "effectively shielded false and malicious defamation in litigation and allowed re-victimization." Petition at 13. He makes no attempt to explain how the latest rendition of his constitutional argument falls under one of the four enumerated reasons for discretionary review in RAP 13.4(b) and asserts three fatally flawed arguments.

First, the Court of Appeals did not reach M.G.'s constitutional challenge on its merits because he failed to preserve the issue for appeal. The Court of Appeals held that M.G. asserted a constitutional challenge "for the first time on

appeal." Slip Op. at 17. M.G. only "mentioned the constitutionality of UPEPA [in the trial court] when [he] opposed Bradshaw's motions for attorney fees and costs" after the UPEPA motion was granted. *Id.* M.G. had therefore failed to preserve the constitutional challenge for appeal and had failed "to make any attempt to establish that the alleged error was manifest or any attempt to satisfy RAP 2.5 (a)(3)." Slip Op. at 17. This Court should not grant review of an issue that was not properly preserved for appeal.

Second, M.G. does not dispute the Court of Appeals' conclusion that M.G. waived his constitutional challenge to the UPEPA. Bradshaw has found no case in which this Court granted discretionary review to address on the merits a constitutional argument that the Court of Appeals deemed waived under RAP 2.5. M.G. certainly has not identified any such authority. This Court "may [therefore] assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). This Court should not

accept review of a constitutional argument that the Court of Appeals concluded M.G. waived, a conclusion he does not challenge.

Third, M.G. does not ask this Court to review the Court of Appeals' actual ruling, i.e., its refusal to review any constitutional argument based on RAP 2.5(a). RAP 13.7(b) limits review to only those questions raised in the petition. *Clam Shacks*, 109 Wn.2d at 98. This Court has departed from this rule only on "rare occasions," when necessary to "serve the ends of justice" and "secure [a] fair and orderly review." *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 373, n.6, 113 P.3d 463 (2005) (citing RAP 1.2(c) and 7.3). No such showing has been or could be made here.

For this reason, the Court should reject the petition for review of any constitutional challenge to the UPEPA.

D. The Court of Appeals' conclusion that Bradshaw's speech involved a "matter of public concern" under the UPEPA does not implicate any provision of RAP 13.4(b).

M.G. contends the Court of Appeals erred in holding that Bradshaw's social media post addressed a matter of "public concern," triggering the applicability of the UPEPA. M.G.'s disagreement with its conclusion that "Bradshaw and Wilson's statements fall within the definition of a 'matter of public concern' and UPEPA applies,"[11] does not warrant discretionary review.

Bradshaw asked the trial court to dismiss the defamation claim against her under the UPEPA because "plaintiffs' cause of action against [her] is based on the exercise of [her] right of freedom of speech, and that [her] statements were a matter of public concern" under RCW 4.105.010(2)(c). Slip Op. at 19. The Court of Appeals correctly noted that "[w]hether speech is a matter of public concern is a question of law, which courts must

[11] Slip Op. at 23.

determine 'by the content, form, and context of a given statement, as revealed by the whole record.'" Slip Op. at 19 (quoting *Billings v. Town of Steilacooom*, 2 Wn. App. 2d 1, 31, 408 P.3d 1123 (2017) (in turn quoting *Connick v. Myers*, 461 U.S. 138, 147–48, n. 7, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983)). By statute, whether speech is a matter of public concern should be broadly construed. RCW 4.105.90; Slip Op at 21.

Further, RCW 4.105.050 provides that in ruling on a motion to dismiss under the UPEPA, the court "shall consider" any evidence that could be considered in ruling on a motion for summary judgment under superior court civil rule 56."

The Court of Appeals followed this statutory framework, examined the evidentiary record before the trial court, and analyzed the content, form, and context of the speech targeted by M.G., to conclude that Bradshaw's speech "was made in the context of an on-going concern about sexual assault of young women on Bainbridge Island and [the high school's] response to reports of such assaults." Slip Op. at 21.

M.G. disputes as false the allegations of sexual misconduct and argues they therefore are not of public concern. The Court of Appeals rejected M.G.'s argument that "false" speech is unprotected by the First Amendment. "[F]alse speech is protected speech as long as it is not . . . defamation . . . ." Slip Op. at 22 (quoting *United States v. Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012)). And M.G. "simply [did] not present a prima facie case of defamation towards M.G." *Id.*

M.G. argues the UPEPA should not bar his defamation claim because Bradshaw's post reflected a "private" grievance against him personally, and not a "matter of public concern." Petition at 7–8 & 17.[12] Again, not only is M.G.'s argument fundamentally flawed, but RAP 13.4(b) does not allow review

[12] In the Court of Appeals, M.G. contended UPEPA only applies to public figures or public campaigns, not private citizens, a contention that was soundly rejected by the Court of Appeals. Slip Op. at 20–21. He does not appear to raise this legal argument in his petition for review.

simply to correct isolated instances of perceived injustices from the application of law to a particular case.

Additionally, *Roberts v. Johnson*, 137 Wn.2d 84, 969 P.2d 446 (1999), the case on which M.G. relies to argue that Bradshaw "manufactured a private grievance" and turned it into a "public concern," with her "own dossier, pre-planned infographics and rumors," Petition at 19, has nothing to do with the UPEPA, claims of defamation, or free speech.[13] *Roberts v. Johnson* addressed whether the filing of an arbitration award in superior court is complete for purposes of calculating the 20-day period for seeking a trial de novo under MAR 6.2 if proof of service does not accompany the filing of the award. 137 Wn.2d at 90–92. How *Roberts v. Johnson* has any relevance here is unclear.

[13] M.G. has no citations to the clerk's papers to explain what he means by "their own dossier, pre-planned infographics, and rumors." M.G. presented no evidence Bradshaw had any involvement in preparing a "dossier or infographics" about M.G. or that she spread rumors about M.G. on the internet.

M.G.'s reliance on *Alaska Structures, Inc. v. Hedlund*, 180 Wn. App. 591, 323 P.3d 1082 (2014) and "stare decisis" is similarly flawed. Petition at 15–19. Although M.G. does not cite to RAP 13.4(b)(2), his reference to "stare decisis" appears to suggest that review is warranted to resolve a conflict with another published decision of the Court of Appeals, i.e. *Alaska Structures*. This Court should reject this argument because no conflict exists.

First, *Alaska Structures* involved the prior anti-SLAPP statute, former RCW 4.24.525 (2010), not the current statute. As the Court of Appeals said in *Jha v. Khan*, 24 Wn. App. 2d 377, 387, 520 P.3d 470 (2022), "[s]imilar to its predecessor statute, the Washington Act Limiting Strategic Lawsuits Against Public Participation, former RCW 4.24.525, UPEPA provides for early adjudication of baseless claims aimed at preventing an individual from exercising the constitutional right of free speech. Unlike its predecessor, however, UPEPA incorporates standards for adjudication that mirror those utilized in Civil Rules 12 and 56."

Alaska Structures did not involve a challenge to a defamation claim raised under the evidentiary standard of CR 56, as occurred here.

Second, under the UPEPA, the crucial question is whether the claim is based on the defendant's exercise of free speech involving "a matter of public concern" (the first step of the UPEPA analysis as laid out in *Jha v. Khan*, 24 Wn. App. at 388). As detailed below, *Alaska Structures* is not controlling precedent on this UPEPA question because it is limited to the application of the law to its facts, which are distinguishable from this case.

Alaska Structures involved a lawsuit initiated by an employer against a former employee for breach of a confidentiality agreement for posting comments about the employer on the internet.

The *Alaska Structures* court held that the anti-SLAPP statute then in effect did not bar the employer's contract claim because the employee had voluntarily limited his right to speak freely about the employer when he signed a confidentiality

agreement and the crux of the case was a private contractual dispute. 180 Wn. App. at 599. The employee argued that he had a free speech right to warn consumers of allegedly deceptive business practices. The Court of Appeals rejected this argument because "the complaint alleges Hedlund voluntarily limited his right to speak freely by signing a confidentiality agreement. The issue here is a simple contractual issue-whether or not Hedlund violated a contract he signed with his former employer." *Id.* at 603.

Here, there is no contractual relationship between M.G. and Bradshaw in which she agreed to restrict what she said online about M.G. and the crux of M.G.'s claim was not any private contract between them. In addition, it is not credible to contend that a social media post that did not mention M.G. was intended to defame him or take revenge on him personally for some unstated reason. The Court of Appeals' decision here does not conflict with *Alaska Structures*. Review under RAP 13.4(b)(2) is thus inappropriate.

Other than citing to *Alaska Structures* and generally castigating the #MeToo movement as "fake," M.G. does not explain how the Court of Appeals erred in concluding that Bradshaw's single social media posting addresses a matter of public concern, to warrant discretionary review under any RAP 13.4(b) bases. M.G.'s unsupported factual arguments merely demonstrate that he is once again "ignor[ing] the actual legal test in determining whether speech is a matter of public concern." Slip Op. at 20.

Next, M.G. insists that Bradshaw's speech was defamatory, but does not address the fatal flaw in his evidentiary presentation to the trial court—he simply failed to show that Bradshaw made any provably false statements about M.G. Slip Op. at 23.[14]

M.G. also contends the Court of Appeals "ignored Petitioners' specifically pled exceptions under RCW [ch.] 4.105

[14] *See also* Slip Op. at 27 ("[Petitioners] make no attempt to substantively argue step three of the UPEPA analysis.")

for litigation related to WLAD, negligence, fraud, and civil conspiracy to commit defamation under the guise of a contradicted and speculative 'huge uptick' in rapes." Petition at 19. First, the exceptions have nothing to do with whether speech is a "matter of public concern." Rather, the statutory exceptions are step two of the three step UPEPA analysis. RCW 4.105.060(1)(b). Second, this assertion is plainly incorrect. The Court of Appeals spent three pages of its decision addressing every exception M.G. raised on appeal. Slip Op. at 23–26.

