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Case No. A08-0825

STATE OF MINNESOTA

IN SUPREME COURT

Middle-Snake-Tamarac Rivers Watershed,

Appellant,

vs.

James Stengrim,

Respondent.

**APPELLANT'S BRIEF AND APPENDIX**

Gerald W. Von Korff, #113232  
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).

## TABLE OF CONTENTS

### PAGE

TABLE OF AUTHORITIES .....	i, ii, iii, iv, v
ISSUE PRESENTED .....	1
I. STATEMENT OF THE CASE AND FACTS .....	1
A. Introduction .....	1
B. The history of the Agassiz Valley flood control project and the prior litigation .....	4
C. The Settlement Agreement .....	8
D. Stengrim's SLAPP defense and Minnesota's anti-SLAPP law .....	13
E. The district court proceedings on the SLAPP motion .....	14
II. ARGUMENT .....	17
A. Summary of Legal Argument .....	17
B. Minnesota Law Favors Enforcement of Settlement Agreements and the Anti-SLAPP law should be read as Discouraging Dispute Resolution .....	23
C. Minnesota's Anti-SLAPP law was designed to chill Abusive Tort Litigations Brought to Chill Advocacy Speech or Action and not to limit the existing rights of good faith litigants .....	31
D. Section 554.05 Expressly Protects Responding Parties Constitutional and Other Rights to Petition the Courts for Interpretation and Enforcement of Settlement Agreements .....	38
III. CONCLUSION .....	41
APPENDIX	

## TABLE OF AUTHORITIES

<u>Cases:</u>	<u>PAGE</u>
American Iron and Supply Co v. DuBow Textiles 1999 WL 326210 (Minn.App.) .....	37
Bodah v. Lakeville Motor Express, Inc. 663 N.W.2d 550, 553 (Minn.2003) .....	36
Boddie v. Connecticut 401 U.S. 371 (1971) .....	18
Briggs v. Eden Council for Hope and Opportunity 969 P.2d 564 (Cal Rptr 1998) .....	30
California Motor Transport Co. v. Trucking Unlimited 404 U.S. 508 (U.S. 1972) .....	19, 21, 23, 34, 39
County of Suffolk v. Long Island Lighting Co. 710 F. Supp 1387 (E.D.NY. 1989) .....	40
Dead Lake Ass'n, Inc. v. Otter Tail County 695 N.W.2d 129, (Minn.2005) .....	26
Dead Lake Ass'n, Inc. v. Commissioner of Minnesota Pollution Control Agency 2005 WL 287490, (Minn.App. 2005) .....	26
Dead Lake Ass'n, Inc. v. Otter Tail County 2005 WL 221773 (Minn.App.,2005) .....	26
Eastern Rail Pres. Conf. v. Noerr Motor Frgt., Inc. 365 U.S. 127 (1961) .....	19, 40, 42
Eggleston v. Keller Drug Co. 120 N.W.2d 305 (Minn.1963) .....	17, 23

Ex parte Hull 312 U.S. 546 (U.S. 1941) .....	39
Fischer Sand & Aggregate Co v. City of Lakeville 874 F.Supp. 957 (D. Minn. 1994) .....	41
Haase v. Stokely-Van Camp, Inc. 99 N.W.2d 898, 902 (1959) .....	25
Harrison v. Springdale Water & Sewer Comm. 780 F.2d 1422, 1427 (8th Cir. 1986) .....	19
Hull v. Rossi (1993) 13 Cal.App.4th 1763, 1769, 17 Cal.Rptr.2d 457 .....	33
In re Agassiz Valley Water Management Project 2004 WL 1615198 .....	7
In re Hennepin County 1986 Recycling Bond Litigation 540 N.W.2d 494 (1995) .....	25
Jallen v. Agre 119 N.W.2d 739 (Minn. 1963) .....	17, 23
Johnson v. Avery 393 U.S. 483 (U.S. Tenn. 1969) .....	39
Johnson v. St. Paul Ins. Co. 305 N.W.2d 571, 573 (Minn. 1981) .....	23
Keller v. Von Holtum 586 N.W.2d 186 (Minn. App. 1997) .....	39
Lund Industries, Inc. v. Westin, Inc. 764 F.Supp. 1342, 1345 (D.Minn. 1990) .....	19, 40
Marchant Investment & Management Co., Inc. v. St. Anthony West Neighborhood Organization, Inc. 694 N.W. 2d 92 (Minn. Ct. App. 2005) .....	16, 22, 35 - 37

Manistee Town Center v. City of Glendale 227 F.3d 1090 (9 <sup>th</sup> Cir. 2000) .....	41
Martens v. Minn. Mining & Mfg. Co. 616 N.W.2d 732, 739 n. 7 (Minn.2000) .....	36
Mertins v. Commissioner of Natural Resources 755 N.W.2d 329 Minn.App.,2008 .....	2
Milkovich v. Lorain Journal Co. 497 U.S. 1(1990) .....	36
Miracle Mile Associates v. City of Rochester 617 F.2d 18 (2d Cir 1980) .....	40
Navellier v. Sletten 52 P.3d 703 (Cal. 2002) .....	30
Near v. Minnesota 283 U.S. 697 (1931) .....	22
Razorback Ready Mix Concrete Co., Inc. v. Weaver 761 F.2d 484 (8th Cir. 1985) .....	21, 40
Schmidt v. Smith 216 N.W.2d 669 (1974) .....	24
Skalbeck v. Agristor Leasing 384 N.W.2d 209 (Minn. 1986) .....	23
State v. Lemmer 736 N.W.2d 650 (Minn. 2007) .....	2
State v. S.L.H. 755 N.W.2d 271 (Minn. 2008) .....	2
State ex rel. Humphry v. Phillip Morris USA, Inc. 713 N.W.2d 350, 355 (Minn. 2006) .....	17

Sterling Capital Advisors, Inc. v. Herzog 575 N.W.2d 121, 125 (Minn. App.1998) .....	24
Surgidev Corp. v. Eye Tech., Inc. 625 F.Supp. 800, 803 (D.Minn. 1986) .....	21, 40
Swanlund v. Shimano Indus. Corp. 459 N.W.2d 151, 154 (Minn.App.1990) .....	37
Theis v. Theis 135 N.W.2d 740 (Minn. 1965) .....	24
Wilcox v. Superior Court 33 Cal Rptr2d 446 (Ct. App. 1994) .....	30, 32, 33
Zobel & Dahl Construction v. Crotty 356 N.W.2d 42 (Minn. 1984) .....	24, 25

**Statutes:**

Minn. Stat §15A.083, Subd. 4 .....	2
Minn. Stat. §103D.011, Subd. 21 .....	1
Minn. Stat. §103D.535, Subd. 9 .....	9
Minn. Stat. §103D.745, Subd. 3 .....	11
Minn. Stat. §103D.745, Subd. 4 .....	11
Minn. Stat. §103F.161, Subd. 3 .....	6
Minn. Stat. §554.03 .....	2, 33, 36
Minn. Stat. §554.05 .....	2, 22, 33, 36

**Other Authorities:**

<i>Increasing Slapp Protection: Unburdening the Right of Petition in California</i> 32 UC Davis Law Review 965, 970-71 .....	21, 32, 33, 34
Restatement (Second) of Contracts § 205 (1981) .....	25
Susskind & McKearnen, <i>Evolution of Public Policy Dispute Resolution</i> 16 Journal of Architectural and Planning Research 97 (1999) .....	25

Tanick, *Anti-Slapp Law Slapped Down in Hennepin County* ..... 21  
1999 Hennepin Lawyer 14 .....

United States Environmental Protection Agency, Consensus Building Institute  
*Using Dispute Resolution Techniques to Address Environmental Justice Concerns*  
Case Studies (2003) ..... 25

## ISSUE PRESENTED

Whether the Court of Appeals correctly ruled that Chapter 554 extends SLAPP penalties to a good faith litigation brought to interpret and enforce a settlement agreement and whether the procedures established for remand fail to protect responding party rights protected by Minnesota Statutes Section 554.05.

### I. STATEMENT OF THE CASE AND THE FACTS

#### A. Introduction.

This case presents this court with its first opportunity to review Minnesota's anti-SLAPP statutes. But by SLAPP litigation standards, the posture of the case is unusual. Minnesota's anti-SLAPP law (Minn.Stat §§ 554.01-554.05), like anti-SLAPP laws throughout the country, is aimed at preventing litigation designed to suppress otherwise lawful efforts by individuals to influence government policy or action.<sup>1</sup> It typically involves a complaint in defamation or other tort brought by a developer or other permit applicant, who utilizes a bad faith claim to stifle citizen advocacy while the permit is under consideration. The anti-SLAPP law is designed to provide quick resolution to such litigation so as to protect lawful speech and other conduct. But in doing so, the anti-SLAPP law must maintain a delicate balance between protecting citizen participation in government action and the constitutional and other legal protections afforded to plaintiffs with good faith claims.

