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No. 46896-4-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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DEPUTY

GARY NORMAN SEA AND MARILYN LOUISE SEA, a marital
community,

Appellants,

v.

PATRICIA SWANSON aka Trisha M. Swanson, a single woman,

Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This lawsuit began as a dispute between Appellants Gary and Marilyn Sea and their neighbor, Respondent Patricia Swanson, over damage caused to the Seas' property by unpermitted alterations to Ms. Swanson's property. When the Seas filed suit to remedy this damage, Ms. Swanson responded with five unrelated, baseless counterclaims. The Seas asked the Superior Court to dismiss the claims under Washington's anti-SLAPP statutes, RCW 4.24.510 and RCW 4.24.525, and impose sanctions under CR 11 and RCW 4.84.185. The court denied those requests and instead dismissed four of five claims under CR 56 and CR 12. The Seas ask this Court to reverse the decisions denying the anti-SLAPP motion, declining to dismiss the fifth claim, and declining to impose sanctions.

First, RCW 4.24.510 and RCW 4.24.525 bar Ms. Swanson's claims for abuse of process, harassment, and tortious interference with contract. Ms. Swanson expressly based those claims on the Seas' communications with Thurston County about her unpermitted work, the Department of Labor and Industries about her unlicensed contractor, and Animal Services of Thurston County about her unlicensed dog. RCW 4.24.510 squarely forbids liability stemming from communications with government. RCW 4.24.525, too, applies to such reports, and required Ms. Swanson to prove a probability of prevailing on the merits, something the Superior Court (rightly) found she had not done.

Second, the Superior Court erred by failing to dismiss the claims under the anti-SLAPP statute. Both anti-SLAPP statutes require an award of attorneys' fees, costs, and statutory damages to the prevailing party. These remedies are essential to the statutory purposes of compensating SLAPP victims and deterring SLAPPs. By failing to impose the remedies, the Superior Court undermined these purposes and deprived the Seas of monetary relief to which they are entitled.

Third, the Superior Court erred by failing to dismiss Ms. Swanson's counterclaim for nuisance, which rests primarily on allegations the Seas removed vegetation from the parties' boundary line and timed these acts to coincide with county inspections. Ms. Swanson provided *no* evidence to support this claim, meaning there could not have been *any* issue of fact, much less a material one.

Finally, the Superior Court erred by failing to award sanctions under CR 11 and RCW 4.84.185. Ms. Swanson's claims had no basis in law or fact, and were interposed for an improper purpose—to silence and penalize the Seas for their petitioning activities—and brought by an attorney already sanctioned before. Further, Ms. Swanson tried to revive her dismissed claims in the Superior Court.

For these reasons, the Seas respectfully ask this Court to reverse the Superior Court's decisions denying their anti-SLAPP motion, declining to dismiss Ms. Swanson's nuisance claim, and refusing to impose sanctions, and to direct the Superior Court to impose the anti-SLAPP statutes' mandatory remedies.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred by failing to dismiss the abuse of process, harassment, and tortious interference with contract counterclaims under RCW 4.24.510.

2. The Superior Court erred by failing to dismiss the abuse of process, harassment, and tortious interference with contract counterclaims under RCW 4.24.525.

3. The Superior Court erred by failing to grant the Seas' motion to dismiss Ms. Swanson's counterclaim for nuisance.

4. The Superior Court erred by failing to grant the Seas' motion for sanctions under CR 11 and RCW 4.84.185.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether RCW 4.24.510 bars liability for claims based on a defendant's reports to government about the plaintiff's unpermitted work on her property, an unlicensed contractor, and her unlicensed dog.

2. Whether RCW 4.24.525 applies to claims based on a defendant's reports to government about the plaintiff's unpermitted work on her property, an unlicensed contractor, and her unlicensed dog.

3. Whether the grant of a motion under CR 12(b)(6) or CR 56 renders a decision on a motion to strike under RCW 4.24.510 or RCW 4.24.525 unnecessary, even though those statutes *require* an award of attorneys' fees, costs, and statutory damages to a prevailing movant.

4. Whether the failure to provide any evidence to support a nuisance claim requires summary judgment and if not, whether the alleged

removal of vegetation along a neighbor's boundary line can state a claim for nuisance.

5. Whether sanctions under CR 11 and RCW 4.84.185 are proper where a party represented by counsel who has been previously sanctioned asserts frivolous claims, including a claim for a civil tort that does not exist and claims barred by an absolute immunity.

IV. STATEMENT OF THE CASE

A. **The Seas Contacted Government Authorities about Ms. Swanson's Unpermitted Work, Unlicensed Contractor, and Rottweiler, and Filed This Lawsuit.**

The Seas moved into their home, next to Ms. Swanson's home, in June 2005. CP 61 ¶ 2. In 2007, Mr. Sea saw a contractor, Neil Morgan, working in Ms. Swanson's backyard, including in what Mr. Sea believed was also a conservation easement, using earthmoving equipment. CP 64 ¶ 11, CP 83. The Seas now know that since at least 2007, excess runoff has flowed and continues to flow from Ms. Swanson's property to their own, causing damage. CP 62-63 ¶ 7. In 2011, Mr. Morgan told Mr. Sea the 2007 work had included placing plastic sheeting against the parties' common fence and covering it with fill. CP 64 ¶ 11. In March 2012, when the fence fell, Mr. Sea saw the plastic sheeting and fill obstructed the drainage swale on Ms. Swanson's side of the boundary. CP 64 ¶ 11, CP 69 ¶ 32. Over the next several months, the Seas discovered more changes made by Ms. Swanson causing the excess runoff. *Id.* ¶¶ 13-18. In June 2013, Mr. Sea discovered a buried drainpipe that collected Ms.

