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2
3 UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

4 KEN ARONSON,

5 Plaintiff - Appellant,

6 v.

7 DOG EAT DOG FILMS, INC.,

8 Defendant - Appellee.

No. 10-35815

DECLARATION OF PETER
LOHNES IN SUPPORT OF
PLAINTIFF'S RESPONSE
TO ORDER TO SHOW
CAUSE

9
10 Peter Lohnes declares and states:

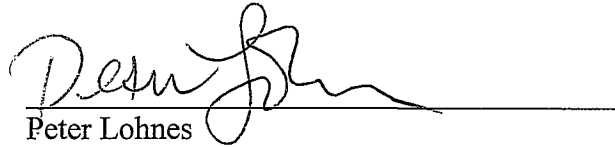
11 1. I am an attorney at Talmadge/Fitzpatrick and one of the attorneys representing plaintiff
12 Ken Aronson. I am over the age of eighteen, competent to testify, and make this statement based upon
13 personal knowledge.

14 2. Attached to this declaration as Exhibit A is a true and correct copy of RCW 4.24.525.

15 3. Attached to this declaration as Exhibit B is a true and correct copy of the Certification of
16 Enrollment of Substitute Senate Bill 6395.

17 4. Attached to this declaration as Exhibit C is a true and correct copy of the House Bill
18 Report on SSB 6395.
19

1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is
2 true and correct. Executed this 4th day of November 2010, at Tukwila, Washington.

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5 Peter Lohnes

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EXHIBIT A



Inside the Legislature

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RCWs > Title 4 > Chapter 4.24 > Section 4.24.525

[4.24.520](#) << [4.24.525](#) >> [4.24.530](#)

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.]

Notes:

Findings -- Purpose -- 2010 c 118: "(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." [2010 c 118 § 1.]

Application -- Construction -- 2010 c 118: "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." [2010 c 118 § 3.]

Short title -- 2010 c 118: "This act may be cited as the Washington Act Limiting Strategic Lawsuits Against Public Participation." [2010 c 118 § 4.]

EXHIBIT B

EXHIBIT B

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 6395

61st Legislature
2010 Regular Session

Passed by the Senate February 16, 2010
YEAS 46 NAYS 0

President of the Senate

Passed by the House February 28, 2010
YEAS 96 NAYS 0

Speaker of the House of Representatives

Approved

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 6395** as passed by the Senate and the House of Representatives on the dates hereon set forth.

Secretary

FILED

Secretary of State
State of Washington

SUBSTITUTE SENATE BILL 6395

Passed Legislature - 2010 Regular Session

State of Washington 61st Legislature 2010 Regular Session

By Senate Judiciary (originally sponsored by Senators Kline, Kauffman,
and Kohl-Welles)

READ FIRST TIME 01/25/10.

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

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

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

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

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

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

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

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

3 (2) The purposes of this act are to:

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

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

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

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

14 (1) As used in this section:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

--- END ---

EXHIBIT C

HOUSE BILL REPORT

SSB 6395

As Passed House:
February 28, 2010

Title: An act relating to lawsuits aimed at chilling the valid exercise of the constitutional rights of speech and petition.

Brief Description: Addressing lawsuits aimed at chilling the valid exercise of the constitutional rights of speech and petition.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Kline, Kauffman and Kohl-Welles).

Brief History:

Committee Activity:

Judiciary: 2/18/10, 2/22/10 [DP].

Floor Activity:

Passed House: 2/28/10, 96-0.

Brief Summary of Substitute Bill

- Allows a party to bring a special motion to strike any claim that is based on an action involving public participation and petition.
- Provides that a party who prevails on a special motion to strike will be awarded costs of litigation, reasonable attorneys' fees, and \$10,000.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 10 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Kelley, Kirby, Ormsby, Roberts, Ross and Warnick.

Staff: Brian Kilgore (786-7119) and Edie Adams (786-7180).

Background:

The First Amendment to the United States Constitutional provides the right "to petition the government for a redress of grievances." The right to petition covers any peaceful, legal

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

attempt to promote or discourage governmental action at any level and in any branch. All means of expressing views to government are protected, including: filing complaints, reporting violations of law, testifying, writing letters, lobbying, circulating petitions, protesting, and boycotting.

Strategic lawsuits against public participation (SLAPPs) are initiated against people who speak out about a matter of public concern. Typically, the party who institutes a SLAPP claims damages for defamation, or interference with a business relationship, resulting from a communication made by a person or group to the government.

