IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

KENT L. and LINDA DAVIS, et al.,	)	
	)	SUPREME COURT NO.
Plaintiffs,	)	87745-9
	)	
vs.	)	THURSTON COUNTY
	)	NO. 11-2-01925-7
GRACE COX, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

ARGUMENT OF COUNSEL AND COURT'S RULING

BE IT REMEMBERED that on July 12, 2012, the above-entitled matter came on for hearing before the HONORABLE Wm. THOMAS McPHEE, Judge of Thurston County Superior Court.

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THE COURT: Counsel, ladies and gentlemen, we're here today to consider the requests of the moving parties, the defendants in this case, for award of attorneys' fees and the penalty provision provided in the law, RCW 4.24.525(6). Let's begin by introducing yourselves to me again, please.

MR. GOLDBERG: I'm Steven Goldberg, Your Honor. I've been admitted pro hac vice in this case. I'm from Portland.

MR. SMITH: Devin Smith, Your Honor, from Davis Wright Tremaine.

MR. JOHNSON: Bruce Johnson also with Davis Wright.

MR. LIPMAN: Good morning, Your Honor. Avi Lipman with McNaul Ebel on behalf of the plaintiffs.

MR. SULKIN: Your Honor, Bob Sulkin, and with us is our client -- one of the clients, Susan Mayer.

THE COURT: Good morning. Counsel, it's my belief it's appropriate to allot to each of you 20 minutes to argue these issues. Any dispute about that?

MR. SULKIN: No, Your Honor, that's fine.

THE COURT: All right. Who is arguing for the moving party?

MR. JOHNSON: Your Honor, Bruce Johnson for

the moving party.

THE COURT: Mr. Johnson.

MR. JOHNSON: I should also like to introduce our clients who have been with us through this entire litigation, I think who have borne through the proceeds admirably. And the lawyers can only express what the clients want, but it's important to stress that the clients here really care and that this is an important issue presented to the Court.

There are actually three orders today that are for the Court's consideration. One order is the order dealing with the discovery question, which I believe the Court ruled on back in February. The second order is an order granting the anti-SLAPP dismissal. And we have copies of both orders. They've been served on all parties. And the third order is the order awarding fees and the $10,000 penalty.

I think it's fair to say, in this case, the briefing has been rather thorough and extremely helpful on both sides, so I don't think it helps me to -- or helps the Court, rather, to go through that briefing or articulate what we said before, because I think it's fully discussed in the record. I think I'd rather talk about some larger principles at stake in this case. This is not --

THE COURT: Let me interrupt you, Mr. Johnson, and ask first: Is there a dispute about entry of the discovery order and the anti-SLAPP order? I have not been apprised of any dispute, if there is.

MR. SULKIN: There isn't, Your Honor, but in our opposition brief, we did raise the question, as I'm sure you know, that, on the one hand, they're telling us there are no documents, and then, all of a sudden, they're reviewing thousands of them. To the extent --

THE COURT: In terms of the actual orders that are to be entered, there's no dispute?

MR. SULKIN: No.

THE COURT: All right. Thank you.

MR. JOHNSON: I should add that the SLAPP order contains a statement discussing the $10,000 per defendant, so that one may be subject to some discussion here.

THE COURT: That, clearly, is an issue here, yes.

MR. JOHNSON: Other than that, I think both orders are appropriate for entry.

THE COURT: All right.

MR. JOHNSON: As I said, this is not the usual fee hearing. This is not simply kind of a collection

action or a lawyer's payday arising out of a private dispute. I would like to tell the Court that I think it's a fundamental premise, a fundamental part of the anti-SLAPP law, that defendants be able to hire lawyers, defend themselves, and obtain appropriate reimbursement. That's inherent in the anti-SLAPP law.

The purpose of this law, as the legislature decreed, was to allow citizens of ordinary means to engage in First Amendment activities without the fear or the expense of meritless litigation. It designed essentially a two-part process: One, providing for very prompt dismissals pursuant to essentially a summary judgment standard; and, two, the provision that basically enables the defendants to obtain fees and the $10,000 per defendant penalty in the event of a successful dismissal order pursuant to the anti-SLAPP law.

And it's clear that the expense of litigation can be a deterrent to people exercising First Amendment rights. As a matter of fact, when Mr. Sulkin first became involved in this case and wrote a letter to our client saying we want you to back down, he promised complicated, burdensome and expensive litigation. It's clear that all sides understand

that is a risk that the legislature tried to address in this anti-SLAPP law.

