

69505-3

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NO. 69505-3-I

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

TANYA L. BEVAN,

Respondent,

vs.

CLINT and ANGELA MEYERS, husband and wife,

Appellants.

REPLY BRIEF

~~FILED~~
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STATE OF WASHINGTON
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INTRODUCTION

Bevan succeeded in the trial court – and can only succeed here – by misconstruing the Meyers' counterclaim as based on (a) someone else's statement to the Health Department, and (b) tortious interference with a business expectancy. Her classic straw-man attack lacks candor and efficacy.

Bevan denied making any statement to the Health Department, and the Meyers never alleged that she did. The Meyers did not even sue the surveyor who did make a statement. This counterclaim could not deter anyone.

And this case has nothing to do with tortious interference with a business expectancy: the counterclaim concerns only the Meyers' home. That is, the Meyers' counterclaim is plainly based upon Bevan's wrongful assertion of ownership of the very property that she herself repeatedly asserted belongs to the Meyers. Bevan's straw-man misdirection should fail here.

This Court should reverse and remand for trial of the Meyers' actual counterclaim, which the trial court refused to strike. The Court should therefore award the Meyers attorney fees and costs. At a minimum, the Meyers should be granted limited discovery, and the trial court's fee and cost award should be reversed as untimely.

REPLY STATEMENT OF THE CASE

Bevan does not dispute – and thus tacitly concedes – the key fact underpinning the Meyers' counterclaim: Bevan herself identified her boundary line to Clint Meyers, to the Meyers' predecessor in interest, and to a potential purchaser of her property. *Compare* BA 5 *with* BR 5-17. Indeed, in her 50-page brief, Bevan nowhere addresses this key point.

Bevan's Statement of the Case is nonetheless highly argumentative, contrary to RAP 10.3(a)(5). It also contains numerous assertions that find no support in the record. A few examples should suffice.

First, Bevan makes numerous argumentative assertions at BR 4, virtually none of which is supported by the citations given. Nor would these assertions find support elsewhere in the record.

Second, Bevan again exploits Clint Meyers' irrelevant and unfortunate email. BR 6-8. The extent to which she will reach for anything to prejudice the courts is well illustrated here, particularly in her entirely argumentative footnote 1. This email literally has nothing to do with the Meyers' counterclaim that Bevan acquiesced in the boundary line that she represented as true.

Third, Bevan argues her purportedly “factual” – but quite fanciful – interpretation of the Meyers’ counterclaim. BR 9-11. She here fails to mention that the operative paragraph at CP 17, ¶ 12.5, states that it is Bevan’s assertion of ownership of the disputed property, not someone else’s statement to the Health Department, that caused their damages. *Id.* Indeed, Bevan admits that the Meyers’ damages are “NOT” attributable to that statement. BR 11. Yet she persists in misconstruing the counterclaim. *Id.*

Fourth, Bevan again descends into openly argumentative assertions, particularly in her footnotes 6 and 7. BR 12-15. There is nothing “odd” about filing an Amended Answer to clarify the basis of a counterclaim in response to a Special Motion to Strike. BR 14. While Bevan argues (in footnote 6) that the Meyers needed leave to file, the trial court did not rule on her motion to strike, and Bevan has not cross-appealed the failure to strike the Amended Answer, which was duly filed and is in the record at CP 108-13.

Fifth, and perhaps most disturbingly, Bevan repeatedly asserts – with absolutely no support in the record – that “counsel for the Meyers actually declined to identify the specific cause of action alleged in the generic ‘[counter]claim for damages.’” BR 15 (citing CP 120). But at CP 120, the Meyers explained that Bevan

misstated their claim as “tortious interference with a business expectancy” – “16 times” – where the counterclaim never even mentions “business expectancy”; rather, their “claims only involve their home.” CP 120. Moreover, the Meyers expressly stated, numerous times (including in each counterclaim they filed) that it was “Bevan’s claim to Meyers’ property that has caused [them] to suffer damages, not just the fact that information was provided to the County.” CP 121. Bevan’s repeated assertion that the Meyers refused to identify their counterclaims is false.

