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No. ~~90184-4~~

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SUPREME COURT
OF THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC.,

Appellant,

v.

CHARLES J. HEDLUND,

Respondent

BRIEF OF AMICUS CURIAE THE McCLATCHY COMPANY, PIONEER NEWS GROUP, AND SOUND PUBLISHING

GORDON THOMAS HONEYWELL LLP

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I. IDENTITY AND INTEREST OF AMICUS

A. The McClatchy Company

The McClatchy Company, through its affiliates, is the third-largest newspaper publisher in the United States with 29 daily newspapers and related websites, including The Olympian, The News Tribune, Tri-City Herald and The Bellingham Herald, as well as numerous community newspapers and niche publications.

B. Pioneer News Group

Pioneer News Group is a family-owned media entity striving to combine the best elements of family ownership with the advantages and operating efficiencies of a larger organization. Pioneer News Group is the majority owner of a number of separate publishing businesses, each of which operates a daily newspaper in numerous communities located in Oregon, Utah, Idaho, Montana and Washington. The company also owns weekly newspapers. The Anacortes American, the Argus, the Courier Times, the Ellensburg Daily Record, and the Skagit Valley Herald, are all members of the Pioneer family.

C. Sound Publishing

With its 43 newspapers titles, Sound Publishing is the largest community media organization in Washington State. Its titles deliver relevant, local news that directly affects the lives of those who raise

families and work in the 100+ communities it serves. Sound Publishing's Washington news products appear in print and digital formats and includes the Everett Daily Herald, the Peninsula Daily News, the alternative publication the Seattle Weekly, the Arlington Times, Marysville Glove, Auburn Reporter, Bellingham Business Journal, Herald Business Journal, Okanogan Valley Gazette-Tribune, Renton Reporter, Kent Reporter, Covington/Maple Valley Reporter, Bainbridge Island Review, Central Kitsap Reporter, North Kitsap Herald, Kingston Community News, Bonney Lake Courier Herald, Enumclaw Courier Herald, Bothell/Kenmore Reporter, Kirkland Reporter, Redmond Reporter, Federal Way Mirror, Forks Forum, Sequim Gazette, Journal of the San Juan Islands, Islands' Sounder, Islands' Weekly, Issaquah/Sammamish Reporter, Bellevue Reporter, Snoqualmie Valley Record, Mercer Island Reporter, South Whidbey Record, Whidbey News Times, Whidbey Examiner and the Vashon-Maury Island Beachcomber.

II. ARGUMENT

Washington's anti-SLAPP statute, RCW 4.24.525, was enacted to provide an early remedy for meritless lawsuits initiated with the goal of using the court system to chill free speech. LAWS of 2010, ch. 118, § 1 – 2. In this case, petitioner Charles Hedlund discussed his former

employer's work conditions in an online job-seeking forum. Opinion at 2. The former employer, AKS, Inc., then sued Mr. Hedlund under a breach of confidentiality agreement claim to stop his online postings. *Id.* at 3. Mr. Hedlund moved to dismiss under the anti-SLAPP statute. *Id.* The Honorable Mary Yu determined that the statute applied, AKS was unable to prove the merits of its claim, and awarded Mr. Hedlund attorney's fees and $10,000. *Id.* AKS appealed, and Division One found the anti-SLAPP statute inapplicable to breach of confidentiality agreements. *Id.* at 10.

This case poses the important question of whether the anti-SLAPP statute is inapplicable to certain causes of action. The current Court of Appeals decision significantly impacts the availability of valuable information, especially in the context of the Internet, and undermines the anti-SLAPP statute's purpose of providing an early remedy for frivolous claims targeted at deterring free speech. RAP 13.4(b)(4) is, therefore, satisfied and this Court should accept review.

A. In Determining Whether Speech Is On A Point Of Public Concern, The Court Should Focus On The Principal Reason For The Lawsuit.

In determining whether the anti-SLAPP statute applies, the court must evaluate the "principal thrust or gravamen of the claim" to determine whether it targets a matter of public participation. *Davis v.*

Cox, __ Wn. App. __, 325 P.3d 255, 261 (2014). Under the statute's terms, it "applies to any claim, however characterized, that is based on an action involving public participation and petition." RCW 4.24.525(2). "Claim" is defined to include "cause of action." RCW 4.24.525(1)(a). Furthermore, the legislature provided that the "act shall be applied and construed liberally," LAWS of 2010, ch. 118, § 3, to effectuate its purpose of remedying abuse of the judicial process by providing an early remedy for meritless lawsuits targeting free speech, LAWS of 2010, ch. 118, § 1 – 2.

The Court of Appeals has held that defendants "'in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant.'" *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 71, 316 P.3d 1119 *review granted,* 180 Wn.2d 1009, 325 P.3d 913 (2014) (quoting *Martinez v. Metabolife Intern., Inc.*, 113 Cal. App. 4th 181, 188, 6 Cal. Rptr. 3d 494 (2003)). In reaching this rule, the *Dillon* Court reasoned that

> it is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.

