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DIVISION II

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NO. 39041-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITIZENS FOR ACCOUNTABLE GOVERNMENT IN EGLON AND

HANSVILLE

Appellant,

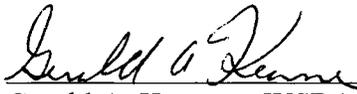
v.

KITSAP COUNTY, et al.,

Respondents.

APPELLANT'S OPENING BRIEF

October 30, 2009


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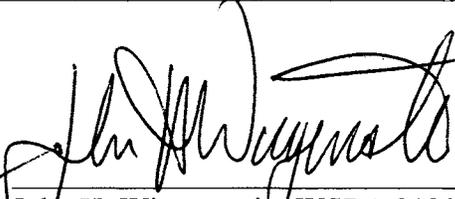

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I. INTRODUCTION

This action was commenced by appellant Citizens for Accountable Government in Eglon and Hansville (“CAGEH”), a Washington non-profit corporation, against Kitsap County and several individuals who claim to be members of a body calling itself the Greater Hansville Area Advisory Committee (“GHAAC”). The action sought declaratory and injunctive relief with respect to (1) the defendant County’s recognition and financial support of a private group of individuals who purport to be spokesmen and representatives for an entire portion of Kitsap County, and (2) the conduct of those individuals in appointing themselves as members of the group, and their actions following their self-appointment.

CAGEH appeals from orders entered by the trial court which (1) dismissed CAGEH’s claims for declaratory and injunctive relief against the individual respondents, and (2) denied CAGEH’s motions to dismiss two affirmative defenses asserted by the individual respondents.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it dismissed appellant’s Seventh Cause of Action (*CP 12*) against the individual respondents for violation of the Open Public Meetings Act, RCW Title 42.30.

2. The trial court erred when it dismissed appellant’s Sixth Cause of Action (*CP 12*) against the individual respondents for Failure to

Comply with GHAAC Bylaws.

3. The trial court erred when it denied appellant's motion to dismiss the individual respondents' affirmative defense of improper joinder.

4. The trial court erred when it denied appellant's motion to dismiss the individual respondents' affirmative defense under RCW 4.24.510 ("SLAPP" Statute) and refused to grant appellant an award of attorney fees under RCW 4.24.520.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

Issues Relating to Assignment of Error No. 1:

Has the appellant stated a claim under the Open Public Meetings Act, RCW Title 42.30, that should survive respondents' CR 12(b)(6) motion?

ANSWER: YES

Issues Relating to Assignment of Error No. 2:

Has the appellant stated a claim under its Sixth Cause of Action, Failure to Comply with Bylaws, that should survive respondents' CR 12(b)(6) motion?

ANSWER: YES

Issues Relating to Assignment of Error No. 3:

As a matter of law, are the individual GHAAC defendants proper parties to this litigation?

ANSWER: YES

Issues Relating to Assignment of Error No. 4:

Does the affirmative defense asserted by the individual respondents under the SLAPP statutes of RCW Title 4.24, fail as a matter of law?

ANSWER: YES

IV. STATEMENT OF THE CASE

A. Factual Background

The trial court action filed by CAGEH arose out of defendant Kitsap County's creation of a "formal relationship" with a group of people called the Greater Hansville Area Advisory Council ("GHAAC") through Kitsap County Resolution No. 125-2007. *CP 50-62*. In this County resolution, the by-laws of the GHAAC were adopted by the County as the official operating procedures of the GHAAC. *CP 52-62*.

Hansville is a small community in the north end of unincorporated Kitsap County. The role of the GHAAC and its members, pursuant to the County Resolution, are to speak for all of the citizens of the area, and – in intent, and in practice – to filter and spin what the County was told (and

not told) about public opinion in the area on matters relating to County governance and decision-making.

The Complaint for Declaratory and Injunctive Relief (*CP 4-15*) asserted claims against the County, and against the other named defendants (who are, or are purported to be, the GHAAC's members). The claims fell into two basic groups: one set of claims, asserted against the County, challenged the County's legal authority to create GHAAC and/or engage in the "formal relationship" that the County created. *CP 10-12*, ¶¶ 4.1 – 8.3.

The second set of claims, against the individual GHAAC members (the "individual GHAAC members" or "individual respondents"), alleged two causes of action: first, that they failed to follow the GHAAC Bylaws in a number of important respects, and second, for violation of Washington's Open Public Meetings Act, RCW 42.30, which the County and GHAAC had admitted applies to the GHAAC. *CP 12*, ¶¶ 10.1 – 10.3.

