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DIVISION III
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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

ANITA R. DENNIS

v.

JOHN CLARK

AND

ANITA R. DENNIS

v.

DAN DEVRIEND

No. 325563

APPELLANTS' BRIEF

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I. INTRODUCTION

This case arises from Anita Dennis' attempt to use anti-harassment petitions to thwart her neighborhood's opposition to her and her husband Jon Dennis' application for a license to grow marijuana at their rural home located near Prosser, Washington. Approximately fifteen members of the community in which the Dennis' reside, including appellants John Clark and Dan DeVriend, attended a Benton County Commissioner meeting where they addressed the commissioners and spoke to the County Sheriff. The neighbors wrote to the Washington Liquor Control Board and met with the Benton County Building Department to advocate that the marijuana permit be denied.

As a part of these efforts, John Clark went to his neighbor Dan DeVriend's home to take pictures of the adjoining Dennis property where a marijuana enclosure fence was being built. Clark and DeVriend remained on the DeVriends' property and took pictures of the fence which the Sheriff told them was perfectly legal. The Dennis' used this as an excuse to file anti-harassment petitions against both Clark and DeVriend. The sole purpose of the petitions was to try to quiet the neighborhood opposition to her and her husband's plans to grow marijuana.

In response to the petitions, Clark and DeVriend filed special motions to strike under RCW § 4.24.525 (the "Anti-SLAPP Act") arguing

that the petitions were strategic lawsuits against public participation. At the hearing, the Commissioner heard argument on the Anti-SLAPP motions but then declined to rule on the motions and instead ruled on the merits of the underlying petitions in violation of RCW § 4.24.525(5)(c). The court denied the anti-harassment petition against DeVriend finding “it does appear that he was engaged [sic] that which is protected under the Anti-SLAPP statute.” In perhaps the most perplexing outcome, the Commissioner entered an order against Clark, ordering not that he refrain from contacting or surveilling the Dennis’ but that he: “ensure that his water does not trespass upon the (Dennis’) driveway or residence...” and prohibiting Clark from possessing firearms.

The Commissioner erred as a matter of law when he failed to stay the underlying petitions when the special motions to strike were filed. The Commissioner further erred in entering an order restricting Clark from allowing water to trespass on to the Dennis’ property as an anti-harassment order. Moreover, the revision court erred by denying appellants’ motions for revision which substantially adopted the Commissioner’s decisions. Because the record is sufficient for this Court to determine whether the petitions were based on protected activity and because Ms. Dennis failed to establish a probability of success by clear and convincing evidence, this Court should vacate the protection order

entered against Clark and remand for entry of judgments in favor of John Clark and Dan DeVriend against Anita Dennis.

II. STATEMENT OF THE CASE

Appellants Dan Devriend and John Clark are neighbors in a rural community of approximately fifteen homes located near Prosser, Washington. *DeVriend CP at 42; DeVriend CP at 56*. In the spring of 2014, Clark and Devriend became aware that their neighbors, Jon and Anita Dennis, had applied for a marijuana grower's permit. *DeVriend CP at 42*. Clark, DeVriend, and other members of the neighborhood got together to see how they could oppose the issuance of the permit. *Id; DeVriend CP at 48; DeVriend CP at 51; DeVriend CP at 56; DeVriend CP at 59*.

On April 29, 2014, the neighbors attended the Benton County Board of Commissioners meeting to voice their concerns about the potential impact of the marijuana farm on their neighborhood. *DeVriend CP at 123*. In addition to speaking before the commissioners, the neighbors spoke with Benton County Sheriff Steven Keane who was in attendance. *Devriend CP at 46*. Clark talked to Sheriff Keane and told him he had taken pictures of the Dennis' property and that he wanted to take additional pictures. *DeVriend CP at 45-47*. Sheriff Keane told the neighbors that they were within their rights to take pictures of the property

so long as they stayed on their own property and did not use a telephoto lens. *DeVriend CP at 46-47*. One neighbor wrote a letter to the Washington State Liquor Control Board (“WSLCB”) expressing her concern about the pending application. *DeVriend CP at 51; DeVriend CP at 54*. Another neighbor wrote letters to the WSLCB and the Yakama Nation. *DeVriend CP at 56*.

