

**FILED**

AUG 12 2013

No. 309029-III

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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MICHAEL HENNE,

Plaintiff/Respondent,

v.

CITY OF YAKIMA, a Municipal Corporation

Defendant/Appellant.

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BRIEF OF *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION  
FOR MUNICIPAL ATTORNEYS IN SUPPORT OF APPELLANT

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## I. INTRODUCTION

Washington State Association of Municipal Attorneys is an organization whose membership is made up of attorneys for most of the cities and towns in the State of Washington. Washington has 281 cities and towns, ranging from Seattle, at over half a million citizens, to Krupp, with a population of about 60. All of these municipalities receive input from the public; that input may frequently consist of reports or complaints against police officers. This case presents the question whether those police officers against whom reports of alleged misconduct come in may retaliate against the city employing them by filing a lawsuit against such city alleging such causes of action as defamation—causes of action related to the complaint against the officer.

This case also affects other kinds of complaints from the public, or from other employees, related to public employees. If the subject employee may sue his or her employer for fielding the report of alleged wrongdoing and passing it on, much of the beneficial purpose of the anti-SLAPP laws will be lost.

WSAMA believes that the trial court committed error by limiting RCW 4.24.525 to those few situations in which a developer seeks to squash opposition to a project by suing neighbors who oppose the

development. Surely the anti-SLAPP laws will *also* apply in those circumstances, but the legislature drafted the two statutes, and the governor signed them into law, with much more broadly-based language.

## II. INTERESTS OF AMICUS CURIAE

The interest of amicus curiae is set forth above, in the motion submitted herewith, and in the declaration of counsel submitted herewith.

## III. STATEMENT OF THE CASE

WSAMA agrees with and adopts the Statement of the Case found at pp. 5-15 of the Brief of Appellant, as if fully set forth herein.

## IV. ARGUMENT

### **A. THE PURPOSES OF THE LEGISLATURE WOULD BE SERVED BY REVERSING THE TRIAL COURT IN THIS CASE.**

The anti-SLAPP statutes were adopted for a single salutary purpose, to permit the reporting of wrongdoing to the appropriate government agency without fear of retaliatory lawsuits. Thus, if A learns that B is violating the law, A may report B to the appropriate government agency without fear that B will sue A for defamation (or other causes of action related to information sharing).

Enacted in 1989, RCW 4.24.510 was the first anti-SLAPP statute in the nation. This statute is limited, in that it protects only those statements made to federal, state, or local government in the course of

decision-making. See RCW 4.24.510 (protecting those who communicate “to any branch or agency of federal, state, or local government”).

Importantly, RCW 4.24.510 created immunity from civil liability for those communications.

There is lesser immunity under RCW 4.24.525, but Sec.525 has a broad scope, and more teeth. Under that statute, immunity is only imputed when the plaintiff is “unable to establish a prima facie case supporting his or her cause of action.” Bruce E.H. Johnson, Sarah K. Duran, *A View From the First Amendment Trenches: Washington State’s New Protections For Public Disclosure and Democracy*, 87 Wash. L. Rev. 495, 497 (2012) (emphasis added) (Johnson and Duran were involved in the drafting and enactment of RCW 4.24.525). As the drafters added: By adopting RCW 4.24.525 in 2010, the Washington Legislature “significantly expand[ed] protections for the free speech rights of individuals, *government entities*, and others.” Bruce E.H. Johnson, Sarah K. Duran, *supra*, 87 Wash. L. Rev. at 497 (emphasis added).

Ultimately, RCW 4.24.525 was later adopted “to protect participants in public controversies from an abusive use of the courts.” S.Rep. No. 118 – 10, at 2 (Wash. 2010) (statement of intent). Even though Sec.510 created immunity, retaliatory lawsuits were still being filed, and

still costing the persons who had to respond to those lawsuits money and time. In contrast, the purpose of 4.24.510 was much narrower, essentially to protect “advocacy to government.” *See* RCW 4.24.510. RCW 4.24.525 was designed to protect more than advocacy to government; its purpose is to protect participation in “matters of public concern” and provide a procedure for “efficient, uniform, and comprehensive method for speedy adjudication of [SLAPP]” suits. *See* RCW 4.24.525 (Findings and Purpose).

Thus while the two statutes may be read in tandem, they are not the same, and their language and purposes reflect differing legislative goals. Section .510 provides broader immunity, but less protection for appropriate defendants. Section .525 provides less immunity, but its scope is much broader. Nonetheless, the legislature is presumed to have known, when it acted, of the existence of .510 and its judicial constructions. The two statutes do work together.