REPLY ARGUMENT

A. The standard of review is *de novo*.

Bevan concedes that the standard of review is *de novo*. BR 17. But she claims that the trial court’s failure to permit discovery is reviewed for an abuse of discretion, albeit while citing no relevant authority for that proposition. *Id.* at 17-18. Whether the trial court’s denial of discovery violated the Meyers’ right to due process is a question of law, reviewed *de novo*. BA 18-21; *see also, e.g., Wash. Indep. Tel. Ass’n v. Wash. Util. & Transp. Comm’n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003). The point of the Meyers’ reference to “abuse of discretion” was simply to note that even under that lower standard, the trial court erred.

B. The Act does not apply to this purely private property-line dispute, which is based on Bevan's wrongful assertion of ownership, not on a public concern, nor on anyone's public participation or petition.

The Meyers explained that the Act does not apply to this private-property dispute. BA 11-15. Bevan's wrongful assertion of ownership to land that she had long-since acknowledged as belonging to the Meyers does not implicate any free speech rights. *Id.* The Act does not apply because the Meyers' counterclaim is not based on any act in furtherance of free speech-rights. *Id.* (citing and discussing ***Aronson v. Dog Eat Dog Films, Inc.***, 738 F. Supp. 2d 1104 (W.D. Wash. 2010) (citing ***City of Cotati v. Cashman***, 29 Cal. 4th 69, 124 Cal. Rptr. 2d 519, 52 P.3d 695 (2002)) and ***Equilon Enterprises v. Consumer Cause, Inc.***, 29 Cal. 4th 53, 66, 124 Cal. Rptr. 2d 507, 52 P.3d 685 (2002)).

Bevan apparently responds at BR 26-28, albeit without ever citing or responding to ***Aronson*** or ***Equilon***. She contends (without citing any authority) that "public concern" means "issues of concern to a government agency," which frankly makes little sense. BR 28. Notwithstanding her forced misconstruction ("public concern" obviously means an issue of concern to the public), she is forced to acknowledge that the Act "applies to 'claims ***based upon***

the communication to the [government] agency” BR 28 (quoting RCW 4.24.510) (emphasis added). The Meyers’ counterclaim is based upon Bevan’s wrongful assertion of ownership of their property, not on any communications with the government. The trial court’s refusal to strike the Meyers’ actual counterclaim confirms this.

The Act does not even apply here.¹ But the financial and tactical incentives for plaintiffs like Bevan to engage in this sort of gamesmanship are manifest. Even though the trial court refused to strike the Meyers’ actual counterclaim, Bevan succeeded in delaying this action and obtaining funding for further litigation. This Court should not permit or encourage these sorts of tactics.

C. Bevan failed to prove by a preponderance of the evidence that the Meyers’ counterclaim was based on her (or anyone’s) “public participation and petition.”

The Meyers also explained that Bevan failed to prove their counterclaim was based on anyone’s “public participation and petition.” BA 15-17. Merely striking a factual allegation that the Meyers had already removed from their Answer cannot justify a

¹ The Meyers previously distinguished *Gilman v. MacDonald*, 74 Wn. App. 733, 875 P.2d 697 (1994) and need not repeat it here. Compare BA 14-15 with BR 34-35. But it bears noting that Bevan’s telling assertion that lies are protected by the First Amendment under *Gilman* – if that were what the case said, which it is not – is directly contradicted by our Supreme Court’s recent decision in *Tan v. Le*, __ Wn.2d __, 300 P3d 356 (2013) (1st Amend. does not protect lies).

\$10,000 penalty and \$19,000 in fees. *Id.* The original allegation of Bevan's wrongful act – and the true gravamen of the Meyers' claims – remains for trial. *Id.*

Bevan nowhere addresses the Meyers' central point that the trial judge left their actual counterclaim based on her wrongful assertion of ownership wholly intact. *Id.* She thus tacitly concedes that the counterclaim was not based on protected communications. That is, the trial court's striking a mere factual allegation, while refusing to strike the actual counterclaim, plainly disproves Bevan's assertion that the counterclaim was based on that allegation of fact.

Instead of addressing the Meyers' actual arguments, Bevan makes a series of strained arguments designed to shoehorn the Meyers' counterclaims into the Act, falsely asserting that they were based on the surveyor's communication with the Health Department – a communication that Bevan adamantly denies having anything to do with (CP 48). BR 21-35. Since Bevan had nothing to do with that communication, and the Meyers did not sue the surveyor, their counterclaims are not based upon that communication, affecting neither the speech nor the speaker.

