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SUPREME COURT  
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 309029-III

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MICHAEL HENNE,

Plaintiff/Respondent

v.

CITY OF YAKIMA, a Municipal Corporation,

Defendant/Petitioner

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**PLAINTIFF/RESPONDENT'S ANSWER  
AND COUNTER PETITION TO  
PETITIONER/DEFENDANT'S PETITION FOR REVIEW**

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 ORIGINAL

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**A. INTRODUCTION AND CITATION TO COURT OF APPEALS DECISION**

Respondent/Plaintiff, Sgt. Michael Henne of the Yakima Police Department, responds in opposition to the Petitioner/Defendant City of Yakima's petition for review of the Court of Appeals' published decision, Henne v. City of Yakima (No. 309029-III), filed on November 7, 2013. Contrary to the Petitioner/Defendant's contentions, the Court of Appeals was correct that the trial court properly granted Plaintiff Henne's motion to amend his complaint prior to the court ruling on the motion to strike.

Respondent/Plaintiff, Sgt. Michael Henne also seeks review of the Court of Appeals finding that Petitioner/Defendant City had standing to bring a motion to strike allegations in Plaintiff's complaint under the Washington State anti-SLAPP statute. RCW 4.24.525.

The Court of Appeals decision is appended to the City's Petition for Review (A 1-24).

**B. ASSIGNMENTS OF ERROR/ISSUES FOR REVIEW**

Petitioner/Defendant's Petition for Review has turned one issue into five in its "Issues Presented for Review." The Petitioner/Respondent City's only issue should be:

Should the Sgt. Henne have been allowed to amend his complaint prior to the City filing an answer?

However, Respondent/Plaintiff Sgt. Henne seeks review of the Court of Appeals holding that a city government has standing to bring a motion to strike under the anti-SLAPP statute (RCW 4.24.525) in a case such as this.

### **C. STATEMENT OF THE CASE**

Sgt. Henne filed a Claim for Damages with the City of Yakima on May 10, 2011, as required by RCW 4.96.010 and RCW 4.96.020. The Claim alleged negligent hiring, supervision and retention, among other allegations. (CP 186-200). The city never responded to Sgt. Henne's Claim for Damages. On November 4, 2011 Sgt. Henne filed a complaint in Yakima County Superior Court and served the city. (CP 3-14). The city did not answer the Complaint.

On December 30, 2011 the City filed a motion to strike. On January 20, 2012 Sgt. Henne moved to amend his complaint. (CP 15-37, 126-133, 138-140, 141-170). The trial court heard the two motions on March 9, 2012: one by Sgt. Henne to amend his complaint and the other by the City to strike some allegations in the initial complaint and invoking RCW 4.24.525. (CP 363-382). Both parties agreed to allow the complaint to be amended and the trial court so ordered. (CP 363-382). The trial

court then heard argument on the city's motion to strike pursuant to RCW 4.24.525 and denied the city's motion. (CP 358-362, 363-382). The city then appealed the trial court's ruling regarding the motion to strike. (CP 357-384).

The Court of Appeals heard oral argument in Henne v. City of Yakima (No. 309029-III) and subsequently filed and published its decision on November 7, 2013. The City petitioned for review of that decision.

#### **D. ARGUMENT**

##### **1. Plaintiff's Motion to Amend Complaint**

This Court should not grant review of the Court of Appeals' decision upholding Sgt. Henne's right to amend his complaint. The seminal issue raised by the City concerns the trial court's ruling with regard to Sgt. Henne's amendment to his complaint. However, the City has ignored CR 15(a), which allows "A party [to] amend the party's pleading once as a matter of course at any time before a responsive pleading is served." In this case, Sgt. Henne filed a motion to amend prior to the City's answer to his complaint. (CP 126-133, 141-170, 330-356). CR 15(a) also states that if a party seeks leave of the court to amend "leave shall be freely given when justice so requires." Under either

criteria, the trial court properly exercised its sound discretion in allowing the Plaintiff to amend his complaint.

Sgt. Henne filed a complaint against the City of Yakima on November 4, 2011. (CP 3-14). The City appeared on November 9, 2011, but it did not answer the complaint. On December 30, 2011 it filed a motion to strike. (CP 15-37). Sgt. Henne moved to amend his complaint on January 30, 2012. (CP 126-133, 138-140, 141-170). The City finally answered Sgt. Henne's complaint on February 7, 2013. (CP 297-305).

Unlike another Yakima case, Bassani v. Sutton, 10-35482 (9th Cir. 2011) where the court found that there would be undue delay and prejudice to the defendants if Bassani was allowed to amend his complaint "two years into litigation and after the close of discovery," in the instant case the defendant had not yet filed an answer when the Plaintiff moved to amend his complaint and no discovery had occurred.

As the Court of Appeals stated in Hines v. Todd Pacific Shipyards Corp., 127 Wn.App. 356, 373-374 (Wash.App. Div. 1 2005),

The amendment of pleadings is left to the sound discretion of the trial court, whose determination will be overturned on review only for an abuse of that discretion. Herron v. Tribune Pub. Co., 108 Wash.2d 162, 165, 736 P.2d 249 (1987). Discretion is abused if it is manifestly unreasonable, or exercised on untenable grounds, or for untenable

reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

There was no abuse of discretion by the trial judge in granting the motion in compliance with the court rules.

