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DIVISION II

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STATE OF WASHINGTON

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No. 46896-4-II

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

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

Appellants,

v.

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

Respondent.

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APPELLANTS' REPLY BRIEF

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## I. INTRODUCTION

Respondent Patricia Swanson's brief makes a key, dispositive admission: at least two of her claims are based on reports to government by Appellants Gary and Marilyn Sea. Those reports are absolutely protected under the anti-SLAPP statutes, RCW 4.24.510 and RCW 4.24.525. But that is not the only reason the Court should reverse the Superior Court's refusal to apply the statutes and impose their mandatory remedies and sanctions. Ms. Swanson also completely misrepresents the evidence in the record; tries to allege a new claim that is itself frivolous; and makes many other arguments with no basis in fact or law.

*First*, RCW 4.24.510 provides immunity from civil liability for *any* communication to a government entity about a matter of concern to that entity. Ms. Swanson argues the statute does not protect false statements. This contention has no support in the statute, its purpose, or cases construing it. At a minimum, the Superior Court should have dismissed under the anti-SLAPP law Ms. Swanson's abuse of process and harassment claims, which she admits are based on the Seas' reports. It also should have dismissed on this basis her tortious interference claim, which (until this appeal) was based on those reports.

*Second*, RCW 4.24.525 also bars those claims. Subsections 2(a), (b), and (c) apply to statements made in, in connection with, or to encourage review by the government. The Seas' reports were all of these, and two of the three *did* effect review by the government—of Ms. Swanson's landscaping work (which a county compliance officer swore

was unpermitted), and her unlicensed contractor (whom the State fined). (The third—a report about Ms. Swanson’s unlicensed dog—resulted in no proceedings; Ms. Swanson euthanized the dog.) In addition, the reports were an act of petition under Subsection 2(e). Ms. Swanson argues because the reports were false, they are not constitutionally protected. The reports were not false. But even if they were, the Seas rely on the statute, not the constitution, and the United States Supreme Court has held as recently as 2012 that false statements are not devoid of protection.

*Third*, Ms. Swanson offers no reasons the Superior Court correctly allowed her nuisance claims to survive and declined to award sanctions. Instead, she claims these issues are not properly before the Court. They are. Both were in the order designated for appeal. And review of these issues promotes judicial economy and serves the ends of justice, furthering this Court’s policy against piecemeal appeals. Ms. Swanson has proven time and again a propensity to bring meritless claims, including by asserting such a claim (for malicious prosecution) in this appeal.

Ms. Swanson cannot identify acts she does not like, assert a legal claim, and thereby harass the Seas. This Court should dismiss the counterclaims, and award the Seas their fees, damages, and sanctions.

## II. ARGUMENT

### A. Ms. Swanson Grossly Mischaracterizes the Evidence in the Record.

Ms. Swanson “disagrees with Seas’ statement of facts in this case.” Resp. Br. at 2. But she does not explain why. And she goes on to blatantly misrepresent the evidence on which she relies.

For example, for the following statements, Ms. Swanson cites her declaration, but her declaration does not say what she claims: (1) Brief at 3: “None of the neighbors *ever complained* about the work Swanson’s mother had done in the backyard,” citing CP 256, which only says “[n]o other resident ever expressed any concerns or complaints *at any of the [Homeowners Association] meetings*”; (2) Brief at 4: “all of Swanson’s guests ... liked [the dog] and were comfortable in her presence,” citing CP 298, which contains no such statement (and would be inadmissible hearsay); (3) Brief at 7: “Swanson’s 2007 landscaping project did not involve any fill or grading,” citing CP 258-59, which contains no such statement; (4) Brief at 26: “Swanson did not violate the ‘conservation easement,’” citing CP 254, which contains no such statement; (5) “Seas knew the true condition of Swanson’s property in 2007,” citing CP 256-57, which states that the Seas could see her backyard from their property.<sup>1</sup>

For still other statements, Ms. Swanson does not cite evidence at all, but instead a complaint and brief filed by her attorney from prior

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<sup>1</sup> Ms. Swanson also claims “[h]er mother’s landscaping project in 2002 did not require any permits,” but cites her own declaration, CP 254, which does not and cannot profess to express a legal opinion about permitting requirements.

litigation (who now purports to be both her attorney and a witness in this case): (1) Brief at 5: “Seas resisted and objected to any proposals Swanson made for replacing the fence,” citing CP 215, i.e., her complaint in her lawsuit against the Seas (the filing of which she ignores as she accuses the *Seas* of being litigious); (2) Brief at 6: “Swanson’s engineers determined that the actual cause of the failure was natural,” citing CP 164, a legal brief filed by Ms. Swanson in the County’s enforcement action against her; (3) Brief at 6: “Seas watched the construction carefully and complained about every small detail,” citing CP 164, i.e., the same brief; and (4) Brief at 26: “Swanson’s landscaping did not cause excess runoff onto Seas’ property,” citing CP 164, i.e., the same brief, and CP 294, a declaration from her attorney filed in opposition to the Seas’ anti-SLAPP motion, relaying hearsay.

