No. 90233-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs/Petitioners,

vs.

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

Defendants/Respondents.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the proper interpretation and application of RCW 4.24.525, one of Washington's "anti-SLAPP" statutes, and whether this statute violates the Washington Constitution.[1] The Foundation previously filed an amicus curiae memorandum in this case supporting review.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents the Court with an opportunity to address the constitutionality of RCW 4.24.525 (§525).[2] Kent and Linda Davis and others (Davis) filed this derivative action on behalf of Olympia Foods Cooperative (Co-op) against Grace Cox and 15 other current and former members of the Board of Directors of the Co-op (Cox). The underlying

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[1] The acronym "SLAPP" refers to "strategic lawsuits against public participation." See Henne v. City of Yakima, 177 Wn. App. 583, 584 n.1, 313 P.3d 1188 (2013), *review granted*, 179 Wn. 2d 1022 (2014).

[2] Other cases before the Court include: Henne, supra; Akrie v. Grant, 178 Wn. App. 506, 315 P.3d 567 (2013), *review granted*, 180 Wn. 2d 1008 (2014); Dillon v. Seattle Deposition Reporters, LLC, 179 Wn. App. 41, 316 P.3d 1119, *review granted*, 180 Wn. 2d 1009 (2014); City of Seattle v. Egan, 179 Wn. App. 333, 317 P.3d 568 (2014), *review pending*; Alaska Structures, Inc. v. Hedlund, 180 Wn. App. 591, 323 P.3d 1082 (2014), *review pending*. WSAJ Foundation filed amicus curiae briefs in Henne and Dillon.

facts are drawn from the Court of Appeals opinion and the briefing of the parties.[3]

The Co-op, by means of a resolution of the Board of Directors, determined to boycott products from Israel. Davis filed this action against Cox on grounds that the resolution was not properly adopted under the Co-op's governing documents, in particular its Boycott Policy. The relief requested by Davis included a permanent injunction against the boycott. In response, Cox filed a motion to strike the complaint pursuant to §525(4)(b). The superior court granted the motion, and awarded damages, attorney fees and costs.

The Court of Appeals affirmed, specifically rejecting a number of state constitutional challenges to the motion to strike procedure in §525(4)(b). See Davis, 180 Wn. App. at 541-48. Among other things, Davis contended that the procedure violates the right to trial by jury, separation of powers, and the right of access to courts. See Davis Br. at 32-44. The Court of Appeals rejected the jury trial challenge by invoking the rule of constitutional construction and equating the motion to strike procedure with summary judgment under CR 56. See Davis, 180 Wn. App. at 546-47 (relying on Dillon, 179 Wn. App. at 89). The court rejected the separation of powers challenge on grounds that the burdens imposed by the motion to strike procedure are substantive and within the province

[3] See Davis v. Cox, 180 Wn.App. 514, 325 P.3d 255, *review granted*, — Wn.2d — (2014); Davis Br. at 4-21; Cox Br. at 2-7; Davis Reply Br. at 3-9; Davis Corrected Pet. for Rev. at 3-6; Cox Ans. to Pet. for Rev. at 1-6; Davis Corrected Supp. Br. at 5-7; Cox Corrected Supp. Br. at 3-4.

of the Legislature. See id. at 545 (distinguishing Putman v. Wenatchee Valley Med. Ctr., 166 Wn.2d 974, 980, 216 P.3d 374 (2009)). The court also rejected the access to courts challenge, reasoning that it is within the power of the Legislature "'to define parameters of a cause of action and prescribe factors to take into consideration in determining liability.'" See Davis at 546 (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 666, 771 P.2d 711, 780 P.2d 260 (1989)).[4]

This Court granted Davis' petition for review, which advances the same constitutional challenges made in the lower court. See Davis Pet. for Rev. at 1-2 (regarding separation of powers, access to courts and vagueness); id. at 8-9 & n.6 (regarding trial by jury); see also Davis Corrected Supp. Br. at 11-16 (regarding all constitutional challenges).[5]

III. ISSUES PRESENTED

1.) Does the motion to strike procedure in §525(4)(b) violate the right to trial by jury, separation of powers, and/or the right of access to courts under the Washington Constitution?

2.) If so, can the statute be saved from being struck down in its entirety by application of either the rule of constitutional construction, or the uncodified severability clause that was adopted in conjunction with §525?

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[4] The Court of Appeals likewise rejected Davis' challenges to the motion to strike procedure in §525(4)(b) on grounds of vagueness, and to the stay of discovery in subsection (5)(c) based on separation of powers and access to courts. See Davis at 542-43 (separation of powers); id. at 543-45 (access to courts); id. at 547-48 (vagueness).

[5] Davis also raises a number of sub-constitutional issues, including whether the Court of Appeals misperceived the "gravamen" of the action, and whether Cox's relevant conduct was "lawful" under §525(2)(e). See Davis Corrected Pet. for Rev. at 1-3 (stating issues); id. at 11-12 (regarding gravamen analysis); id. at 13-14 (regarding lawfulness).

IV. SUMMARY OF ARGUMENT

The motion to strike procedure in §525(4)(b)—which provides, in the context of a pretrial motion hearing, that the moving party "has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition," and that the responding party then has the burden "to establish by clear and convincing evidence a probability of prevailing on the claim"—is facially invalid under the Washington State Constitution on several different grounds, and the constitutional infirmities cannot be avoided by either the rule of constitutional construction or severance.

***Right to trial by jury*:** As written, subsection (4)(b) requires a court to weigh evidence to determine whether the moving and responding parties have met their respective burdens of proof. In addition, the heightened standard of proof imposed on the responding party, and the responding party's obligation to disprove the moving party's affirmative defenses to establish a probability of prevailing, create the potential for meritorious claims to be dismissed. In both respects, subsection (4)(b) violates the right to trial by jury under Wash. Const. Art. I §21. It is not permissible for the court to weigh evidence on a pretrial motion, and only a jury can determine whether the evidence satisfies the applicable burden of proof.