All of the claims were very specific as to the relief being sought: declaratory and injunctive relief. *CP 12-14*.

B. Motion Practice in Trial Court

The individual GHAAC members answered and asserted affirmative defenses, two of which are in issue here: improper joinder,

based on the defendants' claim that the individual GHAAC members were not proper parties to the case, and RCW 4.24.510, Washington's "SLAPP" statute (*CP 21*). Cross-motions were brought by both CAGEH and the individual GHAAC members, with CAGEH seeking dismissal of the two affirmative defenses as a matter of law (*CP 34-76 & 79-85*), and the County and individual GHAAC members seeking dismissal of the claims against the individuals under both the joinder theory, and under the SLAPP statute. *CP 86-107*. CAGEH submitted its response to Defendants' Motions to Dismiss. *CP 108-120*. The County and individual GHAAC members submitted their response to CAGEH's motion to strike affirmative defenses. *CP 131-134*. CAGEH and the defendants both submitted a reply brief to the respective responses. *CP 155-161 & 163-168*.

The trial court denied the defendants' motion as to joinder on the Sixth Cause of Action, but granted dismissal on the Seventh Cause of Action. The court ignored both of CAGEH's motions, and did not bother to explain the basis for its decision, which it made via letter ruling from chambers. *CP 169*. The court's letter ruling of November 17, 2008 was formalized in an Order dated December 9, 2008, which it entered without argument or a hearing for presentment. *CP 170-172*.

Both parties brought additional motions, with CAGEH again seeking a decision on its motion to dismiss the SLAPP defense (*CP 184-226 & 231-259*), and the County and individual GHAAC members seeking reconsideration of the decision to keep the individual GHAAC members in the case on the Sixth Cause of Action (*CP 173-181 & 227-230*). After argument, Judge Steiner again ignored CAGEH's motion regarding the SLAPP statute, and again issued a cryptic letter ruling from chambers dated January 12, 2009 (*CP 260*), then entered the form of Order proposed by the defendants on February 10, 2009, again without any hearing or argument as to the form of order. (*CP 262-265*).

Subsequently, CAGEH and the defendants took CR 41(a) voluntary dismissals of their remaining claims and defenses. *CP 261*. The defendants had specifically maintained their SLAPP defense in the case even after the claims against the individual GHAAC members themselves had been dismissed with prejudice. *CP 261*.

V. ARGUMENT

A. Standard of Review

The mandate of the appellate courts is to decide the law. Pure legal questions receive full *de novo* review. The U.S. Supreme Court firmly

established that it is “emphatically the duty of the judiciary to decide the law”. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In the case of motions under CR 12(b)(6) in Washington State, review is *de novo*. Orwick v. Seattle, 103 Wn2d 249, 692 P.2d 793 (1984).

Although the initial motion to dismiss (CR 86-107) made by the defendants was unclear as to the basis for their motion, their later reply cited CR 12(b)(6). (CP155-161) Under that rule, the allegations of the Complaint are accepted as true and construed most favorably to the plaintiff. Hodgson v. Bicknell, 49 Wn.2d 130, 298 P.2d 844 (1956); Loger v. Washington Timber Prods., Inc., 8 Wn. App. 921, 509 P.2d 1009 (1973).

B. Open Public Meetings Act.

The Open Public Meetings Act, RCW 42.30, provides a comprehensive scheme for ensuring that meetings by public agencies, at which action is taken, are open to the public.

"All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise noted in this chapter." RCW 42.30.030. "Any action taken at meetings failing to comply [with OPMA] shall be null and void." RCW 42.30.060(1).

RCW 42.30.020 provides the following pertinent definitions:

(1) "Public agency" means:

(a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature;

(b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington;

(c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies;

(d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency.

(2) "Governing body" means the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.

(3) "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

(4) "Meeting" means meetings at which action is taken.

In brief, to support an OPMA claim, the plaintiff must produce evidence showing (1) members of a governing body (2) held a meeting of that body (3) where that body took action in violation of OPMA, and (4)

the members of that body had knowledge that the meeting violated the statute. *Eugster v. City of Spokane*, 118 Wn. App. 383, 424, 76 P.3d 741 (2003) (citing *Eugster v. City of Spokane*, 110 Wn. App. 212, 222, 39 P.3d 380, *review denied*, 147 Wn.2d 1021, 60 P.3d 92 (2002)).

