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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.

**SUPPLEMENTAL BRIEF OF PETITIONERS
OGDEN MURPHY WALLACE, PLLC, & PATRICK PEARCE**

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I. INTRODUCTION

RCW 4.24.510 is broad by design: the legislature intended early dismissal of strategic lawsuits against public participation (“SLAPP”) by immunizing any “person” from suit based on their communications to the government regardless of content or motive. Despite the legislature’s broad mandate, the Court of Appeals held that Defendants Ogden Murphy Wallace, PLLC, (“OMW”) and Patrick Pearce (“Pearce”) are not “persons” under RCW 4.24.510. The court reached that conclusion by improperly narrowing the definition of “persons” to “private citizen whistleblowers,” a limitation not present anywhere in the plain text of the statute, Washington case law, or the legislative intent statement. The court concluded that because OMW was paid to conduct an external investigation regarding the workplace grievances of Plaintiff Roger Leishman (“Leishman”), OMW was not a “person” covered by the statute.

The Court of Appeals also failed to address the statute’s other elements, all of which are met here. As a result, the Court of Appeals erroneously concluded that Pearce and OMW are not immune from Leishman’s suit. Because Pearce and OMW satisfy all of the statutory elements, they are immune from Leishman’s suit under RCW 4.24.510. This Court should reverse and reinstate the trial court’s judgment.

II. STATEMENT OF ISSUES

1. Pearce (an individual) and OMW (a PLLC) were retained by the Washington State Attorney General's Office ("AGO") to conduct an external investigation regarding Leishman's workplace discrimination complaint. Did the Court of Appeals err by: (a) limiting RCW 4.24.510's definition of "persons" to citizen whistleblowers despite the plain language of the statute, Washington cases interpreting it, and its legislative history; and (b) refusing to find that Pearce and OMW are "persons" merely because they were paid?

2. After the investigation, Pearce and OMW produced a report to the AGO, the AGO terminated Leishman, and Leishman sued Pearce and OMW. Did the Court of Appeals err when it failed to dismiss Leishman's claims under RCW 4.24.510 because the report contains "information" related to workplace conduct, a matter "reasonably of concern" to the AGO, and all of Leishman's claims are "based upon" the investigation and report?

III. STATEMENT OF THE CASE

The AGO retained Pearce of OMW to conduct an outside investigation and report of findings related to a workplace discrimination complaint filed by Leishman. CP 6 ¶ 41, 129. Pearce interviewed multiple witnesses, including Leishman, and considered various documents

provided by Leishman. CP 6-7 ¶¶ 43, 47, 49-51. Pearce’s investigation culminated in a report provided to the AGO (“OMW Report”), which concluded there had been no discriminatory motivations aimed at Leishman and Leishman behaved inappropriately toward his supervisor. CP 8 ¶ 54, 214-15. The AGO then terminated Leishman. CP 8 ¶ 57.

Leishman filed suit against Pearce and OMW based on their investigation. CP 1, 9-12 ¶¶ 73-105. Pearce and OMW brought a motion for judgment on the pleadings under CR 12(c). CP 303. Finding that Pearce and OMW were immune from suit under RCW 4.24.510, the trial court granted the motion, dismissed Leishman’s claims, and granted OMW’s request for fees under the same statute. CP 431, 438, 552-54.

Leishman appealed and the Court of Appeals reversed. CP 428; *Leishman v. Ogden Murphy Wallace PLLC*, 10 Wn. App. 2d 826, 828, 451 P.3d 1101 (2019). Although it acknowledged that *Segaline v. State, Dep’t of Labor & Indus.*, 169 Wn.2d 467, 238 P.3d 1107 (2010), is “not dispositive,” the Court of Appeals primarily relied on Justice Madsen’s solo concurrence in holding RCW 4.24.510 was limited to “private citizen whistleblowers” who “petition the government on [their] own behalf.” *Leishman*, 10 Wn. App. 2d at 830, 836. Because Pearce and OMW had contracted with the AGO to perform an external employment investigation and were paid for their services, the Court of Appeals concluded they were

not “exercising [their First Amendment] right to petition the government on [their] own behalf,” and thus were not “persons” for purposes of RCW 4.24.510. *Id.* at 835-36. Without addressing the other statutory elements, the Court of Appeals held RCW 4.24.510 did not immunize Pearce and OMW from Leishman’s claims. *Id.* at 836.

