NO. 89674-7

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 309029-III

MICHAEL HENNE,

Plaintiff/Respondent,

v.

CITY OF YAKIMA, a Municipal Corporation,

Defendant/Petitioner.

PETITION FOR REVIEW OF DEFENDANT CITY OF YAKIMA

SENT ON 12/06/13 VIA FAX FOR FILING IN COURT OF APPEALS, DIVISION III

ROBERT C. TENNEY, WSBA #9589
MARK W. WATSON, WSBA #14693
PETER M. RITCHIE, WSBA #41293
Attorneys for City of Yakima
Meyer, Fluegge & Tenney, P.S.
P.O. Box 22680
Yakima, WA 98907
(509) 575-8500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

Statutes

Other

A. IDENTITY OF PETITIONER

Petitioner Defendant City of Yakima (the "City") asks this Court to accept review of the decision terminating review designated in Part B.

B. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' published decision, Henne v. City of Yakima (No. 309029-III), filed on November 7, 2013. The Court of Appeals' decision found that the City had standing to bring a motion to strike allegations within Plaintiff's complaint under the anti-SLAPP statute, RCW 4.24.525, but dismissed the City's appeal as moot because the trial court subsequently allowed Plaintiff to amend his complaint to remove the offending claims. The Court of Appeals also stated that the failure to give a non-moving party notice of intent to file a motion to strike and a reasonable time to remove the offending allegations (absent prejudice to the moving party) would preclude relief under the statute. A copy of the decision is in the Appendix at pages 1 through 24.

C. ISSUES PRESENTED FOR REVIEW

A. Is the Court of Appeals' decision that a nonmoving party may avoid the effect of an anti-SLAPP motion by removing the offending allegations (thus rendering the motion moot) contrary to the provisions of RCW 4.24.525, which do not provide for avoidance by amendment?

B. Is the Court of Appeals' decision that a nonmoving party may avoid the effect of an anti-SLAPP motion (*i.e.*, "mooting") by removing the offending allegations contrary to the intent of RCW 4.24.525, which protects covered entities from the moment when an offending pleading is served?

C. Is the Court of Appeals' decision that a nonmoving party may avoid the effect of an anti-SLAPP motion (*i.e.*, "mooting") by removing the offending allegations contrary to the provisions and intent of RCW 4.24.525 when attorney's fees have been incurred in bringing the motion before an amendment is sought?

D. Is the Court of Appeals' decision that a party filing a motion under RCW 4.24.525 must give the nonmoving party notice of intent to file the motion and an opportunity to remove the offending allegations (absent prejudice to the moving party) before such a motion may be filed contrary to the intent and provisions of the statute, which do not require such a notice procedure?

E. As applied to municipal corporations such as the City, does the Court of Appeals' decision concerning "mooting" by amendment and giving notice/opportunity to the nonmoving party violate the separation of powers doctrine by usurping the exclusive right of the Legislature to adopt

statutory conditions defining under what circumstances claims may proceed against municipalities under RCW 4.24.525?

D. STATEMENT OF THE CASE

Plaintiff Michael Henne ("Plaintiff") is a police officer with the Yakima Police Department ("YPD"). (CP 3). Between January, 2008 and February, 2011, the YPD investigated four reports of potential misconduct by Plaintiff within the scope of his employment as an YPD officer. These complaints included allegations of (1) rude conduct with other police officers, (2) dishonesty involving an alleged assault against Plaintiff, (3) a rule violation failure to broadcast emergency information about a suspect's location, and (4) a possible illegal search. (CP 83-102). Pursuant to the City's Rules, YPD Policy Manual, and policies, the YPD internally investigated all four reports. (CP 46-53, 58-79, 85-102, 106-109, 113-114, 117-120).

On November 4, 2011, Plaintiff filed a lawsuit against the City, alleging, in part, unlawful harassment and retaliation by other YPD officers. (CP 3-14). In his Complaint, Plaintiff alleged three causes of action based upon the internal investigation reports: (1) that he was unlawfully retaliated against by the City acting through its employees and agents; (2) that the City, "by and through its agents harassed and retaliated against Plaintiff by subjecting him to numerous unwarranted internal

investigations;" and (3) that the City, through its employees, failed to investigate and discipline Lt. Wentz, Officer Curtsinger, Capt. Schneider, Sgt. Seely, and Lt. Finch for their unprofessional behavior. (CP 6-12).

The City filed a special motion on December 30, 2011 to strike Plaintiff's claims relating to and derived from the four reports and resulting internal investigations pursuant to Washington's anti-SLAPP statute, RCW 4.24.525. (CP 15-32). The City argued the reports and resulting internal investigations involved "public participation and petition," as defined by RCW 4.24.525(2). (Id.). The City pointed out that Plaintiff specified no actionable legal basis for the alleged harassment and retaliation claims, and the City submitted abundant legal authority showing the absence of a legal basis for the allegations. (Id.).

It is important to note that the reports of alleged misconduct were generated by Plaintiff's fellow officers. (CP 83-102). The YPD then used the information from these reporting officers as a basis to initiate the internal investigations. (Id.). Plaintiff's claim against the City in part was to hold it liable for the acts of these reporting officers and for the resulting internal investigations. (CP 6-12). The City pointed out below that the reporting/investigating officers would be protected by the anti-SLAPP statute, and because the City is sought to be held liable for their conduct it is also protected by the statute. See Bradbury v. Superior Court, 49

Cal.App.4th 1108, 1112-1113, 57 Cal.Rptr.2d 207 (1996) (anti-SLAPP statute applies to municipality vicariously liable for acts of its employees during official investigation). (App. Br. 26-27).

On January 30, 2012, Plaintiff moved to amend the complaint to remove the offending allegations and to strike the City's motion as moot. (CP 126, 129, 131). He also attempted to avoid the motion by claiming he had never asserted claims of harassment and retaliation. (CP 129-130). Plaintiff submitted no evidentiary materials opposing the motion or legal authority in support of his theories. (CP 126-131). The City submitted a reply, pointing out that Plaintiff clearly had made allegations of harassment and retaliation related to the reports of misconduct and resulting internal investigations and that he could not avoid the motion to strike simply by amending the complaint. (CP 171-179).

The City's Special Motion to Strike was heard on March 9, 2012. (CP 363-381). The City argued that the anti-SLAPP statute protected local governments from actions based upon communications and proceedings in those local governments, *i.e.*, in this case reports of police misconduct and resulting internal investigations. (CP 363-381). Plaintiff countered that the statute does not apply to municipal entities. (Id.). The trial court denied the motion to strike and granted Plaintiff's motion to amend. (CP 358-362).