Finally, at least one statement represents a gross misrepresentation of a fact Ms. Swanson claims is essential to her claims: Thurston County “recogniz[ed] Swanson was likely to prevail” in a civil enforcement action related to her landscaping and prompted by the Seas’ reports. Resp. Br. at 7. She cites the County’s notice of voluntary dismissal, which suggests exactly the opposite, stating that because Ms. Swanson’s “multiple pleadings” and hiring of two lawyers had rendered the action “too large and unwieldy,” the County would remove to Superior Court. CP 186.

In contrast, the Seas have supported their statement of facts with accurate citations to the record. Ms. Swanson has provided no evidence to contradict several, key facts: First, the Seas believed, based on their own

observations and those of their engineer, a statement by Ms. Swanson's contractor to Mr. Sea, and statements from Thurston County, that in 2007, Ms. Swanson placed plastic sheeting against the parties' common fence and covered it with fill, obstructing the swale, and that excess runoff was flowing from Ms. Swanson's property to their own. CP 64-66 ¶¶ 11-18; CP 69 ¶ 32.<sup>2</sup> Second, a County compliance coordinator visited the site twice, verified the unpermitted work and swore to it in a declaration, leading to an action by the County. CP 175-76. Third, Ms. Swanson—*not* the Seas—began litigation, filing suit in 2012, alleging an identical claim to one the Superior Court dismissed (that the Seas were “spying” on her), and dismissing her claims after the Seas filed a motion to dismiss. CP 70 ¶¶ 35-36, CP 214, CP 216, CP 219. Fourth, a contractor she hired—who according to one website had been charged with theft and issuing a bad check and been a defendant in nearly two dozen proceedings in Washington—became belligerent with the Seas while on their property, and the Seas reported him to the State, which in turn fined him for being unlicensed. CP 71-72 ¶¶ 39-41, CP 240-241, CP 227-238.

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<sup>2</sup> Ms. Swanson says the Seas should have complained in 2007. Resp. at 20. But it was not until *2012* that Mr. Sea could observe the plastic sheeting and fill Ms. Swanson placed against the common fence in 2007 had “obstructed water infiltration and flow in Swanson’s side of the swale.” CP 64 ¶ 11. And it was not until *2013* that he learned Ms. Swanson had “maintained a perforated drain pipe ... to collect and discharge her backyard runoff to [the Seas’] property....” CP 65 ¶ 14.

**B. RCW 4.24.510 Bars Ms. Swanson's Claims Based on Reports to the Government.**

Ms. Swanson admits at least a portion of her claims are “based on Seas’ false reports to Thurston County and other regulatory organizations.” Resp. Br. at 23.<sup>3</sup> This admission is dispositive. RCW 4.24.510 provides “[a] person who communicates a complaint or information to any branch or agency of federal, state, or local government ... *is immune from civil liability* for claims based upon the communication to the agency or organization regarding *any* matter reasonably of concern to that agency or organization.” Because Ms. Swanson’s claims sought to impose “civil liability” (damages) on the Seas for “communicating a complaint” (reports) to a “branch of ... government” (the Thurston County Resource Stewardship Department, the Department of Labor and Industries, and Animal Services of Thurston County) on a matter of concern to the government, RCW 4.24.510 applies.

In the Superior Court, Ms. Swanson barely mentioned RCW 4.24.510. For the first time, she now argues the law applies only to the second prong of the inquiry under RCW 4.24.525, and does not bar claims based on false reports to government because such reports are not

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<sup>3</sup> See also, e.g., *id.* at 1 (“Seas have enlisted ... government agencies as weapons of intimidation”); 9 (alleging “content, context, and intent of Seas’ communications to government demonstrate that they were not acting as concerned citizens...”; “Seas’ false reports to government are not constitutionally protected...”); 19 (“The statements to Thurston County involved allegations of unpermitted grading on the Swanson property causing excess runoff onto the Sea property.”; “Seas provide a detailed analysis of every detail of Swanson’s landscaping with which they are displeased, complete with ordinance citations and the legal conclusions they want the County to reach”); 21 (“Seas’ communications to government were not protected”); 27 (“the Seas maliciously instigated her prosecution by the County by filing false reports”).

constitutionally protected. Resp. Br. at 29-30. The Court should disregard these arguments. *Silverhawk, LLC v. KeyBank Nat'l Ass'n*, 165 Wn. App. 258, 265, 268 P.3d 958 (2011) (“[a]n argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal”). But even if it considers them, the arguments are meritless.

