

No. 72595-5-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

LEENDERS DRYWALL, INC. and DAVID J. LEENDERS, individually
and on behalf of his marital community,

Plaintiffs/Respondents,

v.

ADRIAN AYALA, et. al.

Defendants/Appellants.

BRIEF OF RESPONDENTS

FINKELSTEIN LAW OFFICE, PLLC
Fred S. Finkelstein, WSBA No. 14340
2208 NW Market Street, Suite 407
Seattle, WA 98107
(206) 587-2332

Attorney for Respondents

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 MAR 17 PM 2:49

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 2

 A. PARTIES 2

 B. The Union, Which Effectively Controls Claimants,
 Persuaded Them To File Liens That Are False And/Or
 Clearly Excessive 3

 C. Claimants’ Lien Against The Bond On Aurora Has
 Expired 7

 D. Claimants’ Lien Against The Bond On Jefferson Has
 Expired 9

 E. Claimants’ Liens Are False And/Or Clearly Excessive . 10

 1. Claimants’ Liens Do Not Reflect Literally
 Hundreds Of Payments That They Received
 From Leenders Drywall 10

 2. Claimants Allege They Worked Thousands
 Of Hours On Projects That Leenders Drywall
 Had Not Yet Started 12

 3. Claimants Puff Up The Amounts Of Their
 Liens By Falsely Asserting They Rarely - If
 Ever - Worked On Two Large Projects 14

 F. Claimants’ False And/Or Clearly Excessive Liens
 Have Damaged Plaintiffs 15

III. ARGUMENT 17

 A. Claimants’ Arguments Are Based On A Fundamental
 Misunderstanding Of Public Works Liens 18

B.	Lien Claims Asserting That Moneys Are Owed Are Not Within The “Heartland” Of First Amendment Activities	20
C.	Plaintiffs Are Not Attempting To “Thwart” Claimants	25
D.	Plaintiffs’ Claims Are Amply Supported By Washington Law	25
E.	Claimants Are Not Immune Under The Anti-SLAPP Statute	30
F.	The Court Should Award Plaintiffs Their Attorney’s Fees And \$10,000	31
IV.	CONCLUSION	32

STATEMENT OF AUTHORITIES

CASES

Ashburn v. Safeco Insurance Co. of America,
42 Wn. App. 692, 713 P.2d 742 (1986) 26

Bevan v. Meyers,
183 Wn. App. 177, 334 P.3d 39 (2014) ... 22

Caruso v. Local Union No. 690 of International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and Helpers of America,
33 Wn. App. 201, 653 P.2d 638 (1982) 30

Dillon v. Seattle Deposition Reporters, LLC,
179 Wn. App. 41, 316 P.3d 1119 (2014) 21, 23, 31

Fielder v. Sterling Park Homeowners Assoc.,
914 F.Supp.2d 1222 (WD Wash. 2012) 21, 31

Henne v. City of Yakima,
___ Wn.2d ___, 341 P.3d 284 (2015) 21, 22, 23, 31

Puget Sound Plywood, Inc. v. Mester,
86 Wn.2d 135, 542 P.2d 756 (1975) 26, 27

Robinson v. Brooks,
31 Wn. 60, 71 P. 721 (1903) 27

Saldivar v. Momah,
145 Wn. App. 365, 186 P.3d 1117 (2008) 23, 24

Sears v. International Brotherhood of Teamsters, Chauffeurs,
Stablemen and Helpers of America, Local No. 524,
8 Wn.2d 447, 112 P.2d 850 (1941) 29, 30

Spratt v. Toft,
180 Wn. App. 620, 324 P.3d 707 (2014) 17, 30, 31

Yakima Asphalt Paving Co. v. Washington State Department of Transportation, 45 Wn. App. 663, 726 P.2d 1021 (1986)	26
---	----

STATUTES

40 USC 270b	5
RCW 4.24.525	1, 17, 20, 23, 24, 25, 28, 31, 32
RCW 39.08.010	7, 8, 9, 10, 18
RCW 60.04	18
RCW 60.04.091	7, 9
RCW 60.04.221	27, 28, 29
RCW 60.28.011	8, 10, 18

TREATISES

“The Construction Lien in Washington: A Legal Analysis for the Construction Industry,” Stoel Rives, LLP (2014)	8, 9, 19
Wash. Prac. & Proc., Tort Law & Practice, Vol 16A, Sec. 22	30

I. INTRODUCTION

Defendants, with the help of the International Union of Painters and Allied Trades, filed liens on four projects, claiming they are owed more than \$800,000 in wages. Defendants have done virtually nothing to pursue payment of these grossly excessive liens because the goal of the Union - which controls Defendants - is to “ruin” Plaintiffs, not help Defendants recover any moneys they may be owed.

The Union’s strategy has largely succeeded because, in response to the liens, general contractors on the four projects withheld more than \$600,000 from Leenders Drywall. The loss of so much money has crippled Leenders Drywall, forcing it to turn down job offers and essentially putting it out of business. Plaintiffs filed suit to (1) have two of the liens released - these liens expired because Defendants failed to file suit in a timely manner, (2) have all four liens released because they are false and/or clearly excessive, and (3) recover damages for the harm they suffered as a result of the improper liens.

To delay Plaintiffs from proceeding with their claims, Defendants moved to dismiss under RCW 4.24.525, Washington’s prohibition against a “Strategic Lawsuit Against Public Participation.” Judge Rogoff properly denied the motion, and this Court should affirm.

II. STATEMENT OF THE CASE

No Defendant submitted a declaration in support of the facts alleged by Defendants; rather, Defendants' "facts" are based solely on declarations from their counsel [CP 28, CP 107], who have no personal knowledge of many of these facts. In contrast, the facts alleged by Plaintiffs are based primarily on the personal knowledge of David Leenders. CP 141, CP 121 - 129. These facts are set forth below.

