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STATE OF WASHINGTON
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DOCKET NO. 42321-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TERRY A. TOWNSEND, Appellant,

v.

STATE OF WASHINGTON, Defendant,

and

KERMIT B. WOODEN, Respondent.

APPELLANT'S REPLY BRIEF

Andrew P. Green
Attorney for Appellant
WSBA#32742

Law Office of Andrew P. Green, PLLC
1105 Tacoma Avenue South
Tacoma, WA 98402
(253) 383-5346
andy@apgreenlaw.com

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III. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

In her Complaint Ms. Townsend alleged that in 2009 WSDOT and its Director of Human Resources, Kermit B. Wooden, were defendants in an age discrimination lawsuit brought by a former employee, Kathy McGuire. CP 4. She also alleged that in or about October 2009, Mr. Wooden learned, in the context of Ms. McGuire's lawsuit, that Ms. Townsend had previously provided information to Ms. McGuire regarding the age discrimination claim made in Ms. McGuire's lawsuit. CP 4.

Mr. Wooden has testified that he was angry when he found out Ms. Townsend had provided the information (in an email) to Ms. McGuire, believed Townsend was trying to help McGuire in her age discrimination lawsuit against him, and that he wanted to terminate Townsend's employment. CP 28, 32.

Ms. Townsend alleges in her lawsuit that Mr. Wooden retaliated against her for assisting Ms. McGuire with her age discrimination suit against him by reassigning her, cutting her pay, and by his other retaliatory conduct toward her. CP 4-5. Wooden denies he discriminated or retaliated against Ms. Townsend. CP 8-9, CP 28-29.

However, the trial court has not made any factual findings in this case to date and the only issue on appeal is its legal conclusion that Wooden's counterclaims against Ms. Townsend could not be dismissed under Washington's anti-SLAPP statute because Ms. Townsend is a plaintiff in a lawsuit seeking personal relief.

At the hearing on Ms. Townsend's anti-SLAPP motion for dismissal of Wooden's counterclaims, the trial court properly held:

RCW 4.24.510 does provide immunity from civil liability when a person communicates a complaint to a government agency of issues that are based on matters of reasonable concern to that agency. That is the only matter that we're really here on for the motion to strike.

RP 14.

The trial court further held, correctly, that the truth of the matters asserted by Ms. Townsend or the good-faith nature of her complaints are not at issue in determining anti-SLAPP immunity. RP 15. The court then identified its only remaining concern:

But I do have a question in my own mind that I'm not resolving yet today. That is whether the anti-SLAPP statute applies when an employee complains about discriminatory treatment they received by their supervisor within a government agency.

RP 15, 16.

After the hearing, Ms. Townsend provided a statement of supplemental authority from another state showing anti-SLAPP law has been applied to grant civil immunity to government employees from a supervisor's slander, libel, and IIED claims against them based on their complaints to their employer that the supervisor sexually harassed them. CP 13.¹

The trial court then ruled in its letter opinion (CP 56-57) that Ms. Townsend was not entitled to anti-SLAPP immunity because she was a plaintiff in a lawsuit seeking personal relief, citing but misinterpreting this Court's decision in *Saldivar v. Momah*, 145 Wn.App. 365, 186 P.3d 1117 (2008), a case neither party had cited in its briefing or argued at the hearing. CP 17-26, 39-44, 45-53, and RP.

Thus the only issue on appeal is whether the trial court erred in its interpretation of this Court's holding in *Saldivar* and its extension of it to a universal rule that no plaintiff in a lawsuit seeking personal relief is entitled to immunity under Washington's anti-SLAPP statute. Such holding was error, as discussed below.

¹ Citing *Metzler v. Lanoue*, 62 Mass.App.Ct. 655, 818 NE2d 1084 (Mass.App.Ct., 2004).

