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No. 693492-7-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC.,

Appellant,

v.

CHARLES J. HEDLUND,

Respondent.

BRIEF OF APPELLANT

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No. 2. The trial court erred in awarding Hedlund all of his attorneys' fees and costs under RCW 4.24.525. (CP 890.)

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Issue No. 2. Was "the speech at issue"—Hedlund's disclosure on a website of non-public details about weaknesses in Alaska Structures' security system—"submitted in a public forum in connection with an issue of public concern"? (CP 890.) (Assignment of Error No. 1.)

Issue No. 3. Was Hedlund's disclosure of non-public details about weaknesses in Alaska Structures' security system—when he had signed a confidentiality agreement in which he agreed to limit his

[1] "Strategic Lawsuits Against Public Participation."

disclosure of certain information about Alaska Structures during and after his employment with the company—"lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition"? (CP 890.) (Assignment of Error No. 1.)

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II. STATEMENT OF THE CASE.

A. Hedlund's Confidentiality Agreement With Alaska Structures.

Appellant Alaska Structures is an Alaska corporation that builds and sells fabric-covered buildings and structures and related products to the U.S. military and others. (CP 267 (¶ 1), 598 (¶ 2).) Alaska Structures' executive offices are located in Kirkland, Washington. (CP 598 (¶ 2).) Respondent Charles Hedlund was employed by Alaska Structures from February 2007 to January 2010. (CP 599 (¶ 3).)

As part of its efforts to maintain the confidentiality of information about proprietary and confidential aspects of its business as well as that of its customers, Alaska Structures requires its employees to sign confidentiality agreements when they are hired. (CP 598-99 (¶¶ 2-3).) Hedlund was asked to, and did, sign an "At Will" Employment Agreement ("Employment Agreement") and a Confidentiality, Work Product, and Noncompete Agreement ("Confidentiality Agreement") on February 12, 2007, at the start of his employment with Alaska Structures. (CP 599 (¶ 3), 604-13.) He was given an opportunity to read the agreements before signing them and was not coerced into signing them. (CP 599 (¶ 3).)

Hedlund's Employment Agreement expressly incorporated the Confidentiality Agreement and stated that the terms of the latter agreement would survive termination of his employment. (CP 605 (§ 8).) By signing

the Confidentiality Agreement, Hedlund agreed to limit his disclosure of certain information about Alaska Structures during and after his employment: "Employee shall not, during the term of Employee's relation with Employer, or at any time thereafter, either directly or indirectly, disclose or permit the disclosure of, reproduce, or in any other way publicly or privately disseminate, any Confidential Information . . . belonging to Employer to any Third Party[.]" (CP 609 (§ 1.1).)

The Confidentiality Agreement defined "Confidential Information" broadly as any "information, whether oral, written, or otherwise recorded, which derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons or entities who can obtain economic value from its use or disclosure," and provided a non-comprehensive list of examples. (CP 609 (§ 1.2).) "Confidential Information" was also defined to include but not be limited to "trade secrets and confidential technical or business information." (CP 609 (§ 1.2).)

B. Hedlund's Internet Posting About Weaknesses in Alaska Structures' Security System.

While Hedlund was employed by Alaska Structures, Dylan Schneider, the company's CIO, installed security measures at the company's Kirkland office consisting of consumer-grade, off-the-shelf

software and cameras that could be purchased by consumers ("2008-2009 Security Measures"). (CP 599 (¶ 5).) Schneider was not known to have experience installing such security systems. (CP 599 (¶ 5).) Hedlund was present in the office during times when Schneider was installing the 2008-2009 Security Measures and appeared agitated by a camera installed on the ceiling behind his desk. (CP 599 (¶ 6).)

Alaska Structures' Kirkland office was burglarized on March 1 and March 7, 2010. (CP 600 (¶ 7).) At the time of the March 1st burglary, Alaska Structures was relying on the 2008-2009 Security Measures installed by Schneider, which failed to capture good images of the perpetrators. (CP 600 (¶ 8).) Immediately after the first burglary, Alaska Structures contracted with a private security firm to install a monitored alarm system to supplement the 2008-2009 Security Measures that remained in place when the March 7th burglary occurred. (CP 600 (¶ 8).) The monitored system was not properly installed, however, and was not functioning when the second burglary occurred. (CP 343, 600 (¶ 8).)

On August 12, 2011, an anonymous user posted a message on the "Alaska Structures Jobs Forum" on Indeed.com in a thread entitled "Alaska Structures Interview Questions" that stated in part:

> "Proper security is a must"
> I doubt if the military gives a rat's behind if any of our enemies get their hands on any top secret tent designs. "Oh

> No! Terrorists might have as good billeting accommodations as our troops!"
> Furthermore, the security measures at AKS are all consumer-grade off the shelf fare installed by the former CIO, who had no prior security experience. AKS was broken into in 2010 and much of the server and several workstations were stolen, containing vast amounts of company information. They didn't have email for a few weeks. The cheap cameras provided no clues as to the identity of the thieves. That is why they now have the high-tech security precaution of human guards.

(CP 600 (¶ 9), 615.) ("August 12th Posting"). Hedlund is the admitted author of the posting. (CP 276-77 (¶ 14), 331.)

The 2008-2009 Security Measures installed by Schneider during Hedlund's employment were still in use at Alaska Structures' Kirkland office at the time of Hedlund's August 12th Posting. (CP 600 (¶ 10).) For that reason, and because the weaknesses of the security system were disclosed in the context of prior burglaries, Matt Triplett, Alaska Structures' Director of Corporate Management, was concerned that thieves would be encouraged to again burglarize Alaska Structures. (CP 598 (¶ 1), 601 (¶ 12).) Additionally, in late August 2011 and September 2011, following the August 12th Posting, many of the company's employees were traveling for business, leaving one or two young female employees alone at the Kirkland office. (CP 601 (¶ 14).) Triplett became concerned that the disclosure of weaknesses in Alaska Structures' security system in the August 12th Posting increased the risk

the office would be burglarized when these workers were alone at the office. (CP 601-02 (¶ 14).) Therefore, Alaska Structures increased the number of security shifts at its Kirkland office in August and September 2011, at a cost of $3,821. (CP 602 (¶¶ 14-15), 617-18.)

C. Procedural History.

Alaska Structures filed this action on August 18, 2011, in King County Superior Court against "John Doe" for breach of contract relating to the August 12th Posting. (CP 1-3.) On August 24, a Letter Rogatory issued to a Connecticut court to enable Alaska Structures to subpoena Indeed.com to identify the author of the August 12th Posting. (CP 6-7, 635-36 (¶ 3).) Information obtained in response to the subpoena to Indeed.com connected the IP address of the user to Cox Communications, which has a principal office in Atlanta, Georgia. (CP 636 (¶¶ 5-6).)

On August 30, a Letter Rogatory was issued to a Georgia superior court. (CP 636 (¶ 7), 665-67.) In response to a subpoena, Cox Communications identified a single subscriber assigned the relevant IP address and notified that subscriber that records had been subpoenaed that would reveal his identity. (CP 637 (¶¶ 9-10).) The subscriber, acting anonymously through his attorney, filed an objection to the subpoena and served it on Cox Communications, which would not provide the subscriber information to Alaska Structures until the subscriber's

objection was resolved. (CP 275 (¶ 4), 637 (¶ 10).) Alaska Structures initially filed a motion to enforce the subpoena to Cox Communications in King County Superior Court but after the anonymous subscriber objected to that court's jurisdiction, it filed the petition in the Georgia superior court. (CP 637 (¶11).)

