IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

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| KENT L. and LINDA DAVIS, JEFFREY and SUSAN TRININ; and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD COOPERATIVE,<br><br>Plaintiffs,<br><br>vs.<br><br>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,<br><br>Defendants. | No. 11-2-01925-7 |

ORAL OPINION OF THE COURT

BE IT REMEMBERED that on the 27th day of February, 2012, the above-entitled and numbered cause came on for hearing before the Honorable Thomas McPhee, Judge, Thurston County Superior Court, Olympia, Washington.

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February 27, 2012 Olympia, Washington

MORNING SESSION

Department 2 Hon. Thomas McPhee, Presiding

Kathryn A. Beehler, Official Reporter

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THE COURT: Please be seated. Good morning, ladies and gentlemen. Welcome back to Superior Court. I am disappointed that we could not be in the larger courtroom to accommodate more people this morning, but there was what appears to be a long and contentious criminal case starting today. Hearings began there at 8:30 this morning, and later in the morning, and very probably before we are concluded here, a large body of prospective jurors will come in and occupy that room as they begin the process of jury selection. So we are stuck here with a smaller courtroom, which apparently does not accommodate everyone. And for that our apologies.

Before I begin this morning with my opinion, I have a couple of questions, one for each lawyer. Mr. Sulkin, I'll begin with you. In your brief arguing the issues raised on the constitutionality of the statute, you refer to the evidence limitation that's contained in the statute both as an issue of burden of proof, measure of damages, and burden of

persuasion. I was not quite clear on what you believe those differences are and how you would have me apply them in this case.

Can you answer that question very quickly, just in the differences in the terminology that you used?

MR. SULKIN: And if I may, Your Honor, you said burden of proof, measure of damages, and a third point?

THE COURT: Burden of proof, measure of evidence, and burden of persuasion. Those are three phrases that are different, but they are used, apparently, in the same context, different parts.

MR. SULKIN: May I approach, Your Honor?

THE COURT: Well, either that or just answer from counsel table, if you wish.

MR. SULKIN: Sure, Your Honor. Ultimately, ultimately, we have two separate questions, I think, not three. And I'm sure I was the one that's at fault for creating this misimpression. I think on the question of discovery, all right, the question of discovery, obviously I believe there's a clear separation of powers problem. If congress --

THE COURT: I understand that.

MR. SULKIN: All right. Now, the limitation on evidence and discovery, what that did to me was

the following: They -- I have the burden, normally, at the end of the case, as the plaintiff, to prove all of the elements of my case. On this motion -- in a normal case, under a Rule 56 motion, which is really what this is, they would have the burden to show there are no issues of fact as to each of the elements.

THE COURT: Unless it is a *Key Pharmaceuticals* motion.

MR. SULKIN: Yeah. Well, here, for instance, the issues they raised in their motion were the following: One, that in fact there is no board policy; and two, there are no damages. And they had some other legal issues that they raised about standing and things of the like.

My argument to you on the issue of evidence was, look. To the extent you think we haven't shown enough evidence as to what happened at the board meetings, who had power, what the agreements were, as to the liability question, denying me discovery is a problem.

THE COURT: I understand those arguments. What I'm focusing on is, Why did you use the different terms? I didn't understand the reason for --

MR. SULKIN: Okay.

THE COURT: -- use of the different terms, and I'm not even sure you intended a significant difference.

MR. SULKIN: I think there's no difference between "measure of damages" and "measure of evidence." I think damages is one element of evidence. So, you have liability of damages; they raised the damages argument in their brief, saying there are no damages.

THE COURT: I didn't ask about measure of damages.

MR. SULKIN: Yeah. And so as to damages and evidence, I think they fall in the same category, that is, separation of powers; we don't have discovery.

Burden of proof I think is a little different, Your Honor, and that is -- and perhaps I'm just repeating myself and you understand my point. It is that on the burden of proof question, you have, the Legislature can set the burden of proof on a statute; that is, clear and convincing, preponderance of the evidence. A place -- they can set that. The real question, though, to you, is, what burden do they have to show, do they have to get over, or what

burdens for me to get to a courtroom. And here, normally, it's one material fact in dispute under Civil Rule 56.

Here, the standard is much higher than that. So what you have is a confluence --

THE COURT: What is the difference between your use of "burden of persuasion" and "burden of proof"? Let's just focus on that question --

MR. SULKIN: None.