Minnesota's SLAPP Law addresses the concerns raised by abusive litigation by:

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<sup>1</sup> Hence the acronym, Strategic Lawsuits Against Public Participation (SLAPP).

(1) conferring a limited immunity for lawful conduct or speech genuinely aimed in whole or in part at procuring favorable government<sup>2</sup> action, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights<sup>3</sup> (section 554.03); (2) making it subject to the reservation and protection of the responding party's rights under constitutional, statutory, case, or common law, or rule<sup>4</sup> (section 554.05); (3) within a procedural framework for expedited judicial consideration of the rights protected<sup>5</sup>

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<sup>2</sup> "Government" includes a branch, department, agency, official, employee, agent, or other person with authority to act on behalf of the federal government, this state, or any political subdivision of this state, including municipalities and their boards, commissions, and departments, or other public authority. Branch of Government refers to the three separate branches, legislative, judicial and executive. State v. S.L.H., 755 N.W.2d 271 (Minn. 2008); Mertins v. Commissioner of Natural Resources, 755 N.W.2d 329 Minn.App., 2008; State v. Lemmer, 736 N.W.2d 650 (Minn. 2007); Minn. Stat § 15A.083 subdiv 4.

<sup>3</sup> Lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights.

<sup>4</sup> "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."

<sup>5</sup> Section 554.02 provides for a motion to dispose of a judicial claim on the grounds that the claim materially relates to an act of the moving party that involves public participation. If the statute applies, discovery is suspended, provided that the court may on motion and after a hearing for good cause shown, order that specified and limited discovery be provided. Responding party has the burden of proof of going forward with the evidence, and of persuasion on the motion. Section 554.05 provides that the "Court shall grant the motion and dismiss the action unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized.

(section 554.02). Typically, SLAPP motions are brought under Rule 12.03 and the plaintiff is found to have met the evidentiary standard of section 554.02 if the complaint states a claim upon which relief may be granted. See Section II (C) *infra*. Until now, the focus of the courts' inquiries has been whether the plaintiff has stated a tort claim which meets the high constitutional standards applicable to defamation in the context of public advocacy. On the occasions where SLAPP relief is sought via summary judgment, until now, courts have applied the provisions of Rule 56 to protect the responding party's rights to trial and to assure that the case is procedurally ready for summary judgment.

Unlike a typical SLAPP suit, this case began as an action to enforce a settlement between the parties, entered into after four years of exhaustive litigation over a flood control project and culminating in an agreement brokered under the special mediation procedures of the Board of Water and Soil Resources. In short, that agreement settled disputes between the Appellant Middle River and various landowners, including Respondent Stengrim, over payment to the landowners for acquisition of their land for the flood control project, and an agreement by the landowners to stop their challenges to the project. When Stengrim failed to comply with the settlement and continued to challenge the project (including the project's funding with which Middle River was to pay Stengrim his agreed-upon damages) Middle River sought to enforce the agreement in court. In response, Stengrim filed both a Rule 11 and motion to dismiss Middle River's claims as a SLAPP suit, designed to prevent him from advocating against the flood control project.

The district court denied Stengrim's Rule 11 Motion and also found that the anti-SLAPP laws were not designed to apply to a dispute over the terms of a settlement agreement under these circumstances, and denied Stengrim's SLAPP motion. In an interlocutory appeal, the Court of Appeals reversed the district court and found that the anti-SLAPP laws not only applied to Middle River's case, but that under those laws, Middle River must show in a summary paper trial by clear and convincing evidence that Stengrim's actions were not genuinely aimed at procuring favorable government action and therefore not immune under Chapter 554. We then asked this court to review whether this new procedure for anti-SLAPP motions articulated by the Court of Appeals wrongly extirpates the statutory protections found elsewhere in the anti-SLAPP laws (in section 554.05) and therefore upsets the delicate balance of constitutional protections that makes navigating the anti-SLAPP laws so precarious.

**B. The history of the Agassiz Valley flood control project and the prior litigation.**

The Middle Snake Tamarac River Watershed District, a Chapter 103D political subdivision of the State of Minnesota, encompasses approximately 1,476 square miles in the counties of Marshall, Polk and Pennington. Located in the flatlands of former Lake Agassiz in the Red River Valley, this region is repeatedly struck by major catastrophic flooding.<sup>6</sup>

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<sup>6</sup> The cost to the public and to individuals is significant. By the end of the 1990's, the Counties of Marshall and Polk had been included in Presidential disaster declarations

The genesis of the Agassiz Valley Water Management Projects lies in a process begun in May of 1997, after 2.5 billion dollar damage estimates from the flood of 1997 spurred the State of Minnesota to initiate a comprehensive mediation process designed to break through decades of deadlock and delay in achieving flood reduction for the Red River Valley.<sup>7</sup> The comprehensive “mediated settlement agreement” that resulted developed a consensus approval track that would harmonize and reconcile environmental objectives enforced by multiple state and local regulators<sup>8</sup> with emerging hydrological approaches to flood reduction. App G-11. The new approval process would subject each proposal to rigorous scrutiny by all regulatory agencies as well as broad public review by citizens and representatives of local government.

The Agassiz Valley Water Management Project navigated through the intensive public review process contemplated by the mediated settlement agreement. The project included environmental enhancements designed to promote environmental objectives

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arising from flooding in 1965, 1966, 1969, 1974, 1975, 1978, 1979, 1989, 1993, 1996, 1997. Average annual flood damage in the Middle River Watershed has been estimated to exceed one-million dollars. Twelve townships in the Warren vicinity estimated the rural damages from the 1997 flood alone to approximate thirteen million dollars. The flood damage to the City of Warren in the 1996 and 1997 floods alone were estimated to exceed six million dollars.

<sup>7</sup> This mediation process is a different mediation from the process that settled the Stengrim litigation.

<sup>8</sup> United States Army Corps of Engineers, Environmental Protection Agency, Department of Natural Resources, MPCA, BWSR, and county government all have regulatory powers in this area.

while achieving flood reduction goals. After the project obtained consensus approval, special legislation designated the Agassiz Valley Water Management Project for construction and funding from State capital bonding funds. See Minn. Stat. §103F.161, Subd. 3. The Middle-Snake-Tamarac Rivers Watershed District was designated to implement the project under a granting agreement with the Minnesota Department of Natural Resources (DNR).

Middle River would carry out this project consisting of a flood water retention impoundment and environmental enhancements, funded by State bonding funds disbursed to Middle River under the DNR grant agreement. Completion of the impoundment would require Middle River to acquire land from landowners, Stengrim included. Middle River carried out a lengthy public process which involved preliminary review of the hydrological and engineering information and properly noticed a public "final hearing" to take evidence on whether the project should go forward, and to consider testimony on the land proposed to be taken for the project. Under Chapter 103D, the Managers take public testimony, make findings and issue a final order, called an establishment order, which approves the project, authorizes land acquisition, and orders construction. Landowners have thirty days to appeal either the establishment, the takings, or both.

James Stengrim owned land designated for acquisition as part of the project. At the final hearing on this project, Stengrim's lawyer appeared and emphatically endorsed

the project.<sup>9</sup> He asked Middle River to adopt a policy under which the landowners would be paid an elevated price, based on a formula that would first determine fair market value and then pay significantly higher than fair market value. Stengrim did not oppose the project at this hearing. In September, 2002, Middle River entered a final order “establishing” the Agassiz Valley Water Management Project, Hane Affidavit (2) ¶3, but rejecting the request to pay all landowners a premium above fair market value.

Middle River’s establishment of that Project triggered a series of highly contentious appeals, delaying construction for years. App. G-14, I-5. Stengrim and other landowners first sued to reverse the project establishment order on the grounds that the project’s cost was greater than revenues produced by special assessments. (There were no assessments against landowners). When the district court rejected this challenge, they attempted an interlocutory appeal. The court dismissed their appeal for lack of jurisdiction,<sup>10</sup> but the interlocutory appeal had delayed trial court proceedings for a full eight months.

When that theory failed, Stengrim and other appellants prolonged the litigation further by making allegations that Middle River regarded as frivolous. See Hane Affidavit Paragraph 9, Appendix I-5. One motion for summary judgment was based on

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<sup>9</sup> As we explained to the Court of Appeals in the two Chapter 103D appeals, Mr. Fagerland told the Board “My clients have expressed to me time and time again that they want their downstream neighbors to have the flood control that this project will provide.” 2004 WL 1615198 (Respondent’s Brief).

