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NO. 97734-8

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

ROGER LEISHMAN,

Respondent,

v.

OGDEN MURPHY WALLACE PLLC and
PATRICK PEARCE,

Petitioners.

RESPONDENT ROGER LEISHMAN'S ANSWER TO BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Respondent Roger A. Leishman
Pro Se, WSBA #19971

PO Box 2207
Bellingham, WA 98227
(206) 849-4015

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INTRODUCTION

The constitutional and legislative history outlined by amicus curiae American Civil Liberties Union of Washington establishes that “[a]nti-SLAPP statutes were not created to immunize reports or investigations made on behalf of the government, pursuant to a government contract.” [ACLU Br. 1](#).

Pursuant to RAP 10(g), Plaintiff Roger Leishman submits this answering brief to address three issues raised by the amicus brief. First, the Court should focus on the fundamental purpose of the Brenda Hill Bill, rather than be distracted by irrelevant debates about Defendant Ogden Murphy Wallace, PLLC’s personhood. Second, as amicus correctly observes, the nature of OMW’s contractual assignment makes RCW 4.22.510 inapplicable to this case, regardless of the original source of the information contained in OMW’s April 29, 2016 investigation report. Third, notwithstanding some of the language employed by both the Court of Appeals and amicus, the trial court also erred in entering judgment as a matter of law because Leishman’s Complaint asserts claims against OMW that are *not* based on any communication to a government agency.

ARGUMENT

A. This Court should construe the language of RCW 4.22.510 consistently with the underlying purpose of the Brenda Hill Bill.

In *Segaline v. Dep’t of Labor & Indus.*, 169 Wn.2d 467, 238 P.3d 1107 (2010), this Court drew a bright line excluding government agencies from the class of “persons” protected by RCW 4.22.510. The outcome in

Segaline informed this Court's subsequent decision in ***Henne v. City of Yakima***, 182 Wn.2d 447, 341 P.3d 284 (2015), which involved amendments to Washington's anti-SLAPP statutes. *See also* Laws of 2002, ch. 232 § 1 (when it amended Washington's anti-SLAPP law to limit the role of a defendant's good or bad faith, the Legislature reiterated that "SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution").

Unsurprisingly, like the Court of Appeals, amicus therefore focuses on the Legislature's use of the word "person," arguing it would be "antithetical to the purposes of Washington's anti-SLAPP statute to read 'person' to immunize investigators who are performing the work of a government agency." ACLU Br. 2. *See also Leishman v. Ogden Murphy Wallace PLLC*, 10 Wn. App. 2d 826, ¶1, 451 P.3d 1101 (2019) ("We are asked here to determine whether a government contractor working within the scope of its contract is a 'person' under RCW 4.24.510").

In the context of this case, however, "person" is a red herring. No one has ever argued that either Patrick Pearce, an individual, or Ogden Murphy Wallace, PLLC, a professional limited liability company, is categorically excluded from the protections of RCW 4.22.510. *See, e.g.,* Supp. Br. 13. This Court should instead focus on the ***nature of the communications*** the Legislature intended to protect when it enacted the Brenda Hill Bill.

RCW 4.24.510 provides:

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). In order to reach the allegations of Leishman’s Complaint, OMW’s arguments necessarily expand each individual word in the statute to their broadest conceivable meaning – “communicates,” “information,” “communication,” “based upon,” etc. The result is nonsensical. As amicus notes, “This would bar claims by the government, itself, based on (for example) fraud or breach of contract.” ACLU Br. 17. Courts have sensibly declined to give RCW 4.24.510 such an expansively literal construction. *See, e.g., Reid v. Dalton*, 124 Wn. App. 113, ¶¶ 42-43, 100 P.3d 349 (2004) (RCW 4.24.510 does not apply to complaints filed with courts, even though they are government agencies); *Eugster v. City of Spokane*, 139 Wn. App. 21, 156 P.3d 912 (2007) (rejecting argument that RCW 4.24.510 immunizes litigant from liability for CR 11 sanctions).

In searching for the forest, the Court should look at the right trees. Amicus identifies some of the key policies this Court should

consider in providing guidance to courts, lawyers, and litigants about the scope of RCW 4.22.510 – in particular, whether the category of communications at issue involves constitutionally protected “petitioning” activities. Leishman previously identified other relevant considerations, such as whether the communication involves the use of government funds; the purely voluntary nature of the communication, regardless of its initial impetus;¹ and the need for statutory immunity in the absence of other legal protections covering whistleblowers. *See* Supp. Br. 9-12. None of these policy considerations applies to communications made by commercial vendors like OWM “who are performing the work of the government on behalf of the government” under their contract with the government. ACLU Br. 4.