THE COURT: -- because that's the only question I have.

No difference?

MR. SULKIN: Well, let me say it this way: They're the same in the sense that the statute does two things. The burden of persuasion is putting it on me when it should be on them; all right?

THE COURT: All right.

MR. SULKIN: That I have the obligation to come forward. Normally it's them. They are the ones making the motion. And the burden of proof is the level of evidence I have to show to get over that. And I think in both of those, that there's a problem.

THE COURT: All right.

MR. SULKIN: I hope that that answers your question.

THE COURT: Thank you. I appreciate that.

Mr. Johnson, a question for you. In *Aronson* and in *City of Seattle*, you were the lawyer in both of those cases. In both cases, Judge Pechman and Judge Strombom wrote that the Legislature has directed that this statute be liberally construed and applied. I couldn't find that anyplace. Where did that come from? Do you know?

MR. JOHNSON: Yes, Your Honor. I'll hand up, if I could -- this is just a printout from the RCWs 4.24.525. And you'll see, "Application, Construction 2010 c 118." It says,

"This Act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from abusive use of the courts."

That's an addendum to the statute.

THE COURT: That's why I didn't see it.

MR. JOHNSON: It's not something that forms part of the statute, but it was part of the bill as passed.

THE COURT: I'll take a look for it.

MR. JOHNSON: And I can hand this copy up.

THE COURT: Thank you.

Ladies and gentlemen, here is the decision that I

have reached in this case. We cover a lot of ground, because there were a number of issues that were raised here and must be decided.

The underlying question presented to me is, does RCW 4.24.525, the Anti-SLAPP Act, apply to the lawsuit brought by the plaintiffs against these defendants. The complaint brought by the plaintiffs is against the defendants in their role as a Board of Directors of Olympia Food Co-op, and the plaintiffs contend that they are acting as members of the Co-op bringing their claims against the directors in the name of and for the benefit of the corporation that is the Co-op.

The plaintiffs contend that in adopting, by consensus, the Boycott and Divestment Resolution of July 15, 2010, the Board members acted beyond their powers. And as a consequence of that, the plaintiffs ask that the court do three things: First, declare the Boycott and Divestment Resolution of July 15 null and void; second, permanently enjoin its enforcement; and third, award damages in favor of the Co-op against each board member individually.

To determine whether § .525 applies, a court first examines the language of the law itself and the act creating it. And this is an interesting history and

guides, in some measure, at least, the resolution of these issues. So I'll go through it in a little detail.

This law was enacted in 2010. It begins with a statement of findings and purpose by the Legislature. In section 1 the Legislature finds and declares four different principles, two of which I believe apply here. In part (a), the Legislature finds and declares that,

"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."

And (d), the Legislature finds and declares that,

"It is in the public interest for citizens to participate in matters of public concern . . . that affect them without fear of reprisal through abuse of the judicial process."

I edited that last slightly to eliminate some language that does not apply to this case at all.

After a statement of findings and declarations, then the Legislature identified the purposes it had in enacting this legislation. They were, first,

"To strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights

of persons to participate in matters of public concern."

Second, "To establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation;" and then, third, "To provide for attorneys' fees, costs, and additional relief where appropriate."

In its enactment, the Legislature followed a nearly identical law enacted in California in 1992, so that was some 18 years ago. In 1992 the California Legislature declared its purpose. And we find that it is remarkably similar to what the Washington Legislature did in 2010. In 1992, the California Legislature declared,

"The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through the abuse of the judicial process."

Interestingly, then, in 1997, some five years later, the California Legislature further amended its statement of purpose by declaring that, "To this end, this section, the Anti-SLAPP law, shall be construed broadly." As we all learned from the response by Mr. Johnson this morning, the Washington Legislature

has enacted a similar direction about liberally construing the law and liberally applying it to reach its goals.

The law itself, our Washington law § .525, declares, "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," and then we have a short laundry list of things that are included within that definition.

When we look at the California law, we see a very similar pattern. The California Legislature declared 18 years earlier, "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes, and then they have a laundry list. And those laundry lists are remarkably similar. And in this case, and in all of the other appellate decisions that I am going to cite this morning, we are dealing with what appears in Washington as the fifth element and what appears in California as the fourth element.