In short, M.G. does not identify how the Court of Appeals' fact-specific, case-specific analysis of the applicability of the UPEPA qualifies for discretionary review under RAP 13.4(b).

E. The Court of Appeals' conclusion that the trial court did not display bias toward M.G. or his attorney is not an issue warranting review under RAP 13.4(b).

M.G. next contends that the Court of Appeals erred in holding that the trial judge demonstrated no bias toward him or his attorney and there was no basis for the judge to recuse herself from the case. Petition at 21–26. This issue is also fact- and case-

specific, and does not raise any unique legal questions warranting Supreme Court review.

The Court of Appeals followed well-established precedent in applying the appearance of fairness doctrine, setting out the test this Court articulated in *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). Slip Op. at 34. As to M.G.'s claim that the trial court judge should have recused herself from the case, the Court of Appeals held that "Attorney Gerlach waived such a challenge because he was aware of the basis of his challenge before asking the court to grant his proposed order on a motion for evidence on February 17, 2023." Slip Op. at 35.

Despite this finding, the Court of Appeals reviewed the trial court's recusal order on its merits and concluded that the record did not support M.G.'s claim of judicial prejudice toward him. Slip Op. at 37–38. It rejected M.G.'s spurious contention that the trial court's UPEPA and CR 11 rulings demonstrated bias. "Judicial rulings alone almost never constitute a valid

showing of bias." Slip Op. at 39 (quoting *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004)).

M.G. fails to demonstrate how this decision conflicts with any Supreme Court or Court of Appeals case. He similarly fails to show how this fact-specific ruling involves an issue of "substantial public interest." The Court should deny review of this issue.

F. Bradshaw should be awarded reasonable attorney's fees, costs and expenses under RCW 4.105.090 and RAP 18.1(j).

Bradshaw requests an award of attorney's fees and expenses under RAP 18.1(j). That rule provides:

> If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review.

Bradshaw was awarded attorney's fees for prevailing in the Court of Appeals. Slip Op. 39–40. This Court should not only deny the petition for review but it should also award

attorney's fees and expenses to Bradshaw under RCW 4.105.090 and RAP 18.1(j).[15]

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[15] M.G. also argues that when the Court of Appeals reversed the trial court's order relating to the case caption, he should have been awarded his requested attorney fees. Petition at 4, 27. He cites no legal authority for any claimed entitlement to attorney fees. RAP 14.2 permits an award of costs only to the substantially prevailing party. M.G. did not substantially prevail on appeal against Bradshaw. RCW 4.105.090 permits an award of attorney fees to a respondent under the UPEPA only if the Respondent prevails in defending against the dismissal motion and the court finds the motion was not substantially justified or was filed solely with the intent to delay the proceedings. M.G. did not prevail on the UPEPA motion to dismiss either in the trial court or before the Court of Appeals. Review of this issue is not warranted under RAP 13.4(b).

V. CONCLUSION

For the reasons set out in this answer, this Court should deny the petition for review and award Bradshaw reasonable attorney's fees and expenses.

Dated this 24th day of May 2025.

s/ Jennifer Wellman
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Beth Andrus, WSBA No. 18381
Skellenger Bender, P.S.
Attorneys for Naszya Bradshaw

I hereby certify that this document has 4,937 words, excluding the parts of the document exempted from the word count pursuant to RAP 18.17(c).

Dated this 24th day of May 2025.

s/ Jennifer Wellman
Jennifer E. Wellman, WSBA No. 29193

CERTIFICATE OF SERVICE

I, Jule Freeman, hereby certify that on May 24, 2025, I caused the foregoing document to be filed with the Clerk of the Washington Supreme Court, via the Appellate Filing Portal, which will send notification of such filing to all registered counsel of record.

DATED this 24th day of May 2025.

s/ Jule Freeman
Jule Freeman, Case Manager
SKELLENGER BENDER, P.S.

APPENDIX A

FILED
3/24/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

M.G., SAMANTHA GERLACH and SUZANNE GERLACH,

Appellants,

v.

BAINBRIDGE ISLAND SCHOOL DISTRICT #303, a municipal corporation, WASHINGTON STATE HOSA, a nonprofit corporation, NASZYA BRADSHAW an individual, ELEANOR WILSON an individual AND DOES 1-100,

Respondents.

No. 86846-2-I

DIVISION ONE

OPINION PUBLISHED IN PART

COBURN, J. — Washington State's Uniform Public Expression Protection Act (UPEPA) is a type of law designed to combat the problem of strategic lawsuits against public participation (anti-SLAPP law). Thurman v. Cowles Co., No. 102791-5, 2025 WL 338065 (Wash. Jan. 30, 2025), https://www.courts.wa.gov/opinions/pdf/1027915.pdf. The law, ch. 4.105 RCW, is designed "to protect important public speech from frivolous litigation by providing a procedural scheme that disposes of such cases early and swiftly in the litigation life cycle." Id. at 1. Plaintiffs appeal, among other orders, the trial court's granting of Eleanor Wilson's and Naszya Bradshaw's joint UPEPA motion and dismissing all claims against them with prejudice.

Central in this case is what occurred in the Bainbridge Island community in the

fall of 2020 and early 2021. As reported by the Bainbridge Island Review, in the fall of 2020, a rally was held to encourage girls to talk about sexual assault. Attendees were invited to tell their stories and learn about "Let's Talk," a service through Bainbridge Youth Services (BYS) which offers group, one-on-one and small group peer support. In January 2021, several women posted allegations of sexual assault and harassment, on social media, perpetrated by named male Bainbridge High School (BHS) students and criticism of how BHS responded to such complaints. One of the named male students was M.G.

In January 2023, M.G., his sibling Samantha Gerlach, and his mother Suzanne Gerlach,[1] sued the Bainbridge Island School District (BISD), Health Occupation Students of America (HOSA)[2], Wilson, Bradshaw, and Does #1-100. The plaintiffs are represented by Marcus Gerlach.[3] Wilson's speech, that is the subject of this suit, is her social media post "@ all the girls who are, or have been victims of [M.G.[4]] in any way" and offering to take their "stories and compose a letter to the school with your demands." Plaintiffs never assert what it is that Bradshaw communicated other than a colorful, defiant social media post in response to being confronted with a possible defamation lawsuit.

In the plaintiffs' first amended complaint,[5] they allege defamation, conspiracy to

[1] Despite identifying M.G. only by initials, plaintiffs disclose in their complaint and declarations how they are related to one another.

[2] HOSA is an afterschool club at Bainbridge High School. Plaintiffs identify HOSA as a Washington State non-profit corporation.

[3] Because of shared surnames, we refer to Samantha and Suzanne by their first name for clarity and to Marcus Gerlach as Attorney Gerlach.

[4] In the record, M.G.'s name is redacted, except for his initials. But it is undisputed that the post used M.G.'s first and last name.

[5] Hereinafter referred to as "complaint."

commit defamation, fraud, cyberstalking, violations of the Washington Law Against Discrimination (WLAD), and loss of consortium. They separately also allege negligence claims against BISD and HOSA.[6] In addition to the granting of the UPEPA motion, the plaintiffs appeal the trial court's (1) granting of defendants' motion to amend the case caption to reflect M.G.'s full name; (2) declining to recuse itself; (3) award of CR 11 sanctions against Attorney Gerlach; (4) denial of the plaintiffs' cross-motion for CR 11 sanctions; and (5) dismissal, under CR 12(b)(6), of all claims against HOSA.[7]

We affirm the dismissal of all claims against Wilson and Bradshaw, and the award of CR 11 sanctions against Attorney Gerlach. Plaintiffs waived any argument that the trial court should have recused itself for an alleged conflict of interest, but nonetheless conclude that the plaintiffs fail to demonstrate that the trial court was biased. However, because the trial court did not apply the correct legal analysis as further discussed below, we reverse the trial court's order amending the case caption and remand for further proceedings.[8] As to all remaining claims, plaintiffs either fail to assign error or fail to sufficiently present argument and citations to the record to warrant review.

[6] The plaintiffs also initially alleged claims under federal law, but later amended the complaint by withdrawing their federal claims.

[7] BISD had joined HOSA's second CR 12(b)(6) motion, requesting partial dismissal of plaintiffs' claims against BISD. The trial court granted BISD's motion dismissing claims for defamation, fraud, civil conspiracy, cyberstalking, and loss of consortium by Samantha. Plaintiffs do not appeal this order. Thus, the only issue in this appeal that relates to BISD is the motion to amend the case caption for which BISD joined.

[8] Because we reverse the trial court's order amending the case caption, this opinion reflects the case caption as it existed prior to the court's August 7, 2023 order. RAP 3.4.

FACTS

M.G. attended BHS from 2018 to 2021. Samantha graduated from BHS in June 2019. Both participated in HOSA while at BHS. At BHS, M.G. received accommodations under Section 504 of the Rehabilitation Act of 1973. Wilson and Bradshaw also attended BHS and graduated in 2020. M.G. never had any interaction with either of them during high school.