A. Parties

1. Leenders Drywall is a small drywall subcontractor that has been registered as a contractor since 1991. David Leenders is the owner of Leenders Drywall. Leenders Drywall treated its employees well, paying them wages when there was no work and loaning them money without interest when they were short of funds. As a result, employees worked for Leenders Drywall for many years and invited David Leenders to family celebrations, such as the baptisms of their children. CP 122.

2. Fourteen of the fifteen defendants - Adrian Ayala, Christian Barrueta, Joaquin Cadena, Leonel Castaneda, Fidel Castro, Abraham Jiminez, Gabriel Larios, Rafael Larios, Cruz Laureano, Gonzalo Maciel, Salvador Maciel, Fredy Orozco, Angel Oytuz, and Arturo Solis (together, "Claimants") - were employed by Leenders Drywall. CP 122.

3. The fifteenth defendant, Juan Martinez (“Martinez”), filed a lien asserting he is owed wages for work performed on one project. CP 151. This claim is false because Leenders Drywall never employed Martinez; in fact, Plaintiffs do not even know who Martinez is. CP 122.

B. The Union, Which Effectively Controls Claimants, Persuaded Them To File Liens That Are False And/Or Clearly Excessive

4. The International Union of Painters and Allied Trades, District Council No. 5 (the “Union”) plays a critical role in this case.

5. For years, the Union tried to convince Leenders Drywall to become a union shop. When Leenders Drywall rebuffed these efforts, the Union angrily vowed to David Leenders that it would “get him.” CP 122.

6. Late in 2012, the Union advised David Leenders that some employees claimed they were owed wages on four projects. The Union specifically told David Leenders that these wage claims would be used to “ruin” Plaintiffs and that David Leenders would “lose everything but the shirt on his back.” CP 122 - 123.

7. The Union effectively controls Claimants through an assignment of claims¹ and/or the influence it exercises over Claimants.

¹ For instance, the private liens that Claimants wrongfully recorded against the Aurora and Jefferson Projects [see Paragraphs 12 and 17, infra], state “The International Union of Painters and Allied Trades, District Council No. 5 is the assignee of this claim.” CP 207, 224.

CP 123. In order to “ruin” Plaintiffs, the Union persuaded Claimants - through misleading promises - to file false and/or clearly excessive liens against four prevailing wage projects [**CP 123**]:

- a. On December 5, 2012, Claimants filed a lien for \$143,051.90 against the Newcastle Library Project (the “Newcastle Project”) [**CP 145**];
- b. On December 6, 2012, Claimants filed a lien for \$228,634.20 against the Aurora Supportive Housing Project (the “Aurora Project”) [**CP 147**];
- c. On December 19, 2012, Claimants filed a lien for \$157,921.90 against the 12th and East Jefferson Workforce Housing Project (the “Jefferson Project”) [**CP 149**]; and
- d. On January 10, 2013, Claimants filed a lien for \$289,520.43 against the H2O Apartments Project (the “H2O Project”) [**CP 151**].

Claimants’ liens against the Newcastle, Aurora, Jefferson and H2O Projects (together, the “Four Projects”) total \$819,128.43. As set forth below, all four liens are false and/or clearly excessive.²

² For instance, the United States Department of Labor investigated the H2O Project and found that Claimants were owed only about twenty percent of the wages they alleged were owed. **CP 311, 313 - 314.**

8. In response to the liens filed by Claimants, general contractors on the Four Projects withheld more than \$600,000 from Leenders Drywall:

- a. On Newcastle, approximately \$336,000 was withheld;
- b. On Aurora, approximately \$203,000 was withheld;
- c. On H2O, approximately \$34,000 was withheld; and
- d. On Jefferson, approximately \$30,000 was withheld.

CP 128. Leenders Drywall, a small subcontractor, has been crippled by the withholding of so much money. **CP 128.**

9. Counsel describes Claimants as “mostly Hispanic, non-native English speakers who worked as drywall installers for Leenders.”

Opening Brief, at 3. One would think that such persons would actively pursue recovery of the \$819,128.43 they say is owed. However, aside from filing suit on the H2O Project,³ Claimants did nothing to pursue recovery of the moneys allegedly owed: they renewed their liens every four months [**CP 33 - 106**] instead of filing suit and they rebuffed Plaintiffs’ offers to mediate a global settlement. **CP 123.** Claimants have

³ On federal public works projects, suit must be filed within one year from a lien claimant’s last day of work on the project. 40 USC 270b. Because Claimants believed - erroneously - that the H2O Project was a federal public works project [**CP 306, 310 - 312**], they filed suit to comply with this one year deadline. **CP 123.**

pursued such a strategy because the goal of the Union, which effectively controls Claimants, is to “ruin” Plaintiffs and leave David Leenders with nothing “but the shirt on his back,” not for Claimants to recover any moneys they may be owed. **CP 122 - 123.**

10. Claimants led the trial court to believe they also filed suit on their lien against the Newcastle Project.⁴ As a result, the trial court mistakenly stated “Defendants have filed lawsuits related to two of the projects.” **CP 289.** In fact, the second lawsuit, Leenders Drywall, Inc. v. Synergy Construction, Inc., King County Superior Court No. 14-2-02650-1 SEA was, as the caption indicates, commenced by Leenders Drywall. **CP 128, 307, 316 - 321.** In that case, in response to Leenders Drywall’s Complaint, Synergy Construction filed an Interpleader Complaint against the Claimants who had filed a lien against Newcastle. **CP 128, 308, 323 - 341.** Tellingly, even though Claimants allege they are owed \$143,051.90 on Newcastle [**CP 145**], they moved to dismiss the Interpleader Complaint [**CP 128, 308, 343 - 359**]. In other words, Claimants fought (and lost) to not have to pursue their claims on the Newcastle Project.