It says in the Washington law,

"As used in this section, an action involving public participation and petition includes 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."

The California statute has exactly that same language in its statute. In the Washington law, there are two prongs for analysis of a claim for dismissal such as this claim brought pursuant to the Anti-SLAPP Act. And in California, the process is similar but not exactly identical. One important difference is the clear and convincing evidence standard in the Washington statute. That standard does not appear in the California statute.

Also relevant to the issues in this case, the Washington law provides for a stay of discovery until the motion can be heard. And it provides that the motion must be heard on a very accelerated basis. There are few areas of our law that require the courts to act as quickly as the courts are required to act in these cases. And you will find in California that there are some changes in the sentence structure, but the sections that deal with

limiting discovery and accelerated resolution are otherwise identical.

Since this is a new law in Washington, enacted in 2010, there are very few appellate court decisions interpreting, applying, and construing the law. Only one Washington appellate decision has been issued so far, and it did not decide anything relevant to this controversy.

There are three federal court decisions applying Washington law issued by the federal courts for western Washington. In the course of decision-making in those three cases, each federal judge considered the large body of California appellate decisions construing and applying the California law. Recall that it is 18 years ahead of us, and recall that it is a very similar law. This type of reference to what other courts have done is often referred to in our law as persuasive authority.

When a Court of Appeals or the Supreme Court in the State of Washington issues a decision, I am bound, as a trial judge here, to follow that decision. I am not bound to follow the decision of the California Supreme Court. But when the California Supreme Court says something of interest that is directly applicable to a case that I am

deciding, and where our courts of appeal have not announced their decision, that decision by the Supreme Court of another state or the Supreme Court or a Court of Appeals from the federal system are all persuasive authority that I should and often do consider.

In the case of *Aronson* v. *Dog Eat Dog Films* - and I'm not making this up. That is the title of the case - *Dog Eat Dog Films* was a film company owned by Michael Moore. And within which he made his documentary film "Sicko." In that film is a very short film clip of a fellow walking on his hands across a street in London and resulting in his injury, and then the idea was to compare the treatment he got in England with the treatment that would be available to him in the United States.

After the film was issued, the person walking on his hands across the street sued the corporation *Dog Eat Dog Films* contending that his privacy had been invaded and that there had been a misappropriation of a person's image, both laws that permit recovery under the laws of the State of Washington when that occurs. In that decision in federal court, Judge Strombom there issued as part of her opinion information or a statement that is

important to this case, and that is why I have mentioned this in detail. I want to demonstrate how far apart the act of walking on one's hands across a street and then putting it in a film is from someone standing on a soapbox or before an audience and exercising his or her right of free speech. But they are all connected. And Judge Strombom wrote,

"The focus is not on the enforcement of plaintiff's cause of action but rather, the defendant's activity that gives rise to defendant's asserted liability and whether that activity constitutes protected speech."

She further wrote,

"The Washington Legislature has directed that the Act be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts. Any conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern is subject to the protections of the statute."

With that background, then, we turn to the evidence and the law in this case. As you know, § .525 contains two prongs. First, the focus is on the defendants, the persons bringing the motion

seeking dismissal of the lawsuit. Under the first prong, the defendants must show that they are protected by § .525 under (2)(e), the part that I read to you earlier, defining an action involving public participation and petition. And you recall that that language is that "any other lawful conduct in the furtherance of the exercise of a 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."

Defendants here must show by a preponderance of the evidence that their conduct fits this definition. I find that they have done so. Four decades of conflict in the Middle East have accompanied the issues that surround the purposes behind this proposed Boycott and Divestment Resolution. The conflict in the Middle East between Israel and its neighbors has certainly gone on longer than that, but focusing on the conflict between the Palestinians and the Israelis over the occupation of land is at least four decades old. And for four decades, the matter has been a matter of public concern in America and debate about America's role in resolving that conflict. I don't believe there can be any dispute

about that issue being a matter of public concern.

In their brief, plaintiffs contend that they don't dispute defendants' right to speak on this important subject. But they object to the improper way that the defendants have used the corporation to voice their speech. Recall the language from the *Dog Eat Dog* case above, "any conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern" is subject to the protections of the statute.

