No. 45478-5.

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

DIVISION II

Ederi Haggenmiller, Pro Se Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

STATE OF WASHINGTON Respondent.

ON APPEAL FROM THE

SUPERIOR COURT OF JEFFERSON COUNTY

Before

The Honorable Keith Harper, Judge

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

1.-The purpose of Anti-SLAPP lawsuits, under RCW 4.24.525, is to establish a method of speedy adjudication of strategic lawsuits against "public participation," brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and the petition for redress of grievances.

"This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." Laws of 2010, ch. 118 § 3.

The Anti-SLAPP law is burden shifting and does not render any other statute a "nullity." Although a Plaintiffs claim may be "based on Defendant's public participation," that claim will survive so long as the plaintiff establishes a likelihood of prevailing on the merits in response to an Anti-SLAPP motion. "The anti-SLAPP remedy is not available where a probability exists that the plaintiff will prevail on the merits.» Equilon Enterprises v. Consumer Cause, 52 P. 3d 685 (2002). Note that once the burden shifts due to a lawsuit based on public participation, Washington's legislature sets a higher burden on the Washington Plaintiff than does California's legislature (clear and convincing versus preponderance of evidence likelihood of prevailing on the merits of the Plaintiffs claim).

When determining if the Anti-SLAPP law applies to the present matter, the Court must first examine whether

Haggenmiller's actions constitute "public participation and petition under RCW 4.24.525." Once the Court finds that Haggenmiller has met "the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition ... the burden shifts to the responding party [Department] to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b).

Haggenmiller's opening brief, demonstrated that he has met his burden of showing the court that the four lawsuits against him were clearly based on Haggenmiller's "public participation." See Haggenmiller's AB 35 at C. The October 31, 2013 requests for relief asking the Court to reconsider "Order Vacating Judgment Denied," dated October 28, 2013. CP 567-8. CP 520-563, 5, 6, because the trial court mistakenly believed it lacked discretion to grant relief.

Additionally, the trial court is required as a matter of law to vacate the order denying the motion to vacate because of improper service; it did not provide Haggenmiller with a copy of such Order. See Hall, 487 So. 2d 1147.

Haggenmiller has clearly stated his belief that an officer of that court has committed fraud during a proceeding in that court, and he/she is engaged in "fraud upon the court". In Bulloch v.

United States, 763 F.2d 1115, 1121 (10th Cir. 1985), the court stated "Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. ... It is where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function --- thus where the impartial functions of the court have been directly corrupted." CP 567-8 and the appeal process Haggenmiller participated in are all clear evidence of Haggenmiller's "public participation and petition for redress of grievances."

The Department claims Haggenmiller had not met his low burden of establishing that his claim was based on "public participation." The Department has not provided any sort of proof or evidence to the contrary. Rather, the Department tries falsely to characterize the claims as being "late CR 59 relief, which the Department properly objected to" also adding that "There is no authority under RAP 7.2(e) and CR 59 to file a "late motion for reconsideration." RB page 32 and clearly ignoring the claim "was based in Rule 60 (b)(4) fraud, 60(b)(5) judgment is void, 60(b)(6) prior order and 60(b)(11) insufficient evidence" CP 543

2.-RCW 4.72.010 The superior court in which a judgment or final order has been rendered, or made, shall have power to vacate or modify such judgment or order:

> (3) For mistakes, neglect or omission of the clerk, or irregularity in obtaining a judgment or order.
> (4) For fraud practiced by the successful party in obtaining the judgment or order.

Candidly, the Department admits that the responses are to Haggenmiller's multiple "untimely post judgments motions", RB 32 based on the very apparent risk to the Department's potential liability perceived from Haggenmiller's threat to sue.

Within their own pleadings the Department has thus agreed that the "bases" of the lawsuits are Haggenmiller's "communications preparatory to or in anticipation of the bringing of an action ... entitled to the benefits of [Anti-SLAPP protections]." Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App 4th 777, at 784 (1996).