Now, the defendants here are people of modest means, who happen to be able to hire lawyers pursuant to this anti-SLAPP law, in the case of Maria LaHood, a staff lawyer for the Center for Constitutional Rights in New York, Mr. Goldberg, and Ms. Harvey, both affiliated lawyers with the Center for Constitutional Rights, and they needed local counsel and finally called me and Devin Smith and said can you help. So we all pitched in and essentially contributed in one form or another to defending this case.

And, quite frankly, it has been complicated, burdensome and more expensive than I would have thought when I got involved in it, but we don't think the expenses of litigation should be a deterrent to free speech, and we believe this anti-SLAPP law is designed precisely to compensate the defendants for this type of expense.

In addition, as the Court knows, there is an issue relating to the $10,000 question. We have cited to the Court, and I know the Court has previously mentioned at least three decisions, two of which deal with this anti-SLAPP law, one of which, *Eklund*, deals

with the prior law, which is .50, and basically all state -- this is federal district court in Seattle, all state that the award should be a per-defendant award.

We believe that the awards are appropriate, we believe the amounts requested are reasonable, and we would ask the Court to enter an appropriate award consistent with the anti-SLAPP law. Thank you.

MR. SULKIN: Good morning, Your Honor, Bob Sulkin.

THE COURT: Good morning.

MR. SULKIN: Mr. Johnson told you what he believed the underlying principles are of the anti-SLAPP statute. We only have to look at the statute itself, what the legislature said those principles are. Here's what the legislature said, and I'm reading from the notes section, Your Honor: "The purposes of this Act are, (a), 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." In (c), "To provide for attorneys' fees, costs and additional relief where appropriate." Where appropriate. And that's what brings us here today.

You have two statutes before you. The derivative

representative statutes are one of the only statutes which give rights to shareholders. In fact, one power shareholders have to tame actions of the board of a corporation are these suits.

So let me give you an example. A corporation files a lawsuit, board approval, loses, and fees are assessed against the firm under a particular statute of penalties. In that circumstance, the corporation pays those fees and those penalties, because it was an authorized act by the board, putting aside rule limit issues. But there's another way corporations can sue, and that's the Derivative Act. And this Court did not find the derivative statute used by my clients to be inappropriate. My clients took advantage of that and sued.

And what they're saying is, shareholders get hit, the fat cats and the board don't, and that's not the law. Not only that, Your Honor, they know this is right, because, in their opening brief, at footnote 15, they allude to this issue. They say to you, reading at line ten, "Thus, if the Court grants defendant's motions required toward attorneys' fees and costs and $10,000 to each defendant," and then footnote 15 says, "in the alternative, fees should be asserted under derivative action under your equitable

powers." They recognized the issue.

In fact, one month before this hearing, before they filed their brief, they were told about the *Phillips* case. Mr. Johnson was a lawyer in the *Phillips* case. He knew precisely what the situation was, and the law is very clear. The court in -- in a proper derivative action, which this one is, the real party in interest is the corporation. Now, I understand, I'm not naive, you may find it to be an anomaly here, but if these people acted with power improperly, they can't be hit. That's the protection shareholders get, and nothing in the anti-SLAPP statute abrogates it. Nothing.

Now, in their reply brief, they say, well, there's this sentence in there that says, well, gee, these awards -- these penalties and fees are without regard to limits and statutes. Well, the limit means, assuming there's a right to them, a right to hit them for fees. You can't create a right, which is what they're trying to do here. What they're trying to do is treat one method of bringing a lawsuit different than another.

THE COURT: If the issue here was not award of fees and penalties under 525 but, rather, a claim under circumstances appropriate to that claim for CR

11, and I determined that a sanction against the derivative shareholder plaintiffs was appropriate, would that be a sanction shifted to the corporation?

MR. SULKIN: Well, there are two issues there, if I may, Your Honor.

THE COURT: Sure.

MR. SULKIN: First, obviously, there's been no finding of CR 11 and, obviously, no basis for it. But let's assume you find that. Okay. I think you can find CR 11 against the individuals. But then, of course, you can't hit them for statutory penalties. I mean, that, you can't do.

Second, if there's a CR 11 violation, the sanction has to be reasonable. And we're going to get to this fee of $280,000. And I don't mean to be disrespectful, Your Honor, but in a new statute where we put forth evidence of a CR 11 violation, I don't think it's even --

THE COURT: I'm testing your assertions here that a corporation is responsible for the acts of individuals who purport to act in its face, and so I propose CR 11. Now --

MR. SULKIN: You can do that.

