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No. 69505-3-I

(King County Superior Court No. 12-2-10602-9)

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION ONE

TANYA L. BEVAN,

Respondent,

v.

CLINT and ANGELA MEYERS, husband and wife,

Appellants.

BRIEF OF RESPONDENT

Samuel A. Rodabough, WSBA No. 35347
Richard M. Stephens, WSBA No. 21776

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
(425) 453-6206

Attorneys for Respondent Tanya L. Bevan

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

TABLE OF CONTENTS

I. INTRODUCTION1

II. STATEMENT OF THE CASE.....3

 A. Facts3

 1. The Bevan and Meyer Properties.....3

 2. The Meyers’ Damage to Ms. Bevan’s Property.....4

 3. Complaint to the Health Department5

 4. Response to the Complaint By Both the Health
 Department and Mr. Meyer.....6

 B. Procedural History9

 1. Complaint.....9

 2. Answer and “[Counter]claim for Damages”9

 3. Special Motion to Strike, RCW 4.24.52512

 4. Trial Court Decision15

 5. Appeal16

 6. Motion to Calculate Attorney’s Fees16

III. ARGUMENT17

 A. The Standard of Review.....17

 1. Special Motion to Strike17

 2. Discovery Issues17

 B. Legislative History of Anti-SLAPP Statute.....18

 1. Immunity Provisions of Anti-SLAPP Statute19

C.	Expedited Dismissal Section of Anti-SLAPP Statute, <i>i.e.</i> , the Special Motion to Strike.....	21
D.	Ms. Bevan Clearly Met Her Initial Burden of Showing by a Mere Preponderance of the Evidence that the Counterclaim Was Based On “An Action Involving Public Participation and Petition”	21
1.	The Meyers’ Counterclaim Sought to Impose Liability Upon Ms. Bevan For a Complaint Made to the Health Department.....	22
2.	Although Pled as a Generic “[Counter]claim for Damages,” the Counterclaim Is Clearly Identifiable As Tortious Interference with Business Expectancy or Economic Relations — A Hallmark Cause of Action for SLAPPs	24
3.	The Legislature Expressly Defined the Phrase “Action Involving Public Participation and Petition” — The Meyers’ Attempts to Redefine It Should Be Rejected	26
4.	The Phrase “Action Involving Public Participation and Petition” Is Subject to “Liberal Construction.”	28
5.	The Counterclaim Was Based Upon “An Action Involving Public Participation and Petition”	28
E.	The Meyers Made No Attempt, Let Alone Proved By Clear and Convincing Evidence, the Facts Necessary to Establish Each and Every Element of Their Counterclaim.....	35
F.	The Trial Court Did Not Abuse Its Discretion in Denying Discovery	41
G.	The Meyers Were Not Deprived of procedural Due Process	42

H.	The Trial Court Did Not Err In Granting Sanctions, Costs and Attorney’s Fees.	44
I.	Ms. Bevan Is Entitled to Costs and Attorney’s Fees on Appeal.	48
	CONCLUSION.....	50

TABLE OF AUTHORITIES

CASES

<i>Amren v. City of Kalama</i> , 131 Wn.2d 25 (1997).....	49
<i>Birkenwald Distrib. Co. v. Heublein, Inc.</i> , 55 Wn. App. 1 (1989).....	36
<i>Brown v. Safeway Stores, Inc.</i> , 94 Wn.2d 359 (1980).....	37
<i>Cal. Motor Transp. Co. v. Trucking Unlimited</i> , 404 U.S. 508 (1972).....	28
<i>Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship</i> , 158 Wn. App. 203 (2010).....	25
<i>Darnell v. Noel</i> , 34 Wn.2d 428 34 Wn.2d 428 (1949).....	40
<i>Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772 (1991).....	18
<i>Eastern R. R. Presidents Conf. v. Noerr Motor Freight</i> , 365 U.S. 127 (1961).....	33
<i>Elcon Const., Inc. v. E. Washington Univ.</i> , 174 Wn.2d 157 (2012).....	38
<i>Eugster v. City of Spokane</i> , 139 Wn. App. 21 (2007).....	17
<i>Gilman v. MacDonald</i> , 74 Wn. App. 733 (1994).....	33, 34
<i>Hillis v. Dept. of Ecology</i> , 131 Wn.2d 373 (1997).....	30
<i>In re Marriage of Eklund</i> , 143 Wn. App. 207 (2008).....	49
<i>In re Marriage of Meredith</i> , 148 Wn. App. 887 (2009).....	29
<i>Isla Verde Int'l Holdings, Inc. v. City of Camas</i> , 146 Wn.2d 740 (2002).....	42

<i>Jackson v. New York State</i> , 381 F.Supp.2d 80 (N.D.N.Y.2005).....	28
<i>Landberg v. Carlson</i> ,, 108 Wn. App. 749 (2011).....	48
<i>Lange v. Nature Conservancy, Inc.</i> , 24 Wn. App. 416 (1979).....	33
<i>Leingang v. Pierce County Med. Bureau, Inc.</i> , 131 Wn.2d 133 (1997).....	36
<i>Loeffelholz v. C.L.E.A.N.</i> , 119 Wn. App. 665 (2004).....	45
<i>Matter of Cashaw</i> , 123 Wn.2d 138 (1994).....	43
<i>Mitchell v. Wash. State Inst. of Public Policy</i> , 153 Wn. App. 803 (2009).....	46
<i>Moore v. Commercial Aircraft Interiors, LLC</i> , 168 Wn. App. 502 (2012).....	39
<i>Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.</i> , 114 Wn. App. 151 (2002).....	38
<i>Pleas v. City of Seattle</i> , 112 Wn.2d 794 (1989).....	25, 39
<i>Sea-Pac Co., Inc. v. United Food & Commercial Workers Local Union 44</i> , 103 Wn.2d 800 (1985).....	36
<i>Spokane Research & Defense Fund v. City of Spokane</i> , 155 Wn.2d 89 (2005).....	49
<i>State v. Watson</i> , 146 Wn. 2d 947 (2002).....	26
<i>Vogt v. Seattle-First Nat. Bank</i> , 117 Wn.2d 541 (1991).....	28

STATUTES

RCW 4.24.500	19, 50
RCW 4.24.510	2, 20, 27, 28, 33
RCW 4.24.525	passim
RCW 4.24.525(2).....	passim
RCW 4.24.525(2)(a)	30, 31
RCW 4.24.525(2)(b)	32
RCW 4.24.525(2)(e)	28, 29, 30
RCW 4.24.525(4).....	passim
RCW 4.24.525(4)(a)	12
RCW 4.24.525(4)(b)	13, 22, 35, 39
RCW 4.24.525(5)(c)	17, 40
RCW 4.24.525(5)(d)	16, 47
RCW 4.24.525(6).....	48
RCW 90.44.040	30

REGULATIONS

WAC 173-160.....	30
King County Board of Health Code	
13.04.070	8, 30, 31

COURT RULES

CR 6(b).....	48
CR 12(f)	14
CR 15(a).....	14
CR 54(a)(1)	45, 46
CR 54(d)(2).....	43, 44, 45, 46, 47
RAP 2.2.....	46
RAP 2.4.....	45
RAP 2.4(g)	17, 47
RAP 2.5(a)	35, 42

RAP 18.1	48
RAP 18.1(a)	48

OTHER AUTHORITIES

Final Bill Report, SSB 6395, at 1, 61 st Leg., Reg. Sess. (Wash. 2012)	25, 32
Final Bill Report, SHB 2699, at 1, 57th Leg., Reg. Sess. (Wash. 2002).....	33
Michael E. Johnston, <i>A Better SLAPP Trap: Washington State’s Enhanced Statutory Protection for Targets of “Strategic Lawsuits Against Public Participation,”</i> 38 Gonzaga L. Rev. 263 (2003).....	25, 32
Webster’s New Collegiate Dictionary 932 (1977).....	27

I. INTRODUCTION

Respondent Tanya L. Bevan (“Ms. Bevan”) is an elderly widow with a simple desire: to enjoy the rural, residential property that she shared with her late husband. CP 47-48. Unfortunately, a survey revealed that, in constructing their new home, the adjoining property owners, Clint and Angela Meyers (“Meyers”), installed a well and permanently created a large mound of site excavation spoils on Ms. Bevan’s property. CP 48.

