No. 309029-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MICHAEL HENNE, Respondent

v.

CITY OF YAKIMA, Appellant

BRIEF OF RESPONDENT

Lish Whitson, WSBA #5400
Kristy L. Stell, WSBA #39986
Attorneys for Respondent
Lish Whitson PLLC
2121 Fifth Avenue
Seattle, WA 98121
Phone: (206) 892-2164
Fax: (206) 892-2246

No. 309029-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MICHAEL HENNE, Respondent

v.

CITY OF YAKIMA, Appellant

BRIEF OF RESPONDENT

Lish Whitson, WSBA #5400
Kristy L. Stell, WSBA #39986
Attorneys for Respondent
Lish Whitson PLLC
2121 Fifth Avenue
Seattle, WA 98121
Phone: (206) 892-2164
Fax: (206) 892-2246

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. INTRODUCTION[1]

Comes now the Plaintiff/Sgt. Henne, Sgt. Michael Henne, a veteran officer of the Yakima Police Department, who brought this lawsuit against the City of Yakima ("city") for redress of tortious actions by city employees and to seek redress for what he believes are significant issues of public interest involving abuses by city officials. In response, the city filed a motion, allegedly based on the intent of RCW 4.24.525, one of two statutes passed by the Washington Legislature to protect the right of people to take part in public participation.

This case does not "involve reports and resulting internal investigations" about Sgt. Henne, as alleged by the city. Sgt. Henne's amended complaint alleges negligent and tortious acts by city employees who were negligently hired, supervised and retained by the city. This appeal should be a review of the city's misapplication of the anti-SLAPP statutes passed by the Washington State Legislature.

As noted herein, the city had not filed an answer before filling its motion to strike. There has not been substantive

[1] All prior pleadings by the Sgt. Henne that have been filed with this court are incorporated in this brief by reference.

discovery to date. This is not an appeal from a summary judgment, nor should it be an appeal from the decision of the trial court to allow the amendment to the complaint that was agreed to by the city.

That being said, there are some representations by the city in its brief which are surprising in light of the omissions and commissions that discovery will plainly show were part of the negligent acts committed by the city. When the city states that it "requires the reporting and investigation of allegations of misconduct against city employees" it is correct. It should have and did investigate complaints against Sgt. Henne and the allegations were not sustained. However, it did not investigate reported allegations of misconduct against other city employees, including some of those who had filed the complaints about Sgt. Henne. That is an issue in the underlying case.[2]

So, is the city's motion to strike a proper use of RCW 4.24.510 and RCW 4.24.525, the Washington Acts limiting Strategic Lawsuits Against Public Participation ("SLAPP") - also known as "the anti-SLAPP statutes"? The answer should be a resounding No. The city has misread and has therefore misapplied

[2] See pages 5-8 of the city's brief for the various rules and regulations that require timely reporting and investigation of complaints.

RCW 4.24.252 as justification for its motion to strike. Unfortunately, by filing its motion, the city has engaged in just the sort of abusive tactics that the anti-SLAPP statutes are intended to discourage.

By way of historic background, the initial drafters of the first anti-SLAPP statutes were First Amendment advocates who wished to eliminate meritless lawsuits intended to spend critics of questionable governmental action into silence. The anti-SLAPP lawsuits were originally specifically intended to address abuses by governmental bodies seeking to silence their critics.

In 2002, RCW 4.24.510 was passed by the Washington State Legislature. It was specifically intended to address abuses by governmental bodies. To paraphrase the legislative **Intent**:

> Strategic lawsuits against public participation, or SLAPP suits, involve communications [by the public], made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. [Such] SLAPP suits are designed to intimidate [the public's] exercise of First Amendment rights and rights under Article I, Section 5 of the Washington state Constitution.
> Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early [judicial] review. Since that time, the United

> States Supreme Court has made it clear that, as long as the petitioning is aimed at procuring [a] favorable government action, result, product, or outcome, [such suits are] protected and the [SLAPP suit] should be dismissed. Chapter 2332, Laws of 2002 amends Washington law to bring it in line with these court decisions which recognize that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making.

