No. 95724-0

SUPREME COURT OF THE STATE OF WASHINGTON

No. 76105-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC.

Appellant,

v.

CHARLES J. HEDLUND,

Respondent/Petitioner.

HEDLUND'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Charles J, Hedlund ("Hedlund") was the Defendant in the trial court and the Respondent in the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

Division One issued an opinion on 1/16/18, attached as **Appendix A**, overturning a significant portion of the trial court's fee and cost award to Hedlund, without any finding of an abuse of discretion by the trial court. The fees and costs had been awarded based on fee shifting language in a Confidentiality Agreement after summary judgment was granted against Plaintiff Alaska Structures ("AKS") on its breach of agreement lawsuit. The Appellate Decision denying the majority of the fees and costs was based solely on the fact the fees and costs were incurred in an earlier appeal by AKS in the same case that succeeded in having dismissal under the then-valid Anti-SLAPP law RCW 4.24.525 re-instated on the basis that the cause of action, although based solely on a posting on an internet jobs forum, was a contract claim and thus not covered by the statute.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in overturning the trial judge's determination that the fees and costs incurred on the first appeal were reasonable and subject to reimbursement under the contract fee shifting language when the appellate court's determination was based solely on the fact the first appeal by AKS of the dismissal order resulted in a re-instatement of the claim, even though on remand summary judgment was granted against AKS and for Hedlund and the case again dismissed?

2. Whether the Court of Appeals erred in overturning the trial judge's determination of the reasonableness of fees and costs without finding an abuse of discretion or that any fees or costs incurred were excessive or duplicative or completely unnecessary to the ultimate outcome of dismissal for Hedlund?

3. Whether the Court of Appeals erred in awarding costs to AKS on the appeal?

4. Whether the Court of Appeals erred in denying fees and costs to Hedlund on the current appeal?

IV. STATEMENT OF THE CASE

Appellant/Plaintiff AKS manufactures tents. In 2012 it sued its former employee Respondent/Petitioner Hedlund for allegedly violating a Confidentiality Agreement by posting a comment on an internet public jobs forum eighteen months after Hedlund left AKS about events occurring after Hedlund had left AKS. The events about which Hedlund posted had been widely publicized and the relevant facts were disclosed in public records as well as court records and court proceedings for two commercial burglary prosecutions. The portion of the internet post for which Hedlund was sued was part of a longer post in which Hedlund called out current AKS employees for masquerading as job seekers on the internet jobs forum to spread false information and dispute posts by actual interviewees and former employees regarding their hostile and abusive treatment by AKS.

After being sued for breach of the Agreement over the post, and after Hedlund's name was disclosed and his dates of employment were known by AKS, Hedlund notified AKS through counsel that the events about which he posted occurred after he had left AKS and that the post could not possibly fall within the Confidentiality Agreement. Nonetheless, AKS persisted with the lawsuit.

The Confidentiality Agreement at issue contained a provision which stated: "In the event either party is required to institute legal action to enforce the provisions of this Agreement, the prevailing party in such litigation shall be entitled to recover its reasonable attorney's fees as well as costs, expenses and disbursements." **CP 786 at ¶ 4.3.**

Finding himself sued as a Defendant by a wealthy, powerful, and litigious former employer, over a comment he posted on a public forum of an internet jobs forum identifying employer fraud, Hedlund obtained counsel working on a contingent fee basis based on the ability to achieve fee reimbursement under the then-valid Anti-SLAPP law. Hedlund promptly sought and obtained dismissal of the lawsuit pursuant to the then-valid Anti-SLAPP law. In the Anti-SLAPP motion proceeding, Hedlund had to establish not just that the Anti-SLAPP law applied to the claim but also that the internet post for which he had been sued did not violate the Confidentiality Agreement. The majority of the briefing and

argument by both parties focused on this latter issue.

When the trial judge, then-King County Superior Court Judge Mary Yu, granted the motion and dismissed the lawsuit, her ruling made clear she was finding that Hedlund's post could not conceivably violate the Agreement as it was posted after Hedlund left the company about events that occurred after he had left, did not reveal confidential information, and that nothing he said could conceivably violate the Agreement. See. e.g., Report of Proceedings 8/17/12 at 49:4-9, attached as **Appendix E**.[1]

AKS appealed to Division One seeking to re-instate the lawsuit. On appeal, much of the briefing and argument again focused on whether or not Hedlund had violated the Confidentiality Agreement, and only partially on whether or not the speech at issue in the claim could fall within the Anti-SLAPP law. See, e.g., **CP 931-933** (excerpts of AKS's appellate reply brief in the first appeal that were made a part of the Summary Judgment Motion at issue in this appeal). AKS vehemently argued that AKS's breach of confidentiality agreement claim against Hedlund should not be dismissed and should be reinstated arguing Hedlund had violated the Confidentiality Agreement.

Division One disagreed with the first prong of the test—whether or not the speech at issue was public participation or speech on a matter of

[1] This Report of Proceedings was made part of the appellate record for the instant appeal.

legitimate public concern—reversing the Anti-SLAPP dismissal. It did so on a flawed basis, finding that "breach of contract" claims could not be covered, rather than exploring the actual conduct at issue (here speech in a public forum about a matter of legitimate public concern–reporting the fraud committed by AKS officials masquerading as job seekers on the internet jobs forum.)[2] The ruling made clear that it was not deciding whether or not the breach of contract claim had merit, and specifically noted that Hedlund might obtain summary judgment on remand and be entitled to his fees and costs under the Agreement:

> [Our holding is] limited to [our] conclusion that Hedlund does not meet the threshold standard for application of the statute and does not in any way preclude the trial court from determining the sufficiency of the complaint for breach of contract on summary judgment. The issue of whether Hedlund violated the confidentiality agreement may well lend itself to summary judgment dismissal, and Hedlund may be entitled to attorney fees under that contract.

Alaska Structures v. Hedlund, 180 Wn. App. 591, 603-04, 323 P.3d 1082 (2014).

After re-instatement of the lawsuit, AKS did not drop its case but continued to litigate it. Hedlund moved for summary judgment and again obtained dismissal for the second time, this time as summary judgment, with a second judge[3] also determining that AKS could not show that

[2] See Hedlund's Petition for Review of that first Division One ruling, attached as **Appendix D**, for a detailed explanation of the flaws with Division One's earlier holding.
[3] The Honorable Suzanne Parisien.

Hedlund's internet post violated the Confidentiality Agreement. AKS continued to vehemently argue at the summary judgment stage that the Confidentiality Agreement had been violated.

On 9/30/16, the Honorable Suzanne Parisien granted summary judgment for Hedlund finding, as Judge Yu had previously done, that AKS had not shown and could not show that the post by Hedlund violated the Confidentiality Agreement. See **CP 263-265**. The Order declared Hedlund the prevailing party and

> Orders that pursuant to the Confidentiality Agreement paragraph 4.3 that Defendant shall be awarded his reasonable attorney's fees and all costs incurred in this action to date, including fees and costs incurred in connection with the Georgia proceedings, the Division One Court of Appeals action, before the Washington State Supreme Court, and while litigating as a John Doe. These fees and costs shall be paid by Plaintiff Alaska Structures. The appellate cost award issued by the appellate courts against Hedlund is deemed a cost and as such it, and any interest, would be required to be repaid to Hedlund by Alaska Structures. The amount of the attorney's fees and costs shall be determined by this Court after subsequent briefing and hearing unless the parties reach agreement as to the amounts of such awards. Defendant shall be entitled to an award of reasonable attorney's fees and all costs incurred in connection with such fee and cost motion, the amounts of which shall be determined by the Court in conjunction with the fee and penalty motions.

CP 264-265. Hedlund provided detailed copies of every attorney invoice and details as to all costs as well as past fee awards for Hedlund's counsel and supporting declarations as to the reasonableness of her rates. **CP 266-384, 458-462**. In ruling, the trial court reviewed every time entry and cost

charge and the complete trial court and earlier appellate court record, and extensive briefing from both parties on the allowable fees and costs. The trial court held that

> The work performed here was appropriate and necessary to lead to dismissal of this action and a judgment in favor of Defendant Hedlund. Alaska Structures, while it succeeded in having the case reinstated and a dismissal based on the Anti-SLAPP law overturned, did not prevail in the lawsuit as a whole and had summary judgment granted against it, and in favor for Defendant, on remand. The fact the original dismissal was overturned due to Division One's disagreement that the Anti-SLAPP law applied to this type of case should not preclude an award to Hedlund under the Contract provision for all his reasonable fees and costs incurred ion this action.

CP 472 at lines 13-21. The trial judge exercised her considerable discretion and denied Hedlund $11,182.10 in requested fees.[4] The trial court awarded fees of $119,160.13 and costs of $12.392.29 including appellate costs Hedlund incurred. **CP 472-473**. The fees and costs were awarded under the contract provision as "reasonable" fees and costs incurred from defending against the unsuccessful breach of agreement case brought by AKS. **Id.**

AKS again appealed to Division One, this time to seek reversal of the trial court's fee and cost award to Hedlund pursuant to the fee recovery language in the Confidentiality Agreement. AKS argued that Hedlund should recover **no** fees and costs as he had not won a Georgia hearing

[4] Hedlund had requested fees of $130,342.23 and costs of $12,392.29. **CP 277**.

where he sought to prevent an internet service provider from disclosing the name of the customer associated with the internet address used to post the comment, or the Division One first appeal that re-instated the case after the Anti-SLAPP dismissal. AKS also specifically sought a reversal of the award of fees and costs for the Georgia proceeding arguing Hedlund had not prevailed on the Georgia motion as the name had been disclosed.

Division One issued its Opinion on 1/16/18 after notifying the parties it would not allow oral argument of the appeal. It upheld the trial court's award of the fees and costs for the Georgia proceeding and award of fees and costs for the summary judgment motion. **Opinion at 5 and n. 3 (App. A)**. The Opinion stated:

> AKS brought this suit against Hedlund for an alleged violation of the Agreement. 'The issue here is a simple contractual issue—whether or not Hedlund violated a contract he signed with his former employer.' Hedlund, 180 Wn. App. at 603. As the trial court determined on summary judgment, he had not. **There is no dispute that, pursuant to the fee shifting provision of the Agreement, Hedlund is entitled to recover attorney fees and costs incurred in defending against that claim**.

Opinion at 5 (emphasis added). The Opinion further stated as follows:

> It is for this reason that Hedlund is entitled to fees and costs associated with the Georgia proceeding. AKS first filed its breach of contract claim against John Doe and then sought to compel the identity of the anonymous poster. This was an action to enforce the Agreement. **Pursuant to the fee shifting provision, Hedlund is entitled to recover attorney fees and costs stemming from actions brought to enforce the Agreement.**

Opinion at p. 5 n. 3 (emphasis added). But Division One held that Hedlund was not entitled to **any** of the fees and costs from the first appeal which had re-instated the AKS lawsuit against him. Division One remanded for the trial court to exclude all fees incurred on the appeals to Division One and the first Petition for Review of that opinion to the State Supreme Court, which was the majority of the fees and more than $100,000. **Opinion at 6.**

Division One then awarded AKS costs as the "prevailing party" in the instant appeal and denied Hedlund fees or costs on this appeal. **Opinion at 6 and n. 4**. AKS submitted a Cost Bill seeking an additional $1,077.23 on top of the $6,180.57 awarded as Costs to AKS from the first appeal, which Division One granted. **App. C** (2018 Cost Award). The majority of the earlier cost award was for a bond that AKS posted voluntarily, without any request from the Courts or Hedlund, in amount several times greater than the judgment then at issue. The current Opinion denies Hedlund any of his fees and costs incurred in both appeals, more than $100,000 in attorneys' fees to date, and forces Hedlund to pay AKS total costs of $7,257.80 even though Hedlund. Division One did not find that Judge Parisien had abused her discretion or point to any fee or cost entry that was duplicative, excessive or unnecessary to achieving the ultimate dismissal of the lawsuit. Division One held that the George motion, which

Hedlund lost, was an event for which Hedlund should be compensated, but it held that fees and costs from the entire appeal of the Anti-SLAPP dismissal should not have been awarded – although its reasoning is unclear, and unstated, except to say that Hedlund had not "prevailed" in avoiding re-instatement of the lawsuit. Although Division One denied AKS much of the relief it requested, Division One awarded AKS costs and denied Hedlund fees or costs finding Hedlund had not prevailed. Hedlund moved for reconsideration, which was denied on 3/14/18 (**Appendix B**.). This Petition for Review follows.

V. ARGUMENT

Review should be granted pursuant to RAP 13.4(b)(1), (2), and (4).

A. The Decision Conflicts with Decisions of the State Supreme Court.

The Opinion conflicts with decisions of the State Supreme Court meriting acceptance pursuant to RAP 13.4(b)(1). This Court has held that **"The standard of review of a fee award is manifest abuse of discretion. Boeing Co. v. Sierracin Corp.,** 108 Wn.2d 38, 65, 738 P.2d 665 (1987). **Accordingly, the scope of appellate review is narrow."** **Fisher Properties, Inc. v. Arden-Mayfair, Inc.**, 115 Wn.2d 364, 375, 798 P.2d 79 (1990).

This Court has held that "**An abuse of discretion exists only where no reasonable person would take the position adopted by the trial**

court." **Singleton v. Frost**, 108 Wn.2d 723, 730, 742 P.2d 1224 (1987) (emphasis added); **see also Griggs v. Averbeck Realty, Inc.**, 92 Wash.2d 576, 599 P.2d 1289 (1979).

The Opinion issued by Division One is in conflict with these holdings from this Court as it does not find an abuse of discretion or that no reasonable person would take the position taken by the trial judge. It does not address, at all, the trial court's determination that the fees and costs incurred on the first appeal were necessary and reasonable to achieve the ultimate dismissal that was obtained. The Opinion further is internally inconsistent and contradicts itself and the result it ultimately reaches as to both parties as further explained below.

On remand from the first appeal, AKS did not drop its lawsuit. It continued to sue Hedlund for breach of the Agreement, and Hedlund moved for summary judgment, which AKS vigorously opposed. Hedlund won summary judgment and had the AKS lawsuit dismissed for the second time. Hedlund was, and is, the "prevailing party" in this litigation. Under the terms of the Contract "the prevailing party in such litigation shall be entitled to recover its reasonable attorney's fees as well as costs, expenses and disbursements." **CP 786 ¶ 4.3**. The trial judge determined that the fees and costs incurred in the first appeal, in the Georgia proceeding, and in the initial dismissal motion were all incurred in

connection with Hedlund's defense of the claim brought against him by AKS, and that the appeal by AKS—seeking to re-instate the lawsuit—was an action by AKS to enforce that Agreement. The trial court did discount and not award Hedlund more than $11,000 in fees requested by Hedlund. The trial court had broad discretion to determine the appropriate fee and cost award. Division One's ruling does not find, and could not appropriately find, that no reasonable person would take the position adopted by the trial court, as is required to overturn the judge's award on the manifest abuse of discretion standard that applies here. **Singleton**, 108 Wn.2d at 730. There was no principled basis for Division One to exclude those fees and costs, and yet award the Georgia fees and costs as it did here. The Opinion conflicts with the Supreme Court's holdings requiring an abuse of discretion and that no reasonable person would find as the trial court did, a finding that would be impossible to make under the facts of this case.

Division One was not allowed by this Court's precedents to overturn the trial judge who issued the fee and costs award below, after presiding over the summary judgment proceeding and reviewing methodically the briefing from the appeal and the entire trial court record and each and every time entry and cost record, without finding she manifestly abused her discretion and acted as no reasonable person would act under the

circumstances. Division One did not make such a finding, and on this record cannot make such a finding, since this learned judge acted understandably, and reasonably, when she determined that AKS's re-instatement appeal—to re-instate its lawsuit that had been dismissed by a finding it could not show Hedlund's post violated the Agreement—was an action to enforce the Agreement, and that Hedlund's defense of that appeal was an action to defend against AKS's contract claim. Division One further cannot make such a finding, since this judge acted understandably, and reasonably, when she determined that the original motion to dismiss was an action to defend against AKS's claim.