Swanson's backyard surface runoff and released it directly to the Seas' property. CP 65 ¶ 14. Mr. Sea visited the Thurston County permitting office several times to discuss conservation easement restrictions on the parties' lots and rules applicable to grading in 2007. CP 64 ¶ 12. The office informed him Ms. Swanson had not obtained a permit for her 2007 project or any other projects. *Id.*

Although the Seas repeatedly tried to persuade Ms. Swanson to remedy the conditions resulting in the excess runoff, she refused. CP 65-67 ¶ 17, 18, 20, 25. Nor would they agree to share another fence with her. CP 69 ¶ 33. Ms. Swanson and her agents entered the Seas' property without notice, and the Seas' attorney contacted her attorney about this trespass. CP 69-70 ¶ 34, CP 211. On December 6, 2012, Ms. Swanson filed a complaint seeking an order compelling the Seas to allow her to enter their property to build a fence and alleging the Seas had installed a camera to "spy" on her. CP 70 ¶ 35, CP 214. After the Seas filed a motion to dismiss, Ms. Swanson dismissed her claims. *Id.* ¶ 36, CP 219.

On April 19, 2013, the Seas filed a complaint with Thurston County about Ms. Swanson's unpermitted grading. CP 66 ¶ 18, CP 83. Two months later, another of Ms. Swanson's workers, Michael Teitzel, purporting to be a licensed contractor, asked the Seas if he could use their property as a staging area to build a new fence entirely on Ms. Swanson's property. CP 70-71 ¶ 37. The Seas granted him limited entry, subject to several conditions by which he failed to abide. CP 70-72 ¶¶ 37-39. Mr. Sea complained. CP 71-72 ¶ 39. Mr. Sea also spoke with Mr. Teitzel

about his unauthorized installation of cement bases on the Seas' property and attempts to connect the Seas' fence return to Ms. Swanson's new fence. *Id.* Mr. Teitzel became belligerent, including shouting and throwing a hammer and two-by-four at Mr. Sea. *Id.* Mr. Sea contacted the State Department of Labor and Industries ("L&I"), learned Mr. Teitzel was not licensed, and reported his unlicensed work. CP 72 ¶ 40. A state inspector issued Mr. Teitzel an infraction and fined him \$1,000 for failure to possess a license. *Id.* ¶ 40 & CP 221. The Seas also learned Mr. Teitzel had been a defendant in nearly two dozen proceedings in Washington, and according to one website, charged in Montana for theft and issuing a bad check. *Id.* ¶ 41, CP 240.

On May 29, 2013, a Thurston County compliance coordinator performed a site visit and verified the existence of the unpermitted work. CP 66 ¶ 19; CP 175. On June 20, 2013, Thurston County demanded Ms. Swanson obtain a permit. *Id.* ¶ 19, CP 151. On August 27, 2013, the County issued her a citation. *Id.* ¶ 20, CP 154. The County started a civil enforcement proceeding but dismissed it without prejudice on March 11, 2014, because Ms. Swanson's "multiple pleadings" and hiring of two lawyers had rendered the action "too large and unwieldy," requiring removal to Superior Court. CP 67 ¶¶ 22-23, CP 186. The County did not immediately file in Superior Court, and the Seas filed the operative complaint in this matter on May 20, 2014. CP 17.

In addition to the drainage issues, the Seas also had issues with Ms. Swanson's dog, a Rottweiler. CP 67-69 ¶¶ 26-31. Ms. Swanson had

previously kept a Rottweiler, Cujo, whom she admitted had bitten two people and “was destroyed.” CP 299 ¶ 8. In summer 2006, Ms. Swanson brought home a different Rottweiler. CP 298 ¶ 5. By 2007, the Seas observed the new Rottweiler barking incessantly and becoming increasingly aggressive; they felt the Rottweiler posed a threat to them and the community. CP 67-68 ¶¶ 27-28. Although they asked Ms. Swanson to control and quiet her Rottweiler several times, she refused to do anything. *Id.* Finally, in January 2012, their attorney contacted the Homeowners Association and filed a complaint with Animal Services. CP 69 ¶¶ 29-30, CP 191-209. Around that time, the barking ceased, and the Seas did not see the Rottweiler again. *Id.* ¶ 31.

B. Ms. Swanson Counterclaimed, Alleging the Seas’ Reports Were Unlawful.

On July 10, 2014, Ms. Swanson filed an answer and counterclaims. CP 28. The counterclaims alleged the Seas had “engaged in an elaborate pattern of harassment directed against Ms. Swanson, her family, and her invitees.” CP 31 ¶ 13. Ms. Swanson asserted five causes of action.

First, she asserted the Seas violated Washington’s Privacy Act, RCW 9.73 *et seq.*, and committed intrusion upon seclusion by “install[ing] a surveillance system” that “record[s] parts of the Swanson property not visible from public spaces,” and which the Seas allegedly used “to record private conversations on the Swanson property.” *Id.* ¶ 14.