IV. ARGUMENT

A. The Trial Court Misinterpreted This Court's Holding in *Saldivar* and the Anti-SLAPP Statutes Provide Ms. Townsend Civil Immunity from Wooden's Counterclaims

1. Wooden's Counterclaims Are Based on Townsend's Prior Communications to Their State Agency Employer About His Discrimination and Retaliation, Not on Her Complaint Filed in this Lawsuit

Wooden's counterclaims specifically state they are based on Ms. Townsend's communications to his employer and administrative officers at WSDOT regarding her claims that he engaged in discrimination or retaliation including gender-based harassment and/or hostile working environment and that such conduct held him in a false light before his supervisors and peers at the agency, defamed him, and damaged his reputation. CP 9-10.

In the *Saldivar* case, the Defendant Dr. Momah made counterclaims against the Plaintiff Saldivar based on both (1) the complaint she filed with the court in the lawsuit against him and (2) for her prior complaints about him to MQAC and the police, government agencies. *Saldivar*, 145 Wn.App. at 375, 186 P.3d 1117.

In reaching its conclusion, this Court distinguished between the two:

While RCW 4.24.510 protects the Saldivars from liability arising from actions taken by MQAC or police in response to their complaints, it is not applicable to private lawsuits

for private relief: the Saldivars are not immune from liability for that portion of the judgment related to the filing of the lawsuit.

Saldivar, 145 Wn.App. at 386, 186 P.3d 1117 (emphasis added).

This (bold) is the key language in this Court's ruling on anti-SLAPP immunity in *Saldivar*, as it distinguishes between claims made based on communications to government agencies (MQAC and police), for which anti-SLAPP immunity is available, and claims made based on the filing of a complaint in a civil lawsuit (i.e., abuse of process), for which anti-SLAPP immunity is not available.

It is particularly telling that in quoting this Court's ruling in *Saldivar* in Respondent's Brief, Wooden omits the key language (in bold, above) from the quote. Respondent's Brief at p. 7. In doing so he, as did the trial court, misconstrues this Court's holding and expands it into a universal and incorrect statement that plaintiffs in lawsuits for personal relief are not entitled to anti-SLAPP immunity.

Rather, this Court in *Saldivar* held, relying upon precedent, that anti-SLAPP immunity does not apply to claims based upon the filing of a lawsuit because "a plaintiff who brings a private lawsuit for private relief is not seeking official government action (a requirement for anti-SLAPP immunity), but rather redress from the court." *Saldivar*, 145 Wn.App. at 375 (citing *Reid v. Dalton*, 124 Wn.App. 113, 126, 100 P.3d 349 (2004)). In Respondent's Brief, Wooden in fact acknowledges, "[t]he immunity

offered by the statute relates to communications made to government officials, not to the court.” Respondent’s Brief at p. 7.

Here, Ms. Townsend communicated her concerns about Wooden’s discrimination and retaliation to officials at WSDOT. These communications, not the complaint in her current lawsuit, are the basis for Wooden’s counterclaims and Townsend remains immune under the anti-SLAPP statute from civil liability for his counterclaims against her based on such communications.

2. *Valdez-Zontek v. Eastmont School District Does Not Support the Trial Court’s Interpretation of Saldivar, and Respondent’s Reliance on It Is Misplaced.*

Furthermore, Wooden’s reliance on Division III’s decision in *Valdez-Zontek v. Eastmont School District*, 154 Wn.App. 147, 225 P.3d 339 (2010) to support his argument in favor of the trial court’s decision is misplaced. In *Valdez-Zontak*, the jury granted a verdict to Ms. Valdez-Zontak, a District employee, for defamation based on the District’s assistant superintendent’s propagation of a rumor that Ms. Valdez-Zontek was having an affair with another District employee. *Valdez-Zontek v. Eastmont School District*, 154 Wn.App. 147, 154-156, 225 P.3d 339 (2010). A Washington State Auditor, Mr. Renick, was one of the people the assistant superintendent, Ms. Jagla, repeated the rumor to during his audit of District time sheets and billing. *Id.* She created and submitted

false documents to the auditor regarding Ms. Valdez-Zontak time sheets, and then asked him to investigate her alleged affair. *Id.*

