

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 15, 2014, 4:23 pm
BY RONALD R. CARPENTER
CLERK

NO. 89674-7

E CRF
RECEIVED BY E-MAIL

**SUPREME COURT
OF THE STATE OF WASHINGTON
COURT OF APPEALS NO. 309029-III**

MICHAEL HENNE,

Plaintiff/Respondent,

v.

CITY OF YAKIMA, a Municipal Corporation,

Defendant/Petitioner.

**DEFENDANT/PETITIONER CITY OF YAKIMA'S
RESPONSE TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION**

**ROBERT C. TENNEY, WSBA #9589
MARK W. WATSON, WSBA #14693
PETER M. RITCHIE, WSBA #41293
Attorneys for City of Yakima
Meyer, Fluegge & Tenney, P.S.
P.O. Box 22680
Yakima, WA 98907
(509) 575-8500**

 ORIGINAL

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
A. <u>INTRODUCTION</u>	1
B. <u>ARGUMENT IN RESPONSE TO BRIEF OF AMICUS CURIAE</u>	1
1. THE MAJORITY OF AMICUS'S ARGUMENTS ARE PREMATURE	1
2. THE CITY IS ENTITLED TO THE PROTECTIONS OF THE ANTI-SLAPP STATUTE REGARDLESS OF WHETHER IT WAS THE RECIPIENT OR THE SPEAKER OF THE INFORMATION RELATED TO THE INTERNAL INVESTIGATIONS	2
C. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

	Page
 <u>State Cases</u>	
<u>Biomed Comm, Inc. v. State Dep't of Health Bd. of Pharmacy,</u> 146 Wn. App. 929, 193 P.3d 1093 (2008)	4
<u>Bradbury v. Superior Court,</u> 49 Cal.App.4th 1108 57 Cal.Rptr.2d 207 (1997)	5-6
<u>Hansen v. California Department of Corrections and Rehabilitation,</u> 171 Cal.App.4th 1537, 90 Cal.Rptr.3d 381 (2008)	7
<u>Tyce Const. Co. v. Dulien Steel Products, Inc. of Wash.,</u> 62 Wn.2d 106, 381 P.2d 245 (1963)	4
<u>Vargas v. City of Salinas,</u> 46 Cal. 4th 1, 205 P.3d 207 (2009)	6
<u>W. Petroleum Importers, Inc. v. Friedt,</u> 127 Wn.2d 420, 899 P.2d 792 (1995)	4
 <u>Statutes</u>	
RCW 4.24.510	6
RCW 4.24.525	1, 2, 3, 5, 6, 8
RCW 4.24.525(2)	7
RCW 4.24.525(2)(a), (b)	7

A. INTRODUCTION

Defendant City of Yakima (“the City”) responds to the brief of amicus curiae Washington State Association for Justice Foundation (WSAJ). Amicus’s argument that the City lacks standing is unavailing. Nothing in the statutory scheme or in Washington law supports Amicus’s claim that the City cannot invoke RCW 4.24.525 to protect misconduct reports made by its employees. To suggest otherwise nullifies the language of the statute and established case law holding that a corporation can act only through its authorized representatives.

B. ARGUMENT IN RESPONSE TO BRIEF OF AMICUS CURIAE

1. THE MAJORITY OF AMICUS’S ARGUMENTS ARE PREMATURE

Amicus spend the majority of its brief addressing the merits of the City’s motion to strike (*i.e.*, whether the City’s motion to strike was based on “an action involving public participation and petition”). Those arguments are premature. The City is not asking this Court to determine the merits of its

motion. The relief the City has requested in this case is remand to the trial court. It has requested this relief because the trial court never considered the merits of the motion to strike; instead, the trial court held that the City is not entitled to anti-SLAPP protections, never reaching the merits. Whether the City is a "person" as defined in the anti-SLAPP statute is the threshold issue which must be determined on the cross-petition before the merits can be reached.