Hedlund was sued by his former employer and forced to litigate and defend himself against the contract claim for nearly seven years. He has incurred attorney's fees of more than $100,000 on appeals, and he was ordered by Division One to pay costs to AKS, who lost the lawsuit, $7,257.80.[5] AKS was told twice, by two different trial court judges—both very well-informed and familiar with the record—that AKS could not establish that what Hedlund posted in an internet chat room violated the Confidentiality Agreement. Yet AKS continues to litigate and try and further punish and bankrupt Hedlund likely spending far more to wage this fight than it has ever been ordered to pay.

[5] See App. C (2018 Cost award of $1,077.23). $6,180.57 in costs was awarded to AKS in the first appeal.

B. The Decision Conflicts with Decisions of the Court of Appeals.

First, Division One acknowledges in the Opinion that "pursuant to the fee shifting provision of the Agreement, Hedlund is entitled to recover attorney fees and costs incurred in defending against [AKS's breach of confidentiality agreement] claim." **Opinion at 5**. Division One recognized that the fees and costs incurred by Hedlund in connection with the Georgia motion, which Hedlund lost, should nonetheless be awarded to Hedlund because the Georgia motion, and Hedlund's defense against it, was "an action to enforce the Agreement. Pursuant to the fee shifting provision, Hedlund is entitled to recover attorney fees and costs stemming from actions brought to enforce the Agreement." **Opinion at 5 n. 3.**

Division One misapprehended the Anti-SLAPP dismissal and AKS's appeal of the Anti-SLAPP dismissal. Hedlund brought a motion to dismiss—under a law that was new, and valid, and legitimately seemed to apply to the claim (and will all due respect to Division One, did in fact apply to the claim[6]), very early in the litigation to avoid costly and unnecessary discovery or arguments for delay of a summary judgment

[6] The Division One holding in this case in the first appeal that the Anti-SLAPP law could not apply to a private contractual claim has subsequently been shown to have been erroneous as **Davis v. Cox**, 183 Wn.2d 269, 351 P.3d 862 (2015), which declared the Anti-SLAPP law to be unconstitutional, was in part a breach of agreement case, and the State Supreme Court, noting this, specifically held the Anti-SLAPP law to apply to such claims. If the Anti-SLAPP law applied the agreement at issue in **Davis**, which this Court found it did, then it also applied to the one at issue here.

motion. Hedlund won that dismissal motion, not merely because the trial court found the claim infringed on a right of public participation or speech, but because AKS could not establish that what Hedlund had posted in his internet post could possibly be found to have violated his Confidentiality Agreement. Hedlund did not bring a "claim" against AKS; he moved to dismiss AKS's contract claim, successfully, when AKS could not show that it could establish what Hedlund had posted could possibly be found to have violated the contract.

AKS appealed to Division One to have the lawsuit re-instated. The majority of the briefing in the appeal dealt with whether or not what Hedlund posted could have been found to have been "confidential" and covered by the Agreement, not whether or not the claim appropriately fell within the Anti-SLAPP law's scope.

Division One, in **Ryan and Wages, LLC v. Wages**, held that "One cannot sue for breach under a contract that has a prevailing party attorney fee clause and then cry foul when held liable for an award of fees to a successful defendant." **Ryan and Wages, LLC v. Wages**, No. 68253–9–I, 174 Wn. App. 1017, 2013 WL 1164786 (Mar. 18, 2013) (Div. I, Wash. Ct App., Judges Becker, Leach and Grosse) (unpublished).

In **Columbia State Bank v. Lnvicta Law Group**, 199 Wn. App. 306, 330-331 (Div. 1, 2017, Judges Mann, Dwyer and Cox), Division One held

that a prevailing party can recover under a contractual fee-shifting provision when the opposing party brings a claim "on the contract":

> **An action is " 'on the contract' " for purposes of a contractual attorney fees provision if the action (1) " 'arose out of the contract' " and (2) " 'if the contract is central to the dispute.' "** **Boauch**, 153 Wn.App. at 615 (quoting **Tradewell Group, Inc. v. Mavis**, 71 Wn.App. 120, 130, 857 P.2d 1053 (1993)).

Columbia State Bank, 199 Wn. App. at 330-331.

Here, the first Division One appeal was based on the "contract" and was part of AKS's effort to enforce the contract. Hedlund's defense of that appeal was necessary and in defense of the contract claim filed by AKS against him. Hedlund had no choice but to defend against the first appeal. His actions on appeal were no different than his actions opposing the Georgia motion to learn his identity. They were both part of his efforts to defend himself against the contract claim AKS had brought against him, and AKS's actions in both Georgia and Division One in the first appeal were actions by AKS to enforce the contract. Division One cannot credibly distinguish between the two events, and award fees to Hedlund for one and deny them to Hedlund for the other. It's refusal in the Opinion to award Hedlund fees and costs in the appeals conflicts with the Court of Appeals decisions in **Columbia Bank, Boach**, and **Tradewell** (see above) since the claim here clearly arose out of the contract and the contract was essential to the dispute. The entire lawsuit, including the appeals, involved

whether or not Hedlund breached the Agreement and the Agreement's requirements for a fee award.

Second, the Agreement at paragraph 4.3 mandates an award of fees and costs when either party is required to "institute legal action to enforce the provisions of this Agreement". **CP 786** ¶ 4.3. This includes legal proceedings to enforce the fee provision of the Agreement. AKS appealed here in this instant appeal seeking to deprive Hedlund of his entire fee and cost award pursuant to the Agreement on the theory that AKS had "prevailed" in part by succeeding on the Georgia motion and in having the lawsuit re-instated through the first Division One appeal. AKS lost those arguments in this appeal, and that relief, but Hedlund was required to defend against those claims in this current appeal to enforce his rights under the Agreement. Hedlund incurred fees and costs enforcing his rights under the Agreement to recover fees and costs. Hedlund incurred fees and costs defending against AKS's action seeking to deprive him of that right. On appeal AKS further continued to argue Hedlund's actions were a violation of the Agreement.

Under the clear terms of the Agreement, Hedlund was entitled to his fees and costs incurred in this appeal as he was defending his rights under the Agreement to the fee and cost award the Agreement provides, in the face of a clear appeal and attempt by AKS to deprive Hedlund of that

right. There was no principled basis for Division One to deny Hedlund a fee and cost award under the Agreement for this appeal. Review should be accepted, the Opinion overturned, and the Court should award Hedlund fees and costs incurred in this and the Division One appeal pursuant to Section 4.3 of the Agreement.

Third, AKS appealed here on five separate and distinct issues, including a claim that the Georgia fees and costs be denied to Hedlund, that AKS be awarded its own fees and costs for "prevailing" in the Georgia motion, that AKS be awarded its own fees and costs for "prevailing" in the first Division One appealing achieving re-instatement of its lawsuit against Hedlund, and that Hedlund should receive no fees and costs since he allegedly prevailed on his summary judgment motion but had lost on the Georgia motion and on the re-instatement appeal. See, e.g., Brief of App.at 1-3, 11, 16, 21 and Reply Br. of App. at 15. AKS failed to prevail on most of its issues. Division One upheld the award of the fees and costs to Hedlund incurred on the Georgia motion. Division One denied AKS's requests for fees and costs to AKS. Division One denied AKS's requests that Hedlund be denied all fees and costs. This means Hedlund thus prevailed in numerous respects, including preserving his right to fees and costs of everything but the first Division One re-instatement appeal. And yet in the current Opinion Division One awarded

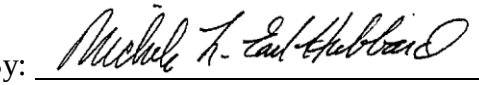
AKS costs in this appeal and denied costs to Hedlund. Such an award is again inconsistent with the remainder of the Opinion, the cited Court of Appeals' precedents, and the clear language of the Confidentiality Agreement. AKS cannot be awarded costs in this appeal consistent with the Opinion that was issued, those precedents, nor paragraph 4.3 of the Agreement. Under paragraph 4.3 of the Agreement and those precedents, Hedlund was entitled to an award of fees and costs, not AKS.

C. The Matter Involves Issues of Substantial Public Interest that Should be Determined by the Supreme Court.

This case concerns issues of substantial public interest that should be determined by the State Supreme Court, meriting acceptance pursuant to RAP 13.4(b)(4). This case concerns not only whether Hedlund is forced to pay thousands of dollars in costs to his former employer who ultimately lost its lawsuit, and whether or not his lawyer is paid the more than $100,000 in fees incurred defending Hedlund against this claim on appeals. This case concerns the appropriate deference to be afforded to trial judge's determinations of fee and cost awards, and will provide much-needed guidance, and reassurances, to trial court's as to the proper scope of such awards and the respect for their discretion. Judge Parisien was overturned without any finding that she abused her discretion or that no reasonable person would have ruled as she did that defending against

the re-instatement appeal constituted "reasonable" fees in the course of finally securing, after seven years, dismissal of a lawsuit AKS could not win, and should have known it could not win. Division One overturned her without challenging any of her findings, and ruled de novo contrary to this Court's precedents. Unpublished decisions such as this one may be cited to trial and appellate courts and will guide future appellate decision-making, as well as the willingness of lawyers to accept cases for defendants on a contingent basis to fight against meritless lawsuits like this one or leave them to fend for themselves and lose unjustly. Cases such as these rarely will reach the appellate courts, as few litigants can risk fighting to achieve justice in such cases. This Court must take this opportunity to make clear the respect to be afforded to our trial court judge's discretionary determinations of fee and cost awards and the level of findings necessary to show an abuse of such discretion. It is unfair to trial court judges to leave them without such guidance and explanation, and it is unfair to the thousands of litigants, like Hedlund, who will in the future lack certainty of their rights, and ability to be reimbursed when they are forced to defend against meritless lawsuits such as this one.

Respectfully submitted this 11th day of April, 2018.

By: 

Michele Earl-Hubbard, WSBA No. 26454

VI. CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on April 11, 2018, I delivered a copy of the foregoing Petition for Review by email pursuant to an electronic service agreement among the parties with back up by U.S. Mail to the following:

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Hendricks & Lewis PLLC
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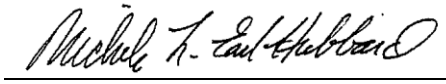
Attorneys for Respondent

Dated this 11th day of April, 2018.



Michele Earl-Hubbard

APPENDIX A

Division One Opinion dated 1/16/18

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC., an Alaska corporation,	)	DIVISION ONE
Appellant,	)	No. 76105-6-I
v.	)	UNPUBLISHED OPINION
CHARLES J. HEDLUND,	)	
Respondent.	)	FILED: January 16, 2018

DWYER, J. — Alaska Structures, Inc. (AKS) appeals from the trial court's order awarding attorney fees and costs to Charles Hedlund. We conclude that the trial court erred by awarding Hedlund fees and costs incurred in advancing an unsuccessful legal theory. Accordingly, we reverse.

I

Hedlund was employed by AKS from February 2007 until January 2010. As a condition of his employment, Hedlund signed a confidentiality agreement (Agreement) that prohibited him from disclosing certain confidential information during and following his employment with AKS. The Agreement also contained a fee shifting provision, stating that "[i]n the event either party is required to institute legal action to enforce the provisions of this Agreement, the prevailing party in such litigation shall be entitled to recover its reasonable attorney's fees as well as costs, expenses and disbursements."

In March 2010, AKS was burglarized twice. The burglaries were part of a string of burglaries in the area and were publicized on television and in newspapers.

In August 2011, an anonymous user—later revealed to be Hedlund—posted a message on an Internet jobsite forum concerning the burglaries. The message criticized the security measures at AKS. Shortly thereafter, AKS filed a complaint in King County Superior Court against "John Doe," alleging that the poster was a party to the Agreement and had violated the Agreement by disclosing confidential information on a public website.

AKS subpoenaed Cox Communications, a Georgia entity, in order to identify the anonymous poster. Counsel for Hedlund objected to the subpoena.[1] AKS then filed a motion to compel, which Hedlund opposed. The Georgia court granted the motion and Hedlund was ultimately identified as the anonymous poster. AKS filed an amended complaint naming Hedlund as the defendant in this suit.

Hedlund argued that he was sued as a result of his postings to a public forum and moved to dismiss the claim pursuant to Washington's anti-SLAPP statute, RCW 4.24.525.[2] Following a hearing, the trial court found that the anti-SLAPP statute applied and that AKS was unable to demonstrate that its action

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[1] Without identifying Hedlund as the attorney's client.

[2] Washington's anti-SLAPP statute, RCW 4.24.525, established a "special motion to strike any claim" that acted to immediately halt discovery pending resolution of the motion. If the moving party prevailed on the motion, the statute authorized an award of attorney fees and costs in connection with the motion as well as an additional award of $10,000. RCW 4.24.525(6)(a)(i), (ii). The anti-SLAPP statute was ruled unconstitutional in 2015. Davis v. Cox, 183 Wn.2d 269, 351 P.3d 862 (2015).

for violation of the Agreement had any merit. The trial court awarded Hedlund attorney fees and costs as well as an additional $10,000 pursuant to the anti-SLAPP statute.

AKS appealed the trial court's ruling to this court. We reversed the trial court's order, concluding that Hedlund did not meet the threshold standard for application of the anti-SLAPP statute. Alaska Structures, Inc. v. Hedlund, 180 Wn. App. 591, 603-04, 323 P.3d 1082 (2014). Our holding in that case addressed only the application of the anti-SLAPP statute. "The issue of whether Hedlund violated the confidentiality agreement may well lend itself to summary judgment dismissal, and Hedlund may be entitled to attorney fees under that contract." Hedlund, 180 Wn. App. at 603. A commissioner of this court awarded AKS costs totaling $6,180.57. Hedlund petitioned our Supreme Court for review, which it denied.

On remand, Hedlund moved for summary judgment asserting that AKS lacked proof that he had violated the agreement. The trial court granted his motion. The trial court also awarded Hedlund attorney fees and costs:

> The Court HEREBY Orders that pursuant to the [Agreement] that Defendant shall be awarded his reasonable attorney's fees and all costs incurred in this action to date, including fees and costs incurred in connection with the Georgia proceedings, the Division One Court of Appeals action, before the Washington State Supreme Court, and while litigating as a John Doe. These fees and costs shall be paid by Plaintiff [AKS]. The appellate cost award issued by the appellate courts against Hedlund is deemed a cost and as such it, and any interest, would be required to be repaid to Hedlund by [AKS].

Hedlund requested a total award of $148,734.52. The trial court reduced the fee award by $17,182.10, awarding fees and costs totaling $131,552.42. AKS appeals the award of fees and costs.

II

AKS contends that the trial court erred by awarding Hedlund attorney fees and costs associated with the anti-SLAPP motion. AKS asserts that it prevailed against Hedlund's anti-SLAPP motion and that, as a result, the hours spent advancing that legal theory should be discounted from the award. We agree.

A

"When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorney fees, and second, whether the award of fees is reasonable." Ethridge v. Hwang, 105 Wn. App. 447, 459, 20 P.3d 958 (2001). "Whether a specific statute, contractual provision, or recognized ground in equity authorizes an award of fees is a question of law and is reviewed de novo." Kaintz v. PLG, Inc., 147 Wn. App. 782, 785-86, 197 P.3d 710 (2008). Whether the amount of fees awarded was reasonable is reviewed for an abuse of discretion. Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., 82 Wn. App. 646, 669, 920 P.2d 192 (1996), aff'd, 134 Wn.2d 413, 951 P.2d 250 (1998).

A prevailing party is one who receives an affirmative judgment in his or her favor. Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). "If neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the

extent of the relief afforded the parties." Riss, 131 Wn.2d at 633. "Under the lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims." Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632, 966 P.2d 305 (1998). The party seeking fees bears the burden of proving the reasonableness of the fees. Mahler, 135 Wn.2d at 434.

