No. 309029-III

COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON

MICHAEL HENNE,

Plaintiff/Respondent,

v.

CITY OF YAKIMA, a Municipal Corporation,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT CITY OF YAKIMA

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I. INTRODUCTION

Plaintiff's brief attempts to deflect the Court's focus from the deficiencies of his position by arguing that this appeal in fact "should be a review of the city's misapplication of the anti-SLAPP statute[] . . . ." (Resp. Br. 1). But rhetoric is the extent of Plaintiff's opposition. Plaintiff's response brief fails to dispute the analysis and argument provided by the City as to the applicability of the Washington anti-SLAPP statute to causes of action alleging the improper institution and investigation of complaints resulting in internal investigations of a police officer. Plaintiff's response brief offers no legally tenable argument or factual basis why the decision of the trial court should be affirmed.

Instead, Plaintiff makes arguments that are unsupported by any law or fact. Plaintiff argues that the trial court did not err because (1) the City did not object to the amended complaint which purported to remove the allegations arising from the four reports and resulting internal investigations, and (2) the

protections of the anti-SLAPP statute do not extend to the City because the City is not a "person" under the statute. In addition, without citation of legal authority and in contradiction to case law applying the protections of a substantively identical anti-SLAPP statute to corporate entities such as the City (Vargas v. City of Salinas, 46 Cal.4th 1, 18, 92 Cal.Rtpr.3d 286 (2009)), Plaintiff argues that (3) the City's motion to strike is in itself the sort of conduct the statute was designed to prevent.

Plaintiff's responsive brief ignores the plain, unambiguous statutory language of RCW 4.24.525, as well as the case law construing it and a substantially similar California statute that has been applied by analogy. Plaintiff also ignores the fact that RCW 4.24.525 and RCW 4.24.510 are two totally different statutes. Further, Plaintiff's responsive brief misrepresents the City's position vis-à-vis Plaintiff's motion to amend his complaint in an effort to present the issue before the Court as moot.

Review of the record and the applicable legal authority demonstrates that the protections of the anti-SLAPP statute apply to the reports and resulting four internal investigations concerning Plaintiff, and therefore the trial court erred in denying the City's motion to strike. The trial court's ruling should be reversed.

II. ARGUMENT IN REPLY

A. AMENDING THE COMPLAINT DID NOT VITIATE THE EFFECT OF THE ANTI-SLAPP STATUTE

Plaintiff's chief argument is that the City's appeal is moot because the trial court granted his motion to amend his complaint, which removed the allegations arising from the reports and investigations falling under the anti-SLAPP statute. (Resp. Br. 6-8, 10). Plaintiff argues the City "agreed" to the amended complaint and therefore the amended complaint (without the subject allegations) is the operative document, and the removed allegations are not part of his case. (Resp. Br. 6-8).

That is not correct. Plaintiff's argument mischaracterizes

the trial court record.[1] In fact, the City vehemently objected to Plaintiff's attempt to bypass the anti-SLAPP statute by removing the offending allegations, and pointed out to the trial court in its initial and reply memoranda that the law forecloses that tactic. (CP 26, 171-181). At oral argument, the City did not oppose the motion to amend subject to the reservation of its right to argue that the Motion to Strike could not be avoided by such amendment. It is plain from the record that the City preserved that objection at the hearing. When discussing the motion to amend, the trial court asked counsel for the City if he had any objections "other than wanting to preserve the city's claim for attorney's fees, penalties and so on . . . ." (RP 2) (emphasis added). Plaintiff's argument otherwise

[1] Plaintiff mischaracterizes several other facts in his responsive brief. First, he argues (without any argument as to relevance) that the City did not file an answer prior to filing the Motion to Strike. (Resp. Br. 1). In fact, the City filed its answer on February 8, 2012, before the Motion to Strike was heard. (CP 297). Second, he asserts (again without any argument as to relevance) that he was served with the Motion to Strike 61 days after he served the complaint, thus intimating that the Motion to Strike was untimely. (Resp. Br. 5). It was not. Under RCW 4.24.525(5)(a), the Motion to Strike had to be filed within 60 days of service of the complaint. Plaintiff filed his complaint on November 4, 2011. (CP 3). The City filed the Motion to Strike on December 30, 2011, well within the 60-day period. (CP 15). Thus, the Motion was timely. At any rate, Plaintiff failed to raise this issue at the trial court level and therefore it cannot be considered for the first time on appeal. Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844 (2005) ("In general, issues not raised in the trial court may not be raised on appeal.").

