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No. 97734-8

NO. 77754-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I

ROGER LEISHMAN,

Appellant,

v.

OGDEN MURPHY WALLACE PLLC and
PATRICK PEARCE,

Respondents.

BRIEF OF APPELLANT ROGER LEISHMAN

Appellant Roger A. Leishman
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INTRODUCTION AND SUMMARY OF ARGUMENT

In 1989, the Washington Legislature passed the “Brenda Hill” anti-SLAPP act to protect citizen whistleblowers who report potential misconduct to relevant government agencies. This appeal presents an issue of first impression under Washington law: when it enacted RCW 4.24.510, did the Legislature intend to grant **absolute immunity** from civil liability for injuries caused by **government vendors** in connection with their contractual engagements?

Plaintiff Roger Leishman is a distinguished attorney and public servant who was formerly employed by the Washington Attorney General’s Office as chief legal advisor to Western Washington University. Defendants Ogden Murphy Wallace PLLC and Patrick Pearce are licensed private investigators. After Leishman complained about homophobic conduct by his supervisor, the AGO told Leishman it had hired Defendants to investigate his sexual orientation discrimination grievance. However, as alleged in the Complaint, Defendants lied to Leishman about the scope of their engagement. Leishman’s employer actually hired Defendants to investigate a separate, undisclosed complaint by Leishman’s supervisor concerning conduct related to Leishman’s disability. (Leishman was diagnosed with Post-Traumatic Stress Disorder

in 2015.) Defendants eventually produced a substandard and biased report based on fabricated information provided solely by the AGO itself.

Leishman's Complaint also identified a pattern of discriminatory and fraudulent conduct by Defendants in the purportedly "independent" investigation business they market to state and local agencies. Leishman asserted claims for fraud, negligent misrepresentation, discrimination, and negligence, and for violations of the Washington Law Against Discrimination, RCW 49.60, and the Consumer Protection Act, RCW 19.86.

On November 3, 2017, the Superior Court entered judgment dismissing the case pursuant to CR 12(c). The court ruled as a matter of law that each of Leishman's causes of action was barred by RCW 4.24.510 – on the grounds that Defendants' tax-payer funded assignment involved their communicating a "complaint or information" about Leishman to the AGO.

This Court should reverse the Superior Court's judgment for three separate and independent reasons. **First**, our Supreme Court has held that RCW 4.24.510 immunizes communications by ***citizen whistleblowers*** who ***inform relevant government agencies*** about potential misconduct – not reports made ***by*** government agencies themselves. ***Segaline v. Dep't***

of Labor & Indus., 169 Wn.2d 467, 473, 238 P.3d 1107 (2010). That same reasoning applies to the many commercial businesses that government agencies hire to perform tasks on their behalf, including investigating workplace complaints by government employees. RCW 4.24.510 was “designed to protect overtures to the government by parties petitioning in their status of citizens,’ and therefore it did not apply to the communications of one hired by a government agency made within the context of that employment.” *Segaline*, 169 Wn.2d at 473 (Madsen, C.J., concurring) (citing *Kobrin v. Gastfriend*, 443 Mass 327, 332, 821 N.E.2d 60 (2005) (Massachusetts’ similar anti-SLAPP statute did not apply to expert retained by agency to evaluate professional misconduct allegations)). Like the Massachusetts Supreme Judicial Court in *Kobrin*, this Court should hold that Washington’s citizen whistleblower anti-SLAPP statute does **not** immunize communications by government vendors within the context of their paid engagement.

Second, when a citizen communicates “a complaint or information” **to** a government agency, RCW 4.24.510 grants immunity from “claims based on the communication.” But the employer complaints about Leishman contained in the Ogden Murphy Report all came directly **from** the AGO – Defendants merely repeated the unfounded accusations

made by Leishman’s supervisors at the agency. Under *Segaline*, RCW 4.24.510 does not apply to Leishman’s claims against Defendants.

Finally, Defendants also failed to meet their CR 12(c) burden of establishing “beyond doubt that the plaintiff cannot prove any set of facts that would justify recovery.” *Wash. Trucking Ass’ns v. Emp’t Sec. Dep’t*, 188 Wn.2nd 198, 393 P.3d 761 (2017) (citations omitted).

