No. 90284-4

SUPREME COURT
OF THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC.,

Plaintiff/Appellant,

v.

CHARLES J. HEDLUND,

Defendant/Respondent.

ALASKA STRUCTURES, INC.'S RESPONSE TO AMICUS CURIAE MEMORANDUM OF WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION.

The Amicus Curiae Memorandum ("WELA Br.") of Washington Employment Lawyers Association ("Amicus") suffers from many of the flawed arguments raised by Petitioner Charles J. Hedlund. Thus, like Hedlund, Amicus has not demonstrated either a "conflict" among Division One's decisions or "an issue of substantial public interest" in this case warranting Supreme Court review. *See* RAP 13.4(b)(2), (4).

II. ARGUMENT.

A. Division One Did Not Announce a "Judicially Created Exception" to the Anti-SLAPP Statute for Breach of Confidentiality Agreement Claims.

Amicus contends that Division One "ignored the clear language of the [anti-SLAPP] statute creating an exception for those claims alleging a violation of a confidentiality agreement." (WELA Br. at 5.) It then contends that it is "irrelevant" that Hedlund voluntarily signed a confidentiality agreement with his former employer limiting his right to speak. (WELA Br. at 6.) Both contentions are incorrect.

1. Division One Correctly Looked to the Gravamen of AKS's Claim That Hedlund's Disclosures About AKS's Security System Breached His Confidentiality Agreement.

Division One accurately stated that under the first prong of the anti-SLAPP analysis, it must "determine whether the gravamen of the underlying claim is based on protected activity" and that it was Hedlund's

burden to prove "that AKS's claim is based on a statement made in connection with an issue of public concern." (Opinion at 4.) The court then specifically addressed Hedlund's assertion that his statements were intended to "alert prospective employees to his opinions and experience with AKS," likening them to "consumer information." (Opinion at 7.) But ultimately, after discussing some of the cases Hedlund cited, the court concluded that the facts here were more akin to those in *World Fin. Grp., Inc. v. HBW Ins. & Fin. Servs., Inc.*, 172 Cal. App. 4th 1561, 92 Cal. Rptr. 3d 227 (2009). (Opinion at 7-9; *see also* Opinion at 1, 2, 5, 10.)

Amicus ignores all of this discussion and instead quotes a sentence from the court's introduction to allege that it created a universally-applicable exception immunizing breach of confidentiality agreement claims from the anti-SLAPP statute's reach. (WELA Br. at 5.) But the court's complete discussion, briefly described above, simply does not bear out Amicus' contention. Unlike Amicus—which ignores the specific facts of this case—Division One concluded that based on the facts, including the content of Hedlund's statements and the existence of his confidentiality agreement, the "gravamen" of AKS's claim sought to hold Hedlund responsible for violating that agreement, not to punish him for engaging in "public participation and petition." *See Episcopal Church Cases*, 45 Cal. 4th 467, 477-78, 198 P.3d 66, 87 Cal. Rptr. 3d 275 (2009)

(concluding that property dispute "and not any protected activity, [was] the gravamen or principal thrust of the action") (internal quotation marks omitted). Amicus stretches this case-specific conclusion too far in asserting that it was intended to create a categorical exception to the reach of the statute for breach of confidentiality agreement claims.

2. *There is No Evidence That the Legislature Implicitly Intended to Render Confidentiality Agreements Unenforceable or Subject to Additional Scrutiny.*

Amicus also suggests—despite the absence of any supporting statutory language or legislative history—that the Legislature implicitly intended that breach of confidentiality agreement claims be "scrutinized more closely" under the anti-SLAPP statute.[1] (WELA Br. at 6, 10.) Amicus then opines that "it is irrelevant whether a party 'voluntarily limited his right to speak . . . freely [by] signing a confidentiality agreement.'" (WELA Br. at 6 (quoting Opinion at 10).) But there is no indication that the Legislature intended to single out breach of confidentiality agreement claims (or any other specific causes of action) and subject them to a more rigorous, but undefined, scrutiny.[2]

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[1] Amicus opines that (1) "requiring confidentiality agreements as a condition of employment . . . is the exception;" and (2) "[c]onfidentiality agreements often address, or affect, issues of public concern." (WELA Br. at 2.) But Amicus offers no support for either proposition and AKS questions their legitimacy.

[2] Amicus' suggestion that the Court should read into the anti-SLAPP statute a special antipathy to breach of confidentiality agreement claims is somewhat ironic given that it criticizes Division One for purportedly manufacturing a "judicially created exception" to the statute's application to such claims.

