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No. 69444-8-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

KIMBERLY ZANKO, a single woman,
MELISSA MACDONALD, a single woman,

Respondents,

vs.

RONALD BRECK EDWARDS and
KELLIE EDWARDS, husband and wife,

Appellants.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAR -5 AM 9:57

BRIEF OF RESPONDENTS

Thomas J. Resick, WSBA #6976
Sarah E. Hall, WSBA #17170
Resick Hansen Fryer Hall & Heinz
412 North Commercial Street
Bellingham, WA 98225
Attorneys for Respondents

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I. INTRODUCTION

This is *not* a case about whether an employee's alleged complaint of sexual harassment deserves the protection of RCW 4.24.525, the Anti-SLAPP statute, because Honorable Charles Snyder rightly held that Respondents' Complaint arose out of conduct that took place prior and independent to any such alleged statement. Therefore, Appellants failed to meet their required burden of proof under the Anti-SLAPP statute. Judge Snyder further correctly ruled that even if the court were to assume for sake of argument that Appellants had met their burden, Respondents had provided clear and convincing evidence of the probability of prevailing on their Complaint.

II. STATEMENT OF THE ISSUES

1. Did Judge Snyder correctly rule that Appellant Edwards' statement allegedly made to his Human Resource Manager at A&A USA did not constitute lawful conduct "involving public participation and petition" as required by RCW 4.24.525, the anti-SLAPP statute?
2. Did Judge Snyder correctly rule that Appellants had failed to meet their burden under the anti-SLAPP statute to show by a preponderance of evidence that Respondents' claims for defamation

and intentional infliction of emotional distress “arose” out of lawful conduct “involving public participation and petition?”

3. Did Judge Snyder correctly rule that Respondents’ claims for defamation and intentional infliction of emotional distress “arose” out of conduct prior and independent to Appellant Edwards’ statement allegedly made to his Human Resource Manager at A&A USA?

4. Did Judge Snyder correctly rule that even if Appellants had met their burden under the anti-SLAPP statute, Respondents had provided clear and convincing evidence of the probability of prevailing on their claims for defamation and intentional infliction of emotional distress?

5. Did Judge Snyder correctly ruled that since there was no violation of the anti-SLAPP statute, statutory remedies were not appropriate?

III. STATEMENT OF THE CASE

On January 4, 2010, Appellant “Breck” Edwards (“Edwards”) was hired by A&A Contract Customs Brokers USA Inc. (“A&A USA”) as an Account Executive with the primary job duty of locating and contacting prospective clients. By early September, 2011, it became apparent that Edwards was not meeting his performance

targets; including failing to procure new clients and not submitting information needed in preparation for an upcoming Las Vegas trade show. Id. Edwards was frequently warned about these shortcomings, as detailed in a response to an email sent by Edwards on September 30, 2011. CP 283.

The Las Vegas trade show was set for October 19, 2011 to October 21, 2011. Respondent Kimberly Zanko (“Zanko”), Director of Business Development for A&A Contract Customs Brokers Ltd., (A&A Canada) a separate company from A&A USA, was responsible for making sure the trade show was a success. CP 277. In preparation, the individuals who were scheduled to attend (including Edwards and the Respondents) had several meetings regarding expectations and goals, including expectations that they would behave with professionalism. CP 278; CP 272.

Nevertheless, on the first day of the trade show, Edwards’ loudly announced in front of a group of people that he had been drinking heavily the night before with his friend “Todd,” who Edwards had invited to stay with him. CP 278; CP 273. Edwards also repeatedly told everyone that Respondents and Todd should have a relationship. CP 279.

Later that evening, as Respondents were networking with other trade show attendees, including prospective clients, Edwards and Todd barged in, both clearly heavily intoxicated. CP 279; CP 273. In fact, the men had some type of drinking device that was half the size of their body strapped around their necks. CP 279. Edwards proceeded to introduce Todd to everyone as a “drug runner” and kept asking Respondents in front of others whether they found Todd attractive and were they interested in a relationship. Id. Both Respondents were very embarrassed and offended by Edwards’ behavior, particularly when one of the contacts they were networking with commented on his intoxication and inappropriate comments. Id.

The following day, Edwards approached Respondent Melissa Macdonald (“Macdonald”), Marketing Manager for A&A Canada, and loudly asked whether she or Zanko had sex with one of the contacts they had met the night before. Id. This conversation took place in front of the companies’ booth with clients and other attendees nearby. Macdonald immediately denied the accusation and told Edwards that his comments were totally inappropriate. Edwards then began loudly berating her and repeatedly calling her a liar. Macdonald told Zanko what had occurred and both women found Edwards’ comments to be very offensive. Id.; CP 279.