mischaracterizes the trial court record.[2]

It is manifest the City did not agree that Plaintiff could amend his complaint to remove the claims arising from the reports and resulting internal investigations and thereby eliminate the City's right to pursue relief under the procedural anti-SLAPP statute. The City pointed out in its opening brief that a party cannot avoid the effect of the anti-SLAPP statute through the artifice of amending the complaint to remove the claims implicating the statute. (CP 26). The law bars such stratagems. 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). Plaintiff does not contest or attempt to refute this legal authority; he merely ignores it.

Although not articulated as such, Plaintiff's argument is really one of waiver. "Waiver is the 'intentional abandonment

[2] The Court should also be aware that Plaintiff's motion to amend was not solely brought to remove the offending allegations and avoid the Motion to strike, but also asserted new causes of action which were not the subject of the Motion to Strike. For example, Plaintiff asserted for the first time in the amended complaint allegations that the City breached the City policies and procedures. (CP 146 ¶¶ 3.18, 3.20; CP 148-49 ¶¶ 4.5-4.7; CP 174). The City's non-opposition to the amendment allowed Plaintiff to assert these new causes of action while (as the trial court record clearly reflects) preserving its right to attorney's fees and the statutory penalty.

or relinquishment of a known right.'" Guillen v. Pierce County, 127 Wn. App. 278, 285, 110 P.3d 1184 (2005) (quoting Mid–Town Ltd. P'ship v. Preston, 69 Wn. App. 227, 233, 848 P.2d 1268 (1993)). "It must be shown by 'substantial evidence' of unequivocal acts or conduct showing intent to waive, 'and the conduct must also be inconsistent with any intention other than to waive.'" Id. Plaintiff has the burden of proving waiver. Id. In Guillen, the Court of Appeals held that Pierce County did not waive its right to assert a CR 41 dismissal of the plaintiffs' claims during oral argument, where there was no substantial evidence that the County unequivocally intended to waive CR 41(a). Id. at 286.

There is clearly no evidence supporting the argument that the City intentionally waived its right to seek its fees and costs in connection with Motion to Strike. Plaintiff can point to no unequivocal acts of the City showing any intent to waive those rights. At no time before the trial court was there ever any acknowledgement by the City that, by not opposing the motion

to amend, it was conceding the Motion to Strike was moot. In fact, the City argued the opposite in its Motion to Strike and reply brief. (CP 26, 171-180).[3]

B. THE PROTECTIONS OF THE ANTI-SLAPP STATUTE APPLY TO THE CITY

Plaintiff argues the City is not a "person" under RCW 4.24.525. (Resp. Br. 12). This is incorrect and ignores the plain language of the statute. RCW 4.24.525(1)(c) defines "moving party" as "a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim." The term "person" is broadly defined 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)(e) (emphasis added).

[3] Indeed, the proposed order filed by the City granting the Motion to Strike (filed after Plaintiff filed his motion to amend) makes it clear the City did not consider the issue moot. Paragraph 2 on page two of the order struck and dismissed all claims and causes of action based upon or derived from the repots and four resulting investigations. (CP 295). This language was intended to take care of any residual claims remaining in the amended complaint given that the amended complaint was unclear as to whether those claims had in fact been entirely removed. At oral argument, counsel for the City pointed out that the proposed order should cover any claims in the amended complaint that purported to continue the claims that were subject of the Motion to Strike. (CP 311). Thus, the City clearly never considered the issue moot.

The City is a municipal corporation. (CP 80). A municipal corporation is a legal entity. Bates v. Sch. Dist. No. 10 of Pierce County, 45 Wash. 498, 499, 88 P. 944 (1907). The Legislature knows how to distinguish between "governmental" and "nongovernmental" entities when it so chooses. See, e.g., RCW 9A.82.010(8); RCW 28B.117.050(2); RCW 42.52.010(9)(d); RCW 90.71.230(1)(e). It has made no such distinction in RCW 4.24.525(1)(e).

