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Washington State Court Issues Nation's First Appellate Decision on the Uniform Public Expression Protection Act

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In 2019, Varisha Khan made political history in Washington when she became one of the first Muslim women elected to public office in the state. Little did the Redmond city council member know, but her campaign would also take on historic legal significance. Years after her election, Khan was sued for statements she made in an article written during the campaign. Refusing to withdraw the article, Khan instead defended her speech rights using the Uniform Law Commission's new anti-SLAPP statute: [the Uniform Public Expression Protection Act](#) (UPEPA).

Passed by Washington in 2021 and other states since, UPEPA provides expedited procedures and substantial protections to protect expressive rights against abusive litigation. Thanks to this new law, Khan's rights have now been vindicated. Her case has also resulted in the first appellate UPEPA decision in the country, *Jha v. Khan*, 520 P.3d 470 (Wash. Ct. App. 2022), providing a strong roadmap for how the law should be applied to protect expression.

The story of Khan's historic candidacy and campaign speech is similar to many SLAPP stories involving individuals with money and questionable scruples who dislike critical speech. As part of her campaign against multi-term incumbent Hank Myers, Khan published an article on [medium.com](#) calling for Redmond's citizens to "[v]ote for ethical, bold leadership." *Id.* at 475. In her article, Khan voiced concerns she heard while campaigning that Redmond's elected officials were "bought by developers" who cared more about business interests than "the needs and voices of the people who live and work here." The article went on to give recent examples underlying this concern, noting where "Myers voted in support of developer proposals whom he took money from" like "Sidd Jha, who gave the \$1,000 maximum donation and was recently involved in a legal case of revenge porn and abuse of his ex-girlfriend." Ultimately, Khan provided her opinion about Myers' votes and Jha's contribution, which she believed "threaten[ed] to create a dangerous precedent where developers can disregard public transparency."

Notwithstanding the existence of a lawsuit against him or public records about his contribution, Jha took issue with Khan's "unflattering statements" and sued her and her spouse for defamation, invasion of privacy, and intentional infliction of emotional

distress. *Id.* After giving written notice of intent to file a dispositive motion under UPEPA, Khan waited more than the 14 days required by Washington’s law—providing Jha an opportunity to either remove his meritless claims or assert meritorious ones—before filing her motion and requesting summary dismissal on all grounds. *Id.* (citing RCW 4.105.020(1)). Although UPEPA’s automatic stay of “[a]ll other proceedings” was already in effect, RCW 4.105.030; UPEPA § 4, Jha’s rotating cast of attorneys nevertheless began filing multiple motions and requests for amendment to circumvent Khan’s request for dismissal of the suit with prejudice. Statute notwithstanding, the trial court allowed Jha’s amendments—and more confusingly—denied Khan’s motion by asserting that Jha had established a *prima facie* case as to falsity, there were genuine disputes as to the alleged falsity of her statement, and the First Amendment could not be applied before resolution of those disputes by a jury.

Khan immediately appealed as of right under UPEPA, and ultimately, Division I of the Court of Appeals of the State of Washington reversed on all grounds. While noting that UPEPA requires its terms to “be broadly construed and applied to protect the exercise of” rights protected under the First Amendment and state constitution, RCW 4.105.901; UPEPA § 11, Judge Stephen J. Dwyer’s [opinion](#) deftly handles a number of important issues of first impression. Carefully walking through UPEPA’s multi-step analysis, the decision provides courts around the nation with guidance as to how to apply the uniform law—which expressly requires consideration for “the need to promote uniformity of the law with respect to its subject matter among states that enact it.” RCW 4.105.902; UPEPA § 12.

As an initial matter, the Court determined that Khan’s campaign article easily fell within the scope of UPEPA’s protections because her speech was regarding the official activities of an elected official and so clearly involved a matter of public concern. 520 P.3d at 477 (citing RCW 4.105.010(2)); UPEPA § 2(b). Specifically, the Court noted that the article “posits that Myers votes in the interest of unsavory business interests and political financiers rather than his constituents and urges Redmond residents to vote for Khan as the better alternative.” *Id.* at 478. At the same time, the Court rejected Jha’s claim that his complaint arose from Khan’s activities as a city council member because the suit was brought against her in an individual capacity based on her private campaign speech—which did not implicate UPEPA’s exception for claims asserted against government officials acting in their official capacity. *Id.* at 482 n. 11 (citing RCW 4.105.010(3)(a)(i)); UPEPA § 2(c).

Moving on to the merits of Jha’s claim—viewed under Rule 12 and 56 standards to avoid constitutional problems that plagued early anti-SLAPP statutes—the Court determined that Jha’s lawsuit should have been dismissed on multiple grounds. First, Jha had not met his burden to establish a *prima facie* case regarding falsity because Khan’s statements about his connection to allegations of abuse were true and, in the context of the political article in which they appeared, could not reasonably be read to imply anything false. *Id.* at 479-81. Second, the Court ruled that Jha necessarily failed his burden as to the article’s concern regarding “public transparency” because Khan’s predictive statement and fears about what might happen in the future were protected opinion—incapable of being false as a matter of law. *Id.* at 482. Last, citing a request

by [amici](#) (including the Reporters Committee for Freedom of the Press and 18 other media organizations), the Court reversed the trial court's refusal to apply the fair reporting privilege, holding that "the question of privilege must be addressed when ruling on a UPEPA motion" and waiting would defeat the legislative purpose in enacting UPEPA. *Id.* at 482-85.

The Court also vacated the lower court's decisions granting Jha's requests to file amended complaints, affirming that the attempted amendments were untimely under the plain language of Washington's law and a plaintiff should not be able to avoid dismissal under UPEPA simply by amending the challenged complaint. *Id.* at 485-86. As such, the Court held that UPEPA required dismissal with prejudice and Khan was entitled to mandatory fees, costs, and litigation expenses at both the trial and appellate level as the prevailing party. *Id.* at 486 (citing RCW 4.105.090(1)); UPEPA § 10. While Jha has already unsuccessfully moved for reconsideration and will no doubt continue to try to keep his suit alive through appeal, one thing is undisputable: attorneys in jurisdictions that have passed UPEPA now have a strong means to protect their clients' right to expression against meritless suits.

Varisha Khan and her spouse were represented by Caesar Kalinowski IV and Bruce E.H. Johnson of Davis Wright Tremaine LLP. Bruce was closely involved in negotiating the enactment of Washington's UPEPA bill and he serves as co-chair of the MLRC's anti-SLAPP committee alongside Texas lawyer Laura Prather. Shontee Pant is a media associate in Davis Wright's Seattle office.