The plain language of §525(4)(b) does not allow the Court, under the rule of constitutional construction, to equate the motion to strike

procedure with summary judgment in order to interpret the statute as consistent with the right to trial by jury. Nor can the unconstitutional language in subsection (4)(b) be excised pursuant to the severance clause because the Court would, in effect, be creating an entirely new procedure.

Separation of powers: Subsection (4)(b) violates the separation of powers doctrine because the motion to strike procedure conflicts, at a minimum, with motions to dismiss under CR 12 and summary judgment under CR 56. The Legislature does not have the institutional competence to alter court procedures for resolving claims short of trial, and there is no possible interpretation of the statute that avoids this constitutional infirmity. Because it arises from the Legislature's lack of authority to adopt subsection (4)(b), it is not susceptible to severability analysis.

Right of access to courts: Subsection (4)(b) violates the right of access to courts under Wash. Const. Art. I §10, based on the potential for screening meritorious cases resulting from the burden imposed on the responding party at an early stage of proceedings, presumptively without the benefit of discovery. As with the right to jury trial, the infirmity cannot be eliminated by severance without creating a new procedure.

Facial invalidity: The constitutional infirmities in subsection (4)(b) render §525 invalid under all circumstances and as to all litigants, and Wash. Const. Art. II §26 does not save the statute as applied to the State or other governmental entities.

V. ARGUMENT

Judicial restraint normally counsels against deciding constitutional questions when a case may be fairly resolved on other grounds. See Isla Verde Intern. Holdings, Inc. v. City of Camas, 146 Wn. 2d 740, 753, 49 P.3d 867 (2002) (collecting cases). However, the Court should address the constitutionality of §525 because, although the statute was only enacted in 2010, it is being invoked by litigants in a variety of contexts and is profoundly altering the landscape of the civil justice system. The arguable chilling effect that §525 has on pursuit of otherwise valid causes of action warrants immediate consideration of constitutional problems apparent on the face of the statute.[6] Furthermore, the Court of Appeals below found it necessary to invoke the rule of constitutional construction to interpret §525 in a manner consistent with the right to trial by jury. See Davis, 180 Wn. App. at 546-47 (relying on Dillon, 179 Wn. App. at 88-9 & n.33). This Court must determine whether the lower court properly applied this rule of construction. Accordingly, this brief focuses on the nature and effect of the constitutional defects in the motion to strike procedure in §525(4)(b).

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[6] Cf. Waples v. Yi, 169 Wn. 2d 152, 156, 234 P.3d 187 (2010) (resolving challenge to pre-suit notice of claim in medical negligence cases based on separation of powers, without addressing sub-constitutional arguments that pre-suit notice was either not mandatory and/or excused); Hunter v. North Mason Sch. Dist., 85 Wn. 2d 810, 812-13, 539 P.2d 845 (1975) (stating "rather than attempting to avoid the constitutional problems inherent in this type of statute by continuing to fashion judicial exceptions to their plain language, we should face the constitutional issue directly and acknowledge their infirmity[,]" in case involving non-claim statute; brackets added).

A. Overview Of The Motion To Strike Procedure In §525(4)(b).

Section 525 was enacted in part for the purpose of creating an expedited procedural framework for resolving anti-SLAPP claims. See Laws of 2010, Ch. 118, §1(2)(b).[7] Under the statute, "[a] party may bring a special motion to strike any claim that is based on an action involving public participation and petition[.]" §525(4)(a).[8] The moving party "has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition." §525(4)(b). The "preponderance of the evidence" language appears to incorporate the common law meaning of the phrase as "more probably true than not true."[9] The moving party's evidence must establish a relationship ("based on an action involving") between the underlying claim and the conduct amounting to public participation and petition by this standard of proof.[10]

If the court determines that the moving party satisfies the initial burden/showing, then "the burden shifts to the responding party to

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[7] Laws of 2010, Ch. 118, which contains the uncodified statement of legislative findings, rule of construction and severance clause in addition to the statutory text of §525, is reproduced in the Appendix to this brief.

[8] The full text of §525 is reproduced in the Appendix to this brief.

[9] Mohr v. Grant, 153 Wn. 2d 812, 822, 108 P.3d 768 (2005) (defining preponderance of the evidence); see also New York Life Ins. Co. v. Jones, 86 Wn. 2d 44, 47, 541 P.2d 989 (1975) (stating "[i]f the Legislature uses a term well known to the common law, it is presumed that the Legislature intended it to mean what it was understood to mean at common law").

[10] In analyzing the relationship, the Court of Appeals has developed a "gravamen" test, see Davis, 180 Wn. App. at 529-30 (relying on Dillon, 179 Wn. App. at 71-72), which is criticized by WSAJ Foundation in briefing before the Court in Dillon, on grounds that the test is not tied to the text of §525 and is uncertain in application. See WSAJ Fdn. Am. Br., at 19-23, Dillon v. Seattle Deposition Reporters, LLC, Wn. Sup. Ct. No. 89961-4 (Aug. 29, 2014).

establish by clear and convincing evidence a probability of prevailing on the claim." §525(4)(b). The reference to "clear and convincing evidence" appears to incorporate the common law meaning of the phrase as "highly probable," i.e., "weightier and more convincing than a preponderance of the evidence[.]" Dillon, 179 Wn. App. at 86-87 (quotation omitted). The evidence must establish that the plaintiff/responding party will prevail "on the claim" by the requisite standard.[11] Prevailing on the claim would necessarily seem to require overcoming all defenses to the claim raised by the moving party. See Dillon at 88.[12]

The determination whether the moving and responding parties have satisfied their respective burdens is made pretrial, in summary fashion on an abbreviated record. The court must hold a hearing within 30 days after service of the motion, and render a decision within seven days afterward. See §525(5)(a)-(b). "[T]he court shall consider pleadings and supporting or opposing affidavits stating the facts upon which the liability

