FAR-29665

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

ERIC PORTER	)	
VS.	)	FAR No.
CHRISTINE ARAUJO, ANTHONY PISANI, MARK FORTUNE, BRUCE BICKERSTALL, PETER CHIN, MARK EHRLICK, as they are Members of the City of Boston Zoning Board Of Appeal; and FUNG AND HSU REALTY ASSOCIATES LLC	)	

APPLICATION FOR FURTHER APPELLATE REVIEW OF DEFENDANT/APPELLEE FUNG AND HSU REALTY ASSOCIATIES LLC.

(1) Request For Further Appellate Review

Pursuant to M.R.App.P. 27.1, defendant/appellee Fung and Hsu Realty Associates LLC ("defendant") requests further appellate review of the decision of the Appeals Court dated January 18, 2024 (No, 22-P-974) (the "decision") in the within case vacating an Order of the Suffolk Superior Court that ordered the disbursement to defendant of $23,979.99 under a surety bond posted by plaintiff in this zoning case, which was further ordered to be paid by the defendant to the plaintiff/appellant ("plaintiff") [1] A copy of the decision is attached hereto.

(2) Statement of Prior Proceedings and of Reconsideration.

[1] The Court required no proof of payment by plaintiff to the surety no proof of payment was ever part of any briefs and of record; but amazingly the Court accepted the word of plaintiff with no substantiation and with no notice from the surety as to confirmation of payment.

Plaintiff filed suit in the Suffolk Superior Court appealing a decision of the Boston Zoning Board of Appeal granting defendant four variances, in which case plaintiff was ordered and posted a surety bond in the amount of $25,000 pursuant to Section 11 of the Boston Zoning Enabling Act[2] (the "Enabling Act"), which case after a trial was dismissed by the Court for lack of standing. Plaintiff appealed that dismissal, which was affirmed by the Appeals Court. 99 Mass. App. Ct. 1123 (2021). After rescript defendant obtained an order to pay defendant from the posted surety bond, which motion was allowed in the amount of $23,979.99 representing attorney's fees and costs that was paid to defendant by the surety that had complete discretion to make such payment.

Plaintiff in the within appeal appealed that disbursement Order; but never argued nor addressed at any time in any briefs or otherwise in the record his claimed reimbursement payment to the surety. At oral argument in his appeal, and without any advance notice, plaintiff for the first time stated that he reimbursed the surety without any proof of payment.

The Appeals Court, although noting that the purpose of an appeal bond was for security for **damages and costs** under the Enabling Act, vacated the Order of disbursement stating that defendant was not entitled to attorney's fees under M.G.L.C 231, § 117 and the so called American Rule as to attorney's fees, notwithstanding that the bond was authorized,

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[2] Boston Zoning Enabling Act, 1856 Mass. Acts, c. 665, as amended by St. 1974. §1 and St. 1993, c. 461, § 2.

issued and was governed by the Enabling Act; notwithstanding the subrogation rights of the surety while holding that the plaintiff had legal standing due to a "potential for injury" and notwithstanding that M.G.L.C. 231, § 117 never provided for "damages and costs." The Appeals Court also entered an Order requiring defendant to pay plaintiff the disbursement amount within thirty days. Defendant has sought a reconsideration of the decision of the Appeals Court, which motion was filed with the Appeals Court on January 31, 2024.

(3) Short Statement of Facts.

Plaintiff was an abutter that owned 80 Linden Street, Allston. Defendant sought to make it a two-family home at a cost of $525,000, with a new addition in the rear with a three-car garage. As to the four variances, the Superior Court (Giles, J.) found that the four variances "were rather insignificant", were "modest, unobstructive, and in keeping with the public good of the neighborhood including remedying "an illegal number of parking spaces."

At trial, the plaintiff testified that he had no expert opinions, with his testimony being the only evidence at trial. After a trial on the merits, the Superior Court in its Decision stated in its opinion that "The Court concluded that the Plaintiff cannot establish standing here. Other than bald, unsubstantiated assertions about increased traffic and decreased parking, the Plaintiff has failed to set forth a particularized injury caused by the Applicant's proposed expansion." The Superior Court further stated

that "The Plaintiff has not demonstrated that the ZBA's decision will cause tangible harm that is personal to him or that his traffic and parking concerns are different from those of the general community" and that as to the impact of parking by defendant "his complaint of increased parking by the fewer occupants of the Property seems *de minimis."* The Superior Court rejected his "vague, unsupported claims that the Project would render his home less marketable"; that the dimensional relief "was modest, unobstructive and in keeping with the public good of the neighborhood"; and that the grant of variances "was wholly justified and clearly not the product of administrative whim."