IV. ARGUMENT

A. Standard of Review.

The issues raised in Pearce and OMW’s CR 12(c) motion are strictly ones of statutory interpretation. This Court reviews the “meaning of a statute . . . de novo.” *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). “[I]f the statute’s meaning is plain on its face,” the Court “must give effect to that plain meaning as an expression of legislative intent.” *Id.* at 9-10.

Moreover, this Court reviews CR 12(c) dismissals “de novo.” *Wash. Trucking Ass’ns v. State Emp. Sec. Dep’t*, 188 Wn.2d 198, 207, 393 P.3d 761 (2017). Although on review, the Court “presume[s] the truth of the allegations,” none of the facts alleged are material to the statutory interpretation at issue. *Id.* In other words, this Court should affirm dismissal because “it appears beyond doubt that the plaintiff cannot prove any set of facts that would justify recovery.” *Id.* (quotes omitted).

B. RCW 4.24.510 Mandates Dismissal of Leishman’s Claims.

The protections granted under RCW 4.24.510 are extremely broad. The statute immunizes any “person” who communicates a “complaint or information” to the government from civil liability for “claims based upon the communication” regarding matters “reasonably of concern” to the government.¹ Rather than apply the statute as written, the Court of Appeals limited the statute’s application to “private citizen whistleblowers” who “petition the government on [their] own behalf.” *Leishman*, 10 Wn. App. 2d at 830, 836. This conclusion departs dramatically from the plain text of RCW 4.24.510, which refers only to “persons,” not “citizens,” “whistleblowers,” or those who “petition” the government. It also departs from Washington case law applying the statute to a variety of persons, including individuals, nonprofit groups, and corporate entities. The Court of Appeals erred when it read a limitation into RCW 4.24.510 that does not exist and held Pearce and OMW are not “persons” simply because they were hired to conduct an investigation.

Moreover, the Court of Appeals acted contrary to the legislature’s intent to protect speech to the government “regardless of content or motive.” By inquiring into the speaker’s motive, courts will be required to

¹ The full text of the statute is attached as an Appendix to this brief.

engage in a fact-heavy analysis and RCW 4.24.510's early dismissal of SLAPP suits will no longer be attainable. The Court should reverse.

1. Pearce and OMW Are Protected “Persons.”

The crux of the Court of Appeals' holding is that only a citizen whistleblower is “a person” entitled to immunity under RCW 4.24.510. But RCW 4.24.510 contains no special definition of “person.” Rather, PLLCs like OMW and individuals like Pearce fall squarely within the plain understanding of the term “person” as used in RCW 4.24.510. *See Riddle v. Elofson*, 193 Wn.2d 423, 432, 439 P.3d 647 (2019) (“Plain meaning is to be discerned from the ordinary meaning of the language at issue[.]” (quotes omitted)). First, there can be no doubt that Pearce is a “person” under any understanding of the term. Second, the intent section of the legislative amendment that resulted in the current statute expressly notes the statute applies to “a civil complaint . . . filed against individuals or **organizations**[.]” Laws of 2002, ch. 232, § 1 (emphasis added). OMW is undisputedly an organization. CP 1 ¶ 2; *see also* footnotes 5-7, *infra*.

Rather than engage in a plain language analysis, the Court of Appeals turned to *Segaline*, a decision the appeals court recognized as “not dispositive,” *Leishman*, 10 Wn. App. 2d at 832, because it concerned the “narrow issue” of whether a “**government agency [itself]**” is a “person” under RCW 4.24.510. *Segaline*, 169 Wn.2d at 473 (emphasis

added).² There, the Washington State Department of Labor and Industries (“L & I”) reported inappropriate behavior of a contractor to the police. *Id.* at 470-71. After the police arrested him, the contractor sued L & I alleging his arrest constituted malicious prosecution, among other things. *Id.* at 472. In a plurality opinion, this Court rejected L & I’s argument that it was immune from suit under RCW 4.24.510. *Id.* at 472-75. The four justice lead opinion³ reasoned that the statute was “enacted to protect one’s free speech rights” and “a government agency” such as L & I “has no such rights to protect.” *Id.* at 473. Accordingly, the Court held that “[i]mmunity under RCW 4.24.510 does not extend to government agencies.” *Id.* at 479.

