IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TERRY A. TOWNSEND, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION; and KERMIT B. WOODEN, Respondents.	No. 42321-9-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Terry A. Townsend appeals the denial of her motion to strike counterclaims filed in her lawsuit against the Washington State Department of Transportation (WSDOT) and Kermit B. Wooden. Townsend contends that the trial court erred in ruling that she was not entitled to dismissal of the counterclaims under the Washington anti-"Strategic Litigation Against Public Participation" (SLAPP) statutes, RCW 4.24.510 et seq. We reverse, holding that the trial court erred in ruling that Townsend was not entitled to dismissal of the counterclaims as a matter of law.

Facts

Townsend has been an employee of WSDOT since 2006. In 2008, when she worked as a Human Resources Consultant, she sent an e-mail containing confidential information to Kathy

McGuire, a former WSDOT employee who was the plaintiff in a federal civil lawsuit against the agency and Wooden, the Director of Human Resources at the time.

Wooden learned about Townsend's e-mail in October 2009 due to his involvement in McGuire's litigation. During a subsequent investigation, Townsend admitted sending the e-mail to McGuire for "nonbusiness" purposes. Wooden reassigned her to another position until the investigation was complete and ultimately imposed a three-month reduction in her salary as a disciplinary sanction.

Townsend appealed the pay cut to the Personnel Resources Board, which upheld the sanction. Six months later, Townsend sued Wooden and WSDOT. She alleged that Wooden had learned in October 2009 about her e-mail to McGuire and about an e-mail she sent to WSDOT's Office of Equal Opportunity in which she asserted that WSDOT had discriminated against her in violation of federal law. She added that beginning in November 2009, Wooden and WSDOT retaliated against her for assisting McGuire and for opposing discriminatory conduct when they reassigned and disciplined her and cut her pay. She alleged that further retaliation occurred when Wooden and WSDOT made threatening and/or derogatory comments directed to or about her as well as gestures threatening her continued employment. She added that Wooden and WSDOT alienated her from coworkers, removed her previous work privileges, increased her undesirable duties, and proposed to remove her from her position into one with lesser duties, pay, status, and security. According to Townsend, this conduct violated both federal and state discrimination law and constituted intentional and/or negligent infliction of emotional distress.

Wooden answered Townsend's complaint and filed two counterclaims for invasion of privacy/false light and defamation. He based these counterclaims on the following allegations:

> 5.2 The Plaintiff, TERRY A. TOWNSEND, intentionally invaded the right of privacy of the Defendant, KERMIT WOODEN, when she falsely claimed that he had engaged in discrimination or retaliation including gender-based harassment, and/or engendering a hostile working environment for the Plaintiff, causing him mental suffering, shame and humiliation.
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> 5.3 By virtue of her action and/or conduct the Plaintiff unreasonably intruded into the private affairs of the Defendant KERMIT WOODEN through unwanted publication of the false allegations she made to his employer and administrators at the Defendant DOT. This conduct held him in a false light before his supervisors and peers at the agency.
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> 5.4 The intentional actions of the Plaintiff caused damage to the Defendant, KERMIT WOODEN in an amount to be proved at trial.
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> . . . .
>
> 6.2 The Plaintiff, Terry Townsend, intentionally published and/or disseminated communications to the administrative officers of the Defendant DOT false allegations concerning his conduct and actions in regard to the Plaintiff without consent of the Defendant KERMIT WOODEN or privilege;
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> 6.3 The Plaintiff intentionally published and/or disseminated false allegations that were designed to injur[e] or destroy the reputation and career of the Defendant, KERMIT WOODEN;
>
> 6.4 The Plaintiff intentionally published and/or disseminated false allegations with actual knowledge that Defendant had not engaged in gender-based discrimination, harassment or retaliation or did so with reckless disregard of the truth.
>
> 6.5 The Plaintiff intentionally or recklessly caused damage to the Defendant and his reputation by virtue of her actions and conduct, in an amount to be proved at trial.

Clerk's Papers (CP) at 10-11.

In response, Townsend filed a motion to strike Wooden's counterclaims pursuant to RCW 4.24.525, one of the anti-SLAPP statutes. Following a hearing, the trial court denied her motion to strike. The trial court reasoned that when private relief is sought, the complaining party ceases to be among the class of persons the anti-SLAPP legislation is designed to protect, relying on *Saldivar v. Momah*, 145 Wn. App. 365, 186 P.3d 1117 (2008), *review denied*, 165 Wn.2d 1049 (2009).

Townsend now appeals the order denying her motion to strike Wooden's counterclaims.