After the jury verdict, the District appealed the defamation verdict, claiming it was immune under the anti-SLAPP statute. The court identified the issue on appeal: “The issue is whether the District is immune from liability under RCW 4.24.510 for Ms. Jagla’s statement to the auditor (Mr. Renick) that Ms. Valdez-Zontek was having an affair with Mr. Thaut.” *Valdez-Zontek*, 154 Wn.App. at 166, 225 P.3d 339.

The court noted the anti-SLAPP statute protects solely communications of reasonable concern to the State agency, and does not provide immunity for other acts that are not based upon the communications. *Id.* at 167, 225 P.3d 339 (citing *Gontmaker v. The City of Bellevue*, 120 Wn.App. 365, 372, 85 P.3d 926 (2004)).

The court concluded, “The District’s arguments are without merit. First, as discussed above, Ms. Jagla and other District officials broadcast non-privileged and provably false statements about the alleged affair to numerous individuals. Substantial evidence supports a finding of defamation liability, with or without Ms. Jagla’s statement to Mr. Renick.” *Valdez-Zontek*, 154 Wn.App. at 167, 225 P.3d 339. On that basis, the court ruled the District was not entitled to anti-SLAPP immunity. *Valdez-*

Zontak does not support the trial court's ruling or Wooden's argument in favor of it on appeal.

3. *The Legislature's Intent as Stated in Both Anti-SLAPP Statutes Is to Allow Anti-SLAPP Immunity for SLAPP Counterclaims Such as Wooden's*

Finally, the trial court's and Wooden's interpretation that no plaintiff in a lawsuit seeking personal relief is entitled to anti-SLAPP immunity conflicts with the intent of the legislature in adopting both the former (RCW 4.24.510) and most recent (RCW 4.24.525) anti-SLAPP statutes. The legislative notes to the former statute specifically identify a "counterclaim" as one type of SLAPP suit subject to statutory immunity. Laws of 2002, ch. 232, §1. And the newest anti-SLAPP statute, adopted in 2010 well after the decision in *Saldivar*, specifically identifies "counterclaim" as one type of claim subject to dismissal under the statute. RCW 4.24.525(a).

The legislature's intent that a counterclaim can be a SLAPP subject to dismissal under Washington's anti-SLAPP laws would be contradicted if the universal rule stated by the trial court and now argued by Wooden on appeal that anti-SLAPP immunity does not apply to plaintiffs in lawsuits seeking personal relief were a correct statement of the law. It is not. Wooden fails to address this critical flaw in the trial court's ruling and in his argument in support of it.

B. Townsend Prevails Under the Burden-Shifting Analysis of RCW 4.24.525(4)(b)

In Respondent's Brief (at p. 11), Wooden further asks this Court, if it determines Ms. Townsend "does fall within the scope of the persons for whom a claim of immunity exists under the anti-SLAPP statute," to review the record and engage in the burden shifting procedure set forth in RCW 4.24.525(4)(b). He argues that Ms. Townsend fails to meet her burden and he meets his under the statute's burden-shifting framework, and asks this Court to affirm the trial court's denial of Townsend's anti-SLAPP motion on these alternative grounds. Respondent's Brief at p. 16.

However, the only issue on appeal is the trial court's ruling that Ms. Townsend is not entitled to anti-SLAPP immunity because she is a plaintiff in a lawsuit seeking personal relief. If this Court determines that ruling was error, it should remand to the trial court for further proceedings consistent its reversal.