On February 10, 2012, the Georgia court granted Alaska Structures' petition to enforce the subpoena to Cox Communications. (CP 637 (¶ 12), 674-97.) Among other findings, the court found "the information in [the August 12th Posting] to be more detailed than what is provided by the news reports submitted by John Doe" and that "John Doe" had "in no way demonstrated that the information provided in the . . . posting . . . was not confidential and was either 'known' or 'readily ascertainable' to the general public[.]" (CP 692.)

Following the Georgia court's order granting Alaska Structures' petition, Cox Communications identified the subscriber as Charles W. Hedlund of Arizona. (CP 276 (¶ 11), 637 (¶ 13), 699-703.) And in a deposition on March 16, 2012, Charles W. Hedlund identified his son, Charles J. Hedlund, as the author of the August 12th Posting. (CP 276 (¶ 12), 638 (¶ 14).) On April 16, Alaska Structures amended its complaint to name Charles J. Hedlund, the respondent herein. (CP 267-71.)

On June 18, 2012, Hedlund filed a Special Motion to Strike

Pursuant to RCW 4.24.525 and Motion for CR 11 Sanctions Against Plaintiff and its Attorneys, (CP 439-56), which Alaska Structures opposed on July 5, 2012 (CP 569-97). After Hedlund filed his reply in support of his motion on July 12, (CP 710-15), Alaska Structures sought leave to file a sur-reply (CP 834-79). Hedlund responded on August 15 (CP 880-85) and Alaska Structures replied on August 16 (CP 886-87).

On August 17, the trial court held a hearing on Hedlund's motion to strike at the end of which it orally granted the motion finding that the action was "subject to the SLAPP statutes" but denied his request for CR 11 sanctions. (RP at 49:1-3, 49:13-16, 50:2.) The court also stated:

> I have to tell you, even coming at it from so many different directions in terms of trying to really see whether or not this posting could really come within that confidentiality agreement, which is why I posed the questions, I have come clearly to the conclusion that it does not. And I recognize that people may disagree with my conclusion at the end of the day, but I am granting the motion to strike.
>
> . . . .
>
> In granting the motion to strike, I just have to say this. I am not doing it because of some larger policy question or some of the things that counsel mentioned in her rebuttal. I recognize and respect the legislative role here, but it is not because of some ideological battle that this court is coming to the conclusion that this is of public concern, subject to the SLAPP statute, and therefore, that is why I am striking. I just see this as a pure legal and factual analysis, and that is why I am doing that.

(RP at 49:4-11, 49:17-50:1.) The court awarded Hedlund $10,000 and his

reasonable attorneys' fees and costs. (RP at 50:2-7, 52:6-9.)

On August 24, the trial court adopted Hedlund's proposed written order, granting his motion to strike and denying his request for CR 11 sanctions. (CP 888-91.) In that order, the court found (1) "that the claim in question is based on an action involving public participation and petition under RCW 4.24.525(2)"; (2) "that the speech at issue is a written statement submitted in a public forum in connection with an issue of public concern"; (3) "that the matter concerns lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition"; and (4) "that the Plaintiff has failed to prove by clear and convincing evidence a probability of prevailing on the claim." (CP 889-90.)

In addition to the $10,000 statutory award, the trial court awarded Hedlund "his reasonable attorney's fees and all costs incurred in this action to date, including fees and costs incurred in connection with the Georgia proceedings related to the subpoena to Cox Communications." (CP 890.) The parties subsequently stipulated to a $38,860.30 award representing the total amount of Hedlund's attorneys' fees and costs, subject to Alaska Structures' right to appeal the award—as distinguished from the amount—of fees and costs to Hedlund. (CP 899-903.) The trial

court entered an order on the parties' stipulation followed by judgment in Hedlund's favor on November 19, 2012. (CP 904-08.)

Alaska Structures filed its Notice of Appeal of the grant of Hedlund's special motion to strike on September 21, 2012. (CP 892-98.)

III. SUMMARY OF ARGUMENT.

Notwithstanding Hedlund's arguments below, this case is not about an employer trying to prevent former employees from speaking about purported workplace "improprieties." Rather, this is a contract dispute that presents a discrete issue—whether Alaska Structures is entitled to pursue its claim for relief for Hedlund's disclosure, in violation of his Confidentiality Agreement, of non-public details about weaknesses in Alaska Structures' security system learned during his employment. Applying Washington's Anti-SLAPP statute to such a dispute does nothing to further the purposes of that statute and, in fact, impinges on Alaska Structures' right to petition by denying it the opportunity to seek redress for Hedlund's violation of his Confidentiality Agreement.

Because Hedlund failed to satisfy his initial burden of establishing that Alaska Structures' breach of confidentiality agreement claim—based on his disclosure regarding the company's security system—involved an "issue of public concern," the trial court erred in granting his motion to strike. Indeed, Hedlund failed to show that his statement about the

security system was of interest to anyone other than himself (and of course Alaska Structures) much less that the security system was part of an ongoing, public controversy. In light of that failure of proof, his motion should have been denied without any showing from Alaska Structures.

Additionally and alternatively, because Hedlund agreed to limit his disclosure of certain information about Alaska Structures learned during his employment by signing the Confidentiality Agreement, he cannot use Washington's Anti-SLAPP statute to immunize himself from liability for violating that preexisting legal obligation.

Even if Hedlund had made the required threshold showing on his motion to strike, Alaska Structures established, by clear and convincing evidence, a probability of prevailing on its claim for Hedlund's breach of his Confidentiality Agreement based upon his disclosure of non-public details about weaknesses in the company's security system. For that separate reason, the trial court erred in granting Hedlund's motion and summarily dismissing with prejudice Alaska Structures' claim.

Finally, even if the Court affirms the grant of Hedlund's motion to strike, the trial court erred in awarding him attorneys' fees and costs in connection with the Georgia proceeding to which he was not a party and in which Alaska Structures prevailed in its petition to enforce the subpoena to Cox Communications.

IV. ARGUMENT.

A. Standard of Review.

Washington courts apparently have not yet articulated a specific standard of review applicable to decisions on motions to strike under RCW 4.24.525. *But see Skimming v. Boxer*, 119 Wn. App. 748, 757, 82 P.3d 707 (2004) (applying de novo review to construction of original anti-SLAPP statute, RCW 4.24.510). But, as discussed below (*see infra* pp. 15-17), Washington's Anti-SLAPP statute was modeled on California's and therefore courts interpreting and applying Washington's statute have looked to California decisions as persuasive authority. *See, e.g., Phoenix Trading, Inc. v. Kayser*, Case No. C10-0920JLR, 2011 U.S. Dist. LEXIS 81432, *16 (W.D. Wash. July 25, 2011); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1110 (W.D. Wash. 2010).

California courts review decisions on anti-SLAPP motions de novo. *See, e.g., Dyer v. Childress*, 147 Cal. App. 4th 1273, 1279, 55 Cal. Rptr. 3d 544 (2007); *Consumer Justice Ctr. v. Trimedica Int'l, Inc.*, 107 Cal. App. 4th 595, 599, 132 Cal. Rptr. 2d 191 (2003). Consequently, a de novo standard of review presumptively applies to the trial court's decision granting Hedlund's motion to strike Alaska Structures' claim for breach of confidentiality agreement under RCW 4.24.525.