Whether the lawsuit is "based on" Haggenmiller's multiple "untimely post judgments filings", or based on Haggenmiller's threat to sue the Department, both activities fall within the realm of "public participation" protected by Anti-SLAPP law.

The Anti -SLAPP statute does not encourage the distinction the Department tries to draw. "This section applies to any claim,

however characterized, that is based on an action involving public participation and petition." See RCW 4.24.525(2).

RCW 4.24.525 (2)(d) defines public participation as "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."

As noted, Haggenmiller made a series of statements to the court. These statements repeatedly reinforce this belief.

The anti-SLAPP statute "requires the trial court to undertake a two-step process in determining whether to grant a SLAPP motion." Kashian v Harriman (2002) 98 CA4th 892. The first step is to decide "whether the defendant has made a threshold prima facie showing that the defendant's acts, of which plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue." 98 CA4th at 906. Simply stated, the trial court must determine whether the challenged cause of action arises from protected activity to which the anti-SLAPP statute applies.

The California Supreme Court has recently provided guidance as to the defendant's burden of proof by reviewing cases "in order to maximize the clarity and guidance respecting

application of the anti-SLAPP statute." Navellier v Sletten (2002) 29 C4th 82, 85 n 2; see also Equilon Enterprises v Consumer Cause, Inc. (2002) 29 C4th 53; City of Cotati v Cashman (2002) 29 C4th 69. In Equilon and City of Cotati the court held that, as part of the defendant's burden in an anti-SLAPP motion, the defendant need not "demonstrate that the action was brought with the intent to chill the defendant's exercise of constitutional speech or petition rights." Equilon, 29 C4th at 57. "A defendant who meets its burden under the statute, of demonstrating that a targeted cause of action is one 'arising from' protected activity faces no additional requirement of proving the plaintiff's subjective intent." Nor does the moving defendant need to demonstrate that the action had an actual chilling effect on the exercise of such rights. City of Cotati, 29 C4th at 74-75.

In Navellier, the court held that the statute did apply to a second lawsuit for (1) fraud based on alleged misrepresentations and omissions in connection with a release that was the subject of a first lawsuit and (2) breach of contract arising from counterclaims asserted in the first suit. The fraud claim was based on the release that had been relied on in a motion to dismiss and, thus, involved "statements or writings made in connection with an issue under

consideration or review by a ... judicial body." The breach of contract claim was based on counterclaims filed in a federal action that were "in furtherance of [his] right of petition or free speech." Accordingly, the action fell squarely within the ambit of the anti-SLAPP statute. 29 C4th at 90.

In Equilon the court upheld the granting of an anti-SLAPP motion in a lawsuit for declaratory relief and injunction that was filed in response to a notice of intent to sue for alleged underground pollution violations. The court held that the suit was one "arising from" activity in furtherance of constitutional rights of speech or petition (i.e., filing the intent-to-sue notices).

3. Plaintiffs' Burden of Proof

If the court finds that the defendant has not made the requisite showing that the defendant's acts were in furtherance of the defendant's constitutional rights of petition or free speech, the special motion to strike is denied. However, if the court finds the defendant has made the requisite showing, the burden then shifts to the plaintiff to establish a probability of prevailing on the claim by making a prima facie showing of facts that would, if proved, support a judgment in the plaintiff's favor. Kashian, 98 CA4th at 905. The plaintiff must do this on the basis of any discovery that has already

been completed, because the filing of the special motion to strike stays discovery unless the court, in its discretion, grants limited discovery. CCP §425.16(g).

4. In cases that allege multiple causes of action, the question arises whether a SLAPP motion can be granted for fewer than all causes of action.

The case of ComputerXpress, Inc. v Jackson, (2001) 93 CA4th 993, resolved this question in favor of permitting the granting of the motion for some, but not all, causes of action. In so ruling, the court held that "the fact the SLAPP motion was properly denied as to some of [plaintiff's] causes of action does not preclude granting the motion as to the remaining causes of action." 93 CA4th at 1004.

