
Civil Rights & Judiciary Committee

SSB 5009

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 Summary of Substitute Bill

- 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 is resolved.
- Awards prevailing movants costs, expenses, and attorneys' fees.
- Authorizes an immediate interlocutory appeal by right if the special motion is denied.

Hearing Date: 3/17/21

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."

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.

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 Substitute 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 state 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; or
11. brought under the consumer protection act, chapter 19.86 RCW.

However, the foregoing exclusions 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.

Stay of Proceedings.

Once the special motion is filed, 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 frivolous 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.

UPEPA 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.