No. 81931-9

C. JOHNSON, J. (concurring/dissenting)—The lead opinion correctly holds that the 42 U.S.C. § 1983 claim is time barred and the amendment to the complaint does not relate back. The lead opinion, however, misreads the statute and the cases analyzing it. After examining the legislature's stated purpose for RCW 4.24.510, the lead opinion concludes that the definition of "person" includes only individuals and citizens. This interpretation is not supported by the language of the statute or by its expressed purposes and is contrary to the cases that have examined it.

The legislature's 2002 amendment to RCW 4.24.510 expressly expanded the scope of "person" beyond individuals and citizens. The amendment added an intent section to the statute defining "Strategic Lawsuits Against Public Participation" (SLAPP) as suits involving:

> 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. . . .

Laws of 2002, ch. 232, § 1 (emphasis added). Narrowly construing the statute to hold that it applies only to individuals and citizens is contrary to this unambiguous

legislative intent to apply the statute to "organizations." The lead opinion, however, limits the scope of RCW 4.24.510 based on the words: "SLAPP suits are designed to intimidate the exercise of First Amendment rights." *See* lead opinion at 6 ("[t]he purpose of the statute is to protect the exercise of individuals' First Amendment Rights"). The lead opinion latches onto this phrase the same way a drowning sailor latches onto even the smallest piece of flotsam – desperately.

But these words should not control the analysis. A sentence describing the design of SLAPP suits does not limit the protections provided by the statute, especially where the statute expressly states that its provisions apply to organizations in the antecedent sentence. The plain wording of the statute's intent is clear: the protections of RCW 4.24.510 apply equally to both individuals *and* organizations. There is no policy reason – let alone judicial precedent – supporting the denial of these protections to a governmental entity, where they apply to organizations as we concluded in *Right-Price Recreation, L.L.C. v. Connells Prairie Community Council*, 146 Wn.2d 370, 46 P.3d 789 (2002).

In *Right-Price*, we rejected the narrowly limited interpretation of "person" adopted by the lead opinion here. The petitioners in *Right-Price* were "two nonprofit *corporations*," Connells Prairie Community Council and Pierce County Rural Citizens Association, as well as officers and spouses from both corporations.

146 Wn.2d at 374 (emphasis added). Although whether the corporations were "persons" under RCW 4.24.510 was not at issue in the case, this court ultimately held, among other things, that the statute applied and provided the corporations with immunity. The lead opinion fails to explain why we must overrule and abandon this approach.

The lead opinion ignores the fact that adopting its narrow definition of "person" would require overruling the only other case that has considered whether the definition of "person" from RCW 1.16.080 applies to RCW 4.24.510. *See Gontmakher v. City of Bellevue*, 120 Wn. App 365, 85 P.3d 926 (2004). In *Gontmakher*, the Court of Appeals conducted an analysis similar to that in the present case and concluded that the city of Bellevue *is* a "person" under RCW 1.16.080 and that this definition applied with equal weight to RCW 4.24.510. 120 Wn. App. at 371. The Court of Appeals reasoning in *Gontmakher* is persuasive:

> [T]here is no compelling policy reason to restrict the application of RCW 4.24.510 to nongovernmental entities. The Gontmakhers argue that the absolute immunity afforded under the statute provides a disincentive for governmental actors to respect its citizens' rights. This same argument, however, can also be made about private citizens: giving private citizens absolute immunity from any action stemming from communications to governmental agencies serves as a disincentive for citizens to ensure that their comments are made in good faith. The legislature, however, evidenced that this was not its concern by specifically broadening the scope of the immunity to remove the good faith requirement. Additionally, it is important to note that RCW 4.24.510 protects only communications made to

> governmental agencies that are reasonably of concern to that agency. RCW 4.24.510 does not provide immunity for any other acts. Because the scope of the immunity is limited, allowing governmental immunity here is not against public policy.

120 Wn. App. at 371-72. The lead opinion would overrule *Gontmakher* because a city does not have free speech rights protected by the First Amendment. The legislature did not intend for us to construe RCW 4.24.510 so narrowly.

Division Three of the Court of Appeals has paradoxically held that, while the definition of "person" in RCW 1.16.080 may expressly include governmental entities like the Department here, the definition of "person" in RCW 4.24.510 may not. *Compare State v. Jeffries*, 42 Wn. App. 142, 145, 709 P.2d 819 (1985) ("person" may include governmental entities under RCW 1.16.080) *with Skimming v. Boxer*, 119 Wn. App. 748, 758, 82 P.3d 707 (2004) ("person" does not include governmental entities under RCW 4.24.510 citing *Right-Price*, 146 Wn.2d at 382). But *Skimming* based this holding on *Right-Price*, even though *Right-Price* did not limit RCW 4.24.510 to nongovernmental entities. Accordingly, there is no judicial precedent to support limiting RCW 4.24.510 to nongovernmental entities.

There are no cases supporting the lead opinion's new approach to RCW 4.24.510. Rather, the lead opinion bases its conclusion to remand this case on its misplaced interpretation of the statute's intent statement. But because RCW

4.24.510, interpreted correctly, provides immunity to the Department, the trial court's dismissal of Segaline's claims was proper. Accordingly, I respectfully dissent to the lead opinion's construction of the statute and decision to remand.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:

Justice Susan Owens

Justice Mary E. Fairhurst

Justice Gerry L. Alexander