Both states' statutes contain identical language regarding the

materials a court should consider in making its determination under the respective statutes. *See, e.g.*, CAL. CODE OF CIV. PROC. § 425.16(b)(2) ("[T]he court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."); RCW 4.24.525(4)(c) ("[T]he court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based."). Further, California courts "neither weigh credibility [nor] compare the weight of the evidence. Rather, [they] accept as true the evidence favorable to the plaintiff . . . and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." *Dyer*, 147 Cal. App. 4th at 1279 (internal quotation marks omitted); *see also Du Charme v. Int'l Bhd. of Elec. Workers*, 110 Cal. App. 4th 107, 112, 1 Cal. Rptr. 3d 501 (2003).

B. Washington's Amended Anti-SLAPP Statute, RCW 4.24.525.

Washington's Anti-SLAPP statute provides for a special early motion to strike "any claim that is based on an action involving public participation and petition." RCW 4.24.525(4)(a). The statute was intended, in part, to "[s]trike 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." Laws of 2010, ch. 118, § 1(2)(a).

Washington's statute prescribes a two-step, burden-shifting inquiry

on a special motion to strike. Hedlund, as the moving party, had "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). The statute defines an "action involving public participation and petition" to include, as relevant here, any statement made "in a place open to the public or a public forum in connection with an issue of public concern" or any 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)(d), (e). Only if Hedlund made that threshold showing should the burden have shifted to Alaska Structures "to establish by clear and convincing evidence a probability of prevailing on [its] claim." RCW 4.24.525(4)(b).

The statute provides for a $10,000 penalty and an award of reasonable attorneys' fees and costs if a special motion to strike is granted. RCW 4.24.525(6)(a)(i), (ii).

Washington's statute is modeled on California's Anti-SLAPP statute. *See, e.g., Aronson*, 738 F. Supp. 2d at 1110; *Castello v. City of Seattle*, Case No. C10-1457MJP, 2010 U.S. Dist. LEXIS 127648, *13 (W.D. Wash. Nov. 22, 2010). But the two statutes are not identical. "Thus, when resorting to California decisions as persuasive authority, courts applying Washington's anti-SLAPP statute must 'pay special

attention to provisions of the California statute that the Washington . . . Legislature expressly adopted, modified, or ignored.'" *Jones v. City of Yakima Police Dep't*, Case No. 12-CV-3005-TOR, 2012 U.S. Dist. LEXIS 72837, *8 (E.D. Wash. May 24, 2012) (quoting Tom Wyrwich, *Comment: A Cure for a "Public Concern": Washington's New Anti-SLAPP Law*, 86 WASH. L. REV. 663, 665 (2011)).

A "crucial distinction[]" between the two statutes is the burden of proof required of the responding party, typically the plaintiff. *Jones*, 2012 U.S. Dist. LEXIS 72837 at *8. California's statute requires the plaintiff to establish "that there is a probability that [it] will prevail on the claim," CAL. CODE OF CIV. PROC. § 425.16(b)(1), which in turn requires the plaintiff to "demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited," *Consumer Justice*, 107 Cal. App. 4th at 603 (internal quotation marks omitted). In contrast, Washington's statute requires the plaintiff "to establish by clear and convincing evidence a probability of prevailing on the claim."[2] RCW 4.24.525(4)(b). Because Washington's statute

[2] In this respect, Washington's statute is more similar to that of Illinois and Minnesota. Illinois's statute states that the "court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or are not in

"radically alters a plaintiff's burden of proof," the "significance of this heightened evidentiary burden cannot be overstated." *Jones*, 2012 U.S. Dist. LEXIS 72837 at *8-9. Thus, in deciding a motion to strike under Washington's statute, courts "must carefully consider whether the moving party's conduct falls within the 'heartland' of First Amendment activities that the Washington Legislature envisioned when it enacted the anti-SLAPP statute." *Jones*, 2012 U.S. Dist. LEXIS 72837 at *9; *see also Fielder v. Sterling Park Homeowners Ass'n*, Case No. C11-1688RSM, 2012 U.S. Dist. LEXIS 174750, *27 (W.D. Wash. Dec. 10, 2012).

C. Hedlund Failed to Make the Threshold Showing That Alaska Structures' Breach of Confidentiality Agreement Claim Was Based on Any Protected Activity or Speech.

1. Hedlund Was Required to Show That Alaska Structures' Breach of Contract Claim Was Based on Speech Involving an Issue of Public Concern.

Hedlund had the threshold burden of showing, by a preponderance of the evidence, that Alaska Structures' breach of confidentiality agreement claim was based on protected activity. RCW 4.24.525(4)(b); *see also Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 434, 260 P.3d 245 (2011), *review denied*, 173 Wn.2d 1029 (2012). If, as Alaska Structures contends, Hedlund failed to make that showing, his special motion to strike should have been denied at this first step of the

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furtherance of acts immunized from, liability by this Act." 735 ILCS 110/20(c). And Minnesota's statute contains virtually identical language. *See* MINN. STAT. § 554.02(3).

inquiry. *Fielder*, 2012 U.S. Dist. LEXIS 174750 at *30 (denying motion, finding that defendants had failed to meet threshold burden); *Greater LA Agency on Deafness v. Cable News Network, Inc.*, 862 F. Supp. 2d 1021, 1036 (N.D. Cal. 2012) (denying motion at first step of analysis); *Jones*, 2012 U.S. Dist. LEXIS 72837 at *6-10 (denying motion for failure to make required threshold showing); *World Fin. Group, Inc. v. HBW Ins. & Fin. Servs., Inc.*, 172 Cal. App. 4th 1561, 1568, 92 Cal. Rptr. 3d 227 (2009) (denying motion, finding that defendants had failed to establish that complaint was "based on acts in furtherance of defendants' free speech rights"), *modified*, 2009 Cal. App. LEXIS 702 (May 7, 2009).

"When evaluating whether the moving party meets its threshold burden, courts look to the 'principle thrust or gravamen of the plaintiff's cause of action.'" *Fielder*, 2012 U.S. Dist. LEXIS 174750 at *24 (quoting *Bautista v. Hunt & Henriques*, Case No. C-11-4010 JCS, 2012 U.S. Dist. LEXIS 5009, *13 (N.D. Cal. Jan. 17, 2012)). "A claim does not arise from constitutionally protected activity simply because it is triggered by such activity or is filed after it occurs." *World Fin. Group*, 172 Cal. App. 4th at 1568; *see also Episcopal Church Cases*, 45 Cal. 4th 467, 478, 198 P.3d 66, 87 Cal. Rptr. 3d 275 (2009) ("The . . . fact that protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a . . . dispute into a

SLAPP suit."); *City of Cotati v. Cashman*, 29 Cal. 4th 69, 78, 52 P.3d 695, 124 Cal. Rptr. 2d 519 (2002). Rather, "the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." *World Fin. Group*, 172 Cal. App. 4th at 1568-69 (internal quotation marks omitted); *see also Aronson*, 738 F. Supp. 2d at 1110-11.

In his proposed order, which the trial court adopted, Hedlund relied on two categories of "public participation and petition" (CP 890): (1) "Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an **issue of public concern**"; and (2) "Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an **issue of public concern**, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2)(d), (e) (emphasis added). That order, however, merely quoted the statutory language and did not identify the specific "issue of public concern" purportedly implicated in this case. In any event, under either category of "public participation and petition," Hedlund was required to—but could not—show that his disclosure of weaknesses in Alaska Structures' security system involved an "issue of public concern."