THE COURT: -- let's take another situation. Let's take a situation where a group of shareholders

come to the corporation and say you've got to sue these people, and the corporation, through its board of directors, says, no, because that would violate the anti-SLAPP statute. And so the shareholders bring a derivative action in the name of the corporation against these other defendants, and, sure enough, they're nailed -- their claim is dismissed in an anti-SLAPP motion. Is the corporation now responsible for those fees and costs?

MR. SULKIN: Absolutely, short of Rule 11 violations. Just because some guys or gal sitting on a board think it's a violation of anti-SLAPP policy doesn't mean it is. There's legion cases where boards say don't do it, don't do it. Most of them deal with don't sue us, which is this case, and people do sue, and sometimes they win, and sometimes they lose. But the fact that you lost a case doesn't mean there's a Rule 11 violation. There just isn't.

THE COURT: I'm not suggesting it is in Sulkin. I'm testing the limits of your assertion here.

MR. SULKIN: The limits of my assertion, Your Honor, are if someone files a case that violates rule 11 as a shareholder, they can be hit for Rule 11. I agree with that. What they can't do then is be hit

for other sanctions unrelated to Rule 11. Rule 11 doesn't talk in those terms, $10,000 per person. But, certainly, theoretically, you can hit them for Rule 11, absolutely. But the way the statute is set up, if we're talking under RCW 4, the anti-SLAPP statute, it's the corporation that is the real party in interest. You know, on the one hand, they want to say they're the corporation. On the other hand, you don't control the corporation, we're the corporation. If that's the case, then maybe it's a $10,000 penalty. I don't think that's right. But we are nominal parties, nominal. The corporation is the real party in interest here. And they cite nothing, nothing, in response to that.

In fact, their footnote 15 recognizes the very issue. They knew it was coming down. They may not like it, the Court may be frustrated by it, but this isn't the place to create law. The legislature knows the law. The legislature itself gets to balance rights and remedies, which is why it says here, provide for attorneys' fees, costs and additional relief where appropriate. It doesn't say where there's a violation of the statute, because it is not always appropriate.

THE COURT: Well, Mr. Sulkin, with all due

respect, isn't that the type of language you often see in a purpose provision of an act, and then where you get to the nuts and bolts, where the rubber hits the road, the legislature says the court shall award -- not may, not in appropriate circumstances -- shall award to a moving party, and that's the language in this statute, is it not?

MR. SULKIN: It is, and you have to -- and it shall be awarded against the real party in interest, the corporation.

THE COURT: Okay.

MR. SULKIN: Not the individuals. You're, in a sense, saying the corporate veil should be pierced when they took proper corporate action under the corporate laws of this state, just like a board of directors would. And this Court is being asked to treat them differently because there's not the board, they're shareholders, they exercised their power appropriately, Your Honor. There was no finding by this Court that they did it inappropriately, and if you did find, you'd have a *Phillips* problem.

And so the fact of the matter is, the legislature has spoken on this. They have not addressed -- said that we're abrogating the protections provided to shareholders, especially in a nonprofit suit. And I

should say, Your Honor, the derivative statute, the nonprofit derivative statute for corporations, does have provisions for attorneys' fees. By contrast, the representative statute, that section for nonprofits, which you found this to be, does not have that provision, which means the legislature knew precisely what to do when it wanted to create -- wanted to create a risk on these shareholders, and it didn't do it here.

And the fact of the matter is, my people, like his, aren't rich people. They're doing what they think is right, just like Mr. Johnson's people are doing what they think are right. And you may disagree with them, he may disagree, I don't know, but their motives are not to do anything but that.

And I gotta tell you, the letter Mr. Johnson -- for more questions on that, I'm happy to answer, Your Honor. But the fact of the matter is, if you look -- we look to the representative statute, which does allow for corporations for fees to be had, and you look for the nonprofit statute, if this one falls under, which it doesn't, I think that tells you everything you need to know.

THE COURT: Why?

MR. SULKIN: Because it shows the legislature

knew how to hit shareholders for fees if it wished to do so, and it chose not to in the nonprofit situation. And there's reasons for that, Your Honor. Because people in a nonprofit co-op situation are not doing it for profit, they're not trying to gain something. They're trying to speak and trying to direct a nonprofit. That's why. And so they're given added protections.

