

HOUSE BILL REPORT

SSB 5009

As Passed House - Amended:

April 9, 2021

Title: An act relating to the uniform public expression protection act.

Brief Description: Enacting the uniform public expression protection act.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Padden, Pedersen, Brown, McCune and Mullet; by request of Uniform Law Commission).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 3/17/21, 3/24/21 [DPA].

Floor Activity:

Passed House: 4/9/21, 97-1.

Brief Summary of Substitute Bill (As Amended By House)

- Creates a special motion for expedited relief to dismiss certain legal claims based on First Amendment activities and stay proceedings and discovery until the motion and any appeal is resolved.
- Awards prevailing movants costs, expenses, and attorneys' fees.
- Awards prevailing respondents costs, expenses, and attorneys' fees if the court finds the motion was not substantially justified or filed solely with intent to delay the proceeding.
- Authorizes an immediate interlocutory appeal by right if the special motion is denied.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass as amended. Signed by 16 members: Representatives Hansen,

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

Chair; Simmons, Vice Chair; Walsh, Ranking Minority Member; Gilday, Assistant Ranking Minority Member; Graham, Assistant Ranking Minority Member; Davis, Entenman, Goodman, Kirby, Klippert, Orwall, Peterson, Thai, Valdez, Walen and Ybarra.

Staff: John Burzynski (786-7133).

Background:

Freedom of Speech, Press, Assembly, and Petition.

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article I, sections 4 and 5, of the Washington Constitution provide in relevant part that "[t]he right of petition and of the people peaceably to assemble for the common good shall never be abridged," and "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

The Right of Trial by Jury.

Article I, section 21, of the Washington Constitution provides "[t]he right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto."

The Washington Supreme Court has applied this provision to limit restrictions on the right to a jury trial, holding "[t]he term 'inviolate' connotes deserving of the highest protection and indicates that the right must remain the essential component of our legal system that it has always been. The right must not diminish over time and must be protected from all assaults to its essential guaranties. At its core, the right of trial by jury guarantees litigants the right to have a jury resolve questions of disputed material facts. But the right of trial by jury is not limitless. For example, it is well established that [w]hen there is no genuine issue of material fact, . . . summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial. . . . Another relevant limit on the right of trial by jury is that it does not encompass *frivolous* claims that are brought for an improper purpose. . . . [F]rivolous suits (i.e., those that lack a reasonable basis, are based on insubstantial claims, or are baseless) are not within the scope of the First Amendment protection but . . . all other suits are constitutionally protected." *Davis v. Cox*, 183 Wn.2d 269, 288-290 (2015) (citations and quotation marks omitted).

Strategic Lawsuits Against Public Participation.

The Legislature has previously found that strategic lawsuits against public participation (SLAPP) are brought primarily to chill the valid exercise of the constitutional rights of

freedom of speech and petition for the redress of grievances; that SLAPP claims 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; and that 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.

The Washington Act Limiting Strategic Lawsuits Against Public Participation, enacted in 2010, authorized litigants to bring a special motion to strike any claim based on an action involving public participation and petition within 60 days of the service of the most recent complaint, or at a later time in the court's discretion. The standard, codified at RCW 4.24.525, provided in relevant part: "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."

In 2015 the Washington Supreme Court invalidated this section as inconsistent with the Washington Constitution's provision guaranteeing the right of trial by jury. The Court concluded "[t]he legislature may enact anti-SLAPP laws to prevent vexatious litigants from abusing the judicial process by filing frivolous lawsuits for improper purposes. But the constitutional conundrum that RCW 4.24.525 creates is that it seeks to protect one group of citizens' constitutional rights of expression and petition by cutting off another group's constitutional rights of petition and jury trial. This the legislature cannot do. We hold 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." *Davis v. Cox*, 183 Wn.2d at 295-296.

Communications to a Government Agency or Self-Regulatory Organization.

Washington law provides that a person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to 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, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing under this defense is entitled to recover expenses, reasonable attorneys' fees, and statutory damages.

Summary of Amended Bill:

The Uniform Public Expression Protection Act (UPEPA) is adopted, which authorizes a litigant defending against certain legal claims to file a special motion to dismiss the claim

within 60 days of being served with the claim.

Covered Claims.

Subject to limited exceptions, a UPEPA special motion applies to any claim asserted in a civil action against a person based on the person's:

1. communication in a legislative, executive, judicial, administrative, or other governmental proceeding;
2. communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or
3. exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or Washington Constitution, on a matter of public concern.

Even if a claim is based on one of the foregoing covered activities, a UPEPA special motion generally does not apply to any cause of action:

1. against a governmental unit or an employee or agent of a governmental unit acting or purporting to act in an official capacity;
2. by a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety;
3. against a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of a communication related to the person's sale or lease of the goods or services;
4. against a person named in a civil suit brought by a victim of a crime against a perpetrator;
5. against a person named in a civil suit brought to establish or declare real property possessory rights, use of real property, recovery of real property, quiet title to real property, or related claims relating to real property;
6. seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action, unless the claims involve damage to reputation;
7. brought under the insurance code or arising out of an insurance contract;
8. based on a common law fraud claim;
9. brought under Title 26 RCW, or counterclaims based on a criminal no-contact order pursuant to chapter 10.99 RCW, for or based on an anti-harassment order under chapter 10.14 RCW or RCW 9A.46.050, for or based on a sexual assault protection order under chapter 7.90 RCW, or for or based on a vulnerable adult protection order under chapter 74.34 RCW;
10. brought under Title 49 RCW; negligent supervision, retention, or infliction of emotional distress unless the claims involve damage to reputation; wrongful discharge in violation of public policy; whistle blowing, including chapters 42.40 and 42.41 RCW; or enforcement of employee rights under civil service, collective bargaining, or handbooks and policies;
11. brought under the Consumer Protection Act, chapter 19.86 RCW; or
12. any claim brought under federal law.