Pursuant to the Enabling Act, defendant filed a motion to compel the posting of a surety bond, which was granted based in part on the statement by the Court that "**Porter is a habitual appealer of zoning decisions**." (emphasis added) and other findings by the Court. Plaintiff posted a surety bond issued in the amount of $25,000 issued by United Casualty and Surety Insurance Company. The condition of that surety bond was "...that if the said Principal shall prosecute the case with effect and shall indemnify and save harmless Fung & Hsu Realty Associates said Obligee in whose favor the City of Boston Zoning Board of Appeal decision was rendered, **from damages and costs which he or they may sustain in case the decision of said board is affirmed then this obligation to be void**. (emphasis added).

On appeal to the Appeals Court in his first appeal, the Appeals Court after noting and summarizing the findings of the Superior Court as to standing held that "Given that aggrieved person's status is a jurisdictional prerequisite to a zoning appeal, Porter's complaint was properly dismissed for lack of standing." As to the issuance of the bond, the Court in footnote 4 stated "we see no abuse of discretion in the judge's allowance of the defendant's request for an appeal bond in the amount of $25,000." 99 Mass. App. Ct. 1123 (2021)[3].

On April 7, 2022, the Court (Mulligan, J.) after noting that a Judge has discretion to issue a bond "to discourage frivolous and vexatious appeals" and in accordance with the Boston Zoning Enabling Act allowed f $23,979.99 in damages to be paid to defendant within ten days, which funds were disbursed by the surety in its discretion to defendant.

On September 6, 2022, after a Single Justice denied plaintiff's appeal of the denial of his motion for a stay filed on August 23, 2022 in Appeals Court No. 2022-J-0413; and thereafter plaintiff appealed to a full panel of the Appeals Court in 2022-J-0864, which allowed the dismissal of defendant's motion to dismiss on the grounds of mootness since the funds were paid without prejudice to any appeal that plaintiff may have from the underlying order to release the funds.

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[3] The Appeals Cour declined to award attorney's fees for the appeal under M.R.App P. 25 which is applicable only for a "frivolous appeal" unlike the Enabling Act.

In this appeal, the Appeals Court vacated the motion of defendant for the release of the bond funds and held that despite the subrogation rights of plaintiff being subrogated to the surety, plaintiff had legal standing due to a "potential injury sufficient to establish standing" citing the case of Sullivan v. Chief Justice for Admin. & Mgt, 448 Mass. 15, 21 (2006) as authority even though that was not a case involving subrogation rights.

The Appeals Court held that defendant was not entitled to recover its expenses and costs and its attorney's fees under M.G L.c. 231, §117 and the American Rule, notwithstanding the Enabling Act. The Court stated that the Judge stated no reasons for the entering the bond order or the reasons for the amount and vacated the Order with a further order to pay plaintiff the bond proceeds within thirty days. No order of remand was made requiring the stated reasons for the posting of the bond.

(4) Statement Of Points With Respect To Which Further Appellate Review of the Decision Is Sought.

ANY ORAL STATEMENT MADE BY PLAINTIFF AT ORAL ARGUMENT FOR THE FIRST TIME WAS IMPROPER.

Any consideration by the Court that "Porter reimbursed the bond company" was nowhere in the record and not in any briefs but was improperly mentioned by plaintiff for the first time in oral argument without any written proof, which was contrary to the Best Evidence Rule. Mass. G. Evid. §§ 1002. A failure by plaintiff to properly raise an issue was also a waiver of that issue on appeal. M.R.App, P. 6(a)(4). Abate v. Fremont Inv. & Loan, 470 Mass. 821, 833 (2015).

THE APPEALS COURT FAILED TO APPLY THE RIGHTS OF SUBROGATION MAKING THE SURETY AS THE PROPER PARTY FOR LEGAL STANDING.