In ComputerXpress, the court of appeal affirmed the denial of the SLAPP motion to strike cause of actions for fraud, negligent misrepresentation, negligence, and interference with contracts, because there was no indication that the alleged conduct "occurred in connection with an official proceeding, concerned a public issue or issue of public interest, or took place in a public forum." The court rejected the argument that these causes of action were part of a conspiracy covering all the causes of action.

The court reversed the denial of the SLAPP motion for causes of action for trade libel, interference with prospective economic advantage, abuse of process, conspiracy, and injunctive relief arising from the filing of an SEC complaint and Internet postings, on the ground that electronic communication media may constitute public forums and the statements on the websites were made "in connection with an issue of public interest." Moreover, the posting of the SEC complaint on the Internet was a statement in a public forum in connection with an issue of public interest. And, as to both the Internet postings and the SEC complaint, the plaintiff failed to establish a probability that it would prevail. 93 CA4th at 1007-1015.

5. Attorneys fees are mandatory for a prevailing anti-SLAPP defendant. CCP §425.16(c).

The ComputerXpress court concluded that its defendants should be considered prevailing parties and, therefore, should recover attorneys fees and costs, notwithstanding the partial loss of their SLAPP motion. The court suggested, however, that an allocation might be appropriate, and the defendants could be required to provide a proper basis for determining how much time was spent on particular claims. 93 CA4th at 1020.

More recently, the court of appeal addressed the question of whether defendants who file a SLAPP motion but prevail on a demurrer that seemingly moots the SLAPP motion are still entitled to attorneys fees. It held that such defendants are entitled to a ruling on the merits of their SLAPP motion, "the result of which will necessarily determine their right to attorney fees."

The statute is silent about when or how the attorneys fees request must be made, which has prompted moving parties routinely to include the request with the special motion to strike. This practice lends itself to a lack of precision, in that the moving party must estimate how much time will be spent in filing a reply and attending the hearing. In American Humane Ass'n v Los Angeles Times Comms. (2001) 92 CA4th 1095, this issue was resolved when the appellate court stated: "There are three ways the special motion to strike attorney fee issue can be raised. The successful defendant can: make a subsequent noticed motion as was envisioned by defendant in this case; seek an attorney fee and cost award at the same time as the special motion to strike is litigated as is often done; or as part of a cost memorandum." 92 CA4th at 1103. Thus, the successful defendant has the option of using a separate, noticed, attorneys fees motion. The trial court

cannot deny an attorneys fees request just because the special motion does not include documents to support the award of attorneys fees.

RCW 4.84.020 provides that, "in all other cases in which attorneys' fees are allowed, the amount thereof shall be fixed by the court at such sum as the court shall deem reasonable ..." See also Singleton v. Frost, 108 Wn.2d 723, 727, 742 P.2d 1224 (1987); Key v. Cascade Packing, Inc., 19 Wn. App. 579, 585, 576 P.2d 929 (1978).

6. The Department has not responded to Haggenmiller's opening brief.

Mills' Brief should be stricken Pursuant to RAP 10.7 for violations of RAP 1O.3(a)(5) because his Brief fails to properly cite to the record. Mills' Respondent Brief is replete with self-serving, conclusory assertions of fact that are not supported by any citation to the record. Recitation of facts not supported by the record violates RAP 10.3(a)(4). Barnes v. Washington Natural Gas Co .. 22 Wn. App. 576, 577 fn. 1,591 P.2d 461 (1979). Failure to cite to the record for a statement of fact is a failure to comply with the Rules of Appellate Procedure and justifies the court ignoring any such statement of fact. See In re Marriage of Simpson, 57 Wn. App.

677,681-82,790 P.2d 177 (1990).

Mills also inappropriately alleges facts that are not in the record at all. It is not just that the facts presented by Mills are not properly cited - it is that the purported "facts" do not exist in the record at all. Mills then uses the "facts" that are not in the record as the basis for his arguments that "no material dispute remains for a fact-finder to resolve." RB 1, 33.

