No. 97734-8
Court of Appeals No. 77754-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

ROGER LEISHMAN,

Respondent,

v.

OGDEN, MURPHY & WALLACE, PLLC, and
PATRICK PEARCE,

Petitioners.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

This Court should grant review so that RCW 4.24.510 is not rewritten by the Court of Appeals contrary to public policy and the clear intent of the Washington legislature. The legislature specifically chose to protect any "person" who communicates "a complaint or information to any branch or agency of federal, state or local government" from civil liability "for claims based upon the communication" regarding matters "reasonably of concern" to that agency. Despite the legislature's broad mandate, the Court of Appeals withheld this immunity from Defendants Patrick Pearce and Ogden Murphy Wallace PLLC ("OMW") on the basis that they are no longer "persons" under the statute solely because they were asked for information by a government entity and received compensation for providing it. Pearce and OMW were hired by the Attorney General's Office ("AGO"), as independent contractors, to conduct an external investigation regarding the workplace grievances of Assistant Attorney General (here Plaintiff) Roger Leishman, who blames his subsequent termination on the investigative report.

The Court of Appeals essentially rewrote RCW 4.24.510 when it found the statute's immunity was limited to "private citizen whistleblowers" who "petition the government on [their] own behalf." App. 4, 10. This conclusion departs dramatically from the plain text of

RCW 4.24.510 and narrows the statute's broad protections, contrary to the legislature's intent to protect speech to government "regardless of content or motive." Moreover, the Court of Appeals misconstrued and improperly extended this Court's opinion in *Segaline v. Department of Labor and Industries*, which concerned only the "narrow issue" of whether a government agency *itself* is a "person" under the statute. *Segaline* was clear that "non-governmental organizations and individuals" are protected by RCW 4.24.510, and it is undisputed that Pearce and OMW were not government organizations or agents of the government. As external investigators, they were not speaking *for* the AGO—rather, they were speaking *to* the AGO. Neither *Segaline* nor the text of RCW 4.24.510 justify the Court of Appeals' holding.

This Court should take this opportunity to clarify *Segaline* and resolve an important question of public policy. The Court of Appeals' decision was animated by an apparent belief that Pearce and OMW's receipt of compensation renders then unworthy of the statute's protection. Yet the same policy considerations that support the protection of "private citizen whistleblowers" also weigh in favor of protecting investigators who assist public function investigations into matters of concern to government entities. A government entity should be able to solicit information from any individual or organization it wishes. The mere fact

that a government entity might compensate these individuals or organizations should not automatically disqualify them from RCW 4.24.510's immunity. If left to stand, the Court of Appeals' decision will disincentivize external investigators from accepting such assignments—or from fully reporting wrongdoing uncovered during such assignments—out of fear of facing the burden and expense of lawsuits arising out of their conclusions. This is certainly not what the legislature intended when it enacted RCW 4.24.510. This Court should grant review.

II. IDENTITY OF PETITIONERS

Petitioners are OMW and Pearce, defendants in the trial court and respondents before the Court of Appeals.

III. CITATION TO COURT OF APPEALS DECISION

Petitioners seek review of the Court of Appeals, Division I, published decision filed May 31, 2018, attached in the Appendix ("App.").

IV. ISSUES PRESENTED FOR REVIEW

Should the Court reverse the Court of Appeals' decision that OMW (a professional limited liability corporation) and Pearce (an individual) are no longer "persons" under RCW 4.24.510 and are thus stripped of the immunities provided by that statute, simply because they conducted, at the AGO's request, an external investigation regarding Leishman's employment, a matter "reasonably of concern" to the AGO,

and received compensation for their work?

V. STATEMENT OF THE CASE

As the trial court granted judgment on the pleadings, the statement of facts is drawn from the allegations in the complaint, which are presumed to be true. *Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 241, 242 P.3d 891 (2010).

A. The Attorney General's Office Fires Leishman

Leishman started working at the AGO as Chief Legal Advisor to Western Washington University in 2015. CP 3 ¶ 17. Shortly after commencing work at the AGO, he began exhibiting trichotillomania, anxiety, and other symptoms, and within a few months was diagnosed with Post-Traumatic Stress Disorder ("PTSD") and codependency. CP 3 ¶¶ 18, 21. In January 2016, Leishman informed the AGO Human Resources Department that he intended to move forward with a "formal disability accommodation" request as a result of these symptoms. CP 4 ¶ 27. Leishman submitted his accommodation request on February 22, 2016, which the AGO subsequently denied. CP 4-5 ¶¶ 29, 34.