The City timely sought expedited review pursuant to RCW

4.24.525(5) on May 25, 2012. (CP 357). On November 7, 2013, the Court of Appeals filed its published decision. (Appendix at 1-9).The Court of Appeals properly held that the protections of the statute apply to the City. (Appendix at 7-8).

The Court of Appeals, however, then erroneously held that the City's appeal was moot because Plaintiff's "amended complaint supersedes the original complaint." (Appendix at 7). The Court of Appeals found that Plaintiff had a right to amend the complaint and remove the offending allegation while the anti-SLAPP motion was pending because "the motion to amend was filed before the City filed its answer and before the parties engaged in discovery . . . [and] [there is no showing of prejudice, dilatory practice, or undue delay." (Appendix at 6).

Significant to this Petition, the Court of Appeals went further and engrafted (without any basis or citation to legal authority and contrary to the plain language of the statute) on the anti-SLAPP statute a judicially imposed requirement that parties moving to strike under RCW 4.24.525 must first inform the nonmoving party of their intent and give the nonmoving party an opportunity to amend the complaint and remove the offending claims; only if the claims are not removed or if prejudice is shown by allowing an amendment, is a motion to strike proper:

> There is no showing of prejudice, dilatory practice, or undue delay. A different situation might be presented if the City had notified Mr. Henne's counsel that the claims violated the anti-SLAPP statute, had warned that a motion would be filed if Mr. Henne did not voluntarily amend his complaint, had given him a reasonable amount of time to make that amendment and yet Mr. Henne had failed to take action—thereby making it necessary for the City to prepare a motion. Absent prejudice, dilatory practice, or undue delay, Officer Henne had a right to amend his complaint while the anti-SLAPP motion was pending.

(Appendix at 6-7) (emphasis added).

The City now seeks review of the Court of Appeals' decision. The Court of Appeals incorrectly created a pre-motion notice and opportunity procedure and incorrectly dismissed the appeal as moot. The decision should be reversed on the issues of mootness and requiring a pre-motion notice procedure, and the case should be remanded for further proceedings consistent with the Opinion of this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court may grant review and consider a Court of Appeals opinion if it "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Likewise, this Court may grant review and consider a Court of Appeals opinion if it involves "a significant question of law under the Constitution of the State of Washington." RAP 13.4(b)(3). The Rules of Appellate Procedure are intended to "be liberally interpreted to promote justice and facilitate the

decision of cases on the merits." RAP 1.2(a). See also State v. Watson, 155 Wn.2d 574, 577-78, 122 P.3d 903 (2005).

1. The Court of Appeals' Decision Allowing Avoidance of An Anti-SLAPP Motion through A Post-Motion Amendment and Imposing A Notice/Opportunity Procedure Raises A Significant Question of Law Involving A Substantial Public Interest

a. Persuasive California Cases Hold That Anti-SLAPP Protections Cannot Be Avoided through Amendment or Voluntary Dismissal

Enacted in 2010, RCW 4.24.525 has received scant attention from the Washington appellate courts. "But because California has a similar statute, California cases are persuasive authorities for interpreting the Washington statute." Longview v. Wallin, 174 Wn. App. 763, 776 n.11, 301 P.3d 45 (2013). See also Aronson v. Dog Eat Dog Films, Inc., 738 F.Supp.2d 1104, 1110 (W.D.Wash.2010) (citing "California law as persuasive authority for interpreting" RCW 4.24.525).

The Court of Appeals' decision is contrary to persuasive California case law holding a plaintiff may not avoid the effect of an anti-SLAPP motion by seeking to amend the complaint and voluntarily dismiss the offending allegations falling within the scope of the statute. The purpose of the anti-SLAPP statute is to provide an early, inexpensive, and expeditious motion procedure testing the evidentiary sufficiency of allegations involving protected conduct. Laws of 2010, ch. 118, § 1.

The statute makes no provision for amending pleadings, and to allow amendment would undermine the statute's purpose by disguising the vexatious nature of the suit "through more artful pleading" and by allowing an easy escape from the statute's protections (*i.e.*, protecting the moving party from delay, distraction and having its energy and resources drained and depleted by a "procedural quagmire"). Simmons v. Allstate, 92 Cal.App.4th 1068, 1073-1074, 112 Cal.Rptr.2d. 397 (2001); Sylmar Air Conditioning v. Pueblo Contracting Services Inc., 122 Cal.App.4th 1049, 1054-1056, 18 Cal.Rptr.3d 882 (2004) (anti-SLAPP motion not avoided where plaintiff filed amended complaint as of right three days before hearing); Navellier v. Sletten, 106 Cal.App.4th 763, 772-73, 131 Cal. Rptr.2d 201 (2003); Moore v. Liu, 69 Cal.App.4th 745, 751, 81 Cal.Rptr.2d 807 (1999) (voluntary dismissal of moving party prior to hearing on anti-SLAPP motion did not avoid liability for attorney's fees).

The City cited the California authority to the trial court and the Court of Appeals, and Plaintiff never provided any countervailing authority. (CP 171-181; App. Br. 17; Resp. Br. 1-15). Plaintiff merely argued that he should be allowed to amend the complaint in the absence of prejudice. (CP 127-129). But whether prejudice exists is not pertinent here. The issue is whether nonmoving parties can avoid the protections

provided by the anti-SLAPP statute by amendment after the motion to strike has been filed. The answer is clearly that they cannot.

Indeed, although the Court of Appeals below conceded that California cases are "persuasive authority for interpreting the Washington statute," (Appendix at 7), it completely disregarded the California authority precluding avoidance of anti-SLAPP motions through amendment or dismissal without comment or without citation to any authority supporting its conclusion that the amendment removed the City from the protections of the statute.

The issue of whether an anti-SLAPP motion may be avoided by a post motion amendment involves a significant question of law involving a substantial public interest that merits review.

b. The Washington Anti-SLAPP Statute Cannot Be Avoided through Amendment or Dismissal and Does Not Require Pre-Motion Notice

The State of Washington has a policy that favors swift adjudication of "SLAPP" claims brought against a governmental entity that involve "public participation and petition," such as those at issue here. That policy is enshrined in RCW 4.24.525. The Legislature intended RCW 4.24.525 as a means to provide an expedited, cost-effective, quick process for eliminating meritless claims that have the effect of chilling participation

and petition in government proceedings. Laws of 2010, ch. 118, § 1.[1] The statute allows a defendant to file an expedited special motion to strike the offending claims. RCW 4.24.525(5)(a).

The decision of the Court of Appeals conflicts with that policy and objective. The Court of Appeals reasons that notice to the nonmoving party and/or prejudice to the moving party is a pre-condition for a special motion to strike. There is absolutely nothing in the anti-SLAPP statute requiring that a nonmoving party first be given notice that the moving party intends to file a motion under the statute and be given an opportunity to withdraw the offending allegations by amendment (such amendment to be denied only if prejudice to the moving party is shown).

