No. 69349-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ALASKA STRUCTURES, INC.,

Appellant,

v.

CHARLES HEDLUND,

Respondent.

AMICUS CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS OF WASHINGTON and WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION

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I. INTRODUCTION

The Legislature adopted RCW 4.24.525 in order to prevent strategic lawsuits against public participation ("SLAPPs") from having a chilling effect on free speech. The anti-SLAPP law makes it harder to sue someone for speaking out in connection with an "issue of public concern." Once the speaker establishes that the suit is based on protected speech, the suit cannot proceed unless there is clear and convincing evidence of merit.

If the anti-SLAPP law is to serve its purpose, Washington courts must determine what constitutes an "issue of public concern" consistently with First Amendment case law. More specifically, courts must examine what was said, how it was said, and where it was said, looking at all of the surrounding circumstances, in determining if a defendant's speech is subject to anti-SLAPP protection. Focusing solely on the specific words complained of, without considering the context in which they were published or spoken, would contradict the reasoning of the United States Supreme Court in First Amendment cases. It would discourage robust public debate by exposing citizens to costly litigation based on comments taken out of context. Therefore, amici Allied Daily Newspapers of Washington and the Washington Newspaper Publishers Association respectfully request that this Court adopt the traditional First Amendment

test for what constitutes a "matter of public concern" when applying RCW 4.24.525.

II. IDENTITY AND INTEREST OF AMICI

Allied Daily Newspapers of Washington (Allied) is a trade association representing 25 daily newspapers across the state. The Washington Newspaper Publishers Association (WNPA) is a trade association representing 120 weekly community newspapers throughout Washington. The newspaper associations are interested in this case because it will affect the extent to which Washington newspapers and other citizens can comment on public affairs without fear of costly lawsuits. The very mission and purpose of newspapers is to inform readers about issues of public concern. Newspapers would have a hard time identifying and reporting on issues of public concern if citizens were afraid to speak out. Also, if newspapers faced costly lawsuits every time a newsmaker wanted to squelch a story, freedom of the press would be lost. In general, the newspaper associations want to uphold the constitutional guarantee of free speech because it advances their mission to inform the public about matters of concern.

III. DISCUSSION

A. A Statement Can Be Made "In Connection With" An Issue of Public Concern Without Directly Addressing That Issue.

1. **The statute protects statements made in connection with public issues.**

RCW 4.24.525(4)(a) authorizes a "special motion to strike any claim that is based on an action involving public participation and petition." The moving party "has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition." RCW 4.24.525(4)(b). If that burden is met, the responding party must "establish by clear and convincing evidence a probability of prevailing on the claim." Id. If that heightened burden is not met, the responding party must pay costs and penalties to the moving party. RCW 4.24.525(6)(a). Thus, the protection of the anti-SLAPP law depends on a threshold showing that the lawsuit stems from some kind of "public participation and petition."

Actions "involving public participation and petition" include statements made in connection with a judicial or government proceeding (RCW 4.24.525(2)(a), (b) and(c)); statements "submitted in a place open to the public or a public forum in connection with an issue of public concern" (RCW 4.24.525(2)(d)); and "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern" (RCW 4.24.525(2)(e)). This

case concerns the latter two types of speech, both of which must be made "in connection with an issue of public concern" to qualify for anti-SLAPP protection. RCW 4.24.525(2)(d) and (e).

2. **Protection is not limited to speech which explicitly addresses a public concern.**

The statute does not say that, to be protected, a defendant's speech must – by itself – attract or warrant public concern. RCW 4.24.525(2)(d) and (e). Nor must the speech directly address or explicitly identify a particular public concern. Id. Rather, the law protects any statement made "in connection with" an issue of public concern, as long as it was made in a public place or public forum or in furtherance of the exercise of free speech. Id. This promotes robust public debate by allowing any citizen to contribute to a discussion freely. For example, a newspaper story about the federal government shutdown may generate a wide variety of reader comments related to the wisdom or effectiveness of government. If reader comments are posted online in response to the shutdown story, they are made "in connection with" an issue of public concern even if they do not address the shutdown directly. To interpret the law otherwise would constrain public discussion and hinder the free flow of ideas.