RCW 4.24.510 applies equally to false and true statements. The statute states that anyone who “communicates a complaint to ... government ... *is immune from civil liability* for claims based on the communication.” It does not contain any limits on “communication,” except that it pertain to a matter “reasonably of concern” to the agency.<sup>4</sup> The law does not require the communication be true, made in good faith, *or* constitutionally protected. Because the statute’s meaning is “plain on its face,” the “court must give effect to that plain meaning as an expression of legislative intent.” *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002); *Bevan v. Meyers*, 183 Wn. App. 177, 187, 334 P.3d 39 (2014) (“the act of reporting to a government agency on matters of concern to the agency ... is absolutely immune...”).

In fact, at least one court has rejected the exact argument Ms. Swanson makes—that because the constitution does not protect false statements to government (an incorrect statement to begin with, *infra* at

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<sup>4</sup> Ms. Swanson does not dispute the Seas have satisfied this element of the statute. Further, the Seas’ statements were of concern to the agencies to which they made the reports. They reported Ms. Swanson’s grading work to the Thurston County Resource Stewardship Department, which initiated enforcement proceedings; her unlicensed contractor to the Department of Labor and Industries, which fined the contractor; and her unlicensed dog to Animal Services of Thurston County, which is responsible for licensing and control of dogs.

II.C.1), RCW 4.24.510 does not apply. Ms. Swanson relies on *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983), which extended the *Noerr-Pennington* doctrine—which concerns the right to petition—to the unfair labor practices context. As one court put it, “[t]he *Noerr-Pennington* doctrine, however, is based on common law. It is not statutory. Here, the Court must focus on the language of RCW 4.24.510.” *Cornu-Labat v. Merred*, 2012 WL 1032866, at \*3 (E.D. Wash. Mar. 27, 2012), *aff'd*, 580 F. App’x 557 (9th Cir. 2014).

Even if the language of the statute were not clear, its statement of purpose and legislative history are. The legislative findings state that “as long as the petitioning is aimed at procuring favorable government action ... it is protected,” noting “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.” RCW 4.24.510 note (Intent 2002 c 232). This finding was added in 2002, when the Legislature removed a requirement that a communication be in good faith to be protected; removal of that requirement is further evidence of the immunity’s absolute nature.<sup>5</sup> Or, as one court put it, arguably “giving private citizens absolute immunity from any action stemming from communications to governmental agencies serves as a disincentive for citizens to ensure their comments are made in good faith. The legislature,

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<sup>5</sup> The Seas adamantly deny the reports they made were false or not made in good faith. But the Court need not reach that conclusion to find RCW 4.24.510 applies.

however, evidenced that *this was not its concern.*” *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 372, 85 P.3d 926 (2004) (emphasis added).

Ms. Swanson also argues RCW 4.24.510 “enters into the special motion analysis, if at all” on the second prong of a special motion to strike under RCW 4.24.525. Resp. Br. at 14. To be sure, immunity under RCW 4.24.510 is one reason Ms. Swanson cannot show a probability of prevailing on her claims under RCW 4.24.525.<sup>6</sup> But it is also an independent defense. *See, e.g., Lowe v. Rowe*, 173 Wn. App. 253, 294 P.3d 6 (2012) (affirming summary judgment of defamation claim based on defendant’s request that sheriff serve trespass notice on plaintiff); *Bailey v. State*, 147 Wn. App. 251, 191 P.3d 1285 (2008) (on discretionary review, reversing decision refusing to find RCW 4.24.510 provided immunity to employee sued for reporting plaintiff’s wrongdoing to university); *Gontmakher*, 120 Wn. App. at 370-74 (affirming summary judgment on claims by landowners based on report of clearcutting on property to State).

Thus, RCW 4.24.510 bars those of Ms. Swanson’s claims based on the Seas’ complaints to government entities. Ms. Swanson admits this is the basis for her abuse of process and harassment claims. Resp. Br. at 23. She now argues her tortious interference claim was based on a conversation between Ms. Sea and someone who owed her money. Resp. Br. at 22, 23 n.4. But she made clear in the Superior Court the claim was

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<sup>6</sup> This was precisely the case in *Phoenix Trading, Inc. v. Loops LLC*, 732 F.3d 936, 942-43 (9th Cir. 2013), in which the Ninth Circuit found the plaintiff had not shown a probability of prevailing on the merits under RCW 4.24.525 because RCW 4.24.510 barred the claims. *Phoenix Trading*, however, does not say that RCW 4.24.510 is only relevant under the second prong of RCW 4.24.525.

also based on reports to the Department of Labor and Industries of her unlicensed contractor. CP 31-32 ¶ 16 (“the Seas have interfered with Ms. Swanson’s business dealings with ... contractors”); CP 301 ¶ 13 (“The contractor worked for me, not the Seas. It was not their place to get involved in any of his or my business.”) (emphasis in original). Thus, the Superior Court erred by failing to apply RCW 4.24.510 to dismiss Ms. abuse of process, harassment, and tortious interference claims.