According to Wilson, while in high school, she had been a victim of sexual harassment and the school handled it poorly. In 2017, she was one of many Bainbridge Islanders who attended a Women's March advocating for women to have the right to speak freely about their experiences as victims of sexual harassment/assaults. She recalled that "[a]t that time, I remember Bainbridge Island being a hotbed of attempted youth social justice action." While attending BHS, she recalled seeing on social media, allegations of sexual assault and harassment perpetrated by male BHS students and reading criticism of how the school handled such incidents. In January 2021, Wilson noticed a "huge uptick" in social media posts from women who felt unheard by BHS and posted the names of "perpetrators," including, but not limited to M.G. Wilson recalled seeing posts from eight different women, some of whom Wilson knew from when she attended BHS. After seeing the posts, Wilson offered on social media to document the stories of victims of sexual assault/harassment. Her post stated:

> @ all the girls who are, or have been victims of M.G. in any way:
>
> if you guys want, I will take your stories and compose a letter to the school with your demands. I will be your Alexander Hamilton.
>
> Anything y'all need. I don't have much to offer except my writing skills, and maybe a few connections. But I'm here for you and I want to help you. You can message me on my insta, @blacksmithshenanigans.

> I'd want ALL of your input on what I write, so if y'all could all talk to each other that'd be greatly appreciated.
>
> No detail spared. No grievance unaired. If you want, I will write it for you. I will represent you. I am not a lawyer, but I am a writer, and a survivor myself. I am here for you.
>
> BELIEVE WOMEN.
> BELIEVE SURVIVORS.

M.G. and Samantha saw Wilson's post. That same month, M.G. attended an in-person meeting with BISD staff to discuss what he characterized as cyber-harassment/sexual harassment against him. M.G. reports being told that BISD could not do anything to prevent cyber-bullying that was outside of school.

M.G. and Samantha also saw postings from Bradshaw on her Instagram account. They aver that the postings were viewable from 2021 through 2023 and characterize the postings as "false, malicious and defamatory comments about [M.G.] on the internet." They never assert what the posts actually said.

Plaintiffs filed their initial complaint in January 2023. They claim Wilson, on or about January 23, 2021, "made defamatory claims and offered to write contrived stories about male Section 504 students and then make demands on the School." As to Bradshaw, the plaintiffs claimed she

> posted false defamatory and malicious stories about M.G. which were designed to impugn his name and reputation in the community. [Bradshaw] acted with disregard for the truth, based in part upon the false stories manufactured by [Wilson].

The complaint did not assert any specific factual allegations related to Bradshaw.

As to HOSA, plaintiffs claim various ways a HOSA advisor mishandled several incidents: (1) failed to discipline a HOSA student who in March 2019 sent through a

school's internal email "remind" account that "underclassmen bullying underclassmen will result in someone's ass getting kicked by another underclassmen"; (2) only required HOSA/School female students to write an apology letter to the advisor, and not to M.G., after admitting in October 2019 to creating a false social media post depicting M.G. as calling another female student fat; (3) failed to collect evidence, conduct a formal investigation or discipline female HOSA/School students when in December 2019, the advisor saw false, malicious and defamatory statements created by Does #1 and #2.

We summarize the plaintiffs' various claims in their complaint as follows.

A. Violation of WLAD

Under former RCW 49.60.215(14) (2020)[9], the "School/HOSA/Does # 1-30" (1) failed to protect a minor, male, Section 504 student; and (2) directly, or indirectly, caused a person of a particular sex or class to be treated as "not welcome, accepted, or desired." The "School/HOSA/Defendants' conduct was extreme and outrageous" and that "the Defendants' conduct intentionally or recklessly caused emotional distress to M.G."

D. Negligence

The school had a special relationship with a Section 504 student, M.G., and that the School and HOSA had a duty to enforce their policies and procedures to protect a male Section 504 student, that they breached that duty, and that the "Defendants' negligence allowed the girls to circumvent [policies and procedures] … and prevented M.G. from succeeding and obtaining an education under FAPE."

[9] Subsection "(14)" does not exist in former RCW 49.60.215. The statute was amended on June 6, 2024, after plaintiffs filed their complaint. LAWS OF 2024, ch. 161, § 3. The new statute also has no subsection "(14)."

E. Defamation

The "Defendants" "falsely accused M.G. of rape." They allege that the "School/HOSA/[Wilson]/[Bradshaw]/Does #1-30" (1) made false statements about M.G. which were unprivileged communications; (2) knew the statements were false or acted with disregard for the truth; and (3) caused permanent physical, mental, emotional and psychological harm to the plaintiffs.

F. Fraud

The "Defendants devised a scheme to defraud M.G. out of money paid to the university, junior college and HOSA. The scheme was to manufacture false, defamatory and malicious claims about M.G., calling M.G. 'Fuck-Boy,' 'Slut-Boy,' 'Rapist,' 'Abuser' with the purpose and intent of defrauding M.G. out of non-refundable monies paid to his university." Washington State University had offered admission to M.G. in December 2020, but later rescinded its offer.

G. Civil Conspiracy

"Defendants" conspired to engage in the schemes alleged, including accomplishing "defamation per se," and that they "knew that their predicate acts were in furtherance of the scheme and part of a pattern targeting a student protected under WLAD."

H. Consortium (RCW 4.24.010) and Emotional Distress

As a direct and proximate cause of the "Defendants' actions," M.G. was prevented from

> 1) Competing in round two HOSA 2021 testing; 2) Attending "Grad's Night Out"; 3) Participating in the School's prom; 4) Attending the School's 2021 graduation ceremony; 5) Personally receiving his scholarship at the School's award's ceremony; 6) Attending church; 7) Depriving M.G. of

> attending his accepted university; 8) removal from M.G.'s senior yearbook. M.G. was ostracized and harassed in the community because of the School's Google Drive, which contained false, defamatory and malicious accusations of rape.

PROCEDURAL HISTORY

In response to plaintiffs' complaint, Wilson and Bradshaw filed a joint motion for expedited relief under UPEPA.[10] RCW 4.105.020. Plaintiffs filed an opposition to the motion and attached declarations from Attorney Gerlach and all the plaintiffs. Both Attorney Gerlach, M.G. and Samantha stated that when Bradshaw was confronted about possible lawsuits from "victims," Bradshaw responded via social media with the following post that M.G. and Samantha both personally saw:[11]

> [f]irst of all: idgaf bout any threats of defamation suits. It's not defamation if you've committed these heinous actions on camera. Dumbass hoe.
>
> Second: idgaf if the abuser is your homie, sister, brother, whateva. They're an abuser. They can learn or rot. I'm not ruining lives, they ruined their own. Eat my black ass.

In the opposition motion, plaintiffs did not assert the application of any of the statutory exceptions to UPEPA under RCW 4.105.010(3). See RCW 4.105.060(1)(b).

[10] This occurred in the United States District Court for the Western District of Washington where BISD had moved the case. A prior notice of intent to file the motion triggered a 14-day window within which plaintiffs could either withdraw or amend their complaint. RCW 4.105.020(1). Plaintiffs chose to amend the original complaint by withdrawing any reference to federal claims. After the amendment, the district court declined to exercise its supplemental jurisdiction and remanded the matter back to State court, where Bradshaw and Wilson refiled their UPEPA motion. Other than the removal of federal claims, there was no substantive change to the Plaintiffs' complaint.

[11] It is unclear as to how Attorney Gerlach, M.G. and Samantha have personal knowledge that Bradshaw was confronted about possible lawsuits and who did the confronting, as plaintiffs did not include that information in the record. Despite the fact that Bradshaw's post did not include any names, M.G. stated he believed "Bradshaw targeted me-a white, male Section 504 student because of Naszya Bradshaw's alleged black privilege."

HOSA responded to the plaintiffs' complaint by filing a second CR 12(b)(6) motion to dismiss.[12] Plaintiffs responded by filing an opposition to the motion. Attached to the motion were multiple exhibits untethered to any declaration establishing personal knowledge of the exhibits' content.[13]

The court held a hearing on June 12 on all the motions, including plaintiffs' motion for reconsideration, which was correctly treated as a motion to recuse. The court denied the motion to recuse during the hearing and later issued a written order on June 23, 2023. The court requested all parties submit proposed orders related to the UPEPA motion for the court's consideration.

More than two weeks after oral argument, but before the court issued any rulings, Wilson submitted a declaration. Wilson and Bradshaw filed a joint supplemental memorandum with attached exhibits. Many of the exhibits were exhibits previously submitted by the plaintiffs. Other exhibits included copies of local newspaper articles, and what appears to be an undated social media post by the superintendent of BISD that was untethered to any declaration.

Plaintiffs filed a June 26 motion to strike the supplemental pleadings as untimely. It was in this motion to strike that plaintiffs first asserted the application of UPEPA exceptions. Attorney Gerlach's statements in this pleading and his subsequent errata filing formed the basis of Wilson's motion for CR 11 sanctions, which the court later

[12] It appears HOSA identifies this as its "second" CR 12(b)(6) motion because it previously filed this motion in federal court when the case was temporarily moved there. The federal court did not rule on the motion before remanding the matter back to Kitsap County Superior Court.

[13] Attorney Gerlach, in the opposition pleading, describes one of the exhibits as the notes of the investigator hired by BISD to conduct an investigation related to social media posts, while also accusing the investigator of being biased. Attorney Gerlach did not attach the actual final report of the investigator.

granted and awarded attorney fees. The court also denied the plaintiffs' cross-motion for CR 11 sanctions.

The trial court denied plaintiffs' motion to strike, granted the UPEPA motion and awarded Bradshaw and Wilson attorney fees under RCW 4.105.090. The trial court also granted HOSA's second CR 12(b)(6) motion dismissing the claims for negligence, defamation, civil conspiracy, and fraud. The court denied plaintiff's motion for reconsideration. The court later granted HOSA's third CR 12(b)(6) motion to dismiss the remaining claims against HOSA.[14] Plaintiffs did not file an objection to the motion. Prior to the court granting the UPEPA motion, Bradshaw and Wilson moved to amend the case caption to identify M.G. by his full name and requested leave of the court to identify M.G. by his full name. BISD and HOSA joined the motion. The court granted the motion.

