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S. Ct. No. 90233-0

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SUPREME COURT OF THE STATE OF WASHINGTON

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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.*

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WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION AMICUS CURIAE MEMORANDUM  
IN SUPPORT OF PETITION FOR REVIEW

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On Behalf of  
Washington State Association for Justice Foundation

**FILED**  
JUL 15 2014

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STATE OF WASHINGTON CRF

ORIGINAL

## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

Washington State Association for Justice Foundation (WSAJ Foundation or Foundation) is a nonprofit corporation under Washington law and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. Both WSAJ and WSAJ Foundation name changes were effective January 1, 2009. The Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in proper interpretation and application of RCW 4.24.525 (or § 525), one of Washington’s “anti-SLAPP” statutes, and an interest in whether this statute is valid under the Washington Constitution. See Laws of 2010, Ch. 118, § 1(2)(a) (uncodified declaration of purpose for § 525).<sup>1</sup>

## **II. BACKGROUND**

This review arises from application of § 525 to a shareholder derivative action by certain Members of a nonprofit corporation, Olympia Food Cooperative, against certain Directors of the corporation. The

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<sup>1</sup> “SLAPP” is an acronym for “Strategic Lawsuits Against Public Participation.” Laws of 2010, Ch. 118, § 1(1)(b). The complete texts of Laws of 2010, Ch. 118, and § 525 are reproduced in the Appendix to this amicus curiae memorandum (ACM).

cooperative, by means of a resolution of the Directors, determined to boycott products from Israel. The Members filed a civil action alleging that the resolution was not properly adopted by the Directors under the governing documents of the cooperative—in particular its Boycott Policy—and sought an injunction against the boycott. The Directors filed a motion to strike the complaint pursuant to § 525(4). The superior court granted the motion, and awarded damages, attorney fees and costs in the amount of \$221,846.75 against the Members.

The Court of Appeals, Division I, affirmed. See Davis v. Cox, — Wn. App. —, 325 P.3d 255 (2014), *review pending*. The court applied the two-step analysis under § 525(4)(b) for resolving motions to strike claims based on an action involving public participation and petition. See Davis, 325 P.3d at 263. Under the first step, 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. See § 525(4)(b). If the moving party satisfies this burden, then the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the underlying claim. See id.

The public participation and petition alleged by the Directors—boycotting Israeli products—falls under § 525(2)(e), involving “[a]ny 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.” See Davis, 325 P.3d at 265. In concluding the Directors satisfied their burden, the Court of Appeals characterizes the “gravamen” or “principal thrust” of the Members’ underlying claim as challenging activity protected by the First Amendment (the boycott), rather than compliance with corporate law, including the cooperative’s Boycott Policy. See Davis at 264-65. This characterization appears to be based principally on the Members’ request for an injunction against the boycott. See id. at 265 (stating request for injunctive relief “is of great significance in resolving the question presented”).

The Court of Appeals next addresses the Members’ argument that the boycott was not “lawful” because it did not comply with the Boycott Policy, concluding that this type of argument is not cognizable under the first step of the § 525(4)(b) analysis. Relying on cases interpreting California’s anti-SLAPP statute, the court appears to limit the lawfulness inquiry to whether the boycott is illegal as a matter of law under the First Amendment:

the Members assert that the trial court erred because the Directors’ conduct was not “lawful,” as required by RCW 4.24.525(2)(e). In essence, the Members argue that adopting the boycott was not “lawful” because the board violated the Boycott Policy in doing so. Although we consider whether the Directors’ activity was “lawful” under the first step of the anti-

SLAPP motion analysis, our review is limited to determining whether the activity was illegal as a matter of law. If, as part of our review under the first step, we accepted the Members' invitation to consider whether the Directors improperly adopted the boycott, the second step would be rendered superfluous and the burden of proof would be improperly shifted. The Members do not assert that the decision to boycott Israeli goods was an activity that was illegal as a matter of law. Rather, they contend that it was a decision made in contravention of the governing rules of the Co-op. Thus, we conclude that the Directors' adoption of the boycott was "lawful" under the first step of the anti-SLAPP statute.

Davis at 265 (citations & footnote omitted).<sup>2</sup> In this way, the court seems to suggest the lawfulness inquiry is subsumed within the determination whether the gravamen of the claim implicates the First Amendment.

Under the second step of § 525(4)(b), the court appears to conduct a type of lawfulness analysis involving corporate law, in the course of determining that the Members cannot satisfy their burden to establish by clear and convincing evidence a probability of prevailing on the underlying claim. See Davis at 266-67.

The Court of Appeals also rejected the Members' constitutional challenges to § 525. The Members argued that the stay of discovery except upon a showing of good cause, see § 525(5)(c), violates separation of powers and the right of access to courts, relying principally on Putman v. Wenatchee Valley Med. Ctr., 166 Wn. 2d 974, 216 P.3d 374 (2009). See Davis at 270-72. They further argued that the heightened burden of

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<sup>2</sup> The complete text of the current version of California's anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16, is reproduced in the Appendix to this ACM.

proof (i.e., clear and convincing evidence of a probability of prevailing) also violates separation of powers and the right of access to courts per Putman, and is unconstitutionally vague. See Davis at 272-73.