In the same timeframe, Leishman also drafted a written complaint regarding sexual orientation discrimination against the AGO, claiming that the AGO had "t[aken] serious adverse action against him" because of the AGO's "deeply rooted implicit and explicit homophobia." CP 4-5 ¶¶ 31-

33. Leishman is openly gay. CP 1 ¶ 1. Leishman provided his draft sexual orientation discrimination complaint to his supervisor during an in-person meeting on March 1, 2016, in an effort to "see if they could resolve the matter privately in accordance with AGO policy." CP 4 ¶ 31. During the meeting, his supervisor disagreed with the allegations against her in Leishman's complaint, and Leishman admits that he became "angry, restless, and agitated" and "raised his voice." CP 4-5 ¶¶ 31-33.

The next day, Leishman formally submitted his complaint to the AGO. CP 4-5 ¶¶ 32-33. The AGO promptly took steps to address the situation. The AGO Regional Services Division Chief informed Leishman that "the AGO was aware of his sexual orientation discrimination complaint and took it seriously, and said [Leishman] would be contacted when the AGO appointed someone to investigate his complaint." CP 3, 5 ¶¶ 24, 36.

The AGO retained Patrick Pearce of OMW as an independent outside investigator to conduct a personnel-related investigation and report of findings related to Leishman's complaint. CP 6 ¶ 41. Pearce interviewed multiple witnesses, including Leishman, and considered various documents provided by Leishman, including a "written chronology enumerating multiple examples of homophobia and implicit bias at the AGO." CP 6-7 ¶¶ 43, 47, 49-51. Pearce's investigation

culminated in the preparation of a report provided to the AGO. CP 8 ¶ 54.[1]

The report considered Leishman's claim of sexual orientation discrimination and whether he had behaved improperly during his March 1, 2016 meeting with his supervisor. CP 4, 8 ¶¶ 31-32, 58, 60. The report concluded that Leishman's claim of sexual orientation discrimination was not substantiated and that Leishman had acted inappropriately in his meeting with his supervisor. *Id.; see also* CP 213-15. The AGO terminated Leishman shortly thereafter. CP 5, 8 ¶¶ 37, 57.

B. Leishman Sues Pearce and OMW Based on their Report to the AGO; The Trial Court Grants Judgment on the Pleadings

Although Leishman had initially threatened to bring employment-related claims against the AGO, they were resolved via settlement. CP 9 ¶¶ 67-69. In the settlement agreement, Leishman "released his claims against the State, including the AGO, and any officers, agents, employees, agencies, or departments of the State of Washington." CP 9 ¶ 60.

Leishman subsequently filed suit against OMW and Pearce stem-

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[1] Though not necessary to the Court's decision, the OMW report is available at CP 197-215. The OMW report is extensively referenced in Leishman's Complaint such that it is properly considered in evaluating this case. *See* CP 8-9 ¶¶ 55-66; *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487 (2015), *citing Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008) ("[W]here a plaintiff asserts allegations in a complaint on specific documents but does not physically attach those documents, the documents may be considered in ruling on a motion for judgment on the pleadings.").

ming from their investigation into his workplace grievances, bringing claims for negligence, violation of the Washington Consumer Protection Act, negligent misrepresentation, fraud, and discrimination. CP 1, 9-12 ¶¶ 73-105; *see* CP 8 ¶¶ 59, 61-63. The gist of the complaint was that the defendants had harmed him through their investigation and report submitted to the AGO, his former employer.

In his complaint against Pearce and OMW, Leishman specifically alleged that his claims were not released by his settlement with the AGO, as they were not "officers, agents, employees, agencies, or department" of the state. CP 9 ¶¶ 69, 71; CP 2 ¶ 8.

Pearce and OMW answered the complaint and brought a motion for judgment on the pleadings under CR 12(c). CP 303. The motion sought dismissal on the basis of immunity under RCW 4.24.510, which provides

> A person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.

The trial court found that immunity applied, granted the motion, and awarded fees and costs. CP 431, 438.

C. The Court of Appeals' Decision

Leishman appealed. The Court of Appeals reversed the trial

court's judgment. The Court of Appeals agreed with Leishman that RCW 4.24.510 protects only "private citizen whistleblowers" and not Pearce and OMW, simply because they contracted with the AGO to perform an external employment investigation and received payment for their services. App. 5-10. Though the Court of Appeals found this Court's opinion in *Segaline* was "not dispositive" on the question (App. 6), the Court nonetheless held that "government contractors" were not intended by the legislature to be protected by RCW 4.24.510, and that "government contractors" therefore are not "persons" under the statute. App. 5, 10.

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Review should be granted under RAP 13.4(b)(4) because this case involves "issue[s] of substantial public interest that should be determined by the Supreme Court." If the Court of Appeals' decision is permitted to stand, the protections of RCW 4.24.510 will be improperly narrowed to protect only "private citizen whistleblowers" who "petition the government on [their] own behalf" (App. 5, 10) and exclude persons—like Pearce, OMW, and others—who are asked by the government to provide information on subjects of concern to the government. This limitation is not present anywhere in the plain text of the statute and, as will be discussed further below, will require courts to engage in an inquiry into the communicator's motivation that is inconsistent with the

legislature's intent in passing RCW 4.24.510. This holding further improperly extends this Court's opinion in *Segaline* and is entirely unjustified by public policy. The government *should* be encouraged to seek information from any source it wishes, including from external investigators. The mere fact that those investigators may be compensated does not make their speech unworthy of protection. If the Court of Appeals' decision is permitted to stand, investigators will be disincentivized from accepting such assignments out of fear that they will face civil lawsuits, and the government will be deprived of the flow of information the legislature expressly intended to protect.