Plaintiffs appeal. More facts are discussed below where relevant.

DISCUSSION

Case Caption

In its initial complaint and throughout its pleadings, plaintiffs identify M.G. only by initials. Bradshaw and Wilson first noted their objection only as a footnote in their joint UPEPA motion. They wrote:

> "M.G." is *not* a minor, and there is no basis in the record for allowing "M.G." to proceed incognito. While counsel has respected the designation in this pleading, the Court should *sua sponte* order amendment of the Complaint to specifically identify "M.G." just like any other adult seeking relief in this public forum.

[14] The remaining claims were cyberstalking, loss of consortium, and emotional distress.

During the June 12, 2023 UPEPA motion hearing, Wilson's counsel observed that it was improper for the plaintiffs to initiate this case using M.G.'s initials, but said, "That's a side issue, we've raised that in a couple of our briefs." The court responded that it had seen that but was not going to address it, explaining that it should be brought as a motion for the court to "address it, if necessary."

Bradshaw and Wilson filed a joint motion on July 7, 2023, to amend the case caption and for leave from the court to use M.G.'s full name. BISD and HOSA joined the motion. The motion stated,

> The Court first decides whether a proposed redaction implicates Article I, Section 10; once that determination has been made, the trial court must consider either a set of constitutional factors under *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640[ ]P.2d 716 (1982), or the factors under GR 15. *State v. S.J.C.*, 183 Wn.2d 408, 412, 352 P.3d 749 (2015); *John Doe G v. Dep't of Corr.*, 190 Wn.2d 185, 191, 410 P.3d 1156 (2018). This is because the public has a right of access to court records, which includes the full names of litigants.

The motion was made while the UPEPA motion was still pending, but the hearing was not held until after the trial court granted the UPEPA motion and dismissed all claims against Bradshaw and Wilson. Plaintiffs' opposition motion focused on lack of notice.

At the hearing, counsel for Bradshaw and Wilson argued that in order for M.G. to litigate in pseudonym or by initials, he needs to seek leave of court ahead of time and show a compelling reason. BISD, which joined the motion but did not submit separate briefing, argued that there needs to be a showing under Ishikawa "that there will be serious and imminent threat to MG – to some interests of MG if his full name is used. And that was not done here." Attorney Gerlach argued as follows:

> When the allegations are plainly false, the public, as a rule, has no legitimate interest in finding out names of people who have been falsely

> accused, that's the Bellevue John Does 1 through 11 v. Bellevue School District case.[15]
> ….
> There is no ambiguity there. In cases involving sexual harassment, as the Court indicated, or sexual assault, and there was assault on this case, as well as sexual harassment, the plaintiff can pursue the case through the use of initials.
> So the idea that somehow, because this started when he was a minor and continued after he was no longer a minor, and somehow that eliminates the initial causes of action and claims, is false.
> So with respect to that, I think the Court was correct. The plaintiff can pursue an action, they can use initials. Case law is clear on that. There's no procedural issue that's mandating, unless the Court would require it, we'd be happy to file a petition to proceed under initials.

The court recognized that M.G.'s privacy concerns are not without merit and acknowledged that it took his privacy and safety concerns seriously, but in deciding whether someone can proceed under their initials, the court must follow the procedures and factors from Ishikawa.[16] In doing so, the court determined that plaintiffs failed to show a "serious and imminent threat to some other important interest" as he sought to protect a right other than the right to a fair trial. The court ruled that the plaintiffs failed to articulate a serious and imminent threat to an important interest if M.G. is forced to use his full name in this action, and any interest here is outweighed by the public's interest in the open administration of justice. The court granted the motion and ordered that "the

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[15] Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405, 164 Wn.2d 199, 205, 189 P.3d 139 (2008) (determining that when allegations of misconduct are "unsubstantiated," disclosure of a teacher's identity violates their right to privacy, and enjoining release under the former public disclosure act).

[16] Under Ishikawa,

> (1) the proponent of closure must make a showing of compelling need, (2) any person present when the motion is made must be given an opportunity to object, (3) the means of curtailing open access must be the least restrictive means available for protecting the threatened interests, (4) the court must weigh the competing interests of the public and of the closure, and (5) the order must be no broader in application or duration than necessary.

John Doe 1 v. Prosecuting Att'y, 192 Wn. App. 612, 617, 369 P.3d 166 (2016) (citing Ishikawa, 97 Wn.2d at 37-39, 640 P.2d 716 (1982)).

case caption shall be amended to include "M.G."s full name. All parties have leave to refer to M.G. by his full name in all future pleadings."

Plaintiffs challenge the court's ruling. They argue that while article I, section 10 of the Washington constitution requires that "[j]ustice in all cases shall be administered openly," "it is equally clear that the public's right to access is not absolute and may be limited to protect other interests." In essence, plaintiffs argue that M.G. was falsely accused of sexual assault and the public has no legitimate interest in finding out the names of people who have been falsely accused. Defendants did not address this issue in their response briefs.

We review a trial court's decision to allow plaintiffs to proceed under pseudonyms for an abuse of discretion. Doe AA v. King County, 15 Wn. App. 2d 710, 717, 476 P.3d 1055 (2020). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Muhammad, 153 Wn.2d 795, 803, 108 P.3d 779 (2005) (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)). A trial court's discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006).

"In the complaint the title of the action shall include the names of all the parties…" CR 10(a)(1).

> Article 1, section 10 of the Washington State Constitution requires courts conduct judicial proceedings openly and without delay. This means court proceedings and court documents are presumptively open to the public, and any exception is appropriate "only in the most unusual of circumstances." Although openness is presumed, it is not absolute. "The

> public's right of access may be limited to protect other significant and fundamental rights, such as a defendant's right to a fair trial."

Doe AA, 15 Wn. App. 2d at 718-19 (internal citations omitted).

"Whether an Ishikawa analysis is necessary depends on whether article I, section 10 applies." S.J.C., 183 Wn.2d at 412. "Whether article I, section 10 applies depends on application of the experience and logic test." Id. A court must determine whether experience and logic support a party's desire to proceed in pseudonym. Doe G., 190 Wn.2d at 199. The experience prong examines "'whether the place and process have historically been open to the press and general public.'" Id. The logic prong examines "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Id.;[17] see Bellevue John Does 1-11, 164 Wn.2d at 217 (holding that experience and logic show that allowing plaintiffs to proceed under pseudonyms does not implicate article 1, section 10 where the public's interest in the plaintiffs' names is minimal and use of those names would chill their ability to seek relief).

[17] The Washington Supreme Court recently stated that "We have held that names in court pleadings are subject to article I, Section 10 and GR 15." John Does v. Seattle Police Dep't et al, No. 102182-8 slip op. at 38 (Wash. February 13, 2025) (unpublished), https://www.courts.wa.gov/opinions/pdf/1021828.opn.pdf. (citing Doe G., 190 Wn.2d at 201). The court then went on to discuss the five-step framework in Ishikawa without any mention of the experience and logic test. Does, slip op. at 38. However, the Supreme Court in Doe G. followed its holding in S.J.C., 183 Wn.2d at 412, and first applied the experience and logic test to determine if article I, Section 10 applied. Doe G., 190 Wn.2d at 199. In doing so, the court concluded that "names of people convicted of criminal offenses, including sex offenders, have historically been open to the public" and observed that "[u]nlike convicted sex offenders, parties who have not been convicted of any crime may have a legitimate privacy interest because there is no public record associating them with the subject of their litigation." Id. at 200. Doe G. involved whether special sex offender sentencing alternative evaluations are exempt from disclosure under the Public Records Act, chapter 42.56 RCW, and whether pseudonymous litigation was proper in the action. Id. at 189. Doe G. did not categorically hold that all names in pleadings are necessarily subject to an Ishikawa analysis. The Supreme Court in John Does, did not disavow or overrule S.J.C. or Doe G. We continue to follow and apply S.J.C. and Doe G.

Courts must analyze a motion to redact or seal, using both GR 15[18] and Ishikawa factors. Doe AA, 15 Wn. App. 2d at 719 (citing Hundtofte v. Encarnacion, 181 Wn.2d 1, 7, 330 P.3d 168 (2014)). A trial court must justify redaction of names in pleadings under GR 15. Doe G., 190 Wn.2d at 198. GR 15(c)(2) authorizes the redaction of names when "justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record."

In the instant case, counsel for Bradshaw and Wilson correctly indicated in their motion that the court must first decide whether Article I, Section 10 applied, and even cited S.J.C., 183 Wn.2d 408 and Doe G., 190 Wn.2d 185. Both cases explain that "whether an Ishikawa analysis is necessary depends on whether article I, section 10 applies," and "whether article I, section 10 applies depends on application of the experience and logic test." Doe G., 190 Wn.2d at 199 (quoting S.J.C., 183 Wn.2d at 412). However, none of the parties at oral argument mention the experience and logic test. In fact, counsel for BISD simply argued that M.G. failed to meet the requirements under Ishikawa. The trial court followed that argument.

While the trial court had reason to admonish plaintiffs for not first seeking to proceed using only M.G.'s initials, the court, nonetheless, was faced with such a request, albeit by way of a hearing brought by defendants. The court proceeded to determine whether M.G. would be permitted to continue to proceed by initials. In doing so, the court was required to apply the correct legal standard.[19] We decline to engage in

[18] GR 15 sets forth a uniform procedure for the destruction, sealing, and redaction of court records. GR 15(a).