As used in the anti-SLAPP statute, the term "person" broadly defines those entities to which the protections of the anti-SLAPP statute extend, including local municipalities and their employees who make reports of misconduct.

On the other hand, the term "government" (which Plaintiff argues is not included in the definition of "person") merely defines the entities to whose proceedings the anti-SLAPP statute applies. The fact that the term "government" is separate defined under the statute does not suggest that the

protections of the anti-SLAPP statute do not apply to the City as a "person," *i.e.*, as a "legal . . . entity."

As foreseen, Plaintiff erroneously relies on Segaline v. State of Washington, 169 Wn.2d 467, 238 P.3d 1107 (2010) to argue that the anti-SLAPP statute does not apply to the City because it is not a "person" under the statute. (Resp. Br. 11-12). Plaintiff confuses two entirely different statutes: RCW 4.24.510 and RCW 4.24.525. The Segaline court addressed an immunity statute, RCW 4.24.510, which contained the "ambiguous" and undefined term "person." Id. at 473. It addressed the "narrow issue . . . whether a government agency that reports information to another government agency is a 'person' under RCW 4.24.510." Id. at 473. It did not address RCW 4.24.525, which is a procedural statute enacted in 2010 after the Segaline case was heard. Due to the absence of a definition of the term "person" in RCW 4.24.510, and noting "varied" treatment of the term "person" "within the RCW," Segaline held that RCW 4.24.510 does not extend to government agencies because the

"purpose" of the statute was to protect "individual" speech rights. Id. at 473-74. It must be emphasized that the term "person" is undefined in RCW 4.24.510.

RCW 4.24.525, on the other hand, is completely different statute that "vastly expand[ed] the type of conduct protected" and was "patterned after California's Anti–SLAPP Act . . . ." Aronson v. Dog Eat Dog Films, 738 F.Supp.2d 1104, 1109 (W.D. Wa. 2010). It is a procedural device to quickly curtail meritless litigation (such as claims barred by statutory immunities, lack of viable legal theories, or not factually supported) targeted at entities lawfully communicating on matters of public or governmental concern. It is broader in scope and purpose than RCW 4.24.510. Unlike RCW 4.24.510, it contains an expansive definition of "person" 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) (emphasis added). This clearly encompasses municipal

corporations such as the City. Plaintiff has provided no apposite authority to the contrary.

Plaintiff argues that the purpose of RCW 4.24.525 is limited to preventing lawsuits chilling private citizens' petitions to government for redress. (Resp. Br. 4-5, 11-14). "The intent behind the language of an enactment becomes relevant only if there is some ambiguity in that language." W. Petroleum Importers, Inc. v. Friedt, 127 Wn.2d 420, 424, 899 P.2d 792 (1995). There is no ambiguity in the definition of "person" in RCW 4.24.525(1)(e), which extends to "any legal . . . entity." In any event, the purpose of RCW 4.24.525 extends to the protection of "individuals and entities . . . to speak out on public issues," here reporting the misconduct of Plaintiff, a police officer. 2010 Wash. Laws, ch. 118 § 1 ¶ (1)(c).

C. THE ANTI-SLAPP STATUTE DOES NOT SOLELY EXTEND TO PRIVATE CITIZENS

Plaintiff also argues, without any supporting legal

authority,[4] that the trial court's decision was proper because the City's motion was an attempt "to use its greater resources and power to silence Sgt. Henne"—and therefore was itself the sort of act the anti-SLAPP statute was designed to prevent. (Resp. Br. 8-10). This argument is totally contradicted by the plain language of the statute and by case law construing the statute. The Legislature intended the anti-SLAPP to have broad and far sweeping application and did not limit it to individual citizens seeking redress from their government. This point is clear:

> [N]othing in the Anti–SLAPP Act prohibits a powerful corporate defendant from employing the anti–SLAPP statute against individuals of lesser strength and means . . . .
>
> That Defendant may be considered a powerful business entity as compared with the private party Plaintiff is of no import under the modern framework of the statute.

Aronson, 738 F. Supp.2d at 1111 (emphasis added). See 2010 Wash. Laws, ch. 118 § 1 ¶ (1)(c).