The anti-SLAPP statute makes no provision for pre-motion notice to provide an opportunity for amending the complaint (or a prejudice proviso precluding such an amendment), and there is no reason why such a right should be implied.[2] Washington courts "are not free to engraft . . . exception[s] to [a] statute where the plain language of the statute is to the contrary." Schilling v. Radio Holdings Inc., 136 Wn.2d 152, 165, 961 P.2d

[1] The Legislature has directed that the anti-SLAPP statute "is to be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." Aronson, 738 F. Supp.2d at 1110.

[2] Rather, the statute provides that the anti-SLAPP motion must be filed within 60 days of the date when the action is commenced. RCW 4.24.525(5)(d). With such a short deadline, it is clear the Legislature did not intend a notice requirement.

371 (1998) (only the Legislature could create "inability to pay" exception to entitlement to double damages for "willful" failure to pay wages under RCW 49.52.070). The State knows how to establish notice pre-conditions for actions involving government entities. See, e.g., RCW Chapters 4.92, 4.96. RCW 4.24.525 contains no notice pre-conditions.

Furthermore, the purpose of the anti-SLAPP statute is undercut if a nonmoving party is allowed to assert offending claims, force the moving party to defend against them, and, if the moving party can afford the costs of moving to strike the claims, simply avoid the costs imposed by statute by amending the complaint at the eleventh hour. Indeed, the Court of Appeals' decision may have the opposite effect of actually encouraging such meritless claims, as some parties will lack either the knowledge or wherewithal to invoke the statutory procedure to challenge them with a timely motion to strike. This will result in a win-win for the nonmoving party: if the claims are challenged, they can be easily dismissed without financial consequence to the nonmoving party; if they are not, the moving party will have no choice but to incur the costs of defending against them. Accordingly, the Court of Appeals' decision increases the potential for the abusive practices against which the statute was designed to protect.

In practice, the Court of Appeals' decision invites unnecessary litigation and conflicts with the important public interest in judicial

economy by quickly resolving meritless SLAPP claims at the beginning of lawsuits before substantial time and expense is incurred defending against those claims. This is consistent with the Legislature's objective to set up an expedited, "efficient, uniform, and comprehensive" mechanism through which claims "based on an action involving public participation and petition" can be evaluated and resolved at the beginning of the litigation. Laws of 2010, ch. 118, § 1.

The Court of Appeals' decision is completely inconsistent with that objective and policy. Allowing a SLAPP plaintiff leave to amend the complaint once the motion to strike has been filed (and when, as here, the plaintiff provides no evidence substantiating the claims) undermines the protections provided by the statute by allowing the plaintiff to avoid quick dismissal by mere artifice. As one court has stated,

> Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend. This would totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits.

Navellier, 106 Cal. App. 4th at 773.

Relatedly, the Court of Appeals' decision will waste judicial resources by having anti-SLAPP motions filed and noted for hearing, only

to be easily defeated by motions to amend. The public's interest is harmed when judicial resources are wasted, as they were in this case when the City (and the courts) was compelled to expend significant time, money, and energy in seeking to have the offending claims eliminated.

Finally, the "notice and opportunity" procedure the Court of Appeals created is unworkable and without guidance, especially when matched up against the requirement under RCW 4.24.525(5)(a) that a moving party must file the special motion to strike within 60 days from time of service of the complaint. The Court of Appeals provided no guidance whether the notice must be in writing or contain specific language. Likewise, it did not state when notice must be given relative to the date of service or how much time the nonmoving party has to respond. Absent a "clearly demarcated test," the Court of Appeals' requirement is unworkable. Schilling, 136 Wn.2d at 164 (court could not create "financial inability" to pay exception to wage statute). The lower court decision obfuscates an unambiguous statutory provision, and will lead to confusion and inconsistent results when trial courts try to apply the ruling.

In short, by misconstruing the statute and judicially engrafting a notice/opportunity to amend/absence of prejudice precondition, the decision of the Court of Appeals severely undermines the Legislature's objective and policy and is contrary to the statutory language. The public

has a substantial interest in the law protecting participation and petition in governmental proceedings. The City submits the decision of the Court of Appeals was arbitrary, contrary to the statutory language and intent of the Legislature, and merits review (and reversal) by this Court.

2. The Court of Appeals' Decision Involves A Significant Question of Law under the Constitution Because It Violates the Separation of Powers Doctrine

The decision of the Court of Appeals that a non-moving party be given a chance to withdraw an offending SLAPP allegation violates the established separation of powers doctrine by usurping the exclusive power of the Legislature to define under what circumstances claims may be brought against the State and municipalities.

The Washington State Constitution does not contain a formal separation of powers clause, but "the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine." Brown v. Owen, 165 Wn.2d 706, 718, 206 P.3d 310 (2009). "The doctrine of separation of powers divides power into three coequal branches of government: executive, legislative, and judicial." Waples v. Yi, 169 Wn.2d 152, 158, 234 P.3d 187 (2010). "If 'the activity of one branch threatens the independence or integrity or invades the prerogatives of another,' it

violates the separation of powers." Id. (quoting State v. Moreno, 147 Wn.2d 500, 505–06, 58 P.3d 265 (2002)).

It is the law in this State that the Legislature may establish conditions precedent, including pre-suit notice requirements. It is the exclusive province of the Legislature to enact pre-suit notice requirements for claims against the State and municipalities, and define under what circumstances claims may be brought against them (here, under what circumstances SLAPP claims may be brought against municipalities and dismissed pursuant to the anti-SLAPP statute). McDevitt v. Harbor View Med. Ctr., 85367-3, 2013 WL 6022156 (Wash. Nov. 14, 2013). Article II, section 26 of the Constitution authorizes the Legislature to direct "in what manner, and in what courts, suit may be brought against the state."[3]

This Court has frequently held that the Legislature can establish procedural requirements and conditions precedent before suit can be brought against the State and local governments. See, e.g., Coulter v. State, 93 Wn.2d 205, 207, 608 P.2d 261 (1980) (upholding the pre-suit requirements of former RCW 4.92.110 for tort damages against the State under an Article II, section 26 rationale); Medina v. Pub. Util. Dist. No. 1 of Benton County, 147 Wn.2d 303, 312, 53 P.3d 993 (2002) (upholding

[3] Article II, section 26 of the Washington State Constitution provides: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." (Appendix at 30).

pre-suit notice requirement of former RCW 4.96.020(4) against local government entities under an Article II, section 26 rationale).