Here, the GHAAC falls within the definition of “public agency” under RCW 42.30.020(1)(c), and acts as its own “governing body” under RCW 42.30.020(2). The Executive Committee of the GHAAC (CP 56-58) also qualifies as a “governing body” and is thus subject to the same requirements under the Act as the GHAAC itself.

The Act is clear with respect to enforcement. Under RCW 43.20.120(1):

(1) Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this chapter applicable to him, with knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars. The civil penalty shall be assessed by a judge of the superior court and an action to enforce this penalty may be brought by any person. A violation of this chapter does not constitute a crime and assessment of the civil penalty by a judge shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense. (*emphasis added*).

Moreover, while CAGEH’s Complaint does not seek monetary damages or civil penalties for violation of the Act, RCW 42.30.130 makes clear that injunctive relief may be had:

Any person may commence an action either by mandamus or

injunction for the purpose of stopping violations or preventing threatened violations of this chapter **by members of** a governing body. (*emphasis added*).

The Act very clearly creates obligations on the part of the individual members of the governing body, and specifically provides for personal liability of members who knowingly violate the Act, and injunctive relief to prevent those individuals from continued violations of the Act. Because the Act also provides that action taken in violation of the Act are void (RCW 42.30.060), it is clearly appropriate for a court to grant declaratory relief regarding the validity of actions taken in the past which do not comply with the Act.

Here, the trial court should not have dismissed the OPMA claim. The defendants produced no evidence or analysis as to why the OPMA would not apply to the individual GHAAC defendants. The facts as alleged by CAGEH were that the individual GHAAC members conducted meetings, and that the GHAAC was considered by the County to be acting as a County agency or body. CAGEH alleged that meetings have taken place which did *not* comply with the OPMA. Of course, the extent to which that occurred, and what took place at those meetings, cannot be known until discovery is conducted – and that is exactly the kind of pernicious harm that the Act is intended to address, because actions taken

in secret, behind closed doors, and without notice to the affected citizenry, are the hardest to detect and uncover. A dismissal under CR 12(b)(6) was not justified on the record before the trial court, and was error.

C. Declaratory Relief

As with the Open Public Meetings Act claim, the trial court declined to offer any explanation or rationale for its decision to dismiss the Sixth Cause of Action, which was a claim for declaratory and injunctive relief brought against the individual GHAAC members. That is not surprising, because there was no legal basis for the ruling.

Washington's Declaratory Judgment Act, RCW 7.24, provides that "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." *RCW 7.24.010*. This power includes the power to determine people's rights and obligations under a statute, ordinance, or written instrument (*RCW 7.24.020*), a contract (*RCW 7.24.030*), and a more general power stated in RCW 7.24.050, which provides "The enumeration in RCW 7.24.020 and 7.24.030 does not limit or restrict the exercise of the general powers conferred in RCW 7.24.010, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty." The Act

“is designed to settle and afford relief from insecurity and uncertainty with respect to rights, status and other legal relations and is to be liberally construed and administered.” *DeNino v. State*, 102 Wn.2d 327, 330 (1984).

As would be expected, the court’s power to bind persons to its judgment depends on whether the person was a party to the action, and RCW 7.24.110 therefore states: When declaratory relief is sought, **all persons shall be made parties who have or claim any interest which would be affected by the declaration**, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . . (emphasis added)

This statute means what it says: **all persons** whose interests would be affected must be joined, and where parties whose rights would be affected and whose interests would be prejudiced are **not** joined, a declaratory judgment cannot be entered and the case must be either dismissed or remanded to allow the necessary joinder. *Williams v. Poulsbo Rural Tel. Ass’n.*, 87 Wn.2d 636, 643-44 (1976).

In this case, the record before the trial court showed that each of the individual respondents had (and have) an interest that would be affected by the declaratory relief CAGEH sought. The claims against those respondents sought declaratory relief that the respondents were not properly appointed to the GHAAC, did not follow the Bylaws in trying to amend the Bylaws, and did not follow the Bylaws by securing input from citizens. CAGEH sought a declaration that the acts of the GHAAC were therefore void and of no effect. *CP 12-14*.