But also recall the language of the statute itself. It begins, in that subpart (e), "any lawful conduct." And it is here that the plaintiffs contend that the conduct in enacting the resolution was not lawful. Therefore, the analysis shifts to the second prong of the statute, where plaintiffs must prove by clear and convincing evidence a probability of prevailing on the claim.

This is a new law, and it is also a new or unique evidence standard. Clear and convincing evidence of a fact is something that the courts are very used to dealing with. Clear and convincing evidence of a probability is certainly more unique than clear and convincing evidence of a fact. Probability, I am satisfied, relying upon the authorities provided me

by the plaintiff, means less than the preponderance standard. But the evidence, to meet that threshold standard, must be clear and convincing under the law.

Some writers have suggested that the proof standard here is akin to the summary judgment standard under Civil Rule 56. My application of the evidence burden here is not dissimilar to that. But even for summary judgments, the evidence standard is not uniform. Motions for summary judgment may be decided for cases requiring clear, cogent, and convincing evidence when that is the underlying burden, as well as evidence in the more traditional case of a preponderance of the evidence.

So what evidence do the plaintiffs offer to meet their burden on this second prong? First, the issue of consensus. The governing documents of the corporation, the Co-op here, is very clear. Decisions of the Board must be by consensus. That is not so for the membership nor is it so for the staff. There is no requirement that either of those bodies act by consensus that is contained in the bylaws of the corporation.

This issue of consensus is a very important part of the fabric of the Co-op, but it is not material to this case. Census means many different things, but

it can, and does in this case, mean the unanimous consent among decision-makers. Here, unanimity is not the issue.

It is undisputed that there was no consensus among the staff in addressing this Boycott and Divestment Resolution. And we know that while the bylaws do not require consensus for the staff to act, the Boycott Policy certainly does. But we know that they didn't reach consensus there. We know that the Board did reach consensus. There is no dispute about that.

The issue is, Did the Board have authority to make a decision, to pass, or to use the language of the Co-op, to "consent to" the Boycott and Divestment Resolution of July 15, 2010. In the words of the statute, was the Board's conduct lawful. And whether they acted with consensus or not is not material to that issue, because there is no dispute they did act with consensus towards that issue.

Next we deal with the key issue here, and that is what is the authority of the Board to act in this matter. As a matter of law, the Olympia Food Co-op was organized as a nonprofit corporation and remains a nonprofit corporation under the law. Under our law, the governance documents of the Co-op are its articles of incorporation and bylaws. Under our

law, "The affairs of a corporation shall be managed by a board of directors."

The Co-op's governance documents, the bylaws, repeat the statute, "The affairs of the cooperative shall be managed by a Board of Directors."

It is equally clear that under our law a board of directors of a nonprofit corporation may delegate some of its powers. In this case the Co-op's Board has done so with respect to the Boycott Policy. The Boycott Policy, consented to by the Board in 1993, has its operative language in paragraph 5 where the policy declares, "The Department manager will make a written recommendation to the staff who will decide by census whether or not to honor a boycott."

The policy is silent about the consequences of staff failing to reach consensus to either honor the boycott or to not honor the boycott.

Plaintiffs contend that where the staff does not reach consensus to honor a boycott, the matter simply ends, and the boycott is not honored. Plaintiffs contend that the delegation in the Boycott Policy is a complete delegation of that power and that the Board did not retain any power to decide boycott requests, even where consensus was not reached by the staff one way or the other.

The Boycott Policy does not explicitly support these contentions. It speaks to consensus one way or the other but not the failure to reach consensus. For the plaintiffs, the Boycott Policy is at best ambiguous about failing to reach consensus. To explain the intent of the Board in 1993 regarding this issue, plaintiffs offer the identical declarations of two Board members at the time, to the effect that "authority to recognize boycotts would reside with the Co-op staff, not the Board."

Whatever the standard for weighing evidence in a motion such as this, the evidence must be evidence admissible under the rules of evidence in case law. The statements of the two declarants are inadmissible as expressions of their subjective intents at the time the policy was enacted. As statements of intent of the Board, they are inadmissible as hearsay.

The only objective evidence specifically relating to this issue is in the Board minutes from July 28, 1992, almost a year before the policy was finally adopted. The formal proposal there is stated as, "If a boycott is to be called, it should be done by consensus of the staff."

