No. 81931-9

MADSEN, C.J. (concurring)—I concur in the conclusion reached by the lead opinion that the Washington State Department of Labor and Industries is not a "person" within the meaning of RCW 4.24.510's immunity from civil liability. However, I reach this conclusion for different reasons than those set forth in the lead opinion.

Chapter 4.24 RCW, when first enacted, "addressed the SLAPP[1] indirectly." Michael E. Johnston, *A Better Slapp Trap: Washington State's Enhanced Statutory Protection for Targets of "Strategic Lawsuits Against Public Participation*, 38 Gonz. L. Rev. 263, 281 (2002-03) (hereafter Johnston, 38 Gonzaga L. Rev.). The legislature recognized:

> Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

RCW 4.24.500. Former RCW 4.24.510 (1989), "[t]he operative provision of the

[1] SLAPP is an acronym for "strategic lawsuits against public participation."

legislative package," provided that "'a person who communicate[d] in good faith with a government body [was] immune from liability stemming from that communication.'" Johnston, 38 Gonzaga L. Rev. at 281 (quoting former RCW 4.24.510). The individual could recover costs and attorney fees expended in defense against a SLAPP filer. Former RCW 4.24.510.

"As originally enacted, sections 4.24.500-.520 did not afford a SLAPP target with a particularly efficient remedy. While the target could ordinarily expect to prevail, it had to endure considerable litigation before it could do so." Johnston, 38 Gonzaga L. Rev. at 288. The legislature accordingly amended RCW 4.24.510, stating:

> Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.
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> Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. This bill amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making.

Laws of 2002, ch. 232, § 1.

Thus, for the first time, the legislature expressly recognized the constitutional threat that SLAPP litigation poses. In amending RCW 4.24.510, the legislature provided

that "good faith" was no longer an element of the SLAPP defense and added a provision allowing statutory damages of $10,000 in addition to attorney fees and costs for defending. However, "[s]tatutory damages may be denied if the court finds that the complaint or information was communicated in bad faith." RCW 4.24.510.[2]

Under RCW 4.24.510, "the potential SLAPP target enjoys a near absolute statutory immunity." Johnston, 38 Gonzaga L. Rev. at 286. The difference in chapter 4.24 RCW as originally enacted and as amended in 2002 has been described as converting RCW 4.24.510 "from a whistleblower statute to a true anti-SLAPP statute." Johnston, 38 Gonzaga L. Rev. at 286.

The fact that RCW 4.24.500 remains as it was originally enacted while RCW 4.24.510 was expressly amended to adequately address SLAPP suits and protect the right to petition government indicates to me that the statutes provide broader protection than would be true if these statutes addressed only citizens' First Amendment rights to petition government —at the least, the "whistleblowing" nature of RCW 4.24.500 remains as

[2] RCW 4.24.510 provides:

> 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. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

well. Indeed, the plain language of the statutes shows that the term "communications" is broadly intended. RCW 4.24.500 refers to communication of "information . . . concerning potential wrongdoing" in the context of law enforcement and efficient government operation. RCW 4.24.510 refers to immunity for communications "regarding any matter reasonably of concern to" a government agency. These terms, by their plain language, are *not limited to* the "communications made to influence a government action or outcome" (Laws of 2002, ch. 232, § 1) that are so often the subject of SLAPP suits, although they certainly encompass such communications.

Given the language and history of the pertinent statutes, I am not convinced that whether a "person" enjoys free speech rights in the sense of the right to petition the government is dispositive of the question whether a government agency is a "person" qualifying for RCW 4.24.510's immunity from civil liability. Broader communications are encompassed by the statute, and it cannot be doubted that a government agency is entitled to communicate in numerous ways and on innumerable topics.

I nevertheless agree with the majority's result on this question because the statutes' purposes show that government agencies are not "persons" within the contemplation of RCW 4.24.510. The reason for the immunity, as well as for the attorney fees, costs, and statutory damages, is to remove the threat and burden of civil litigation that would otherwise deter the speaker from communicating. RCW 4.24.500, .510; *see* Laws of 2002, ch. 232, § 1 (referring to the fact that SLAPP suits are designed to intimidate the exercise of rights under the First Amendment and article I, section 5 of

the Washington State Constitution). This intimidation factor does not, in my view, affect government agencies in the way that it does private individuals and organizations, and therefore this reason for the statutes does not apply to government entities as it does to individual persons or private organizations. There is a distinction between a privately funded environmental group that seeks to preserve a particular habitat and, for example, an ongoing government agency that reports unlawful conduct or communicates other information to another government agency. Indeed, it is a common requirement of government agencies that they communicate with other government agencies on a variety of topics, with various agency assessments and evaluations being part and parcel of the agency's required communications.

Moreover, insofar as RCW 4.24.510 does encompass petitioning the government to influence decision-making and has as an express purpose the protection of this right, it is similar to the Massachusetts SLAPP law that, the Massachusetts Supreme Court said, is limited to "those defendants who petition the government on their own behalf. In other words, the statutes is designed to protect overtures to the government by parties petitioning in their status as citizens," and therefore it did not apply to the communications of one hired by a government agency made within the context of that employment. *Kobrin v. Gastfriend*, 443 Mass. 327, 332, 821 N.E.2d 60 (2005) (the Massachusetts statute explicitly states it applies with respect to suits against a party based on the party's exercise of the right to petition, while this purpose is not explicit in RCW 4.24.510 but rather is found in the purpose clause of the amending legislation).

Finally, the purpose section of the amending legislation expressly refers to "individuals" and "organizations," but it does not refer to governmental entities. If the legislature had intended that governmental agencies be included within the protection of the immunity, it could easily have said so.

I agree that the government is not a person entitled to immunity under RCW 4.24.510, for the reasons stated in this opinion.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: