

No. 71792-8-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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THE BASEBALL CLUB OF TACOMA, LLC, a  
Washington limited liability company,

*Respondent,*

v.

SDL BASEBALL PARTNERS, LLC, a Nevada limited  
liability company, ROBERT J. SCHLEGEL, and ROBERT  
K. SCHLEGEL,

*Appellants*

and

MIKAL THOMSEN, and AARON ARTMAN,

*Respondents.*

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
Hon. Barbara Linde

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**APPELLANTS' REPLY BRIEF**

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## I. ARGUMENT ON REPLY

### A. TBCOT Misreads the Fundamental Point of SDL's Brief.

The introduction to TBCOT's Answering Brief misreads SDL's fundamental point. SDL does not assert that all private disputes are carved out of the scope of the anti-SLAPP statute. Rather, SDL contends that the statute was not intended to be read so expansively so as to reach private disputes such as this one, where the claims are not intended "primarily" to chill the exercise of free expression. That is what the "principal thrust" or "gravamen" test is all about.

TBCOT concedes that, if the gravamen of SDL's counterclaims and third-party claims is not related to public participation, TBCOT cannot prevail here. Yet it attempts to establish that gravamen by seizing on collateral allusions to protected activity, in order to avoid answering for their wrongdoing that arises out of a private contractual matter.

TBCOT asserts that SDL's reliance on this Court's recent anti-SLAPP decisions in *Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014) and *Alaska Structures, Inc. v. Hedlund*, 180 Wn. App. 591, 323 P.3d 1082 (2014), is misplaced. *See* Answering Brief, at pp. 15-16. TBCOT misapprehends the point that SDL was making in citing those cases.

SDL did not, as TBCOT claims, cite *Davis* for the proposition that the anti-SLAPP statute “is limited to [cases involving] injunctive relief or specific performance.” See Answering Brief, at p. 15. *Davis* did not so hold. Rather, SDL cited *Davis* for its general proposition that a “consideration of the relief sought by the party asserting the cause of action” -- regardless of the specific type of relief sought -- “can be a determinative factor when resolving” the question of the principal thrust or gravamen of the claim. See 180 Wn. App. at 523. And SDL in turn was arguing that this is a useful test to be applied here.

Similarly, SDL did not, as TBCOT claims, cite *Hedlund* for the proposition that the anti-SLAPP statute does not apply in cases where there is an agreement that specifically limits a person’s right to petition. See Answering Brief, at p. 16 (attempting to distinguish *Hedlund* by noting that “[h]ere, no agreement is present that limits TBCOT’s right to petition the courts”). Rather, SDL cited *Hedlund* for its more general proposition that the anti-SLAPP statute should not be applied to cases, including this one, involving private contractual matters in cases where a breach of the contract is alleged. See 180 Wn. App. at 603.

This Court’s decisions in *Davis* and *Hedlund* provide the Court with a useful dichotomy showing when the anti-SLAPP statute is appropriately invoked, and where it is not. Moreover, this Court’s latest

anti-SLAPP decision in *Bevan v. Meyers*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2014 WL 4187803 (Div. I, No. 69505-3-I, August 25, 2014), underscores the dichotomy and further illustrates why it should be fatal to TBCOT's anti-SLAPP challenge to SDL's counterclaims. In *Bevan*, this Court upheld an anti-SLAPP dismissal of counterclaims because the counterclaims sought damages that "flow[ed] only from" the response of a public agency to a plaintiff's complaint. *Bevan* at \*5, ¶ 21. That plainly is not the case here. SDL's counterclaims seek damages that flow from TBCOT's breach of contract; that TBCOT brought this action has absolutely nothing to do, in the end, with the cause of SDL's damages. For the same reasons that this Court upheld the anti-SLAPP dismissal of the counterclaims in *Bevan*, this Court should reverse the dismissal of SDL's counterclaims against TBCOT.

**B. SDL Does Not Seek to Amend or Rewrite its Claims.**

TBCOT asserts that SDL, in its opening brief, is improperly attempting to amend its counterclaims and third-party claims by excising the allegedly offending language. *See* Answering Brief, at p. 17. To the contrary: SDL did not seek leave to amend its claims and does not do so here. Rather, by illustratively deleting the collateral allusions to TBCOT's filing of this lawsuit from its counterclaim, SDL was giving this Court a practical and pragmatic way to test SDL's claims to see whether they meet

the “gravamen” standard for determining whether the claims are a SLAPP. What is the legal operative effect of the remaining allegations after the supposedly offending language is removed? Do the claims “stand on their own two feet” and survive CR 12(b)(6) muster? These are the questions the “gravamen” test calls upon a court to answer, and SDL’s illustrative approach, of demonstratively excising the allegations that form the basis for the opposing party’s anti-SLAPP claim, provides a pragmatic way to arrive at those answers.