Thereafter, Ms. Bevan’s surveyor filed a complaint with the Health Department seeking relocation of the well. CP 101. In response, the Health Department made an independent determination and decided to deny the Meyers’ well permit. CP 103, 106-07. The Meyers did not appeal the permit denial. CP 104.

Unfortunately, the Meyers still refused to take responsibility for their actions. Because the Meyers would not move the well and spoil pile, Ms. Bevan was constrained to file a lawsuit to quiet title to her property and to remedy the trespass. CP 48. In response, the Meyers pled a self-entitled “[counter]claim for damages.” CP 17. The claim alleged that Ms. Bevan and/or her surveyor “contacted the...Health Department claiming that [the Meyers’] well was on [Ms. Bevan’s] property” and that, as a result of the complaint, the Health Department “revoked its permission to

allow [the Meyers] to use the well or occupy their [new] home.” *Id.* The claim sought significant damages. *Id.* In short, the claim sought to impose liability upon Ms. Bevan for the complaint to the Health Department—an act for which state law provides absolute immunity.

Specifically, strategic lawsuits against public participation, or SLAPPs, are often initiated to retaliate against people who make complaints to government to procure favorable government action. RCW 4.24.510 (intent). In 2010, the State Legislature created an expedited process, known as a Special Motion to Strike, to facilitate summary dismissal of SLAPPs. An expedited process was necessary because “SLAPPs...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.” RCW 4.24.525 (findings).

Ms. Bevan filed a Special Motion to Strike the Meyers’ counterclaim for damages. CP 21-46. The trial court granted the Motion and awarded mandatory attorney’s fees and a statutory penalty. CP 144.

As a result of the Meyers’ dubious counterclaim, and now an appeal, Ms. Bevan continues to suffer great expense, harassment, and interruption of her life which, as indicated above, the Special Motion to Strike was designed to cure. Ms. Bevan respectfully requests that this Court affirm the trial court and award costs and attorney’s fees on appeal.

II.
STATEMENT OF THE CASE

A. Facts

1. The Bevan and Meyer Properties

Ms. Bevan is an elderly widow that lives and resides on several contiguous parcels of real property in unincorporated King County near Duvall. CP 47, 87, 101. The parcel that is the subject of this dispute consists of approximately 40 acres, and was originally acquired by Ms. Bevan's late husband in the 1960's. CP 47-48, at ¶3.

In 2006, the Meyers acquired approximately 35 acres of real property adjacent to Ms. Bevan's 40-acre parcel. CP 81; 61 at ¶4.1; 69 at ¶4.1. They subsequently applied to King County for a permit to construct a residence valued at approximately \$1 million, and applied to Public Health – Seattle & King County ("Health Department") to install a new well and septic system to serve the new residence. CP 88, 106.

The Meyers constructed their residence, well, and septic system. *Id.* Incredibly, notwithstanding the substantial cost of their proposed residence, the Meyers did not perform the rudimentary, and comparatively inexpensive, step of surveying their property in order to ensure that their development activities were properly located on their property. CP 57-58, at ¶11.

2. The Meyers' Damage to Ms. Bevan's Property

In 2011, Ms. Bevan commissioned Ed Anderson, Professional Land Surveyor (PLS), to perform a survey of her contiguous properties, including the 40-acre parcel. CP 48, at ¶3; CP 87. The survey revealed that the Meyers significantly damaged Ms. Bevan's property with their development activities. CP 48. Specifically, not only did the Meyers install a well nearly 20 feet over the property line, but they failed to account for the 100-foot wellhead radius from adjoining property lines required by applicable regulations. CP 48, at ¶3; CP 87, 543-55. In other words, the well encumbers a substantial portion of Ms. Bevan's property.

Additionally, in an apparent effort to avoid incurring the substantial cost of hauling away their excavation spoils, the Meyers created a massive mound of spoils, approximately 140 feet in diameter, on Ms. Bevan's property. CP 48, at ¶3; CP 87. In their defiance, the Meyers also intentionally removed Ms. Bevan's survey stakes, destroyed trees and/or other vegetation, stockpiled building materials, and caused other damage to her property. CP 48, at ¶3; CP 101. Quite obviously, the Meyers did not have permission to utilize, let alone damage, Ms. Bevan's property. CP 48, at ¶3. Nor did they have a property interest that would have entitled them to do so. *Id.*

3. Complaint to the Health Department

On September 1, 2011, Ms. Bevan's surveyor emailed Ken Elliott, Registered Sanitarian at the Health Department and notified him that, based upon his survey, the Meyers' well had been installed on Ms. Bevan's property. CP 100-01. The clear purpose of the email was to persuade Mr. Anderson, a public official, to take action regarding the well. The entirety of the email states as follows:

Hi Ken,

My name is Ed Anderson. I'm a Professional land surveyor and owner of Mead Gilman and Assoc. While performing a survey of the east line of [Ms. Bevan's] parcel 1726079033, we discovered a new well that was installed by [the Meyers] 1726079003 as part of new construction on that parcel. We found this well to be 18' onto [Ms. Bevan's] parcel 1726079033. I did not find this well in your "Well map" so I'm not sure if it was permitted or perhaps it is but not added to the map yet. Shortly after staking the property line, the owner of 1726079003 (Meyers) pulled the stakes and threatened the owner of 1726079033 Bevan. The KC County Sheriff was called and a report was filed. Ms. Bevan is an elderly widow so we are trying to help her through this process to avoid unnecessary stress.

My question is: Can your department ask a property owner to provide a survey showing that a proposed well is on the correct property? If so can you do that now that the well is installed? The well will obviously need to be moved onto 1726079003 (Meyers) far enough to provide a well radius that doesn't encroach onto my client's

property. If possible, I would like to discuss this with you. Thank you

Ed Anderson PLS
Mead Gilman and Assoc.

CP 100-01.

4. Response to the Complaint By Both the Health Department and Mr. Meyer

Mr. Elliott at the Health Department investigated the surveyor's allegations over the next several months, which included additional correspondence with Ms. Bevan's surveyor and the Meyers' well and septic designer, Mr. Amman. CP 99-100.

Sadly, when Mr. Meyer learned about the complaint to the Health Department by Ms. Bevan's surveyor, he went berserk. He sent an email to the Health Department expressing hostile and bigoted views toward Ms. Bevan because of her Russian heritage. CP 98-99; CP 49, at ¶6. In particular, in that email, Mr. Meyer refers to Ms. Bevan as a "crazy Russian," and that he "suspect[s] she is [sic.] may be associated with Russian crime efforts." CP 98. In what may be construed as a physical threat toward Ms. Bevan, Mr. Meyer stated that

[t]here are only two types of people in the US that speak **Russian: criminals, and those that hunt criminals**

CP 98 (emphasis added). Worse, Mr. Meyer bragged that he "**was**

part of the latter.” *Id.* (emphasis added).

In an attempt to undermine the credibility of the professionals that surveyed Ms. Bevan property, Mr. Meyer stated that they had been

strong-armed by Bevan’s russian crime partners to falsify the [property] line

CP 98 (emphasis added). Mr. Meyers also stated that he had “seen the tactics and results of these russian criminals many times.” *Id.* Finally, he stated that Ms. Bevan is “either nuts or a criminal (or both), and can not be trusted.”¹ CP 99. Mr. Meyer disputed the location of the property line,

¹ The Meyers unfairly criticize Ms. Bevan for referencing these facts. Br. of Appellants at 8-9. First, this email is part of the email chain constituting Mr. Meyer’s and the surveyor’s respective communications with the Health Department (*i.e.*, the very communications that formed the basis of the Meyers’ counterclaim for damages). Second, SLAPPs are often filed to retaliate against people who make complaints to government, and the email evidences a desire to retaliate. Third, to the extent that there were disputed issues of material fact that the trial court might have to resolve on the Special Motion to Strike, the email goes directly toward credibility. After all, Mr. Meyer essentially admitted to the falsity of these statements to the trial court. CP 127. In other words, he was willing to make false statements to the Health Department to serve his purposes. Finally, as indicated in Ms. Bevan’s declaration, upon reading the contents of this email, she had “anxiety, difficulty sleeping, and...feared for [her] personal safety.” CP 49, at ¶6. At that time, counsel for Ms. Bevan was considering filing a motion for a restraining order against Mr. Meyer because of the physical threat contained in his email. However, because such a motion may have been prohibited at that time, counsel for Ms. Bevan needed to make it clear that further threats to Ms. Bevan would not be tolerated. *See* RCW 4.25.525(5)(c) (“[a]ll...motions...shall be stayed upon the filing of a special motion to strike.”)

but tellingly refused to provide *any* contrary evidence in that regard either at time or when given subsequent opportunities. CP 98-99.

