

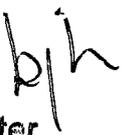
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No. 89674-7

SUPREME COURT
OF THE STATE OF WASHINGTON
COURT OF APPEALS NO. 30902-9-III

Filed 
Washington State Supreme Court

MAY - 8 2014 

Ronald R. Carpenter
Clerk

MICHAEL HENNE,
Plaintiff/Respondent,

v.

CITY OF YAKIMA, a Municipal Corporation,
Defendant/Petitioner.

Brief of Amici Curiae Washington Employment Lawyers Association and
American Civil Liberties Union of Washington.

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I. INTRODUCTION AND ARGUMENT SUMMARY

This case involves the application of RCW 4.24.525, the Washington Anti-SLAPP statute, to a lawsuit brought against the City of Yakima by a former Police Officer. The Plaintiff generally claimed negligence arising out of the City's internal investigations concerning the Plaintiff's alleged misconduct. The City filed a motion to dismiss under the anti-SLAPP statute, and the Plaintiff brought a motion to amend the complaint. The trial court allowed an amendment to the complaint and denied the City's motion to dismiss. The City appealed and the Plaintiff cross appealed arguing that the City was not a "person" within the meaning of the statute. The Court of Appeals ruled that the amendment to the Complaint was proper and the City was a "person" within the meaning of the statute. *Henne v. City of Yakima*, 177 Wn. App. 583, 313 P.3d 1188 (2013) *review granted*, 179 Wn.2d 1022, 320 P.3d 718 (2014).

Applying ordinary rules of statutory interpretation, this Court should reverse the Court of Appeals and rule that the City is not a "person" within the meaning of the statute. A contrary ruling would create absurd results that the legislature could have never intended. Amici take no position on whether the proposed amendment was proper, or whether the City's objection to the amended complaint was waived. Amici also take no position on the merits of Plaintiff's claim.

The breadth of RCW 4.24.525 and the frequency with which anti-SLAPP motions are brought threaten to substantially transform the practice of law in the State of Washington, and pose grave constitutional

questions.¹ While the parties have not raised those issues, the Court's interpretation of the statute and its determination of whether governmental entities are entitled to SLAPP protection should be informed by those constitutional considerations.

II. INTEREST OF AMICI

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 American Civil Liberties Union of Washington (ACLU-WA) is a statewide, nonprofit, nonpartisan organization with over 20,000 members that is dedicated to constitutional principles of liberty and equality. The ACLU-WA has long been committed to the defense and preservation of civil liberties, including the right to free speech and to

¹ In the month of April alone, the Court of Appeals has issued four opinions on the special motion to strike. See *Spratt v. Toft*, 2014 WL 1593133 (Wash. Ct. App. Apr. 21, 2014); *Alaska Structures, Inc. v. Hedlund*, 2014 WL 1593127 (Wash. Ct. App. Apr. 21, 2014); *Davis v. Cox*, WL 1357260 (Wash. Ct. App. Apr. 7, 2014); *Kent L. v. Cox*, No. 71360-4-I (Wash. Ct. App. April 7, 2014). These followed several others issued over just a handful of months. See *City of Seattle v. Egan*, 317 P.3d 568 (Wash. Ct. App. Feb. 3, 2014); *Dillon v. Seattle Deposition Reporters, LLC*, 316 P.3d 1119 (Wash. Ct. App. Jan. 21, 2014); *Thompson v. Nw. Cir.*, 69224-1-I, 2014 WL 231951 (Wash. Ct. App. Jan. 21, 2014); *Akrie v. Grant*, 178 Wn. App. 506, 511, 315 P.3d 567 (2013). In 2013, the Court of Appeals issued opinions in ten such cases, including *Akrie* and *Henne*. Further, Amici understands that petitions for review in *Akrie* and *Dillon* are pending before the Court.

petition. It supports laws which protect an individual exercising those rights from SLAPP suits, but granting the government anti-SLAPP protection undermines the entire purpose of the statute.