In Coulter, this Court decided that the pre-suit notification requirement of former RCW 4.92.110 was within the authority of the Legislature to enact under Article II, section 26. Coulter, 93 Wn.2d at 207. In Medina, this Court applied the same principle with regard to the former RCW 4.96.020(4) 60 day pre-suit notice to local government entities in tort actions, upholding the notice requirement because it was enacted within the constitutional power of the Legislature under Article II, section 26. Medina, 147 Wn.2d at 314–15.

Recently this Court upheld the legislatively-enacted pre-suit notice requirement of former RCW 7.70.100(1) (facially neutral as to its application between governmental and nongovernmental defendants) as applied to the State as "a constitutionally valid statutory precondition for suit against the State because it was adopted by the legislature as provided in Article II, section 26 of the Washington Constitution." McDevitt, 85367-3, 2013 WL 6022156 at * 1.

The anti-SLAPP statute at issue, RCW 4.24.525, should be treated no differently. Like the facially neutral pre-suit requirements referenced above which were upheld under Article II, section 26, as applied to government entities, RCW 4.24.525 is a constitutionally valid statutory

pre-condition adopted by the Legislature (which is facially neutral in its application to both governmental and nongovernmental entities). As applied to municipalities, RCW 4.24.525 establishes a procedure by which SLAPP claims against municipalities can be tested for merit at an early stage. Article II, section 26 of the Constitution provides that it is for the legislature to define under what circumstances and in what manner SLAPP suits may be brought against municipalities.

The Legislature validly established the anti-SLAPP statute at issue in 2010. Laws of 2010, ch. 118. The procedure and method the Legislature established to achieve the statutory purpose is the special motion to strike. RCW 4.24.525(4)-(5). The Legislature viewed this procedural mechanism as so crucial to the protection of participation and petition in governmental proceedings that it provided for an "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." RCW 4.24.525 (5)(d).

By its judicial engrafting of a requirement (contrary to persuasive on-point California law) that a nonmoving party must be given a chance to withdraw an offending allegation (absent prejudice to the moving party) before a motion to strike is filed, as applied to municipalities, the Court of Appeals encroached on the right of the Legislature to define under what circumstances and in what manner SLAPP claims may be brought against

municipalities. The statute nowhere provides for amendment or notice/opportunity or even hints at it. Indeed, the requirement is profoundly inimical to the purpose of the statute: "The key concern of anti-SLAPP laws is to spare the moving party from the expense of defending a lawsuit brought to quell free expression. That purpose is thwarted if a plaintiff can amend his complaint to avoid payment of those fees." (Appendix at 21). The Court of Appeals' decision completely undermines that purpose by creating an escape hatch for nonmoving parties that was not intended and is not present in the statute. It removes all teeth from the statute and renders it without real force or effect.

The motion to strike mechanism in RCW 4.24.525 is closely comparable to the pre-suit requirements noted above. Like those requirements, as applied to municipalities, RCW 4.24.525 defines the circumstances and procedures under which claims based on participation and petition in governmental proceedings may be brought against municipalities. It was enacted as provided by the express constitutional authority in Article II, section 26 for the Legislature to direct "in what manner, and in what courts, suit may be brought against the state." By engrafting on the statute an amendment escape clause and a requirement that a nonmoving party be given notice and opportunity to amend his complaint, the Court of Appeals intruded on the power of the Legislature

and violated separation of powers principles. Accordingly, its decision is unconstitutional and should be reversed.

F. CONCLUSION

Given the sweeping implications of the Court of Appeals' decision, review is appropriate. The decision involves significant issues of public concern justifying review under RAP 13.4(b)(4). It also violates the separation of powers doctrine, justifying review under RAP 13.4(b)(3). This Court should accept review, reverse the dismissal of the appeal, and remand this case for further proceedings consistent with this Court's Opinion, including a determination of whether the allegations which were the subject of the motion to strike are covered by the anti-SLAPP statute and whether the City is entitled to a $10,000 statutory award and attorney's fees and costs.

RESPECTFULLY SUBMITTED this 6 day of December, 2013.

MEYER, FLUEGGE & TENNEY, P.S.
P.O. Box 22680
Yakima, WA 98907-2680
Attorneys for Defendant/Appellant

By: MARK D. WATSON, WSBA #14693

By: PETER M. RITCHIE, WSBA #41293

APPENDIX

1. November 7, 2013 Published Opinion, Henne v. City of Yakima (No. 309029-III);

2. Cal.Civ.Proc.Code § 425.16;

3. RCW 4.24.525;

4. Washington State Constitution, Article II, section 26;

FILED
NOV. 7, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MICHAEL HENNE,

Respondent,

v.

CITY OF YAKIMA, a Municipal Corporation,

Appellant.

No. 30902-9-III

PUBLISHED OPINION

KULIK, J. — Michael Henne, a Yakima police officer, filed a complaint against the city of Yakima (City) for alleged retaliatory use of internal investigations. The trial court denied the City's anti-SLAPP[1] motion to strike several claims in Mr. Henne's complaint. Mr. Henne then amended his complaint to remove the offending claims.

We conclude that the City is a legal entity and, therefore, could file its motion to strike under RCW 4.24.525. But we also conclude that the offending claims were removed from Mr. Henne's complaint and, thus, the issue is now moot. Accordingly, we dismiss the appeal.

[1] Strategic Lawsuit Against Public Participation, RCW 4.24.510.

FACTS

The City hired Michael Henne as a police officer in 1998 and promoted him to sergeant in 2007. Between January 2008 and February 2011, the City received four reports of potential misconduct by Officer Henne within the scope of his employment as a police officer. These complaints included allegations of (1) rude conduct with other police officers, (2) dishonesty involving an alleged assault against Officer Henne, (3) a rule violation failure to broadcast emergency information about a suspect's location, and (4) a possible illegal search. The City subsequently conducted internal investigations of the reports and ultimately cleared Officer Henne of all allegations.

On November 4, 2011, Officer Henne filed a complaint in Yakima County Superior Court against the City, alleging in part that after he was promoted to sergeant, Lieutenant Nolan Wentz began harassing him and telling other officers that Officer Henne should not have been promoted. Officer Henne alleged that some police officers started harassing him by filing false reports against him, which resulted in unwarranted internal investigations. Officer Henne also maintained that the City failed to discipline city employees when they disseminated information about the investigations to other city employees and in the community. Officer Henne complained that the City failed to follow its own internal investigation policies by neglecting to investigate facts in his favor

and failing to give him notice of findings or copies of internal investigation files. Officer Henne asserts that even after he was cleared of all allegations, he was transferred to a less desirable position and "had to endure continuing criticism and harassment by [police department] officers and leadership." Clerk's Papers (CP) at 10.