The trial court acknowledged that it had never dealt with an anti-SLAPP motion before. VRP, at p. 21 lines 19-20. The court agreed, however, that SDL’s collateral allusions to TBCOT’s claims were not material because, unlike the situation in *Albergo v. Immunosyn Corp.*, 2011 WL 197580 (S.D. Cal., Jan 20, 2011), SDL’s claims could stand independently on their own. See VRP, at p. 12, line 19, to p. 13, line 8 (distinguishing *Albergo*), and p. 22, line 24, to p. 25, line 2 (noting that “We don’t have that situation [i.e., *Albergo*] here.”). Indeed, even TBCOT’s counsel agreed that, with the single exception of SDL’s claim that TBCOT’s fraud count was frivolous under RCW 4.84.185 (addressed below), all of SDL’s counterclaims and third-party claims could have been asserted independently as stand-alone claims. See VRP, at p. 13, lines 12-17. This analysis demonstrates that the principal thrust or gravamen of

SDL's claims was unrelated to TBCOT's petitioning activity, and that the motion to strike should have been denied.

TBCOT's reliance on *Sylmar Air Conditioning v. Pueblo Contracting Servs., Inc.*, 122 Cal. App. 4th 1049, 18 Cal. Rptr. 3d 882 (2004), and *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068, 1073, 112 Cal. Rptr. 2d 397 (2001), is misplaced. Those cases dealt with a specific problem: litigants facing an anti-SLAPP motion who seek to amend and recast the same claims in different language. Those courts noted that allowing an amendment in such circumstances would effect an end-around the anti-SLAPP statute and would frustrate its very purpose (*i.e.*, to provide a quick dismissal remedy). Here, as noted above, SDL did not and does not seek to amend; rather, SDL is providing this Court with a practical way to test whether SDL's claims, separated from the allegedly offending language, can stand alone. It is clear that they can.

TBCOT also asserts that SDL's counterclaims and third-party claims relate entirely to the fact that TBCOT filed a "complaint" (singular) alleging that SDL misrepresented the historical EBITDA. Answering Brief, at p. 11. TBCOT is misreading SDL claims, which referred only to "complaints" (plural) and which made no reference to a "filing." See SDL's Counterclaims and Third-Party Claims, CP 118 (¶ 16). Moreover, both the SDL claims and the declaration of Robert J. Schlegel referred to

the fact that the third-party defendants “began to complain” or “began complaining” about certain matters. See CP 117 (¶¶13-14); and CP 203 (¶¶ 11-12). Clearly, Clearly, SDL was referring generically to “complaints,” which might just as well have been called objections, criticisms, or protests, and not to the civil action complaint that TBCOT filed.

**C. SDL’s “Frivolous Claim” Count Under RCW 4.84.185 Was Immaterial.**

SDL voluntarily dismissed its claim under RCW 4.84.185 -- *i.e.*, that TBCOT’s fraud claim was frivolous -- shortly after TBCOT filed its motion indicating that such a claim was premature. If, as is common before a CR 11 motion is made, TBCOT had simply informed SDL’s counsel of its position that the claim under RCW 4.84.185 implicated the anti-SLAPP statute, SDL would have had an opportunity to drop the claim even earlier. In any event, SDL mooted the issue by dismissing the claim before the trial court ruled on the anti-SLAPP motion to strike. *See Kyle v. Carmon*, 71 Cal. App. 4th 901, 84 Cal. Rptr. 2d 303, 307 (1999) (court’s order striking complaint under anti-SLAPP statute was void where plaintiff voluntarily dismissed complaint before a ruling on the anti-SLAPP motion); *see also, id.*, 84 Cal. Rptr. 2d at 308 and 310.

But there is a bigger issue implicated here. Essentially, TBCOT’s argument is that the anti-SLAPP statute eliminates any defense or

argument designed to address frivolous causes of action. This goes well beyond the intended scope of the anti-SLAPP statute, which -- as TBCOT agrees -- is meant to combat “lawsuits” brought “primarily” to chill the valid exercise of constitutional rights. *See* Answering Brief, at p. 8.

The tail is wagging the dog here. SDL’s frivolous claim assertion was not TBCOT’s main target: the thrust of the motion to strike was directed at the other counterclaims and the third-party claims. But whatever the merits of such a claim, the issue of the frivolous claims statute claim is legally insufficient to sustain the trial court’s dismissal of SDL’s other counterclaims and third-party claims.