I want to turn to their claim for fees. I have to say, I hold Mr. Johnson, I've know him for many years, in high regard. But this fee request, I've been doing this for 30 years, is nothing short of outrageous. I was a little bit taken aback when he cited to my letter to him about the complex nature of the case, and, of course, I wrote the letter to try to get a resolution. But, more importantly, what the letter meant was, should this thing go through trial and everything else, it would be complicated, expensive and the like.

Your Honor, there are two motions filed in this case. They're charging $280,000 in fees. In *Castello*, the fees were $53,000. In *Aronson*, they asked for 46,000. They were carved back to $31,000. They lost the 12(b)(6) motion in this case, which covered half the original brief. They're claiming

fees for documents, which they told you they didn't exist, for reviewing thousands of pages of documents, which I was told and you were told didn't exist and weren't relevant. We have a lawyer claiming she billed 20 hours in a day. I've never heard of such a thing. Did she eat? Did she go to the bathroom? Did she make a phone call? Did she take a break? Was she as efficient the first hour as the last? You have conversations with four lawyers billing over $400 an hour to edit a brief for the first time. That's not efficient workmanship, Your Honor.

I did this on pro bono. I'm not getting paid for this. I'm doing it because I think it's right. I didn't keep my time records, but I can tell you, it isn't anywhere near this. I just tried a case last May, a four-day jury trial on a budget, won every dollar I asked for, filed a brief on appeal. My total fee was $145,000. Now, that's not the average case, but it can be done.

In their reply brief, not only do they not provide you any law on the issue of penalties, they don't address -- nor do they address the *Phillips* situation, which I think speaks volumes, but they don't say anything about *Castello* or *Aronson.* Nothing. They don't try and defend this

20-hour-a-day billing, the multiple phone calls, nothing. They don't try and defend block billing, nothing.

I thought, quite frankly, Your Honor, when the fee -- when you ruled against us, this would be a no-brainer issue. It's not my practice to fight things like this, and if they're arranged, it's okay. But this is by multiples of nine above what was awarded in *Aronson*, and by five and a half what was awarded in *Castello* with two law firms.

Your Honor, if you have any questions, I'd be happy to answer them. I would say that, you know, given that Mr. Johnson, he didn't make any arguments in his opening statement other than the ones on principle, generally, the way this works, he makes an argument, I get a chance to respond, and he gets a chance to respond. If he does make arguments, I'd like a chance to respond. And I don't mean he set this up that way, but it just sometimes happens that way.

THE COURT: Mr. Sulkin, other than your contention that the appropriate standard for judging rates is the Olympia standard, if, in fact, it is a standard that encompasses Seattle or the entire Puget Sound basin, do you contend that the rates requested

here are unreasonable, or is your contention based solely upon the standard that it should be Olympia, a local standard?

MR. SULKIN: Let me take it by lawyer, Your Honor, if I may.

THE COURT: You may.

MR. SULKIN: If we're applying a regional standard, I have no problem with Mr. Johnson's rates, nor with his colleague's rates of Davis Wright. I have to tell you, I'm sure Mr. Goldberg, Ms. Harvey, and Ms. LaHood are nice people, but I think it's interesting that none of them were needed in the other two cases that Mr. Johnson had. Mr. Johnson didn't need them at all. Their rates are over $400 an hour, and, with due respect, they have no -- literally, no knowledge on this subject. None. So I look at that, and I say, if they were in the law firm, would Mr. Johnson reach out to them? The answer is no. He did what he should have done. You reach out to an associate at a lower billing rate. He did a good job. That's what you do. You don't reach out to three other partners at $425 an hour.

The question is twofold: Are they the right type of person you would pick? And, second, are the rates justified? I don't think the right type of person to

pick, you wouldn't pick four partners to sit around on this case. And, second, given the fact that they have a limited ability in this area, I think their rights are high.

THE COURT: All right. Thank you.

MR. SULKIN: And I should say, in a civil rights case, I would feel differently. You have a civil rights case and unions, which they do, I probably wouldn't have a problem with it. So it's not a personal issue. It's just where they are.

THE COURT: All right.

MR. SULKIN: Thank you.