[11] The conjunction of the "clear and convincing evidence" standard of proof with "a probability of prevailing on the claim" seems to represent an amalgam of the clear and convincing *and* preponderance of the evidence standards, resulting in a completely new standard. The Court of Appeals below rejected Davis' vagueness challenge to this hybrid standard of proof, reasoning that "[s]ince both standards are well known, there seems to be little risk that, when considered together, confusion will abound." Davis, 180 Wn. App. at 547-48. This reasoning is non-sequitur because clarity of the combination does not follow from the clarity of each standard individually. Nonetheless, despite the lack of clarity, WSAJ Foundation reads §525(4)(b) as effectively raising the burden of proof on the responding party in connection with the motion to strike procedure, while leaving the underlying burden of proof at trial unchanged. But see Cox Supp. Br. at 12 (suggesting that the combination of clear and convincing evidence and a probability of prevailing "is ***less*** than the ultimate burden of proving claims by a preponderance"; emphasis in original).

[12] Section 525(4)(d)(ii), which provides that the motion to strike procedure does not affect either the *burden* of proof or the *standard* of proof, seems to confirm that the motion to strike procedure alters both the placement of the burden of proof and the nature of the evidence required to satisfy the burden.

or defense is based." §525(4)(c). Discovery is automatically stayed upon filing a motion to strike, except upon an order for good cause shown. See §525(5)(c).

With this background regarding the motion to strike procedure in §525(4)(b), the constitutional challenges based on the right to trial by jury, separation of powers, and right of access to courts can be addressed.

B. The Motion To Strike Procedure Violates The Right To Trial By Jury.

Under the Washington Constitution, "[t]he right of trial by jury shall remain inviolate[.]" Wash. Const. Art. I §21.[13] As written, §525(4)(b) violates this constitutional right in three independent ways. *First,* it requires the court to weigh evidence on a pretrial motion in order to determine whether the moving and responding parties have met their respective burdens of proof, and does not reserve genuine issues of material fact for trial. *Second*, the heightened clear and convincing standard of proof imposed on the plaintiff/responding party potentially screens out cases where the evidence would be sufficient to submit to the jury and support a verdict in the plaintiff's favor in cases governed by the lower preponderance of the evidence standard. *Third*, the obligation to disprove the moving party's affirmative defenses in order to establish a probability of prevailing on the claim, also by the heightened standard of proof, further subjects potentially meritorious claims to dismissal.

[13] The full text of Wash. Const. Art. I §21 is reproduced in the Appendix to this brief.

Any one of the foregoing violations of the right to trial by jury would be sufficient to render the motion to strike procedure unconstitutional. In the context of a pretrial motion hearing at law, it is never permissible for a court to weigh evidence, resolve conflicts in testimony, make determinations regarding credibility of witnesses, or draw inferences from the evidence. Additionally, with respect to the burden imposed on the responding party under §525(4)(b), it is not possible to determine, in advance, which meritorious cases will be screened out by the motion to strike procedure because only the jury can determine whether a party has satisfied the burden of proof.

Recognizing the seeming conflict between the motion to strike procedure of §525(4)(b) and the right to trial by jury, the Court of Appeals invoked the rule of constitutional construction to equate this procedure with summary judgment under CR 56. See Davis at 546-47 (relying on Dillon at 89). If a statute is ambiguous and more than one construction is possible, only one of which is constitutional, a court is obligated to adopt the constitutional construction out of deference to the authority and role of the Legislature.[14] However, "in construing an otherwise unconstitutional statute in such a manner as to render it constitutional, courts are not free to rewrite the statute as if there were no such thing as the constitutional

[14] See State ex rel. Dept of Fin., Budget & Bus. v. Thurston Cnty., 199 Wash. 398, 404, 92 P.2d 234 (1939); State v. Strong, 167 Wn. App. 206, 212-13, 272 P.3d 281, *review denied,* 174 Wn. 2d 1018 (2012).

doctrine of separation of powers."[15] A court "may not strain to interpret the statute as constitutional: a plain reading must make the interpretation reasonable."[16]

The Court of Appeals erred in applying the rule of constitutional construction because it is not possible to construe §525(4)(b) as equivalent to summary judgment. Subsection (4)(b) is written in terms of "burden," "showing," "establish," "preponderance of the evidence," "clear and convincing evidence," and "probability of prevailing," all of which connote the weighing of evidence, resolution of factual disputes, and assessment of the merits of the claim.[17] The judge is required to determine whether the moving and responding parties have satisfied their burdens of proof on a written record in the context of an abbreviated and expedited motion hearing. See §525(4)-(5).

This contrasts with summary judgment, which forecloses the weighing of evidence and resolution of factual disputes in keeping with the right to trial by jury. See LaMon v. Butler, 112 Wn. 2d 193, 199 n.5, 770 P.2d 1027 (1989). The role of the judge on summary judgment is instead limited to determining whether there are genuine issues of material

[15] In re Parentage of L.B., 121 Wn. App. 460, 475, 89 P.3d 271 (2004), *aff'd in part & rev'd in part*, 155 Wn. 2d 679, 122 P.3d 161 (2005).

[16] Washington St. Republican Party v. Washington St. Pub. Disclosure Comm'n, 141 Wn. 2d 245, 281, 4 P.3d 828 (2000) (internal quotation omitted); accord State v. Abrams, 163 Wn. 2d 277, 282, 178 P.3d 1021 (2008) (stating a court "cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question"; internal quotation omitted).

[17] It is worth noting that the superior court felt obligated to weigh the evidence in deciding Cox's motion to strike. See Davis, 180 Wn. App. at 532-34 (finding harmless error in superior court's weighing of evidence).

fact, or whether the moving party is entitled to judgment as a matter of law. See CR 56(c).[18] Section 525(b)(4) is unconstitutional precisely because it does not reserve genuine issues of material fact for the jury.

