No.



SUPREME COURT
OF THE STATE OF WASHINGTON

No. 86585-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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VALVE CORPORATION,

Appellants,

BUCHER LAW PLLC and AFN LAW, PLLC,

Respondents.

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# PETITION FOR REVIEW

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CORR CRONIN LLP

Blake Marks-Dias, WSBA 28169
Jeff Bone, WSBA No. 43965
1015 Second Avenue, Floor 10
Seattle, Washington 98104-1001
(206) 625-8600 Phone
(206) 625-0900 Fax
bmarksdias@corrcronin.com
jbone@corrcronin.com

Attorneys for Petitioner

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## I. INTRODUCTION

Should the Court of Appeals have applied the Uniform Public Expression Act ("UPEPA") so broadly that it would give lawyers the freedom to violate the rights of others with impunity? And should that court have articulated a test for litigation privilege that would virtually eliminate abuse of process claims against lawyers, contrary to another published decision of that court? Those are the questions that demand this Court's review pursuant to RAP 13.4(b).

As the Complaint of Petitioner Valve Corporation ("Valve") alleges, Defendants Bucher Law PLLC and AFN Law, PLLC (collectively, the "Bucher Defendants") conspired to extort Valve for hundreds of millions of dollars in illegitimate settlements. The Bucher Defendants executed this plan by committing torts—abuse of process and tortious interference—that furthered their own self-serving financial interests, harmed Valve, and even prejudiced their own clients.

The Court of Appeals determined that the Bucher Defendants' tortious conduct was protected by UPEPA and the litigation privilege. Those erroneous holdings raise numerous concerns that this Court should address under RAP 13.4(b).

*First*, contrary to the Court of Appeals' decision, UPEPA does not apply to Valve's claims against the Bucher Defendants, because those claims are not based "on an issue under consideration or review in a … judicial proceeding" and do not infringe on the Bucher Defendants' constitutional "right of freedom of speech … or the right of association." RCW 4.105.010(2)(b)–(c). The Bucher Defendants merely copied some allegations from an unrelated federal case in order to bring arbitrations on behalf of their clients—arbitrations that the Bucher Defendants have prosecuted without any impediment from this lawsuit.

*Second*, Valve's claims involve communications "related to" the Bucher Defendants' "sale" of "services" that are excepted from UPEPA as commercial speech. RCW 4.105.010(3)(a)(iii).

Whether UPEPA applies here is a matter of substantial public interest that implicates constitutional questions. RAP 13.4(b)(3)–(4).

*Third*, the Court of Appeals determined that Valve's complaint failed to state a cause of action—and thus merited dismissal under UPEPA—because the Bucher Defendants were "protected as a matter of law by the litigation privilege." *Valve Corp. v. Bucher Law PLLC*, 571 P.3d 312 (2025) ("Opinion") at slip op. p. 12, attached as Appendix A. The court ruled that litigation privilege immunity applies whenever an attorney's conduct is "pertinent or material" to a legal proceeding, Opinion at 13-14, but the published *Mason v. Mason* precedent decisively rejected that test in connection with "[a]buse of process claims," which "necessarily include allegations that involve conduct related to a judicial proceeding." 19 Wn. App. 2d 803, 834, 497 P.3d 431 (2021). *Mason* directed courts to assess whether an attorney's use of process aligned with the "legitimate purposes" of a legal proceeding, noting that "an attorney can be liable for

abuse of process where the attorney was alleged to have intentionally employed legal process for an inappropriate and extrinsic end." *Id.* at 835. Valve alleged such conduct. The Court of Appeals' departure from Division Two's decision in *Mason* would virtually insulate attorneys from ever facing abuse of process claims in Washington State. This is exactly the type of conflict that warrants this Court's intervention under RAP 13.4(b)(2).

For the above reasons, the Court should grant Valve's petition and accept review.

## II. ASSIGNMENTS OF ERROR

(1) Was it error for the Court of Appeals to conclude that UPEPA barred Valve's claims, when the claims did not infringe upon the Bucher Defendants' rights of expression and when UPEPA's commercial-speech exception applied?

(2) Did the Court of Appeals err—and create conflict with another published Court of Appeals decision—in applying the litigation privilege to bar Valve's claim for abuse of process, when Washington State precedent has held the privilege inapplicable to such claims?

## III. STATEMENT OF THE CASE

Valve, a corporation headquartered in Bellevue, Washington, operates Steam, an online platform through which video game makers sell and distribute their games to Steam users, all of whom must agree to the Steam Subscriber Agreement ("SSA"). CP 2-3, ¶¶ 12, 13.

The version of Valve's SSA at issue here included a robust dispute resolution process that required initiating any formal dispute by notice: "A party who intends to seek arbitration must first send the other a written notice that describes the nature and basis of the claim or dispute and sets forth the relief sought." CP 2-3, ¶ 13; CP 25, § 11.B. The parties were then required "to make reasonable, good faith efforts to informally resolve any dispute

before initiating arbitration." CP 25, § 11.B. Only after completing these steps, including thirty days of good faith, individual negotiations, could a party commence arbitration. *Id.*

Valve and each of its users previously agreed that "all disputes" between them must be resolved via "individual binding arbitration." CP 25, § 11.A. The users also agreed "not to bring or ***participate in*** a class or representative action" or "class, collective, or representative arbitration" and "not to ***seek to combine any action*** or arbitration with any other action or arbitration." CP 25, § 11.D (emphasis added).

Bucher Law's principal, Will Bucher, created a scheme to "weaponize" the SSA's arbitration clause to extort Valve for hundreds of millions of dollars, via a quick, collective settlement of tens of thousands of claims brought in a mass arbitration. CP 4, 5 ¶¶ 28, 34; CP 30. Mr. Bucher did not target Valve to serve the needs of concerned clients with meritorious claims but rather to exploit Valve's perceived financial position. CP 4, ¶ 29; CP 33-34.

The Bucher Defendants did not evaluate whether any of their clients had actual claims against Valve; instead, they copied allegations from a pending lawsuit and simply asked prospective clients how much money they wanted from Valve.[1] CP 7-8, ¶ 44. The Bucher Defendants failed to inform their clients of significant litigation risks and even attempted to contract away their ethical duties to those clients. CP 11, ¶¶ 59-61; CP 150-53. For example, they did not tell their clients that an arbitrator could order consumers who brought frivolous claims to pay Valve's costs and fees. CP 25, ¶ 11.C.

Viewing these allegations in the light most favorable to Valve, as is required at the motion to dismiss stage, the only reasonable inference is that the Bucher Defendants intentionally did not tell Valve customers about the dispute resolution requirements of the SSA in order to further their self-interested

[1] Valve has since learned that those "clients" include deceased individuals, children, and people with no idea of the legal actions being carried out in their names.

profit motives, which rested on impermissibly combining individual claims and refusing individual negotiation with Valve.

Rather than try to resolve their clients' individual disputes as the SSA required, the Bucher Defendants sought to amass a large client base to "make [Valve's] entrance fee to just defend prohibitively expensive." CP 5, ¶ 32; CP 30. As Mr. Bucher explained in a presentation to a potential funder (the "Funding Presentation"), his plan was to onboard 75,000 clients, such that Valve would be required to pay AAA fees for all of them, exposing Valve to a "largely non-refundable fee of $225 million as the cost of admission" before Valve could defend itself on the merits. CP 30. Mr. Bucher pointedly did not suggest that the underlying claims had any merit.[2]

[2] It is inconceivable that the few lawyers employed by the Bucher Defendants could have ethically and responsibly represented tens of thousands of clients in nearly simultaneous arbitrations. *See, e.g.*, *Florida Bar v. Farah*, No. SC2022-0472, 2025 WL 629341, at *4 (Fla. Feb. 27, 2025) (referring attorney for sanctions for taking on "far more . . . plaintiffs than he could reasonably handle" with knowledge that he "could not provide legal services

After recruiting tens of thousands of clients, the Bucher Defendants disregarded the reasonable, good faith, individualized negotiation process required by the SSA—because that process would have thwarted their plans for a quick, lucrative settlement. Instead, they sent a generic, combined "notice" to Valve of tens of thousands of claims, immediately demanding a collective settlement. That notice failed to provide the clients' Steam account IDs (Valve's primary method of identifying an individual customer), locations, bases of dispute, and relief sought. CP 12, ¶¶ 67-71; CP 155-57. The Bucher Defendants demanded that Valve settle each claim for a uniform payment of $2,400 per case, plus $1,600 in legal fees—regardless of an individual's alleged damages. CP 12, ¶ 68; CP 155-57. In total, they demanded almost $180,000,000 to settle the claims of 44,903 clients. *Id.*

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to the thousands of . . . plaintiffs and still fully comply with his professional obligations").

When Valve asked for necessary information about individual Steam users (CP 159-64), the Bucher Defendants began flooding the email inbox of Valve's counsel with tens of thousands of uninformative, nearly identically worded messages. That barrage was so massive it caused a disruption of service for the email server.[3] CP 12-13, ¶ 72; CP 166-68.

Notwithstanding this bad faith and hollow attempt at "notice" by the Bucher Defendants, Valve attempted to engage in individualized negotiations with each Steam user represented by the Bucher Defendants. CP 13, ¶ 73; CP 166-68. Well before the expiration of the SSA's 30-day negotiation period, Valve's counsel asked the Bucher Defendants for a reasonable extension to allow Valve to respond to each individual demand. CP 13, ¶ 74; CP 170. The Bucher Defendants did not respond.

[3] This deliberate effort to disrupt a company's computer systems via mass emails is in itself tortious. *E.g.*, *School of Visual Arts v. Kuprewicz*, 3 Misc. 3d 278, 281-82 (Sup. Ct. New York Cnty. 2003).

That silence was followed by the Bucher Defendants' initiation of more than 1,000 arbitrations. CP 13, ¶ 75; CP 172, 179. They also told Valve they had collected an additional 18,204 clients but refused to identify any of them unless Valve first offered to settle all their clients' claims together. CP 13, ¶¶ 76-78; CP 174-77.