Like the California statute it is modeled on, Washington's Anti-

SLAPP statute does not define "issue of public concern"[3] but California courts have identified a number of guiding principles:

> "[P]ublic interest" is not mere curiosity. Further, the matter should be something of concern to a substantial number of people. Accordingly, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Additionally, there should be a degree of closeness between the challenged statements and the asserted public interest. The assertion of a broad and amorphous public interest is not sufficient. Moreover, the focus of the speaker's conduct should be the public interest, not a private controversy.

Hailstone v. Martinez, 169 Cal. App. 4th 728, 736, 87 Cal. Rptr. 3d 347 (2008); *see also All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.*, 183 Cal. App. 4th 1186, 1201-02, 107 Cal. Rptr. 3d 861 (2010). Also, in cases where a public issue was found to exist, "the subject statements either concerned a person or entity in the public eye[,] conduct that could directly affect a large number of people beyond the direct participants[,] or a topic of widespread, public interest[.]" *Rivero v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 105 Cal. App. 4th 913, 924, 130 Cal. Rptr. 2d 81 (2003); *see also Hailstone*, 169 Cal. App. 4th at 736-37.

Although California courts have also found that an "issue of public

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[3] Although California's statute uses the phrase "issue of public interest," CAL. CODE OF CIV. PROC. § 425.16(e)(3), (4), courts applying Washington's statute have still found California decisions to be persuasive authority in evaluating the existence of an "issue of public concern." *See, e.g., Aronson*, 738 F. Supp. 2d at 1110-12; *but see Jones*, 2012 U.S. Dist. LEXIS 72837 at *8-9 (accepting California decisions as persuasive authority but due to differences in plaintiff's burden of proof emphasizing that when applying Washington's statute, courts must carefully consider the defendant's threshold showing).

interest" can exist as to a more limited but definable portion of the public, in such cases, "the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance." *World Fin. Group*, 172 Cal. App. 4th at 1572-73 (internal quotation marks omitted).

Alaska Structures does not dispute, for purposes of Hedlund's motion to strike, that Indeed.com, which allows users to post publicly-accessible comments, constitutes a "public forum."[4] But Hedlund failed to establish the second part of his required initial showing, namely, that non-public details about weaknesses in Alaska Structures' security system was "an issue of public concern." RCW 4.24.525(2)(d), (e).

2. Hedlund Cannot Manufacture an "Issue of Public Concern" by Relying on Amorphous Issues Having No Connection to His Disclosure About Alaska Structures' Security System.

In the trial court, Hedlund claimed vaguely that "the statements"—which he did not define—implicated issues of public concern because they purportedly discussed "management improprieties of a large employer who is also a government contractor" and "conditions of the workplace."

[4] *See, e.g., Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1576, 27 Cal. Rptr. 3d 863 (2005) (Yahoo! message board maintained for plaintiff was a public forum); *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 895, 897, 17 Cal. Rptr. 3d 497 (2004) (defendant's statements published on her website were made in a public forum).

(CP 448.) He also claimed that there was an issue of public concern because Alaska Structures had been the victim of burglaries that were part of a "major crime spree" that purportedly "involv[ed] significant public resources." (CP 448.) Notably, the trial court never identified, in either its oral ruling or its written order, the issue(s) of public concern purportedly implicated by Hedlund's disclosure about Alaska Structures' security system. (*See* CP 888-91; RP at 49:1-50:1.) In any event, even assuming the court accepted one or more of Hedlund's proffered issues of public concern, Hedlund failed to satisfy his threshold burden because he improperly generalized amorphous issues without demonstrating any connection between either those issues and the statement upon which Alaska Structures' claim for breach of confidentiality agreement is based or that the company's security system (an inherently private matter) was the subject of an ongoing public controversy.

In asserting his generalized "issues of public concern"—"management improprieties," "conditions of the workplace," and a "major crime spree" (CP 448)—Hedlund contended that "the issue is not the exact words" he used in his August 12th Posting but rather "whether that speech—in its complete context not just a few isolated words—is on a matter of public concern." (CP 712, 714.) He then described the "complete context" of his August 12th Posting extraordinarily broadly as

"the string of posts to which [he] was responding, on a forum for job seekers, used to aid seekers in deciding whether or not to work at a particular company" that is "subscribed to [by] numerous people interested in the subject." (CP 712.) Hedlund's contention is wrong for a number of reasons which, considered alone or collectively, demonstrate that he failed to make his threshold showing that an "issue of public concern" existed with respect to his disclosure about weaknesses in Alaska Structures' security system in violation of his Confidentiality Agreement.

First, Hedlund's invitation to ignore the "exact words" of his August 12th Posting in favor of an overbroad description of the "context in which they arise" (CP 712) is inconsistent with the limited focus of anti-SLAPP statutes, case law describing what constitutes an issue of "public concern" or "public interest," and the limited nature of Alaska Structures' breach of confidentiality agreement claim.

California courts have emphasized that the defendant's threshold showing is an important limitation that should be "diligently" applied:

> to ensure that movants show the requisite connection between the non-movants' claims and the movants' anti-SLAPP protected activity. Otherwise, anti-SLAPP motions morph into automatic early motions for summary judgment that test the non-movants' claims absent the procedural protections that are necessarily and properly part of every summary judgment motion.

Doe v. Gangland Prods., Inc., 802 F. Supp. 2d 1116, 1123 (C.D. Cal.

2011); *see also Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1132, 2 Cal. Rptr. 3d 385 (2003) (noting that California legislature intended "public interest" "requirement to have a limiting effect on the types of conduct" that constitute "public participation and petition"). And courts applying Washington's Anti-SLAPP statute have emphasized even more strongly the importance of the defendant's required threshold showing given that the statute so "radically alters a plaintiff's burden of proof." *Jones*, 2012 U.S. Dist. LEXIS 72837 at *8-9. As a result, courts "must carefully consider whether the moving party's conduct falls within the 'heartland' of First Amendment activities" envisioned by the Legislature in enacting the statute. *Jones*, 2012 U.S. Dist. LEXIS 72837 at *9; *see also Fielder*, 2012 U.S. Dist. LEXIS 174750 at *27.

Here, the trial court failed to heed this direction as it never explicitly identified the issue(s) of public concern it concluded triggered the anti-SLAPP statute. (*See* CP 888-91.) Rather, it appeared to largely ignore Hedlund's required threshold showing and instead focused on the second step of the inquiry as to the substantive merit of Alaska Structures' breach of contract claim and in particular the question whether details about the company's security system could constitute "Confidential Information" under Hedlund's Confidentiality Agreement. (*See, e.g.*, RP at 30:15-23, 32:17-20, 33:13-18, 34:10-13, 49:4-9.)

Moreover, California courts have explicitly rejected the suggestion that they should ignore the "exact words" at issue in favor of some amorphous, generalized public issue extrapolated from the broader context. Instead, the "key [is to examine] the *specific nature of the speech* 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); *see also World Fin. Group*, 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."); *Dyer*, 147 Cal. App. 4th at 1279 ("[W]e focus on the specific nature of the challenged protected conduct, rather than generalities that might be abstracted from it."); *Consumer Justice*, 107 Cal. App. 4th at 601 ("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.").