Later that day, Zanko learned that Edwards intended to bring his friend Todd to a client dinner that evening. Id. Finding this to be very unprofessional, Zanko immediately texted Edwards and told him not to do so. Id. CP 285. Edwards responded that he didn't understand why Todd could not come as the client had already met Todd and liked him. Zanko was appalled to hear that Edwards had introduced a client to someone he called a drug runner. Id.

That night when the Respondents arrived at dinner, they found Edwards to be, again, completely intoxicated. CP 280; CP 274. He was loud and obnoxious in front of the client and the other restaurant patrons. Id. Zanko asked Edwards to stop ordering shots of alcohol and he became belligerent and angry towards her in front of everyone. Id. Edwards also kept loudly saying that the client they were dining wanted a relationship [implying sex] with Zanko and that another client they were to meet later, wanted a relationship with Macdonald. Id. Both Respondents found these comments to be very offensive and embarrassing. During the same dinner, Edwards then loudly stated that Macdonald should "take one for the team," suggesting she should engage in sexual relations with a client to obtain new business. Id. Macdonald was shocked by this outrageous statement and emotionally

distressed that anyone would think she would ever prostitute herself. CP 274.

The next day, Macdonald received a series of texts from Edwards suggesting that she should still meet up with this client for a relationship. CP 274. Edwards also teased her that the client had taken pictures of her. Macdonald was offended by the sexual tenor of these texts. Id.

Over the next few weeks, it became clear that Edwards was still not adequately performing at work. CP 280; 281. During a meeting, Edwards admitted that he had not been contributing as he should and that he just wasn't motivated to work. Id. At no time during this meeting did Edwards ever mention any concerns about the Las Vegas trip. Id.

On November 21, 2011, Edwards was asked whether he should consider postponing a sales course he was to attend since he was so far behind on his performance targets. CP 281. At first, Edwards responded that he wanted to proceed with the course, but then agreed that postponing the course was a good idea. The decision to postpone this sales course was completely made by Edwards. "Perhaps I should postpone the course until then. This way I can really see how I am doing and if this is the position I want to stick with." Id. CP 288; 289.

Edwards forwarded to his wife the discussion about postponing the sales course and then asked her, “What do you think of this? It sounds like they are getting ready to dispose of me.” Id. CP 290; 291. He then contacted Douglas R. Mawer, Chief Operating and Financial Officer for A&A Canada and the Respondents’ employer, requesting that they have lunch. CP 295.

During lunch, the men spent the first half discussing golf. Then, Edwards proceeded to tell Mr. Mawer that while in Las Vegas, he had overheard Zanko tell Macdonald to give a client her room key to secure the client’s business. Id. At no time during this lunch did Edwards ever state that he was upset about what he had overheard or felt harassed or uncomfortable in any manner. In fact, there was no discussion about sexual harassment in any fashion.

On November 30, 2011, as a means of improving his performance, Edwards was asked to start working full time in the Blaine office. CP 281. But, Edwards rarely came to the office up to the day he was terminated. Id. CP 292; 293. Also during the time frame of September 1, 2011 to January 31, 2012, Edwards was given a revenue target of \$4,807.69, however, he only signed one new account for revenue of \$252.00. Id.

On or about December 12, 2011, A&A USA received the EEOC notice stating that Edwards was alleging sexual harassment and retaliation. But, Edwards had never reported or spoke to anyone about these allegations, including A&A USA's Human Resource Manager. CP 296; 297.

On December 22, 2011, approximately two weeks *after* the filing of the EEOC notice; Mr. Mawer told the Respondents about the conversation he had with Edwards over lunch. This was the first time either Respondents had heard anything about it. CP 281; 282; CP 275. Both Respondents immediately told Mr. Mawer that Edwards' version was totally false and that it was Edwards who had suggested Macdonald engage in sexual relations with the client. Id. The Respondents were greatly offended by Edwards outrageously allegation and very embarrassed to be having this conversation with their boss. Id. CP 296; 297.

The Respondents found Edwards' conduct during the entire Las Vegas trip, particularly his offensive sexual statements made in front of clients and colleagues, and the false statements made to Mr. Mawer, to be outrageous and intolerable. Both Respondents have suffered severe emotional distress over the entire incident and have

serious concerns whether their business reputations have been damaged. CP 280; 281; 282; CP 275.

On June 21, 2012, an administrative hearing was held in front of the Employment Security Department. CP 299; 300. A&A USA and its witnesses participated telephonically at the hearing. Id. As part of his submissions, Edwards produced a document authorized by him that was sent on February 9, 2012, one week after his termination. Id. The document states that Edwards had already retained an attorney and was “currently pursuing legal action against A&A for wrongful termination.”

