NO. 90284-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC.,

Respondent,

v.

CHARLES HEDLUND,

Petitioner.

AMICUS CURIAE MEMORANDUM

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of approximately 150 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life.

The Plaintiff in this case posted comments on a website that were critical of his former employer. The employer filed suit alleging a breach of a confidentiality agreement. The employee moved to dismiss pursuant to Washington's Anti-SLAPP statute, RCW 4.24.525. The trial court granted the motion, and the employer appealed. The Court of Appeals ruled that the statute did not apply because the claim was for the enforcement of a private contract and the posting did not address an issue of "public concern." *Alaska Structures, Inc. v. Hedlund,* ___Wn. App.___, 323 P.3d 1082 (2014). The employee filed a Petition for Review.

II. SUMMARY OF ARGUMENT

WELA has strong concerns about the constitutionality of Washington's Anti-SLAPP statute, RCW 4.24.525. Those constitutional concerns include the First Amendment, separation of powers, procedural due process, and the right to trial by jury. *See* WELA amicus brief in *Henne v. City of Yakima*, No. 89674-7 (filed May 7, 2014). Those issues and whether

the statute violates the right of access to courts have not been raised by the parties. We expect that the Court will not address them here. In the absence of a ruling that the statute is unconstitutional, the Court should interpret the statute to apply to "any claim," regardless of its label, which is "based on" "public participation" as defined by the statute.

The Court of Appeals ruled that Plaintiff did not speak on matters of "public concern." This was error. The quality of prospective employers is of public concern, and of vital concern to employees, that is at least as important as a consumer's interest in potential purchases of commercial products. Both are protected by RCW 4.24.525.

The appeals court found the lack of public concern "particularly true" where the employee "voluntarily limited his right to speak freely by signing a confidentiality agreement. The issue here is a simple contractual issue - whether or not Hedlund violated a contract he signed with his former employer." Slip Opinion at 10. The Anti-SLAPP statute applies with equal force to all claims. It provides: "This section applies to *any claim, however characterized*, that is based on an action involving public participation and petition." RCW 4.24.525(2) (emphasis added).

While requiring confidentiality agreements as a condition of employment, as in this case, is the exception, confidentiality or non-disparagement provisions in settlement agreements are the rule. Confidentiality agreements often address, or affect, issues of public concern.

If the employee's conduct is "based on" "public participation," the nature or label of the Plaintiff's legal claim is irrelevant. The statute provides no exception or preference for claims alleging breach of contract or any other claim. The statute applies to *"any claim, however characterized."* A judicially created exception for confidentiality provisions is contrary to the language of the statute.

The statute does not define the term "based on." A claim is "based on" public participation activity if it is the "but for" cause of the claim. This requires that the public participation activity itself give rise to the claim, not simply relate in some way to the claim. Unless a "but for" relationship between the claim and the public participation activity is required, the application of the statute would be dramatically expanded to include public participation activity which is only indirectly related to the claim asserted which itself is protected by the First Amendment right to petiton for redress of grievances. In this case, the employee's website posting (public participation) was the "but for" cause of the breach of contract claim, and the Anti-SLAPP statute should have been applied.

The Court should accept review because the Court of Appeal's decision is in conflict with another decision of the Court of Appeals. *See* RAP 13.4(b)(2). This case involves issues of substantial public interest because: (1) thousands of employees have an extremely strong interest in learning about the quality of potential employers through website postings

designed for that purpose; and (2) the Court of Appeals opinion appears to create a statutory preference for certain types of contractual provisions, *i.e.*, confidentiality provisions, which often involve or affect issues of public concern. *See* RAP 13.4(b)(4).

III. ARGUMENT

A. The Website Posting is "Public Participation" and Addresses an Issue of "Public Concern."

Addressing only a small part of the relevant website postings, the Court of Appeals ruled that the expression was not on an issue of public concern. The Court of Appeals is wrong. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community." *Davis v. Cox*, ___Wn. App. ___, 325 P.3d 255 (2014), review pending, (*quoting Connick v. Myers*, 461 U.S. 138, 146 (1983)). The ability of employees to access information that sheds light on the quality of the working environment at places of potential employment before they apply for, or accept, a job is a very strong public concern of the community.