<sup>10</sup>In re Agassiz Valley Water Management Project, 2004 WL 1615198.

hearsay allegations that the managers of Middle River had defrauded the DNR by misrepresenting the hydrology of the project and its watershed.<sup>11</sup> The claim of fraud was emphatically denied by the DNR (the alleged victim of the fraud). The motion also contained an assertion that Middle River's engineer had committed perjury. The motion papers including the perjury allegation were circulated throughout the community. Affidavit of Jeff Hane, App. I. The district court's denial of that motion was the subject of a second interlocutory appeal to the Court of Appeals.<sup>12</sup>

**C. The Settlement Agreement.**

When the landowners brought still a third motion for summary reversal (this time

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<sup>11</sup> Stengrim's attorney wrote as follows: "In this case, the Watershed District's grant application was incomplete and misrepresented the area proposed to be benefitted by the Watershed District Project. Petitioners contend there is no protection afforded by this very expensive project. Petitioner Jim Stengrim asked DNR Red River Basin Coordinator Donald Buckhout to identify the delineated protection area on the map submitted to the DNR by the Watershed District. The Watershed District must either admit that it misrepresented the protected area or that it made a mistake and submitted faulty information to the DNR in its application.....The Court should not simply rely on the grant as an indicator of public necessity, as it was issued under questionable circumstances and based upon erroneous information. In the last few months, Petitioners discovered new information that demonstrates no public necessity exists for the flood control project at issue.....The Watershed District applied to the State through the Department of Natural Resources for a grant whereby the State would pay 75% of the cost of the Project. The State approved this grant based on the Application submitted by the Watershed District. Recently, Petitioners discovered that this Application submitted for funding does not identify the benefitted/protected area anticipated by the Project, but instead inaccurately inferred that the "drainage area" of 31.6 square miles was the Protected Area justifying this project..... "

<sup>12</sup>In the Matter of the Agassiz Valley Water Management Project, Case No. A05-878, Order dated June 28, 2005.

alleging that environmental funding was illegal), the district court granted the District's request to refer the litigation to the Board of Water and Soil Resources for mediation and recommendations.<sup>13</sup> Minn. Stat. Ann. §103D.535, Subdiv. 9. That mediation resulted in a settlement, the terms of which dismissed the landowners challenges with prejudice, affirmed the District's establishment order, determined the amount of just compensation to be paid to Stengrim and other appealing landowners and cleared the way, at last, for the legislatively authorized construction. During the negotiations, the managers wanted a complete settlement, and that meant an end to the efforts to obstruct the project. Hane Affidavit (1) ¶¶ 12-18. App. I-8 - I-10. To this end, the managers insisted that the settlement agreement must contain cooperation clauses that would bring opposition to the project, in all its aspects, to an end. The settlement agreement thus contained a series of collaboration clauses designed to prevent further delay, including a landowner agreement to "make no further challenges in litigation or otherwise against the establishment of the project, which landowners now understand will be going forward." App J, I-8. The agreement also contained an integration clause barring reference to parol evidence. App.

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<sup>13</sup> Section 103D.535 subdivision 9 provides that "If an appeal is from the order of the managers and made to the district court, and the court determines that there are involved facts, circumstances, or matters especially within the knowledge, functions, or duties of the board, the court may refer to the board as referee questions of fact within the scope of the board's knowledge, functions, and duties. The board shall make its findings of fact upon the questions and report them back to the court." One of the advantages of the referral process is that BWSR provides a mediation services which seeks to resolve disputes.

Shortly after disbursement of the funds, Stengrim began to violate the agreement. We provided the district court with detailed evidence that demonstrates that Stengrim was seeking to prevent establishment of the project. See, generally, Hane Affidavit, App. I; Drees Affidavit. The evidence included efforts to challenge the transfer of funds necessary to pay Stengrim and others as unlawful. In an interview with an AP reporter, Stengrim stated that he was engaged in compiling data so as to defeat the project and get his land back from Middle River. In the March 15, 2007 edition of the *Minneapolis Star & Tribune*, Mr. Stengrim is reported to be continuing his efforts to use the Data Practices Act "in an effort to save his land" and "stop the flood-control project." App I-10. And in various forums, Stengrim sought to stop the project by re-advancing the claim, already adjudicated against him, that Middle River and its managers had defrauded the DNR. Middle River began to spend significant resources responding to the previously

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<sup>14</sup> The settlement agreement, which contained an integration clause had the following components: (A) The landowners agreed that they would enter a stipulation of dismissal of their appeal, the effect of which was to cause a judgment to be entered affirming the order of the District establishing the project. (B) The landowners recognized that "the Watershed District "will be operating the project in accordance with a properly approved project management plan." (C) The landowners agreed "that they will endeavor to establish a positive collaborative relationship between Landowners and the District." (D) The landowners agreed to cooperate with implementation of the agreement. It stated "Both Parties will use good faith to see that this Agreement is implemented....." (E) The landowners agreed to a conclusion of disputes clause in which they agreed to engage "no further challenges in litigation or otherwise against the establishment of the project, which landowners now understand will be going forward." (G) The landowners released the District from any and all claims that were made in the litigation, or which could have been made in the litigation.

adjudicated claim that the DNR had been defrauded by the managers. The claim was advanced to the United States Army Corps of Engineers as grounds for denial of a Clean Water Act permit and in a request to the Legislative Auditor to act immediately to intercept project funds before it was too late to stop the project.

Middle River first tried to persuade Stengrim that this claim had already been adjudicated against him and that his attempt to reclaim his land and stop the project represented a breach of the settlement agreement. Stengrim did not then deny that he was seeking to challenge the project. He took the position, rather, that he had not given up that right in the settlement agreement. He asserted, and continues to assert, that when he specifically promised to "make no further challenges in litigation or otherwise against the establishment of the project, which landowners now understand will be going forward," that the term "establishment" had a very narrow meaning. He advanced the position that "establishment" meant the order of establishment only.<sup>15</sup> Thus, he had agreed not to

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<sup>15</sup> Stengrim's contention that "establishment" of a project is narrowly defined as adoption of the final order is inconsistent with the way in which that term is used in Chapter 103D as well. Under Chapter 103D, a "Project" means planning and development, construction, maintenance, repair, or improvement of a watershed district. Minn. Stat. Ann. § 103D.011, Subd. 21. To establish the project is to order that the project be planned, developed, constructed, and maintained in the future. An establishment order designates the project as an official project of the district; it orders the engineer to proceed with making necessary surveys and preparing plans and specifications. It orders the actual construction and provides for the funding of the project. See Minn. Stat. §103D.745, Subd. 3. Indeed, in order to facilitate this process, the establishment hearing is actually recessed until the engineer's report and bids are received. See for example, Minn. Stat. §103D.745, Subd. 4. Construction is an integral part of the project, and the order establishing the project orders construction. And so, Stengrim's hyper-technical attempt to argue that he can interfere with funding and

challenge the order of establishment, but he could challenge the funding, construction or other aspects approved in that order. He claimed also that proof of his interpretation might be found in parol evidence found in email exchanges between the drafting attorneys. Affidavit of Kelly Hadac, dated November 19, 2007, Paragraphs 4 - 8, referenced exhibits 3 - 7.

After trying to stop the funding for land acquisition on the grounds that the payment mechanism was illegal, he next went to the Office of Legislative Auditor and tried to stop use of State funds to pay for the construction of the project before it was too late. In his statement, he specifically contends that Middle River was committing fraud on the flood hazard mitigation grant.<sup>16</sup> These are the very same claims that were raised and rejected in one of the dispositive motions in the district court proceedings before settlement. Entry of the judgment conclusively established this issue against Stengrim. Moreover, his statement to the Office of Legislative Auditor was flagrantly false and misleading because there was no fraud. It is clear from the statement that he was asking

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construction of the project because its not part of the establishment of the project isn't even correct as a matter of hyper-technical Watershed law.

<sup>16</sup> Stengrim's request for OLA assistance in stopping the project before it is too late is recorded by the OLA as follows: "The drainage area the watershed district said was going to be used for the project has already been used for another impoundment. The district is improperly enlarging the drainage area of a ditch system. The area that the flood hazard mitigation grant is supposed to be for is supposed to be for an area covering a specific geographic area. Approximately 15 miles of this area belongs to another drainage system that is not covered by the project. He feels that the district is getting state money under false pretenses.....Jim said it's illegal to use state money twice for the same drainage area, which essentially comes down to fraud in grant funds.

the Office of Legislative Auditor for assistance in stopping the project, before it was too late. He is quoted as saying:

Jim said that he was told that the district would turn dirt this spring. He thinks that their thinking is that the project can't be stopped one they do that. Jim said that he is more than willing to come down and show us and anyone else we think needs to be involved the information he has, as some of the pictures and maps are hard to read if he e-mailed them to us. He just needs 2-3 days notice.