The Health Department was apparently not persuaded by Mr. Meyer's empty rhetoric or bigotry based upon Ms. Bevan's national origin. After verifying the information received from Ms. Bevan's surveyor, the Health Department made an independent determination that it would not grant final approval to the Meyers for their well and septic system. CP 103, at ¶6; CP 106-07. Specifically, in a letter dated November 4, 2011, Mr. Elliott notified the Meyers that their "off-site well has not been authorized [in that location] by either Public Health, or the neighbor [Ms. Bevan]." CP 106. Because the input was not from an approved water source, the Health Department also denied the permit for the septic system.² *Id.*

The Health Department gave the Meyers the opportunity to produce a survey or other credible evidence disputing the location of the property line. CP 106. The Meyers declined. CP 103. Likewise, the Health Department notified the Meyers of their right to appeal the permit denials. CP 106. However, in an obvious concession regarding the accuracy of Ms. Bevan's survey, the Meyers chose not to appeal the denial

² See King County Board of Health Code, 13.04.070 ("No on-site sewage system may be constructed...if the plumbing fixtures draining to the system are not supplied with water from an approved source.").

of their permits. CP 104, at ¶7.

B. Procedural History

Despite opting against appealing their permit denials, the Meyers still refused to take responsibility for their actions. Rather than moving their well and excavation spoil pile, the Meyers' attorney threatened to sue Ms. Bevan and asserted ownership to several acres of her property, including the portion containing the well and spoil pile. Despite efforts to work with the Meyers amicably, Ms. Bevan was constrained to file a lawsuit.³ CP 48, at ¶5.

1. Complaint

On March 12, 2012, Ms. Bevan filed a Complaint in King County Superior Court. CP 60-67. The Complaint asserted claims for quiet title, ejectment, waste and injury to land, common law trespass, timber trespass, unlawful removal of survey stakes, and negligence. *Id.*

2. Answer and “[Counter]claim for Damages”

On July 6, 2012, nearly four months after the filing of the

³ Ms. Bevan even offered to allow the Meyers to utilize the well pending resolution of this lawsuit. CP 48, at ¶5. Again, the Meyers unfairly criticize Ms. Bevan for making referencing this fact. *See, e.g.*, Br. of Appellants, at 9. As clearly stated by Ms. Bevan, however, her offer to allow use the well pending resolution of this lawsuit “was not related in any way to a settlement of this case, but was instead intended as a neighborly accommodation to facilitate the Meyers’ occupancy.” CP 48, at ¶5 (emphasis added). In short, it was not an offer of settlement because no claims would be resolved.

Complaint, and in response to a Motion for Default, the Meyers finally filed an Answer, CP 9-14, followed by an Amended Answer. CP 15-20. The Amended Answer alleged counterclaims to quiet title to several acres of Ms. Bevan's property under the theory of mutual recognition and acquiescence and a counterclaim for trespass. CP 18. More importantly, relevant to this appeal, the Meyers also asserted a self-described generic "[counter]claim for damages." CP 17.

The counterclaim for damages alleged that Ms. Bevan and/or her surveyor "contacted the...Health Department claiming that [the Meyers'] well was on her property." CP 17. Based upon a dubious assumption that members of the public can somehow affirmatively dictate what action, if any, a public agency takes in response to a complaint, the counterclaim alleged that, as a result of the complaint the Health Department "revoked its permission to allow [the Meyers] to use the well or occupy their home." *Id.* Further, the counterclaim alleged that the purpose of the complaint to the Health Department was to "intentionally...interfere with [the Meyers'] use of the well, their home and their real property, and to cause defendants to suffer damage relating to that loss of use." *Id.* Finally, the counterclaim alleged extensive damages, including

loss of use of their well, home and property; increased living costs arising out of their need to live elsewhere; diminution in the value of their property; costs and

expenses relating to the installation of the well and related facilities; costs required to be incurred in the investigation and response to plaintiff's claims; fees and costs relating to County permits and approvals; attorney's fees and costs; and other damages.

CP 17. Of course, none of these damages would have been incurred if the Health Department did not deny the Meyers' well and septic permits, or even if the Meyers' had successfully appealed their permits denials. In other words, if the Meyers have incurred damages, the damages are attributable to a decision by the Health Department to deny their permits, and NOT because Ms. Bevan's surveyor made a complaint to Health Department. In short, the counterclaim sought to impose liability upon Ms. Bevan for the complaint to the Health Department—an act for which the Anti-SLAPP statute provides complete and absolute immunity.

In proceedings before the trial court, including briefing and oral argument, counsel for the Meyers steadfastly refused to identify the specific nature of this generic “[counter]claim for damages.”⁴ At no time did counsel ever identify its constituent elements or the facts that allegedly satisfy those elements. Yet, here on appeal, despite having waived the issue below, counsel for the Meyers remarkably alleges for the first time

⁴ As indicated further herein, Ms. Bevan asserts that this counterclaim bears each and every hallmark of a claim for tortious interference with business expectancy, or as alternatively named, tortious interference with economic relations. *See infra* at 35-40.

that the Meyers have proven a probability of prevailing on the merits of their counterclaim by clear and convincing evidence. *See* Br. of Appellants at 17.

3. Special Motion to Strike, RCW 4.24.525

On August 30, 2012, counsel for Ms. Bevan utilized the new, expedited process for summary dismissal of SLAPPs, namely counsel filed a Special Motion to Strike, RCW 4.25.525(4). CP 21-46. The Motion sought to strike the counterclaim for damages.⁵ *Id.*

Pursuant to RCW 4.24.525(4)(a), a party may bring a Special Motion to Strike any claim that is based on an “action involving public participation and petition,” which was broadly defined by the Legislature as follows:

[A]n “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;

⁵ A counterclaim is subject to a Special Motion to Strike. *See* RCW 4.24.525(1)(a) (expressly defining “claim” to include a “counterclaim.”).

(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;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; 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). The Legislature also established a specialized, two-step burden of proof for a Special Motion to Strike:

[Step 1] A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition.

[Step 2 (if necessary)] If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

RCW 4.24.525(4)(b) (brackets inserted). In summary, in order for the trial court to grant the Motion, Ms. Bevan had to prove by a mere preponderance of the evidence that the counterclaim was based on an “action involving

public participation and petition.” Once met, the burden shifted to the Meyers to prove by clear and convincing evidence a probability of prevailing on the merits of the counterclaim, a counterclaim that they refused to identify.

Ms. Bevan’s Motion and supporting evidence met her burden of proof. Critically, however, the Meyers took an odd approach to their opposition. First, the Meyers attempted to file yet another Amended Answer⁶ to delete their references in the counterclaim for damages to the

⁶ As indicated above, the Meyers had already filed an Amended Answer. They could not file a Second Amended Answer without leave of the Court. *See* CR 15(a). Counsel for Ms. Bevan objected accordingly. CP 141.

Additionally, at no time in their briefing or oral argument did counsel for the Meyers ever argue that the Amended Answer somehow prevented liability under the Special Motion to Strike. Indeed, it would be wholly inconsistent with the purpose of the Special Motion to Strike to allow a SLAPP filer to evade liability by filing an amended pleading once a Special Motion to Strike had already been filed. Because a Special Motion to Strike is essentially a motion for summary judgment, Ms. Bevan had already expended approximately \$15,000 to file the Special Motion to Strike. CP 168-71. *See also* RCW 4.24.525 (findings) (“SLAPPs...are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense...”). Likewise, under CR 12(f), Ms. Bevan was likely prohibited from filing a Reply to the Meyers’ Amended Answer before filing a Motion to Strike. *See* CR 12(f) (requiring the filing of a Motion to Strike “**before** responding to a pleading.”)(emphasis added).

Finally, amending the counterclaim did not “cure” the fact that the counterclaim was a SLAPP. Indeed, none of the alleged damages would have occurred, but for an independent decision by the Health Department to deny the well and septic permits.

communications with the Health Department. CP 108-113. Second, the Meyers' briefing focused exclusively on disputing whether Ms. Bevan had met her burden of proof. *See* CP 116 (Meyers' statement of issues). As indicated, the Meyers' briefing and oral argument made no attempt whatsoever, let alone an attempt to demonstrate by clear and convincing evidence, a likelihood of prevailing on the merits of their counterclaim for damages. Indeed, counsel for the Meyers actually declined to identify the specific cause of action alleged in the generic "[counter]claim for damages."⁷ *See* CP 120 (denying that the counterclaim for damages is in truth a claim for tortious interference with business or economic relations, while failing to identify it by name or its elements).

4. Trial Court Decision

Ms. Bevan's Special Motion to Strike was heard by the Honorable Judge Middaugh on September 28, 2012. Judge Middaugh is an experienced trial court judge that has personally handled many anti-SLAPP cases. *Trans.* at 4. At oral argument, Judge Middaugh asked the

⁷ For this reason, in her Reply on the Special Motion to Strike, Ms. Bevan did not need to produce additional evidence disputing the Meyers' various facts regarding the alleged counterclaim. Accordingly, it is quite disingenuous for counsel for the Meyers to proclaim here on appeal that certain facts are "uncontroverted" in their favor, including Ms. Bevan's alleged statements regarding the property line. *See, e.g.*, Brief of Appellants, at 17. In order to prevail on her Special Motion to Strike, Ms. Bevan did not need to dispute facts presented in a legal vacuum without reference to a cognizable cause of action or its elements.

parties to focus on whether the counterclaim for damages was based upon “lawful conduct...in furtherance of the exercise of the constitutional right of petition.” Trans. at 4 (referring to RCW 4.24.525(2)(e)).

Judge Middaugh granted the Special Motion to Strike. CP 143-45. The Order Granting Plaintiff’s Special Motion to Strike awarded Ms. Bevan “[c]osts of litigation and any reasonable attorney’s fees incurred in connection with [the] Motion,” as well as a mandatory, statutory penalty of \$10,000. CP 144.

5. Appeal

On October 25, 2012, the Meyers filed this interlocutory appeal. *See* RCW 4.24.525(5)(d) (“Every party has a right of expedited appeal from a trial court order on the special motion.”). Accordingly, Ms. Bevan’s remaining claims for quiet title, ejectment, waste and injury to land, common law trespass, timber trespass, unlawful removal of survey stakes, and negligence, and the Meyers’ remaining counterclaims for quiet title and trespass, are currently proceeding forward in the trial court. Trial is scheduled for January 27, 2014.

6. Motion to Calculate Attorney’s Fees

As indicated, the Order Granting Plaintiff’s Special Motion to Strike established Ms. Bevan’s entitlement to “[c]osts of litigation and any reasonable attorney’s fees incurred in connection with [the] Motion [to

Strike],” as well as a mandatory, statutory penalty of \$10,000. CP 144. Accordingly, Ms. Bevan subsequently filed a Motion for Establishment of Costs and Attorneys’ Fees on Plaintiff’s Special Motion to Strike, the purpose of which was to calculate the amount of fees owed. CP 155-67. The Court granted Ms. Bevan’s Motion. CP 256-61. Counsel for the Meyers now asserts that this Order is reviewable pursuant to RAP 2.4(g). Br. of Appellants, at 10. Ms. Bevan disputes this assertion. *See infra*, at 46.

III. ARGUMENT

A. The Standard of Review

The issues raised by the Meyers on appeal are subject to varying standards of review.

1. Special Motion to Strike

This court “review[s] the trial court’s interpretation and application of the anti-SLAPP statute...*de novo*.” *Eugster v. City of Spokane*, 139 Wn. App. 21, 33 (2007).

2. Discovery Issues

The Meyers allege that the trial court should have allowed discovery in this case pursuant to RCW 4.24.525(5)(c). *See, e.g.*, Br. of Appellants, at 18. Per RCW 4.24.525(5)(c), “[n]otwithstanding the stay [of discovery] imposed by this subsection, the court, on motion and for

good cause shown, may order that specified discovery...be conducted.”

This provision affords great discretion to the trial court. Discovery rulings are reviewed for an abuse of discretion. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777 (1991). The Meyers apparently agree. See Br. of Appellants, at 19 (“[t]he trial court...abused its discretion...in denying the Meyers any opportunity to conduct crucial discovery.”).

B. Legislative History of Anti-SLAPP Statute

The Brief of Appellants fails to provide a comprehensive review and associated background of the anti-SLAPP statute itself. The tactic appears designed to focus the Court on the Meyers’ narrow interpretation regarding the purpose of the anti-SLAPP statute. In reality, the legislative history demonstrates that its purposes are multiple, and its application is robust. In particular, this legislative history is relevant to determining the applicability of the statute and for understanding the critical role that it plays in eliminating SLAPPs.

For reasons explained further herein, as a result of recent legislation in 2010, it is necessary to clarify that prior use of the singular, generic term “anti-SLAPP statute” is now somewhat inapt. In reality, the anti-SLAPP statute now consists of both long-standing immunity provisions and a new expedited tool for relief, known as a “Special Motion to Strike.” Both the longstanding immunity provisions and the

special motion to strike contain independent standards for granting differing forms of relief.

1. Immunity Provisions of Anti-SLAPP Statute

Strategic lawsuits against public participation, or SLAPPs, are initiated to intimidate or retaliate against people who report information regarding wrongdoing to government authorities. In 1989 the State Legislature sought to stem the abuse of SLAPPs by creating immunity from civil liability for people who in good faith communicate a complaint or information to a government agency. *See* Laws of 1989, ch. 234.

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.

Laws of 1989, ch. 234, § 1 (codified at RCW 4.24.500) (emphasis added).

In other words, one of the stated purposes of the anti-SLAPP statute is to protect individuals who report information to government.

By 2002, the State Legislature remained concerned that the anti-SLAPP statute was not having an adequate deterrent effect on SLAPPs and did not fully protect defendants from fear of reprisal for their

communications to government. Thus, the statute was amended to be consistent with jurisprudence giving robust protection of First Amendments rights of Free Speech and Petition, thereby affording greater protection against SLAPPs:

Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United State supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. This bill amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making.

Laws of 2002, ch. 232, § 1 (codified at RCW 4.24.510 (intent)) (emphasis added). Thus, one of the purposes of the anti-SLAPP statute is to protect the right of speech and petition to government, regardless of content or motive, as long as the communication is designed to procure favorable government action.

In particular, the statute was amended to remove the requirement that the communication be made in good faith and to require mandatory statutory penalty of \$10,000 to a person who prevails against a lawsuit based on a communication to a government agency or organization. *See*

Laws of 2002, ch. 232.

C. Expedited Dismissal Section of Anti-SLAPP Statute, *i.e.*, the Special Motion to Strike

By 2010, the State Legislature was still not satisfied that the anti-SLAPP statute was having an adequate deterrent effect on SLAPPs, or that it was resolving SLAPPs in an early and prompt manner.

Accordingly, the anti-SLAPP statute was amended with an entirely new standalone provision, which established new standards for expedited dismissal of SLAPPs. This new provision effectively expanded the scope and applicability of immunity, required that it be liberally construed to effectuate its purpose, provided a special statutory process for the speedy resolution of SLAPPs (*i.e.*, the Special Motion to Strike), and imposed mandatory attorney's fees and litigation costs (in addition to the \$10,000 mandatory penalty enacted in 2002) against a prevailing defendant in a SLAPP. *See* Laws of 2010, ch. 118.

D. Ms. Bevan Clearly Met Her Initial Burden of Showing by a Mere Preponderance of the Evidence that the Counterclaim Was Based On An "Action Involving Public Participation and Petition"

As indicated above, for purposes of the Special Motion to Strike, Ms. Bevan had the initial burden of demonstrating by a preponderance of the evidence that the Meyers' counterclaim was based on an "action involving public participation and petition":

A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

RCW 4.24.525(4)(b) (emphasis added). Ms. Bevan clearly met this burden.

Quite tellingly, although the Meyers filed a 25-page Brief of Appellants, they strategically decided NOT to quote the very counterclaim for damages that was the basis of the Special Motion to Strike. Instead, they used their briefing to provide post hoc rationalizations regarding the alleged intent of the counterclaim for damages. Unlike the Meyers, Ms. Bevan has no need to run from the express language of the Meyers' counterclaim.

