No. 90284-4

SUPREME COURT
OF THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC.,

Plaintiff/Appellant,

v.

CHARLES J. HEDLUND,

Defendant/Respondent.

ALASKA STRUCTURES, INC.'S RESPONSE TO AMICUS CURIAE BRIEF OF THE McCLATCHY COMPANY, PIONEER NEWS GROUP, AND SOUND PUBLISHING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. INTRODUCTION.

The McClatchy Company, Pioneer News Group, and Sound Publishing (collectively, "Amici") contend that the Supreme Court should grant review under RAP 13.4(b)(4) for two reasons: (1) Division One allegedly concluded that "the cause of action dictated applicability of the anti-SLAPP statute;" and (2) Division One purportedly evaluated "merely one statement out of context" rather than viewing "the entire context of the communication." (Brief of Amicus Curiae The McClatchy Company, Pioneer News Group, and Sound Publishing ("Publishers' Br.") at 5, 7.) But Division One properly looked to the "gravamen" of Alaska Structures, Inc.'s ("AKS") claim for breach of a confidentiality agreement and correctly concluded that Petitioner Charles J. Hedlund had failed to satisfy his initial burden of demonstrating that his disclosures about AKS's security system involved an "issue of public concern" within the meaning of the anti-SLAPP statute, RCW 4.24.525.

II. ARGUMENT.

A. Division One Correctly Looked to the Gravamen of AKS's Claim in Light of the Specific Statements at Issue.

Amici agree that a court should look to the "principal thrust or gravamen of the claim" to determine whether it is based on "public participation and petition" within the meaning of Washington's anti-

SLAPP statute. (*See* Publishers' Br. at 3.) But Amici contend that Division One disregarded this standard and instead concluded that the statute was "inapplicable to breach of confidentiality agreements." (Publishers' Br. at 3.) Amici also advocate for a standard that asks whether the allegedly protected activity is the "principal reason" for the claim. (Publishers' Br. at 5.) Amici then opine that the "core target" of AKS's breach of confidentiality agreement claim "was Hedlund's speech" and that AKS sued Hedlund "to stop his online postings." (Publishers' Br. at 3, 6.) But Amici's proposed "principal reason" standard would inject a subjective intent element into the anti-SLAPP analysis that courts have explicitly rejected. Amici also distort Division One's decision by asserting that it exempts breach of confidentiality agreement claims from the anti-SLAPP statute's reach.

As to Amici's espousal of a "principal reason" standard, it is both factually unsupported and contrary to authority rejecting a subjective intent element of the anti-SLAPP analysis.[1] For example, in *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, the California Supreme Court rejected the relevance to the anti-SLAPP analysis of plaintiff's subjective motivations in bringing the action. 29 Cal. 4th 53, 58, 52 P.3d 685, 124

[1] By focusing on the irrelevancy of AKS's subjective intent in bringing suit, AKS is not conceding Amici's unsupported opinion of AKS's intent. Rather, given that intent is irrelevant, there is no reason to waste the Court's time arguing that factual issue.

Cal. Rptr. 2d 507 (2002). *See also City of Cotati v. Cashman*, 29 Cal. 4th 69, 74, 52 P.3d 695, 124 Cal. Rptr. 2d 519 (2002) ("[T]he question of subjective intent is not relevant [to the anti-SLAPP inquiry]."). And the "fact the Legislature expressed a concern in the statute's preamble with lawsuits brought primarily to chill First Amendment rights does not mean that a court may add this concept as a separate requirement in the operative sections of the statute." *Equilon*, 29 Cal. 4th at 60-61 (internal quotation marks omitted). Rather, the "relevant focus is not on the [plaintiff]'s litigation tactics, but on the substance of the [plaintiff]'s lawsuit." *OM Fin. Life Ins. Co. v. Keel*, Case No. C 07-04723 MHP, 2008 U.S. Dist. LEXIS 5677, *15 (N.D. Cal. Jan. 25, 2008) (internal quotation marks omitted). *See also Anheuser-Busch Cos. v. Clark*, Case No. 2:13-cv-00415-GEB-CKD, 2013 U.S. Dist. LEXIS 100805, *24 (E.D. Cal. July 18, 2013) (rejecting relevance of subjective intent and concluding that "Defendant's evidence of Plaintiffs' motivation does not establish that Plaintiffs' claims arose from Defendant's protected activity"); *Episcopal Church Cases*, 45 Cal. 4th 467, 477-78, 198 P.3d 66, 87 Cal. Rptr. 3d 275 (2009) (fact that protected activity may have triggered claim does not mean it arose from the activity; rather, the "critical consideration" is whether claim is based on protected speech).

As to Amici's assertion that Division One immunized all breach of

confidentiality agreement claims from the anti-SLAPP statute's reach, AKS previously addressed this faulty contention, or permutations thereof, in response to Hedlund's petition for review and the amicus curiae memorandum of the Washington Employment Lawyers Association. (*See* Alaska Structures, Inc.'s Answer to Hedlund's Petition for Review at 14-16; Alaska Structures, Inc.'s Response to Amicus Curiae Memorandum of Washington Employment Lawyers Association at 1-5.) Amici's version of the argument has no more merit than the others.

