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No. 67864-7-I
COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

SUZANNE L. WEINSTOCK,

Appellant,

v.

ALAMO RENTAL (US), INC., et al.,

Respondents.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Alamo ducks the tough questions at the heart of this appeal: First, what is the scope of protected communications under the plain meaning of the anti-SLAPP statutes considered as a whole? And second, in light of the constitutional right to petition the courts to redress private wrongs, do the anti-SLAPP statutes immunize such communications from meritorious claims? Instead of tackling these difficult issues, Alamo seeks to prevail on appeal by relying on disputed facts in order to paint a false and disreputable portrait of Weinstock.

B. ARGUMENT IN REPLY

1. THE PLAIN MEANING OF THE ANTI-SLAPP STATUTES IS THAT CONSTITUTIONALLY PROTECTED COMMUNICATIONS ENJOY QUALIFIED IMMUNITY

In the Brief of Appellant, Weinstock's lead argument is that the plain meaning of the anti-SLAPP statutes, when read as a whole, is to provide a qualified immunity for communications addressing substantive issues of some public interest or social significance against lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. Brief of Appellant, pp. 13-19. Alamo's response to Weinstock's argument is limited to asserting that Weinstock's reliance on *Segaline v. Dep't of Labor & Industries*, 169 Wn.2d 467, 238 P.3d 1107 (2010), is misplaced

because the issue before the court in *Segaline* was whether a government agency is a “person” who may assert the anti-SLAPP defense. Brief of Respondents, pp. 20-21. Weinstock’s reliance on *Segaline* is not misplaced. In *Segaline*, the plurality opinion held that government agencies may not assert the anti-SLAPP defense because “[t]he purpose of the statute is to protect the exercise of individuals’ First Amendment rights under the United State Constitution and rights under article I, section 5 of the Washington State Constitution. A government agency does not have free speech rights.” *Segaline v. State Dep’t of Labor and Industries*, 169 Wn.2d at 473 (citations omitted). Chief Justice Madsen, concurring in the result, also recognized that the defense exists to counter lawsuits that “are designed to intimidate the exercise of rights under the First Amendment and article I, section 5 of the Washington State Constitution” *Id.* at 482 (Madsen, C.J., concurring). While the specific question before the *Segaline* court was whether government agencies are entitled to raise the anti-SLAPP defense, the five justices who constituted the deciding majority all agreed that the purpose of the anti-SLAPP defense is to protect the exercise of rights under the First Amendment and article I, section 5 of the Washington State Constitution. As Weinstock discusses in her brief, when one considers all that the legislature has said in its enactments on anti-SLAPP – which is required when determining the plain

meaning of the statute – it is clear that the legislature’s intent was to protect and advance this purpose. Alamo, however, does not offer a response to Weinstock’s discussion of the statute’s plain meaning.

2. ALAMO FAILS TO RESPOND TO WEINSTOCK’S ARGUMENT THAT THE QUALIFIED IMMUNITY UNDER THE ANTI-SLAPP STATUTES APPLIES ONLY TO SHAM LITIGATION

Weinstock’s second argument in the Brief of Appellants is that the U.S. Constitution protects Weinstock’s right to petition state courts to redress private wrongs unless her lawsuit is a mere sham filed for improper purposes, and that the 2010 amendments to the anti-SLAPP statutes provide a procedural mechanism allowing a plaintiff to show that her lawsuit is not a sham, but Alamo failed to follow those procedures. Brief of Appellant, pp. 19-25. Alamo does not respond to this argument; much less discuss Weinstock’s treatment of the six U.S. Supreme Court and five Washington cases upon which she relies.

3. RCW 4.21.510 DOES NOT PROVIDE A DEFENSE AGAINST THE OUTRAGE OR CONSUMER PROTECTION ACT CLAIMS

Weinstock argued in the Brief of Appellants that the defense under RCW 4.21.510 does not apply to her claims for outrage or for violation of the Consumer Protection Act because the gravamen of these claims is not fundamentally about a communication. Brief of Appellant, pp. 25-29.

The essence of Alamo's response is: "This is wrong. Weinstock has no basis for an outrage claim but for Alamo's communication to the police. The same rings true for her CPA claim. All of Weinstock's claims stem from Alamo's communication to a government agency that was of reasonable concern to that agency." Brief of Respondent, p. 23. Unlike the defamation or false light claims, however, where the harm done *is* the communication, the nature of the outrage claim is that Alamo engaged in extreme and outrageous conduct in seemingly working with Weinstock to have her drive the car all the way across the country, rather than merely drop it off in Connecticut as she suggested, CP 60, only to obtain police assistance in recovering the car when Weinstock didn't make good enough time on her trip. Similarly, the nature of her Consumer Protection Act claim is that Alamo engaged in an unfair trade practice by using the police to recover supposedly late-returned cars even when it knew the renter was in the process of returning the car.

4. WEINSTOCK PRESENTED CLEAR AND CONVINCING EVIDENCE THAT ALAMO KNEW OR SHOULD HAVE KNOWN THAT THE POLICE REPORT IT FILED CONTAINED MATERIAL FALSE AND MISLEADING INFORMATION

Weinstock argued in the Brief of Appellants that Alamo should not be awarded statutory damages because it communicated to the Port of Seattle Police Department in bad faith. Alamo responds with three

arguments:

First, Alamo argues that Weinstock has presented no evidence that Alamo knew, or should have known, that she was returning the vehicle. Brief of Respondents, pp. 24-25. But Alamo employee Marvin Bryant testified that he had spoken to Weinstock and knew that she was returning the car. He reported the car stolen not because Weinstock was failing to return the car, but because she did not get it back as soon as he told her to. CP 102-103.

