No. 95724-0

SUPREME COURT
OF THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC.,

Plaintiff/Appellant,

v.

CHARLES J. HEDLUND,

Defendant/Respondent.

ALASKA STRUCTURES, INC.'S ANSWER TO HEDLUND'S PETITION FOR REVIEW

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I. INTRODUCTION.

The unstated premise of premise of Hedlund's Petition for Review ("Petition") seems to be that the contractual fee-shifting provision on which he relies entitles the prevailing party to all of its fees and costs. But that is not what the contract says. Rather, it provides explicitly for "reasonable" fees and costs which in Washington do not include fees and costs for unsuccessful theories. This well-established principle was not addressed in Respondent's Brief or the Motion for Reconsideration Hedlund filed with the Court of Appeals or even in this Petition. Instead, for reasons Hedlund asserts are explained in Appendix D to his Petition, Hedlund appears to blame the "flawed" opinion of the Court of Appeals in 2014 for the failure of his anti-SLAPP theory. (Petition at 5, n.2.) But even if Hedlund's criticism were valid, Hedlund's blame theory is totally irrelevant to whether the trial court erred in awarding fees and costs for Hedlund's unsuccessful anti-SLAPP theory; and Hedlund offers no case support or even argument for its relevance.

II. STANDARD OF REVIEW.

According to clear precedent of this Court and the Court of Appeals, the proper standard of review of the trial court's attorney fee award in this case is whether it conformed to established norms for the determination of "reasonable" attorney fees rather than "untenable

grounds or untenable reasons."

"In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion. That is, the trial court must have exercised its discretion on *untenable grounds or for untenable reasons." Pham v. City of Seattle*, 159 Wn.2d 527, 530, 151 P.3d 976 (2007) (emphasis added) (citations omitted). Giving meaning to "untenable grounds or untenable reasons," that same paragraph reiterated the rule of *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) ("*Bowers*') that "[t]he court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time." 159 Wn.2d at 538.

"'A trial court does not abuse its discretion unless the exercise of its discretion is manifestly unreasonable *or based upon untenable grounds or reasons.*' This Court has overturned attorney fee awards when it has disapproved of the basis or method used by the trial court, or when the record fails to state a basis supporting the award." *Brand v. Dept. of Labor & Industries*, 139 Wn. 2d 659, 665, 989 P.2d 1111 (1999) (citation omitted) (emphasis added).

"Although a trial court has discretion with regard to calculating reasonable attorney's fees, that discretion is not unbridled. We have set forth standards to be followed in determining reasonable attorney's fees

and trial courts are obligated to heed those standards in arriving at an award of reasonable attorney fees." *Singleton v. Frost*, 108 Wn.2d 723, 733, 742 P.2d 1224 (1987).

III. COUNTERSTATEMENT OF THE CASE.

A. Hedlund's Confidentiality Agreement.

Alaska Structures employed Hedlund from February 2007 to January 2010. (CP 267, 599; Opinion at 1.[1]) Consistent with Alaska Structures' policy requiring employees to sign confidentiality agreements to protect the company's proprietary information and that of its customers, Hedlund signed a Confidentiality Agreement at the start of his employment in which he agreed to limit his disclosure of certain information about Alaska Structures during and after his employment. The Confidentiality Agreement contained a reasonable attorney fee provision. (CP786.)[2]

B. Hedlund's Internet Post About Alaska Structures' Security System.

During Hedlund's employment and while he was in the office, Alaska Structures' Chief Information Officer installed in the company's

[1] Division One's published opinion filed April 21, 2014, is attached to Hedlund's initial Petition for Review as Appendix A.

[2] The Confidentiality Agreement stated: "In the event either party is required to institute legal action to enforce the provisions of this Agreement, the prevailing party in such litigation shall be entitled to recover its reasonable attorney's fees as well as costs, expenses and disbursements." (CP 786, para. 4.3.)

Kirkland office consumer-grade, off-the-shelf software and cameras that could be purchased by consumers ("2008-2009 Security Measures").[3] (CP 599; Opinion at 2.)

Alaska Structures' Kirkland office was burglarized twice in March 2010. (CP 600.) At the time of the first burglary, the 2008-2009 Security Measures failed to capture good images of the perpetrators. (CP 600.) Immediately after the first burglary, a private security firm installed a monitored alarm system to supplement the 2008-2009 Security Measures but, due to improper installation, the monitored system was not functioning when the second burglary occurred. (CP 343, 600.)

On August 12, 2011, an anonymous user—later identified as Hedlund (CP 277, 331)—posted a message on the "Alaska Structures Jobs Forum" on Indeed.com that made fun of the 2008-2009 Security Measures.

Because the 2008-2009 Security Measures installed during Hedlund's employment were still in use at the time of the post and the post disclosed the security system's weaknesses in the context of prior burglaries, Alaska Structures was concerned that the thieves would be encouraged to again burglarize the Kirkland office. (CP 600-01.) Also, at the time, many of the company's employees were traveling, leaving one or

[3] The CIO did not have experience installing such systems. (CP 599; Opinion at 2.)

two young female employees alone at the office. (CP 601-02.) Therefore, Alaska Structures increased the number of security shifts at its office in August and September 2011, at a cost of $3,821. (CP 602, 617-18.)

C. Initial Trial Court Proceedings.

In April 2012, Alaska Structures' amended complaint alleged that Hedlund had breached his confidentiality agreement by disclosing weaknesses in Alaska Structures' security system in his online post. (CP 269-70.)

In June 2012, Hedlund filed a special motion to strike Alaska Structures' complaint under Washington's anti-SLAPP statute, RCW 4.24.525, which the trial court granted. (CP 439-56, 888-91.) Under the statute, the trial court awarded Hedlund $10,000 and his reasonable attorney fees and costs. (CP 890.) The parties stipulated to a $38,860.30 award of fees and costs to Hedlund, subject to Alaska Structures' right to appeal the award, as distinguished from its amount. (CP 906-08.)

Contrary to Hedlund's assertion that "the majority of the briefing and argument by both parties" during the anti-SLAPP proceedings focused on whether the post violated the confidentiality agreement (Petition at 3-41), the major focus was on whether the anti-SLAPP statute applied. Judge Yu, *sua sponte*, focused on whether information disclosed in the

post was encompassed by the definition of confidential in the employment agreement. (*See, e.g.*, Verbatim Transcript of Proceedings, August 17, 2012 at 32, 33, 34, and 49 attached as Appendix E to the Petition.)

On September 21, 2012, Alaska Structures appealed the trial court's grant of Hedlund's motion to strike (CP 892-98) and filed a supersedeas bond to stay enforcement of the judgment pending appeal.

D. The Court of Appeals' Initial (2014) Decision and Hedlund's Unsuccessful Petition to this Court.

On April 21, 2014, the Court of Appeals held that Hedlund failed to make the threshold showing that his post about Alaska Structures' security system involved an issue of public concern and reversed the grant of Hedlund's anti-SLAPP motion. (Opinion at 1, 10.) As is evident from the Opinion, the principal issue on appeal was whether Hedlund's post was protected activity under the anti-SLAPP statute and *not*, as Hedlund now asserts, whether his post violated the Confidentiality Agreement. (Petition at 4.) Tellingly, in his prior petition to this Court, Hedlund complained that:

> Division One should have focused, as the parties did in their briefing, on whether the posting was on an issue of public concern, and Division One needed to view the entire post in context, and not isolated sentences taken out of context. Division One was provided with numerous cases from Washington and California, which has a similar Anti-SLAPP provision, showing that criticisms and website postings for the purposes of warning away the public from a particular product or business or

professional were speech on matters of public concern.

Petition at 13, Appendix D.

Rather than accepting the remand and seeking to have the case dismissed on the merits, Hedlund *un*successfully petitioned this Court to review the Court of Appeals decision. Hedlund's argument focused exclusively on Hedlund's contention that his post was protected by the anti-SLAPP statute. *See, e.g., id.* at 9-20. In turn, Alaska Structures' answer established that Hedlund's petition was baseless. (*See* Attachment A hereto.)

On May 5, 2016, the Court of Appeals Mandate (a) awarded "costs in the amount of $6,180.57 against judgment debtor Charles J. Hedlund, in favor of judgment creditor Alaska Structures, Inc."; and (b) again reversed and again remanded this case to the Superior Court.

E. Most Recent (2016) Trial Court Proceedings.

At a hearing on September 30, 2016, the trial court signed an order prepared by Hedlund's counsel that granted "Defendants' Motion for Summary Judgment and Award of Fees and Costs."

On October 24, 2016, the trial court, without a hearing, signed another order prepared by Hedlund's counsel which, without addressing Alaska Structures argument that "reasonable" attorney fees and costs do not include time incurred on unsuccessful theories, awarded all of the

costs and fees Hedlund's counsel had requested at the rates in effect when the services were provided.

Contrary to Hedlund's unsupported assertion, there is *no evidence* that "the trial court reviewed every time entry and cost charge and the complete trial court and earlier appellate court record." (Petition at 6-7.)

Also contrary to Hedlund's assertion (Petition at 7), Alaska Structures appealed *only* that part of the fee award that required Alaska Structures to pay for all of Hedlund's wholly unsuccessful anti-SLAPP campaign.

F. Most Recent (2018) Court of Appeals Decision.

On January 16, 2018, in an unpublished opinion, the Court of Appeals Court reversed and remanded the trial court's fee and costs award:

> . . . Washington case law recognizes that a reasonableness determination requires the court to exclude 'any hours pertaining to unsuccessful theories or claims.'" *SAK & Assocs., Inc. v. Ferguson Constr., Inc.* 189 Wn. App. 405, 421, 357 P.3d 671 (2015) (quoting *Mahler*, 135 Wn.2d at 434). Hedlund's anti-SLAPP motion advanced a legal theory separate and distinct from the merits of the contractual claim. Our determination that Hedlund did not meet the threshold standard for application of the anti-SLAPP statute confirmed that his legal theory was wholly unsuccessful. *Hedlund*, 180 Wn. App. at 603-04.
>
> By failing to discount the hours spent on Hedlund's anti-SLAPP motion from the fee award, the trial court awarded Hedlund fees and costs associated with an unnecessary and unsuccessful legal theory. In so doing, the trial court erred.

> Accordingly, we reverse the trial court's order and remand for entry of an award that excludes attorney fees and costs incurred in Hedlund's appeals to the court and the Supreme Court, including the appellate award assessed against him that was deemed a cost by the trial court.

(Opinion at 6 (footnote omitted).)

The opinion resolved the parties' requests for appellate fees and costs as follows:

> Hedlund and AKS each request an award of appellate fees and costs pursuant to RAP 18.1 and the fee shifting provision of the Agreement. As AKS prevailed in this court, it is entitled to an award of appellate costs. But because Hedlund was both the prevailing party on the ultimate issue and the losing party in this stage of the proceeding, neither party is entitled to an award of appellate fees. Upon compliance with RAP 18.1, a commissioner of this court will enter an appropriate cost award.

(Opinion at 6, n.4.)

Alaska Structures filed a Bill of Costs on January 26, 2018.

On February 5, 2018, Hedlund filed a Motion for Reconsideration ("Motion") (Attachment B hereto) which Alaska Structures answered (Attachment C hereto), and the Court of Appeals denied.