A. The Court of Appeals' Decision Disregards the Plain Text of RCW 4.24.510 and Narrows the Statute's Protection Contrary to Legislative Intent

In 1989, the legislature enacted RCW 4.24.510, which immunizes any "person who communicates a complaint or information" to government, in order to "encourage the reporting of potential wrongdoing to governmental entities." *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 367, 85 P.3d 926 (2004). RCW 4.24.510 is considered to an anti-SLAPP ("Strategic Lawsuit Against Public Participation") statute.

The plain language of RCW 4.24.510 is extremely broad. As the legislative statement of intent makes clear, the immunity is designed to facilitate "early dismissal" of lawsuits against "individuals" and

"organizations" based on communications made to influence the government, without regard to "content or motive." RCW 4.24.510. The legislative intent statement shows that the legislature intended both natural persons and organizational entities to be "persons" under the statute. Since its passage, the statute has been interpreted broadly by Washington courts.[2]

However, in 2010, however, this Court, in a plurality opinion without controlling reasoning, did find RCW 4.24.510 was limited in one "narrow" respect—that a "government agency that reports information to another government agency is [not] a 'person' under RCW 4.24.510." *Segaline v. State, Dep't of Labor & Indus*., 169 Wn. 2d 467, 473, 238 P.3d 1107 (2010). RCW 4.24.510 does not define the term "person," and the Court explained that the "persons" receiving immunity under the statute were "non-government individual[s] or organization[s]." *Id*. at 474 n.4. It

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[2] For example, RCW 4.24.510 does not protect only the fact of the communication to the government agency, but all claims "based upon" the communication, including, but not limited to, the "conduct of the investigation" leading to the communication, and other "events surrounding the communication." *Dang v. Ehredt*, 95 Wn. App. 670, 681-84, 977 P.2d 29 (1999). Furthermore, numerous cases have applied the immunity to corporate and business entities, not just individuals or non-profit advocacy groups. *See, e.g., Dang*, 95 Wn. App. at 681-84 (holding that bank corporation had immunity for communications with police regarding possible criminal activity); *Ferguson v. Baker Law Firm, P.S.*, 2019 WL 3926173, at *6 (Wash. Ct. App. Aug. 19, 2019) (unpublished) (granting immunity to the Baker Law Firm for communications to Washington Employment Security Department regarding reasons for plaintiff employee's termination); *Akmal v. Cingular Wireless Inc*., No. C06-748JLR, 2007 WL 1725557, at *5 (W.D. Wash. June 8, 2007), aff'd, 300 F. App'x 463 (9th Cir. 2008) (similar).

is beyond dispute that Pearce and OMW are not government agencies, and, as discussed above, Leishman expressly admitted that Pearce and OMW were not government agencies or agents of government entities. CP 2 ¶ 8, 9 ¶¶ 69, 71. Indeed, the Court of Appeals noted that *Segaline* was "not dispositive" on the question of whether Pearce and OMW, retained by the AGO to perform an external investigation regarding Leishman's employment, were protected by the statute. App. 6.

Yet the Court of Appeals ignored the plain text of RCW 4.24.510 and the legislature's intent, and departed from the "narrow" holding of *Segaline*, when it announced an *entirely new* construction of RCW 4.24.510. No Washington court has ever held, as the Court of Appeals did, that the protections of RCW 4.24.510 are limited to "private citizen whistleblowers" who "advocate to government" or "petition the government on [their] own behalf." App. 5, 10. These limitations are nowhere evident in the plain text of the statute, which makes no reference to "citizens" or "rights of petition," and, as discussed further below, are entirely inconsistent with the legislative intent.

B. The Court of Appeals' Decision Will Require an Inquiry Into the Speaker's Motive, Contrary to Legislative Intent

The Court of Appeals' opinion is utterly at odds with the legislature's express intent that immunity be applied to government

communications without regard to the "content or motive" of the speech. Though RCW 4.24.510 contained a "good faith" requirement at its inception, that requirement was deleted by the legislature in 2002. *Bailey v. State*, 147 Wn. App. 251, 261, 191 P.3d 1285 (2008) (*citing* Laws of 2002, ch. 232. § 1). Noting that the original statute "failed to set forth clear rules for early dismissal review," the legislature removed the good faith requirement in an effort to make it easier to dismiss cases at an early stage in the litigation, noting the statute protects speech "regardless of content or motive." RCW 4.24.510; *Bailey*, 147 Wn. App. at 261; *cf. Dutton v. Wash. Physicians Health Program*, 87 Wn. App. 614, 622, 943 P.2d 298, 302 (1997) (noting that "good faith is usually a question of fact" not resolvable on summary judgment).