During the previous week, Jon Dennis constructed the enclosure fence where the marijuana would be grown if the permit was granted. *DeVriend CP at 44*. The fence was not built to code and based on Dan DeVriend’s complaint to the County regarding its construction the Benton County Building Department inspected the fence and on April 17, 2014 ordered it be torn down. *DeVriend CP at 43*. Jon Dennis started to rebuild the fence a few days later. *DeVriend CP at 44*. On April 25, 2014, with remaining concerns about the fence’s construction and the Dennis’ plans, Clark and DeVriend took pictures of the fence from a lawful vantage point on the DeVriend’s property to show the WSLCB and the Building Department. *DeVriend CP at 45*. On May 1, 2014, two days after the Benton County Commissioners meeting, and approximately one week after Clark took the pictures of the fence, Anita Dennis filed anti-harassment petitions against Clark and DeVriend. *DeVriend CP at 1*.

In the section of Anita Dennis' anti-harassment petition against DeVriend which asks "What happened immediately before the harassment or stalking occurred?", Dennis wrote:

WE STARTED CONSTRUCTION ON A LEGAL, ENGINEED [sic] & PERMITTED STRUCTURE.

DeVriend CP at 5 [errors in original]. The petition against Clark contains a similar statement. *See Clark CP at 5*. In the section of the petition which asks "What did the respondent do or say that you believe to be harassing or stalking behavior?", Ms. Dennis wrote in part that DeVriend:

HAS ENCOURAGE [sic] OTHER, MORE EASILY MANIPULATED PEOPLE, HIS MOTHER IN LAW, SUSAN REEMS & A MALE NEIGHBOR, JOHN CLARK TO DO ILLEGAL THINGS AND BE AGGRESSIVE TOWARDS US.

DeVriend CP at 5 [errors in original].

Based on these statements in the petitions, it appeared that Ms. Dennis' petitions were filed in response to Clark and DeVriends' efforts to oppose the Dennis' plan to start a marijuana farm. In response, Clark and DeVriend filed special motions to strike under the Anti-SLAPP Act. *DeVriend CP at 14*.

The special motions to strike were noted for hearing on the same day as Ms. Dennis' petitions. At the hearing, Ms. Dennis stated to the court: "(W)hat started this whole thing was I have applied for the

marijuana growing license so a lot of my neighbors are really upset with that.” *5/23/14 RP at 2.*

After Ms. Dennis presented her argument to the Commissioner about the anti-harassment petitions, Clark and DeVriend presented their argument regarding the Anti-SLAPP motion through counsel. *5/23/14 RP at 3.* Counsel informed the court that under RCW § 4.24.525 that once a motion to strike is filed the underlying proceedings must be stayed until the disposition of the Anti-SLAPP motion. *5/23/14 RP at 3; see also DeVriend CP at 16.* Counsel also argued to the court that Clark and DeVriend’s motions to strike should be granted because the anti-harassment petitions were based on their public participation and that Ms. Dennis had failed to establish by clear and convincing evidence that she would prevail on her underlying claims. *5/23/14 RP at 4.*

At this point, the Commissioner stated: “Counsel nobody disagrees with what you’re arguing about the Anti-SLAPP statute [...] but you need to address two things.” *5/23/14 RP at 5.* The Commissioner then proceeded to ask about Clark’s sprinklers and how water trespass from Clark’s sprinklers onto the Dennis’ property and taking pictures of Ms. Dennis’ daughter “further the purposes of the Anti-SLAPP statute.” *RP 5/23/14 at 5-6.* Counsel explained that, the sprinklers had been used the same way for seven years and it only became a “problem” when Ms.

Dennis filed her anti-harassment petition. *RP 5/23/14 at 7; see also DeVriend CP at 45*. Counsel further explained that Clark did not intentionally take any pictures of Ms. Dennis' daughter, but rather that Clark was taking pictures of the fence. *RP 5/23/14 at 7; see also DeVriend CP at 45*.

At the conclusion of the hearing, the Commissioner entered an order against Clark "in regards [to] his trespass of water upon her property." *5/23/14 RP at 10*. As to DeVriend, the Commissioner stated:

[T]he court is not going to grant an anti-harassment order in regards to that matter *it does appear that he was engaged [sic] that which is protected under the Anti-SLAPP statute*. And as far as the Anti-SLAPP application you can address that on the normal civil docket rather than on this docket.

5/23/14 RP at 10 [emphasis added]. Despite finding that the Anti-SLAPP statute applied, the Commissioner declined to address the "Anti-SLAPP application" and instead entered orders on the merits of the anti-harassment petitions. *Id, see also DeVriend CP at 65; Clark CP at 64*.