1. The Meyers' Counterclaim Sought to Impose Liability Upon Ms. Bevan For a Complaint Made to the Health Department

Specifically, the Meyers' counterclaim for damages expressly alleged in relevant part, as follows:

12.3 Defendants had their home built on the property, and as a part of the project, contracted for the installation of a well to provide water to their house. Defendants and their well contractor obtained necessary approvals for the well location from King

County.

- 12.4 As [sic.] some point after the installation of the well, but before the defendants could move into their house, **plaintiff and/or her agents, at her direction, contacted the King County Health Department claiming that defendant's well was on her property. As a result, the County revoked its permission to allow defendants to use the well or occupy their home.**
- 12.5 **In making her claim of ownership to the property on which defendants' well is located, the plaintiff intentionally sought to interfere with defendants' use of the well, their home and their real property, and to cause defendants to suffer damages relating to that loss of use.**
- 12.6 **As a result of plaintiff's intentional actions, defendants have suffered and continue to suffer damages and losses** including, but not limited to, loss of use of their well, home, and property; increased living costs arising out of their need to live elsewhere; diminution in the value of their property; costs and expenses relating to the installation [sic.] of the well and related facilities, loss required to be incurred in the investigation and response to plaintiff's claims; fees and costs relating to County permits and approvals; attorney's fees and costs; and other damages, the exact amount of which will be shown at the time of trial.
- 12.7 As a result of plaintiff's actions, defendants have suffered and continue to suffer great inconvenience, stress and the reasonable value of their time expended as a result of plaintiff's intentional acts.

12.8 Defendants are entitled to judgment for their damages and losses, compensatory and punitive, suffered as a result of plaintiff's actions.

CP 17 (emphasis added).

In summary, the counterclaim alleged that (1) Ms. Bevan and/or the surveyor complained to the Health Department regarding the Meyers' well, (2) the complaint to the Health Department was intended to interfere with the Meyers' use of their well and residence, (3) as a result of the Complaint, the Health Department revoked its permission to allow the Meyers to use their well or residence, and (4) the Meyers suffered damages.

2. Although Pled as a Generic “[Counter]claim for Damages,” the Counterclaim Is Clearly Identifiable As Tortious Interference with Business Expectancy or Economic Relations — A Hallmark Cause of Action for SLAPPs

Although pled as a generic “claim for damages,” based upon its elements, it is clear that the counterclaim is more specifically identified as a claim for “tortious interference with business expectancy,”⁸ or as

⁸ In Washington, to prove tortious interference with a business expectancy, a claimant must demonstrate the following elements:

- (1) the existence of a valid contractual relationship or business expectancy;
- (2) knowledge of the relationship or expectancy on the part of the interfere;
- (3) intentional interference inducing or causing a

alternatively named, “tortious interference with economic relations.” *See, e.g., Cornish Coll. of the Arts v. 1000 Virginia Ltd. P’ship*, 158 Wn. App. 203, 214 (2010).

Not surprisingly, the legislative history for the most recent amendments to the Anti-SLAPP statute state as follows: “Typically, a person who institutes a SLAPP suit claims damages for defamation or **interference with a business relationship** resulting from a communication made by a person or group to the government.” *See* Final Bill Report, SSB 6395, at 1, 61st Leg., Reg. Sess. (Wash. 2012). *See also* Michael E. Johnston, *A Better SLAPP Trap: Washington State’s Enhanced Statutory Protection for Targets of “Strategic Lawsuits Against Public Participation,”* 38 Gonzaga L. Rev. 263, 273 (2003) (“SLAPP filers often claim abuse of process, malicious prosecution, and **intentional interference with a business expectancy** or other similar torts.”) (emphasis added). The Meyers’ counterclaim obviously fits the classic mold of a SLAPP.

breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.

Pleas v. City of Seattle, 112 Wn.2d 794, 800 (1989).

3. The Legislature Expressly Defined the Phrase “Action Involving Public Participation and Petition” — The Meyers’ Attempts to Redefine It Should Be Rejected

The Brief of Appellants expends much effort asserting that the instant case is a mere private dispute between property owners, and not the type of “public” dispute to which the anti-SLAPP statute applies. *See, e.g.*, Br. of Appellants, at 11-15. The argument lacks merit.

First and foremost, the Special Motion to Strike may be granted when a party demonstrates that it is based upon an “action involving public participation and petition.” “Legislative definitions included in the statute are controlling.” *State v. Watson*, 146 Wn. 2d 947, 954 (2002). Only in the absence of a statutory definition do Washington courts give a term its plain and ordinary meaning ascertained from a standard dictionary. *Id.*

Here, the phrase “action involving public participation and petition” has been broadly defined by the State Legislature to include the following:

(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;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; 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).

Notably, the Brief of Appellants avoids referring to these broad definitions when making assertions about the application of the anti-SLAPP statute for the Special Motion to Strike. Instead, the Meyers argue that use of the term “public” by the State Legislature requires that the underlying dispute have some form of notoriety, publicity, or high visibility. Br. of Appellants, at 12-15. Tellingly, however, neither subsections (a), (b), or even (e) (with respect to the constitutional right of petition) even utilize the word “public.” Additionally, the word “public” is just as frequently defined to mean “of or relating to a government.” *See Webster’s New Collegiate Dictionary* 932 (1977). Thus, when the anti-

SLAPP statute refers, for example to an issue of “public concern,” it is referring to issues of concern to a government agency. This is consistent with RCW 4.24.510, which states that the anti-SLAPP statute applies to “claims based upon the communication to the [government] agency...**regarding any matter reasonably of concern to that agency.**” RCW 4.24.510 (emphasis added).

4. The Phrase “Action Involving Public Participation and Petition” Is Subject to “Liberal Construction”

Additionally, the legislation enacting the Special Motion to Strike states that it must be “construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.” RCW 4.24.525 (application). “‘Liberal construction’ is a command that the coverage of an act’s provisions in fact be liberally construed and that its exceptions be narrowly confined.” *Vogt v. Seattle-First Nat. Bank*, 117 Wn.2d 541, 552 (1991). In other words, the Special Motion to Strike applies to any claim based upon “an action involving public participation and petition.” As a result of liberal construction, the Court is obligated to construe the applicability of this phrase broadly.

5. The Counterclaim Was Based Upon “An Action Involving Public Participation and Petition”

Ms. Bevan argued to the trial court that, with the possible exception of subsection (d), all of the broad definitions of “an action

involving public participation and petition” apply to the Meyers’ counterclaim, especially when considering the command for liberal construction. *See* CP 32 (citing RCW 4.24.525(a)-(e), & (e)).

As indicated above, at oral argument, Judge Middaugh asked the parties to focus on whether the counterclaim for damages was based upon “lawful conduct...in furtherance of the exercise of the constitutional right of petition.” Trans. at 4 (referring to RCW 4.24.525(2)(e)).

There is little doubt that the counterclaim was based upon lawful conduct in the exercise of the constitutional right of petition. “[T]he right to petition extends to all departments of the [g]overnment.” *In re Marriage of Meredith*, 148 Wn. App. 887, 899 (2009) (citing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). The right to petition also includes the right to “complain to public officials and to seek administrative and judicial relief.” *Id.* (citing *Jackson v. New York State*, 381 F.Supp.2d 80, 89 (N.D.N.Y.2005)).

For example, in *Marriage of Meredith*, a trial court order in a dissolution proceeding prohibited the husband from contacting any government agency regarding the wife’s immigration status. Although this was an intimate and private matter between a husband and wife, and apparently not an issue of notoriety, the Court of Appeals held that such a prohibition unconstitutionally interfered with the husband’s constitutional

right to petition government for a redress of grievances. *Marriage of Meredith*, 148 Wn. App. at 899-902.

Here, there is no question that the counterclaim for damages was aimed at lawful conduct in furtherance of the constitutional right to petition. Ms. Bevan and/or the surveyor were fully entitled to make a complaint to the Health Department regarding the Meyers' well.

Also, there can be little doubt that the complaint to the Health Department was "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).