Consideration of the entire section of the minutes relating to boycotts from this meeting shows that the

focus is on resolving, by policy, whether individual managers or the staff would decide boycott requests. And in the minutes, just above the formal proposal is the statement, "BOD," or board of directors, "can discuss if they take issue with a particular decision."

The enumerated powers of the Board contained in the bylaws includes, at No. 16, "Resolve organizational conflicts after all other avenues of resolution have been exhausted."

Plaintiffs have offered no evidence that the Board exempted boycott matters from this power, certainly not evidence that could be considered clear and convincing.

The next argument that the plaintiffs make is on the issue of nationally recognized boycott. The plaintiffs make three contentions in this regard. First, plaintiffs contend that if the Board did have the power to resolve the deadlock on the boycott, the Boycott and Divestment Resolution of July 15, 2010, was unlawful because the Board failed to determine that the matter was a nationally recognized boycott.

In the first of three arguments, they argue that the Boycott and Divestment Resolution does not reflect a national boycott. Their evidence is not

sufficient to meet the clear and convincing standard, nor is it sufficient to even create a material issue of fact. I will be more direct in this regard. The evidence clearly shows that the Israel boycott and divestment movement is a national movement. It is clearly more than a boycott. It is a divestment movement, as well.

The question of its national scope is not determined by the degree of acceptance. There appears to be very limited acceptance, at least in the United States. Further, in arguing that the movement has achieved little success, plaintiffs offer examples that demonstrate the national scope of the issue. Plaintiffs argue that the movement has not penetrated the retail grocery business, but that does not determine national scope. The assistance to each side here from national organizations organized to support or oppose the movement demonstrates its national scope.

Next plaintiffs contend that even if the movement is national in scope, the Board did not address that issue in its resolution of June 15, 2010. The only evidence offered is that the staff, in its discussion, never reached that aspect of the proposal. This contention is refuted by documentary

evidence that is clear contravention of the plaintiffs' contention.

The minutes of the Board meeting of May 20, 2010, show that a presentation was made to the Board regarding the boycott proposal that included presentation of, "The nationally and internationally recognized boycott." I'm quoting there from the minutes of the meeting.

At the meeting the Board decided to resubmit the matter to staff with the direction to Harry Levine to "write a Boycott Proposal following the outlined process." I construe "outlined process" to mean the process outlined in the Boycott Policy, because that is the format that Mr. Levine followed. In his lengthy paper dated June 7, 2010, Mr. Levine included a section entitled "A growing movement for Boycott, Divestment, Sanctions (BDS)," and following that section a section entitled "Prominent Supporters."

The minutes of the Board meeting of July 15, 2010, state that Harry shared with the group the summary of staff feedback and the process therein arising out of the submission to staff. This record clearly reflects that the scope of the movement or boycott was addressed; plaintiffs offer only vague rebuttal, not clear and convincing evidence.

Finally, plaintiffs contend that the Board acted in contravention of its powers granted it under the bylaws to "Resolve organizational conflicts after all other avenues of resolution have been exhausted." Plaintiffs contend that the Board did not exhaust other avenues before it acted. Plaintiffs offer two avenues, first vote of the membership, or second, education of the membership. This is not clear and convincing evidence.

The avenues suggested by plaintiffs are not in the Co-op's scheme for resolving boycott requests. The scheme was for staff consideration first, as authorized by the Boycott Policy, and if necessary, followed by Board consideration in resolution of organizational conflicts as authorized in the bylaws. The record shows that the Board resubmitted the matter to staff first and then acted when that avenue proved a dead end. The record shows that the Board considered further delay, reviewed the history of the proposal, and balanced the need for completion against further delay. That evidence is not disputed.

In sum, I conclude that defendants have satisfied their burden under the first prong of § .525 and now conclude that plaintiffs have failed in their burden

under the section prong. In so doing, I have addressed the substance of plaintiffs' complaint. I have not addressed other contentions made by defendants, because I did not have to in order to decide this matter. I am sure appellate review will be de novo under this statute.

I must, however, address the constitutionality of the statute, because I am applying it here. I conclude that it is constitutional. Plaintiffs argue that they are relieved from making the showing required under the second prong of §§ (4)(b) of § .525 because the law is unconstitutional in two respects.