Stengrim was asking the OLA allow him to come down to St. Paul right away, because without prompt action, the project can't be stopped. Once they "turn dirt this spring" it will be too late.

Middle River commenced this litigation because there was a real controversy between Stengrim and Middle River over the meaning of his undertaking to "make no further challenges in litigation or otherwise against establishment of the project." Throughout the current litigation, Middle River has sought to simplify and reduce the litigation cost to the parties. We have sought a swift resolution of the dispute over the meaning of the agreement, because it is integrated, and we urged that the meaning of the agreement itself can be adjudicated without further discovery. For this reason, we urged the district court to stay discovery (App. A), conduct mediation, and failing that, to determine the meaning of the agreement by summary judgment.

**D. Stengrim's SLAPP defense and Minnesota's anti-SLAPP law.**

After the district court stayed discovery at our request, Stengrim amended his answer to assert that Middle River could not enforce the settlement agreement, regardless

of its terms, because he was engaged in advocacy for governmental action—presumably advocacy to stop the project. By so doing, he completely reversed course in his approach to the litigation. He had launched interrogatories, requests for admissions, and notices of depositions to support his claim that the meaning of the agreement could be interpreted with parol evidence and to rebut Middle River’s claims that his conduct was directed at defeating establishment, as Stengrim defined that word. Now, he contended that he did not need discovery, because the SLAPP statute created a heightened standard for enforcement of settlement agreements which required Middle River to provide clear and convincing evidence to prove its case. He argued that affidavits making out a prima facie case were not sufficient in this regard, but that the affidavits of Middle River would have to be more persuasive than the countervailing affidavits submitted by the moving party.

**E. The district court proceedings on the SLAPP motion.**

When mediation on the current litigation failed, both parties moved for summary judgment on Stengrim’s SLAPP motion. Stengrim also moved for Rule 11 and SLAPP punitive sanctions. Despite the fact that discovery had been stayed at our request, Stengrim did not move for Rule 12 relief, because he wanted to be able to rely on parol evidence to change the plain language of the agreement.<sup>17</sup> He asked the court to interpret the settlement agreement with the aid of parol evidence consisting of a series of emails exchanged by the drafting attorneys. In addition, he wanted to establish by affidavit that

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<sup>17</sup> Affidavit of Kelly Hadac, dated November 19, 2007, Paragraphs 4 - 8, referenced exhibits 3 - 7.

the conduct alleged by Middle River was in some respects not true. Thus, the district court was presented with Stengrim's assertion that under Section 554.02, he was entitled to summary judgment on Middle River's breach of settlement claim by asserting that his affidavit evidence should overwhelm Middle River's competing evidence under the clear and convincing standard of section 554.02.

The district court denied Stengrim's motions and set the case for trial. App. F. Judge Dixon stated that the SLAPP statute did not apply to the circumstances presented by this case. At Middle River's request, Judge Dixon ordered another attempt at mediation. But rather than mediate, Stengrim lodged yet another interlocutory appeal.

In the Court of Appeals, Stengrim and amicus ACLU argued that Minnesota should now adopt the California approach to SLAPP, despite the fact that California's anti-SLAPP statutes differs fundamentally from Minnesota's. The ACLU went so far as to argue that because of the public policy interest in preserving the right to advocate before the government, settlement agreements that contain provisions limiting that right should not be enforced. (See ACLU Brief at pp. 9-10.) We contended that while Minnesota's anti-SLAPP statute provides immunity to protect public participation in government, Section 554.05 prevents the SLAPP procedure from interfering with good faith litigation or common law rights to seek redress, and that this right to seek redress certainly extends to enforcement of settlement agreements.

The Court of Appeals noted these arguments, but concluded that our concerns should be alleviated by the provision in section 554.02, subd. 2(1) that permits limited

discovery in SLAPP suits. The court evidently felt that this was a sufficient procedural safeguard to allow a plaintiff faced with a SLAPP motion to defend its claims.

The court then concluded that the anti-SLAPP laws may be applied to a claim for breach of a settlement agreement, and that here, it was Middle River's burden to show *by clear and convincing evidence* that Stengrim's actions were not immune under the statute. In doing so, the Court of Appeals did not look at whether Middle River's contract enforcement claim alleged sufficient facts to show that the Stengrim's actions are not immune under the statute<sup>18</sup> (since he had waived his rights to petition the government in the settlement agreement), therefore removing this case from the anti-SLAPP procedures. Instead, the court held that the district court must weigh the parties' affidavits, evidently determining credibility in the process, and determine whether Middle River could show by clear and convincing evidence through this summary paper procedure that Stengrim's actions were not genuinely aimed at procuring favorable government action. In other words, the approach adopted by the Court of Appeals removes the settlement agreement from the analysis and the context of Middle River's case, and only looks at Stengrim's motives. As we point out below, applying this California-type approach to SLAPP cases in Minnesota ignores the Constitutional protections otherwise afforded to good faith plaintiffs, as recognized and preserved in section 554.05.

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<sup>18</sup> This is the standard previously adopted by the Court of Appeals in Marchant Investment & Management Co., Inc v. St. Anthony West Neighborhood Organization, Inc., 694 N.W.2d 92 (Minn. App. 2005).

## II. ARGUMENT

### A. Summary of Legal Argument.

The context of our lawsuit is that the plaintiff and defendant have already resolved the dispute over the validity and form of the government action and Middle River seeks to enforce and implement that resolution. The courts have long recognized that settlement agreements are favorites of the law. Jallen v. Agre, 119 N.W.2d 739 (Minn. 1963); Eggleston v. Keller Drug Co., 120 N.W.2d 305 (Minn.1963). Stengrim contends that Chapter 554 overrides this presumption and that Middle River's good faith efforts to enforce settlement of a public dispute or litigation should be treated as if it were an abusive SLAPP litigation, and therefore analyzed by the district courts under the Chapter 554 clear and convincing standard, rather than under the typical standards of contract interpretation. See State ex rel. Humphry v. Phillip Morris USA, Inc., 713 N.W.2d 350, 355 (Minn. 2006). In other words, Stengrim would treat settlement of public disputes as inherently suspect. Under the guise of Chapter 554, he would create separate standards for enforcement of private and public disputes, reversing for settlement of public disputes the usual presumption that settlements are valid and ought to be enforced, and instead treating them as if they were presumptively frivolous tort litigations designed to intimidate citizens from public advocacy. But Stengrim goes even further: he seeks to expand dramatically the SLAPP procedure utilized by Minnesota courts when applied to their intended target, by turning the SLAPP motion procedure into a summary trial by affidavit, in which the court decides whose affidavits are most clear and most convincing.

It is the central thesis of our position that the rights conferred on responding parties by section 554.05 are material, indeed essential, to the interpretation of the rest of Chapter 554 and critical to maintain both state and federal constitutionality of its provisions. The motion provisions of section 554.02 do not supercede the rights provided in section 554.05. Rather, section 554.05 says that nothing in the rest of the statute can be read to detract from the responding parties rights afforded by that section. Section 554 is rendered constitutional precisely because it incorporates the responding parties rights. Section 554.05 expressly incorporates the provisions of Rule 12 and 56. It expressly incorporates the jury trial rights in Minnesota's Constitution. It expressly incorporates the common law right to enforce contracts and settlement agreements. It expressly incorporates the constitutional petitioning right to bring before the courts disputes, provided that they are brought in good faith. It has been said:

Since the Magna Carta, the world has recognized the importance of justice in a free society. "To no one will we sell, to no one will we refuse or delay, right or justice." (Magna Carta, 1215.) This nation's founding fathers knew people would never consent to be governed and surrender their right to decide disputes by force, unless government offered a just forum for resolving those disputes. Coucher & Kelly, *The Social Contract from Hobbes to Rawls* (1994). The right to justice is embodied in the Constitution of the United States "establish justice" is set forth as one of our nation's four primary goals. The Due Process Clause guarantees no one shall be deprived of life, liberty or property except by "due process of law." The Fourteenth Amendment guarantees "equal protection of the laws." The federal Constitution also requires that citizens have access to the means of enforcing any legal right a state has created. (*Boddie v. Connecticut* (1971) 401 U.S. 371 (1971)) These fundamental federal rights are protected against state action by both the due process and equal protection clauses of the federal Constitution. Accordingly, federal courts recognize a constitutional right of access to court to petition for redress of grievances. The "right to

petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.” California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) Because “the right to petition is ‘among the most precious of the liberties safeguarded by the Bill of Rights,’ ... the right of access to the courts shares this ‘preferred place’ in our hierarchy of constitutional freedoms and values. Harrison v. Springdale Water & Sewer Comm., 780 F.2d 1422, 1427 (8th Cir. 1986).”<sup>19</sup>

To be consistent with Section 554.05, the remand order should have affirmed the District Court’s determination that enforcement of a settlement agreement in good faith cannot be a SLAPP litigation. And, even if it were brought under the sweep of SLAPP, to be consistent with section 554.05, the remand order must have made it clear that on summary judgment the District Court has discretion to determine when the case is ripe for adjudication by summary judgment, and that it must deny a motion if the evidence submitted by the plaintiff raises a genuine issue of material fact that must be tried.