On October 20, 2023, Valve filed its Complaint against the Bucher Defendants for tortious interference and abuse of process, based on interactions with the Bucher Defendants and on information Valve learned from a lawsuit between Bucher and his former employer, *Bucher v. Zaiger LLC*.[4] (Meanwhile, Valve began engaging in arbitration with Steam customers represented by the Bucher Defendants. Those arbitrations remain ongoing.)

The Bucher Defendants moved to dismiss Valve's Complaint under CR 12(b)(6) and UPEPA. CP 180-215. Correctly noting that such motions "should be granted 'sparingly

[4] The record of this lawsuit revealed the Funding Presentation. CP 28-41, 43-141.

and with care,'" the trial court found that Valve had sufficiently pleaded both causes of action. CP 566-67. It held that Valve had pleaded a tortious interference claim against the Bucher Defendants and their funder, and that Valve's abuse of process claim was particularly supported "given the unique circumstances of the case and the terms of the SSA." CP 567. The trial court also rejected the Bucher Defendants' argument that the litigation privilege barred all claims against them, recognizing that "the privilege does not extend to every circumstance which bears some relation to a judicial proceeding." *Id.*

The trial court was "not convinced that UPEPA applies to this context," holding that that UPEPA's commercial-speech exception, RCW 4.105.010(3)(a)(iii), applied and exempted Valve's claims as alleged. CP 567-68.

The Bucher Defendants sought an appeal of that decision as of right under UPEPA. On June 30, 2025, the Court of Appeals reversed the trial court, holding that UPEPA applied to Valve's

claims, that the commercial-speech exception did not apply, and that the litigation privilege barred Valve's causes of action, such that Valve had "failed to state a cause of action upon which relief can be granted." Opinion at 17.

## IV. ARGUMENT

### A. This Court Should Grant Review Because the Court of Appeals Failed to Properly Interpret UPEPA, Implicating Issues of Public and Constitutional Importance.

The Court of Appeals erroneously held that UPEPA applies to Valve's claims. This decision is founded on three critical errors. *First*, it improperly expands the scope of UPEPA for communications about judicial proceedings. *Second*, it relies on foreign case law and statutes to rewrite Washington law. *Third*, it disregards the proper burdens and presumptions applicable at this stage of litigation.

Because those errors will create confusion regarding the application of a new Washington statute—errors that could infect innumerable litigations going forward—and because the Court of Appeals' decision involves rights under the Washington and

United States Constitutions, the Supreme Court should accept review under RAP 13.4(b)(3) and (4) to clarify when UPEPA can apply and when there are exceptions to the law.

### 1. The Court of Appeals Ignored Facts in the Record and Expanded the Scope of UPEPA.

To obtain dismissal under UPEPA, a moving party must show that the responding party's causes of action violated fundamental rights associated with free expression. Here, by erroneously determining that the Bucher Defendants' communications were "on an issue under consideration or review in a … judicial … proceeding," RCW 4.105.010(2)(b), the Court of Appeals' decision dramatically expanded the scope of UPEPA and ignored the facts of the case.

With only two sentences of analysis, the Court of Appeals held UPEPA applicable simply because Valve had alleged that the Bucher Defendants were inspired by another firm's legal strategy, ignoring that the Bucher Defendants' wrongful communications were not connected to that strategy in any substantive way:

> Citing *Wolfire*, Valve alleges in its complaint that the Bucher Defendants seek to "copycat" a legal theory developed by another law firm in another lawsuit that had already been sent to arbitration. Thus, as alleged by Valve, the Bucher Defendants' communications pertain to an issue under consideration in a judicial proceeding as required by RCW 4.105.010(2)(b).

Opinion at 7.

The Court of Appeals erroneously relied on a single allegation taken out of context from Valve's Complaint. Valve alleged only that the Bucher Defendants "targeted Valve … because they could 'copycat' a legal theory" from *Wolfire,* based on Mr. Bucher's Funding Presentation. CP 6-7, ¶¶ 38, 40. Valve alleged no other connection to the *Wolfire* action.

The Court of Appeals also misapplied UPEPA's procedural requirements. The Bucher Defendants—not Valve—bear the burden of proving UPEPA applies. But the court erroneously relied on its own distorted characterization of a single Valve allegation rather than requiring the Bucher Defendants to establish the statutory elements.

The *Wolfire* litigation history confirms there is no meaningful connection between that federal case and the Bucher Defendants' clients' arbitrations. When the Bucher Defendants brought their arbitrations, all consumer plaintiffs had been dismissed from the *Wolfire* litigation and were required to pursue their individual claims in arbitration. 2021 WL 4952220, at *3 (W.D. Wash. Oct. 25, 2021).

The Court of Appeals considered none of this. Nor did the court engage in any discussion or analysis of what UPEPA means by a "[c]ommunication on an issue under consideration or review in a … judicial … proceeding." Its decision provides no guidance as to the limitations of this provision under UPEPA. A court applying the Court of Appeals' decision might invoke UPEPA by referencing ***any*** communication related to ***any*** issue in ***any*** case that has been litigated, no matter how attenuated the connection. There is no indication, either in the statutory language or otherwise, that UPEPA's drafters intended such an irrational outcome.

The Court of Appeals further determined that UPEPA applied based on the Bucher Defendants' purported "[e]xercise of the right of freedom of speech … or the right of association, guaranteed under the United States Constitution or Washington state Constitution, on a matter of public concern," Opinion at 7 (citing RCW 4.105.010(2)(c)). This decision, if left undisturbed, would create an entirely new, factually unsound precedent, which relies on inapplicable case law from other states:

(i) The Court of Appeals wrote that a Texas appellate court "applied First Amendment protections to attorneys representing clients" in *Schimmel v. McGregor*, 438 S.W.3d 847 (Tex. Ct. App. 2014). Opinion at 8, n.3. That is not accurate. *Schimmel* does not mention the First Amendment. Rather, that court referred to the "exercise of the right of free speech" as that term was defined, not under the Constitution, ***but in a Texas statute***. 438 S.W.3d at 858.

(ii) The court also relied on *Thornton v. Breland*, 441 So.2d 1348, 1350 (Miss. 1983)—a decision long on rhetoric and

short on constitutional analysis. Opinion at 8, n.3. *Thornton* predates a United States Supreme Court opinion stating that "during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).

Until now, no court in Washington has held that an attorney's speech on behalf of clients is entirely protected by the First Amendment. This case is not an appropriate vehicle for such an expansion of Washington law. As Valve alleged, its claims have ***no effect*** on attorneys' rights of representation: the Bucher Defendants have filed thousands of arbitrations on behalf of clients. Plus, Valve alleged that the Bucher Defendants' actions were ***unnecessary for their representation of their clients*** and were, in fact, ***detrimental*** to their clients' interests. *See, e.g.*, CP 9-13, ¶¶ 48, 53-54, 60-61, 68, 76-78. That the Bucher Defendants also have to defend themselves against torts—legal wrongs unnecessary to the representation of their

clients—is entirely immaterial to any right of association that could invoke UPEPA protection. In holding otherwise, the Court of Appeals again disregarded Valve's well-pled allegations.

### 2. The Court of Appeals Improperly Imported Texas Law into UPEPA's Commercial-Speech Exception.

The trial court found that the commercial-speech exception to UPEPA preserved Valve's causes of action. CP 568. The Court of Appeals reversed, adding language from a Texas statute to UPEPA. Opinion at 10-12. That decision was error.

Washington's commercial-speech exception states, in full:

> [T]his chapter does not apply to a cause of action asserted: … (iii) Against a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of a communication related to the person's sale or lease of the goods or services.

RCW 4.105.010(3). This language, standing alone, cannot account for the Court of Appeals' conclusion in the present dispute that "the Bucher Defendants' communications were acts of legal representation." Opinion at 12. The court reached this conclusion by noting that any communications and actions underlying Valve's causes of action "were sent to their clients'

*adversary*, not to their clients or potential clients." *Id.* (emphasis original).

That analysis relies on language from the Texas anti-SLAPP statute which has no equivalent in Washington law. Under Tex. Civ. Prac. & Rem. Code § 27.010(a)(2), a commercial exception applies only when the intended audience of a communication is "an actual or potential buyer or customer" of the commercial services at issue. By contrast, commercial speech under Washington's UPEPA does not require any specific audience. The Court of Appeals erroneously held that it does.

### 3. The Court of Appeals Erred in Finding That Valve Failed to State a Cause of Action Upon Which Relief Can Be Granted.

A complaint may be dismissed under UPEPA if a "moving party establishes that … [t]he responding party failed to state a cause of action upon which relief can be granted." RCW 4.105.060(1)(c)(ii). The Court of Appeals concluded that Valve's Complaint could be dismissed under this provision

based solely on application of the litigation privilege; it explicitly did ***not*** reach any other grounds "for dismissal under UPEPA, CR 12, and CR 56." Opinion at 12-13.

As discussed below, the Court of Appeals erred by failing to follow Division Two's ruling in *Mason* and by determining that the litigation privilege bars Valve's claim of abuse of process. If litigation privilege does not apply, it follows—because the Court of Appeals did not reach any argument that Valve failed to allege the elements of its claim—that Valve's claim must stand, as the trial court held. CP 567.

### B. Review is Necessary to Resolve a Court of Appeals Conflict Over the Application of Litigation Privilege to Abuse of Process Claims.

The Court of Appeals erroneously departed from *Mason* to hold that the Bucher Defendants' conduct was "protected as a matter of law by the litigation privilege" (Opinion at 12) and thus could not form the basis of an abuse of process claim. That conflict with a prior, published Court of Appeals decision merits review under RAP 13.4(b)(2).

