

**Case No. A08-0825**

**STATE OF MINNESOTA**

**IN SUPREME COURT**

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**Middle-Snake-Tamarac Rivers Watershed,**

**Appellant,**

**vs.**

**James Stengrim,**

**Respondent.**

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**APPELLANT'S REPLY BRIEF AND  
SUPPLEMENTAL APPENDIX**

Gerald W. Von Korff, #113232  
Tim Sime, #0265172  
RINKE-NOONAN  
1015 West St. Germain Street, Suite 300  
P.O. Box 1497  
St. Cloud, MN 56302  
(320) 251-6700

*Attorneys for Appellant Middle Snake  
Tamarac Rivers Watershed District*

Daniel A. Haws, #193501  
Kelly S. Hadac, #0328194  
MURNANE BRANDT  
30 East Seventh Street, Suite 3200  
St. Paul, MN 55101  
(651) 227-9411

*Attorneys for Respondent James  
Stengrim*

John P. Borger, #9878  
Leita Walker, #387095  
FAEGRE & BENSON, LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-3901  
(612) 766-7501

*Attorneys for Amicus Curiae American  
Civil Liberties Union of Minnesota*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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**I. ACLU and Stengrim's Position Mangles the Plain Language of Chapter 554.**

Both ACLU and Stengrim complain that Middle River's interpretation of Chapter 554 distorts its plain language. We protest.

The primary objective in all statutory interpretation is to ascertain and give effect to the intent of the Legislature. Minn.Stat. § 645.16. A statute should be interpreted "to give effect to all of its provisions, and 'no word, phrase, or sentence should be deemed superfluous, void, or insignificant.'" Baker v. Ploetz, 616 N.W.2d 263, 269 (Minn. 2000) (quoting Amaral v. Saint Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999)). Moreover, a statute should be construed to avoid absurd or unjust consequence. Id.

Disregarding these fundamental rules of construction, the ACLU-Stengrim position mangles the plain language of Chapter 554, leaving significant portions of the statute without meaning. The flaws in their approach to the statute include the following three examples:

- Stengrim and ACLU fail to provide a cogent explanation of which rights are protected by the provision of section 554.05 that "nothing in this chapter limits or precludes any rights the moving party or responding party may have under any other constitutional, statutory, case, or common law, or rule."

We say that Middle River's first amendment right to petition Article III Courts is protected. ACLU argues that it is not, but offer no coherent substitute interpretation that gives section 554.05 meaning. We say that the right to enforce settlement agreements is protected by the common law and by our litigated case. ACLU argues that it is not, but again fails to offer any coherent substitute interpretation that gives meaning to the phrase "statutory, case or common law." We say that the right to rely on provisions of civil Rule

56 and 12 is protected by the reference to rights afforded by “rule”. ACLU argues it is not, but once again offers no coherent substitute interpretation.

- Stengrim and ACLU fail to give effect to the phrase “nothing in this in this chapter limits or precludes” the enumerated rights in section 554.05.

This phrase has no meaning unless the enumerated rights supercede conflicting provisions that limit or preclude the enumerated rights. ACLU turns this phrase upside down and argues that it really means “everything in this chapter limits or precludes” the enumerated rights.. But the section says that the enumerated rights may neither be precluded or limited. The reference to limitation implies that the rest of Chapter 554 may not even modestly interfere with the protected rights.

- Stengrim and ACLU fail to recognize that Chapter 554 also expressly immunizes public participation in the form of petitioning the judiciary for relief.

Section 554.01, subd. 2 defines “Government” as including any branch of the government, language that surely includes the judiciary. Under subdivision 6 of that section, "Public participation" means speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action, and hence Middle River’s litigation is a form of public participation immunized from liability by section 554.03.

Chapter 554's recognition that petitioning the judicial branch for favorable government action is a form of public participation is fully consistent with the Supreme Court’s holding in California Motor Transport,<sup>1</sup> that petitioning the judicial branch is First Amendment protected conduct. It is this very doctrine that ACLU relies upon when

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<sup>1</sup> California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

it brings novel cases advancing unpopular causes and represents the reason that in other contexts the ACLU jealously protects this right, as evidenced by the quotation on pages 18-19 of our original brief.