On April 11, 2018, Hedlund filed this Petition seeking review of the decision of the Court of Appeals.

Alaska Structures has *not* forced Hedlund "to defend himself against the contract claim for seven years" as Hedlund claims. (Petition at 13.) Hedlund and his counsel chose and implemented their unsuccessful

anti-SLAPP strategy. And, when it was rejected by the Court of Appeals in early 2014, could have expeditiously sought dismissal on the merits in the trial court. But they did not, choosing instead an option that, if successful, would have provided favorable publicity and statutory damages and attorney fees rather than straightforward dismissal and "reasonable attorney fees and costs."

Even more egregiously, Hedlund falsely claims that Alaska is trying to "further punish and bankrupt Hedlund . . . ." (Petition at 13.) Hedlund and his attorney selected his four-year anti-SLAPP strategy and they decided to seek costs and fees for that unsuccessful strategy. Alaska Structures' good faith appeal of the anti-SLAPP dismissal was wholly successful, as was Alaska Structure's opposition to Hedlund's ill-advised and wholly unsuccessful Supreme Court petition. In any event, under the contingent fee agreement between Hedlund and his counsel, only the fee award will go to Hedlund's counsel. (CP 338.) Hedlund has not offered any evidence that he is obligated to pay more.

The 2018 Court of Appeals decision reduced the portion of Hedlund's fee and cost award that Alaska Structures appealed from $108,230.75 to $41,951.49. Presumptively, on remand, the revised fee and cost award will be reduced by this Court's costs awards to Alaska Structures thereby relieving Hedlund of any obligation to pay those costs

out-of-pocket.

IV. ARGUMENT.

A. The Court of Appeals Decision is Fully Consistent with Decisions of This Court.

The contractual fee-shifting provision on which Hedlund relies does *not* provide for an award of *all* of the prevailing party's fees and costs. Rather it explicitly provides for an award of "reasonable" fees and costs to the prevailing party which requires the trial court to exclude fees and costs incurred on unsuccessful theories. *See, e.g., Bowers* at 597 (the court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent "on unsuccessful claims, duplicated effort, or otherwise unproductive time"). *Accord, Pham v. Seattle City Light, supra*, 159 Wn.2d at 538 ("The court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time."); *Mahler v. Szucs,* 135 Wn.2d 398, 957 P.2d 632 (1998) ("Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims."); *Fetzer v. Weeks,* 122 Wn.2d 141, 151, 859 P.2d 1210 (1993) (court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time).

Here, as the Court of Appeals concluded, Hedlund's anti-SLAPP motion advanced a legal theory separate and distinct from the merits of the contractual claim. The Court of Appeals' determination that Hedlund did not meet the threshold standard for application of the anti-SLAPP statute confirmed that his legal theory was wholly unsuccessful. *Alaska Structures, Inc. v. Hedlund*, 180 Wn. App. 591, 603-04, 323 P.3d 1082 (2014). Consequently, the reversal of the trial court's fee award and remand for entry of an award that excludes attorney fees and costs incurred in the initial appeal and Supreme Court petition is consistent with and indeed, required by *SAK & Assocs.. Inc. v. Ferguson Constr. Inc.,* 189 Wn. App. 405, 421, 357 P.3d 671 (2015) and *Mahler v. Szucs, supra.*

None of the cases Hedlund cites supports of his argument that the decision of the Court of Appeals conflicts with decisions of this Court.

Boeing Co. v. Sierracin Corp., 108 Wn. 2d 38, 738 P.2d 665 (1987) which relied on *Bowers* for the proposition that "[t]he amount of a fee award is discretionary, and will be overturned only for manifest abuse," *id.* at 65, reversed the fee award, in part, because this Court "disagree[d] with the method used by the trial court." *Id.*

Fisher Properties, Inc. v. Arden Mayfair, Inc., 115 Wn.2d 364, 798 P.2d 799 (1990), demonstrates the propriety of reversing and remanding to segregate out inappropriate fee awards, as the Court of

Appeals did in this case. *Fisher*, 115 Wn.2d 364, was the *second* time this Court considered that case. The first time the case reached this Court, *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 726 P.2d 8 (1986) the defendant Arden Mayfair asserted that the trial court had erred in awarding Fisher attorney fees for almost all of the services Fisher's attorneys awarded because most of the judgment for damages was based on claims for which attorney fees were not authorized. The lease at issue contained no provision authorizing attorney fees. The sole provision authorizing attorney fees was the commissive waste statute, RCW 64.12.020. This Court agreed that the fee award was improper because it was inconsistent with the general rule requiring that attorney fees may be awarded only when authorized by a private agreement, a statute or a recognized ground of equity. *Fisher Properties v. Arden Mayfair*, 106 Wn.2d at 849-50. Consequently, this Court reversed and remanded to require the trial court to determine the portion of Fisher Properties' attorneys' services that would have been provided had *only* the commissive waste claim been raised and to award only fees attributable to those services. *Id.* at 850.

On remand, the trial court segregated and computed the fees for the commissive waste claim. Then, on the appeal following that exercise, this Court concluded that the trial court did not abuse its discretion in

computing the amount of those fees at the attorneys' historical rates in effect at the time the services were rendered. 115 Wn.2d at 377.

In this case, the Court of Appeals declared, "Washington case law recognizes that a reasonableness determination requires the court to exclude any hours pertaining to unsuccessful theories or claims." Opinion at 6 (*citing SAK & Assocs. Inc. v. Ferguson Constr. Inc.*, *supra*, 189 Wn. App. at 421 (*quoting Mahler*, *supra*, 135 Wn.2d at 434). This declaration is wholly consistent with *Singleton v. Frost*, *supra*, which explicitly endorsed the *Bowers* rule that "the trial court should consider the total hours *necessarily expended* in the litigation by each attorney." 108 Wn.2d at 733 (emphasis added).

Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 599 P.2d 1289 (1979), addressed the propriety of entry of a default judgment but did not address attorney fees and costs at all. It stated the general rule that a court abuses its discretion "when no reasonable person would take the position adopted by the trial court," *id.* at 584 (citation omitted) and approved the trial court's vacating a default judgment even though there had been a rule violation in obtaining that judgment.

B. The Court of Appeals Decision is Fully Consistent with Court of Appeals Precedent.

None of the cases Hedlund cites are inconsistent with other

decisions by the Court of Appeals. In fact, they highlight the propriety of the Court of Appeals' approach.

In *Boguch v. Landover Corp.*, 153 Wn. App. 595, 224 P.2d 795 (2009), plaintiff entered into an exclusive sale and listing agreement with two real estate brokers for the sale of certain real estate. The property did not sell and Boguch sued the brokers for breach of contract, negligence and breach of professional duties under RCW 18.86. Eventually, Boguch lost on summary judgment, and the realtors were awarded attorney fees and costs under a provision in the listing agreement which specified "[i]n the event either party employs an attorney to enforce any terms of this Agreement and is successful, the other party agrees to pay reasonable attorneys' fees." *Id.* at 107.

On appeal, Boguch contended that the trial court erred in awarding fees for the negligence and breach of professional statutory duties. The Court of Appeals agreed. "Whether a party is entitled to attorney fees is an issue of law that the reviewing court reviews de novo." *Boguch* at 615 (citations omitted). The applicable rule of law was that "A prevailing party may recover attorney fees under a contractual fee-shifting provision such as the one at issue herein only if a party brings a 'claim on the contract.'" *Id.* The court continued, "If a party alleges breach of duty imposed by an external source, such as a statute or the common law, the

party does not bring an action on the contract, even if the duty would not exist in the absence of a contractual relationship." *Id.* (citations omitted). The court concluded that neither the negligence claim nor the assertion of breach of professional duties were actions on the contract because these claims did not violate specific contractual undertakings. *Id.* at 615-19.[4]

While the amount of a fee award is discretionary, *Boeing v. Sierracin Corp.*, *supra*, 108 Wn.2d at 65, when fees are awarded for ineligible matters, "'the award must properly reflect a segregation of the time spend on issues for which fees are authorized from time spent on other issues.'" *Boguch* at 620 (citation omitted). Because the fee award included an award for ineligible matters, it was necessary to vacate the fee award and remand for segregation and recalculation. *Id.* at 621.

Tradewell Group Inc. v. Mavis, 71 Wn.App. 120, 857 P.2d 1053 (1993), is similar. It was, in relevant part, an unsuccessful action by a lessor under a lease. The Court of Appeals held that the trial court had properly limited defendant's award of attorney fees and costs to those incurred in defending lessor's breach of contract claim and denied fees for defending lessor's claims for promissory estoppel, unjust enrichment and tortious interference. *Id.* at 129. Although the contractual paragraph upon

[4] Here, as in *Boguch*, the trial court awarded fees for a theory that was not based on the contract; namely, the anti-SLAPP statute. Consistent with *Boguch* the Court of Appeals also could have determined that Hedlund was not entitled to fees for his unsuccessful (and noncontractual) theory which was an issue of law reviewed de novo.

which the award was based encompassed "any litigation" involving enforcement of the parties' rights "hereunder" the Court of Appeals agreed that this language only established a right to fees and costs incurred in defending the contract-related claims. *Id.* at 129-30. The court concluded that tortious interference, unjust enrichment and promissory estoppel did not arise out of the lease/contract and consequently, the trial court did not err in denying the defendant's request for fees in defending against the noncontract claims. "[A]n action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute." *Id.* at 130 (citations omitted).

Columbia State Bank v. Invicta Law Group, 199 Wn. App. 306, 330-331 (2017), restates rules set forth in *Boguch* and *Tradewell Group*, but on its facts, has little, if anything, to do with this case. The Court of Appeals held that a claim for successor liability on a breach of a professional limited liability company's promissory note extended liability to the individual who continued the limited liability company's law business even though that individual had not signed the promissory note as primary obligor. In addition, the individual successor became liable under the contractual provision for attorney fees. There is no question of successor liability in this case.

Ryan and Wages, LLC v. Wages, No 68253-9-I (Wa. Ct. App. Div.

One) 174 Wn. App. 1017 (2013) (unpublished), also is largely irrelevant here. In that case, the plaintiff made a claim under an operating agreement against a limited liability company that was not a party to the operating agreement and lost. Nevertheless, the Court of Appeals affirmed a fee award to the limited liability company under a straightforward application of the equitable doctrine of mutuality of remedies which authorizes contractual fee awards even after the contract itself is ruled invalid or unenforceable. Here, there is no claim that the nondisclosure agreement was invalid or unenforceable and the doctrine of mutuality of remedies is wholly inapplicable.

Hedlund's assertion that the Court of Appeals erred in concluding that Alaska Structures rather than Hedlund had prevailed on appeal is specious. Alaska Structures did *not* appeal either the summary judgment or the trial court's award of Hedlund's fees and costs of $23,321.48 related to that motion. Rather, the essential issue on appeal was whether under controlling Washington law, Hedlund was entitled to fees and costs for his unsuccessful anti-SLAPP campaign; and that issue was resolved decisively in favor of Alaska Structures which effectively reduced the contested portion of the fee award from $108,230.75 ($131,552.42 (trial court award) - $23,321.85(uncontested by Alaska Structures) to $41,951.49 ($108230.75 - $66,289.26 (anti-SLAPP portion)).