Second, Ms. Swanson alleged abuse of process because she asserted the Seas “filed false reports about Ms. Swanson and her use and

maintenance of her property with the homeowners association, Thurston County, and other regulatory organizations.” *Id.* ¶ 15.

Third, Ms. Swanson alleged tortious interference with contract based on her claim the Seas “interfered with Ms. Swanson’s business dealings with consultants, contractors, and with a person who owes her money on a deed of trust.” *Id.* ¶ 16.

Fourth, Ms. Swanson alleged nuisance premised on the Seas’ alleged removal of vegetation along the boundary line between the properties, disturbance of “the ground and drainage capability along that line,” and removal of and damage to gravel and vegetation in that area. CP 32 ¶ 17. Ms. Swanson alleged the Seas “conducted these activities to coincide with inspections, as an adjunct to their abuse of process.” *Id.*

Finally, Ms. Swanson’s fifth claim alleged each of the preceding paragraphs also supported a claim for harassment. *See* CP 31-32 ¶¶ 13-17.

C. The Superior Court Denied the Seas’ Anti-SLAPP Motion and Dismissed All of the Counterclaims Except the Nuisance Claim.

On August 1, 2014, the Seas filed a Motion to Dismiss Pursuant to RCW 4.24.525(2); RCW 4.24.510, CR 12(b)(6) and for CR 11 Sanctions. CP 38. They argued that Washington’s anti-SLAPP statutes, RCW 4.24.525 and RCW 4.24.510, barred Ms. Swanson’s claims, and that even if the court found RCW 4.24.525 inapplicable, it should dismiss the claims under CR 12(b)(6) or CR 56. CP 38-60; CP 332-45.

In response, Ms. Swanson asked the court to decide the motion under CR 56. CP 318. To support her privacy claim, she stated her belief the Seas must be recording her because they had “spooky knowledge” of conversations she had had in her house and backyard. CP 299 ¶ 9. To support her interference claim, she claimed Ms. Sea had “orchestrated” a request from someone who bought a house from Ms. Swanson for documents regarding his loan and modifications to his loan terms, and that the Seas reported her unlicensed contractor to L&I. CP 300-01 ¶¶ 10, 13.

The Superior Court held a hearing September 19, 2014. Verbatim Report of Proceedings (“RP”). It acknowledged another case, *Bevan v. Meyers*, 183 Wn. App. 177, 334 P.3d 39 (2014), “specifically talks about a situation that is similar to the one before the court ... [a]nd so it is clear to me that the type of issues before the court could be applicable under the anti-SLAPP statute.” RP 31:7-17. The court found it was a “really close call” whether the anti-SLAPP statute applies, but that if it did, it would apply to the harassment and abuse of process claims. RP 31:19-24. The court then said “today I am not going to find ... it would be appropriate to dismiss [those two claims] under the anti-SLAPP statute.” RP 32:5-9.

The court dismissed the claims under CR 56 and CR 12 except the nuisance “claims.” *See* RP 32-35.¹ It recognized the “counterclaim itself, as it relates to facts that might support a counterclaim, are contained in just

¹ In fact, Ms. Swanson alleged only one nuisance claim, in paragraph 17 of her Answer and Counterclaims. Paragraph 18 made another factual allegation that Ms. Swanson characterized as an “additional nuisance damage,” i.e., not a basis for another claim. *See* CP 32 ¶¶ 17-18.

over about a page and a third of the document submitted on behalf of Ms. Swanson. And although we are a notice pleading state, there has to be some type of notice about the claim.” RP 33:2-10. The court performed a detailed analysis of each claim, stating:

[1. Tortious interference with contract.] There is absolutely insufficient evidence to create a material issue of fact in this case. One cannot come to a hearing like this and say that it appears, that maybe this happened, that it appears that this is what motivated it. There is *no evidence*, other than Ms. Swanson’s *pure speculation* based on hearsay statements and her own thought process, that would create the allegation or a claim of tortious interference with contract....

[2. Civil harassment.] There is no cause of action in the State of Washington for civil harassment....

[3. Abuse of process.] [I]t must be shown that there is an existence of an ulterior purpose to accomplish an objective not within the proper scope of process and that it is an act in the use of legal process, not proper *in the regular prosecution of the proceeding*. It is also clear that that abuse of process must happen or be applied after the process has been filed. And it only applies to legal proceedings. Therefore, I grant the motion to dismiss ... this matter, as well...

[4. Invasion of privacy.] [I]t is clear to me that *there is no evidence, other than Ms. Swanson’s personal belief that maybe she is being recorded*. There is no other evidence than that. And it is her supposition.

She bases that upon the fact that she thinks that the Seas have “spooky knowledge” of things that are going on with her. That is not enough to survive a summary judgment standard. *You have to come forward with real evidence to rebut a claim.* And there is none of that as it relates to that claim...

RP 32:16-25; 34:1-2; 34:8-17; 35:10-35:19. Although Ms. Swanson’s attorney complained he had not been able to conduct discovery, the court noted it was Ms. Swanson who had advocated a summary judgment standard. RP 37:3-17 (“I evaluated [the motion] under that standard pursuant to the briefing that you submitted.” RP 37:15-17.). The court directed the parties to try to agree to an order. *Id.* 38:3-5.