III. ARGUMENT

A. Governmental Entities are Not Entitled to Bring Special Motions to Strike under the Anti-SLAPP Statute

1. The Plain Language of the Statute Shows That Government Entities Are Not Persons Who Can Bring a Special Motion to Strike

“Statutory construction begins by reading the text of the statute or statutes involved.” *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196, 199 (2005). In discerning the meaning of the “plain language” of a statute, “[w]e look to ‘the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.’” *Akrie v. Grant*, 178 Wn. App. 506, 511, 315 P.3d 567 (2013).

The Anti-SLAPP statute allows a “party” to bring a “special motion to strike,” RCW 4.24.525(4)(a), and creates a specific procedure that must be followed:

(b) A **moving party** bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

RCW 4.24.525(4)(b) (emphasis added). Contrary to the City’s argument

here that a special motion to strike can be brought by *any* “party,” this statute has a special definition regarding who is a “moving party”:

(c) “Moving party” means a **person** on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

RCW 4.24.525(1)(c) (emphasis added). In turn, the statute defines a “person” as:

(e) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

RCW 4.24.525(1)(e).

This definition does not include “government.” Indeed, “government” is itself defined:

(b) “Government” includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

RCW 4.24.525(1)(b). The legislature therefore specifically considered and defined “government” as playing a role in the Anti-SLAPP process, but declined to include “government” as a “party” entitled to bring a special motion to strike. “When a statute lists the things upon which it operates, we presume the legislature intended the omissions.” *City of Seattle v. Sisley*, 164 Wn. App. 261, 265-66, 263 P.3d 610, 612 (2011)(citing *Washington State Republican Party v. Washington State Pub. Disclosure Comm’n*, 141 Wn.2d 245, 280, 4 P.3d 808, 827 (2000)(“the rule of *expressio unius est exclusio alterius* applies.”))

Indeed, the legislature went further to define a role for government

when a “moving party” brings a motion to strike:

(e) The attorney general’s office *or any government body to which the moving party’s acts were directed* may intervene to defend or otherwise support the moving party.

RCW 4.24.525(4)(e) (emphasis added). Logically, this gives government a role to play to defend the “moving party’s” participation in governmental processes by submitting oral or written statements or documents to that governmental entity, as described in RCW 4.24.525(2)(a-c), but it does not by itself make government a “person” entitled to anti-SLAPP protection for its own actions. “Government” can intervene to support a “moving party” when the moving party is a “person” whose “action involving public participation and petition” needs protection, but government is not itself an eligible “moving party.”

This reading would also be consistent with the general Anti-SLAPP statutory scheme as a whole, as set forth in 4.24.500 *et seq.*, of which .525 is a part. Sections .500 and .510 are “related provisions” to Section .525 and the Court should consider the “statutory scheme as whole.” *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281, 283 (2005). In that regard, RCW 4.24.500 provides, “[t]he legislature finds that the threat of a civil action for damages can act as a deterrent to *citizens* who wish to report information to federal, state, or local agencies.” (Emphasis added). It articulates the legislative purpose to protect “*individuals* who make good-faith reports to appropriate governmental bodies.” *Id.* (Emphasis added). The legislative findings and purpose for enacting Sections .500-520 are related and part of the statutory scheme as whole,

and should be used to interpret .525, which was enacted later.

Similarly, Section .510 creates immunity from suit for any “person” who communicates a complaint to any governmental agency. The “Note” attached to the statute addresses that section’s intent:

Strategic lawsuits against public participation, or SLAPP suits, involve communications *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. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.

(Emphasis added).

The legislative findings for .525 are all consistent with the legislative findings for .500 and .510. The findings for .525, contained in Laws of 2010 ch. 118, include:

(1) 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**; ...

(c) The costs associated with defending such suits 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 **public entities** and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; [emphasis added.]

These findings demonstrate that when the Legislature enacted Section .525 it intended to continue the purposes of Sections .500 and .510: protecting the individual right to free speech and petition the government, not

protecting the government. Section .525 should be harmonized by finding the government is not a person with anti-SLAPP protection under .525.

2. A Municipality Does Not Have First Amendment Rights and Therefore is Not Entitled to Anti-SLAPP Protection.

This Court has already held that, with respect to Section .510, the government does not possess First Amendment rights:

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.