Facts presented by Mills that are not properly cited:

1.-**"The trial court granted summary judgment to the Department" RB 1.**
2.-**"Haggenmiller...does not support this claim with any testimony from a doctor" RB 1.**
3.-**"no doctor testified to a greater amount of permanent partial disability" RB 2, 15.**
4.-**"He neither protested nor appealed the October 5, 2011 order."RB 3**
5.-**"Dr. Kessler understood that Haggenmiller had an audiogram performed as early as 2009" RB 4**
6.-**"Haggenmiller had 20.83 percent hearing loss." RB 4, 16.**
7.-**"four percent impairment attributable to his reported tinnitus." RB 4**
8.-**"Dr. Kessler did not provide an opinion about any mental health condition." RB 5**
9.-**"not provide a tinnitus rating because it did not significantly impact Haggenmiller's daily life" RB 6**
10.-**"The Department moved for summary judgment" RB 7**
11.-**"The superior court granted the Department's motion for summary judgment." RB 8**
12.-**"arguing that it was untimely under CR 59(b) and the Court of Appeals had sole authority" RB 8**
13.-**"On December 13, 2013 the Department's representatives appeared by phone for the motion**

hearing." RB 9

14.-"Haggenmiller ongoing conduct borders on harassment" RB 11

15.-"On review of a summary judgment order, the appellate court's inquire is the same as the superior court's" RB12

16.-"because Haggenmiller reported it did not interfere with the aspects of normal daily living." RB 19

17.-"Haggenmiller did not protest or appeal the allowance order. Thus, res judicata applies to the unappealed October 5, 2011order" RB 24-26

18.-"Indeed, Haggenmiller chose not to have Dr. Kessler appear live for the presentation of Dr. Kessler's own testimony." RB 30

19.-"There is no authority under RAP 7.2(e) and CR 59 to file a late motion for reconsideration." RB 32

II. ISSUES

a. May the board, after determining that a certain described tinnitus condition Finding of Fact No. 2 CABR 39, is an occupational disease and direct the Department of Labor and Industries (the "Department") to allow the workman's claim, include in its order a finding that another condition, allegedly disabling, is not causally related to the same industrial exposure?

The board entered finding 7. CABR 39; one of the basis for this appeal, which states that Haggenmiller has a mental health condition which was not causally related to conditions of employment. Thereof, the basis that the board has exceeded its jurisdiction in determining that the mental health condition is not causally related to the industrial exposure. AB 6, 12

It is not disputed that the board's and the superior court's

jurisdiction is appellate only, and for the board and the trial court to consider matters not first determined by the department would usurp the prerogatives of the department, the agency vested by statute with original jurisdiction. Both parties agree that if a question is not passed upon by the department, it cannot be reviewed either by the board or the superior court. Cole v. Department of Labor & Indus., 137 Wn. 538, 243 P. 7 (1926); DuFraine v. Department of Labor & Indus., 180 Wn. 504, 40 P.2d 987 (1935); Leary v. Department of Labor & Indus., 18 Wn.2d 532, 140 P.2d 292 (1943); Turner v. Department of Labor & Indus., 41 Wn.2d 739, 251 P.2d 883 (1953).

To ascertain whether the board acted within its proper scope of review in entering finding 3, 4, 5, 6 and 7; CABR 39; we look to the provisions of the order appealed to the board. The questions the board may consider and decide are fixed by the order from which the appeal was taken (see Woodard v. Department of Labor & Indus., 188 Wn. 93, 61 P.2d 1003 (1936)) as limited by the issues raised by the notice of appeal. Brakus v. Department of Labor & Indus., 48 Wn.2d 218, 292 P.2d 865 (1956).

b. Duty to publish procedures. RCW 42.56.040
(1) Each state agency shall separately state and currently

publish in the Washington Administrative Code and each local agency shall prominently display and make available for inspection and copying at the central office of such local agency, for guidance of the public:

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
(e) Each amendment or revision to, or repeal of any of the foregoing.

(2) Except to the extent that he or she has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published or displayed and not so published or displayed.

c. There is no provision in the act statute authorizing a transfer of the appeal from the county of the residence of the worker or beneficiary, or in the county where the injury occurred, to another county. RCW 51.52.100.