⁴ Claimants suggest the same thing here, stating “Lawsuits are pending related to the Notices of Claim filed for two projects. The Workers have yet to file lawsuits on the other two projects.” **Opening Brief, at 1.**

C. Claimants' Lien Against The Bond On Aurora Has Expired

11. The Aurora Project, located at 10507 Aurora Avenue North in Seattle, is owned by DESC Aurora Supportive Housing LP ("DESC"). **CP 126, 202.** Aurora was not a public works project because, among other reasons, the property was privately owned and developed. **CP 126.** On December 6, 2012, Claimants erroneously filed a public works lien against the privately owned Aurora Project. **CP 147.**

12. On February 6, 2013, belatedly realizing that Aurora was a private project, Claimants recorded a private lien against the property. **CP 126, 204.** This lien was frivolous on its face because, contrary to RCW 60.04.091, it was recorded more than 90 days after any Claimants' last day of work on the project, which was September 15, 2012. **CP 205.** In late 2013, Claimants finally released this lien. **CP 126.**

13. The contract between DESC and the general contractor required the contractor to provide a bond to protect DESC from liens that might be filed against the project. **CP 126, 210, 212.** The contractor provided the bond through Safeco Insurance Company of America ("Safeco"). **CP 126, 214.** That the Safeco bond was provided pursuant to DESC's contract with the general contractor - and not under RCW 39.08.010 - is evidenced by the fact that the bond identifies the "Owner"

as “DESC Aurora Supportive Housing LP” [CP 214], not the State of Washington.⁵

14. Because the Safeco bond was provided pursuant to a contract and not under RCW 39.08.010, the limitations period in the bond applies. See Section III-D, infra. Paragraph 12 in the Safeco bond provides that a claimant must file suit against the bond within:

one year from the date (1) on which the Claimant sent a Claim to the Surety . . . or (2) on which the last labor or service was performed by anyone or the last materials or equipment were furnished by anyone under the Construction Contract, whichever of (1) or (2) first occurs [emphasis added]. CP 216.

15. Claimants filed their \$228,634.20 lien against Aurora on December 6, 2012. CP 147. Claimants never filed suit on this lien. CP 127. Because the one year period has elapsed, the claim against the bond has expired.⁶ CP 127. Plaintiffs’ first cause of action seeks an Order releasing Claimants’ lien against the Aurora Project [CP 8], as Claimants refuse to release the expired lien [CP 127].

⁵ Bonds provided under RCW 39.08.010 “must be . . . payable to the State of Washington.” The Construction Lien in Washington: A Legal Analysis for the Construction Industry, Chapter Eight, at 2, Stoel Rives, LLP (2014).

⁶ Claimants also liened the retainage that was allegedly withheld on the Aurora Project. However, because Aurora is not a public works project, statutory retainage was not withheld under RCW 60.28.011.

D. Claimants' Lien Against The Bond On Jefferson Has Expired

16. The Jefferson Project, located at 500 12th Avenue in Seattle, is owned by Jefferson and 12th, LLC. **CP 127, 220.** The Jefferson Project, like Aurora, was not a public works project because, among other reasons, the property was privately owned and developed. **CP 127.** On December 19, 2012, Claimants erroneously filed a public works lien against the privately owned Jefferson project. **CP 149.**

17. On February 6, 2013, Claimants belatedly realized that Jefferson was a private project and recorded a private lien against the property. **CP 127, 222.** This lien was frivolous on its face because, contrary to RCW 60.04.091, it was recorded more than 90 days after Claimants' last day of work on the project, which was August 11, 2012. **CP 224.** In late 2013, Claimants finally released this lien. **CP 127.**

18. The contract between Jefferson and 12th, LLC and the general contractor also required the contractor to provide a bond to protect the owner from liens. **CP 127, 228.** This bond, like the one on Aurora, was provided through Safeco. **CP 127, 230.** That the Safeco bond is not a statutory bond provided under RCW 39.08.010 is made clear by the fact that the bond identifies the "Owner" as "Jefferson and 12th LLC" [**CP 230**], not the State of Washington. See Footnote 5, infra.

19. Because the bond on Jefferson was provided pursuant to a contract and not under RCW 39.08.010, the limitations period in the bond controls. See Section III-D, infra. Paragraph 12 of the bond on Jefferson also provides that a claimant must file suit against the bond within:

one year from the date (1) on which the Claimant sent a Claim to the Surety . . . or (2) on which the last labor or service was performed by anyone or the last materials or equipment were furnished by anyone under the Construction Contract, whichever of (1) or (2) first occurs [emphasis added]. CP 232.

20. Claimants filed their \$157,921.90 lien against Jefferson on December 19, 2012. **CP 149**. Claimants never filed suit on this lien. **CP 128**. Therefore, the one year period has passed and Claimants' lien against the bond on Jefferson has expired.⁷ **CP 128**. Plaintiffs' second cause of action is to release Claimants' lien against the Jefferson Project [**CP 8**], as Claimants refuse to release the expired lien [**CP 128**].

E. Claimants' Liens Are False And/Or Clearly Excessive

1. Claimants' Liens Do Not Reflect Literally Hundreds Of Payments That They Received From Leenders Drywall

21. One reason the liens are false and/or clearly excessive is they do not reflect literally hundreds of payments that Claimants received

⁷ Claimants also liened the retainage that was allegedly withheld on Jefferson. However, because Jefferson was not a public works project, statutory retainage was not withheld under RCW 60.28.011.

from Leenders Drywall. In other words, the lien amounts are based on the false premise that Claimants were never paid for their work. **CP 124**. In response to Claimants' motion, Plaintiffs set forth three such examples.