D. Ms. Swanson Tried to Revive Her Dismissed Claims.

On September 25, 2014, counsel for Ms. Swanson sent a draft order to counsel for the Seas, proposing the court dismiss the tortious interference with contract, harassment, abuse of process, and intrusion of privacy claims. CP 384-87. To avoid any doubt, counsel for the Seas on September 29, 2014, replied with proposed revisions that would make clear the dismissal would include the entire claims—i.e., the label given to and underlying allegations for each. CP 388-39. Counsel for Ms. Swanson responded that the Court had left open the possibility those allegations could support a claim for nuisance. CP 393. He proposed, as an alternative, a description “based on the description of the nuisance claims in the Response,” or in other words, to include

(1) constant monitoring in person and by surveillance equipment, (2) removal of

vegetation and other modifications in the boundary area that creates a wet and muddy condition, (3) harassment of Ms. Swanson and her dogs, which may have included inflicting physical harm on one of Ms. Swanson's dogs, and (4) interference and harassment of workers and contractors hired by Ms. Swanson to perform work on her property.

Id. Ms. Swanson made this proposal even though the court had rejected the factual basis for her surveillance and interference claims, and even though she had never alleged in-person monitoring or harm to her dogs (in her counterclaims or otherwise).

The parties presented orders to the Superior Court, which sided with Ms. Swanson. On November 7, 2014, it entered an order denying the Seas' motions under "the anti-SLAPP statutes, RCW 4.24.510 and RCW 4.24.525 and for CR 11 Sanctions" and granting the Seas' "motion to dismiss under CR 12(b)(6) and CR 56" all claims except the nuisance claim. CP 414. The Seas filed a Notice of Appeal November 13, 2014.

V. ARGUMENT

In 1989, Washington became the first state to enact an anti-SLAPP statute, RCW 4.24.510. That law bars civil liability for claims based on communications to the government of reasonable concern to the government, and awards a party prevailing on such a defense attorneys' fees, costs, and statutory damages. The law was designed to eliminate claims that "act as a deterrent to citizens who wish to report information to federal, state, or local agencies." Laws of 2002, ch. 232, § 1.

Because the protections of RCW 4.24.510 were inadequate, the Legislature enacted a new anti-SLAPP statute in 2010. The purpose of that law is to curb “lawsuits brought primarily to chill the valid exercise of the constitutional right[] of freedom of speech and petition.” *Id.* S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wa. 2010). Such lawsuits, the Legislature found, “are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities,” deterring them from “fully exercising their constitutional rights.” *Id.*

The new anti-SLAPP statute allows the target of a SLAPP to bring a special motion to strike at the outset, and requires the responding party to “establish by clear and convincing evidence a probability of prevailing.” *See* RCW 4.24.525(4)(b). *Davis v. Avvo, Inc.*, 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012) (dismissing claims under anti-SLAPP statute); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104 (W.D. Wash. 2010) (same). Discovery is stayed pending a decision on the motion, and a defendant who cannot meet her burden faces dismissal of her claims and a damage and fee award. *See* RCW 4.24.525(5)(c), (6)(a). The Legislature directed the law be “construed liberally.” S.B. 6395, 61st Leg., Reg. Sess. (Wa. 2010).

A. The Superior Court Erred by Failing to Apply RCW 4.24.510 and RCW 4.24.525 to Ms. Swanson’s Claims.

This Court need not decide if Ms. Swanson’s abuse of process, harassment, tortious interference, or privacy claims have merit. The

Superior Court found they did not, dismissing them under CR 56, and Ms. Swanson has not appealed that decision. *See Caswell v. Pierce Cnty.*, 99 Wn. App. 194, 992 P.2d 534 (2000) (court will not consider issues not cross-appealed unless made to support appealed decision). Instead, the Court need only decide whether the Superior Court erred by failing to dismiss the abuse of process, harassment, and tortious interference claims under RCW 4.24.510 and RCW 4.24.525, and impose those statutes' mandatory remedies. This Court "review[s] the grant or denial of an anti-SLAPP special motion de novo." *Bevan v. Meyers*, 183 Wn. App. 177, 183, 334 P.3d 39 (2014). For the following reasons, the court erred.

1. RCW 4.24.510 bars Ms. Swanson's claims.

RCW 4.24.510 bars Ms. Swanson's abuse of process, harassment, and tortious interference claims. Under that statute,

[a] person who communicates a complaint or information to any branch or *agency of federal, state, or local government* ... is *immune from civil liability* for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.

RCW 4.24.510 (emphases added). Under RCW 4.24.510, "the act of reporting to a government agency on matters of concern to the agency is an exercise of the right to petition for which a party is *absolutely immune* from liability." *Bevan*, 183 Wn. App. at 187 (emphasis added). The law does not require the communication be true, made in good faith, or about a

matter of public concern. *See Phoenix Trading, Inc. v. Kayser*, 2011 WL 3158416, at *7 (W.D. Wash. July 25, 2011) (law applies even if statement “not ... in good faith.”). *See also Bailey v. State*, 147 Wn. App. 251, 263, 191 P.3d 1285 (2008) (immunity even if statement not of public interest).