While the act provides that the civil rules of the superior court apply to the appeal, the rule for change of venue based on the convenience of witnesses does not apply to appeals. RB 28. "PROVIDED, That for good cause shown in the record to prevent hardship, the board may grant continuances upon application of any party, but such continuances, when granted, shall be to a time and place certain within the county where the initial hearing was held unless it shall appear that a continuance elsewhere is required in justice to interested parties" RCW 51.52.102. Further, the

Department never confirmed with name, date, time and location as required (Not in the Record) so the convenience of witnesses was not a valid concern, also no place of residence is in the record. CABR 79.

d. Generally, under the appearance of fairness doctrine, proceedings before administrative tribunals acting in a quasijudicial capacity are valid only if 'a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.' Wash. Med. Disciplinary Bd. v. Johnston, 99 Wn.2d 466, 478, 663 P.2d 457 (1983).

The doctrine is intended to avoid the evil of participation in the decision-making process by a person who is personally interested or biased. City of Hoquiam v. Pub. Employment Relations Comm'n,97 Wn.2d 481, 488, 646 P.2d 129 (1982). Under the appearance of fairness doctrine, it is not necessary to show that a decision-makers bias actually affected the outcome, only that it could have. Buell v. City of Bremerton, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972). CP 529

Haggenmiller complains that the industrial appeals judge took Kilduff's representation that she needed to be in Olympia for cost purposes, without questioning either factual or legal validity of such statements, Haggenmiller points IAJ potential personal

interest to have such hearing in Olympia instead of Poulsbo to avoid such travel himself. CP 401

Because of extreme contention by the Industrial Insurance Judge and Kilduff, Haggenmiller was unfairly schedule to a far away tribunal. Haggenmiller did not waive his rights by complying to go to Olympia and choose Poulsbo; located 23 miles south from his street address and 12 miles north from the location of Dr. Randolph's Bremerton office, where he was physically present for Haggenmiller,'s January 26, 2011 examination. CP 401.

This location satisfied the minimum contacts and fairness for the other parties, it is connected with the cause of action. Hard to imagine fairness without minimum contacts, Haggenmiller medical witness was to testify by phone as Dr. Kessler did not agree to go to Olympia and Haggenmiller's request for continuance was denied, he was extremely prejudice and unable to present the table of categories rating to his doctor because the Department (Ex-Parte) (RB 7) scheduled a hearing in a county other than the county where the injury occurred or where the claimant resides, RB 29, 30, AB 2, 14, 15, 22, CP 401

Kilduff wrongly stated that: (AB 16) the Taxpayer will save $400.00.This is not "well grounded in fact" as no evidence of

taxpayer liability was presented. She falsely represents, that the Department would have to pay the IME for one hour of driving from and to Olympia where he is located, (AB 16) instead of the Department policy of paying from and to his Bremerton office of examination. No evidence of such cost savings was presented; Kilduff was silent of Haggenmiller's offer of "no objections to any telephone testimony" made along with claimant's August 6, 2012 plea to object to any other venue for the hearings. (AB 15) Kilduff knows of my difficulty with driving long distances (CABR 33)and used that to harass and increase my cost, making this onerous location an incentive to settle. (AB 16)

Kilduff unnecessarily multiplied the proceedings by scheduling an Ex-Parte contrived two lay witnesses in order to induce the court to transfer the convening place of hearing. CABR 65, RB 7, 28

The IAJ denial for reason of cost, as the stronger argument is invalidated as a cost-shifting by his own statement "Each party pays for its own expert witness cost in a civil litigation" CABR 33 the defense of "if require in justice to interested parties" RB at 28 had not been sufficiently pleaded, the defendants are estopped from relying upon it as a defense.