Officer Henne's causes of action included, in relevant part, that the City (1) interfered with his rights by reassigning him to a less desirable position after he refused to resign from his position while he was under investigation, (2) harassed and retaliated against him by subjecting him to numerous unwarranted internal investigations, and (3) failed to investigate and discipline numerous officers for their unprofessional behavior. Officer Henne asked for damages due to lost wages and benefits, lost opportunities for advancement, emotional distress, pain, embarrassment, and humiliation. He also asked for injunctive relief to enjoin the City from perpetuating the hostile work environment.

The City filed a motion on December 30, 2011, to strike the claims related to the internal investigations under Washington's anti-SLAPP statute. It maintained that these claims were protected under the statute because they involved "'public participation and petition.'" CP at 15.

On January 30, 2012, Officer Henne moved to amend the complaint under CR 15 and strike the City's motion as moot. He pointed out that CR 15 allows for liberal amendment of a complaint unless the defendant can show actual prejudice. He also argued that the City's motion to strike "is brought on its mistaken belief that the Plaintiff is claiming the Defendant unlawfully harassed and retaliated against Plaintiff by initiating and/or conducting internal investigations." CP at 129. He emphasized that the heart of his amended complaint was the City's negligent hiring and supervision of city employees and the breach of police department policies and procedures relating to internal investigations outlined in the collective bargaining agreement and the civil service rules. Officer Henne explained that he was not alleging that complaints should not be investigated, but that the investigations were improperly conducted. The City countered that Officer Henne could not avoid the consequences of the anti-SLAPP statute by amending the complaint.

At the hearing, the City argued that the anti-SLAPP statute was designed to protect local governments from actions that are based upon communications and proceedings in those local governments, i.e., lawsuits based on public participation, pointing out "this lawsuit is about . . . suing the city for the alleged acts of its agents in reporting internal investigation matters." CP at 318. Officer Henne countered that the government is not a

"person" for purposes of the anti-SLAPP statute.

The court denied the motion to strike and granted Officer Henne's motion to amend. Officer Henne's amended complaint removed all allegations related to the City's internal investigations. The remaining causes of action included allegations that the City failed to adequately supervise the chief of police and curtail the harassment by other police officers against Officer Henne, breached internal investigation policies by failing to keep the internal investigation confidential, and improperly removed Officer Henne from his position and improperly tried to intimidate him into resigning.

The City appeals.

ANALYSIS

Mootness

The dispositive issue is whether the amendment of the complaint moots this appeal. The City argues that Officer Henne cannot avoid the anti-SLAPP statute by amending the complaint to remove the claims arising from the internal investigations, which it claims are protected under the SLAPP statute. Citing *Navellier v. Sletten*, 106 Cal. App. 4th 763, 131 Cal. Rptr. 2d 201 (2003), it urges us to follow California precedent, which generally prohibits an "eleventh hour amendment to plead around a motion to strike under the anti-SLAPP statute." *Id.* at 772. California courts reason that

allowing a SLAPP plaintiff leave to amend the complaint once the court finds the defendant has made a prima facie showing undermines the legislature's goal of quick dismissal of meritless SLAPP suits. *Id.* (quoting *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068, 1073-74, 112 Cal. Rptr. 2d 397 (2001)).

Officer Henne counters that once he amended his complaint to remove the claims arising from the internal investigations, the City's appeal was moot. He points out that he is not complaining about the City's internal investigations of him; instead, the amended complaint alleges that the City failed to follow its own policies regarding such investigations. In sum, he argues that the operative document before us is the amended complaint, which effectively disposes of the entire appeal.

Here, the motion to amend was filed before the City filed its answer and before the parties engaged in discovery. There is no showing of prejudice, dilatory practice, or undue delay. A different situation might be presented if the City had notified Mr. Henne's counsel that the claims violated the anti-SLAPP statute, had warned that a motion would be filed if Mr. Henne did not voluntarily amend his complaint, had given him a reasonable amount of time to make that amendment and yet Mr. Henne had failed to take action—thereby making it necessary for the City to prepare a motion. Absent prejudice, dilatory practice, or undue delay, Officer Henne had a right to amend his

complaint while the anti-SLAPP motion was pending. Thus, the amended complaint supersedes the original complaint. With the removal of the allegations relating to the City's internal investigations of Officer Henne, the issues raised in this appeal are moot.

The City as a Legal Entity Under RCW 4.24.525

RCW 4.24.525 is significantly broader than RCW 4.24.510 in scope and purpose and contains a detailed definition that includes "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity." RCW 4.24.525(1)(e). A California court[2] interpreting California's anti-SLAPP statute has held that "[t]he anti-SLAPP suit statute is designed to protect the speech interests of private citizens, the public, *and governmental speakers*." *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1117, 57 Cal. Rptr. 2d 207 (1996) (emphasis added). The court reasoned that "[g]overnment can only speak through its representatives" and that "[a] public entity is vicariously liable for the conduct of its employees acting within the scope of their employment." *Id.* at 1114. Further, noting that under the federal civil rights statute, municipalities and counties are treated as persons, the court held that a "person" under the California anti-SLAPP statute "must be

[2] Because Washington's anti-SLAPP statute was modeled after California's statute, California cases are persuasive authority for interpreting the Washington statute. *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1110 (W.D. Wash. 2010).

read to include a governmental entity." *Id.* Given the statute's plain language and California precedent, the City, which is a municipal corporation and a recognized "legal entity," falls within the meaning of the anti-SLAPP statute.

The amendment of the complaint moots the other issues raised on appeal. Accordingly, we dismiss the appeal as moot.

Attorney Fees

Both parties request attorney fees on appeal. The City requests attorney fees and costs under RCW 4.24.525(6) and RAP 18.1. RCW 4.24.525(6)(a) requires an award of attorney fees "to a moving party who prevails, in part or in whole, on a special motion to strike." Because the City is not the prevailing party on the motion to strike, we deny its attorney fees request.

Officer Henne contends that statutory penalties, costs and attorney fees should be awarded to him. However, his request for expenses is inadequate. To receive an award of costs and attorney fees on appeal, a party must devote a section of its opening brief to the request. RAP 18.1(b); *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 700-05, 915 P.2d 1146 (1996). The court rule requires more than a bald request for attorney expenses on appeal. *Phillips Bldg.*, 81 Wn. App. at 705. The party seeking costs and attorney fees must provide argument and citation to authority to establish that such expenses are

warranted. *Id.* Officer Henne has failed to do so. Accordingly, we deny his request for attorney fees.

Kulik, J.
Kulik J.

I CONCUR:

Korsmo, C.J.