The court order entered against Clark contained only two provisions: (1) Clark is restrained from entering the Dennis residence and "shall ensure that his water does not trespass upon the driveway or residence of Petitioner"; and (2) Clark is prohibited from possessing a firearm or other dangerous weapon. *Clark CP at 64*. The order does not

restrain Clark from contacting or keeping Ms. Dennis under surveillance.

Id.

After the hearing, Clark and DeVriend moved for revision of the Commissioner's rulings pursuant to RCW § 2.24.050 and LCR 53.2(e). *Clark CP at 79; DeVriend CP at 79.* Clark and DeVriend asserted that the Commissioner erred by: (1) declining to address the anti-SLAPP motion; (2) by failing to stay the underlying anti-harassment petitions until the anti-SLAPP motion was resolved; (3) by entering a protective order that only addressed water-trespass without evidence of intent to alarm or annoy; and (4) by not granting Clark and DeVriend their attorney fees, costs, and statutory damages. *Clark CP at 80; DeVriend CP at 80.* On revision, the Superior Court affirmed the Commissioner's decisions without further comment. *Clark CP at 164-65; DeVriend CP at 162-63.*

III. ISSUES PRESENTED FOR APPEAL

1. Whether The Trial Court Erred As A Matter Of Law When It Failed To Stay The Pending Anti-Harassment Petitions Without A Finding Of Good Cause In Violation Of RCW § 4.24.525(5)(c).

2. Whether The Trial Court Erred By Failing To Grant The Anti-SLAPP Motions Filed By Clark And DeVriend.
3. Whether The Trial Court Erred As A Matter Of Law By Entering A Water Trespassing Injunction As An Anti-Harassment Order Without Finding That The Water Trespass Occurred As A Knowing And Willful Course Of Conduct Intended To Seriously Alarm, Annoy, Or Harass Ms. Dennis.
4. Whether The Trial Court Erred In Entering An Order Requiring The Surrender Of Firearms And Prohibition Against Firearm Possession.
5. Whether the Revision Court Erred in Denying Clark and DeVriends' Motions for Revision.
6. Whether Clark And DeVriend Should Be Awarded Attorney Fees, Costs and Statutory Damages On Appeal Pursuant To RAP 18.1 And RCW § 4.24.525(6).

IV. ARGUMENT

This Court should vacate the anti-harassment orders in this matter because the trial court erred by addressing the anti-harassment petitions

when Anti-SLAPP motions to strike had been filed in response to the petitions. RCW § 4.24.525(5)(c) makes it clear that “any pending hearings or motions in the action *shall* be stayed upon the filing of a special motion to strike.” [emphasis added]. In the event that the trial court fails to timely rule on an anti-SLAPP motion, each party has the right to an expedited appeal. RCW § 4.24.525(5)(d). Here, the court failed to stay the anti-harassment petitions, which lead to a series of further errors by the court that heard and agreed that the Anti-SLAPP statute applied but nevertheless only entered orders on respondent’s underlying claims.

Further, this Court should vacate the anti-harassment order entered against Clark because the court abused its discretion in entering an anti-harassment order that related only to the alleged water trespass from Clark’s sprinklers. Intentional and wrongful trespass is actionable under RCW § 4.24.630 and injunctive relief may be sought under RCW § 7.40.020. However, by entering this order in the context of an anti-harassment proceeding, the trial court entered an injunction in regards to a purely civil matter in a summary proceeding with criminal penalties attached if the order is violated.

Finally, because the only anti-harassment restriction related to the alleged trespass of sprinkler water, the prohibition requiring Clark to surrender all firearms and prohibit his possession of a firearm was

inappropriate and violated Clark's right to bear arms under the Second Amendment.

The granting or denial of an anti-SLAPP motion to strike is reviewed *de novo*. The requested relief in this appeal is that the Court determine that the anti-SLAPP motion should have been granted. In doing so, the Court should vacate the anti-harassment orders and remand with instructions to dismiss the anti-harassment petitions with prejudice and enter judgments in favor of Clark and DeVriend in accordance with RCW § 4.24.525(6).

A. The Trial Court Erred As A Matter Of Law By Failing To Stay The Pending Anti-Harassment Petitions When Anti-SLAPP Motions Were Filed By Clark And DeVriend.

This Court should determine that the trial court erred as a matter of law when it failed to stay the underlying proceedings without addressing the appellants' anti-SLAPP motions. "[T]he grant or denial of an anti-SLAPP motion," as well as questions involving "issues of statutory interpretation," are reviewed *de novo*. *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 70, 316 P.3d 1119, 1133 review granted, 180 Wn.2d 1009, 325 P.3d 913 (2014).

