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No. 97734-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROGER LEISHMAN,

Respondent,

v.

OGDEN MURPHY WALLACE, PLLC,
and PATRICK PEARCE,

Petitioners.

**PETITIONERS OGDEN MURPHY WALLACE, PLLC, &
PATRICK PEARCE'S RESPONSE TO AMICUS BRIEF OF
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON**

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I. INTRODUCTION

Despite acknowledging throughout its brief that RCW 4.24.510 is to be read “broadly” so as to cover any “person” who “communicates” “information” to the government, the American Civil Liberties Union of Washington (“ACLU-WA” or “Amicus”) erroneously argues the statute does not protect Defendants Ogden Murphy Wallace, PLLC, (“OMW”) and Patrick Pearce (“Pearce”) from Plaintiff Roger Leishman’s (“Leishman’s”) lawsuit simply because of their contract with the Washington State Attorney General’s Office (“AGO”). ACLU-WA Br. at 7-8, 10, 17. Recognizing that Pearce (an individual) and OMW (a PLLC) would ordinarily qualify as “person[s]” under RCW 4.24.510, ACLU-WA forsakes textual analysis in favor of relying on select legislative history and inapposite case law. But none of that authority supports ACLU-WA’s largely policy-driven argument that RCW 4.24.510 protects only those individuals or organizations petitioning the government on their own behalf. Rather, the text of the statute, its legislative history, and Washington case law all demonstrate the legislature intended RCW 4.24.510 to apply broadly to any person providing information to the government in order to facilitate early dismissal of strategic lawsuits against public participation (“SLAPP”) like the one at issue here and to ensure the free flow of information to the government. Without the

statute's protections, individuals like Pearce and entities like OMW would be discouraged from providing full and accurate information to the government (or even contracting with the government in the first place) for fear of becoming the target of a SLAPP suit.

ACLU-WA also fails to address the statute's other elements, all of which Pearce and OMW satisfy. Because all of RCW 4.24.510's elements are met here, Pearce and OMW are immune from Leishman's suit. The Court should therefore reverse and reinstate the trial court's judgment.

II. ARGUMENT

A. ACLU-WA Misinterprets the Meaning of "Person" Under RCW 4.24.510.

1. ACLU-WA Offers No Textual Analysis.

ACLU-WA recites the requirements of RCW 4.24.510, but makes the same mistake as the Court of Appeals by failing to offer any textual analysis of the statute's definition of "person." ACLU-WA's approach is contrary to this Court's established procedure for statutory interpretation, which "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789 (2004). As Pearce and OMW explained in their briefing, individuals like Pearce and PLLCs like OMW fall squarely within the plain meaning of the term "person" as used in RCW 4.24.510. Pet'rs' Suppl. Br. at 6.

ACLU-WA also fails to discuss, let alone identify, the allegedly irrelevant authority Pearce and OMW rely upon in their plain language analysis. ACLU-WA Br. at 11 n.8. Regardless, all of the authority cited by Pearce and OMW is relevant to determining the meaning of “person” under RCW 4.24.510 because a plain language analysis includes examination of “related statutes or other provisions of the same act in which the provision is found[.]” *See State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002).

Moreover, contrary to ACLU-WA’s contention, the Court of Appeals limited the definition of “person[s]” to “private citizen whistleblowers.” ACLU-WA Br. at 12; *Leishman v. Ogden Murphy Wallace PLLC*, 10 Wn. App. 2d 826, 830, 451 P.3d 1101 (2019). This conclusion departs dramatically from the plain language of RCW 4.24.510 and impermissibly “add[s] words [to the statute] where the legislature has chosen not to do so.” *Christensen*, 153 Wn.2d at 194; Pet’rs’ Suppl. Br. at 5-6. The Court should reject such a strained interpretation of RCW 4.24.510, which, as ACLU-WA concedes, “should be construed broadly[.]” ACLU-WA Br. at 7.