FEARING, J. (concurring in part and dissenting in part) — I agree with the majority's second ruling that a city is a "person" for purposes of Washington's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, RCW 4.24.525. I write separately, in part, because I believe the issue merits additional analysis. I also write separately because the majority fails to provide directions to the trial court as to what steps to take as a result of this ruling. Presumably, the majority wishes no steps to be taken, to which I respectfully disagree.

I dissent from the majority's first ruling dismissing the appeal as moot. I also respectfully question the majority's ruling on an important substantive question after declaring the appeal moot. I would remand the case to the trial court to continue with its review as to whether the anti-SLAPP statute applies to any of the claims in Officer Michael Henne's first and/or amended complaint and to determine whether to award city of Yakima the statutory penalty and reasonable attorney fees and costs incurred by reason of Officer Henne's asserting claims that offend the statute.

MOOTNESS

Michael Henne sued Yakima, in part, claiming he was subjected to unwarranted internal investigations. He alleged in one paragraph in his causes of action: "4.5 Defendant by and through its agents harassed and retaliated against Plaintiff by subjecting him to numerous unwarranted internal investigations." Clerk's Papers at 12.

This claim impliedly objected to the city's response to complaints about the conduct of Officer Henne on matters that could be of public importance.

Yakima brought a motion, pursuant to the anti-SLAPP statute, to strike allegations in the complaint. As a result, Officer Henne amended his complaint to remove paragraph 4.5. Yakima proceeded with its motion anyway and argued it should still be awarded, despite the amendment, reasonable attorney fees and costs and the statutory penalty for having to bring the motion to strike. The trial court did not address whether the awards are proper despite an amendment to remove offending language, since it ruled that a city is not a "person" under the statute.

On appeal, Yakima continues to argue it should be awarded the penalty and fees and costs regardless of whether Henne amended his complaint. The majority agrees with the city that the trial judge erred when ruling the city was not protected by the statute. But then the majority ignores the question of whether Yakima is entitled to an award. Whether Yakima should receive any award is an active, viable question that should be addressed. The appeal is not moot.

A case is moot "when it involves only abstract propositions or questions, the substantial questions in the trial court no longer exist, or a court can no longer provide effective relief." *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005); *State v. Slattum*, 173 Wn. App. 640, 647, 295 P.3d 788, *review denied*, 178 Wn.2d 1010 (2013). Generally, this court may not consider a case if the issue presented is moot. *In re Det. of R.R.*, 77 Wn. App. 795, 799, 895 P.2d 1 (1995)

(quoting *In re Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983)). We may provide Yakima relief in the form of statutory awards or by remanding to the trial court to decide whether an award is proper.

ANTI-SLAPP STATUTE

A legal bully employs the legal system in order to punish someone who publicly spoke about the bully's conduct and in order to quiet someone from speaking, in the future, about that conduct. Typically, the bully's conduct is a matter of public importance. Examples of legal bullying include Lance Armstrong suing the *Sunday Times* for suggesting he used banned substances and Texas ranchers suing Oprah Winfrey and Ellensburg's Mad Cowboy Howard Lyman for depicting American beef as unsafe. For the latter case see *Texas Beef Group v. Winfrey*, 201 F.3d 680 (5th Cir. 2000). Oprah Winfrey and the *Sunday Times* had resources to pay their respective defenses, but many defendants face bankruptcy when faced with defending a legal bully's suit. The legal bully does not necessarily sue to win, but to intimidate. University of Denver Professors George W. Pring and Penelope Canan coined the term "Strategic Lawsuit Against Public Participation (SLAPP)," to describe such suits. Tom Wyrwich, *A Cure for a "Public Concern": Washington's New Anti-SLAPP Law*, 86 WASH. L. REV. 663, 666 (2011). The cases involve not only lawsuits traditionally associated with free speech, such as libel and defamation suits, but other actions such as business interference, conspiracy, or trespass. *Id.*

In February 2010, the Washington state legislature passed its Act Limiting Strategic Lawsuits Against Public Participation. LAWS OF 2010, ch. 118. The Washington Act protects the free expression of Washington citizens by shielding them from meritless lawsuits designed only to incur costs and chill future expression. Wyrwich, *supra*, at 663. Washington's Act was modeled on California's influential anti-SLAPP statute. *Id.*

The 2010 Washington Act contains a declaration of purpose:

> (1) The legislature finds and declares that:
> (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.
> (2) The purposes of this act are to:
> (a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;
> (b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and
> (c) Provide for attorneys' fees, costs, and additional relief where appropriate.

LAWS OF 2010, ch. 118, §1. The legislature directed the courts to liberally interpret the Act. "This Act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." LAWS OF 2010, ch. 118, § 3.

Washington's anti-SLAPP statute, codified at RCW 4.24.525, allows a party to bring a special motion to strike a claim that is based on an action involving public participation and petition. An "action involving public participation and petition" includes "[a]ny . . . 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). A party bringing a special motion to strike 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, then the responding party must establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court must deny the motion to strike. RCW 4.24.525(4)(b). If a party prevails on an anti-SLAPP motion to strike, the offending party incurs sanctions. In such event, the court shall award, to a moving party, costs of litigation and any reasonable attorney fees incurred in connection with each motion on which the moving party prevailed. RCW 4.24.525(6)(a)(i). The court shall also award the prevailing movant an additional amount of $10,000. RCW 4.24.525(6)(a)(ii).

RCW 4.24.525 demands expedited review of the "moving party's" motion to strike and the stay of discovery until the court resolves the motion. *See* RCW 4.24.525(5)(a)-(c). The trial court's denial of Yakima's motion is before this Court of Appeals on interlocutory review because "[e]very 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." RCW 4.24.525(5)(d).

RCW 4.24.525 is not Washington's first anti-SLAPP statute. In 1989, Washington adopted the nation's first anti-SLAPP law still codified at RCW 4.24.500 to .520. The law, known as the "Brenda Hill Bill," provides immunity from civil liability for claims based on good faith communication with the government regarding any matter "reasonably of concern." Wyrwich, *supra*, at 669. The Brenda Hill Bill was not without defect, since it provided no method for early dismissal. *Id.* With courts unable to dismiss SLAPPs before discovery, defendants had no means of escaping the significant legal expenses SLAPPs intend to inflict. *Id.* at 670.

CITY AS "PERSON" UNDER ANTI-SLAPP STATUTE

The one pertinent question the majority addresses is whether the city of Yakima is a "person" entitled to recover the penalties and costs afforded in the anti-SLAPP statute. The statute allows recovery to a prevailing "moving party." RCW 4.24.525(6)(a). A "'moving party' means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim." RCW 4.24.525(1)(c). In turn, the statute defines a "person" broadly as "an individual, *corporation*, business trust, estate,

trust, partnership, limited liability company, association, joint venture, or *any other legal* or commercial *entity*." RCW 4.24.525(1)(c) (emphasis added).