In this case, Charles Hedlund made statements on an Internet forum for job seekers, Indeed.com, as part of a discussion of the culture,

practices and working conditions at Alaska Structures. CP 808-832. The parties agree that Indeed.com is a public forum, but disagree about whether the statements were made in connection with an issue of public concern. To ensure that the anti-SLAPP law prevents the chilling of speech as the Legislature intended, this Court should apply First Amendment principles in resolving the dispute.

B. The Term "Issue of Public Concern" Was Defined in First Amendment Cases Before RCW 4.24.525 Was Adopted.

1. **Washington used different language than in the California anti-SLAPP statute.**

RCW 4.24.525, adopted in 2010, is "patterned after California's Anti-SLAPP Act." Aronson v. Dog Eat Dog Films, Inc., 738 F.Supp.2d 1104, 1109 (W.D. Wash. 2010). As in Aronson, the parties here rely on California law as persuasive authority for interpreting the Washington law. Id. at 1110. However, the states' laws are not identical. Where Washington protects statements connected with "an issue of public *concern*," California protects statements "made in connection with an issue of public *interest*." Cal. sec. 425.16(e)(3); RCW 4.24.525(4)(d) and (e) (italics added).

The House and Senate bill reports for SSB 6395, enacted as RCW 4.24.525, do not explain the difference in language. RCW 4.24.525 does

not define "issue of public concern." However, when adopting the 2010 anti-SLAPP law, the Legislature was aware of First Amendment decisions of the United States Supreme Court.[1] The United States Supreme Court has used the term "matter of public concern" rather than California's term, "issue of public interest," in determining the bounds of protected speech. See, e.g., Garcetti v. Ceballos, 547 U.S. 410, 416, 126 S.Ct. 1951, 1953, 164 L.Ed.2d 689 (2006); Connick v. Myers, 461 U.S. 138, 147-148, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 776, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ("The freedom of speech... guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment"). This suggests that the Washington Legislature intended to draw from First Amendment case law when using the term "issue of public concern" in the anti-SLAPP statute.[2] "When a statute does not define a term used at common law, courts must look to and apply the common law definition." State v. Bash, 130 Wn.2d 594, 606–07, 925 P.2d 978 (1996); Peasley v. Puget Sound

[1] The House Bill Report for SSB 6395 refers to the First Amendment and says in part, "The United States Supreme Court has held that a dismissal of a SLAPP should be granted in all cases except where the target's activities are not genuinely aimed at procuring favorable government action. However, a SLAPP can result in years of litigation and substantial expense before it is dismissed."

[2] Washington courts have not used the term "matter of public concern" in a similar manner in cases involving Wash. Const. art. I, sec. 5, which protects free speech.

Tug & Barge Co., 13 Wn.2d 485, 504–05, 125 P.2d 681 (1942); N. Pac. Ry. Co. v. Henneford, 9 Wn.2d 18, 21, 113 P.2d 545 (1941).

2. Speech deals with an issue of public concern when, in light of all the circumstances, it can be fairly considered as relating to a matter of political, social or other concern to the community.

In Snyder v. Phelps, 131 S.Ct.1207, 179 L.Ed.2d 172 (2011), the United States Supreme Court summarized the First Amendment test for determining when speech addresses a matter of public concern. That case involved anti-gay picketing by church members near the funeral of Marine Lance Corporal Lance Snyder, who was killed in the line of duty in Iraq. The Rev. Fred Phelps and fellow members of Westboro Baptist Church stood on public land near the funeral with signs stating, for example, "God Hates the USA/Thank God for 9/11," "America is Doomed," "Thank God for Dead Soldiers," "God Hates Fags" and "God Hates You." 131 S.Ct. at 1213. The Court said, "Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case." Id. at 1214.[3]

[3] Speech on matters of public concern is "at the heart of the First Amendment's protection." Id., quoting Dun & Bradstreet, Inc. v. Greenmoss Builders Inc., 472 U.S. 749, 758-759, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). "That is because speech concerning public affairs....is the essence of self-government." Id. (citation omitted). On