Section 554.05 protects not only constitutional rights but also rights afforded by “statutory, case, or common law, or rule.” Yet ACLU and Stengrim seem to suggest that this express protection should be ignored, because it would somehow undermine the purpose of the rest of Chapter 554. But this perceived conflict only exists if one takes the position that the purpose of Chapter 554 is to strike down meritorious claims against persons who characterize themselves as public participants. But no such conflict exists between the rights afforded in section 554.05 and protection of public participants against abusive baseless suits. If the statute is viewed as preventing abuse, then there is nothing hostile to the requirement in Rule 56 that the District Court grant summary judgment only when there are no material facts in dispute. See Denton v. Browns Mill Development Co., Inc., 561 S.E.2d 431 (Ga. 2002) and Browns Mill Development Co., Inc. v. Denton, 543 S.E.2d 65 (Ga. App. 2000); EarthResources, LLC v. Morgan County, 638 S.E.2d 325 (Ga App. 2006). Similarly there is nothing hostile to the true purpose of Chapter 554 in Rule 12's provision that on a motion to dismiss for failure to state a claim, one accepts as true the allegations of the complaint. Chapter 554 is not designed to deprive a fair trial and cross examination rights to good faith litigants. It doesn't turn settlement enforcement into a disfavored claim or grant immunity to a party who breaches the settlement. It merely provides a weapon to deter abusive litigation designed to chill

public participation. Protecting plaintiffs as public participants does not undermine the protection against abusive litigations either, for only parties who assert abusive claims are sanctioned. The District Court's decision here must be affirmed, because the District Court quite correctly determined that in this case, there were issues of fact that needed to be resolved at trial. The statute's protection of rights afforded by rules of procedure makes perfect sense in this context.

The position we take will keep Chapter 554's functions in tact exactly as the courts have construed it, until the Court of Appeals decision here. See Marchant Investment & Management Co., Inc v. St. Anthony West Neighborhood Organization, Inc., 694 N.W.2d 92 (Minn.App. 2005). As noted in our original brief, the Court in Marchant considered the SLAPP motion there (presented in the context of a Rule 12 motion to dismiss by the SLAPP defendant) by accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the non-moving party (as the court is required to do in the context of a Rule 12 motion). Id. at 97. Although the Marchant decision does not specifically explain its approach by connecting it to express language in Chapter 554, surely the acceptance of the allegations of a complaint as true, when addressing a Rule 12 motion, must rest on section 554.05's prohibition against limitation of the enumerated rights, including rights afforded by "rule".

Through the consistent application of the framework of Rules 56 and 12, Minnesota has been able to dispose of frivolous suits seeking to restrict public participation with dispatch. This has been done without any effort to create a summary

paper trial procedure which discards opposing affidavits as less clear and less convincing than the moving party's affidavits. All of this has been achieved because it is practicable in most cases to separate out abusive tort litigations against civic participants from good faith litigations at an early stage.

Thus, it is ACLU and Stengrim that ask the Court to ignore plain statutory language in hopes of advancing a broader purpose than the statute intends. ACLU argues that section 554.05 is general language, that the other provisions are specific, and therefore the other sections of Chapter 554 override and supercede section 554.05. But that argument is just another way of saying that any rights expressly recognized by section 554.05 should not be given effect at all. The language of section 554.05 plainly says the opposite. Indeed, if ACLU's approach is correct, then section 554.05 is meaningless surplusage, a result precluded by this Court's rules of construction. Baker, 616 N.W.2d at 269.

**II. The District Court's Denial of Summary Judgment Rests on its Holding That Application of Chapter 554 Would Not Be Appropriate to the Circumstances Presented in this Case.**

Both ACLU and Stengrim wrongly contend that the District Court rooted its decision in a finding that no breach of contract case can ever give rise to SLAPP relief. While the District Court found that the use of Chapter 554 to attack settlement enforcement lacked precedent, the Court's opinion actually states that application of Chapter 554 sanctions would not be appropriate to "such suits in this case." (Appellant's Appendix ("AA") at F-4). The appellate issue here is Stengrim's insistence that the

District Court could not deny summary judgment, even though it found that there were material factual issues in dispute.

The District Court did not hold (nor was the issue squarely presented) that a breach of contract claim could never be an abusive SLAPP litigation. An abusive suit by its very nature distorts the facts or law beyond recognition, so it is theoretically possible that an abusive suit might wear the garb of a breach of contract claim, but actually seek to punish other conduct. Nor did the District Court squarely hold that even an abusive settlement enforcement suit could never present SLAPP concerns. The District Court's decision merely stated that applying SLAPP to breach of settlement claims was not appropriate "in this case." That holding must be affirmed because we presented sufficient evidence that Stengrim did violate the settlement agreement to survive summary judgment.