At a hearing on March 9, 2012, the trial judge, Hon. Blaine Gibson of the Yakima County Superior Court, allowed Sgt. Henne's amendment, with the acquiescence of the City's attorney. (CP 140 -171, 363-382).<sup>1</sup>

Then, following his review of the written motion and response, a reading of the statute and hearing oral argument on the merits of the City's motion to strike, the trial judge denied the City's motion, which can be fairly characterized as the City's own SLAPP motion.

The CR 15(a) issues presented in the City's Petition for Review are bewildering in light of the discussion between the court and the City's attorney at the time of the hearing on March 9. The trial court asked the City's attorney [Mark Watson] directly, "[D]oes the city oppose the motion to amend?" To which Mr. Watson responded "No, your Honor." (CP 363-382). After the City's attorney said the City did not oppose Sgt. Henne's motion to amend his complaint, the trial court granted the motion and then turned to the appropriateness of the City trying to use the anti-SLAPP statute against one of its own employees. (CP 363-382).

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<sup>1</sup> See Appendix (A 25-44) The Verbatim Report of Proceedings at the March 9, 2012 hearing at page 2, lines 2-21. (CP 363-382).

Sgt. Henne's amendment to his complaint was simply a clarification of his concerns in filing the lawsuit against the City for its discriminatory acts and omissions. The City's answer to the original complaint was not filed until approximately four months after Sgt. Henne's complaint was served and after his motion to amend his complaint was filed. (CP 297-305)

As noted above, the City did not oppose Sgt. Henne's motion to amend his Complaint, which in any event was permitted by CR 15(a). (CP 363-382). In addition, the City not only failed to timely answer the original complaint, it failed to directly answer the motion to amend the complaint prior to the hearing on the motion to amend. The City's petition for review should be denied.

## **2. Defendant's Motion to Strike**

This Court should review and consider the Court of Appeals' decision that a city is a "person" for purposes of Washington's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, RCW 4.24.525. After hearing oral argument on March 9, 2012, the trial court dismissed the City's motion to strike, based on the court's reading of RCW 4.24.525. Judge Gibson stated:

Well, having read through this, I look at the statute and I look at the purpose of the statute. It seems to me that if this statute can be used to recover penalties and attorney fees from an individual who's petitioning the government for redress of grievances, that's exactly the opposite of the purpose of the statute. So I am denying the city's motion.<sup>2</sup> (CP 363-382). [Emphasis added]

By way historic background, one of the first advocates of statutes to protect citizens from “strategic lawsuits against public participation (SLAPP)”<sup>3</sup> has defined a SLAPP as “a lawsuit that is intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition.” The first proponents of such laws were First Amendment advocates who wished to eliminate the chilling effect of SLAPP suits intended to spend critics of governmental action into silence. In other words, the anti-SLAPP lawsuits were originally intended to address abuses by governmental bodies seeking to silence their critics.

In 1989, the Washington State Legislature passed RCW 4.24.500 “Good faith communication to government agency.” The Legislature stated:

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<sup>2</sup> See Appendix (A 25-44) Ruling by the Hon. Blaine G. Gibson of the Yakima County Superior Court in The Verbatim Report of Proceedings at the March 9, 2012 hearing at page 12, line 3. (CP 363-382)

<sup>3</sup> Nazanin Rafsanjani (Friday, April 02, 2010). "SLAPP Back: Transcript". *ON THE MEDIA* ([onthemedia.org](http://onthemedia.org)). WNYC (National Public Radio, PBS). Retrieved 2011-06-29.

Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

Then, in 2002, the Washington legislature passed RCW 4.24.510, which was further intended to address abuses by governmental bodies.

The legislative intent was stated as follows:

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.

In 2010, the legislature passed RCW 4.24.525, while preserving the earlier statutes which inform the meaning of RCW 4.24.525.<sup>4</sup> The meanings of the terms used in this statute are well understood. The Public means the people. Public participation means participation in the public forum by the people. Government, as defined by the statute means “a

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<sup>4</sup> When the legislature passed RCW 4.24.525 (See footnote 3) in 2010, it stated its findings as follows:

"(1) The legislature finds and declares that:

(a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities;

(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and

(e) An expedited judicial review would avoid the potential for abuse in these cases.

(2) The purposes of this act are to:

(a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and

(c) Provide for attorneys' fees, costs, and additional relief where appropriate."

[Emphasis added]

branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority.”

There was no need for the Washington State Legislature to specifically define “Government” in such detail, if city governments were to be subsumed within the term “People.”