The U.S. Supreme Court has held that a dismissal of a SLAPP should be granted in all cases except where the target's activities are not genuinely aimed at procuring favorable government action. However, a SLAPP can result in years of litigation and substantial expense before it is dismissed.

Washington law addresses the use of SLAPPs by creating immunity from civil liability for people who communicate a complaint or other information to an agency of the federal, state, or local government, or to a self-regulatory organization that has been delegated authority by a government agency. The anti-SLAPP statute entitles a person who prevails against a SLAPP to expenses, reasonable attorney's fees, and statutory damages of \$10,000. Successfully dismissing a suit under the anti-SLAPP statute can take a year or longer. If the trial court decision is appealed, receiving final judgment can take two or three years.

Summary of Bill:

An "action involving public participation and petition" is defined as including any oral statement made, or written statement submitted:

- to a legislative, executive, judicial, or other governmental proceeding authorized by law;
- in connection with an issue under consideration by a legislative, executive, judicial, or other governmental proceeding authorized by law;
- that is reasonably likely to encourage or enlist public participation in an effort to effect the consideration of an issue by a legislative, executive, judicial, or other proceeding authorized by law; or
- in a place open to the public or a public forum in connection with an issue of public concern.

An "action involving public participation and petition" also includes any other lawful action in furtherance of the exercise of the constitutional rights of free speech or petition.

Within 60 days of service of a complaint, or as a court determines, a party may bring a special motion to strike any claim that is based on an action involving public participation and petition. The court is directed to hold a hearing on the special motion with all due speed and to render its decision no later than seven days after the hearing is held. 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. 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.

A moving party who prevails, in whole or in part, on a special motion to strike any claim that is based on an action involving public participation and petition will be awarded costs of litigation, reasonable attorneys' fees, and \$10,000. The court may award additional relief such as sanctions upon the responding party and its attorneys. If the court finds that the special motion to strike a claim is frivolous or was intended to cause unnecessary delay, it must award costs of litigation, reasonable attorneys' fees, and an amount of \$10,000 to the responding party.

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.

The act shall be construed liberally to effectuate its general purpose of protecting participants in public controversies from abusive use of the courts.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The SLAPP suits use the courts to suppress speech. The bill is aimed at strengthening our current anti-SLAPP law. The existing law is from 1989 and was the first of its kind in the country. It is simple and lacks procedural mechanisms. It is also narrow in focus, applying only to communications with certain government agencies. The bill expands SLAPP protections to the constitutional limit. Anti-SLAPP laws enforce the constitutional rights of petition and free speech, but are not required by the Constitution. The courts are responsible for enforcing these rights and this new legislation would give them an expedited way to do that. Courts need this new tool to quickly recognize and dismiss SLAPPs. Development is one area that frequently results in SLAPPs. For example, a neighborhood association will try to block development the residents feel is objectionable by petitioning elected officials not to approve a permit. The developer sues or just threatens to sue for libel. The suit is groundless but can stifle speech, as discovery costs are ruinous to the average individual. The bill accelerates the dismissal process of these suits so they can be dismissed before discovery. Meritorious complaints are unaffected by this bill. It represents a good balance between protecting citizens in exercising their free speech and petition rights and allowing meritorious claims to proceed.

(Opposed) This bill protects too much speech. Libelous statements should not be protected. Defamation in open public forums should not be allowed. More clarification is needed in how courts will carry forward the process created by the bill.

Persons Testifying: (In support) Senator Kline, prime sponsor; Rowland Thompson, Allied Daily Newspapers of Washington; and Bruce Johnson, Davis Wright Tremaine.

(Opposed) Arthur West.

Declaration of Peter Lohnes in Support of Plaintiff's Response to Order to Show Cause

Peter Lohnes declares and states:

1. I am an attorney at Talmadge/Fitzpatrick and one of the attorneys representing plaintiff Ken Aronson. I am over the age of eighteen, competent to testify, and make this statement based upon personal knowledge.
2. Attached to this declaration as Exhibit A is a true and correct copy of RCW 4.24.525
3. Attached to this declaration as Exhibit B is a true and correct copy of the Certification of Enrollment of Substitute Senate Bill 6395.
4. Attached to this declaration as Exhibit C is a true and correct copy of the House Bill Report on SSB 6395.