No. 89674-7

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 309029-III

MICHAEL HENNE,

Plaintiff/Respondent,

v.

CITY OF YAKIMA, a Municipal Corporation,

Defendant/Petitioner

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF CITY OF YAKIMA'S PETITION FOR REVIEW

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STATEMENT OF ISSUES

The Washington State Association of Municipal Attorneys ("WSAMA") sought leave to address only one issue:

Whether, given the legislature's clear statement of policies and procedures in RCW 4.24.525, it would violate separation of powers and be inconsistent with the statute for courts to engraft onto the anti-SLAPP laws an implied exception ("safe harbor") for a plaintiff who, on notice or motion, voluntarily amends his or her complaint to withdraw allegations subject to anti-SLAPP fees and costs prior to the special hearing mandated by RCW 4.25.525.

STATEMENT OF THE CASE

WSAMA joins in the Statement of the Case and facts as asserted by the City of Yakima in its Petition for Review, at pp. 3-7.

ARGUMENT

BY CREATING A "SAFE HARBOR" OUT OF WHOLE CLOTH, THE COURT OF APPEALS CROSSED THE LINE BETWEEN LEGISLATIVE AND JUDICIAL RESPONSIBILITIES AND MODIFIED RCW 4.25.525 IN THE GUISE OF CONSTRUING IT.

A. WSAMA Agrees with Judge Fearing's Partial Concurrence

WSAMA agrees with Judge Fearing's thoughtful partial dissent below, on the subjects of applicability of the anti-SLAPP laws, Yakima's standing to assert immunity and claim fees. *See* ___ Wn.App. ___, ___,

313 P.3d ___, 1191-97. WSAMA believes that Judge Fearing, if anything, did not go far enough.

First, Judge Fearing reached the obvious conclusion (in partial concurrence) that the City of Yakima is a "person" who can claim immunity, and who is entitled to fees, costs, and a statutory penalty under some circumstances:

> ¶ 34 We are not free to use our own judgment and rule that a government entity should not receive protections under RCW 4.24.525. Instead, we must apply the statute's broad definition of "person." A reviewing court's primary goal is to determine and give effect to the legislature's intent and purpose in creating the statute. *Woods v. Kittitas County,* 162 Wn.2d 597, 607, 174 P.3d 25 (2007); *Am. Cont'l Ins. Co. v. Steen,* 151 Wn.2d 512, 518, 91 P.3d 864 (2004). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Woods,* 162 Wn.2d at 607, 174 P.3d 25; *State v. J.M.,* 144 Wash.2d 472, 480, 28 P.3d 720 (2001). We must give meaning to every word and interpret the statute as written. *Enter. Leasing, Inc. v. City of Tacoma Fin. Dep't,* 139 Wn.2d 546, 552, 988 P.2d 961 (1999); *Prosser Hill Coal. v. County of Spokane,* 309 P.3d 1202, 1207 (2013).
>
> ¶ 35 With the majority, I conclude that a "person" under the 2010 anti-SLAPP statute includes a government entity such as a city. My conclusion is based upon principles of statutory interpretation and decisions from California. "Person" under the 2010 statute, unlike the 1989 version, includes a "corporation" and "any legal entity," both which, under lay and legal definitions, include a city and any other government entity.
>
> ¶ 36 Courts should consider the meaning that naturally attaches and take into consideration the meaning that attaches from the context. *State v. Ratliff,* 140 Wn.App. 12,

16, 164 P.3d 516 (2007). In construing statutory language, words must be given their ***1195** usual and commonly accepted meaning. *In re Adoption of Lybbert,* 75 Wn.2d 671, 674, 453 P.2d 650 (1969). RCW 4.24.525(1)(e) omits the terms "city," "government entity," and "municipal corporation." Such an omission might lead one to conclude a municipal corporation was not desired as a "person" under the anti-SLAPP statute. Many statutory definitions of "persons" include a "government entity" or "municipal corporation," which suggests the omission of such words is intentional. *See* RCW 5.51.010(3); RCW 7.04A.010(6); RCW 23B.01.400(23); RCW 70.105D.020(19). At the same time, if the legislature did not wish a government entity to be included as a "person," the legislature could have expressly stated such through exceptions.