Had the Court of Appeals properly read *Segaline*, it would have concluded Pearce and OMW qualify as “persons” because, as Leishman concedes, Pearce and OMW are not government agencies or employees but rather individuals and organizations with free speech rights. *See* CP 2 ¶ 8; Wash. Const. art. I, § 5 (“Every person may freely speak . . . on all subjects[.]”); *see also Arizona Students’ Ass’n v. Arizona Bd. of Regents*, 824 F.3d 858, 868 (9th Cir. 2016) (“Both natural persons and corporations

² *See also 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[.]”).

³ Justice Madsen concurred but not on narrower grounds so Justice Sanders’ four person plurality is the controlling opinion. *See* n.9, *infra*.

enjoy . . . free-speech rights.”).⁴ *Segaline* thus does not support the proposition that individuals and organizations such as a PLLC are not within the scope of the statute.

The Court of Appeals departed from *Segaline*'s narrow holding and instead announced an entirely new construction of RCW 4.24.510. No Washington court has ever held that the protections of RCW 4.24.510 are limited to “private citizen whistleblowers” who “petition the government on [their] own behalf.” *Leishman*, 10 Wn. App. 2d at 830, 836. Rather, Washington case law extends the statute's protections to individuals, businesses, and entities other than “citizen whistleblowers” for their communications with government entities, including a bank's communications with police,⁵ a consulting firm's communications with a city regarding allegations of a hostile work environment,⁶ and a corporation's communications with the state regarding reasons for the

⁴ The lead opinion's citation to RCW 1.16.080(1) further demonstrates that Pearce and OMW are “persons” under RCW 4.24.510 because, although the Court did not find the general definition under RCW 1.16.080(1) controlling due to the use of the word “may,” subsection 2 of that statute is mandatory and includes LLCs like OMW. *See* RCW 1.16.080(2) (the term “‘person’ . . . shall . . . be construed to include a limited liability company.” (emphasis added)); *see also Segaline*, 169 Wn.2d at 474. Even if RCW 1.16.080 does not apply, Pearce and OMW are still immune from suit under RCW 4.24.510 because at common law, “the term ‘person’ includes both natural and artificial persons,” including “corporations” such as OMW. *See In re Brazier Forest Products, Inc.*, 106 Wn.2d 588, 595, 724 P.2d 970 (1986).

⁵ *Dang v. Ehredt*, 95 Wn. App. 670, 681-84, 977 P.2d 29 (1999); *Engler v. City of Bothell*, No. C15-1873JLR, 2016 WL 3453664, at *7 n.7 (W.D. Wash. June 20, 2016).

⁶ *Harris v. City of Seattle*, 302 F. Supp. 2d 1200, 1201-03 (W.D. Wash. 2004), *aff'd*, 152 F. App'x 565 (9th Cir. 2005).

termination of an employee.⁷ The Court of Appeals failed to distinguish, let alone address, this case law.

The Court of Appeals further erred because it relied on, and mischaracterized, Justice Madsen’s concurrence in *Segaline*. Justice Madsen explicitly rejected the notion that “whether a ‘person’ enjoys free speech rights” is “dispositive of the question whether a government agency is a ‘person’ qualifying for RCW 4.24.510’s immunity[.]” 169 Wn.2d at 482 (Madsen, J., concurring). Rather, as Justice Madsen explained, the “reason for the immunity” is to “remove the threat and burden of civil litigation that would otherwise deter the speaker from communicating.” *Id.* Justice Madsen relied on “the language and history” of the statute, including the intent section of the amendment that resulted in the current statute, and noted it broadened the reach of the statute by ensuring a “SLAPP target” had an “efficient remedy” and did not have to “endure considerable litigation[.]” *Id.* at 480-82 (quotes omitted).