[19] Following oral argument, Bradshaw filed a statement of "Supplemental Authorities" that were previously available at the time Bradshaw filed her response brief. RAP 10.8 allows a party to file a statement of additional authorities. "We view this rule as being intended to provide parties an opportunity to cite authority decided after the completion of briefing. We do not view it

our own experience and logic analysis, and instead reverse the trial court's order and remand for further proceedings.[20]

UPEPA Motion

Plaintiffs challenge the trial court's decision to grant the UPEPA motion. They contend the act is unconstitutional, and, in the alternative, that the trial court erred in concluding the speech in question was one of public concern, and that UPEPA exceptions did not apply. Finding no error, we affirm the trial court.

UPEPA, chapter 4.105 RCW, is designed to provide an expedited process for dismissing lawsuits that target activities protected by the First Amendment, such as freedom of speech, press, assembly, petition, and association on matters of public concern. Thurman, slip op. at 1-2. RCW 4.105.903 provides: "This chapter applies to a civil action filed or cause of action asserted in a civil action on or after July 25, 2021." The UPEPA allows a defendant to file a special motion for expedited relief within 60 days of being served with a pleading asserting a covered cause of action. Id. Relevant to this case, chapter 4.105 RCW applies to any claim asserted "against a person based on the person's … [e]xercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or Washington state Constitution, on a matter of public concern."

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as being intended to permit parties to submit to the court cases that they failed to timely identify when preparing their briefs." O'Neil v. City of Shoreline, 183 Wn. App. 15, 23, 332 P.3d 1099 (2014). Moreover, Bradshaw also raises arguments she could have, but failed to raise in her response brief. Thus, we grant plaintiffs' motion to strike Bradshaw's supplemental pleading.

[20] Though all claims against Bradshaw, Wilson and HOSA have been dismissed, the record before us does not establish that all claims against Does 1-100 and BISD have been dismissed. We recognize that based on the trial court's ruling, pleadings were filed that used M.G.'s full name. Our holding addresses the issue before the trial court of whether M.G. may proceed without using his full name. It does not address motions to redact or seal court records under GR 15.

RCW 4.105.010(2)(c). Certain exceptions to this rule are enumerated in RCW 4.105.010(3)(a).

Plaintiffs assert for the first time on appeal that RCW 4.105.010(3) is facially unconstitutional and as applied because it violates the right to a jury trial, is too vague, and violated plaintiffs' right to due process.

Constitutional challenges are subject to de novo review. Portugal v. Franklin County, 1 Wn.3d 629, 647, 530 P.3d 994 (2023) ("We presume statutes are constitutional, and the party challenging constitutionality bears the burden of proving otherwise."). Additionally, an appellate court "may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a); State v. Strine, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). A party must raise an issue at trial in order to preserve the issue for appeal, unless the party can show the presence of a "'manifest error affecting a constitutional right.'" RAP 2.5(a)(3); State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011).

Plaintiffs only mentioned the constitutionality of UPEPA below when they opposed Bradshaw's motion for attorney fees and costs under RCW 4.105. In that motion, plaintiffs asserted that Wilson's law firm made statements, in 2020, that challenged UPEPA's constitutionality regarding the application of attorney fees and costs. That is plainly distinct from the claim they assert on appeal. In addition, they make no attempt to establish that the alleged error was manifest or make any attempt to satisfy RAP 2.5(a)(3). The plaintiffs have waived their constitutional claims.

They next argue that the trial court erroneously applied RCW 4.105.060. We disagree.

Our Court reviews issues of statutory interpretation de novo. Pub. Util. Dist. No. 2 of Pac. County v. Comcast of Wash. IV, Inc., 8 Wn. App. 2d 418, 449, 438 P.3d 1212 (2019). "In assessing whether the trial court erred by denying [a] UPEPA motion, we engage in the three-step analysis dictated by RCW 4.105.060(1)." Jha v. Khan, 24 Wn. App. 2d 377, 388, 520 P.3d 470 (2022). First, it is the moving party's burden to establish that UPEPA applies to the cause of action. RCW 4.105.060(1)(a); Id. Second, once the moving party has satisfied this requirement, the burden shifts to the responding party to establish that a statutory exception applies under RCW 4.105.060(1)(b). Jha, 24 Wn. App. 2d at 387. And third, if the responding party fails to demonstrate that an exception applies, the trial court must dismiss the action if either:

> (i) The responding party fails to establish a prima facie case as to each essential element of the cause of action; or
> (ii) The moving party establishes that:
> (A) The responding party failed to state a cause of action upon which relief can be granted; or
> (B) There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

RCW 4.105.060(1)(c). The court must dismiss the cause of action or part of the cause of action if three conditions are met. Thurman v. Cowles Co., 29 Wn. App. 2d 230, 238, 541 P.3d 403 (2024), rev'd, on other grounds, 562 P.3d 777 (Wash. 2025).

> In ruling on a motion under RCW 4.105.020, the court shall consider the pleadings, the motion, any reply or response to the motion, and any evidence that could be considered in ruling on a motion for summary judgment under superior court civil rule 56.

RCW 4.105.050.

A. UPEPA Application

Under the first step of the UPEPA analysis, Bradshaw and Wilson both maintain that UPEPA applies because plaintiffs' cause of action against them is based on the exercise of their right of freedom of speech, and that their statements were a matter of public concern. Plaintiffs argues otherwise.

UPEPA applies when a complaint is based on the individual's "[e]xercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or Washington state Constitution, on a matter of public concern." RCW 4.105.010(2)(c). Whether speech is a matter of public concern is a question of law, which courts must determine "'by the content, form, and context of a given statement, as revealed by the whole record.'" Billings v. Town of Steilacoom, 2 Wn. App. 2d 1, 31, 408 P.3d 1123 (2017) (quoting Connick v. Myers, 461 U.S. 138, 147-48, 148 n.7, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)). Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community. Jha, 24 Wn. App. 2d at 389.

We first analyze the "content, form, and context" of the target of the plaintiffs' claims against Bradshaw and Wilson. It is undisputed that those claims attack Bradshaw's and Wilson's speech, and that speech consisted of public social media posts. Wilson's speech targeted "all the girls who are, or have been victims of M.G. in any way." Wilson offered to compile their stories and compose a letter to the school with their demands. Plaintiffs never disclosed what Bradshaw actually said in her posts that they describe as "false defamatory and malicious stories" about M.G. Plaintiffs also

challenge Bradshaw's social media post after having been confronted about possible defamation lawsuits. Her response was colorfully direct:

> "[f]irst of all: idgaf bout any threats of defamation suits. It's not defamation if you've committed these heinous actions on camera. Dumbass hoe.
>
> Second: idgaf if the abuser is your homie, sister, brother, whateva. They're an abuser. They can learn or rot. I'm not ruining lives, they ruined their own. Eat my black ass."

The "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." Snyder v. Phelps, 562 U.S. 443, 453, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) (quoting Rankin v. McPherson, 483 U.S. 378, 387, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987)).

Plaintiffs next argue that UPEPA does not apply because the speech at issue was defamatory, false and not matter of public concern.

Plaintiffs rely on Jha, 24 Wn. App. 2d 377, and Spratt v. Toft, 180 Wn. App. 620, 632, 324 P.3d 707 (2014), to argue that UPEPA only applies to public figures or public campaigns. Spratt involved statements made by a person who was in the middle of a political campaign against a private citizen. 180 Wn. App. at 627. Jha involved statements written by one political candidate about another in an article published online. 24 Wn. App. 2d at 390. Though these cases involved political campaigns, their holding did not mandate that speech does not equate to a public concern unless it was political speech. Plaintiffs ignore the actual legal test in determining whether speech is a matter of public concern. It is a question of law, which courts must determine "'by the content, form, and context of a given statement, as revealed by the whole record.'" Billings, 2 Wn. App. 2d at 31 (quoting Connick, 461 U.S. at 147-48). Moreover, as this court stated in Jha, speech relating to political, social, or other concern to the

community involves matters of public concern. 24 Wn. App. 2d at 389. Under the statute, our legislature requires us to broadly construe whether speech is a matter of public concern. Id. at 390; RCW 4.105.901.

In the instant case, Bradshaw's and Wilson's speech was made in the context of an on-going concern about sexual assault of young women on Bainbridge Island and BHS' response to reports of such assaults.

Bradshaw and Wilson submitted, as exhibits, local newspaper articles and other publications that documented community effort between 2017 and 2023 to address the issue of sexual assault. The Bainbridge Island Review reported many people heading from the island to Seattle in 2017, to participate in a women's march. In 2018, the local paper ran an opinion column about the #MeToo movement. In fall 2020, the paper reported on a rally to encourage girls to talk about sexual assault. Attendees were invited to tell their stories and learn about "Let's Talk," a service through BYS which offers one-on-one and small group peer support. BYS organized a march that began at BHS "To End Sexual Assault and Rape Culture on Bainbridge Island" in 2021. Another newspaper article, in January 2023, discussed how three agencies on the island, including BHS, worked to give power back to victims of sexual assault. It was with this backdrop that Bradshaw and Wilson exercised their First Amendment right to speak out. Wilson offered to provide victims advocacy by bringing their experiences to the attention of the Bainbridge Island School District. Bradshaw's statement could be seen as a public pronouncement that one need not be fearful to speak out if you speak the truth, even when facing threats of litigation.

Though plaintiffs argue that the speech that is the subject of their complaint is "false," false speech is protected speech as long as it is not incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, pornography, fraud or true threats. United States v. Alvarez, 567 U.S. 709, 717, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012). Plaintiffs argue that UPEPA does not apply because the speech at issue was defamatory. "Under the UPEPA, provable defamation claims survive the expedited dismissal process and are not dismissed unless and until a trier of fact finds that defamation has not been proved. However, claims against protected expression are covered by the UPEPA notwithstanding a plaintiff characterizing that expression as defamation." Thurman, 29 Wn. App. 2d at 241. Here, the plaintiffs simply do not present a prima facie case of defamation towards M.G.