The District Court's decision that SLAPP relief is not appropriate in this case arises in a procedural context which made summary resolution impossible, let alone summary imposition of sanctions. The evidence relied on by Stengrim (the Elseth affidavit) at pages 10-11 of Stengrim's brief was painstakingly contradicted by Middle River's evidence to the District Court. (AA at I-1 - I-25.) This evidence, if believed, created an overwhelming case in our favor. Imposition of sanctions was equally inappropriate. Bill Johnson's Restaurants, Inc v. National Labor Relations Board, 461 U.S. 731, 745 (1983) (First Amendment right of access to courts bars summary imposition of sanctions when material facts remain in dispute).

That brings us back to the gravamen of Stengrim's position. He believes that

Chapter 554 says that one who claims the mantle of a public participant is entitled to summary relief, even if the opponent of that relief presents evidence which would cause it to prevail. Middle River presented concrete persuasive evidence that Stengrim breached his settlement agreement by attempting to delay or prevent establishment of the Agassiz Valley Water management project. Stengrim's defense against that claim hinged on hotly disputed evidence of highly doubtful persuasive value. Stengrim contended that trying to interfere with funding and construction was not a challenge to its establishment, a position that we showed was both legally wrong as a technical matter, and totally contrary to the spirit of the agreement. But, as we explained in our original brief, Stengrim contended that his interpretation was supported by parole evidence consisting of pre-settlement emails, despite the fact that the settlement agreement contains an integration clause. He also denied, despite overwhelming evidence to the contrary, that he was really trying to stop the project.<sup>2</sup>

Stengrim's defense thus rests on his claim that Chapter 554 requires a summary

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<sup>2</sup> In the Court of Appeals, Stengrim also wrongly argued that Middle River failed to preserve its objection to proceeding summarily and should have moved for delay under Section 554.02. This argument misstated completely our position in the District Court. We filed an extensive affidavit objecting to proceeding to summary judgment without discovery as authorized by Rule 56.06. (AA at I-23.) But we urged the District Court to adopt a more straightforward, expediting procedure which might resolve the case without further discovery. We said that Elseth and Stengrim's contention that emails could contradict the plain language of an integrated settlement agreement should first be addressed by considering partial summary judgment in our favor. If that occurred, the additional discovery focused on irrelevant parole evidence might be wasteful and unduly costly. We therefore urged the Court to defer its ruling on further discovery until it ruled on our motion for partial summary judgment, in hopes that this ruling might radically simplify the issues and make settlement possible.

paper trial in which an integrated agreement can be impeached by parol evidence, (the meaning of which is hotly contested by affidavits,) even when the District Court decides that disputed facts make summary resolution impossible. The District Court allowed the case to proceed, and it would have been preposterous for the Court to hold that Middle River's efforts to enforce rights procured at the end of a lengthy litigation were outside of the rights protected by section 554.05. Implicit in the District Court's decision is the recognition that a SLAPP suit does not allow Courts to resolve good faith disputes by paper trial. Cf Bill Johnson's Restaurants, Inc., 461 U.S. at 745 (noting that First Amendment right of access to courts bars summary imposition of sanctions when material facts remain in dispute).

**III. Rule 56 and Constitutional Protections to a Fair Trial and the Right to Cross Examination Do Not Allow Stengrim to Demand Reversal of a Denial of Summary Judgment When There Are Material Factual Disputes.**

The facts recited by Stengrim on pages 7-11 of his brief consist not of undisputed facts, but rather Stengrim's argumentative version of the inferences that might be drawn in his favor from disputed evidence. We should be entitled to move to strike those pages from the brief, because they do not fairly recognize the standard of review which applies to judicial review of an order denying summary judgment.<sup>3</sup> We did not move to strike, however, because Stengrim's approach to the facts illustrates starkly the radical nature of his assertion that Chapter 554 says that Stengrim's evidence, no matter how weak,

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<sup>3</sup> See e.g. Burns v. State, 570 N.W.2d 17, 19 (Minn.App. 1997) (noting that the review of a denial of summary judgment based on a claim of immunity presumes that the facts alleged by the nonmoving party are true).

trumps Middle River's, no matter how strong. Stengrim argues that the District Court may—indeed must—decide which affidavits to believe and moreover, that the District Court must accept as true the disputed evidence submitted by the party who moves for summary judgment. Stengrim's argument is that Chapter 554 turns Rule 56 upside down and gives the advantage to the party seeking summary judgment.