A court ruling on an anti-SLAPP motion "shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." RCW 4.24.525(4)(c). Once an anti-SLAPP

motion is filed, all pending hearings in the action “shall be stayed...until entry of the order ruling on the motion” unless “on motion and for good cause shown, [the Court] may order that specified discovery or other hearings or motions be conducted.” RCW 4.24.525(5)(c); *Dillon*, 316 P.3d at 1132 (2014).

Here, the trial court failed to stay the underlying anti-harassment petitions by Ms. Dennis when Clark and DeVriend filed anti-SLAPP motions in response to her claims. *5/23/14 RP at 10*. Ms. Dennis did not file a motion seeking to conduct the anti-harassment hearings prior to the entry of an order ruling on the anti-SLAPP motions. Nor did the trial court on its own motion find good cause to proceed with the anti-harassment hearings despite the fact that counsel for Clark and DeVriend raised the issue of the mandatory stay in their anti-SLAPP motions and at the hearing. *5/23/14 RP at 3; DeVriend CP at 16*.

Based on these failures, the trial court failed to follow the statute requiring that underlying matter be stayed until a ruling on the anti-SLAPP motion was entered. As a result, this Court should vacate the order denying an anti-harassment petition against DeVriend and the order granting an anti-harassment petition against Clark.

B. The Trial Court Erred By Failing To Grant The Anti-SLAPP Motions Filed By Clark And DeVriend.

This Court should determine that the trial court erred by failing to grant the anti-SLAPP motions filed by Clark and DeVriend. “A party may bring a special motion to strike any claim that is based on an action involving public participation and petition.” RCW § 4.24.525(4)(a). An action involving public participation include those based on “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)(e).

Determining whether an Anti-SLAPP motion should be granted is a two-step inquiry. *Davis v. Cox*, 180 Wn. App. 514, 526, 325 P.3d 255, 262 (2014) (*citing* RCW § 4.24.525(4)(b)). First, the moving party must show “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). Upon satisfaction of the first step, “the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim.” *Id.* In determining whether the parties have met this burden, the court “shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” RCW § 4.24.525(4)(c).

The procedure for deciding Anti-SLAPP motions is similar to that used in deciding a motion for summary judgment. *Davis v. Cox*, 180 Wn.

App. at 528. The trial court does not find facts, but rather must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff. *Id.* On appeal, the standard of review is *de novo*. *Dillon*, 179 Wn. App. at 70. The Anti-SLAPP statute “shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts” RCW 4.24.525 (emphasis added).

1. Clark And DeVriend Established By A Preponderance Of The Evidence That The Claims By Ms. Dennis Were Based On Their Public Participation In Opposing Her Marijuana License Application.

This Court should determine, as established by a preponderance of the evidence that Ms. Dennis’ anti-harassment petitions were brought in response to Clark and DeVriend’s public participation in opposing the Dennis marijuana license application. RCW § 4.24.525 applies to any “claim, however characterized, that is based on an action involving public participation and petition.” RCW § 4.24.525(2). This includes: “lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern...” RCW § 4.24.525(2)(e). In determining whether a claim or counterclaim arises from public participation and petition, courts look to the gravamen of the

claim. *City of Seattle v. Egan*, 179 Wn. App. 333, 338, 317 P.3d 568 (2014).

In other words, the act underlying the plaintiff's cause, or the act which forms the basis for the plaintiff's cause of action, must itself have been an act in furtherance of the right of free speech [or petition].”

Bevan v. Meyers, __ Wn. App __, 334 P.3d 39, 43 (Wash. Ct. App. 2014) (quoting *Aronson v. Dog Eat Dog Films, Inc.*, 738 F.Supp.2d 1104, 1110 (W.D.Wash.2010)).

“Washington’s anti-SLAPP statute was modeled after California’s statute” and therefore, “California cases are persuasive.” *Henne v. City of Yakima*, 177 Wn. App. 583, 589, 313 P.3d 1188 (2013). In *Thomas v. Quintero*, a California appellate court held that California’s Anti-SLAPP statute applies to anti-harassment proceedings. *Thomas v. Quintero*, 126 Cal. App. 4th 635, 646 (2005) accord RCW § 10.14.190 (“Nothing in this chapter shall be construed to infringe upon any constitutionally protected rights including, but not limited to, freedom of speech and freedom of assembly”).