The permitting and regulation of wells and septic systems are unquestionably issues of public concern. With limited exception, natural groundwaters belong to the public, and are only subject to withdrawal as authorized by law. *See, e.g., Hillis v. Dept. of Ecology*, 131 Wn.2d 373, 383 (1997) ("As a general matter, groundwater in Washington is publicly owned.") *See also* RCW 90.44.040 ("[s]ubject to existing rights, all natural ground waters of the state ... are hereby declared to be public ground waters and to belong to the public and to be subject to appropriation for beneficial use under the terms of this chapter and not otherwise."). The drilling of wells and their accompanying designs are regulated by state law. *See, e.g.,* chapter 173-160 WAC. In turn, the local

Health Department ensures that all wells are installed consistent with state law. *See* King County Board of Health Code 13.04.070.B.6 (“Construction of the well must meet Washington State Department of Ecology construction standards under chapter 173-160 WAC.”). Likewise, the County’s permit review criteria include locational constraints (to protect against contamination and encroachments upon neighboring property) and provisions for adequate water quality and quantity. *See* King County Board of Health Code 13.04.070.

Similarly, septic systems are regulated by state law, and administered by local health officers. Septic systems carry the potential for public exposure to sewage and can adversely affect ground and surface waters and neighboring properties. *See* King County Board of Health Code, Title 13, On-site Sewage (“[T]his title is enacted...to protect and preserve public health” and to “provide for and promote the health of the general public.”). No on-site sewage system may be constructed...if the plumbing fixtures draining to the system are not supplied with water from an approved source.”).

Additionally, any complaint to the Health Department was an “oral...or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law.” RCW 4.24.525(2)(a). Specifically, such

communications were made in reference to pending well and septic permits that remained in the permit process. The proceedings and procedures for reviewing, considering, and acting upon such permits are authorized by law, namely the Code of the King County Board of Health and state enabling statutes.

The complaint to the Health Department was also an “oral...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.” RCW 4.24.525(2)(b) (emphasis added). Specifically, the well and septic permits remained in the permit process and were under consideration by the Health Department. As recognized in the legislative history to the most recent amendments to the Anti-SLAPP statute, “[a] 2003 Gonzaga law review article describes most SLAPPs...as being filed against people or groups alleging **environmental** or consumer protection **violations**.” See Final Bill Report, SSB 6395, at 1, 61st Leg., Reg. Sess. (Wash. 2012). That same law review article also notes that “SLAPPs are particularly common in the **land use** arena.” Michael E. Johnston, *A Better SLAPP Trap: Washington State’s Enhanced Statutory Protection for Targets of “Strategic Lawsuits Against Public Participation,”* 38 Gonzaga L. Rev. 263, 266 (2003) (emphasis added). In other words, it is not surprising that

the SLAPP statute broadly applies to “issues under consideration or review,” because complainants regarding permits and land use activities are a common target of SLAPPs.

As indicated previously, the 2002 amendments to the Anti-SLAPP statute removed the requirement that communications with the government be made in good faith. The legislative history regarding this amendment states as follow:

SLAPP suits are intended to intimidate the exercise of First Amendment rights granted under Article I, Section 5 of the Washington Constitution.... United State Supreme Court precedent has established that as long as government petitioning is aimed at having some effect on government decision-making, the petition is protected, **regardless of content or motive**, and the case should be dismissed.

See Final Bill Report, SHB 2699, at 1, 57th Leg., Reg. Sess. (Wash. 2002) (emphasis added).

For example, in *Lange v. Nature Conservancy, Inc.*, 24 Wn. App. 416 (1979), a developer sued an environmental group for various claims because its communications to the County resulted in the developer’s property being included in the County’s inventory of “natural areas on private lands.” *Id.* at 417. The Court held that the environmental group’s communications were privileged because “an individual, and thus [the environmental group], has a First Amendment right to try to influence

government action.” *Id.* at 422 (citing *Eastern R. R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961)).

Similarly, in *Gilman v. MacDonald*, 74 Wn. App. 733 (1994), a case that closely parallels this one, a property owner was sued by his adjoining neighbor after he complained to the King County Building and Land Development Division that his neighbor had illegally cleared his property. *Id.* at 734-35. The neighbor then sued the complaining property owner for “defamation, commercial disparagement, and intentional interference with business relationships.” *Id.* at 736. The defendant claimed that his “statements were qualifiedly privileged... and [Plaintiffs’] action was barred under RCW 4.24.510 [the anti-SLAPP Statute].” *Id.* The Court agreed, holding that because of free speech principles, the Plaintiff must show “by clear and convincing evidence that the defendant knew of the falsity of the communications or acted with reckless disregard as to their falsity.” *Id.* at 739. Accordingly, the Court upheld dismissal of the claims and awarded attorneys fees. *Id.* at 740. Of course, since *Gilman* was decided in 1994, the anti-SLAPP statute has been amended to expand its applicability, and to remove the requirement that the communications to the government be made in good faith. In other words, even if the complaint to the government is patently false, it is still protected speech meriting immunity!

The Meyers' counterclaim readily acknowledged that Ms. Bevan was being sued because she and/or her surveyor "contacted the...Health Department claiming that [the Meyers'] well was on [Ms. Bevan's] property" for the purpose of persuading the County to "revoke its permission to allow [the Meyers'] to use the well or occupy their [new] home." CP 17. Such a communication is a quintessential exercise of the rights of both free speech and petition as protected by the First Amendment and Article I, Sections 4 and 5 of the Washington Constitution. Thus, Ms. Bevan easily met her burden of proving by a preponderance of the evidence that the counterclaim was based on "an action involving public participation and petition." RCW 5.24.525(4)(b).

E. The Meyers Made No Attempt, Let Alone Proved By Clear and Convincing Evidence, the Facts Necessary to Establish Each and Every Element of Their Counterclaim

As indicated above, in proceedings before the trial court, the Meyers limited their arguments to disputing whether Ms. Bevan met her burden of proof by a mere preponderance of the evidence that the counterclaim was based upon "an action involving public participation and petition." RCW 4.24.525(4)(b). *See also* CP 116 (Meyers' statement of issues on Special Motion to Strike.). At no time did the Meyers attempt, let alone demonstrate by "clear and convincing evidence," a probability of prevailing on the merits of their counterclaim. The Meyers now attempt to make this argument on

appeal for the first time. Br. of Appellants, at 17. The issue has been waived. RAP 2.5(a).

In addition to opting against proving by clear and convincing evidence a likelihood of prevailing on the merits of their counterclaim before the trial court, counsel for the Meyers steadfastly refused to identify the specific nature of the generic “[counter]claim for damages.” At no time did counsel ever identify its constituent elements or the facts that allegedly satisfied those elements. As indicated, however, the claim bears and every hallmark, and carefully walks through each element, of a claim for tortious interference with a business expectancy, or as alternatively named, tortious interference with economic relations.

To prove a claim for tortious interference with a business expectancy, the Meyers must prove the following elements: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage. *See, e.g., Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157 (1997).

First, the Meyers did not prove the existence of a valid contractual or business expectancy. This element requires that “the complainant have

a **legal right** to that which he claims to have lost.” *Birkenwald Distrib. Co. v. Heublein, Inc.*, 55 Wn. App. 1, 10 (1989) (emphasis added). See also *Sea-Pac Co., Inc. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 805 (1985) (“The plaintiff must show that the future opportunities and profits are a reasonable expectation and **not based on merely wishful thinking.**”) (emphasis added).

The Meyers did not prove that they had a **legal right** to the use of their well and septic system and, by extension the occupancy of their residence, without meeting the requisite permit criteria. As previously indicated, in a decision issued by the Health Department, dated November 4, 2011, the Meyers were informed their permits were “disapproved.” CP 106. The Meyers were expressly urged to “hire a Professional Land Surveyor (P.L.S.) to determine if there is any basis to dispute [the Health Department’s] findings.” *Id.* The decision denying their permits informed them of their right to file a written appeal to the health officer within 60 calendar days. *Id.* No such appeal was filed and the Health Department’s decision is final. CP 104. Accordingly, as a matter of law, because the Meyers did not have a **legal right** to their permits, they did not have a valid business expectancy.