WSAMA believes that, to the extent that RCW 4.24.525 can be read in tandem with RCW 4.24.510, the earlier statute (.510) was broadened by adoption of RCW 4.24.525. This is because, while .510 contains no definition of the “persons” protected by its umbrella, RCW 4.24.525 does provide those definitions, at Sec. (1)(e): “(e) ‘Person’

means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity.” Thus while it may be unclear from the language of .510 whether the legislature intended the immunity it provided to extend to municipal corporations, there can be no doubt that cities *are* covered by RCW 4.24.525. To the extent that RCW 4.24.525 protects those exercising First Amendment rights to speech or petition, it should be noted that Yakima does have recognized First Amendment rights.<sup>1</sup>

The trial court’s decision, however, effectively eviscerates that beneficial legislative purpose. Under its ruling, while an individual reporter enjoys Section .510 immunity and can make a .525 motion, that individual’s employer *can* be sued, under a vicarious liability theory. This end-run around the anti-SLAPP laws should not be tolerated.

Indeed, using the hypothetical set forth above, if A reports B to government agency C, and an employee of C realizes that the information must go to a different department of C or another agency entirely, C can

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<sup>1</sup> Just like any corporation, a municipal corporation is protected under the First Amendment. *See First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-84 (1978); *see also County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D. N.Y. 1989) (finding a county, as a municipal corporation, had a constitutional first amendment right to petition administrative agencies). Thus, a municipal corporation does indeed have rights under the First Amendment.

be subjected to a retaliatory lawsuit. Thus government managers would have to direct employees not to share the very information RCW 4.24.510 and .525 were designed to encourage, to the very department or agency that can make use of the information.

The public detriment from this rule is obvious, and the inconsistency between this result and the language of the anti-SLAPP laws is also evident. The legislature could not reasonably have intended that the *first* report of the information in question (about public employees, about matters of public concern) should be immune, but any *later* dissemination to the government department or agency needing the information would not be immune.

WSAMA thus believes and asserts that reversal of the trial court is required to serve the public interest, and the beneficial purposes of RCW 4.24.525.

**B. A PLAINTIFF FILING A RETALIATORY LAWSUIT SHOULD NOT BE ALLOWED TO AVOID PAYING FOR FEES AND PENALTIES BECAUSE HE/SHE AMENDED THE COMPLAINT LATER.**

The beneficial purposes of RCW 424.525 would be lost in many cases if a plaintiff could have a “do-over” once he or she realized that immunity, penalties and fees were the price of filing a retaliatory lawsuit. Indeed, a plaintiff’s counsel has ethical and CR 11 duties to be aware of

such issues before filing the lawsuit to begin with. Filing a lawsuit necessarily triggers a response, which costs the defendant city in money, staff time, and focus. The City of Yakima should have been entitled to serve the public, rather than retaining counsel to fight a SLAPP suit.

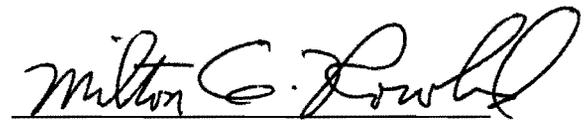
WSAMA joins in Yakima's briefing on this subject, at pp. 45-48 of the Brief of Appellant. WSAMA's purpose in addressing this issue separately is to advise this Court that the problem is endemic, and common to cities across this State.

#### V. CONCLUSION

Based upon the foregoing, your Amicus respectfully requests this Court to decide this case consistently with the views and points expressed herein. The trial court must be reversed.

RESPECTFULLY SUBMITTED this 12th day of August, 2013.

FOSTER PEPPER PLLC



Milton G. Rowland WSBA No.

15625

WSAMA Amicus Committee

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CERTIFICATE OF SERVICE

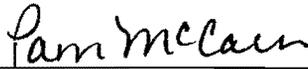
I, Pam McCain, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on August 12, 2013, I delivered a true and correct copy of Washington State Association of Municipal Attorneys' Motion for Permission to File Brief of Amicus Curiae, Declaration of Milton G. Rowland in Support of Washington State Association of Municipal Attorneys' Motion for Permission to File Brief of Amicus Curiae, and Brief of Amicus Curiae Washington State Association for Municipal Attorneys in Support of Appellant, concerning the above entitled matter, on the following parties *via U.S. Mail, postage prepaid*:

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**COPY**

SIGNED at Spokane, Washington, this 12th day of August, 2013.

  
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Pam McCain