2. ACLU-WA's Reading of the Legislative History Is Overly Narrow.

ACLU-WA's assertion that the sole purpose of RCW 4.24.510 is to "protect the right to petition" is not supported by the statute's legislative history. ACLU-WA Br. at 2. Rather, the legislative history demonstrates that the statute more broadly protects "communications" made to the government by "individuals or organizations" "so long as [the communication] is designed to have some effect on government decision making." Laws of 2002, ch. 232, § 1. Given Pearce and OMW were retained by the AGO to investigate Leishman's claims of workplace discrimination and submit a report, the work they performed was intended to have an effect on the AGO's decision as to how to resolve Leishman's claims. Applying RCW 4.24.510's protections to Pearce and OMW would therefore align with the stated legislative intent of the statute.

ACLU-WA's argument that Pearce and OMW are not entitled to RCW 4.24.510's protection because they were not exercising their petition rights also contravenes the legislature's intent to protect communications to the government "regardless of content or motive." Laws of 2002, ch. 232, § 1. As Pearce and OMW explained in their brief, the legislature chose to make the content of the communication and the speaker's intent irrelevant when it eliminated the "good faith" requirement in 2002. Pet'rs'

Suppl. Br. at 17-18; *see also Bailey v. State*, 147 Wn. App. 251, 261-63, 191 P.3d 1285 (2008) (2002 legislative amendments eliminated “good faith” requirement and thus a court’s inquiry into the “motive” for the communication). Accepting ACLU-WA’s argument would therefore reintroduce an inquiry into the speaker’s motive and undermine the legislature’s intent to facilitate early dismissal of SLAPP suits. Pet’rs’ Suppl. Br. at 12, 17-19. Put another way, it would require courts to conduct a “factual” inquiry into the content of, or motivation behind, the communication, and would therefore lead to “costly discovery and motions practice,” which ACLU-WA acknowledges are “precisely the costs” RCW 4.24.510 is “intended to avoid.” ACLU-WA Br. at 8 n.6.

Moreover, ACLU-WA’s argument is internally inconsistent. ACLU-WA concedes that “neither the content of the speech or the source of the information conveyed should affect [RCW 4.24.510’s] protections,” but then concludes that Pearce and OMW are not entitled to immunity because they were not exercising their right of petition. ACLU-WA Br. at 8. Regardless, ACLU-WA’s argument is baseless because ACLU-WA fails to cite any Washington authority for the proposition that “the history of petitioning has never included reports or investigations” like the ones at issue here. *Id.* at 2, 8-10. Case law in fact holds the opposite, i.e., that individuals like Pearce and organizations like OMW do not lose First

Amendment protections merely because they contracted with the government. Pet'rs' Suppl. Br. at 13 & n.11; *see also, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011) (a “great deal of vital expression . . . results from an economic motive” and is protected under the First Amendment). Thus, none of ACLU-WA’s arguments regarding the legislative history of RCW 4.24.510 have any merit.

3. ACLU-WA Misconstrues and Overlooks Relevant Case Law.

ACLU-WA concedes that RCW 4.24.510 applies “to a variety of persons including individuals, nonprofit groups, and corporate entities,” and Washington courts applying the statute so recognize. *See* ACLU-WA Br. at 13; Pet'rs' Suppl. Br. at 8-9 & related notes (collecting cases, e.g., *Dang v. Ehredt*, 95 Wn. App. 670, 681-84, 977 P.2d 29 (1999)). But in arguing that such a broad interpretation of RCW 4.24.510 does not extend to persons acting under a contract to provide information to the government, ACLU-WA fails to acknowledge, let alone distinguish, *Harris v. City of Seattle*, 302 F. Supp. 2d 1200 (W.D. Wash. 2004), *aff'd*, 152 F. App'x 565, 569-70 (9th Cir. 2005). *Harris* is particularly on point. Pet'rs' Suppl. Br. at 8 n.6, 13-14. There, the court held that an external consulting firm hired by the city to perform an investigation and submit a

report regarding allegations of a hostile workplace environment was immune from an employee's claims based on that investigation and report. 302 F. Supp. 2d at 1201-03.

