

WASHINGTON CASE UPDATE

Anti-SLAPP Statute Ruled Unconstitutional

case in point...

From the Desk of Kyle Riley: Washington's Anti-SLAPP (Strategic Lawsuit Against Public Participation) statute provides an early means of disposing of lawsuits that aim to stifle free speech. Washington is one of 28 states that has enacted an anti-SLAPP statute. The current version of Washington's anti-SLAPP statute was modeled after California's statute. Since its enactment, defendants have been taking advantage of the statute as a defense to claims relating to speech activities protected by the Constitution. Read on to see why the Washington Supreme Court held that the statute is unconstitutional.

Claims Pointer: Under RCW 4.24.525, the key provision of Washington's anti-SLAPP statute ("the statute"), all underlying claims and discovery are stayed pending a ruling on a special motion to strike. The statute awards a prevailing party attorney fees and a \$10,000 statutory fine. The Washington Supreme Court held that the statute violates the right to a jury trial provided by the Washington State Constitution. After examining the statute, the Washington Supreme Court determined that the statute is more restrictive than similar proceedings because it requires the adverse party to prove by clear and convincing evidence that it has a likelihood of prevailing on its claims. The Court held that the high standard of proof does not adequately protect a person's right to a trial. This development is potentially harmful to defendants who are faced with frivolous lawsuits designed to penalize lawful expression.

Davis v. Cox, No. 90233-0, 2015 WL 3413375 (Wash. May 28, 2015)

The Olympia Food Cooperative is a nonprofit grocery store that engages in activities such as boycotts to affect public policy. The Cooperative had a written boycott policy, which required a consensus of the board before the Cooperative could engage in a boycott. A majority of the board decided, without unanimity, to boycott products from Israel in order to protest what they perceived were human rights violations. Five of the board members brought an action against the board for violating the Cooperative's written boycott policy. The defendant board members filed an anti-SLAPP motion against the 5 board members, arguing that despite the policy, the board had the authority to make decisions without unanimous decisions. The trial court ruled in favor of the defendant board members, dismissed the plaintiff board members' suit, and ordered them to pay over \$220,000 in fees, costs, and fines. The Court of Appeals affirmed the trial court ruling.

The Washington Supreme Court accepted review and ultimately held that Washington's anti-SLAPP statute is unconstitutional. The Court observed that the anti-SLAPP procedure was more onerous on the nonmoving party than the procedure for summary judgment. The Court explained that when a party files an anti-SLAPP motion, the party bringing the motion need only demonstrate by a preponderance of the evidence that the action involves public participation and petition before the burden shifts to the plaintiff. The plaintiff then bears the burden to prove by clear and convincing

evidence that they will probably prevail on the claim. By contrast, when a party presents a summary judgment motion, all inferences are drawn in favor of the non-moving party and the non-moving party need only demonstrate that a genuine issue of material fact exists as to the issues raised by the motion for summary judgment as a matter of law. Because the statute placed a much heavier burden on the party bringing the suit than the summary judgment standard, it could not survive constitutional attack.

The Court attempted to reconcile the statute with the summary judgment standard, but ultimately could not because the anti-SLAPP procedure required a court to determine matters of fact, which is a function of the jury. The defendant board members argued that the statute should survive constitutional attack because its text mirrored that of California's anti-SLAPP statute, which California courts had held to not violate the right to a jury because its procedure approximated a summary judgment standard. The Court distinguished the California statute on the basis that the Washington legislature chose to include a clear and convincing evidence standard, whereas the California statute only requires the plaintiff to prove a "probability" of prevailing on its claims. The Court also refused to rely on other state's statutes that the defendants claimed were more restrictive than California's because no other state imposed a clear and convincing evidence standard.

The Court set out Washington's constitutional right to a jury, pointing out that the right is not



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absolute. Frivolous claims, those that lack a legal basis, or those advanced without a reasonable cause are not afforded the right to a trial by jury. While the summary judgment standard does not violate the right to a trial by jury (in part because it is granted, if at all, as a matter of law rather than fact), the statute required the court to determine facts and imposed too high a standard given the harsh results of dismissal of the plaintiff's claims and potentially heavy costs. The Court compared the statute's procedures to those applied to frivolous claims and found that the statute was insufficient to protect a person's right to a trial by jury. The Court pointed out that a number of statutes and causes of action discourage frivolous lawsuits by imposing punishment by way of fines, discipline, and monetary damages on claims for unlawful use of civil proceedings. The statute, on the other hand not only dismisses a person's claim before discovery and opportunity to present evidence to a jury, but also imposes fines on the losing party.

The Court concluded that because the statute violates the Washington Constitution, it is invalid. The Court further determined that it could not sever the offending provisions from the rest of the statute, because the violating provisions were at the heart of the statute. Ultimately, the Court reversed the trial court and Court of Appeals, stating that "RCW 4.24.525(4)(b) violates the right of trial by jury under article I, section 21 of the Washington Constitution because it requires a trial judge to invade the jury's province of resolving disputed facts and dismiss—and punish—nonfrivolous claims without a trial."



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