C. Hedlund Identifies No Issue of Substantial Public Interest Warranting Supreme Court Review.

Although Hedlund claims that Division One's decision concerns an issue of substantial public interest that should be determined by this Court (Petition at 19-20), he fails to identify a single factor that favors such a conclusion.

This is not public interest litigation, but rather a private dispute between two parties about fees and costs. Hedlund does not promote an important right affecting the public interest but rather his attorney's quest for more than $100,000 in prosecuting an unsuccessful claim or theory.

That quest does not implicate new or uncertain law. It is well-settled law in Washington that reasonable attorney fees do not include compensation for "unsuccessful claims and theories." *Bowers, supra*, 100 Wn.2d 597. Thus, the case does not demonstrate a need for an authoritative determination of any legal standard.

Hedlund asserts that this case concerns "the appropriate deference to be afforded to trial judge's [sic] determinations of fee and costs awards." (Petition at 19.) But the applicable standard of review is well established. *See* Section II Standard of Review, at 1-3, *supra.*

These legal principles encourage sound application of contract principles and discourage assertion of meritless claims and theories. They

accord the respect that is due trial courts, the parties and their agreements.

The report of this unpublished opinion is unlikely to have any significant adverse impact on attorneys' willingness to bring contingent fee cases which ordinarily facilitate the assertion of affirmative claims rather than a defense to a contract action. Litigants will undoubtedly continue to litigate attorney fee and cost issues. But Hedlund has failed to demonstrate any significant likely recurrence of the particular issues that have arisen in this case.

V. CONCLUSION.

The opinion of the Court of Appeals is not inconsistent with decisions of this Court or with other decisions of the Washington Court of Appeals. There is no issue of substantial public interest that needs to be decided by this Court. Thus, Hedlund has failed to demonstrate that this Court should grant review of Division One's decision under RAP 13.4(b)(3) and (4). Consequently, Hedlund's petition should be rejected.

DATED this 4th day of May, 2018.

Respectfully Submitted,

HENDRICKS & LEWIS PLLC

By: /s/ O.Yale Lewis, Jr.
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Attorneys for Alaska Structures, Inc.

CERTIFICATE OF SERVICE

I, Katherine Hendricks, declare that I am a member of the law firm of Hendricks & Lewis PLLC, 1516 Federal Ave. E., Seattle, Washington 98102, and a lawyer for Alaska Structures, Inc. and I duly made service of Alaska Structures, Inc.'s Answer to Hedlund's Petition for Review 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 4th day of May, 2018.

/s/Katherine Hendricks
KATHERINE HENDRICKS

ATTACHMENT A

No. 90284-4

SUPREME COURT
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ALASKA STRUCTURES, INC.'S ANSWER TO HEDLUND'S PETITION FOR REVIEW

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I. INTRODUCTION.

Petitioner Charles J. Hedlund fails to establish a basis for this Court to grant review of Division One's decision reversing the grant of Hedlund's motion to strike the complaint of Plaintiff Alaska Structures, Inc. ("AKS") under Washington's anti-SLAPP statute, RCW 4.24.525.

That the amended statute is relatively new does not alone justify Supreme Court review, particularly as Hedlund fails to substantiate any error in the standards and principles for deciding anti-SLAPP motions articulated by Division One. Rather, Hedlund simply disagrees with the result reached by the court based on the facts of this case. But, while that fact-specific application is important to the parties in this case, it does not demonstrate a conflict among Division One's anti-SLAPP decisions, a "significant question of [constitutional] law," or "an issue of substantial public interest" requiring this Court's review. RAP 13.4(b)(2)-(4). The Court should therefore deny review and let stand Division One's decision reversing the trial court's grant of Hedlund's motion to strike AKS's complaint under RCW 4.24.525.

II. STATEMENT OF THE CASE.

A. Hedlund's Confidentiality Agreement.

AKS employed Hedlund from February 2007 to January 2010.

(CP 267, 599; Opinion at 1.[1]) Consistent with AKS's policy requiring employees to sign confidentiality agreements to protect the company's proprietary information and that of its customers, Hedlund signed a Confidentiality Agreement at the start of his employment under which he agreed to limit his disclosure of certain information about AKS 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 598-99, 609.) "Confidential Information" was defined broadly and included, but was not limited to, "trade secrets and confidential technical or business information." (CP 609.)

B. Hedlund's Internet Post About AKS's Security System.

During Hedlund's employment, AKS's CIO installed in the company's Kirkland office consumer-grade, off-the-shelf software and cameras that could be purchased by consumers ("2008-2009 Security Measures").[2] (CP 599; Opinion at 2.) Hedlund was in the office during times when the CIO was installing these security measures. (CP 599.)

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[1] Division One's published opinion filed April 21, 2014, is attached to Hedlund's Petition for Review as Appendix A.

[2] The CIO did not have experience installing such systems. (CP 599; Opinion at 2.)

The Kirkland office was burglarized twice in March 2010. (CP 600.) At the time of the first burglary, the 2008-2009 Security Measures failed to capture good images of the perpetrators. (CP 600.) Immediately after the first burglary, a private security firm installed a monitored alarm system to supplement the 2008-2009 Security Measures but, due to improper installation, the monitored system was not functioning when the second burglary occurred. (CP 343, 600.)

On August 12, 2011, an anonymous user—later identified as Hedlund (CP 277, 331)—posted a message on the "Alaska Structures Jobs Form" 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, 615; Opinion at 2.)[3]

[3] Hedlund suggests that Division One found that the information he disclosed about AKS's security system was public information available from police reports and

Because the 2008-2009 Security Measures installed during Hedlund's employment were still in use at the time of the post and the post disclosed the security system's weaknesses in the context of prior burglaries, AKS was concerned that the thieves would be encouraged to again burglarize the Kirkland office. (CP 600-01.) Also, at the time, many of the company's employees were traveling, leaving one or two young female employees alone at the office. (CP 601-02.) Therefore, AKS increased the number of security shifts at its office in August and September 2011, at a cost of $3,821. (CP 602, 617-18.)

C. Proceedings in the Trial Court.

AKS's April 2012 amended complaint alleged that Hedlund had breached his confidentiality agreement by disclosing weaknesses in AKS's security system in his online post. (CP 269-70.)

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newspapers. (Hedlund's Petition for Review ("Petition") at 7.) But not only did AKS vigorously dispute that allegation (*see, e.g.*, Brief of Appellant ("Appellant's Br.") at 41-45; Reply Brief of Appellant Alaska Structures, Inc. ("Reply Br.") at 20-21), Division One made no such factual finding nor could it properly do so. Division One has likened the procedure on an anti-SLAPP motion to the procedure on summary judgment, under which the "trial court may not find facts or make determinations of credibility." *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 88-90, 316 P.3d 1119, *review granted*, 180 Wn.2d 1009 (2014). And with respect to the second step of the anti-SLAPP analysis—under which the plaintiff must show by clear and convincing evidence a probability of prevailing on the merits—the trial court "must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff." *Dillon*, 179 Wn. App. at 90. That procedure is necessary "in order to preserve the plaintiff's right to a trial by jury" which "is inviolate under the state constitution." *Dillon*, 179 Wn. App. at 89. Since a de novo standard of review applies to the trial court's decision on an anti-SLAPP motion, *Dillon*, 179 Wn. App. at 70, these same standards applied to Division One's review and it therefore could not have made the factual finding Hedlund suggests or any other binding determination of the merits of AKS's breach of confidentiality agreement claim.

In June 2012, Hedlund filed a special motion to strike AKS's complaint under Washington's anti-SLAPP statute, RCW 4.24.525, which the trial court granted. (CP 439-56, 888-91.) Under the statute, the trial court awarded Hedlund $10,000 and his attorneys' fees and costs. (CP 890.) The parties stipulated to a $38,860.30 award of fees and costs to Hedlund, subject to AKS's right to appeal the award, as distinguished from its amount. (CP 906-08.) AKS appealed the trial court's grant of Hedlund's motion to strike on September 21, 2012. (CP 892-98.)

D. The Court of Appeals' Decision.

In its April 21, 2014 decision reversing the grant of Hedlund's motion to strike AKS's complaint under RCW 4.24.525, Division One first identified the de novo standard of review and the two-step process for deciding an anti-SLAPP motion articulated in its earlier decisions. (Opinion at 4-5.) The court then stated that the first step:

> requires a court to review the parties' pleadings, declarations, and other supporting documents to determine whether the gravamen of the underlying claim is based on protected activity. [The moving party] must make an initial prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's right of petition or free speech. If the substance or gravamen of the complaint does not challenge the defendant's acts in furtherance of the right of free speech or petition, the court does not consider whether the complaint alleges a cognizable wrong or whether the plaintiff can prove damages. In other words, Hedlund is required to make a threshold showing that each of AKS's claims is based on protected activity.

(Opinion at 4-5 (footnotes omitted).) Division One also recognized decisions from California courts as persuasive authority[4] in determining whether an "issue of public concern"[5] is involved. (Opinion at 5-6, 9.)

The court acknowledged Hedlund's contention that his post was akin to "'consumer information' of public concern" and his reliance on several California cases addressing such information in the anti-SLAPP context, including *Wilbanks v. Wolk*,[6] which Hedlund also cites in his Petition. (Opinion at 7-8.) But the court ultimately found this case to be more like *World Financial Group, Inc. v. HBW Insurance & Financial Services, Inc.*[7] than the consumer information cases Hedlund cited:

> There, the plaintiff sued a competing business and its agents for misappropriating trade secrets and using confidential information to solicit customers and employees. HBW and the former World Financial Group employees filed a special motion to strike under California's statute, claiming their conduct was of public interest because it involved workforce mobility, free competition, and the pursuit of employment. In affirming the trial court's finding that the complaint was not subject to the anti-SLAPP statute, the court rejected the argument that the communications were meant to aid consumers in "the pursuit of lawful employment" and to aid "workforce

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[4] Because Washington's anti-SLAPP statute was modeled on California's statute, courts have looked to California cases as persuasive authority. *See, e.g., Dillon*, 179 Wn. App. at 69 n.21; *Longview v. Wallin*, 174 Wn. App. 763, 776 n.11, 301 P.3d 45, *review denied*, 178 Wn.2d 1020 (2013).

[5] California's statute uses the term "public interest," *see* CAL. CIV. PROC. CODE § 425.16(e)(3), (4), instead of Washington's term "public concern," *see* RCW 4.24.525(2)(d), (e), but Division One saw "no discernible difference in the two terms" (Opinion at 6).

[6] 121 Cal. App. 4th 883, 17 Cal. Rptr. 3d 497 (2004).

[7] 172 Cal. App. 4th 1561, 92 Cal. Rptr. 3d 227 (2009).

> mobility and free competition." The court rejected the arguments because the communications themselves were not about any broad social topics, or made to inform the public, but "were merely solicitations of a competitor's employees and customers undertaken for the sole purpose of furthering a business interest. World Financial Group is more closely aligned to the case here.

(Opinion at 8-9 (footnotes omitted).)

The court recognized that it "must adhere to the legislature's policy that the purpose of the anti-SLAPP statute is to strike a balance between the right of the person to file a lawsuit and that person's right to a jury trial and the rights of people to participate in 'matters of public concern.'" (Opinion at 10.) Here, those balancing of rights led "to the conclusion that the postings cannot be deemed protected activity." (Opinion at 10.) Thus, the court concluded that the gravamen of AKS's complaint was "a simple contractual issue—whether or not Hedlund violated a contract he signed with his former employer" under which he voluntarily limited his right to speak freely on certain matters. (Opinion at 1, 10.) Therefore, Hedlund failed to make the threshold showing that his post about AKS's security system involved an issue of public concern. (Opinion at 1, 10.)

