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Legal Alerts

Washington Supreme Court Levels the Playing Field in Real Estate and Land Use Litigation

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On May 28, a unanimous Washington Supreme Court struck down a portion of the state's Anti-SLAPP statute as violating the right to trial by jury. Prior to this ruling, we advised clients to be extremely cautious about bringing lawsuits that could conceivably be construed as seeking damages arising out of public comment on projects. This ruling helps to level the playing field by allowing developers to bring legitimate claims for damages to court without the fear their cases might be dismissed for appearing to infringe on the right to free speech. A Strategic Lawsuit Against Public Participation, or SLAPP, asserts claims for damages based on the defendant's statements to government, such as letters to the planning department opposing permits the plaintiff seeks. Such statements are protected by the First Amendment, and a 2002 amendment to the State's Anti SLAPP act allowed SLAPP defendants to file a special motion to dismiss early in the litigation. In addition to dismissing the case, each successful defendant would receive an award of attorneys' fees and a statutory fine of $10,000. However, the special motion required the judge, rather than a jury, to weigh and resolve disputed facts, and to find to a very high degree of certainty that the plaintiff would win at trial. In *Davis v. Cox*, the Supreme Court held that this shift violated the Constitution, protecting defendants' rights to free speech only at the expense of plaintiffs' rights to trial by jury. The surviving elements of Washington's Anti-SLAPP statute, together with cases interpreting the First Amendment, continue to extend immunity from liability for the exercise of First Amendment rights to petition and provide an affirmative anti-SLAPP defense. However, the Court's invalidation of the special motion process means a defendant in a SLAPP must now demonstrate the suit is frivolous or a sham as a matter of law-the same, difficult standard that applies to any lawsuit-prior to obtaining an early dismissal. Prior to this

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ruling, courts had been taking an expansive view of the statute, arguably beyond what the legislature intended, raising the possibility that legitimate cases could be dismissed without a ruling on the merits. For example, the Court of Appeals previously held that filing a lawsuit was a protected communication with government which could support a plaintiff's Anti-SLAPP special motion to dismiss the defendant's counterclaim. *Baseball Club of TacomStea v. SDL Baseball Partners, LLC*, __ Wn. App. ___, 2015 WL 2086152, at *3 (2015). The *Davis* case limits that concern and frees plaintiffs to enforce their rights in court as provided by the Constitution. While this ruling does not permit damages based on protected communications, it does remove the reasonable fear that a court would summarily dismiss an otherwise legitimate tortious interference claim as a SLAPP.

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