B

AKS brought this suit against Hedlund for an alleged violation of the Agreement. "The issue here is a simple contractual issue—whether or not Hedlund violated a contract he signed with his former employer." Hedlund, 180 Wn. App. at 603. As the trial court determined on summary judgment, he had not. There is no dispute that, pursuant to the fee shifting provision of the Agreement, Hedlund is entitled to recover attorney fees and costs incurred in defending against that claim.[3]

But Hedlund did more than simply defend against the merits of the claim. Rather than promptly moving for summary judgment, Hedlund opted to first pursue an independent legal theory that, if successful, would have resulted in an award of $10,000 in addition to attorney fees and costs.

[3] It is for this reason that Hedlund is entitled to fees and costs associated with the Georgia proceeding. AKS first filed its breach of contract claim against John Doe and then sought to compel the identity of the anonymous poster. This was an action to enforce the Agreement. Pursuant to the fee shifting provision, Hedlund is entitled to recover attorney fees and costs stemming from actions brought to enforce the Agreement.

The parties dispute whether Hedlund's anti-SLAPP motion constituted a "claim" against which AKS could prevail. But "Washington case law recognizes that a reasonableness determination requires the court to exclude 'any hours pertaining to unsuccessful *theories* or claims.'" SAK & Assocs., Inc. v. Ferguson Constr., Inc., 189 Wn. App. 405, 421, 357 P.3d 671 (2015) (quoting Mahler, 135 Wn.2d at 434). Hedlund's anti-SLAPP motion advanced a legal theory separate and distinct from the merits of the contractual claim. Our determination that Hedlund did not meet the threshold standard for application of the anti-SLAPP statute confirmed that his legal theory was wholly unsuccessful. Hedlund, 180 Wn. App. at 603-04.

By failing to discount the hours spent on Hedlund's anti-SLAPP motion from the fee award, the trial court awarded Hedlund fees and costs associated with an unnecessary and unsuccessful legal theory. In so doing, the trial court erred. Accordingly, we reverse the trial court's order and remand for entry of an award that excludes attorney fees and costs incurred in Hedlund's appeals to this court and the Supreme Court, including the appellate award assessed against him that was deemed a cost by the trial court.[4]

[4] Hedlund and AKS each request an award of appellate fees and costs pursuant to RAP 18.1 and the fee shifting provision of the Agreement. As AKS prevailed in this court, it is entitled to an award of appellate costs. But because Hedlund was both the prevailing party on the ultimate issue and the losing party in this stage of the proceeding, neither party is entitled to an award of appellate fees. Upon compliance with RAP 18.1, a commissioner of this court will enter an appropriate cost award.

Reversed.

We concur:

APPENDIX B

Division One Order Denying Motion for Reconsideration

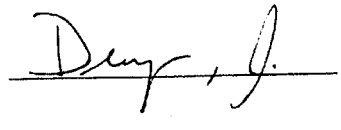
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC., an Alaska corporation,	)	DIVISION ONE
Appellant,	)	No. 76105-6-I
v.	)	ORDER DENYING MOTION FOR RECONSIDERATION
CHARLES J. HEDLUND,	)	
Respondent.	)	

The respondent, Charles Hedlund, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:



APPENDIX C

Division One 3/26/18 Cost Award

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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March 26, 2018

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CASE #: 76105-6-I
Alaska Structures, Inc., Appellant vs. Charles J. Hedlund, Respondent

Counsel:

The following ruling by Commissioner Masako Kanazawa of the Court was entered on March 23, 2018, regarding appellant's cost bill:

On January 16, 2018, this Court issued an unpublished opinion reversing the trial court's award of attorney fees and costs to respondent Charles Hedlund. In the opinion, this Court stated that appellant Alaska Structures, Inc. (AKS) prevailed in this Court and is thus entitled to an award of appellate costs. Opinion at 6 n.4.

AKS submitted a timely cost bill, requesting costs in the total amount of $1,077.23. Hedlund filed an objection to the cost bill, arguing that, "as explained in the accompanying Motion for Reconsideration," AKS should not be deemed the prevailing party. This Court denied Hedlund's motion for reconsideration on March 14, 2018.

Each one of the items in AKS's cost bill is allowed under RAP 14.3(a) (statutory attorney fees, preparation of the report of proceedings, copies of clerk's papers, and clerk's reproduction charge). Accordingly, the requested costs are awarded.

Therefore, it is

ORDERED that costs in the total amount of $1,077.23 are awarded to appellant Alaska Structures, Inc. Respondent Charles Hedlund shall pay this amount.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

APPENDIX D

Division One Petition for Review from 1st appeal

No. _____

SUPREME COURT OF THE STATE OF WASHINGTON

No. 69349-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC.

Appellant,

v.

CHARLES J. HEDLUND,

Respondent/Petitioner.

HEDLUND'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Charles J, Hedlund was the Defendant in the trial court and the Respondent in the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

The Division One Court of Appeals issued a published opinion on 4/21/14, attached hereto as Appendix A, overturning the grant of a Motion to Strike under the Anti-SLAPP law RCW 4.24.525 on the basis that the cause of action, although based solely on a posting on an internet jobs forum, was a contract claim and thus not covered by the statute.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in ruling that a lawsuit that sought to penalize speech under a contract breach theory could not fall within the protection of the Anti-SLAPP statute?

2. Whether the Court of Appeals erred when it reviewed isolated sentences of a lengthy website jobs' forum posting rather than the entire post in context in deciding whether or not the post was covered by the Anti-SLAPP statute RCW 4.24.525?

3. Whether the Court of Appeals erred in applying outdated and atypical California cases regarding attempts to steal clients as basis for rejecting Anti-SLAPP law application to this case solely involving speech?

IV. STATEMENT OF THE CASE

Tentmaker Alaska Structures ("AKS") sued a former employee Charles J. Hedlund ("Hedlund") after he posted a lengthy comment on the internet jobs forum page for AKS on the website Indeed.com. Indeed.com

is an online resource for job-seekers, including job postings, salary averages, and a forum where employees and applicants can discuss a company's work environment. Slip Opinion ("Op.") at 2; CP 516. This site is meant to be a resource for job seekers to ask others about a company to aid them in deciding whether or not to work there. **Id.**

On 8/12/11—19 months after Hedlund left AKS—Hedlund posted comments on Indeed.com under the screen name "Can you Smell the B.S.?"claiming that specified posters pretending to be job seekers and interviewees were actually long-time employees of the company perpetrating fraud on the forum participants. CP 513-567, 792-832. Hedlund responded to posts by "Jeff Hooper" (CP 808) and "Jason Richards" (CP 809) who had posted glowing reports of their alleged recent interview experiences at AKS and expressing "love" and admiration for AKS CEO/President Richard Hotes. The "Hooper" and "Richards" posters were responding to other posts by job applicants expressing concerns about the unprofessional and hostile antics of Hotes and others, the presence of surveillance cameras throughout the office and a creepy feeling of being watched and treated like a subject in a psychological experiment. CP 129-156, 289-305, 808-832. Hooper sought to justify the surveillance cameras mentioned in many of the previous posts by claiming: "If you work in military contracting proper security is a must,

and usually a contractual requirement. So I fully understand the need for the security." CP 808. These posts stood out in direct contrast to numerous posts by candidates more than seven pages in length reporting abusive interview tactics and reports of alcohol being poured over an employee while he was working, forcing employees to stand on streets and sing Mary Had a Little Lamb to humiliate themselves, and other abusive and disturbing practices. CP 129-156, 289-305, 808-832. Hedlund, believing the Hooper and Richards posts to be by employees masquerading as job seekers to mislead the public, created a screen name "Can you Smell the B.S.?" and posted a response that began "Wow. Is anyone else struck by the transparency of the previous 2 shill comments? They each reek of employees of Alaska Structures trying to save face for the company and keep people filling into the group interviews …" CP 810, 516, 793-795. Hedlund accused the two posters of being AKS employees seeking to mislead job applicants. CP 810-811. He addressed line by line some of the comments the two posters had made. His post was broken in to two with the first posting at 4:30 p.m. due to its length and appears as if it was two posts, not simply one continuing response. CP 810-813. The second part of Hedlund's post posted at 4:51 p.m.. CP 812-813. The part two contains the section of the response regarding the "proper security" comment initiated by Hooper. CP 812. Hedlund, Hooper and Richards exchanged

posts where Hedlund accused the posters of being employees and questioned the accuracy of their posts and discussed work place abuses and mistreatment of employees and applicants. CP 813-14, 816, 820-24, 832. Another poster calling himself "Jackson Five" posing as a job seeker began attacking Hedlund and other critical posters and denied being an employee when accused. CP 829. He subsequently admitted he was in fact an employee. CP 19, 829-31, 19 (Hedlund response thanking him for being honest).

Other posters also began questioning whether AKS employees were masquerading as job seekers, and another suggested AKS was a cult. CP 817-18. Another poster posted saying "I want to thank everyone on this forum who posted their experiences and concerns . . the last thing we need are companies ran by egomaniacs like this taking advantage of people for their own sick pleasure!" and suggesting AKS and Hotes be investigated by the State Attorney General. CP 831. Another poster "Jupiter" who had applied for a reception position stated "I sure have enjoyed reading about the wacky interviews, and am sorry for those people who actually worked at that loony bin. **Many, many thanks to those who posted and warned everyone away!**" CP 824 (emphasis added).

On 8/16/11 a poster "AKS is ridiculous" commented on Hedlund's posts that questioned the legitimacy of the Hooper and Richards posts and

complained that AKS had had Hedlund's comments quickly removed. CP 825. The poster stated: "any posts that reveal them to be the tricky conniving dishonest people they really are get removed as quick as can to help perpetuate the idea that this is just disgruntled employees complaining instead of the truth…" CP 825-826. Hooper continued to post disputing that he worked for AKS. CP 826. Hedlund posted again noting the censorship that occurs on the site where AKS can have comments almost immediately taken down as it did his posts and challenging Hooper's claim he was not an AKS employee. CP 828-829.

AKS has now focused this lawsuit on just a few sentences of Hedlund's post taking them out of context. In the portion of the post that responded to the Hooper comment that "proper security is a must" Hedlund stated:

> "Proper security is a must"
>
> I doubt if the military gives a rat's behind if any of our enemies get their hands on any top secret tent designs. "Oh No! Terrorists might have as good billeting accommodations as our troops!"
>
> Furthermore, the security measures at AKS are all consumer-grade off the shelf fare installed by the former CIO, who had no prior security experience. AKS was broken into in 2010 and much of the server and several work stations were stolen, containing vast amounts of company information. They didn't have email for a few weeks. The cheap cameras provided no clues as to the

> identity of the thieves. That is why they now have the high-tech security precaution of human guards.

CP 812. The post was part of the longer post and chain of exchanges between Hedlund and the current employees of AKS masquerading as job seekers seeking to mislead other forum members and discredit the reports of workplace abuses. CP 513-567, 655, 792-832.

Hedlund left AKS in January 2010. CP 513-514, 792. Two months after he left AKS was burglarized, and the burglaries were widely publicized on television news and in news papers. CP 274-438. Public records about the burglaries reveal that the Chief Information Officer (CIO) Dylan Schneider, who had no security experience (CP 436-438), oversaw the installation of a security system in the week **following** the first burglary and before the second burglary, but it was not activated on the night of the second burglary as it was "faulty". CP 334-347. Public records revealed that Schneider secretly installed hidden cameras in the server room that captured pictures of the thieves during the second burglary on 3/7/10. CP 343. The image quality of these secret cameras was described by police in their report as of "good quality" CP 345. Footage from the security cameras showing where the cameras were located and the quality of the footage as well as details of AKS's security systems were made part of the police investigation and public records. CP 274-

438. Division One acknowledged that Hedlund's "comments were based on public information contained in police reports and newspapers." Op. at 2. Further, Hedlund in his declaration has sworn under penalty of perjury that "everything I learned about the burglaries and the subsequent security efforts was learned after I had left my employment with AKS." CP 514. And "Everything I said about the security system and measures also referred to measures taken after the burglaries and were details I had learned after I had left my employment at AKS." CP 515; **see also** CP 797-799, 801, 803-804, 806. AKS did not and cannot refute these statements.

Hedlund posted his comments more than a year and a half after he left AKS reporting on events occurring after he left the company. AKS nonetheless claimed the website post breached a "confidentiality agreement" Hedlund had allegedly signed during his first days on the job as a sales coordinator agreeing not to disclose trade secrets learned while an employee. On 8/18/11, six days after the post, AKS filed a lawsuit against Hedlund as a John Doe. CP 1-3. On 4/16/12, AKS filed an amended complaint naming Hedlund as the Defendant. CP 267-273. It belatedly focused on the security portion of the posts.. See CP 792, 800. It falsely alleged that the posting about the burglaries and security system violated a confidentiality agreement. CP 267-273. AKS knows that

Hedlund had left his employment with AKS several weeks before the burglaries and that any information about the burglaries or succeeding security measures were facts (1) not confidential as they were the subject of public records and (2) learned by Hedlund long after Hedlund had ceased to be an employee and thus could not be covered by a confidentiality agreement.

AKS makes a practice of suing its former employees to silence and intimidate them. A few months before it sued Hedlund, AKS sued its former filmmaker Chris Machowski for posting a portion of a video on Vimeo.com. CP 518-519, 523-551. Just days before it filed its John Doe lawsuit against Hedlund it sued its former CIO Schneider and his wife over comments Schneider posted on Indeed.com criticizing AKS's President and owner Hotes. CP 519-520, 553-567. Schneider and his wife were sued under the guise of a confidentiality agreement for stating that Hotes (a) does not know how to drive from Kirkland to Seattle, (b) enjoys inflicting abuse on his employees, and (c) pushes employees to go to unsafe locations to perform charitable work while the president will go to such places himself due to claimed illnesses." CP 564-565. AKS sued Schneider for disclosing information to his wife and sued his wife for disclosing details she knew of her husband's work place environment. CP 564-566.

In addition to AKS being a large employer in the area and a military contractor, Richard Hotes, President of AKS, is a public figure. He has been written about in Vanity Fair, the Wall Street Journal, an article by actor Sean Penn on a popular blog, to name but a few. CP 718--791. Hotes is a board member of a charity run by Sean Penn and his bio promoting himself and his company are displayed on the site's website. CP 778-780. He promotes his products and services as the best in the world and AKS as the biggest business of its kind in the world. CP 779. Hotes regularly socializes with movie stars, business moguls, politicians and Hollywood elite, and courts positions that place him in the limelight. CP 718-791

After being warned and refusing to dismiss the suit, Hedlund brought an Anti-SLAPP motion which was granted by then King County Superior Court Judge Mary Yu. AKS appealed to Division One Court of Appeals, which reversed finding that breach of contract claims could not be covered by the Anti-SLAPP statute, although noting the likelihood that AKS' contract claim would fail and that Hedlund could likely recover his attorney fees and costs via the contract. Op. at 10.

V. ARGUMENT

Review should be granted pursuant to RAP 13.4(b)(2)-(4). The decision is in conflict with another decision of the Court of Appeals. RAP 13.4(b)(2). The decision addresses a significant question of law under the

Constitution of the State of Washington or of the United States. RAP 13.4(b)(3). The petition further involves an issue of substantial public inters that should be determined by the Supreme Court. RAP 13.4(b)(4).

Division One recognized that the Anti-SLAPP statute RCW 4.24.525 "shall be applied and construed liberally . . . " LAWS of 2010, ch. 118, § 3; Op. at 4. The Act requires a court to engage in a two-step process. First, to determine if the claims fall within the Act, and second, whether the claimant can prove a likelihood of prevailing. Division One has misinterpreted the purpose and reach of the Anti-SLAPP law, finding it to provide "immunity from suit" (Op. at 4) rather than its actual relief, which is merely an early procedural intervention so a court can examine the merits of a claim before a defendant can be bankrupted by defense of meritless lawsuit.