We contend that the Court of Appeals went amiss by failing to recognize that Section 554.05 constrains application of Chapter 554. We contend that by offering responding parties rights under “constitutional, statutory, common law rule” the legislature is embedding protections found in the Noerr-Pennington - California Motor Freight line of cases as well as the common law and rules of procedure that protect responding parties to a fair adjudication at good faith value. Noerr-Pennington is both a

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<sup>19</sup> Quotation from Application of American Civil Liberties Union of San Diego to File Amicus Curiae Superior Court, Community Youth Athletic Center v. City of National City, Court of Appeals for California, Fourth Division, Court of Appeal No. D052584 No. 37-2007-000764040-CU-EI-SC.

rule of statutory construction and constitutional law. The doctrine states that legislation will not be construed to interfere with a petitioner's activity, unless the legislative intent is clear and unambiguous. It is a constitutional principle that recognizes that the right to access Article III courts is a fundamental right guaranteed by the First Amendment.

It is not our mission to impair the effectiveness of Chapter 554 as applied to its legislatively intended target. Chapter 554 was passed to address the emerging problem of abusive tort litigations brought in bad faith by developers or others seeking government approvals. The primary evil addressed by Chapter 554 was not litigations brought to enforce contractual or permit rights after the approvals were obtained. Rather, Chapter 554 was designed to prevent developers or others from using abusive frivolous tort litigations as a weapon to defeat or chill the rights of citizen advocates to be heard before the decision is made.

The typical SLAPP claim is brought as a tort (usually defamation, or tortious interference with contract) by a plaintiff for whom the governmental approval is so valuable, that the fear of Rule 11 sanctions is insufficient to deter. The target of the frivolous litigation is citizen advocates for whom the cost of litigation is a major deterrent, and the plaintiff typically engages in litigation conduct designed to inflict the maximum cost on the defendant while government approval is pending. When the legislature passed Chapter 554, it must have been aware of the legitimate rights of both plaintiffs seeking judicial redress for valid tort claims and the potential victim of an abusive SLAPP suit. It was recognized that constitutional guarantees of access to

government and trial by jury must be respected. *Increasing Slapp Protection: Unburdening the Right of Petition in California*, 32 UC Davis Law Review 965 (1999).

There existed already highly developed first amendment jurisprudence recognizing the right of litigants to seek judicial resolution of their disputes without fear of sanction unless the claims be brought in bad faith. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (U.S. 1972) (extending Noerr Pennington doctrine to access to courts); Surgidev Corp. v. Eye Tech., Inc., 625 F.Supp. 800, 803 (D.Minn. 1986) (following Razorback Ready Mix Concrete Co., Inc. v. Weaver, 761 F.2d 484 (8th Cir. 1985)); see also Lund Industries, Inc. v. Westin, Inc., 764 F.Supp. 1342, 1345 (D.Minn. 1990). The issues confronted by these concerns were, and are, by no means inconsiderable. See Tanick, *Anti-Slapp Law Slapped Down in Hennepin County*, 1999 Hennepin Lawyer 14, App. L; Halley's Custom Homes, Inc. v. Lynn Levine and Kim Ramey, Hennepin County Case No. 95-9126, App. G.

This problem, of balancing the right to a fair adjudication against the protection of citizens from frivolous tort litigation has been achieved in different state SLAPP laws, with differing success. Chapter 554 achieves this balance in two ways. First, section 554.03 confers only a limited immunity for lawful conduct or speech, expressly exempting speech that constitutes a tort or interference with another's constitutional rights from its protection. Second, section 554.05 states that the SLAPP provisions of Chapter 554 are subject to the responding party's rights under constitutional, statutory,

case, or common law, or rule.<sup>20</sup>

The rights recognized by section 554.05 plainly trump the rest of Chapter 554 because that section states 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." (Emphasis added.) This section provides the textual basis for what the courts have done when applying Chapter 554 in practice. When confronted with a complaint alleging a tort committed by a citizen in the course of advocating before government, the court's have nonetheless applied the procedural rules designed to protect the rights of responding party to bring valid claims. To this end, they have accepted as true the allegations of the Complaint, as when confronted by a motion to dismiss under Rule 12.03. See Marchant Investment & Management Co., Inc. v. St. Anthony West Neighborhood Organization, Inc., 694 N.W. 2d 92 (Minn. Ct. App. 2005). They have exercised careful discretion to grant summary judgment only when timely, and then only after accepting as true the affidavits of the party opposing summary judgment. See Section C, *infra*. Even if a suit to enforce a settlement could be considered a SLAPP suit, the plaintiff would nonetheless be entitled to these protections.

We assert that there is a more fundamental problem with the approach taken by the Court of Appeals. Chapter 554 was not designed to provide relief to parties who violate a

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<sup>20</sup> To the extent that Chapter 554 constrains suits for statements made while affording favored treatment to injunctive relief, it would seem to turn the prior restraint doctrine upside down. Cf Near v. Minnesota, 283 U.S. 697 (1931).

settlement agreement resolving and determining the shape of government action. To do so would impair a party's constitutional right to a meaningful remedy and impair the inherent power of Article III courts to enforce that remedy. Section 554.05 preserves the rights of the responding party to enforce rights afforded under constitutional, statutory, case, or common law, or rule. When a settling party seeks to enforce a settlement, it is doing just that. Middle River's rights to enforce its settlement agreement are founded in the right at common law to enforce a contract and the recognition of the courts that settlements of litigation are favored in the law. Its rights as well rest on the fundamental right to access the courts, as recognized from the Noerr-Pennington doctrine in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (U.S. 1972).

**B. Minnesota Law Favors Enforcement of Settlement Agreements and the Anti-SLAPP law should be read as Discouraging Dispute Resolution.**

We think it hard to imagine that the legislature contemplated that Chapter 554 would apply to the enforcement of settlement agreements among parties bound by those agreements. Minnesota courts have long recognized that settlement agreements are favorites of the law. "There can be no doubt that a definite settlement of a lawsuit, under our decisions, will be enforced, absent fraud or collusion, mistake, or such an improvident agreement that it ought not to stand in equity and good conscience. The law favors settlement of litigation." Jallen v. Agre, 119 N.W.2d 739 (Minn. 1963). See Eggleston v. Keller Drug Co., 120 N.W.2d 305 (Minn. 1963); Johnson v. St. Paul Ins. Co., 305 N.W.2d 571, 573 (Minn. 1981). Settlements are presumed valid. Skalbeck v. Agristor Leasing,

384 N.W.2d 209 (Minn. 1986). Settlements may be enforced by the presiding judge of a pending litigation, within the pending litigation when, after their making, one party refuses to tender promised performance which is the quid pro quo for dismissal of the litigation. Or, settlements may be enforced as a breach of the contract of settlement after dismissal of the litigation. A valid compromise and settlement is final, conclusive, and binding upon the parties; it is as binding as any contract the parties could make, and as binding as if its terms were embodied in a judgment; and, regardless of what the actual merits of the antecedent claim may have been, they will not afterward be inquired into and examined. Theis v. Theis, 135 N.W.2d 740 (Minn. 1965); Schmidt v. Smith, 299 Minn. 103, 216 N.W.2d 669 (1974).

Apart from the plain language of the settlement itself, every contract - including a settlement agreement - has an implied condition that each party will not unreasonably interfere with performance of that contract. Zobel & Dahl Construction v. Crotty, 356 N.W.2d 42 (Minn. 1984). The obligation to refrain from interfering with performance of a contract is fundamental and the enforcement of that obligation by the courts is fundamental to the ability to convince parties to terminate their litigation by agreement. The obligations exists whether it is installed in the contract expressly. Zobel & Dahl Constr. v. Crotty, 356 N.W.2d 42, 45 (Minn.1984). It is well established that Minnesota law imposes an Implied Covenant of Good Faith and Fair Dealing into every non-sales contract to prevent one party from unjustifiably hindering the other party's performance. Sterling Capital Advisors, Inc. v. Herzog, 575 N.W.2d 121, 125 (Minn. App.1998)

(citations omitted). “ The Supreme Court has stated:

“Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not "unjustifiably hinder" the other party's performance of the contract.” Zobel & Dahl Constr. v. Crotty, 356 N.W.2d 42, 45 (Minn.1984); see also Haase v. Stokely-Van Camp, Inc., 257 Minn. 7, 13, 99 N.W.2d 898, 902 (1959); Restatement (Second) of Contracts § 205 (1981).” In re Hennepin County 1986 Recycling Bond Litigation, 540 N.W.2d 494 (1995).