Following this amendment, courts have applied the immunity broadly without inquiring into the content of the communication or motivation of the communicator. For example, in *Bailey*, Eastern Washington University's former risk manager alleged the University had terminated her employment based on the defendant's complaint. The defendant informed the University that its risk manager had purported to represent the University at a board meeting for the county's Air Pollution Control Authority when she actually was serving the interests of her husband's asbestos removal business and that she had previously been

charged with embezzlement. *Id*. at 255-58. The Court of Appeals held that RCW 4.24.510 immunized the defendant from suit. *Id*. The plaintiff's claims that the complaint was made maliciously did not negate application of the statute, as the defendant had no obligation to prove she acted in good faith. *Id*. at 261-62.

Similarly, in *Dehlin v. Forget Me Not Animal Shelter*, 200 Wn. App. 1072, 2017 WL 4712142, at *7 (Wash. Ct. App. Oct. 19, 2017) (unpublished), the Court of Appeals concluded that the defendants' communications to police were immunized even if they were motivated, as plaintiff claimed, by a "preexisting grudge" against plaintiff.

Both *Bailey* and *Dehlin* protection extends far beyond "citizen whistleblowers" and extends to those making even knowingly false and malicious reports. In other words, the communicator of the "complaint or information" does not have to be a "citizen" who is "advocat[ing] to government" (App. 10) whose motive is to protect the public good—the statute is equally protective of communications motivated by malice or a grudge against the subject of the "complaint or information." By eliminating a "good faith" requirement, the legislature determined to achieve the goal of early dismissal by dispensing with factual inquiries into the motivation behind any particular communication.

The Court of Appeals, in artificially limiting the definition of

"person" under the statute to "citizens" who "petition the government on [their] own behalf," has injected substantial uncertainly into the analysis by effectively requiring the courts to conduct a factual inquiry into the content of the communication or motivation behind a communication. The Court of Appeals found that Pearce and OMW "benefit[ted] by being paid for [their] services" and were therefore "not exercising [their] right to petition the government on [their] own behalf." App. 10. There is no support in Washington law for the Court of Appeals' finding that Pearce and OMW are stripped of the immunity to which they are entitled under RCW 4.24.510 simply because they "benefit[ted] by being paid" for OMW Report. If RCW 4.24.510 protects potentially false or malicious communications motivated by"preexisting grudge[s]," then it should also protect communications motivated by a desire to receive compensation from a government entity who has specifically requested information from an external source regarding a subject of concern. The legislature has allowed grudgeholders to communicate false and malicious statements to the government without fear of reprisal. Consistent with this aim, the legislature certainly did not intend to disincentivize external investigators from accepting assignments in good faith from government agencies.

The Court of Appeals relied heavily upon Justice Madsen's concurring opinion in *Segaline*. Justice Madsen relied heavily upon

Kobrin v. Gastfriend, 443 Mass. 327, 332, 821 N.E.2d 60 (2005), a case construing the Massachusetts anti-SLAPP statute, to support her conclusion that government entities were not "persons" under Washington's anti-SLAPP statute. However, the Massachusetts statute differs dramatically from RCW 4.24.510 and contains the following language, which is absent from the Washington statute:

> In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of *its right of petition* under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss.

Mass. Gen. Laws ch. 231, § 59H (emphasis added). Massachusetts courts have found that this language (in particular, the word "its") requires a party to exercise its *own personal* right of petition, and that persons employed by the government to make a communication are not exercising their own personal right to petition and are therefore not covered by the statute's immunities. *See Kobrin*, 443 Mass. at 332-33. As RCW 4.24.510 makes no reference to parties' "rights of petition," these courts' reasoning does not apply. Also, the Massachusetts statute includes several bars to early dismissal not present in the Washington statute—for example, courts may deny special motions to dismiss when a speaker's statement was "devoid of factual support" or the speaker's acts cased "actual injury to the responding party." Mass. Gen. Laws ch. 231, § 59H.

RCW 4.24.510, which applies without regard to content or motive, is clearly designed to be broader and more protective than the Massachusetts statute. Because Washington's legislature intended to facilitate early dismissal without inquiry into content or motive, it did not intend to limit RCW 4.24.510's protections as Massachusetts limits its immunity.