MR. JOHNSON: Just a few points, Your Honor, about *Castello* and *Aronson*. First of all, *Castello* was a defamation case. I've done defamation cases for 35 years. It's fairly straightforward. *Aronson* was an invasion of privacy case that was contradicted by applicable Washington statute. I've handled those for many years. This was, quite frankly, a case of quite complicated internal governance issues. And, yes, there were a lot of internal documents, all of which were available to the plaintiffs because these were corporate documents, bylaws, decision making minutes from meetings of the board and so forth. Nothing secret there. Quite frankly, this was fully

appropriate, and it was appropriate to engage counsel who were involved in these types of issues and have been involve in these types of issues more than I have.

These are not nominal parties. They filed a lawsuit. There's no lawsuit except -- there's no derivative exception contained in the anti-SLAPP laws. And, as a matter of fact, to the contrary, the anti-SLAPP law says the remedies shall be liberally construed and without regard to any other limits under state law. And, as the Court noted, the attorneys' fees --

THE COURT: The remedies or the protections?

MR. JOHNSON: The protections are without regard to any limits under state law.

THE COURT: No. No, in the liberally construed language, which we learned at the last hearing came from the statement of purpose, it is not part of the statute, but I believe I learned that was liberally construed as far as the protection goes, not the attorneys' fees and penalties.

MR. JOHNSON: I would contend, as I said, Your Honor, that the substantive remedies available in terms of fees and so forth are very much a part of the substantive remedies here. And as the Court

noted, it's a mandatory fee-shifting rule, shall be awarded in the statute. The Court is not being asked to treat these plaintiffs any different from any other plaintiffs. There's no exemption that they're entitled to, that ought to grant them a free ride in this context.

And, as I said, this Court has full discretion to determine what's appropriate, and we would put our reliance in the judge to determine in these circumstances what fee award is appropriate. I can simply say this was after a hard-litigated case that presented issues that I was frankly inexperienced with because of the internal corporate governance issues and the derivative issues, and we believe this is an appropriate award. We have chopped back dramatically on the issues.

THE COURT: Where is your corporate governance expert in this group, Mr. Johnson?

MR. JOHNSON: Well, I did consult a lawyer involved in our office dealing with nonprofit corporations, but, quite frankly, she'd never been involved in litigation growing out of a nonprofit dispute.

THE COURT: Your colleagues, your co-counsel in this endeavor are experienced, successful lawyers,

but I didn't see a lot of corporate governance experience in that litigation history. What I saw was constitutional rights and the very important protections for those. But when we get to corporate governance, I didn't see a lot of $400 experience there.

MR. JOHNSON: I would agree with that, Your Honor. We learned a lot on the fly. We learned a lot from our clients. We learned a lot from meeting with them. I would add, Barbara Harvey, who is not here and the Court hasn't met, devoted most of her time dealing directly with the clients, doing the gathering of the information, doing the factual gathering. To be very blunt, I don't think there's a whole lot of rocket science dealing with derivative statutes beyond the fact that CR 23 has certain rules, and there are certain internal corporate governance issues. More important, from our standpoint, was having somebody who knew the clients, who had been working with the clients and really helped compile the factual information we needed. But I would agree with you that we didn't really have an absolute corporate nonprofit expert within our team. Thank you, Your Honor.

THE COURT: Thank you.

MR. SULKIN: May I briefly respond, sir?

THE COURT: Yes, Mr. Sulkin.

MR. SULKIN: And I think you've got a handle on the fee issue, but the point that I want to make is the point you make. There is no statement that damages should be liberally construed. Those rights are not to be liberally construed. You gave them the rights. That's fine. There's nothing in this statute, and he had his chance -- Mr. Johnson, again, I respect, is one of the best lawyers in Seattle, if not the country, on some of these issues. There is no law that supports their position in abrogating the representative suit statute for nonprofits. There just isn't. And we may not like it, we may think it's wrong, we may think a million different things about it, but that's just the way the legislature did it.

And the fact that he can get up here and say it's not fair that these people should get a free ride, it happens all the times. Again, when corporations sue appropriately, the directors don't get hit; the corporation does. This was just a different way of doing it, albeit one perhaps that they hadn't conceived of, but we know they did by footnote 15, but we can't -- you know, tough cases make bad law,

and maybe this is a tough case. But the law is pretty clear on this, and we ask you to follow it, Your Honor.

THE COURT: All right. Thank you. Mr. Johnson, let's review the issue raised by Mr. Sulkin about the 12(b)(6) and his contention that, in the words of the statute, this was not a motion upon which the moving party prevailed.