This implicit obligation is all the more powerful here, because the contract expressly includes the obligation to act in good faith.<sup>21</sup>

The interpretation and enforcement of private settlement agreements is inherent in the judicial function. Settlement of major public litigations is equally in the public interest. In the last several decades, there has been great emphasis on using alternative dispute resolution to resolve major controversies, and a new field of study has fostered a trained corps of mediators successfully to divert and resolve some of the most thorny major public litigations. Susskind & McKearnen, *Evolution of Public Policy Dispute Resolution*, 16 *Journal of Architectural and Planning Research* 97 (1999).<sup>22</sup> Resolution of environmental and land use disputes has been in the forefront of this trend because the problems are so exasperately complex to resolve and because it often requires creative concessions from a variety of interested parties. See United States Environmental Protection Agency, Consensus Building Institute, *Using Dispute Resolution Techniques to*

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<sup>21</sup> "Both Parties will use good faith to see that this Agreement is implemented....."

<sup>22</sup> <http://web.mit.edu/publicdisputes/pdr/evolution.pdf>

*Address Environmental Justice Concerns, Case Studies (2003)*<sup>23</sup>

There are numerous examples of major complex litigations, with significant public policy implications, which have been resolved by settlement, and the ability to enforce those settlements is a matter of considerable public importance. Indeed, settlement of suits brought on behalf of litigants by the American Civil Liberties Union is a common occurrence. These suits typically involve an agreement by the litigants as to how the government will adjust its practices in some way deemed acceptable to both government and litigant. Land development too, for example, often involve hotly contested simultaneous litigations involving several governmental regulators in different forums. The Dead Lake cases that were before this court and the Court of Appeals, for example, involved a MERA suit brought by an environmental advocacy group, separate court of Appeals challenges to conditional use permit and grant of MPCA permit, and a district court challenge to denial of a request for Environmental Impact Statement<sup>24</sup>. Resolution of such controversies by settlement cannot take place unless the participants compromise their respective positions on what the government will do, and the right to return to court to adjudicate disputes over the meaning of the agreement, or obtain appropriate breach of

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<sup>23</sup> <http://web.mit.edu/publicdisputes/pdr/evolution.pdf>

<sup>24</sup> Dead Lake Ass'n, Inc. v. Otter Tail County, 695 N.W.2d 129, (Minn.2005) (conditional use permit review); Dead Lake Ass'n, Inc. v. Commissioner of Minnesota Pollution Control Agency, 2005 WL 287490, (Minn.App. 2005); Dead Lake Ass'n, Inc. v. Otter Tail County, 2005 WL 221773 (Minn.App.,2005) (Appeal from negative declaration on EIS).

contract relief, is inherent in the concept of settlement itself.

In the development context, the developer may agree to reduce the density or otherwise constrict the nature of the permit it is seeking. When it does this, it gives up the right to advocate for further development. Citizen opponents may, for their part, agree that if the developer proceeds as agreed, they will withdraw their request for an environmental impact statement and support the conditional use permit. They too give up the right to challenge the developer's project, if he proceeds as agreed. Such agreements give up the right to further advocacy in return for the certainty that each party will adhere to the agreement. Sometimes the agreement may require the developer to place lands in trust by way of environmental mitigation. Sometimes a public settlement may provide for payment of attorneys fees to one of the parties. But inherent in these settlements is that all parties constrain their public advocacy, by agreeing to support a governmental resolution of the problem, and not to oppose the permitting or other governmental action necessary to implement their agreement.

If parties to a proposed settlement believe that the agreement is unwise, or wish to preserve the right to contend that government should act otherwise than propounded in the settlement, then they have the right, indeed the obligation, to proceed with their dispute. They cannot agree to an adjudication of disputed rights with their fingers crossed, intending later to contend that the first amendment guarantees that they can break their agreement.

The suggestion that landowner opponents to public projects have a constitutional

right to seek government action inconsistent with their agreement threatens the ability of government to settle eminent domain litigations as well. It is common for landowners whose land is proposed for taking as part of a major public project to combine demands for enhanced compensation with hard fought challenges to the public purpose of the project itself or the statutory authority of the condemning authority. Many of these cases are settled by public authorities in a comprehensive manner, in which the landowner consents to a public purpose finding and agrees to the amount of just compensation. In this very case, the attorney for landowners stated at the final public hearing on the project that landowners favored prompt construction of the project, but then, after the public hearing, reversed course and aggressively challenged the project on the grounds that it did not serve a public purpose. Stengrim's argument essentially contends that landowners who agree to an adjudication on public purpose and compensation can then double back and challenge the project, despite their agreement not to do so, in an effort to recover the land which they have just transferred to the authority by agreement and consent judgment.

In the Court of Appeals, the parties wrangled over whether the district court's decision rested on a finding that Chapter 554 can never be applied to a breach of contract dispute. That issue is substantially broader than the issue presented here, which arises in the context of settlement of a litigation brought to resolve whether this project should be established or not. The district' court's decision does not seem to rest on the determination that there is no conceivable litigation, framed as breach of contract, that might fall within the sweep of Chapter 554. Chapter 554 is designed to address

litigations brought in bad faith, and hence it may be difficult to envision all potential litigations brought to harass and chill advocacy before the government decision is made.

Application of Chapter 554 to breach of contract claims brought in good faith, however, raises significant constitutional and statutory issues. A broad range of contracts may be viewed as constraining the right to seek favorable governmental action. Contracts involving intellectual property rights may constrain a party from seeking government protection for those rights. Development covenants or easements may prevent parties from seeking government zoning permits or other approvals, when the covenant or easement bar the proposed land use. It is commonplace for a landowner to sell land to a developer for development purposes, and the proposed development may require substantial government approvals which are costly to obtain. It is common as well for the development agreement to require the seller to refrain from challenging the proposed development, or even to join in requesting government approval even to the point of remaining a party to appeals or litigations seeking a favorable adjudication to the proposed development. A covenant not to compete might bar a vendor from seeking government approval of a proposed contract by bidding or request for proposal process. An action for damages based on breach of that covenant by competing for government business is a claim arising from the breaching party's request for favorable government action—the grant of a contract.

The breach of contract litigations described here commonly involve complex and fact intensive disputes regarding the meaning of agreements, the details of particular

contract or property claims, and disputes over whether the parties have kept their end of the particular bargain. Sending all of these disputes through the Chapter 554 motions procedure, with a stay of discovery and proof of “clear and convincing evidence” at an early stage would radically change current practice in Minnesota. In some of these litigations, both parties might be contesting each other’s right to seek favorable government action, placing them both in the position of arguing that the other must prove its case at an early stage with clear and convincing evidence.

In California, all of these contracts, along with a panoply of other claims, are swept into the statutory SLAPP procedure, and this accounts for the explosion of SLAPP litigation in that State to which we referred in our petition for review. See Navellier v. Sletten, 52 P.3d 703 (Cal. 2002) (dissenting opinion). A review of the course of California jurisprudence from afar suggests that sweeping in non-tort litigation of every kind into the SLAPP procedure does not reduce aggressive litigation, but rather increases the cost of litigation and raises significantly the stakes for each side in ways that are counter-productive. But even in California, the broad sweep of judicial interpretation is reigned in by assuring that the plaintiff’s allegations must be credited as true either at the Rule 12.03 stage or summary judgment stage. See Wilcox v. Superior Court, 33 Cal Rptr2d 446 (Ct. App. 1994); Briggs v. Eden Council for Hope and Opportunity, 969 P.2d 564 (Cal Rptr 1998).

The structure of Chapter 554 makes it doubtful that the legislature contemplated bringing these cases into the sweep of the Section 554.02 procedure because of the grave

issues otherwise confronted. Notice that the immunity provision of section 554.03 excludes from the statutory immunity claims for tort and to enforce constitutional rights. Under this provision, for example, had Middle River brought a defamation claim against Stengrim for publishing the claim of perjury during the appeals process, or for publishing the claim that the managers defrauded the Department of Natural Resources, either claim would have been protected from the Chapter 554 penalty, because they are both torts. Could the legislature have intended to include non-tort claims in the sweep of section 554.02, while failing to exempt valid breach of contract or settlement claims from its sweep? This is strong evidence that the legislature never contemplated that claims like Middle River's would find their way into section 554.02. One reason for drawing that conclusion is the plain purpose of the SLAPP procedure. But the textual basis for drawing that conclusion is the protection for the responding party found in section 554.05 to enforce rights afforded by statutory, constitutional, or common law or rule. As we have said this has both statutory and constitutional foundations. Settlement agreements, and their enforcement, are not suspect. They represent the successful culmination of the public advocacy process, in which the parties make their peace, and signify to each other that they are mutually satisfied with the terms of that agreement.