According to Defendants, Washington’s anti-SLAPP statute grants them absolute immunity because the April 29, 2016 final Ogden Murphy Report is a “complaint or information” communicated to the State. But Leishman’s Complaint also sought recovery based on separate events occurring before Defendants’ investigation even began. Even assuming *arguendo* RCW 4.24.510 applied to the April 2016 Ogden Murphy Report as a “communication” to a government agency, the statute does **not** immunize Defendants for their separate conduct, such as their misrepresentations and omissions earlier in Spring 2016. This Court should reverse the judgment, including its award of mandatory attorney’s fees to Defendants under RCW 4.24.510.

ASSIGNMENTS OF ERROR

1. The trial court erred in entering judgment on the pleadings dismissing Leishman’s complaint under CR 12(c). CP 431.

2. The court erred in awarding attorney’s fees and costs to Defendants under RCW 4.24.510. CP 552.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in ruling RCW 4.24.510 applies to communications by government vendors made within the context of their paid engagements?
2. Under *Segaline v. Dep’t of Labor & Indus.*, did the trial court err in concluding Leishman’s claims were based on a “a complaint or information” communicated to a government agency?
3. Did the trial court err in granting judgment on the pleadings even though Leishman’s Complaint included claims that were not based on communications to any government agency?

STATEMENT OF THE CASE

A. Plaintiff Roger Leishman

Leishman has been a member of the Washington State Bar Association since 1990. CP 1 (¶ 1). After a distinguished legal career in Seattle, Leishman began employment in July 2015 with the AGO as Chief Legal Advisor to Western Washington University. CP 2-3 (¶¶ 11-17). Leishman lives in Bellingham with his three children.

Shortly after commencing work at the AGO, Leishman began exhibiting serious trichotillomania, anxiety, and other symptoms. Leishman promptly disclosed his symptoms to the AGO, as well as his prior history of managing mild anxiety. CP 3 (¶ 18). In November 2015, Leishman’s physician diagnosed him with Post Traumatic Stress Disorder and serious codependency. *Id.* at ¶ 21. Leishman’s PTSD is rooted in trauma he encountered as a youth thirty years earlier. CP 322 (¶ 1). Leishman informed his employers about his new diagnosis, and ultimately submitted a formal request for a reasonable accommodation of his disability in February 2016. CP 3-4 (¶¶ 23, 27, 29).

B. Defendants OMW and Pearce

Defendant Ogden Murphy Wallace PLLC (“OMW”) is a Washington Professional limited liability corporation. CP 1 (¶ 2). Defendant Patrick Pearce is a member of OMW. CP 1 (¶ 3). OMW and Pearce are licensed private investigators. CP 2 (¶ 4). Defendants provide employment investigation services to state agencies under a rate-capped Master Contract with the State. CP 322 (¶ 10).

Pearce is also licensed as an attorney. CP 2 (¶ 4). However, as provided by both the Washington Constitution and the terms of the Master Contract between OMW and the State, Defendants did *not*

provide any legal services in connection with the Leishman/AGO investigation. *Id.* at ¶¶ 6-7.

C. Leishman’s sexual orientation discrimination grievance

In addition to being disabled, Leishman is openly gay. CP 1 (¶ 1). On January 7, 2016, Leishman discovered the AGO had taken adverse employment action against him based on homophobic allegations made four months earlier by his immediate supervisor, Bellingham Education Team Leader Kerena Higgins. CP 3-4 (¶ 25). Neither Higgins nor anyone else from the AGO had previously informed Leishman about her allegations, nor given him an opportunity to respond. *Id.*

Leishman also observed additional examples of implicit homophobia and anti-gay bias at the AGO. *See, e.g.*, CP 4, 7 (¶¶ 28, 49). For example, during the 2015-16 school year, WWU conducted a search for a new university president. During a public meeting of the Trustees, Leishman compared their task to Seattle Men’s Chorus search to replace its conductor for the first time in thirty-five years. CP 403. The Trustees were aware Leishman sang in the Chorus. Nevertheless, the State took adverse action against Leishman because one of its representatives considered his analogy offensive. *Id.*