Just as importantly, even if §525(b)(4) could be construed to require nothing more than the proffer of evidence—as opposed to the weighing of evidence—the heightened standard of proof and shifting burden on affirmative defenses still engender the risk that otherwise meritorious claims will never reach the jury. Equating §525(4)(b) with summary judgment does not address these independent encroachments upon the right to trial by jury.[19]

C. The Motion To Strike Procedure Violates Separation Of Powers.

As this Court stated in Putman:

> The Washington State Constitution does not contain a formal separation of powers clause, but "'the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.'" *Brown v. Owen,* 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Carrick v. Locke,* 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). The doctrine of separation of powers divides power into three co-equal branches of government: executive, legislative, and judicial. *City of Fircrest v. Jensen,* 158 Wn.2d 384, 393–94,

[18] Cf. Leiendecker v. Asian Women United of Minnesota, 848 N.W.2d 224, 231-33 (Minn.2014) (finding somewhat similar Minnesota Anti-SLAPP statute "mutually inconsistent" and "incompatible" with summary judgment practice, and declining to apply the rule of constitutional construction because it is not possible to interpret anti-SLAPP statute as consistent with the right to trial by jury, but also declining to strike down statute because constitutional argument was not preserved).

[19] In most civil cases, the plaintiff would have the burden to prove a claim by a preponderance of the evidence, and would not have any burden to disprove the defendant's affirmative defense. The fact that some types of civil claims involve a clear and convincing standard of proof does not render §525(4)(b) constitutional for those claims because the plaintiff would still be required to disprove affirmative defenses by the heightened standard.

> 143 P.3d 776 (2006), *cert. denied,* 549 U.S. 1254, 127 S.Ct. 1382, 167 L.Ed.2d 162 (2007). The doctrine "'does not depend on the branches of government being hermetically sealed off from one another,'" but ensures "that the fundamental functions of each branch remain inviolate." *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009) (quoting *Carrick*, 125 Wn.2d at 135, 882 P.2d 173). If "'the activity of one branch threatens the independence or integrity or invades the prerogatives of another,'" it violates the separation of powers. *Fircrest*, 158 Wn.2d at 394, 143 P.3d 776 (internal quotation marks omitted) (quoting [*State v.*] *Moreno*, 147 Wn.2d [500,] 505–06, 58 P.3d 265 [(2002)]).
>
> Some fundamental functions are within the inherent power of the judicial branch, including the power to promulgate rules for its practice. *Id.; In re Disbarment of Bruen,* 102 Wash. 472, 476, 172 P. 1152 (1918). If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters. *Fircrest,* 158 Wn.2d at 394, 143 P.3d 776.

166 Wn. 2d at 980 (brackets added); accord Waples v. Yi, 169 Wn. 2d 152, 158, 234 P.3d 187 (2010) (quoting Putman). In Putman, the Court struck down the certificate of merit requirement in medical negligence actions on separation of powers grounds because it conflicted with the pleading requirements of CR 8 and 11. See 166 Wn. 2d at 982-85. In Waples, the Court held the pre-suit notice of claim statute governing medical negligence actions unconstitutional as to a private defendant because it conflicted with CR 3(a), regarding the commencement of actions. See 169 Wn. 2d at 159-61; see also McDevitt v. Harborview Med. Ctr., 179 Wn. 2d 59, 75, 316 P.3d 469 (2013) (clarifying that Waples was an as-applied invalidation because public health care providers are on different constitutional footing). Similarly, in this case, the motion to strike procedure in §525(4)(b) should be struck down because it conflicts

with court rules, in particular CR 12 and 56, establishing procedures for the dismissal of claims.[20]

CR 12(b) provides for motions to dismiss based on the following grounds:

> (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19.

Subsections (b)(1)-(5) and (7) of this rule relate to a court's authority to hear the case or grant complete relief. A motion to dismiss for failure to state a claim upon which relief can be granted under subsection (b)(6) hinges upon whether the plaintiff's complaint is legally sufficient to support a claim, based on hypothetical facts. See Bravo v. Dolsen Cos., 125 Wn. 2d 745, 750, 888 P.2d 147 (1995). This Court has specifically rejected the federal "plausibility" standard for such motions, which allows consideration of the likelihood of success on the merits. See McCurry v. Chevy Chase Bank, FSB, 169 Wn. 2d 96, 102-03 & n.3, 233 P.3d 861 (2010).

CR 12(c) provides for motions for judgment on the pleadings. The only difference between a motion to dismiss for failure to state a claim under CR 12(b)(6) and a motion judgment on the pleadings under CR 12(c) is timing; a CR 12(b)(6) motion is filed before the answer, while a CR 12(c) motion is filed after. See Meyer v. Dempcy, 48 Wn. App. 798,

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[20] The full texts of the current versions of CR 12 and 56 are reproduced in the Appendix to this brief.

801, 740 P.2d 383 (1987), *review denied,* 109 Wn. 2d 1009 (1987). Motions under CR 12(b)(6) and (c) are converted to summary judgment motions under CR 56 if a court considers materials beyond the pleadings.

CR 56(c) provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Consistent with the right to trial by jury, the court may not weigh evidence, resolve conflicts in the evidence, choose among competing inferences from the evidence, or make determinations of credibility on summary judgment. See LaMon, 112 Wn. 2d at 199 n.5.

The motion to strike procedure in §525(4)(b) cannot be harmonized with motions to dismiss under CR 12 or for summary judgment under CR 56. Unlike these motions, §525(4)(b) alters the standard of proof in most civil cases and the placement of the burden of proof with respect to affirmative defenses. Also unlike these motions, subsection (4)(b) requires the court to weigh evidence in order to determine whether the moving and responding parties have satisfied their respective burdens of proof, as described above.