Amici agree that the principal thrust or "gravamen" of the claim determines whether it is based on "public participation and petition." (Publishers' Br. at 3.) Division One applied that standard, concluding that the "gravamen" of AKS's claim was not any protected activity but rather a private contractual dispute arising from Hedlund's disclosures about AKS's security system in violation of his confidentiality agreement with his former employer. (*See* Opinion at 1, 2, 5, 8-9, 10.) *See also Episcopal Church Cases*, 45 Cal. 4th at 477-78 (concluding that property dispute, "not any protected activity, [was] the gravamen or principal thrust of the action") (internal quotation marks omitted). Therefore, Amici's assertion—based on single statements plucked from the context of the court's holistic discussion—that Division One applied the wrong standard is unavailing.

B. The Context of a Statement on a Private Matter Cannot Trump the Actual Content of the Statement at Issue.

Amici assert that, in determining whether the moving party has met his burden of establishing that his speech involves an issue of public concern, "the court should evaluate the entire context of the communication, not merely one statement out of context." (Publishers' Br. at 7.) Speaking in generalities without reference to Hedlund's disclosures about AKS's security system (the statements at issue), Amici then claim that comments on a "former employer's work conditions" that "give information about the employer to prospective employees" involve an issue of public concern. (Publishers' Br. at 2-3, 7-8.)

Although Amici appear to fault Division One for allegedly ignoring context, they focus on a slightly different argument. Amici assert that generally, an employee's or former employee's comments about an employer are akin to "consumer comments" and therefore involve an issue of public concern essentially as a matter of law. But Amici's assertion is contrary to the wealth of case law identifying the standards and principles governing the "public concern" inquiry.[2]

First, the anti-SLAPP statute does not define an "issue of public

[2] The case law has largely developed in connection with California's anti-SLAPP statute but there has been no dispute that California cases are persuasive authority in this respect because Washington's statute was modeled on California's. *Fielder v. Sterling Park Homeowners Ass'n*, 914 F. Supp. 2d 1222, 1231 n.4 (W.D. Wash. 2012); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1110 (W.D. Wash. 2010).

concern" and California courts have recognized that "it is doubtful an all-encompassing definition could be provided." *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1132, 2 Cal. Rptr. 3d 385 (2003); *see also L.A. Unified Sch. Dist. v. Superior Court of L.A. Cnty.*, Case No. B251693, 2014 Cal. App. LEXIS 659, *24 (July 23, 2014) (citing anti-SLAPP cases and noting that "[c]ourts have struggled with a definition [of public interest], in large part because the analysis is so fact specific"). Thus, Amici's suggestion that any general topic, including their generic "employee information" topic, can constitute an issue of public concern essentially as a matter of law ignores the definitional impediments involved in the inquiry. (*See* Opinion at 6 (public concern/interest terms are "inherently amorphous") (internal quotation marks omitted).)

Second, courts have emphasized that the specific speech or conduct at issue must be evaluated in addressing the "public concern" requirement, rejecting the type of generalities or abstractions that Amici espouse here. *See, e.g., Aronson*, 738 F. Supp. 2d at 1111 (although film addressed issues of widespread public concern, "not all speech in a film is of public significance" for purposes of anti-SLAPP statute; rather, the "issue turns on the specific nature of the speech rather than generalities abstracted from it"); *Commonwealth Energy Corp. v. Investor Data Exch., Inc.*, 110 Cal. App. 4th 26, 34, 1 Cal. Rptr. 3d 390 (2003) (California cases

have rejected "what might be called the synecdoche theory of public issue in the anti-SLAPP statute[;] [t]he part is not synonymous with the greater whole"); *Weinberg*, 110 Cal. App. 4th at 1132 ("a broad and amorphous public interest is not sufficient").

This more focused examination is consistent with the intent that the "public concern/interest" element limit the reach of the anti-SLAPP statute. *See, e.g.*, *Weinberg*, 110 Cal. App. 4th at 1132 ("public interest" requirement intended to limit the type of conduct falling under the statute); *Rivero v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 105 Cal. App. 4th 913, 926, 130 Cal. Rptr. 2d 81 (2003) (noting the Legislature's "goal . . . that the public-issue requirement have a limiting effect"). And the "public concern" limitation takes on particular significance with respect to Washington's statute because it "radically alters a plaintiff's burden of proof" by requiring in the second step that plaintiff demonstrate—by clear and convincing evidence—that it is likely to prevail on its claim. *Jones v. City of Yakima Police Dep't*, Case No. 12-CV-3005-TOR, 2012 U.S. Dist. LEXIS 72837, *8-9 (E.D. Wash. May 24, 2012). Thus, federal courts applying Washington's statute have "carefully consider[ed] whether the moving party's conduct falls within the 'heartland' of First Amendment activities that the . . . Legislature envisioned when it enacted" the statute. *Jones*, 2012 U.S. Dist. LEXIS 72837 at *9. And respecting the "public

concern" limitation is consistent with the Legislature's intention that the statute achieve a balance between a person's right to file lawsuits and to trial by jury and a person's right "to participate in matters of public concern." Laws of 2010, ch. 118, § 1(2)(a).