ACLU-WA instead relies on cases involving government entities. ACLU-WA Br. at 10-11, 13. But as explained in prior briefing, *Segaline v. State, Dep't of Labor & Indus.*, 169 Wn.2d 467, 238 P.3d 1107 (2010), is inapposite because it addresses only the "narrow issue" of whether a "government agency [itself]" is a "person" under RCW 4.24.510, whereas here Pearce is an individual and OMW is a PLLC. *Id.* at 473; *see also* Pet'rs' Suppl. Br. at 6-7; *Diamond Concrete, LLC v. Pac. Nw. Reg'l Council of Carpenters*, No. C11-5360BHS, 2011 WL 3102759, at *2 (W.D. Wash. July 25, 2011) (unreported) ("*Segaline's* holding is limited to governmental agencies[.]").¹ Similarly, *Henne v. City of Yakima*, 182 Wn.2d 447, 341 P.3d 284 (2015), is not on point because the Court considered the "narrow" question of whether a municipality could take advantage of anti-SLAPP protections where "the challenged lawsuit [wa]s not based on the government's own communicative activity." *Id.* at 454,

¹ *Segaline* in fact supports immunizing Pearce and OMW from Leishman's claims because all nine justices in that case concluded RCW 4.24.510 applies to a "non-government individual or organization." 169 Wn.2d at 474 n.4 (internal quotes omitted); *id.* at 482-83 (Madsen, J., concurring) (RCW 4.24.510 protects "private individuals and organizations"); *id.* at 484 (Johnson, J., concurring and dissenting) ("The plain wording of the statute's intent is clear: the protections of RCW 4.24.510 apply equally to both individuals **and** organizations." (emphasis in original)).

449. Here, by contrast, Pearce and OMW are private parties and Leishman’s suit is based on their communications to the AGO. ACLU-WA’s reliance on *Castello v. City of Seattle*, No. C10-1457MJP, 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010), is also misplaced given the case involved claims brought against city paramedics and firefighters, i.e., government employees. *Id.* at *1.²

In attempting to justify its reliance on those cases, ACLU-WA incorrectly regards Pearce and OMW’s speech as that of the government. *See, e.g.*, ACLU-WA Br. at 10 (RCW 4.24.510 does “not [] extend” to “government speech”); *see also id.* at 2, 4, 8, 17. But as Leishman alleged in his complaint and as Pearce and OMW’s contract demonstrates, Pearce and OMW were “not” acting as “agents” or “employees” of the AGO. CP 129; *see also* CP 2 ¶ 8, 9 ¶¶ 69, 71; Pet’rs’ Suppl. Br. at 12-13. Instead, they were acting as external investigators. In other words, in preparing the report to the AGO, Pearce and OMW were not speaking “on behalf of the government” (as ACLU-WA incorrectly argues), but **to** the government, on a matter of concern to the AGO, about which the AGO had specifically sought an outside opinion. ACLU-WA Br. at 12.

² *Henne* and *Castello* are also inapposite because the courts there analyzed RCW 4.24.525, a separate statute than the one at issue here. *See Henne*, 182 Wn.2d at 456-57; *Castello*, 2010 WL 4857022, at *4-*6.

Moreover, ACLU-WA's mere assertion that Pearce and OMW were performing the "work of a government agency" does not provide the Court with any guidance for deciding future cases. *Id.* at 2, 4, 8, 17. It also fails to consider Washington's existing framework for determining whether a private entity is acting on behalf of the government. Pet'rs' Suppl. Br. at 13 & n.12. Under that framework, Pearce and OMW's conduct is not attributable to the government because they were investigating complaints of workplace discrimination and were therefore not carrying out the governmental functions of the AGO as the "legal adviser of the state officers[.]" *See* Wash. Const. art. III, § 21; *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 517-18, 387 P.3d 690 (2017) (a "private entity" is to be "treated as the functional equivalent of an agency" only when certain factors are met, including "whether the entity performs a government function"); *id.* at 524 (a governmental function is one that cannot be "delegated to the private sector").