On July 16, 2012, Mr. Resick, counsel for Respondents, received a phone call from Ms. Reba Weiss, Edwards’ counsel, to discuss a settlement offer she had sent. CP 300. Mr. Resick informed Ms. Weiss that the client was not interested in settlement and then told her, as a courtesy, that the Respondents were considering filing a lawsuit against Edwards for his offensive conduct and false statements. Id. At no time, did Mr. Resick ever warn or threaten Ms. Weiss that if Mr. Edwards continued to pursue his wrongful termination claim, that the Respondents intended to sue him. Id.

On July 26, 2012, the EEOC issued at Edwards request, a Notice of Right to Sue so that he could file his wrongful termination

lawsuit. On July 30, 2012, *after* Edwards voluntarily closed his EEOC complaint, the Respondents in their individual capacities and as Canadian citizens, filed their Complaint for Slander and Intentional Infliction of Emotional Distress. The Complaint was not served on Edwards until August 22, 2012, almost one month after he requested his Right to Sue. CP 300; 304-307.

In their Complaint, the Respondents' are identified as Canadian citizens and employees of A&A Canada. CP 218. The Complaint also states that Respondents' causes of action arises out of Edward's conduct while "*...on a business trip in the State of Nevada,*" where he made "*...certain inappropriate comments which included telling Plaintiff, Melissa Macdonald, one of the female employees of A&A, to act as a prostitute in order to obtain business from a client of A&A and that she "should take one for the team."*" CP 219. [emphasis added]. The Complaint further states that at a later time, Edwards reversed "*...the facts of the situation and claimed that Kimberly Zanko informed Melissa Macdonald that she should have sexual relations with one of the customers.*" CP 219. [emphasis added]. Also stated at paragraph 3.5 of the Complaint, "Breck Edwards made known his allegations to the employer of the Plaintiffs." No where in the Complaint is there any cause of action based on Edwards'

statement allegedly made to his Human Resource Manager at A&A USA.

On August 28, 2012, Appellants filed Defendants' Special Motion to Strike Claims of Slander and Intentional Infliction of Emotional Distress and Request for Imposition of Fines and Sanctions Pursuant to RCW 4.24.525. On September 28, 2012, Honorable Judge Charles Snyder heard oral argument and ruled against Appellants' motion, finding that they had not met their burden of showing that Respondents lawsuit arose out of speech protected under RCW 4.24.525. Judge Snyder further ruled that even if the anti-SLAPP statute applied, Respondents had established by clear and convincing evidence the probability of prevailing on their claims. As stated by Judge Snyder:

So for this Court to determine what this statute means when it says a probability of prevailing, I think the Court can only do one thing, and say if their evidence was believed by a fact finder, would they prevail, and I believe they could, and they could prevail on a slander lawsuit if their evidence is believed and Mr. Edwards' is not.

And I am not saying it is going to be. I am saying if, and that is all the Court can do is look at it like a summary judgment. Take all of the evidence in favor of the Plaintiffs. If I take their information and their evidence in the light most favorable to them, could a finder of fact say, yes, they've been slandered? I think they could.

And so under those circumstances, even if I felt the anti-SLAPP statute applied, I think the second prong here has been met by the Plaintiffs...

RP 21-22.

IV. ARGUMENT

A. Standard of Review.

An order denying a motion to strike under RCW 4.25.525, the Anti-SLAPP statute is reviewed de novo. The Court shall consider "...pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." RCW 4.24.525 (4)(c). The Court shall not weigh credibility nor compare the weight of the evidence, but accepted as true all evidence favorable to the Respondents and evaluate Appellants' evidence only to determine if it defeats Respondents' showing as a matter of law. Nygaard, Inc. v. Timo Uusi-Kerttula, 159 Cal.App.4th 1027, 1036 (2008) [emphasis added]; HMS Capital Inc. v. Lawyers Title Co., 118 Cal.App.4th 204, 212, 12 Cal.Rptr.3d 786 (2004); Soukup v. Law Offices of Herbert Hafif, 39 Cal.4th 260, 269, fn.3, 46 Cal.Rptr.3d 638 (2006).¹

¹ It is appropriate for Washington courts to rely upon California law in construing RCW 4.24.525. Aronson v. Dog Eat Dog Films, Inc., 738 F.Supp.2d 1104 (W.D. Wash 2010).

B. Edwards' Statement Allegedly Made To His Human Resource Manager Does Not Constitute Protected Speech Under RCW 4.24.525.