Segaline v. State, Dep’t of Labor & Indus., 169 Wn.2d 467, 473, 238 P.3d 1107, 1110 (2010)(emphasis added). The Court’s reasoning supports the conclusion that the government is not a person with anti-SLAPP protection under RCW 4.24.525. It, along with the analysis of Washington’s statutes set forth above, provides a reason for this Court to interpret the statute differently than the California Court of Appeals has interpreted California’s statute.

Segaline’s reasoning demonstrates why it is immaterial that .510 did not define “person” and .525 did. The purpose of both statutory provisions is to protect the state and federal constitutional rights to speech and to petition of **individuals**, and this Court has unequivocally held that governments do not have such rights. There is no basis to conclude the

legislature intended to change longstanding law and grant the government the same rights as individuals and other non-governmental entities.² Thus, the statutory scheme, taken as a whole, and relevant case law interpreting that scheme, show that the legislature did not intend to give governmental entities the right to anti-SLAPP protection by filing special motions to strike under RCW 4.24.525.

3. Allowing Governmental Entities to Use the Anti-SLAPP Statute to Strike Actions Brought Against Them Would Lead to Absurd Results

“We avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences. The spirit or purpose of an enactment should prevail over the express but inept wording.” *State v. Elgin*, 118 Wn.2d 551, 556, 825 P.2d 314 (1992). An interpretation of this statute allowing governmental entities to bring a special motion to strike (and its inherent \$10,000 penalty, plus attorney’s fees and costs) against its employees or other citizens would lead to absurd results, and would turn the original laudable purpose of the statute on its head.

The City of Yakima argues in favor of a statutory interpretation that would allow it to file a motion to strike in an attempt to defeat virtually all claims brought against the City. It argues that “RCW

² See *Columbia Broadcasting System v. Democratic Nat’l Comm.* (“CBS”), 412 U.S. 94, 139–42 (1973) (Stewart, J., concurring) (“*The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government*”); *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1449 (2014) (“The whole point of the First Amendment is to afford individuals protection against such infringements. The First Amendment does not protect the government, even when the government purports to act through legislation reflecting ‘collective speech’”).

4.24.525, on the other hand, is a procedural device to quickly curtail any litigation targeted at entities lawfully communicating on matters of public or governmental concern.” City’s Appellate Brief at 20, n. 3 (emphasis added). That is incredibly broad. According to the City’s interpretation, there is no action brought against a governmental entity that could not be subject to motion to strike, because by definition, any action brought against a governmental entity would involve communication on matters of “governmental concern.” It is not a stretch to see that governmental entities could bring a special motion to strike in nearly any action brought against them, especially if statements exchanged within governmental entities have anti-SLAPP protection. This would stifle, not protect, individuals’ right to speech and petition, and would undermine government accountability, rendering this statute an absurdity.

More specifically, in this case the City argues that its internal investigation is a “proceeding” within the meaning of the statute, and that those investigations are therefore “public participation.” Again, the City’s argument conflates different parts of the statute to create an absurdity. Municipal investigations concerning employment-related issues occur routinely (and, like police internal investigations, are often confidential while the investigation is ongoing - contrary to being “public” participation). For example, under the Washington Law Against Discrimination (“WLAD”), RCW 49.60, *et seq.*, claims for illegal harassment are commonplace. In such claims the harassed employee typically complains to Human Resources about the harassing conduct.

Under state and federal law, the employer is obligated to investigate the allegations and take appropriate remedial action, and failure to do so is the gravamen of most harassment claims. *See, e.g., Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 404, 693 P.2d 708 (1985)(liability imputed to employer where it failed to take prompt remedial action); *Fuller v. City of Oakland, Cal.*, 47 F.3d 1522, 1529 (9th Cir. 1995)(“an investigation is principally a way to determine whether any remedy is needed and cannot substitute for the remedy itself”). Yet, if the inadequacy of the employer’s harassment investigation is central to the employee’s eventual lawsuit and constitutes a “proceeding” then it would be subject to the anti-SLAPP provisions of RCW 4.24.525. To avoid dismissal and sanctions, the employee (prior to any discovery) must establish by clear and convincing evidence that the claim will succeed. The legislature could have never intended such an absurd result of injecting the anti-SLAPP statute into these employment matters, particularly with a government employer.