Another example of the AGO's "closeted" culture occurred on October 15, 2015, at the AGO's all-attorney conference. The theme of the conference was diversity and inclusion. Yet the conference speakers failed to acknowledge the presence of lesbian and gay individuals – including both the out lesbian who gave the keynote speech, newly-appointed University of Washington President Ana Mari Cauce, and the gay Chief Deputy Attorney General who introduced her as a successful woman, immigrant, and Latina (but not as a lesbian). The next day, Leishman sent an email to one of the organizers of the conference, Assistant Attorney General Chalia Stallings-Ala'ilima. Ms. Stallings-Ala'ilima had previously served with Leishman on the board of the Washington Initiative for Diversity, a statewide nonprofit organization promoting diversity and inclusion in the legal profession. In his October 16, 2015 email, Leishman conveyed his concerns about the diversity-themed conference's omission of references to LGBT individuals. CP 340. Leishman's email also objected to the conference's focus on the importance of welcoming only those employees and clients with **visibly** diverse traits.

D. March 1, 2016 meeting with Leishman's supervisor

Having previously provided Higgins with a copy of his draft discrimination grievance regarding her homophobic statements in Fall 2015, Leishman sought to resolve the matter privately with Higgins during their regular weekly meeting in his office on March 1, 2016. CP 4 (¶ 31). Higgins denied any wrongdoing in connection with the homophobic statements that had been the basis of the AGO taking adverse action against Leishman. *Id.* at ¶ 31-32.

During their March 1, 2016 meeting, Leishman also asked Higgins to consider supporting his pending disability accommodation request. She refused. *Id.* at ¶ 32. Leishman raised his voice after ***Higgins accused Leishman of faking his disability.*** *Id.*

While Defendants were conducting their investigation into Leishman's sexual orientation discrimination grievance, Leishman engaged Sean Phelan, of the Seattle law firm Frank Freed, to represent him in connection with all issues related to his disability. CP 29 (¶ 8). Ms. Phelan arranged for him to be evaluated by a psychiatrist for purposes of his pending request that the AGO reasonably accommodate Leishman's disability. CP 322 (¶ 5). Dr. Larry Freeman opined that Leishman's angry, restless, and agitated behaviors during the March 1, 2016 meeting with

Higgins resulted from his disability. Leishman's response to his supervisor's abusive statements was typical for someone suffering from PTSD. *Id.*

E. Employer retaliation

Leishman submitted his sexual orientation discrimination grievance the day after his meeting with Higgins. CP 4-5 (¶ 33). That same week, Leishman received a letter from the AGO enumerating various reasons for denying his reasonable accommodation request. Leishman immediately responded by detailing in writing how each of the AGO's stated rationales was fallacious. CP 5 (¶ 34).

On the following Monday, March 7, 2016, the AGO placed Leishman on an abusive home assignment in retaliation for Leishman's attempts to seek a nondiscriminatory workplace, i.e., his sexual orientation discrimination grievance and his criticism of the AGO's purported rationales for denying his accommodation request. CP 5-6 (¶¶ 35-40). The AGO never informed Leishman that his home assignment had any relationship to the incident with Higgins related to his disability. CP 7 (¶ 48).

F. The AGO hired Defendants to justify taking adverse action against Leishman

In March 2015, as part of the State’s procurement process, the AGO purported to hire Defendants “*to investigate the allegations in [Leishman’s] sexual orientation complaint.*” CP 6 (¶ 41) (emphasis added). The State and Defendants executed a Work Order pursuant to the detailed Master Contract governing their commercial relationship. Notably, the Master Contract includes a requirement Defendants maintain ample liability insurance. CP 131.

The AGO wanted to use the March 1, 2016 incident as a justification for firing Leishman. CP 322 (¶ 6). However, the AGO was unwilling to place its purported concerns about the incident in writing without first obtaining the imprimatur of an outside investigator. *Id.* From the outset of their assignment, Defendants knew the AGO was looking for a colorable pretext to fire Leishman. *Id.* at ¶ 7.