The Washington anti-SLAPP statute is intended to address lawsuits "... filed against individuals or organizations on a substantive issue of some public interest or social significance..." that are designed to intimidate the exercise of First Amendment rights. Laws of 2002, Ch.232, §1. In 2010, the statute was expanded to protect any public statements submitted to a public forum and "any...lawful conduct in furtherance of the exercise of the constitutional right of free speech related to issues of public concern or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2). Under the statute, "[a] party may bring a special motion to strike any claim that is based on an action "involving public participation and petition." *Id.* An action involving public participation requires lawful conduct in furtherance of the exercise of free speech in connection with an issue of public concern. *Aronson v. Dog Eat Dog Films, Inc.*, 738 F.Supp. 2d 1104, (W.D. Wash. 2010).

1. **There Is An Issue Of Fact As To Whether Edwards' Even Made A "Protected" Statement.**

Appellants argue that they are entitled to anti-SLAPP protection for a statement Edwards allegedly made to A&A USA's

Human Resource Manager regarding a conversation he overheard in Las Vegas. Specifically, Edwards' states that he told his manager that while he was at the trade show, he overheard Zanko tell Macdonald "words to the effect, 'do whatever was necessary to get the client for the company, even if that meant using your room key.'" Appellants' Brief pp. 11-12. This alleged statement Respondents argue, is "protected speech" within the meaning of RCW 4.24.525 and, according to Appellants, is the basis for the Respondents' lawsuit. Of note, the only evidence Appellants offer that Edwards ever even made this statement to his Human Resource Manager is his self-serving declaration, which is strongly disputed by Respondents, making whether the alleged "protected speech" even occurred an issue of fact.²

2. The Statement Edwards Claims He Made Does Not Constitute Lawful Conduct "Involving Public Participation and Petition".

Even if Edwards did tell his Human Resource Manager what he claims he overheard, RCW 4.24.525 still requires Appellants to

² In their opening brief, Appellants reference an affirmative defense contained in A&A USA's Answer to Edwards' wrongful termination suit filed in the United States District Court, Western District of Washington. *See* Case No. 2:12-cv-01689-MJP. Since this Answer is not part of the record on appeal, it should not be part of this appeal. Nevertheless, Respondents wish to point out that A&A USA is entitled to assert this affirmative defense because Edwards never complained to his Human Resource Manager about sexual harassment. Therefore, he could not have taken advantage of any preventive or corrective opportunities.

show that this statement constitutes lawful conduct “involving public participation and petition.” Appellants argue that Edwards’ statement is protected because it was an “employee’s complaint of sexual harassment to his manager” and sexual harassment in the workplace is a matter of public concern. But, Edwards’ own testimony is that he only told his Human Resource Manager that he had overheard Zanko tell Macdonald words to the effect to “do whatever was necessary to get the client for the company, even if that meant using your room key.” There is no testimony that Edwards ever told A&A USA’s Human Resource Manager that he felt sexually harassed by what he overheard or that the comment seemed to be sexually harassing or that he even felt it was inappropriate conduct.

The sexual harassment case cited by Appellants is illustrative: There, the plaintiffs were women employees’ alleging sexual harassment due to inappropriate physical contact *they were personally subjected to* by a male colleague. Glasgow v. Georgia-Pac. Corp., 103 Wn.2d 401, 693 P.2d 708 (1985). Therefore, in our case, even if Edwards’ allegations are to be believed, any claim of sexual harassment belongs to Macdonald who was the actual person subjected to the inappropriate conduct.

During oral argument, it was clear that Judge Snyder was also suspect about whether Edwards' alleged statement to his Human Resource Manager even qualified as "protected" speech.

THE COURT: ... He [Edwards] didn't ever complain that he was sexually harassed. He said that one of these, that these women were doing things that were inappropriate --

MS. WEISS: No, no, no.

THE COURT: -- and saying things amongst themselves, and then he made a claim, but then he's not pursuing that claim..

RP 14.

- a. Edwards' Alleged Statement Was Made In Bad Faith.

Appellants will argue that it's not necessary that the conduct Edwards complains of, in fact, constitutes illegal activity as long as the complaint was made in good faith. See Appellant's brief p. 27. But here, even if Edwards did make this statement to his Human Resource Manager, it could not have been made in good faith because at the time he made this statement, he knew the statement was untrue.

The Respondents have both testified that at no time did the conversation as reported by Edwards to his Human Resource Manager ever take place. Further, according to both Respondents it was actually Edwards who made repeated suggestions that the Respondents

should engage in sexual relations to obtain business. While RCW 4.24.525 is to be followed, it is unlikely that the Washington Legislature ever meant for it to apply to a case where there is a dispute as to whether the “protected” statement was even made and there is testimony that the speaker was intentionally deceitful.