ACLU-WA also incorrectly relies on Justice Madsen's sole concurrence in *Segaline*, which is not controlling. ACLU-WA Br. at 13-16; Pet'rs' Suppl. Br. at 7 n.3 & 11 n.9. Regardless, Justice Madsen's concurrence supports applying immunity here because, contrary to ACLU-WA's assertion, the same "intimidation factor" discussed by Justice Madsen applies to external investigators like Pearce and OMW.

ACLU-WA Br. at 16; *see also Segaline*, 169 Wn.2d at 480-82 (Madsen, J., concurring) (RCW 4.24.510 provides SLAPP targets with an “efficient remedy,” i.e., early dismissal, in order to “remove the threat and burden” of “considerable litigation” that would “otherwise deter” communications (internal quotes omitted)). As Pearce and OMW explained in their brief, external investigators do not have access to the same resources that protect government entities from the threat of civil litigation. Pet’rs’ Suppl. Br. at 10. They do not have the benefit of the more than 500 lawyers in the AGO’s in-state legal team or the deep pocket of the State.³ Immunity is therefore important for external investigators like Pearce and OMW so as not to discourage them from providing full and accurate information to the government for fear of becoming the target of a SLAPP suit. *Id.*⁴

ACLU-WA overstates the significance of *Kobrin v. Gastfriend*, 443 Mass. 327, 821 N.E.2d 60 (2005), a case Justice Madsen cited in her concurrence. Justice Madsen did not conclude that the differences between RCW 4.24.510 and the Massachusetts statute at issue in *Kobrin* were “formal rather than substantive,” as ACLU-WA mistakenly claims. ACLU-WA Br. at 15. Rather, Justice Madsen merely cited *Kobrin*

³ *See* Wash. State Office of the Attorney General, Divisions, <https://www.atg.wa.gov/divisions> (last visited May 21, 2020).

⁴ Neither the prospect of compensation nor the availability of insurance removes this intimidation factor given the administrative and financial burdens of protracted civil litigation and the expense of maintaining insurance. ACLU-WA Br. at 14.

without analyzing the language of the Massachusetts statute or discussing the facts or holding of the case. *See Segaline*, 169 Wn.2d at 482-83 (Madsen, J., concurring) (noting similarity between the Massachusetts statute and RCW 4.24.510 only “insofar as RCW 4.24.510” encompasses “petitioning the government to influence decision-making”).

In any event, *Kobrin* is distinguishable on the facts and the law. There, the board of medicine hired an investigator for its own disciplinary proceedings against a physician, whereas here Pearce and OMW were retained by the AGO to investigate Leishman’s (not the AGO’s) complaints. 443 Mass. at 328; CP 6 ¶ 41. Moreover, *Kobrin* was based on the court’s “construction of the statutory phrase ‘said party’s exercise of **its** right of petition,’” a limitation that is not included in RCW 4.24.510. *See Cardno ChemRisk, LLC v. Foytlin*, 476 Mass. 479, 485, 68 N.E.3d 1180 (2017) (quoting Mass. Gen. Laws ch. 231, § 59H) (emphasis in original)); *see also Kobrin*, 443 Mass. at 330 (holding that defendant was not exercising his “right of petition under the constitution **within the meaning of the statute**” (emphasis added and internal quotes omitted)). Tellingly, even a case cited by ACLU-WA demonstrates that *Kobrin* is “legally inapposite” because “there is no showing” that the “Massachusetts statute [addressed in *Kobrin*] mirrors RCW 4.24.510.” *Castello*, 2010 WL 4857022, at *9; ACLU-WA Br. at 13 (citing *Castello*).