Second, courts have consistently rejected arguments like Hedlund's in which he attempts to elevate a private, workplace dispute into an issue of public interest by asserting abstract issues of "management improprieties" and "conditions of the workplace." (CP 448.) For example, in a case where plaintiff alleged in part that defendants had

improperly used its confidential information and trade secrets to solicit plaintiff's agents and customers, the court rejected the defendants' proffered abstract issues of public interest characterized as "the pursuit of lawful employment" and "workforce mobility and free competition":

> The fact that a broad and amorphous public interest can be connected to a specific dispute is not sufficient to meet the statutory requirements of the anti-SLAPP statute. . . . By focusing on society's general interest in the subject matter of the dispute instead of the specific speech or conduct upon which the complaint is based, defendants resort to the oft-rejected, so-called synecdoche theory of public issue in the anti-SLAPP statute, where [t]he part [is considered] synonymous with the greater whole. . . . In evaluating the first prong of the anti-SLAPP statute, we must focus on the *specific nature of the speech* rather than the generalities that might be abstracted from it.

World Fin. Group, 172 Cal. App. 4th at 1566, 1569-70 (internal quotation marks omitted). *See also Olaes v. Nationwide Mut. Ins. Co.*, 135 Cal. App. 4th 1501, 1510, 38 Cal. Rptr. 3d 467 (2006) (concluding that proffered general public interest "in the fair resolution of claims of sexual harassment" did not bring defamation claim involving a sexual harassment investigation within the ambit of the anti-SLAPP statute).

Another California appellate court rejected an argument like Hedlund's that attempted to transform a private workplace dispute into an issue of public concern by citing generalized employment issues. In *Rivero*, a former supervisor of eight janitors on a state university campus

asserted various claims based on the union's distribution of documents that allegedly contained false information about him. 105 Cal. App. 4th at 916-17, 925. The union argued that its challenged activity involved an issue of "public interest" because (1) "the abusive supervision of employees" in the University of California system "impacts a community of public employees numbering 17,000"; and (2) the alleged unlawful workplace activity occurred at a publicly-financed institution. *Rivero*, 105 Cal. App. 4th at 919, 924-25 (internal quotation marks omitted). The California court rejected both contentions.

The court first rejected as overbroad the union's contention "that any time a person criticizes an unlawful workplace activity the statements concern a public issue because public policy favors such criticism":

> [I]f the Union were correct, discussion of nearly every workplace dispute would qualify as a matter of public interest. We conclude, instead, that unlawful workplace activity below some threshold level of significance is not an issue of public interest, even though it implicates a public policy.

Rivero, 105 Cal. App. 4th at 924. And it similarly rejected the union's contention that the involvement of a publicly-financed institution made it an issue of public interest, stating that "[a]gain, the Union's argument sweeps too broadly; under their argument, every allegedly inappropriate use of public funds, no matter how minor, would constitute a matter of

public interest." *Rivero*, 105 Cal. App. 4th at 924-25.

Third, Hedlund failed to establish any connection between his generalized issues of "public concern" ("management improprieties" and "conditions of the workplace" (CP 448)) and his specific disclosure of non-public details about weaknesses in Alaska Structures' security system, the statement upon which the breach of confidentiality agreement claim was based. Alaska Structures' complaint reflected the narrow focus of its claim: "Hedlund's posting included information that was not known to, and was not readily ascertainable by proper means by, the general public concerning [Alaska Structures'] security." (CP 268 (¶ 5); *see also* CP 2 (¶ 7), 586-87.) Thus, Hedlund's reference to other posts by other individuals about interviewing and working at Alaska Structures (CP 712)—even assuming for purposes of argument that those posts might constitute protected activity—does nothing to show that Alaska Structures' claim for breach of confidentiality agreement based specifically on Hedlund's disclosure about its security system arose from or is based on protected activity or speech. *See, e.g.*, *Fielder*, 2012 U.S. Dist. LEXIS 174750 at *27-28 (stating that "collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute") (internal quotation marks omitted); *Dyer*, 147 Cal. App. 4th at 1280 (noting that although movie at issue might address topics of

widespread public interest, the defendants were "unable to draw any connection between those topics" and the plaintiff's claims); *Weinberg*, 110 Cal. App. 4th at 1132 (in determining whether there is an issue of public interest "there should be some degree of closeness between the challenged statements and the asserted public interest").

Similarly, Hedlund's contention that issues of public concern involving "management improprieties" and "conditions of the workplace" existed was based largely, if not entirely, on *other* statements from *other* people on *other* subject matter: "Hedlund provides in his second declaration the posts he captured back in August 2011 to which he was responding. They illustrate clearly that the discussion was on an issue of 'public concern' and AKS has not and cannot show otherwise."[5] (CP 712-13.) But his "compilation" of posts discuss interviewing and working for Alaska Structures. (*See* CP 808-32.) The only disclosure of details about Alaska Structures' security system is Hedlund's August 12th Posting, which is the sole basis for the breach of confidentiality agreement claim.[6] (CP 812.) Hedlund cannot manufacture an "issue of public

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[5] Hedlund's assertion that Alaska Structures failed to show that "the discussion" did *not* involve an issue of public concern misstates the burden of proof because it is his burden to make the threshold showing that Alaska Structures' breach of confidentiality agreement claim was based on protected activity. RCW 4.24.525(4)(b).

[6] Another poster made a vague reference to "security" that contained no details: "If you work in military contracting proper security is a must, and usually a contractual requirement. So I fully understand the need for the security." (CP 808.)

concern" simply by publishing off-topic and non-public details about Alaska Structures' security system in purported response to statements made by others on unrelated subject matter. *See Weinberg*, 110 Cal. App. 4th at 1133 ("A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people."). Adopting Hedlund's argument would permit individuals to make otherwise unlawful statements as long as they are made in the context of other, unrelated subject matter on an issue of public concern no matter how off-topic those unlawful statements might be.

Fourth, Hedlund made no showing that details about weaknesses in Alaska Structures' security system were related to an ongoing, public controversy. Where, as here, the allegedly protected activity or speech is, at best, of interest to a limited portion of the public, the moving party must show, "at a minimum," that the activity or speech occurred "in the context of an *ongoing* controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance." *World Fin. Group*, 172 Cal. App. 4th at 1572-73 (internal quotation marks omitted and first emphasis added). *See also Phoenix Trading*, 2011 U.S. Dist. LEXIS 81432 at *16 (noting that the general purpose of Washington's Anti-SLAPP statute was to protect "*participants* in *public controversies* from

abusive use of the courts") (emphasis added). Hedlund made no showing that details of Alaska Structures' security system were either part of a controversy or that any such controversy was ongoing. In fact, absent unusual facts that Hedlund has not shown exist here, non-public details about a private company's security system are inherently a matter of private, not public, concern.

Although Hedlund attempts to rely on the fact that Alaska Structures was a burglary victim to generalize an ill-defined "issue of public concern" as to a "major crime spree" purportedly "involving significant public resources," (CP 448), he offers no evidence that the burglary of the company was part of a "controversy," that any purported controversy was "ongoing," or that details about weaknesses in the company's security system had even a remote connection with that undefined controversy. Hedlund attempted to make a tenuous connection between his statement about the security system and the expenditure of public resources by claiming that the burglaries were "creat[ed] at least in part by the faulty and inadequate security measures," (CP 448), but he offered no evidence to support his conjecture. The police and news reports—which Hedlund does not claim he had access to at the time of his August 12th Posting—make only brief references to security and instead, at least with respect to the news reports, highlighted the burglars' use of

"Knox boxes," emergency-access key boxes attached to the outside of buildings. (*See, e.g.*, CP 321-27; *see also* CP 338-39, 345, 409.)