C. **Even If Appellants Can Show Edwards’ Statement To His Human Resource Manager Is Protected Speech, They Have Not Met Their Burden Of Showing That Respondents’ Lawsuit “Arose” From This Statement.**

Assuming Appellants can show that they are entitled to the protections afforded by the anti-SLAPP statute, to prevail on their motion, they still must show by a preponderance of evidence that Respondents lawsuit arises from Edwards’ claimed “protected speech.”

In making this determination, the court must again consider all pleadings and supporting and opposing affidavits and accept as true all evidence favorable to the Respondents and evaluate Appellants’ evidence only to determine if it defeats Respondents’ submissions as a matter of law. Nygaard, Inc. v. Timo Uusi-Kerttula, 159 Cal.App.4th 1027, 1036 (2008).

A lawsuit does not “arise” from protected activity simply because it was filed after the protected activity took place. Equilon

Enterprises, v. Consumer Cause, Inc., 29 Cal. 4th 53, 66, 124 Cal.Rptr.2d 507 (2002). Nor does the fact that a lawsuit may have been “triggered” by protected speech necessarily entail that it arises from such activity. City of Cotati v. Cashman, 29 Cal.4th 69, 79, 124 Cal.Rptr.2d 519 (2002). Rather, the critical point is whether the Respondents’ causes of action, itself, were *based on* an act in furtherance of the Appellants right of petition or free speech. Richard Mann, Jr. v. Quality Old Time Service, Inc., 120 Cal.App.4th90, 102, 15 Cal.Rptr.3d 215 (2004).

1. Respondents Are Suing In Their Individual Capacity As Canadian Citizens Employed By A Different Company.

Since, Appellants argue that Edward’s alleged statement to his Human Resource Manager at A&A USA constitutes protected speech, they have the burden of showing that Respondents’ lawsuit for defamation and intentional infliction of emotional distress arose from this statement. But, Edwards’ alleged complaint of sexual harassment was made to his employer, A&A USA, while it is undisputed that the Respondents have filed in their individual capacity as Canadian citizens employed by a different company.

2. Respondents' Complaint State Causes Of Actions For Edwards' Conduct Prior And Independent To His Alleged Statement.

Moreover, Respondents' Complaint clearly state causes of action arises out of Edward's conduct while "...on a business trip in the State of Nevada," where he made "...certain inappropriate comments which included telling Plaintiff, Melissa Macdonald, one of the female employees of A&A, to act as a prostitute in order to obtain business from a client of A&A and that she "should take one for the team." The Complaint further states that at a later time, Edwards then deliberately reversed the story and told Respondents' supervisor at A&A Canada "that Kimberly Zanko informed Melissa Macdonald that she should have sexual relations with one of the customers." Nowhere in the Complaint is there any cause of action "arising" from Edwards' statement allegedly made to his Human Resource Manager at A&A USA about sexual harassment, which, incidentally, took place after the Nevada trip. In fact, the Complaint does not even mention Edwards' employer, A&A USA.

In addition to their Complaint, Respondents have submitted declarations specifically detailing Edwards' defamatory and outrageous conduct in Nevada and with their employer, Doug Mawer, CEO of A&A Canada. These declarations must be considered and

accepted as true in an anti-SLAPP motion. RCW 4.24.525(4)(c); Nygaard, Inc. v. Timo Uusi-Kerttula, 159 Cal.App.4th 1027, 1036 (2008). Consequently, since Judge Snyder found that Respondents' lawsuit arose from Edwards' conduct prior and independent to his alleged protected speech; the court correctly ruled that Appellants had failed to meet their burden of proof.

In response, Appellants only state that Judge Snyder was "ruling upon the wrong set of facts." Appellant's brief p. 47. Appellants then appear to argue that Edwards' lunchtime conversation with Doug Mawer, CEO of A&A Canada and Edwards' statement to his Human Resource Manager at A&A USA are one in the same. Mr. Doug Mawer, however, is the CEO of A&A Canada, which employs the Respondents and is a completely separate company from A&A USA. Mr. Mawer is also a completely different individual than Edwards' Human Resource Manager at A&A USA. Further, nowhere in their brief do Appellants ever mention Edwards even having a discussion with Mr. Mawer about Respondents' alleged conversation in Las Vegas. Therefore it is somewhat farfetched for Appellants' to now claim that these two separate statements are actually the same event.