¶ 37 Under RCW 4.24.525(1)(e), a "person" includes a "corporation," not simply a private or for profit corporation. Alternate lay definitions for a "corporation" include "the municipal authorities of a town or city," and "a body formed and authorized by law to act as a single person" although "constituted by one or more persons" and legally endowed with "various rights and duties together with the capacity of succession." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 510 (1993). *Black's Law Dictionary* includes a "public" "political" and "municipal" corporation within its classifications of "corporation." BLACK'S LAW DICTIONARY 391–93 (9th ed.2009).

¶ 38 RCW 4.24.525(1)(e) also defines a "person" as any "legal or commercial entity." *Black's Law Dictionary* defines a "legal entity" as "[a] body, other than a natural person, that can function legally, sue or be sued, and make decisions through agents." Black's, *supra,* at 976. A city has a legal existence, by which it may make decisions, sue, and be sued. A city is a "legal entity." In many decisions, government or public entities are referred to as legal entities. *See, e.g., Pub. Util. Dist. No. 1 of Snohomish County v. Taxpayers & Ratepayers of Snohomish County,* 78 Wn.2d 724, 737, 479 P.2d 61 (1971).

> ¶ 39 RCW 4.24.525(1)(e) partially defines a "person" as "any other legal *or* commercial entity." (Emphasis added.) Use of the word "or" denotes that noncommercial entities are included. We presume that the word "or" does not mean "and" and that a statute's use of the word "or" is disjunctive to separate phrases unless there is a clear legislative intent to the contrary. *HJS Dev., Inc. v. Pierce County,* 148 Wn.2d 451, 473 n. 95, 61 P.3d 1141 (2003); *State v. Weed,* 91 Wn.App. 810, 813, 959 P.2d 1182 (1998). Noncommercial entities include nonprofits and government entities.
>
> ¶ 40 Because the California anti-SLAPP statute served as a model for the Washington Act, courts can use the borrowed statute rale to interpret the Washington Act. *Fielder v. Sterling Park Homeowners Ass'n,* 914 F.Supp.2d 1222, 1234 (W.D.Wa.2012) (court used California law to interpret Washington anti-SLAPP statute); *Aronson v. Dog Eat Dog Films, Inc.,* 738 F.Supp.2d 1104, 1110 (W.D.Wa.2010); *Wyrwich, supra,* at 689. The California Code of Civil Procedure grants a "person," sued for exercising a right to petition or free speech, the opportunity to file a special motion to strike the offending claims. Cal. Civ. Proc. § 425.16(b)(1). The statute does not define the term "person." Nevertheless, California courts have held that a municipal corporation is a "person" under the state's anti-SLAPP statute. *Schaffer v. City & County of San Francisco,* 168 Cal.App.4th 992, 85 Cal.Rptr.3d 880 (2008); *Visher v. City of Malibu,* 126 Cal.App.4th 364, 367 n. 1, 23 Cal.Rptr.3d 816 (2005); *Bradbury v. Superior Court,* 49 Cal.App. 4th 1108, 1114, 57 Cal.Rptr. 2d 207 (1996).
>
> ¶ 41 In short, municipal corporations are persons, my friend.

___ Wn.App. at ___, 313 P.3d at 1194-96.

Having reached this conclusion, Judge Fearing expresses some doubt as to how the majority could conclude that the case is moot:

> ¶ 43 The key concern of anti-SLAPP laws is to spare the moving party from the expense of defending a lawsuit brought to quell free expression. That purpose is thwarted if a plaintiff can amend his complaint to avoid payment of those fees. One can argue that, if the case is quickly dismissed by an anti-SLAPP motion, the fees incurred by the defendant are minimal such that they should not be shifted to the claimant. *But the fees will not always be minimal. Preparing the motion involves analysis of facts and claims as well as legal research and writing. Because of the importance of exercising free speech and the worth of a discussion of matters of public concern, the statute considers any fees too high. The one exercising its rights should not bear any costs.* Thus, I would allow the city of Yakima to recover the penalty and reasonable attorney fees and costs, if, upon remand, Yakima "prevails" on its motion to strike.

Henne v. City of Yakima, ___ Wn.App. __, 313 P.3d 1188, 1196 (Fearing, J., dissenting in part) (emphasis supplied). It is the concern addressed by Judge Fearing, that "the fees will not always be minimal," that prompts this Brief. The legislature did not intend that a defendant entitled to strike a SLAPP claim have to bear *any* costs.