In short, Hedlund failed to make any supported showing that the details about weaknesses in Alaska Structures' security system that he disclosed in his August 12th Posting were of interest to a significant number of people, were part of an ongoing, public controversy, or would impact a significant number of people. As a result, he failed to meet his burden of showing, by a preponderance of the evidence, that Alaska Structures' claim against him for disclosing those details in violation of his Confidentiality Agreement was "based on an action involving public participation and petition." RCW 4.24.525(4)(b). Because he did not make that required threshold showing, the burden never shifted to Alaska Structures and Hedlund's special motion to strike should have been denied at the first step of the analysis.

D. By Signing the Confidentiality Agreement, Hedlund Agreed to Limit the Information He Could Disclose About Alaska Structures That He Learned During His Employment.

1. Preexisting Legal Relationships Can Limit or Waive the Right to Public Participation and Petition.

Although Washington courts do not appear to have addressed the issue, courts in other states have held that parties can waive their rights

under anti-SLAPP statutes or rules.[7] *See, e.g., Navellier v. Sletten*, 29 Cal. 4th 82, 94, 52 P.3d 703, 124 Cal. 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 or she later breaches that contract.");[8] *Pennsbury Vill. Assocs., LLC v. McIntyre*, 608 Pa. 309, 324, 11 A.3d 906 (2011) ("[W]here 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.").

For example, in *Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, the Watershed District brought suit to enforce a settlement agreement in which the defendant agreed to "address no further challenges" to a flood management project. 784 N.W.2d 834, 836 (Minn. 2010) ("*Stengrim*") (internal quotation marks omitted). The defendant moved to dismiss under Minnesota's anti-SLAPP statute arguing that the lawsuit "targeted protected acts of public participation that are immune

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[7] Washington courts have held, however, that constitutional rights can be waived and that freedom of speech is not absolute. *See, e.g., Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 394, 858 P.2d 245 (1993); *State v. Humphries*, 170 Wn. App. 777, 789, 285 P.3d 917 (2012).

[8] The court in *Navellier* concluded that this waiver inquiry related to the second step of the anti-SLAPP motion analysis—plaintiff's burden of demonstrating a probability of prevailing. 29 Cal. 4th at 94. Other courts have addressed the issue as part of the defendant's threshold showing. *See Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, 784 N.W.2d 834, 842 (Minn. 2010). Regardless, the courts agree that public participation rights can be waived.

from liability." *Stengrim*, 784 N.W.2d at 836-37. Like Washington's statute, Minnesota's statute required the defendant to make a threshold showing that the "'claim materially relates to an act of the moving party that involves public participation.'" *Stengrim*, 784 N.W.2d at 841 (quoting MINN. STAT. § 554.02, subd. 1). In discussing that threshold showing, the Minnesota Supreme Court concluded that "[p]reexisting legal relationships, such as those based on a settlement agreement where a party waives certain rights, may legitimately limit a party's public participation." *Stengrim*, 784 N.W.2d at 842. "It would be illogical to read [the statute] as providing presumptive immunity to actions that a moving party may have contractually agreed to forgo or limit." *Stengrim*, 784 N.W.2d at 842. Ultimately, the court concluded that the anti-SLAPP motion could be denied as premature:

> [A] district court has the authority to deny a defendant's anti-SLAPP motion where a defendant has entered into a settlement agreement and contractually agreed not to hinder the establishment of a project, thereby waiving certain rights to public participation, but retaining others, and the court determines that there are genuine issues of material fact about the settlement agreement's effect on the defendant's public participation rights.

Stengrim, 784 N.W.2d at 842.

Finding *Stengrim* persuasive, an Illinois appellate court reached a similar conclusion in a dispute where plaintiffs alleged the existence of an

oral agreement under which the defendant had agreed not to contest a setback calculation, an agreement defendant allegedly breached. *Johannesen v. Eddins*, 963 N.E.2d 1061, 1062-63, 1065-66 (Ill. App. Ct. 2011). The court stated that it could "see no reason why a party cannot waive rights under the [anti-SLAPP statute] based on a preexisting legal relationship." *Johannesen*, 963 N.E.2d at 1067. And like *Stengrim*, the Illinois court concluded that material issues of fact precluded granting the anti-SLAPP motion. *Johannesen*, 963 N.E.2d at 1066-67.

The Massachusetts Supreme Court reached a similar conclusion in a case where the plaintiff alleged that defendant had breached a confidentiality agreement in connection with deposition testimony and related discussions. *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 157, 159, 691 N.E.2d 935 (1998). The court recognized that "[m]any preexisting legal relationships may properly limit a party's right to petition, including enforceable contracts in which parties waive rights to otherwise legitimate petitioning." *Duracraft*, 427 Mass. at 165. Moreover, the court stated it was "aware of no case that has immunized alleged breaches of such preexisting legal obligations based on constitutional protection for the right to petition" nor did it find "cases dismissing such claims under anti-SLAPP statutes of other jurisdictions." *Duracraft*, 427 Mass. at 166. The court concluded that plaintiff's

submission of a copy of the nondisclosure agreement "constitute[d] a substantial basis other than [defendant's] petitioning activity" to support the plaintiff's claims and that the anti-SLAPP motions "therefore must fail." *Duracraft*, 427 Mass. at 168.

2. Hedlund Agreed to Limit the Information He Could Disclose About Alaska Structures By Signing the Confidentiality Agreement.

At the start of his employment, Hedlund signed both the Employment Agreement and the Confidentiality Agreement that was explicitly incorporated into the Employment Agreement. (CP 599 (¶ 3), 604-13.) The Confidentiality Agreement prohibited him from disclosing Alaska Structures' "Confidential Information," which was defined to include but not be limited to "trade secrets and confidential technical or business information." (CP 609 (§ 1.2).) The agreement also provided that Hedlund's non-disclosure obligation applied during and after his employment with the company. (CP 605 (§ 8), 609 (§ 1.1).)

Thus, by signing the Employment Agreement and the Confidentiality Agreement, Hedlund expressly and voluntarily waived his ability to make certain disclosures about Alaska Structures (e.g., the company's confidential information). As discussed in more detail below (*see infra* pp. 40-41), Hedlund made no credible challenge to the validity of the Confidentiality Agreement and instead merely asserted that he had

"no memory of signing a 'confidentiality agreement.'" (CP 440.) And in any event, like *Stengrim* and *Johannesen*, any question as to whether non-public details about weaknesses in Alaska Structures' security system disclosed by Hedlund fell within the Confidentiality Agreement's definition of "Confidential Information" arguably presents issues of fact that justify denying Hedlund's early motion to strike. *See Stengrim*, 784 N.W.2d at 842 (concluding that anti-SLAPP motion could be denied where genuine issues of fact existed as to settlement agreement's effect on defendant's public participation rights); *Johannesen*, 963 N.E.2d at 1066-67 (finding that trial court erred in granting motion where issues of fact existed as to agreement and its effect on defendant's claimed immunity).

In short, Hedlund's "pre-existing legal relationship[]" with Alaska Structures, namely, the Confidentiality Agreement, precludes him "from engaging in the activity protected by anti-SLAPP legislation," and, therefore he "cannot claim immunity for actions taken in violation of [his] pre-existing legal obligation." *Pennsbury*, 608 Pa. at 324; *see also DaimlerChrysler Motors Co. v. Lew Williams, Inc.*, 142 Cal. App. 4th 344, 354, 48 Cal. Rptr. 3d 233 (2006). The trial court therefore erred in granting his motion and dismissing with prejudice Alaska Structures' breach of confidentiality agreement claim under RCW 4.24.525.

E. Even If Hedlund Had Made His Required Initial Showing, Alaska Structures Established a Probability of Prevailing on its Breach of Confidentiality Agreement Claim.