3. The Superior Court Did Not Rule Appellants Were Required To Have A Pending EEOC Complaint.

Finally Appellants argue that Judge Snyder erroneously held that the fact Edwards did not have an EEOC complaint pending was decisive. This is not what Judge Snyder stated. Judge Snyder made the statement regarding the timing of the EEOC claim in the context of his discussion regarding the purpose of RCW 4.24.525. The purpose of anti-SLAPP statute according to the Washington Legislature, is to address concerns over "...lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances..." 2010 Wash. Legis. Serv. Ch. 118(S.S.B. 6395). Accordingly, in deciding Appellants' motion seeking protection under this statute, Judge Snyder appropriately engaged in a discussion as to whether the purpose of the statute was being served.

Edwards filed his EEOC complaint on or about December 12, 2011 and then voluntarily requested the EEOC terminate his complaint so he could personally sue A&A USA for wrongful termination. The request for termination is dated as mailed July 26, 2012, four days before the Respondents filed their lawsuit and almost a month before he was served with their Complaint. Therefore, Judge Snyder found

the timing of the termination of the EEOC investigation significant as it was additional evidence that Respondents' lawsuit did not have a chilling effect on Edwards' right of public participation or petition.

D. The Respondents Showed Clear And Convincing Evidence Of The Probability Of Prevailing On Their Lawsuit.

Although Judge Snyder ruled that Appellants did not meet their burden of proving Respondents lawsuit arose out of "protected" speech within the purview of RCW 4.24.525, he still reviewed the presented evidence and determined that Respondents had shown clear and convincing evidence of the probability of prevailing on their claims.

So for this Court to determine what this statute means when it says a probability of prevailing, I think the Court can only do one thing, and say if their evidence was believed by a fact finder, would they prevail, and I believe they could, and they could prevail on a slander lawsuit if their evidence is believed and Mr. Edwards' is not.

And I am not saying it is going to be. I am saying if, and that is all the Court can do is look at it like a summary judgment. Take all of the evidence in favor of the Plaintiffs. If I take their information and their evidence in the light most favorable to them, could a finder of fact say, yes, they've been slandered? I think they could.

And so under those circumstances, even if I felt the anti-SLAPP statute applied, I think the second prong here has been met by the Plaintiffs...

In making that determination, Judge Snyder engaged in the appropriate anti-SLAPP analysis and did not weigh the credibility or weight of the evidence, but accepted as true all evidence favorable to the Respondents and assessing Appellants' evidence only to determine if it defeats Respondents showing as a matter of law. Nygaard, Inc. v. Timo Uusi-Kerttula, 159 Cal.App.4th 1027, 1036 (2008). As stated in Overstock.Com v. Gradient Analytics, Inc., 151Cal.App.4th 688, 699-700 (2007):

[A] plaintiff opposing an anti-SLAPP motion cannot rely on allegations in the complaint, but must set forth evidence that would be admissible at trial. [citation omitted]. Precisely because the statute (1) permits early intervention in lawsuits alleging unmeritorious causes of action that implicate free speech concerns, and (2) limits opportunity to conduct discovery, the plaintiff's burden of establishing a probability of prevailing is not high: We do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law.

Once a plaintiff has shown the requisite evidence of the probability of prevailing on any part of their claim:

...the plaintiff *has established* that its cause of action has some merit and the entire cause of action stands. Thus, a court need not engage in the time-consuming task of determining whether the plaintiff can substantiate all theories presented within a single cause of action and need not parse the cause of action so as to leave only those portions it has determined have merit.

Richard Mann, Jr. v. Quality Old Time Service, Inc., 120 Cal.App.4th 90, 106, 15 Cal.Rptr.3d 215 (2004)(emphasis in the original).

1. Respondents Claims Are Based On Edwards' Outrageous And Defamatory Conduct In Nevada.

Here, Respondents claims of defamation and intentional infliction of emotional distress are based on Edward's outrageous and defamatory conduct while attending a trade show in Las Vegas, Nevada and his deliberate falsehood to their employer, Doug Mawer, CEO of A&A Canada.

Respondents have provided evidence that at this trade show, Edwards frequently made sexually based remarks towards the Respondents in front of others, including asking them if they had sex with clients and telling them to use sex to obtain new business. Upon returning from Las Vegas, Edwards then lied to Respondents' employer and told him that it was Zanko who told Macdonald to prostitute herself for business.

2. Respondents Have Shown The Probability Of Prevailing On Their Defamation Claim.

A defamation claim consists of four elements: (1) falsity, (2) unprivileged communication, (3) fault, and (4) damages. Moe v. Wise, 97 Wash.App. 950, 957, 989 P.2d 1148 (1999). To establish the element of falsity, the Respondents need only show the offensive

statements was “provable false.” Schmalenberg v. Tacoma News, Inc. 87 Wash.App. 579, 590-91, 943 P.2d 350 (1997). While expressions of opinion are protected and not actionable, a statement meets the provably false test to the extent it expresses or implies provable facts, regardless of whether the statement is in the form of a statement of fact or statement of opinion. Id.