G. Defendants misrepresented the scope of the Leishman/AGO investigation.

Both the AGO and Defendants explicitly informed Leishman that OMW’s investigation was limited to the sexual orientation discrimination issues raised by Leishman’s grievance, and did **not** involve his separate dispute with the AGO regarding his disability. CP 6 (¶¶ 42, 44).

Defendants' representations were false. In a damning March 16, 2016 email withheld by Defendants during discovery, Pearce acknowledges that from the outset he misled Leishman regarding the scope of his investigation:

I had a brief phone call with the complainant this afternoon regarding the interview scheduled for tomorrow morning. **One of the topics that came up was scope of investigation. Per the complainant, he understood the scope was limited to discrimination based on sexual orientation.**

CP 339 (emphasis added).

Referring to his initial meeting with representatives of the AGO the week before, however, Pearce's email reveals the AGO's and Defendants' shared secret understanding regarding the *actual* scope of Defendants' investigation:

Per our recent call, my understanding is I am looking at: 1) discrimination based on sexual orientation; and 2) **conduct violations regarding interactions with a coworker** on February 26 [sic]. If possible before tomorrow morning's interview, I'd like to confirm scope and the limitation to: 1) sexual orientation discrimination, and 2) conduct on February 26.

Id. (emphasis added).

Defendants surreptitiously shifted the focus of the Leishman/AGO investigation from Leishman's sexual orientation discrimination

grievance. The final Ogden Murphy Report did not discuss homophobia or implicit bias. CP 8 (¶ 59). It did not address any of the documents and witnesses related to Leishman's sexual orientation discrimination grievance that were identified in the twelve-page Leishman/AGO Chronology he provided to Defendants. *Id.* Instead, the focus of Defendants' report was the supervisor's separate complaint about "Employee Conduct During 3/1/16 Meeting." *Id.* at ¶ 60.

H. Defendants also misrepresented the nature of their purportedly "independent" investigation.

Based on his experience over the years as a litigation attorney, Leishman expected that OMW would conduct an independent, objective investigation into his sexual orientation discrimination grievance. He was confident that such an investigation was likely to corroborate his allegations. Leishman was hopeful that input from an objective third party would slow his AGO colleagues' unfair rush to judgment.

During their initial meeting, Pearce indeed told Leishman his role was not to resolve disputed factual issues or make credibility determinations, but rather to collect relevant evidence and present it to Leishman's employers. CP 6 (¶ 44). Contrary to Defendants' representations, however, the Leishman/AGO investigation was anything

but independent. Rather, Defendants worked closely with the AGO to generate a character-assassinating report. Defendants repeatedly conferred with customer representatives about the scope and purpose of the investigation. CP 323 (¶ 12). Defendants and the AGO together identified which witnesses to interview, and selected which documents to consider. For example, in a date email to the AGO identifying potentially relevant evidence, Pearce acknowledged the significance of Leishman's "October 16, 2015 email to the organizer of the October 15, 2015 all attorney conference regarding LGBT presence at the conference." CP 340. Nevertheless, as with the other corroborating evidence identified by Leishman, Defendants failed to consider Leishman's email or the concerns it raised. CP 8 (¶ 59).

Other than interviewing Leishman, then an AGO employee, all the "evidence" Defendants gathered came directly from other representatives of the AGO itself. CP 35-36. Defendants' report parrots unreliable and false hearsay as true. CP 8 (¶¶ 59, 61). The final Ogden Murphy Report includes numerous material false or misleading statements and omissions. *Id.* at ¶ 62.

After circulating drafts of their report, Defendants incorporated the AGO's comments into the final Ogden Murphy Report. CP 323 (¶ 12).

In contrast, Leishman and his attorneys were never given any opportunity to review or discuss drafts of the Ogden Murphy Report, or to respond to its allegations. CP 8 (¶ 55).

I. Defendant's misrepresentations to Leishman were part of an ongoing business model

Defendants' webpage informs the public that Pearce serves as an independent outside investigator for workplace complaints, including charges of discrimination. CP 15. Defendants market their purportedly "independent" workplace investigation business to numerous state and local agencies. CP 14-15. However, Defendants' licensed private investigation business model was and is under intense economic pressure. CP 322 (¶ 8). Defendants are highly motivated to satisfy the agency clients whose continued business they seek under OMW's Master Contract with the State. *Id.* at ¶ 9.