As we stated in the prior section, the District Court's order found that there were factual issues in dispute and that the SLAPP statute was not "appropriate to be extended to such suits in this case." (AA at F-4.) The appellate standard of review ordinarily requires parties briefing a case challenging a lower court's ruling on summary judgment to accept as true all facts properly supported by the party opposing summary judgment and to accept inferences which might be drawn from opposing party's facts. Burns v. State, 570 N.W.2d 17, 19 (Minn.App. 1997). Further, the factual foundation for appellate consideration would prevent the proponent of summary judgment from submitting a statement of facts in its brief that were properly controverted in the District Court. On such an appeal, moreover, the appellate court would defer to the judgment of the District Court that denial of discovery would render summary judgment premature. Lewis v. St. Cloud State Univ., 693 N.W.2d 466, 473 (Minn.App. 2006). These are rights protected by Rule 56 and constitutional protections of cross examination and the right to trial by jury.

Another illustration of the sweeping nature of Stengrim's assertion that this Court may accept disputed evidence as true is found at pages 10-11 of his brief. There, Stengrim recites the contentions of Mr. Elden Elseth, J.D, who asserts that he knows that

Middle River brought the litigation for abusive purposes. Yet, Elseth's evidence is deeply colored by bias and self interest. He has been an active and aggressive opponent of the Agassiz project, and he has been a close friend and legal advisor to Mr. Stengrim on this very case. (AA at I-13 - I-14.) He actively participated in the litigation strategy and advanced some of the legal theories which were summarily rejected by the District Court. (AA at I-13 - I-14.) He has three pending litigations against Middle River, or its employees. In Zutz and Elseth v Nelson and Stroble (unpublished), he brought a libel action against two fellow District managers. 2009 WL 1752139 (Minn.App.).<sup>4</sup> He has been the subject of an independent investigation initiated by the Marshall County Attorney into his conduct as a manager, an investigation which culminated with a determination by the independent investigator that Elseth and Zutz were engaged in a witch hunt against opposing managers. (AA at I-14 - I-15.)

Elseth's contention that Middle River brought this litigation for abusive purposes in bad faith is contradicted by a detailed affidavit of Middle River's general counsel, explaining Middle River's exhaustive efforts to proceed in good faith and to avoid litigation if possible. (AA at I-1 - I-25.) Before advising the District to proceed with this litigation, Middle River's counsel engaged in substantial due diligence. (AA at I-2 - I-3.) But Stengrim argues that the clear and convincing evidence standard of section 554.02 strips away these evidentiary standards and requires that Elseth's evidence be accepted as superior to Middle River's contrary evidence.

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<sup>4</sup> A copy of the unpublished decision is included in Appellant's Supplemental Appendix ("ASA") at 7 - 9.

A further example of Stengrim's sweeping assertion of the right to prevail summarily upon disputed evidence is found at pages 7-8 of his brief. Stengrim there quotes emails which, he contends, alter the settlement agreement by allowing him to challenge construction of the project. Actually, the emails in question have nothing to do with preservation of Stengrim's right to stop funding or construction of the project. In fact, the emails referred to in Stengrim's brief arise because some of the parties wanted to assure their right to provide input into project implementation details. (ASA 1 - 4). For example, the Audubon Society wanted to provide input into the mechanism by which the hydrology of Audubon lands would be protected. As a result during the drafting of the settlement agreement, the lawyers engaged in an email exchange to make sure that the drafted language would not interfere with landowner ability to review and comment on the plans and specifications.

Despite the fact that Stengrim's interpretation is contradicted by an active participant in the settlement negotiations, Stengrim contends that as an allegedly immunized SLAPP litigant, the clear and convincing standard of section 554.03 means that his interpretation of the settlement agreement prevails over any other evidence to the contrary. If adopted, Stengrim's position would make enforcement of settlement agreements more difficult than winning the litigation in the first instance. Not only does this approach defy common sense, it plainly "precludes or limits" Middle River's enumerated section 554.05 rights to rely on case and common law (the settled litigation in particular).