III. ARGUMENT.

A. Different Results Based on Different Facts Do Not Demonstrate a "Conflict" Among Division One's Anti-SLAPP Decisions.

Hedlund suggests that Division One's decision in this case conflicts with its other recent anti-SLAPP decisions because it allegedly

ignored the "broader context approach" purportedly followed in those other cases when determining whether an "issue of public concern" exists. (Hedlund's Petition for Review ("Petition") at 13.) He cites four recent Division One decisions in purported support of his claim: *Dillon v. Seattle Deposition Reporters, LLC*,[8] *Seattle v. Egan*,[9] *Davis v. Cox*,[10] and *Spratt v. Toft*.[11] (*See* Petition at 13-14, 17.) But he fails to substantiate any such conflict between the decisions in those cases and the decision here. That the court reached different conclusions based on the unique facts and considerations of those other cases does not demonstrate a "conflict" justifying Supreme Court review in *this* case.

In each of the cases, Division One described the two-step process for deciding an anti-SLAPP motion. With respect to the first step,[12] the moving party "has the initial burden of showing by a preponderance of the evidence that the claim targets activity 'involving public participation and petition.'" *Dillon*, 179 Wn. App. at 67; *see also Egan*, 179 Wn. App. at 337; *Davis*, 2014 Wash. App. LEXIS 779 at *9; *Spratt*, 2014 Wash. App. LEXIS 936 at *8. In making that assessment, "'it is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the

[8] 179 Wn. App. 41, 316 P.3d 1119, *review granted*, 180 Wn.2d 1009 (2014).
[9] 179 Wn. App. 333, 317 P.3d 568 (2014).
[10] Appeal No. 71360-4-I, 2014 Wash. App. LEXIS 779 (Apr. 7, 2014).
[11] Appeal No. 70505-9-I, 2014 Wash. App. LEXIS 936 (Apr. 21, 2014).
[12] Because Division One concluded that Hedlund failed to meet his initial burden and thus did not reach the second step of the analysis, this answer focuses on the first step.

anti-SLAPP statute applies[.]'" *Dillon*, 179 Wn. App. at 72 (quoting *Martinez v. Metabolife Int'l, Inc.*, 113 Cal. App. 4th 181, 188, 6 Cal. Rptr. 3d 494 (2003)); *see also Egan*, 179 Wn. App. at 338, 341-42; *Davis*, 2014 Wash. App. LEXIS 779 at *12.[13]

Division One's decision in this case is entirely consistent with these standards. The court recognized that Hedlund had the initial burden of making a "prima facie showing that [AKS's] suit arises from an act in furtherance of [his] right of petition or free speech." (Opinion at 4.) And the court stated that "[i]f the substance or gravamen of the complaint does not challenge the defendant's acts in furtherance of the right of free speech or petition [i.e., the first step of the analysis], the court does not consider whether the complaint alleges a cognizable wrong or whether the plaintiff can prove damages [i.e., the second step of the analysis]." (Opinion at 4-5.) Because the court concluded that the gravamen of AKS's claim was "a simple contractual issue"—whether Hedlund breached his confidentiality agreement with his former employer by disclosing non-public details about weaknesses in AKS's security system—Hedlund did not satisfy his initial burden to support his anti-SLAPP motion. (*See* Opinion at 10.)

Hedlund points to nothing to support his allegation that Division

[13] The court did not use this precise language in *Spratt* but nothing the court said in that case conflicts with or contradicts this standard. *See generally Spratt*, 2014 Wash. App. LEXIS 936 at *8-15.

One followed a purported "broader context approach" in its other anti-SLAPP cases that it ignored in reaching these conclusions here. That the court sometimes reached a different conclusion in the other cases (i.e., that the moving party had satisfied the required threshold showing) does not demonstrate a "conflict" because each of the cases involved unique facts and considerations that differ from those here.

In *Dillon*, plaintiff alleged violations of the privacy act for the defendants' recording of his conversations without his knowledge, transcripts of which were later used in a pending federal court action. 179 Wn. App. at 51-53, 55. Defendants alleged that their conduct involved "public participation and petition" because the recordings were done in a "judicial proceeding," RCW 4.24.525(2)(a), and were "in furtherance of the exercise of the constitutional right of petition," RCW 4.24.525(2)(e). *Dillon*, 179 Wn. App. at 70. After a lengthy discussion primarily on the nature and scope of the constitutional "right to petition," Division One disagreed, finding that their conduct did not fall within either category of "public participation and petition." *Dillon*, 179 Wn. App. at 71-86. Thus, *Dillon* bears little, if any, resemblance to this dispute involving the alleged breach of a former employee's confidentiality agreement.

But although *Dillon* does not support Hedlund's "conflict" claim, it does identify relevant guiding principles that the court applied here. For

instance, Division One noted that a "'defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant.'" *Dillon*, 179 Wn. App. at 71 (quoting *Martinez*, 113 Cal. App. 4th at 188). Rather, the court must look to the "principal thrust or gravamen" of the plaintiff's cause of action, as it did here. *Dillon*, 179 Wn. App. at 72 (emphasis and internal quotation marks omitted).

The court in *Dillon* also specifically recognized the importance of the legislature's intent to achieve a balancing of rights in the anti-SLAPP statute: "'A solution [to SLAPP suits] cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group.'" *Dillon*, 179 Wn. App. at 85 n.32 (quoting *Opinion of the Justices (SLAPP Suit Procedure)*, 138 N.H. 445, 451, 641 A.2d 1012 (1994)). Here, consistent with *Dillon*, Division One found that this balancing of rights supported its conclusion that Hedlund's post about AKS's security system in violation of his confidentiality agreement was not protected activity but rather "a simple contractual issue." (Opinion at 10.)

Egan, which addressed the interplay between the Public Records Act ("PRA") and the anti-SLAPP statute, also provides no support for Hedlund's conflict claim. The City of Seattle filed suit for a declaratory judgment and injunctive relief after Egan threatened to sue over the City's

reliance on an exemption to the disclosure of records he had requested. *Egan*, 179 Wn. App. at 336. The City's suit was based on a provision of the PRA authorizing a court to enjoin the production of a public record that is subject to an exemption. *Egan*, 179 Wn. App. at 336, 338.

On the appeal from the denial of Egan's anti-SLAPP motion, Division One concluded that the "gravamen" of the City's claims "was whether a PRA exemption applied to Egan's original request, not to suppress Egan's right to bring an action." *Egan*, 179 Wn. App. at 338. And although Egan claimed the anti-SLAPP statute applied because the City filed suit "because of [his] 'threat' to sue," the court stated that the "fact that one party's protected activity may have triggered the other party's cause of action does not necessarily mean the cause of action arose from the protected activity." *Egan*, 179 Wn. App. at 338, 341. Thus, *Egan*, like *Dillon*, is consistent with Division One's decision in this case in that the court properly looked to the "gravamen" of the plaintiff's claim to determine whether it targeted protected activity. (*See* Opinion at 4-5.) Beyond that, *Egan*—with its unique facts and considerations—is of little to no use in assessing the fact-specific result here.

Davis and *Spratt* also do not support Hedlund's "conflict" claim.

For instance, consistent with its decisions in *Egan*, *Dillon*, and this case, in *Davis*, Division One again stated the "guiding principle" it had

adopted "for determining whether a lawsuit targets constitutionally protected speech," namely, that it is "the principal thrust or gravamen of the plaintiff's cause of action that determines" whether the statute applies. *Davis*, 2014 Wash. App. LEXIS 779 at *12 (internal quotation marks and emphasis omitted). Additionally, there was little dispute in *Davis* that the activity at issue—a boycott of Israeli goods and investments by a food co-op—involved an issue of public concern implicating "[f]our decades of conflict in the Middle East." 2014 Wash. App. LEXIS 779 at *4, 14-15. Thus, because the plaintiffs sought to permanently enjoin the boycott and nonviolent boycotts are protected by the First Amendment, the court concluded that the "principal thrust of [plaintiffs'] suit [was] to make [defendants] cease engaging in activity protected by the First Amendment." *Davis*, 2014 Wash. App. LEXIS 779 at *13. Again, given these facts, *Davis* does not support Hedlund's claim that the court reached the wrong result in this employment confidentiality agreement dispute involving a post about a private company's security system.

Spratt was a defamation action brought against a candidate for state office in connection with statements he made allegedly in response to challenges to his qualifications for office. 2014 Wash. App. LEXIS 936 at *2-8, 14. In reversing the denial of the candidate's anti-SLAPP motion, Division One noted that "the new law was enacted to protect statements on

matters of public concern, which is the sine qua non of democracy," and recognized that "[e]qually, at the heart of our democracy is the election of candidates to office." *Spratt*, 2014 Wash. App. LEXIS 936 at *11 (internal quotation marks omitted). "Speech involves matters of public concern," the court stated, "when it can be fairly considered as relating to any matter of political, social, or other concern to the community." *Spratt*, 2014 Wash. App. LEXIS 936 at *14 (internal quotation marks omitted). Because the candidate had "a protected right to speak in furtherance of his candidacy," his action in "combat[ing] accusations against him while he was campaigning for office clearly falls within those protected rights." *Spratt*, 2014 Wash. App. LEXIS 936 at *11. Thus, *Spratt* demonstrates the unremarkable proposition that political speech lies at the core of First Amendment protections, a proposition that has no applicability to Hedlund's post about AKS's security system in violation of a confidentiality agreement he signed when employed by AKS.

B. Hedlund Fails to Establish That Division One's Decision Was Based on the Label of AKS's Cause of Action.

Hedlund also repeatedly argues that, in purportedly ignoring his "broader context approach," Division One "focused on the label Plaintiff assigned to the claim" and thereby "let the label of the claim control, not the subject matter and context of the speech." (Petition at 11, 13, 16-17.)

He then asserts that he cited "numerous cases" allegedly "finding speech similar to [his] to be on a matter of public concern under a variety of labels by Plaintiffs," suggesting the court ignored these cases.[14] (Petition at 15.) But Hedlund is wrong on both counts.

Division One explicitly acknowledged Hedlund's assertion that, based on the cases he cited, his activity was "protected because his postings were meant to alert prospective employees to his opinions and experience with AKS and to alert them to potentially fraudulent postings by employees of AKS posing as new applicants." (Opinion at 6-7.) The court also recognized that Hedlund "analogize[d] his postings to 'consumer information' of public concern" and that he "relie[d] on several California cases."[15] (Opinion at 7-8.) But ultimately, in light of the facts of this case—including the fact that Hedlund signed a confidentiality agreement with his former employer limiting his right to speak on certain issues—the court rejected Hedlund's assertions, finding this case to be unlike the consumer cases he relied upon. (*See* Opinion at 7-9.) Instead, consistent with its other decisions, Division One looked to the "gravamen" of AKS's claim, which sought to hold Hedlund responsible for violating

[14] In his "Issues Presented for Review," Hedlund also claims that Division One "appl[ied] outdated and atypical California cases" (Petition at 1), but fails to offer any meaningful explanation of this allegation.