The Court of Appeals held here that "'attorneys and law firms have absolute immunity from liability for acts arising out of representing their clients,'" whenever the challenged conduct is "'pertinent or material to the redress or relief sought.'" Opinion at 13-14 (citations omitted); *see also id.* at 1 (litigation privilege "afford[s] attorneys immunity from civil liability for communications that 'have some relation to' a judicial proceeding or a party to the proceeding") (citation omitted). Applying that test to Valve's abuse of process claim, the Court of Appeals ruled that the Bucher Defendants' conduct was absolutely immunized because it was, in the court's judgment, "part of a legal practice and . . . directly related to representing clients." *Id.* at 15. The court further determined that the Bucher Defendants' effort to "benefit financially" from their disruption of the dispute resolution process raised no concerns, since it meant that their "interests [were] aligned with, and subsidiary to their clients' interests in recovering damages in the arbitration proceedings." *Id.* at 16-17.

### 1. The Opinion Conflicts with the Court of Appeals' Decision in *Mason*.

This holding directly conflicts with Division Two's *Mason* ruling by improperly applying the "pertinent or material" standard when assessing whether abuse of process claims are barred by litigation privilege. *Mason* explains why abuse of process claims require a different inquiry.

*Mason* holds that "litigation privilege does not apply, and an attorney can be liable for abuse of process where the attorney was alleged to have intentionally employed legal process for an inappropriate and extrinsic end." 19 Wn. App. 2d at 835; *accord. Scott v. Am. Exp. Nat'l Bank*, 22 Wn. App. 2d 258, 267-68, 514 P.3d 695 (2023) (endorsing *Mason* framework). Because *Mason*'s complaint's well-pled allegations accused both a party and his attorney of acts undertaken for a purpose "unrelated to the legitimate goals" of a family law proceeding, litigation privilege could not lie. *Mason*, 19 Wn. App. 2d at 840. In so holding, the *Mason* court established several principles of law that were not followed by the Court of Appeals here.

First, *Mason* decisively rejected the expansive test for litigation privilege articulated by the Court of Appeals here—that immunity applies whenever an attorney's conduct is "pertinent or material" to a legal proceeding. Opinion at 13-14. This formulation sweeps too broadly when applied to "[a]buse of process claims," which "necessarily include allegations that involve conduct related to a judicial proceeding." *Mason*, 19 Wn. App. 2d at 834. Indeed, "no abuse of process claim could ever lie whether raised against an attorney or a party to a lawsuit" if immunity were triggered merely by a showing of "relatedness." *Id.* Thus, "litigation privilege does not inexorably apply to all abuse of process claims." *Id.* The Court of Appeals here has created a test for immunity that would do exactly that, effectively eliminating abuse of process claims against attorneys.

Second, the *Mason* court stressed that intent is inextricably intertwined with abuse of process, which is about "the ***misuse*** of a judicial proceeding to accomplish an end for which the process was not designed." *Id.* (emphasis added). A court must therefore

examine whether the attorney "intentionally employed legal process for an inappropriate and extrinsic end." *Id.* at 835. By contrast, the Court of Appeals' framework for litigation privilege in this action does not even permit an analysis of a defendant's objectives. *See, e.g.*, Opinion at 15 (holding that the Bucher Defendants' conduct was protected merely because it was "part of a legal practice and . . . directly related to representing clients.").[5]

Third, *Mason* emphasized that any analysis of litigation privilege must examine whether the attorney's use of process was ethically sound: it is not enough to say that an attorney was acting to advance a client's interests when assessing whether litigation privilege applies to an abuse of process claim. That is because "an attorney's private duty to provide zealous

[5] *Young v. Rayan*, a decision from Division One, "decline[d] to follow" *Mason* insofar as it "looks to a defendant's intent" in determining the applicability of the litigation privilege. 27 Wn. App. 2d 500, 514, 533 P.3d 123 (2023). *Young*, however, involved defamation, false light, and civil conspiracy claims—not abuse of process claims like those at issue here.

representation must yield to his or her public duty 'to further the administration of justice' as an officer of the court." 19 Wn. App. 2d at 836 (citing *Fite v. Lee,* 11 Wn. App. 21, 28, 521 P.2d 964 (1974)). *Mason* thus dictates that "[w]hen an attorney engages in conduct that, by definition, constitutes abuse of process, the attorney violates his or her duty to act as a public officer of the court," and may be liable. *Id.* By contrast, the Court of Appeals here gave no consideration to whether the Bucher Defendants violated their professional obligations by engaging in the conduct alleged by Valve. *See* Opinion at 16-17. Rather, so long as the Bucher Defendants' actions were "related to representing clients" (*id.* at 15), the Court held that no further inquiry was necessary.[6]

[6] The Court of Appeals also invoked a "public policy" rationale for applying litigation privilege. Opinion at 14. But, as *Mason* observed, "the traditional public policy considerations that justify application of litigation privilege to bar other tort claims filed against attorneys do not apply in the narrow context of abuse of process," a tort which degrades the administration of justice and violates an attorney's public duty as an officer of the court. 19 Wn. App. 2d at 834.

### 2. The Court of Appeals' Deficient Effort to Distinguish *Mason* Further Illustrates Why Review is Necessary.

The Court of Appeals did not address these principles and instead sought to distinguish *Mason* on its facts. It stated that "unlike in *Mason*," Valve failed to accuse the Bucher Defendants of pursuing "an ultimate end that is unrelated to the legal relief they are pursuing for their clients." Opinion at 16. But *Mason* primarily focused on whether the attorney's "end" was related to the "***legitimate*** purposes of a judicial proceeding." 19 Wn. App. 2d at 835 (emphasis added); *see also id.* at 840.

Valve's pleading fits comfortably within the *Mason* framework. The Complaint alleges that the Bucher Defendants deliberately thwarted the SSA's dispute resolution process in order to extort a windfall settlement extrinsic to the underlying merits of their clients' individual arbitration claims (*see, e.g.*, CP 9-10, 14, 16 at ¶¶ 52-55, 82-85, 99-100)—claims which the Bucher Defendants made no effort to evaluate on their merits.

CP 7-9, ¶¶ 42-49.[7] This was, at its core, "'coercion to obtain a collateral advantage, not properly involved in the proceeding itself … by the use of the process as a threat or a club.'" *Batten v. Abrams*, 28 Wn. App. 737, 746, 626 P.2d 984 (1981) (quoting B.W. Prosser, Torts § 121, at 856-58 (4th ed. 1971)). When Valve alleged that the Bucher Defendants' actions were unrelated to "legitimate purposes" of an arbitration proceeding, *Mason*, 19 Wn. App. 2d at 835, the Court of Appeals should have determined, like the trial court, that those actions are not protected by the litigation privilege.

[7] The Court of Appeals also disregarded numerous other well-pled allegations. For instance, it stated that "[w]hen Valve indicated it required individualized notices for each customer complaint, the Bucher Defendants complied." Opinion at 15. But Valve expressly alleged that the Bucher Defendants did ***not*** comply with that requirement: instead, they flooded the email inbox of Valve's counsel with tens of thousands of duplicative messages. CP 12-13, ¶ 72. The Bucher Defendants then initiated over 1,000 arbitrations before Valve had a meaningful opportunity to respond. CP 13, ¶¶ 73-75. The Court of Appeals' failure to assume the truth of these allegations constitutes error.

The Court of Appeals' misreading of *Mason* supports granting discretionary review under RAP 13.4(b)(2): the Opinion will create "serious inconsistencies in [the State's] . . . case law" and "generate considerable confusion" over how to apply litigation privilege to abuse of process claims. *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 281, 358 P.3d 1139 (2015) (explaining rationale for resolving Court of Appeals split).

Resolving this confusion and clarifying the law also raises "an issue of substantial public interest." RAP 13.4(b)(4). The Court of Appeals' interpretation would virtually insulate attorneys from ever facing abuse of process claims in the State of Washington. This would send a message to the legal profession that attorneys may manipulate the legal process and flout the rules of professional conduct with impunity. As *Mason* recognizes, permitting abuse of process claims in certain discrete circumstances (like those alleged here) serves an important public policy by deterring attorneys from violating their "duty to

act as a public officer of the court." 19 Wn. App. 2d at 837.[8] Valve respectfully asks that the Court intervene to preserve this important check against attorney misconduct.

## V. CONCLUSION

In its Opinion, the Court of Appeals issued a decision that impermissibly broadens UPEPA and disregards Washington court precedent. To correct the Courts of Appeals' errors and to provide clarity regarding a case that is now in conflict with published Washington precedent, implicates constitutional questions, and interprets laws directly affecting the public interest, this Court should grant Valve's petition for review.

I certify that this memorandum contains 4,982 words, in compliance with RAP 18.17(c).

[8] Such bad attorney behavior cannot be allowed: "The public is entitled to be able to trust lawyers to protect their property, liberty, and lives. … The profession is harmed where an attorney's practices reflect poorly on the profession …" *In re Seare*, 493 B.R. 158, 220 (D. Nev. 2013).

DATED this 30th day of July, 2025.

CORR CRONIN LLP

*s/ Blake Marks-Dias*

Blake Marks-Dias, WSBA 28169
Jeff Bone, WSBA No. 43965
1015 Second Avenue, Floor 10
Seattle, Washington 98104-1001
(206) 625-8600 Phone
(206) 625-0900 Fax
bmarksdias@corrcronin.com
jbone@corrcronin.com

Attorneys for Petitioner

## RAP 18.17 CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

1. I am employed at Corr Cronin LLP, attorneys for record for Petitioner herein.

2. On this date, I caused a true and correct copy of the foregoing document to be served via the Court of Appeals Electronic Filing Notification System on the following parties:

Daniel M. Weiskopf, WSBA No. 44941
Theresa M. DeMonte, WSBA No. 43994
Claire Martirosian, WSBA No. 49528
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, WA 98101
(206) 467-1816 Phone
dweiskopf@mcnaul.com
tdemonte@mcnaul.com
cmartirosian@mcnaul.com
tdo@mcnaul.com (Legal Assistant)
mmonkress@mcnaul.com (Paralegal)

*Attorneys for Respondents*

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: July 30, 2025, at Seattle, Washington.