[4] An appellate court does not address issues that a party neither raises appropriately nor discusses meaningfully with citations to authority, on appeal from a trial court's judgment. Saviano v. Westport Amusements, Inc., 144 Wn. App. 72, 84, 180 P.3d 874 (2008).

Aronson makes it clear that corporate defendants such as the City are entitled to the protections of the anti-SLAPP statute. See also Bradbury v. Superior Court, 49 Cal.App.4th 1108, 1112-1113, 57 Cal.Rptr.2d 207 (1996) (anti-SLAPP statute applies to municipality held vicariously liable for the actions of its employees during official investigation).

D. THIS COURT SHOULD APPLY CASE LAW CONSTRUING THE SUBSTANTIALLY IDENTICAL CALIFORNIA ANTI-SLAPP STAUTE

Plaintiff also implies that any reliance on California cases is improper because "the cases must be read in light of the body of each state's case law and the specific language of the anti-SLAPP state statutes . . . ." (Resp. Br. 13). The City does not understand this argument. This Court has been provided with the text of the California anti-SLAPP statute. This Court can discern that the California anti-SLAPP statute is substantially identical to the Washington anti-SLAPP statute. Moreover, RCW 4.24.525 was patterned after California's anti-SLAPP statute, and Washington cases apply California case law

construing its anti-SLAPP statute by analogy. Aronson, 738 F.Supp.2d at 1109-1110.

E. PLAINTIFF ASSERTED ALLEGATIONS ARISING FROM THE REPORTS AND RESULTING INTERNAL INVESTIGATIONS BEFORE THE MOTION TO STRIKE WAS FILED

In an effort to persuade the Court that the reports and resulting internal investigations are not an issue in this case, Plaintiff argues he is not asserting any allegations based upon those reports. (Resp. Br. 10). This misrepresents the record. Plaintiff clearly alleged that the reports by fellow officers and resulting internal investigations were retaliatory against him before the Motion to Strike was filed, as the City pointed out in its reply brief to the trial court. (CP 171-177). As indicated above, Plaintiff could not avoid the impact of the anti-SLAPP statute by amending the complaint to eliminate these claims. Therefore, whether Plaintiff has abandoned those claims at this time is of no moment.

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F. PLAINTIFF HAS PROVIDED NO ARGUMENT OR EVIDENCE IN SUPPORT OF HIS CLAIMS ARISING FROM THE REPORTS AND RESULTING INVESTIGATIONS

Once it is demonstrated a claim "is based on an action involving public participation and petition," the burden shifts to the non-moving party to establish by "clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b); American Traffic Solutions Inc. v. City of Bellingham, 163 Wn. App. 427, 434, 260 P.3d 245 (2011). This means the non-moving party must produce evidence and legal authority in support of its claims. See Santa Barbara County Coalition against Automobile Subsidies v. Santa Barbara County Association of Government, 167 Cal.App.4th 1229, 1238, 84 Cal. Rptr.3d 714 (2008) (once a defendant shows that the claim is based on an action involving public participation and petition "[t]he plaintiff must establish the unlawfulness of the activity as part of its burden of showing a probability of prevailing on its claim.").

Plaintiff supplied no evidence or legal argument in support of the underlying claims arising from the reports and four resulting investigations. Plaintiff has made no attempt to refute any of the City's arguments in that regard. Accordingly, Plaintiff has failed to establish a basis for probably prevailing on these claims by "clear and convincing evidence."

III. CONCLUSION

Plaintiff provides no apposite legal authority demonstrating that the trial court's decision should be affirmed. The allegations in Plaintiff's original complaint alleging harassment and retaliation against Plaintiff by the initiation and conducting of numerous unwarranted internal investigations are subject to the anti-SLAPP statute as being a claim based upon "action involving public participation and petition," as broadly defined in the anti-SLAPP statute. As such, Plaintiff had "to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). Plaintiff has failed to do so. The City is entitled to an award of its "costs of

litigation and any reasonable attorney's fees incurred in connection with each motion on which the moving party prevails" as well as the statutory $10,000 penalty under RCW 4.24.525(6)(a)(i)-(ii).

Respectfully submitted this 21 day of December, 2012.

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