Inherent in the Court of Appeals' opinion is a conclusion that Pearce and OMW are simply not worthy of protection under the statute. Government agencies should be incentivized to compensate with outside individuals and organizations like Pearce, OMW, or others who have—or can gather—information that is "reasonably of concern" to the government. If individuals and organizations are not immunized for the content of reports, they will be less likely to agree to perform such services—or they will be incentivized to modify or distort their conclusions if they do discover wrongdoing on the part of any government agency or employee. The flow of information to government will therefore be reduced. Interpreting RCW 4.24.510 as the Court of Appeals did would disrupt agencies' efforts to seek assistance with investigations into "matters reasonably of concern" to those agencies.

In addition to disincentivizing the government from seeking outside expertise regarding matters of concern, the Court of Appeals' decision would have other consequences. For example, under the Court of

Appeals' decision, if a police department offered a $1,000 reward in exchange for information leading to the arrest of a criminal, and a person provided the police with information—even if he or she were entirely unaware of the existence of a potential reward—the mere fact of the reward would invalidate his or her protection under statute.

C. The Court of Appeals' Decision Incorrectly Regards Pearce and OMW's Speech as that of the Government

Though the Court of Appeals found *Segaline* "not dispositive" on the question of whether OMW and Pearce were protected by OMW, it reasoned that Pearce and OMW were performing the "work of a government agency" when they reported to the AGO. App. 6, 10. The court expressed concern that if independent contractors were protected, a government agency could do an end-run around *Segaline* and obtain the protections of RCW 4.24.510 "by engaging contractors to carry out government functions." *Id.* The court thus viewed a contractor's speech as being functionally equivalent to the speech of the government itself.

This reasoning is based on a fundamental misunderstanding of the circumstances of this case. CP 2 ¶ 8, 9 ¶¶ 69, 71. As Leishman specifically alleged in his complaint, Pearce and OMW were *not* acting as agents of the AGO. Instead, they were acting as external investigators. In other words, in preparing the report to the AGO, Pearce and OMW were

not speaking "*for*" the government, as the Court of Appeals appeared to conclude—they were speaking "*to*" the government, on a matter of concern to the AGO, about which the AGO had specifically sought an outside opinion. Furthermore, the AGO was not trying to do an end-run around *Segaline* by retaining OMW. After his termination, Leishman threatened to bring employment-related claims against the AGO and they were resolved via settlement. CP 9 ¶¶ 67-69.

Moreover, because Pearce and OMW were conducting a workplace investigation, they were not engaged to carry out governmental functions. Pearce and OMW were investigating complaints of workplace discrimination, which implicated the AGO in its proprietary capacity as an employer—not its governmental capacity as the "legal adviser of the state officers." Wash. Const. Art. III, sec. 21. While there may be circumstances where a private actor's conduct is fairly attributable to the government itself (regardless of whether that actor contracts with the government) such that immunity would not apply under *Segaline*, such circumstances are not present here. At a minimum, such attribution would require the delegation of an exclusively governmental function or some other circumstance whereby the private actor was so intertwined with the government that the actor effectively obtained the status of the government. Courts are able to make these types of determinations in

other contexts,[3] but the Court of Appeals made no effort to do so here. External investigators do not fit this role. As previously stated, their speech could very well be *antagonistic* to the interests and motives of the government entity that retained them.

As previously discussed, to the extent the speech of Pearce and OMW is not the speech of the government, the same policy considerations that support the protection of "citizen whistleblowers" weigh in favor of protecting "individuals" and "organizations" who assist public function investigations into matters of concern to government entities. In her concurring opinion in *Segaline*, Justice Madsen reasoned that the purpose of immunity under RCW 4.24.510 is to "remove the threat and burden of civil litigation that would otherwise deter the speaker from communicating" and reasoned that "[t]his intimidation factor does not. . . affect government agencies in the way that it does private individuals and organizations, and therefore this reason for the statute does not apply to government entities as it does to individual persons or private

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[3] For example, courts apply a specified list of factors to determine whether a private entity falls under the definition of a "state or local agency" who is therefore subject to the Public Records Act. *See* RCW 42.56.010(2); *Fortgang v. Woodland Park Zoo*, 187 Wn. 2d 509, 517–18, 387 P.3d 690 (2017). The test is designed to determine if the private entity was acting as the "functional equivalent of a[] government agency." Pearce and OMW, by performing an outside employment investigation with no relationship to the AGO's powers as defined by the Washington legislature, certainly cannot be said to be acting as the "functional equivalent of a government agency."

organizations." *Segaline*, 169 Wn. 2d at 482. OMW and Pearce, even if they are not "citizen whistleblowers," are not subject to the immunities that protect government entities from the threat of civil litigation, nor does the prospect of compensation remove the "intimidation factor" discussed by Justice Madsen, given the burdens and expenses of protracted civil litigation. Protection for OMW and Pearce, and others like them, is important in order to avoid the chilling effect that would exist if those investigating matters of concern to government entities were silenced, or tempted to modify or distort their opinions, out of fear of facing civil damage claims from those who disagree.

VII. CONCLUSION

For all the above-stated reasons, this Court should grant review.