To establish a prima facie defamation claim, the claimant must show (1) that the defendant's statement was false, (2) that the statement was unprivileged, (3) that the defendant was at fault, and (4) that the statement proximately caused damages. Caruso v. Loc. Union No. 690, 107 Wn.2d 524, 529, 730 P.2d 1299 (1987). In a defamation case, the plaintiff has the burden of establishing a prima facie case on all four elements of defamation. LaMon v. Butler, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989). "The prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists." Id.

Wilson's solicitation of stories from "girls who are, or have been victims of M.G." is not an offer to write "contrived stories about male Section 504 students" as alleged by plaintiffs. Samantha's and M.G.'s assertion that Bradshaw posted "false, malicious and defamatory" comments or allegations about M.G. are conclusory statements and do not

assert specific, material facts. And Bradshaw's social media post after being confronted with a possible defamation lawsuit did not assert M.G., let alone any named individual, had committed sexual assault. In short, plaintiffs fail to establish a statement made by Bradshaw or Wilson that is provably false.

We agree with the trial court that Bradshaw and Wilson's statements fall within the definition of a "matter of public concern" and UPEPA applies.

B. Statutory Exceptions

Once the moving party has established that UPEPA applies, the burden shifts to the responding party to establish that a statutory exception under RCW 4.105.010(3) applies. RCW 4.105.060(1)(b); Jha, 24 Wn. App. 2d.at 388. RCW 4.105.010(3)(a) provides 12 exceptions that fall outside the scope of the act.

Plaintiffs assert that three exceptions apply. (1) RCW 4.105.010(3)(a)(iv)[21] (claims "against a person named in a civil suit brought by a victim of a crime against a perpetrator."); (2) RCW 4.105.010(3)(a)(viii) (claims "based on a common law fraud claim."); (3) RCW 4.105.010(3)(a)(x) (claims "brought under Title 49 RCW.").

Under the second step of the UPEPA analysis, we review whether plaintiffs met their burden to establish that a statutory exception applies.

Wilson contends that plaintiffs waived the ability to raise any exceptions under the UPEPA statute because they did not raise exceptions in their filed opposition.

After Wilson and Bradshaw filed their joint UPEPA motion, plaintiffs responded by filing an opposition to the motion, but did not assert in the pleading the application of any exception under RCW 4.105.010(3). Later, after Wilson and Bradshaw filed a

[21] Plaintiffs appear to inadvertently omit "(a)" in its citations to RCW 4.105.010(3) exceptions.

supplemental memorandum, plaintiffs filed a motion to strike the supplemental brief. In that motion to strike, plaintiffs asserted the same three exceptions under RCW 4.105.010(3)(a) that they raise on appeal. The court, in its consideration of the UPEPA motion, denied plaintiffs' motion to strike and considered all of the submitted pleadings by all parties. Though Attorney Gerlach did not expressly cite to RCW 4.105.010(3) during oral argument at the June 12, 2023 hearing, he did argue, "We can't dismiss [WLAD], defamation, fraud or cyber acts in place because of the conspiracy by the co[-]defendants." Thus, plaintiffs did assert the application of exceptions below that was considered by the trial court. We now turn to each of the asserted exceptions.

(i) RCW 4.105.010(3)(a)(iv)

The first exception is RCW 4.105.010(3)(a)(iv) that provides for a cause of action "against a person named in a civil suit brought by a victim of a crime against a perpetrator." Plaintiffs assert that M.G. is a victim of cyber harassment[22] by Bradshaw and Wilson, and that plaintiffs brought a civil suit against them.

[22] RCW 9A.90.120 defines cyber harassment:
(1) A person is guilty of cyber harassment if the person, with intent to harass or intimidate any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to that person or a third party and the communication:
(a)(i) Uses any lewd, lascivious, indecent, or obscene words, images, or language, or suggests the commission of any lewd or lascivious act;
(ii) Is made anonymously or repeatedly;
(iii) Contains a threat to inflict bodily injury immediately or in the future on the person threatened or to any other person; or
(iv) Contains a threat to damage, immediately or in the future, the property of the person threatened or of any other person; and
(b) With respect to any offense committed under the circumstances identified in (a)(iii) or (iv) of this subsection:
(i) Would cause a reasonable person, with knowledge of the sender's history, to suffer emotional distress or to fear for the safety of the person threatened; or
(ii) Reasonably caused the threatened person to suffer emotional distress or fear for the threatened person's safety.

Plaintiffs fail to cite to any substantive evidence anywhere in the record to support this claim that M.G. was the victim of cyber harassment specifically by Bradshaw and Wilson. In the complaint, plaintiffs characterize the unnamed student who uploaded the link to the dossier in the school's Google Drive as a cyber-stalker.

(ii) RCW 4.105.010(3)(a)(viii)

The next exception, RCW 4.105.010(3)(a)(viii), provides for a cause of action "based on a common law fraud claim." Plaintiffs cite to their complaint, in which they allege "Defendants devised a scheme to defraud M.G. out of money paid to the university, junior college and HOSA." The facts asserted under his claim for fraud include that the uploaded dossier described M.G.'s attendance at community college, that he attends BHS and goes to Olympic College for Running Start, and that he was in a leadership position in HOSA the previous year.

Common law fraud consists of nine essential elements[23] which must be proven by clear, cogent and convincing evidence.

Plaintiffs cite to nothing in the record to support their claim of fraud or attempt to address how they relied on any facts represented by Bradshaw or Wilson to their detriment.

[23] The nine essential elements are:
(1) A representation of an existing fact;
(2) Its materiality;
(3) Its falsity;
(4) The speaker's knowledge of its falsity or ignorance of its truth;
(5) His intent that it should be acted on by the person to whom it is made;
(6) Ignorance of its falsity on the part of the person to whom it is made;
(7) The latter's reliance on the truth of the representation;
(8) His right to rely upon it;
(9) His consequent damage.
Sigman v. Stevens-Norton, Inc., 70 Wn.2d 915, 920, 425 P.2d 891 (1967).

(iii) RCW 4.105.010(3)(a)(x)

The last exception asserted by plaintiffs is RCW 4.105.010(3)(x) that provides for a cause of action "brought under Title 49 RCW." Plaintiffs merely state that "M.G. alleged violations under RCW 49.60 Washington's Law Against Discrimination ('WLAD')" and cite to their complaint. Plaintiffs simply list a cause of action in their first amended complaint without citing to any asserted facts in the record to show how Bradshaw or Wilson committed a WLAD violation. In fact, the claim of a WLAD violation in the complaint lists BISD, HOSA and Does #1-30, not Bradshaw or Wilson.

In summation, plaintiffs fail to satisfy RAP 10.3(a)(6) (requiring an appellant's brief to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record"); see also Jackson v. Quality Loan Serv. Corp., 186 Wn. App. 838, 845, 347 P.3d 487 (2015). It follows that plaintiffs have not met their burden to demonstrate that any exceptions under RCW 4.105.010 apply to establish that their claims against Bradshaw and Wilson fall outside the reaches of UPEPA.

B. Prima Facie Case

Under the third step of the UPEPA analysis, dismissal with prejudice of a cause of action or part of a cause of action must occur if either:

> (i) The responding party fails to establish a prima facie case as to each essential element of the cause of action; or
> (ii) The moving party establishes that:
> (A) The responding party failed to state a cause of action upon which relief can be granted; or
> (B) There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

RCW 4.105.060(1)(c). Plaintiffs make no attempt to substantively argue step three of the UPEPA analysis. See RAP 10.3(a)(6) (requiring appellant's brief to include "argument in support of the issues presented for review"); see also Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986) (assignment of error is waived if unsupported by argument or authority).

In conclusion, we hold that plaintiffs failed to establish that the trial court erred in dismissing the claims against Bradshaw and Wilson under UPEPA.[24] We affirm.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublish opinions. See RCW 2.06.040.

CR 12(b)(6)

Gerlach next challenges the trial court's CR 12(b)(6) dismissal of all claims against HOSA.[25]

We review a trial court's ruling to dismiss a claim under CR 12(b)(6) de novo. West v. Stahley, 155 Wn. App. 691, 696, 229 P.3d 943 (2010). Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove "any set of facts which would justify recovery." Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998). The court presumes all facts alleged in the plaintiff's

[24] We need not address plaintiffs' challenge of the award of attorney fees under RCW 4.105.010(3) because their only challenge was based on their argument that the UPEPA motion should not have been granted.

[25] HOSA contends that plaintiffs introduced six new facts in their opening brief that are not in the record. To the extent that these facts constitute new evidence that was not presented to the trial court, we do not consider it. See Spokane Airports v. RMA, Inc., 149 Wn. App. 930, 936, 206 P.3d 364 (2009) (stating "[g]enerally, we will not accept additional evidence on appeal …").

complaint are true and may consider hypothetical facts supporting the plaintiff's claims. Id.

On appeal, plaintiffs argue that the trial court erred in dismissing its WLAD claim against HOSA because it is subject to WLAD for discrimination, including intentional sexual misconduct, physical abuse and assault. While this court presumes all facts alleged in the plaintiffs' complaint as true, they do not cite to any facts in their complaint or present any meaningful argument. Instead, they simply say "[s]ufficient facts established liability by HOSA's sponsors, officers and members." "We are not required to search the record for applicable portions thereof in support of the plaintiffs' arguments." Mills v. Park, 67 Wn.2d 717, 721, 409 P.2d 646 (1966). As to the other causes of action dismissed against HOSA, plaintiffs summarily state that the trial court dismissed them based on misreading the case law. Instead of citing to relevant parts of the record, plaintiffs merely cite to their own pleadings below. "[I]t is improper to attempt to 'incorporate by reference' into a party's merits brief arguments made in other pleadings. State v. I.N.A., 9 Wn. App. 2d 422, 426, 446 P.3d 175 (2019); See Diversified Wood Recycling, Inc. v. Johnson, 161 Wn. App. 859, 890, 251 P.3d 293 (2011) ("We do not permit litigants to use incorporation by reference as a means to argue on appeal or to escape the page limits for briefs set forth in RAP 10.4(b)."); Kaplan v. Nw. Mut. Life Ins. Co., 115 Wn. App. 791, 800 n.5, 65 P.3d 16 (2003).