Even if Hedlund made his threshold showing, Alaska Structures established by clear and convincing evidence a probability of prevailing on its claim that he breached his Confidentiality Agreement by disclosing non-public details about weaknesses in the company's security system. "Clear, cogent, and convincing evidence" requires "that the trier of fact be convinced that the fact in issue is 'highly probable'." *Colonial Imps., Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993) (quoting *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)). "If a court denies an anti-SLAPP motion, it has merely found that the plaintiff's claims may have merit; the court does not evaluate whether plaintiff's claim will succeed." *Fielder*, 2012 U.S. Dist. LEXIS 174750 at *25.

Here, Alaska Structures showed that (a) a valid confidentiality agreement existed, (b) Hedlund breached that agreement by disclosing information about its security system, and (c) damages resulted from the breach, thereby establishing a probability of prevailing on its claim. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (stating breach of contract claim elements).

1. Alaska Structures Established the Existence of a Valid Confidentiality Agreement Signed By Hedlund.

"The essential elements of a contract are 'the subject matter of the

contract, the parties, the promise, the terms and conditions, and . . . the price or consideration.'" *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 31, 959 P.2d 1104 (1998) (quoting *Family Med. Bldg., Inc. v. Washington*, 104 Wn.2d 105, 108, 702 P.2d 459 (1985) (en banc)). There is no credible dispute that Alaska Structures established each of these elements with respect to Hedlund's Confidentiality Agreement.

The subject matter of the agreement was explicit—Hedlund's agreement to maintain the confidentiality of Alaska Structures' "Confidential Information" during and after his employment. (CP 609 (§§ 1.1, 1.2).) The contracting parties were also explicitly identified—Alaska Structures, the "Employer," and Hedlund, the "Employee." (CP 609.) Hedlund promised he would not disclose the "Confidential Information" in return for which Alaska Structures agreed to, and did, pay him wages and benefits during his employment. (CP 513 (¶ 3), 599 (¶ 4), 609.) *See Equal Emp't Opportunity Comm'n v. Fry's Elecs., Inc.*, Case No. C10-1562RSL, 2011 U.S. Dist. LEXIS 20407, *3 (W.D. Wash. Feb. 14, 2011) ("The general rule in Washington is that contracts signed when an employee is first hired, such as . . . confidentiality provisions, are supported by consideration."); *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 834, 100 P.3d 791 (2004) (stating same with respect to non-compete agreement).

Washington adheres to the "objective manifestation theory" of mutual assent under which the courts "impute to a person an intention corresponding to the reasonable meaning of his words and acts." *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 517, 408 P.2d 382 (1965). "Unexpressed intentions are nugatory when the problem is to ascertain the legal relations . . . between two parties." *Plumbing Shop*, 67 Wn.2d at 517; *see also Multicare Med. Ctr. v. Dep't of Soc. & Health Servs.*, 114 Wn.2d 572, 587, 790 P.2d 124 (1990) ("[T]he unexpressed subjective intention of the parties is irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations."). Whether mutual assent exists is typically a question of fact. *Multicare*, 114 Wn.2d at 586 n.24.

Here, Hedlund signed the Confidentiality Agreement (and the Employment Agreement that explicitly incorporated the Confidentiality Agreement), thereby indicating his acceptance of the agreement. (CP 599 (¶ 3), 605 (§ 8), 608, 613.) His vague allegations that he "has no memory of signing a 'confidentiality agreement'" and that he does not recall the documents he signed at the start of his employment or "what they said," are wholly insufficient to establish a lack of mutual assent or otherwise render the agreement unenforceable. (CP 440, 514 (¶ 4).) "The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs." *Nat'l Bank of Wash.*

v. Equity Investors, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973). Notably, Hedlund has not said he did not sign the Confidentiality Agreement (only that he had "no memory of signing") nor did he state that it was not his signature on that agreement or the Employment Agreement. (CP 608, 613.) He also failed to provide any evidence of fraud, deceit, or coercion that would negate his signature on the two agreements. *See Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982) ("A party to a contract which he has voluntarily signed cannot, in the absence of fraud, deceit, or coercion be heard to repudiate his own signature."). Thus, Hedlund's purported inability to remember signing the Confidentiality Agreement is insufficient to refute his acceptance of the agreement as manifested by his signature. And to the extent Hedlund alleges a failure to read the agreement before signing it, that failure is irrelevant to its validity given the fact he had an opportunity to do so. *Yakima Cnty.*, 122 Wn.2d at 389; *Nat'l Bank*, 81 Wn.2d at 912 ("[A] party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.").

2. Hedlund's Disclosure of Weaknesses in Alaska Structures' Security System Was a Breach of the Confidentiality Agreement.

By signing the Confidentiality Agreement, Hedlund agreed not to

disclose—during and after his employment—Alaska Structures' "Confidential Information," which was defined, in part, as "information, whether oral, written, or otherwise recorded, which derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons or entities[.]" (CP 609 (§ 1.2).) "Confidential Information" was also defined to include but not be limited to "trade secrets and confidential technical or business information." (CP 609 (§ 1.2).)

As discussed above, the portion of Hedlund's August 12th Posting upon which Alaska Structures' breach of confidentiality agreement claim is based is the description of non-public details about weaknesses in the 2008-2009 Security Measures installed during Hedlund's employment: "[T]he security measures at AKS are all consumer-grade off the shelf fare installed by the former CIO, who had no prior security experience." (CP 600 (¶ 9), 615.) That information was not known outside of Alaska Structures and could not be readily ascertained by non-employees. (CP 601 (¶ 11).) Alaska Structures necessarily derived value from information about weaknesses in its security system not being generally known in order to dissuade burglars from exploiting those weaknesses. (CP 601 (¶¶ 11-12).) This is particularly true as Alaska Structures had already been the victim of two burglaries at the time of Hedlund's August

12th Posting. In fact, the value that Alaska Structures (or any business) necessarily derives from maintaining the confidentiality of the details of its security system is demonstrated by the police reports provided by Hedlund's counsel. Those reports suggest that the burglars had prior knowledge of the company's security system because they appeared to know in advance the areas covered by surveillance cameras and therefore could avoid those areas to prevent identification. (*See, e.g.*, CP 338-39.) Thus, such information constituted "Confidential Information" as defined in the agreement and Hedlund's disclosure of that information in his August 12th Posting violated his Confidentiality Agreement.

Hedlund failed to refute this evidence. After the fact he asserted that the "consumer-grade off the shelf fare installed by the former CIO, who had no prior security experience" (CP 615) to which he referred was a "newly-installed security system [that] did not work on the night of the second burglary because it was 'faulty' and that Schneider had managed the installation." (CP 450.) He then claimed that this "newly-installed security system" and the fact that Schneider had installed it were "revealed in . . . public records." (CP 450.) But the police report Hedlund apparently relied upon (but failed to specifically cite to) describes a distinctly different system than that referenced in his August 12th Posting:

The recently installed monitored burglary alarm system

> (installed since the last commercial burglary of the business a week prior) was not activated and Schneider said it was faulty; he was unable to provide detail of the system; he is the business contact for the alarm system and managed its installation.