One way a statement could be provably false is when “it falsely describes the act, condition or event that comprises its subject matter.” [cite omitted] If a direct statement of facts would be defamatory, then a statement of an opinion implying the existence of those false facts supports a defamation action. [cite omitted]. Such is the case when ordinary persons hearing the statements would not perceive them to be “pure” expressions of opinion.

Valdez-Zontek v. Eastmont School District, 154 Wash.App. 147, 158, 225 P.3d 339 (2010).

3. The Respondents Have Set Forth Specific Defamatory Statements.

Appellants argue that Respondents are vague about the precise statements they claim were defamatory. Appellants then point to Respondents’ Complaint and completely ignore the declarations filed by the Respondents and their employer in support of their claims.

A review of all the pleadings as required by RCW 4.24.525 (4)(c) is quite illustrative. In their declarations, Respondents state that while they were attending the trade show in Las Vegas, Edwards was

often intoxicated and in front of colleagues and clients repeatedly behaved offensively and made defamatory remarks. Specifically, *in front of others:*

1. Edwards questioned Respondents whether they found his friend “Todd” attractive and wanted to engage in a relationship;

2. Edwards asked Respondent Macdonald whether she or Respondent Zanko had sex with a client and then loudly called her a liar when she denied it;

3. Edwards became belligerent and angry towards Respondent Zanko when she asked him to stop drinking at a client dinner.

4. Edwards told Respondent Zanko and Respondent Macdonald that clients they were meeting wanted sexual relationships;

5. Edwards loudly stated in a crowded restaurant that Respondent Macdonald should “take one for the team,” suggesting she should engage in sexual relations with a client to obtain new business.

6. Edwards sent Respondent Macdonald a series of texts suggesting she should meet up with a client for a sexual relationship. He also teased her that the client had taken pictures of her; and,

7. After the Las Vegas trip, Edwards told the Respondents boss’ Doug Mawer, CEO of A&A Canada that during the trade show Zanko had told Macdonald to give a client her room key, suggesting

sexual relations, as an inducement to secure the client's business. Edwards deliberately made this statement to Mr. Mawer knowing it to be false.

4. Edwards' Defamatory Statement About Respondents' Engaging In Sexual Relationships Are Provable False.

It is clear that Edwards offensive statements made in Las Vegas are provably false. For example, Edwards accusing the Respondents of having sex with clients; calling Macdonald a liar when she denies the accusation; repeatedly makes statements that the Respondents' are willing to engage in sex for clients and reporting to Respondents' employer, Doug Mawer, that Zanko told Macdonald to have sexual relations with a client to get new business, all have provable false facts or imply the existence of those false facts.

5. Edwards' Defamatory Statements Were Not Privileged Or Made In Anticipation Of Litigation.

With respect to the elements of unprivileged communication and fault, a communication is privilege when the declarant and recipient have a common interest in the subject matter of the communication and generally applies to organizations, partnerships and associations. Valdez-Zontek v. Eastmont School District, 154 Wn.2d 147, 162, 225 P.3d 339 (2010). But, the privilege is abused and its protection lost if the statement is made with "ill will or absence

of good faith.” Lillig v. Becton-Dickinson, 105 Wn.2d 653, 657-658, 717 P.2d 1371 (1986). As for fault, since the Respondents are private individuals, the negligence standard applies. Valdez-Zontek, *supra*, 154 Wn.2d at 157.

Appellants argue that Edwards’ alleged statement to his Human Resource Manager at A&A USA, is privileged because it was a statement concerning sexual harassment and therefore a matter of public interest. Appellants also argue that this statement is protected because it was made prior to litigation. But, again, Appellants’ arguments are based on the assumption that Respondents are claiming defamation with respect to Edwards’ alleged statement to his Human Resource Manager. Rather, as shown by their Complaint and the Declarations filed in support, Respondents’ claims for defamation arise out of Edwards’ numerous statements in Las Vegas regarding Respondents and clients and colleagues engaging in sexual relationships. Respondents are also suing for defamation based on Edwards’ deliberately false statement to their supervisor, Doug Mawer that Zanko told Macdonald to engage in prostitution to obtain a client. There certainly is no “public interest” in loudly telling people to behave like prostitutes to get new business. Nor is there any “public interest” in lying about what occurred to the Respondents’ employer.

These defamatory statements were negligently made because Edwards was intoxicated and acted with reckless disregard as to who overheard them. Finally, these statements were not made in anticipation of litigation because Edwards' is not suing A&A USA over his conduct towards Respondents.