III. STATUTORY CONSTRUCTION

Haggenmiller argues that the superior court incorrectly interpreted RCW 51.32.080, WAC 296-20-220(1)(o), and this Board's published Significant Decision in In re Robert Lenk, Sr., BIIA Dec., 91 6525 (1993),

A. STANDARD OF REVIEW AND RULES OF LAW

We review statutory interpretation de novo. Dep't of Ecology v. Campbell & Gwynn, LLC, 146 Wn.2d 1, 9, 43 P. 3d 4 (2002). Our duty is to carry out the legislature's intent and if the statute's meaning is plain on its face, that plain meaning is an expression of legislative intent. Campbell, 146 Wn.2d at 9 -10. We cannot add words to an unambiguous statute when the legislature has not included that language. Durland v. San Juan County, 174 Wn. App. 1, 23, 298 P. 3d 757 (2012).

B. PLAIN MEANING

We discern the plain meaning of a statute from all that the legislature has said in the statute and its related statutes that disclose legislative intent about the provision in question. Jametsky v. Rodney A, _ Wn.2d _, 317 P. 3d 1003,1006 (2014). We consider the natural and contextual meanings that attach to a term, giving words their usual, ordinary, and commonly accepted meaning, and we may look to a dictionary for an undefined term' s ordinary meaning. State v. Ratliff, 140 Wn. App. 12, 16, 164 P.3d 516 (2007); Bremerton Pub. Safety Ass 'n v. City of Bremerton, 104 Wn. App. 226, 230 -31, 15 P. 3d 688 (2001).

C. Motion for JMOL.

Reviewed de novo. Abel v. Dubberly, 210 F.3d 1334, 1337 (11th Cir. 2000). The evidence is examined in the light most favorable to the non-moving party. The non-movant must put forth more than a scintilla of evidence suggesting that reasonable minds could reach differing verdicts. A substantial conflict in the evidence is required before a matter will be submitted to the jury. Id.

The trial court ruled summarily on the judgment as a matter of law motion, thus its findings of fact and conclusions of law are superfluous in this appeal. Haggenmiller need not challenge those findings, as review is de novo, nor may the Department rely on them. RP September 27, 2013.

D. Summary Judgment

The grant or denial of summary judgment is reviewed de novo. B&G Enters., Ltd. v. United States, 220 F.3d 1318, 1322 (11th Cir. 2000); Thornton v. E.I. Du Pont de Numours & Co., 22 F.3d 284, 288 (11th Cir. 1994). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Whatley v. CNA Ins. Co., 189 F.3d 1310, 1313 (11th Cir. 1999).

The court must view all evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party. St. Charles Foods, Inc.v. America's Favorite Chicken Co., 198 F.3d 815, 819 (11th Cir.1999).

What does (and does not) create a fact issue:

The factual dispute must be genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury reasonably could find for the plaintiff." Id. at 252.

"When an expert opinion is not supported by sufficient evidence to validate it in the eyes of the law, or when indisputable record facts render the opinion unreasonable, it cannot support a jury verdict." Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2598 (1993).

E. Standard of Review. The Trial Court's Summary Disposition Without Holding an Evidentiary Hearing to Resolve Disputed Issues of Fact Is Reviewed.

An order entered by the trial court that relies solely on affidavits is similar to an order granting summary judgment, and is reviewed as if it were a summary judgment order. Brinkerhoff v. Campbell, 99 Wn. App. 692, 696, 994 P.2d 911, 914 (2000). In Brinkerhoff, one party appealed a trial court's order enforcing a settlement agreement. Although the facts were disputed, the trial court entered an order relying solely on affidavits. Id. at 696. On appeal of the enforcement order, the parties disputed the standard of review. Despite the fact that orders enforcing settlements are usually reviewed for abuse of discretion, this Court concluded that because the trial court acted summarily, relying solely on affidavits, the standard of review was not abuse of discretion, but de novo. Id.

F. The trial court summarily disposed of the Motion to Vacate Judgment/Orders; CP 520-563, Motion for Reconsideration; CP 567-568, Motion for Entry of Default and Subsequent Entry of Default Judgment. CP 721-723.

The court declined to hold an evidentiary hearing, weigh evidence, or make credibility determinations regarding the parties' conflicting evidence. CP 565-566, CP 570, CP 729. RP December

13, 2013 at 2 et seq.