In preparing his Complaint against Defendants, Leishman discovered that at least one other distinguished public servant has also been the victim of a similar faux "independent" investigation conducted by Defendants. In May 2014, the Office of Insurance Commissioner's Chief Hearing Officer Patricia Petersen filed a whistleblower complaint against a superior in the OIC after he improperly pressured her to rule for

the OIC in matters pending before her. CP 10 (¶ 84). The OIC engaged Pearce to conduct a taxpayer-funded “independent outside investigation” into Judge Petersen’s whistleblower complaint. *Id.* As with Leishman’s sexual orientation discrimination complaint two years later, Pearce instead issued a clumsy report that whitewashed the OIC’s conduct and attacked Judge Petersen’s character and competence. *Id.* at ¶ 85. The State ultimately agreed to pay \$450,000 to Judge Petersen to settle her whistleblower claim. *Id.*

J. Impact of Defendants’ conduct on Leishman

While Leishman’s sexual orientation discrimination complaint was pending with the AGO, the attorneys representing the AGO refused to communicate with Leishman’s attorney about his disability, his accommodation request, or his home assignment. CP 7 (¶ 52). Instead, the AGO informed Leishman’s disability attorney the AGO was waiting for Defendants to complete their investigation ***into his sexual orientation discrimination grievance*** before it would respond to ***any*** of her other inquiries. *Id.*

If Leishman had known Defendants’ representations about the nature and scope of their investigation were false, Leishman and his disability lawyer would have objected immediately. *Id.* at ¶ 53. They

would have refused to participate any further in the purported “independent” investigation into Leishman’s sexual orientation discrimination grievance. Leishman and his attorney would have insisted the AGO engage without further delay in an interactive process to address Leishman’s separate disability accommodation request under the ADA and WLAD – including the resolution of any concerns about Leishman’s *or* his supervisor’s conduct during the March 1, 2015 encounter.¹ *Id.*

Instead, on May 7, 2016, the AGO delivered a one-sentence letter terminating Leishman’s employment, together with copies of the Ogden Murphy Report. CP 8 (¶ 57). After months of delay, lawyers for the AGO and for Leishman participated in mediation in October 2016. CP 9 (¶ 67). The parties reached a written Settlement Agreement under which Leishman released his claims against the State. *Id.* at ¶ 68. Leishman’s Settlement Agreement with the State did not include a release of OMW or Pearce. *Id.* at ¶ 71.

¹ Conduct related to Leishman’s disability, including raising his voice after his supervisor accused him of faking his disability, is protected under both the WLAD and the ADA. *See, e.g., Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 93 P.3d 930 (2004); *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007).

K. Proceedings in Superior Court

Leishman filed his lawsuit against Defendants on May 10, 2017. During an August 18, 2017 discovery conference, counsel for Defendants informed the court they would be filing a motion for judgment on the pleadings under CR 12(c). Defendants filed their motion on October 6, 2017, and the trial court entered judgment on the pleadings after hearing argument on November 3, 2017. CP 432. The court denied Leishman's motion for reconsideration on December 5, 2017. CP 433. On January 2, 2018, the trial court entered a supplemental judgment awarding \$24,058.55 in attorney's fees under RCW 4.24.510. CP 552. Leishman timely appealed. CP 428, 547.

ARGUMENT

A. The standard of review for a CR 12(c) judgment on the pleadings is *de novo*.

Courts resolve a motion for judgment on the pleadings under CR 12(c) "identically to a CR 12(b)(6) motion." *Wash. Trucking Ass'ns v. Emp't Sec. Dep't*, 188 Wn.2d 198, 393 P.3d 761 (2017) (citing *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012)). Courts must "presume the truth of the allegations and may consider hypothetical facts not included in the record." *Id.* (citing *FutureSelect Portfolio Mgmt.*,

Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014)). Dismissal is “appropriate only when it appears beyond doubt” that the plaintiff cannot prove any set of facts that “would justify recovery.” *P.E. Sys., LLC*, 176 Wn.2d at 210.