If there was ever any question about whether the City of Yakima is a “Government,” pursuant to RCW 4.24.525(1)(b), versus a “Person,” pursuant to RCW 4.24.525(e), it can be laid to rest by the letter in this court’s file sent by Ronald R. Carpenter, Supreme Court Clerk, when he wrote on December 19, 2013, “It is noted that the \$200 filing fee accompanied the petition. Pursuant to RCW 2.32.070, no fee shall be required to be advanced by the state or any municipal corporation. Accordingly, Petitioner’s check #061579, is being returned as in enclosure hereto.” (A 45-46).

As noted above, the first Washington anti-SLAPP statutes were augmented by RCW 4.24.525. As with the earlier statute, this statute was enacted by the Washington legislature because of its continuing concern regarding lawsuits brought by e.g. governmental agencies intending to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The only twist in this lawsuit is

that the defendant is a governmental body attempting to assert a SLAPP motion in its effort to stifle the First Amendment rights of a plaintiff employee seeking redress.<sup>5</sup>

It is understood that the legislature enacted Washington's anti-SLAPP statute to prevent a chill on the valid exercise of constitutional free speech rights brought about by lawsuits. To emphasize the point, the legislature found that "[i]t is in the public interest for citizens to participate in matters of public concern and provide information" on public issues that affect them "without fear of reprisal through abuse of the judicial process."

To serve that purpose, the law provides, in relevant part, that "[a] party may bring a special motion to strike any claim that is based on an action involving public participation" as defined in the statute. An action involving public participation includes "[a]ny ... written statement... in a place open to the public or a public forum in connection with an issue of public concern" and "other lawful conduct in furtherance of the exercise of

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<sup>5</sup> The First Amendment to the United States Constitution states: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I Sections 4 and 5 of the Declaration of Rights to the Washington State Constitution state: The right of petition and of the people peaceably to assemble for the common good shall never be abridged. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right. [Emphasis added]

the constitutional right of free speech in connection with an issue of public concern." It is Sgt. Henne, not the City, who is attempting to exercise his Constitutional rights.

Reliance on California case law is unnecessary in order to understand the intent and meaning of this statute. The court in Akrie v. Grant, 68345-4-I, 69300-0-I (Wa.App. Div. 1, 2013) stated:

We have never before interpreted RCW 4.24.525(6)(a). Nonetheless, the language of the statute is plain and unambiguous. "In the absence of a specific statutory definition, words in a statute are given their common law or ordinary meaning." State v. Chester, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997); *accord* Hunter v. Univ. of Wash., 101 Wn.App. 283, 290-91, 2 P.3d 1022 (2000). [Emphasis added]

In other words, "Government" means government and "People" means people.

With this in mind, the primary question the court must address is: Whether, pursuant to RCW 4.24.525(4), the City properly brought a special motion to strike Sgt. Henne's claims.

His claims are based on actions involving public participation and petition, as defined in subsection (2) of RCW 4.24.525. If this court determines that the City's motion was not properly brought, for the sake of the citizens of Washington State, the City's position regarding the use of

the anti-SLAPP statutes should be soundly rejected. This court should seize this opportunity to clarify the law and clearly hold that the rights of the citizens of Washington State to engage in public participation and petition will be protected by the anti-SLAPP statute and that the statute may not be used or abused by governmental bodies to stifle the legitimate exercise of citizens' Constitutional rights.

In other words, the anti-SLAPP statute should not be turned on its head by allowing the City to sue an aggrieved employee who is simply seeking redress through the courts. The statute, as abused by the City, is not properly applicable to Sgt. Henne. The City's attempt to apply the statute to this case is without merit, either factually or legally. As Judge Gibson said at page 10, line 20 of The Verbatim Report of Proceedings, *"When I looked at this, it just didn't pass the smell test. What the city is trying to do is exactly what the anti SLAPP statutes were designed to prevent, that it's the moneyed interest trying to squash the little person who is trying to seek some kind of relief from the government."* (A 25-44)(CP 363-382).

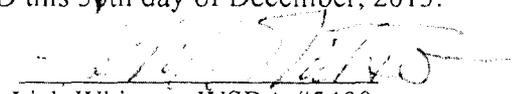
#### **F. CONCLUSION**

Respondent/Plaintiff Sgt. Henne respectfully asks that this Court uphold the trial court's ruling granting Sgt. Henne's motion to amend the complaint and dismiss the Petitioner/Defendant City's motion to strike

pursuant to RCW 4.24.525. Respondent/Plaintiff Sgt. Henne also respectfully ask that this Court review and consider the Court of Appeals' decision that a city is a "person" for purposes of Washington's anti-SLAPP and render a decision in line with the intent of the Legislature.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of December, 2013.

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## APPENDIX

1. The Verbatim Report of Proceedings at the March 9, 2012 hearing. (A 25-44).
2. December 19, 2013 letter from Ronald R. Carpenter, Supreme Court Clerk. (A 45-46).

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF YAKIMA

MICHAEL HENNE, )

Plaintiff, )

vs. ) No. 11-2-03986-1

CITY OF YAKIMA, )

Defendant. )

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that the above-mentioned cause came on for hearing on March 9, 2012, before the Honorable Blaine Gibson, Yakima County Superior Court, Yakima, Washington.