Here, RCW 4.24.510 bars Ms. Swanson’s abuse of process, harassment, and tortious interference claims because they are based on the Seas’ reports to the government. Even Ms. Swanson did not dispute her abuse of process claim was based on such reports. CP 320. As the Superior Court recognized, so, too, were her claims for harassment. RP 31:20-23; CP 31 ¶ 15 (“as part of [a] pattern of harassment, the Seas have filed false reports ... with the homeowners association, Thurston County, and other regulatory organizations”); CP 317 (“program of harassment” includes “attempts to engage ... government”). Moreover, her tortious interference claims were also based on the Seas’ communications with government: their report to L&I about her unlicensed contractor. CP 31-32 ¶ 16; CP 301 ¶ 13. RCW 4.24.510 provided absolute immunity to the Seas from these claims.

2. RCW 4.24.525 bars Ms. Swanson’s claims.

Ms. Swanson’s claims were also barred by RCW 4.24.525. To invoke that statute, “[a] moving party ... has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition.” RCW 4.24.525(4)(b); *see also Davis v. Cox*, 180 Wn. App. 514, 525-26, 325 P.3d 255 (2014),

review granted, No. 90233-0 (Wash. Oct. 9, 2014); *Aronson*, 738 F. Supp. 2d at 1109. As Division I of this Court has stated, this is a “threshold” issue that requires “an initial *prima facie* showing that the claimant’s suit arises from an act in furtherance of the right of petition or free speech,” i.e., the act is “within the realm of protected activity.” *Spratt v. Toft*, 180 Wn. App. 620, 630, 624, 324 P.3d 707 (2014).

“An action involving public participation and petition includes”

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law... [or]

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

RCW 4.24.525(2).

To decide whether an action is “based” on public participation or petition, courts evaluate the “principal thrust or gravamen” of the claim. *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 72, 316 P.3d 1119 (2014), *review granted*, 180 Wn.2d 1009 (2014); *Bevan*, 183 Wn. App. at 185. *See also Davis*, 180 Wn. App. at 529; *City of Seattle v. Egan*, 179 Wn. App. 333, 338, 317 P.3d 568 (2014). This test requires deciding whether a plaintiff’s claim “targets conduct that advances and assists the defendants’ exercise of a protected right”; if it does, “the cause of action targets the exercise of that protected right.” *Davis*, 180 Wn. App. at 530 (internal quotation marks omitted).

As the Superior Court recognized, *Bevan* is analogous. 183 Wn. App. 177. There, *Bevan* notified the Department of Public Health-Seattle & King County (“KCHD”) that neighbors, the Meyers, had installed a well on *Bevan*’s property, causing KCHD to deny the Meyers a permit for the well and septic system. *Id.* at 181. *Bevan* sued to quiet title in the property and the Meyers counterclaimed, asserting *Bevan* had interfered with the “use and enjoyment” of their property. *Id.* The trial court dismissed the counterclaim under RCW 4.24.525 because it was based on the report to KCHD. *Id.* at 182. Division I of this Court affirmed, finding the counterclaim was “directly based on an action in furtherance of the right to petition—the [plaintiff’s] report to KCHD.” *Id.* at 186.

Just as in *Bevan*, at least three of Ms. Swanson’s counterclaims target the Seas’ communications with government and are thus subject to

RCW 4.24.525.² Again, her abuse of process claim is based on allegedly “false reports” the Seas filed with “Thurston County and other regulatory organizations.” CP 31 ¶ 15. So, too, is her harassment claim. *See id.* (“as part of [a] pattern of harassment, the Seas have filed false reports ... with the homeowners association, Thurston County, and other regulatory organizations”); CP 317 (“program of harassment” includes “attempts to engage ... government”). CP 31-32 ¶¶ 13-17. The tortious interference claim is based partly on the Seas’ alleged interference with “Ms. Swanson’s business dealings with ... contractors,” or in other words, the Seas’ report to L&I. CP 31 ¶ 16. *See also* CP 301 ¶ 13. These were “[s]tatements made” “in connection with” and “to encourage or enlist public participation in an effort to effect ... review of an issue in” a “government proceeding.” RCW 4.24.525(2)(a),(b),(c). They were also “in furtherance of the exercise of the constitutional right of petition.”³

² The Seas believe that *all* of the counterclaims were retaliatory and subject to the anti-SLAPP statute because the claims targeted protected activity. The nuisance claim is based on the Seas’ alleged removal of vegetation along the parties’ boundary line “to coincide with inspections, as an adjunct to their abuse of process.” CP 32 ¶ 17. Ms. Swanson’s declaration and response to the Seas’ motion repeatedly target the Seas’ efforts to effect public participation by “engag[ing] neighbors, the homeowners associations, and various agencies of state and local governments.” CP 317. *See also* CP 327 (attacking the Seas’ “multiple and concerted efforts ... to alarm, annoy, harm and harass Ms. Swanson,” including by “filing false reports”); CP 298 ¶ 4 (“the Seas have registered and/or filed complaints against me with four separate County agencies; one State agency...”); CP 301 ¶ 11 (“the Seas’ ... efforts to get the County involved in my activities”); *id.* ¶ 13 (the Seas “called Labor and Industries to file a complaint against” Swanson’s contractor). These acts, Ms. Swanson stated, caused her to “spen[d] thousands of dollars on attorneys’ fees responding to the Seas’ various attorneys’ unsubstantiated letters, the County lawsuit and now this litigation.” CP 302 ¶ 16.