B. Washington enacted the “Brenda Hill Bill” to protect private citizen whistleblowers.

RCW 4.24.510 began as the “Brenda Hill Bill.” *Johnson v. Ryan*, 186 Wn. App. 562, ¶ 16, 346 P.3d 789 (2015). During the 1980s, Brenda Hill and her then-husband bought a home in Vancouver, Washington, from a real estate developer. When the Hills tried to refinance their mortgage in 1987, they discovered the developer had not paid the excise tax on the transaction. In fact, the real estate company had failed to pay taxes on sales for two years, imperiling the title to homes purchased by the Hills and three hundred other families.

Mrs. Hill reported this violation to the Washington State Department of Revenue. Acting largely on the information provided by Mrs. Hill, the department collected \$477,000 in unpaid taxes owed by the developer. As a result of the report she made to state officials, the developer filed a \$1.8 million defamation suit against her that burdened her family for the next six years. Mrs. Hill asked the State's lawyers to

defend her, but they had no authority to do so. The cost of defending the developer's suit forced the Hills into bankruptcy, and she has never owned another home. See [Seattle P-I, "Woman fought a big firm -- now it's a new battle," January 25, 2007.](#)

In 1989, in response to Brenda Hills' story and her testimony to legislators, Washington passed the nation's first law protecting defendants from "SLAPP" lawsuits. "SLAPP" stands for "Strategic Lawsuit Against Public Participation." SLAPP lawsuits are intended to intimidate private critics by burdening them with such burdensome legal defense costs that they "intimidate citizens from exercising their First Amendment rights and rights under article I, section 5 of the Washington State Constitution." *Segaline v. Dep't of Labor & Indus.*, 169 Wn.2d 467, 473, 238 P.3d 1107 (2010). Washington's anti-SLAPP statute does **not** immunize complaints made **by** government agencies. *Id.* Rather, SLAPP suits are filed against private-sector critics, typically by thin-skinned but well-financed individuals and organizations.

The purpose of Washington's "whistleblower immunity" anti-SLAPP law "is to protect individuals who make good faith reports of potential wrongdoing to appropriate governmental bodies." RCW 4.24.500. "The legislature enacted RCW 4.24.510 to encourage the

reporting of potential wrongdoing to governmental entities.”

Gonthmakher v. City of Bellevue, 120 Wn. App. 365, 366, 85 P.3d 926 (2004).

While the SLAPP immunity statute was before the legislature, it was amended by the State Senate to broaden the scope of whistleblower immunity to also immunize certain other “claims arising from the communication of such complaint or information.” However, Governor Booth Gardner vetoed that section of the bill, concluding such “broadened immunity from civil action is more than what is needed in these instances.” Laws of 1989, ch. 234, § 3.

The legislature subsequently amended the anti-SLAPP statute in 2002 and 2010, first to address the role of the defendants’ good faith, and then to create a separate mechanism for expedited dismissal of SLAPP suits. However, this case involves only the Brenda Hill whistleblower immunity provision contained in RCW 4.24.510:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government ... is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.

RCW 4.24.510 (emphasis added).

C. RCW 4.24.510 does not immunize government vendors from civil liability for harms caused by their wrongdoing.

Defendants' CR 12(c) motion was based on a single untenable proposition: that RCW 4.24.510 "grants *absolute immunity* from civil liability to persons retained by government entities to conduct investigations." CP 303 (emphasis in original). In particular, RCW 4.24.510 does *not* apply to the communications of "one hired by a government agency made within the context of that employment." *Segaline*, 169 Wn.2d at 473, (Madsen, C.J., concurring) (emphasis added) (citing *Kobrin*, 443 Mass at 332).

In *Kobrin*, the state pharmacy board paid an expert to evaluate accusations the psychiatrist plaintiff engaged in prescription misconduct. The Supreme Judicial Court held Massachusetts' anti-SLAPP statute did not apply to claims against the state's paid investigator brought by the now-exonerated doctor. *See also Cardno ChemRisk, LLC v. Foytlin*, 68 N.E.3d 1180, 1189 (Mass. 2017) (anti-SLAPP statute protects those who "petition their government as citizens," not merely as "vendors of services").