In so doing, the law is clear that when a court is considering the constitutionality of a statute enacted by the Legislature, that statute is presumed to be constitutional. And the party challenging the constitutionality, the plaintiffs here, must overcome that presumption by evidence beyond a reasonable doubt our highest evidence standard.

This is recent law in Washington, so its constitutionality has not been previously addressed. Two attempts have been made in two of the three federal court decisions that I alluded to earlier, but in each case, the federal judge declined to

consider the matter because it was not timely made before those courts.

In *Costello v. The City of Seattle*, Judge Pechman made a comment that certainly occurred to me. She stated, "Furthermore, the assertion that the Anti-SLAPP Act is unconstitutional is questionable given that California's Anti-SLAPP Act, which is substantially similar to Washington's statute, has been litigated multiple times and not held unconstitutional." She cited as an example *Equilon Enterprises v. Consumer Cause, Incorporated*, a 2002 decision from the California Supreme Court.

Plaintiffs here contend that § .525 is unconstitutional for two reasons. First, the Legislature imposed a heightened burden of proof, clear and convincing evidence; and second, it restricts full discovery until the Anti-SLAPP motion is decided.

In this regard, it is important to note that the law requires very speedy resolution of the motion. A significant portion of that time is a time when discovery is not permitted in any event. What the discovery restriction here requires is that a party initiating a lawsuit where the First Amendment rights of the defendant are implicated must have evidence to

support the complaint before discovery is undertaken, before the case is filed.

Plaintiff contends that RCW 4.24.525 violates the constitutional provision for separation of powers among the executive, the Legislature, and the courts. Those are three separate but co-equal branches of government. And here the focus is on the separation between the Legislature and the courts in the control of how cases proceed through the courts.

Second, they contend that the statute violates or denies individuals the right of access to courts guaranteed in our constitutions. Plaintiffs rely upon *Putman v. Wenatchee Valley Medical Center*, a 2009 Supreme Court decision from our Washington Supreme Court. I am bound to follow *Putman* if it applies to this case. I find that it does not.

First, addressing the claim that § .525 violates the separation of powers doctrine, the rule long recognized and repeated in *Putman* is that the Legislature can regulate substantive matters, but the courts have exclusive power to regulate procedural matters.

As regards the burden of proof argument, the clear and convincing evidence argument, our United States Supreme Court has spoken as recently as the year 2000

in *Raleigh v. The Illinois Department of Revenue* where it stated, "Given its importance to the outcome of cases, we have long held the burden of proof to be a substantive aspect of the claim," in other words, a part of the claim that the Legislature can regulate.

As regards limits on discovery, the plaintiffs here contend that this is procedural. In assessing that argument, I considered a statement from our Supreme Court in *Sofie v. Fibreboard Corporation* where the Washington Supreme Court wrote,

"The Legislature has the power to shape litigation. Such power, however, has 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." *Sofie v. Fibreboard* dealt with an issue of the right to trial by jury.

As I considered that statement, I reflected that just as legislative powers are limited, court rules may not encroach upon constitutional protections, as well. Where the Legislature acts to provide rights protecting constitutional guarantees, especially fundamental First Amendment rights, does not the separation powers of doctrine recognize a primacy of purpose? Even if the act appears to implicate

procedures in court, if the purpose is to enforce fundamental constitutional rights, is that not a substantive act? I concluded "yes," and I find support for that conclusion in the *Putman* case.

The *Putman* case involved a different statute, not related to the types of rights of restrictions we're dealing with, but it dealt with this separation of powers issues, as well as access to courts issues. And it was construing a statute identified as RCW 7.70.150. And the Supreme Court wrote,

> "We hold that RCW 7.70.150 is procedural, because it addresses how to file a claim to enforce a right provided by law. [Citation omitted] The statute does not address the primary rights of either party; it deals only with the procedures to effectuate those rights. Therefore, it is a procedural law and will not prevail over conflicting court rules."

RCW 4.24.525 is different. It does address a primary right of a party, the First Amendment right of free speech and petition. I conclude that the act of the Legislature in this regard is not unconstitutional.

Second, addressing the claim that § .525 violates the constitutional rights of access to courts, as

regarding the burden of proof argument, there is little support in the law for that contention. As late as 2004, the 6th Circuit Court of Appeals in *Garcia v. Wyeth-Ayerst Laboratories* wrote,

"The argument that a state statute stiffens the burden of proof of a common law claim does not implicate this right to access of courts and a jury trial."