MR. JOHNSON: Your Honor, I'm unaware of any 12(b)(6) motion that we filed and lost. We filed one motion. It was an anti-SLAPP motion.

THE COURT: Well, it was an issue in your original briefing contending that, in the alternative, the case should be dismissed under Civil Rule 12(b)(6).

MR. JOHNSON: That was part and parcel of the anti-SLAPP motion. Your Honor, the anti-SLAPP law states that if the plaintiff can show no probability of success that you're entitled to a remedy, and the fact is that a Civil Rule 12(b)(6) motion is nothing more than showing as a matter of law the plaintiff has no remedy. That was part and parcel of the anti-SLAPP motion we filed. I don't know how to separate it out, quite frankly.

THE COURT: All right. Mr. Sulkin, why is

that argument not persuasive, in your view?

MR. SULKIN: Because it's not accurate.

THE COURT: All right.

MR. SULKIN: It's not -- I mean, if you look at his brief --

THE COURT: I did.

MR. SULKIN: -- the first nine pages, putting aside the introduction, are on the anti-SLAPP. And then after that, the entire argument is that we're not proper representatives under the representative statute. That is part of the 12(b)(6) motion. That has nothing to do with the anti-SLAPP. He argued this person doesn't represent this, nine pages of it. In fact, that's what most of the real work was done. Because the anti-SLAPP work, Your Honor, was done because Mr. Johnson helped write the statute. He handled at least three cases prior to this, *Phillips*, the dog case, the *Castello* and *Aronson*. He knew that, and he didn't need these people for it. The real work was on the 12(b)(6), on the representative suit issue, which he lost.

THE COURT: All right.

MR. JOHNSON: Your Honor.

THE COURT: Last word.

MR. JOHNSON: The statute says, "The court

shall award to a moving party who prevails in part or in whole on a special motion to strike."

THE COURT: Counsel, I'm going to give you my decision on part of the issues here today, and then I will explain to you what remains to be resolved. There were a number of issues that the plaintiffs asked that I consider in advance of awarding attorneys' fees to the defendant as is required by the statute, and I will address those specific issues, and then I will address what is a reasonable attorney fee here.

First, let's be clear that the Court does not have discretion in this matter in terms of the decision as to whether or not to award attorneys' fees. The language of the statute reads in Section 525(6)(a), "The Court shall award to a moving party who prevails in whole or in part on a special motion to strike made under subsection four of this section without regard to any limits under state law," and then it lists costs of litigation and a reasonable attorney fee in connection with each motion on which the moving party prevailed, and an amount of $10,000 not including the costs of litigations and attorneys' fees, and then two other subparts that are not material here. So that's the law under which I work.

Now, the plaintiffs offer a couple of contentions. The first of those is that this action brought by them is denominated and pursued as a derivative action under the Nonprofit Corporation Act, specifically RCW 24.03.040(2). It is at various times characterized as a derivative action and other times characterized as a representative suit. Those terms are relatively synonymous; they mean shareholders bringing an action in the name of a corporation.

The plaintiff's contention here is that Section 040(2) is silent about fee shifting and, therefore, controls over the provisions of an entirely different statute, the anti-SLAPP statute in Section 525.

They argue that since the regular Corporation Act permits fee shifting in shareholder derivative actions and the Nonprofit Corporation Act does not permit fee shifting in shareholder representative actions, one must infer that the legislature intended there be no fee shifting for nonprofit shareholder representative actions, even those resulting in dismissal pursuant to RCW 4.24.525.

I don't find that argument persuasive. The silence in Section 040 of the Nonprofit Corporation Act on fee shifting does not diminish the breadth of

Section 525. If one was looking for limitations, you would look in two places. You'd look in the Act itself to see if there were limitations or exceptions under any part of RCW 4.24.525, the anti-SLAPP statute, to see if some parties or circumstances are exempt from the requirement that the court shall award attorneys' fees to a prevailing party. Nothing is there.

Then you would look in the Nonprofit Corporation Act to see if there was a specific exception carved out that said shareholders who bring representative suits are exempt from the application of Section 525. It doesn't say that. It's just merely silent. And the anti-SLAPP statute is more specific. It was enacted many, many years after the Nonprofit Corporation Act. It controls in this case, and does not have any of the language limiting application of it to, or excluding in its application, members of the nonprofit corporation bringing a representative suit. The plaintiffs do not prevail on that issue.