In response to these arguments, the court holds that the stay of discovery and motion to strike procedure under § 525 are similar to, and no more burdensome than, summary judgment proceedings under CR 56. See Davis at 269-71. In finding no constitutional violation, the court also seems to cast § 525 as a special proceeding.<sup>3</sup> The court further rejects the vagueness challenge on grounds that the clear and convincing and probability standards of proof are commonly understood, without explicitly addressing the amalgam of the two standards under § 525(4)(b). See Davis at 273.<sup>4</sup>

The Members have filed a Petition for Review, raising a number of issues involving interpretation of § 525 and the constitutional validity of

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<sup>3</sup> See Davis at 271 (distinguishing Putman, relying on In re Estate of Fitzgerald, 172 Wn. App. 437, 294 P.3d 720 (2012), *review denied*, 177 Wn. 2d 1014 (2013), which involves the Trust and Estate Dispute Resolution Act (TEDRA), Ch. 11.96A RCW); see also RCW 11.96A.090(1) (providing that “[a] judicial proceeding under [TEDRA] is a special proceeding under the civil rules of court”); In re Estate of Stover, 178 Wn. App. 550, 561, 315 P.3d 579 (2013) (recognizing TEDRA actions are special proceedings), *review denied*, 180 Wn. 2d 1004 (2014).

<sup>4</sup> The Court of Appeals also affirmed evidentiary rulings and denial of the Members’ motion for discovery by the superior court. See Davis at 267-68 (evidentiary rulings); id. at 268-69 (good cause for lifting stay).

the statute. See Davis Pet. for Rev. at 1-2. At the same time, several other cases involving § 525 are currently pending before the Court.<sup>5</sup>

### III. ARGUMENT IN SUPPORT OF REVIEW

#### A. A Number Of Sub-Constitutional Issues Raised By The Members Regarding Interpretation And Application Of § 525 Warrant Review Under RAP 13.4(b)(4) Because They Involve Issues Of Substantial Public Interest.

##### 1. What is the proper test for determining whether the anti-SLAPP statute applies?

Relying on prior Court of Appeals opinions and California case law, the court below focuses on the “gravamen” or “principal thrust” of the plaintiff’s claim in resolving whether § 525 applies. See Davis at 264. This test is not tied to the language of the statute, and is arguably imprecise and uncertain in application. Under this approach, it is difficult to discern, for example, the basis for characterizing the gravamen of the Members’ complaint as targeting a boycott protected under the First Amendment rather than a challenge based on improper corporate governance.<sup>6</sup> This raises questions about whether the Court of Appeals’

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<sup>5</sup> See Henne v. City of Yakima, 177 Wn. App. 583, 313 P.3d 1188 (2013), *review granted*, 179 Wn. 2d 1022 (2014); 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, — Wn. App. —, 323 P.3d 1082 (2014), *review pending*.

<sup>6</sup> A similar problem is present in Dillon, where the lower courts and the parties disagree regarding whether the § 525 inquiry should focus on the recording of telephone calls or the submission of transcripts of the calls in a court proceeding. See 316 P.3d at 1126-27 & 1134.

approach accords with the text of the statute, and its underlying goal of establishing a uniform method for adjudication of anti-SLAPP claims. See Laws of 2010, Ch. 118, § 1(2)(b).

**2. What is the meaning of “other lawful conduct” under § 525(2)(e)?**

The Court of Appeals’ apparent holding, that the issue of lawfulness under § 525(2)(e) is subsumed within the question of whether the Members’ claim implicates the First Amendment, raises the question of whether the phrase “other lawful conduct,” as it appears within the text of the statute, has any independent meaning. The court relies on California cases for this holding, but the relevant portion of the California anti-SLAPP statute is phrased differently and does not include comparable language. See Davis at 265; see also Cal. Code Civ. Proc. § 425.16(e)(4) (omitting “lawful” in corresponding subsection).

**3. To what extent should interpretation and application of § 525 be driven by cases interpreting and applying California’s anti-SLAPP statute?**

The Court of Appeals did not rely on California law solely with respect to the issue of lawfulness. The influence of California law pervades the decision, without the court acknowledging the significant differences in the texts of the two statutes. See Davis at 265, 269-71; compare § 525 with Cal. Code Civ. Proc. § 425.16.