**C. RCW 4.24.525 Also Bars Ms. Swanson’s Claims Based on Reports to the Government.**

**1. Claims based on reports to the government trigger application of the new anti-SLAPP law.**

Subsections 2(a), (b), and (c) of the anti-SLAPP statute apply to “statement[s] made ... in a ... governmental proceeding,” those made “in connection with an issue under consideration or review by” such a proceeding, or those statements “reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in” such a proceeding. RCW 4.24.525. Subsection 2(e) applies to “conduct ... in furtherance of the exercise of the constitutional right of petition.” *Id.* Ms. Swanson’s harassment, tortious interference, and abuse of process claims fit within all of these categories.

Notably, despite Ms. Swanson’s lengthy, contrary arguments, Resp. at 15-21, none of these requires a statement be constitutionally protected, true, or a matter of public concern. The only anti-SLAPP cases Ms. Swanson cites interpret *different* portions of the statute that do not

deal with communications to government and instead contain a “public concern” requirement. In *Alaska Structures, Inc. v. Hedlund*, 180 Wn. App. 591, 323 P.3d 1082 (2014), the court found an employee’s disclosure of information in alleged violation of a confidentiality agreement was not speech “in connection with an issue of public concern,” as required by the speech portion of RCW 4.24.525(2)(e). 180 Wn. App. at 603. In *Johnson*, “a lengthy and tedious chronology of a private dispute between [the defendant] and [the plaintiff], his former boss” was not a matter of public concern to qualify for protection under RCW 4.24.525(2)(d). *Johnson v. Ryan*, \_\_\_ P.3d \_\_\_, 2015 WL 1259907, at \*9 (Wash. Ct. App. Mar. 19, 2015).

In a footnote, Ms. Swanson argues “the plain language” of subsections 2(a), (b), and (c) require a “proceeding” to exist at the time of the statement. Resp. Br. at 23 n.5. As the Seas noted in the Superior Court and their opening brief, Ms. Swanson provides no authority for this argument, and it is unsupported by the language of the statute, and California cases interpreting nearly identical language.

Subsection 2(c) protects statements “reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a ... governmental proceeding.” It does not state a proceeding must exist. The Seas’ reports to Thurston County about Ms. Swanson’s unpermitted work and the Department of Labor and Industries about her unlicensed contractor not only were *likely* to effect review of an issue by the government, but, as Ms. Swanson

admits, they *did*: the County investigated the claims, found they had merit, and started a civil enforcement action, and the Department of Labor and Industries issued her contractor an infraction and fined him \$1,000.

Further, California courts, interpreting nearly identical language to Subsections 2(a) and (b), have found that “communication to an official administrative agency ... designed to prompt action by that agency is as much a part of the ‘official proceeding’ as a communication made after the proceedings had commenced.” *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1009 (2001) (complaint to Securities and Exchange Commission was made in “official proceeding”, rejecting contention defendants had not shown complaint was ever under review) (internal quotation marks omitted). *See also Dible v. Haight Ashbury Free Clinics*, 170 Cal. App. 4th 843, 850 (2009) (complaint by plaintiff’s former employer to Employment Development Department, even if motivated by desire to deflect responsibility for patient’s death, was protected); *Lee v. Fick*, 135 Cal. App. 4th 89, 96 (2005) (letter to school board made in “official proceeding”; “communications to an official agency intended to induce the agency to initiate action are part of an ‘official proceeding’”). Given this well-established authority, the Seas’ reports were made in, in connection with, and to encourage review by a government proceeding and therefore within the purview of the anti-SLAPP statute.

The Seas’ reports to the government are also acts of petition under Subsection 2(e). The Seas cited ample authority to support this argument in their opening brief. *See* Opening Br. at 17-20. Indeed, they cited a case

directly on point, *Bevan v. Meyers*, 183 Wn. App. 177, 334 P.3d 39 (2014). See RP 31:7-17 (*Bevan* “specifically talks about a situation that is similar to the one before the court”). There, the (counterclaim) defendant notified a county agency that the (counterclaim) plaintiff had installed a well on the defendant’s property; when the plaintiff sued to recover damages stemming from this report, Division I of this Court held the counterclaim was “directly based on an action in furtherance of the right to petition—the [plaintiff’s] report to KCHD.” 183 Wn. App. at 186. Here, too, three of Ms. Swanson’s counterclaims are based on the Seas’ reports to government, i.e., exercise of their petition rights.

