No. 693492-2-I

---

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

---

ALASKA STRUCTURES, INC.,

Appellant,

v.

CHARLES J. HEDLUND,

Respondent.

---

# RESPONSE OF APPELLANT ALASKA STRUCTURES, INC. TO AMICUS CURIAE BRIEF

---

O. Yale Lewis, Jr.
WSBA No. 1367
Stacia N. Lay
WSBA No. 30594
Attorneys for Appellant

Hendricks & Lewis PLLC
901 Fifth Avenue, Suite 4100
Seattle, Washington 98164
(206) 624-1933

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**

Appellant Alaska Structures, Inc. agrees with amici curiae Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association ("Amici") that the U.S. Supreme Court's "public concern" test provides useful guidance in applying the requirement of Washington's Anti-SLAPP statute that the moving party show that the statement at issue was made "in connection with an issue of public concern." RCW 4.24.525(2)(d), (e).[1] But Alaska Structures strongly disagrees with Amici's articulation of the "public concern" test and their interpretation of the "public concern" element of the Anti-SLAPP statute.

**ARGUMENT**

Amici make three general arguments.[2] First, they advocate for the adoption of the U.S. Supreme Court's "test" for determining whether speech addresses issues of "public concern" for First Amendment purposes as the test for the "public concern" element of Washington's Anti-SLAPP statute. (Amici's Br. at 6, 9-10.) Second, in interpreting that test, they suggest that the context in which a statement is made is critically important to the "public concern" inquiry. (Id. at 4-5, 10-11.) Third, they claim that the speech need not itself address the public issue as long as it is

[1] *See* Appellant's Br. at 14-16 for an outline of relevant portions of the statute.
[2] They also claim—incorrectly and irrelevantly—that Alaska Structures "misapplie[d]" one California case, asserting that the case is limited to speech relating to business interests. (Amici's Br. at 11.) But that case, which is not so limited, is only one of many Alaska Structures cited for generally applicable propositions under California's Anti-SLAPP statute. (*See* Appellant's Br. at 18-19, 21, 25-26, 30; Reply Br. at 13, 15-16.)

made "in response to" the issue. (Id. at 4-5.)

## I. The Supreme Court's "Public Concern" Test Provides Useful Guidance But Should Be Applied in Light of the Policy Interests Balanced in Washington's Anti-SLAPP Statute and its Radical Alteration of a Plaintiff's Burden of Proof.

Amici advocate for the adoption of the Supreme Court's "public concern" test in part because the Washington Legislature did not define "issue of public concern" in the Anti-SLAPP statute and it chose that language instead of the "public interest" language in California's statute, upon which Washington's statute was modeled. (Amici's Br. at 5-7.)

While Alaska Structures does not agree with Amici's suggestion that "public concern" is, standing alone, akin to a term of art,[3] it does agree that in the absence of a statutory definition, the Supreme Court's "public concern" decisions are useful in applying the Anti-SLAPP statute's "public concern" element. Also, because Washington courts have followed those decisions in public employee First Amendment free speech cases, they have experience with that "public concern" inquiry. *See, e.g.*, *White v. State*, 131 Wn.2d 1, 10-11, 929 P.2d 396 (1997); *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 850-51, 719 P.2d 98 (1986). But Alaska Structures believes that "test" should be interpreted and applied in a manner that gives due consideration to two unique elements of

[3] For example, *Connick v. Myers* appears to use the phrases "public interest," "public issues," "public import," and "public concern" more or less interchangeably. 461 U.S. 138, 140, 145, 147, 148, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

Washington's Anti-SLAPP statute.

The Supreme Court's "public concern" test is often applied in cases addressing the free speech rights of public employees that sought to achieve "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987) (internal quotation marks omitted). But in the Anti-SLAPP statute, the Legislature sought to balance distinct policy interests, specifically, "the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern[.]" Laws of 2010, ch. 118, § 1(2)(a).

Additionally, unlike the California statute on which it was modeled, Washington's statute radically alters the burden of proof early in the proceeding by requiring the party responding to the motion to strike "to establish **by clear and convincing evidence** a probability of prevailing on [its] claim." RCW 4.24.525(4)(b) (emphasis added). (*See* Appellant's Br. at 16 (describing differing standards).) As a result of this "heightened evidentiary burden," federal courts applying the statute have emphasized that "courts . . . must carefully consider whether the moving party's conduct falls within the 'heartland' of First Amendment activities that the .