RESPECTFULLY SUBMITTED this 3rd day of October, 2019.

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Attorneys for Petitioners

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on October 3, 2019, I caused a copy of the foregoing **PETITION FOR REVIEW**, to be served via the Washington State Appellate Courts' Portal electronic service to:

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DATED this 3rd day of October, 2019, at Seattle, Washington.

By: s/Thao Do
Thao Do, LEGAL ASSISTANT

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INDEX TO APPENDIX

FILED
10/21/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROGER LEISHMAN, Appellant, v. OGDEN MURPHY WALLACE PLLC, and PATRICK PEARCE, Respondents.	)	No. 77754-8-I DIVISION ONE PUBLISHED OPINION FILED: October 21, 2019

MANN, A.C.J. — Washington's anti-SLAPP statute, RCW 4.24.510,[1] provides immunity from civil liability for a "person" that communicates a complaint or information to a federal, state, or local agency, regarding a matter of reasonable concern to the agency. In Segaline v. Dep't of Labor & Indus., 169 Wn.2d 467, 470, 238 P.3d 1107 (2010), a plurality of our Supreme Court held that a government agency communicating information to another government agency is not a "person" and therefore not afforded immunity under RCW 4.24.510. We are asked here to determine whether a

[1] As the legislature explained:
Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.

LAWS OF 2002, Chapter 232, § 1.

government contractor working within the scope of its contract is a "person" under RCW 4.24.510.

Roger Leishman sued Ogden Murphy Wallace, PLLC and Patrick Pearce (collectively "OMW") for negligence, violation of the Washington Consumer Protection Act (CPA), ch. 19.86 RCW, negligent misrepresentation, fraud, and discrimination, in connection to services rendered by OMW to the Washington Attorney General's Office (AGO) for an internal investigation of a workplace dispute involving Leishman. OMW moved for dismissal on the pleadings, arguing that OMW was immune from civil liability under RCW 4.24.510 for communicating the findings of its investigation to the AGO. The trial court agreed.

On appeal, Leishman contends that RCW 4.24.510 does not support the trial court's decision and that OMW, a government contractor, is not a "person" under the statute. We agree, and consistent with the plurality in Segaline, hold that government contractors, when communicating to a government agency under the scope of their contract, are not "persons" entitled to protection under RCW 4.24.510.

We reverse.

I.

Leishman began employment in July 2015 with the AGO as Chief Legal Advisor for Western Washington University. Shortly after beginning work at the AGO, Leishman began exhibiting serious trichotillomania, anxiety, and other symptoms. Leishman disclosed his symptoms to the AGO as well as his prior history of managing mild anxiety. In November 2015, Leishman's physician diagnosed him with post-traumatic stress disorder (PTSD) and serious codependency. Leishman informed the AGO of his

new diagnosis and ultimately submitted a formal request for reasonable accommodation of his disability in February 2016. In March 2016, Leishman, an openly gay man, also filed a complaint with the AGO, alleging that his supervisor, Kerena Higgins, made homophobic comments towards him. Leishman felt that his PTSD was triggered by Higgins's comments and her micromanagement of his work. During a meeting with Higgins to discuss Leishman's disability accommodation and Higgins's comments, Leishman became aggressive, raised his voice, and pounded his fists.[2]

Higgins complained to the AGO about Leishman's inappropriate conduct and the AGO placed Leishman on home assignment. The AGO retained OMW to conduct an independent investigation into Leishman's sexual orientation discrimination claim against Higgins, and Higgins's allegation that Leishman was inappropriate during their meeting.

OMW drafted a report (OMW Report) concluding that "Leishman has not established support for his complaint of discrimination against him based on sexual orientation as prohibited by AGO polices." The OMW Report also concluded that "Mr. Leishman's conduct during the March 1 meeting [with Higgins] violated expected standards of conduct for his position as reflected in his job description." The AGO terminated Leishman on May 7, 2016.

After his termination, Leishman submitted a tort claim against the State for employment-related claims, and the parties reached a settlement. In the settlement

[2] We take the facts alleged by Leishman as true for purposes of our review of OMW's motion to dismiss. Becker v. Cmty. Health Sys., Inc., 184 Wn.2d 252, 257-58, 359 P.3d 746 (2015).

agreement, Leishman "released his claims against the State, including the AGO, and any officers, agents, employees, agencies, or departments of the State of Washington."

Subsequently, Leishman sued OMW for negligence, violation of the CPA, negligent misrepresentation, fraud, and discrimination. In Leishman's complaint, he alleged that OMW was not acting as the AGO's agent and therefore his claims against OMW were not barred by his settlement agreement with the AGO.