Ms. Swanson does not mention *Bevan* and instead argues the right of petition does not include false reports to the government. But “a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and *then* permit the parties to address the issue in the second step of the analysis, if necessary.

Otherwise, the second step would become superfluous in almost every case.” *Davis v. Cox*, 180 Wn. App. 514, 531-32, 325 P.3d 255 (emphasis added) (quotation marks, alteration omitted), *review granted*, 182 Wn.2d 1008 (2014). See also *Governor Gray Davis Comm. v. Am. Taxpayers Alliance*, 102 Cal. App. 4th 449, 458 (2002) (interpreting California law: “[t]he Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law”). Thus, the

Court need not decide whether the Seas' statements are false to evaluate whether they are within subsection 2(e) of the anti-SLAPP statute.

Moreover, even if the Seas' reports were false (they were not), "a citizen does not lose the petition right 'merely because his communication to the government contains some harassing or libelous statements.'" Opening Br. at 19 (quoting *In re Marriage of Meredith*, 148 Wn. App. 887, 900, 899, 201 P.3d 1056 (2009)). The only case Ms. Swanson cites for her opposite contention, *Gertz v. Welch*, 418 U.S. 323 (1974), has been distinguished (if not overruled) on the point for which she quotes it—that "there is no constitutional value in false statement of facts." Resp. Br. at 24. In 2012, the Supreme Court noted that "isolated statements in some earlier decisions do not support the ... submission that false statements, as a general rule, are beyond constitutional protection" because "*some false statements are inevitable* if there is to be an open and vigorous expression of views in public *and* private conversation, *expression the First Amendment seeks to guarantee.*" *United States v. Alvarez*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2537, 2544-45 (2012) (emphasis added). Thus, it is simply untrue that the right to petition is lost if the petition itself is false.<sup>7</sup>

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<sup>7</sup> Ms. Swanson first claims "courts look to First Amendment cases to determine the reach of subsection [2](e)," Resp. Br. at 24, but then says the Washington Constitution "specifically excludes false statements from its protection of free speech," *id.* at 25. It does not. For example, the state Supreme Court has held it is "not an accurate statement of the law" that "nondefamatory, false statements about [political] candidates may be prohibited." *Rickert v. State, Pub. Disclosure Comm'n*, 161 Wn.2d 843, 850, 168 P.3d 826 (2007). Ms. Swanson cites a concurrence by Judge Siddoway in *Johnson v. Ryan*, but even that concurrence does not go so far, saying only the constitution "preserve[s] civil liability for defamation." 2015 WL 1259907, at \*19.

For the first time on appeal, Ms. Swanson claims the anti-SLAPP statute does not apply because the Seas' false reports violate RCW 9A.76.175, which makes it a crime to "knowingly make[] a false or misleading material statement to a public servant." Resp. Br. at 25. RCW 9A.76.175 is a criminal law that has no application here. And RCW 4.24.510 makes clear the same prohibition does not apply in the civil context: under that statute, *all* statements to government (including public servants) are protected from damages. *See supra* at II.B.

Ms. Swanson relies on cases holding the California anti-SLAPP law does not apply to illegal acts. Resp. Br. at 25 (citing *Gerbosi v. Gaims, Weil, W. & Epstein, LLP*, 193 Cal. App. 4th 435, 445 (2011)). But in *Gerbosi*, a court refused to apply California's anti-SLAPP law because the defendant's wiretapping was *admittedly* and *conclusively* illegal. *Gerbosi*, 193 Cal. App. 4th at 446. As it held, "when a defendant's assertedly protected activity *may or may not* be criminal activity, the defendant may invoke the anti-SLAPP statute unless the activity is criminal as a matter of law." *Id.* at 446; *see also Davis*, 180 Wn. App. at 532 (quoting same portion of *Gerbosi*). Here, in contrast, the Seas' reports are not unlawful, much less "admittedly" or "conclusively" illegal.