The second issue raised is a variation of that, and that is, since this is a representative action, imposition of the attorneys' fees and penalties must be assessed against the corporation, Olympia Food Co-op, and not the members who bring the suit on its

behalf. That argument is likewise not persuasive.

A representative action is permitted where the corporation does not act. That's one of the circumstances where you can bring a representative action. In those circumstances, a shareholder, a member in a nonprofit corporation, may bring the action on its behalf, but that permission does not shift the responsibility imposed on a plaintiff by Section 525 to the corporation. The persons at risk under Section 525 are the parties who bring the action, not the corporation in whose name they purport to act. The law, in my view, requires imposition of the costs, attorneys' fees and penalties against the main plaintiffs here, not the corporation.

The third issue raised is that there should be only one penalty of $10,000 assessed here, because the board of directors is the defendant and a single entity, and where the law says the Court shall award to a moving party who prevails, I am to construe that language as meaning the board of directors is the prevailing party and not the individuals against whom the remedies were sought personally and individually.

That contention is not persuasive. Other trial courts have dealt with this issue, primarily federal

courts in this state, and determined that the language of the statute means that if there is more than one defendant, and all defendants join in seeking to have the case against them dismissed under the anti-SLAPP statute, that each is entitled to a $10,000 penalty. No Washington appellate court has decided that issue, but it is hard for me to construe how the language of the statute itself means anything other than as the federal trial courts have construed it and as I believe I must construe it.

The legislature is not always right in the things that it does. It doesn't always anticipate the consequences of some of its acts. It may be hard to believe that the legislature would have suggested that a $160,000 penalty is appropriate here, but that's what the legislature says, and I'm not given the power under any circumstances to impose my belief about what the legislature says, unless there's an ambiguity that I'm called upon to construe, and there is not that ambiguity here. This is an issue that I suspect must most likely be addressed in the legislature.

In any event, my decision will be that the law requires imposition of a $10,000 penalty for each defendant in this case.

The next issue is what a reasonable attorney fee is, what are the reasonable rates that are to be applied here. The law is very clear that a lodestar approach is appropriate. The lodestar approach requires that the Court determine what hours are reasonable, what rates are reasonable, and then multiply hours times rates, and determine an attorney fee. In some instances, there is a multiplier that can be applied, but no party contends that a multiplier is appropriate here, at least the defendants did not contend that upon condition that I award the full attorney fee.

If I don't award the full attorney fee, and I think it's doubtful that I will, the defendants have then requested a multiplier. I find no basis for a multiplier here, using the lodestar approach. But addressing what is appropriate here, I conclude that what we're dealing with here is primarily underlying a national issue. That clearly was part of the case that I decided in determining that the anti-SLAPP motion applied. The process of seeking a remedy under the anti-SLAPP statute is not a part yet of the Olympia legal culture. There's been only two other cases that I'm aware of that have included anti-SLAPP motions here in Thurston County. One of those was a

case in front of me with which Mr. Johnson is very familiar, because he was the lawyer who brought the anti-SLAPP motion.

What is important in that case, in my view, is that this was a commercial dispute where the parties were represented by local counsel, but when the defendant filed a counterclaim and the plaintiff sought to have that counterclaim dismissed under the anti-SLAPP statute, the local counsel hired Mr. Johnson, because he was the expert. I was never called upon to rule on that issue. The case settled on the eve of the anti-SLAPP hearing.

The other case in Thurston County is a case involving Walla Walla Community College, whom the Attorney General represented. The other attorneys were from Seattle and San Diego.

I mention those in order to show that there is no established local rate for this type of work yet. The law is new, and I suspect there may be development of a rate at some time in the future, but I am satisfied that a regional rate encompassing the law firm where most of this work is currently done, Davis Wright Tremaine, is the appropriate standard to use in judging what a reasonable rate is.

The objection Mr. Sulkin raised about the rates of

the other lawyers is a matter that I will address as we move downstream, and I will not address that right now.

The fifth and last issue that I will address this morning is the contention that, in determining the attorneys' fees to be awarded here, the Court should focus exclusively on work done on the anti-SLAPP motion and not on two other aspects of the litigation, the discovery dispute, and the Civil Rule 12(b)(6) motion. Civil rule 12(b)(6) is for dismissal of the case. It doesn't depend upon the standards of Section 525, the anti-SLAPP statute, but it is an alternative for dismissing the case. It is also appropriate under Section 525 to refer to it or to use it to show that the party asserting the claim, the plaintiffs in this case, cannot establish a probability of prevailing.