Additionally, the Meyers did not prove the existence of a valid contractual or business expectancy, because this element is not met when a

defendant “asserts a legally protected interest of his own which he believes may be impaired by the performance of a proposed transaction.” *Id.* at 776 (quoting *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 375 (1980)). See also *Elcon Const., Inc. v. E. Washington Univ.*, 174 Wn.2d 157, 168 (2012) (“Exercising one’s legal interest in good faith is not improper interference.”). The evidence demonstrated that, based upon the survey, the well was installed on Ms. Bevan’s property. CP 48, at ¶3. Quite obviously, Ms. Bevan has a legally protected interest in her property, including the right to ensure that her property is free of trespass, nuisance, and waste, among other damage. CP 48, at ¶5. Accordingly, she was entitled to assert her legally protected interests in her property because any final approval from the Health Department for an encroaching well would impair her interests.

Third, the Meyers did not prove by clear and convincing evidence that there was an intentional interference inducing or causing a breach or termination of the relationship or expectancy. Interference with a business expectancy is only intentional “if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action.” *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158 (2002). As indicated by Mr. Anderson, the Health Department took the information provided by the

surveyor and made an independent determination what to do with that information. CP 106. Nor did Ms. Bevan intend that the Meyers be unable to use the well, septic system, and residence. CP 48, at ¶5. To the contrary, when she learned that the Meyers could not occupy their residence, she voluntarily offered to allow them to use the well pending resolution of this lawsuit. *Id.*

Fourth, the Meyers did not prove by clear and convincing evidence that Ms. Bevan interfered for an improper purpose or used improper means. “To be improper, interference must be wrongful by some measure beyond the fact of the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession.” *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, 510 (2012) (citing *Pleas v. City of Seattle*, 112 Wn.2d 794, 803–04 (1989)). “Therefore, plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a **duty of non-interference.**” *Pleas*, 112 Wn.2d at 804 (emphasis added). The Meyers had no evidence whatsoever that the communications with the Health Department were for an improper purpose or improper means. The communications did not violate any statute, regulation, recognized rule of common law, or an established standard of trade or profession. And most assuredly, the Meyers cannot

demonstrate that Bevan and/or her surveyor had a duty of non-interference (*i.e.*, a duty to sit idly by and allow the final approval of a well that, based upon the opinion of a professional land surveyor, was located on Ms. Bevan's property).

Because of the inherent problem of trying to prove a probability of prevailing on their counterclaim for tortious interference with business relations, the Meyers have creatively attempted to re-interpret their claim here on appeal. For the first time, the Meyers now cite to cases that allegedly stand for the proposition that there is cognizable claim for misrepresenting property lines. *See* Br. of Appellants, at 18 (citing various cases). As indicated, the Meyers already waived the argument below that they proved, by preponderance of the evidence, a probability of prevailing on the merits of their counterclaim. Regardless, each of the cases referenced by the Meyers refer to claims for fraud⁹ or negligent misrepresentation.¹⁰ However, each of those claims requires a buyer-seller relationship for a sale of real property. Ms. Bevan still owns her property. CP 47, at ¶1. Nor did Meyers buy Ms. Bevan's property. CP

⁹ *Darnell v. Noel*, 34 Wn.2d 428, 430 (1949); *Lawson v. Vernon*, 38 Wn.2d 422 (1905); *Thompson v. Huston*, 17 Wn.2d 457 (1943); *Dixon v. MacGillivray*, 29 Wn.2d 30 (1947).

¹⁰ *Hoel v. Rose*, 125 Wn. App. 14 (2004); *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820 (1998).

129. Despite their belated efforts here on appeal, the Meyers still demonstrate, by clear and convincing evidence, a probability of prevailing on the merits of their evolving counterclaim.

F. The Trial Court Did Not Abuse Its Discretion in Denying Discovery

The trial court did not err in denying the Meyers' request for discovery. Per RCW 4.24.525 (5)(c), "[n]otwithstanding the stay [of discovery] imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery...be conducted." This provision affords great discretion to the trial court.

The Meyers request to the trial court for additional discovery was limited to discovery regarding "ownership of the property." CP 121:15-17. However, even Judge Middaugh did not find the issue of ownership relevant to her limited inquiry under the Special Motion to Strike:

The issue before me is your counterclaim that says because [Ms. Bevan and/or her surveyor] contacted this government agency we're entitled to damages, and that to me is a totally separate thing from whether they were right to say it's on our property versus your right to say it's on our property. The question is, can you sue them because they went to the government agency and said this is what we think, take a look at it.

Trans. at 16.

Indeed, even if the complaint to the Health Department regarding

property ownership was false (which it was not), it was the exercise of free speech and petition that nonetheless merits immunity! As previously indicated, the anti-SLAPP statute was amended in 2002 to remove a requirement that the communications be made in “good faith.”

The Legislature presumably precluded discovery in SLAPP suits to assure adequate pre-filing inquiries and to avoid victimization through increased costs. *See* RCW 4.24.525 (findings). As defendants, the Meyers were free to conduct discovery in this matter and, if it revealed a potential counterclaim against Ms. Bevan, could have amended their pleadings with such a counterclaim at a later date to ensure an adequate pre-filing inquiry. They chose not to. It was not an abuse of discretion for the trial court to disallow discovery, especially since the issue regarding property ownership was irrelevant to the inquiry under the Special Motion to Strike.

G. The Meyers Were Not Deprived of Procedural Due Process

As an initial matter, the Meyers readily admit that, with respect to the claim for procedural due process, they “did not raise the issue below.” *See* Brief of Appellants, at 19, n.8. Per RAP 2.5(a), the Court should not consider this new issue, and it should be deemed waived. This conclusion is further bolstered by the prudential doctrine that “if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues.” *Isla Verde Int’l Holdings, Inc. v.*

City of Camas, 146 Wn.2d 740, 752 (2002).

Regardless, the Meyers' constitutional argument is devoid of merit. In particular, [d]ue process protects against the deprivation of life, liberty or property. *See Matter of Cashaw*, 123 Wn.2d 138, 143 (1994). "The threshold question in any due process challenge is whether the challenger has been deprived of a protected interest in life, liberty or property." *Id.* (citing *In re J.H.*, 117 Wn.2d 460, 472-73 (1991)). Here, the Meyers cite no case law for the proposition that the right to petition the courts is a life, liberty or property interest for purposes of procedural due process.

Regardless, the Meyers also failed to explain why such interests would not have been adequately protected here, if they simply engaged in discovery and amended their answer with a counterclaim at a later date, once an adequate pre-filing inquiry had been conducted.

The legislature clearly had an interest in ensuring that SLAPPs were dismissed at the earliest stage possible to avoid further victimization. *See RCW 4.24.525* (findings). Indeed, one of their concerns was that a SLAPP suits "deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues." For this reason, the State Legislature concluded that "[a]n expedited judicial review would avoid the potential for abuse." *Id.*

H. The Trial Court Did Not Err In Granting Sanctions, Costs and Attorney's Fees.

In a final act of desperation, the Meyers allege that Ms. Bevan's Motion to Establish Attorney's Fees was untimely under CR 54(d)(2).

As a reminder, the Court's Order Granting Plaintiff's Special Motion to Strike awarded to Plaintiff "[c]osts of litigation and any reasonable attorneys' fees incurred in connection with [the Special Motion to Strike]." CP 144. In other words, the Order Granting the Motion to Strike established Ms. Bevan's entitlement to attorney's fees.

Accordingly, Ms. Bevan subsequently filed a Motion for Establishment of Costs and Attorney's Fees on Plaintiff's Special Motion to Strike (hereinafter "Motion to Calculate Attorney's Fees"), the purpose of which was merely to calculate the attorney's fees to be awarded. It is this latter motion that the Meyers allege was somehow untimely.

The enactment in 2010 of the expedited procedure for summary dismissal of SLAPPs, namely the Special Motion to Strike, came **after** the adoption of CR 54(d)(2) in 2007. RCW 4.24.525 "shall be applied and construed liberally." RCW 4.24.525 (application).

However, the Meyers' timeliness argument fails at several levels. First, Ms. Bevan's Motion to Calculate Attorney's Fees was **not** a "[c]laim for attorneys' fees and expenses" as used in CR 54(d)(2). The

Court already granted Ms. Bevan’s claim for attorneys’ fees and expenses in adjudicating the Special Motion to Strike. The subsequent motion was merely *to calculate the amount of attorney’s fees* pursuant to the Court’s prior Order Granting the Special Motion to Strike which established entitlement to fees. Here, the Special Motion to Strike was precisely *a claim for attorneys’ fees* under the language of CR 54(d)(2)—though a unique one brought at the beginning of the case. The subsequent Motion to Calculate Attorney’s Fees was not.