In this case, Defendants are mere vendors. Their relationship with the State is governed by detailed written contracts allocating risks and

responsibilities. CP 88. For example, unlike Leishman or Brenda Hill, Defendants are protected by mandatory liability insurance policies. CP 131. All of the communications at issue related directly to Defendants' paid assignment.² This Court should reverse the trial court's CR 12(c) judgment on the same ground as the Massachusetts Supreme Judicial Court's ruling in *Kobrin*: Washington's citizen whistleblower anti-SLAPP statute does not apply to contractors hired by a government agency when they act within the context of their paid employment.

D. RCW 4.24.510 does not apply to Leishman's Complaint because Defendants did not communicate "a complaint or information" to the AGO.

"A strategic lawsuit against public participation—otherwise known as a "SLAPP" suit—is a meritless suit filed primarily to chill a defendant's exercise of First Amendment rights." *Seattle v. Egan*, 179 Wn. App. 333, 317 P.3d 568 (2014). RCW 4.24.510 protects against lawsuits that abuse the judicial process in order to silence free expression. *Davis v. Cox*, 183 Wn.2d 269, 275, 351 P.3d 862 (2015). In *Segaline*, the Supreme Court held that because the First Amendment

²In contrast, RCW 4.24.510 would potentially protect Pearce from liability if he had discovered procurement fraud at the AGO during the course of his assignment and reported it to the State Auditor.

does not protect government speech, “[i]mmunity under RCW 4.24.510 does not extend to government agencies.” 169 Wn.2d at 473.

Even if this Court declines to adopt the formal holding of *Kobrin*, it should nevertheless reverse the judgment below. The trial court erred as a matter of law under the Washington Supreme Court’s ruling in *Segaline* because Defendants did not communicate a “complaint or information” to the government. RCW 4.24.510. Rather, each of the alleged complaints about Leishman’s conduct *came from the AGO itself*. See, e.g., CP 8 (¶¶ 60-63).

Leishman’s Complaint alleges Defendants failed to conduct an independent investigation. CP 9. Instead, Defendant relied *solely* on information furnished *by the AGO*. CP 38. In particular, the Ogden Murphy Report focused on the AGO’s unrebutted litany of complaints about Leishman’s conduct. After Leishman submitted his grievance about his supervisor’s homophobic comments in Fall 2015, she apparently complained to their superiors at the AGO about Leishman’s conduct during their March 1, 2016 meeting. AGO representatives in turn furnished this and other information about Leishman to Defendants. CP 8 (¶ 60); CP 38. The AGO, not Defendants, is the source of any “complaint or information” about Leishman contained in the Ogden

Murphy Report. Extending RCW 4.24.510's whistleblower protection to Defendants would undermine rather than serve the Legislature's purpose in enacting Washington's "Brenda Hill" citizen whistleblower protection statute.

E. RCW 4.24.510 does not grant immunity for Defendants' other conduct.

Finally, this Court should reverse the trial court's entry of judgment on the pleadings for a third independent reason: Leishman's Complaint is not limited to claims based on Defendants' communications to the AGO. RCW 4.24.510 "does not provide immunity for other acts that are not based upon the communications." *Gontmakher*, 120 Wn. App. at 372.

Defendants' motion for judgment on the pleadings under CR 12(c) required them to establish "beyond doubt that the plaintiff cannot prove any set of facts that would justify recovery." *Wash. Trucking Ass'ns*, 188 Wn.2d 198 (citations omitted). Even assuming arguendo the April 29, 2016 Ogden Murphy Report constituted a "complaint or information" communicated to the State, which it was not, examination of Leishman's Complaint confirms it is *not* limited to "claims based upon" the Report. RCW 4.24.510. To the contrary, Leishman also sought recovery based on

separate events occurring long ***before*** Defendants forwarded the Ogden Murphy Report to the State.