In many discrimination or harassment cases, an employee will file a Charge of discrimination with the EEOC or the Washington State Human Rights Commission. The administrative agency will contact the municipal employer and request a response. Typically, the government’s response will assert legitimate reasons for the municipality’s conduct, which under Yakima’s interpretation would constitute a “written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law.” RCW

4.24.525(2)(b). As such it qualifies as “public participation,” and any attempt to rely on that governmental response *for any reason, and regardless of what it says*, would subject the employee to the anti-SLAPP statute. The chilling effect on the employee of any attempt to rely upon the City’s articulated reason for adverse action is overwhelming.

This Court’s “paramount duty in statutory interpretation is to give effect to the Legislature’s intent.” *Hubbard v. Dep’t of Labor & Indus. of State of Washington*, 140 Wn.2d 35, 43, 992 P.2d 1002, 1006 (2000). The purpose of the Anti-SLAPP statute is to promote and protect public participation and petitioning speech. Allowing the government to bring special motions to strike would accomplish *the exact opposite*. Individuals will be deterred from bringing lawsuits, administrative claims, or indeed “any claim, however characterized” against the government for fear of facing a special motion to strike.

In any case involving the government, the power dynamic could not be more skewed. An employee or citizen seeking redress by bringing a claim against the government is fighting a litigant with immense resources. Not only does the government have the resources to bring the motion to strike, it can more easily sustain the loss of \$10,000 plus fees and costs if its motion is found to have been “frivolous or [] solely intended to cause unnecessary delay.” RCW 4.24.525(6)(b). As a result, many citizens will be deterred from bringing claims and petitions for fear

of having to fight a motion to dismiss even if frivolous.³

This statute will be used, and has been used, to stifle the very participation and petitioning activities it was designed to protect. That is an absurd result that does not effectuate the legislature's intent, and it should be avoided. The most prudent way to do that is to hold, consistent with the plain language of the statute, related provisions, and the statutory scheme as a whole, that governmental entities are not "persons" or eligible "moving parties" for purposes of RCW 4.24.525.

B. The Court's Determination of Whether a Government is a Person for Purposes of this Statute Should be Informed by Constitutional Considerations and Concerns

If this case is not resolved by deciding the narrower issue that a governmental entity is not a "person" or "moving party" eligible to bring a special motion to strike under RCW 4.24.525, much larger issues will necessarily come to the fore. Amici recognize that the Washington and federal Constitutional issues outlined below have not been directly addressed by the parties before the Court, but they are of paramount importance and should inform the Court's statutory interpretation. Amici do not, by their submission here, ask the Court to strike down any portion

³ The Court of Appeals recently recognized that Section .525 appears to create an absurd situation because both the movant and the respondent are engaged in protected activity (petitioning the court for redress of grievances) so either could file a special motion to strike, but the Statute favors only one: "Ironically, had Toft sued Spratt, Spratt would arguably have had a cause of action under that same statute for Toft's claims. We are not unmindful of the *absurdity of such a circumstance* and recognize, but do not decide, the conundrum presented by the statute in this situation." *Spratt v. Toft*, 2014 WL 1593133, *5 (Div. I, April 21, 2014) (emphasis added).

of the statute at this time, as it would be inappropriate to do so without briefing from the parties. Amici simply wish to illustrate how the more narrow interpretation of the statute to preclude governments from using the special motion to strike procedure will avoid these questions for now, and is the more prudent course of action.

1. Application of RCW 4.24.525. Especially When the Government is the “Moving Party,” Would Violate the *Noerr-Pennington* Doctrine.⁴

The First Amendment affords immunity to parties who petition a court for redress of grievances so long as their petitions are not frivolous. The *Noerr-Pennington* doctrine bars liability under RCW 4.24.525 to that extent, otherwise the statute would unconstitutionally interfere with the First Amendment right to seek redress by petitioning Washington courts.