³ The reports were also made in public fora (i.e., government offices) about matters of public concern (e.g., an unlicensed contractor, “potentially dangerous” dog, unpermitted grading). But the Seas did not and do not base their SLAPP argument entirely on RCW 4.24.525(2)(d).

In the Superior Court, Ms. Swanson admitted the Seas' reports are "arguably an exercise of the right to petition the government," but claimed "a party does not have the right to petition government by filing false reports." CP 322. Although the Seas' reports were accurate, even so, a citizen does not lose the petition right "merely because his communication to the government contains some harassing or libelous statements." *In re Marriage of Meredith*, 148 Wn. App. 887, 900, 899, 201 P.3d 1056 (2009) (right to petition includes right to "petition any department of the government, including state administrative agencies" and "complain to public officials and to seek administrative and judicial relief"). Ms. Swanson also claimed the anti-SLAPP statute does not apply to the Seas' communications with the Homeowners Association, but this, too, is wrong. California courts have found such communications are acts protected by the anti-SLAPP statute. *See Cabrera v. Alam*, 197 Cal. App. 4th 1077 (2011).⁴ If the Superior Court had any doubt about this, the Legislature directed that the anti-SLAPP statute be "construed liberally." S.B. 6395, 61st Leg., Reg. Sess. (Wa. 2010).

Ms. Swanson also argued in the Superior Court that RCW 4.24.525 requires the Seas to show her claim "arises from an act in furtherance of [the] right to petition" that is also "in connection with a matter of public concern." CP 319. This is wrong. RCW 4.24.525

⁴ Washington courts have relied on California law as persuasive authority to interpret the Washington statute. *See, e.g., Alaska Structures, Inc. v. Hedlund*, 180 Wn. App. 591, 599, 323 P.3d 1082 (2014).

(2)(a),(b) and (c), which apply to statements made in connection with government proceedings, do not even contain the term “public concern.” RCW 4.24.525(2)(e) applies to “conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, *or* in furtherance of the exercise of the constitutional right of petition.” The Seas’ complaints are a matter of public concern, but even so, they were certainly an exercise of their right to petition. The petition portion of Subsection 2(e) requires no “public concern.”

Finally, Ms. Swanson argued, with no authority, that Subsections 2(a), (b), and (c) apply only where the counterclaimant intends to thwart public participation or free speech “for the purpose of interfering with a live public controversy” or during an existing government proceeding. CP 321. This, too, is wrong. RCW 4.24.525 protects petitioning the government, irrespective of whether there is any live, commenced proceeding. *See Bevan*, 183 Wn. App. at 181-82 (report to agency before litigation was an act of petition under RCW 4.24.525); *Castello v. City of Seattle*, 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010) (complaints to managers at fire department before any official proceeding were protected acts of speech and petition under RCW 4.24.525).

Thus, at least the abuse of process, harassment, and tortious interference counterclaims targeted conduct subject to RCW 4.24.525. Once the Seas made this showing, the burden shifted to Ms. Swanson to establish by clear and convincing evidence a probability of prevailing on the merits. RCW 4.24.525(4)(b). This has been interpreted to require a

showing sufficient to defeat summary judgment. *Dillon*, 179 Wn. App. at 88; *Davis*, 180 Wn. App. at 533; *Spratt*, 180 Wn. App. at 636-37. Here, because the Superior Court found Ms. Swanson's abuse of process, harassment, and tortious interference claims could not survive summary judgment, they necessarily could not survive an anti-SLAPP motion. The new anti-SLAPP law bars the claims.

3. The Superior Court erred by refusing to apply the anti-SLAPP statutes.

The Superior Court dismissed all of Ms. Swanson's claims except the nuisance claim under CR 56 and CR 12, and it denied the Seas' anti-SLAPP motion, depriving them of the statutes' mandatory remedies. CP 415. *See* RCW 4.24.510 (costs, reasonable fees, and \$10,000 in damages to party prevailing on defense); RCW 4.24.525(6)(b) (costs, reasonable fees, and \$10,000 statutory damages per moving party to party who prevails "in part or in whole" on anti-SLAPP motion). Because the Legislature mandated that the new anti-SLAPP law be liberally construed and enacted both laws' remedies to serve the public policy in encouraging public participation and petition, this was error.

The Legislature designed RCW 4.24.525 to "protect[] participants in public controversies from an abusive use of the courts." S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wa. 2010). It enacted RCW 4.24.510 to "prevent voices from being silenced." S.B. Rep. on H.B. 2699, 57th Leg., Reg. Sess. (Wash. 2002). Thus, anti-SLAPP remedies "provide[] both financial relief in the form of fees and costs, as well as a vindication of

society's constitutional interests.” *Liu v. Moore*, 69 Cal. App. 4th 745, 752 (1999) (interpreting fee provision of California anti-SLAPP law, upon which Washington based its law). The remedies are important, for it is the filing of a lawsuit itself, not the ultimate outcome, that violates the law because “[i]ntimidation will naturally exist anytime a community member is sued ... even if it is probable that the suit will be dismissed.” *Equilon Enters., LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 60 (2002).