(CP 343.) That description refers to the monitored alarm system that Allied Fire & Security installed immediately after the first burglary on March 1, 2010, an installation that Schneider managed. (CP 600 (¶ 8), 634.) That system bears no resemblance to the "consumer-grade off the shelf fare installed by the former CIO [Schneider]" that Hedlund described in his August 12th Posting (CP 615) because he was describing the security system Schneider installed during Hedlund's employment. (CP 599 (¶¶ 5-6).) Thus, Hedlund's reliance on the police records is misplaced as they fail to demonstrate that the details of Alaska Structures' 2008-2009 Security Measures were public information.[9]

Nor do the news reports establish that the specific details about the 2008-2009 Security Measures disclosed by Hedlund were public knowledge. (*See* CP 321-27.) They make only fleeting references to Alaska Structures as one of the businesses burglarized without any specific reference to its security system (CP 322, 324, 326), and largely focus on the burglars' use of "Knox boxes" (CP 321, 324, 326).

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[9] And even if the police reports had described the 2008-2009 Security Measures, Hedlund does not claim that he learned the information disclosed in his August 12th Posting from those reports. Rather, the reports were acquired by his counsel in connection with his motion to strike. (CP 334 (October 2011 public records request).)

Alaska Structures therefore demonstrated a probability of prevailing on its claim that Hedlund breached his Confidentiality Agreement by disclosing confidential details about weaknesses in the 2008-2009 Security Measures of Alaska Structures.

3. Alaska Structures Established With Reasonable Certainty Damages Accruing From Hedlund's Breach of His Confidentiality Agreement.

"[A] party injured by breach of contract is entitled (1) to recovery of all damages that accrue naturally from the breach and (2) to be put into as good a pecuniary position as he would have had if the contract had been performed." *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 82-83, 248 P.3d 1067 (2011); *see also Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 39, 686 P.2d 465 (1984). A breach of contract plaintiff need only provide evidence that establishes the amount of damages with reasonable certainty. *Columbia Park*, 160 Wn. App. at 83.

At the time of Hedlund's August 12th Posting, the 2008-2009 Security Measures he described were still in use at Alaska Structures' Kirkland office. (CP 600 (¶ 10).) For that reason, and because Hedlund described the security system's weaknesses in the context of prior burglaries, Alaska Structures was concerned that his disclosure would encourage or facilitate additional burglaries. (CP 601 (¶ 12).) In addition, at the time of Hedlund's August 12th Posting, oftentimes only one or two

young female employees were working at the company's office due to the travel of other employees. (CP 601 (¶ 14).)

As a result of these concerns, Alaska Structures increased the number of security shifts at its office in August and September 2011, at a cost of $3,821, which was reflected in invoices provided by Alaska Structures. (CP 601-02 (¶¶ 14-15), 617-18.) Thus, as a consequence of Hedlund's disclosure of non-public details about weaknesses in the security system in violation of his Confidentiality Agreement, Alaska Structures incurred at least $3,821 in damages.

Moreover, Hedlund's disclosure of non-public details about Alaska Structures' security system may have harmed the company by undermining its trustworthiness in the eyes of its customers and potential customers. As a necessary and critical part of Alaska Structures' business, customers provide their confidential information to the company, which in turn agrees to maintain the confidentiality of that information. Having a former employee disclosing Alaska Structures' own confidential information with impunity—notwithstanding the existence of a valid Confidentiality Agreement signed by the former employee—necessarily undermines Alaska Structures' standing with its customers.

Additionally, Alaska Structures sought permanent injunctive relief preventing Hedlund from disclosing further Confidential Information in

violation of his Confidentiality Agreement, which specifically provides for such relief. (CP 271 (¶ 19), 612 (§ 4.1).)

In summary, Alaska Structures established, by clear and convincing evidence, a probability of prevailing on its breach of confidentiality agreement claim. It provided both an Employment and a Confidentiality Agreement signed by Hedlund at the start of his employment. The Confidentiality Agreement plainly and unambiguously sets forth Hedlund's non-disclosure obligation. And Hedlund's disclosure of the details of the 2008-2009 Security Measures, which he learned of during his employment and which were not readily ascertainable by non-employees, constituted a breach of his non-disclosure obligation. His improper public disclosure in turn resulted in damages to Alaska Structures in the form of the cost of increased security at its Kirkland office. Therefore, even if Hedlund had made his threshold showing that details of the security system involved an issue of public concern, Alaska Structures satisfied its burden of "establish[ing] by clear and convincing evidence a probability of prevailing on [its] claim." RCW 4.24.525(4)(b). Consequently, Hedlund's motion should have been denied.

F. Hedlund Was Not Entitled to an Award of Attorneys' Fees and Costs In Connection With the Georgia Court Proceeding.

Washington's Anti-SLAPP statute expressly limits the award of

attorneys' fees and costs to motions on which the moving party prevailed:

> (a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike . . . without regard to any limits under state law:
> (i) Costs of litigation and any reasonable attorneys' fees **incurred in connection with each motion on which the moving party prevailed**[.]

RCW 4.24.525(6)(a)(i) (emphasis added). But here, the trial court awarded Hedlund attorneys' fees and costs incurred in the Georgia court proceeding even though he was neither the moving nor the prevailing party in that proceeding. (CP 890.) That award was therefore error as a matter of law. *See Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001) ("Whether a party is entitled to attorney fees is an issue of law which is reviewed de novo.").

First, the anonymous subscriber that Alaska Structures sought to identify by its petition to enforce the subpoena to Cox Communications in the Georgia proceeding was Hedlund's father, not Hedlund. (CP 276 (¶ 11).) The response to Alaska Structures' petition clearly stated that the response was being filed on behalf of "'John Doe,' an anonymous individual whose identity is being sought by Plaintiff via a subpoena served upon Cox Communications." (CP 307.)

Second, even if Hedlund was somehow allowed to step into his father's shoes in order to be considered a party in the Georgia proceeding,

the award of attorneys' fees and costs in connection with that proceeding was error because neither Hedlund nor his father prevailed. The Georgia court granted Alaska Structures' petition to enforce the subpoena to Cox Communications—the only matter involved in that proceeding—and therefore Alaska Structures, not Hedlund or his father, was the prevailing party. (CP 674-97.) Hedlund offered no authority supporting an award of prevailing party attorneys' fees and costs associated with a motion he lost in another court unconnected to an anti-SLAPP statute.

The trial court therefore erred in awarding Hedlund attorneys' fees and costs "incurred in connection with the Georgia proceedings related to the subpoena to Cox Communications" (CP 890) under RCW 4.24.525(6)(a)(i), which limits the award to fees and costs "incurred in connection with each motion on which the moving party prevailed."

V. CONCLUSION.

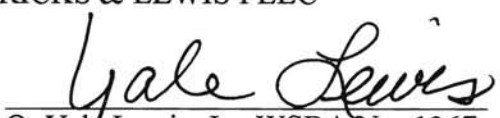
Washington's Anti-SLAPP statute was intended to strike a balance between the equally legitimate "rights of persons to file lawsuits and to trial by jury" and "rights of persons to participate in matters of public concern." Laws of 2010, ch. 118, § 1(2)(a). But here, the trial court's grant of Hedlund's motion to strike distorts that balance, giving greater rights to Hedlund by allowing him to avoid liability for breaching his Confidentiality Agreement at the expense of Alaska Structures' right to

petition the courts for relief for that breach. *See Duracraft*, 427 Mass. at 166 ("By protecting one party's exercise of its right of petition, unless it can be shown to be sham petitioning, the statute impinges on the adverse party's exercise of its right to petition, even when it is not engaged in sham petitioning."). For the reasons discussed herein, the trial court's grant of Hedlund's special motion to strike is unsustainable on each step of the inquiry and should be reversed.

DATED this 25th day of January, 2013.

Respectfully Submitted,

HENDRICKS & LEWIS PLLC

By: 

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