The individual respondents clearly were and are proper parties to the case, where their very status as alleged members of GHAAC, and what they did in that capacity, are central aspects of the claims. The GHAAC itself is merely a group of private individuals on whom respondent County chose to bestow special status and benefits. They have no separate legal existence. They are most analogous to an unincorporated association, whose members are all individually proper parties to a lawsuit that is based on the conduct of the association members. *See, e.g., Riss v. Angel, 131 Wn.2d 612 (1997) (members of unincorporated homeowner association were all proper defendants in suit arising out of violation of CC&Rs).*

The respondents argued that because the County was a defendant, joinder of the individuals was improper. But no legal authority was ever submitted to support that claim. And, factually, the record established that the individual GHAAC members are not elected officials or employees of Kitsap County; that they are not appointed by the County; and that the County does not control who the members are. The Bylaws (CP 54-55) specify that the GHAAC members are to be appointed by neighborhoods and community groups. The County plays no role in selecting the GHAAC members, or in vetting or approving the members after they are appointed by their neighborhoods or organizations. The County retains no control in the Bylaws over the appointment or continued service of the GHAAC members. The County thus cannot somehow

impose the court's judgment on the GHAAC members themselves.

Indeed, the County spoke quite candidly and clearly on this issue through Ann Blair, a County liaison employee who was deeply involved in the GHAAC and related issues in the Hansville–Egdon area. After defendant Sid Knutson quit the GHAAC in early July 2008 (*CP 245-246*), a resident of his neighborhood, Laurie Wiegenstein, contacted GHAAC president Judith Foritano and inquired as to the correct process to follow per the Bylaws to see about becoming appointed by the neighborhood as the GHAAC representative. *CP 247-249*. Foritano stalled and delayed replying, and Ms. Wiegenstein eventually contacted Blair to ask her to help get a response from GHAAC. *CP 250-255*. Blair responded, and then a few days later (in late August, 2008) Ms. Wiegenstein was informed by Foritano that Knutson had unilaterally re-appointed himself to the GHAAC, and that he would not show up for most meetings but would have someone else sit in for him. *CP 247*.

This was obviously a conscious decision by Foritano – and perhaps others within the GHAAC – to make sure that the neighborhood in question did *not* get to appoint its own representative, that the GHAAC would remain comprised of only the chosen few, and that only they would participate and run the show. This blatant decision to ignore the Bylaws and the neighborhood appointment process led to an email from CAGEH counsel to Ann Blair, strongly encouraging her to discuss the matter with Foritano and Knutson and have them reconsider what they had done:

Ms. Blair, you were copied on an email today from Foritano to my wife Laurie. I encourage you to speak with Foritano and Knutson immediately, and to encourage them to reconsider what they have done. Please respond by close of business this Friday and let me know what, if any, action you and/or Foritano and Knutson are taking. Thanks.
CP 242 .

Blair's response:

Good morning again, John. I regret that you (and Laurie too, I am guessing) are upset with Sid and his change of plans regarding his work with GHAC. He is the person you need to talk to about this. Judy's response is simply notifying Laurie about Sid's decision and confirming that GHAC has a plan to deal with what must be absences from meetings that Sid knows will occur in the future.

. . . This appears to be a situation where a GHAC member and the officers of that organization have a legitimately different point of view from yours. **Your email asks me to interfere in and direct a GHAC member's personal decision about serving on the GHAC and, at this point, I am not going to do that.**

A

Anne S. Blair
District Manager
Commissioner Steve Bauer — District 1
360/337-4426
asblair@co.kitsap.wa.us
CP 242 (emphasis added).

Blair's email could not have been be clearer: as far as the County is concerned, it has no interest or role in the selection of GHAAC members, does not care whether those members are appointed in compliance with the Bylaws, and views the entire process as merely a "personal decision"

by the person in question – with no role at all for the neighborhood members or the County. The County never submitted any evidence to the contrary in the trial court proceedings. In light of the County’s own characterization of the GHAAC members and the County’s lack of control or interest in the appointment process, it is simply fatuous for the County’s attorneys to continue to claim that the individual GHAAC members are just “part of the County.” They are proper defendants, and their interests are directly affected by the court’s decision as to their status as GHAAC members, and their conduct and decisions made in that role. The trial court erred in dismissing the Sixth Cause of Action.

D. Injunctive relief.

The same principles apply as to the injunctive relief sought. The basic rule for any civil action is that a judgment entered against a nonjoined party is not binding. See *Glandon v. Searle*, 68 Wn.2d 199, 202-03 (1966); *In re Estate of Krueger*, 11 Wn.2d 329, 342, 119 P.2d 312 (1941). Consequently, a complete determination of a controversy cannot be obtained if it is necessary to include a nonjoined party in the judgment granting relief. *Williams, supra.* (applying concept in declaratory relief setting).