Rather, as Pearce and OMW explained in their brief, “the Massachusetts statute was more narrowly tailored” than RCW 4.24.510. *Castello*, 2010 WL 4857022, at *9; Pet’rs’ Suppl. Br. at 11-12. *Kobrin* therefore is not “of even persuasive value.” *Castello*, 2010 WL 4857022, at *9; *see also Davis v. Cox*, 183 Wn.2d 269, 283, 351 P.3d 862 (2015) (this Court is “cautious in looking beyond our state’s statute” because “the details of [anti-SLAPP] statutes vary significantly”), *abrogated on other grounds, Maytown Sand & Gravel, LLC v. Thurston Cty.*, 191 Wn.2d 392, 440 n.15, 423 P.3d 223 (2018).

Finally, contrary to ACLU-WA’s assertion, no Washington court has held that for purposes of RCW 4.24.510 the “cause of action itself must be based on an act in furtherance of the right of free speech.” ACLU-WA Br. at 11. The only case ACLU-WA cites for this proposition concerned RCW 4.24.525, a different statute this Court subsequently struck down “as a whole.” *Davis*, 183 Wn.2d at 295; ACLU-Br. at 11 (citing *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1109-1111 (W.D. Wash. 2010)).⁵ Regardless, ACLU-WA fails to cite any

⁵ That RCW 4.24.525 is not relevant to the question presented here is further supported by the fact that none of the justices in *Segaline* considered that statute even though it had gone into effect before the case was decided. *See Segaline*, 169 Wn.2d at 470-86; Laws of 2010, ch. 118, § 2. But to the extent the Court relies on RCW 4.24.525, it should also consider *Miller v. Watson*, No. 3:18-cv-00562-SB, 2019 WL 1871011 (D. Or. Feb. 12, 2019), *report and recommendation adopted*, 2019 WL 1867922 (Apr. 25, 2019), which analyzed a nearly identical Oregon statute and which the Oregon court held protected an external investigation conducted by a law firm. *Id.* at *1, *5. Moreover, because the

authority to support its argument that Pearce and OMW were not exercising their right of free speech and also fails to account for cases granting First Amendment protections to “speech [that] is sold.” *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).⁶

In sum, the Court should reject ACLU-WA’s overly narrow interpretation of the term “person.” The plain language of RCW 4.24.510, its legislative history, and Washington case law all demonstrate that the term “person” covers individuals like Pearce and PLLCs like OMW even if they contract with the government.

B. ACLU-WA Does Not Dispute That Pearce and OMW Satisfy RCW 4.24.510’s Remaining Elements.

ACLU-WA fails to address the other elements of RCW 4.24.510, all of which are met here. First, as ACLU-WA concedes, RCW 4.24.510 applies even where the “complaint or information” communicated to the government “comes originally from the government [] itself.” ACLU-WA Br. at 8 n.6. The OMW Report is therefore a “complaint or information”

language of the Oregon statute more closely resembles RCW 4.24.525 than the statute at issue in *Kobrin, Miller* provides better guidance here. *Compare* RCW 4.24.525(2), with Or. Rev. Stat. § 31.150(2), and Mass. Gen. Laws ch. 231, § 59H.

⁶ ACLU-WA is mistaken that Pearce and OMW’s compensation did not factor into the Court of Appeals’ decision. ACLU-WA Br. at 13-16; *Leishman*, 10 Wn. App. 2d at 832 (“[A] government contractor is not immune from liability for providing **paid** communications to a government agency.” (emphasis added)); *id.* at 836 (“The contractor benefits from **being paid** for its services and any communication to the government agency as a result of the services rendered is not the type of communication that RCW 4.24.510 was intended to protect.” (emphasis added)).

for purposes of RCW 4.24.510 even though it contains information from the AGO. Pet'rs' Suppl. Br. at 13-14.