Under the separation of powers doctrine, the Legislature does not have authority to adopt the motion to strike procedure in §525(4)(b) at odds with court rules because it is a procedural rather than substantive statute. "Substantive law 'creates, defines, and regulates primary rights,'

while procedures involve the 'operations of the courts by which substantive law, rights, and remedies are effectuated.'" Putman at 984 (quotations omitted); accord Waples at 161 (quoting Putman). The Legislature describes §525 as a "method for speedy adjudication" of SLAPP suits. Laws of 2010, Ch. 118, §1(2)(b). The statute does not create any substantive rights, but rather attempts to balance substantive rights grounded in sources outside of the statute.[21] One of the principal purposes of §525 is to "[s]trike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern[.]" Laws of 2010, Ch. 118, §1(2)(a). These substantive rights are all protected by the state and federal constitutions.[22]

The burdens of proof imposed on the moving and responding parties under §525(4)(b) must also be deemed procedural because the Legislature makes clear that ultimate burdens of proof at trial remain unchanged. See §525(4)(d)(ii) (stating "the determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding"). In this way, the motion to strike procedure is superimposed

[21] The provision of remedies in the form of attorney fees, costs and statutory damages under §525(6) does not independently create any substantive rights. Cf. Greenhalgh v. Dep't of Corr., 180 Wn. App. 876, 894, 324 P.3d 771, 779 (indicating 42 U.S.C. §1983 "does not create any substantive rights, but only a remedy when a government official or employee violates federally guaranteed rights"), *review denied*, — Wn. 2d — (2014); Nguyen v. Cnty. of Clark, 732 F. Supp. 2d 1190, 1194 (W.D. Wash. 2010) (concluding §525 "is procedural and does not affect a vested right, and therefore is remedial in nature and applies retroactively").

[22] See e.g. Sofie, supra (regarding right to trial by jury under Wash. Const. Art. I §21); John Doe v. Puget Sound Blood Center, 117 Wn. 2d 772, 780, 819 P.2d 370 (1991) (regarding right of access to courts under Art. I §10).

on existing common law claims as a type of screening mechanism.[23] Thus, the Court of Appeals below incorrectly characterizes the burdens of proof as substantive. See Davis at 545. Because §525(4)(b) is procedural and in conflict with CR 12 and 56, it violates separation of powers.

D. The Motion To Strike Procedure Violates The Right Of Access To Courts.

The Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Wash. Const. Art. I, §10.[24] This provision entails a right of access to courts. See Putman, 166 Wn. 2d at 979; see also Blood Center, 117 Wn. 2d at 780. In Putman, the Court invalidated a statute requiring a certificate of merit at or near the beginning of a medical negligence lawsuit because it "unduly burdens" the right of access to courts. Id. at 977-79.[25] The Court reasoned that "[o]btaining the evidence necessary to obtain a certificate of merit *may not be possible* prior to discovery." Id. at 979 (emphasis added). Importantly, the Court did not suggest that the certificate of merit could not be obtained without discovery under the circumstances present in Putman. Instead, the mere *possibility* that the certificate of merit

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[23] Section 525 does not qualify as a special proceeding, and Cox does not appear to argue that the legislature has additional latitude on this basis. See Putman, 166 Wn. 2d at 981-82 (defining special proceedings to consist of those proceedings "created or completely transformed by the Legislature").

[24] The full text of Wash. Const. Art. I, §10 is reproduced in the Appendix to this brief.

[25] While the majority opinion in Putman does not explicitly identify the source of the right of access to courts, the Court quoted Blood Center, 117 Wn. 2d at 780, for the proposition that "[t]he people have a right of access to courts; indeed, it is 'the bedrock foundation upon which rest all the people's rights and obligations.'" Putman at 979. Blood Center makes it clear that the right is grounded in Art. I §10. See 117 Wn. 2d at 780.

requirement might bar a valid claim was sufficient to find that the requirement unconstitutionally burdens the right of access to courts, regardless of whether it actually has the effect of barring the particular claim. See id.

In a different, but analogous way, the motion to strike procedure in §525(4)(b) unduly burdens the right of access to courts. Under this procedure it is *possible* that otherwise valid claims will be dismissed based on the heightened standard of proof and/or shifting burden of proof with respect to affirmative defenses. On this basis, the procedure should be struck down.

E. Section 525 Cannot Be Saved By Its Severability Clause.

Section 525 was enacted with a severability clause that provides:

> If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Laws of 2010, Ch. 118, §5. The test for severability is:

> whether the constitutional and unconstitutional provisions are so connected ... that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature.

Abrams, 163 Wn. 2d at 285-86 (quoting Hall v. Niemer, 97 Wn. 2d 574, 582, 649 P.2d 98 (1982)). Under this test, the existence of a severability clause in the enacting legislation is not dispositive. See Abrams at 287. The unconstitutional provision must be "grammatically, functionally, and volitionally severable." Id. A court may not rewrite a statute to conform to

constitutional requirements without performing a legislative act and thereby infringing upon the separation of powers. See id. at 289 (applying severance clause when "[n]o new procedure needs to be created").

Here, the unconstitutional provisions of the motion to strike procedure in §525(4)(b) do not meet the requirements for severability, and the statute must be struck down in its entirety. While subsection (4)(b) in its entirety would be grammatically severable from the balance of the statute, the constitutionally infirm provisions of the subsection cannot be excised from the rest of the subsection. The subsection would need to be rewritten substantially in order to conform to summary judgment practice or otherwise avoid the jury trial, separation of powers and access to courts deficiencies discussed above.[26]

Otherwise, subsection (4)(b) is not functionally severable from the balance of the statute because the motion to strike procedure is at the heart of §525. Without the motion to strike procedure, the definitions of terms in subsection (1) and (2), the limitation on use of the procedure in prosecutions in subsection (3), the other procedural provisions in subsections (4) and (5), and the remedies in subsection (6) are meaningless.[27]

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[26] The extent of rewriting that would be necessary is evident from comparing the actual language of subsection (4)(b) with the standard for summary judgment, and the lower court's and Cox's characterizations of subsection (4)(b), in their efforts to interpret it as equivalent to summary judgment. A table making the comparison is included in the Appendix to this brief.