22. In 2012, Leenders Drywall issued 27 checks to Adrian Ayala, totaling \$40,235.88. **CP 142, 154**. Ayala's liens against the Four Projects, which total \$131,754.48 [**CP 145, 147, 149, 151**], do not reflect this \$40,235.88. **CP 124**. This is one reason that Ayala's liens are clearly excessive. Furthermore, a drywaller alleging he earned \$131,754.48 in one year is, in and of itself, compelling evidence that his claims are grossly inflated, particularly when he was paid \$40,235.88.

23. In 2012, Leenders Drywall issued 16 checks to Cruz Laureano, totaling \$15,871.67. **CP 142, 156**. Laureano's liens against Jefferson [**CP 149**] and H2O [**CP 151**] do not reflect this \$15,871.67. **CP 124**. This is one reason, among many others, that Laureano's liens are false and/or clearly excessive.

24. In 2012, Leenders Drywall issued Angel Oytuz 12 checks, totaling \$16,151.04. **CP 142, 158**. Oytuz's liens against the Four Projects [**CP 145, 147, 149, 151**] do not reflect the \$16,151.04 that he was paid by Leenders Drywall. **CP 124**. This is one reason, among many others, that his liens are false and/or clearly excessive.

2. Claimants Allege They Worked Thousands Of Hours On Projects That Leenders Drywall Had Not Yet Started

25. A second reason the liens are false and/or clearly excessive is that Claimants allege they worked literally thousands of hours on projects before Leenders Drywall began work on those projects. In response to Claimants' motion, Plaintiffs set forth five of the many instances in which this occurred.

26. Leenders Drywall's first day of work on the Jefferson Project was February 22, 2012. **CP 124, 125**. Nevertheless, according to his calendars, Gonzalo Maciel worked 44 days, 10 hours per day on Jefferson prior to February 22: 26 days in January [**CP 160**] and 18 days in February [**CP 161**]. These 440 hours are false.

27. According to his calendars, Salvador Maciel worked 40 days, 10 hours per day on Jefferson before February 22: 25 days in January ("This month was framing 12 & Jefferso") [**CP 166**] and 15 days in February ("This month 12 and Jefferse") [**CP 167**]. These 400 hours are false because Leenders Drywall did not begin work on Jefferson until February 22 [**CP 124, 125**].

28. Leenders Drywall's first day of work on the Aurora Project was May 29, 2012. **CP 125**. Nevertheless, according to his calendars, Gonzalo Maciel worked at least 55 days, 10 hours per day on Aurora prior

to May 29: 27 days in March [CP 162], at least 25 days in April⁸ [CP 163], and at least 3 days in May [CP 164].⁹ These 550 hours are false.

29. According to his calendar for May, Salvador Maciel worked 23 days, 10 hours per day on Aurora before May 29 (“This month Aurora”). CP 168. Because Leenders Drywall did not begin work on Aurora until May 29 [CP 125], these 230 hours are false.

30. Leenders Drywall’s first day of work on the H2O Project was May 8, 2012. CP 125. According to his calendars, Fidel Castro worked at least 21 days, 10 hours per day on H2O prior to May 8: at least 16 days in April¹⁰ [CP 170] and 5 days in early May [CP 171]. These 210 hours are false.

⁸ Gonzalo Maciel’s April calendar has 4 days filled in after April 30. CP 163. These 40 hours may very well be included in his \$40,548.13 lien against the Aurora Project [CP 147]. Similarly, his February calendar [CP 161] has 3 days filled in after February 29 - these 30 hours may also be included in his lien.

⁹ Gonzalo Maciel’s calendar for May [CP 164] does not clearly indicate which projects he allegedly worked on. Therefore, he may very well allege that he worked even more days on Aurora before May 29, when work on that project began.

¹⁰ It is unclear from his April calendar [CP 170] if Castro alleges he worked on H2O on April 7, 14, 21 and/or 28. If he did, these hours should be added to the total he could not have worked on the H2O Project.

3. Claimants Puff Up The Amounts Of Their Liens By Falsely Asserting They Rarely - If Ever - Worked On Two Large Projects

31. In 2012, in addition to the Four Projects, Leenders Drywall worked on two projects known as Market Square (the “Shoreline Project”) and Aviara Apartments (the “Mercer Island Project”). Claimants worked numerous hours on Shoreline and Mercer Island, as they were both large projects. **CP 125.**

32. Claimants were entitled to lower wages on Shoreline and Mercer Island because they were not prevailing wage jobs. **CP 125.** Thus, Claimants have a clear incentive to allege they worked as few hours as possible on these two projects.

33. To puff up the amounts of their liens on the Four Projects, Claimants falsely assert they rarely - if ever - worked on Shoreline and Mercer Island. **CP 125.** In response to the anti-SLAPP motion, Plaintiffs set forth three of the many instances in which this occurred.

34. According to his calendars, Fidel Castro never worked on Shoreline in 2012. **CP 126, 173 - 176.** In fact, Castro worked 57 days on Shoreline: 16 in February [**CP 178**], 17 in March [**CP 179**], 14 in April [**CP 180**], and 10 in May [**CP 181**], reducing his lien claims by 570 hours.

35. According to his calendars, Gonzalo Maciel never worked

on Shoreline in 2012. CP 126, 160 - 164. In fact, he worked 41 ½ days on Shoreline: 11 in February [CP 183], 8 ½ in March [CP 184], 16 in April [CP 185], and 6 in May [CP 186], thereby reducing his lien claims by 415 hours.

36. According to his calendars, Arturo Solis never worked on Mercer Island. CP 126, 188 - 192. In fact, he worked 43 days on Mercer Island: 7 ½ in June [CP 194], 14 ½ in July [CP 195], 8 in August [CP 196], and 13 in September [CP 197]. Thus, Solis' lien claims are inflated by at least 430 hours.

37. Plaintiffs' third cause of action [CP 8 - 9] is for Claimants' liens to be released because they are made in bad faith and/or are wilfully excessive. See Section III-D, infra.

F. Claimants' False And/Or Clearly Excessive Liens Have Damaged Plaintiffs

38. As set forth in Paragraph 8, infra, general contractors withheld more than \$600,000 from Leenders Drywall as a result of Claimants' liens. Plaintiffs' fourth cause of action is that Claimants tortiously interfered with Leenders Drywall's contracts on the Four Projects by filing false and/or clearly excessive liens against those projects. CP 9.

39. The withholding of this \$600,000 crippled Leenders

Drywall and deprived it of working capital, thereby preventing it from working on other jobs. **CP 128.** For instance, in 2013 and 2014, general contractors asked Leenders Drywall to work on the following projects: Wellman & Zuck Construction on a La Quinta Inn project in Bellingham; Marpac Construction on the Harvard project in Seattle; and Compass Construction on the Nova Apartments project in Seattle. **CP 128.**

40. Leenders Drywall wanted to accept these offers because the jobs would have been profitable. However, due to the \$600,000 that was withheld on the Four Projects, Leenders Drywall had to turn down these jobs because it did not have sufficient working capital. **CP 128.** Plaintiffs' fifth cause of action is that Claimants tortiously interfered with Leenders Drywall's business opportunities and expectancies. **CP 9.**¹¹

41. Plaintiffs filed suit against Claimants on July 10, 2014. **CP 1.** Tellingly, Claimants did not respond by asserting claims against Plaintiffs; instead, they moved to dismiss under the anti-SLAPP statute.

42. Judge Rogoff heard Claimants' motion on September 19, 2014 and took the matter under advisement. On September 24, 2014,

¹¹ Plaintiffs also seek a declaratory judgment that Claimants' liens are invalid and an abuse of process. **CP 10.** Plaintiffs are dismissing without prejudice their claims for conspiracy and violation of the Consumer Protection Act. **CP 121.**

after careful consideration of the issues, Judge Rogoff issued a seven page decision [CP 289], denying the motion. He concluded:

[T]he law is clear. The act of filing a lien as a precursor to filing a lawsuit to settle a private dispute does not fall within the “heartland” of protected speech. It cannot form the basis for an Anti-SLAPP motion, and thus Defendants have failed to meet their burden of proof. **CP 295.**

Significantly, Claimants ignore Judge Rogoff’s detailed ruling.

III. ARGUMENT

RCW 4.25.525(4)(b) sets forth the two part test for deciding motions brought under the anti-SLAPP statute:

A moving party bringing a special motion to strike a claim under this subsection 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. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

Judge Rogoff denied Claimants’ motion to dismiss because he found that Claimants did not satisfy the first part of the test. **CP 295.** Because Judge Rogoff’s decision was proper, this Court should affirm.¹²

¹² Judge Rogoff did not address the second part of the test. **CP 295.** Therefore, in the unlikely event his ruling is reversed, the case should be remanded to Judge Rogoff so he can decide the second prong of the test. Spratt v. Toft, 180 Wn. App. 620, 633, 324 P.3d 707 (2014).

A. **Claimants' Arguments Are Based On A Fundamental Misunderstanding Of Public Works Liens**

Claimants assert the filing of their public works liens “constitutes the requisite public participation and petitioning under the anti-SLAPP statute.” **Opening Brief, at 7-8.** Claimants ignore there cannot be any “public participation and petitioning” on Aurora and Jefferson because they are not public works projects. See Paragraphs 11 and 16, infra.

Furthermore, Claimants’ arguments are based on a fundamental misunderstanding of liens against public works projects:

- Under RCW 60.04, et. seq., persons owed money for work performed on a private project record a lien with the Auditor’s Office where the property is located;
- On public works projects, where the owner is a public entity, liens cannot be recorded with the Auditor. Instead, under RCW 39.08.010 the general contractor posts a bond and under RCW 60.28.011 the public owner withholds five percent of moneys it pays to the general contractor. A claimant on a public works project can file a lien against this statutory bond and retainage;
- A lien on a public works project is not a claim against the public body: the public body has no role in a claim against

the bond and does nothing but hold the retainage until a court decides who is entitled to the money. In fact, the public body “is likely to tender the retainage fund to the court and ask to be dismissed.” The Construction Lien in Washington: A Legal Analysis for the Construction Industry, Chapter Eight, at 10, Stoel Rives, LLP (2014).

In oral argument before Judge Rogoff, Claimants asserted they “have asked this government agency to both withhold money and to assist them in acquiring the money that’s due to them under the law.” **RP at 12** [emphasis added]. Claimants make this same argument here:

By sending the Notices of Claim, the Workers were petitioning the Department of Housing and Urban Development, the Seattle Office of Housing, and the King County Library System to redress the theft of their wages by continuing to withhold the retainages related to each of the four projects in question.

Opening Brief, at 18. As set forth above, however, the public body does nothing to decide the merits of the liens.

Claimants also assert their liens are “a means of getting the public agency’s money.” **RP at 13.** This, too, is wrong: a lien against the bond is a claim against the surety who provided the bond, and a lien against the retainage is a claim against the funds the public body retained from the contractor; in short, the public body does not have any “skin in the game.”

Judge Rogoff was absolutely correct when he found that “by taking the lien, Defendants were not asking the agency or business who held the bond to DO anything” [CP 291] [caps in original]:

The Notice of Claim or Lien at issue in this case is NOT the same as a damages claim in a tort case where the party is asking the governmental agency to conduct an investigation and/or provide redress. Rather, the Notice of Claim here was simply a notice that Defendants intended to encumber the bond on a specific construction project. The limited nature of these Notices of Claim is made painfully clear upon reading them.