Second, like the Court of Appeals, ACLU-WA does not address whether Leishman's complaint alleges any conduct that is not "based upon" the OMW Report. As Pearce and OMW explained in their briefing, all of Leishman's claims concern the OMW Report, the method of creating the OMW Report, the investigation leading to the OMW Report, or the events surrounding the OMW Report. Pet'rs' Suppl. Br. at 14-16; *see also* CP 6-9 ¶¶ 44, 53, 58-64. All of Leishman's claims are therefore "based upon" the OMW Report and the events leading up to it under controlling case law. *See Dang*, 95 Wn. App. at 682-84; *Harris*, 302 F. Supp. 2d at 1201-04.

Finally, ACLU-WA does not dispute that the matters covered in the OMW Report are "reasonably of concern" to the AGO. Because the OMW Report arose from a workplace discrimination complaint and was used to make a workplace employment decision, the OMW Report concerns a matter of concern to the AGO. Pet'rs' Suppl. Br. at 16-17; *Harris*, 302 F. Supp. 2d at 1203; *Bailey*, 147 Wn. App. at 262.

C. ACLU-WA's Policy Arguments Are Irrelevant and Without Merit.

ACLU-WA's policy arguments on the proper interpretation of RCW 4.24.510 are not relevant to the legal question before the Court. *See Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 421, 334 P.3d 529 (2014) (rejecting amici's policy arguments); Pet'rs' Suppl. Br. at 20 n.14. Regardless, these policy arguments fail on the merits.

Contrary to ACLU-WA's assertion, granting immunity to external investigators like Pearce and OMW would not "insulate" the government's decisions from judicial review. ACLU-WA Br. at 16. Rather, as demonstrated by Leishman's separate employment-related claim against the AGO (which Leishman and the AGO settled), the government could still be directly liable for its workplace decisions. CP 9 ¶¶ 67-69; Corrected Pet. Review at 18. Moreover, by citing to *Segaline* and *Henne* as support for this argument, ACLU-WA acknowledges those cases apply only to the government itself and do not control the outcome of this appeal, i.e., whether RCW 4.24.510's immunity extends to individuals like Pearce and PLLCs like OMW. ACLU-WA Br. at 16.

Nor would application of RCW 4.24.510 in this case lead to absurd results, as ACLU-WA argues. ACLU-WA Br. at 17. RCW 4.24.510 prohibits liability based only on the content of a communication, not the

performance of a contract. *See* Laws of 2002, ch. 232, § 1 (the statute protects communications to the government “regardless of content or motive”). For example, if Pearce and OMW failed to conduct the investigation as required by the terms of the contract, Pearce and OMW would still be liable for breach. Moreover, ACLU-WA fails to cite, and Pearce and OMW are not aware of, a case in which this Court applied RCW 4.24.510 to bar a lawsuit brought by the recipient of the information, i.e., the other party to the contract, as opposed to a suit initiated by a separate third party.

Further, ACLU-WA fails to address the drawbacks of allowing Leishman’s suit to proceed despite acknowledging that SLAPP suits in general have “enormous” negative consequences. ACLU-WA Br. at 5. Under ACLU-WA’s own logic, subjecting Pearce and OMW to liability here would deter the large swath of individuals and entities that work with government agencies from reaching conclusions critical of agency supervisors, or working with the government at all, because SLAPP suits may deter not only the target of the suit but also “other persons from speaking out” in the future. *Id.* The important public purposes that are served when government entities retain outside experts to address matters of concern, such as promoting fair and unbiased investigations, thus

further support applying RCW 4.24.510 in this case. Pet'rs' Suppl. Br. at 19-20.

In sum, ACLU-WA's policy arguments are not relevant to the issues in this appeal and are meritless in any event. The Court should disregard these arguments.

III. CONCLUSION

The Court should reverse the Court of Appeals and reinstate the trial court's grant of judgment on the pleadings.

RESPECTFULLY SUBMITTED this 22nd day of May, 2020.

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