In 2010, the initial Washington anti-SLAPP statute was supplemented by RCW 4.24.525. As with the earlier statute, which is still in force, this statute was enacted by the Washington Legislature because of its continuing concern regarding lawsuits brought by governmental agencies primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. As found in **Findings-Purpose** accompanying RCW 4.24.525:

> 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 [here Sgt. Henne] are put to great expense, harassment, and interruption of their productive activities;

> (c) The costs associated with defending such suits [or motions as in the instant case] 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 the 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.

B. STATEMENT OF THE CASE

Sgt. Henne filed a Claim for Damages with the City of Yakima on May 10, 2011, as required by RCW 4.96.010 and RCW 4.96.020. The Claim alleged negligent hiring, supervision and retention, among other allegations. (CP 186-200). The city never responded to Sgt. Henne's Claim for Damages. Having no response from the city, on November 4, 2011 Sgt. Henne filed a complaint in Yakima County Superior Court and served the city. (CP 3-14). The city did not answer the complaint. (CP 126-133, 310-329).

However, on January 4, 2012, 61 days after the complaint was served, Sgt. Henne was served with the city's Motion to Strike. (CP 15-37). Two motions were heard by the trial court on March 9, 2010, one to amend the Sgt. Henne's complaint and the

other to strike some allegations in Sgt. Henne's initial complaint. (CP 126-133, 138-140, 141-170). Both parties agreed to allow the complaint to be amended and the trial court so ordered. (CP 303-356). The trial court then heard argument on the city's motion to strike pursuant to RCW 4.24.525 and denied the city's motion. (CP 303-356). The city then appealed the trial court's ruling regarding the motion to strike. (CP 357-384). However, once the Sgt. Henne's Complaint was amended, with the agreement of the city, there is little justification for this appeal.

C. THE TRAIL COURT DID NOT ERR

The issue is straight forward. The city filed a special motion to strike, improperly invoking an anti-SLAPP statute (which in this case was tantamount to a SLAPP motion by the city against the Sgt. Henne). That motion is denied by the trial court. (CP 303-356). The trial court's denial should be upheld by this court.

Matters that are not relevant at this juncture are the issues raised on pages 3 and 4 of the city's brief of the appellant. Issues 1 through 6 refer to the Yakima Police Department internal investigations of Sgt. Henne. These are not part of the Sgt. Henne's case. (CP 141-170). As noted above, before the city's

motion was heard the trial court asked the city's attorney if the city had any objection to the amended complaint. (CP 310-329). After the city's attorney said "No", the trial court granted the motion to amend the complaint. (CP 330-356). As the discussion at page 2, lines 2-21 of the transcript of proceedings reflects, the exchange was as follows (CP 310-329):

> THE COURT: Good morning. Let's begin with the motion to amend. Mr. Watson, other than wanting to preserve the city's claim for attorney fees, penalties and so on, other than that, does the city oppose the motion to amend?
>
> MR. WATSON [for the city]: No, your Honor. Other than the order that we are asking for the court to enter, we want it to apply to the amended complaint to the extent that it purports to continue these claims that are the subject of the SLAPP motion. In other words, if the court is going to strike the claims, they shouldn't be asserted in the amended complaint.
>
> THE COURT: I thought the specific claim that you had focused on was the one that was deleted from the amended complaint.
>
> MR. WATSON: Largely. I mean, I don't know if there is any residual left in or not. It is rather broad. By and large, it is being deleted it is [sic] near as I can tell.
>
> THE COURT: I'm going to grant the motion to amend the complaint.

It was only after the parties and the court had agreed to the amended complaint that the trial court, after hearing oral argument, denied the city's motion to strike. (CP 310-329, 330-356). When the city's motion was argued and then denied, the amended complaint was the operative complaint in the case and it did not at that time, nor does it now, allege that the internal investigations of Sgt. Henne are at issue in the case. (CP 303-356, 141-170).