Nonetheless, if the Court decides to review the record and engage in the burden-shifting analysis of RCW 4.24.525(4)(b) as Wooden urges, Ms. Townsend meets her burden, as she argued and established² before the

² The trial court denied Ms. Townsend's anti-SLAPP motion based on its incorrect interpretation of this Court's ruling in *Saldivar*, not because Ms. Townsend failed to meet her burden or Wooden met his under the RCW 4.24.525(4)(b) burden-shifting procedure.

trial court, under the 4.24.525(4)(b) analysis and Wooden fails to meet his. CP 49-53, RP 8, 14.

Specifically, the statute assigns a moving party the initial burden of demonstrating by a preponderance of the evidence that the claim or claims concern an action involving public participation and petition. Here, Ms. Townsend meets her initial burden by relying, for purposes of her anti-SLAPP motion, on Mr. Wooden's assertion in his counterclaims³ that she communicated to administrative officers of WSDOT regarding her concerns that he had engaged in discrimination or retaliation. CP 49.

While Wooden failed to identify any specific statements as the basis for his counterclaims, CP 9-10 & CP 27-29, internal complaints with allegations of misconduct which lead to investigations and statements related to disciplinary proceedings, as he claims Ms. Townsend made here, fall within the purview of the anti-SLAPP legislation. *Castello*, 2010 WL 4857022 at *5.

Once the moving party meets her initial burden, the burden shifts to the non-moving party to establish by clear and convincing evidence a probability of proving the claim or claims. *Castello*, 2010 WL 4857022 at

³ The court may consider pleadings in its burden-shifting analysis. RCW 4.24.525(c).

*3 (citing RCW 4.24.525(4)(b)). In his response to Townsend's anti-SLAPP motion and now on appeal, Wooden appears to assert that he meets his burden as the non-moving party by arguing that the PRB decision upholding his disciplinary action is clear and convincing evidence that he did not discriminate or retaliate⁴ against Ms. Townsend and she is estopped⁵ from claiming otherwise. Wooden's argument to this effect is misplaced. When the burden shifts to the non-moving party under RCW 4.24.525(4)(b), "it is mandatory for [him] to come forward with clear and convincing evidence of every element of his claim." *Castello*, 2010 WL 4857022 at *10.

Accordingly, as the non-moving party under the newest anti-SLAPP statute, Wooden must establish by clear and convincing evidence the probability of proving every element of his counterclaims for defamation and invasion of privacy.

⁴ In contrast, at the hearing on Ms. Townsend's motion Wooden's counsel admitted "Now, it could well be that at some point some trier of fact may decide that my client's motivations were discriminatory." CP 11.

⁵ Whether Townsend is collaterally estopped, based on the PRB's decision, from asserting her underlying claims of discrimination/retaliation in her lawsuit against WSDOT and Wooden is not at issue on this appeal and is not relevant to determining her anti-SLAPP immunity from Wooden's counterclaims for defamation and invasion of privacy.

Here, as Townsend argued and established to the trial court (CP 49-53, RP 8, 14), Mr. Wooden failed to provide any evidence, let alone clear and convincing evidence, of a probability of proving the elements either of his counterclaims for (a) Defamation or (b) Invasion of Privacy/False Light.

a. Defamation

A party claiming defamation of any sort must establish four elements: (1) falsity, (2) unprivileged communication, (3) fault, and (4) damages. *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). The court examines the non-moving party's proof of each of these elements under the "clear and convincing standard." *Castello*, 2010 WL 4857022 at *6.

(1) Falsity

Statements of opinion are generally held not to be "provably false" and thereby entitled to First Amendment protection. *Castello*, 2010 WL 4857022 at *6. (citations omitted). In *Castello*, the court noted "Both the Plaintiff's complaint and his responsive pleadings (to the Defendants' special motion to strike) have been noteworthy for their failure to identify with specificity any statements to SFD superiors, co-workers or investigators which are 'provably false.'" *Id.* at 7. The court found that

“the absence of such details leaves him without clear and convincing evidence of provable falsehood, the cornerstone of his claims, regarding Defendants’ statements within the Department.” *Id.* The same is true here. Mr. Wooden has failed to identify with specificity a single statement Ms. Townsend made that is “provably false.”