Discussion

Counterclaims and Anti-SLAPP Immunity

At issue is whether the trial court erred in holding that Townsend is not protected by Washington's anti-SLAPP statutes because she is a plaintiff in a lawsuit seeking personal relief. This is an issue of statutory interpretation that we review de novo. *State v. Williams*, 158 Wn.2d 904, 908, 148 P.3d 993 (2006).

The Washington legislature has observed that strategic lawsuits against public participation (SLAPP suits) are "'filed against individuals or organizations on a substantive issue of some public interest or social significance,'" and "'are designed to intimidate the exercise of First Amendment rights.'" *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1109 (W.D. Wash. 2010) (quoting Laws of 2002, ch. 232, § 1); *see also Segaline v. Dep't of Labor & Indus.*, 169 Wn.2d 467, 480, 238 P.3d 1107 (2010) (Madsen, C.J., concurring). As first enacted, the Washington anti-SLAPP law provided that "[a] person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . 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." RCW 4.24.510; *Bailey v. State*, 147 Wn. App. 251, 261, 191 P.3d 1285 (2008), *review denied*, 166 Wn.2d 1004 (2009). This initial anti-SLAPP statute, RCW 4.24.510, was intended to encourage the reporting of potential wrongdoing to governmental entities by protecting reporting parties from the threat of retaliatory lawsuits. *Aronson*, 738 F. Supp. 2d at 1109 (citing *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 366, 85 P.3d 926 (2004)); *see also Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 167, 225 P.3d 339 (2010) (fact that district officials "broadcast" false statements

to numerous individuals deprived district of immunity under RCW 4.24.510). In 2002, the legislature amended RCW 4.24.510 to provide that a person who prevails on the anti-SLAPP defense is entitled to statutory damages of $10,000 in addition to attorney fees and costs. *Segaline*, 169 Wn.2d at 480-81 (Madsen, C.J., concurring). Although good faith is not an element of the defense, courts may deny statutory damages if the complaint or information was communicated in bad faith. *Segaline*, 169 Wn.2d at 480 (Madsen, C.J., concurring) (citing RCW 4.24.510).

In 2010, the legislature enacted another anti-SLAPP statute that broadened the scope of protected communication and created a procedural device to quickly curtail any litigation found to be targeted at persons lawfully communicating on matters of public or governmental concern. *Castello v. City of Seattle*, 2010 WL 4857022, at *3 (W.D. Wash.).[1] RCW 4.24.525 allows an individual to bring a "special motion to strike any claim that is based on an action involving public participation and petition." RCW 4.24.525(4)(a). A "claim" includes "any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief." RCW 4.24.525(1)(a); *see also* Laws of 2002, ch. 232, § 1 (legislative note to RCW 4.24.510 identifies counterclaim as type of SLAPP suit).

A moving party who brings a special motion to strike has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. RCW 4.24.525(4)(b). If the moving party meets that burden, the responding party must establish by clear and convincing evidence a probability of prevailing on the claim. RCW 4.24.525(4)(b). If the responding party meets this burden, the trial court must deny the motion to

[1] We may cite this unpublished opinion as authority because *Fed. R. App. P.* 32.1(a)(i)-(ii) permits citation to unpublished federal opinions issued on or after January 1, 2007. GR 14.1(b).

strike. RCW 4.24.525(4)(b). In making this determination, the court considers pleadings as well as supporting and opposing affidavits stating the facts on which the liability or defense is based. RCW 4.24.525(4)(c). A moving party who prevails is entitled to costs, attorney fees, and the $10,000 penalty referenced in RCW 4.24.510. RCW 4.24.525(6)(a).

Here, the trial court never considered these shifting burdens or the facts supporting Wooden's counterclaims because it held that Townsend was not entitled to anti-SLAPP immunity as a matter of law. In so holding, the court relied on *Saldivar*, which we decided before the legislature enacted RCW 4.24.525.

Perla and Albert Saldivar accused Perla Saldivar's physician, Dr. Dennis Momah, of sexually assaulting Perla Saldivar during office visits. *Saldivar*, 145 Wn. App. at 373. After complaining about Momah to the Medical Quality Assurance Commission (MQAC) and filing a formal complaint with the police department, the Saldivars sued him for negligence, lack of informed consent, breach of fiduciary duty, violation of the Consumer Protection Act, ch. 19.86 RCW, and outrage. *Saldivar*, 145 Wn. App. at 373-74. Momah counterclaimed, alleging intentional infliction of emotional distress (outrage), negligent infliction of emotional distress, and abuse of process. *Saldivar*, 145 Wn. App. at 375. He contended that the Saldivars' complaint in the lawsuit, as well as their complaints to MQAC and the police, were without good cause and for the motive of obtaining money under false pretenses. *Saldivar*, 145 Wn. App. at 375.