First, each of the Notices of Claim are addressed to at least six different entities - the bonding company, the entity who owns the construction property, and the various contractors who hold bonds on the projects. See Exhibits 1-4, Declaration of David Leenders. The Notice of Claim does not ask anyone to do anything. *Id.* It does not seek to authorize or request that the governmental agency investigate anyone. *Id.* It simply notifies those holding an interest in the bond on the project that they intend to try to collect unpaid wages from Leenders Drywall, Inc.

This Court is satisfied that, by taking the lien, Defendants were not asking the agency or business who held the bond to DO anything. They simply intended to notify that bondholding entity that they believed that their employer, who took out a bond on the project, owed them some money in a private dispute. CP 291 [emphasis added].

B. Lien Claims Asserting That Moneys Are Owed Are Not Within The “Heartland” Of First Amendment Activities

The purpose of RCW 4.24.525 is “to prevent frivolous SLAPP suits from deterring individuals and entities from exercising their

constitutional speech rights - that is, their communicative activity.”

Henne v. City of Yakima, ___ Wn.2d ___, 341 P.3d 284, 288 (2015)

[emphasis added]. A “defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant.” Dillon v. Seattle Deposition Reporters, LLC, 179 Wn. App. 41, 71, 316 P.3d 1119 (2014) [quotation omitted]. Rather:

it is the *principal thrust or gravamen* of the plaintiff’s cause of action that determines whether the anti-SLAPP statute applies and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute [Italics in original].

Id. at 72 [quotation omitted]. See also Fielder v. Sterling Park

Homeowners Assoc., 914 F.Supp.2d 1222, 1232 (WD Wash. 2012)

(“[C]ourts evaluating a special motion to strike . . . must carefully consider whether the moving party’s conduct falls within the “heartland” of First Amendment activities”) [quotation omitted] [emphasis added].

Plaintiffs’ claims against Claimants do not involve activities protected under the First Amendment, such as filing a complaint with a government agency or testifying at a public hearing. Rather, “the principal thrust or gravamen” of Plaintiffs’ claims is that Claimants refuse

to release two expired liens and that Claimants filed false and/or clearly excessive liens, all of which damaged Plaintiffs. Claimants' liens, which allege that money is owed in a private dispute with Plaintiffs, are plainly not within the "heartland" of First Amendment activities [*id.*] and not the exercise of "constitutional speech rights." Henne, 341 P.3d at 288.

In his written opinion, Judge Rogoff cited Bevan v. Meyers, 183 Wn. App. 177, 334 P.3d 39 (2014) to illustrate "the distinction between public participation and private dispute." **CP 292**. In that case, Bevan complained to the King County Department of Health ("KCDH") about the safety of Meyers' well, which he believed encroached on his property. When Bevan filed suit, Meyers counterclaimed alleging, among other things, he was damaged by Bevan's complaint to KCDH. Bevan filed a motion to strike under the anti-SLAPP Statute. The trial court granted the motion to the extent that Meyers' counterclaims were based upon Bevan's complaint to KCDH [*id.* at 182], and Division One affirmed. Judge Rogoff emphasized:

The Court made clear that the simple property dispute, and Bevan's desire to seek redress from the courts to settle that private dispute did not constitute 'action involving public participation and petition.' *Id.* However, the ancillary act of seeking assistance from the KCDH and asking them to investigate a claimed violation of safety standards did fall within the heartland of free speech rights, and thus was a basis upon which Bevan could bring a Motion to Strike.

CP 293. See also Dillon, 179 Wn. App. at 79 (right to petition in RCW 4.24.525(2)(e) “does not encompass a right of access to the courts”); Saldivar v. Momah, 145 Wn. App. 365, 387, 186 P.3d 1117 (2008) (“A plaintiff who brings a private lawsuit for private relief is not seeking official governmental action, but rather redress from the court”).¹³

For these reasons, Judge Rogoff properly concluded [CP 293 - 294] that Claimants’ anti-SLAPP motion had no merit:

In the present case, the 15 defendants sought redress from the Courts for a private dispute. They claim that Leenders failed to pay them all of the wages he owed them for the work they did as his employees. In an effort to prepare that private dispute for a lawsuit, they took out liens against the bonds on the four projects for which they believed they had done work and not received just payment [emphasis added].

As such, Defendants did not ‘make a statement in a governmental proceeding authorized by law.’ RCW 4.24.525(2)(a). The Notice of Claim was a statement of intent to seek money and was made to companies holding a bond. The liens here do not fit within subsection (2)(a) [emphasis added].

¹³ Claimants largely ignore the cases that Plaintiffs cite in Section III-B, infra, all of which were cited and relied upon by Plaintiffs in the trial court. Instead, Claimants rely upon California cases that are inapposite because, as Judge Rogoff stated, “they all involve a situation where the defendant engaged in an action where he or she asked a governmental agency to do something on his or her behalf” [citations omitted]. CP 293. See also Henne, 341 P.3d at 289 (“despite some similarities, [anti-SLAPP laws in Washington and California] also have significant differences”).

Moreover, Defendants' liens were not 'statements in connection with an issue under consideration or review by a governmental proceeding.' RCW 4.24.525(2)(b). Because a private lawsuit does not constitute a right to public participation and petition, Saldivar v. Momah, 145 Wn. App. 365, 387 (2008), actions furthering such private lawsuits cannot form the basis for an Anti-SLAPP motion under subsection (2)(b), so long as they are not direct requests to a separate governmental agency to act [emphasis added].

Defendants' liens also were not statements reasonably likely to encourage or enlist public participation in an effort to effect consideration or review of an issue in a governmental proceeding. See RCW 4.25.525(2)(c). The notices of claim had only one purpose - to ensure money from a bond remained available to Defendants should they prevail on a private lawsuit against their employer. The liens were not publicly filed in an attempt to garner sympathy or support. They did not enlist anyone to do anything on Defendants' behalf. Thus, the Notices of Claim and liens were not actions involving public participation and petition pursuant to subsection (2)(c) [emphasis added].