[15] The court specifically cited two such cases that Hedlund references again in his Petition: *Makaeff v. Trump Univ., LLC*, 715 F.3d 254 (9th Cir. 2013); *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 53 Cal. Rptr. 3d 752 (2007). (Opinion at 6-7.)

his confidentiality agreement, not to silence any protected activity.

But the fact that Division One considered, but disagreed with, Hedlund's argument and found the cases he cited inapplicable to the facts of this case does not establish that the court ignored the content or context of his statements or that it relied solely on "the label of [AKS's] claim."[16] (Petition at 13.) Indeed, as AKS discussed at length in its briefing, Hedlund's extraordinarily broad context argument—in which he essentially asked the court to ignore what he actually wrote and instead focus on statements made by other people, on other topics, and often at other times far removed from the date of his posting to arrive at an amorphous "issue of public concern" that he never clearly defined—was contrary to the weight of authority.[17] (*See, e.g.*, Appellant's Br. at 21-32; Reply Br. at 10-16.)

Thus, Hedlund has failed to establish that the "label" of AKS's cause of action controlled Division One's decision to the exclusion of the content or context of his post about AKS's security system.

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[16] Hedlund also suggests that Division One held that the anti-SLAPP statute does not apply to breach of contract claims as a matter of law. (*See, e.g.*, Petition at 1, 9, 12.) But Division One stated no such holding and Hedlund fails to establish that it did.

[17] In his Petition, Hedlund appears to again erroneously equate the existence of a public forum (which was not disputed) with the existence of an issue of public concern (which was very much disputed). (*See, e.g.*, Petition at 1, 11, 12, 14.) But as AKS demonstrated (*see* Reply Br. at 3-4), those are separate requirements. Therefore, the fact that a public forum exists does not mean that everything stated in that forum addresses an issue of public concern for purpose of the anti-SLAPP statute.

C. Hedlund Fails to Establish That Division One Misinterpreted the Anti-SLAPP Statute in Any Way Relevant to its Decision.

Hedlund also claims that Division One misinterpreted the anti-SLAPP statute in at least two ways. First, by stating that it "provide[s] 'immunity from suit'" rather than its purported "actual relief, which is merely an early procedural intervention so a court can examine the merits of a claim." (Petition at 10.) And second, by allegedly "erroneously [holding] that the Act applies only to a claim 'based on an oral statement.'" (Petition at 11 (emphasis omitted).) But Hedlund fails to establish any error with respect to these two issues or that, even if he had, the purported errors had any bearing on the court's conclusion that he failed to satisfy his initial burden of showing that his post about AKS's security system involved an "issue of public concern."

With respect to the first issue, Hedlund fails to explain any meaningful (or relevant) difference between the court's description of the nature of the anti-SLAPP statute and his description. Division One's description is consistent with other courts' descriptions of both California's and Washington's statutes. *See, e.g., Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (stating that "defendant's rights under [California's] anti-SLAPP statute are in the nature of immunity: They protect the defendant from the burdens of trial, not merely from ultimate

judgments of liability"); *Fielder v. Sterling Park Homeowners Ass'n*, 914 F. Supp. 2d 1222, 1230 (W.D. Wash. 2012) (noting that Washington's anti-SLAPP statute "provides relief to a defendant which is in the nature of immunity from suit"). In any event, even assuming Hedlund had established that the court's description was incorrect (which he has not), he does not demonstrate that the description had any impact on the court's decision which would justify Supreme Court review.

As to Division One's statement that the anti-SLAPP statute permits a party to bring a motion to strike a claim "based on an oral statement" in connection with an issue of public concern (Opinion at 4), the court's statement is ambiguous at best as to whether it intended to state that the statute *only* applies to "oral" statements. The parties never disputed that the statute defines "public participation and petition" to include "[a]ny 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[.]" RCW 4.24.525(2)(d). The parties also never disputed the fact that Hedlund's post was a "written statement" under the statute nor did Division One find that Hedlund failed to satisfy his initial burden because his post was written rather than oral. In short, even assuming for argument purposes that Hedlund's suggestion is correct and Division One intended to hold that the statute only applies to oral statements, that

theoretical holding played no role in the court's decision and therefore does not provide a basis for Supreme Court review.

D. Hedlund Identifies No Significant Question of Constitutional Law or Issue of Substantial Public Interest Warranting Supreme Court Review.

Hedlund also generically claims that Division One's decision "addresses a significant question of law under the Constitution of the State of Washington or of the United States," and involves "an issue of substantial public [interest] that should be determined by the Supreme Court." (Petition at 9-10.) But he never articulates the specific "significant question of law" or the "issue of substantial public interest" allegedly implicated by this case, other than referring to the anti-SLAPP statute as a "new and important law." (Petition at 10-11, 20.)

While AKS does not discount the importance of the anti-SLAPP statute or its goal of "[s]trik[ing] 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), that says nothing about why the Court should grant review in *this* case. Hedlund asserts that this Court must accept review because the "other Anti-SLAPP cases which this Court will review or has been asked to review do not and cannot address the precise wrong and harm at issue in this case," (Petition at 10), but fails to identify the alleged "precise wrong and harm."

Thus, Hedlund fails to demonstrate that this Court should grant review of Division One's decision under RAP 13.4(b)(3) and (4).

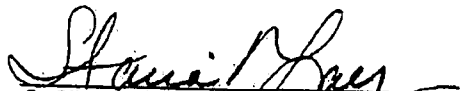
IV. CONCLUSION.

In essence, Hedlund asks this Court to accept review of this case because Division One reached different results in different cases involving different facts and considerations. But that fact does not establish a "conflict" among Division One's decisions, a "significant question of law" under the Washington or United States Constitutions, or "an issue of substantial public interest," RAP 13.4(b)(2)-(4), and therefore Hedlund's petition for review should be denied.

DATED this 13th day of June, 2014.

Respectfully Submitted,

HENDRICKS & LEWIS PLLC

By: 

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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 Alaska Structures, Inc.'s Answer to Hedlund's Petition for Review 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 13th day of June, 2014.

Lisa Schaefer
LISA SCHAEFER

OFFICE RECEPTIONIST, CLERK

To: Stacia Lay
Subject: RE: Alaska Structures, Inc. v. Hedlund, Supreme Court No. 90284-4 -- Alaska Structures, Inc.'s Answer to Hedlund's Petition for Review for filing

Received 6-13-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Stacia Lay [mailto:SL@hllaw.com]
Sent: Friday, June 13, 2014 2:42 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: michele@alliedlawgroup.com; Kathy George (kgeorge@hbslegal.com); O. Yale Lewis, Jr.
Subject: Alaska Structures, Inc. v. Hedlund, Supreme Court No. 90284-4 -- Alaska Structures, Inc.'s Answer to Hedlund's Petition for Review for filing

Case Name: *Alaska Structures, Inc. v. Hedlund*, Supreme Court No. 90284-4 (COA No. 69349-2-I)

Filer: Plaintiff Alaska Structures, Inc.
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Attached for filing in the above-referenced matter, please find Alaska Structures, Inc.'s Answer to Hedlund's Petition for Review.

As stated in the certificate of service attached to the Answer, Alaska Structures, Inc.'s Answer to Hedlund's Petition for Review has been served on all parties via this email and U.S. Mail.

Thank you,

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ATTACHMENT B

THE COURT OF APPEALS, DIVISION ONE
FOR THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC. Appellant, v. CHARLES J. HEDLUND, Respondent.	No. 76105-6-I **MOTION FOR RECONSIDERATION, AND CERTIFICATE OF SERVICE**

I. IDENTIFY OF MOVING PARTY

Respondent Charles Hedlund seeks the relief requested in Part II.

II. RELIEF REQUESTED

Respondent Hedlund seeks reconsideration, and alteration, of the Opinion issued January 16, 2018, as indicated below.

III. STATEMENT OF FACTS

Appellant Alaska Structures ("AKS") sued its former employee Respondent Charles Hedlund for allegedly violating a Confidentiality Agreement. The act alleged to violate the Agreement was Hedlund's posting of a comment on an internet public chat room, eighteen months after Hedlund left AKS, about events occurring after Hedlund had left AKS.

After being sued Hedlund notified AKS through counsel that the event about which he posted occurred after he had left AKS and that it could not possibly fall within the Confidentiality Agreement, but AKS persisted with the lawsuit.

The Confidentiality Agreement contained a provision which stated: "In the event either party is required to institute legal action to enforce the provisions of this

Agreement, the prevailing party in such litigation shall be entitled to recover its reasonable attorney's fees as well as costs, expenses and disbursements." **CP 786 ¶ 4.3.**

Finding himself sued as a Defendant by a wealthy, powerful, and litigious employer, over a comment he posted on a public forum of an internet chat room, Hedlund sought and obtained dismissal of the lawsuit soon after being sued pursuant to the then-valid Anti-SLAPP law. In the Anti-SLAPP motion proceeding, Hedlund had to establish not just that the Anti-SLAPP law applied to the claim but also that the internet post for which he had been sued did not violate the Confidentiality Agreement. The majority of the briefing and argument focused on this latter issue.

When the trial judge, then-King County Superior Court Judge Mary Yu, now State Supreme Court Justice Yu, granted the motion and dismissed the lawsuit, her ruling, quoted extensively in the appellate briefing, made clear she was finding that Hedlund's post could not conceivably violate the Agreement as it was posted after Hedlund left the company about an event that occurred after he had left and that nothing he said could conceivably violate the Agreement.

Unhappy that its lawsuit had been dismissed, AKS appealed seeking to re-instate the lawsuit. On appeal, much of the briefing and argument again focused on whether or not Hedlund had violated the Confidentiality Agreement, and only partially on whether or not the speech at issue in the claim could fall within the Anti-SLAPP law. See, for example, CP 931-933 (excerpts of AKS's appellate reply brief in the first appeal that were made a part of the Summary Judgment Motion at issue in this appeal). AKS vehemently argued that AKS's breach of confidentiality agreement claim against

Hedlund should not be dismissed and should be reinstated arguing Hedlund had violated the Confidentiality Agreement.

This Court disagreed with the first prong of the test — whether or not the speech at issue was public participation or speech on a matter of legitimate public concern — reversing the Anti-SLAPP dismissal. This Court's ruling made clear that it was not deciding whether or not the breach of contract claim had merit, and specifically noted that Hedlund might obtain summary judgment on remand and be entitled to his fees and costs under the Contract.

Having achieved re-instatement of the lawsuit, AKS did not drop its case but continued to litigate it. Hedlund moved for summary judgment and again obtained dismissal for the second time, this time as summary judgment, with a different judge again determining that AKS could not show that Hedlund's internet post violated the Confidentiality Agreement. AKS continued to vehemently argue that the Confidentiality Agreement had been violated at the summary judgment stage.

AKS again appealed, this time to seek reversal of the trial court's fee and cost awards to Hedlund pursuant to the fee recovery language in the Confidentiality Agreement. AKS argued that Hedlund should recover **no** fees and costs as he had not won a Georgia proceeding where he sought to prevent an internet service provider from disclosing his name, or in the Division One first appeal that re-instated the case after the Anti-SLAPP dismissal. AKS also specifically sought a reversal of the award of fees and costs for the Georgia proceeding arguing Hedlund had not prevailed on the Georgia motion.