*s/ Melinda R. Sullivan*
Melinda R. Sullivan, Legal Assistant

# APPENDIX A

FILED
6/30/2025
Court of Appeals
Division I
State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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|---|---|
| VALVE CORPORATION,<br><br>Respondent,<br><br>v.<br><br>BUCHER LAW PLLC and AFN LAW, PLLC, and JOHN DOE CORPORATION,<br><br>Appellants. | No. 86585-4-I<br><br>DIVISION ONE<br><br>PUBLISHED OPINION |

FELDMAN, J. — It has long been recognized "that lawyers are officers of the court who perform a fundamental role in the administration of justice." *Spevack v. Klein*, 385 U.S. 511, 524, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967). The litigation privilege recognizes this fundamental role by affording attorneys immunity from civil liability for communications that "have some relation to" a judicial proceeding or a party to the proceeding. *Deatherage v. Examining Bd. of Psychology*, 134 Wn.2d 131, 135, 948 P.2d 828 (1997) (citing Restatement (Second) of Torts § 588 (AM. LAW INST. 1977)). The Uniform Public Expression Protection Act, chapter 4.105 RCW (UPEPA), augments this protection by providing "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." *M.G. v. Bainbridge Island Sch. Dist. #303*, __ Wn. 3d ___, 566 P.3d 132, 144 (2025).

Contrary to these bedrock legal principles, Valve Corporation asserted tortious interference and abuse of process claims against Bucher Law PLLC and AFN Law PLLC (the Bucher Defendants) arising out of communications and related conduct in the course of the law firms' representation of thousands of Valve customers who allege that its anticompetitive practices have raised prices for computer games on its "Steam" platform and kept them at artificially high prices. Because the litigation privilege indisputably protects the Bucher Defendants' conduct, Valve's claims fail as a matter of law and the trial court erred in denying the Bucher Defendants' motion to dismiss the claims under UPEPA. Accordingly, we reverse and remand for entry of an order dismissing Valve's claims against the Bucher Defendants with prejudice.

I

Valve operates an online service known as "Steam." Steam is a platform through which video game developers sell and distribute games and Steam users may purchase, download, and play those games.

Steam users agree to the Steam Subscriber Agreement (SSA), which includes dispute resolution provisions. Addressing that issue, the SSA states, "If Valve is unable to resolve your concerns and a dispute remains between you and Valve . . . YOU AND VALVE AGREE TO RESOLVE ALL DISPUTES AND CLAIMS BETWEEN US IN INDIVIDUAL BINDING ARBITRATION." The SSA continues:

> Try to Resolve Dispute Informally First . . . You and Valve agree to make reasonable, good faith efforts to informally resolve any dispute

> before initiating arbitration. A party who intends to seek arbitration must first send the other a written notice that describes the nature and basis of the claim or dispute and sets forth the relief sought. If you and Valve do not reach an agreement to resolve that claim or dispute within thirty (30) calendar days after the notice is received, you or Valve may commence an arbitration. Written notice to Valve must be sent via postal mail . . . .

Thus, if a Steam user has a concern, claim, or dispute that the parties are unable to resolve informally within thirty days, the user may commence an arbitration. The SSA further states:

> If you seek $10,000 or less, Valve agrees to promptly reimburse your filing fee and your share if any of AAA's arbitration costs, including arbitrator compensation, unless the arbitrator determines your claims are frivolous or were filed for harassment. Valve agrees not to seek its attorneys' fees or costs unless the arbitrator determines your claims are frivolous or were filed for harassment.

Critical here, the SSA prohibits Steam users from bringing or participating in a class, collective, or representative arbitration and mandates "individual binding arbitration only."

The Bucher Defendants represent thousands of individual Steam users seeking resolution in arbitration of disputes relating to Valve's alleged anticompetitive practices under federal antitrust and state consumer protection laws. In accordance with the SSA, the Bucher Defendants initiated the dispute resolution process by sending a letter on behalf of their clients relating to Valve's alleged anticompetitive practices and proposing settlement terms pursuant to the informal dispute resolution process.

Valve responded that the notice lacked important customer identifying information, was not particularized to individual customers, and "was not sent in good faith." The Bucher Defendants replied by sending Valve individual e-mails

on behalf of each of their clients following Valve's request for individual complaints. After the parties failed to resolve their disputes within the thirty-day window established in the SSA, the Bucher Defendants filed their clients' claims individually in arbitration.

Following the initiation of the individual arbitration claims, Valve filed tortious interference and abuse of process claims alleging that the Bucher Defendants had attempted to "weaponize the terms of Valve's dispute resolution agreement with Steam users to line their own pockets" and that the Bucher Defendants "have abused the legal process and interfered with Valve's relationships with its customers." The Bucher Defendants then filed a dispositive motion, seeking dismissal under UPEPA, CR 12, and CR 56.

The trial court denied the Bucher Defendants' motion, holding (a) Valve has alleged sufficient facts to establish plausible claims for tortious interference and abuse of process, (b) the Bucher Defendants had failed to establish the litigation privilege precluded Valve's claims, and (c) "a statutory exception to UPEPA" applied to the Bucher Defendants' actions. Lastly, the court denied Valve's request for an award of attorney fees and costs under RCW 4.105.090 because the Bucher Defendants had not filed their UPEPA motion with intent to delay the proceeding and there was "at least some justification" for filing the motion. This timely appeal followed.

II

A

Preliminarily, Valve argues the trial court's UPEPA order is not appealable as of right. We disagree.

RAP 2.2(a) limits appeals as of right to specified categories "[u]nless otherwise . . . provided by statute . . . ." Here, UPEPA provides that a "moving party may appeal as a matter of right from an order denying" a UPEPA motion. RCW 4.105.080. Our Supreme Court recently confirmed, "A moving party may appeal as a matter of right from an order denying a motion under RCW 4.105.020." *Thurman v. Cowles Co.*, 4 Wn. 3d 291, 299, 562 P.3d 777 (2025). Based on these legal authorities, we reject Valve's argument that the trial court's UPEPA order is not appealable as of right.[1]

B

Turning to the merits of the appeal, the Bucher Defendants argue the trial court erred in denying their UPEPA motion. We agree.

As noted previously, the Washington legislature enacted UPEPA "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." *M.G.*, 566 P.3d at 145. UPEPA is an "anti-SLAPP" law, where SLAPP refers to a "strategic lawsuit against public participation." *Jha v. Khan*, 24 Wn. App. 2d 377, 386, 520 P.3d 470 (2022). Such

[1] Because we do not reach the Bucher Defendants' alternative grounds for dismissal under CR 12 and CR 56 (*see* section II.B.3 below), we need not determine whether the trial court's rulings as to those issues are also appealable at this time.

proceedings are sometimes described as lawsuits "that masquerade as ordinary lawsuits but are intended to deter ordinary people from exercising their political or legal rights or to punish them for doing so." *Planet Aid, Inc. v. Reveal*, 44 F.4th 918, 923 (9th Cir. 2022) (quoting *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013)).

Under UPEPA, a defendant "may file a special motion for expedited relief to dismiss the cause of action" within 60 days of being served with a complaint. RCW 4.105.020(2). In ruling on such a motion, "the court shall dismiss with prejudice a cause of action" if three requirements are met: (1) the defendant "establishes under RCW 4.105.010(2) that [UPEPA] applies"; (2) the plaintiff "fails to establish under RCW 4.105.010(3) that [UPEPA] does not apply"; and (3) the plaintiff "fails to establish a prima facie case as to each essential element of the cause of action" or "failed to state a cause of action upon which relief can be granted" or "[t]here is no genuine issue as to any material fact and the [defendant] is entitled to judgment as a matter of law." RCW 4.105.060(1). We review the denial of a UPEPA motion to dismiss de novo. *Jha*, 24 Wn. App. 2d at 387.

1

Regarding the first requirement to grant dismissal under UPEPA, RCW 4.105.010(2) states in relevant part as follows:

> [T]his chapter applies to a cause of action asserted in a civil action against a person based on the person's:
>
> (a) Communication in a legislative, executive, judicial, administrative, or other governmental proceeding;

> (b) Communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding;
>
> (c) Exercise 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.

The Bucher Defendants argue UPEPA applies here under subsections (b) and (c). Both arguments are persuasive.[2]

Starting with subsection (b), the Bucher Defendants' communications and corresponding conduct at issue here pertain to "an issue under consideration or review in a . . . judicial . . . proceeding." RCW 4.105.010(2)(b). In *Wolfire Games, LLC v. Valve Corp.*, No. C21-0563-JCC, 2021 WL 4952220, at *1 (W.D. Wash. Oct. 25, 2021), the plaintiffs alleged that Valve "utilizes anticompetitive practices and its monopoly powers to inflate prices on games sold and distributed through [its] Steam Store and Steam Gaming Platform." The court granted Valve's motion to compel arbitration of the claims asserted by Steam users and denied its motion to stay the claims asserted by a software developer, holding the SSA required arbitration of the former and there was no proper basis to stay the latter. *Id.* at *3. Citing *Wolfire*, Valve alleges in its complaint that the Bucher Defendants seek to "'copycat' a legal theory developed by another law firm in another lawsuit that had already been sent to arbitration." Thus, as alleged by Valve, the Bucher Defendants' communications pertain to an issue under consideration in a judicial proceeding as required by RCW 4.105.010(2)(b).

[2] The trial court did not expressly address the applicability of UPEPA under RCW 4.105.010(2), ruling instead that Valve had established that UPEPA does not apply based on RCW 4.105.010(3)(a)(ii), which we discuss in section II.B.2 below.

