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**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.

**SUPPLEMENTAL BRIEF OF
DEFENDANT/PETITIONER CITY OF YAKIMA**

**SENT ON 04/04/14 VIA E-MAIL FOR FILING IN THE
SUPREME COURT OF THE STATE OF WASHINGTON**

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A. IDENTITY OF PETITIONER

Defendant City of Yakima (the “City”) submits the following supplemental argument in support of its Petition for Review and in response to Plaintiff’s Cross-Petition. The City incorporates by reference those arguments already set forth in its briefs submitted in the Court of Appeals as well as in its Petition for Review and Reply Brief.

B. SUPPLEMENTAL LEGAL ARGUMENT

1. A NARROW INTERPRETATION OF RCW 4.24.525 UNDERMINES THE LEGISLATIVE GOAL OF THE ANTI-SLAPP STATUTE AND THE PUBLIC POLICY INTERESTS OF THIS STATE IN REPORTING AND PREVENTING MISCONDUCT AND OTHER CRIMINAL ACTIVITY

Washington State recognizes the important fundamental policy of protecting the free communication of information from SLAPP claims. The first manifested recognition of this policy occurred when the Legislature enacted RCW 4.24.510, which allowed a defendant to recover fees and a statutory penalty in defending against SLAPP claims. See RCW

4.24.510. The statute's protections, however, were limited. The purpose of the statute is "to protect citizens who provide information to government agencies by providing a defense for retaliatory lawsuits." Valdez-Zontek v. Eastmont Sch. Dist., 154 Wn. App. 147, 167, 225 P.3d 339 (2010). Accordingly, RCW 4.24.510 only creates immunity for statements made to governmental officials.¹

The Legislature greatly expanded those protections in 2010 when it enacted RCW 4.24.525, creating anti-SLAPP procedural protections for any "individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal . . .

¹ The statute provides, in part:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.

entity” making submissions “in” or “in connection with” government “proceedings.” RCW 4.24.525(1)(e), (2)(a, b). One of the Legislature’s fundamental goals in enacting RCW 4.24.525 was to provide broad procedural protections for statements and other communications on matters of public concern. See RCW 4.24.525. In enacting RCW 4.24.525, the Legislature balanced public policy concerns and determined that the interests of the State and its citizenry are best served by broadly and promptly protecting communications and reporting involving matters of public concern.

Plaintiff’s position in this case is that RCW 4.24.525 should not apply to municipalities based on this Court’s decision in Segaline v. State, Dep’t of Labor & Indus., 169 Wn.2d 467, 238 P.3d 1107 (2010); he argues the statute’s goals are only furthered if it is limited to individuals and other non-public entities. This argument is not only inconsistent with the plain language of the statute, as has been fully briefed in the City’s Petition for Review and below in the Court of Appeals,

but directly contradicts public policy interests and the stated goal of the statute.

There is no legitimate reason why the anti-SLAPP statute protections of RCW 4.24.525 should be removed from public entities, such as municipalities like the City, acting through their employees. Under Plaintiff's position, a citizen filing a report with a governmental agency on potential law enforcement officer misconduct is protected from claims brought by the officer for damages under the anti-SLAPP statute (as he/she would have been pre-RCW 4.24.525 under RCW 4.24.510). But Plaintiff's position is that a municipality which reports (through its employees) or passes on citizen reports and investigates acts of potential law enforcement officer misconduct is not protected by RCW 4.24.525 and is therefore exposed to costly and extensive litigation. This distinction depends upon plaintiff's erroneous reading of the definition of "person" in RCW 4.24.525. There is no basis in

the language, or in the evident intent, of the statute for reporting entities to be treated differently.

As a matter of public policy, this Court should protect all entities that share and report issues of public concern, regardless of the source of the information, especially when they involve law enforcement. It should not matter that complaints of potential misconduct derive from public employees rather than from citizens not employed in the public sector, because the same goal is implicated: to protect the reporting of wrongdoing and ensuring transparent and effective government. Washington has consistently recognized a public policy interest in preventing crime and misconduct. See, e.g., Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 416, 259 P.3d 190 (2011) (“[T]he public does have a legitimate interest in how a police department responds to and investigates such an allegation [of sexual misconduct] against an officer.”); State v. Nicholson, 77 Wn.2d 415, 419, 463 P.2d 633 (1969) (“[T]he public has an interest in bringing to justice

persons who have committed crimes”); State v. Parris, 163 Wn. App. 110, 118, 259 P.3d 331 (2011) (“Convicted sex offenders in Washington also have a reduced expectation of privacy because of the ‘public’s interest in public safety’ and in the effective operation of government.”).