COUNSEL IN ATTENDANCE were Mr. Lish Whitson,, Attorney at Law, Seattle, Washington, representing the Plaintiff; Mr. Mark Watson, Attorney at Law, Yakima, Washington, representing the Defendant.

Reported by: Joan E. Anderson

CSR No. 2564

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## P R O C E E D I N G S

1  
2 THE COURT: Good morning. Let's begin with the  
3 motion to amend.

4 ~~Mr. Watson, other than wanting to preserve the city's~~  
5 claim for attorney fees, penalties and so on, other than  
6 that, does the city oppose the motion to amend?

7 MR. WATSON: No, your Honor. Other than the order  
8 that we are asking for the court to enter, we want it to  
9 apply to the amended complaint to the extent it purports to  
10 continue these claims that are the subject of the SLAPP  
11 motion. In other words, if the court is going to strike the  
12 claims, they shouldn't be asserted in the amended complaint.

13 THE COURT: I thought the specific claim that you  
14 had focussed on was the one that was deleted from the  
15 amended complaint.

16 MR. WATSON: Largely. I mean, I don't know if  
17 there is any residual left in it or not. It is rather  
18 broad. By and large, it is being deleted it as near as I  
19 can tell.

20 THE COURT: I'm going to grant the motion to amend  
21 the complaint. Now let's get to the issue of the anti SLAPP  
22 situation.

23 I would like to start with kind of reviewing my  
24 understanding of how this process developed, and maybe  
25 counsel can educate me if my understanding isn't correct.

MOTION HEARING

1 My recollection of how this whole process started was there  
2 were times when moneyed interests, like developers, were  
3 trying to get whatever the governmental agencies were that  
4 ~~allowed the developments to grant them permits and so on.~~  
5 Citizens or groups of citizens would come forward and oppose  
6 those developers' plans.

7 Then some clever lawyers for, again, some moneyed  
8 interest developed this process of suing the people who had  
9 petitioned the governmental bodies in opposition to what the  
10 moneyed interests want, not because there was really any  
11 merit to the lawsuits but to make it so expensive for  
12 private citizens or organization that they couldn't pursue  
13 their interests or other people, that the efforts of other  
14 people were chilled because they were afraid to come forward  
15 and oppose in their various governmental entities the  
16 proposals being made by the moneyed interests because they  
17 didn't want to get sued.

18 So because of that, states adopted what are called anti  
19 SLAPP statutes which were designed to help protect the  
20 people who were petitioning the government and to discourage  
21 the moneyed interests from using their power to chill the  
22 petitioning process.

23 Does anybody think that my understanding of this is not  
24 right, not correct?

25 MR. WHITSON: Your Honor, it is. May I pass to

1 counsel and to you a recent case that may actually elucidate  
2 that.

3 THE COURT: Go ahead.

4 MR. WHITSON: ~~The thing that was missing from the~~  
5 arguments that both Mr. Watson and I made was 4.24.510.  
6 4.24.510 was initially drafted by the legislature in 1999.  
7 It was amended in 2002. It's still on the books.

8 The case that's attached there is a case that came down  
9 this last year which interprets 510 and talked about whether  
10 or not the government is a person. The majority between  
11 pages one and six comes down firmly on the side that the  
12 government is not a person for purposes of an anti SLAPP  
13 statute.

14 THE COURT: Mr. Watson, have you had a chance to  
15 review this case?

16 MR. WATSON: I'm well aware of that decision, your  
17 Honor.

18 THE COURT: Well, that was going to be one of the  
19 questions I asked you. I mean, I wasn't aware of the case.  
20 I looked at the statute and I see where the definition  
21 section of the statute, it defines government in one B and  
22 then it defines person in one E. It says that persons are a  
23 lot of things. Clearly the legislature knows what a  
24 government is, and it's not included in the list of persons.

25 MR. WATSON: You're talking about the definition

1 of 510?

2 THE COURT: I'm talking about the definitions  
3 included in 525.

4 ~~MR. WATSON: In 525. The person means an~~  
5 individual, corporation, business, trusted safe,  
6 partnership, limited liability company, association, joint  
7 venture, any other legal or commercial entity. That's much  
8 broader.

9 These two statutes are different. 510 creates an act  
10 of immunity. It creates an immunity as defined in that  
11 statute, and I haven't read it again in a while. That  
12 statute is separate from 525.

13 525 is a procedural statute. In and of itself, 525  
14 does not create immunities. What it does is say if an  
15 action falls within the definition of this statute, once you  
16 make that prima facie showing, then the nonmoving party has  
17 to show a probability of prevailing by clear and convincing  
18 evidence.

19 THE COURT: Mr. Watson, for --

20 MR. WATSON: I'm getting to the definition part.

21 THE COURT: Go ahead.

22 MR. WATSON: That's what you're asking about.

23 So 510 doesn't contain a definition of person. That's  
24 what the decision in Segaline focussed on. There was no  
25 definition of person in 510 that was sufficiently definite

1 to include governmental entities whereas 525 is a very broad  
2 definition, which includes any other legal or commercial  
3 entity.