Regarding subsection (c), the Bucher Defendants' representation of their clients is protected by the guarantee of freedom of speech, association, and petition under the United States Constitution. The "'right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition.'" *Mothershed v. Justices of Supreme Court,* 410 F.3d 602, 611 (9th Cir. 2005) (quoting *Denius v. Dunlap,* 209 F.3d 944, 953 (7th Cir. 2000)). Courts in other states have likewise applied First Amendment protections to attorneys representing clients in bringing suit.[3]

Much the same is true with regard to the Washington State Constitution. Washington's right of access to the courts is grounded in article I, section 10, which states, "Justice in all cases shall be administered openly, and without unnecessary delay." In *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009), our Supreme Court declared, "The people have a right of access to courts; indeed, it is the bedrock foundation upon which rest all the people's rights and obligations." *Id.* at 978 (internal quotation marks omitted). Our courts have "generally applied the open courts clause [of article I, section 10] [in the context of] . . . the right to a remedy for a wrong suffered." *King v. King*, 162 Wn.2d 378, 388, 174 P.3d 659 (2007) (internal quotation marks omitted). Thus, in representing their clients, the Bucher Defendants were exercising their constitutional rights under the

[3] *See Schimmel v. McGregor*, 438 S.W.3d 847, 858 (Tex. App. 2014) (recognizing attorney right to petition on behalf of clients and also attorney right to freedom of speech on behalf of clients in applying Texas anti-SLAPP law); *Thornton v. Breland*, 441 So. 2d 1348, 1350 (Miss. 1983) ("We regard the lawyer's right and responsibility of zealous advocacy on behalf of his client among the most precious forms of speech.").

Washington State Constitution, in addition to the United States Constitution, as RCW 4.105.010(2)(c) requires.

RCW 4.105.010(2)(c) also requires that the protected conduct relate to "a matter of public concern." Whether speech is on a matter of public concern is a question of law, which courts determine "'by the content, form, and context of a given statement, as revealed by the whole record.'" *Jha*, 24 Wn. App. 2d at 389 (quoting *Billings v. Town of Steilacoom*, 2 Wn. App. 2d 1, 31, 408 P.3d 1123 (2017)). "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.'" *Spratt v. Toft*, 180 Wn. App. 620, 632, 324 P.3d 707 (2014) (internal quotation marks omitted) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011)).

Here, the Bucher Defendants' statements and conduct representing their clients' interests are on matters of public concern. The arbitration claims at issue were based on alleged violations of federal antitrust and state consumer protection laws. Antitrust and consumer protection actions are matters of public concern: "the purpose of [Washington's Consumer Protection Act] is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920. Not all conduct by an attorney is protected; the "petitioning activity must actually give rise to and be the basis for the asserted liability." *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 82, 316 P.3d 1119 (2014). But the Bucher Defendants' conduct here in

representing their clients *is* the basis of Valve's assertion of liability. Thus, the Bucher Defendants have established, as a matter of law, that UPEPA applies to their communications and associated conduct under both RCW 4.105.010(2)(b) and (c).

2

Addressing the second requirement to grant dismissal under UPEPA, the trial court ruled in relevant part as follows:

> The Court finds a statutory exception to UPEPA in this matter, as the plain language of RCW 4.105.010(3)(a)(iii) does not apply the statute to a claim brought "against a person . . . selling . . . services if the cause of action arises out of a communication related to the person's sale . . . of the . . . . services." Such is the context of the [Bucher] Defendants' actions addressed by this suit.

Applying de novo review (as indicated above), we conclude that the trial court misapplied RCW 4.105.010(3)(a)(iii) and reached an erroneous holding.

"Rules of statutory construction provide that a statute which is clear on its face is not subject to judicial interpretation." *Marquis v. City of Spokane*, 130 Wn.2d 97, 107, 922 P.2d 43 (1996). "Statutory construction begins by reading the text of the statute or statues involved. If the language is unambiguous, a reviewing court is to rely solely on the statutory language." *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). Issues of statutory interpretation are reviewed 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).

Here, the statutory provision at issue is unambiguous. Under RCW 4.105.010(3)(a)(iii), UPEPA does not apply to causes of action against a person selling services "if the cause of action arises out of a communication related to the

*person's sale . . . of the . . . services*." (Emphasis added.) Valve's tortious interference and abuse of process claims against the Bucher Defendants do not arise out of communications related to the Bucher Defendants' sale of their legal services. They instead arise out of the Bucher Defendants' communications with Valve initiating arbitration proceedings, which communications and related conduct are included within—not excluded from—the scope of UPEPA.

Valve argues a Texas court's interpretation of that state's anti-SLAPP statute is persuasive, but the holding in that case is based on easily distinguishable facts. In *Kostura v. Judge*, 627 S.W.3d 380, 383-84 (Tex. App. 2021), an attorney asserted tort claims against a law firm that previously employed him. The attorney alleged defamation, invasion of privacy, and intentional infliction of emotional distress because the firm sent a letter to numerous clients who had worked with the attorney informing them that the attorney was no longer able to practice law and thus the clients should seek new counsel. *Id*.

The firm responded by filing a motion to dismiss the claims under the Texas Citizens Participation Act (TCPA), an anti-SLAPP statute. The Texas court held the firm's communication to clients "ar[ose] out of the sale" of legal services between the clients and the firm regarding the firm's provision of such services. *Id.* at 388. It was thus subject to an exception to the TCPA which states that the Act does not apply to "a legal action brought against a person primarily engaged in the business of selling [ ] services, if the *statement or conduct arises out of the sale [ ] of . . . services, [ ] or a commercial transaction in which the intended audience is an actual or potential buyer or customer*." *Id.* (emphasis added).

*Kostura* is inapposite because the statements at issue there arose from communications related to the law firm's ability to continue to sell legal services to its clients and were thus subject to the foregoing exception to the TCPA. Here, in contrast, the Bucher Defendants' statements were sent to their clients' *adversary*, not to their clients or potential clients, and addressed an ongoing legal dispute with that adversary. Instead of centering on the commercial relationship between a law firm and its clients, as in *Kostura*, the Bucher Defendants' communications were acts of legal representation. Because RCW 4.105.010(3)(a)(iii) does not apply here, Valve has "fail[ed] to establish under RCW 4.105.010(3) that [UPEPA] does not apply," RCW 4.105.060(1)(b), and the second requirement for dismissal under UPEPA is satisfied.

3

Lastly, as to the third requirement to grant dismissal under UPEPA, the Bucher Defendants principally argue Valve "failed to state a cause of action upon which relief can be granted" under RCW 4.105.060(1)(c)(ii)(A). That is so, they argue, for two reasons: first, their conduct is protected as a matter of law by the litigation privilege; and second, Valve has not pleaded—and cannot properly plead—various elements of its claims, such as a viable duty of non-interference, as required to state a cause of action for tortious interference,[4] and initiating legal proceedings to "accomplish an end" outside of those proceedings, as required to

[4] *See, e.g., Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989) (quoting *Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371 (1979); *Libera v. City of Port Angeles*, 178 Wn. App. 669, 676-77, 316 P.3d 1064 (2013).

state a cause of action for abuse of process.[5] We agree with the first argument and therefore do not reach the second. Nor do we reach the Bucher Defendants' other asserted grounds for dismissal under UPEPA, CR 12, and CR 56.

RCW 4.105.060(1)(c)(ii)(A), applicable here, imports CR 12's requirement for judgment on the pleadings. A motion to dismiss on such grounds, whether asserted under CR 12(b)(6) or CR 12(c), is properly granted "where the plaintiff cannot prove any set of facts consistent with the complaint that would entitle the plaintiff to relief." *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 843, 347 P.3d 487 (2015). "The plaintiff's allegations and any reasonable inferences are accepted as true." *Gorman v. City of Woodinville*, 160 Wn. App. 759, 762, 249 P.3d 1040 (2011). However, the complaint's legal conclusions are not required to be accepted as true. *Jackson*, 186 Wn. App. at 843 (quoting *Gorman v. Garlock*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005)). If a plaintiff's claim is legally insufficient even under the proffered hypothetical facts, dismissal is appropriate. *Id*. at 843-44.

Turning to the merits of the Bucher Defendants' immunity argument, the litigation privilege is a judicially created privilege that protects participants, including attorneys, against civil liability for statements they make in the course of judicial proceedings. *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980). "[A]ttorneys and law firms have absolute immunity from liability for acts arising out of representing their clients." *Jeckle v. Crotty*, 120 Wn. App. 374, 386, 85 P.3d

[5] *See, e.g., Sea-Pac Co., Inc. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 806-07, 699 P.2d 217 (1985) (citing *Batten v. Abrams*, 28 Wn. App. 737, 748, 626 P.2d 984 (1981)).

931 (2004). Attorney conduct is "absolutely privileged" when it is "pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief." *McNeal*, 95 Wn.2d at 267.

Extending the privilege to attorneys "is based upon a public policy of securing to them as officers of the court the utmost freedom in their efforts to secure justice for their clients." *Id*. As this court recently explained, the litigation privilege "protects participants from retaliatory, derivative lawsuits—regardless of the merit of those suits—instead relying on checks by the trial court such as sanctions to address false testimony." *Young v. Rayan*, 27 Wn. App. 2d 500, 503, 533 P.3d 123 (2023). The privilege "recogniz[es] that our legal system depends on reducing the threat that every statement or argument may lead to further litigation." *Id.*

While stated broadly, the litigation privilege is "limited to situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct." *Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 476, 564 P.2d 1131 (1977). In this way, the "potential harms of a broad application of litigation privilege . . . are blunted by forms of accountability" such as sanctions and "professional disciplinary proceedings, which may occur based on . . . behavior during litigation and which are therefore an additional avenue to confront harm caused by privileged statements." *Young*, 27 Wn. App. 2d at 510 (citing *Wynn v. Earin*, 163 Wn.2d 361, 378, 181 P.3d 806 (2008)). The privilege has been applied to a variety of claims against attorneys representing their clients, including tortious interference claims. *See, e.g., Young*,

27 Wn. App. 2d at 515-25 (applying privilege to defamation, false light, and civil conspiracy claims); *Jeckle*, 120 Wn. App. at 386 (applying privilege to tortious interference with a business relationship claim, among others).