(2) Unprivileged Communication

As noted in *Bailey v. State*, there is support for early dismissal review in qualified and absolute immunity cases. 147 Wn.App. 251, 191 P.3d 1285, 1289 (2008) (citing *Robinson v. City of Seattle*, 119 Wn.2d 34, 65, 830 P.2d 318 (1992) (qualified immunity granted in 42 U.S.C. 1983 cases requires that insubstantial claims must be resolved quickly); *Taggart v. State*, 118 Wn.2d 195, 206, 822 P.2d 243 (1992) (defense of common law immunity that is not adequately negated should be dismissed even though discovery could prove claim)).

Here, Ms. Townsend’s communications to WSDOT were privileged. First is the absolute privilege accorded to statements made in the context of a quasi-judicial proceeding. This privilege applies to statements made during the investigative phase of such proceeding and in “situations in which authorities have the power to discipline.” *Story v. Shelter Bay Co.*, 52 Wn.App. 334, 338-41, 760 P.2d 368 (1988) (applying

the privilege to unsolicited complaints to governmental agencies). In *Castello*, the court found that the SFD investigations and disciplinary actions, with their accompanying rights of appeal and judicial review, constitute “quasi-judicial proceedings.” 2010 WL 4857022 at *9. The same is true where Mr. Wooden is alleging statements made by Ms. Townsend were in the context of disciplinary action or appeal.

Also entitled to privilege status are communications to a public officer who is authorized or privileged to act on the matter communicated on. *Gilman v. MacDonald*, 74 Wn.App. 733, 738, P.2d 697 (1994). In *Castello*, the court found that the Defendants’ statements to their superiors within the Department (and to the investigators delegated by those superiors) fell within this category. 2010 WL 4857022 at *9. Ms. Townsend’s communications to administrative officers of WSDOT also fall within this category. Additionally, the common interest privilege applies here, as Ms. Townsend and WSDOT had a common interest in “the subject matter of the communication.” *Moe v. Wise*, 97 Wn.App. 950, 957, 989 P.2d 1148 (1999). Finally, the anti-SLAPP statute itself also makes her communications privileged. Mr. Wooden fails to establish by clear and convincing evidence that Ms. Townsend’s communications were not privileged.

(3) Fault

If a plaintiff (counter-plaintiff, here) is a public figure or official, the proof of fault for defamation requires evidence of actual malice. *Corbally v. Kennewick Sch. Dist.*, 94 Wn.App. 736, 741, 973 P.2d 1074 (1999). Individuals under public contract are public figures who must prove alleged defamatory statements against them were made with actual malice. *Corbally*, 94 Wn.App. 736 (teacher), *Corey v. Pierce Co.*, 154 Wn.App. at 762, 225 P.3d 367 (2010) (deputy prosecutor), *Castello*, *supra* (paramedic/firefighter). Here, Mr. Wooden has presented no evidence of actual malice (or even of negligence required of a private party suing for defamation) by Ms. Townsend. He has certainly failed to present clear and convincing evidence of the probability of proving the fault element of his defamation claim.

(4) Damages

As in *Castello*, Wooden's response to Plaintiff's special motion "does not even address the issue of damages, much less provide clear and convincing evidence of the probability of proving them." 2010 WL 4857022 at *11. As in the Plaintiff's complaint in *Castello*, there are allegations of damages in Wooden's counterclaims here, "but the anti-SLAPP statute is unequivocal in its requirement that Plaintiff [counter-

plaintiff here] bears the burden of establishing his claim by clear and convincing evidence” once the moving party has met her burden on a special motion to strike. *Id.* Wooden here has failed to present the requisite proof of damages.

b. Invasion of Privacy/False Light

A “false light” invasion of privacy claim requires a defendant “publicize” a matter placing another in false light where: “(a) the false light would be highly offensive to a reasonable person and (b) the [defendant] knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed.” *Vande Hey v. Walla Walla Comm. College*, 154 Wn.App. 752 (2008) (citing *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 470-71, 722 P.2d 1295 (1986)).