The same considerations that support the protection of citizen whistleblowers raised by Justice Madsen weigh in favor of protecting individuals and organizations that assist in external investigations into matters of concern to government entities. *See id.* at 481 (RCW 4.24.510

⁷ *Ferguson v. Baker Law Firm, P.S.*, No. 78025-5-I, 2019 WL 3926173, at *6 (Wash. Ct. App. Aug. 19, 2019) (unpublished); *Akmal v. Cingular Wireless, Inc.*, No. C06-748JLR, 2007 WL 1725557, at *5 (W.D. Wash. June 8, 2007), *aff’d*, 300 F. App’x 463 (9th Cir. 2008).

provides “broader protection than would be true” if it “addressed only citizens’ First Amendment rights to petition government”). OMW and Pearce, like “citizen whistleblowers,” do not benefit from the same immunities that protect government entities from the threat of civil litigation. Moreover, the prospect of compensation does not remove the “intimidation factor” discussed by Justice Madsen, given the burdens and expenses of protracted civil litigation. *See id.* at 482; *see also, e.g., Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (“The doctrine of qualified immunity protects government officials from liability for civil damages[.]” (quotes omitted)). Protection for OMW and Pearce, and others like them, is important to avoid the chilling effect on those investigating matters of concern to government entities. Otherwise such persons would be silenced, or tempted to modify or distort their opinions, out of fear of facing civil damages claims from those who they are investigating.⁸ It is important for government entities to be able to rely on frank appraisals by external investigators to assess internal workplace and like complaints.

⁸ The cases upon which Leishman relies to dispute the threat of litigation are inapposite because they involve claims as between parties to a contract, whereas here Leishman was not a party to the contract between Pearce/OMW and the AGO. *See Answer to Pet. Review* at 16-17; *Reply Br. of Appellant* at 15; *Specialty Asphalt & Constr., LLC v. Lincoln Cty.*, 191 Wn.2d 182, 185, 421 P.3d 925 (2018); *Donatelli v. D.R. Strong Consulting Eng’rs, Inc.*, 179 Wn.2d 84, 91-92, 312 P.3d 620 (2013).

Justice Madsen then noted that RCW 4.24.510 is “similar to” a Massachusetts statute that “is limited to those defendants who petition the government on their own behalf[.]” 169 Wn.2d at 483 (Madsen, J., concurring & citing *Kobrin v. Gastfriend*, 443 Mass. 327, 821 N.E.2d 60 (2005)). Clinging to Justice Madsen’s reference to *Kobrin*, the Court of Appeals erroneously concluded that the “concurrence extended the reasoning of *Kobrin*” to RCW 4.24.510. *Leishman*, 10 Wn. App. 2d at 834.⁹ But Justice Madsen merely cited *Kobrin* in passing and did not discuss the facts or holding of the case, which none of the parties briefed in *Segaline*. See 169 Wn.2d at 483 (Madsen, J., concurring).¹⁰

Kobrin, regardless, provides no guidance here because the Massachusetts statute differs substantively from RCW 4.24.510. The Massachusetts statute provides in relevant part:

In any case in which a party asserts that the civil claims . . . against said party are based on said **party’s exercise of its right of petition under the constitution** of the United States or of the commonwealth, said party may bring a special motion to dismiss.

Mass. Gen. Laws ch. 231, § 59H (emphasis added). As the *Kobrin* court acknowledged, “The constitutional ‘right of petition’ is a term of art that

⁹ The Court of Appeals failed to analyze whether Justice Madsen’s concurrence had any binding authority, i.e., whether or not it was the narrowest ground supporting *Segaline*. See *Davidson v. Hensen*, 135 Wn.2d 112, 128-29, 954 P.2d 1327 (1998). It was not.