This Court should have no illusions about the scope of the legal rule adopted by the trial court in this case. Defendants argued “immunity under this statute is extremely broad,” and shields from judicial scrutiny “not just the communication itself, but also ‘events surrounding the communication.’” CP 311 (citing ***Dang v. Ehredt***, 95 Wn. App. 670, 681-84, 977 P.2d 29 (1999)). According to Defendants, the relevant “communication” for purposes of RCW 4.24.510 is the final Ogden Murphy Report; the relevant “events surrounding” the Report includes the entire “***investigation that led to the OMW Report.***” CP 310, 312 (emphasis in original). Under Defendants’ logic, ***all*** vendors doing business with a federal, state, or local government have “***absolute immunity*** from civil liability” for their actions during the course of the assignment, unless they avoid communicating with their customers altogether. CP 303 (emphasis in original).

The case Defendants relied on in the trial court, ***Dang v. Ehredt***, is inapposite. ***Dang*** involved bank employees who telephoned the police after erroneously determining a customer was attempting to deposit a counterfeit check. This Court determined “no meaningful distinction can

be drawn between the cause of action based on the bank's communication to the police and a cause of action based on the method of arriving at the content of the communication. All of the actions of which Ms. Dang complains and all of the damages she claims to have suffered stem from (that is, are 'based upon') the bank's telephone call to the police." 95 Wn. App. at 84.

In contrast with the plaintiff's narrow claim in *Dang*, Leishman alleges that in addition to teaming up with the AGO to draft the Ogden Murphy Report, Defendants made other statements directly to Leishman, and took other identified actions that injured him. For example, before interviewing Leishman in March 2016, Defendants already knew Leishman's understanding of the "scope of the investigation" was that it was "limited to discrimination based on sexual orientation. CP 339. Nevertheless, Defendants secretly agreed with the AGO to focus their investigation instead on unrelated accusations of "conduct violations regarding interactions with a coworker." *Id.*; see also CP 6 (¶¶ 41-45).

Defendants' deception and shoddy work caused Leishman to miss out on the last clear chance to avert his unlawful termination by the AGO and salvage his legal career. But Leishman's Complaint goes beyond this obvious economic injury. Defendants also harmed Leishman by joining

the AGO in its disregard for Leishman’s sexual orientation and disability. CP 12 (¶¶ 100-05). Defendants’ unfair and deceptive marketing of its “independent private investigation” business practices has already harmed other government employees. CP 10 (¶¶ 79-85). Defendants contributed to the excruciating uncertainty and delay before Leishman was able to reach a resolution of his status with the AGO. Finally, Defendants’ fraudulent acts caused Leishman to suffer separate dignitary harms. CP 11 (¶¶ 86-99). Defendants’ conduct significantly exacerbated Leishman’s disability symptoms and caused substantial distress to him and his family. CP 10 (¶ 76).

This Court can and should draw a “meaningful distinction” between the Ogden Murphy Report and events that occurred before Defendants began their investigation. *Dang*, 95 Wn. App. at 84. Because Defendants failed to demonstrate “beyond doubt” that Leishman cannot prove **any set of facts** that “would justify recovery,” the trial court erred in granting judgment on the pleadings. *P.E. Sys., LLC*, 176 Wn.2d at 210.

CONCLUSION

Government agencies contract with thousands of commercial vendors every year – procuring anything from office supplies, to foster services, to expert evaluations, to huge construction projects. Each of

these private businesses necessarily communicates with its agency customer in the course of its paid assignment. Under the broad rule of statutory immunity adopted by the trial court, anyone injured by commercial vendors during the course of their tax-payer-funded assignments would have no legal recourse against even the most flagrant wrongdoer.

The trial court erred as a matter of law. When the Legislature enacted a whistleblower immunity anti-SLAPP act in 1989, it intended to protect private citizens who speak out on matters of public concern, *not* to grant blanket immunity from civil liability to virtually every vendor hired by a government agency. Leishman respectfully requests that this Court reverse the trial court's judgment.

DATED May 24, 2018.

/s/ Roger A. Leishman
Roger A. Leishman, WSBA # 19971
Pro se

CERTIFICATE OF SERVICE

I certify that on this day I caused the foregoing document to be served by email via the Court's electronic portal as follows:

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DATED: May 24, 2018

 /s/ Roger Leishman

Roger Leishman

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