OMW filed a motion for judgment on the pleadings, under CR 12(c), on the basis that RCW 4.24.510 granted it immunity for its communication of the OMW Report to the AGO. Leishman responded that "no Washington decision discusses the potential applicability of RCW 4.24.510 to ordinary vendor-customer communications where the customer happens to be a government agency."[3]

The trial court granted OMW's motion for judgment on the pleadings and subsequently entered an order for attorney fees and costs pursuant to RCW 4.24.510. Leishman appeals.

II.

RCW 4.24.510 provides immunity from civil liability for a "person" that communicates a complaint of information to a federal, state, or local agency, regarding a matter of reasonable concern to the agency.[4] Leishman contends that RCW 4.24.510

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[3] The parties only addressed whether RCW 4.24.510 required dismissal of Leishman's complaint, and did not address whether OMW was an agent of the AGO and therefore barred under the settlement agreement.

[4] RCW 4.24.510 states:

> A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to 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, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern

was intended to protect private citizen whistleblowers and not immunize government contractors from civil liability for work done on behalf of the government. We agree.

A.

We review a trial court's judgment on the pleadings de novo. Pasado's Safe Haven v. State, 162 Wn. App. 746, 752, 259 P.3d 280 (2011). As part of our review, "we examine the pleadings to determine whether the claimant can prove any set of facts, consistent with the complaint, which would entitle the claimant to relief." Pasado's Safe Haven, 162 Wn. App. at 752. "The factual allegations in the complaint are accepted as true." Nw. Animal Rights Network v. State, 158 Wn. App. 237, 241, 242 P.3d 891 (2010).

The interpretation of the language in RCW 4.24.510 presents an issue of statutory interpretation, which is also reviewed de novo. Jametsky v. Olsen, 179 Wn.2d 756, 761-62, 317 P.3d 1003 (2014). The goal of statutory interpretation is to "ascertain and carry out the legislature's intent." Jametsky, 179 Wn.2d at 762. We give effect to the plain meaning of the statute, "derived from the context of the entire act as well as any related statutes which disclose legislative intent about the provision in question." Jametsky, 179 Wn.2d at 762 (internal quotations omitted). If the statute's language is unambiguous, then the inquiry ends. Jametsky, 179 Wn.2d at 762. If, however, the language is subject to more than one reasonable interpretation, we "may resort to

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to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." Jametsky, 179 Wn.2d at 762.

B.

Our decision turns on whether the term "person" in RCW 4.24.510 extends immunity to government contractors working within the scope of their contract, such as OMW. Our Supreme Court addressed the meaning of "person" in the plurality decision Segaline. After concluding that the term "person" is ambiguous, the four justice lead opinion authored by Justice Sanders, and a concurrence by Justice Madsen, agreed that a government agency is not a "person" under RCW 4.24.510. The lead opinion and concurrence, disagreed on the underlying reasoning. Compare Id. at 472-74 with Id. at 479-83.

In Segaline, an employee at the Washington State Department of Labor and Industries (L&I) called the police when Segaline, an electrical contractor, harassed L&I employees when applying for electrical permits. Segaline, 169 Wn.2d at 471. Eventually, Segaline was arrested. Segaline sued L&I claiming negligent infliction of emotional distress, intentional infliction of emotional distress, malicious prosecution, negligent supervision, and violation of his civil rights. Id. at 472. L&I claimed immunity under RCW 4.24.510, arguing its communication to the police was protected. Id. at 472-73. The plurality in Segaline found that L&I, a government agency, was not a "person" within the meaning of RCW 4.24.510. Segaline, 169 Wn.2d at 474-75.

Because Segaline only addressed government agency to government agency communication, it is not dispositive on whether a government contractor performing services for a government agency is a "person" under RCW 4.24.510. The question

before us, therefore, is if a government agency is not a "person" afforded immunity under RCW 4.24.510 for its communications to another government agency, is a government contractor performing work on behalf of an agency a "person," and therefore immune from civil liability for its communications to a government agency? The reasoning of the Segaline plurality, along with the legislative intent behind RCW 4.24.510, support the conclusion that a government contractor is not immune from liability for providing paid communications to a government agency.

The Segaline lead opinion reasoned that a government agency is not a "person" under RCW 4.24.510 because "[t]he purpose of the statute is to protect the exercise of individuals' First Amendment rights under the United States Constitution and rights under article I, section 5 of the Washington State Constitution" and should not extend to government agencies, which do not have First Amendment rights to protect. Segaline, 169 Wn.2d at 473 (citing RCW 4.24.510, Historical and Statutory Notes).

Justice Madsen agreed that the legislature, in adopting RCW 4.24.510, "expressly recognized the constitutional threat that SLAPP litigation poses." Id. at 480. Justice Madsen, however, was not convinced that a "person's" free speech rights "is dispositive of the question whether a government agency is a 'person' qualifying for RCW 4.24.510's immunity from civil liability." Segaline, 169 Wn.2d at 482. The crux of the issue for Justice Madsen was the purpose of the statute—removing "the threat and burden of civil litigation" that could deter a speaker from communicating to the government. Segaline, 169 Wn.2d at 482. Justice Madsen concluded that the threat of litigation did not affect government agencies the same as it did individuals. Segaline, 169 Wn.2d at 482.