Here, the Bucher Defendants' conduct was both "pertinent" and "material" to the relief they sought for their clients, and thus insulated from suit by the litigation privilege. The Bucher Defendants agreed to represent clients individually in arbitration pursuant to Valve's SSA and contacted Valve in accordance with its prescribed dispute resolution process. When Valve indicated it required individualized notices for each customer complaint, the Bucher Defendants complied. The conduct Valve complains of—the filing of thousands of individual arbitration requests—is a direct result of its own agreement barring class actions and prohibiting collective or representative arbitration.[6] Such conduct is part of a legal practice and is directly related to representing clients, which is precisely the kind of conduct the litigation privilege is designed to protect.

Valve claims, and the trial court agreed, the litigation privilege does not apply here because its scope is "limited to situations where some power to discipline remains available." *Deatherage v. Examining Bd. of Psychology*, 134 Wn.2d 131, 136, 948 P.2d 828 (1997). Although Valve "does not dispute . . . that litigation privilege could extend, when appropriate, to lawyers appearing in arbitration proceedings," it does not identify any persuasive reason that the arbitrators of these individual claims would be unable to discipline the Bucher Defendants for any alleged improper conduct. In addition, professional

[6] On this particular issue, Valve is hoist by its own contractual petard. Notably, Valve no longer requires individual arbitration in its SSA.

responsibility disciplinary avenues are available to Valve to address its concerns. Valve instead claims that because the arbitration demands of the Bucher Defendants' clients are asserted individually, *as its own SSA requires*, no single arbitrator is "well situated" to remedy the alleged harm caused by the Bucher Defendants' actions. Contrary to Valve's contention, "some power to discipline" impermissible conduct is "available" through the individual arbitrations it demanded, which is sufficient to show the "availab[ility]" of "some" power to discipline, even though it is not the remedy Valve prefers. *Deatherage,* 134 Wn. 2d at 136.

Lastly, Valve argues the litigation privilege does not apply here based on *Mason v. Mason*, 19 Wn. App. 2d 803, 835, 497 P.3d 431 (2021), which declined to apply the privilege to an abuse of process claim. In *Mason*, an attorney was alleged to have pursued a parenting plan modification for a client to intentionally place the other parent's immigration status at risk. *Id*. This conduct supported an abuse of process claim, as the attorney "intentionally employed legal process for an inappropriate and extrinsic end." *Id.* Here, unlike in *Mason*, Valve has not alleged the Bucher Defendants have an ultimate end that is unrelated to the legal relief they are pursuing for their clients by following the terms of Valve's SSA. While Valve alleges that the Bucher Defendants will benefit financially from such relief, that is only because, as Valve's complaint confirms, the Bucher Defendants "keep[] 40 percent of any amount recovered from Valve, plus reimbursement for any upfront fees and costs." Thus, the Bucher Defendants' interests are aligned

with, and subsidiary to, their clients' interests in recovering damages in the arbitration proceedings. On this record, *Mason* is inapposite.

III

In sum, all three requirements for dismissal of Valve's tortious interference and abuse of process claims under UPEPA are satisfied here: the Bucher Defendants have established that UPEPA applies to Valve's claims; Valve has failed to establish an exception to UPEPA's applicability; and Valve has "failed to state a cause of action upon which relief can be granted." RCW 4.105.060(1)(c)(ii)(A). Because the trial court erred in denying the Bucher Defendants' UPEPA motion, we reverse the trial court's ruling and remand for entry of an order dismissing Valve's claims against the Bucher Defendants with prejudice in accordance with RCW 4.105.060(1)(ii)(A).[7]

Feldman, J.

WE CONCUR:

Díaz, J.

Chung, J.

[7] While UPEPA requires an award of prevailing party attorney fees, *see* RCW 4.105.090(1), the Bucher Defendants specifically state they are "not appealing [the] denial of fees" by the trial court. The Bucher Defendants also do not seek attorney fees on appeal. And with regard to attorney fees on remand, the Bucher Defendants state that they "preserve all rights to seek fees under UPEPA and otherwise on remand *if further litigation is required*," (emphasis added), but as no further litigation is required here, that issue is resolved as well.

# APPENDIX B

West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.105. Uniform Public Expression Protection Act (Refs & Annos)

West's RCWA 4.105.010

4.105.010. Application of chapter

Currentness

(1) In this section:

(a) “Goods or services” does not include the creation, dissemination, exhibition, or advertisement or similar promotion of a dramatic, literary, musical, political, journalistic, or artistic work.

(b) “Governmental unit” means a public corporation or government or governmental subdivision, agency, or instrumentality.

(c) “Person” means an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity.

(2) Except as otherwise provided in subsection (3) of this section, this chapter applies to a cause of action asserted in a civil action against a person based on the person's:

(a) Communication in a legislative, executive, judicial, administrative, or other governmental proceeding;

(b) Communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding;

(c) Exercise 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.

(3)(a) Except when (b) of this subsection applies, this chapter does not apply to a cause of action asserted:

(i) Against a governmental unit or an employee or agent of a governmental unit acting or purporting to act in an official capacity;

(ii) By a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety;

(iii) Against a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of a communication related to the person's sale or lease of the goods or services;

  

(iv) Against a person named in a civil suit brought by a victim of a crime against a perpetrator;

(v) Against a person named in a civil suit brought to establish or declare real property possessory rights, use of real property, recovery of real property, quiet title to real property, or related claims relating to real property;

(vi) Seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action, unless the claims involve damage to reputation;

(vii) Brought under the insurance code or arising out of an insurance contract;

(viii) Based on a common law fraud claim;

(ix) Brought under Title 26 RCW, or counterclaims based on a criminal no-contact order pursuant to chapter 10.99 RCW, for or based on an antiharassment order under *chapter 10.14 RCW or RCW 9A.46.050, for or based on a sexual assault protection order under *chapter 7.90 RCW, or for or based on a vulnerable adult protection order under chapter 74.34 RCW;

(x) Brought under Title 49 RCW; negligent supervision, retention, or infliction of emotional distress unless the claims involve damage to reputation; wrongful discharge in violation of public policy; whistleblowing, including chapters 42.40 and 42.41 RCW; or enforcement of employee rights under civil service, collective bargaining, or handbooks and policies;

(xi) Brought under the consumer protection act, chapter 19.86 RCW; or

(xii) Any claim brought under federal law.

(b) This chapter applies to a cause of action asserted under (a)(iii), (viii), or (xi) of this subsection when the cause of action is:

(i) A legal action against a person arising from any act of that person, whether public or private, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audiovisual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution; or

(ii) A legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.

**Credits**

[2021 c 259 § 2, eff. July 25, 2021.]

  

## OFFICIAL NOTES

***Reviser's note:** Chapters 7.90 and 10.14 RCW were repealed by 2021 c 215 § 170, effective July 1, 2022. For later enactment, see chapter 7.105 RCW.

Notes of Decisions (18)

West's RCWA 4.105.010, WA ST 4.105.010
Current with all legislation of the 2025 Regular Session of the Washington Legislature.

**End of Document**

# APPENDIX C

West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.105. Uniform Public Expression Protection Act (Refs & Annos)

West's RCWA 4.105.060

# 4.105.060. Dismissal of cause of action in whole or part

Currentness

(1) In ruling on a motion under RCW 4.105.020, the court shall dismiss with prejudice a cause of action, or part of a cause of action, if:

(a) The moving party establishes under RCW 4.105.010(2) that this chapter applies;

(b) The responding party fails to establish under RCW 4.105.010(3) that this chapter does not apply; and

(c) 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.

(2) A voluntary dismissal without prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of a motion under RCW 4.105.020 does not affect a moving party's right to obtain a ruling on the motion and seek costs, attorneys' fees, and expenses under RCW 4.105.090.

(3) A voluntary dismissal with prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of a motion under RCW 4.105.020 establishes for the purpose of RCW 4.105.090 that the moving party prevailed on the motion.

**Credits**
[2021 c 259 § 7, eff. July 25, 2021.]

Notes of Decisions (3)

  

West's RCWA 4.105.060, WA ST 4.105.060
Current with all legislation of the 2025 Regular Session of the Washington Legislature.

**End of Document**

# APPENDIX D

V.T.C.A., Civil Practice & Remedies Code § 27.010

# § 27.010. Exemptions

Currentness

(a) This chapter does not apply to:

(1) an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney;

(2) a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer;

(3) a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action;

(4) a legal action brought under the Insurance Code or arising out of an insurance contract;

(5) a legal action arising from an officer-director, employee-employer, or independent contractor relationship that:

(A) seeks recovery for misappropriation of trade secrets or corporate opportunities; or

(B) seeks to enforce a non-disparagement agreement or a covenant not to compete;

(6) a legal action filed under Title 1, 2, 4, or 5, Family Code, [1] or an application for a protective order under Subchapter A, Chapter 7B, Code of Criminal Procedure;

(7) a legal action brought under Chapter 17, Business & Commerce Code, other than an action governed by Section 17.49(a) of that chapter;

(8) a legal action in which a moving party raises a defense pursuant to Section 160.010, Occupations Code, Section 161.033, Health and Safety Code, or the Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 et seq.);

  

(9) an eviction suit brought under Chapter 24, Property Code;

(10) a disciplinary action or disciplinary proceeding brought under Chapter 81, Government Code, or the Texas Rules of Disciplinary Procedure;

(11) a legal action brought under Chapter 554, Government Code;

(12) a legal action based on a common law fraud claim; or

(13) a legal malpractice claim brought by a client or former client.

(b) Notwithstanding Subsections (a)(2), (7), and (12), this chapter applies to:

(1) a legal action against a person arising from any act of that person, whether public or private, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution; and

(2) a legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.

(c) This chapter applies to a legal action against a victim or alleged victim of family violence or dating violence as defined in Chapter 71, Family Code, or an offense under Chapter 20, 20A, 21, or 22, Penal Code, based on or in response to a public or private communication.

**Credits**

Added by Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011. Amended by Acts 2013, 83rd Leg., ch. 1042 (H.B. 2935), § 3, eff. June 14, 2013; Acts 2019, 86th Leg., ch. 378 (H.B. 2730), § 9, eff. Sept. 1, 2019; Acts 2021, 87th Leg., ch. 915 (H.B. 3607), § 3.001, eff. Sept. 1, 2021; Acts 2023, 88th Leg., ch. 804 (H.B. 527), § 1, eff. Sept. 1, 2023.