4 Well, the city of Yakima is a municipal corporation.  
5 It is a legal entity. So there is a much broader definition  
6 of person in 525 whereas 510 has no definition. That's what  
7 the court in Segaline was having to deal with was the  
8 absence of a definition in that statute. That's the  
9 distinction.

10 THE COURT: Okay. Getting back to my basic  
11 understanding of how SLAPP suits developed and anti SLAPP  
12 statutes developed, do you agree that my understanding of  
13 that is, I guess, roughly accurate about how these things  
14 developed.

15 MR. WATSON: That may have been the genesis for  
16 the enacting of some of the initial SLAPP legislation. This  
17 particular statute is much broader than the scenario you've  
18 painted.

19 In other words, in applying the literal terms of the  
20 statute, it's not so limited to the scenarios that you've  
21 painted, the so-called moneyed interests type of scenario.  
22 I think the case law is pretty clear that you can't -- you  
23 don't look at the general background of a statute to get  
24 around the literal terms and the literal application of the  
25 language of the statute.

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The purpose of this statute, 525, which is procedural, is to protect local governments from actions that are based upon communications, participation and proceedings of those local governments. That's much broader than the moneyed interest scenario you've painted, and the statute contains no such limitation.

THE COURT: Getting back to how these whole things developed, first of all, you referred to this as a SLAPP -- this is actually an anti SLAPP statute, is it not? It's a lawsuit designed to help protect people from SLAPP lawsuits.

MR. WATSON: Well, this statute protects local government from --

THE COURT: No, no, no. Well, whoever it's designed to protect, its designed to protect them from SLAPP lawsuits, right?

MR. WATSON: From lawsuits involving public participation and what's the definition of the public participation petition.

THE COURT: So, again, my understanding is that this statute and other statutes like it were designed to prevent the chilling effect that SLAPP lawsuits have on people who are wishing to petition their governmental entities for redress.

MR. WATSON: Well, it's not just limited to petitions, participation as well. The statute goes beyond

1 petition.

2 THE COURT: So I'm looking at the findings and  
3 purpose for this statute. The legislature finds and  
4 ~~declares that it is concerned about lawsuits brought~~  
5 primarily to chill the valid exercise and constitutional  
6 rights of freedom of speech and petition for the redress of  
7 grievances. That's what this statute is supposed to do,  
8 right?

9 MR. WATSON: That's one of the purposes.

10 THE COURT: So the trouble I have with this is --  
11 again, my understanding being the way this developed was it  
12 was the little people who were being squashed by the people  
13 with money using the SLAPP lawsuits. So the anti SLAPP  
14 statutes were designed to protect the little people from the  
15 big powerful people.

16 MR. WATSON: I don't read the statutes being so  
17 limited, your Honor.

18 THE COURT: Well, I'm not getting to the reading.  
19 I'm talking about generally isn't that what the statutes  
20 were designed to do?

21 MR. WATSON: Well, to get into the thought  
22 processes of individual legislators would be a difficult  
23 thing. I think the fact that one purpose may have been  
24 stated in a legislative declaration doesn't exclude other  
25 purposes as well.

1 THE COURT: This is the legislative statement of  
2 the findings and purpose made by the legislature.

3 MR. WATSON: I understand.

4 ~~THE COURT: So the problem I have here is what you~~  
5 have filed, the way you're using the statute looks to me  
6 exactly like a SLAPP lawsuit. It's the moneyed interest  
7 trying to squash somebody who's seeking redress from the  
8 government.

9 MR. WATSON: No, no. What this lawsuit is about  
10 is suing the city for the alleged acts of its agents in  
11 reporting internal investigation matters.

12 THE COURT: Isn't the city trying to use this  
13 statute to get money from the person who's seeking redress  
14 from the city?

15 MR. WATSON: They're seeking to dismiss claims  
16 based upon others who have engaged in public participation  
17 and petition for which the city is being sought to be held  
18 liable.

19 THE COURT: So the city is not asking for any  
20 money from the plaintiff in this case; is that correct?

21 MR. WATSON: There's no counterclaim, no. This  
22 motion is being brought to strike the allegations of the  
23 claim that the plaintiff has brought.

24 THE COURT: Okay. The allegation has been  
25 stricken. The city is not seeking any money. So we're

1 done, right?

2 MR. WATSON: No. We're seeking our attorney fees  
3 and the statutory penalty.

4 THE COURT: ~~Mr. Watson, that's money, isn't it?~~

5 MR. WATSON: Well, we're not seeking damages in  
6 the sense that he's done something. We're seeking an award  
7 of attorney fees and the statutory penalty.

8 THE COURT: In the form of money.

9 MR. WATSON: Yes.

10 THE COURT: You are seeking money. You're trying  
11 to recover -- the city is using its power to try to recover  
12 money from the person who is seeking redress from the city  
13 for grievances. Isn't that a correct statement?

14 MR. WATSON: Seeking money for the expenses  
15 incurred in striking the allegations that are being made  
16 against the city based upon the alleged acts of its agents  
17 engaging in public participation and petitions defined under  
18 the statute.