¹⁰ See also Suppl. Br. Pet’r, No. 81931-9, 2009 WL 5258635 (Wash. June 3, 2009); Suppl. Br. Resp’t, No. 81931-9, 2009 WL 5258636 (Wash. June 3, 2009); Pet’r’s Resp. to Amicus Br., No. 81931-9, 2009 WL 5258634 (Wash. Nov. 2, 2009).

the Legislature did not adopt casually or accidentally.” 443 Mass. at 334. The *Kobrin* court found this language requires a party to exercise **its own personal right** of petition, and that persons employed by the government to make a communication are not exercising their own personal right of petition and are thus not covered by the statute. *Id.* at 332-33. Because RCW 4.24.510 makes no reference to a party’s “right of petition”—only a “person[’s] . . . communicat[ion]”—*Kobrin* does not apply.

Moreover, the Massachusetts statute includes several bars to early dismissal not present in RCW 4.24.510. For example, courts may deny special motions to dismiss when a speaker’s statement was “devoid of factual support” or the speaker’s acts caused “actual injury to the responding party.” Mass. Gen. Laws ch. 231, § 59H. In contrast, RCW 4.24.510 facilitates early dismissal of SLAPP suits, applies without regard to the speaker’s content or motive or actual injury, and is thus more protective than the Massachusetts statute.

The Court of Appeals’ formulation of “person” undermines the early dismissal of SLAPP suits. It is a fact-driven approach to deciding who is a “person,” and thus necessitates discovery. The appeals court also failed to properly apply its own fact-driven approach. Without considering the record, the Court of Appeals concluded Pearce and OMW were performing the “work of a government agency.” *Leishman*, 10 Wn. App.

2d at 836. But as Leishman concedes and as Pearce and OMW’s contract demonstrates, Pearce and OMW were “acting in their individual, corporate” capacities and “not as agents” or “employees” of the AGO. CP 129; *see also* CP 2 ¶ 8, 9 ¶¶ 69, 71.

Finally, the Court of Appeals’ approach is problematic because it fails to consider the line of cases (1) granting First Amendment protections to “speech [that] is sold”¹¹ and (2) applying specific factors to determine whether a private entity is acting on behalf of the government.¹²

2. The OMW Report Contains “Information” Communicated to the AGO.

The Court of Appeals did not address whether the OMW Report is a “complaint or information” for purposes of RCW 4.24.510. The text of the statute and the undisputed record demonstrates the answer is yes. In *Harris v. City of Seattle*, 302 F. Supp. 2d 1200 (W.D. Wash. 2004), *aff’d*, 152 F. App’x 565, 569 (9th Cir. 2005), the court applied RCW 4.24.510 in nearly identical circumstances. There, the city retained a consulting firm to investigate employee complaints of a hostile work environment. *Id.* at 1201-02. The firm interviewed several city employees, including the

¹¹ *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); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011) (noting that a “great deal of vital expression . . . results from an economic motive” and is protected under the First Amendment).

¹² *See Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 517-18, 387 P.3d 690 (2017) (Public Records Act); *Sprague v. Spokane Valley Fire Dep’t*, 189 Wn.2d 858, 879-80, 409 P.3d 160 (2018) (government employees); *Port of Longview v. Int’l Raw Materials, Ltd.*, 96 Wn. App. 431, 440-43, 979 P.2d 917 (1999) (independent contractors).

plaintiff, and drafted a “report” for review by the city attorney. *Id.* at 1202. The plaintiff sued the firm for defamation. *Id.* at 1201. The court held the firm was entitled to “invoke” RCW 4.24.510 in part because the “hostile workplace investigation report” the firm “submitted to the [c]ity” was a “communication” for purposes of the statute. *Id.* at 1201-03.

Harris demonstrates RCW 4.24.510 applies even where a report contains information from the government and thus forecloses Leishman’s argument that Pearce and OMW are not entitled to immunity simply because the OMW Report contains information from the AGO. Moreover, Leishman’s argument is belied by his claim that RCW 4.24.510 applies only to whistleblowers. In a classic whistleblower context the information comes from persons within the agency itself. *See Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 287, 358 P.3d 1139 (2015) (defining “whistle-blowing” as “when employees . . . report[] employer misconduct”).