No Washington decision answers the question of whether a city is a "person" entitled to the protections of the 2010 anti-SLAPP statute, nor does any Washington decision involve a government entity as a "moving party." A city, particularly one as large as Yakima, is not typically viewed as a party that may be intimidated by SLAPP suits, and thus the purpose of anti-SLAPP statutes is not a tailor fit in the context of Yakima seeking protection. Since the statute seeks to preserve free speech rights and government entities do not possess free speech rights, a forceful argument is made that a government entity should not be considered a "person" under RCW 4.24.525(1)(e).

Our state's high court in *Segaline v. Department of Labor and Industries*, 169 Wn.2d 467, 238 P.3d 1107 (2010) ruled that a government entity is not a "person" under the 1989 anti-SLAPP statute, RCW 4.24.500 to .520, for the reasons expressed above. Nevertheless, the 1989 statute did not define the word "person." The statute also read that it was designed to protect "*individuals* who make good faith reports to appropriate governmental bodies." RCW 4.24.500 (emphasis added).

RCW 1.16.080(1) is a guiding light to the interpretation of all statutes. The statute reads: "The term 'person' may be construed to include the United States, this state, or any state or territory, or any public or private corporation or limited liability company, as well as an individual." But as the court in *Segaline* noted, the provision does not compel the

court to broadly construe "person," but rather the use of "may" permits the court to interpret "person" to include such entities. *Segaline*, 169 Wn.2d at 474.

We are not free to use our own judgment and rule that a government entity should not receive protections under RCW 4.24.525. Instead, we must apply the statute's broad definition of "person." A reviewing court's primary goal is to determine and give effect to the legislature's intent and purpose in creating the statute. *Woods v. Kittitas County*, 162 Wn.2d 597, 607, 174 P.3d 25 (2007); *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Woods*, 162 Wn.2d at 607; *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). We must give meaning to every word and interpret the statute as written. *Enter. Leasing, Inc. v. City of Tacoma Fin. Dep't*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999); *Prosser Hill Coal. v. County of Spokane*, 309 P.3d 1202, 1207 (2013).

With the majority, I conclude that a "person" under the 2010 anti-SLAPP statute includes a government entity such as a city. My conclusion is based upon principles of statutory interpretation and decisions from California. "Person" under the 2010 statute, unlike the 1989 version, includes a "corporation" and "any legal entity," both which, under lay and legal definitions, include a city and any other government entity.

Courts should consider the meaning that naturally attaches and take into consideration the meaning that attaches from the context. *State v. Ratliff*, 140 Wn. App. 12, 16, 164 P.3d 516 (2007). In construing statutory language, words must be given their

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

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

RCW 4.24.525(1)(e) also defines a "person" as any "legal or commercial entity." *Black's Law Dictionary* defines a "legal entity" as "[a] body, other than a natural person, that can function legally, sue or be sued, and make decisions through agents." BLACK'S, *supra*, at 976. A city has a legal existence, by which it may make decisions, sue, and be

sued. A city is a "legal entity." In many decisions, government or public entities are referred to as legal entities. *See, e.g., Pub. Util. Dist. No. 1 of Snohomish County v. Taxpayers & Ratepayers of Snohomish County*, 78 Wn.2d 724, 737, 479 P.2d 61 (1971).

RCW 4.24.525(1)(e) partially defines a "person" as "any other legal *or* commercial entity." (Emphasis added.) Use of the word "or" denotes that noncommercial entities are included. We presume that the word "or" does not mean "and" and that a statute's use of the word "or" is disjunctive to separate phrases unless there is a clear legislative intent to the contrary. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 473 n.95, 61 P.3d 1141 (2003); *State v. Weed*, 91 Wn. App. 810, 813, 959 P.2d 1182 (1998). Noncommercial entities include nonprofits and government entities.

Because the California anti-SLAPP statute served as a model for the Washington Act, courts can use the borrowed statute rule to interpret the Washington Act. *Fielder v. Sterling Park Homeowners Ass'n*, 914 F. Supp. 2d 1222, 1234 (W.D. Wa. 2012) (court used California law to interpret Washington anti-SLAPP statute); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1110 (W.D. Wa. 2010); Wyrwich, *supra*, at 689. The California Code of Civil Procedure grants a "person," sued for exercising a right to petition or free speech, the opportunity to file a special motion to strike the offending claims. CAL. CIV. PROC. § 425.16(b)(1). The statute does not define the term "person." Nevertheless, California courts have held that a municipal corporation is a "person" under the state's anti-SLAPP statute. *Schaffer v. City & County of San Francisco*, 168 Cal. App. 4th 992, 85 Cal. Rptr. 3d 880 (2008); *Visher v. City of Malibu*, 126 Cal. App.

4th 364, 367 n.1, 23 Cal. Rptr. 3d 816 (2005); *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1114, 57 Cal. Rptr. 2d 207 (1996).

In short, municipal corporations are persons, my friend.

AVOIDANCE OF ANTI-SLAPP STATUTE BY AMENDMENT

The majority and I do not dispute that Officer Henne was entitled to amend his complaint to exclude any language that offends the anti-SLAPP statute. I disagree with the majority, however, in that the majority fails to address the principal purpose of the appeal—determining whether or not Officer Henne avoids the statute's repercussions by the amendment. The statute's provisions do not help us answer this question. No Washington decision has addressed the question of whether the plaintiff may escape the statutory sanctions by an amendment, so I rely upon the purpose of the statute.

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

allow the city of Yakima to recover the penalty and reasonable attorney fees and costs, if, upon remand, Yakima "prevails" on its motion to strike.

No California decision directly addresses this important issue. In *Navellier v. Sletten*, 106 Cal. App. 4th 763, 131 Cal. Rptr. 2d 201 (2003), the court addressed a plaintiff seeking to amend his complaint, after the motion to strike was granted, to assert claims that did not offend the anti-SLAPP statute. Our case is in a different posture since Officer Henne filed his motion to amend before any motion hearing. Nevertheless, the California court denied the motion to amend wishing to preclude the plaintiff from escaping the provisions of the statute by amending the complaint. This wish is served by imposing the statutory awards when a motion to amend is filed to avoid those awards.

ALLEGATIONS PROHIBITED BY ANTI-SLAPP STATUTE

Michael Henne denies that any of the allegations in his first complaint offended the anti-SLAPP statute. He argues that the complaint did not seek recovery for the internal investigations of the Yakima Police Department but for a failure to follow city procedures and for violating the collective bargaining agreement. He further argues that the focus of his complaint was negligent supervision and hiring of employees, not negligent investigating. Finally, he contends he amended his complaint only as a matter of precaution.