In the trial court, the County relied on *Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 951 P.2d 805 (1998) to argue against joinder of the individuals. That case involved a dispute between the parties as to

where their mutual boundary line was located, in an area near the old ASARCO smelter. Ruston sought declaratory judgment on that issue. Tacoma lost at trial, and on appeal argued that the trial decision had to be vacated because Ruston had not joined the Department of Natural Resources (a tenant on the land) and the former owner, ASARCO. Tacoma also appeared to argue that the residents of the two municipalities needed to be joined. *Ruston*, 90 Wn. App. at 81-82. The court disagreed, concluding that full relief on the claims could be ordered without the joinder of those entities, pointing out that the municipalities represented their respective citizens and would thus represent their interests. *Id.* at 82.

Ruston has no application here. As with the other cases previously relied on by the respondents, and as with cases of this type generally, the argument there was that the person in question had *not* been joined, and needed to be, and without that joinder the court would have no jurisdiction under the Declaratory Judgment Act, RCW 7.24. Thus, those cases always focus on an alleged lack of joinder of some person or entity, and claim that this is a procedural defect. In this case, the respondents argued that they should *not* be parties – the exact opposite situation. In the trial court the respondents never produced any law to establish that joinder is improper – i.e., that as a matter of law the individual GHAAC members cannot be parties in the case. Also, in cases such as *Ruston*, the municipal entity in question presumably obtained its representative capacity by way of proper legal procedure. In the present case, at issue is

whether the members of the body in question (GHAAC) properly obtained their positions. That was not an issue in the cases cited by respondents.

Here, CAGEH seeks injunctive relief against the Individual GHAAC members: an order directing them to stop representing themselves as the GHAAC and to stop representing that they have a special status or relationship with the County. There is no way to bind the individual GHAAC members to such a judgment or decree if those persons are not parties to this action.

At its most basic level the case before the court – and now before this court - involves questions whether the “members” of this supposedly advisory body, which speaks for the citizens of the Hansville and Eglon areas to the County (and other government bodies and individuals; CP 53, Bylaws, Art. III, Section 4) on matters that the body views as being important, were ever actually properly appointed to their positions. There is no more fundamental premise than that those who are charged with representing the views of the citizenry must have actually obtained their representative positions as required under the law. Whether it be vote fraud, election manipulation, or some other technique, when a representative takes the position by his or her own improper means, that person is clearly a proper defendant for purposes of declaratory and injunctive relief – because those who are being represented have the right to representation by someone who got there by following the rules.

E. Improper Joinder.

For the same reasons detailed above, the trial court erred in denying CAGEH's motion to dismiss the defense of improper joinder. The evidence before the trial court established that the individual GHAAC members were and are proper parties to the case. The trial court erred in refusing to dismiss this affirmative defense.

F. SLAPP Statutes.

As with the trial court's other decisions, there was no explanation given here. And, as with the other decisions, the reason is that there was no legitimate basis for refusing to dismiss this defense.

Despite the fact that the Complaint merely sought declaratory and injunctive relief, i.e., that a court rule on whether the County and GHAAC have followed the law or not – the County and Individual GHAAC members (all of whom are being defended by the County at taxpayer expense) asserted Washington's "SLAPP" statutes in their Answers to the Complaint. These statutes (RCW 4.24.500-510) were passed by our legislature to provide a remedy for people who are sued for money damages because they spoke out to a government body on a matter of interest to that body. The statutes do not apply here.

The statutes provide as follows:

RCW 4.24.500 Good faith communication to government agency — Legislative findings — Purpose.

Information provided by citizens concerning potential

wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that ***the 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 against 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. (*emphasis added*).

RCW 4.24.510 then goes on to state:

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. (*emphasis added*)

As set forth in the statute, the SLAPP statute can only apply if the defendant establishes that (1) the plaintiff is suing the defendant to impose civil liability, (2) for claims based on a communication by the defendant to a government body, and (3) the plaintiff seeks money damages on those claims. The County's SLAPP defense does not apply because *none* of these elements are satisfied.

1. “Civil Liability” = Civil Action for Damages

Washington courts use the term civil liability to describe a civil action in which the defendant is held liable to the plaintiff for damages. *See, e.g., Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 159, 270-71 (2005) (discussing when violation of liquor laws by tavern can serve as basis for civil liability in action for damages by injured third party).* The term “civil liability” means “civil action for damages” – indeed, RCW 4.24.500 and .510 interchange the two terms, with the former using “civil action for damages” and the latter using the term “civil liability”.