This Court issued its Opinion on January 16, 2018, without oral argument. It upheld the trial court's award of the fees and costs for the Georgia proceeding and award of fees and costs for the summary judgment motion. **Opinion at 5 and n. 3.** The Opinion stated:

> AKS brought this suit against Hedlund for an alleged violation of the Agreement. 'The issue here is a simple contractual issue—whether or not Hedlund violated a contract he signed with his former employer.' Hedlund, 180 Wn. App. at 603. As the trial court determined on summary judgment, he had not. There is no dispute that, pursuant to the fee shifting provision of the Agreement, Hedlund is entitled to recover attorney fees and costs incurred in defending against that claim.

Opinion at 5. The Opinion further stated as follows:

> It is for this reason that Hedlund is entitled to fees and costs associated with the Georgia proceeding. AKS first filed its breach of contract claim against John Doe and then sought to compel the identity of the anonymous poster. This was an action to enforce the Agreement. **Pursuant to the fee shifting provision, Hedlund is entitled to recover attorney fees and costs stemming from actions brought to enforce the Agreement.**

Opinion at p. 5 n. 3 (emphasis added).

But this Court held in the Opinion that Hedlund was not entitled to fees and costs from the first appeal which had re-instated the AKS lawsuit against him. This Court then remanded for the trial court to exclude all fees incurred on the appeals to Division One and the State Supreme Court. **Opinion at 6.**

This Court awarded AKS costs as the "prevailing party" in the instant appeal and denied Hedlund fees or costs on this appeal. **Opinion at 6 and n. 4.** AKS has since submitted a Cost Bill seeking an additional $1,077.23 on top of the $6,180.57 awarded as Costs to AKS from the first appeal. The majority of the earlier cost award was for a bond that AKS posted voluntarily, without any request from the Courts or Hedlund, in amount several times greater than the judgment then at issue.

The current Opinion denies Hedlund any of his fees and costs incurred in both appeals, approximately $100,000 in attorneys' fees to date, and forces Hedlund to pay AKS costs of more than $7,000.00 even though Hedlund prevailed against AKS by having AKS's lawsuit dismissed. This Motion for Reconsideration follows.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. The Opinion is Internally Inconsistent and Contradictory.

"The standard of review of a fee award is manifest abuse of discretion. **Boeing Co. v. Sierracin Corp.**, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). Accordingly, the scope of appellate review is narrow." **Fisher Properties, Inc. v. Arden-Mayfair, Inc.**, 115 Wn.2d 364, 375, 798 P.2d 79 (1990).

"An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court." **Singleton v. Frost**, 108 Wn.2d 723, 730, 742 P.2d 1224 (1987)(emphasis added)**Error! Bookmark not defined.**; **see also Griggs v. Averbeck Realty, Inc.**, 92 Wash.2d 576, 599 P.2d 1289 (1979).

The Opinion issued by this Court is internally inconsistent and contradicts the result it ultimately reaches as to both parties, and should be reconsidered and altered as described below.

1. Fees and Costs Incurred in Defending against AKS' Appeal Seeking to Re-instate the Lawsuit were Incurred Defending Against AKS's Claim, and AKS's Appeal to Re-Instate the Lawsuit was an Action to Enforce the Agreement.

First, this Court acknowledges in the Opinion that "pursuant to the fee shifting provision of the Agreement, Hedlund is entitled to recover attorney fees and costs incurred in defending against [AKS's breach of confidentiality agreement] claim." **Opinion at 5.** This Court recognized that the fees and costs incurred by Hedlund in

connection with the Georgia motion, which Hedlund lost, should nonetheless be awarded to Hedlund because the Georgia motion, and Hedlund's defense against it, was "an action to enforce the Agreement. Pursuant to the fee shifting provision, Hedlund is entitled to recover attorney fees and costs stemming from actions brought to enforce the Agreement." **Opinion at 5 n. 3.**

Again, the relevant language of the Agreement states: "In the event either party is required to institute legal action to enforce the provisions of this Agreement, the prevailing party in such litigation shall be entitled to recover its reasonable attorney's fees as well as costs, expenses and disbursements." **CP 786 ¶ 4.3.**

This Court misapprehends the Anti-SLAPP dismissal and AKS's appeal of the Anti-SLAPP dismissal. Hedlund brought a motion to dismiss—under a law that was new, and valid, and legitimately seemed to apply to the claim (and will all due respect to this Court, did in fact apply to the claim[1]), very early in the litigation to avoid costly and unnecessary discovery or arguments for delay of a summary judgment motion. Hedlund won that dismissal motion, not merely because the trial court found the claim infringed on a right of public participation or speech, but because AKS could not establish that what Hedlund had posted in his internet post could possibly be found to have violated his Confidentiality Agreement. Hedlund did not bring a "claim" against AKS; he moved to

[1] The Division One holding in this case in the first appeal that the Anti-SLAPP law could not apply to a private contractual claim has subsequently been shown to have been erroneous as **Davis v. Cox**, 183 Wn.2d 269, 351 P.3d 862 (2015), which declared the Anti-SLAPP law to be unconstitutional, was in part a breach of agreement case, and the State Supreme Court, noting this, specifically held the Anti-SLAPP law to apply to such claims. If the Anti-SLAPP law applied the agreement at issue in **Davis**, it also applied to the one at issue here.

dismiss AKS's contract claim, successfully, when AKS could not show that it could establish what Hedlund had posted could possibly be found to have violated the contract.

AKS appealed to this Court to have the lawsuit re-instated. AKS did not seek merely to avoid the $10,000 penalty from an Anti-SLAPP dismissal or even the fees and costs and award levied against AKS with the dismissal, but AKS also sought re-instatement of the lawsuit and the right to continue suing Hedlund for alleged breach of the Confidentiality Agreement. The majority of the briefing in the appeal dealt with whether or not what Hedlund said could have been found to have been "confidential" and covered by the Agreement, not whether or not the claim appropriately fell within the Anti-SLAPP law's scope.

As this Court said in **Ryan and Wages, LLC v. Wages**, "One cannot sue for breach under a contract that has a prevailing party attorney fee clause and then cry foul when held liable for an award of fees to a successful defendant." **Ryan and Wages, LLC v. Wages**, No. 68253–9–I, 174 Wn. App. 1017, 2013 WL 1164786 (Mar. 18, 2013) (Div. I, Wash. Ct App., Judges Becker, Leach and Grosse) (unpublished).

> The prevailing party may recover under such a contractual fee-shifting provision, however, only if the opposing party brings a claim "on the contract": that is, only if a party seeks to recover under a specific contractual provision. ... **Boauch v. Landover Corp.**, 153 Wn.App. 595, 615, 224 P.3d 795 (2009) (citing **Hemenway v. Miller**, 116 Wn.2d 725, 743, 807 P.2d 863 (1991); **Burns v. McClinton**, 135 Wn.App. 285, 310–11, 143 P.3d 630 (2006), review denied, 161 Wn.2d 1005 (2007); **G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.**, 70 Wn.App. 360, 366, 853 P.2d 484 (1993), review denied, 123 Wn.2d 1002 (1994)).
>
> **An action is " 'on the contract' " for purposes of a contractual attorney fees provision if the action (1) " 'arose out of the contract' " and (2) " 'if the contract is central to the dispute.' "** **Boguch**, 153 Wn.App. at 615 (quoting **Tradewell Group, Inc. v. Mavis**, 71 Wn.App. 120, 130, 857 P.2d 1053 (1993)).

Columbia State Bank v. Lnvicta Law Group, 199 Wn. App. 306, 330-331 (Div. 1, 2017, Judges Mann, Dwyer and Cox) (emphasis added).

The first Division One appeal was based on the "contract" and was part of AKS's effort to enforce the contract. Hedlund's defense of that appeal was necessary and in defense of the contract claim filed by AKS against him. Hedlund had no choice but to defend against the first appeal. His actions on appeal were no different than his actions opposing the Georgia motion to learn his identity. They were both part of his efforts to defend himself against the contract claim AKS had brought against him, and AKS's actions in both Georgia and this Court in the first appeal were actions by AKS to enforce the contract. This Court cannot credibly distinguish between the two events, and award fees to Hedlund for one and deny them to Hedlund for the other.

On remand, AKS did not drop its lawsuit. It continued to sue Hedlund for breach of the Agreement, and Hedlund moved for summary judgment, which AKS vigorously opposed. Hedlund won summary judgment and had the AKS lawsuit dismissed for the second time. Hedlund was, and is, the "prevailing party" in this litigation. Under the terms of the Contract "the prevailing party in such litigation shall be entitled to recover its reasonable attorney's fees as well as costs, expenses and disbursements." CP 786 ¶ 4.3. The trial judge reviewed all of the detailed fee and cost records, as well as the complete briefing of the appeal and the trial court, to determine the amount of fees, costs and expenses that were "reasonable." The trial judge determined that the fees and costs incurred in the first appeal, in the Georgia proceeding, and in the initial dismissal motion were all incurred in connection with Hedlund's defense of the claim brought against him by AKS, and that the appeal by AKS—seeking to re-instate the lawsuit—was an action

by AKS to enforce that Agreement. The trial court did discount and not award Hedlund more than $17,000 in fees requested by Hedlund. The trial court had broad discretion to determine the appropriate fee and cost award. This Court's ruling does not find, and could not appropriately find, that no reasonable person would take the position adopted by the trial court, as is required to overturn the judge's award on the manifest abuse of discretion standard that applies here. **Singleton**, 108 Wn.2d at 730. The trial court appropriately exercised her discretion in determining the appeal and the trial court Anti-SLAPP motion were incurred in connection with Hedlund's defense of the claim brought against him by AKS and that the appeal by AKS seeking to reinstate the lawsuit was an action by AKS to enforce that Agreement. There is no principled basis for this Court to exclude those fees and costs, and award the Georgia fees and costs as it has done here. The Opinion should be reconsidered, and the trial court's original award should be affirmed.

2. The Fees and Costs Incurred in Defending Against AKS' Appeal Here Seeking to Deprive Hedlund of the Fees and Cost Award under the Agreement in its Entirety were Incurred Defending Against AKS's Claim, and AKS's Appeal to Deprive Hedlund of his Fee and Cost Award under the Agreement and Hedlund Opposition to Such Appeal were Actions to Enforce the Agreement.

Second, the Agreement at paragraph 4.3 mandates an award of fees and costs when either party is required to "institute legal action to enforce the provisions of this Agreement". **CP 786** ¶ 4.3. This includes legal proceedings to enforce the fee provision of the Agreement. AKS appealed here in this instant appeal seeking to deprive Hedlund of his entire fee and cost award pursuant to the Agreement on the theory that AKS had "prevailed" in part by succeeding on the Georgia motion and in having the lawsuit re-instated through the first Division One appeal. AKS lost those arguments in this appeal,

and that relief, but Hedlund was required to defend against those claims in this current appeal to enforce his rights under the Agreement. Hedlund incurred fees and costs enforcing his rights under the Agreement to recover fees and costs. Hedlund incurred fees and costs defending against AKS's action seeking to deprive him of that right. On appeal AKS further continued to argue Hedlund's actions were a violation of the Agreement.