D. ARGUMENT

The trial court put the issues related to the city's misapplication of the anti-SLAPP statutes succinctly when it stated the following, at page 7, lines 19-23 of the Verbatim Report (CP 310-329):

> THE COURT: So, again, my understanding is that this statute and other statutes like it were designed to prevent the chilling effect that SLAPP lawsuits have on people who are wishing to petition their governmental entities for redress.

The trial court went on to say at page 8, lines 2-8 (CP 310-329):

> THE COURT: So I'm looking at the findings and purpose for this statute. The legislature finds and declares that it is concerned about lawsuits brought primarily to chill the valid exercise and constitutional rights of freedom of speech and

> petition for the redress of grievances. That's what this statute is supposed to do, right?

The trial court then said, at page 12, lines 3-9 (CP 310-329):

> THE COURT: Well, having read through this, I look at the statute and I look at the purpose of the statute. It seems to me that if this statute can be used to recover penalties and attorney's fees from an individual who's petitioning the government for redress of grievances, that's exactly the opposite of the purpose of the statute. So I am denying the city's motion.

When drafting the Bill of Rights and adopting the First Amendment, the Founding Fathers, had learned from the British King how a government, if not constrained, could infringe on the right to speak freely. It is hard to imagine a more chilling tactic for keeping employees from suing their government employers than the threat of penalties, costs and attorney fees if they fail to prevail. Speaking of the use of SLAPP suits, an unnamed (contemporary) judge is quoted as saying: "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."

With this SLAPP motion, the city is attempting to use its greater resources and power to silence Sgt. Henne and deprive him of his right to petition the courts on issues of public concern. The courts are Sgt. Henne's defense against this attempted limitation on

his rights to free speech and to petition. This court must now ask the question whether, pursuant to RCW 4.24.525, the city has properly brought a special motion to strike or whether its motion is both ill-conceived and an attempt to turn Washington's anti-SLAPP statutes on their heads.

The city is confused about two unrelated matters. First, it has ignored the fact that Sgt. Henne is not complaining about the Yakima Police Department's internal investigations of him. If there are complaints, they should be investigated. In Sgt. Henne's case, they were investigated and not sustained. Sgt. Henne's position, with respect to his internal investigations, was clear to the city as reflected in the exchange between the trial court and the city's attorney as quoted above on page 7. (CP 310-329) . Sgt. Henne is concerned, among other things, that the Yakima Police Department and the City of Yakima have not followed their own rules and requirements to conduct internal investigations of several others who have had complaints brought against them, some of whom were the complainants against Sgt. Henne. In light of the discussion prior to the trial court's ruling on the motion to amend, the fact that the city is still arguing that the case is about Sgt. Henne's internal investigations is baffling.

This issue again appears at page 4 (paragraph 7) of the city's brief of the appellant, where the city has alleged that there is an issue as to whether "a Special Motion to Strike, brought pursuant to RCW 4.24.525 [is] rendered moot by the attempted removal of the claims that are the subject of the motion by amendment?" As noted above, at page 2, lines 2-21 of the Transcript of Proceedings, on the issue of the Amended Complaint Mr. Watson said "No" when asked by the court if the city opposed the Sgt. Henne's motion to amend his complaint. (CP 310-329). At that point the there was no "attempted removal of claims." There was an amendment to the Sgt. Henne's complaint, which the city expressively agreed to and accepted. (CP 303-356). The discussion at the hearing made clear that the city understood that the intent of the amended complaint was to remove any misunderstanding related to internal investigations of Sgt. Henne. (CP 310-329).

The second matter is the use of words in the statutes in question and whether they apply to the city. At page 4, paragraph 8 of the city's brief of the appellant, the city asks: "Are the protections of RCW 4.24.525 limited to private citizens?" The terms in the statute are not ambiguous. The dictionary meaning of

"public" is people. "Public participation" means people taking part in matters that touch their lives.