“Damages” means the compensation which the law awards for an injury done to the plaintiff. *State ex rel Macri v. City of Bremerton, 8 Wn.2d 93, 101 (1941).* Put another way, damages is a term used in torts to denote “an award made to a person by a competent judicial tribunal . . . because of a legal wrong done to him by another.” *Ford v. Trendwest Resorts, Inc., 146 Wn.2d 146 (2001); see also Myhra v. Chicago, Milwaukee, & Puget Sound R.R., 62 Wash. 1, 9 (1925)* (“Damages, in general legal acceptance, means compensation for the loss incurred or the injury sustained in the given case.”). The term does not include attorneys’ fees or taxable costs. *Macri, supra.*

No Washington court has ever applied the SLAPP defense to a case where the plaintiff’s claims sought relief *other than* money damages. Indeed, this court has expressly held the SLAPP statute cannot apply

unless the claim is be one for money damages . In Port of Longview v. Int'l. Raw Matls., Ltd., 96 Wn. App. 431 (1999), Division 2 of the Court of Appeals expressly held that “civil liability” under RCW 4.24.510 means “civil action for damages” and refused to apply the SLAPP statute. In that case, the Port was the landlord under a commercial lease, and sought a judgment of unlawful detainer against its tenant, IRM, and a writ of restitution. The tenant, which had expressed concerns that the safety of its employees was jeopardized by the Port’s operations, asserted a counterclaim for retaliatory eviction based on the exercise of its First Amendment right to free speech, and also asserted the defense of immunity under the SLAPP statutes. The court upheld IRM’s right to assert the retaliatory eviction counterclaim, based on its First Amendment rights, but rejected IRM’s claim that the SLAPP statute applied:

In providing individuals with immunity under RCW 4.24.510, the Legislature has sought "to protect individuals who make good-faith reports to appropriate governmental bodies," recognizing that "the threat of a civil action for damages can act as a deterrent to citizens" lodging such reports. RCW 4.24.500 (*emphasis added*).

By its plain language, thus, RCW 4.24.510 affords immunity only from "civil liability," that is, from the threat of a "civil action for damages." Here, the Port does not seek damages from IRM, but only that its rights to possession and termination of the commercial tenancy be adjudicated pursuant to the limited summary proceeding under RCW 59.12. The proceeding before the trial court was limited to determining the rights of the parties specifically with respect to the subject property and their possession rights thereto. See *Heaverlo*,

80 Wn. App. at 733 (purpose of unlawful detainer proceeding is to determine parties' solely as to issue of possession and related issues thereto). **RCW 4.24.510 is inapplicable to the instant unlawful detainer proceeding** (*emphasis added*).

Port of Longview, 96 Wn. App. 445-46.

Likewise, in *Emmerson v. Weilep*, 126 Wn. App. 930, *rev. denied* 155 Wn.2d 1026 (2005), Division 3 cited *Port of Longview* with approval. In that case, Emmerson was a city code enforcement office, and Weilep was a citizen who continued to pester Emmerson, harass him, etc. Emmerson eventually sought and obtained an anti-harassment protection order against Weilep. Weilep then sought to dismiss the order under the SLAPP statutes. The district court (which had original jurisdiction over the matter) ruled against Weilep, as did the superior court, both courts finding that the SLAPP statute did not apply to the case.

On Weilep's appeal, the court affirmed the decision that the SLAPP statutes did not apply. Quoting the statutes, the court stated:

As amended in 2002, the anti-SLAPP statute protects "individuals who make good-faith reports to appropriate governmental bodies" from the threat of a "civil action for damages." *See RCW 4.24.500* .

The legislature finds that the 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 against 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 governmental bodies.

RCW 4.24.500 (emphasis by the court); see also RCW 4.24.510 , Intent -

2002 c 232 ("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 .*") (*emphasis by the court*) Emmerson, 126 Wn. App. at 936.

The court went on to reject Weilep's claim that the applied because RCW 4.24.510 did not expressly use the term "damages":

Accordingly, although Mr. Weilep points out the text of RCW 4.24.510 expressly provides for immunity from "civil liability," as opposed to immunity from a civil action for damages, its meaning must be construed in the context of the statutory scheme. See *Dep't of Ecology v. Campbell & Gwinn, L.L.C .*, 146 Wn.2d 1 , 11, 43 P.3d 4 (2002) (stating that although the plain meaning rule directs a court to construe and apply words according to the meaning that they are ordinarily given, the rule also permits the court to consider underlying legislative purposes, background facts, and statutory context to determine its plain meaning); see also *ITT Rayonier, Inc. v. Dalman* , 122 Wn.2d 801 , 807, 863 P.2d 64 (1993) (statutory provisions must be read in their entirety and construed together, not by piecemeal). Here, the legislative purpose gives qualifying parties immunity from "civil action[s] for damages," (RCW 4.24.500) and the statutory intent language discusses liability in terms of a "civil complaint or counterclaim . . . on a substantive issue." RCW 4.24.510, Intent - 2002 c 232. **The term "civil liability" should not be read in isolation, but construed within the context of the statute's intent and purpose to mean a civil action for damages. *Emmerson, at 936-37 (emphasis added).***