Under the clear terms of the Agreement, Hedlund is entitled to his fees and costs incurred in this appeal as he was defending his rights under the Agreement to the fee and cost award the Agreement provides, in the face of a clear appeal and attempt by AKS to deprive Hedlund of that right. There is no principled basis for the Court to deny Hedlund a fee and cost award under the Agreement for this appeal. The Opinion should be reconsidered, and the Court should award Hedlund fees and costs incurred in this appeal pursuant to Section 4.3 of the Agreement.

3. AKS is Not Entitled to Costs as it Did Not Prevail.

Third, AKS appealed here on five separate and distinct issues, including a claim that the Georgia fees and costs be denied to Hedlund, that AKS be awarded its own fees and costs for "prevailing" in the Georgia proceeding, that AKS be awarded its own fees and costs for "prevailing" in the first Division One appealing achieving re-instatement of its lawsuit against Hedlund, and that Hedlund should receive no fees and costs since he allegedly prevailed on his summary judgment motion but had lost on the Georgia motion and on the re-instatement appeal. See, e.g., Brief of App.at 1-3, 11, 16, 21 and Reply Br. of App. at 15. Even if the Court does not reconsider its current Opinion as Hedlund asks, AKS failed to prevail on most of its issues. This Court upheld the award of the fees and costs to Hedlund incurred on the Georgia motion. This Court denied AKS's requests for

fees and costs to AKS. This Court denied AKS's requests that Hedlund be denied all fees and costs. This means Hedlund thus prevailed in numerous respects, including preserving his right to fees and costs of everything but the first Division One re-instatement appeal. And yet in the current Opinion this Court has awarded AKS costs in this appeal and denied costs to Hedlund. Such an award is again inconsistent with the remainder of the Opinion, and the clear language of the Confidentiality Agreement. Even if the Court does not reconsider its Opinion, AKS cannot be awarded costs in this appeal consistent with the Opinion that was issued nor paragraph 4.3 of the Agreement. Under paragraph 4.3 of the Agreement, Hedlund is entitled to an award of fees and costs, not AKS.

B. The Court has Not Found the Judge to have Manifestly Abused Her Considerable Discretion, and the Agreement, and Holdings of the Instant Opinion, Support the Modifications Requested.

AKS chose to sue Hedlund. When it learned the employee it had sued had left the company years before the event he was sued for reporting on, it should have known the employee could not have breached his Confidentiality Agreement that was limited to information learned while an employee. When the first trial judge dismissed the lawsuit finding Hedlund's post could not violate the Confidentiality Agreement, AKS appealed seeking to have the lawsuit re-instated. When the lawsuit was re-instated, AKS did not dismiss it but continued to sue claiming Hedlund had violated the Confidentiality Agreement. When AKS lost, again, with summary judgment being granted against it this time, AKS sought to deprive Hedlund of the fees and costs the Agreement clearly contemplates he would receive for all fees and costs incurred in defending against the lawsuit.

AKS appealed for a second time to this Court, this time to deprive Hedlund of any fee and costs award under the Agreement. AKS lost that argument here. But this Court, in contradiction of the holding and statements within the remainder of the Opinion, nonetheless held that Hedlund could not recover his fees and costs for the re-instatement appeal or this current appeal and that AKS was entitled to costs.

The Court cannot overturn the learned trial judge who issued the fee and costs award below, after presiding over the summary judgment proceeding and reviewing methodically the briefing from the appeal and the entire trial court record, without finding she manifestly abused her discretion and acted as no reasonable person would act under the circumstances. This Court cannot make such a finding, since this learned judge acted understandably, and reasonably, when she determined that AKS's re-instatement appeal—to re-instate its lawsuit that had been dismissed by a finding it could not show Hedlund's post violated the Agreement—was an action to enforce the Agreement, and that Hedlund's defense of that appeal was an action to defend against AKS's contract claim. This Court further cannot make such a finding, since this learned judge acted understandably, and reasonably, when she determined that the original motion to dismiss was an action to defend against AKS's claim.

This appeal was an action by AKS to enforce the Agreement, and Hedlund's defense of this appeal was an action by Hedlund to enforce his own rights under the Agreement to obtain the fee and cost award pursuant to paragraph 4.3. AKS lost its claim to have Hedlund deprived entirely of a fee and cost award, as it sought in this appeal, as well as its claim to deprive Hedlund of the fees and costs incurred in the Georgia

proceeding. AKS did not prevail, but Hedlund did, and Hedlund, not AKS should be awarded appellate costs. Hedlund should further be awarded appellate fees.

Hedlund was sued by his former employer and forced to litigate and defend himself against the contract claim for nearly seven years. He has incurred attorney's fees of more than $100,000 on appeals before this Court, and he was ordered by this Court to pay costs to AKS, who lost the lawsuit, more than $6000, with more than $1000 more requested now. AKS was told twice, by two different trial court judges—both smart, experienced, and very well-informed and familiar with the record—that AKS could not establish that what Hedlund posted in an internet chat room violated the Confidentiality Agreement. Yet AKS continues to litigate and try and further punish and bankrupt Hedlund likely spending far more to wage this fight than it has ever been ordered to pay.

For all of the above reasons, this Court should reconsider and amend the Opinion, and finally place Hedlund where he belongs—whole and unpunished from this lawsuit that his former employer has lost, as the Agreement clearly contemplates. The trial court should be upheld as she did not manifestly abuse her discretion and did not act as no reasonable person would under the circumstances. All of the fees and costs which Hedlund was awarded below were incurred by Hedlund in defending against AKS's claim. AKS's appeals to re-instate the lawsuit and the instant appeal to deprive Hedlund of any fee and cost award under the Agreement were actions to enforce the Agreement. Hedlund is entitled to the fees and costs awarded below and fees and costs on this appeal. AKS is not entitled to fees or costs. The trial court should be affirmed in full.

V. CONCLUSION

For the foregoing reasons, this Motion to reconsider should be granted, AKS should be denied any cost award, Hedlund should be awarded fees and costs on this appeal, and the trial court fee and cost award should be affirmed in full.

Dated this 5th day of February, 2018.

ALLIED LAW GROUP, LLC
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By _____
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that today, I delivered a copy of the foregoing by email pursuant to agreement with back up by U.S. Mail to the following:

O. Yale Lewis, Jr.
Hendricks & Lewis PLLC
1516 Federal Ave. E
Seattle, WA 98102
oyl@hllaw.com

Dated this 5th day of February, 2018.

_____
Michele Earl-Hubbard

ATTACHMENT C

No. 76105-6-1

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 RESPONDENT CHARLES J. HEDLUND'S MOTION FOR RECONSIDERATION

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COUNTERSTATEMENT OF THE CASE

In August 2012, Alaska Structures (a) appealed a trial court order that granted Hedlund's special motion to strike under RCW 4.24.525 (Washington's anti-SLAPP statute) and awarded Hedlund $10,000 in statutory damages and reasonable fees and costs; and (b) filed a supersedeas bond to stay enforcement of the judgment pending appeal.

On April 21, 2014, this Court held that the trial court erred in striking Alaska Structures pleadings under the anti-SLAPP statute and reversed and remanded.

Rather than accepting the remand and seeking summary judgment on the merits, Hedlund unsuccessfully petitioned the Supreme Court to review this Court's decision.

On May 5, 2016, this Court's Mandate (a) awarded "costs in the amount of $6,180.57 against judgment debtor Charles J. Hedlund, in favor of judgment creditor Alaska Structures, Inc.;" and (b) reversed and again remanded this case to the Superior Court.

At a hearing on September 30, 2016, the trial court signed an order prepared by Hedlund's counsel that granted "Defendants' Motion forS;ummary Judgment and Award of Fees and Costs."

On October 24, 2016, the trial court, without a hearing, signed another order prepared by Hedlund's counsel that awarded all of the costs

and fees Hedlund's counsel had requested at the rates in effect when the services were provided.

Alaska Structures appealed only that part of the fee award that required Alaska Structures to pay for Hedlund's wholly unsuccessful anti-SLAPP campaign in Georgia and Washington.

On January 16, 2018, this Court reversed and remanded the trial court's fee and costs award:

> . . . Washington case law recognizes that a reasonableness determination requires the court to exclude 'any hours pertaining to unsuccessful *theories* or claims.'" *SAK & Assocs., Inc. v. Ferguson Constr., Inc.* 189 Wn. App. 405, 421, 357 P.3d 671 (2015) (quoting *Mahler*, 135 Wn.2d at 434). Hedlund's anti-SLAPP motion advanced a legal theory separate and distinct from the merits of the contractual claim. Our determination that Hedlund did not meet the threshold standard for application of the anti-SLAPP statute confirmed that his legal theory was wholly unsuccessful. *Hedlund*, 180 Wn. App. at 603-04.
>
> By failing to discount the hours spent on Hedlund's anti-SLAPP motion from the fee award, the trial court awarded Hedlund fees and costs associated with an unnecessary and unsuccessful legal theory. In so doing, the trial court erred. Accordingly, we reverse the trial court's order and remand for entry of an award that excludes attorney fees and costs incurred in Hedlund's appeals to the court and the Supreme Court, including the appellate award assessed against him that was deemed a cost by the trial court.

(Opinion at 6 (footnote omitted).)

The opinion resolved the parties' requests for appellate fees and costs as follows:

> Hedlund and AKS each request an award of appellate fees and costs pursuant to RAP 18.1 and the fee shifting provision of the Agreement. As AKS prevailed in this court, it is entitled to an award of appellate costs. But because Hedlund was both the prevailing party on the ultimate issue and the losing party in this stage of the proceeding, neither party is entitled to an award of appellate fees. Upon compliance with RAP 18.1, a commissioner of this court will enter an appropriate cost award.

(Opinion at 6, n.4.)

Pursuant to RAP 18.1 Alaska Structures filed a Bill of Costs on January 26, 2018.

On February 5, 2018, Hedlund filed a motion for reconsideration asserting that "AKS should be denied any costs award, Hedlund should be awarded fees and costs on this appeal, and the trial court fee and cost award should be affirmed in full." (Motion for Reconsideration ("Motion") at 14.) As grounds for reconsideration, Hedlund asserts that (a) Alaska Structures' successful appeal of the trial court's anti-SLAPP order, Hedlund's unsuccessful Supreme Court petition, Alaska Structures' successful appeal of the trial court's award of fees and costs for Hedlund's unsuccessful anti-SLAPP strategy, and Hedlund's unsuccessful opposition to Alaska Structures' appeal were all "actions" to enforce the Confidentiality Agreement; (b) this Court's January 16, 2018 opinion is internally inconsistent and contradictory;" (c) there is no principled basis for this Court to deny Hedlund a fee and cost award for this appeal; (d)

Alaska Structures is not entitled to its costs on appeal because it did not prevail on appeal; (e) this Court did not find that the "Learned judge manifestly abused her considerable discretion;" and (f) Alaska Structures is trying to bankrupt Hedlund.

This Response is filed pursuant to the Court's February 14, 2018 order to answer the reconsideration motion within 15 days.