In this case, the evidence that Ms. Dennis’ petitions were filed based on the public participation of Clark and DeVriend is overwhelming. Clark, DeVriend, and the other members of the neighborhood were actively engaged in opposing the Dennis’ marijuana license application. *DeVriend CP at 48; DeVriend CP at 51; DeVriend CP at 56; DeVriend*

CP at 59. Further, they did so in a lawful manner by addressing their concerns with state and local government. Appellants attended a Benton County Commissioners meeting, spoke with the Benton County Building Department, and sought to encourage neighborhood support for their position. To provide documentation in support of their concerns, Clark took pictures of the Dennis' fence from the DeVriends' property, which according to respondent were taken at a distance of 370' from her residence. *Clark CP at 5.* Moreover, DeVriend's complaint one week earlier to the Building Department got the original fence torn down. *DeVriend CP at 44-45; see also Gill v. Hearst Pub. Co., 253 P.2d 441 (Cal. 1953)* (taking photographs from a lawful vantage point is constitutionally protected under the First Amendment).

Ms. Dennis' petition itself identifies the activity leading up to the harassment:

WE STARTED CONSTRUCTION ON A LEGAL, ENGINEED
[sic] & PERMITTED STRUCTURE.

DeVriend CP at 5 [errors in original]; *see WAC § 314-55-075(1)* (permitted marijuana grow must take place in a fully enclosed structure. If grown outdoors, the enclosing fence must be at least eight feet high). At the hearing, Ms. Dennis identified the proposed marijuana grow as "what started this whole thing" and "a lot of my neighbors are really upset with

that.” *5/23/14 RP at 2*. Other than her initial petitions and her statements at the hearing, Ms. Dennis presented no additional evidence or testimony in support of her petitions or in opposition to appellants’ special motions to strike.

Based on the declarations of Clark, DeVriend, their neighbors, Sheriff Keane, as well as the pleadings and testimony of Ms. Dennis, it is apparent that the anti-harassment petitions were filed because of appellants’ public participation and petition. The trial court appears to have agreed with this conclusion as the Commissioner stated “it does appear that [DeVriend] was engaged [sic] that which is protected under the Anti-SLAPP statute.” *5/23/14 RP at 10*. The Commissioner also crossed out the restrictions preventing Clark from contacting or surveilling Ms. Dennis which would indicate that the trial court believed that the photographing was a protected activity. *Clark CP at 64*. Consequently, this Court should determine that Clark and DeVriend have shown by a preponderance of evidence that the anti-harassment petitions are claims involving public participation and petition.

2. Ms. Dennis Failed To Establish A Likelihood Of Success By Clear And Convincing Evidence.

This Court should determine that Ms. Dennis failed to establish a probability of prevailing on her anti-harassment petitions by clear and convincing evidence. “Special motions to strike under the anti-SLAPP statute are subject to a burden-shifting scheme.” *Bevan*, 334 P.3d at 42. Once the moving party has established that the claim involves public participation and petition, the burden shifts to the opposing party “to establish by clear and convincing evidence a probability of prevailing on the claim.” RCW § 4.24.525(4)(b).

Here, Ms. Dennis failed to show a probability of prevailing on her anti-harassment petitions. In her petition, the alleged “harassing” behavior by DeVriend which formed the basis of the petition was:

HAS ENCOURAGE [sic] OTHER, MORE EASILY MANIPULATED PEOPLE, HIS MOTHER IN LAW, SUSAN REEMS & A MALE NEIGHBOR, JOHN CLARK TO DO ILLEGAL THINGS AND BE AGGRESSIVE TOWARDS US.

DeVriend CP at 5 [errors in original]. In order to meet the elements necessary for the issuance of an anti-harassment order, the conduct at issue must serve “no legitimate or lawful purpose.” RCW § 10.14.020(1). Further, the statute “explicitly does not criminalize actions—‘a course of

conduct’—that are constitutionally protected.” *State v. Bradford*, 175 Wn. App. 912, 924-25, 308 P.3d 736, 742 (2013) *review denied*, 179 Wn.2d 1010, 316 P.3d 494 (2014); RCW § 10.14.190 (“Nothing in this chapter shall be construed to infringe upon any constitutionally protected rights including, but not limited to, freedom of speech and freedom of assembly”). As stated by the trial court: “[T]he court is not going to grant an anti-harassment order in regards that matter [DeVriend] it does appear that he was engaged [sic] that which is protected under the Anti-SLAPP statute.” 5/23/14 RP at 10.