Second, the Meyers misread CR 54(d)(2) and CR 54(a)(1). “A judgment is the final determination of the rights of the parties in the action,” *i.e.*, one final judgment. CR 54(a)(1). “[A] court generally must resolve all claims for and against all parties before it enters a final and enforceable judgment on any part of the case;” the goal of having one final judgment is “to avoid confusion and piecemeal appeals.” *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 693 (2004) (citations omitted) (the “one exception” being CR 54(b)).

That CR 54(a)(1) “includes any order from which an appeal lies” does not turn every order for which interlocutory appeals lie by statute into final judgments. *Id.* Rather, that phrase is consistent with the rule from RAP 2.4 that brings up all other appealable orders with the final judgment for appellate review: “Thus, in more practical terms, an appeal from the

final judgment or decree brings up for review all the usual decisions made in the course of trial—rulings on evidence, decisions regarding jury instructions, and so forth—so long as they prejudicially affect the final judgment and are not harmless.” 2A Wash. Prac., Rules Practice RAP 2.4 (7th ed.). The Court’s Order Granting the Special Motion to Strike was not a judgment under CR 54(d)(2), but rather an interlocutory order subject to a special appeal. *See also*, RAP 2.2 (acknowledging appeals from final judgments separately from appeals of various interlocutory orders).

The Meyers’ attempt to tie CR 54(a)(1)’s reference to judgment to the time limit in CR 54(d)(2) also makes no sense within the context of a Special Motion to Strike. The premise of CR 54(d)(2) is a final order relating to something *other than a claim for attorney’s fees* followed within 10 days by a claim for attorney’s fees. That Rule does not say that a motion *to calculate the amount of fees* must be filed within 10 days *of an order awarding attorney’s fees*. The Court should not stretch the Rule to apply to different facts in a manner that would defeat the Court’s Order and somehow render the present interlocutory appeal moot. *See Mitchell v. Wash. State Inst. of Public Policy*, 153 Wn. App. 803, 823 (2009) (“Absent clear language to the contrary” court will not “mechanically apply” court rules “to deprive a litigant of costs to which he is justly

entitled.”).

The Drafters’ Comments to CR 54 clarify that the harm intended to protect against is that a “motion for an award of fees in the trial court” would “automatically join an appeal *on the merits of the case*,” and so later filed motions for fees could “create delay at the appellate level.” Drafters’ Comment to CR 54(d)(2). But, since the current appeal is interlocutory and not *on the merits*, the Court’s order calculating fees does not automatically join the current appeal. RAP 2.4(g) states: “An appeal from a decision *on the merits of a case* brings up for review an award of attorney fees entered after the appellate court accepts review *of the decision on the merits*.” (Emphasis added). The interlocutory order on the Special Motion to Strike was clearly *not* a decision *on the merits of the case*, so any decision now to calculate the fees would not be automatically appealable and could not delay the appeal. The trial court below agreed:

The time lines of CR 54 do not apply. The court had already granted the claim for attorney’s fees, just not the amount. The purpose of expedited appeal under the [anti-SLAPP] statute is to expeditiously address the limited issue of striking of a claim so that, if overturned, the case could go back to trial on the merits. In this case the Strike claim was a counterclaim. The complaints of plaintiffs have yet to be addressed. There has been no decision on the merits of any claim and, there are other issues still pending so there has been no final determination in this matter. Final costs, attorney fees and damages are yet to be determined by the Court.

CP 260.

Similarly, the procedures for a Special Motion to Strike do not authorize an appeal from a subsequent order calculating fees. RCW 4.24.525(5)(d). CR 54(d)(2) was designed to avoid delay on appeal due to automatic joinder of an award of fees, but that cannot occur here, so the Rule does not apply.

Third, the Court's Order Granting the Special Motion to Strike simply left it to further proceedings for the determination of the amount of fees without addressing a time or manner for that to occur. CP 144. The Meyers did not object to the language of the Court's Order on the grounds that the Order lacked a time limit for Ms. Bevan to move for calculation of the fees awarded. The Meyers should not be allowed to complain now. Additionally, even if the Meyers argument was correct, the trial court was free to enlarge the time for filing this motion under CR 6(b) because CR 54 is not listed as rule where enlargement is prohibited.

I. Ms. Bevan Is Entitled to Costs and Attorney's Fees on Appeal

Pursuant to RAP 18.1, Ms. Bevan respectfully requests that the Court award attorney's fees for this appeal. "If [attorney's] fees are allowable at trial, the prevailing party may recover fees on appeal as well." *Landberg v. Carlson*, 108 Wash. App. 749, 758 (2001). Specifically, RAP 18.1(a) authorizes the court to grant attorney's fees "[i]f applicable law

grants to a party the right to recover reasonable attorneys fees or expenses.” RAP 18.1(a).

RCW 4.24.525(6) requires that the prevailing party on a Special Motion to Strike be awarded mandatory costs and attorney’s fees:

The Court **shall** award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

- (i) **Costs of litigation and any reasonable attorneys’ fees incurred in connection with each motion on which the moving party prevailed;**

RCW 4.24.525(6) (emphasis added). By employing the term “shall,” this provision is mandatory. *See, e.g., Amren v. City of Kalama*, 131 Wn.2d 25, 35 (1997) (“the statute is very clear that the court ‘shall’ award attorney’s fees to a person who prevails against an agency in an action seeking the disclosure of public records” (citing former RCW 42.17.340(4)).

Clearly, the Legislature intended that claims based upon advocacy to government, regardless of content or motive, should be treated seriously by including a mandatory and statutorily-defined remedy by stating that “the Court **shall** award” attorneys’ fees, costs and the statutorily-defined penalty. RCW 4.24.525(6) *See also In re Marriage of Eklund*, 143 Wn. App. 207, 218 (2008) (monetary penalty for noncompliance with parenting plan is mandatory); *Spokane Research & Defense Fund v. City of Spokane*, 155

Wn.2d 89, 102 n.9 (2005) (penalties are mandatory for violations of the public records act, although the amount is discretionary). The State Legislature mandated this penalty because “SLAPPs 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.” RCW 4.24.525 (Findings). *See also* RCW 4.24.500 (“The costs of defending against [SLAPP] suits can be severely burdensome.”). This case is no exception.

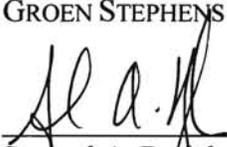
CONCLUSION

Ms. Bevan established by a preponderance of the evidence that she was sued for protected activities, namely contacting the Health Department regarding the Meyers’ illegal development activities. In turn, the Meyers never attempted to meet their burden by clear and convincing evidence that it could prevail on the merits of its counterclaim. Accordingly, the Court should affirm the trial court and award Ms. Bevan costs and attorney’s fees on appeal.

RESPECTFULLY SUBMITTED this 24th day of June, 2013.

GROEN STEPHENS & KLINGE LLP

By:



Samuel A. Rodabough, WSBA No. 35347
Richard M. Stephens, WSBA No. 21776
Attorneys for Respondent Bevan

DECLARATION OF SERVICE

I, Samuel A. Rodabough, declare as follows pursuant to GR 13 and RCW 9A.72.085:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

2013 JUN 26 PM 1:43
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON

On June 24, 2013, I caused the foregoing document to be served on the following persons via the following means:

Attorneys for Defendants, Clint and Angela Meyers

Pauline V. Smethka
Helsell Fetterman LLP
1001 Fourth Ave., Ste. 4200
Seattle, WA 98154-1154

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

Kenneth W. Masters
Shelby R. Frost Lemmel
Masters Law Group, PLLC
241 Madison Ave. N.
Bainbridge Island, WA 98110

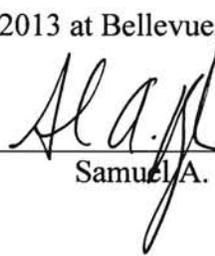
- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

G. Lee Raaen
Attorney at Law
200 First Ave. W., Ste. 402
Seattle, WA 98119

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 24th day of June, 2013 at Bellevue, Washington.

A handwritten signature in black ink, appearing to read 'S.A. Rodabough', written over a horizontal line.

Samuel A. Rodabough