ARGUMENT

The unstated premise of Hedlund's motion seems to be that the contractual fee-shifting provision on which Hedlund relies entitles the prevailing party to all of its fees and costs. But that is not what the contract says. Rather the contract explicitly provides for "reasonable" fees and costs to the prevailing party. In Washington a reasonableness determination requires the Court to exclude fees and costs incurred in unsuccessful claims and theories, which in this case, precludes fees and costs for Hedlund's unsuccessful anti-SLAPP strategy. Consequently, Hedlund's repetitive mischaracterizations of Alaska Structures' successful appeals to this Court and Hedlund's unsuccessful petition for Supreme Court review as "actions" to enforce the agreement in which Hedlund prevailed are not only factually and analytically incorrect, but more importantly, wholly irrelevant under controlling Washington law which, as this Court held, precludes fees and costs for Hedlund's unsuccessful anti-

SLAPP strategy irrespective of whether he prevailed on summary judgment. (Counterstatement of the Case, *supra*, at 2.

If the Court is persuaded by Hedlund's assertion that affirmation of Hedlund's fees and costs in the Georgia proceeding was "inconsistent and contradictory" with this Court's reversal of the trial court's award of fees and costs for Hedlund's unsuccessful anti-SLAPP quest in this Court and the Washington Supreme Court, the award of costs and fees in Georgia should be reversed, a result that would be fully consistent with controlling Washington law; because Hedlund's intervention in Georgia , which relied extensively on the Washington anti-SLAPP statute was not only wholly unsuccessful, but also wholly unnecessary. Its only impact was delay and increased costs to both parties.

The statement that "[Hedlund] has incurred attorney's fees of more than $100,000 on appeals before this Court . . ." (Motion at 13, lines 4 and 5) is highly misleading. Hedlund's fees in this Court and the Washington Supreme Court are the direct result of (a) Hedlund's unsuccessful strategy to pursue relief under the anti-SLAPP statute rather than through summary judgment on the issue of whether the information in his post was covered by the Confidentiality Agreement; and (b) Hedlund's insistence that Alaska Structures should pay for that unsuccessful strategy. In any event, Hedlund will not be responsible for paying those fees because according

to Hedlund's fee agreements with the Allied Law Group ("Allied") "[t]he firm will look solely to an Award or settlement to satisfy its fees . . ." (CP 338.)

The related assertion that "Alaska Structures continues to litigate and try and further punish and bankrupt Hedlund . . ." (Motion at 13, lines 10 and 11) is especially egregious. Hedlund and his attorney selected the anti-SLAPP strategy they pursued for four years and they decided to seek costs and fees for that unsuccessful strategy. Alaska Structures' good faith appeal of the anti-SLAPP dismissal was wholly successful, as was Alaska Structure's opposition to Hedlund's ill-advised and wholly unsuccessful Supreme Court petition. Presumptively, on remand, the revised fee and cost award to Hedlund will be reduced by this Court's costs awards to Alaska Structures thereby relieving Hedlund of any obligation to pay those costs.

The point of Hedlund's unsupported assertion that the majority of the briefing [in the trial court] on Hedlund's anti-SLAPP motion focused on whether Hedlund's post violated the Confidentiality Agreement rather than whether the anti-SLAPP law applied to the claim. (Motion at 2, lines 6-9) is obscure; but factually, it is clearly incorrect. Rather, as is evident in the transcript of the hearing on Hedlund's anti-SLAPP motion, it was Judge Yu, on her own initiative, who was concerned with whether the

information disclosed was covered by the confidentiality agreement. (*See, e.g.*, Verbatim Transcript of Proceedings on August 17, 2012, p. 32, line 17-20; p. 33, line 13-18; p. 34, line 10-13.) And, the only part of Judge Yu's ruling quoted in the appellate briefing appears in Alaska Structures' brief which offers *no* support for Hedlund's contention that Judge Yu was concerned about Hedlund's timing argument (Motion at 2, lines 10-15):

> 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.

Verbatim Transcript of Proceedings on August 17, 2012 at 49, lines 4-9.

Subsequently, in this Court, contrary to Hedlund's assertions (Motion at 2, lines 17-21), the parties briefing and oral arguments overwhelmingly focused on whether Hedlund's disclosure constituted protected activity under the anti-SLAPP statute[1] which was the sole issue raised by Hedlund's unsuccessful Supreme Court petition.

Hedlund's critique of this Court's 2014 reversal of the trial court's anti-SLAPP dismissal of Alaska Structures complaint ("Initial Opinion") (Motion at 6, n. 1) is also misplaced. That opinion–as Alaska Structures

[1]The pages cited by Hedlund, pages 16, 21 and 25 of Alaska Structure's Reply Brief to this Court in 2013 (CP 931-933) provide negligible support for Hedlund's assertion that on appeal "much of the briefing and argument against focused on whether or not Hedlund had violated the Confidentiality Agreement, and only partially on whether or not the speech at issue in the claim could fall within the anti-SLAPP law." For the Court's convenience, those pages are attached hereto as Attachments "A," "B," and "C."

understood it–did not hold that the anti-SLAPP law could not apply to a private contractual claim (Motion at 6, footnote) but rather than Hedlund's post did not constitute participation in a matter of public concern that would be deemed to be protected activitys. (*See, e.g.*, Initial Opinion at 10.) Further, *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015) did not "specifically [hold] that the anti-SLAPP law applied to [breach of agreement] claims." (Motion at 6, n. 1.) More importantly, Hedlund's critique of this Court's Initial Opinion is irrelevant to whether Hedlund's anti-SLAPP strategy was successful or unsuccessful which is the principal issue on this appeal.

Hedlund's assertion that Hedlund rather than Alaska Structures prevailed on this appeal (Motion at 10) is specious. Alaska Structures did *not* appeal either the summary judgment or the trial court's award of Hedlund's fees and costs of $23,321.48 related to that motion. Rather, the essential issue on appeal was whether under controlling Washington law, Hedlund was entitled to fees and costs for his unsuccessful anti-SLAPP campaign; and that issue was resolved decisively in favor of Alaska Structures which effectively reduced the contested portion of the fee award from $108,230.75 ($131,552.42 - $23,321.85) to $41,951.49 ($108230.75 - $66,289.26).

Hedlund's claim that this Court's reversal of the trial court's award

of fees and costs for Hedlund's unsuccessful anti-SLAPP quest was legally deficient because there was no finding that the "learned trial judge had manifestly abused her considerable discretion" (Motion at 12) is also specious. Such a finding was not necessary because, as a matter of law, the order under review was clearly erroneous. *See, e.g. Sak & Assoc. Inc. v. Ferguson Constr. Inc.*, 189 Wn. App. 405, 421, 357 P.3d 671 (2015); *Mahler v. Szucs,* 135 Wn.2d 398, 434, 957 P.2d 632 (1998) and related Supreme Court cases, none of which included such a finding.

Pursuant to the contractual fee-shifting provision on which Hedlund relies and RAP 18.1, Alaska Structures requests its costs and reasonable attorney fees in answering Hedlund's Motion for Reconsideration.

CONCLUSION

For the reasons stated in this Court's January 18, 2018 opinion and the opening and reply briefs of Alaska Structures, all of which, by this reference, are incorporated in this response to Hedlund's reconsideration motion, each of Hedlund's assertions/arguments should be rejected. Alternatively, if the Court is persuaded by Hedlund's argument that affirmance of Hedlund's fees and costs in the Georgia proceeding is inconsistent with this Court's reversal of the trial court's award of Hedlund's fees and costs in this Court and the Washington Supreme Court

then the trial court's award of Hedlund's costs and attorney fees for the Georgia proceeding should also be reversed which would be fully consistent with controlling Washington law. Under either alternative, Alaska Structures should be awarded its costs and reasonable attorney fees in opposing Hedlund's motion.

DATED this 28th day of February 2018.

Respectfully Submitted,

HENDRICKS & LEWIS PLLC

By: _____
O. Yale Lewis, Jr., WSBA No. 1367
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Katherine Hendricks, declare that I am an attorney with the law firm of Hendricks & Lewis PLLC, 1516 Federal Ave. E. Seattle, Washington 98102, and one of the lawyers for Alaska Structures and I duly made service of Response of Appellant Alaska Structures, Inc. to Respondent Charles J. Hedlund's Motion for Reconsideration 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 25th day of February, 2013.

Kate Hendricks
KATHERINE HENDRICKS

ATTACHMENT "A"

concern," regardless of the actual content of the speech at issue, because of the public resources invested in investigating and prosecuting the crimes. But again, his theory runs afoul of the rule that the Court must examine the specific speech at issue rather than "society's general interest in the subject matter of the dispute[.]" *World Fin. Group*, 172 Cal. App. 4th at 1570, 1572; *see also Rivero*, 105 Cal. App. 4th at 924-25 (rejecting theory that "issue of public interest" existed because the allegedly protected speech occurred at a publicly-financed institution). In short, Hedlund has made no showing—supported by law and fact—that his August 12th Posting of non-public details about weaknesses of Alaska Structures' security system involved any "issues of public concern."

C. **Hedlund Failed to Refute Alaska Structures' Showing That It Is Likely to Prevail on its Breach of Contract Claim.**

Hedlund alleges—without citation to the record—that Alaska Structures argued that he had signed a "secrecy for life" confidentiality agreement preventing him from ever disclosing anything about the company, including events occurring after his employment ended. (Resp. Br. at 30.) But Alaska Structures has never made such a claim. Rather, its claim has always been limited to Hedlund's disclosure of non-public details about the company's security system, which he learned of during his employment, matters covered by the Confidentiality Agreement he signed at the start of his employment. Hedlund's other contentions with respect to

ATTACHMENT "B"

burglaries of Alaska Structures and other businesses).) For example, Hedlund claims that police records revealed "intricate details" about Alaska Structures' security system but cites to no specific evidence in support of that assertion. (*See* Resp. Br. at 32.) He then makes several pages of allegations with no citations to the record. (Resp. Br. at 33-36.) In short, Hedlund's rambling, unsupported and largely inaccurate allegations that the information he disclosed about weaknesses in Alaska Structures' security system was not confidential information does not refute Alaska Structures' properly supported showing to the contrary. (*See* Appellant's Br. at 41-44.)

Hedlund's criticism of Alaska Structures' current security system is inaccurate and irrelevant. (*See* Resp. Br. at 26-29.) There is no reason to believe that the monitored security alarm system installed by Allied Fire & Security after the first burglary is inadequate; and in fact, as Hedlund acknowledges, a hidden camera secretly installed in the Alaska Structures server room after the first burglary did, in fact, capture images of the second burglary. These images are reported as being of "'good quality' by police and were used to identify the burglars." (Resp. Br. at 33.) Furthermore, the reason for the additional security shifts in August and September 2011 was to provide extra security for office personnel. That increase was a direct response to Hedlund's disclosures (Appellant's Br. at 6-7; CP 598-602), not a perceived weakness in the monitored security alarm system. For all of

ATTACHMENT "C"

establishing that sanctions are appropriate, a burden he made no attempt to satisfy. *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994).

III. CONCLUSION.

The only thing Hedlund has demonstrated is that he has a personal vendetta against Alaska Structures. But a vendetta is not something that Washington's Anti-SLAPP statute was intended to carve out from civil liability in order to foster the public's ability to participate in ongoing public controversies about issues of public concern. And even if Hedlund's personal dislike of Alaska Structures could somehow be transformed into an "issue of public concern," Alaska Structures demonstrated that it has a legitimate contract claim that it is entitled to have determined on the merits. As a result, Alaska Structures respectfully requests that the Court reverse the trial court's grant of Hedlund's motion to strike and the corresponding monetary awards to Hedlund.

DATED this 26th day of April, 2013.

Respectfully Submitted,

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