There is also a public policy interest in knowing how public employees are conducting themselves because the public has an interest “in knowing what their public officers are doing in the discharge of public duties” Dawson v. Daly, 120 Wn.2d 782, 798, 845 P.2d 995 (1993) (quoting Stone v. Consol. Publ’g Co., 404 So.2d 678, 681 (Ala. 1981)).

The State’s public policy interests and the goals of the anti-SLAPP statute do not change based upon the source of a report of potential misconduct. Since the same goal exists, the source of the report should not matter. Thus, there is no basis to establish any such distinction. “[T]he purpose of the anti-SLAPP statute plainly supports an interpretation that protects statements by governmental entities or public officials as well

as statements by private individuals.” Vargas v. City of Salinas, 46 Cal. 4th 1, 18, 205 P.3d 207 (2009).

Indeed, arguably there is a greater interest in protecting the internal reporting by public employees (*i.e.*, members of the law enforcement community) because they are directly involved in the function of government, have more access to the information about the activities of fellow officers, and should be encouraged to report misconduct and other failures. If the statute’s protections apply to common citizens outside of the governmental process, *a fortiori* they should apply to those employed in it, especially members of law enforcement to whom public safety is entrusted.

Plaintiff’s position would result in governmental entities being held to a different standard of liability for reporting and investigating misconduct than non-public entities, as their ability to freely report and investigate potential misconduct would be less protected than those of a member of the general public. In the area of tort liability, the public policy of this State

is to hold a government entity liable “to the same extent as if it were a private person or corporation.” RCW 4.92.090; RCW 4.96.010(1). Given that public policy, the City should be entitled to the same anti-SLAPP protections from tort claims as non-governmental (*i.e.*, private) entities.

Moreover, Plaintiff’s position would likely make public employees and their public employers more reluctant to report potential misconduct. No goal of the statute and no public policy concern of this State is furthered by holding that the protections of RCW 4.24.525 do not apply to governmental entities.² This State should equally encourage the reporting of potential misconduct by governmental entities through their employees as well as by non-public entities, as the interest in eliminating misconduct is the same regardless of the source of the information.

² For an example from another state, see John v. Douglas Cnty. Sch. Dist., 125 Nev. 746, 760, 219 P.3d 1276 (2009) (claims against county school district dismissed under anti-SLAPP statute).

In sum, application of anti-SLAPP protections to municipalities, such as the City, and its employees is consistent with RCW 4.24.525's stated goal of protecting statements and other conduct reporting on matters of public concern, because that statute protects "any legal . . . entity." RCW 4.24.525(1)(e). Artificially creating a public entity versus non-public entity distinction will have the undesirable effect of discouraging and stifling those reports of misconduct that are deemed to be in the public interest and necessary to the proper functioning of democratic government.

**2. THE COURT OF APPEALS' DECISION
AND PLAINTIFF'S POSITION THAT
AMENDMENT OF THE COMPLAINT
TO REMOVE THE OFFENDING
ALLEGATIONS RENDERED THE APPEAL
MOOT UNDERMINES THE GOALS AND
PROTECTIONS OF THE ANTI-SLAPP
STATUTE**

Both the Court of Appeals' decision and Plaintiff maintain that the current appeal is moot because the liberal pleading amendment rules in CR 15 allowed removal of the

offending allegations even after the special motion to strike was filed, thus avoiding the impact of the anti-SLAPP statute. Aside from the California cases (cited below by the City in the Court of Appeals and in the City's Petition for Review) holding that a claimant cannot avoid the impact of the anti-SLAPP statute by amending the complaint (which Plaintiff has not refuted or countered), there are several additional reasons why the position of the Court of Appeals and Plaintiff is incorrect.

First, the Court of Appeals' interpretation undermines the stated policy goal of RCW 4.24.525, which is to provide expedited statutory protections for statements and other reporting on matters of public concern, whether made by an "individual," "corporation," or "other legal . . . entity." See RCW 4.24.525 (establishing statutory protections as matter of substantive law). RCW 4.24.525 provides a mechanism for early and prompt determination of claims falling within the purview of the statute. RCW 4.24.525(5)(a) (motion to be made within 60 days of service of the complaint). Thus, RCW

4.24.525 provides a means of promptly sanctioning claimants who file meritless SLAPP claims and deterring SLAPP lawsuits that can adversely affect or stifle free communication or reporting.