Second, Alamo argues: “Whether the vehicle was considered 43 or 3 days overdue, it was overdue.” Brief of Respondents, p. 25 (emphasis in original). But from Bismarck, North Dakota, Weinstock spoke to an Alamo agent on November 20, 2008, describing the bad weather conditions she was encountering, and was told by the agent to take as long as she needed in order to drive safely. CP 61.

Third, Alamo argues: “Even if Weinstock was on her way returning the vehicle she had not. [sic] She failed to return a car that did not belong to her when the car was reported to POSPD.” Brief of Respondents, p. 25. But mere failure to return a rental car on time, while perhaps a breach of the rental agreement, is not a crime. There must also be the “intent to deprive the owner or owner’s agent” of the rental car. RCW 9A.56.096(1). Marvin Bryant’s knowledge that Weinstock was in

the process of returning the car – even if he were dissatisfied with the time it was taking – shows that Alamo did not understand Weinstock to have any intent to deprive it of the vehicle.

5. ALAMO DID NOT SEGREGATE THE EXPENSES AND FEES INCURRED IN ESTABLISHING THE ANTI-SLAPP DEFENSE FROM OTHER EXPENSES AND FEES

Weinstock argued in the Brief of Appellants that Alamo’s request for expenses and attorneys’ fees failed to segregate the time spent in establishing the defense under RCW 4.24.510 from other fees and expenses it incurred in the case. Brief of Appellants, pp. 37-40.

Alamo argues: “Alamo’s efforts to establish the Anti-SLAPP defense included discovery in part which cannot, and should not, be segregated from time spent researching and drafting the motion. ... As Weinstock claimed liability, the defense had to determine what evidence she had to substantiate her claims.” Brief of Respondents, p. 28. Alamo’s statement here is remarkably inconsistent with Alamo’s position that the anti-SLAPP defense is absolute, that it immunizes Alamo from any liability regardless of whether or not Weinstock can substantiate her claims. If Alamo is correct that the anti-SLAPP statute confers immunity even from an otherwise valid claim, it should have raised that defense at the outset of the case, rather than consume valuable court time and run up large legal bills.

Alamo argues that it presented the trial court with three options for awarding fees – presumably implying that one or all of these options included a segregation of the time spent in establishing the anti-SLAPP defense from other expenses and fees incurred in the case. Brief of Respondents, p. 28. But none of the options described by Alamo are limited to the fees incurred in establishing the defense. In fact, all three of them involve substantial time spent on the defense prior to July 6, 2011, which is the first date on which counsel’s billing records show *any* time spent working on the anti-SLAPP defense. CP 172.

6. ALAMO IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS INCURRED ON APPEAL

Alamo asks for an award of attorneys fees and expenses on appeal. Brief of Respondents, p. 29. For the reasons discussed above, and in Appellant’s brief, the trial court’s decision should be reversed. No attorneys fees or expenses on appeal should be awarded to Alamo.

C. CONCLUSION

Alamo could have had its car returned to an Alamo facility in Connecticut on November 15, 2008. Instead, it persuaded Weinstock to drive the car across the country in order to return the car to SeaTac. When bad weather prevented Weinstock from getting the car back by November 21, as discussed with Alamo, she spoke with a rental agent who told her to

take as long as it took to drive safely. Nevertheless, because the car wasn't returned within the timeframe Marvin Bryant expected, on behalf of Alamo he reported the car stolen. He included in the stolen car report false and misleading information about when the car was due back and suggesting that Alamo had tried, but failed, to communicate with Weinstock. Weinstock was subsequently arrested and incarcerated and was subject to criminal proceedings for the following three years as she fought the charges. Now Alamo tries to wrap itself within the immunity of a statute designed to protect citizens from lawsuits brought for the purpose of intimidation and harassment. Weinstock's lawsuit does not intimidate or harass Alamo. It only asks that Alamo be held accountable for its wrongful actions that have damaged Weinstock.

DATED this 24th day of April, 2012.

THE GILLETT LAW FIRM

A handwritten signature in black ink that reads "Michael B. Gillett". The signature is written in a cursive style with a horizontal line underneath it.

Michael B. Gillett
Attorney for Appellant

APPENDIX B
CITED STATUTORY PROVISIONS

RCW 9A.56.096(1)

A person who, with intent to deprive the owner or owner's agent, wrongfully obtains, or exerts unauthorized control over, or by color or aid of deception gains control of personal property that is rented, leased, or loaned by written agreement to the person, is guilty of theft of rental, leased, lease-purchased, or loaned property.

Declaration of Service

I, MICHAEL B. GILLETT, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I am the attorney-of-record for Appellant Suzanne L. Weinstock in the above-entitled matter. I am over 18 years of age, knowledgeable of the matters stated herein, and competent to testify as to the same. On this day, I caused to be served on the persons indicated below the Reply Brief of Appellants, via messenger service with instructions to serve not later than April 25, 2012:

Attorney for Respondent:

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SIGNED this 24th day of April, 2012, at Seattle, Washington.



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