B. RCW 4.22.510 does not immunize paid investigators who are performing the work of a government agency.

This appeal involves two separate statutory construction questions. The *government vendor issue* asks whether the Legislature intended to grant absolute immunity from civil liability for injuries caused by government vendors who are paid to communicate with their agency customers as part of their contractual engagements. The *nexus issue* asks

¹ In Brenda Hill’s case, the Department of Review “asked her to provide names of other homeowners in her community whose contracts had not been recorded,” then assessed the developer \$477,000 in unpaid excise taxes based “largely on information that Mrs. Hill provided.” Supp. Br. at Appendix 62.

whether the trial court misapplied CR 12(c) when it granted judgment on the pleadings without recognizing that multiple claims in the Complaint are *not* based upon OMW’s communication to the AGO in the OMW Report dated April 29, 2016. See [Leishman Supplemental Brief](#) (“Supp. Br.”) at 1-2; see also [Answer to Petition for Review](#) at 4.

Leishman’s original appeal brief included a third argument that was based on the substance of OMW’s report about its investigation into his sexual orientation discrimination complaint. [Appellant’s Opening Brief](#) at 24-25. As the Complaint alleges, the OWM Report was a mere conduit for secret employer complaints about Leishman’s own conduct. CP 8 at ¶160.² Leishman learned of his supervisors’ allegations for the first time when he read the final OMW Report in May 2016. [5/1/20 Declaration of Roger A. Leishman](#) at ¶136.³ Discovery in this lawsuit subsequently revealed that the undisclosed expansion of OMW’s assignment occurred at the behest of Chief Deputy Attorney General Shane Esquibel, and

² Citations to paragraph numbers refer to the Complaint, CP 1-13. Additional citations, including references to the 5/1/20 Leishman Declaration, may be treated as presenting “hypothetical facts” for purposes of CR 12. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). Leishman is not asking the Court to rule on the merits of any legal claim, bar grievance, or Executive Ethics Board complaint, but rather to determine whether the trial court misapplied CR 12(c) and RCW 4.10.510.

³ <https://www.dropbox.com/s/81a1qaiva8tfbck/97734-8%20Leishman%20Declaration%205-1-2020.pdf?dl=0>. Leishman originally submitted this Declaration on May 1, 2020 in connection with the Solicitor General’s motion to file an amicus brief on behalf of the State. The Chief Justice denied that amicus motion on May 5, 2020. For the convenience of the other justices, an additional copy of the Leishman Declaration accompanies this answering brief.

violated the plain language of the Work Order authorizing OMW's investigation. *Id.* at ¶78 and Exs. B, J.

As amicus observes, "many petitions to the government involve quoting data or information that comes from government sources; this form of advocacy must be protected." ACLU Br. 8 n.6. Indeed, Leishman himself has publicly criticized the State's response to his disability and sexual orientation disclosures, and has alerted relevant government agencies to lawyer misconduct based on documents Leishman eventually obtained from the Attorney General's Office under the Public Records Act. *See, e.g.*, Leishman Dec. at ¶¶68, 79-80; *see also* "[My Story So Far](https://www.rogerleishman.com/p/my-story-so-far.html)."⁴ Rather than rely on two inelegant pages of argument from his opening appeal brief, Leishman asks the Court to instead adopt amicus's succinct characterization of the Brenda Hill Bill's application to OMW's specific contractual role: "It would make no sense in light of the petitioning and public participation purposes of the statute to immunize investigators who are performing the work of a government agency." ACLU Br. 8.

C. Leishman's Complaint asserts claims against OMW that were not based upon the OMW Report.

For purposes RWC 4.22.510 whistleblower immunity, OMW relies solely on the OWM Report to the AGO dated April 29, 2016 as the relevant "communication" to a government agency. *See, e.g.*, [OMW Supp. Br. 13](#).

⁴ <https://www.rogerleishman.com/p/my-story-so-far.html>.

Like poker players, [lawyers and judges have “tells.”](#)⁵ One notorious example of a lawyer tell is the overuse in legal writing of the word “clearly,” which often signals that an argument is not as strong as the writer wishes. *See, e.g.*, Respondents’ Br. 6 (“all the claims in Leishman’s complaint clearly arise entirely out of Pearce and OMW’s investigation and report to the AGO”) (emphasis added). According to OWM, “Leishman’s claims boil down to assertions that (1) the OMW Report was false 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.... These are clearly claims that are ‘based upon’ the OMW Report under controlling Washington caselaw.” *Id.* at 24 (emphasis supplied).