**IV. Middle River Does Not Challenge Stengrim's Right to Access Public Data; It Challenges his Right to breach the Settlement Agreement.**

In his quest for Chapter 554's immunity, Stengrim wrongly interprets our claim as asserting the settlement bars Stengrim from utilizing the Data Practices Act. We make no such claim. On the contrary, Middle River asserts Stengrim's data process requests were part of his efforts to breach the settlement by stopping the project, and that the act of interfering with the project was barred. If Stengrim had been collecting the same data for any other proper purpose, this litigation would not have been pursued. In fact, notwithstanding his unprecedented use of a blizzard of data practices requests, and the huge burden placed on Middle River's small staff, Middle River has no legal complaint against Stengrim's exercise of his data practices right, and does not seek to restrain his rights to use them. Middle River's concern arose from the fact that Stengrim stated that he was seeking the data for the purpose of forcing Middle River to return his land, a purpose which required stopping the project.<sup>5</sup>

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<sup>5</sup> Middle River's concern that Stengrim was actively seeking to interfere with project establishment was heightened by the fact that he reinstated more than two dozen previously cancelled data requests, requests which had been suspended during settlement negotiations. These requests were designed to advance his frivolous claim that Middle River defrauded the Department of Natural Resources. During settlement negotiations Stengrim advised Middle River's Administrator, Nick Drees, that these requests were "fodder for the disagreement of the settlement" negotiations and affirmed that as soon as the case was over he would "put a match" to the requests, because the data would no longer be needed once the litigation was resolved. (ASA 6 (Drees Deposition, pp. 131 - 132).) Reinstatement of these data practices requests coincided with Stengrim's announced intention to utilize the data to support his efforts to unwind the project and force return of the land on which the project was to be built.

Similarly, Middle River did not, and does not, contend that Stengrim is barred by the agreement from advocacy against watershed districts, flood control, or other matters of public concern. The issue here is his repeated attempt, using frivolous and baseless allegations of fraud already rejected in litigation, to hold up funds to complete the project and to slow down the granting of a US Army Corps of Engineer's permit for the project. Each of these efforts forced Middle River to expend staff resources and attorney resources to respond once again to the frivolous charges, and in the case of the United States Army Corps of Engineers permit challenge, there was a risk of significant construction delay.

**V. Rhode Island, Georgia and other State Cases Offer No Support for Stengrim-ACLU's Position.**

Not only do both Georgia and Rhode Island have substantially different SLAPP statutes, we fundamentally disagree with ACLU's assertion that decisions in those states' courts support its position. See Hometown Properties, Inc. v. Fleming, 680 A.2d 56 (R.I. 1996) (District Court granted summary judgment against libel claims 18 months after commencement of action when landfill operator failed to offer any evidence rebutting defendant's detailed scientific proof that she correctly alleged that landfill was polluting the environment); Alves v. Hometown Newspapers, Inc., 857 A.2d 743 (R.I.,2004) (summary judgment correctly granted against libel plaintiff as to undisputed contents of letter to the editor asserting that influential government official was exerting a lot of pressure to keep school construction proposal moving along); Palazzo v. Ives, 944 A.2d

144 (R.I. 2008) (construction of SLAPP statutes must be limited in scope lest the constitutional right of access to the courts whether by private figures, public figures, or public officials be improperly thwarted); Browns Mill Development Co v. Denton, 543 S.E.2d 65 (Ga. App. 2000) (SLAPP statute deals only with "abusive litigation that seeks to chill exercise of certain First Amendment rights").

The Flemming decision relied on by ACLU arises from an attempt by a landfill operator to silence truthful public statements that its landfill was polluting groundwater. It is thus a prototypical SLAPP litigation. Moreover, the procedural history of the litigation shows that the appellate court felt it appropriate to grant summary judgment relief only after a suitable period of pre-trial proceedings and then ordering summary judgment because there were no material facts in dispute.

Following a public meeting to discuss groundwater contamination by landfills, Fleming wrote a letter to various public agencies urging the closing and clean up of the landfill and alleged that there was substantial contamination of the groundwater. 680 A.2d at 58-59. The District Court allowed 18 months of pre-trial proceedings before issuing the SLAPP decision reviewed by the Rhode Island Supreme Court.