[27] Cf. Leonard v. City of Spokane, 127 Wn. 2d 194, 202, 897 P.2d 358, 362 (1995) (declining to sever funding mechanism that was the "heart and soul" of challenged legislation).

Lastly, neither subsection (4)(b) nor the constitutionally infirm provisions of the subsection are "volitionally" severable from the balance of §525. "A clause is volitionally severable if the balance of the legislation would have likely been adopted had the legislature foreseen the invalidity of the clause at issue." Abrams at 288. "Otherwise, the proper remedy is complete statutory invalidation rather than changing legislative intent by upsetting the legislative compromise." Griffin v. Eller, 130 Wn. 2d 58, 69, 922 P.2d 788 (1996). In adopting §525, the Legislature intended to "[s]trike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern." Laws of 2010, Ch. 118, §1(2)(a). The Court cannot excise subsection (4)(b) in its entirety, nor the offending provisions of the subsection, from the remainder of §525 without upsetting the intended balance, however flawed it may be. With the Court's guidance regarding the flaws in §525 that render it unconstitutional in its entirety, it is within the province of the Legislature to re-examine whether it can and should strike a different balance in any new effort to address concerns arising from SLAPP litigation.

F. The Legislature Does Not Have Unfettered Authority To Alter Common Law Causes Of Action Or How They Are Resolved, And It Exceeded Its Authority In Enacting §525(4)(b).

The Court of Appeals below and Cox both rely on a quotation from Sofie, 112 Wn. 2d at 666, that "'[i]t is entirely within the Legislature's power to define parameters of a cause of action and prescribe factors to take into consideration in determining liability[,]'" to support the

constitutionality of the motion to strike procedure in §525. The Court of Appeals relies on this quotation to reject Davis's access to courts challenge. See Davis at 546. Cox relies on the quotation to dismiss Davis's separation of powers challenge. See Cox Supp. Br. at 17. Their analyses based on this one line from Sofie should be rejected for several reasons.

First, the Legislature's authority to alter a common law cause of action is not actually implicated here because §525(4)(b) does ***not*** alter any cause of action, nor the ultimate burden or standard of proof. The fact that a ruling has been made on a motion to strike and the substance of that ruling are inadmissible at trial, and, as noted above, the underlying burden and standard of proof are not affected. See §525(4)(d)(i)-(ii). The motion to strike procedure merely imposes a new, unprecedented mechanism for screening certain claims without altering them.

Second, the isolated quotation from Sofie does not support unfettered legislative authority to modify common law causes of action, as the lower court and Cox suggest. In context, the Court in Sofie stated:

> It is entirely within the Legislature's power to define parameters of a cause of action and prescribe factors to take into consideration in determining liability. *This is fundamentally different from directly predetermining the limits of a jury's fact-finding powers in relevant issues, which offends the constitution.*

112 Wn. 2d at 666 (emphasis added). The italicized language confirms that legislative modifications of a common law cause of action must still satisfy constitutional requirements. After all, the Court in Sofie struck down the cap on damages in RCW 4.24.250 on grounds that it violated the right to trial by jury:

> The Legislature has the power to shape litigation. *Such power, however, has its limits: it must not encroach upon constitutional protections*. In this case, by denying litigants an essential function of the jury, the Legislature has exceeded those limits.

112 Wn. 2d at 651 (emphasis added). The right to trial by jury is inviolate as to essential jury functions to which the right attaches. See id. at 638, 642-56; accord id. at 670 (Callow, C.J., dissenting, describing majority opinion as recognizing "an absolute right"). In this way, Sofie supports the challenge to §525(4)(b) in this case. The invalid motion to strike procedure carries the substantial risk that claims to which the right to trial by jury attaches will not proceed to trial, when those claims would otherwise survive motions under CR 12 and 56.

Sofie certainly does not support the lower court's or Cox's view that the Legislature has plenary authority to create a mechanism that screens out potentially meritorious claims. The dissenting opinions in Sofie questioned how the majority could conclude that the right to trial by jury was violated by the cap on damages when, in State v. Mountain Timber Co., 75 Wash. 581, 135 P. 645 (1913), *aff'd*, 243 U.S. 219 (1917), the Court had previously upheld a workers compensation system that entirely supplanted common law rights and remedies. See Sofie at 676 (Callow, C.J., dissenting); id. at 685-87 (Dolliver, J., dissenting); id. at 689-90 (Durham, J., dissenting). In answering the dissents, the majority explained the constitutional footing for Mountain Timber as follows:

> In the case of workers' compensation, this court in *State v. Mountain Timber Co., supra,* did not engage in the historical analysis regarding the right to a jury trial. Our analysis instead centered on the state's police power to abolish causes of action and

> replace them with a mandatory industrial insurance scheme. Because the use of such power was done for the public health and welfare *and a comprehensive scheme of compensation was inserted in its place*, the abolition of the cause of action was not unconstitutional.[5] 75 Wash. at 583, 135 P. 645.
>
> > [5]We note here that while the Legislature has the power to abolish a civil cause of action, *Mountain Timber* establishes that *such a legislative act must have its own independent constitutional foundation.*

Sofie, 112 Wn. 2d at 651 & n.5 (footnote in original; emphasis added). The Court did not adopt the approach of one dissent, urging that the general police power alone should suffice as the "independent constitutional foundation" to abolish or limit common law remedies. See id. at 689 (Durham, J., dissenting).