19 THE COURT: Before even reading the Segaline case,  
20 I wasn't aware of that. When I looked at this, it just  
21 didn't pass the smell test. What the city is trying to do  
22 is exactly what anti SLAPP statutes were designed to  
23 prevent, that it's the moneyed interest trying to squash the  
24 little person who is trying to seek some kind of relief from  
25 the government.

1           Are there any cases that say that this statute is  
2           designed to allow a government entity to attempt to recover  
3           monetary -- penalties and attorney fees from a person who is  
4           suing the governmental agency seeking relief for grievances?

5           MR. WATSON: I believe the Hansen case, your  
6           Honor, construing a very similar California statute involves  
7           that situation.

8           THE COURT: In Washington is there any case law?

9           MR. WATSON: No. We only have one reported state  
10          court decision in Washington. It really doesn't address  
11          that issue. The only case I've been able to find is the  
12          California case law which at least one federal district  
13          court here in Washington has applied by analogy because the  
14          statutes are very similarly worded.

15          The Hansen case involved just this scenario where an  
16          employee sued the state of California and some of its  
17          employees for allegedly harassing him by initiating his  
18          internal investigations. The court held that that fell  
19          within the scope of the SLAPP statute because it was a  
20          proceeding in or in connection with the proceeding  
21          authorized by law, an internal investigation. The court  
22          struck those parts of the pleadings and made an award  
23          against the plaintiff.

24          The case law is pretty clear that you can't avoid the  
25          effect of this SLAPP statute, this procedural SLAPP statute,

1 by amending your complaint or by trying to take a nonsuit of  
2 that claim.

3 THE COURT: Well, having read through this, I look  
4 at the statute and I look at the purpose of the statute. It  
5 seems to me that if this statute can be used to recover  
6 penalties and attorney fees from an individual who's  
7 petitioning the government for redress of grievances, that's  
8 exactly the opposite of the purpose of the statute. So I am  
9 denying the city's motion.

10 Now, having said that, I still have -- let me just  
11 think out loud here. Mr. Whitson, I looked at this. I read  
12 through this. The first question that came to mind is why  
13 wasn't this pursued as a grievance? The police have  
14 collective bargaining rights. Why isn't this a collective  
15 bargaining issue?

16 MR. WHITSON: Your Honor, some of the -- there are  
17 a couple of answers. The union wasn't interested in doing  
18 that. Perhaps one of the reasons is that some of the  
19 leadership in the union are implicated in some of the things  
20 talked about. It becomes a Catch 22. It's an imperfect  
21 system. I wish it had worked the way that it should have,  
22 and you would be absolutely right. That was not possible.

23 THE COURT: All right. I also share the city's  
24 concern about exactly what is the recognized cause of action  
25 here. You think back to law school about what the classic

1 causes of action are. Other than, I suppose, intentional  
2 infliction of emotional distress, what kind of classic tort  
3 action does this fall into?

4 MR. WHITSON: Well, counsel has talked about us  
5 being broad in our approach. We are because that's what's  
6 allowed under Washington law. RCW 4.96.10 and 4.96.20 talk  
7 about tortious conduct of local government entities and the  
8 tortious conduct of local government entities and their  
9 agents.

10 In addition to that, I think all residents of Yakima  
11 probably know this. There were endemic problems under the  
12 administration of Sam Granato, which were endorsed by city  
13 manager Dick Zais. As you may know, we've taken numerous  
14 depositions in other lawsuits. We believe that we will be  
15 able to show that unfortunately -- I don't want to  
16 characterize it as something that might be interpreted with  
17 a definition, but it was bad situation. We believe we'll be  
18 able to show that to a jury.

19 THE COURT: Okay. I'm still asking -- this is  
20 more out of curiosity than anything else because we're  
21 beyond the issues of this hearing. You referred to tortious  
22 conduct. What's the name of the tort? Is it intentional  
23 infliction of emotional distress? Is it something -- if you  
24 looked it up in a textbook, what would be the name of this  
25 tort?

1 MR. WHITSON: It's hard to define that, your  
2 Honor, for this reason: My client did not bring this  
3 lawsuit while any internal investigations were pending.

4 ~~One of the things that I would think a jury would find~~  
5 was that there was selective enforcement because you've  
6 heard the arguments that when a complaint is made there is a  
7 necessity to do an investigation and we don't disagree with  
8 that. But complaints were made about the people who were  
9 making complaints, and there was no internal investigation.

10 So in part what we're saying is the procedures didn't  
11 work. I don't know whether we would characterize that  
12 somehow as something analogous to a breach of contract or a  
13 breach of bad faith. We believe we'll be able to show a  
14 jury that there was something rotten in Denmark and that he  
15 suffered as a result. He had to re-mortgage his house at  
16 some great financial cost. He and his wife had been trying  
17 to have a child for sometime. That was interrupted and it's  
18 caused great anguish for both of them.

19 As you know, from what you've heard already, there were  
20 rumors that were circulating that he was a bad apple. Then  
21 the question is can he ever come back on the streets of  
22 Yakima and have the respect of the citizens.