After the trial court entered judgment in favor of Momah, the Saldivars appealed and argued that because his counterclaims arose from their privileged complaints to MQAC, RCW 4.24.510 rendered them immune from liability. *Saldivar*, 145 Wn. App. at 386. We distinguished between the Saldivars' complaints to MQAC and the police and their lawsuit:

> While RCW 4.24.510 protects the Saldivars from liability arising from actions taken by MQAC or police in response to their complaints, it is not applicable to private lawsuits for private relief; the Saldivars are not immune from liability for that portion of the judgment related to the filing of the lawsuit.

Saldivar, 145 Wn. App. at 386.

We reasoned further that the purpose of RCW 4.24.510 is to help protect people who make complaints to the government from civil suits regarding those complaints. *Saldivar*, 145 Wn. App. at 387. More specifically, anti-SLAPP immunity is with respect to "'communications to a public officer who is authorized to act on the communication.'" *Saldivar*, 145 Wn. App. at 387 (quoting *Skimming v. Boxer*, 119 Wn. App. 748, 758, 82 P.3d 707, *review denied*, 152 Wn.2d 1016 (2004)). The filing of a lawsuit does not constitute protected communication under the anti-SLAPP statute because "[a] plaintiff who brings a private lawsuit for private relief is not seeking official governmental action, but rather redress from the court." *Saldivar*, 145 Wn. App. at 387.

Townsend questions the trial court's reliance on *Saldivar* to deny her motion to strike. She points out first that Wooden's counterclaims are based on her communications to his employer and administrators at WSDOT and not on the filing of her lawsuit. Townsend argues that under the reasoning in *Saldivar*, she is entitled to anti-SLAPP immunity because Wooden's counterclaims focus on her communications about him to a governmental agency and, more specifically, to public officers authorized to act on her communication. As stated, the purpose of RCW 4.24.510 is to help protect people who make complaints to the government from civil suits regarding those complaints. *Saldivar*, 145 Wn. App. at 387; *see also Connick v. Myers*, 461 U.S. 138, 144-45, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (public employees do not lose their rights

as citizens to participate in public affairs by virtue of their employment).

RCW 4.24.525 reinforces that protection, and a federal district court recently applied the statute in granting civil immunity to employees of the Seattle Fire Department against a former co-worker's defamation and false light claims based on their internal complaints about him to officers of the fire department. *Castello*, 2010 WL 4857022, at *1-2; *see also Aronson*, 738 F. Supp. 2d at 1114 (plaintiff's claims for invasion of privacy and misappropriation of likeness were subject to dismissal under RCW 4.24.525). For the purposes of Wooden's counterclaims, Townsend is a defendant seeking the dismissal of defamation and false light/invasion of privacy claims based on her internal complaints. *See Lietz v. Hansen Law Offices, PSC*, 166 Wn. App. 571, 588 n.25, 271 P.3d 899 (2012) (plaintiff in underlying lawsuit was defendant in counterclaims). As Townsend points out, the legislature's inclusion of counterclaims as a type of SLAPP suit subject to dismissal shows its intent to allow plaintiffs in a lawsuit seeking private relief to have civil immunity from counterclaims based on protected communications.

The reason for anti-SLAPP immunity, as well as the accompanying attorney fees, costs, and statutory damages, is to remove the threat and burden of civil litigation that would otherwise deter the speaker from communicating. *Segaline*, 169 Wn.2d at 482 (Madsen, C.J., concurring). Washington's anti-SLAPP law expressly refers to counterclaims as one such threat. Under both the reasoning in *Saldivar* and the language in RCW 4.24.525, we hold that the trial court erred in ruling that Townsend was not entitled to anti-SLAPP immunity as a matter of law because of her status as a plaintiff in a civil lawsuit.

As stated, Townsend's ability to seek immunity from Wooden's counterclaims under the anti-SLAPP statutes was the only issue the trial court decided. Consequently, it is the only issue

before us today. Although the parties provide briefing on the burden-shifting test that must precede a decision on a motion to strike under RCW 4.24.525, the trial court did not address that test and determine whether Wooden's counterclaims survive or whether Townsend is entitled to their dismissal. Because this determination involves both factual and legal questions, we reverse and remand so that the trial court may evaluate the merits of Townsend's motion to strike under RCW 4.24.525(4). Because Townsend has not yet prevailed on the merits, we deny her request for attorney fees and costs at this time. RCW 4.24.510, .525(6)(a); RAP 18.1.

Reversed and remanded.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

PENOYAR, J.

JOHANSON, A.C.J.