Defendants' liens and notices of claim also were not intended to change the public's perception about fair wages. Defendants did not go out into the public and enlist people to assist them generally in seeking a change in wage laws. Rather, they prepared a lawsuit against a private employer to address their own private dispute. When an employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, then first amendment speech is not at issue [citation omitted]. Here Defendants filed their Notices of Claim in an effort to settle a private lawsuit. They did not seek a public forum to change wage laws. They did not seek to petition the government for any change in the law. Subsections (2)(d) and (e) thus do not apply [emphasis added].

CP 293 - 294. Claimants completely ignore Judge Rogoff's detailed analysis of why RCW 4.24.525 does not apply here.

C. Plaintiffs Are Not Attempting To "Thwart" Claimants

Claimants assert that Plaintiffs filed suit to "thwart" Claimants' "efforts to recover the wages unlawfully withheld from them." **Opening Brief, at 2.** This ignores that Claimants did nothing to pursue three of their four liens: they did not file lawsuits and they rebuffed Plaintiffs' requests to mediate an overall settlement. Paragraph 9, infra. Claimants took such a bizarre approach because, as set forth above, they are controlled by the Union, whose goal is to "ruin" Plaintiffs, not for Claimants to recover any moneys they may be owed. This can be seen by Claimants' response to Plaintiffs' lawsuit here and, also, to Synergy Construction's Interpleader Complaint in Leenders Drywall v. Synergy Construction: instead of asserting their own claims against Plaintiffs and pursuing recovery of the moneys they are allegedly owed, Claimants filed a motion to dismiss in each action. Thus, in reality, Claimants have "thwarted" their own claims.

D. Plaintiffs' Claims Are Amply Supported By Washington Law

Plaintiffs' causes of action are amply supported by the facts and Washington law. For instance:

Safeco provided the bonds on Aurora and Jefferson pursuant to contracts between the property owners and the general contractors. Paragraphs 13 and 18, infra. These bonds provide that suit must be commenced within one year from the date the liens were filed. Paragraphs 14 and 19, infra. This one year limitation period is enforceable under Washington law:

Parties to a contract can agree to a shorter limitations period than that called for in a general statute [citation omitted]. A contract limitation period prevails over the general statute of limitations unless prohibited by statute or public policy, or unless the provision is unreasonable [citation omitted].

Yakima Asphalt Paving Co. v. Washington State Department of Transportation, 45 Wn. App. 663, 665-66, 726 P.2d 1021 (1986) [emphasis added]. Claimants' liens against Aurora and Jefferson have expired because they did not file suit within one year. Ashburn v. Safeco Insurance Co. of America, 42 Wn. App. 692, 695, 713 P.2d 742 (1986) ("Washington courts have upheld the validity of the 1-year limitation in insurance contracts"). Claimants' Opening Brief ignores Yakima Asphalt and Ashburn, which Plaintiffs cited below. **CP 133 - 134.**

A lien is void in its entirety if it is "obviously and wilfully excessive." Puget Sound Plywood, Inc. v. Mester, 86 Wn.2d 135, 141, 542 P.2d 756 (1975). This has been the law in Washington for more than

100 years. Robinson v. Brooks, 31 Wn. 60, 61, 71 P. 721 (1903) (“whole claim should fail” because it was “manifest from the record that the lien claimants inflated their real claim”). There is abundant evidence here that Claimants grossly inflated their liens. Paragraphs 21 - 37, infra. Claimants’ Opening Brief ignores Puget Sound Plywood and Robinson, which Plaintiffs cited below. **CP 134 - 135**.

Plaintiffs seek damages for the harm they suffered as a result of Claimants’ improper liens. Puget Sound Plywood, 86 Wn.2d at 141 (lien claimant liable for damages caused by a “wilfully excessive” lien). Claimants’ Opening Brief ignores Puget Sound Plywood, which Plaintiffs cited below. **CP 132, 134 - 135**. See also RCW 60.04.221(8):

Any potential lien claimant shall be liable for any loss, cost, or expense, including reasonable attorney’s fees and statutory costs, to a party injured thereby arising out of any unjust, excessive, or premature notice filed under purported authority of this section [emphasis added].¹⁴

Claimants attempt to distinguish RCW 60.04.221(8) by grossly distorting the plain language of the lien laws. In their Reply Brief in the trial court, Claimants asserted:

¹⁴ Judge Rogoff emphasized that “The fact that the legislature itself created at least one statutory cause of action for a person who believes they have been injured by the filing of a lien, cuts against the argument that the filing of such a lien should be considered protected speech. RCW 60.04.221(8).” **CP 295**.

[RCW 60.04.221(8)] carves out what, at most, may be deemed an exception to the immunity under RCW 4.25.510. However, there is a specific process to be followed in attempting to recover under that exception: a party that believes a “frivolous” lien has been filed under that chapter **must** file a motion with a superior court alleging so, and then present evidence at a “show cause” hearing. RCW 60.04.221(9)(a).

CP 250 [emphasis added]. This argument is flatly wrong because RCW 60.04.221(9)(a) provides that a party “**may**” file a frivolous lien action and set a show cause hearing, not that it “**must.**” Plaintiffs made this abundantly clear at oral argument:

[Claimants say] that you’re required to file a frivolous lien action and ask for a show cause hearing. That’s not true. It’s an option. You may do that. Owners or people who are wronged by liens may want to take advantage of that situation because it’s an expedited process.

On the other hand, it’s a pretty difficult burden in that process to win. So a lot of people who are wronged by liens decide, ah, I’m either going to wait out that lien or I’m not sure I can meet this really heavy burden. I’m either going to wait out the lien or I’m going to file a lawsuit, where I just have to prove, through discovery, through trial, through motions, that the lien is frivolous or is not valid. So it’s an option. You may do it.