3. All of Leishman’s Claims Are “Based Upon” the OMW Investigation and Report.

The Court of Appeals also did not address whether Leishman’s complaint alleges any conduct that is not based upon the OMW Report. All of Leishman’s claims rely on factual assertions that (1) the OMW Report was false or omitted information that Leishman believes should have been included; and (2) Leishman was not informed during the

investigation that the OMW Report would address certain topics. CP 6-9 ¶¶ 44, 53, 58-64. Under controlling case law, all of Leishman’s claims are “based upon” the OMW Report and the events leading up to it.

Immunity under RCW 4.24.510 covers not just the communication itself, but also the “conduct of the investigation” leading to the communication and other “events surrounding the communication.” *Dang v. Ehredt*, 95 Wn. App. 670, 681-84, 977 P.2d 29 (1999). In *Dang*, bank personnel reported to the police that the plaintiff was attempting to deposit a fraudulent check that was later determined to be valid. *Id.* at 674-76. The plaintiff sued the bank for negligence and false imprisonment and the bank asserted immunity under RCW 4.24.510. *Id.* at 673, 681-82. The court rejected the plaintiff’s argument that immunity extended only to the bank’s phone call to the police, not its conduct of the investigation, and held that immunity extended to “cause[s] of action based on the method of arriving at the content of the report.” *Id.* at 681-83. The court explained that “allowing a cause of action for the events surrounding the communication . . . while immunizing the communication itself, would thwart the policies and goals underlying the immunity statute,” including removing the “threat of a civil action for damages” for reporting information to the government. *Id.* at 681, 683. Moreover, as the court noted, “no meaningful distinction can be drawn between the cause of

action based on the [] communication” itself and “a cause of action based on the method of arriving at the content of the communication.” *Id.* at 683.

Here, the fact that some of Leishman’s claims relate to OMW’s method of investigation does not shield his complaint from dismissal. All of the claims in Leishman’s complaint concern the OMW Report, the “method” of creating the OMW Report, the “investigation . . . lead[ing] to [the OMW Report],” or the “events surrounding” the OMW Report. *See id.* at 682-83; *see also Harris*, 302 F. Supp. 2d at 1201-04 (consulting firm was “immune as to all” of plaintiff’s claims “[b]ecause all of” the “possible allegations” against the consulting firm “ar[ose] out of the hostile workplace investigation report” submitted to the city, “which relate[d] to a matter reasonably of concern” to the city).¹³

4. The Findings in the OMW Report Are Matters “Reasonably of Concern” to the AGO.

The matters covered in the OMW Report are “reasonably of concern” to the AGO because Leishman has never argued otherwise and the Court of Appeals did not address this element. *See State v. Collins*, 121 Wn.2d 168, 178, 847 P.2d 919 (1993) (this Court does not consider

¹³ Contrary to Leishman’s contention, a private entity is not immune from all claims merely because it communicates with a government agency. Answer to Pet. Review at 17. Rather, the claim must arise entirely out of the communication with the government agency, as all of Leishman’s claims do here. Such claims stand in stark contrast, for instance, to a claim for the organization’s fraudulent billing practices or physical injury to a plaintiff as a result of a car accident during the course of the investigation.

arguments not raised before the trial court or Court of Appeals); *see also* CP 315-30; Answer to Pet. Review at 4 & n.1; Br. of Appellant at 19-28; Reply Br. of Appellant at 10-20; *Leishman*, 10 Wn. App. 2d at 830-36. The element is also satisfied on the merits because the OMW Report arose from a workplace discrimination complaint and the “AGO is firmly committed to providing an environment that provides fair and equal treatment in employment without regard to an individual’s protected class status.” *See* CP 199 (citing AGO Policy I.30.I-II); *see also Harris*, 302 F. Supp. 2d at 1203 (report regarding firm’s investigation of possible hostile work environment in city agency addressed matter of reasonable concern to city). Issues of workplace discrimination and conduct are matters of concern to public entities. Indeed, here the information was used to make a workplace employment decision and “resulted in [Leishman’s] termination[.]” *See Bailey v. State*, 147 Wn. App. 251, 262, 191 P.3d 1285 (2008) (immunizing employee for communications made to university regarding another terminated employee’s alleged conflict of interest).