However, exclusions 3, 8, and 11 detailed above (related to certain commercial, fraud, and consumer protection claims) do not apply, and thus the claim is subject to a UPEPA special motion, when the cause of action is:

1. a legal action against a person arising from any act of that person, whether public or private, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution; or
2. a legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.

Notice Requirement.

Prior to filing a special motion for expedited relief, the moving party must provide written notice to the responding party of its intent to file the motion at least 14 days prior to filing. During that time the responding party may withdraw or amend its pleading. If the moving party fails to provide the required advance notice, it may still file a special motion for expedited relief, but it is not entitled to recover attorneys' fees if it prevails.

Stay of Proceedings.

Once the movant provides advance notice of intent to file a special motion for expedited relief, or files such motion, all other proceedings between the moving and responding party, including motion practice and discovery, are stayed. The stay remains in effect until entry of an order ruling on the motion and expiration of the time allowed for the moving party to file an appeal if the motion is denied: 21 days.

Limited Discovery.

While proceedings are stayed, the court may allow limited discovery if a party shows that specific information is necessary to establish whether a party has satisfied or failed to satisfy its burden under the special motion, and the information is not reasonably available unless discovery is allowed.

Motion Timeline and Standards.

The court must hold a hearing on the special motion within 60 days of when it is filed, unless the court authorizes limited discovery for the purpose of the special motion or other good cause exists for a delay. The court must rule on the special motion within 60 days of the hearing.

In ruling on the special motion, the court must consider the pleadings, motion, any reply or

response, and any evidence the court could consider in ruling on a motion for summary judgment pursuant to Superior Court Civil Rule 56.

The court must grant the special motion and dismiss the covered claim with prejudice if:

1. the moving party establishes UPEPA applies;
2. the responding party fails to establish an exception to UPEPA applies; and
3. either:
 - a. the responding party fails to establish a prima facie case as to each essential element of the cause of action; or
 - b. the moving party establishes the responding party failed to state a cause of action upon which relief can be granted, or there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Fee and Cost Shifting.

If the moving party prevails, the court must award the movant costs, reasonable attorneys' fees, and reasonable litigation expenses related to the motion. If the responding party prevails and the court finds the special motion was not substantially justified or filed solely with intent to delay, the court must award the respondent costs, reasonable attorneys' fees, and reasonable litigation expenses related to the motion.

Interlocutory Appeal.

A moving party may file an interlocutory appeal as a matter of right from an order denying the motion in whole or in part. The appeal must be filed within 21 days after entry of the order. If a party appeals, all proceedings between all parties in the action are stayed until the conclusion of the appeal.

Broad Construction.

The bill contains a provision requiring broad construction and application to protect the speech, press, assembly, petition, and association rights guaranteed by the United States Constitution or Washington Constitution.

Repeal of Prior Anti-SLAPP Law.

The act would repeal RCW 4.24.525, Washington's prior anti-SLAPP law invalidated by the Washington Supreme Court in *Davis v. Cox*.

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 main goal of SLAPP cases is to drag defendants through litigation. Abusive SLAPP suits have prompted major statutory reforms across the country, including a recent law in New York. The uniform act offers the current and best protections available, was the product of a two-year drafting process, and is an important protection against forum shopping for jurisdictions that lack anti-SLAPP laws or have weak anti-SLAPP laws.

The "Me Too" movement demonstrates the need for stronger sexual assault survivor support and protection. This bill will restore critical safeguards for domestic assault survivors that were lost when the state's prior anti-SLAPP law was struck down by the Washington Supreme Court. This is an important protection from abusive defamation lawsuits, which have a chilling effect on reporting.

(Opposed) None.

(Other) Baseless litigation should be stopped, but the First Amendment right to bring a meritorious case should be supported. The bill is not narrowly drawn as drafted and will sweep up legitimate disputes. The exceptions to the exceptions within this bill are too broad. The bill will allow anti-SLAPP motions to be filed in cases involving property line disputes and insurance coverage disputes.

The prior version of this bill was used against legitimate claims like boundary disputes, added time and expense to resolving claims, and was held unconstitutional because it required dismissal of nonfrivolous cases without a trial.

The right to bring a claim for defamation is a fixture of American jurisprudence, holds accountable those who lie or act with reckless disregard for the truth, and creates an incentive to rely on fact and think before acting. Defamation defendants will celebrate passage of this bill.

Persons Testifying: (In support) Senator Padden, prime sponsor; Antoinette Bonsignore; Bruce Johnson, Davis Wright Tremaine LLP; and Lane Shetterly, Uniform Law Commission.

(Other) Jesse Wing and Ian Birk, Washington State Association for Justice; Clint Meyers; and Jeffrey Needle, Washington Employment Lawyers Association.

Persons Signed In To Testify But Not Testifying: Becky Roe, Washington State Association for Justice.