In their brief they say that RCW 60.04.221(9)(a), they say that you must do that. They use the word “must.” The statute says may. May. It’s an option. The person wronged by the lien has the option of doing this expedited process through the frivolous lien hearing or they can wait it out or they can file a lawsuit, just like we have.

RP 26 - 27 [emphasis added].

Astonishingly, Claimants make the same argument to this Court:

RCW 60.04.221 does not authorize Leenders to file this lawsuit. Instead, it allows a party who believes a “frivolous” lien has been filed to institute a “show cause” hearing. RCW 60.04.221(9)(a). Leenders ignored that provision as well, both in filing this lawsuit and in their Response in the court below.

Opening Brief, at 22 - 23. Again, as set forth above, RCW 60.04.221(9)(a) states a party “**may**” file a frivolous lien action, not that it “**must.**” Claimants’ assertion that Plaintiffs “ignored that provision” is also false: Plaintiffs could not respond in writing because Claimants raised this argument in their Reply Brief; furthermore, Plaintiffs specifically rebutted this false assertion at oral argument. **RP at 26-27.**

Plaintiffs’ remaining causes of action are also amply supported by the facts and longstanding Washington law:

a. Claimants tortiously interfered with Leenders Drywall’s contracts on the Four Projects. See, e.g., Sears v. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 524, 8 Wn.2d 447, 455, 112 P.2d 850 (1941) (“The rule is well settled that an individual or labor union which maliciously or wantonly interferes or intermeddles with a contract between third persons, for the purpose of securing a breach thereof, is liable for [tortious interference and] the damages resulting if the contract is actually

breached”) [quotation omitted];

b. Claimants tortiously interfered with the contracts that Leenders Drywall could not accept due to the withholding of the \$600,000. See, e.g., Caruso v. Local Union No. 690 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 33 Wn. App. 201, 207, 653 P.2d 638 (1982) (“It is sufficient if the evidence reveals that the alleged interferor knew or should have known of the business opportunity or expectancy”); and

c. Claimants are liable for the tort of abuse of process. See, e.g., Wash. Prac. & Proc., Tort Law & Practice, Vol 16A, Sec. 22:10 at 236 - 37 (2013).

E. Claimants Are Not Immune Under The Anti-SLAPP Statute

Claimants assert that “After the passage of the anti-SLAPP statute, however, certain claims simply cannot lie,” including those asserted by Plaintiffs. **Opening Brief, at 28.** Claimants rely on Spratt v. Toft, 180 Wn. App. at 620 for this argument. In that case, Toft was running for elected office and Spratt, who formerly worked for Toft, challenged his qualifications as a candidate. When Toft responded to these challenges, Spratt filed suit, claiming Toft’s statements were defamatory.

Emphasizing that the election of candidates is “at the heart of our

democracy,” id. at 630, Spratt held that Toft’s statements were protected under the anti-SLAPP statute. In stark contrast, Plaintiffs’ claims against Claimants do not involve issues that are “at the heart of our democracy” [id.] or within the “heartland” of First Amendment activities. Fiedler, 914 F.Supp at 1232.¹⁵

The legislature did not intend for the anti-SLAPP statute to impinge on “the rights of persons to file lawsuits and to trial by jury,” as this would “raise issues about the statute’s constitutionality.” Dillon, 179 Wn. App. at 85. If Claimants are immune under the anti-SLAPP statute, when will the expired liens be released? When will the hundreds of thousand of dollars withheld from Leenders Drywall be disbursed? How will Plaintiffs recover damages for the harm caused by Claimants? What will stop the Union and/or the Claimants from employing similar bad acts against other contractors that the Union wants to “ruin”?

F. The Court Should Award Plaintiffs Their Attorney’s Fees And \$10,000

RCW 4.24.525(6)(b) provides:

If the court finds that the special motion to strike is

¹⁵ Furthermore, defamation suits, which Spratt asserted against Toft, are a primary target of the anti-SLAPP statute because such claims are “commonly used” “to discourage a speaker from voicing his or her opinion.” Henne, 341 P.3d at 286.

frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

- (i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;
- (ii) An amount of ten thousand dollars, not including the costs of litigation and attorney's fees; and
- (iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms

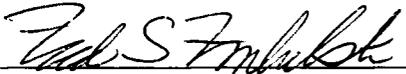
Plaintiffs request this Court to award them attorney's fees and \$10,000 because Claimants' anti-Slapp motion is frivolous and/or "solely intended to cause unnecessary delay."

IV. CONCLUSION

For the reasons set forth above, the Court should affirm the ruling of the trial court and award attorney's fees and \$10,000 to Plaintiffs.

March 16, 2015

FINKELSTEIN LAW OFFICE, PLLC

By: 
Fred S. Finkelstein
WSBA No. 14340
Attorneys for Plaintiffs/Respondents

2015 MAR 17 PM 2:49

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**COURT OF APPEALS, STATE OF WASHINGTON
DIVISION ONE**

LEENDERS DRYWALL, INC. and DAVID J.)
LEENDERS, individually and on behalf of his)
marital community,)

Plaintiffs/Respondents,)

vs.)

ADRIAN AYALA, et. al.,)

Defendants/Appellants.)

NO. 72595-5

DECLARATION OF MAILING

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the date below I caused copies of the following documents: (1) Brief of Respondents and (2) this Declaration of Service to be served upon the following persons in the manner provided below:

Attorney for Adrian Ayala, et. al (via messenger)
Daniel Hutzenbiler
Andrew Lukes
Robblee Detwiler & Black, PLLP
2101 Fourth Avenue, Suite 1000
Seattle, WA 98121

DATED this 16th day of March, 2015.

FINKELSTEIN, LAW OFFICE, PLLC



Fred S. Finkelstein, WSBA #14340
Attorney for Respondents Leenders Drywall, Inc.
and David Leenders