Just as a consumer has an interest in knowing about the quality of a product before she makes a purchase, an employee has an interest in knowing about the quality of a prospective employer before she decides to apply for a job. A defamation claim by a manufacturer of a product for a bad online review is no different than a breach of contract claim by a former employer based on a negative posting on a website intended to inform employees about

potential employers. Consumer reviews are protected by the Anti -SLAPP statute in California.[1] There is no reason to believe that an employment review about a potential employer was intended to be treated any differently.[2]

B. The Anti-SLAPP Statute Applies to All Claims Without Exception.

The statute "applies to *any claim, however characterized,* that is based on an action involving public participation and petition." RCW 4.24.525(2)(emphasis added). The Court of Appeals ignored the clear language of the statute creating an exception for those claims alleging a violation of a confidentiality agreement. The Court held that "[t]he gravamen of the complaint is not whether there was a violation of Hedlund's free speech rights, but rather, whether the parties' contract was violated. Because this is a private contractual matter, the anti-SLAPP statute does not apply." Slip

[1] Consumer reviews address an issue of public concern even though the details of a particular product have significance to only a limited number of people. "[Members of the public] clearly have an interest in matters which affect their roles as consumers, and peaceful activities, such as plaintiffs', which inform them about such matters are protected by the First Amendment." *Wilbanks,* 121 Cal. App. 4th at 899 (*quoting Paradise Hills Assocs. v. Procel,* 235 Cal. App. 3d 1528, 1544, 1 Cal. Rptr. 2d 514 (1991)); *Cf. Morden v. Intermec Technologies Corp.*, 77 F. App'x 424, 426 (9th Cir. 2003) ("Since lying to ISO auditors has the capacity to deceive consumers, who may rely on a corporation's claim that it meets ISO standards, Rock met the "clear mandate of public policy" requirement of a wrongful discharge claim" through reliance on Washington's Consumer Protection Act). Although Mr. Hedlund's posting about this relatively small employer itself may not have been of "widespread" public interest, the labor market is vast and many corporations employ thousands of people.

[2] The Court must be cautious in relying on interpretations of California's anti-SLAPP statute, since it is worded differently and has been abused in ways this Court should avoid. *See* Cal. Code Civil Pro. 425.17 (recognizing abuses and creating exemptions). The California Supreme Court's ruling in this regard, however,is commonsense and consistent with the purpose of Washington's law: "Websites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute." *Nygard, Inc. v. Uusi-Kerttula,* 159 Cal. App. 4th 1027, 1039, 72 Cal. Rptr. 3d 210 (2008) (*quoting Barrett v. Rosenthal,* 40 Cal. 4th 33, 41, n.4, 51 Cal. Rptr. 3d 55, 146 P.3d 510 (2006)). "It is public because it posts statements that can be read by anyone who is interested, and because others who choose to do so can post a message through the same medium that interested persons can read." *Wilbanks v. Wolk,* 121 Cal. App. 4th 883, 897, 17 Cal. Rptr. 3d 497 (2004).

Opinion at 1. A judicially created exception for confidentiality provisions is contrary to the clear language of the statute which requires its application to "*any claim, however characterized.*"[3]

The determination of whether the statute applies to a particular claim is made by evaluating whether the conduct at issue constitutes "public participation" and, if so, whether the claim asserted is "based on" that conduct. If those elements are satisfied, it is irrelevant whether a party "voluntarily limited his right to speak by freely signing a confidentiality agreement." Slip Opinion at 10.

Confidentiality agreements, in particular, often address and even impact issues of "public concern." The Legislature may well have considered that public policy favors the disclosure of corporate misconduct, and that the enforcement of confidentiality agreements should be scrutinized more closely but not prohibited. *See* Minna J. Kotkin, *Secrecy in Context: The Shadowy Life of Civil Rights Litigation,* 81 Chicago-Kent L. Rev. 571 (2006) (discussing the adverse social consequences of confidentiality provisions contained in discrimination settlements, especially in light of the growing infrequency of trials on the merits); Erik S. Knutsen, *Keeping Settlements Secret*, 37 FLA. ST. U. L. REV. 945 (2010)(discussing whether the public

[3] The Court of Appeals relied upon California case law in concluding that certain classes of claims, including claims involving a confidentiality agreement, were not protected by Washington's statute. Slip Opinion at 7-9. But unlike Washington's statute, the California statute does not expansively apply to "any claim, however characterized." *See* Cal. Code of Civ. Pro. 425.16(b)(1). The California cases relied upon by the Court of Appeals are therefore inapposite.

civil justice system can and should tolerate secret settlements of non-aggregate private law disputes).

Applying the Anti-SLAPP statute to a violation of a confidentiality agreement does not foreclose the enforcement of those agreements. There exist many potential cases where the claim is not "based on" "public participation" and the statute won't apply, *i.e.*, a private communication. In many cases the heightened burden of "clear and convincing" evidence will be easily satisfied, *i.e.*, when the employee calls a press conference to announce the terms of a settlement. Amicus takes no position about whether there exists "clear and convincing" evidence that the employee violated the provision of the confidentiality agreement in this case.

C. The Court Should Apply a "But For" Standard of Causation To Determine Whether the Statute is "Based On" "Public Participation" Conduct.