However, the Court of Appeals' decision creates a safe harbor for SLAPP claimants by removing the teeth from the protections of RCW 4.24.525, since under its rationale a claimant can freely assert SLAPP claims and then simply remove them through amending the complaint after a special motion to strike is filed.³ Allowing Plaintiff to remove the offending allegations and avoid the consequences of the statute through amendment would dissipate the value and deterrent goal of the motion-to-strike procedure by allowing a party to amend its pleadings at any time solely in order to avoid an adverse result. That result is inconsonant with the statutory

³ As noted below, such amendment is not permanent, as nothing prevents a claimant from amending the complaint at a later time to re-assert the same claims, in the same or different guise.

language and purpose. Under the Court of Appeals' decision, the sanction and deterrent effects of the statute are removed.

Second, the plain language of the statute counsels against the maneuver of post-motion filing amendment. This is because the anti-SLAPP statute stays activity in the pending case once a special motion to strike is filed:

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

RCW 4.24.525(5)(c) (emphasis added).

Thus, Plaintiff should not have been able to amend the Complaint to avoid the effects of the statute after the City filed its anti-SLAPP motion.

Third, the Court of Appeals and Plaintiff misunderstand the nature and impact of an amendment in the anti-SLAPP

motion context. Offending claims removed through voluntary amendment are not dismissed with prejudice; in effect they are simply non-suited without prejudice or other adverse impact on the pleader. No deterrence is involved. That is not merely an academic distinction.

On the other hand, RCW 4.24.525 motion practice provides an expedited right to dismissal of unsupported offending claims with prejudice, attorney's fees, and a statutory penalty. There is a direct, adverse impact to a SLAPP claimant and a directly related deterring effect. RCW 4.24.525(6)(a)(iii). Thus, the amendment did not render the anti-SLAPP issue moot. To hold otherwise would eviscerate the deterrent goals of the statute.

Finally, it is an important point that Plaintiff's argument actually recognizes application of the anti-SLAPP statute to the allegations against the City, and concedes the special motion to strike was well-taken. Indeed, it would not have been necessary for Plaintiff to amend the Complaint if the statute did not apply

to the allegations of the un-amended original Complaint. The only rational reason for amending the Complaint to remove the offending allegations was to avoid the impact of the anti-SLAPP statute.

C. **CONCLUSION**

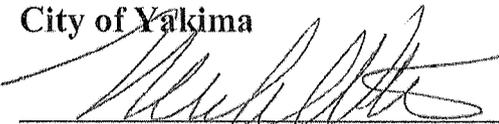
This Court should:

1. Reverse the dismissal of the appeal;
2. Hold that an anti-SLAPP motion is not rendered moot by amendment of the offending complaint;
3. Hold that there is no requirement under the anti-SLAPP statute that the nonmoving party be given notice of the anti-SLAPP statute and be provided an opportunity to remove the offending allegations by amendment (absent prejudice) before an anti-SLAPP motion may be filed;
4. Award the City its reasonable attorney's fees and costs incurred in this appeal pursuant to RAP 18.1 and RCW 4.24.525(6)(a); and

5. Remand this case for further proceedings consistent with this Court's Opinion, including for a determination of whether the allegations which were the subject of the motion to strike are covered by the anti-SLAPP statute and whether the City is entitled to a \$10,000 statutory penalty and attorney's fees and costs, including those incurred on appeal (to the extent not awarded by this Court).

RESPECTFULLY SUBMITTED this 4th day of April, 2014.

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**SUPREME COURT
OF THE STATE OF WASHINGTON**

MICHAEL HENNE,)
) NO. 89674-7
) COURT OF APPEALS NO. 309029-III
Plaintiff/Respondent,)
)
vs.) CERTIFICATE OF SERVICE
) SENT ON 4/4/14 VIA E-MAIL FOR
CITY OF YAKIMA,) FILING IN SUPREME COURT
a Municipal Corporation,) OF THE STATE OF WASHINGTON
)
Defendant/Appellant.)
_____)

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

On the 4th day of April, 2014, I both e-mailed and deposited in the mails of the United States Postal Service in a properly stamped and addressed envelope containing a copy of the **SUPPLEMENTAL BRIEF OF DEFENDANT/PETITIONER CITY OF YAKIMA** to the following:

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DATED this 4th day of April, 2014, at Yakima, Washington.



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From: Peter M. Ritchie [mailto:petermritchie@gmail.com]
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Please find the attached Supplemental Brief of Defendant/Petitioner City of Yakima 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.

The attached Supplemental Brief of Defendant/Petitioner City of Yakima is filed in Henne v. City of Yakima, Supreme Court Case No. 89674-7, by the undersigned.

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