With the appearance of new counsel, the word “clearly” is absent from OMW’s Supplemental Brief. Nevertheless, the brief exhibit several other common lawyer tells. For example, OMW’s most recent repetition of the same frivolous assertion appears both without any citation to the record **and** buried in a footnote. OMW Supp. Br. 16 n.13 (“the claim must arise entirely out of the communications with the government agency, as all of Leishman’s claims do here”).

Contrary to OMW’s unsupported caricature, however, an examination of Leishman’s actual Complaint reveals that he asserted claims based on OMW’s communications, omissions, and other actions

⁵ <https://www.rogerleishman.com/2020/05/SecretAgent.html>.

that occurred in March 2016 – even before OMW’s investigation began, and six weeks before OMW’s April 29, 2016 communication to the AGO. Indeed, although OMW collaborated with the employment lawyers at the AGO, Patrick Pearce is the **only lawyer** who personally spoke to Leishman in March and April 2016 regarding the scope and purpose of OMW’s investigation into his sexual orientation discrimination complaint. CP 6-8 (¶¶ 41-55); *see also* Leishman Dec. at ¶¶ 20-54.

Leishman’s answer to amicus dwells on this particular aspect of the nexus issue for a very good reason: both amicus and the Court of Appeals stumbled over OMW’s fake news. According to amicus, “the Court of Appeals properly identified ... that the claims at issue arose from the contents of that report) ACLU Br. 3 (emphasis supplied); *see also* Supp. Br. at 3-9 (Court of Appeals erroneously repeated OMW’s unfounded factual assertions, rather than taking the facts alleged by Leishman as true pursuant to CR 12).

In psychology, the “illusory truth effect” is the phenomenon that “occurs when repeating a statement increases the belief that it’s true even when the statement actually is false.” Joe Pierre M.D., “[Illusory Truth, Lies, and Political Propaganda](#),” *Psychology Today* (1/22/20).⁶ Modern research validates the propaganda adage “Repeat a lie often enough and people will eventually come to believe it.” *Id.*

⁶ <https://www.psychologytoday.com/us/blog/psych-unseen/202001/illusory-truth-lies-and-political-propaganda-part-1>.

In this case, OMW's repeated falsehood matters because Washington's anti-SLAPP statute does *not* protect communications with parties other than government agencies. *In re Discipline of Schafer*, 149 Wn.2d 148, 167-68, 66 P.3d 1036 (2003); *see also Segaline*, 169 Wn.2d at ¶ 41 (Johnson, J., dissenting) ("RCW 4.24.510 does not provide immunity for any other acts" besides the communication to a proper government agency) (citation omitted).

CONCLUSION

Leishman has the luxury of participating in an abstract policy discussion with amicus and the justices of this Court for two reasons. First, regardless of how expansively the Court applies RCW 4.22.510's reference to "persons" in the context of paid investigators performing the work of a government agency under the terms of a Master Contract and Work Order, the trial court committed plain error by dismissing Leishman's entire Complaint under CR 12(c). Even without relying on the OMW Report itself, Leishman's [importunate efforts](#) over the last three years have uncovered a mountain of incriminating evidence supporting his separate misrepresentation, deception, and discrimination claims against OMW.⁷ Nevertheless, Leishman agrees with amicus that Washington's pioneering anti-SLAPP statute was not intended to leave government employees injured by negligent investigation reports without any legal recourse.

⁷ <https://www.rogerleishman.com/2020/05/Importunate.html>.

Second, most *pro se* litigants living with mental illness do not have the benefit of three decades of civil rights experience. Once again, Leishman urges the Court to carefully examine both the plain language of the Complaint and the undisputed documentary record, and to ensure that an increasingly imbalanced adversary system does not undermine the rule of law.

Leishman respectfully requests that this Court affirm the Court of Appeals' decision, provide courts and counsel with necessary guidance regarding the proper application of RCW 4.22.510 and CR 12, and remand this case for further proceedings in Superior Court.

DATED May 22, 2020.

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

**DECLARATION OF ROGER A. LEISHMAN" (INCLUDING THE EXHIBITS)
ATTACHED TO THE RESPONDENT'S ANSWER TO THE AMICUS BRIEF OF
THE ACLU OF WASHINGTON ARE STRICKEN PURSUANT TO THE
ASSIGNMENT JUSTICE'S 6/5/2020 RULING**

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- tdavis@aclu-wa.org
- tdo@mcnaul.com

Comments:

Sender Name: Roger Leishman - Email: rogerleishman@reachfar.net
Address:
PO BOX 2207
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Phone: 360-331-3077

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Comments:

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Address:
PO BOX 2207
BELLINGHAM, WA, 98227-2207
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