The second part of the anti-SLAPP statute is that the burden shifts to the plaintiff to establish by clear and convincing evidence a probability of prevailing on the claim.

To use a Civil Rule 12(b)(6) standard to refute that contention relates to the Section 525 motion, the anti-SLAPP motion, and that is how Mr. Johnson has explained his use of it. I'm going to consider

and resolve that as we move forward.

The other issue is whether the discovery issue should be excluded from the calculation of attorneys' fees. The discovery dispute in this case arose directly and exclusively because the anti-SLAPP law provides for a stay of discovery. And what was litigated in that motion was whether or not the stay should be lifted, because that power is given to a court in some limited circumstances. The statute says that the Court shall award costs of litigation and attorneys' fees in connection with each motion on which the moving party prevailed. The defendants clearly prevailed on this motion. I conclude that those fees are covered by the attorney fee provision.

Those are the rulings that I've made to date. Now, what remains is to determine what hours are reasonably awarded here and what the rates should be for attorneys other than the Davis Wright Tremaine lawyers. Mr. Johnson, what you provided to me was a declaration from each lawyer. They're very separate documents.

By way of background, I will tell you that I just concluded an attorney fee dispute that involved both fee shifting and common fund and involved many millions of dollars for attorneys' fees. I have

studied over the last 60 days award of attorneys' fees from A to Z, I think, and I am aware of my responsibility to go through these request for attorneys' fees with a pretty careful examination of all of the requests made, using the standards that identify whether the work was necessary, identify whether it was duplicated, identify whether the method of billing, block billing, or more precise timekeeping gives the Court sufficient evidence upon which to base a decision. There's many other standards. They all apply here.

And, Mr. Johnson, I concluded I could not do that, flipping from one date through four different sets of documents. And so if you wish to be awarded attorneys' fees here, and I'm sure you do, I'm going to require you take those four statements and consolidate them into a single document that moves each lawyer's claimed time for any particular date into a consolidated set of claims for each date so I can look at a date and see four different claims and determine under the circumstances or under the standards required of me whether what is being requested is reasonable under the circumstances.

I will be away for two weeks starting next week and will return and make my decision then without

further oral argument, but I will expect that you will have that to me in electronic form as well as hard copy, and not pdf, I want it in a word-processing format, by the conclusion of two weeks.

MR. JOHNSON: Two weeks from today?

THE COURT: Two weeks from today.

MR. JOHNSON: Your Honor, we do have the two orders that I believe have been more or less agreed to at this stage.

THE COURT: All right.

MR. JOHNSON: Which is the discovery order and the order granting the SLAPP remedy.

MR. SULKIN: There was one other issue. I assume, so the record is clear, you're denying our CR 59 motion relating to the withholding of --

THE COURT: The what?

MR. SULKIN: Our CR 59 motion. I want it on the record you're denying it so we have a full record on appeal.

THE COURT: The CR 59 motion, I'm not even aware what the --

MR. SULKIN: In our brief, we said --

THE COURT: Oh, the reconsideration of the discovery?

MR. SULKIN: Yeah. I mean, it's not a reconsideration. It's, we didn't know they had all these documents that they now claim they have. We want them, and I just want to be clear that there's a ruling on that for the record.

THE COURT: My ruling is that it's denied.

MR. SULKIN: Thank you.

MR. JOHNSON: Your Honor, I'm handing up a copy of the anti-SLAPP decision and the order denying discovery.

MR. SULKIN: Your Honor, can we read this? We just got this ourselves. I assume there's no issue. If I could have a few minutes.

THE COURT: All right.

MR. JOHNSON: I think we sent it out with our initial motion.

MR. SULKIN: Yeah.

MR. JOHNSON: We just added today's date.

MR. SULKIN: No problem with the anti-SLAPP motion, as far as its format, obviously. And we have no problem as to form as to the other issue.

THE COURT: I've signed both orders. That concludes our business. We'll stand in recess.

MR. SULKIN: Thank you, Your Honor.

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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, AURORA J. SHACKELL, CCR, Official Reporter of the Superior Court of the State of Washington, in and for the County of Thurston, do hereby certify:

I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter, as designated by Counsel to be included in the transcript, and that the transcript is a true and complete record of my stenographic notes.

Dated this the 8th day of November, 2012.

AURORA J. SHACKELL, RMR CRR
Official Court Reporter
CCR No. 2439