As regards the limit on discovery, here I follow the lead of the California Supreme Court in *Equilon Enterprises*, a case I identified earlier. Although dealing with a different aspect of the statute, the court there concluded that the statute does not restrict access; instead, it "provides an efficient means of, dispatching early on in a lawsuit, a plaintiff's meritless claims."

The same reasoning applies here. The Legislature has not created a restriction on access. Rather, it has determined that where the subject of the lawsuit involves speech or acts protected by the First Amendment, there must be clear and convincing evidence of a meritorious claim at initial filing. The statute provides for a mechanism for efficiently dispatching those that don't. I find that the act is not unconstitutional for those reasons.

That concludes my opinion here. The result is that I am prepared to dismiss the lawsuit of the plaintiffs. Concurrently with that, I will be required to enter orders awarding to the defendants attorneys' fees and a penalty of $10,000 per defendant against the plaintiffs. I don't decide at this point that the statute requires a separate $10,000 award to each defendant. I will decide that if there is an issue about it as we move forward. But I do note that a federal court, Judge Pechman in the *City of Seattle* case, issued such a ruling.

I am going to be gone now on a short vacation, and so I do not contemplate that I will enter the orders until I return. That will give us some time before the entry of those orders and the case moves forward. I am struck in this case by some aspects of this lawsuit that I think it is appropriate for the citizens of this community to consider.

The Olympia Food Co-op is an institution in this community. It has existed for a long time and presumably will continue to exist for a long time. This case and this process that we've gone through will move forward and will be resolved, ultimately, in our Court of Appeals, I suspect.

What will be resolved is not the underlying

dispute which brings so many of the citizens here today to observe, but rather, the dry and technical application of the statute. However it is resolved, it will be a long and expensive process. And as I indicated, there are considerable sums of money now at issue in this case that were not necessarily present before and have nothing to do with the issue of whether this is an appropriate boycott for the Co-op to undertake or not.

I express absolutely no opinion in that regard. But it does occur to me that whatever the final decision in this case is, whether it is this decision or whether it is determined that I have made a mistake and the case should move forward to an ultimate resolution either that the Board acted correctly or not -- whatever that decision is down the road, after a considerable period of time and resources are invested in it, that decision can be overturned very quickly and very simply, simply by a vote of the membership of the cooperative.

Nothing here that is decided in terms of deciding the course of the Co-op is cast in stone. And given this state of the case, where we have a judicial determination about the merits of the SLAPP motion, but some time before that order is entered and

becomes appealable, I urge that the parties consider resolution of this case something short of the type of order that will be entered at the end of this case. It would seem to me that it is in the best interests of all parties, and I urge your consideration of that view and that proposal.

That is not a process that I can order. It is not a process that I will be involved in. But the interests of the citizenry in this case, as evidenced by the number of people who have appeared here, seems to suggest that that is a matter for their concern; and there is an avenue of resolution here short of the type of order that I am required by law, now that I have made my decision, to enter and which will be reviewed.

That is all I have to say in that regard. Counsel, I will be returning after next week. So I will be back in the saddle on Monday, March 12th. I start civil jury trials then. This would be an appropriate case, I believe, for presentation of the orders on the Friday motion calendar.

I will leave it to you to consult with Ms. Wendel to arrange an appropriate date.

MR. SULKIN: Thank you, Your Honor.

THE COURT: Ladies and gentlemen, we'll stand

in recess.

(Conclusion of the February 27, 2012 Proceedings.)

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

Department No. 2 Hon. Wm. Thomas McPhee, Judge

| | |
|---|---|
| Kent and Linda Davis, et al., Plaintiffs, vs. Grace Cox, et al., Defendants. | No. 11-2-01925-7 REPORTER'S CERTIFICATE |

STATE OF WASHINGTON )
) ss
COUNTY OF THURSTON )

I, Kathryn A. Beehler, Official Reporter of the Superior Court of the State of Washington, in and for the county of Thurston, do hereby certify:

That the foregoing pages, 1 through 36, inclusive, comprise a true and correct transcript of the proceedings held in the above-entitled matter, as designated by Counsel to be included in the transcript, reported by me on the 27th day of February, 2012.

Kathryn A. Beehler, Reporter
C.C.R. No. 2248