**D. The Trial Court’s Grant of TBCOT’s Motion Cannot Be Sustained on the Alternate Ground of the Second Prong of the anti-SLAPP Analysis.**

TBCOT devotes over one-third of its brief to a discussion of the second prong of the anti-SLAPP test, *i.e.*, whether the non-moving parties have satisfied the burden of establishing by “clear and convincing” evidence a probability of prevailing on their claims. TBCOT characterizes this discussion as a matter of SDL having waived a challenge to a trial court finding against SDL on the second prong.

**1. SDL Has Waived Nothing, Because There Was No Finding on the Second Prong to Which SDL Could Have Assigned Error.**

TBCOT's waiver argument is based on SDL's supposed failure to assign error to the "finding" of the trial court that SDL did not meet its burden under the second prong. *See* Answering Brief, at p. 2. Yet the trial court's order granting the motion to strike -- which TBCOT's counsel drafted -- does not contain any findings whatsoever. *See* Order Granting Plaintiff's and Third-Party Defendants' Special Motion to Strike Pursuant to RCW 4.24.525, at CP 219-221.

Although TBCOT does not say so, when TBCOT refers to the trial court's finding on the second prong, TBCOT could only be referring to the trial court's statement about the second prong, made during the hearing on TBCOT's motion. And SDL does not deny that the trial court said during that hearing that SDL failed to show by clear and convincing evidence that SDL was likely to prevail on its counterclaim. *See* VRP at 23.

SDL, however, was under no obligation to assign error to this statement. Indeed, SDL ***could not*** have assigned error to this statement. It has been the law in Washington *for decades* that a party may not assign error to such a statement. As this Court put the point some 45 years ago:

Defendants' assignments of error 1 and 5 are to quoted portions of the trial court's oral opinion. *Such statements are not rulings which can be appealed or assigned as error.* A trial court's oral opinion is only an indication of the court's views or

thinking, and does not become final until or unless incorporated in written findings or conclusions of law. *Ferree v. Dorice*, 62 Wn.2d 561, 383 P.2d 900 (1963); *In re Dillenberg v. Maxwell*, 70 Wn.2d 331, 413 P.2d 940, 422 P.2d 783 (1966).

*Johnson v. Whitman*, 1 Wn. App. 540, 541, 463 P.2d 207 (Div. One 1969) (emphasis added). *Accord, Sweeten v. Kauzlarich*, 38 Wn. App. 163, 169, 684 P.2d 789 (1984).

Having failed to convert the trial court's preliminary "views or thinking" on the second prong into a final determination, by failing to propose that a finding on the point be included in the trial court's written order, TBCOT could have left the point alone and left the resolution of this appeal to this Court's decision on the prong one issue. Instead, TBCOT chose to raise the prong two issue. But without a finding in TBCOT's favor in the trial court's written order, TBCOT can raise prong two only as an alternate ground for affirmance. And, as such, SDL has a right to reply and to show why the trial court's grant of TBCOT's motion cannot be sustained on that ground, either.

**2. The Second Prong Cannot Sustain the Trial Court's Grant of TBCOT's Motion.**

There are two reasons why the second prong cannot sustain the trial court's grant of TBCOT's motion: (1) SDL met its second prong burden; and (2) SDL was denied a fair opportunity to address the second

prong issue, because SDL was denied minimum discovery before the trial court ruled on TBCOT's motion.

There is a threshold issue as to what "clear and convincing" actually means in this context. Unless the phrase is held to refer only to evidence that is sufficient to raise a genuine issue of material fact, the anti-SLAPP statute would run afoul of the constitutional guarantee of open access to the courts. Indeed, both the Washington and California courts have noted that the test to be applied to an anti-SLAPP motion is similar to that of a motion for summary judgment. *See Davis v. Cox, supra*, 180 Wn. App. at 546-547; *see also Kyle v. Carmon, supra*, 84 Cal. Rptr. 2d at 307 (holding that, in order to preserve plaintiff's right to jury trial, the court's determination of the motion cannot involve a weighing of the evidence).

Here, if the trial court had credited the declaration testimony of SDL's Robert Schlegel (CP 200-204), as that court should have done, the conclusion is compelled that there were genuine issues of material fact that precluded granting TBCOT's motion: (1) TBCOT and the third-party defendants received complete and comprehensive access to SDL's financials prior to their decision to purchase the team (CP 201-202, ¶¶ 6 and 7); (2) during the negotiations, TBCOT and the third-party defendants represented to SDL that they valued and were buying the team based on

comparable sales, not a multiple of EBITDA (CP 202, ¶ 8); and (3) the third-party defendants made false representations to SDL, which SDL relied upon in selling the team with an “earn-out” provision and rejecting other offers. (CP 204, ¶ 14).