Moreover, as AKS discussed at length in its briefing to Division One, the existence of Hedlund's confidentiality agreement is directly relevant because courts have concluded that such pre-existing legal relationships can waive rights that may otherwise be protected under the anti-SLAPP statute.[3] (*See* Brief of Appellant at 32-37.) As one court succinctly stated, "[i]t would be illogical to read [the anti-SLAPP statute] as providing presumptive immunity to actions that a moving party may have contractually agreed to forgo or limit." *Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, 784 N.W.2d 834, 842 (Minn. 2010) ("*Stengrim*") (noting also that, as here, the "underlying dispute . . . is essentially a contractual argument" under which defendant had entered into a settlement agreement "thereby waiving certain rights to public participation"). *See also Pennsbury Vill. Assocs., LLC v. McIntyre*, 608 Pa. 309, 324, 11 A.3d 906 (2011) (citing, with approval, cases from California and Massachusetts as standing "for the proposition that where pre-existing legal relationships preclude a party from engaging in the activity protected by anti-SLAPP legislation, that party cannot claim immunity for actions taken in violation of its pre-existing legal obligation"); *Navellier v. Sletten*, 29 Cal. 4th 82, 94, 52 P.3d 703, 124 Cal.

[3] There is no dispute that constitutional and statutory rights can be waived. *See Wynn v. Earin*, 163 Wn.2d 361, 381, 181 P.3d 806 (2008); *Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 394, 858 P.2d 245 (1993).

Rptr. 2d 530 (2002) ("[A] defendant who . . . has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP statute's protection in the event he . . . later breaches that contract.").

Although courts have differed regarding whether this waiver inquiry is best addressed at the first or second prong of the anti-SLAPP analysis, that does not make an agreement waiving or limiting the right to speak on certain issues "irrelevant" nor does it make Division One's reference to the agreement incorrect for purposes of justifying Supreme Court review. *See Stengrim*, 784 N.W.2d at 841-42 (addressing waiver issue as part of the moving party's threshold showing); *Navellier*, 29 Cal. 4th at 94 (stating that waiver inquiry related to second step of analysis where nonmoving party has burden of demonstrating a probability of prevailing). *See also Johannesen v. Eddins*, 963 N.E.2d 1061, 1066 (Ill. App. Ct. 2011) (concluding that issues of fact regarding whether defendant waived rights must be resolved first before "the issue of whether defendant's actions were genuinely aimed at procuring favorable government action" under anti-SLAPP statute even becomes relevant).

B. Generic, Amorphous Issues—Divorced From the Actual Content of the Statements At Issue—Do Not Establish the Existence of an Issue of Public Concern.

Amicus contends that Hedlund's statements—the actual content of which Amicus never describes—addressed an issue of public concern,

which issue it describes generically as information about the "quality" of "prospective employers" and the "working environment at places of potential employment." (*See* WELA Br. at 2, 3, 4, 10.) But courts have repeatedly found such abstract generalities, unconnected to the specific speech or conduct at issue, insufficient to establish an issue of public concern for purposes of the anti-SLAPP statute.

Instead, courts have made it abundantly clear that the "specific nature of the speech" at issue must be examined in evaluating the public concern element, "rather than the generalities that might be abstracted from it." *Commonwealth Energy Corp. v. Investor Data Exch., Inc.*, 110 Cal. App. 4th 26, 34, 1 Cal. Rptr. 3d 390 (2003) (emphasis omitted); *see also Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1111 (W.D. Wash. 2010) (recognizing that not all speech in the documentary film was of public significance for purposes of anti-SLAPP statute; rather, the "issue turns on the specific nature of the speech rather than generalities abstracted from it"); *City of Indus. v. City of Fillmore*, 198 Cal. App. 4th 191, 217, 129 Cal. Rptr. 3d 433 (2011) ("The inquiry must focus on the content of the speech . . . on which the cause of action is based, rather than generalities or abstractions."); *World Fin. Grp.*, 172 Cal. App. 4th at 1569 ("[D]efendants erroneously identify generalities that might be derived from their speech rather than the specific nature of what they actually said

and did."); *Consumer Justice Ctr. v. Trimedica Int'l, Inc.*, 107 Cal. App. 4th 595, 601, 132 Cal. Rptr. 2d 191 (2003) ("If we were to accept [defendant's] argument that we should examine the nature of the speech in terms of generalities instead of specifics, then nearly any claim could be sufficiently abstracted to fall within the anti-SLAPP statute."). Moreover, consistent with this principle of a content-specific examination, courts have also required "some degree of closeness between the challenged statements and the asserted public interest." *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1132, 2 Cal. Rptr. 3d 385 (2003); *see also Allstate Ins. Co. v. Tacoma Therapy, Inc.*, Case No. 13-CV-05214-RBL, 2014 U.S. Dist. LEXIS 52934, *7 (W.D. Wash. Apr. 16, 2014) ("The key to protection under the Anti-SLAPP statute is a direct connection between the actions of the party faced with a SLAPP suit and an issue of public concern[.]").