Finally, Ms. Swanson argues her counterclaims "do not fit within the scope of the problem the legislature sought to remedy through the anti-SLAPP statutes" because she did not intend to silence any good-faith speech on a matter of public concern. Resp. Br. at 15. The statute's text does not require proof of her intent, proof of the Seas' intent, or (as to the

sections of the law on which the Seas rely) that the Seas' speech was on a matter of public concern.<sup>8</sup> Instead, Ms. Swanson relies on its legislative purpose. "Statutory policy statements do not give rise to enforceable rights in and of themselves. It is the statutory sections that follow the policy statement that provide the enforceability of certain rights." *Judd v. Am. Tel. & Tel. Co.*, 116 Wn. App. 761, 770, 66 P.3d 1102 (2003).

But even if the statement of purpose were relevant to this Court's decision, it supports application of the statute here. Although it *does* discuss "matters of public concern," it *also* declares "[i]t is in the public interest for citizens to ... *provide information to public entities* ... on public issues that affect them *without fear of reprisal* through abuse of the judicial process." RCW 4.24.525 note (Findings—Purpose). Or, as the California Supreme Court put it, an intent to "encourage continued participation in matters of public significance ... does not imply ... an across-the-board 'issue of public interest' pleading requirement" since "[a]ny matter pending before an official proceeding possesses some measure of 'public significance' owing solely to the public nature of the proceeding, and free discussion of such matters furthers effective exercise of the petition rights." *Briggs v. Eden Council for Hope & Opportunity*,

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<sup>8</sup> In fact, courts in California have rejected all three arguments. See *Trapp v. Naiman*, 218 Cal. App. 4th 113 (2013) (allegations that defendant, an experienced foreclosure attorney, knew his lawsuits had no merit but "kept filing one frivolous [unlawful detainer] after another" to "bully and intimidate" plaintiff were irrelevant to decide whether plaintiff's action fell within anti-SLAPP statute); *Dible*, 170 Cal. App. 4th at 851 ("If the actionable communication fits within the definition contained in the [anti-SLAPP] statute, the motive of the communicator does not matter."); *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53 (2002) (declining to import intent-to-chill requirement where none appeared in text of statute).

19 Cal. 4th 1106, 1122, 1118 (1999) (refusing to import requirement that statements be of public interest to qualify for protection).

Further, a House report on the bill that created RCW 4.24.525 noted it was designed to encompass the right to petition, which “covers *any* peaceful, legal attempt to promote or discourage governmental action at any level and *in any branch*. All means of expressing views to government are protected, including: *filing complaints ....*” House Bill Report, SSB 6395. And a Senate report noted that “[t]ypically, a party 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.” Senate Bill Report, SSB 6395. Thus, the Seas’ actions here—reports to the government—are plainly within the law’s purpose.

Given this authority, at least Ms. Swanson’s abuse of process, harassment, and tortious interference counterclaims—all premised on reports to government—targeted conduct subject to RCW 4.24.525.<sup>9</sup>

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<sup>9</sup> Ms. Swanson also argues the Court must view the evidence in the light most favorable to her. Resp. Br. at 14. But the Court need not accept her characterizations of her claims. The anti-SLAPP statute applies “to any claim, *however characterized*, that is based on an action involving public participation and petition.” RCW 4.24.525(2) (emphasis added). It directs courts to look beyond the pleadings, stating they “shall consider ... supporting and opposing affidavits stating the facts upon which the liability or defense is based.” RCW 4.24.525(4)(c). As the Seas explained in their opening brief (and Ms. Swanson fails to address), this requires only a “threshold” showing that a suit targets speech or conduct “within the realm of protected activity.” *Spratt v. Toft*, 180 Wn. App. 620, 632, 630, 324 P.3d 707 (2014). *See, e.g., Davis*, 180 Wn. App. at 525-26 (rejecting plaintiffs’ characterization of their suit as targeting “corporate malfeasance” where they challenged a board decision to boycott Israeli products.).

**2. Ms. Swanson failed to show a probability of prevailing on the merits of her claims.**

Once the Seas made this showing, the burden shifted to Ms. Swanson to establish by clear and convincing evidence a probability of prevailing on the merits. RCW 4.24.525(4)(b). As Ms. Swanson admits, this requires a showing sufficient to defeat summary judgment. Resp. Br. at 13. Here, because the Superior Court found Ms. Swanson's abuse of process, harassment, and tortious interference claims could not survive summary judgment, they necessarily could not survive an anti-SLAPP motion. The new anti-SLAPP law therefore bars the claims.

Ms. Swanson does not defend the merits of those claims. Instead, she argues her allegations and evidence “do support a claim for malicious prosecution,” and she will “clarify” this in the Superior Court. Resp. Br. at 27-28 (emphasis in original). The argument borders on frivolous.