This case was one of several Anti-SLAPP cases heard by Division One on the same day; decisions which contradict and conflict with one another and which ignore the clear language of the Anti-SLAPP Act. The other Anti-SLAPP cases which this Court will review or has been asked to review do not and cannot address the precise wrong and harm at issue in this case, and so this case, too, must be accepted for this Court to clearly instruct the lower Court's on the claims covered by this new and important

law avoiding the need for numerous other cases to come before this Court in the future for correction.

The Act applies to "any claim, however characterized, that is based on" either "any written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern" or "[a]ny lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern…" RCW 4.24.525(2) and (2)(d) and (e).

Hedlund made a written statement on a website jobs' forum, which all parties acknowledge, as they must, was a written statement in a public forum.[1] Op. at 3. Hedlund's post was further "conduct in furtherance of" the exercise of the constitutional right of free speech." Rather than focus, as it should, on whether the statement was on an issue of public concern and whether the "other conduct" was "lawful", Division One instead focused on the label Plaintiff assigned to the claim rather than the actual conduct at issue, thus narrowly construing the Act and ignoring its clear language.

Division One erroneously held that the Act applies only to a claim "based on an **oral** statement or '[a]ny other lawful conduct in furtherance

[1] Web sites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute.'" **Nygard, Inc. v. Uusi-Kerttula**, 159 Cal.App.4th 1027, 1039, 72 Cal.Rptr.3d 210 (2008), *citing* **Barrett v. Rosenthal,** 40 Cal.4th 33, 41, fn. 4, 51 Cal.Rptr.3d 55, 146 P.3d 510 (2006). Indeed.com is an open forum and can be accessed by anyone.

of the exercise of the constitutional right of free speech in connection with an issue of public concern . . . " Op. at 4 (emphasis added). It held that the Act could not apply to this case because it involved an allegation of a breach of contract and that "[t]he gravamen of the complaint is not whether there was a violation of Hedlund's free speech rights, but rather, whether the parties' contract was violated." Op. at 1.

Division One stated "AKS argues that the action involves a breach of contract claim and not free speech. We agree. … the legislature did not grant a party immunity from liability for the consequences of speech that is otherwise unlawful or unprotected." Op. at 5.

Division One was required to first assess whether or not the claim "however characterized" was "based on" any "written statement … submitted[] in a place open to the public or a public forum in connection with an issue of public concern" or "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern…"

Hedlund was sued for posting a comment on an internet Jobs forum – a written statement in a public forum. AKS alleged this posting violated a confidentiality agreement. The posting is not "unlawful" conduct unless the posting actually breached a confidentiality agreement – something

AKS had not proven (and cannot prove) and which would have required Division One to side step the first prong of the test.

Division One should have focused, as the parties did in their briefing, on whether the posting was on an issue of public concern, and Division One needed to view the entire post in context, and not isolated sentences taken out of context. Division One was provided with numerous cases from Washington and California, which has a similar Anti-SLAPP provision, showing that criticisms and website postings for the purposes of warning away the public from a particular product or business or professional were speech on matters of public concern Division One in another Anti-SLAPP case heard the same day and in an opinion issued the same day used the broader context approach in finding speech to be on a matter of public concern, yet here it looked just to the label of the claim.

In **Spratt v. Toft**, __ P.3d __, 2014 WL 1593133 (4/21/14), Division One found that statements by a former employer privately to a few individuals and in an anonymous letter to others that he had "fired" an employee met the test because the employer was a candidate for public office and was defending himself against the former employee's allegations that he was an unpleasant boss. **Id.** at *2-4. Division One found the statements by the former employer that he had fired the former employee fell within the "public concern" test looking at the context of the

speech because the employer was defending against allegations by the employee in the context of a political campaign. **Id.** at *4. Division One did not focus on the statement, out of context, and determine whether or not the allegation that the employer had fired the employee was itself a matter of public concern.

Here, Division One focused on the label AKS assigned to the claim and did not even get to the speech issue, and it further ignored the context of Hedlund's speech and that his right to free speech was not limited if the contract did not apply to the comments posted. It should have looked at the actual conduct—written speech in a public forum—and then afforded Hedlund the same broad interpretation it afforded in **Spratt** viewing the context and entirety of the speech to decide if the "public concern" test applied.

As California has artfully explained, courts "do not evaluate the first prong of the anti-SLAPP test solely through the lens of the plaintiff's cause of action." **Stewart v. Rolling Stone LLC**, 181 Cal. App. 4th 664, 679, 105 Cal. Rptr. 3d 98 (2010). The "critical consideration" is what the cause of action is "based on." **Navellier v. Sletten**, 29 Cal.4th 82, 88, 124 Cal.Rptr.2d 530, 52 P.3d 703 (Cal. 2009).

> [C]onduct alleged to constitute breach of contract may also come within constitutionally protected speech or petitioning,. The anti-SLAPP statute's definitional focus is not the form of

> the plaintiff's cause of action, but, rather the defendant's activity that gives rise to his or her asserted liability and whether that activity constitutes protected speech or petitioning

Nevellier, 29 Cal.4th at 92 .; **see also Nygard, Inc. v. Uusi-Kerttula**, 159 Cal. App. 4th 1027, 72 Cal.Rptr.3d 210 (Cal. App. Ct. 2008) (alleged breach by employee of confidentiality agreement for facts revealed about workplace and boss); **Hecimovich v. Encinal Sch. Parent Teacher Organization**, 137 Cal.Rptr.3d 455, 473-74, 203 Cal. App. 4th 450, 473-74 (Cal. App. Ct. 2012) (breach of contract and defamation claim) .

Division One was cited to numerous cases focusing on the context of speech and finding speech similar to Hedlund's to be on a matter of public concern under a variety of labels by Plaintiffs.[2] Op. at 7-8. It quoted the

[2] **See e.g., Gilbert v. Sykes**, 147 Cal. App. 4th 13, 23-24, 53 Cal. Rptr.3d 752 (2007) (holding patient's website describing "nightmare" results from plaintiff plastic surgeon "contribute[d] to the public debate" about plastic surgery and so were statements on a matter of public interest and thus covered by California Anti-SLAPP statute); **Phoenix Trading, Inc. v. Kayser**, No. C10-0920JLR, 2011 WL 3158416 (W.D.Wash. July 25, 2011) (applying Washington Anti-SLAPP statute "public concern" test to statements of competitor about quality of toothbrushes used in New York prisons); **aff'd**, 732 F.3d 936 (9th Cir. 2013); **Terry v. Davis Community Church**, 131 Cal. App. 4th 1534, 1547 (2005) (California Anti-SLAPP statute applied to church's report about plaintiff's conduct with a minor circulated to 100 individuals; holding "whether … an adult who interacts with minors in a church youth program has engaged in an inappropriate relationship with any of the minors is clearly a matter of public interest."); **Traditional Cat Ass'n, Inc. v. Gilbreath**, 118 Cal. App. 4th 392, 397 (2004) (California Anti-SLAPP statute applied to statements on one cat breeder's website critical of another breeder with court holding statements to be of public interest although website and subject likely only of interest to cat breeding community); **Higher Balance, LLC v. Quantum Future Group, Inc.**, No. 08-233-HA, 37 Media L. Rep. 1181, 2008 WL 5281487 at *4-5 (D. Or. Dec. 18, 2008) (meditation institute sued over anonymous posting in an online forum re: institute's products and criminal charges against co-founder and court applying Oregon Anti-SLAPP statute rejected argument that statements were "of interest only to a limited, definable portion of the public" and found statements to be in connection with an issue of public interest and covered by the statute); **Maekaeff v. Trump Univ., LLC**, 715 F.3d

Ninth Circuit holding that "[u]nder California law, statements wanting consumers of fraudulent or deceptive business practices constitute a topic of widespread public interest, so long as they are provided in the context of information helpful to consumers." Op. at 7; quoting **Maekeff v. Trump University LLC**, 715 F.3d 254, 262 (9th Cir. 2013). Division One nonetheless held that it was "not inclined to extend that same protection to someone who signed a confidential agreement potentially limiting his right to speak on certain issues." Op. at 7. Again, Division One let the

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254, 261-263 (9th Cir. 2013) (finding seminar attendee's statements about seminar provider to be on an issue of public interest and covered by California Anti-SLAPP statute because statements were made to warn consumers about provider's alleged deceptive practices and to warn them not to use seminar provider's services); **Sedgwick Claims Mgmt Servs., Inc. v. Delsman**, No. C 09–1468 SBA, 2009 WL 2157573 at *8 (N.D. Cal. July 17, 2009); **aff'd** 422 Fed.Appx. 651 (9th Cir. 2011) (applying California Anti-SLAPP stature to insured's complaints on his website and in postcards to other potential customer's about insurance claims service provider holding statements to be on a matter of public interest; communications "purpose is to enlighten potential consumers of Sedgwick's allegedly questionable claims practices and to avoid using the company's services"); **GetFugu, Inc. v. Patton Boggs LLP,** 220 Cal.App.4th 141, 151, 162 Cal.Rptr.3d 831 (2013) (California Anti-SLAPP statute applied to statements made about an investment company because there is a public concern in the markets "to help secure futures, pay for homes, and send children to college," which in turn "supports the common interest of all Americans in a growing economy that produces jobs, improves our standard of living, and protects the value of our savings."); **Nygard, Inc.** , 159 Cal. App. 4th at 1042 ; **Wilbanks v. Wolk**, 121 Cal. App. 4th 883, 899 (2004) (holding that California Anti-SLAPP law applied to statements about viatical settlement brokers); **Steaks Unlimited, Inc. v. Deaner**, 623 F.2d 264, 280 (3d Cir. 1980); **see also Carver v. Bonds**, 135 Cal. App. 4th 328, 344 (2005) (applying anti-SLAPP statute to bar claims by podiatrist where newspaper provided warning and "other information to assist patients in choosing doctors"); **New York Studio, Inc. v. Better Business Bureau of Alaska, Or. & Wash.,** 39 Media L. Rep. 2297, 2011 WL 2414452 (W.D.Wash. 6/13/11) (barring claims under Washington's anti-SLAPP statute arising from press release posted to website cautioning consumers about talent agent practices related to children); **AR Pillow Inc. v. Maxwell Payton LLC**, 2012 WL 6024765; 41 Media L. Rep. 1042 (W.D. Wash. 12/4/12). **Paradise Hills Assoc. v. Procel**, 235 Cal. App. 3d 1528, 1544, 1 Cal. Rptr. 2d 514 (1991); **Davis v. Avvo, Inc**, 2012 WL 1067640 at * 3; 40 Media L. Rep. 2372 .

label of the claim control, not the subject matter and context of the speech. Division One was wrong. Speech should be examined in context, as the court did in **Spratt**, when deciding whether the speech is on a matter of public concern. Courts in Washington and elsewhere (see fn. 2, for example) have deemed statements to be on a matter of public concern looking at the broader context and refusing to allow the focus to be on whether precise words taken out of context were of concern to the public. The Division One Court of Appeals, in **Davis v. Cox**, __ P.3d __, 2014 WL 1357260 (Wn. Ct. App. 4/7/14) held that actions related to a proposed boycott of goods at a local Co-op fell within the Anti-SLAPP statute examining the "other lawful conduct" prong broadly as the Act intended and the speech activities in context.. It held that actions related to preparing a material for a court action did not fall within the "petition" clause interpreting the provision narrowly in **Dillon v. Seattle Deposition Reporters**, 316 P.3d 1119 (Wn. App. Ct. 2014), **cert granted.** It rejected application of the Anti-SLAPP Act to a case brought under the Public Record Act injunction provision finding that because a statute authorized the cause of action the Anti-SLAPP law can never apply, ignoring the use to which the records requested were to be used and whether or not the request was an "act in furtherance of" protected activity. **Seattle v. Egan**, 317 P.3d 568 (2014)..

California recently applied its Anti-SLAPP law to posts by a mother on a social networking site that her daughter's ex-boyfriend was a "deadbeat dad", "may be taking steroids", had "picked up street walkers" and homeless people and that people should be "scared of him" finding the statements on a matter of public concern because the boyfriend ran a forensics business and that the comments were akin to consumer comments. **Chaker v. Mateo**, 209 Cal. App. 4th 1138 (2012). California also deemed statements about a volunteer coach removed from coaching a volunteer youth sports team to be on a matter of public concern, although the comments were circulated to just a few parents and dealt with coach's removal for trying to sit out a player for bad behavior, finding the speech was in connection with the broader public issue of the safety of youth sports. **Hecimovich v. Encinal Sch. Parent Teacher Org.**, 203 Cal..App.4th 450, 137 Cal.Rptr.3d 1534 (2012).

In **Doe v. Gangland Productions, Inc.**, 730 F.3d 946 (9th Cir. 2013), the Ninth Circuit overturned a trial court's refusal to apply the California Anti-SLAPP law to a breach of agreement claim by a gang member stemming from filmmakers alleged breach of agreement not to reveal the identity of the gang member in the film. The trial court had held that the gang member's identity was not a matter of public concern and further found that the newsgathering alleged – disclosing the identity

in violation of the agreement, was not lawful conduct and so could not be covered by the Anti-SLAPP law. The Ninth Circuit explained that this combined the first and second prongs of the Act – looking to whether the claim could be shown as part of the determination of whether the conduct was protected. It further found the public concern test had to be examined broadly and in the context of the full film, not focusing on whether the identity disclosure was itself the public concern. **Id.**

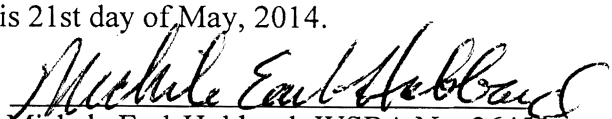
In **Nygard,** California dismissed a breach of confidentiality claim against an employee over statements she made about workplace conditions and her boss finding discussions of workplace conditions generally to be a matter of legitimate public concern. **Nygard, Inc.** , 159 Cal.App.4th at 1042 (emphasis in original). California has described an issue of public concern as "**any issue in which the public is interested**." **Nygard, Inc.**, 159 Cal.App.4th at 1042 (emphasis in original). "Courts have recognized the importance of the public's access to consumer information. … Members of the public … clearly have an interest in matters which affect their roles as consumers, and peaceful activities…which inform them about such matters are protected by the First Amendment." **Wilbanks v. Wolk**, 121 Cal.App.4th 883, 899 (2004) (holding California Anti-SLAPP law applied to statements about viatical settlement brokers)

Hedlund posted information about AKS to aid in consumer choice; to assist forum members in deciding where to apply for a job and where to invest their time and energy, and to point out fraud by company officials posing as applicants to post false and misleading information to mislead applicants. The choice of where to invest your career is as important as what brand of toothpaste to buy, what dentist to use or the many other subjects courts have held fell within statements of public concern under Anti-SLAPP laws. Division One here erred in narrowly construing the Act and viewing it through the lens of the Plaintiff's label of its cause of action. Its decision conflicts with its own decisions, deals with an issue of state and federal constitutional law, and erodes this new and important law[3] requiring Supreme Court review to correct the misstatements.

VI. CONCLUSION

The Court should accept review and reverse the decision of the Court of Appeals, reinstate the decision of the trial court, and award Hedlund his fees and costs incurred on appeal..

Respectfully submitted this 21st day of May, 2014.

By: 

Michele Earl-Hubbard, WSBA No. 26454
Allied Law Group LLC

---

[3] See Bruce E.H. Johnson & Sarah K. Duran, **A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy**, 87 Wash. L. Rev. 495, 518 (2012)

VII. CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on May 21, 2014, I delivered a copy of the foregoing Corrected Brief of Respondent by email pursuant to an electronic service agreement among the parties with back up by U.S. Mail to the following:

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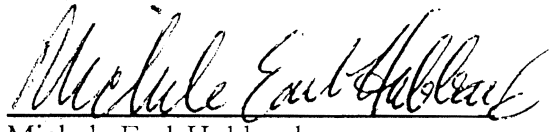
Dated this 21st day of May, 2014.