For this reason, “the trial court **must**, upon defendant’s motion for a fee award, rule on the merits of the SLAPP motion even if the matter has been dismissed.” *Pfeiffer Venice Props. v. Bernard*, 101 Cal. App. 4th 211, 218 (2002) (emphasis added). “[A]ny other rule would deprive the true SLAPP defendant of statutorily authorized fees, frustrating the purpose of the statute’s remedial provisions.” *Id.* See also, e.g., *Collins v. Allstate Indem. Co.*, 428 F. App’x 688, 690 (9th Cir. 2011) (district court erred by denying anti-SLAPP motion after dismissing complaint under Fed. R. Civ. P. 12(b)(6)); *ARP Pharmacy Servs., Inc. v. Gallagher Bassett Servs., Inc.*, 138 Cal. App. 4th 1307, 1323 (2006) (“the grant of judgment on the pleadings did not render respondents’ pending anti-SLAPP motion moot”); *White v. Lieberman*, 103 Cal. App. 4th 210, 220 (2002) (reversing trial court’s decision that anti-SLAPP motion was moot because it had dismissed claim without leave to amend).

This result is particularly important in light of the Legislature’s directive—within the enactment itself—that RCW 4.24.525 “**shall** be applied and construed liberally.” S.B. 6395, 61st Leg., Reg. Sess. (Wa.

2010) (emphasis added). “A policy requiring liberal construction is a command that the coverage of an act’s provisions be liberally construed and that its exceptions be narrowly confined.” *City of Yakima v. Int’l Ass’n of Fire Fighters, AFL-CIO, Local 469*, 117 Wn.2d 655, 670, 818 P.2d 1076 (1991). The Superior Court did the opposite here, stating it was a “close call” whether the anti-SLAPP statute applies, and then denying the anti-SLAPP motion. This, too, was error.

In light of the anti-SLAPP statute’s purpose and this authority, the Superior Court erred by denying the Seas’ anti-SLAPP motion. Under its order, the Seas incurred significant attorneys’ fees that they cannot recover, punishment for exercising their rights to petition. Ms. Swanson is free to file future meritless lawsuits without consequence (and, by attempting to revive her dismissed claims, has already demonstrated a willingness to do so). Because Ms. Swanson filed a SLAPP, the Seas are entitled to their attorneys’ fees, costs, and \$10,000 each in statutory damages. *See Akrie v. Grant*, 178 Wn. App. 506, 510-11, 315 P.3d 567 (2013) (trial court erred by failing to award \$10,000 to each of five movants), *review granted*, 178 Wn.2d 1008 (2014).

B. The Superior Court Erred by Finding a Genuine Issue of Material Fact Precluded Judgment on Ms. Swanson’s Nuisance Claim.

The Superior Court declined to dismiss Ms. Swanson’s nuisance claim because “there is a sufficient issue of material fact.” RP 35:21-22. But Ms. Swanson provided *no* evidence to support her nuisance claim,

and *no* legal authority suggesting nuisance could arise from the facts she alleged. The Superior Court erred in refusing to dismiss this claim.

A party opposing summary judgment may not rest upon mere allegations or denials, but must set forth *specific facts* showing a genuine issue for trial. CR 56(e). “A fact is an event, an occurrence, or something that *exists in reality*. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. The ‘facts’ required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. *Ultimate facts or conclusions of fact are insufficient.*” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (emphasis added, citations omitted). This standard was not met here.

Ms. Swanson’s counterclaim alleges the Seas “removed vegetation along the boundary line between the properties, have disturbed the ground and drainage capability along that line, and have removed and damaged gravel and vegetation placed in that area by Ms. Swanson.” CP 32 ¶ 17. To support these allegations, Ms. Swanson provided *no* evidence—not even a (speculative) statement in her declaration, much less documentation supporting her claim. For this reason alone, the Superior Court should have dismissed the claim outright.

Further, even if Ms. Swanson had provided evidence supporting the allegations in her complaint, they do not state a claim for nuisance. “Nuisance is *a substantial and unreasonable interference with the use and enjoyment of land.*” *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 923, 296 P.3d 860 (2013) (quotation marks, citation omitted,

emphasis added). “In private nuisance an intentional interference with the plaintiff’s use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability.” *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 689, 709 P.2d 782 (1985) (citation omitted).

Ms. Swanson does not allege the Seas’ removal of vegetation interferes with *her* enjoyment of *her own* property, but instead her efforts to remedy the drainage problems harming the Seas. Moreover, removal of vegetation itself is not a “substantial” or “unreasonable” interference. Finally, Ms. Swanson did not provide evidence the alleged removal caused her any damage. For each of these reasons alone, the Superior Court should have dismissed the nuisance claim.⁵

C. The Superior Court Erred by Failing to Grant the Seas’ Motion for Sanctions under CR 11 and RCW 4.84.185.

The Superior Court should have imposed sanctions under RCW 4.84.185 and CR 11. Under RCW 4.84.185, a court may award attorneys’