First, to defeat the Seas' anti-SLAPP motion, Ms. Swanson had to show she could defeat summary judgment on the claims subject to that motion—not some hypothetical claim. She did not. Abuse of process requires showing an act in a legal proceeding was not “proper in the regular prosecution of the proceedings.” *Saldivar v. Momah*, 145 Wn. App. 365, 388, 186 P.3d 1117 (2008). As the Superior Court held, Ms. Swanson did not identify any “legal proceeding” the Seas initiated, nor did she allege facts to show “an act in the use of legal process, not proper in the regular prosecution of the proceeding.” See RP 34:8-17. In addition, “there is no general civil harassment claim in Washington law.” *Castello*

v. *City of Seattle*, 2010 WL 4857022, at \*4 (W.D. Wash. Nov. 22, 2010).  
See also RP 34:1-2. Finally, Ms. Swanson's interference claim failed to allege damages or the breach or termination of a relationship. *Leingang v. Pierce Cnty. Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997) (listing elements). See RP 32:16-25 ("There is no evidence, other than Ms. Swanson's *pure speculation* based on hearsay statements and her own thought process, that would create ... a claim of tortious interference...").

Second, even if Ms. Swanson tries to amend her counterclaims to allege a malicious prosecution claim, that amendment would be futile. A claim for malicious prosecution arising from civil proceedings requires:

(1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; *and* (5) that the plaintiff suffered injury or damage as a result of the prosecution....

(6) arrest or seizure of property *and* (7) special injury (meaning injury which would not necessarily result from similar causes of action).

*Clark v. Baines*, 150 Wn.2d 905, 911-12, 84 P.3d 245 (2004) (emphasis added). Further, if a malicious prosecution claim is based on a report to the government, RCW 4.24.510 bars it. See *Segaline v. State, Dep't of Labor & Indus.*, 144 Wn. App. 312, 326, 182 P.3d 480 (2008) (rejecting

argument that RCW 4.24.510 does not apply to malicious prosecution claim), *rev'd on other grounds*, 169 Wn.2d 467 (2010).

Ms. Swanson does not allege, nor could she, that she was arrested or her property seized. In fact, she does not even appear to recognize the existence of that element, reciting the first five only, even though her own authority lists them all. *See* Resp. Br. at 28 (citing *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 695, 82 P.3d 1199 (2004)).<sup>10</sup> Of course, even if Ms. Swanson did allege an arrest or seizure, she did not provide evidence of the remaining elements—an issue this Court need not reach.

**D. If This Court Finds the Anti-SLAPP Statutes Apply, It Must Reverse the Superior Court's Decision.**

The Seas argued in their opening brief that a refusal to grant an anti-SLAPP motion while dismissing a claim under CR 56 is error, or in other words, the anti-SLAPP motion is not moot. Ms. Swanson does not dispute this. Therefore, if this Court finds either anti-SLAPP statute bars her claims, it must reverse the Superior Court's decision.

Ms. Swanson claims the Superior Court “denied the anti-SLAPP motion under the first prong of the analysis.” Resp. at 8. The court did not say this at oral argument or in its order. *See* RP; CP 414-15. Instead, in response to a question whether it was dismissing the abuse of process

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<sup>10</sup> Ms. Swanson also cites *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 125 P.2d 681 (1942), but that case applies to malicious prosecution of *criminal* proceedings—where a plaintiff need only show the first five elements. *See Clark*, 150 Wn.2d at 911-12. (reciting five elements from criminal context, then stating “[i]n Washington a malicious prosecution claim arising from a civil action requires the plaintiff to prove the same five elements listed above plus two additional elements”).

claim under the anti-SLAPP statute, the court responded “[b]ut I dismissed it under your other arguments.” RP 37:19-23. The Court appeared to find it need not reach the anti-SLAPP motion if it dismissed the claims under CR 56. To the extent it did, it erred. *See* Opening Br. at 21-22.

**E. The Superior Court Erred by Failing to Dismiss Ms. Swanson’s Nuisance Claims and Award the Seas Sanctions under CR 11 and RCW 4.84.185.**

Ms. Swanson does not defend her nuisance claims, nor dispute her claims were without basis in fact or law, warranting sanctions under CR 11 and RCW 4.84.185. Instead, she argues this Court cannot consider either argument because this appeal encompasses only the Superior Court’s decision on the anti-SLAPP motion. But this Court can and should review the Superior Court’s entire order. *See* CP 414-15.<sup>11</sup>

*First*, the entire order is reviewable under RAP 2.4(a). Under that rule, “[t]he appellate court *will*, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal.” The Seas designated and pursuant to RAP 5.3 attached a copy of the Court’s written order, CP 414-15. That order denies the Seas’ anti-SLAPP motion to dismiss *all* of Ms. Swanson’s claims, and in the *alternative*, declines to dismiss her nuisance claims under CR 56. The order also denies the motion for sanctions. This Court should not accept Ms. Swanson’s artificial attempt to cordon off portions of the order she does not wish to

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<sup>11</sup> Ms. Swanson argues the Court should not consider the Seas’ argument under RCW 4.84.185 because it is new. It is not. The Seas asked the Superior Court to impose sanctions under the statute in their anti-SLAPP motion. CP 57.

address—but which the Seas designated, which were part and parcel of the Superior Court’s order denying the anti-SLAPP motion, and which this Court has agreed to review. Ms. Swanson has not cited—nor can the Seas locate—a case in which the Court declined to review a portion of an order to which error was assigned in the opening brief, as is the case here.