The Anti-SLAPP statute states that the claim must be "*based on* an action involving public participation and petition." RCW 4.24.525(2) (emphasis added). The statute does not define the term "based on."[4] To determine if the claim is "based on" public participation, "the trial court must decide whether the claim targets activity involving public participation and

[4] California's Anti-SLAPP statute applies to a cause of action "arising from" public participation activity: "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." Cal.Code.Civ.Pro. 425.16(b)(1) (emphasis added). Unlike Washington's statute, the California statute does not require evidence that is "clear and convincing."

petition. To properly do so, the trial court must focus on the principal thrust or gravamen of the claim." *Davis v. Cox,* ___Wn. App. ___, 325 P.3d 255, ¶ 11 (2014), review pending. "[W]hen the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on non-protected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." *Id.* at ¶ 27 (*quoting Dillon v. Seattle Deposition Reporters*, 179 Wn. App. 41, 316 P.2d 1119, 1134 (2014), *review granted,* 180 Wn.2d 1009 (2014)).

To satisfy this standard, "public participation" must be the "but for" cause of the claim; only where the public participation gives rise to the claim in a direct sequence, unbroken by any new independent activity which gives rise to the claim. *Cf Schnall v. AT & T Wireless Services, Inc.,* 171 Wn.2d 260, 278, 259 P. 3d 129 (2011) ("the plaintiff has the burden of showing "a cause which in direct sequence [unbroken by any new independent cause] produces the injury complained of without which such injury would not have happened"). In the absence of a "but for" relationship between the "public participation" and the claim asserted, the breadth of the statute will be expanded to include public participation that is merely ancillary to a claim protected by the First Amendment right of access to courts.[5] A claim which

[5] Defendants rely on the statute's mandate of a liberal interpretation, and argue for the broadest possible interpretation including "[a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2)(e). The Court must limit this expansive language. In the absence of a bright line rule foreclosing the application to claims only indirectly related to conduct that qualifies as "public participation," defendants have a powerful incentive to abuse the procedural

relies on "public participation" conduct as evidence is not "based on" public participation.[6]

In this case, the website posting was the "but for" cause of the breach of contract claim, it did address an issue of public concern, and the label given to the claim is irrelevant.

D. There Exists a Conflict In the Court of Appeals.

In *Dillon v. Seattle Deposition Reporters*, 179 Wn. App. 41, 316 P.2d 1119, 1134 (2014), the plaintiff's telephone conversations with a lawyer were secretly recorded by court reporters and then filed in support of litigation. Plaintiff sued for a violation of the privacy act and the Defendant's successful anti-SLAPP motion was reversed on appeal. Among the numerous reasons for the reversal, the Court of Appeals ruled that the petitioning activity which forms the basis for bringing an anti-SLAPP motion "must actually give rise to and be the basis for the asserted liability." 179 Wn. App at 82. Because filing the transcripts (the protected activity) did not give rise to the privacy

mechanisms of the statute. Even if a motion to dismiss is denied, appeal and considerable delay may result. The statute's chilling effect on meritorious claims is considerable and creates a meaningful burden on the right of access to courts.

[6] For example, as a prerequisite to filing a claim under Title VII of the 1964 Civil Rights Act, an employee must file a Charge with the EEOC. 42 U.S.C. § 2000e-5(b). The employer's response often is a long narrative explaining its reasons and is supported by documentation, which constitute "public participation" under the Washington's Anti-SLAPP statute. *See* RCW 4.24.525(2)(b). Although the information supplied by the employer is often relied upon by the employee in support of a discrimination claim, it is not the "but for" cause of a discrimination claim, which arises from the employer's alleged illegal motivation for adverse action and not from submitting information to the EEOC in an effort at exoneration. Similarly, many state and federal regulatory agencies require corporations to submit information in furtherance of a wide variety of investigations. Although the information submitted may qualify as "public participation," it would not be the "but for" cause of claims alleging negligence or a violation of Washington's consumer protection statute, and this Court should so hold.

violation (secret recording), the Court of Appeals in *Dillon* correctly found that the anti-SLAPP statute did not apply.

In this case, however, the conduct of posting on the website did give rise to the asserted violation of the confidentiality agreement; "but for" the website posting the confidentiality agreement could not have been violated. The Anti-SLAPP statute should have applied in this case.

E. The Public Interest Justifies Review.

There exists a strong public interest in protecting comments that are posted on websites designed to inform employees about the quality of potential places of employment. There exists a strong public interest in closely scrutinizing the enforcement of confidentiality agreements which affect issues of "public concern."

IV. CONCLUSION

The Petition for Review should be GRANTED.

Respectfully submitted this 16th day of July, 2014.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By, _____
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