2. THE CITY IS ENTITLED TO THE PROTECTIONS OF THE ANTI-SLAPP STATUTE REGARDLESS OF WHETHER IT WAS THE RECIPIENT OR THE SPEAKER OF THE INFORMATION RELATED TO THE INTERNAL INVESTIGATIONS

Amicus argues that the City does not have standing to assert the protections of RCW 4.24.525 because it was merely "the recipient of statements or submissions provided by employees who were not sued." (Am. Br. of WSAJ 13). The essence of its argument is that this is not really a SLAPP case because the City was not the whistleblower here; its non-party employees were. That argument is based on the false premise

that the City, or any other corporate entity, is a separate entity acting apart from its employees and agents.

This case fits the pattern of a SLAPP case. Plaintiff, a police officer, sued the City for the acts of its employees (fellow police officers) making reports concerning Plaintiff's misconduct as a police officer. Thus, the City is being sued for reporting Plaintiff's potential abuse of power as a governmental agent. There is no doubt reporting misconduct by government employees is necessary for accountability and is in the public interest as a whole. Plaintiff's lawsuit (with respect to the retaliatory reports and resulting investigations claim) attempted to punish the City for shining the light on his misconduct. The City submits Plaintiff's lawsuit—that attempts to restrict the reporting of matters of public import—is precisely the sort of SLAPP case RCW 4.24.525 was designed to remedy.

Amicus's insistence that only the City's employees would be protected under the statute ignores the nature of the corporate entity and the facts and claims that form the basis for

this matter. The language of the statute expressly applies to non-individuals, *i.e.*, a “corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity.” The meaning is clear and requires no construction. “The intent behind the language of an enactment becomes relevant only if there is some ambiguity in that language.” W. Petroleum Importers, Inc. v. Friedt, 127 Wn.2d 420, 424, 899 P.2d 792 (1995).

Obviously, municipal corporations such as the City can only act by and through individuals. Biomed Comm, Inc. v. State Dep’t of Health Bd. of Pharmacy, 146 Wn. App. 929, 934, 193 P.3d 1093 (2008) (corporation can only act through its authorized representatives). A “corporation” itself is a legal fiction. Tyee Const. Co. v. Dulien Steel Products, Inc., of Wash., 62 Wn.2d 106, 112, 381 P.2d 245 (1963) (“[T]he corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact . . .”). Its presence is

symbolized by the acts of its agents and employees “authorized to act for it.” Id.

The City is being sued for the acts of its employees (*i.e.*, its police officers who initiated the misconduct reports). It is these actions that are the genesis of the motion to strike Plaintiff’s claims.

Under Plaintiff’s allegations, Plaintiff has alleged the City can only act through its employees, the reports of the City’s employees within the scope of their employment are made the statements of the City. There is no basis to distinguish one from the other. It is revealing that Amicus admits that the reports of the City’s employees would be protected under RCW 4.24.525 if they were parties. (Am. Br. of WSAJ 13 n.13). Why this is not true of the City, when it is being sued for the acts of those same employees (its authorized agents) is not clear.

Where a municipality is alleged to be liable for its employees’ acts within the purview of the anti-SLAPP statute, the protections apply. Bradbury v. Superior Court, 49

Cal.App.4th 1108, 1111, 1113-1114, 57 Cal.Rptr.2d 207 (1997) (vicariously liable governmental entities and their representatives are included in the anti-SLAPP statute's protection of petitioning rights); Vargas v. City of Salinas, 46 Cal. 4th 1, 17, 205 P.3d 207, 215-17 (2009). Accordingly, employers sued under principles of vicarious liability are also under the umbrella of anti-SLAPP immunity.