*Second*, the Seas appeal the Superior Court’s decision to allow the nuisance claims to survive the anti-SLAPP order. As they stated, “*all* of [Ms. Swanson’s] counterclaims were retaliatory and subject to the anti-SLAPP statute because the claims targeted protected activity.” Opening Br. at 18 n.2. Thus, the issue whether the nuisance claims have merit under the anti-SLAPP law is squarely before the Court. For the reasons in the Seas’ opening brief, they should be dismissed. *Id.* at 23-25.

*Third*, deciding the nuisance claims will promote judicial economy and justice. This State has an “indisputable policy against allowing piecemeal appeals,” which “must be avoided in the interests of speedy and economical disposition of judicial business.” *Bank of Am., N.A. v. Owens*, 177 Wn. App. 181, 193 & 193 n.21, 311 P.3d 594 (2013) (quotation marks, citations omitted). This Court also “liberally interpret[s]” its rules “to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). Both of these principles favor review here. Ms. Swanson’s claims are plainly without merit. The Court should not allow her to proceed with her nuisance claims, only to have this case before it in another appeal. The sanctions order, too, if unreviewed, will only encourage Ms. Swanson to continue her abusive litigation tactics.

**F. The Seas Are Entitled to Their Attorneys' Fees and Costs on Appeal.**

The attorneys' fee awards in the anti-SLAPP statutes are mandatory. *See* RCW 4.24.510; RCW 4.24.525(6)(a); Opening Br. at 27. Perhaps recognizing this, Ms. Swanson does not dispute the Seas are entitled to the fees they spent in the Superior Court if this Court finds at least one anti-SLAPP law applies. Instead, she argues this Court should not award fees on appeal. None of her arguments are persuasive.

Ms. Swanson argues "there is no precedent for awarding anti-SLAPP fees to a moving party that lost in the trial court." Resp. Br. at 31. Not so. In *Bailey*, the court found the Superior Court erred by failing to grant a defendant's motion under RCW 4.24.510, remanded "for an award of expenses, attorney fees, and statutory damages," and "award[ed] attorney fees and expenses to [the defendant] on appeal." *Bailey*, 147 Wn. App. at 264. Further, as the Seas noted, "where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees ... on appeal." Opening Br. at 28 (quoting *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 423, 161 P.3d 406 (2007)).

Ms. Swanson also argues "[b]y prevailing at the trial court, Swanson has demonstrated that her counterclaims were not clearly frivolous or abusive," nor is she "at fault" for "any error committed by the trial court." Resp. Br. at 31. Ms. Swanson did not "prevail" in the Superior Court; all her claims except nuisance were dismissed with prejudice. CP 415. And she could have dropped her claims. Instead, she

pursued them, attempted to revive them under the guise of her nuisance claims, and now seeks to assert *another* meritless claim, for malicious prosecution. *See* Opening Br. at 11-12. *See also* RCW 4.24.525(6)(a)(iii) (allowing court to award “[s]uch additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated”).

But more importantly, Ms. Swanson ignores the text and purpose of the anti-SLAPP statutes. A claim need not be “frivolous or abusive” to mandate fees. *See* RCW 4.24.510 (“A person prevailing upon the defense provided for in this section *is entitled* to recover expenses and reasonable attorneys’ fees....”) (emphasis added); RCW 4.24.525(6)(a) (“The court *shall* award to a moving party who prevails ... reasonable attorneys’ fees...” (emphasis added). *See also* *Bevan*, 183 Wn. App. at 188-89 (“RCW 4.24.525(6) *requires* a trial court to award attorney fees and costs, along with a \$10,000 sanction, to a moving party who prevails on a special motion ...”) (emphasis added).

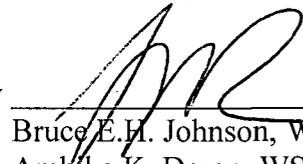
### III. CONCLUSION

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

RESPECTFULLY SUBMITTED this 8th day of May, 2015.

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