Under the *Noerr-Pennington* doctrine, “[t]hose who petition government for redress are generally immune from . . . liability.” *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000)(protecting § 1983 claims “based on the petitioning of public authorities”). “The doctrine immunizes petitions directed at any branch of government, including the executive, legislative, judicial and administrative agencies.” *Id.* “The *Noerr-Pennington* doctrine ensures that those who petition the government for redress of grievances remain

⁴ *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

immune from liability for statutory violations, notwithstanding the fact that their activity might otherwise be proscribed by the statute involved.” *White v. Lee*, 227 F.3d 1214, 1232 (9th Cir. 2000). “With respect to petitions brought in the courts, the Supreme Court has held that a lawsuit is unprotected only if it is a ‘sham’—*i.e.*, ‘objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.’” *Id.* at 1232 (citing *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993)). *See also Empress LLC v. Cty & Cnty of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005).

Here, Officer Henne exercised his First Amendment right to petition the Court for redress, claiming he had been wronged by the government. There is no allegation that his claim is frivolous. In response, his employer, the government of the City of Yakima hindered or punished his exercise of those rights by seeking a \$10,000 penalty and attorneys’ fees as a barrier to relief. *Noerr-Pennington* immunizes Officer Henne from liability for petitioning activity, and the Court should reject the motion to strike in this case as an improper attempt to chill his First Amendment rights.

Although the Washington Court of Appeals has not specifically cited the *Noerr-Pennington* doctrine, it nevertheless has recognized that parts of RCW 4.24.525 may be constitutionally suspect on First Amendment grounds. In *dicta*, the Court in *Akrie v. Grant*, 178 Wn. App. 506, 513 n.8, 315 P.3d 567 (2013), recognized that Section .525 would impair constitutional rights if its burden of proof provisions were used to

punish non-frivolous lawsuits:

Baseless or frivolous litigation is not protected by the First Amendment. *Bill Johnson's Rests., Inc. Nat'l Labor Relations Bd.*, 461 U.S. 731, 743, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); *Reid v. Dalton*, 124 Wn. App. 113, 126, 100 P.3d 349 (2004). However, the anti-SLAPP statute does not sanction and frustrate only claims that are frivolous. Rather, the statute mandates dismissal of all claims based on protected activity where the plaintiff cannot prove by clear and convincing evidence a probability of prevailing on the merits. RCW 4.24.525(4)(b). ... [A] claim may thus also be dismissed on an anti-SLAPP motion without being frivolous. Indeed, analyzing whether the burden to prove the claim by "clear and convincing evidence" has been met is vastly different from an inquiry into frivolity. Accordingly, it is clear that the anti-SLAPP statute sweeps into its reach constitutionally protected first amendment activity.

Id. *Akrie* also expressed concern with misuse of the statute's penalty provisions to violate individual freedom of speech:

The anti-SLAPP statute exacts a content-based restriction on the right to petition, as it imposes a \$10,000 statutory damage award only on those suits that are "based on an action involving public participation and petition." RCW 4.24.525(4)(a). ... "[A]ny statute that purports to regulate such [protected first amendment activity] based on its content is subject to strict scrutiny." [citations omitted.] Whether and at what point a cumulative award of statutory damages that is vastly out of proportion to the relief sought in the underlying lawsuit ceases to be narrowly tailored to achieving the compelling state interests furthered by the anti-SLAPP statute is a question that we leave for another day.

Id. *Akrie* further noted, "[I]t is clear that the anti-SLAPP statute sweeps into its reach constitutionally protected first amendment activity." *Id.* Yet like here, the parties did not raise potential constitutional problems with some parts of the statute, so the Court left that for "another day."

If the Court decides this case on the narrower ground that

governmental entities are not persons or moving parties for purposes of the statute, these thorny issues can be addressed another day, though they will certainly need to be decided in the near future. But if the Court allows the City of Yakima to proceed with anti-SLAPP protection, these issues will become immediately relevant.

2. **Allowing Governmental Entities to Turn the Motion to Strike Procedure Against Individual Free Speech and Petition Rights Would Threaten the Validity of the Statute Based on Separation of Powers Concerns.**

While the Legislature has the power to enact substantive laws to protect individuals from SLAPP suits, the powerful procedural provisions of this statute implicate separation of powers concerns that would be exacerbated if SLAPP protection is afforded to government entities. As this Court has recently stated, procedural parts of statutes may violate separation of powers when they conflict with court rules to such an extent that harmonizing them is impossible:

If “the activity of one branch threatens the independence or integrity or invades the prerogatives of another,” it violates the separation of powers. *Fircrest*, 158 Wn.2d at 394, 143 P.3d 776 (internal quotation marks omitted) (quoting *Moreno*, 147 Wn.2d at 505–06, 58 P.3d 265). 1112 ¶ 10 **Some fundamental functions are within the inherent power of the judicial branch, including the power to promulgate rules for its practice.** *Id.*; *In re Disbarment of Bruen*, 102 Wash. 472, 476, 172 P. 1152 (1918). If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters. *Fircrest*, 158 Wash.2d at 394, 143 P.3d 776.