Michele Earl-Hubbard

APPENDIX A

Division One Opinion dated 4/21/14

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

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April 21, 2014

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CASE #: 69349-2-I
Alaska Structures, Inc., Appellant v. Charles Hedlund, Respondent

King County, Cause No. 11-2-28441-7.SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Reversed and Remanded"

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure
c: The Honorable Mary Yu

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC., an Alaska corporation,	)	No. 69349-2-I
Appellant,	)	DIVISION ONE
v.	)	PUBLISHED OPINION
CHARLES J. HEDLUND,	)	
Respondent.	)	FILED: April 21, 2014

GROSSE, J.P.T.[1] — To succeed on a special motion to strike under Washington's anti-SLAPP statute,[2] the moving party must make an initial prima facie showing that the claimant's suit arises from an act in furtherance of his right of petition or free speech in connection with a matter of public concern. If the movant does not meet that threshold, then the anti-SLAPP motion is dismissed. Here, the plaintiff, Alaska Structures, Inc., brought an action against the defendant, Charles Hedlund, for violating a confidentiality agreement. The gravamen of the complaint is not whether there was a violation of Hedlund's free speech rights, but rather, whether the parties' contract was violated. Because this is a private contractual matter, the anti-SLAPP statute does not apply. Accordingly, we reverse the trial court and remand for further proceedings.

FACTS

From February 2007 to January 2010, Charles Hedlund worked as a sales coordinator at Alaska Structures, Inc. (AKS), a supplier of tents to the United States

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[1] Judge C. Kenneth Grosse was a member of the Court of Appeals at the time oral argument was heard on this matter. He is now serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

[2] Washington Act Limiting Strategic Lawsuits Against Public Participation.

military. In August 2011, Hedlund made several postings regarding AKS on an Internet jobsite forum, Indeed.com. Those postings were removed from the web site at AKS's request. Indeed.com is a web site designed to be a resource for job seekers. It includes job postings, salary averages, and a forum where employees and applicants can discuss a company's work environment. The web site is designed to allow job seekers to ask others about a company to aid in making a decision whether or not to work there. Hedlund claimed he made his comments to describe an accurate picture of AKS to prospective employees, and because he suspected that other postings on the web site describing AKS were made by employees masquerading as job seekers. Hedlund characterized the various postings regarding AKS as a debate among the parties posting. AKS has focused on one particular posting as providing the basis for its suit of breach of confidentiality. Hedlund wrote:

> [T]he security measures at AKS are all consumer-grade off the shelf fare installed by the former CIO, who had no prior security experience. . . . The cheap cameras provided no clues as to the identity of the thieves. That is why they now have the high-tech security precaution of human guards.

Hedlund denied having any special knowledge of security measures. While Hedlund was employed there, Dylan Schneider, the chief information officer (CIO) of AKS, installed software and security cameras. AKS knew that Schneider did not have any prior experience in deploying security measures.

Hedlund posted his comment after he had left AKS and after the AKS headquarters had been broken into. His comments were based on public information contained in police reports and newspapers.

Based on this posting, AKS sued Hedlund for breach of a confidentiality agreement. Hedlund argued that he was sued as a result of his postings to a web site, which is a public forum, and moved to dismiss the claim under the anti-SLAPP statute.

The trial court found the anti-SLAPP statute applied and that AKS was unable to demonstrate that its action for violation of the confidentiality agreement had any merit. The court awarded Hedlund requested attorney fees and a $10,000 penalty. AKS appeals.

ANALYSIS

AKS argues that the trial court erred in determining that the contents of Hedlund's posting addressed issues of public concern. AKS further argues that even if this posting were of public concern, Hedlund violated the confidentially agreement he signed with AKS while in its employ.

In 2010, the Washington legislature expanded the protections embodied in RCW 4.24.525. In the preamble, the legislature stated the purpose of the new section:

> (a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;
>
> (b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," 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;
>
> (c) 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;
>
> (d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and
>
> (e) An expedited judicial review would avoid the potential for abuse in these cases.[3]

[3] LAWS OF 2010, ch. 118, § 1.

The act further provides that it "shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts."[4] The anti-SLAPP statute provides relief to a defendant in the nature of immunity from suit.[5]

Pursuant to the anti-SLAPP act, a party may bring a special motion to strike any claim based on an oral statement or "[a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2)(e). Here, Hedlund was required to prove by a preponderance of the evidence that AKS's claim is based on a statement made in connection with an issue of public concern. RCW 4.24.525(4)(b).

In deciding an anti-SLAPP motion, a court must follow a two-step process.[6] We review a court's interpretation and application of the anti-SLAPP statue de novo.[7] The first prong of the analysis requires a court to review the parties' pleadings, declarations, and other supporting documents to determine whether the gravamen of the underlying claim is based on protected activity. A defendant filing an anti-SLAPP motion to strike must make an initial prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's right of petition or free speech.[8] If the substance or gravamen of the complaint does not challenge the defendant's acts in furtherance of the

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[4] LAWS OF 2010, ch. 118, § 3; Akrie v. Grant, ___ Wn. App. ___, 315 P.3d 567, 571 (2013).
[5] Henne v. City of Yakima, 177 Wn. App. 583, 594-95, 313 P.3d 1188 (2013).
[6] Dillon v. Seattle Deposition Reporters, LLC, __ Wn. App.__, 316 P.3d 1119, 1132 (2014).
[7] City of Seattle v. Egan, __ Wn. App __, 317 P.3d 568, 569 (2014).
[8] RCW 4.24.525(4)(b); see also Dillon, 316 P.3d at 1133.

right of free speech or petition, the court does not consider whether the complaint alleges a cognizable wrong or whether the plaintiff can prove damages.[9] In other words, Hedlund is required to make a threshold showing that each of AKS's claims is based on protected activity. AKS contends that the trial court erred when it concluded that Hedlund's postings on Indeed.com fell within the protected activity of the anti-SLAPP statute. AKS argues that the action involves a breach of contract claim and not free speech. We agree.

Here, the trial court made the following findings:

> The Court further finds that the speech at issue is a written statement submitted in a public forum in connection with an issue of public concern.
>
> The Court further finds that the matter concerns lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

But, what constitutes public concern must be viewed in the context of this act. Under the act, the legislature is "concerned about lawsuits" that deter participation in matters of public concern.[10] It created the special motion in RCW 4.24.525 to "[s]trike a balance between the rights of persons to file lawsuits . . . and the rights of persons to participate in matters of public concern."[11] But the legislature did not grant a party immunity from liability for the consequences of speech that is otherwise unlawful or unprotected.

Washington's anti-SLAPP statute mirrors California's anti-SLAPP statute. Accordingly, California cases may be considered persuasive authority when interpreting

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[9] Dillon, 316 P.3d at 1139.
[10] LAWS OF 2010, ch. 118, § 1.
[11] LAWS OF 2010, ch. 118 § 1.

RCW 4.24.525.[12] California uses the term "public interest" while Washington uses "public concern." California courts have defined "public interest" as "any issue in which the public is interested."[13] As the district court noted in Stutzman v. Armstrong, "'[t]hose terms are inherently amorphous and thus do not lend themselves to a precise, all encompassing definition.'"[14] We are reminded of Justice Potter Stewart's famous definition of "pornography," "I know it when I see it" and we see no discernible difference in the two terms.[15]

In Cross v. Cooper, the California court noted that its courts adopted a framework of categories for determining whether a statement implicates an issue of public interest and falls within the protection of the anti-SLAPP statute:

> The first category comprises cases where the statement or activity precipitating the underlying cause of action was "a person or entity in the public eye." The second category comprises cases where the statement or activity precipitating the underlying cause of action "involved conduct that could affect large numbers of people beyond the direct participants." And the third category comprises cases where the statement or activity precipitating the claim involved "a topic of widespread, public interest."[16]

It is true that in applying those categories, several California cases have found that consumer information posted on web sites concern issues of public interest. See, e.g.,

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[12] Compare RCW 4.24.525 with Cal. Civ. Proc. Code § 425.16. See City of Longview v. Wallin, 174 Wn. App. 763, 776 n.11, 301 P.3d 45, rev. denied, 178 Wn.2d 1020, 312 P.3d 650 (2013).

[13] Nygard, Inc. v. Uusi-Kerttula, 159 Cal. App. 4th 1027, 1042, 72 Cal. Rptr. 3d 210 (2008).

[14] No. 2:13-CV-00116, 2013 WL 4853333, at *5 (E.D. Cal. 2013) (quoting E Clampus Vitus v. Steiner, 2:12-CV-01381, 2012 WL 6608612 (E.D. Cal. 2012)).

[15] Jacobellis v. State of Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring).

[16] 197 Cal. App. 4th 357, 373, 127 Cal. Rptr. 3d 903 (2011) (footnotes and citations omitted) (quoting Rivero v. American Fed'n of State, County, and Mun. Emps., AFL-CIO, 105 Cal. App. 4th 913, 924, 130 Cal. Rptr. 2d 81 (2003)).

Gilbert v. Sykes[17] (holding patient's statements about a plastic surgeon were of public interest because the information provided was material to potential consumers "contemplating plastic surgery"); Wong v. Tai Jing[18] (review on Yelp, Inc. criticizing dental services and discussing the use of silver amalgam raised issues of public interest). Similarly, the Ninth Circuit in Makaeff v. Trump University, LLC,[19] held that "[u]nder California law, statements warning consumers of fraudulent or deceptive business practices constitute a topic of widespread public interest, so long as they are provided in the context of information helpful to consumers."

Hedlund argues that these cases support his activity as protected because his postings were meant to alert prospective employees to his opinions and experience with AKS and to alert them to potentially fraudulent postings by employees of AKS posing as new applicants. But consumers of products are in a special class of protection and we are not inclined to extend that same protection to someone who signed a confidentiality agreement potentially limiting his right to speak on certain issues.

Hedlund analogizes his postings to "consumer information" of public concern. He relies on several California cases. For example, in Wilbanks v. Wolk, the defendant, a consumer watchdog, warned people on her web site to "[b]e very careful when dealing" with the plaintiff, a settlement broker, because the plaintiff "provided incompetent advice" and was "unethical."[20] In holding the statements to be protected activity under the anti-SLAPP statute, the Wilbanks court noted that "[m]embers of the public . . . clearly have an interest in matters which affect their roles as consumers, and peaceful

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[17] 147 Cal. App. 4th 13, 23, 53 Cal. Rptr. 3d 752 (2007).
[18] 189 Cal. App. 4th 1354, 117 Cal. Rptr. 3d 747 (2010).
[19] 715 F.3d 254, 262 (9th Cir. 2013).
[20] 121 Cal. App. 4th 883, 890-91, 17 Cal. Rptr. 3d 497 (2004).

activities, which inform them about such matters are protected by the First Amendment."[21] The Wilbanks court noted that the statements at issue "were not simply a report of one broker's business practices, of interest only to that broker and to those who had been affected by those practices," but rather were a warning not to use those services and thus were made "[i]n the context of information ostensibly provided to aid consumers choosing among brokers," making the statements an issue of public concern.[22]

But, we believe the situation here to be more akin to World Financial Group, Inc. v. HBW Insurance & Financial Services, Inc.[23] There, the plaintiff sued a competing business and its agents for misappropriating trade secrets and using confidential information to solicit customers and employees.[24] HBW and the former World Financial Group employees filed a special motion to strike under California's statute, claiming their conduct was of public interest because it involved workforce mobility, free competition, and the pursuit of employment.[25] In affirming the trial court's finding that the complaint was not subject to the anti-SLAPP statute, the court rejected the argument that the communications were meant to aid consumers in "the pursuit of lawful employment" and to aid "workforce mobility and free competition."[26] The court rejected the arguments because the communications themselves were not about any broad social topics, or made to inform the public, but "were merely solicitations of a

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[21] 121 Cal. App. 4th at 899 (quoting Paradise Hill Assocs. v. Procel, 235 Cal. App. 3rd 1528, 1544, 1 Cal. Rptr. 514 (1991)).
[22] 121 Cal. App. 4th at 900.
[23] 172 Cal. App. 4th 1561, 92 Cal. Rptr. 3d 227 (2009).
[24] World Fin. Grp., 172 Cal. App. 4th at 1564-66.
[25] World Fin. Grp., 172 Cal. App. 4th at 1566-67.
[26] World Fin. Grp., 172 Cal. App. 4th at 1569.

competitor's employees and customers undertaken for the sole purpose of furthering a business interest."[27] World Financial Group is more closely aligned to the case here.[28]

Furthermore, such a holding is in line with California's more restrictive tests set forth in Weinberg v. Feisel:[29]

> The statute does not provide a definition for "an issue of public interest," and it is doubtful an all-encompassing definition could be provided. However, the statute requires that there be some attributes of the issue which make it one of public, rather than merely private, interest. A few guiding principles may be derived from decisional authorities. First, "public interest" does not equate with mere curiosity. (Time, Inc. v. Firestone, supra, 424 U.S. [448, 454–455,] 96 S.Ct. at pp. 965–966, 47 L.Ed.2d [154, 163 (1976)]; Briscoe v. Reader's Digest Association, Inc., (1971) 4 Cal.3d 529, 537, 93 Cal.Rptr. 866, 483 P.2d 34.)] Second, a matter of public interest should be something of concern to a substantial number of people. (Dun & Bradstreet v. Greenmoss Builders, supra, 472 U.S. [749, 762, 105 S.Ct. 2939, 2947, 86 L.Ed.2d 593, 604 (1985).)] Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. (Ibid.; Hutchinson v. Proxmire (1979) 443 U.S. 111, 135, 99 S.Ct. 2675, 2688, 61 L.Ed.2d 411, 431.) Third, there should be some degree of closeness between the challenged statements and the asserted public interest (Connick v. Myers (1983) 461 U.S. 138, 148–149, 103 S.Ct. 1684, 1690–1691, 75 L.Ed.2d 708, 720–721); the assertion of a broad and amorphous public interest is not sufficient (Hutchinson v. Proxmire, supra, 443 U.S. at p. 135, 99 S.Ct. at p. 2688, 61 L.Ed.2d at p. 431). Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort "to gather ammunition for another round of [private] controversy. . . ." (Connick v. Myers, supra, 461 U.S. at p. 148, 103 S.Ct. at p. 1691, 75 L.Ed.2d at p. 721.) Finally, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (Hutchinson v. Proxmire, supra, 443 U.S. at p. 135, 99 S.Ct. at p. 2688, 61 L.Ed.2d at p. 431.)

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[27] World Fin. Grp., 172 Cal. App. 4th at 1572.

[28] World Fin. Grp., is consistent with the United States Supreme Court's decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985). Dun & Bradstreet similarly dealt with a lawsuit regarding commercial activities by a private business about a private business directed to other private businesses: a private agency issuing a credit report to five subscribers about the bankruptcy of another business.

[29] 110 Cal. App. 4th 1122, 1132, 2 Cal. Rptr. 3d 385 (2003), cited with approval in Hilton v. Hallmark Cards, 599 F.3d 894, 906 (9th Cir. 2010)).

We must adhere to the legislature's policy that the purpose of the anti-SLAPP statute is to strike a balance between the right of the person to file a lawsuit and that person's right to a jury trial and the rights of people to participate in "matters of public concern." On these facts that balance leads us to the conclusion that the postings cannot be deemed protected activity. This is particularly true where the complaint alleges Hedlund voluntarily limited his right to speak freely by signing a confidentiality agreement. The issue here is a simple contractual issue—whether or not Hedlund violated a contract he signed with his former employer.

Our ruling is limited to our conclusion that Hedlund does not meet the threshold standard for application of the statute and does not in any way preclude the trial court from determining the sufficiency of the complaint for breach of contract on summary judgment. The issue of whether Hedlund violated the confidentiality agreement may well lend itself to summary judgment dismissal, and Hedlund may be entitled to attorney fees under that contract. However, those issues are not before us and we hold only that the trial court erred in striking AKS's pleadings under the anti-SLAPP statute.

Reversed and remanded.