TBCOT argues that representations of future intent cannot give rise to a fraud claim. *See* Answering Brief, at 26. But the Washington Supreme Court has long held that while future promises do not constitute fraud, the misrepresentation of present intent is an actionable representation. Thus, as the Washington Supreme Court said in *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 457 P.2d 535 (1969), “if a promise is made for the purpose of deceiving and with no intention to perform, it constitutes such fraud as will support an action for deceit.” 76 Wn.2d at 396; *see also Hewett v. Dole*, 69 Wash. 163, 170, 124 P. 374 (1912). Indeed, TBCOT acknowledges that SDL alleged that the third-party defendants “misrepresented TBCOT’s intent to pay” the earn-out. *see* Answering Brief, at p. 27. In sum, on the record that was before the trial court, the second prong cannot sustain the court’s grant of TBCOT’s motion.

In addition, TBCOT’s motion should not have been granted based on the second prong, because SDL was denied a fair opportunity to develop that record through discovery.

In the guise of arguing the second prong, TBCOT was really arguing for summary judgment prior to SDL's ability to conduct basic discovery. The anti-SLAPP statute provides that, notwithstanding the discovery stay that takes effect on the filing of a special motion to strike, "the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted" prior to ruling on the anti-SLAPP motion. RCW 4.24.525(5)(c). This provision is akin to CR 56(f) in the summary judgment context.

In opposing TBCOT's anti-SLAPP motion, SDL pointed out that it had not had an opportunity to conduct any depositions of TBCOT's personnel prior to the filing of the motion, CP 194-195, and SDL specifically asked the trial court for the opportunity to conduct basic discovery prior to a ruling on the motion:

SDL respectfully requests that, if the special motion to strike is not denied outright, it should be continued to permit SDL to conduct the following depositions which have been noticed: Isaac Wells (May 20, 2014); Brian Coombe (May 21, 2014); Scott Soley (May 21, 2014); Aaron Artman (May 22, 2014); and Mik[a]l Thomsen (May 23, 2014). SDL expects that these depositions will yield additional evidence in support of SDL's counterclaims and third-party claims and give SDL a full and fair opportunity to respond.

CP 195.

As SDL stated to the trial court, these already-scheduled depositions would have consumed only four consecutive days' time. SDL's counsel reiterated this limited discovery request during the hearing.

*See* VRP at p. 17, lines 7-16 and p. 20, lines 1-4. In its reply in support of the motion, TBCOT requested that any such continuance should allow for them to take depositions of SDL’s representatives, as well. CP 216, lines 21-29. Nevertheless, the trial court did not grant a continuance and provided no analysis or explanation for this decision, either during the hearing or in its order. *See* VRP, pp. 21-26; CP at pp. 219-220. Trial courts should not be allowed to rush to judgment in an anti-SLAPP matter, as the court so evidently did here.

**E. The Trial Court’s Award of Statutory Damages to the Third-Party Defendants was Improper.**

TBCOT does not dispute that the third-party defendants, Mikal Thomsen and Aaron Artman, did not assert any claims against SDL. The fact that the anti-SLAPP statute defines the term “person” to include individuals (Answering Brief, at p. 20) is irrelevant if Messrs. Thomsen and Artman did not themselves engage in any protected activity. Again, as set forth in SDL’s opening brief, TBCOT cannot have it both ways: either the third-party defendants are separate and distinct from TBCOT and “are protected from liability by the corporate veil (Answering Brief, at 23) or “their actions are the actions of [TBCOT] itself” (Answering Brief, at 21). As stated in SDL’s Opening Brief, under either proposition a separate award of \$10,000 each to Messrs. Thomsen and Artman was erroneous and should be reversed.

**II. CONCLUSION**

This Court should reverse the trial court's grant of TBCOT's anti-SLAPP motion, reinstate SDL's counterclaims and third-party claims, and remand for further proceedings on the merits on those claims.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of August, 2014.

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CERTIFICATE OF SERVICE

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused true and correct copies of *Appellants' Reply Brief*, and *Declaration of Service* to be served on the below-listed attorney(s) of record by the method(s) indicated:

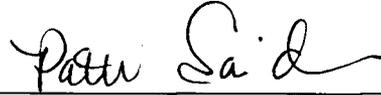
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