Respondent may attempt to argue that the issuance of a protective order restraining Clark would make it appear that Ms. Dennis met her burden at least in regards to his petition. This is not correct for two reasons. First, as discussed *infra*, the trial court abused its discretion in entering an order against Clark.

Second, and more importantly, RCW § 4.24.525 already contemplates a situation where only some of a party’s claims involve public participation. Under RCW § 4.24.525(6)(a): “[t]he court shall award to a moving party who prevails, **in part or in whole**, on a special motion to strike” costs of litigation and an amount of ten thousand dollars. [emphasis added]. So while the trial court entered an order preventing Clark’s sprinkler water from trespassing on the Dennis’ driveway, it did

not restrain him from taking pictures of the Dennis property or “talking to another aggressive neighbor.” *See Clark CP at 5*. When asked if the court had “any other basis for the order against Mr. Clark other than the watering incident,” The Commissioner explicitly stated “It’s the only incident.” *5/23/14 RP at 10*. The Commissioner then proceeded to cross out the “no contact” and “no surveillance” portions of the anti-harassment order. *Clark CP at 64*.

Therefore, Ms. Dennis, even in the light most favorable to her submissions, did not show by clear and convincing evidence a probability of prevailing on the allegations contained in her petition which related to public participation by Clark. Based on this, the Court should remand this matter to the trial court with direction to grant the Anti-SLAPP motions and enter judgments in favor of Clark and DeVriend under RCW § 4.24.525(6).

C. Whether The Trial Court Abused Its Discretion In Entering An Anti-Harassment Order Against Clark Restraining Water Trespass Without Any Evidence Presented That The Alleged Trespass Was Intended To Seriously Harm, Harass, Or Annoy Ms. Dennis.

The trial court abused its discretion by entering an anti-harassment order against Clark requiring that he “ensure that his water does not trespass upon the driveway or residence of Petitioner.” *Clark CP at 162*.

For conduct to amount to unlawful harassment, it must meet the following elements: (1) a knowing and willful; (2) course of conduct; (3) directed at a specific person; (4) which seriously alarms, annoys, harasses, or is detrimental to such person; and (5) which serves no legitimate or lawful purpose. RCW § 10.14.020(2). RCW § 10.14.080(6) gives the trial court broad discretion in fashioning a remedy to combat harassment. “Although a trial court has broad authority in this area, the authority is not limitless.” *Trummel v. Mitchell*, 156 Wn.2d 653, 668, 131 P.3d 305, 313 (2006). “[T]he facts of the relationship between the parties should guide the court's discretion” in determining what relief is appropriate. *Id.* (quoting *Hough v. Stockbridge*, 150 Wn.2d 234, 76 P.3d 216 (2003)) (internal quotations omitted).

Anti-harassment hearings are summary proceedings. *See* RCW § 10.14.080(2) (The “full hearing [...] shall be set for not later than fourteen days from the issuance of the temporary order”). As a result, there are many issues that anti-harassment hearings are ill-equipped to resolve. *See e.g.* RCW § 10.14.080(10) (real property possession disputes); RCW § 10.14.080(11) (minor child custody disputes).

In her petition, Ms. Dennis alleged that Clark’s irrigation water was traveling onto the Dennis’ driveway. *Clark CP at 6*. In response, Clark did not dispute that water from his sprinklers went onto the Dennis’

driveway. *Clark CP at 45*. Instead, he declared that this was not intentional, but that the sprinklers had been used in the same way for the past seven years and that he had no intent of harassing the Dennis' with his sprinkler water. *Id.* Notably, Clark did not receive any complaints about the water in the years leading up to the petition. *Id.*

At the end of the hearing, The Commissioner concluded as follows:

In regards to the matter Mr. Clark the court is going to enter the anti-harassment order in favor of Ms. Dennis in regards his trespass of water upon her property. He is not to turn his sprinklers on so that they hit her driveway or water her cars that is a trespass and Mr. Eisinger you've already admitted that the Anti-SLAPP statute does not protect someone from violating the law inappropriately.

5/23/14 RP at 10. When asked for clarification about the findings and whether this was finding a single incident to be a course of conduct, the Commissioner said that as the watering had been going on for seven years, it constituted a course of conduct. *5/23/14 RP at 11*. The court also found that Clark's control over the water was sufficient to find that watering over the property line was intentional. *Id.*

In this case, the trial court erred in not making the necessary finding, or even addressing, the required element that the course of conduct be knowingly and willfully directed at the petitioner to "seriously alarm, annoy or harass" them. *See RCW § 10.14.020(2)*. As noted by Ms.