Mr. Wooden failed to address these elements, or provide any evidence or analysis in support of his invasion of privacy claim in his response brief or declaration, or on appeal.

Furthermore, “publicity” for purposes of a false light claim means “communication to the public at large so that the matter is substantially certain to become public knowledge, and that communication to a single person or small group does not qualify.” *Vande Hey*, 154 Wn.App. 752 (citations omitted).

Here, Mr. Wooden failed to show by any evidence, let alone by clear and convincing evidence, that Ms. Townsend “publicized” any statements within the meaning of an invasion of privacy claim. Her communications as he alleges in his counterclaims were with administrative officers of WSDOT. Finally, Mr. Wooden has also failed to present any proof of his alleged damages for this counterclaim.

Mr. Wooden failed to carry his burden of establishing by clear and convincing evidence a probability of proving either of his counterclaims as required. Accordingly, if this court decides to review the record and engage in the burden shifting analysis of RCW 4.24.525(4)(b) as Mr. Wooden urges, it should find in Ms. Townsend’s favor, reverse the trial court, and remand for dismissal of his counterclaims and an award of \$10,000.00 in statutory damages as well as attorney’s fees and costs as the remedies provided by the anti-SLAPP statutes.

V. CONCLUSION

As this Court held in *Saldivar v. Momah*, anti-SLAPP immunity is not available for counterclaims based on the filing of a complaint in a lawsuit. However, Mr. Wooden’s counterclaims here are based on Ms. Townsend’s prior communications to administrative officers at WSDOT regarding discrimination by its HR Director, a matter reasonably of

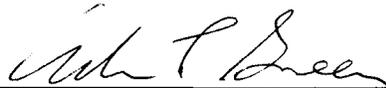
concern to that agency. The trial court erred in holding Ms. Townsend was not entitled to anti-SLAPP immunity simply because she is a plaintiff in a lawsuit seeking personal relief. Such holding conflicts with the legislative intent of the anti-SLAPP legislation to allow immunity from SLAPP counterclaims and the case law as set forth above, and is a misstatement of the law.

Furthermore, Ms. Townsend met her burden of establishing by a preponderance that Wooden's counterclaims are based on her prior protected communications to WSDOT and Wooden failed to meet his burden of establishing every element of his counterclaims by clear and convincing evidence as required under RCW 4.24.525(4)(b).

For these reasons, Appellant respectfully requests this court reverse the trial court's ruling on her anti-SLAPP motion and remand for further proceedings consistent with such reversal, including dismissal of Wooden's counterclaims, \$10,000.00 in statutory damages, as well as attorney's fees and costs related to establishing her anti-SLAPP defense as allowed by the anti-SLAPP statutes, and on appeal pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 4th day of January, 2012.

Law Office of Andrew P. Green, PLLC



Andrew P. Green, WSBA #32742
Attorney for Appellant

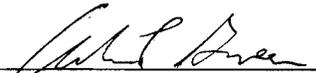
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CERTIFICATE OF SERVICE

I certify that on the 4th day of January, 2012, I caused a true and correct copy of this Appellant's Brief to be served on the following in the manner indicated below:

Counsel for Defendant State () U.S. Mail
Name Glen A. Anderson () Hand Delivery
Address 1250 Pacific Ave., Ste. 105 (X) ABC Legal Messenger
Tacoma, WA 98401-2317

Counsel for Respondent Wooden () U.S. Mail
Name William Michael Hanbey () Hand Delivery
Address 1605 Cooper Point Rd. NW (X) ABC Legal Messenger
Olympia, WA 98507-2575

By: 
Andrew P. Green