Putman v. Wenatchee Valley Med. Ctr., P.S., 166 Wn.2d 974, 980, 216

P.3d 374, 377 (2009)(emphasis added)

In *Putman*, this Court was asked to address the constitutionality of provisions of the newly-minted medical malpractice statute, which created a procedural mandate that, at or close to the time of filing a lawsuit for medical malpractice, a plaintiff was required to file a “certificate of merit” from an expert that there is a “reasonable probability that the defendant’s conduct did not follow the accepted standard of care.” *Id.* at 983. This Court held, unanimously, that the certificate of merit requirement directly conflicted with Civil Rules 8 and 11, violating separation of powers. Specifically, this Court held that it conflicted with Rule 11 by requiring “additional verification of the pleadings,” something Rule 11 requires only in very specific circumstances. 166 Wn.2d at 983. The statute also conflicted with Rule 8 by requiring more than a “short and plain statement of the claim” with the opportunity for discovery “to uncover the evidence necessary to pursue their claims.” *Id.* (Citation omitted). Specifically:

The certificate of merit requirement essentially requires plaintiffs to submit evidence supporting their claims before they even have a chance to conduct discovery and obtain such evidence.

Id. (Emphasis added).

Some of the procedural provisions of Section .525 raise separation of powers concerns similar to those in *Putman*, especially when used by the government and other powerful entities to stifle freedom of speech and the right to petition. At the very outset of the case, a defendant can use the anti-SLAPP “special motion to strike” to automatically obtain a stay of

discovery. Without access to discovery, the plaintiff then must come forward with “clear and convincing evidence [establishing] a probability of prevailing on the claim.” RCW 4.24.525(4)(b). Just as the statute struck down in *Putman*, the burden of proof part of the Anti-SLAPP statute requires “plaintiffs to submit evidence supporting their claims before they even have a chance to conduct discovery to obtain such evidence.” *See* 166 Wn.2d at 983. That seems to conflict with Rule 8.

Similarly, the same part of the Anti-SLAPP statute discussed above conflicts with Rule 11 because it requires a higher standard of pleading than the Rule. Just as with the statute in *Putman*, this part of the statute *de facto* requires additional verification of the pleadings under circumstances not required by Rule 11. At the pleading stage, without any discovery, the plaintiff is required to support her claims by “clear and convincing evidence.” In addition, the part of the Anti-SLAPP statute which awards presumed sanctions as a result of bringing a “special motion,” without any showing that the claim was not well-grounded in fact, frivolous, or brought for an improper purpose, conflicts with Rule 11. All a movant needs to show is that the claim is in some way based on actions involving public participation or petitioning, under the extremely broad interpretation of the statute discussed above, and a sanction of \$10,000 plus fees and costs is presumed.⁵

⁵ RCW 4.24.525’s procedures also *potentially* conflict with numerous other Civil Rules promulgated by this Court: **Civil Rule 9** (statute in effect creates a new category of “special matter” not listed); **Civil Rule 12(b)** (statute creates a new and different procedure for dismissal of the case); **Civil Rules 26(b)(1) and 26(c)** (statute turns Rule

Amici recognize that two panels of Division I have (in rather summary fashion) addressed and rejected separation of powers doctrine arguments in conjunction with the Anti-SLAPP statute. *See Spratt v. Toft*, 70505-9-I, 2014 WL 1593133, at *7 (Wash. Ct. App. Apr. 21, 2014); *Davis v. Cox*, 71360-4-I, 2014 WL 1357260, at *11-12 (Wash. Ct. App. Apr. 7, 2014). Those cases are incorrectly decided because the Court of Appeals mistakenly relied on the notion of a “burden of proof” being a substantive part “of a claim,” when that reasoning is not applicable to the Anti-SLAPP procedure. RCW 4.24.525 does not change the burden of proof at trial for any “claim.” It sets up a procedural pre-trial hurdle. Obviously these issues require a more extensive analysis, and they haven’t been raised in this case. The existence of these issues, however, demonstrate why constitutional avoidance principles should be followed here, and the Court should decide this case on the narrower grounds by determining that governmental entities are not entitled to Anti-SLAPP