Dennis, “what started this whole thing was I have applied for the marijuana growing license so a lot of my neighbors are really upset with that.” *5/23/14 RP at 2*. However, the neighbors did not find out about the permit application until March or April of 2014. *See DeVriend CP at 42; See DeVriend CP at 44*. Because the sprinkler water issue had not arisen in the seven years prior, the court abused its discretion in finding that seven years of alleged water trespass constituted a course of conduct intended to alarm, harass, or annoy Ms. Dennis.

Further, as noted by the trial court, the only issue it was granting the order on was in regard to the water trespass. *5/23/14 RP at 10*. Based on this finding, the granting of an anti-harassment order on the issue is particularly inappropriate. If Ms. Dennis was concerned about the water trespass, she could have brought an action for damages against Clark. *See RCW § 4.24.630*. She also could have sought to enjoin Clark’s water from trespassing on her property. *See RCW § 7.40.020*. Instead, Ms. Dennis received what amounted to a no-trespassing injunction in a summary hearing without the requirement of a bond and without the filing of a separate civil action, and an order, if violated by Clark, subjecting him to criminal gross misdemeanor liability. *RCW § 10.14.170*. The concern of the court and the remedy granted by the court does not fall within the proper scope of the Anti-Harassment Act. Therefore, this Court should

determine the trial court abused its discretion in entering an anti-harassment order against Clark.

D. The Court Erred In Entering An Order Requiring The Surrender Of Firearms And Prohibiting Clark From Possessing Firearms.

This Court should determine that the trial court abused its discretion or committed manifest constitutional error by entering an anti-harassment order containing a “no firearms” provision. Under the United States Constitution, “the right of the people to keep and bear arms, shall not be infringed.” U.S. Const. amend II. The Second Amendment confers an “individual right to keep and bear arms.” *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). “[T]he core of the Second Amendment right is to allow ‘law-abiding, responsible citizens to use arms in defense of hearth and home.’” *United States v. Chovan*, 735 F.3d 1127, 1133 (9th Cir. 2013) (*quoting Heller*, 554 U.S. at 636)).

Under RCW § 9.41.800(2), a court, when entering an anti-harassment order, “may, upon a showing by a preponderance of the evidence [...] that a party has: Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony”, require the party to surrender any firearm or dangerous weapon.

In this case, there was no allegation by Ms. Dennis that a firearm was used, displayed, or threatened to be used by Clark. *See Clark CP at 1-*

10. The only thing stated in the petition is “WHAT HARM WOULD COME TO MR. CLARK WITHOUT HIS SHOTGUN FOR 2 WEEKS.”

Clark CP at 8. The answer to Ms. Dennis’ question is that the order violates Clark’s rights under the Second Amendment of the Constitution.

At the hearing, the trial court entered an order which states:

Respondent is required to surrender any firearm or other dangerous weapon, or any concealed pistol license to Benton County Sheriff, by (date) ASAP. Respondent is prohibited from obtaining or possessing a firearm or other dangerous weapon, or a concealed pistol license.

Clark CP at 64.

Determining whether a statute violates the Second Amendment is a two-step inquiry. First, the court determines whether the challenged law burdens conduct protected by the Second Amendment and if so, directs courts to apply an appropriate level of scrutiny. *Chovan*, 735 F.3d at 1136 (citing *U.S. v. Chester*, 628 F.3d 673, 679 (4th Cir.2010)). In *Chovan*, the defendant was convicted of committing domestic violence assault against his spouse. *Chovan*, 735 F.3d at 1130. As a result, Chovan was barred from possessing a firearm under 18 U.S.C. § 922(g)(9). *Id.* Fourteen years after the conviction, the FBI learned that Chovan was in possession of firearms, executed a search warrant, and arrested him for violation of 18 U.S.C. § 922(g)(9). *Id.* at 1131.

Chovan moved to dismiss the charge on the ground that 18 U.S.C. § 922(g)(9) was unconstitutional under the Second Amendment. *Id.* On appeal, the Court of Appeals concluded that 18 U.S.C. § 922(g)(9), “by prohibiting domestic violence misdemeanants from possessing firearms [...], burdens rights protected by the Second Amendment.” *Id.* at 1337. Next the court had to determine what level of scrutiny was appropriate. *Id.* The “core right” as described in *Heller* was “the right of a *law-abiding, responsible citizen* to possess and carry a weapon.” *Id.* at 1138. As the statute burdened Chovan because of his criminal conviction, he was not a law-abiding citizen. *Id.* Therefore, the court determined intermediate scrutiny was appropriate.