The foregoing passage from Sofie points to a constitutionally-based limitation on the Legislature's police power to abolish or limit common law claims. Although Sofie does not identify the precise provision of the Washington Constitution, it must at a minimum involve the right of access to courts in Art. I §10. See Marriage of King, 162 Wn. 2d 378, 388, 174 P.3d 659 (2007) (stating "[w]e have generally applied the open courts clause [i.e., Art. I §10] in one of two contexts: 'the right of the public and press to be present and gather information at trial and the right to a remedy for a wrong suffered'"; quoting Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 24 (2002)); see also Blood Center, 117 Wn. 2d at 780-81 (Art. I §10 includes access to court procedures, including discovery); Putman, 166 Wn. 2d at

979 (similar).[28] This constitutional right includes those remedies existing at common law when the state constitution was adopted, and their modern analogues.[29]

The right of access to courts under Art. I §10 can only be infringed if the Legislature provides a quid pro quo—as in Mountain Timber, the workers compensation case discussed in Sofie—or if the legislation is narrowly tailored to achieve a compelling state interest. The latter test is applied in the open courts context under Art. I §10, and is well known to constitutional analysis involving fundamental rights. See e.g. State v. Wise, 176 Wn. 2d 1, 10, 288 P.3d 1113 (2012) (indicating that closure of court proceedings must be the least restrictive means necessary to protect

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[28] But see Lakeview Blvd. Condo Ass'n v. Apartment Sales Corp., 144 Wn. 2d 570, 582, 29 P.3d 1249 (2001). In Lakeview, the Court stated:

> We recognize that the legislature has broad power to enact laws to benefit society, and we have generally shown deference to the decisions of the legislature, except where the legislature has acted in an arbitrary or discriminatory manner. Similarly, we recognize that the legislature has broad authority under the police power to pass laws ... that tend to promote the public welfare. *Because the legislature may alter or restrict a common law right without foreclosing that right, we decline to determine whether a right to a remedy is implied by the language of article I, section 10 of the state constitution.*

144 Wn. 2d at 582 (emphasis added). The italicized language seems circular because, if Wash. Const. Art. I §10 entails a right to a remedy, then it would appropriately serve as a limitation on the Legislature's police power to "alter or restrict a common law right." As noted in the main text, unfettered police power to alter or restrict common law rights is contrary to Sofie, 112 Wn. 2d at 651 & n.5.

[29] See State ex rel. Macri v. City of Bremerton, 8 Wn. 2d 93, 109, 111 P.2d 612 (1941) (stating "The truth is, the Bills of Rights in the American Constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation"; internal quotations omitted); see also Sofie at 648-50 (holding constitutional right to jury trial "attaches to actions in which a jury was available at common law as of 1889 and to actions created by statutes in force at this same time allowing for a jury," and to analogous "developments in the law over time"); id. at 652 (stating "[t]he scope of the right to trial by jury may be defined by the common law through a historical analysis, but the right itself is protected by the state constitution").

a compelling interest). Here, §525 does not provide any quid pro quo to plaintiffs, nor is it narrowly tailored to achieve a compelling state interest unique to defendants. The protection of the rights of free speech and petition is compelling as to plaintiffs and defendants alike. See Akrie, 178 Wn. App. at 513 n.8 (stating "it is clear that the anti-SLAPP statute [§525] sweeps into its reach constitutionally protected first amendment activity" and "exacts a content-based restriction on the right to petition"); Spratt v. Toft, 180 Wn. App. 620, 632 & n.19, 324 P.3d 707 (2014) (noting irony that motion to strike may have violated plaintiff's right to petition, and describing the situation as a "conundrum"); see also Wash. Const. Art. I §10 (regarding right of access to courts). In any event, §525 is not narrowly tailored because it screens out potentially meritorious claims by plaintiffs, as described above.

G. Section 525 Is Facially Invalid As To All Litigants, Including The State And Other Governmental Entities.

Because facial invalidity means there are no circumstances where a statute can be constitutionally applied, there is some question whether any constitutional infirmity in §525(4)(b) exists when the State or any other governmental entity is the moving party. See McDevitt, 179 Wn. 2d at 74. Although the Legislature has authority under Wash. Const. Art. II §26 to "direct by law, in what manner, and in what courts, suits may be brought against the state," this authority is not unlimited. Procedural requirements for claims against the State and other governmental entities must be reasonable and cannot "constitute a substantial burden on the ability of

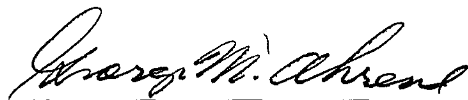
governmental tort victims to obtain relief." See McDevitt, 179 Wn. 2d at 68 (citing Hall, 97 Wn. 2d at 581); see also Medina v. Public Utility Dist., 147 Wn. 2d 303, 312, 53 P.3d 993 (2002) (noting that Art. II §26 authority also relates to political subdivisions of the State and municipalities).

For all of the reasons previously discussed in §§B-D, §525(4)(b) is unreasonable and substantially burdens claims against all defendants, public or private. Consequently, §525(4)(b) is facially unconstitutional.[30]

VI. CONCLUSION

The Court should strike down §525 as unconstitutional on its face under one or more of the grounds discussed in this brief.

DATED this 5th day of December, 2014.



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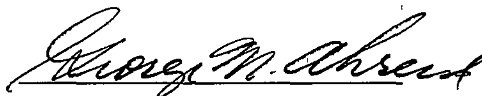
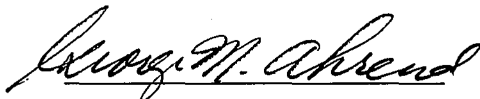


FOR BRYAN P. HARNETIAUX
WITH AUTHORITY



FOR DAVID P. GARDNER
WITH AUTHORITY

On Behalf of WSAJ Foundation

[30] In any event, §525 may not apply to a governmental entity under the definition of "person" in subsection (1)(e) of the statute. This question is before the Court in Henne, supra.

APPENDIX

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 10

§ 10. Administration of Justice

Currentness

Justice in all cases shall be administered openly, and without unnecessary delay.