. . Legislature envisioned when it enacted the . . . statute." *Jones v. City of Yakima Police Dep't*, Case No. 12-CV-3005-TOR, 2012 U.S. Dist. LEXIS 72837, *8-9 (E.D. Wash. May 24, 2012); *see also Fielder v. Sterling Park Homeowners Ass'n*, 914 F. Supp. 2d 1222, 1232 (W.D. Wash. 2012). Such careful consideration is also consistent with the Supreme Court's repeated statement that "speech on public issues" is given special protection because "it is the essence of self-government." *Connick*, 461 U.S. at 145 (internal quotation marks omitted). When speech falls outside that "heartland,"—as it does here with Appellee's disclosure of non-public information about Alaska Structures' security system—it does nothing to further the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people" that the First Amendment seeks to ensure and is therefore not entitled to the special protection afforded speech on matters of public concern. *Connick*, 461 U.S. at 145 (internal quotation marks omitted).

Thus, if the Court adopts the Supreme Court's "public concern" test, Alaska Structures believes that it should be interpreted and applied in light of these unique elements of Washington's Anti-SLAPP statute.

But Alaska Structures does not agree that adopting the Supreme Court's "public concern" test renders irrelevant the California cases interpreting that state's Anti-SLAPP statute. Amici acknowledge that the

California cases are "instructive" but then suggest that California's "public interest" element "is less protective of free speech" than the Supreme Court's "public concern" test.[4] (Amici's Br. at 9, 10.) There is no dispute that Washington's statute was modeled on California's, and for that reason, federal courts applying Washington's statute have appropriately treated California cases as persuasive authority. *See, e.g.*, *Fielder*, 914 F. Supp. 2d at 1231 n.4; *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1110 (W.D. Wash. 2010). Due regard should of course be given to substantive differences between the two statutes, just as the Supreme Court's "public concern" test should not be adopted and applied without giving consideration to the unique elements of Washington's statute. But Amici have made no showing that the California courts' interpretation of the "public interest" element is so out of step with Washington's "public concern" element and the Supreme Court's "public concern" test that California cases have no persuasive value in the "public concern" inquiry.

## II. Amici Propose a Skewed Interpretation of the "In Connection With an Issue of Public Concern" Element That Dismisses the Critical Importance of the Statement's Content.

Amici's interpretation of the Supreme Court's "public concern" test and their application of that test to the Anti-SLAPP statute's

[4] To the contrary, based upon a comparison of the "content" that has satisfied California's "public interest" standard with the comparatively more important "content" that is the focus of the "public concern" opinions discussed herein, California's standard arguably is, if anything, looser than the Supreme Court's "public concern" standard.

requirement that the statement be made "in connection with an issue of public concern," are flawed in at least two important respects. First, Amici appear to suggest that context alone can transform a statement into one on an issue of public concern.[5] Second, Amici advocate for an overbroad interpretation of the statute's "in connection with" requirement that would require little, if any, connection between the statement's content and the public issue it purportedly addresses.

Although not a well-defined "test," the Supreme Court has identified guiding principles for the "public concern" inquiry. Whether "speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. Speech addresses "matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community[.]'" *Snyder v. Phelps*, 131 S. Ct. 1207, 1216, 179 L. Ed. 2d 172 (2011) (quoting *Connick*, 461 U.S. at 146). And "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and

[5] They also allege, incorrectly, that Alaska Structures contended that context is irrelevant to the "public concern" inquiry. But it made no such contention. Rather it refuted Appellee's assertion that, regardless of the actual content of his statement, the Court could conclude it addressed an issue of public concern based only on his extremely broad description of the context in which it was made. (*See* Appellant's Br. at 21-32; Reply Br. at 3-4, 10-16.) And, notwithstanding Amici's suggestion to the contrary (Amici's Br. at 10-11), Alaska Structures' argument is consistent with *Aronson*, 738 F. Supp. 2d at 1111, which discussed context but also stated that the "public concern" inquiry "turns on the specific nature of the speech[.]"

of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83-84, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004). Washington courts have described a similar standard requiring consideration of "the content, form and context of the statement, as revealed by the whole record." *White*, 131 Wn.2d at 11; *see also Meyer*, 105 Wn.2d at 850-51. But the Washington Supreme Court has emphasized that "[c]ontent is the most important factor." *White*, 131 Wn.2d at 11; *see also Havekost v. U.S. Dep't of the Navy*, 925 F.2d 316, 318 (9th Cir. 1991) ("'content is the greatest single factor in the *Connick* inquiry'") (quoting *Berg v. Hunter*, 854 F.2d 238, 243 (7th Cir. 1988)). The speaker's intent is also relevant to the "public concern" inquiry, including whether the speech "was intended to mask an attack . . . over a private matter." *Snyder*, 131 S. Ct. at 1217 (parties had no pre-existing relationship or conflict suggesting such an intent); *see also Tyner v. Dep't of Soc. & Health Servs.*, 137 Wn. App. 545, 557, 154 P.3d 920 (2007).