In applying intermediate scrutiny, the court recognized “[t]he burden the statute places on domestic violence misdemeanants’ rights, however, is quite substantial.” *Id.* “As such, the statute is a more ‘serious encroachment’ on the Second Amendment right.” *Id.* (quoting *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir.2011)). However, the court upheld the statute as applied to Chovan. *Chovan*, 735 F.3d at 1139. First, the court determined that the government has an important government interest in preventing domestic gun violence. *Id.* Next the court determined the statute was substantially related to the government interest in that (1) the statute sought to reach non-felons who nonetheless had demonstrated a

violent past; (2) a high rate of domestic violence recidivism exists; (3) domestic abusers use guns; and (4) use of guns by domestic abusers is more likely to result in the victim's death. *Id.*

Here, RCW § 9.41.800 might pass the same level of scrutiny as discussed in *Chovan* had the trial court properly applied the statute. However, the trial court did not properly apply the statute. With no allegation or evidence of use or threat of firearm use, Clark should not have been restrained from possessing a firearm. As discussed *supra*, the anti-harassment order entered against Clark amounts to little more than an improper water-trespassing injunction. This injunction comes with a perplexing prohibition against firearm possession. As Clark has not been convicted of a crime and has not even been accused of improperly using a firearm, he is a law-abiding citizen entitled to the core protections of the Second Amendment. *Heller*, 554 U.S. at 636. Based on this, the trial court not only abused its discretion by entering such a restriction, it committed manifest constitutional error by infringing on the constitutional rights of Clark. *See* RAP 2.5. Therefore, this Court should vacate the anti-harassment order entered against Clark.

E. The Revision Court Erred by Denying Appellants' Motion for Revision of the Commissioner's Decisions.

Following the anti-harassment hearing, appellants timely filed motions for revision seeking the Superior Court's review of the Commissioner's decisions in both the Clark and DeVriend matters. On June 24, 2014, the revision court entered an order on the motions for revision denying appellants' motions and affirming the Commissioner's decision without further comment or explanation. *Clark CP at 164-65; DeVriend CP at 162-63.*

The revision court's denial of the motions constituted an adoption of the Commissioner's rulings. "A trial court reviews a commissioner's ruling *de novo* based on the evidence and issues presented to the commissioner." *Williams v. Williams*, 156 Wn. App 22, 27-28, 232 P.3d 573 (2010). "When an appeal is taken from an order denying revision of a court commissioner's decision" the appeals court reviews the superior court's decision, not the commissioners. *Id.* However, "(a) revision denial constitutes an adoption of the commissioner's decision and the court is not required to enter separate findings and conclusions." *Id.*

In this matter, based on the Commissioner's errors described above, the revision court erred by denying appellants' motions for revision. As such, the court should remand this matter to the trial court

with direction to grant the Anti-SLAPP motions and enter judgment in favor of appellants.

F. This Court Should Award Clark And DeVriend Their Attorney Fees, Costs And Statutory Damages On Appeal.

The Court should award Clark and DeVriend their costs and attorney fees on appeal. Under RAP 18.1, the appellate court may grant a party fees if allowed by applicable law. RCW § 4.24.525(6) provides for a mandatory award to a “moving party who prevails” the costs of litigation and any reasonable attorneys’ fees incurred, as well as \$10,000 statutory damages. If Clark and DeVriend are successful on appeal, then the Court should order these be awarded.

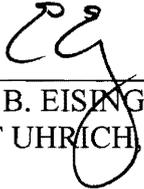
V. CONCLUSION

This Court should vacate the anti-harassment order dispositions for Clark and DeVriend and remand with instructions to dismiss the anti-harassment petitions with prejudice and to enter judgments against Ms. Dennis in their favor. The trial court erred in declining to address the Anti-SLAPP motion despite the fact that the record more than adequately addressed both prongs of the motion. The trial court further abused its discretion by entering an anti-harassment order against Clark that acted as a water-trespassing injunction and prevented Clark from possessing firearms.

RESPECTFULLY SUBMITTED this 7th day of November, 2014

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By:



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On the 7th day of November, 2014, I served a true copy of:

Appellants' Brief

By US First Class Mail postage pre-paid to:

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I certify the foregoing to be true and correct under the penalty of
perjury under the laws of the State of Washington.

Executed this 7th day of November, 2014, at Richland,
Washington.


HOLLY R. HARRIS