WE CONCUR:

APPENDIX B

Relevant Statutes & Constitutional Provisions
Relevant to Issues Presented for Review

U.S.C.A. Const. Amend. I

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

West's RCWA Const. Art. 1, § 5

§ 5. Freedom of Speech

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

West's RCWA 4.24.525

4.24.525. Public participation lawsuits--Special motion to strike claim--Damages, costs, attorneys' fees, other relief--Definitions

(1) As used in this section:
(a) “Claim” includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;
(b) “Government” includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;
(c) “Moving party” means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;
(d) “Other governmental proceeding authorized by law” means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including 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.
(e) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;
(f) “Responding party” means a person against whom the motion described in subsection (4) of this section is filed.
(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an “action involving public participation and petition” includes:
(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or
(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.
(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.
(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.
(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.

APPENDIX E

Report of Proceedings

8/17/12 Anti-SLAPP Motion Hearing

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

ALASKA STRUCTURES, INC.,)

Plaintiff,)

vs.) No. 11-2-28441-7 SEA

CHARLES J. HEDLUND,)

Defendant.)

VERBATIM TRANSCRIPT OF PROCEEDINGS

Heard before the Honorable Judge Mary Yu, at King County Courthouse, 516 Third Avenue, Room W-928, Seattle, Washington

APPEARANCES:

RANDY GAINER and ROBERT MOSS, representing the Plaintiff;

MICHELLE EARL-HUBBARD, representing the Defendant.

DATE: August 17, 2012

REPORTED BY: Joanne Leatiota, RPR, CRR, CCP

Seattle, Washington; Friday, August 17, 2012

AFTERNOON SESSION - 1:31 P.M.

--oOo--

THE COURT: We are here this afternoon in the matter of Alaska Structures versus Charles Hedlund, cause number 11-2-28441-7 with a Seattle designation. Let's have counsel introduce themselves for the record, please.

MR. GAINER: Your Honor, my name is Randy Gainer from Davis Wright Tremaine. I represent Alaska Structures. And with me here today is Robert Moss, general counsel for Alaska Structures.

MR. MOSS: Good afternoon.

MS. EARL-HUBBARD: Your Honor, Michelle Earl-Hubbard from Allied Law Group on behalf of the defendant Charles Hedlund. With me today is my client Charles Hedlund.

THE COURT: You are the moving party, so why don't we go and get started.

MR. GAINER: Your Honor, if I could interject, we filed a motion for leave to file a surreply. Would you like argument on that?

THE COURT: I don't want any argument on it, and I have to say that I did review everything, but it's not well taken. Surreply, the rebuttals, all the responses, and even the paperwork that I received yesterday is not

appreciated, given that I really like to be prepared.

I did review everything, and it just is unfortunate that this continues to occur in many cases where people at the last minute start raising issues. But I read it. I am not striking anything. It's all on the record.

MR. GAINER: Thank you, your Honor.

MS. EARL-HUBBARD: Your Honor, how long will you be allowing us for our argument?

THE COURT: I don't set time limits. I have read everything, so go right ahead and --

MS. EARL-HUBBARD: Should I tell you if I'd like to reserve some time for rebuttal?

THE COURT: Again, I am not keeping time.

MS. EARL-HUBBARD: Well, I would like some time for rebuttal, and I would appreciate, rather than just talk, answering your questions.

Just one quick thing on the surreply issue. We actually disagree that we raised new issues. I think from the very outset, Mr. Hedlund's argument has been, prior to the lawsuit being served on him as well as now, these were events that happened after he left, things he learned about after he left. That's never changed.

And they're wrong when they interpreted our original to say it was solely based on public records. The simple fact was there were events after he left about

things he learned after he left. And I actually think in some ways what they filed in the surreply proves our point about why their case itself would not have merit.

This, as you know, is what we call an anti-SLAPP motion under a fairly new statute that was passed in 2010, and we are moving based on RCW 4.24.525(2)(d) and (e). Those two provisions, we believe, cover the speech that is at issue in this case. This is a speech case. This is a person who has been sued as a result of something he wrote on a public forum website.

So it's very unlike many of the cases that the plaintiff -- and I will try to call them plaintiff, not defendant. I always get them confused. This is a very different case than the cases that Alaska Structures has repeatedly cited, mostly out of California, where the lawsuits were not about speech. They were about things such as a theft of a customer list, for example, a theft of a copyright or a trademark or conduct as opposed to speech.

This is a speech case, and I think that puts us in a different ballpark in terms of how you would approach it.

We agree that the first step for this court is to determine that our case falls within the SLAPP statute, paragraph (d) and (e) in this case. And that requires

for (d) that it be something involving any oral statement made or written -- or sorry, any oral statement made or written statement or other document submitted anyplace open to the public or a public forum in connection with an issue of public concern. That is paragraph (d).

Paragraph (e) is any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern or in furtherance of the exercise of the constitutional right of petition.

We believe that the first parts of both of these prongs are very simple and cannot be contested.

The legislature specified when they passed this law in 2010 that this statute shall be applied and construed liberally to effectuate the general purpose of protecting participants in public controversies from abusive use of the courts.

In this case you have a written statement on a public forum. There is clear case law that a public forum is -- a website is, in fact, a public forum. It is also lawful conduct in furtherance of the exercise of free speech. This was Mr. Hedlund posting in a public chat room comments.

The issue about whether or not this was speech on a

matter of public concern is the one point that the plaintiffs have argued does not apply here. We believe that that is not a contention that can be well taken.

If you look at the Nygard case from California -- and Washington statute was, in fact, modeled on California's law, so many of their provisions can be taken into account.

And it held that the issue of public -- in their case they use the word "interest," not "concern." That's about the only difference really in the wording. But the issue of public interest is any issue in which the public is interested. The issue need not be significant to be protected by the anti-SLAPP statute. It is enough that it is one in which the public takes an interest. That's really all it is.

In this case the evidence is clear that Mr. Hedlund went to a website called Indeed.com. It's a public forum. There is a jobs page for his employer Alaska Structures where hundreds and hundreds of people have posted comments about Alaska Structures.

Alaska Structures takes down most negative comments relatively quickly, but at any point in time, you can go there and grab a snapshot -- and I provided you with many of those. I provided the other court systems in Georgia, through the Georgia co-counsel, the snapshots

we grabbed on those particular days, and there are tons of people talking about this company. There's a reason for that.

In the Avvo case that our federal court applied the Washington SLAPP statute, they were dealing with a lawsuit against the Avvo website, which I thought at one time they only reviewed lawyers, but apparently they review dentists and doctors as well. But it has a public forum component to it where consumers can post evaluations about these professionals to one another, and consumers can use that information to decide, do I use this professional or don't I.

Our federal court had absolutely no problem in a case, frankly, where the lawyers who represent Alaska Structures were representing Avvo, in interpreting that website, that exchange of information about a professional to help a consumer decide whether or not to use that professional, as being a discussion that was a matter of public concern.

This situation is very similar. You have job seekers who are asking for information about a company to decide whether or not to invest their time, their resources, in going to a company to work there. You have people posting comments about that company, their own experiences as interviewees.

And what my client found when he came upon this website, you had people who clearly worked for that company who are masquerading as interviewees, who he believed were committing a fraud upon the consumers by posting false information to counteract the many, many hundreds of negative comments that were being posted there.

So what he did when he found this website in August of 2011 from his father's house was create a screen name named "can you smell the BS" where he posted some comments calling out these masquerading posters, saying basically, "You work there. Don't pretend you don't work there. You obviously are an employee." He was trying to give the consumers accurate information about the posts so that they could, in fact, make a better informed decision. And it was because of the company having these masquerading posters there that he got involved at all.

And we have provided you with the entire post, not just the one that they try to focus on now, to show the string about how it started. Because they're wrong when they say that you look at just specific words to decide whether that was a post about a matter of public concern or that they can isolate their claim against this speaker by just picking certain sentences for which to

sue him.

What they have done is filed a lawsuit against this speaker that started with the original post on the website as part of this exchange among consumers on this public forum to help effectuate decision-making. So you cannot isolate.

What the statute was very clear is that you are supposed to look -- and you could go to the California case that talks about this, but you are supposed to look at whether or not the conduct in general is the type of conduct that is part of the foster of the First Amendment.

In this case it's speech that makes that an easy call. That was there because a lot of the cases were not about speech. They were about things like theft of customer lists or conduct, and the question there was harder, whether that conduct was part of your free speech exercise. In this case we start with a premise that it is free speech exercise.

The other part -- assuming you have speech that clearly is a matter of public concern, so you now apply under the SLAPP statute. The next step must be -- oh, and the other final point, sorry. The one case we have cited as well about the subject of these discussions, again, the much broader context of the discussion there,

is that Mr. Hedlund was talking about his job experience. He was talking about the workplace environment. All the other posters were as well.

And there is a case called Nygard that we have cited to you out of California. They have tried to distinguish -- because somehow the boss in that case was a public figure and that somehow made it different. That's not what the California case is premised on. It's premised on an employee who had a confidentiality agreement who posted or talked, I believe, to a reporter a lot about his job experience. And the employer sued him for this breach of contract agreement.

And they found that, no, in fact, discussing your job place, conditions, and circumstances and things like that is a matter of public concern. It is not the confidential trade secret-type information that his contract covered. But it was almost a public policy-based argument, if you will, that you cannot gag employees from being able to talk about their workplace experiences in that fashion. And in that case they threw out the confidentiality breach lawsuit based on their anti-SLAPP statute.

And in this case we have asked you to analogize to that, and Alaska Structures had said, oh, no, that employer was famous. He was rich. He was a public

figure, and ours isn't.

And that was the point of my declaration that I gave you on our reply to show you that, no, Mr. Hotes -- I believe is how you pronounce his name -- actually is a public figure, to the extent that even mattered. He actually does sport public attention. He's in magazines. He's at events hobnobbing with celebrities and Sean Penn, and he does have a foundation that he tries to maximize and get publicity for, as well as promotion for his own company that he says is one of the best in the world, et cetera.

So even to the extent that that was a qualifying figure, that would matter, too, but we don't think it is. We think the subject matter of the discussion, it's a much broader issue, not just the particular sentence they have chosen to latch on today is the issue that you have to look at.

When you get beyond that step, however, assuming the statute applies, in order to survive, the plaintiff here has to show that they can, by clear and convincing evidence, prove they will prevail on their case. They do that now before any discovery.

And the reason is because the anti-SLAPP statute is supposed to protect speech, supposed to protect against the abuses of the legal system to silence people and to

scare them away so that they're afraid to exercise their First Amendment rights.

If you look at Alaska Structures' actual lawsuit and the facts of this case, there is no way they can meet that burden. This is a lawsuit that never should have been filed. And once they knew my client's name, it never should have been served on him because it is abundantly clear that everything he is talking about happened after he left and is about events that cannot be deemed confidential, anyway.

The actual words they're trying to sue him for having posted, now that they have winnowed it down, chasing him through three separate state court systems and going after his father, are that he said, "They have consumer-grade off-the-shelf security measures." That was the first part, and that their cameras are, quote, cheap.

That's what they're suing him for. They're claiming those are confidential facts that violated the confidentiality agreement he signed back in 2007 when he worked as a salesman for a couple of years.

Now, he left in January of 2010, and the company was burglarized in March of 2010. And in March of 2010, apparently between burglary number one and the second burglary, also in March of 2010, Alaska Structures did

some sort of security upgrade. They installed some new security system. And apparently the person who installed it was their chief information officer who had no security experience, and it didn't work on day two, so it was turned off.

Now, how do we know this? Because the police reports report all of this. The police reports that ultimately led to a prosecution by the King County prosecuting attorney with hundreds of pages of records, many of which I have given you as well as a disk with the cameras, show that burglary number two, there was a security system installed by the chief information officer, it didn't work, so there was absolutely nothing for that event.

That was out there, that was publicized. There was an awful lot of news coverage about these burglaries because they hit a number of companies, not just Alaska Structures. So this was not a secret.

But it also is something that happened after he left. What they have now on their response said is, oh, no, no, we actually never fixed our security system. We were burglarized in March of 2010 twice, but in August 2011 when my client posted something on Indeed.com, they have actually in a public court file claimed that they as a government contractor did nothing

to upgrade their security.

Now, my client never would have known that. No one would have ever guessed they would have actually done that. So he was talking about events he understood happened after he left. There has to be some intent to breach a contract. And the things he has said under oath he was talking about were the security measures that happened after he left.

Now, that assumes that you can even get to the confidentiality breach case by finding these are even facts. I don't think that you could say when he says cheap cameras that that is a confidential fact. Because what he may think is cheap may be very different what you or I or Alaska Structures thinks is cheap. Whether something is cheap is not a confidential fact. It's a matter of opinion.

You can't be sued for breach of contract for saying someone has cheap cameras. You can't be sued for saying someone's security system, whatever that is, is off the shelf or consumer grade. Who knows what that means? He probably doesn't know what that means. But those are the confidential facts they try to claim he's being sued for.

And again, you have to look back to his actual confidentiality contract he signed. 2007, there's a

bunch of documents put in front of him. These are not the kinds of things that could possibly support that claim.

Now, in their latest permutation, what they have tried to argue based on, frankly, a different person's confidentiality agreement with very different terms is that somehow when Alaska Structures has an employee sign one of these contracts, it's a secrecy pledge for life. It's an agreement that I, as some salesperson for some period of time at this company for whatever period of time I live, if I ever learn anything about that company that the company says is confidential and I talk about it, they can sue me.

So when I am a janitor at Enron to get myself through journalism school and I sign some contract, go off to become a journalist, and now as a reporter for The New York Times, I find out about the Enron scandal. When I write about that, I'm going to be sued because I signed a secrecy pledge for life as a janitor.

Our world does not work that way. That is not what that contract says. And contracts require a meeting of the minds, and Mr. Hedlund has sworn under oath he never signed away his rights to free speech to talk about Alaska Structures about things after he left. That's in his very first declaration.

The only way they prove to you that they can prevail on the merits is to convince you that that contract had consideration and requires that it is a secrecy pledge for life and that what he said, cheap cameras, off-the-shelf consumer-grade security system, was a secret confidential fact.

They cannot meet all of those steps. So there is no way in the world that they can prevail. We have presented you the history of this company with going after its critics over and over and over again to shut them up, to scare them, to silence others.

They have an existing case in this very courthouse against the man who installed the security system and his wife because he posted a comment on Indeed.com saying that the president couldn't find his way from Kirkland to Seattle without a map or something to that effect. He's being sued for that. Apparently they haven't cited the anti-SLAPP statute. And his contract, I believe, is different than Mr. Hedlund's.

But they have done that over and over again. They take down all the negative comments on Indeed.com that they can get their hands on. You could not find Mr. Hedlund's comments "can you smell the BS" today if you looked for it. They were all gone within four hours.

So even their claim of damage is hard to believe

because his statements about these cheap cameras off the shelf, et cetera, were there four hours' time, and it's very unlikely that burglars found that in the four hours requiring them to up their security finally after all those years.

The final point, the chiropractor's agreement that she has signed, if you look at it, it's very different. It has in it provisions about if she -- it's going to extend for ten years after. It doesn't say that. That if she believes she's learned something that is not from her work, it's from something else, that she can disclose that, but she has to go to them and ask permission and do all these other things.

They know how to write the secrecy pledge for life when they want to, but they didn't with Mr. Hedlund. They are trying to convert it to that now, but that just isn't going to work.

So given that his speech is covered by the SLAPP statute, it is a matter of public concern. They cannot meet their burden of proving by clear and convincing evidence that this breach of confidentiality agreement lawsuit has merit.

Your Honor has to apply what the legislature intended, grant the special motion to strike, strike the lawsuit, award this man his reasonable attorney's fees

and costs, which, again, were incurred by them chasing him across three states, and award him the $10,000 fine.

We have also asked for CR 11 sanctions, which is a separate provision of the anti-SLAPP statute. It says the Court can give sanctions as necessary to prevent this type of conduct from this entity and others in the future, because they knew before they named him, before they amended, before they sued him who he was, and they should have known that he left in January of 2010. He posted in August of 2011. And all of the events that he was talking about related to the March 2010 burglary.