Notes of Decisions (224)

**O'CONNOR'S CROSS REFERENCES**

See also CPRC §129A.004; ***O'Connor's Texas Civil Forms***, FORMS 3K:1 et seq.; ***O'Connor's Texas Rules***, "Motion to Dismiss--Anti-SLAPP Motion," ch. 3-K, §1 et seq.

  

**O'CONNOR'S ANNOTATIONS**

***Generally***

***Temple v. Cortez Law Firm, PLLC***, 657 S.W.3d 337, 344 (Tex.App.--Dallas 2022, no pet.). "[W]hen a TCPA movant's step-one burden and a nonmovant's TCPA exemption are both disputed, is a court required to consider those two issues in that order? [¶] We have not located any binding authority answering or analyzing this question. [¶] The TCPA does not answer it. While the order of the typical three-step TCPA analysis is suggested by [CPRC] §27.005's subsections (b), (c), and (d), … nothing in the TCPA sheds any light on the order in which a court is to consider a movant's step-one burden under §27.005(b) and a nonmovant's exemption under [CPRC] §27.010(a). [¶] In some cases, we have considered step one before the exemption. *At 345:* In others, we have considered only the exemption. [¶] Our sister courts have taken both approaches as well, often without analyzing the order of decision. [¶] Still others have suggested, without any analysis, that considering step one first is the proper approach. *At 346:* When a TCPA movant's step-one burden and a nonmovant's TCPA exemption are both disputed, we conclude that a court may consider a nonmovant's exemption first, if it chooses to do so. [T]o the extent that … our sister courts' other opinions can be interpreted [precluding this], we disagree and decline to follow their opinions. [¶] Regardless of when a court considers a nonmovant's exemption, the TCPA 'does not apply to' the matters described in its twelve exemptions."

***§27.010(a)(1)***

***State v. Harper***, 562 S.W.3d 1, 11 (Tex.2018). "[T]he TCPA 'does not apply to an enforcement action that is brought in the name of this state … by … a county attorney.' Because the legislature did not define 'enforcement action,' we must determine the term's 'common, ordinary meaning.' *At 12:* We conclude that, within the TCPA, the term 'enforcement action' refers to a governmental attempt to enforce a substantive legal prohibition against unlawful conduct. … Under this definition, a removal petition [under Tex. Loc. Gov't Code ch. 87] is not an 'enforcement action' in the abstract. Instead it is a procedural device, and as such a party cannot initiate a removal action to enforce the removal statute itself. *At 14-15:* A removal petition is not an 'enforcement action' unless it seeks to enforce a substantive legal prohibition against unlawful conduct. The removal grounds alleging [D's] incompetency do not meet this definition, which means that the TCPA's 'enforcement action' exemption does not apply to them. But under the same definition, the state's additional ground alleging official misconduct based on violations of the Open Meetings Act is an enforcement action. So the enforcement-action exemption renders the TCPA inapplicable to the state's additional ground."

***§27.010(a)(2)***

***Castleman v. Internet Money Ltd.***, 546 S.W.3d 684, 688 (Tex.2018). "Focusing on the text and context of the TCPA's commercial-speech exemption, we construe the exemption to apply when (1) the defendant was primarily engaged in the business of selling or leasing goods, (2) the defendant made the statement or engaged in the conduct on which the claim is based in the defendant's capacity as a seller or lessor of those goods or services, (3) the statement or conduct at issue arose out of a commercial transaction involving the kind of goods or services the defendant provides, and (4) the intended audience of the statement or conduct were actual or potential customers of the defendant for the kind of goods or services the defendant provides. *At 690-91:* Thus, the commercial-speech exemption applies only to *certain* communications related to a good, product, or service in the marketplace--communications made not as a protected exercise of free speech by an individual, but as commercial speech which does no more than propose a commercial transaction. [¶] Here, although [D] was primarily engaged in the business of selling goods, his allegedly defamatory statements did not arise out of his sale of goods or services or his status as a seller of those goods and services. [D] made the statements in his status as a customer or consumer of [P's] services. Moreover, the intended audience of [D's] statements was not an actual or potential buyer or customer of the goods he sells. [D] intended his statements to reach [P's] actual or potential customers. His statements constituted protected speech warning those customers about the quality of [P's] services, not pursuing business for himself. Neither [D] nor his business stood to profit from the statements at issue, and although he might have been personally gratified by the damage the statements might make to [P's] business, the statements do not fall within the TCPA's commercial-speech exemption. We thus conclude that the TCPA's commercial-speech exemption does not apply here." (Internal quotes omitted.) *See also* ***Whitelock v. Stewart***, 661 S.W.3d 583, 598 (Tex.App.--El Paso 2023,

  

pet. denied) (commercial-speech exemption did not apply to Ps' claims against former customers who posted comments about Ps on social media because comments were not about any commercial transaction involving sale or leasing of goods and did not relate to parties' previous dispute over sale or leasing of horses; instead, comments related to whether Ps committed acts of animal cruelty and whether P1 committed fraudulent acts as vice-president of nonprofit organization); ***Kostura v. Judge***, 627 S.W.3d 380, 387-90 (Tex.App.--Amarillo 2021, pet denied) (commercial-speech exemption applied to P-attorney's claims against his former law firm challenging the accuracy of statements made in firm's letters to clients that changed attorney-client relationship because of alleged disability affecting P's capacity to practice law); ***Buzbee v. Canales***, 621 S.W.3d 802, 809-10 (Tex.App.--El Paso 2021, pet. denied) (commercial-speech exemption applied to attorney's advertisements expressly directed to only potential medical malpractice claimants; although there was some support that advertisements were also published for existing client's benefit, court stated that "linking commercial speech issues to issues of public concern does not convert otherwise commercial expression into noncommercial speech"); ***Kassab v. Pohl***, 612 S.W.3d 571, 578 (Tex.App.--Houston [1st Dist.] 2020, pet. denied) (commercial-speech exemption applied to P's claims against three sets of Ds for their role in alleged theft and sale of P's client information to D1-malpractice attorney that enabled D1 to contact those clients to provide legal services in pursuit of barratry claims against P); ***Round Table Physicians Grp. v. Kilgore***, 607 S.W.3d 878, 885-87 (Tex.App.--Houston [14th Dist.] 2020, pet. denied) (commercial-speech exemption applied when D-healthcare provider filed notices of liens in its capacity as seller of healthcare, liens arose out of commercial transaction involving D's provision of healthcare to P and her son, and P was intended audience of liens); ***Martin v. Walker***, 606 S.W.3d 565, 569-70 (Tex.App.--Waco 2020, pet. denied) (commercial-speech exemption applied to gambling addict's claim for damages associated with D's operation of illegal gambling machines); ***Morrison v. Profanchik***, 578 S.W.3d 676, 682-84 (Tex.App.--Austin 2019, no pet.) (commercial-speech exemption applied to P's defamation claim against D-competitor based on allegedly fake online review of P's business).

***VSMSQ Structural Eng'rs, LLC v. Structural Consultants Assocs.***, 679 S.W.3d 767, 774 (Tex.App.--Houston [1st Dist.] 2023, no pet.). "As the party asserting the commercial-speech exemption, [P] had the burden to prove the exemption's application. If the commercial-speech exemption applied, the trial court 'ha[d] no choice but to deny the motion.' *At 776:* [Ds] argue that the commercial-speech exemption does not exempt [P's] misappropriation claim from the TCPA's application because the TCPA applies to the claim pursuant to §27.010(b)(1)[. Ds] correctly assert that … §27.010(b)(1) provides an exception--the artistic-work exception--to the commercial-speech exemption for 'dramatic, literary, musical, political, journalistic, or otherwise artistic work' when the other elements of §27.010(b)(1) are met. [¶] [Ds] had the burden to show that the TCPA applied to [P's] common-law misappropriation claim pursuant to §27.010(b)(1) and, thus, also had the burden to show that the artistic-work exception removed the claim from the commercial-speech exemption's reach. *At 778:* We conclude that [P] met its burden to show that the commercial-speech exemption applied to its common-law misappropriation claim. We also conclude that [Ds] failed to meet their burden to show that the TCPA applied to the claim under §27.010(b)(1) and thus failed to show that the artistic-work exception to the commercial-speech exemption applied. Accordingly, we hold that the trial court did not err in denying [Ds'] motion to dismiss [P's] misappropriation claim."

***NexPoint Advisors, L.P. v. United Dev. Funding***, 674 S.W.3d 437, 447-48 (Tex.App.--Fort Worth 2023, pet. denied). "The first element of the commercial speech exemption is that [D] was primarily engaged in the business of selling or leasing goods or services. Services is not a defined term. Therefore, we look to its common meaning. … '[S]ervice' includes 'work done by an organization or person that does not involve producing goods.' 'Services' is also defined as 'economic commodities, such as banking, that are mainly intangible and usually consumed concurrently with their production.' [¶] [D] was in the business of selling financial services. [D] marketed and sold shares in its business and engaged in 'work' to protect and enhance its shareholders' investment values as part of their purchase and ownership of the shares. Although this did not involve the sale of goods, [D] performed this 'work' for purchasers of its shares of stock, i.e., shareholders. We hold that these activities constitute selling services within the meaning of the commercial speech exemption in §27.010(a)(2)."

***Buzbee v. Canales***, 621 S.W.3d 802, 810 (Tex.App.--El Paso 2021, pet. denied). "We do not believe the Court in ***Castleman*** [***v. Internet Money Ltd.***, 546 S.W.3d 684 (Tex.2018),] intended to limit application of the commercial-speech exemption [in §27.010(a)(2)] to only a defendant who is primarily engaged in the business of selling or leasing 'goods.' Our belief is based on

  

the Court's repeated references to 'services' in other parts of the opinion, … as well as the plain language of the statute. Indeed, when applying ***Castleman***, other courts have treated the omission as an oversight. We join them."