Since the trial court denied Yakima's motion for relief under the anti-SLAPP statute, based upon the trial court's view that a municipal corporation was not protected by the statute, the trial court did not address whether the first complaint, nor if any

provisions of the amended complaint, violate the statute. The parties have not fully briefed nor argued whether the anti-SLAPP statute prohibits any of the allegations in plaintiff's initial or amended complaint. Therefore, I would remand to the trial court to determine whether any allegations offend the statute. The trial court should strike any offending language in the amended complaint.

If the trial court finds the anti-SLAPP statute prohibits any claim in Michael Henne's original or amended complaint, the parties should brief the court regarding whether the city of Yakima is entitled to the $10,000 statutory award and attorney fees and costs.

California's statute, like the Washington statute, reads that a prevailing movant "shall" be awarded reasonable attorney fees and costs and the statutory penalty. *See* CAL. CIV. PROC. § 425.16(b)(1); RCW 4.24.525(6)(a). Nevertheless, California courts have refused to grant the prevailing party, on a motion to strike, the statutory penalty and fees and costs when the motion was of limited success.

In *Moran v. Endres,* 135 Cal. App. 4th 952, 953-54, 37 Cal. Rptr. 3d 786 (2006), church members filed suit, alleging that defendants committed various torts as part of a wrongful attempt to control the church and asserting causes of action for defamation, false light, intrusion upon seclusion, assault, battery, and civil conspiracy, among others. Defendants filed a special motion to strike the complaint under the anti-SLAPP statute. The trial court granted defendants' motion only as to the civil conspiracy cause of action. The trial court denied any statutory award on the ground that the anti-SLAPP motion had

such insignificant effect on the lawsuit that defendants could not be viewed as prevailing for purposes of attorney fees award. The California Court of Appeals affirmed, reasoning that awarding the statutory penalty would not further the legislature's purpose. The California legislature enacted the anti-SLAPP statute to prevent parties from using the judicial process to chill public participation. CAL. CIV. PROC. § 425.16. In *Endres*, the California Court of Appeals noted, "[n]either the public's nor defendants' right to participate was advanced by [their] motion." 135 Cal. App. 4th at 955. Granting their motion, the court found, was an "illusory victory." *Id.* at 954. The factual allegations did not change and the possible recovery remained the same. *Id.*; *see also Brown v. Elec. Arts, Inc.*, 722 F. Supp. 2d 1148, 1155 (C.D. Cal. 2010) (applying California law, the court, in suit brought by the National Football League's greatest running back, Jim Brown, denied an anti-SLAPP statute award because the motion's importance was insignificant to the case).

Washington's statute is based on the California statute. Bruce E.H. Johnson and 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). Like the California legislature, our legislature was "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." LAWS OF 2010, ch. 118, § 1. To "[e]stablish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation," the legislature, "[p]rovide[d] for attorneys' fees,

costs, and additional relief *where appropriate*." LAWS OF 2010, ch. 118, § 1 (emphasis added). But, unlike California's anti-SLAPP statute—which requires its courts to award fees, costs, and the statutory penalty to "prevailing" movants—RCW 4.24.525(6)(a) requires courts to award reasonable attorney fees, costs, and the statutory penalty to "a moving party who prevails, in part or in whole."

If the trial court finds Washington's anti-SLAPP statute prohibits claims in Michael Henne's original or amended complaint, I would direct the parties to brief the trial court on whether the city of Yakima prevailed for purposes of RCW 4.24.525. More specifically, the parties should brief whether RCW 4.24.525 requires a court to award fees, costs, and the statutory penalty to a moving party who prevails in part, but whose victory is illusory and which does not further the legislature's stated intent—advancing public participation.

Fearing, J.
Fearing, J.

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 6. Of the Pleadings in Civil Actions
Chapter 2. Pleadings Demanding Relief (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

West's Ann.Cal.C.C.P. § 425.16

§ 425.16. Anti-SLAPP motion

Effective: January 1, 2011
Currentness

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, 11130.5, or 54690.5 [1].

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and " defendant" includes "cross-defendant" and " respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

Credits

(Added by Stats.1992, c. 726 (S.B.1264), § 2. Amended by Stats.1993, c. 1239 (S.B.9), § 1; Stats.1997, c. 271 (S.B.1296), § 1; Stats.1999, c. 960 (A.B.1675), § 1, eff. Oct. 10, 1999; Stats.2005, c. 535 (A.B.1158), § 1, eff. Oct. 5, 2005; Stats.2009, c. 65 (S.B.786), § 1; Stats.2010, c. 328 (S.B.1330), § 34.)

Notes of Decisions (3039)

Footnotes

1 So in enrolled bill. Probably should be "54960.5".

West's Ann. Cal. C.C.P. § 425.16, CA CIV PRO § 425.16

Current with all 2013 Reg.Sess. laws, all 2013-2014 1st Ex.Sess. laws, and Res. c. 123 (S.C.A.3)

West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.24. Special Rights of Action and Special Immunities (Refs & Annos)

West's RCWA 4.24.525

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

Effective: June 10, 2010
Currentness

(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.

Credits
[2010 c 118 § 2, eff. June 10, 2010.]

Notes of Decisions (9)

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 2. Legislative Department (Refs & Annos)

West's RCWA Const. Art. 2, § 26

§ 26. Suits Against the State

Currentness

The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.

Credits
Adopted 1889.

Notes of Decisions (39)

West's RCWA Const. Art. 2, § 26, WA CONST Art. 2, § 26
Current through amendments approved 11-6-2012

End of Document

IN THE COURT OF APPEALS, DIVISION III
FOR THE STATE OF WASHINGTON

MICHAEL HENNE,	)
	) **COURT OF APPEALS No. 309029-III**
Plaintiff/Respondent,	)
	) **CERTIFICATE OF SERVICE**
vs.	)
	) **SENT ON 12/06/13 VIA FAX FOR**
CITY OF YAKIMA,	) **FILING IN COURT OF APPEALS,**
a Municipal Corporation,	) **DIVISION III**
Defendant/Appellant.	)

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

On the 6th day of December, 2013, I deposited in the mails of the United States Postal Service a properly stamped and addressed envelope containing a copy of the **PETITION FOR REVIEW OF DEFENDANT CITY OF YAKIMA** to the following:

Counsel for Plaintiff/Respondent:

Lish Whitson, Esq.
Kristy L. Stell, Esq.
Lish Whitson PLLC
2121 5th Avenue
Seattle, WA 98121-2510

DATED this 6TH day of December, 2013, at Yakima, Washington.

Deanna Boss

Deanna Boss