**C. Minnesota's Anti-SLAPP law was designed to chill Abusive Tort Litigations Brought to Chill Advocacy Speech or Action and not to limit the existing rights of good faith litigants.**

During the 1970's and 1980's, a new tactic began to be used by developers and industry to prevent citizens from challenging real estate developments, industrial and

agricultural permits on environmental and public health or other grounds. The problem would arise in the context of a public proceeding where a proponents of a feedlot, or a large real estate development, or a pollution permit would be participating in a quasi-judicial or legislative proceeding and citizens would seek to participate in those proceedings in opposition to the request. Project proponents hit upon a method of trying to eliminate public participation in adjudicative or legislative proceedings, such as requests for conditional use permit, rezoning or an environmental negative declaration. The project proponent would seize upon something that one of the opponents said in the proceeding, or in public discussion of the merits of the request, and claim that the allegation constituted a tort such as business slander or tortious interference with contract.<sup>25</sup>

Under this approach, individual citizens, or groups of citizens would find themselves served with a baseless complaint brought by the developer or other project proponent. The complaint would allege that their participation in the permitting process, and the accompanying alleged defamation, would deny the plaintiff a business opportunity. The plaintiff would then proceed to force the citizen group to spend large amounts of money on costly discovery, instead of advocacy, and to defend costly legal

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<sup>25</sup> Defamation in its various forms is a favorite, as are conspiracy, interference torts such as interference with contract or prospective economic advantage, judicial torts such as abuse of process, antitrust violations, civil rights violations, nuisance, and even intentional infliction of emotional distress. *Increasing Slapp Protection: Unburdening the Right of Petition in California*, 32 UC Davis Law Review 965, 970-71. See also Wilcox v. Superior Court, 33 Cal Rptr2d 446, 449-450 (Ct. App. 1994)

motions. Frequently, the goal of these suits was not to obtain a decision on the merits, but rather to bankrupt the opposition through a costly collateral tort suit for damages.<sup>26</sup> Because the SLAPP plaintiff uses legally baseless allegations to chill opposition before government approvals have been obtained, the tort complaint is filed, of course, while government action is pending and as yet undecided.

The target of SLAPP legislation then is a meritless tort litigation brought for the purpose of stifling advocacy during government decision making. The SLAPP litigation is brought during consideration, not after the decision is made, because it cannot have its abusive impact if deferred until after the decision is finalized. Minnesota's SLAPP law addresses the concerns raised by abusive litigation by (1) conferring a limited immunity for lawful conduct or speech, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights<sup>27</sup> (section 554.03); (2) subject to the reservation and protection of the responding party's rights under constitutional, statutory, case, or common law, or rule (section 554.05); (3) within a procedural framework for expedited

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<sup>26</sup> Because the incidental effects on the targets rather than the relief nominally sued for are the filers' true objectives, filers ordinarily do not care if they lose; indeed they may well expect to lose. The filers' indifference both to the usual measures of success, and to the financial constraints that affect the targets, makes it hard to control the problem through customary methods. 32 UC Davis Law Review, supra at 970. The SLAPP suit is a "meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." Wilcox v. Superior Court, 33 Cal Rptr2d 446 (Ct. App. 1994); See Hull v. Rossi, (1993) 13 Cal.App.4th 1763, 1769, 17 Cal.Rptr.2d 457.

<sup>27</sup> This limitation on the immunity has been referred to as a startling feature of the Statute. UC Davis at 1024.

judicial consideration of the rights protected (section 554.02).

The few Minnesota cases which have applied Chapter 554 have implemented the goal of the statute to provide an early review of the facial legitimacy of the tort allegations, while carefully protecting the rights of the plaintiff to a fair judicial forum for resolution of valid claims. In so doing, however, the courts have not clearly articulated the textual basis for resolving this balance. But it seems clear that the statutory basis is section 554.05 and California Motorfreight, supra. Both the rights of the citizen defendant and the rights of the tort plaintiff are clearly deserving of protection:

Constitutional guarantees of access to government and trial by jury must be respected; to brush these guarantees aside even for the most benevolent purposes would (even if the courts permitted it) be more dangerous than the evil the remedy sought to correct. ....Also, recourse must be protected for people and businesses with legitimate complaints of defamation, interference and the like. Filers lose seventy-seven percent of SLAPP suits that proceed to judgment, but that means they win twenty-three percent of them. *Increasing Slapp Protection: Unburdening the Right of Petition in California*, 32 UC Davis Law Review 965 (1999). .

An example of the straightforward application of Chapter 554 to its intended target is found in Marchant Investment & Management Co., Inc v. St. Anthony West Neighborhood Organization, Inc., 694 N.W.2d 92 (Minn. App. 2005) There, Marchant Investment & Management Co., Inc. (Marchant), a real-estate developer, proposed a development project called the River Run Apartment Project, in the Sheridan neighborhood of Northeast Minneapolis. Marchant wanted a zoning variance and needed municipal permits. A civic group, St. Anthony West Neighborhood Organization joined with other neighborhood organizations to oppose the project. During the permitting

process, the neighborhood group wrote the mayor and council claiming that the developer was insensitive to the consensus plan for the area above St. Anthony falls and that the developer "refused to listen to our concerns...."

Based on this letter asserting that the developer "refused to listen to our concerns", the developer sued the neighborhood organization and its officers and directors, alleging defamation, tortious interference with a prospective business advantage, tortious interference with a contract, civil conspiracy, and civil aiding and abetting. The Marchant litigation had all the earmarks of a so-called strike, or SLAPP suit. The alleged torts were, in the first place, legally preposterous. The allegation that the developer refused to listen the concerns of the neighborhood organization was not defamatory. The court could conclude from the very allegations of the complaint, and documents incorporated by reference, that the tort did not exist. In dismissing the Complaint, under a Rule 12.03 standard, the court accepted the Plaintiff's allegations, supplemented by Affidavits as true. The court stated:

Marchant contends that STAWNO is not entitled to immunity for the statements in Rainville's letter because they are tortiously defamatory in stating that STAWNO "met countless times with the developers" and the developers "refused to listen to our concerns." Because this is an appeal from judgment on the pleadings, our consideration focuses on the pleadings' allegations. Minn. R. Civ. P. 12.03. Marchant Investment & Management Co., Inc. v. St. Anthony West Neighborhood Organization, 694 N.W.2d at 95 (Minn. Ct. App. 2005)

As frequently occurs under Rule 12.03, the court exercised its discretion to review the actual uncontested documents referenced in the complaint.

We may also consider documents and statements that are incorporated by reference into the pleadings. See Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 739 n. 7 (Minn.2000) (limiting review of order for dismissal to documents and statements referred to in complaint). All facts alleged in the complaint must be taken as true and all reasonable inferences drawn in favor of the nonmoving party. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553 (Minn.2003). Id.

Chapter 554 calls upon the district court to accelerate, where possible, the application of the high burden imposed on plaintiffs by the constitution itself when alleging the tort of defamation with respect to public advocacy. Chapter 554 works in this context, because it works in tandem with Constitutional law that constrains the tort itself. The court in Marchant was not confronted by a factual dispute as to whether the plaintiff actually published the alleged defamation, or whether otherwise defamatory allegations were true. The guts of Marchant may be found in the Court of Appeals careful review of the application of the substantive tort law of defamation to the allegations of the complaint and incorporated documents. The Marchant decision focuses on Milkovich v. Lorain Journal Co., 497 U.S. 1(1990) and its Minnesota implementation.

In this context too, we see the district courts and appellate courts using their common sense and discretion to assure that legitimate tort plaintiffs are not deprived of rights that are otherwise afforded to them by law, including the right to proceed with a prima facie valid tort claim, Minn. Stat. Ann. §554.03; the constitutional right to a jury trial, Minn. Stat. Ann 554.05; the right to seek adjudication of claims brought in good faith, Id.; and the right to avail itself of a responding party's rights under Rule 56 and 12.