***§27.010(a)(3)***

***Union Pac. R.R. v. Dorsey***, 651 S.W.3d 692, 701-02 (Tex.App.--Houston [14th Dist.] 2022, no pet.). "[D] appears to argue that a single claim or cause of action like negligence--a 'legal action'--can be subdivided under the TCPA into a claim that seeks recovery for bodily injuries and a separate claim that seeks recovery for property damages, and the TCPA exception would not apply to the separate claim seeking recovery of property damages. [D] cites no case treating a claim as such under the TCPA, and we have found none. The plain language of [§27.010(a)(3)] indicates that if the claim seeks recovery for bodily injury, wrongful death, or survival, then the TCPA does not apply--it does not matter that the claim could also result in recovery of damages that arguably fall outside the meaning of 'bodily injury.'"

***Tyler v. Pridgeon***, 570 S.W.3d 392, 398 (Tex.App.--Tyler 2019, no pet.). "[T]he hospital lien sought to recover judgments for damages and the proceeds of settlements of [patient's] causes of action for injuries sustained by him in the accident. Thus, the lien is a statement regarding [patient's] bodily injury action. [P's] declaratory judgment action involves the interpretation and application of the hospital lien statute pursuant to which [hospital] filed a lien to obtain payment for its services to [patient] for his bodily injuries. We are unpersuaded by [hospital's] argument that the lien cannot be a statement regarding [patient's] bodily injury action because the lawsuit was filed after the lien was recorded. By its own terms, the lien was to attach to judgments or settlements occurring at any time after the lien was recorded. We conclude that this exemption applies, making [P's] declaratory judgment suit exempt from application of the TCPA's dismissal scheme."

***Kirkstall Rd. Enters. v. Jones***, 523 S.W.3d 251, 253 (Tex.App.--Dallas 2017, no pet.). "[D] argues the bodily injury exemption [in §27.010(c), now §27.010(a)(3)] was not intended to apply to protected speech but instead was intended to provide guidance to the courts that a motion to dismiss under the TCPA would be improper in a non-speech based personal-injury case. [¶] The plain language of §27.010(c) [now §27.010(a)(3)] excludes legal actions seeking recovery for bodily injury. [P's] negligence claim seeks to recover for the bodily injuries--four gunshot wounds--that he claims he sustained as a result of [D's] negligence in editing and producing its [television] program. [¶] [W]e conclude that [P] has shown that it is exempted from application of the TCPA." *See also* ***Cavin v. Abbott***, 545 S.W.3d 47, 56-58 (Tex.App.--Austin 2017, no pet.).

***§27.010(a)(4)***

***Robert B. James, DDS, Inc. v. Elkins***, 553 S.W.3d 596, 606 (Tex.App.--San Antonio 2018, pet. denied). "Consistent with how the supreme court and our sister courts have construed 'arising out of' in various contexts, we construe 'arising out of an insurance contract' [in §27.010(a)(4)] as requiring that the insurance contract be a 'but-for' or motivating cause of the alleged facts entitling the plaintiff to relief, or that the alleged facts entitling the plaintiff to relief have a nexus to or originate in a contractual relationship between an insurer and an insured for insurance benefits." *But see* ***Tervita, LLC v. Sutterfield***, under this code section.

***Tervita, LLC v. Sutterfield***, 482 S.W.3d 280, 285-86 (Tex.App.--Dallas 2015, pet. denied). "[P] contends … that his claims against [D] are exempt from the TCPA because they arise out of the worker's compensation insurance contract between [D] and [D's insurance carrier]. [¶] [P] contends [D] discriminated against him because he filed a worker's compensation claim, conduct specifically prohibited by [Lab. Code] Ch. 451…. [P] emphasizes that he could not assert this claim if [D] had not elected to obtain worker's compensation coverage. [P] also contends his claim for negligent misrepresentation arises out of a worker's compensation insurance policy because his claim is based on the false representation that benefits were not available to him under the policy. [¶] We conclude the [CPRC] §27.010(d) [now §27.010(a)(4)] exemption does not apply. [P's] suit is not a 'legal action brought under the Insurance Code or arising out of an insurance contract.' [P's] 'legal action' against [D] is brought under the Texas Labor Code and the common law, not the Texas Insurance Code. … And [P] does not seek worker's compensation benefits under the insurance contract between [D] and [D's insurance carrier] in this suit. Instead, he seeks damages under Ch. 451…." *But see* ***Robert B. James, DDS, Inc. v. Elkins***, under this code section.

  

***§27.010(a)(7)***

***KB Home Lone Star Inc. v. Gordon***, 629 S.W.3d 649, 657 (Tex.App.--San Antonio 2021, no pet.). "[Ps] have identified nothing to support their contention that the presence of a DTPA legal action in a lawsuit bars an otherwise meritorious TCPA motion to dismiss a separate legal action in that lawsuit. We … hold [CPRC] §27.010(a)(7) exempts all claims under [Tex. Bus & Com. Code] Ch. 17 …, other than an action governed by [Tex. Bus. & Com. Code] §17.49(a) …, but does not exempt any other claim, document, or filing requesting legal, declaratory, or equitable relief that might otherwise be subject to the TCPA."

***§27.010(a)(12)***

***Baylor Scott & White v. Project Rose MSO, LLC***, 633 S.W.3d 263, 282-83 (Tex.App.--Tyler 2021, pet. denied). "[T]he statutory fraud exemption [in §27.010(a)(12)] does not exempt only common law fraud claims. It is not so limited. Instead, it states that the TCPA does not apply to a legal action *based on* a common law fraud claim. We presume that the Legislature worded it in this manner for a purpose, and we apply the plain language of the words used in the statutory exemption. There are other legal actions--i.e. causes of action or claims for relief--alleged by [P] that are based on, and require proof of, common law fraud. This means that, as pleaded by [P], these causes of action require proof of common law fraud as part of their elements, are 'based on a common law fraud claim,' and thus are exempt from the TCPA's reach under the facts of this case. Specifically, we hold that [P's] causes of action for unjust enrichment, civil conspiracy, and aiding and abetting a breach of fiduciary duty are *based on* common law fraud. *At 285 n.13:* In so holding, we do not intend to create a rule that these claims and remedies are per se based on a common law fraud claim in every case. However, under the pleadings and underlying facts as they have been developed at this juncture, these legal actions are based on a common law fraud claim." *See also* ***Union Pac. R.R. v. Dorsey***, 651 S.W.3d 692, 701 (Tex.App.--Houston [14th Dist.] 2022, no pet.) (Ps' negligent-misrepresentation claim was not exempt from TCPA under fraud exception in §27.010(a)(12) because, although negligent-misrepresentation claim is similar to fraud, it is properly identified as claim sounding in negligence rather than fraud).

***Straub v. Pesca Holding LLC***, 621 S.W.3d 299, 305 (Tex.App.--San Antonio 2021, no pet.). "[W]e hold that the 2019 amendments to the TCPA, which exempt common law fraud from the Act, apply to a newly added party's claims when the new party is added to a legal action on or after the effective date of the Act."

***§27.010(b)***

***VSMSQ Structural Eng'rs, LLC v. Structural Consultants Assocs.***, 679 S.W.3d 767, 776 (Tex.App.--Houston [1st Dist.] 2023, no pet.). "[Ds] correctly assert that … §27.010(b)(1) provides an exception--the artistic-work exception--to the commercial-speech exemption for 'dramatic, literary, musical, political, journalistic, or otherwise artistic work' when the other elements of §27.010(b)(1) are met. [¶] [Ds] had the burden to show that the TCPA applied to [P's] common-law misappropriation claim pursuant to §27.010(b)(1) and, thus, also had the burden to show that the artistic-work exception removed the claim from the commercial-speech exemption's reach. *At 777-78:* [W]hether the buildings structurally engineered by [P] depicted in the images on [Ds'] website qualify as 'artistic works,' as that term is used in §27.010(b)(1), is a question of law…. [¶] The TCPA does not define the term 'artistic work,' and no Texas caselaw discusses its meaning. [¶] [In §27.010(b)(1),] 'otherwise artistic work' follows a list of specific types of artistic works, namely, 'dramatic, literary, musical, political, [and] journalistic [works].' [W]e limit the application of the general phrase 'otherwise artistic work' to the type of artistic work characterized by 'dramatic, literary, musical, political, [and] journalistic [works].' [¶] Here, the listed 'dramatic, literary, musical, political, [and] journalistic [works]' are best characterized as creative expressions or products of creative expressions that convey or express information, messages, or ideas. This characterization is supported by the examples of specific artistic works listed in §27.010(b)(1), namely, 'audio-visual work ..., a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform.' [¶] [Ds] assert that 'engineering has long been recognized to be an art form in addition to a scientific endeavor.' But [Ds] provided no definition or description of what the structural engineering here entailed or what was involved in the preparation of the structural engineering designs incorporated into the buildings depicted on [Ds']

website. We note that [P's] first amended petition states that [P's] 'engineering designs' for the buildings depicted on [Ds'] website 'specif[ied] the structural requirements necessary to implement the architectural design for the respective buildings.' That description connotes no element of creative expression. While structural engineering may be an art in the sense that it is an occupation that requires skill, and the engineering designs may have some artistic qualities, the record contains no indication that the buildings are 'artistic works' in the sense that the engineering aspects of the buildings are of the same or similar character as 'dramatic, literary, musical, political, [or] journalistic [works].' [¶] We … conclude that [Ds] failed to meet their burden to show that the TCPA applied to the claim under §27.010(b)(1) and thus failed to show that the artistic-work exception to the commercial-speech exemption applied."

**Footnotes**

1 V.T.C.A., Family Code § 1.001 et seq.; § 16.001 et seq.; § 71.001 et seq.; § 101.001 et seq.

V. T. C. A., Civil Practice & Remedies Code § 27.010, TX CIV PRAC & REM § 27.010
Current through legislation effective July 1, 2025, of the 2025 Regular Session of the 89th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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