Here, Amicus fails to even acknowledge the specific statements at issue with respect to AKS's breach of confidentiality agreement claim—Hedlund's disclosures about AKS's security system—and therefore necessarily fails to make any connection between those statements and its generic purported issue of public concern. Amicus' contention regarding this issue therefore presents no basis on which to grant review.

C. Amicus' Proposed "But For" Standard to Determine Whether a Claim is "Based On" Public Participation Has No Relevance to the Discrete Issue in This Case.

Amicus also advocates for the adoption of a "but for" causation standard in determining whether a claim is "based on an action involving public participation and petition," RCW 4.24.525(2). (*See* WELA Br. at 3, 7-9.) But Amicus' position on the appropriate causation standard is irrelevant to the discrete issue in this case and therefore does not demonstrate a basis for Supreme Court review.

Amicus argues for a causation standard under which the "public participation" must "give[] rise to the claim in a direct sequence." (WELA Br. at 8.) Amicus then asserts that the anti-SLAPP statute applied here because "the conduct of posting on the website did give rise to the asserted violation of the confidentiality agreement; 'but for' the website posting the confidentiality agreement could not have been violated." (WELA Br. at 10; *see also* WELA Br. at 3.)

But Amicus' assertion adds nothing to the discussion in this case. There is no dispute that AKS's breach of confidentiality agreement claim is based on a portion of Hedlund's online posting (specifically, his disclosures about AKS's security system). But that is irrelevant to Division One's conclusion that Hedlund failed to satisfy his initial burden of demonstrating that his post about AKS's security system involved an

issue of public concern. Or, stated differently, because Division One concluded that there was no "public participation" within the meaning of the anti-SLAPP statute, it was unnecessary to reach any question of causation with respect to AKS's breach of confidentiality claim.[4]

Thus, while there may be other cases in which this Court is called upon to address the appropriate causation standard this is not such a case and therefore Amicus' advocacy for a particular standard does not demonstrate a basis for granting review in this case.[5]

D. Division One's Decision in *Dillon*—Based on Different Facts and Statutory Considerations—Does Not Demonstrate a Conflict With Its Decision in This Case.

Amicus contends that Division One's decision in this case conflicts with its decision in *Dillon v. Seattle Deposition Reporters, LLC*,[6] because here, Division One purportedly failed to follow the causation standard it applied in *Dillon*. (WELA Br. at 9-10.) More specifically, Amicus asserts that Division One should have applied *Dillon*'s causation standard requiring protected activity to "'actually give rise to and be the basis for the asserted liability'" to conclude here that the anti-SLAPP statute

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[4] Presumably for that reason, Hedlund's Petition for Review, and AKS's answer thereto, do not discuss the causation issue Amicus raises. This Court has "many times held that arguments raised only by amici curiae need not be considered." *State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988). Similarly, an (irrelevant) issue raised only by amicus should not establish a basis for granting review.

[5] This is not to suggest that AKS agrees that Amicus' proposed standard is appropriate, rather, it is simply unnecessary to reach that issue given the facts of this case.

[6] 179 Wn. App. 41, 316 P.3d 1119, *review granted*, 180 Wn.2d 1009 (2014).

applies. (WELA Br. at 9-10 (quoting *Dillon*, 179 Wn. App. at 82).)

But, as discussed in some detail in AKS's answer to Hedlund's petition for review, the facts and issues of law in *Dillon* are markedly different than those present in this case. (*See* Alaska Structures, Inc.'s Answer to Hedlund's Petition for Review at 10-11.) Thus, *Dillon* says little, if anything, about the propriety of the court's decision in this case or whether this Court should grant review in this case. This is particularly true because, as discussed above, the appropriate causation standard was not at issue; rather, the issue was whether Hedlund satisfied his burden of demonstrating that his statements about AKS's security system addressed an issue of public concern under the anti-SLAPP statute.

III. CONCLUSION.

For the foregoing reasons, Amicus has failed to demonstrate either a "conflict" between Division One's decisions or an "issue of substantial interest" warranting Supreme Court review in this case.

RESPECTFULLY SUBMITTED this 7th day of August, 2014.

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CERTIFICATE OF SERVICE

I declare that I am a legal assistant employed by Hendricks & Lewis PLLC, 901 Fifth Avenue, Suite 4100, Seattle, Washington 98164, and I duly made service of Alaska Structures, Inc.'s Response to Amicus Curiae Memorandum of Washington Employment Lawyers Association by email and U.S. First Class Mail to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 7th day of August, 2014.

Lisa Schaefer

LISA SCHAEFER

OFFICE RECEPTIONIST, CLERK

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Attached for filing please find Alaska Structures, Inc.'s Response to Amicus Curiae Memorandum of Washington Employment Lawyers Association.

As stated in the accompanying certificate of service, the Response has been served on all parties and amici via U.S. Mail and email on today's date.

Thank you,

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