The city argued to the trial court, less than persuasively, that RCW 4.24.525 gives broad meaning to "person" in paragraph (e) by claiming the city is a "legal entity" and thus a "person." However, not only does (e) not identify "governments" among the various entities that can be construed as a "person," the statute also specifically defines what "government" means in paragraph (b). The definition in (b) clearly includes the city.

In addition, the Washington Supreme Court in Segaline v. State of Washington Department of Labor and Industries, 169 Wn.2d 467, 473, 238 P.3d 1107 (2010), in interpreting the anti-SLAPP statute RCW 4.24.510, clearly held:

> Here, a government agency is not a "person" under RCW 4.24.510. The purpose of the statute is to protect the exercise of individuals' First Amendment rights under the United States Constitution and rights under article I, section 5 of the Washington State Constitution. RCW 4.24.510, Historical and Statutory Notes. A government agency does not have free speech rights. It makes little sense to interpret "person" here so that an immunity, which the legislature enacted to protect one's free speech rights, extends to a government agency that has no such rights to protect.

A case relied on by the city is Hansen v. Department of Corrections and Rehabilitation, 171 Cal.App.4th 1537, (2008), a California decision which did not turn on the California anti-SLAPP statute, rather, at 1547 the California court held:

> Moreover, [California Department of Corrections and Rehabilitation], as a public entity, is immune from liability on the claim of intentional infliction of emotional distress under Government Code sections 815.2 and 821.6. Pursuant to these sections, public employees, acting within the scope of their employment, and the public entity, are immune from tort liability for any acts done by the employees in preparation for formal judicial or administrative proceedings, including investigation of alleged wrongdoing, and for any acts done to institute and prosecute such formal proceedings. (Cites omitted) Since the acts of which Hansen complains were part of CDCR's internal investigation, a precursor to a formal judicial or administrative proceeding, both the employees and CDCR are immune.

The assertion by the city, and some courts, that California Code of Civil Procedure Section 425.16 mirrors RCW 4.24.525 over simplifies the distinctions. The cases from California and other jurisdictions, which are cited by the City, must be read in the context of not only the language of the respective anti-SLAPP state statutes as they existed in each jurisdiction at the time of the decisions, but also e.g. in the Hansen case other statutes that may

be implicated based on the facts of the case. In addition, 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 in each of those other jurisdictions.

If the intent of the city is to ask this court to interpret Washington's anti-SLAPP statutes based on California law, then this court should be provided with a copy of both the applicable Washington and California statutes. The common concern with the potential chilling effect of SLAPP suits is reflected in the law of each of the states. California Code of Civil Procedure §425.16 (a) reads in part:

> 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.

In the instant case, "motion" would be substituted for "lawsuits" in the first sentence.

E. CONCLUSION

As noted above the trial court stated, that after reading the briefs of the parties and hearing arguments related to the City's Motion to Strike, pursuant to RCW 4.24.525:

> I look at the statute and I look at the purpose of the statute. It seems to me that if this statute can be used to recover penalties and attorney's fees from an individual who's petitioning the government for redress of grievances, that's exactly the opposite of the purpose of the statute.

The city brought a misapplied Motion to Strike and now has compounded its error by filing this Appeal. The city brought this motion and appeal as a governmental agency posturing as a "person" for purposes of the statute. The city is not a "person" and the factual issues the city wants to argue were eliminated in the amended complaint and are no longer part of this lawsuit. The city's appeal should be dismissed and statutory penalties, costs and attorney's fees should be awarded to the Sgt. Henne.

Signed in Seattle, Washington on November 21, 2012.

Lish Whitson PLLC

By: _____
Lish Whitson, WSBA #5400
Kristy L. Stell, WSBA #39986
Attorneys for Sgt. Henne

I certify under penalty of perjury under the laws of the State of Washington that I faxed, mailed, and/or delivered to all counsel of record a copy of the document on which this certificate is affixed/signed on 11/21/12.
Kristy Stell