23 THE COURT: I appreciate this. I'm asking these  
24 questions because I have to assume that there's going to be  
25 discovery, which if it hasn't already, will ask these

1 questions.

2 MR. WHITSON: Yes.

3 THE COURT: Then I assume there's going to be a  
4 ~~summary judgment motion where I will have to decide is~~  
5 there, in fact, a recognized cause of action here.

6 MR. WHITSON: Absolutely, your Honor.

7 THE COURT: I recall in my young days as a lawyer  
8 I was doing some defense work. A very well known  
9 plaintiff's attorney out of the Tri-Cities had filed a  
10 lawsuit. I filed a summary judgment motion. He obviously  
11 recognized he had problems with his cause of action. So he  
12 amended his complaint. I filed another summary judgment  
13 motion. He amended his complaint again. I filed another  
14 summary judgment motion.

15 He cornered me in court and said, why don't we just --  
16 let's just have the trial. Let's not worry about all these  
17 legal issues. On my third or fourth summary judgment motion  
18 I got his case dismissed. He had great facts but he had no  
19 law.

20 That's what I'm -- you talk about getting the case to  
21 the jury because there are situations where juries will look  
22 at facts and say, well, this is horrible. This shouldn't  
23 have happened. If there isn't a recognized legal basis,  
24 sooner or later it gets thrown out of court.

25 That's why I'm asking the questions. I looked at this

1 and thought where does this fit in the pigeonholes that we  
2 learned about in law school? You have to have a recognized  
3 cause of action. I don't know what it is yet.

4 MR. WHITSON: Your Honor, if we are allowed to  
5 have discovery, I think perhaps one of the reasons why this  
6 was brought as, quote, unquote, anti SLAPP as opposed to a  
7 summary judgment is that we would have asked for a 56(f)  
8 period of time to do the proper discovery.

9 Certain allegations have been made, some by Mr. Watson,  
10 some by witnesses that Mr. Watson quotes. We know, for  
11 example, that Sam Granato told his captains and lieutenants  
12 that if I say to do something, you buy that. So we actually  
13 have sworn testimony in depositions where people that we  
14 know were given a direct order from Sam Granato claimed that  
15 it was their own decision.

16 Now, of course, they are stuck with a situation where  
17 do they admit to perjury or do they fess up? We haven't had  
18 a chance to explore that with them in this case.

19 THE COURT: Well, you're going to now.

20 MR. WHITSON: Yes.

21 THE COURT: Sooner or later you're going to have  
22 to answer the question.

23 MR. WHITSON: And I look forward to those hard  
24 questions from the bench, your Honor. I think we'll have  
25 answers.

1 THE COURT: All right. I assume there's going to  
2 be additional hearings. I assume that we may --

3 MR. WHITSON: All that we ask, your Honor, is that  
4 either we have discovery or that we have a settlement.

5 THE COURT: Okay. Well, I can help with discovery  
6 if there is a problem. I can't help with settlement.

7 Anything else, counsel?

8 MR. WATSON: We'll get an order to your Honor.

9 THE COURT: All right.

10 MR. WHITSON: There are proposed orders, your  
11 Honor. I don't know whether they will work or not. I think  
12 they were filed with the court.

13 THE COURT: Do you want to try to put something  
14 together now? I'll be here the rest of the morning.

15 MR. WATSON: I'm going to want to list all the  
16 documents. I don't know if the orders by Mr. Whitson did.  
17 His order had a provision for attorney fees and costs in  
18 favor of --

19 THE COURT: No, I'm not granting attorney fees.  
20 I'm just denying this motion and the case goes on.

21 MR. WATSON: I think we can get something put  
22 together just denying the order. We'll get it put together.

23 THE COURT: It just could be a simple generic  
24 order that the motion to amend is granted and the motion to  
25 -- since it's not a summary judgment motion, there isn't any

1 requirement that all of the things that I considered be  
2 listed.

3 MR. WATSON: I think I would prefer to have those  
4 listed, your Honor, for purposes of the record. We're going  
5 need to determine -- we feel pretty strongly about this  
6 argument.

7 This statute is interesting. It has some provisions in  
8 it that don't provide any guidance. There is a right for an  
9 expedited appeal for any ruling your Honor makes, which we  
10 don't have any guidance from our courts on how that works.  
11 So I'd just like to try to get everything listed so if there  
12 is any question about it we'll have it there.

13 MR. WHITSON: I guess one thing I would like to  
14 know before we go forward, is there going to be an appeal  
15 under 525? If so, is the defendant going to claim that that  
16 stays any discovery?

17 MR. WATSON: I don't know.

18 THE COURT: I assume he has to talk to his client  
19 before he gives a decision.

20 MR. WATSON: No decision has been made, your  
21 Honor. So I really can't respond.

22 THE COURT: Please let Mr. Whitson know as soon as  
23 you know.

24 This case has not been preassigned, I don't think.

25 MR. WATSON: No.

1 THE COURT: If there's going to be additional  
2 hearings, I spent a lot of time on this. If there's going  
3 to be additional hearings, it may make sense to have them in  
4 front of me. I'm going to be gone until the end of March.  
5 So if anything comes up, you'll need to have it heard by  
6 another judge.