The same analysis applies to this action. CAGEH's Complaint did not seek to impose civil liability on anyone. It did not seek damages from anyone. Injunctive relief is equitable in nature (*Brown v. Voss, 105 Wn.2d*

366, 372 (1986)), and declaratory relief under the Declaratory Judgment Act (RCW 7.24.010 *et seq.*) is likewise equitable in nature, being appropriate where the plaintiff has no adequate remedy at law. Watson v. Washington Preferred Life Ins. Co., 81 Wn.2d 403, 407 (1972).

This distinction was emphasized in O'Keefe v. Murphy, 860 F.Supp. 748 (E.D. Wash. 1994), reversed on other grounds sub nom O'Keefe v. Van Boening, 82 F.3d 322 (9th Cir. 1996). In that case, O'Keefe was a prisoner at the Washington State Penitentiary. He brought claims against the prison superintendent and other defendants under 42 USC §1983, claiming that the prison's mail review and censorship policies violated his constitutional rights. The defendants sought summary judgment, claiming qualified immunity under §1983. The court summarized the analysis:

“Government officials performing discretionary functions generally are shielded from liability for civil damages [in a §1983 action] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

However, claims for injunctive and prospective declaratory relief are unaffected by qualified immunity. *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993) (citing other authority).

O'Keefe seeks injunctive and prospective declaratory relief (only). Therefore, qualified immunity cannot shield defendants from this action.

O'Keefe, 860 F.Supp. at 750-51 (*emphasis added*).

In this case, the statute in question, RCW 4.24.510, provides that:

A person who communicates a complaint . . . 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. . . . (*emphasis added*).

Just as in *O'Keefe*, and as made clear by the Washington cases, the concept of “immunity” only applies to civil claims for damages, and does not have any application to claims for declaratory and injunctive relief, which is what CAGEH has asserted in this case.

The defendants are not seeking immunity from liability for damages. They want something far broader, something RCW 4.24.510 does not provide, and something far more destructive to our system of representational government and its basic precepts of accountability: absolute immunity and insulation from any kind of judicial review at all.

2. Claims are not based on communication to government body.

None of CAGEH's claims against the Individual GHAAC members are based on a communication by any of those defendants to a government body. The claims are based on (1) the Individual GHAAC members' failure to follow their own Bylaws with respect to how members were appointed, how they attempted to amend their Bylaws, and how they are obligated to listen to citizen inputs, and (2) failure to comply with Washington's Open Public Meetings Act.

None of these claims involve or implicate the Individual GHAAC members or GHAAC as a whole communicating to a government body or agency. Washington law is clear that RCW 4.24.500-510 are not implicated merely because a defendant had some communications with the government body or agency that pertained in some way to some issue that later arises in the case; the claims by the plaintiff must be *based on* those specific communications. *Trummel v. Mitchell*, 156 Wn.2d 653, 677 (2006); *Skimming v. Boxer*, 119 Wn. App 748 (alleged defamatory comments by defendant that led to plaintiff's lawsuit were not made to government body, and in addition were not intended to influence government action or outcome, as RCW 4.24.510 also requires). No such evidence was presented here, nor did CAGEH's claims even allege such.

3. No claim for damages

As detailed above, there is no claim for damages by CAGEH against anyone, hence there is no claim of civil liability. Claims for injunctive or declaratory relief are legally distinct from claims for damages. Indeed, nowhere does RCW 7.24 (the Declaratory Judgment Act) even mention damages, or civil liability.