B. Because Yakima is a "Person" Entitled to the Protections of RCW 4.24.525, Separation of Powers is Implicated By the Safe Harbor Created Below.

WSAMA, your amicus, believes that the question of a "safe harbor" is for the legislature, not the courts. The parameters of such a safe harbor are unknown and presently unknowable. Cities like Yakima would be forced to litigate these issues extensively, in situations, like the case at bench, in which a motion was made, and on the eve of hearing, the SLAPP

plaintiff dismissed claims subject to the statute. The court of appeals evidently decided that, because Yakima showed no "prejudice," Yakima was not entitled to the reimbursement of fees and costs, and the penalty to which the legislature already decided, in adopting RCW 4.24.525, Yakima was entitled.

This was error, and will lead to other situations in which a plaintiff sues without fear of anti-SLAPP immunity, because, after all, it can amend the complaint to dismiss the SLAPP claims, if the defendant asserts the defense. There are constitutional implications to this Court's often-repeated statement that the courts "may not create an exception in the law where there is none." *State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990). *See also* Washington Constitution, Art. 2, § 1.

First, the statute describes with great particularity the proceedings contemplated:

> (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.

In other settings, a party may voluntarily dismiss its claims against the defendant, but in doing so may not prejudice the defendant's entitlement to attorney's fees and costs, if any. See *Cork Insulation Sales Co. v. Torgerson*, 54 Wn.App. 702, 705, 986 P.2d 841 (1989); *Hawk v. Branjes*, 97 Wn.App. 776, 986 P.2d 841 (1999).

Similarly, in *Johnson v. Horizon Fisheries, LLC*, 148 Wn.App. 628, 201 P.3d 346 (2009), for example, the court upheld an award of attorney's fees to the defendant after the plaintiff voluntarily dismissed. If the defendant is entitled to fees related to the lawsuit, the plaintiff cannot ordinarily take that right away from the defendant by voluntarily dismissing; the right to fees vests when the motion is filed, if not earlier.

This is not true where, for example, the defendant's entitlement to fees depends upon a judgment in its favor. *Wachovia SBA Lending v. Kraft*, 138 Wn.App. 854, 158 P.3d 1271 (2007). But RCW 4.24.525 is not such a statute:

> (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:

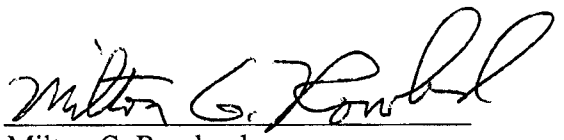
> (i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;
>
> (ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and
>
> (iii) Such additional relief, including sanctions upon 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

(Emphasis supplied.) All that the anti-SLAPP statute requires is that the defendant prevail on the special motion to strike. By allowing the plaintiff to, in effect, voluntarily dismiss its SLAPP claims in the face of a motion

to strike, and to require a defendant to provide notice of intent to file such a motion, WSAMA believes that the court below impermissibly intruded into a legislative sphere, and amended the statute in the guise of construing it. See *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 36-37, 100 P.3d 814 (2004) (court should not question the wisdom of a statute, even if its results seem unduly harsh, or rewrite a statute with which it does not entirely agree).

WSAMA respectfully request this Court to accept review, reverse that portion of the decision below that creates a "safe harbor" for those filing SLAPP suits, and remand.

RESPECTFULLY SUBMITTED this 4th day of February, 2014.



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The Honorable Ronald R. Carpenter, Supreme Court Clerk,

On behalf of Milton G. Rowland, WSBA No. 15625, attached hereto please find the following for filing in the above referenced matter:

1. Motion of the Washington State Association of Municipal Attorneys for Leave to File Brief of Amicus Curiae in Support of City of Yakima's Petition for Review;
2. Declaration of Milton G. Rowland in Support of Washington State Association of Municipal Attorneys' Motion for Permission to File Brief of Amicus Curiae in Support of City of Yakima's Petition for Review;
3. Brief of Amicus Curiae Washington State Association of Municipal Attorneys in Support of City of Yakima's Petition for Review; and
4. Certificate of Service.

Thank you for your attention to this matter.

Pam McCain
Foster Pepper PLLC