But neither the Supreme Court nor Washington courts have held—or even suggested—that context can alone transform a statement on a private matter into one on an issue of public concern. For example, the Supreme Court has emphasized that employee grievances do not become matters of public concern simply because they arise in the context of government employment. *Connick*, 461 U.S. at 147, 149. And in *Snyder*,

the private context in which the speech was made—a soldier's funeral—could not "by itself transform the nature of [the] speech." 131 S. Ct. at 1217. Washington courts have similarly rejected attempts to elevate context over content, noting that *Connick* "'made it plain that an individual cannot bootstrap his individual grievance into a matter of public concern either by bruiting his complaint to the world or by invoking a supposed popular interest in all aspects of the way public institutions are run.'" *Meyer*, 105 Wn.2d at 851 (quoting *Mahaffey v. Kansas Bd. of Regents*, 562 F. Supp. 887, 890 (D. Kan. 1983)).

Amici also propose an overbroad interpretation of the Anti-SLAPP statute's requirement that a statement be made "in connection with" an issue of public concern. Their interpretation appears to replace the "connection" requirement with an "in response to" standard. As an example, Amici suggest a newspaper story about the government shutdown to which readers post comments, and contend that because the comments are posted "in response to" the story, they are made "in connection with" an issue of public concern. (Amici's Br. at 4.) But this interpretation sweeps far too broadly, in that it suggests a superficial proximity standard under which all the comments—regardless of their content or their relevance to the public issue the story reports on—would be considered to be made "in response to" an issue of public concern.

Amici's "in response to" standard is also inconsistent with the "public concern" inquiry which requires a sufficient connection between the speech and the matter of public concern it allegedly addresses. For example, in one case, a Western State Hospital pharmacist submitted a paper regarding gender discrimination in connection with a complaint by another pharmacist, alleging that the paper related to the quality of patient care, a matter of public concern. *Wilson v. State*, 84 Wn. App. 332, 335-37, 343, 929 P.2d 448 (1996). The court disagreed, concluding that the paper involved "an internal office matter" that was "not clearly connected to the provision of quality patient care." *Wilson*, 84 Wn. App. at 343, 345, 347. *See also Rankin*, 483 U.S. at 381, 386 (discussing clear connection between the statement's subject and the matter of public concern); *Aronson*, 738 F. Supp. 2d at 1111 (speech was "directly connected" to the subject of the documentary); *Meyer*, 105 Wn.2d at 851 (speech had "only an attenuated relationship, if any, to public interest"); *Tyner*, 137 Wn. App. at 558 (rejecting proposition that speech "tangentially related to a public issue" would "satisfy the public concern requirement").

In short, Amici offer no basis to reject the statute's "in connection with" standard and the connection requirement of the Supreme Court's "public concern" test, in favor of an overbroad "in response to" standard.

## CONCLUSION

Alaska Structures agrees that the Supreme Court's "public concern" test includes principles that can help guide application of the Anti-SLAPP statute's "public concern" element, giving due consideration to the distinct policy interests the Legislature balanced and to the statute's radical alteration of the burden of proof. But the Court should reject Amici's overbroad interpretation of the statute's "in connection with" requirement as it places far too much emphasis on the statement's context and far too little emphasis on its content.

Although Alaska Structures did not explicitly discuss the Supreme Court's "public concern" test in its prior briefing, its arguments for reversing the grant of Appellee's motion to strike are consistent with the interpretation and proposed application of that test discussed herein. Thus, the trial court's decision should still be reversed for the reasons described in Alaska Structures' prior briefing and the reasons described herein.

DATED this 1st day of November, 2013.

Respectfully Submitted,

HENDRICKS & LEWIS PLLC

By: 

O. Yale Lewis, Jr., WSBA No. 1367
Stacia N. Lay, WSBA No. 30594
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Lisa Schaefer, declare that I am a legal assistant employed by the law firm of Hendricks & Lewis PLLC, 901 Fifth Avenue, Suite 4100, Seattle, Washington 98164, and I duly made service of Response of Appellant Alaska Structures, Inc. to Amicus Curiae Brief by email and U.S. First Class Mail to the following:

Michele Earl-Hubbard, Esq.
Allied Law Group
P.O. Box 33744
Seattle, Washington 98133
Michele@alliedlawgroup.com

Katherine George, Esq.
Harrison-Benis LLP
2101 Fourth Avenue, Suite 1900
Seattle, Washington 98121
kgeorge@hbslegal.com

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 1st day of November, 2013.

LISA SCHAEFER