VI. REQUEST FOR ATTORNEY FEES AND EXPENSES

When the government body or agency takes on the defense of the individual defendant (as the County has done, and is doing, here for the individual GHAAC members), and the plaintiff proves that the SLAPP defense does not apply, the plaintiff is entitled to an award of fees. RCW 4.24.520 states:

In order to protect the free flow of information from citizens to their government, an agency receiving a complaint or information under RCW 4.24.510 may intervene in and defend against any suit precipitated by the communication to the agency. In the event that a local governmental agency does not intervene in and defend against a suit arising from any communication protected under chapter 234, Laws of 1989, the office of the attorney general may intervene in and defend against the suit. An agency prevailing upon the defense provided for in RCW 4.24.510 shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense. ***If the agency fails to establish the defense provided for in RCW 4.24.510, the party bringing the action shall be entitled to recover from the agency costs and reasonable attorney's fees incurred in proving the defense inapplicable or invalid. (emphasis added)***

That is the case here, and CAGEH therefore requests that the court award attorneys fees to CAGEH pursuant to RAP 18.1. Where a statute provides for an award of attorney fees and costs, such an award is warranted at the appellate level as well as at trial. *Boyd v. Davis*, 127 Wn.2d 256, 263-64, 897 P.2d 1239 (1995) (where contract provides for award of attorney fees to prevailing party, fees are awarded to prevailing party on appeal as well

as in trial court).

The SLAPP statutes serve an important public interest: they protect citizens from the chilling effect of a lawsuit that seeks a large award of money damages from them just because they complained or communicated to a government body or agency about an issue within that body or agency's purview. The threat of an expensive defense, and possible financial ruin, would obviously chill the free speech rights of the citizen.

But such a powerful tool can also be misused by a defendant, and turned from a shield into a sword. That is just what the County has done here, with the trial court's willing assistance. CAGEH is a non-profit corporation whose directors and members have serious concerns about the County/GHAAC relationship and the way in which the GHAAC has operated, and who face the chilling prospect that their political voice is being filtered and controlled by a group of people whom they never elected, never appointed, and who do not even follow their own Bylaws. CAGEH came to the trial court asking that the court review what was done and how it was done, and provide declaratory and injunctive relief as the court finds appropriate.

In retaliation for CAGEH's questioning the County's authority to do what it did, and in retaliation for CAGEH's asking a court to look at whether the GHAAC members were even properly appointed and have followed their own rules, the County – using lawyers paid by taxes from CAGEH members and all other citizens of the affected areas – struck back at CAGEH by asserting a SLAPP defense that has no application here and failed as a matter of law on every element. The County sought to impose enormous statutory damages and attorneys fees on CAGEH *merely because CAGEH asked this court to rule on the legitimacy of the conduct of the County and its favored group of self-appointed "representatives."* The "chilling effect" of the County's action on Hansville's citizens is obvious. This court should recognize the County's bad faith defense tactic, and the trial court's obvious error, for what they are, reverse and dismiss the RCW 4.24.500-520 defense as to all defendants, and award CAGEH its attorney fees and costs incurred in securing dismissal of the defense.

VII. CONCLUSION

It is unclear why the trial court ruled as it did – and that lack of

clarity exists because the trial court retreated to the cloistered environment of chambers to make its rulings, safe from public view and discussion, and refused to explain the bases for any of its rulings, all of which raise troubling questions. But whatever its unstated motives, the trial court obviously erred in dismissing the Sixth and Seventh causes of action against the individual GHAAC defendants, and in refusing to dismiss their affirmative defenses based on (1) improper joinder and (2) RCW 4.24.500-.510. This court should reverse the trial court, reinstate CAGEH's Sixth and Seventh causes of action against the individual GHAAC defendants, and allow those claims to be resolved on the merits. Likewise, this court should rule that the individual GHAAC defendants' affirmative defenses based on improper joinder, and on RCW 4.24.500-.510, be dismissed with prejudice and that the trial court award CAGEH its attorney fees and costs incurred in obtaining that dismissal.

Finally, pursuant to RAP 18.1, this court should award CAGEH its attorney fees and costs on appeal, as detailed above, because the RCW 4.24.500-.510 defense alleged by the individual GHAAC defendants was improper and fails as a matter of law.

NO. 39041-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITIZENS FOR ACCOUNTABLE GOVERNMENT IN EGLON AND
HANSVILLE,

Appellant,

v.

KITSAP COUNTY, et al.,

Respondents.

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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION II

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I hereby certify, under penalty of perjury of the laws of the State of Washington, that on this date I delivered true and correct copies of the following documents:

1. Appellant's Opening Brief

To the following attorneys of record:

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on October 30, 2009 by United State First Class Mail.

I declare under oath and penalty of perjury that the foregoing statements are true and accurate.

SIGNED at Kingston, Washington on this 30th day of October,
2009.


Susan Miedema
Secretary to
Gerald A. Kearney