There is no way they could have thought that their breach of contract or breach of confidentiality agreement had merit against this man, because I think the secrecy pledge for life theory is a new generation. I think it happened after they saw our reply. And I don't think that it has any credence at all under the law.

Do you have any questions for me? Or I'll save the rest for reply.

THE COURT: I don't.

MS. EARL-HUBBARD: Thank you.

THE COURT: Thank you.

MR. GAINER: May it please the Court, my name is Randy Gainer, and I represent Alaska Structures. I plan

to refer to a couple new cases that came out since our response was submitted. I have given Ms. Earl-Hubbard copies. If the Court would like copies, I'd be happy to provide them.

THE COURT: Counsel, I obviously don't have a chance to read them right now. I hope you are not going to rely on them or utilize them, because it really puts me at a disadvantage.

MR. GAINER: Thank you, your Honor.

There are two facts that must be emphasized at the outset. First, Alaska Structures didn't sue Mr. Hedlund because of any negative posts he made on the Indeed.com site. We sued him because of one post out of many. In this post he disclosed sensitive confidential information in violation of his confidential agreement.

The remainder of his post, still up there. Dozens of negative posts about Alaska Structures, still up there. Some positive ones about Alaska Structures also up there. The claims from opposing counsel that we take down everything is not true, not supported by the record.

The second thing that needs to be emphasized is that Judge Cynthia Wright, the chief judge of the Atlanta Superior Court, rejected Mr. Hedlund's free speech claims when she enforced the petition to Cox

Communications, which enabled us to determine that it was Mr. Hedlund who had posted this one piece of confidential information.

Now, we understand that Judge Wright's 24-page well-reasoned decision is not binding on this court, but we believe it deserves consideration.

Hedlund can't prevail for three reasons: First, his online message was not made in connection with a public issue; second, if the Court finds that it was made in connection with such an issue, he waived his right to post the confidential information; and third, we will prevail on a breach of contract claim.

His duty to show you that his post and the specific parts of it were about a public concern is stated in the anti-SLAPP statute at 4.24.525(4)(b), and he must satisfy that burden before we have a burden to show that you we'll prevail on the contract claim.

He makes four flawed arguments to try to meet his burden of proof. First, he argues that because the Indeed.com website is a public forum, everything he posts there is protected speech. That extreme position was -- has been rejected by many courts, one of which we discuss in our materials, Doe versus Gangland court.

And that court said if you follow that reasoning to its conclusion, then every case that involves a

copyright or breach of contract claim regarding a film or a television show and that sort of thing would be subject to the anti-SLAPP statute. That can't be the law.

And, in fact, one of the cases that Hedlund relies on, the Carver case, says that not everything posted in a public forum is subject to the anti-SLAPP statute. That's why there is this two-prong test. He has to show that what we sued him for is a matter of public concern.

The second flawed argument that he states is on page 4 of his reply where he says, as Ms. Earl-Hubbard said here today, "The activity at issue here is speech. The focus must be on whether that speech" -- his online message -- "in its complete context" -- not just a few isolated words -- "is a matter of public concern."

Now, this argument ignores California cases that hold that the focus of the defendant's activities that gives rise to his asserted liability and whether that activity constitutes protected speech is what the Court should focus on.

And we talk about that in our brief, the World Financial Group case and the All One God case. Nine and ten of our response talk about that.

Now, Hedlund agrees, as Ms. Earl-Hubbard here did today, that the courts should apply California cases as

they construe their anti-SLAPP statute, but she just ignores this principle that's firmly established by California law.

A recent case, the Aguilar case in California, once again reiterated that exact same principle that came out since our response on July 19th.

Speech that gives rise to Hedlund's liability is part of his online message which disclosed confidential information about Alaska Structures' security cameras. That's what we pleaded in our amended complaint. That's what we sued Hedlund for, not because of any other post that he or anybody else made.

Hedlund at times emphasizes that that's what we concentrated on. He did that on page three of his motion, on four of his motion, but other times he likes to ignore them.

The Court should follow those California cases -- World Financial, All One God -- as similar cases and hold that the speech at issue is his comments about the security cameras, not any other posts. We are here about that one post.

The third error that Hedlund makes is to try to extrapolate from that post to broader issues. Again, he ignores a settled anti-SLAPP principle when he claims that the information about security cameras should be

construed as being about employment relations or management idiosyncrasies or improprieties of a government contractor or internal goings-on at Alaska Structures.

The Commonwealth Energy case and others say that the courts should not extrapolate from the actual speech to those kind of broad, amorphous issues. We didn't sue him about those kinds of comments or any other issues. We sued him about confidential information he disclosed.

The fourth error that Hedlund makes is to fail to show that his message meets any standard for determining when speech is in connection with a public concern.

Now, we talked in our brief about how it fails to meet the Rivero and Weinberg tests. That's at pages 14 and 15 of our response. But it also fails to meet the Nygard test, which he cited here today.

The facts of Nygard show that Mr. Nygard and his company were internationally known public figures, and there was extensive interest in Mr. Nygard and his Bahamas home which were the subject of the magazine article. He doesn't come close to showing any public interest in the Alaska Structures security cameras.

And even if the Court were to accept Mr. Hedlund's claim that the message was somehow about Mr. Hotes, the CEO of Alaska Structures, rather than the security

cameras, which is the focus of this online message, he still couldn't meet the Nygard standard.

The articles counsel for Mr. Hedlund provided that showed some references to Mr. Hotes are articles about other people. They have some brief references to Mr. Hotes and his earthquake relief activities, but they don't come close to showing that he's an international public figure like Mr. Nygard was. And any comments about Mr. Hotes, which are really not at issue here, don't have anything to do about the security cameras that Mr. Hedlund posted about.

Also, he's failed to show that the issues that Mr. Hedlund addressed in his online message come anywhere near to the type of public interest that the Washington federal courts who have opined on Washington statute addressed in those kinds of cases. We have discussed those in our briefs, so I won't repeat it here.

The final standard that Mr. Hedlund tries to invoke are consumer protection cases such as the Wilbanks case where a woman named Ms. Wilks was criticizing a buyer, apparently somebody who sells interests in life insurance policies while the policyholder is still alive. And in that case, the Court premised its decision on its earlier holding in the same case that what was at issue was consumer protection information.

The Wilbanks court stated, "Courts have recognized the importance of public access to consumer information. The growth of consumerism in the United States is a matter of common knowledge. Members of the public have recognized their roles as consumers. They clearly have an interest in matters which affect their roles as consumers."

Similarly in Carver, where they had the article on the San Francisco Chronicle website about doctors who exaggerate their experience treating professional athletes, the Court held in that case that that was in the public interest because they were warning consumers of medical services not to fall prey to this kind of exaggeration which Dr. Carver did to market his podiatry practice.

Again, they cited to the Wilbanks case because it was an aid to consumers choosing among service providers.

The same in Davis versus Avvo. That website provided information to the general public which may be helpful to them in choosing a doctor, dentist or lawyer. That's asterisk three of that decision.

So these are consumer cases, and there are no cases that we have found or that Hedlund has cited that say that same type of consumer protection rationale should apply to posts by employees about their employers or

former employees about their former employers.

In fact, the cases we have discussed in our brief hold the contrary. For example, in the Rivero case where the employees at the I-House at the University of California, where I once worked, bad-mouthed their supervisor, and he sued them. They filed an anti-SLAPP motion, and the Court said that's not in the public interest. It's a small group of employees. We're not going to make that public interest.

The same in the Price case where a union in the midst of a strike leafletted the neighborhood of one of the managers of the company. Again, the Court held that's not a public interest.

In the DuCharme case where a union trustee publicized that he had fired a business manager for financial mismanagement and that business manager filed an anti-SLAPP motion, the Court said, no, that's not a public interest.

Now, the Court in Commonwealth Energy summed up these cases and said, "To extrapolate a series of personal incidents into a public policy debate would mean that every workplace dispute would qualify as a matter of public interest."

That can't be the case. You'd be in here with anti-SLAPP motions on every employee/employer matter,

and that's not what the legislature intended.

The consumer information cases that Hedlund relies on don't apply here for a second reason, and that's because none of the defendants in those cases disclosed confidential information.

And for a third reason they don't apply, and that's because what they were sued about in those cases was actual consumer protection information, not tangential information that didn't have anything to do with consumer protection issues, which is why we have sued Hedlund.

We are not talking about his employment relations claims that he's made those posts. That's fine. They're out there. People can read them and make up their own mind. What we are talking about is when he disclosed that our security measures are ineffective in the context of saying there were burglaries, that's something different altogether.

Now, we are not required to show you that we can meet our burden of proof unless you find on the first prong for Mr. Hedlund. But I'll go ahead and cover those, unless your Honor wants me to stop.

THE COURT: No, go ahead.

MR. GAINER: We'll prevail on our contract claim for three reasons: First, Mr. Hedlund has not challenged

the validity of his confidentiality agreement, at least not since we provided a copy and reminded him that he had signed it. He can't dispute that he got consideration for that promise not to disclose. And his unilateral understanding, which he's put into the record recently, that he didn't understand that he was bound after he left Alaska Structures, is inadmissible under the objective manifestation contract rule that Washington applies.

The agreement says what it says. And what it says is that he will not disclose confidential information during his employment or at any time thereafter. We're not rewriting the contract. This is not anything new. That's in all the employment contracts that Alaska Structures has people sign, because they have many military customers and they want to protect their information.

Section 1.2 of the agreement defines confidential information to mean information, whether oral, written or otherwise recorded, which derives independent economic value, actual or potential, from not being genuinely known to and not being readily ascertainable by proper means by other persons or entities who can obtain economic value from its use or disclosure.

The same section states that confidential information

includes confidential technical and business information.

The statement in Hedlund's online message that the security measures are consumer-grade off-the-shelf fare installed by the former CIO who had no prior security experience was confidential information as defined by the confidentiality agreement.

The next part of that message says the cheap cameras provided no clues to the identity of the thieves, referring to those burglaries at Alaska Structures' Kirkland office.

Together, those sentences reveal that the security measures discussed in the message were security cameras, and they show that those cameras installed by a CIO without security experience were ineffective.

That information meets the definition of confidential information in the agreement. It was not generally known to, and not readily ascertainable by proper means by other persons or entities who could obtain economic value from it or its use.

Specifically, the information could be used by thieves to help them steal more hardware and data from Alaska Structures' Kirkland office.

He's tried to defend his disclosure of this information by arguing it was generally known and

readily ascertainable. He first tried to rely on three news articles, two police reports, and then he generally refers to Indeed.com post. But when you look carefully at those, as we did, there is no reference at all to the security cameras and the news articles or the police reports.

And there are two of the 64 posts that have something about security cameras, but they don't reveal that those cameras were ineffective. Mr. Hedlund revealed that.

Also, the CIO not having experience, nobody knew that he had installed those cameras until Mr. Hedlund disclosed it. So nobody would know to look at that particular person's LinkedIn resumé online until after Mr. Hedlund disclosed that information.

THE COURT: Counsel, I have to tell you that even though I am not quite sure I get to this second issue, as you are addressing it, I have to just tell you I still am struggling with how the information posted is confidential information when I look at the provision and how it's written and how we generally have these kind of agreements. I really want to give you an opportunity to persuade me that that information's confidential.

MR. GAINER: So your Honor, I have tried to come up with an analogy for myself in case we had this kind of

discussion. It could be that if the back door lock on this office was easily jimmied or broken and only employees knew that and the company hadn't fixed it, if you disclosed that outside of the company, then especially in this context where you have identity thieves out there trolling for this kind of computer hardware, that's going to be harmful to the company.

That's not a formula like the formula for Coke or some, you know, trade secret, but it is closely held, and these contracts are intended to keep people from going out to places where the information shouldn't be spread and spreading the information.

That's why you have an agreement rather than just relying on trade secret statutes. They go beyond the trade secret statutes, and most employees know when they sign up on these agreements that they shouldn't go out and talk about their employer's business without at least determining that they have got that right under the agreement.

Now, in terms of the post-termination effect of these agreements, that's not anything new. The Georgia court, when she looked at the same issue, noted that the agreements extended post termination, and when she said the person who posted this information probably violated that agreement, she must have taken that into account.

So it's not just while you are employed, it's not just something you learn while you are employed. The agreement says what it says. Now, we're not the one trying to rewrite the agreement and take out those provisions. The Washington contract law says we interpret the agreement as it's written unless you can show a different mutual understanding.

And Mr. Hedlund hasn't even tried that. He's told your Honor what he thought, but he hasn't even said anything about mutual understanding of the parties or cited any evidence that would suggest Alaska Structures thought these agreements terminated when the employees terminate their employment.

That's certainly not the case, and that's why they're in all of these agreements. They have post-termination effectiveness.

THE COURT: That's not what's really of concern to me. What concerns me is this posted information and finding that it is confidential information under the agreement.

MR. GAINER: So again, your Honor, when you go into the hallway here, you see the security cameras. They're in a glass ball. You can't tell what kind of security camera's in there. You assume it's effective. Now, it could be just a hoax. It could be a mock security

camera meant to just let people know they're being watched or, you know, persuade them that they are.

This was not -- it was not generally known that the security cameras there were not capturing usable images to help people arrest anybody who broke into the office. Mr. Hedlund thought it was important for some reason for him to throw that out there just as an aside in this debate he was having on line. He should have stopped there. There was not any need for him to disclose that. And it would empower anybody who had mal intent to say okay, I don't have to worry about my face being captured on these cameras. They don't work.

THE COURT: But generally, and even this definition, generally is intended to protect trade secrets or intellectual property in some way, and you are wanting me to conclude that information about security cameras and who installed them is confidential information under this agreement when that's not how it's drafted.

MR. GAINER: Well, your Honor, you don't need a confidentiality agreement if all you are trying to protect is trade secrets. When we draft them -- and I draft them for people -- it's intended to go further than trade secret protection. Otherwise, we could just say you can't disclose trade secrets.

So when it says explicitly "includes technical and

business information," we're going beyond that. We don't have to show all the things that one has to show to prevail on a trade secret case.

So those cases that have to do with, for example, customer lists, those are typically not trade secrets. They are not kept that way, but they are confidential information. And so Alaska Structures was trying to wrap its hands around further information than just trade secrets within its organization.

THE COURT: And I have it in front of me. So what is the language that captures security cameras and who installed them and somebody's opinion as to whether they are off-the-shelf, high-tech, super grade or --

MR. GAINER: Again, you have to go to the next piece of the disclosure, and that is, didn't work basically. When Mr. Hedlund says they're consumer fare, nonprofessional, installed by somebody who doesn't know what they are doing, and didn't work.

So in the context of these steps which -- we're not talking hypotheticals here. There are thefts going on. He's basically telling the world, they don't have good security out there. They have bogus security. At least that's what he thought.

It's not true what Ms. Earl-Hubbard said that we didn't upgrade the security. We did. We installed

better lighting, more cameras, we got a different CIO, we hired these security guards to be there more frequently and longer because of the risk that someone would come in again and steal the information.

So in the context of people targeting the hardware, the servers that Alaska Structures runs with important military customer information, to disclose that the security measures are ineffective violates this agreement. That's what I am arguing.

He's also tried to argue that the information was readily ascertainable by proper means. But it was not. He says in his most recent filing that he got it from this chiropractor who worked at Alaska Structures, who gave it to some other Alaska Structures employees, who then gave it to him.

But all of those people are bound by confidentiality agreements that had similar provisions. Not markedly different, as Ms. Earl-Hubbard has argued, but rather, they extended past their termination date as well. They had similar definitions, so that something that's sensitive and is going to hurt the company by allowing somebody else to have economic advantage from that information, they were prohibited from disclosing that information.

So if he got it from them, as he now says, after all

this, then he didn't get it by proper means. It was still supposed to be confidential.

Now, there are several courts, and we cite them in our materials -- the Daimler-Chrysler decision, Pennsbury Village, Oasis, Duracraft and Midland Pacific -- which all looked at agreements that the defendants in those cases had entered into that restricted them from publicizing certain information. They went ahead and did it, anyway, and then filed an anti-SLAPP motion when they were sued for disclosing the information.