Flemming's motion for summary judgment was supported by extensive well-documented scientific proof that showed that her pollution allegations were not slanderous, but true, exactly as her letter had contended. Id. at 58-60. Judgment followed because the plaintiff landfill operator did not respond with its own competing facts, but merely rested on the allegations of the complaint. Id. at 64. The landfill

operator asserted that by pleading the elements of tort, it would be entitled, without offering testimony, to an exemption from Rhode Island's SLAPP procedures.

The Flemming case makes it clear that summary judgment was appropriate because the landfill operator failed to contradict Fleming's evidence, but relied instead on its pleadings, after being afforded 18 months to marshal evidence that Fleming's allegations regarding pollution were false. Indeed, in Flemming and subsequently, the Rhode Island Court has warned that SLAPP statutes have constitutional limitations. The Court in Flemming wrote that "In keeping with this long-recognized principle of constitutional scrutiny, we shall, in construing statutory language, adopt that interpretation that allows us to avoid a finding of unconstitutionality." Id. at 60.

We see in the Rhode Island cases no attempt to utilize immunity provisions in anti-SLAPP legislation to steamroll away a plaintiff's rights to trial and cross examination. We see rather, efforts to apply the substantive constitutional limitations on tort claims when the material facts are undisputed. For example, in Palazzo v. Ives, 944 A.2d 144, 150 (R.I. 2008), the Court wrote:

By the nature of their subject matter, anti-SLAPP statutes require meticulous drafting. On the one hand, it is desirable to seek to shield citizens from improper intimidation when exercising their constitutional right to be heard with respect to issues of public concern. On the other hand, it is important that such statutes be limited in scope lest the constitutional right of access to the courts (whether by private figures, public figures, or public officials) be improperly thwarted. There is a genuine double-edged challenge to those who legislate in this area.<sup>6</sup>

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<sup>6</sup> The court continued in footnote 10: "It should go without saying that, when faced with anti-SLAPP filings, the courts should give careful consideration to the negative effect that such filings can have on the right of access to the courts and should

A careful review of the Rhode Island cases reinforces our view that the crucible for balancing rights is the procedural protections of Rule 12 and Rule 56.

ACLU further cites the decisions of the Courts of Georgia as supporting the ACLU approach. The Georgia statute does not even purport to deny access to litigations proceeding in good faith. It merely requires a lawyer's certification of good faith in order to allow the litigation to proceed. Ga. Code Ann. § 9-11-11.1. Thus, the Browns Mills cases relied on by ACLU merely deal with the narrow question whether a Court should dismiss the complaint if the plaintiff's lawyer refuses to sign a certification that the case is brought in good faith. See Denton v. Browns Mill Development Co., Inc., 561 S.E.2d 431 (Ga. 2002) and Browns Mill Development Co., Inc. v. Denton, 543 S.E.2d 65 (Ga. App. 2000). The Georgia Courts have made it clear that legitimacy of the SLAPP procedure rests on the fact that it attacks only abusive claims:

The statute deals only with "abusive litigation that seeks to chill exercise of certain First Amendment rights" based upon defamation, invasion of privacy, breach of contract, and intentional interference with contractual rights and opportunities arising from speech and petition of government.

Browns Mill Development Co., Inc., 543 S.E.2d at 68.

It is this exact balance that the Minnesota legislature sought to achieve in section 554.05. Because Minnesota's anti-SLAPP law intends to curtail abusive litigation aimed at chilling public participation, it cannot be used as a sword to cut down a good faith litigants efforts to enforce rights it obtained in a settlement agreement.

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scrutinize same with special care. Great caution should be the watchword in this area."

**VI. Stengrim and ACLU's Reliance on PRE v. Columbia Pictures is Completely Misplaced.**

Stengrim also contends that we have not adequately responded to the Court of Appeals erroneous citation of Professional Real Estate Investors v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993) ("PRE") for the proposition that the first amendment constitutional right to access the Courts may not be raised defensively. This novel proposition, that the first amendment applies only to plaintiffs and not to defendants, would be truly remarkable if indeed it could be found in the PRE decision, but it cannot. Stengrim and ACLU correctly point out that we did not cite PRE in our initial brief, but their contention that we did not respond to the Court of Appeals' error is not correct. We attacked the Court of Appeals reasoning beginning at page 36 of our brief.