Plaintiffs do not present sufficient argument to warrant review as to the trial court's granting of HOSA's second CR 12(b)(6) motion. See RAP 10.3(a)(6) (requiring an appellant's brief to provide "argument in support of the issues presented for review,

together with citations to legal authority and references to relevant parts of the record"); see also Jackson,186 Wn. App. at 845.

Because plaintiffs did not respond to HOSA's third CR 12(b)(6) motion, plaintiffs have waived any error as to the trial court's granting of that motion. See RAP 2.5(a); Ryder v. Port of Seattle, 50 Wn. App. 144, 150, 748 P.2d 243 (1987) (An issue, theory, or argument not presented to the trial court will not be considered on appeal.).

Motion for Reconsideration

Plaintiffs filed a motion for reconsideration of the court's July 19, 2023 orders granting HOSA's second CR 12(b)(6) motion and granting Bradshaw's and Wilson's UPEPA motion. The court denied the motion for reconsideration.

We review the denial of a motion for reconsideration for an abuse of discretion. McCoy v. Kent Nursery, Inc., 163 Wn. App. 744, 758, 260 P.3d 967 (2011). Generally, a trial court abuses its discretion if its decision is "manifestly unreasonable or exercised on untenable grounds or for untenable reasons." Id. "Under CR 59(a)(4), reconsideration is warranted if the moving party presents new and material evidence that it could not have discovered and produced at trial." Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland, 95 Wn. App. 896, 906, 977 P.2d 639 (1999).

Plaintiffs merely state that they provided "new facts and evidence to support the request for reconsideration, including controlling case law." This is not sufficient to warrant review. RAP 10.3(a)(6) (requiring an appellant's brief to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record"); see also Jackson, 186 Wn. App. at 845.

CR 11

Plaintiffs next contend that the trial court improperly awarded CR 11 sanctions for Wilson, while denying their request for cross-sanctions. We disagree.

In plaintiffs' motion to strike Bradshaw and Wilson's supplemental briefing, Attorney Gerlach wrote that "Wilson ***wanted*** a rape culture on Bainbridge Island to support her fantasies of sexual assault and 'a hotbed of attempted youth social justice.'" He also wrote:

> The intent and purpose of the false, malicious and defamatory statements was to coerce the boys into suicide, like a 2017 student. Wilson's supplemental brief referenced a 2017 rally. In 2017 a student committed suicide in Wilson's class. The police failed to fully investigate all contributing factors to the death of a student, who would have graduated with Wilson in 2020.

Wilson's counsel notified Attorney Gerlach that he had violated CR 11 and demanded the statements relating to wanting a rape culture and coercing boys into suicide be removed. The notice informed Attorney Gerlach that if he did not file a corrected brief with the statements removed, a motion for sanctions would follow. Attorney Gerlach re-filed its June 26 motion labeling it an "ERRATA FILING" without any further explanation. The statement relating to rape culture was changed to:

> *A student* ***desired*** a rape culture on Bainbridge Island. This could support fantasies of sexual assault and "a hotbed of attempted youth social justice."

The statements relating to coercing suicide remained the same. The "errata filing" did not request removal of the original pleading, did not move to seal it, and did not identify what had been changed from the original. The court granted Wilson's CR 11 motion and denied plaintiffs' cross-motion for CR 11 sanctions. The court awarded Wilson $6,445 in attorney fees.

We review a trial court's imposition of CR 11 sanctions for an abuse of discretion. Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). Under an abuse of discretion standard, a trial court's sanction decisions are reversed "only if the [trial court's] decisions only are manifestly unreasonable or based on untenable grounds." Stiles v. Kearney, 168 Wn. App. 250, 263, 277 P.3d 9 (2012).

CR 11 requires every pleading to be signed by an attorney or party. That signature "constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact..." CR 11.

CR 11 deals with two types of filings: "baseless filings and filings made for improper purposes." Stiles, 168 Wn. App. at 261. To impose sanctions for a baseless filing, the trial court must find not only that the claim was without factual or legal basis, but also that the attorney who signed the filing did not conduct a reasonable inquiry into the factual basis of the claim. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). Additionally, "the trial court must make findings specifying the actionable conduct." Stiles, 168 Wn. App. at 262 (citations omitted).

A. CR 11 Sanctions Granted

In granting the CR 11 motion against Attorney Gerlach, the trial court issued detailed written findings of fact and conclusions of law.

The court found that Attorney Gerlach failed to revise the statement about suicide in his previous brief. His errata filing did not request the removal of the original pleading or request that it be sealed. The court held that Attorney Gerlach did not provide any

factual basis for the statements he made. Moreover, the trial court found that there was no evidence to support an assertion that any student "desired" or "wanted" rape culture, or that Wilson coerced any boys into suicide.

On appeal, Attorney Gerlach continues to maintain that his pleadings were "factually accurate." Regarding his assertion that Wilson "wanted a rape culture," Attorney Gerlach argues that "Wilson actually used the word, 'want' four times in her targeted attack on M.G. and stated, 'no detail spared' and 'no grievance unaired.'" He cites to Wilson's posting where she wrote:

> If you guys want, I will take your stories and compose a letter to the school with your demands. …I want to help you. …I'd want ALL of your input on what I write … If you want, I will write it for you.

(Emphasis added.) He argues, without citing the record, that the "fraudulent 'rape culture' allegedly occurred during COVID when school was remote and public events shut down." He argues, citing to his own pleadings, that "Defendants claimed a new 'rape culture' formed on Bainbridge Island" without any evidence of proof. He also maintains that Samantha was correct when she stated, "I am not sure if Eleanor Wilson had something to do with that girls' suicide." He further claims that "[i]f Plaintiffs had been provided responses to discovery requests, Samantha could have stated with evidence whether Eleanor Wilson had something to do with that girls' suicide." Lastly, he cites to evidence, that was submitted with a later motion for reconsideration, to support his errata filing that "a student desired a rape culture." This evidence was in the form of a 2021 tax return document for the non-profit Kitsap Support Advocacy and Counseling (KSAC) organization, that indicated it had received contributions and grants totaling $818,888. It also included an unsupported assertion that BISD student Z.P. was

a board member of KSAC. Even if we were to consider the KSAC evidence, none of this supports a reasonable factual basis for the assertions that "a student desired a rape culture" or that the intent of the statements plaintiffs characterize as false, malicious and defamatory was to coerce boys into suicide.

The record supports the trial court's findings that the assertions made that were subject to the CR 11 sanctions were done so without factual or legal basis, and that Attorney Gerlach did not conduct a reasonable inquiry into the factual basis of the claims. The trial court did not abuse its discretion in imposing CR 11 sanctions.[26]

B. CR 11 Sanction Denied

Plaintiffs appear to appeal the denial of their cross-motion for CR 11 sanctions. After Wilson filed her motion for sanctions against Attorney Gerlach, plaintiffs filed a cross-motion for sanctions for a variety of reasons. On appeal, plaintiffs simply state, without any citation to the record, "[p]laintiffs filed a CR 11 cross-motion after Defendants' falsely accused Plaintiffs of being "white supremist." Plaintiffs do not sufficiently present argument or citations to the record to warrant review. RAP 10.3(a)(6). Plaintiffs also raise a new basis for CR 11 sanctions against Wilson's attorney that was not raised below. We decline to review a new argument on appeal that was not presented below. RAP 2.5(a). This court generally declines to review any claim of error not raised before the trial court. Plaintiffs do not argue that any exceptions to this rule apply. See Mullor v. Renaissance Ridge Homeowners' Ass'n, 22 Wn. App. 2d 905, 919, 516 P.3d 812 (2022).

[26] We need not address whether the court erred in determining Attorney Gerlach's statements were made for an improper purpose.

Recusal

Plaintiffs also assert that the trial court should have recused itself because about 10 years earlier, while the judge was in private practice, she represented the City of Bainbridge Island in an acrimonious dispute with Suzanne and Attorney Gerlach, who, as property owners, applied for a city permit. Plaintiffs argue that despite repeated requests by Attorney Gerlach for the trial court to recuse itself, it refused.

"Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing." State v. Gamble, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). "Evidence of a judge's actual or potential bias must be shown before an appearance of fairness claim will succeed." State v. Chamberlin, 161 Wn.2d 30, 37, 162 P.3d 389 (2007). Under the Code of Judicial Conduct, designed to provide guidance for judges, "'[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.'" Gamble, 168 Wn.2d at 188 (alteration in original) (quoting CJC Canon 3(D)(1)). Recusal is within the sound discretion of the trial court. In re Parentage of J. H., 112 Wn. App. 486, 496, 49 P.3d 154 (2002). This court reviews trial judges' decisions whether to recuse themselves to determine if the decision was manifestly unreasonable or based on untenable reasons or grounds. Kok v. Tacoma Sch. Dist. No. 10, 179 Wn. App. 10, 23-24, 317 P.3d 481 (2013). A litigant who proceeds to a trial or hearing before a judge despite knowing of a reason for potential disqualification of the judge waives the objection and cannot challenge the court's qualifications on appeal. Buckley v. Snapper Power Equip. Co., 61 Wn. App. 932, 939, 813 P.2d 125 (1991).