Bevan again repeats her false assertions that the Meyers' claim is “really” tortious interference with a business expectancy.

BR 24-25. The absurdity of this tactic has been addressed above: there is no “business relationship” involved here, but rather a false claim to the Meyers’ property. It is transparent that Bevan is attempting to change the Meyers’ claim so that it somehow fits under the Act and can be dismissed. This tactic should fail.

Bevan again baldly asserts that she proved the counterclaim was based on the communication, but then cites only a series of inapposite cases. BR 28-35 (citing *In re Marriage of Meredith*, 148 Wn. App. 887, 201 P.3d 108 (2009) (dissolution case); *Hillis v. Dept. of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997) (groundwater case); and *Gilman* (discussed *supra*)). Even if there may be some arguable public interest in “groundwater,” that would not convert this litigation over ownership of private property into a matter of public concern. Again, Bevan is just reaching.

D. The Meyers provided clear and convincing evidence of a probability of prevailing on their counterclaim regarding Bevan’s wrongful assertion of ownership, contrary to the boundary-line she herself pointed out.

The Meyers also provided uncontroverted evidence that if believed is clear and convincing proof that Bevan wrongfully asserted ownership to property that she admitted belongs to the Meyers. BA 17-18. Bevan undisputedly pointed out the true

boundary lines to the Meyers' predecessor, to Clint Meyers, and to a potential buyer of Bevan's property. *Id.* Washington law fully supports the Meyers' counterclaim. *Id.* at 18 & n.6 (citing, *inter alia*, ***ESCA Corp. v. KPMG Peat Marwick***, 135 Wn.2d 820, 828, 959 P.2d 651 (1998); ***Darnell v. Noel***, 34 Wn.2d 428, 431-32, 208 P.2d 1194 (1949); ***Dixon v. MacGillivray***, 29 Wn.2d 30, 185 P.2d 109 (1947); ***Thompson v. Huston***, 17 Wn.2d 457, 135 P.2d 834 (1943); ***Lawson v. Vernon***, 38 Wash. 422, 80 P. 559 (1905); ***Hoel v. Rose***, 125 Wn. App. 14, 18, 105 P.3d 395 (2004)).

Bevan claims that the Meyers did not raise this issue below. BR 35-36. That is incorrect. The Meyers repeatedly asserted that their counterclaim is based on Bevan's wrongful assertion of ownership, and they in fact prevailed on that argument: the trial court refused to strike their actual counterclaim. *See, e.g.*, CP 128-29, 134-35, 144. While it is true that the Meyers couched their response largely in terms of the Act not applying here, Bevan herself acknowledged this element of the Special Motion analysis. CP 36. This issue was plainly raised in the trial court.

Bevan takes her straw-man attack all the way to its absurd conclusion, asserting that the Meyers failed to argue a tortious interference with business expectancy claim (which they have

never asserted) and so they have waived their counterclaim! BR 36-41. But it is Bevan who has utterly failed to address the Meyers' real counterclaim. This Court should reverse.

E. At the very least, the Meyers were entitled to necessary discovery, the denial of which violated their fundamental right to due process of law.

The trial court denied the Meyers a fundamental element of due process: discovery. BA 18-21. This deprivation of due process is contrary to the very terms of the Act. *Id.* (citing RCW 4.24.525(5)(c)). The *Mathews* balancing test plainly supports the need for discovery here. BA 19-21. The trial court erred denying limited discovery, depriving the Meyers of procedural due process.

Bevan first responds by quoting the place in the record where Judge Middaugh accepted Bevan's mischaracterization of the Meyers' counterclaim. BR 41 (quoting RP 16). This simply proves that Bevan succeeded in misdirecting the trial court. Restating the error does not help Bevan.

Bevan also argues that the Legislature "precluded discovery" in the Act. BR 42. This is inaccurate: the Act permits limited discovery. RCW 4.24.525(5)(c). That is all the Meyers sought. The trial court erred in depriving them of it.