7 MR. WHITSON: I don't think anything is going to  
8 be resolved before the end of March, your Honor.

9 THE COURT: All right.

10 MR. WATSON: Thank you.

11 MR. WHITSON: Thank you.

12 *(Proceedings were adjourned.)*  
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C E R T I F I C A T E

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STATE OF WASHINGTON )

) ss.

COUNTY OF YAKIMA )

I, Joan E. Anderson, an Official Court Reporter of the Superior Court of the State of Washington in and for the County of Yakima, do hereby certify that the Verbatim Report of Proceedings in the foregoing cause was ordered by Mr. Mark Watson, Attorney at Law, on the 5th day of April 2012.

I further certify that said Verbatim Report of Proceedings was filed with the Clerk of the Court in the above county, and a copy delivered to Mr. Watson, on the 10th day of April 2012.

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Official Court Reporter

RONALD R. CARPENTER  
SUPREME COURT CLERK

SUSAN L. CARLSON  
DEPUTY CLERK / CHIEF STAFF ATTORNEY

THE SUPREME COURT  
STATE OF WASHINGTON



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December 19, 2013

LETTER SENT BY E-MAIL

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Honi Renee Townsley, Clerk  
Court of Appeals, Division III  
500 N. Cedar Street  
Spokane, WA 99201

Re: Supreme Court No. 89674-7 - Michael Henne v. City of Yakima  
Court of Appeals No. 30892-8-III

Clerk and Counsel:

The Court of Appeals has forwarded the petition for review in the above referenced matter. The matter has been assigned the Supreme Court cause number indicated above.

It is noted that a \$200 filing fee accompanied the petition. Pursuant to RCW 2.32.070, no fees shall be required to be advanced by the state or any municipal corporation. Accordingly, Petitioner's check number #061579, is being returned as an enclosure hereto.

The parties are directed to review the provisions set forth in RAP 13.4(d), regarding the filing of any answer to petition for review and any reply to answer.

The petition for review will be set for consideration without oral argument by a Department of the Court; see RAP 13.4(i). If the members of the Department do not unanimously agree on the manner of the disposition, consideration of the petition will be continued for determination by the En Banc Court.

Usually there is approximately four months between receipt of the petition for review in this Court and consideration of the petition. This amount of time is built into the process to

Page 2  
No. 89674-7  
December 19, 2013

allow an answer to the petition and for the Court's normal screening process. At this time it is not known on what date the matter will be determined by the Court. The parties will be advised when the Court makes a decision on the petition.

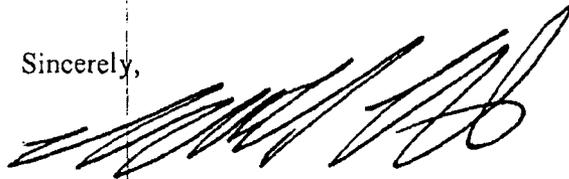
It is noted that any amicus curiae memorandum in support of or in opposition to a pending petition for review should be served and received by this Court and counsel of record for the parties and other amicus curiae by not later than 60 days from the date the petition for review was filed; see RAP 13.4(h).

The parties are referred to the provisions of General Rule 31(e) in regards to the requirement to omit certain personal identifiers from all documents filed in this court. This rule provides that parties "shall not include, and if present shall redact" social security numbers, financial account numbers and driver's license numbers. As indicated in the rule, the responsibility for redacting the personal identifiers rests solely with counsel and the parties. The Clerk's Office does not review documents for compliance with the rule. Because briefs and other documents in cases that are not sealed may be made available to the public on the court's internet website, or viewed in our office, it is imperative that such personal identifiers not be included in filed documents.

**It is noted that for attorneys, this office uses the e-mail address that appears on the Washington State Bar Association lawyer directory. Counsel are responsible for maintaining a current business-related e-mail address in that directory.**

The Clerk of the Court of Appeals is requested to forward their file and briefs in Court of Appeals cause number 30902-9-III.

Sincerely,



Ronald R. Carpenter  
Supreme Court Clerk

RRC:lm  
Enclosure as stated

## OFFICE RECEPTIONIST, CLERK

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**From:** Kristy Stell <kristy.stell@whitsonlaw.com>  
**Sent:** Tuesday, December 31, 2013 12:00 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** 'Lish Whitson'; tenney@mftlaw.com; watson@mftlaw.com  
**Subject:** Michael Henne v. City of Yakima, Supreme Court Case No. 89674-7  
**Attachments:** Answer and Counter Petition to Petition for Review.pdf; Appendix.pdf; Certificate of Service.pdf

Clerk of the Court,

Attached for filing in Michael Henne v. City of Yakima, Supreme Court Case No. 89674-7, Court of Appeals NO. 30892-8-III are the following documents:

1. Plaintiff/Respondent's Answer and Counter Petition to Petitioner/Defendant's Petition for Review w/ Cover sheet, Table of Contents, and Table of Authorities
2. Appendix
3. Certificate of Service

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