Instead, the court relied purely on affidavits and took all the evidence in the light most favorable to the Department. Id. Thus, the standard of review here is de novo. Westberry v. Interstate Distrib. Co., 164 Wn. App. 196, 209, 263 P. 3d 1251 (2011), review denied, 174 Wn.2d 1013 (2012).

Acknowledging the summary nature of the trial court' s order disposition below is important to properly assess Haggenmiller's arguments on appeal. Although they seek affirmation of the trial court's summary judgment order, the Department incorrectly relies upon some of the findings and conclusions to support their arguments, and claims that they are somehow binding in this appeal. Respondent Brief at 33;

Thus, this Court may not — as the Department suggests — make credibility determinations or reach findings about disputed issues of fact. Boeing Co. v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793, 798 (2002) disapproved of on other grounds by Harry v. Buse Timber & Sales, Inc., 166 Wn.2d 1, 201 P.3d 1011 (2009).

Acknowledging the current state of the factual record is also important because it means this Court cannot grant the Department

the summary judgment they request. The facts that the Department cite in support of their arguments is established by impeached testimony, there is no substantial evidence supporting their movant's position, and that reasonable persons must draw the same conclusion, in favor of Haggenmiller, stated differently, the movant couldn't show that there are no genuine issues of material fact and that it was entitled to judgment as a matter of law. CP 521 et seq.

G. "Motion and Declaration for Entry of Default and For Entry of Default Judgment or In the Alternative Entry of Partial Default Judgment" (CP 675-719) and "Motion and Declaration of Sanctions" (CP 721-3)

A. Filing a Complaint and Default Judgment at the same time is a common procedure under Washington's Rules.

Mills seems to make an argument that the filing of the Complaint, Summons and Default Judgment all at the same time somehow prejudiced the Department and was improper. RB 8, CP 727.

Haggenmiller is unable to make any sense of this argument as CR 3 and CR 4 provide for the service of a Summons and Complaint in advance of commending the action. Default judgments are routinely entered when more than 20 days have elapsed from the date of service.

B. Mills lost the opportunity to present his defenses by failing to present them to the trial Court at the time and place of Hearing.

Mills argues, "that it was untimely under CR 59(b)" (RB 8) and "Because Division II now has jurisdiction over this matter, the Department is not filing a response" CP 727.

Mills' problem is that he failed to present any prima facie defenses to the trial court that would merit denial of the default judgment. He did not present any substantive evidence of any defenses to the claims to the trial court, and cannot raise those defenses for the first time on appeal. RP December 13, 2013

IV. CONCLUSION

The arguments raised by Mills in his response brief do not contradict nor rebut the arguments and assignment of errors raised by Haggenmiller concerning this appeal and his rights to full and speedy recovery under RCW 4.24.525.

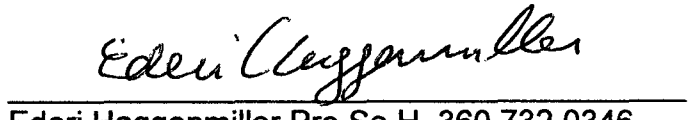
Haggenmiller respectfully requests the Court reverse the trial court's order, denying, striking and awarding cost in opposition to Haggenmiller's RCW 4.24.525(4)(a) for four Special Motions to Strike and statutory penalties under RCW 4.24.525, and require the award and penalty be issued

contemporaneously with the order granting Haggenmiller's special motion to strike, along with any other relief requested in Haggenmiller's opening brief.

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

Signed at Jefferson County, Washington

August 20, 2014



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

Ederi Haggenmiller, Pro Se Appellant,
v.
DEPARTMENT OF LABOR AND INDUSTRIES,
STATE OF WASHINGTON Respondent.

Certificate of Service

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COA: 454785

I certify that on this day I served the attached REPLY BRIEF OF APPELLANT TO COURT OF APPEALS, DIVISION TWO, plus this two page certificate of service to the parties to this proceeding as listed above. A true and correct copy thereof was delivered to the United States Postal Service and placed into the stream of mail to the respective parties as indicated.
Dated this 20th day of August, 2014.

Ederi Haggenmiller

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