On the Meyers' procedural due process claim – which they agree should be avoided, if possible – Bevan flatly states that this Court should not reach the issue, but makes no argument. BR 43. If the Court does not reverse on the grounds discussed above, this is precisely the sort of issue this Court should agree to first hear on appeal. The expedited basis of the Special Motion procedure makes it exceedingly unlikely that parties will spot and fully raise a constitutional challenge in the trial court. As a result, this very significant issue will tend to evade appellate review, particularly where, as here, the Act simply does not apply. If the Court cannot resolve the appeal in the Meyers' favor short of addressing the constitutional issue, then it should reach the issue.

On the merits, Bevan first raises the red herring that the Meyers have cited no case stating that they have a “life, liberty or property interest” in access to justice. BR 43. This is a procedural due process challenge, not a substantive due process challenge. Bevan's argument is irrelevant.

Bevan also claims that the Meyers could have conducted discovery and then amended their counterclaim. *Id.* Obviously, this was a compulsory counterclaim. *See, e.g.*, CR 13(a). Equally obviously, discovery is limited by relevance to the allegations in the

case. See, e.g., CR 26(b)(1). One thus cannot conduct discovery on an issue that is not raised. This too is a red herring, which also proves too much. If defendants could conduct extensive discovery and then amend – which they cannot – then they could easily evade what Bevan claims is the entire purpose of the Act: expedited treatment of such claims.

Finally, Bevan raises the “deterrence” aspect of the Act. BR 43. The problem with this argument – and with invoking the Act in first place – is that the Meyers’ counterclaim cannot deter anyone from invoking a right to speak, petition the government, etc. Their counterclaim – which survived Bevan’s motion – is that she wrongfully asserted ownership of property that she previously acknowledged belongs to the Meyers. The mere factual allegation about the surveyor’s statement to the Health Department – which they voluntarily removed from their counterclaim – does not threaten anyone with any consequences for speaking out: Bevan made no such communication, and the surveyor was not sued. No speech is or would be deterred.

In sum, the Meyers were deprived of their procedural due process right to conduct limited discovery on the central issue in the case. The trial court’s failure to permit this discovery flies in the

face of the specific language of the statute permitting discovery. Equally important, had discovery been permitted, it is likely that the Meyers would have been better able to illustrate to the court the true nature of their counterclaims, obviating the Special Motion.

F. The trial court erred in granting sanctions, costs and attorney fees.

In light of the errors described above, the trial court plainly erred in granting fees and costs to Bevan. BA 21-23. Indeed, the Meyers are entitled to fees and costs, both in the trial court and here, should they prevail. *Id.* They should prevail.

Bevan raises a series of arguments basically asserting that the plain language of CR 54(d)(2) does not mean what it says. BR 44-44. The most basic problem with these arguments is that they would permit any party to ignore the 10-day rule and request fees any time the court orders fees under a statute, contingent upon counsel filing a fee affidavit – the vast majority of fee awards – eviscerating the Rule. Indeed, CR 54(d)(2) specifically says, “Unless otherwise provided by statute,” yet the Act (which Bevan is at pains to note was adopted “**after**” this Court Rule) nowhere exempts itself from the Rule. If the Legislature wanted to make an exemption it could have, but it did not, so the Rule controls.

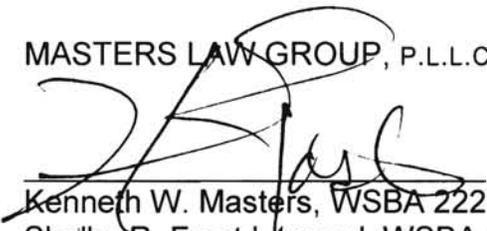
Bevan's fee request was simply untimely. She cites no authority creating an exception here. The Court should reverse the fee and cost award as untimely.

CONCLUSION

For the reasons stated, this Court should hold that the Act does not apply and that Bevan failed in her burden, or that the Meyers met their burden or should be entitled to discovery, such that the trial court's application of the Act violated the Meyers' fundamental right to due process. It should reverse the order striking a factual allegation that had already been removed from the Meyers' answer, reverse the \$10,000 sanction, and reverse the award of fees and costs to Bevan. If the Court agrees that the Act does not apply and that the motion was meant largely to achieve delay, it should grant the Meyers fees and costs on appeal.

RESPECTFULLY SUBMITTED this 26th day of August, 2013.

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CERTIFICATE OF SERVICE BY MAIL

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