5. The Court of Appeals’ Decisions Is Contrary to the Legislative Intent of RCW 4.24.510.

As *Leishman* acknowledges, RCW 4.24.510 protects communications to government entities “regardless of content or motive.” *Id.*; Answer to Pet. Review at 15. Although RCW 4.24.510 originally

contained a “good faith” requirement, the legislature removed that in 2002. Washington courts have since applied the immunity broadly without inquiring into the content of the communication or the motivation of the speaker. *See* Laws of 2002, ch. 232, § 1; *see also Bailey*, 147 Wn. App. at 261-62 (plaintiff’s claim that defendant’s communications were made maliciously had no bearing on RCW 4.24.510’s application); *Dehlin v. Forget Me Not Animal Shelter*, No. 34407-0-III, 2017 WL 4712142, at *7 (Wash. Ct. App. Oct. 19, 2017) (unpublished) (defendants’ communications were immunized even if they were motivated by a “preexisting grudge” against the plaintiff). In eliminating the “good faith” requirement, the legislature intended to make it easier to dismiss cases at an “early” stage by dispensing with factual inquiries into the motivation behind any particular communication. Laws of 2002, ch. 232, § 1.

The Court of Appeals, in limiting the definition of “person” under the statute to “citizens” who “petition the government on [their] own behalf,” undermines both these legislative policy choices. By its nature, the definition proposed by the Court of Appeals requires a court to determine the person’s motive—was the person claiming immunity seeking to petition the government. Indeed, here, the crux of Leishman’s complaint is that OMW and Pearce had a bad motive in not disclosing their investigation included Leishman’s interactions with his supervisor.

The rule also undermines legislative intent to allow early dismissal of a complaint. Instead of an early determination based on a CR 12(c) motion, as was the case here, the Court of Appeals' rule requires courts to conduct a factual inquiry into the content of, or motivation behind, the communication. The promise of immunity is significantly undermined if investigators are subject to the risk of substantial litigation costs.

These impacts have the potential to greatly inhibit if not deter the ability of government entities to retain outside expertise to address matters of concern when complaints are made. Use of outside expertise is important for at least three reasons. First, many government entities simply do not have the internal resources or expertise to conduct investigations into matters of internal concern. Second, retaining outside expertise can bring in a level of objectivity that would not be reached where an internal investigator is obtaining information from and assessing the credibility of their co-employees and superiors. Third, using an outside investigator, rather than someone in-house, can avoid exacerbating internal tensions that may exist from the situation being investigated.

Ironically, whistleblower complaints are one type of many internal workplace issues that can benefit from an outside investigation. From a policy perspective, as adopted by the legislature, there is no substantive difference between the immunity that should apply to Leishman's claim of

workplace discrimination and the immunity that should apply to an outside investigator of that claim. Immunity provides a protective umbrella to make sure that government operates lawfully and with transparency.

In sum, the Court of Appeals' decision is contrary to the plain language of RCW 4.24.510 and the legislative intent behind the statute.¹⁴

C. OMW and Pearce Are Entitled to Attorney Fees.

RCW 4.24.510 provides: "A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense." Because OMW and Pearce prevail under RCW 4.24.510, they should be awarded their reasonable fees and costs. RAP 18.1(a).

V. CONCLUSION

For the foregoing reasons, Pearce and OMW respectfully request that the Court reverse, reinstate the trial court's grant of judgment on the pleadings and award of fees, and award additional fees for this appeal.

¹⁴ Leishman's remaining policy arguments are not relevant to the legal question before this Court. See Answer to Pet. Review at 18-19; *Sonitrol Nw., Inc. v. City of Seattle*, 84 Wn.2d 588, 593-94, 528 P.2d 474 (1974) (Court's function is "not" to "criticize the public policy which prompted the adoption of the legislation" (quotes omitted)).

RESPECTFULLY SUBMITTED this 18th day of March, 2020.

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APPENDIX

RCW 4.24.510**Communication to government agency or self-regulatory organization—Immunity from civil liability.**

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, 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. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

[**2002 c 232 § 2; 1999 c 54 § 1; 1989 c 234 § 2.**]

NOTES:

Intent—2002 c 232: "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.

Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. Chapter 232, Laws of 2002 amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making." [**2002 c 232 § 1.**]

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