⁵ In her Response to the Seas’ motion, Ms. Swanson tried to change her nuisance claim to include “(1) constant monitoring in person and by surveillance equipment, (2) removal of vegetation and other modifications in the boundary area that creates a wet and muddy condition, (3) harassment of Ms. Swanson and her dogs, which may have included inflicting physical harm on one of Ms. Swanson’s dogs, and (4) interference and harassment of workers and contractors hired by Ms. Swanson to perform work on her property.” CP 324. But a complaint “cannot be amended through arguments in a response brief to a motion for summary judgment.” *Camp Fin., LLC v. Brazington*, 133 Wn. App. 156, 162, 135 P.3d 946 (2006). Moreover, the Superior Court found Ms. Swanson had no basis to allege surveillance or interference with her workers and contractors. RP 32:16-25; 34:1-2; 34:8-17; 35:10-19. Further, Ms. Swanson provided no evidence for her new claims the Seas conducted “in person” monitoring, or harmed her dogs (other than speculation, CP 298-99 ¶¶ 7-8 (alleging a friend had found her admittedly sick dog “shaking and hiding” and speculating the Seas had harmed the dog)). Finally, other than (2) above, none of the allegations relates to Ms. Swanson’s land, yet nuisance is an “interference with the use and enjoyment of *land*.” *Womack v. Von Rardon*, 133 Wn. App. 254, 260, 135 P.3d 542 (2006) (no nuisance claim for killing of cat; plaintiff “suffered a loss, but not a loss related to land....”).

fees to the prevailing party if the action was “frivolous and advanced without reasonable cause.” RCW 4.84.185. “A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts.” *Stiles v. Kearney*, 168 Wn. App. 250, 260, 277 P.3d 9 (2012). CR 11 requires attorneys to certify pleadings and motions that they sign are “well grounded in fact,” “warranted by existing law or a good faith argument for extension, modification, or reversal of existing law,” and “not interposed for any improper purpose.” CR 11. Penalties for violating this rule include reasonable expenses incurred by the filing, including fees. *Id.*

Here, Ms. Swanson’s claims were not well grounded in law or fact, nor did Ms. Swanson ask for an alteration of existing law. As the Superior Court found, there is *no claim* for civil harassment in Washington. RP 34:1. *See also Castello v. City of Seattle*, 2010 WL 4857022, at *4 (W.D. Wash. 2010) (“there is no general civil harassment claim in Washington”). Further, the court found Ms. Swanson’s tortious interference claim was based on “pure speculation”; her abuse of process claim was not based on an improper use of legal process by the Seas; and her privacy claims were based on “supposition.” RP 35:10-20. Moreover, after advocating a summary judgment standard, Ms. Swanson did not even try to provide evidence to support her nuisance claim. At least three of her claims were barred by the anti-SLAPP laws, and all were objectively baseless and interposed for an improper purpose: to silence and punish the Seas.

Had Ms. Swanson’s counsel made a reasonable inquiry, he would have discovered this. He did not, and instead misrepresented the facts he

did know, arguing that “if you file a criminal report for an improper purpose and then have that process move forward ... that’s an abuse of process, and *that’s exactly what happened here.*” RP 23:10-14. Ms. Swanson never alleged the Seas filed a *criminal* report against her, much less that any criminal “process” moved forward. The action taken by the County was a civil—not criminal—enforcement action. Further, Ms. Swanson has tried to revive her dismissed claims in the guise of her nuisance claim. CP 393.

For these reasons, the Superior Court should have sanctioned Ms. Swanson and her attorney. This is particularly so because Ms. Swanson’s counsel has already been sanctioned *by this Court for the same type of conduct.* *Bert Kutu Revocable Living Trust ex rel. Nakano v. Mullen*, 175 Wn. App. 292, ¶¶ 74, 65, 306 P.3d 994 (2013) (counsel had “failed to adequately investigate or make reasonable inquiry into the facts supporting the complaint, and further ignored the facts he did obtain and included clearly false claims in the two complaints he filed....” and the claims “were frivolous and advanced without reasonable cause”).⁶

D. The Seas Are Entitled to Their Attorneys’ Fees and Costs on Appeal.

Because the old anti-SLAPP statute requires an award of “expenses and reasonable attorneys’ fees incurred in establishing the

⁶ The Seas recognize “[a] party may not cite *as an authority* an unpublished opinion of the Court of Appeals.” GR 14.1. But they do not cite *Bert Kutu Revocable Living Trust* (the portion of which they quote is unpublished) as authority, only for the fact that Ms. Swanson’s counsel has previously been sanctioned for the same type of conduct as here.

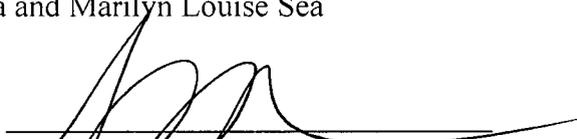
defense,” RCW 4.24.510, and the new law requires such an award for fees or costs “incurred in connection with each motion on which the moving party prevailed,” RCW 4.24.525(6)(a)(i), the Seas are entitled to their fees on appeal if the Court reverses the trial court’s decision. *See Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 423, 161 P.3d 406 (2007) (“[W]here a prevailing party is entitled to attorney fees below, they are entitled to attorney fees ... on appeal.”).

VI. CONCLUSION

For these reasons, the Seas respectfully ask that the Court reverse the Superior Court’s decisions denying their anti-SLAPP motion, declining to dismiss the nuisance claim, and declining to award sanctions, and to direct the Superior Court to award the mandatory remedies under RCW 4.24.510 and RCW 4.24.525.

RESPECTFULLY SUBMITTED this 2nd day of March, 2015.

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