Id. at 72. Pursuant to this logic, the question becomes whether the protected activity is the principal reason for the claim or whether the protected activity is merely supporting evidence. As the Division One Court of Appeals illustrated in *Davis* v. *Cox*, the "gravamen of the claim" is not the cause of action, but rather the underlying activity that gives rise to the claim. 325 P.3d at 264. In *Davis*, the court looked past the breach of a fiduciary duty cause of action to find that the claim was truly meant to prevent the Directors of a co-op from participating in a nonviolent boycott. *Id.* at 264-65.

Here, the Court of Appeals declined to follow *Davis* concluding the cause of action dictated applicability of the anti-SLAPP statute. Opinion at 10 ("The issue here is a simple contractual issue – whether or not Hedlund violated a contract he signed with his former employer."). By holding the statute does not apply to "someone who signed a confidentiality agreement potentially limiting his right to speak," Opinion at 7, the Court of Appeals erroneously bypassed the required analysis of the first prong, whether the breach of contract claim *arose* from the exercise of free speech.

Further, the Court of Appeal's reliance on *World Financial Group, Inc. v. HBW Insurance & Financial Services, Inc.* is misplaced because in that case, the court underwent a thorough analysis of the speech at

issue to hold that it was a private dispute about stealing customers, not promoting workforce mobility and free competition. 172 Cal. App. 4th 1561, 1569-70, 92 Cal. Rptr. 3d 227 (2009).

In contrast to the situation in *World Financial Group, Inc.*, the core target of AKS's lawsuit was Hedlund's speech. In fact, AKS's lawsuit sought "permanent injunctive relief against Hedlund from posting or otherwise disclosing confidential information of AKS in violation of his Confidentiality Agreement[.]" CP 271. The remedy sought is highly relevant. In *Davis*, the court explained:

> In seeking to identify the principal thrust or gravamen of the Members' claim, it is instructive to look to the remedy sought. One remedy the Members sought was permanent injunctive relief. In essence, the Members sought to have the court permanently enjoin the Directors from continuing the boycott. Because the nonviolent elements of boycotts are protected by the First Amendment, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), the Members' desired remedy reveals that the principal thrust of their suit is to make the Directors cease engaging in activity protected by the First Amendment. This is of great significance in resolving the question presented.

Davis, 325 P.3d at 264 -265.

In the context of employer-employee claims, there are situations where communications are merely used as evidence to support a cause of action (e.g. statements made to the Human Rights

Commission).[1] But, in cases like *Hedlund*, it is the speech itself that creates the lawsuit. Certainly, an employee's postings on an Internet message board designed to give information about the employer to prospective employees meet the threshold for public concern.

B. When Determining Whether Speech Is A Matter Of Public Concern, The Court Should Consider The Context Of The Entire Communication.

To fall under Washington's anti-SLAPP statute, the underlying action must involve "public participation and petition." RCW 4.24.525(2). When determining whether speech is connected with an issue of public concern, the court should evaluate the entire context of the communication, not merely one statement out of context. Applying a similar contextual analysis to consumer comments, courts have considered whether a comment is made in the "context of information helpful to consumers" to determine if it involves a matter of public interest. *Makaeff v. Trump University, LLC*, 715 F.3d 254, 262 (9th Cir. 2013) (finding internet posts and letters were meant to warn and provide information to other consumers); *see also Gilbert v. Sykes*, 147 Cal. App. 4th 13, 23-24, 53 Cal. Rptr. 3 (2007) (evaluating the entire

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[1] *See Martin v. Inland Empire Utilities Agency*, 198 Cal. App. 4th 611, 625, 130 Cal. Rptr. 3d 410 (2011) ("the pleadings establish that the gravamen of plaintiff's action against defendants was one of racial and retaliatory discrimination, not an attack on Atwater or the board for their evaluations of plaintiff's performance as an employee.")

context of the website to find a purpose of providing helpful information to potential consumers and a contribution to a general debate over plastic surgery).

Here, the discussions at issue are akin to consumer comments and provide helpful information to prospective employees. In recent years, there has been a dramatic shift in employment practices as companies utilize and encourage employee mobility to respond to global competition. Katherine V.W. Stone, *Employee Representation in the Boundaryless Workplace*, 77 Chi.-Kent L. Rev. 773, 776 (2002). Job seekers have changed their approach as well, researching potential employers online and gathering invaluable information from various online sources including past and current employees. *Id.* at 773-74.

As the workplace today reflects an increasingly mobile workforce partially dependent on the information provided by current or former employees, such discussions become a matter of public concern. Applying the anti-SLAPP statute to this topic merely ensures that employers do not bring frivolous lawsuits meant to curb opinions and sharing of information. If the complaint is not frivolous, employers have recourse in the second prong of the anti-SLAPP analysis. Amici urge this Court to accept review and extend the protections of RCW

4.24.525 to public internet commentary targeted at issues of public concern.

III. CONCLUSION

For the reasons set forth above, Amici request that this Court grant the Petition for Review.

Dated this 21st day of July 2014.

Respectfully submitted,

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Attached for filing in the above case are:

Motion for Leave to File Brief of Amicus Curiae The McClatchy Company, Pioneer News Group, and Sound Publishing

Brief of Amicus Curiae The McClatchy Company, Pioneer News Group, and Sound Publishing

Thank you.

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