Justice Madsen compared RCW 4.24.510 with Massachusetts's similar SLAPP law that the Massachusetts Supreme Court held was limited to defendants that petition the government on their own behalf. Segaline, 169 Wn.2d at 482-83 (citing Korbin v. Gastfriend, 433 Mass. 327, 332, 821 N.E.2d 60 (2005)). The facts in Korbin are similar to the facts here—a government agency hired a government contractor to conduct an investigation into a licensed psychiatrist. Korbin, 443 Mass. at 329. As a result of the investigation, the government agency suspended the psychiatrist's license. Id. at 329. The psychiatrist sued the investigator under various tort theories and the Korbin court grappled with whether the Massachusetts's anti-SLAPP statute barred the psychiatrist's claims. Id. at 332. The Korbin court found that the anti-SLAPP statute did not bar the psychiatrist's claims because neither the statute nor the legislative history "suggests any intention to protect a government-retained investigator acting on behalf of an administrative agency." Id. at 337. Furthermore, "the board contracted with the defendant to engage in investigative activities in aid of the board's case against the plaintiff, and he was compensated for his services." Id. at 337.

Justice Madsen's concurrence extended the reasoning of Korbin to find that RCW 4.24.510 should not protect a government agency's communication with another government agency from civil liability. Justice Madsen explained:

> Moreover, insofar as RCW 4.24.510 does encompass petitioning the government to influence decision-making and has as an express purpose the protection of this right, it is similar to the Massachusetts SLAPP law that, the Massachusetts Supreme Court said, is limited to "those defendants who petition the government on their own behalf. In other words, the statute is designed to protect overtures to the government by parties petitioning in their status as citizens," and therefore it did not apply to the communications of one hired by a government agency made within the context of that employment.

Id. at 482-83.

Justice Madsen's concurrence also finds support in the legislative intent. The legislative intent behind RCW 4.24.510 is explained in both RCW 4.24.500 and the Historical and Statutory Notes to RCW 4.24.510. In RCW 4.24.500, the legislature explained:

> Information provided by citizens concerning potential wrongdoing is vital to law enforcement and efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate government bodies.

Further, when the legislature amended RCW 4.24.510 to remove a "good faith" requirement, the legislature added a detailed statement explaining the intent of RCW 4.25.510:

> Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.
>
> Although Washington State adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States Supreme Court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. Chapter 232, Laws of 2002 amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making.

LAWS OF 2002, ch. 232, § 2. This legislative intent makes clear that RCW 4.24.510 was meant to protect a citizen's right to advocate to government agencies and public participation in governance.

The same reasons that underlie the Segaline plurality apply to government contractors in this case. The Segaline lead opinion concluded that government agencies are not immune under RCW 4.25.510 because they are not exercising First Amendment rights. When government contractors are communicating, for the purpose of carrying out their duties under a contract with a government agency, they are similarly not exercising First Amendment rights. If we were to find otherwise, then a government agency could escape the constraints of RCW 4.25.510, as dictated in Segaline, by engaging contractors to carry out government functions.

As Justice Madsen's concurrence and the legislative intent make clear, RCW 4.24.510 was meant to protect a citizen's right to advocate to government agencies and public participation in governance. Insulating government contractors from civil liability for injury caused by their contracted submissions to government agencies does not meet the intent behind RCW 4.24.510. When a government contractor is hired to conduct an internal investigation and report its findings to the government agency, it is not exercising its right to petition the government on its own behalf, advocating to government, or attempting to have effect on government decision making. Instead, the government contractor is performing the work of a government agency. The contractor benefits from being paid for its services and any communication to the government agency as a result of the services rendered is not the type of communication that RCW 4.24.510 was intended to protect.

We hold that government contractors, when communicating to a government agency under the scope of their contract, are not "persons" entitled to protection under RCW 4.24.510.

We reverse both the judgment on the pleadings and the award of attorney fees to OMW and remand for proceedings consistent with this opinion.[5]

Mann, ACJ

WE CONCUR:

Chun, J.

Appelwick, J.

[5] Because the issue was not raised below or before us on appeal, we specifically do not address whether OMW was an "agent" of L&I and thus whether Leishman is precluded from seeking relief under the terms of the settlement agreement.

RCW 4.24.510

Communication to government agency or self-regulatory organization—Immunity from civil liability.

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to 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, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

[**2002 c 232 § 2; 1999 c 54 § 1; 1989 c 234 § 2.**]

NOTES:

Intent—2002 c 232: "Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.

Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. Chapter 232, Laws of 2002 amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making." [**2002 c 232 § 1.**]

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October 03, 2019 - 3:38 PM

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