Disqualification of a single judge without a showing of prejudice is a right granted to parties by statute. Harbor Enters., Inc. v. Gudjonsson, 116 Wn.2d 283, 285, 803 P.2d 798 (1991); see RCW 4.12.050. After exercising the statutory right to peremptory removal of one judge, a party may not disqualify a second judge for prejudice by simply filing a second motion and affidavit under RCW 4.12.050. State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). A party claiming bias or prejudice must support the claim; prejudice is not presumed as it is under statutory right to peremptory removal. Id. at 328-39.

Even assuming that a sufficient basis may have existed to warrant recusal, Attorney Gerlach waived such a challenge because he was aware of the basis of his challenge before asking the court to grant his proposed order on a motion for evidence on February 17, 2023.

The trial court, as presiding judge, heard the plaintiffs' February 17 motion. Attorney Gerlach requested the presiding judge to sign orders directing social media companies to produce records. The court denied the request. Later in the hearing, counsel for BISD asked if the court was considering whether to assign the case to a particular judge. The court responded that it would be doing that later that day. It observed and stated "I'm next up on the rotation, so I think I'm probably next up, so it will probably be me." At no time did Attorney Gerlach ask the trial court to recuse itself or articulate a concern that the trial court could not be fair. The presiding judge later signed an order assigning the case to herself. A week later, plaintiffs filed a motion for reconsideration of the court's February 17 order denying its request for motions for evidence. The basis of the motion was that the judge, while in private practice, had

previously represented the City of Bainbridge in the litigation involving a permit application 10 years prior.

Despite the fact plaintiffs did not raise this concern or object to the court hearing their motion for evidence on February 17, the court considered the motion to recuse. The court explained that the case was preassigned in the ordinary course and that the court was the next judge in the rotation. The judge explained that though she was familiar with Attorney Gerlach's name prior to the February 17 hearing, that was not unusual in the small jurisdiction for an attorney's name to sound familiar. The court explained, "I have been on the bench for over 10 years, and prior to that, handled hundreds of cases as a practicing attorney for more than 16 years. I have no memory of any prior interactions with attorney Gerlach personally, and after reviewing his Motion, have only a very vague memory of the case he cites." The court further stated that "[a]fter a thorough review of attorney Gerlach's materials there is nothing about the prior case that causes me to feel any personal bias toward attorney Gerlach or his family." The court denied the motion and issued its order on June 23, 2023. Plaintiffs do not appeal that June 23 order.

At oral argument, Attorney Gerlach asserted that the reason plaintiffs did not request the trial judge to recuse itself on February 17 was because they had already exercised their statutory right to peremptory removal of a different judge. Wash. Court of Appeals oral argument, M.G. v. Bainbridge Island Sch. Dist., No. 86846-2-I (Jan. 22, 2025), at 21 min., 30 sec. through 21 min., 41 sec., *video recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2025011480/.

However, if the party shows actual prejudice on the part of a judge, the court must consider a motion for disqualification even if the statutory right has been exhausted. State v. Detrick, 90 Wn. App. 939, 942-43, 954 P.2d 949 (1998). Here the judge, who had been on the bench more than 10 years and had previously handled hundreds of cases as a practicing attorney, said she had no memory of any prior interactions with attorney Gerlach personally, and after reviewing his motion, only had a very vague memory of the case he cited. This is similar to the situation in Gamble, where our Supreme Court affirmed this court's holding that the remoteness of the representation of opposing party and the fact the judge did not recall it led to a conclusion that the moving party had not established an appearance of unfairness. 168 Wn.2d at 189.

Plaintiffs nevertheless contend that the trial court displayed bias and prejudice toward Attorney Gerlach throughout the entire proceeding. We disagree.

First, plaintiffs point to the fact that during the February 17 proceeding the trial court judge assigned the case to herself. The judge explained that she was next in the rotation and that is why she assigned the case to herself. That does not support a claim of actual prejudice or bias.

Second, plaintiffs assert that the trial judge cut Attorney Gerlach off from making an argument during the February 17 hearing. In arguing why the plaintiffs were seeking the orders for evidence, Attorney Gerlach stated, "[v]ictims in other cases are taking their own lives as a result of some of the school's failures to protect - -" The court interrupted and said,

> I'm going to ask you just to kind of stick to the - - the issues here, please. I - - I - - I'm not going to be making decisions in this based on, like, equity

> and policy. This is about kind of the rules and - - so I appreciate context in terms of your case for understanding the intent of identifying particular people and how that might be relevant, but in terms of talking about the greater public good or ill from these things, I don't think that's really important for today.

Trial judges have wide discretion to manage their courtrooms and conduct trials fairly, expeditiously, and impartially. State v. Johnson, 77 Wn.2d 423, 426, 462 P.2d 933 (1969). We, therefore, review a trial judge's courtroom management decisions for abuse of discretion. Peluso v. Barton Auto Dealerships, Inc., 138 Wn. App. 65, 69, 155 P.3d 978 (2007). Attorney Gerlach began making conclusory allegations supposedly related to "other cases" and unrelated to the claims in their complaint. The court continued to allow Attorney Gerlach to argue after directing him to stay on topic. The court did not abuse its discretion in doing so and this does not demonstrate actual bias or prejudice.

Third, plaintiffs also argue that during the February 17 hearing, the trial judge mocked Attorney Gerlach by saying, "Can I just ask you a question?" "As a – you are a lawyer right?" Plaintiffs quote the court out of context. Attorney Gerlach was asking the court to sign orders to assist plaintiffs in obtaining records from social media companies. The court then asked

> Can I just ask you a question? … You're a licensed lawyer. So why do you need the Court to issue a CR 45 subpoena? Because you have the legal authority to do it yourself, and - - and so why does the Court need to - - to assist you with that?

There is nothing unreasonable about this question. Given the fact Attorney Gerlach shared the same surname with at least some of the plaintiffs, it was not unusual for the judge to first confirm that Attorney Gerlach was an attorney before following up with more questions asking why he needed the court order since he had the authority to sign subpoenas as an attorney. The record does not support plaintiffs' claim that the court

was mocking Attorney Gerlach and it does not support a claim of actual bias or prejudice.

Lastly, plaintiffs contend that the trial court's UPEPA and CR 11 rulings are clear evidence of bias. However, "[j]udicial rulings alone almost never constitute a valid showing of bias." In re Pers. Restraint of Davis, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). As discussed above, the trial courts UPEPA and CR 11 rulings were proper.

Plaintiffs have not met their burden to establish actual prejudice by the trial judge.

Attorney Fees on Appeal

Bradshaw, Wilson, and plaintiffs all request attorney fees on appeal under RAP 18.1. We award fees to Bradshaw and Wilson and deny plaintiffs' request for fees.

RAP 18.1 authorizes an award of attorney fees if allowed by "applicable law." RAP 18.1(a) "A party is entitled to attorney fees on appeal if a contract, statute, or recognized ground of equity permits recovery of attorney fees at trial and the party is the substantially prevailing party." Hwang v. McMahill, 103 Wn. App. 945, 954, 15 P.3d 172 (2000). If a trial court "awards attorney fees pursuant to a statute... attorney fees are awardable on appeal as well." SEIU Healthcare Nw. Training P'ship v. Evergreen Freedom Found., 5 Wn. App. 2d 496, 515, 427 P.3d 688 (2018). Attorney fees on appeal "are awardable in the court's discretion," and subject to the party's compliance with RAP 18.1. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 825, 828 P.2d 549 (1992).

RCW 4.105.090 provides that on a motion under RCW 4.105.020, the court shall award court costs, reasonable attorneys' fees, and reasonable litigation expenses related to the motion: (1) To the moving party if the moving party prevails on the motion;

or (2) To the responding party if the responding party prevails on the motion and the court finds that the motion was not substantially justified or filed solely with intent to delay the proceeding.

Bradshaw and Wilson prevail on their UPEPA motion and are entitled to an award fee related to that motion under RCW 4.105.090(1) and RAP 18.1. We grant their request for fees and deny plaintiffs' request for fees.

RAP 18.9(a)

HOSA also requests an award of attorney fees and costs from defending this appeal as sanctions for plaintiffs' frivolous appeal under RAP 18.9.

HOSA cites to Kinney v. Cook, 150 Wn. App. 187, 195, 208 P.3d 1 (2009), in support of their argument, which provides that appropriate sanctions for a frivolous appeal can include an award of attorney fees and costs to the opposing party.

RAP 18.9(a) authorizes the appellate court, on its own initiative or on motion of a party, to order a party or counsel who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." RAP 18.9(a). "Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party." Yurtis v. Phipps, 143 Wn. App. 680, 696, 181 P.3d 849 (2008) (citing Rhinehart v. Seattle Times, Inc., 59 Wn. App. 332, 342, 798 P.2d 1155 (1990)). "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal." Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 906, 151 P.3d 219 (2007). Further, all doubts as to whether an

appeal is frivolous are resolved in favor of the appellant. Id. The fact that we reverse and remand as to the issue of the case caption shows that the appeal is not frivolous. We decline to award attorney fees to HOSA.

CONCLUSION

We reverse the trial court's order amending the case caption to use M.G.'s full name because the court did not apply the correct legal standard, and remand for further proceedings on that issue. We affirm the court's dismissal of all claims against Bradshaw and Wilson under UPEPA, as well as the CR 11 sanctions imposed against Attorney Gerlach. We hold that plaintiffs waived their claim that the trial court improperly refused to recuse itself because of an alleged conflict, and conclude that plaintiffs fail to otherwise demonstrate that the court was biased against plaintiffs. They did not present sufficient argument and citations to the record to warrant review as to their remaining claims.

Coburn, J.

WE CONCUR:

SKELLENGER BENDER

May 24, 2025 - 10:21 AM

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