**B. The Constitutional Issues Raised By The Members Warrant Review Under RAP 13.4(3) Because They Present Significant Questions Of Law Under The Washington Constitution, And These Questions Are Not Expressly Raised In The Other Anti-SLAPP Cases On Review Before The Court.**

**1. Can The Statutory Procedure For A Special Motion To Strike Under § 525 Be Equated With Summary Judgment Under CR 56, In Order To Render The Statute Constitutional?**

Section 525 is phrased in terms normally associated with the weighing of evidence, such as “burden,” “preponderance of the evidence,” “establish,” “clear and convincing evidence,” and “probability of prevailing.” The statute does not expressly provide any mechanism for resolving disputed questions of fact, issues of credibility, or competing inferences that may be drawn from the evidence, under either steps one or two of the analysis. The statutory language contrasts with the language of the summary judgment rule, which provides for judgment to be entered if, and only if, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See CR 56(c).<sup>7</sup> Nonetheless, the Court of Appeals held that the procedure under § 525 is constitutional, in part because it is akin to a motion for summary judgment.<sup>8</sup> This aspect of the court’s decision raises a significant question

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<sup>7</sup> The complete text of the current version of CR 56 is reproduced in the Appendix to this ACM.

<sup>8</sup> See Davis at 272-73 (resolving challenges based on separation of powers, access to courts, and right to trial by jury on this basis).

meriting this Court’s consideration, regarding the extent to which a court can re-cast statutory language in order to render a statute constitutional.<sup>9</sup>

**2. Does the automatic stay of discovery or the heightened burden of proof under § 525 implicate separation of powers or the right of access to courts?**

The Court of Appeals upholds the automatic stay of discovery on grounds that it is no more burdensome than CR 56(f), and also implicitly suggests that a motion to strike under the anti-SLAPP statute is akin to a special proceeding, and therefore not subject to the *Civil Rules* under CR 81(a). See Davis at 271. Yet, the court does not explain how a motion to strike under the anti-SLAPP statute satisfies the definition of a special proceeding. See Putman, 166 Wn. 2d at 981-82 (defining special proceedings as those “created or completely transformed by the legislature”). The Court of Appeals’ rationale for upholding the constitutionality of this aspect of § 525 merits review by this Court.

Even if § 525 is deemed to be a special proceeding and the motion-to-strike procedure is constitutionally compatible with the *Civil Rules*, the Court of Appeals analysis of the heightened burden of proof leaves unaddressed the question whether the Legislature can superimpose such a procedure onto a common law or statutory claim otherwise fully

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<sup>9</sup> See Dillon, 179 Wn. App. at 89-90 & n.33 (recognizing duty to construe statute to uphold constitutionality, wherever possible).

cognizable under Washington substantive and procedural law. This is a fundamental constitutional issue worthy of the Court's attention.



The constitutional questions noted above are not expressly raised in the anti-SLAPP cases this Court has accepted for review. See Dillon, supra; Akrie, supra.

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#### IV. CONCLUSION

The Court should grant the Petition for Review.

DATED this 7th day of July, 2014.

  
GEORGE M. AHREND. *For*   
BRYAN P. KARNETIAUX, *with authority*

On Behalf of WSAJ Foundation

## APPENDIX

### Laws of 2010, Ch. 118

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: (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.

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

(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.

[2010 c 118 § 2, eff. June 10, 2010.]

**Cal. Code Civ. Proc. § 425.16. Anti-SLAPP motion**

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. 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 abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering

attorney's fees and costs pursuant to subdivision (d) of Section 6259, 11130.5, or 54690.51.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) 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: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

(Added by Stats.1992, c. 726 (S.B.1264), § 2. Amended by Stats.1993, c. 1239 (S.B.9), § 1; Stats.1997, c. 271 (S.B.1296), § 1; Stats.1999, c. 960 (A.B.1675), § 1, eff. Oct. 10, 1999; Stats.2005, c. 535 (A.B.1158), § 1, eff. Oct. 5, 2005; Stats.2009, c. 65 (S.B.786), § 1; Stats.2010, c. 328 (S.B.1330), § 34.)

## **CR 56. SUMMARY JUDGMENT**

(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 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.

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

## OFFICE RECEPTIONIST, CLERK

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Monday, July 07, 2014 4:16 PM  
**To:** 'George Ahrend'  
**Cc:** Bryan P Harnetiaux; Stewart A. Estes; brucejohnson@dwt.com; ambikadoran@dwt.com; Robert Sulkin; Avi Lipman  
**Subject:** RE: Davis v. Cox (S.C. #90233-0)

Rec'd 7-7-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** George Ahrend [mailto:gahrend@trialappeallaw.com]  
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**Subject:** Davis v. Cox (S.C. #90233-0)

Dear Mr. Carpenter:

On behalf of the Washington State Association for Justice Foundation, a letter request to appear as amicus curiae and a proposed amicus curiae memorandum in support of the petition for review are attached to this email for filing with the Court in the above-referenced case. Counsel for the parties are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

George Ahrend  
Ahrend Albrecht PLLC  
16 Basin St. SW  
Ephrata WA 98823  
Office (509) 764-9000  
Fax (509) 464-6290  
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**AHREND ALBRECHT** PLLC  
**TRIAL & APPEAL**

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