The Snyder Court said that "the boundaries of the public concern test are not well defined," but there are some "guiding principles" that ensure broad protection of speech. Id. at 1216. "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social or other concern to the community,'" quoting Connick, 461 U.S. at 146, "or when it 'is a subject of legitimate news interest.'" Snyder at 1216. The controversial nature of a statement is irrelevant to determining whether it deals with a matter of public concern. Id. Rather, "[d]eciding whether speech is of public or private concern requires us to examine the 'content, form and context' of that speech, 'as revealed by the whole record.'" Id., quoting Dun & Bradstreet, Inc. v. Greenmoss Builders Inc., 472 U.S. 749, 761, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). In First Amendment cases, the court must independently examine the whole record to make sure that the judgment does not intrude on free expression. Snyder at 1216, citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). "In considering content, form and context, no factor is dispositive, and it is necessary to evaluate all the

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the other hand, First Amendment protection is "often less vigorous" for "matters of purely private significance." Id.

circumstances of the speech, including what was said, where it was said and how it was said." Snyder at 1216.

Applying those principles to the funeral picketing, the Court said the "content" of Westboro's signs plainly related to broad issues of interest to society – "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy." Id. at 1216-17. The Court also considered, as context, that the signs conveyed Westboro's position on issues in a manner designed to reach a broad audience. Id. at 1217. It also mattered that the picketing was in a "public place adjacent to a public street." Id. at 1218. In sum, the Court said that although the picketing inflicted great pain, "we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate." Id. at 1220.

3. This Court should apply the First Amendment "public concern" test in this case.

The test articulated in Snyder v. Phelps should apply here when determining whether Mr. Hedlund's statements were made "in connection with an issue of public concern" for purposes of RCW 4.24.525. Although California court decisions concerning the similar anti-SLAPP law are instructive, it is the United States Supreme Court which sets binding

precedent concerning First Amendment rights. State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008) ("When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings"); Tricon, Inc. v. King County, 60 Wn.2d 392, 394, 374 P.2d 174 (1962). The anti-SLAPP law is designed to protect First Amendment rights by preventing strategic lawsuits from chilling public discourse. This Court should decline to adopt a California test that is less protective of free speech than the First Amendment test developed by the nation's highest court.

More specifically, this Court should reject the appellant's arguments that only Mr. Hedlund's "exact words," and not the "broader context" of the Indeed.com discussion in which he posted them, should be considered in determining if RCW 4.24.525's "public concern" test was met. Brief of Appellant at 23-30. First, ignoring the context of speech, when determining if it is protected, would contradict the First Amendment case law which pre-dated Washington's anti-SLAPP law. Dun & Bradstreet, Inc., 472 U.S. at 761. Second, it also would contradict Aronson, one of the few cases applying Washington's law, in which a copyright owner alleged that use of a video in Michael Moore's documentary "Sicko" was a copyright infringement and invasion of

privacy. In that case, the United States District Court looked beyond the specific content of the allegedly misappropriated video and considered the overall "context," which was "discussion of the healthcare system," in determining that the filmmaker was entitled to anti-SLAPP protection. Aronson, 738 F.Supp.2d at 1111.

Finally, in opposing consideration of the context in which speech occurs, the appellant misapplies World Financial Group, Inc. v. HBW Insurance & Financial Services, Inc., 172 Cal.App.4th 1561 (2009). That case stands for the unremarkable proposition that, when speech is designed solely to promote a business interest, such as "hawking" a product or soliciting a competitor's customers, it is not connected with an issue of public interest for purposes of California's anti-SLAPP law. World Financial at 1571-72. It has no bearing here, where Mr. Hedlund was not selling anything and spoke in an open public forum in response to other citizens' comments about Alaska Structure's practices.

III. CONCLUSION

This case presents the important question of what constitutes an issue of public concern for purposes of anti-SLAPP protection. In order to protect robust public discourse as the Legislature intended, this Court should consider all of the circumstances surrounding the targeted speech,

consistently with the First Amendment test for determining matters of public concern. Based on that test, the trial court should be affirmed.

Dated this 14th day of October, 2013.

Respectfully submitted,

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