The PRE decision nowhere even remotely supports the Court of Appeals conclusion. That perhaps explains why neither ACLU and Stengrim argue directly that PRE supports the Court of Appeals decision, but rather criticize us for not citing it directly. Both Stengrim and ACLU are, commendably, refusing to endorse the Court of Appeals faulty reasoning, because the PRE case doesn't even touch on the issue for which it is cited.

In PRE, the Supreme Court affirmed a judgment upholding anti-trust counter-claim defendant Columbia Pictures' defensive use of the California Motor Freight doctrine to avoid a treble damages claim. 508 U.S. at 59-60. The PRE decision centers on whether Columbia pictures could escape liability if Columbia subjectively believed

that it was unlikely to prevail, even though its case had an objective chance of success. Id. At 53-54. PRE represents an expansion of the Supreme Court's recognition of the importance of the First Amendment protection of access to the courts by holding that even though Columbia Pictures ultimately lost on the merits, imposition of sanctions would nonetheless limit its petitioning rights because a reasonable copyright owner in Columbia's position could have believed that it had some chance of winning.

The holding of the PRE decision bars the imposition of sanctions for petitioning an Article III Court if the "action was arguably 'warranted by existing law' or at the very least was based on an objectively 'good faith argument for the extension, modification, or reversal of existing law'." Id. at 65. See also Bill Johnson's Restaurants, Inc., 461 U.S. 731 (1983); BE & K Construction Co v. NLRB, 536 U.S. 516 (2002).<sup>7</sup>

It is important in this context to continually keep in mind that our case does not rest on the California Motor Freight doctrine alone, although that doctrine is sufficient to sustain our position. Section 554.05 does way more than merely recognizing a responding party's constitutional rights. Chapter 554 cannot preclude those rights, but it may not limit them either. This is express direction to construe Chapter 554 liberally to avoid intrusion into the zone of protection guaranteed by California Motor Freight, and of course, the First Amendment petitioning right. By including petitioning the judicial

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<sup>7</sup> These two labor relations cases illustrate the strength of the protections afforded by the First Amendment to petition Article III courts for relief, because federal courts have traditionally deferred to invasion of otherwise protected petitioning rights in order to maintain orderly labor relations.

branch for relief in the definition of public participation,<sup>8</sup> Chapter 554 further signals the intent to protect the right to bring cases to Article III courts in good faith. But even if the First Amendment did not exist, section 554.05 still expressly protects Middle River's rights under Rules 56 and 12, its rights under common law, and its rights under the previous case, now settled and dismissed with prejudice.

**VII. All Issues were Properly Preserved.**

Finally, Stengrim and ACLU wrongly assert that we have not properly preserved some of the issues that we raise in our brief. We have consistently held to the position that the Chapter 554 is not unconstitutional, and cannot be unconstitutional, because of the language in section 554.05. We addressed the constitutional petitioning right in the District Court. At all levels, we cited authorities raising the right to a jury trial. It appears that Stengrim and ACLU seem to be having difficulty with a subtlety in our position that arises from the express preservation of responding parties rights in section 554.05. Because this section expressly prevents any part of Chapter 554 from precluding or limiting constitutional rights, we have always said that, properly construed, it is impossible for Chapter 554 to be unconstitutional.

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<sup>8</sup> Section 554.02, subs. 2, 6.

**VIII. Conclusion.**

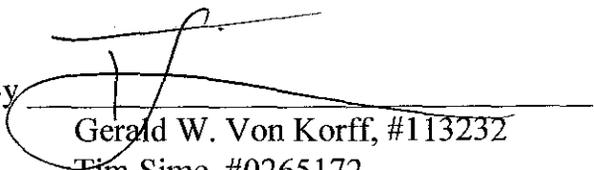
The plain language of Chapter 554 supports the District Court's denial of summary judgment. But that result is supported by plain common sense as well, and this case needs a heavy dose of common sense. Stengrim had a virtually unrestricted right to attempt to stop the Agassiz Valley Water Management Project during litigation, a right he often abused. But he ultimately gave away that right by contract of settlement and consent to judgment. He cannot now be immunized for breaching his agreement. The statutory implementation of that common sense is found in section 554.05.

Dated: July 15, 2009

Respectfully Submitted,

RINKE-NOONAN

By

  
Gerald W. Von Korff, #113232

Tim Sime, #0265172

Attorneys for Appellants Middle Snake

Tamarac Rivers Watershed District

P.O. Box 1497

St. Cloud, MN 56302-1497

320 251-6700