In all of those cases, the courts held no, you waived your right to publicize that information. We think the Court should follow those cases here.

We also showed that there were damages, specifically the extra guard shifts that Alaska Structures had to pay for, and we believe we should have an opportunity to recover those damages as well as to get an order prohibiting Mr. Hedlund from disclosing any further confidential information.

Finally, there is the issue of the quality of the evidence that we rely on. Obviously these agreements are not disputed. They say what they say. We believe they cover the information. We have showed damages.

The clear and convincing standard, even in the case

that Mr. Hedlund relies on, the Bland versus Mentor case, basically says that the trial court should view the evidence in connection with the surrounding facts and circumstances.

Well, the surrounding facts and circumstances here is that Mr. Hedlund disclosed the information without even considering whether it was -- whether he was contractually prohibited from doing so. He tried to unsuccessfully show that the information was available elsewhere, and wasn't, and he's changed the story about where he's got the information. Most recently, it's from these former employees and the chiropractor.

So if the Court weighs our documentary evidence against his changing story, we believe the Court should find that we have proven our case by clear and convincing evidence. We should have an opportunity to do that.

In terms of the CR 11 sanctions, the case that we cited, Skimming versus Boxer, holds that they shouldn't be imposed unless it's patently clear that a claim has absolutely no chance of success.

Now, the Georgia court already held before we amended our complaint here that the person who posted this information probably breached the confidentiality agreement. So we had one judge saying yes, it looks

like you have a claim. We have also showed the Court the facts that we rely on, and we believe those facts show that we have a claim and should prevail.

Mr. Hedlund's argument for sanctions is based on his mistaken assumptions that the confidentiality agreement doesn't even matter and that everything that he posts on a public website is protected. He's wrong on both counts.

For all these reasons, and those we argue in our response and surreply papers, we ask that the Court deny Mr. Hedlund's anti-SLAPP motion and his motion for sanctions.

Now, your Honor, there are a few comments that Ms. Earl-Hubbard made in her remarks that I'd like to respond to. She said that Alaska Structures takes down all the negative posts. It's not correct. I looked at the post this morning. There are many negative posts up there. I am not sure what that has to do with what we are arguing here, but it's not correct.

She said Avvo is similar to this case. We believe it's not because it's a consumer protection case. This is an employment case. Two different things. She said that there are employer's representatives masquerading as employees. There is no evidence of that in the record. It's actually not true. Again, I am not sure

what it has to do with the issues that really are important here.

She said we start with the premise that Mr. Hedlund's speech was free speech. Again, one judge has already looked at this and found the person who posted this, if they were a former employee, waived the right to post confidential information. So I don't think that that's correct.

She says Mr. Hotes is a public figure. There is no evidence of that. There is a few references to him providing earthquake relief. That doesn't make him a public figure. The posts are not about him, anyway.

She said there was an awful lot of news coverage about these burglaries. She's given the Court three community news articles that refer to several burglaries. One of them happens to mention Alaska Structures. So there is not a lot of coverage about the burglaries.

And besides, the burglaries are not what's at issue here. It's the security camera disclosures that Mr. Hedlund made.

She said we never fixed the system. That's not correct. We supplemented it so that it now is a better system.

She said that in our latest iteration, we have

emphasized different terms of the agreement. Again, that's incorrect. All along we have pointed to the fact that these confidentiality agreements have post-termination effectiveness.

Finally, she says that the contractor, Ms. Alexie Montelon's contract is different because it's worded -- Mr. Hedlund's like hers if he wanted it to have post-termination effect. They are somewhat different, but in terms of defining confidential information and having a post-termination clause in them, they both do. There is nothing of importance that's different between the two contracts. So I don't think that that argument has any merit.

Your Honor, I would like to answer any other questions you may have.

THE COURT: No. Thank you.

MS. EARL-HUBBARD: Okay. I will try to get through all these, your Honor.

THE COURT: Let me tell you what I'd like you to focus on, because it seems like the primary issue really is to make a determination of whether comments are of public concern. That's really sort of the focal point of whether or not we go to the next step.

You have heard my comments in terms of having some concern as to whether or not this is really confidential

information or whether it comes under the agreement, and I think I have answered that question in my own mind, but I'd rather have you focus on the first part.

MS. EARL-HUBBARD: The public interest. A couple of quick things. Mr. Gainer talks a lot about how courts have acknowledged that there is this public interest, public concern in informed consumer decisions, in consumerism, where a person about to buy a product or hire a certain professional, of course, deserves to have all the facts so he or she can make a conscious informed choice. That's what a lot of these cases talk about.

It's actually incorrect to say that in all those cases, people were not posting, quote, confidential information. That's kind of circular, if you will, because the whole point is, is this speech a matter of public concern in the first place. And to reach that, it doesn't really matter what it is.

The problem with that argument is you have to look at where this particular speech occurred. This was on the Avvo website -- I am sorry, this was on the Indeed.com website, a public forum, where people were sharing information with one another to inform a decision about do I go to this interview, do I take this job, do I invest my time and my energy and my resources, my career, with this company over that company.

Now, whether or not it's more important to society that I have that information when I am deciding who to hire as a podiatrist or a dentist or what brand of toothpaste to buy versus where I am going to invest my years and years of work, I don't understand the logic, and I don't think that the case law is meant to break it out that way.

The cases that they are discussing from California, you know, a few unhappy -- I think they were janitors, perhaps for handing out some leaflets about their boss, that sort of union protesting where they wanted to, you know, protest and to disparage someone, that's not what we have here.

What we had here was a job forum where people were asking questions, people were providing answers, and absolutely, there is evidence that people at Alaska Structures were committing fraud and were going on and masquerading as employees.

Jackson 5, one of the posters whose posts are in the material we have provided you, one of the people that Mr. Hedlund, under the screen name "can you spell the BS," called out as lying, saying, "I know you guys work here," Jackson 5 admits in one of these posts, "You got me. I work at AKS." He admitted it.

So there is evidence in the record that people who

work there are, in fact, pretending not to and only later are coming forward saying, "You are right. I work there." There is a concerted effort in these posts to distort the information available to these job seekers.

And I would represent to you that that is just as important an exchange as what we say about our doctors and our lawyers and our dentists on Avvo and what was said on the Better Business Bureau website about, I believe it was, a podiatrist.

The cases that we cite to you that, frankly, Alaska Structures' law firm cited to the federal court in the Avvo case that talk about how broad that meaning is, "matter of public concern," they are wrong when they say you look at the specific words.

Because in the Aronson case, our federal court interpreting our Washington SLAPP statute, said the focus is on whether the plaintiff's cause of action itself is based on an act in furtherance of the defendant's right of free speech.

He was engaged in speech. He was talking about matters of legitimate public concern in response to questions by others. It was not the leafletting, it was not a few people complaining about a bad job experience. It was engaged in calling out fraud on a consumer-type website. Only the decision that they were informing was

not what brand of toothpaste to buy, but do I go to this interview, do I invest my livelihood, my time with this particular employer. I think that's a more important choice than who you hire.

And, in fact, if you look at the Nygard case, again, I think they are not accurately characterizing it. That was a case where the public concern was not about whether the boss was a public figure or this person had a right to talk about the boss, but that person was talking about the job experience and the environment.

And there, in fact, are case laws, and I think it talked about how you have to have the right to be able to talk about bad working conditions. You can't gag someone from that. That would actually be a violation of law.

So I do not see how you could possibly reconcile this case with Avvo and some of these other consumer-type cases. If you find the posts on a forum about website discussions with the motive Mr. Hedlund has said he had, coming in and calling out fraud by people giving inaccurate information, I don't see how you can reconcile saying that's not a matter of legitimate public concern, but posts on Avvo are and posts on Better Business Bureau are. Consumer choice is no more important than employer or employment choices. So

that's, I guess, how I would reconcile that.

It's actually wrong to say the Georgia court has already made the decision that your Honor could look to. The Georgia court had three newspaper articles because in the very short time, that's what we find on the Web. It was still up in about 2010. She didn't have police reports, she didn't have the footage.

We've since got, through public records requests, vast information which we have provided to you which has the footage of the cameras so you can make those decisions. It does have a police report that publicly reveals the fact that the information -- you know, the system didn't work, that it was installed by Mr. Schneider, those sorts of things.

And further, the judge denied the motion to quash a subpoena on standing grounds, not on the First Amendment grounds, because she was told that the person whose identity they were after, the owner of the Internet connection, wasn't the poster. And she said she didn't think that he had standing to assert the First Amendment rights of the poster.

If you look at the judge's opinion, at the very end, that's what it says. She denies it on standing grounds.

She also didn't know -- because at the time the person who was the objector was his father, and we

weren't revealing, oh, this man worked there, and he left on this day, she didn't know the poster didn't work at the company on the date that he was supposed to have posted these things. She didn't know that all the events that the employee was posting about happened after he left.

So any, you know, off-the-cuff comments that might have been in saying it appears this person may have violated, first of all, were not based on a contract signed by a particular person because they didn't know who the person was, but the judge was not told this person didn't work here on the day that he's talking about. He didn't work -- the things that he's talking about happened after.

So any of those conclusions they try to argue somehow should guide your Honor, I think, are not, in fact, accurate.

Let's just see if there is anything else that I can say that would be at all helpful to you.

I disagree that the "can you spell the BS" posts are up there. I don't think they are. But the point is -- and you can see this from the snapshots -- we have gone and grabbed snapshots and then gone back and things are gone. So a lot of things are gone.

Yes, you are right, there is still negative stuff

there. I went and looked today, and there is new negative stuff. There is often new negative stuff, and it does seem to mysteriously disappear.

I don't know that I have a whole lot else.

The other point, though, that I want your Honor to understand is, again, in light of what the courts have said with these consumer cases, with Avvo, with the Aronson case involving the *Sicko* film, if you don't find that the anti-SLAPP statute applies, if you narrowly construe the statute and don't honor what the legislature said about broadly construing that concept of public concern, you are leaving people like Mr. Hedlund at the mercy of very wealthy plaintiffs who can haul them into court and bankrupt them and eventually force them to give up their free speech rights.

The purpose of that statute, and the reason it's to be broadly construed, is to allow this court to decide now, you are right, this case is not going to have merit, it's not going to go forward, the pain stops now.

And if you don't find that that statute applies, then yes, you can *sua sponte* still dismiss the case, I suppose, finding that they haven't shown enough evidence. But you take away the purpose of the statute, which is to allow parties to stop the abuse and to send a message to people, don't file these lawsuits without

being able to prove you can actually prevail.

The reason for the CR 11 sanction is not based on the fact that they sued a John Doe. It's not even based on the fact that they went to Georgia or the fact -- it's sort of based on the fact they went to Arizona.

Once they knew that Charles J. Hedlund, one of their employees, who left in January 2010, was their target, they never should have amended. They should have walked away. Because at that point they knew that this person had left before the burglaries and that the events were after the burglaries.

Now, they should have known from the posts that cheap cameras and off-the-shelf and consumer grade were not going to support a confidentiality agreement, anyway. They should have known that. But we believe that CR 11 sanctions are merited regardless of what you rule on the anti-SLAPP motion, because these kinds of lawsuits shouldn't be filed by lawyers. Once they know the facts, and they know this employer was no longer there, which the Georgia court did not know, they should not be hauling people into court. They should not be wasting the Court's or the parties' time.

THE COURT: Thank you.

MR. GAINER: May I respond briefly?

THE COURT: No.

I am going to go ahead and grant the motion to strike. I am finding that this is subject to the SLAPP statutes.

I have to tell you, even coming at it from so many different directions in terms of trying to really see whether or not this posting could really come within that confidentiality agreement, which is why I posed the questions, I have come clearly to the conclusion that it does not. And I recognize that people may disagree with my conclusion at the end of the day, but I am granting the motion to strike.

I will go ahead and, according to the statute, award fees. I am not awarding CR 11 sanctions. And it may just have to be with this court's view of CR 11 sanctions on some cases that are not always as clear-cut as counsel would like to see.

In granting the motion to strike, I just have to say this. I am not doing it because of some larger policy question or some of the things that counsel mentioned in her rebuttal. I recognize and respect the legislative role here, but it is not because of some ideological battle that this court is coming to the conclusion that this is of public concern, subject to the SLAPP statute, and therefore, that is why I am striking. I just see this as a pure legal and factual analysis, and that is

why I am doing that.

Again, I am not granting CR 11, but I am required to award the costs of litigation and fees, and I'd like to hear, frankly, from the two of you on the narrow question of this amount of $10,000 as a fine, because I read the statute -- the language is "shall," but I have to admit I was a little surprised.

So I will briefly hear from both of you just on that narrow issue.

MS. EARL-HUBBARD: Your Honor, if I could go first. I don't know that counsel will actually disagree with me, because I used to work with counsel. The author of the anti-SLAPP statute is actually a lawyer from Davis Wright Tremaine, Bruce Johnson. I worked with him in my own firm in terms of the development of this, and the whole point of this is it is meant to be a mandatory penalty.

It came from the whistleblower statute or -- I forget the actual number of it, but the idea is that statute, the whistleblower claim that's meant for automatic dismissals of claims where you are sued for good-faith reports to the government, that was the jumping-off point for the anti-SLAPP statute, and that statute has in it, I believe, a mandatory $10,000 fine.

So it was meant, in my understanding, at all times to

be mandatory. I don't think it is discretionary. Mr. Gainer can dispute that if he likes, but I think the word "shall" is pretty clear. And again, because -- it should be more than just making a person whole. There is supposed to be a cost for hauling someone in, and there is supposed to be a societal cost to detract from bringing -- trying to punish this kind of speech. That was the purpose of the whistleblower statute, that's the purpose of this one. So I believe it's mandatory.

THE COURT: Counsel, do you want to comment at all?

MR. GAINER: Your Honor, the statute does say "shall" regarding the fine, and I am not going to tell the Court it doesn't say what it says.

MS. EARL-HUBBARD: Your Honor, one other thing. I did actually print out my bill. To the extent the Court would like the proof of the actual fees at this point, I'd be happy to give it to you. It does not include today. I could tell you what that is.

I could also in a subsequent briefing, if you prefer, do a declaration and provide this to both you and to counsel. I can reveal what my rate is. My rate on this case has varied at times from $340 an hour to currently $355 an hour.

When I left the law firm that the plaintiffs are represented by in 2007, my rate was $360 an hour. I

doubt that they will dispute my rate of 355 is unreasonable. But I do have my bill, and I can present it to both sides, if you like, or I can do it later.

THE COURT: What I would like to do today is simply enter an order. I would like that on a six-day motion, just attach a declaration, give them the opportunity to respond to it in terms of fees, and just because it really does say reasonable attorney's fees, which, as you know, then requires a particular determination.

But I would like to enter, again, an order today. We will do the fees on a six-day motion.

MS. EARL-HUBBARD: Your Honor, I did -- I don't know that I updated. It's the same order that I had prepared the same language. I don't know if you want to work from that or if you have your own. The only thing I did not do -- I don't think I added the surreply in terms of the things reviewed, but it's up to you if you'd like to use our form or if you have a different form in mind.

THE COURT: Or if you want to take it back. I want everything included in terms of I considered -- much to my own detriment, I considered all of the paper that was submitted, surreplies, everything, and it really ought to be included on that document for appellate purposes.

I am comfortable with you taking it, adding it, sending it over to counsel, and then somebody e-mailing

that to us. I will sign it, we will file it, and then get it back out to you.

MS. EARL-HUBBARD: Would you like that by e-mail today, then?

THE COURT: It's nice to have it today, because generally my experience is that if we don't, then we end up having to chase you down and get an order.

MS. EARL-HUBBARD: I am actually on vacation next week, so I will -- boy, how do we do this. I will try to be back to the office before five, but maybe I can at least update the information on it, Randy, send it to you, and then you can just submit it to the court clerk.

MR. GAINER: I can do that.

THE COURT: Thank you.

(Proceedings adjourned at 2:37 p.m.)

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