Third, even if Amici had identified a specific issue of public concern, they fail to make the required connection between that issue and Hedlund's disclosures about AKS's security system, the statements on which AKS's breach of confidentiality agreement claim is based. *See, e.g.*, *Allstate Ins. Co. v. Tacoma Therapy, Inc.*, Case No. 13-CV-05214-RBL, 2014 U.S. Dist. LEXIS 52934, *7 (W.D. Wash. Apr. 16, 2014) ("The key to protection under the Anti-SLAPP statute is a direct connection between the actions of the party faced with a SLAPP suit and an issue of public concern[.]"); *Dyer v. Childress*, 147 Cal. App. 4th 1273, 1280, 55 Cal. Rptr. 3d 544 (2007) (finding that moving parties were "unable to draw any connection" between the topics of widespread public interest addressed in film and plaintiff's claims); *Weinberg*, 110 Cal. App. 4th at 1132 (stating that "there should be some degree of closeness between the challenged statements and the asserted public interest").

Fourth, characterizing the speech as "consumer information" is not alone sufficient to establish an issue of public concern, particularly where, as here, the matter affects an admittedly small number of people. *See,*

e.g., *Commonwealth Energy*, 110 Cal. App. 4th at 34 (in case involving telemarketing, noting that "the general importance of consumer information . . . does nothing to make the sales pitch here implicate an issue of public interest"); *Consumer Justice Ctr. v. Trimedica Int'l, Inc.*, 107 Cal. App. 4th 595, 601-02, 132 Cal. Rptr. 2d 191 (2003) (in case challenging literature for a natural breast enlargement pill, rejecting argument that speech was about herbal supplements in general, an alleged issue of public interest, but was instead about a particular product).[3]

In any event, Division One correctly concluded that, given the facts here, the dispute between Hedlund and his former employer was more akin to those cases involving workplace issues or business relationships. (*See* Opinion at 8-9 (discussing *World Fin. Grp., Inc. v. HBW Ins. & Fin. Servs., Inc.*, 172 Cal. App. 4th 1561, 92 Cal. Rptr. 3d 227 (2009)).) And Division One's conclusion is supported by other cases finding an absence of an issue of public interest in similar workplace contexts. *See, e.g.*, *Price v. Operating Eng'rs Local Union No. 3*, 195 Cal. App. 4th 962, 971-74, 125 Cal. Rptr. 3d 220 (2011); *Du Charme v. Int'l Bhd. of Elec. Workers*, 110 Cal. App. 4th 107, 114-19, 1 Cal. Rptr. 3d 501 (2003); *Rivero*, 105 Cal. App. 4th at 919, 924-29.

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[3] The court in *Wilbanks v. Wolk* stated that consumer information "generally" may concern a matter of public interest, but limited that statement to information that "affects a large number of persons." 121 Cal. App. 4th 883, 898, 17 Cal. Rptr. 3d 497 (2004).

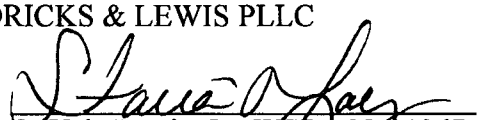
In sum, for all of the foregoing reasons, Amici have not demonstrated any error in Division One's analysis of the "public concern" element warranting Supreme Court review. That Amici would like this Court to "extend the protections of RCW 4.24.525 to public internet commentary targeted at issues of public concern" (Publishers' Br. at 8-9), is not a valid basis to seek review in this case.[4]

III. CONCLUSION.

Amici contend that this case involves an "issue of substantial public interest," RAP 13.4(b)(4), warranting this Court's review of Division One's decision. But the issues Amici identify were properly decided in accordance with applicable standards and principles and Amici's desire to have this Court weigh in on other, broader issues regarding the anti-SLAPP statute that are not implicated by Division One's decision in this case does not justify granting review.

RESPECTFULLY SUBMITTED this 7th day of August, 2014.

HENDRICKS & LEWIS PLLC

By: 

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[4] And granting review on that basis would be superfluous as no one has claimed that the statute does not apply to such commentary. Rather, under the specific facts of this case, AKS argued, and Division One agreed, that Hedlund had failed to demonstrate that his disclosures about AKS's security system involved an issue of public concern.

CERTIFICATE OF SERVICE

I declare that I am a legal assistant employed by Hendricks & Lewis PLLC, 901 Fifth Avenue, Suite 4100, Seattle, Washington 98164, and I duly made service of Alaska Structures, Inc.'s Response to Amicus Curiae Brief of The McClatchy Company, Pioneer News Group, and Sound Publishing by email and U.S. First Class Mail to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 7th day of August, 2014.

Lisa Schaefer

LISA SCHAEFER

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Attached for filing please find Alaska Structures, Inc.'s Response to Amicus Curiae Brief of The McClatchy Company, Pioneer News Group, and Sound Publishing.

As stated in the accompanying certificate of service, the Response has been served on all parties and amici via U.S. Mail and email on today's date.

Thank you,

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