Marchant illustrates also the appropriate approach to true SLAPP litigation:

The participation-in-government immunity provided under Minn. Stat. §§ 554.01-554.05 (2004) explicitly requires the nonmoving party to disprove the movant's immunity by clearly and convincingly establishing an underlying tort. Even assuming that all facts alleged in the complaint are true and drawing all reasonable inferences in Marchant's favor, it has not met this high, statutorily imposed burden. See Swanlund v. Shimano Indus. Corp., 459 N.W.2d 151, 154 (Minn.App.1990) (stating that clear and convincing standard requires court to view evidence "through the prism of the substantive evidentiary burden" (quotation omitted)), review denied (Minn. Oct. 5, 1990). The district court did not err in dismissing the defamation claim in accord with the immunity provision in the participation-in-government statute.

Early judicial intervention usually occurs at the Rule 12 stage. Because the plaintiff is alleging a tort which attacks speech or conduct involving public participation, the plaintiff carries an extraordinary legal burden which arises from the substantive law of tort itself, because the ability to challenge public advocacy via the law of defamation or other tort is severely constrained by the First Amendment. In Marchant we see the court requiring the plaintiff as part of the Chapter 554 process to supplement the record with the actual defamatory content itself, so that the court can assure itself that the plaintiff has not used evasive generic allegations in the complaint in hopes of keeping the case alive.

We see similar balancing of the rights of the parties in the unpublished case American Iron and Supply Co v. DuBow Textiles, 1999 WL 326210 (Minn.App.). After American Iron sought a conditional use permit from the City of St. Cloud, a competitor distributed the following statement:

"American Iron is not to be trusted! They have a history dating back 40 years of corruption and legal violations. Two of the owners of American Iron have spent time in prison for theft (from the city of Minneapolis) and

tax evasion. They have been linked to potentially beneficial political contributions. Is this the type of company we should encourage into St. Cloud?"

To balance the respective rights of the parties, the district court established a discovery schedule. After completion of preliminary discovery, the district court ruled against defendant's motion to dismiss. Discovery had established the content of the statements, the court found, but it was "premature at this stage" to rule on whether there was a qualified privilege. . . . :

"The totality of the evidence standard requires that the plaintiff have the benefit of discovery before attempting to meet its burden. We conclude that the district court did not err in declining to rule on qualified privilege at the early dismissal stage."

Chapter 554 does not, and cannot, deprive the district court of its discretion to grant or deny summary judgment based on whether the record is ready for resolution. Rules 56 and 12 are actually incorporated expressly by section 554.05's recognition that responding parties are protected by rights conferred by rule.

**D. Section 554.05 Expressly Protects Responding Parties Constitutional and Other Rights to Petition the Courts for Interpretation and Enforcement of Settlement Agreements**

This brings us to the court of appeals determination that section 554.05 does not incorporate the Noerr-Pennington - California Motor Freight protections into Chapter 554, because its protections apply to anti-trust disputes and are not intended to be raised

defensively. But See Keller v. Von Holtum, 586 N.W.2d 186 (Minn. App. 1997).<sup>28</sup> That determination potentially undermines a variety of protections implemented by the Minnesota courts. These protections are largely constitutional in nature, providing access to the courts for judicial resolution of disputes in good faith.

The case of California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (U.S. 1972) is the leading case in a chain of cases which strike down attempts to restrict litigant's access to the courts whether using the anti-trust laws or other purported barriers to access to the judiciary. In California Motor Transport, the plaintiff claimed that a group of major trucking companies were combining and conspiring to jointly challenge smaller trucking companies in the courts. Allegedly, the anti-trust laws were being violated, because the large trucking concerns had adopted a joint strategy of challenging smaller trucking companies in the courts in ways that would create barriers to entry of new companies, thereby limiting competition.

But the Supreme Court ordered dismissal of the claim. The right of seeking judicial access in the courts is just as sacred and just as protected as the right to petition the legislature, the Supreme Court held: "The right of access to the courts is indeed but one aspect of the right of petition. See Johnson v. Avery, 393 U.S. 483 (U.S. Tenn. 1969); Ex parte Hull, 312 U.S. 546 (U.S. 1941)" Since that time, the courts have repeatedly recognized that the Noerr Pennington doctrine prevents the legislative branch

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<sup>28</sup> Stengrim arguably waived this contention by pleading Noerr Pennington in his own Answer.

from seeking to bar access to the courts in this way. See, e.g. Miracle Mile Associates v. City of Rochester, 617 F.2d 18 (2d Cir 1980).

The protection afforded a litigant by Noerr Pennington's constitutional doctrine is broad and deep. Eastern Rail Pres. Conf. v. Noerr Motor Frgt., Inc., 365 U.S. 127 (1961). Under the Noerr-Pennington doctrine, the act of filing a lawsuit is immune from antitrust or tort liability unless it is found to be a mere sham intended to disguise tortious or anti-competitive liability. See Noerr, 365 U.S. at 140. Under Noerr Pennington, a plaintiff cannot be barred from litigating in courts of general jurisdiction, then, unless the court finds that the act is baseless, a mere sham. In the Eighth Circuit, this exception has been further defined as follows:

It is only where a defendant's resort to the courts is accompanied or characterized by illegal and reprehensible practices such as perjury, fraud, conspiracy with or bribery of government decision makers, or misrepresentation, or is so clearly baseless as to amount to an abuse of process, that the Noerr-Pennington cloak of immunity provides no protection.... Thus the filing of suit will fit within the "sham exception," and will give rise to tort liability, only if "clearly baseless," or if accompanied by perjury, fraud, conspiracy, bribery, misrepresentation, or other "illegal and reprehensible practices." Surgidev Corp. v. Eye Tech., Inc., 625 F.Supp. 800, 803 (D.Minn.1986) (following Razorback Ready Mix Concrete Co., Inc. v. Weaver, 761 F.2d 484 (8th Cir.1985)) (citations omitted); see also Lund Industries, Inc. v. Westin, Inc., 764 F.Supp. 1342, 1345 (D.Minn.1990).

The protected right of access to the courts is not limited to private citizens. On the contrary, the right to access the courts is available to governmental subdivisions as well. The protections of Noerr Pennington plainly apply to governmental subdivisions like the Middle Snake Tamarac Rivers Watershed District. County of Suffolk v. Long Island

Lighting Co., 710 F. Supp 1387 (E.D.NY. 1989); Fischer Sand & Aggregate Co v. City of Lakeville, 874 F.Supp. 957 (D. Minn. 1994); Manistee Town Center v. City of Glendale, 227 F.3d 1090 (9<sup>th</sup> Cir. 2000). If a party may safely petition the courts for relief in the first instance, it follows with greater force that a party may seek in good faith to enforce the settlement and judgment resulting from that petition. Stengrim's position, if adopted, thus chills the petitioning right in two ways. It chills the right to litigate in the first instance by under-cutting the enforceability of the judgment obtained. And, it chills and impairs the attempt to enforce by treating the request for relief as an abusive SLAPP suit.

### III. CONCLUSION

The Marchant case discussed in Section C above has numerous differences from the circumstances in this case. The neighborhood association was expressing its views in a public forum seeking to influence the outcome of a public decision making process BEFORE the final decision had been made. In other words, Marchant had not yet received its permit. No binding adjudication had yet been made relating to the permit, and certainly no adjudication had yet been made that would bind the neighborhood association. The neighborhood association had not entered into an agreement with the developer or the city and had received no money in consideration of its agreement. We can find no Minnesota case that remotely suggests that the legislature intended to apply this statute to suits to enforce settlement agreements when they are brought to resolve a dispute in good faith. Nor does any case support the proposition that the statute or Constitution would allow the court to summarily try the issues by weighing the affidavits

confronted.

The Court of Appeals remand order should have affirmed the District Court's conclusion that the SLAPP procedures of Chapter 554 do not apply to the circumstances of this litigation. Denial of Stengrim's motion for Rule 11 sanctions alone should have been sufficient to establish that Middle River's suit is not within the intended target of Chapter 554. We contend that by offering responding parties rights under "constitutional, statutory, common law, or rule" the legislature is embedding protections found in the Noerr-Pennington - California Motor Freight line of cases as well as the common law and rules of procedure that protect responding parties to a fair adjudication of suits brought in good faith. Moreover, even if a settlement enforcement litigation were regarded as an appropriate SLAPP target, the remand order should have made it clear that District Courts must throughout their navigation of Chapter 554 give meaningful effect to the protections found in Section 554.05. Those include the express incorporation of the provisions of rules such as Rule 56 and 12, the common law allowing enforcement of settlements, the constitutional protection of the right to jury trial, and the right to seek adjudication of disputes in good faith.

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Respectfully Submitted,

RINKE-NOONAN

By



Gerald W. Von Korff, #113232

Tim Sime, #0265172

Attorneys for Appellant

P.O. Box 1497

St. Cloud, MN 56302-1497

320 251-6700