Credits
Adopted 1889.

Notes of Decisions (423)

West's RCWA Const. Art. 1, § 10, WA CONST Art. 1, § 10
Current through amendments approved 11-4-2014

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West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 21

§ 21. Trial by Jury

Currentness

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Credits
Adopted 1889.

Notes of Decisions (524)

West's RCWA Const. Art. 1, § 21, WA CONST Art. 1, § 21
Current through amendments approved 11-4-2014

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West's Revised Code of Washington Annotated
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
3. Pleadings and Motions (Rules 7-16)

Superior Court Civil Rules, CR 12

RULE 12. DEFENSES AND OBJECTIONS

Currentness

(a) **When Presented.** A defendant shall serve his answer within the following periods:

(1) Within 20 days, exclusive of the day of service, after the service of the summons and complaint upon him pursuant to rule 4;

(2) Within 60 days from the date of the first publication of the summons if the summons is served by publication in accordance with rule 4(d)(3);

(3) Within 60 days after the service of the summons upon him if the summons is served upon him personally out of the state in accordance with RCW 4.28.180 and 4.28.185 or on the Secretary of State as provided by RCW 46.64.040.

(4) Within the period fixed by any other applicable statutes or rules.

A party served with a pleading stating a cross claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court.

(A) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action.

(B) If the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which

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relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in section (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in section (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in that pleading will further the efficient economical disposition of the action, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(i) Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

Credits

[Amended effective January 1, 1972; January 1, 1980; September 18, 1992.]

Notes of Decisions (434)

CR 12, WA R SUPER CT CIV CR 12
Current with amendments received through 11/1/14

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West's Revised Code of Washington Annotated
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
7. Judgment (Rules 54-63)

Superior Court Civil Rules, CR 56

RULE 56. SUMMARY JUDGMENT

Currentness

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or

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as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

Credits

[Amended effective September 1, 1978; September 1, 1985; September 1, 1988; September 1, 1990; September 1, 1993.]

Notes of Decisions (848)

CR 56, WA R SUPER CT CIV CR 56
Current with amendments received through 11/1/14

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2010 Wash. Legis. Serv. Ch. 118 (S.S.B. 6395) (WEST)

WASHINGTON 2010 LEGISLATIVE SERVICE

61st Legislature, 2010 Regular Session

Additions are indicated by **Text**; deletions by ~~Text~~ .

CHAPTER 118
S.S.B. No. 6395
CLAIMS--CONSTITUTIONAL AMENDMENTS--PETITIONS

AN ACT Relating to lawsuits aimed at chilling the valid exercise of the constitutional rights of speech and petition; adding a new section to chapter 4.24 RCW; creating new sections; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** (1) The legislature finds and declares that:

(a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities;

(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and

(e) An expedited judicial review would avoid the potential for abuse in these cases.

(2) The purposes of this act are to:

(a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and

(c) Provide for attorneys' fees, costs, and additional relief where appropriate.

NEW SECTION. **Sec. 2.** A new section is added to chapter 4.24 RCW to read as follows:

<< WA ST 4.24 >>

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

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

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

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

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

NEW SECTION. **Sec. 3.** This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.

NEW SECTION. **Sec. 4.** This act may be cited as the Washington Act Limiting Strategic Lawsuits Against Public Participation.

NEW SECTION. **Sec. 5.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Approved March 18, 2010.
Effective June 10, 2010.

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.24. Special Rights of Action and Special Immunities (Refs & Annos)

West's RCWA 4.24.525

4.24.525. Public participation lawsuits--Special motion to strike claim--Damages, costs, attorneys' fees, other relief--Definitions

Effective: June 10, 2010
Currentness

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

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

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

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

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

Credits
[2010 c 118 § 2, eff. June 10, 2010.]

Notes of Decisions (77)

West's RCWA 4.24.525, WA ST 4.24.525
Current with all 2014 Legislation and Initiative Measures 594 (2015 c 1) and 1351 (2015 c 2)

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Comparison of the text of the motion to strike procedure in RCW 4.24.525(4)(b) with summary judgment procedure under CR 56, and the Court of Appeals' and Cox's characterizations of the motion to strike procedure

	RCW 4.24.525(4)(b)	CR 56	Court of Appeals in Dillon/Davis	Cox
Step one:	"A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition." RCW 4.24.525(4)(b).	"[T]he moving party bears the initial burden of showing the absence of an issue of material fact." Young v. Key Pharm., Inc., 112 Wn. 2d 216, 225, 770 P.2d 182, 187 (1989) (brackets added); accord CR 56(c).	"[W]hen deciding whether the moving party has shown, by a preponderance of the evidence, that the claim was based on an action involving public participation and petition, the court also must view the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party." Dillon v. Seattle Deposition Reporters, LLC, 179 Wn. App. 41, 90, 316 P.3d 1119, *review granted*, 180 Wn. 2d 1009 (2014) (brackets added); accord Davis v. Cox, 180 Wn. App. 514, 528, 325 P.3d 255, *review granted*, — Wn. 2d — (2014).	"The first step of the anti-SLAPP motion requires 'an initial *prima facie* showing that the claimant's suit arises from an act in furtherance of the right of petition or free speech.'" Cox Supp. Br. at 4 (quoting Spratt v. Toft, 180 Wn. App. 620, 624, 324 P.3d 707 (2014)).
Step two:	"If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion." RCW 4.24.525(4)(b).	"If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." Young, 112 Wn. 2d at 225 (footnote & internal quotation omitted); accord CR 56(c).	"[I]n analyzing whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits, the trial court may not find facts, but rather must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff." Dillon, 179 Wn. App. at 90 (brackets added); accord Davis, 180 Wn. App. at 528.	The second step "requires 'a *prima facie* showing of facts ... admissible at trial ... sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment.'" Cox Supp. Br. at 6 (quoting Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 679 (2010); ellipses in original).