26 on its head by providing automatic stay of discovery unless good cause is shown, rather than the other way around under the rule); **Civil Rule 41(a)(A)** (statute does not appear to permit voluntary dismissal to escape sanction, which would be allowed under the Rule); **Civil Rule 56** (statute does not require the initial showing of entitlement to judgment on the merits as a matter of law; requires moving party to show not merely that there are issues of material fact that preclude summary judgment, but that he has a “probability” of success by “clear and convincing” evidence; also, statute does not require that the evidence be viewed in the light most favorable to the non-movant); **Civil Rule 56(f)** (statute prohibits discovery unless the non-moving party shows “good cause,” instead of the lesser showing that discovery is needed that might preclude summary judgment. *But see Kent L. v. Cox*, No. 71360-4-I (Div. I, April 7, 2014) (“the ‘good cause’ standard is similar to Civil Rule (CR) 56(f), which allows a party facing a summary judgment motion to seek a continuance to engage in discovery ‘essential to justify his opposition.’”).

protection. The separation of powers argument looms large in this statute, and should be avoided for now by precluding the City of Yakima from availing itself of this procedure under the Anti-SLAPP statute.

IV. CONCLUSION

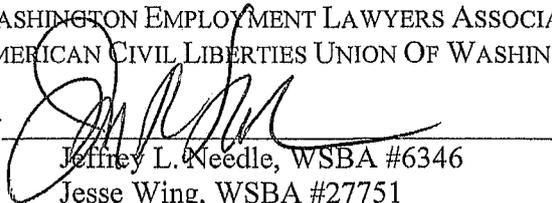
The plain language of the statute taken as a whole mandates an interpretation that municipalities are not “persons” empowered as a “moving party” within the meaning of the statute. Moreover, the purpose of Anti-SLAPP protection is to safeguard the First Amendment rights of individuals, which this Court has already held government entities do not possess. For these reasons alone, this Court should reverse the Court of Appeals. In light of the grave constitutional questions that would otherwise be presented, constitutional avoidance principles should be followed here, and the Court should decide this case on narrower grounds by determining that governmental entities are not entitled to Anti-SLAPP protection.

DATED this 29th day of April, 2014.

Respectfully submitted,

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

By



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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the United States that on April 29, 2014, I emailed for filing the MOTION TO APPEAR AS AMICI CURIAE FOR PLAINTIFF/ RESPONDENT to the Supreme Court for the State of Washington at supreme@courts.wa.gov pursuant to the Supreme court protocols for electronic filing at: http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/?fa=atc_supreme_clerks.display&fileID=fax

On April 29, 2014, I also served the MOTION on the following:

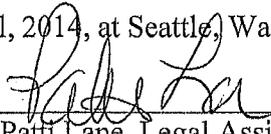
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DATED this 29th day of April, 2014, at Seattle, Washington.



Patti Lane, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Patti Lane
Subject: RE: Henne v. City of Yakima; No. 89674-7 - Mtn to Appear Amici Curiae for Plntf/Resp; Brief of Amici Curiae WELA and ACLU-WA

Rec'd 4/29/14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Patti Lane [mailto:pattil@MHB.com]
Sent: Tuesday, April 29, 2014 3:12 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: jneedle@wolfenet.com; dunne@aclu-wa.org; talner@aclu-wa.org; Joseph R. Shaeffer; Jesse Wing
Subject: Henne v. City of Yakima; No. 89674-7 - Mtn to Appear Amici Curiae for Plntf/Resp; Brief of Amici Curiae WELA and ACLU-WA

Attached is the Motion to Appear Amici Curiae for Plaintiff/Respondent and the Brief of Amici Curiae Washington Employment Lawyers Association and American Civil Liberties Union of Washington for filing in *Henne v. City of Yakima*, No. 89674-7. Thank you.

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