Amicus's argument also is based on the false premise that RCW 4.24.525 only applies to the "person," as that term is defined in the statute, who communicates the protected statements. Nothing in RCW 4.24.525 supports Amicus's position. While RCW 4.24.510 limits its protections to the "person who communicates a complaint," RCW 4.24.510, the later-enacted RCW 4.24.525 is not so limited. The statute is broader in scope and does not distinguish between the recipient and the communicator of protected reports. The statute encompasses a broad range of conduct, including "any claim . . . based on action involving public participation and petition"

which is broadly defined to include “any oral statement made, or written statement or other document submitted” “in” or “in connection with an issue under consideration or review by” an “executive . . . or other governmental proceeding authorized by law.” RCW 4.24.525(2) (a), (b).

The statute does not limit its protections to any claim “against a person making or submitting” an oral or written statement or document, but broadly applies to “any claim, however characterized, that is based on” the making or submission of any oral or written statement or document. RCW 4.24.525(2).

This case fits within that broad range of conduct. See Hansen v. California Department of Corrections and Rehabilitation, 171 Cal.App.4th 1537, 1544-45, 90 Cal. Rptr.3d 381 (2008) (coworker allegations of misconduct and criminal activity against corrections officer resulting in formal internal investigation protected by anti-SLAPP statute).

C. CONCLUSION

Amicus fails to raise any valid challenges to the application of RCW 4.24.525 to the City in this case. This Court should reverse the dismissal of the appeal, and remand this case for further proceedings consistent with this Court's Opinion.

RESPECTFULLY SUBMITTED this ^{7th} 15th day of May, 2014.

**MEYER, FLUEGGE & TENNEY, P.S.
P.O. Box 22680
Yakima, WA 98907-2680
Attorneys for Defendant/Petitioner**

By: Peter M. Ritchie
MARK D. WATSON, WSBA #14693

By: Peter M. Ritchie
PETER M. RITCHIE, WSBA #41293

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, May 15, 2014 4:24 PM
To: 'Deanna Boss'
Cc: Lish Whitson; 'Kristy Stell'; 'jneedle@wolfenet.com'; 'jessew@mhb.com'; 'josephs@mhb.com'; 'dunne@aclu-wa.org'; 'talner@aclu-wa.org'; 'amicuswsafj@wsajf.ORG'; 'gahrend@trialappeallaw.com'; 'dpg@winstoncashatt.com'; 'rowlm@foster.com'; Peter Ritchie; Mark Watson; Robert Tenney
Subject: RE: Henne v. City of Yakima / Supreme Court Case No. 89674-7

Rec'd 5-15-14

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: Deanna Boss [mailto:Boss@mftlaw.com]
Sent: Thursday, May 15, 2014 4:23 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Lish Whitson; 'Kristy Stell'; 'jneedle@wolfenet.com'; 'jessew@mhb.com'; 'josephs@mhb.com'; 'dunne@aclu-wa.org'; 'talner@aclu-wa.org'; 'amicuswsafj@wsajf.ORG'; 'gahrend@trialappeallaw.com'; 'dpg@winstoncashatt.com'; 'rowlm@foster.com'; Peter Ritchie; Mark Watson; Robert Tenney
Subject: Henne v. City of Yakima / Supreme Court Case No. 89674-7

Please find the attached Responses of Defendant/Petitioner City of Yakima to the Amicus Briefs filed by the American Civil Liberties Union of Washington and the Washington State Association for Justice Foundation filed via e-mail attachment hereto pursuant to Supreme Court filing protocol set forth at http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/?fa=atc_supreme_clerks.display&fileID=fax.

Deanna Boss
Legal Assistant to Mark D. Watson and Peter M. Ritchie
Meyer, Fluegge & Tenney, P.S.
230 South Second Street
P.O. Box 22680
Yakima, WA 98907-2680
(509) 575-8500 Fax: (509) 575-4676
boss@mftlaw.com
www.mftlaw.com

CONFIDENTIALITY NOTICE

This e-mail transmission may contain information which is protected by attorney-client, work product and/or other privileges. If you are not the intended recipient, you are hereby notified that any disclosure, or taking of any action in reliance on the contents is strictly prohibited. If you have received this transmission in error, please contact us immediately and return any e-mail to us by choosing Reply (or the corresponding function on your e-mail system) and then deleting the e-mail.