With respect to his statement to Doug Mawer, CEO of A&A Canada and the Respondents' employer, Edwards' acted with actual malice as he deliberately chose to make a statement he knew was false. Moe v. Wise, 97 Wash.App. 950, 964, 989 P.2d 1148 (1999).

6. Edwards' Statements Constitute Defamation Per Se.

In a defamation case, a plaintiff is not required to prove actual damage if the communication constitutes "defamation *per se*." Valdez-Zontek v. Eastmont School District, 154 Wash.App.147, 165, 225 P.3d 339 (2010).

In Valdez-Zontek, the Court of Appeals upheld a jury instruction which read:

A defamatory communication is defamation *per se* if it injures the plaintiff in her profession or creates the imputation of unchastity to her, and, further the defendant knew the communication was false or acted with reckless disregard for the truth or falsity of the communication. If you find that defendant made a communication that was defamation *per se*, then plaintiff may recover presumed damages, reflecting non-economic loss such as harm to reputation and emotional distress.

Id.

Here, Respondents had to endure Edwards' defamatory communications during the Las Vegas trip about having sexual relations with colleagues and clients, including statements that they would engage in sex to procure business. The Respondents have shown how Edwards' defamatory statements caused them emotional distress and fear that their business reputations have been damaged. Then, they had to face further humiliation and emotional distress when Edwards' involved their supervisor at A&A Canada and made slanderous falsehoods.

7. Respondents Have Shown The Probability Of Prevailing On Their Claim Of Intentional Infliction Of Emotional Distress.

A claim of intentional infliction of emotional distress involves extreme and outrageous conduct that was intentionally or recklessly inflicted and caused emotional distress. Strong v. Terrell, 147 Wash.App. 376, 384, 195 P.3d 977 (2008); Kloepfel v. Bokor, 149 Wash.2d 192, 66 P.3d 630 (2003).

The Respondents have presented numerous examples of Edwards' extreme and outrageous conduct at the trade show in Las Vegas when he would become intoxicated and loudly declare that they should engage in sexual relationships with colleagues and clients. He

also accused them of actually having engaged in sexual relations. When they denied his accusations, Edwards would then publically call the Respondents liars. Edwards also publically stated that the Respondents should behave like prostitutes in order to obtain business and constantly harassed them with sexual inappropriate comments. Finally, Edwards deliberately chose to lie to Respondents' supervisor at A&A Canada and reversed the facts, accusing Zanko of suggesting Macdonald prostitute herself to a client. These actions were done intentionally and with reckless disregard to the emotional distress they caused Respondents and cannot be considered "...annoyances, petty oppressions, or other trivialities." Kloepfel, *supra*, 149 Wash.2d at 632.

Here, the Respondents have stated that Edwards' extreme and outrageous conduct not only caused them acute and severe emotional distress at the time the conduct took place, but has continued to cause emotional distress and make them fearful that their ethical reputation and standing in the business community has been damaged. Consequently, Judge Snyder correctly held that Respondents had provided clear and convincing evidence a probability of prevailing on their claim of intentional infliction of emotion distress.

V. CONCLUSION

Appellants' claim that Edwards' statement allegedly made to A&A USA's Human Resources Manager that he overheard Zanko tell Macdonald "words to the effect, 'do whatever was necessary to get the client for the company, even if that meant using your room key,'" constitutes "protected" speech as required by RCW 4.24.525, the anti-SLAPP statute. There is an issue of fact, however, whether Edwards' ever even made such statement. Further, Appellants have not met their burden of showing how this particular statement constitutes lawful conduct "involving public participation and petition" under the anti-SLAPP statute.

The Appellants have further failed to meet their burden under the anti-SLAPP statute to show by a preponderance of evidence that Respondents claims for defamation and intentional infliction of emotional distress "arose" out of the alleged statement Edwards' made to A&A USA's Human Resource Manager. In fact, under the appropriate standard of review for an anti-SLAPP motion, the evidence clearly shows that Appellants claims "arose" out of conduct prior and independent to Edwards' alleged statement to A&A USA's Human Resource Manager.

Nevertheless, even if it is assumed Appellants met their burden under the anti-SLAPP statute, the Respondents have shown by clear and convincing evidence a probability of prevailing on their claims. Accordingly, the Honorable Charles Snyder's decision to dismiss Appellants' Special Motion to Strike Claims of Slander and Intentional Infliction of Emotional Distress and Request for Imposition of Fines and Sanctions Pursuant to RCW 4.24.525 should be upheld.

Respectfully submitted this 4th day of March 2013



Thomas J. Resick, WSBA #6976
Sarah E. Hall, WSBA #17170
Resick Hansen Fryer Hall & Heinz
Attorney for Respondents