The Appeals Court rejected defendant's argument as to lack of standing/ subject matter jurisdiction and held that the reimbursement of the surety was "the potential for injury sufficient to establish standing" citing Sullivan v. Chief Justice for Admin., 448 Mass. 15, 21 (2006), which case had nothing to do with subrogation rights. The SJC in that decision stated that "injury alone is not enough, a plaintiff must allege a breach of duty owed..." and "In addition, for the plaintiff to have standing the injury alleged must fall with the area of concern of the statute or regulatory scheme under which the injurious action has occurred." The area of concern in the within case involved the law of subrogation.

Subrogation is equitable in origin but is practiced as a remedy at law. It arises out of payment under an insurance policy or surety bond when, upon payment to the insured, the insurer becomes entitled to the rights (and is subrogated to the rights) of the insured.. Frost v. Porter Leasing Corp., 386 Mass. 425, 427 (1982) The right of subrogation is not dependent on contract, but rests on principles of natural justice and equity. Amory v. Lowell, 83 Mass. (1 Allen) 504, 507 (1861). A subrogation right is the contractual, statutory, or common law right of an insurer to recover from a noninsured party for payments made under an insurance policy. Subrogation Rrights and Waiver of Subrogation, 57 Mass. Prac., § 8:33. Travelers Ins. Company v Graye, 358 Mass. 238, 240–241(1970) (The

right of subrogation is not dependent on contract but 'rest(s) upon natural justice and equity). Subrogation is "an equitable adjustment of rights that operates when a creditor or victim of loss is entitled to recover from two sources, one of whom bears a primary legal responsibility. If the secondary source (the subrogee) pays the obligation, it succeeds to the rights of the party it has paid (called the subrogor) against the third, primarily responsible party." Frost v. Porter Leasing Corp., Id. and Safety Ins. Co. v. Massachusetts Bay Transp. Authority, 58 Mass. App. Ct. 99, 103 (2003). A subrogee stands in the shoes of the subrogor in whose name the action is brought Liberty Mut. Ins. Co. v. Nat'l Consol. Warehouses, Inc., 34 Mass. App. Ct. 293, 297(1993) citing Harvard Trust Co. v. Racheotes, 337 Mass. 73, 75 (1958).

Subrogation is the substitution of one person in place of another, whether as a creditor, or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. Unibank for Savings v. 999 Private Jet, LLC, 410 F. Supp. 3d 261, 265–266 (D. Mass. 2019). Equitable subrogation, by virtue of its payment of another's obligation, steps into the shoes of the party who was owed the obligation for purpose of getting recompense for its payment. East Boston Sav. Bank v. Ogan, 428 Mass. 327, 330 (1998).

When an insurer pays a loss or a claim on behalf of an insured, the insurer is subrogated to the rights of the insured. Buhl v. Viera, 328 Mass.

201, 202–204 (1952). It is not essential that the insurance policy or bond expressly provide for subrogation because subrogation rests upon the principles of natural justice and equity. Massachusetts Hospital Life Ins. Co. v. Shulman, 299 Mass. 312, 316 (1938).

"When an insurer pays an insured's claim under its Contract, the insurer succeeds to any right of action the insured may have against the parties responsible for the loss. Stevens v. Stewart–Warner Speedometer Corp., 223 Mass. 44, 46 (1916) and New England Gas & Elec. Ass'n v. Ocean Acc. & Guar. Corp., 330 Mass. 640, 659 (1953). If an insurer has paid the insured for the entire loss, it may in its own discretion bring an action, either in its own name or as subrogee, on behalf of the insured against a third party. Travelers Ins. Co. v. Graye, Id.; and Liberty Mut Ins. Co. v. Nat'l Consol. Warehouses, Inc., 34 Mass. App. Ct. 293, 296 (1993).

Where subrogation occurs, "whether by agreement or by operation of law, [the insurer] succeeds to any right of action that the insured may have against a third person whose negligence or wrongdoing caused the loss and may recover the loss from that person on a *pro tanto* (to the extent of its payment) basis." Apthorp v. OneBeacon Ins. Group, LLC, 78 Mass. App. Ct. 115, 119 (2010).

PLAINTIFF LACKED LEGAL STANDING AND SUBJECT MATTER JURISDICTION TO APPEAL THE BOND DISBURSEMENT.

Standing is an essential element of subject matter jurisdiction and, must be satisfied to give power to the Court to resolve the case, and without it the Court has an obligation to dismiss as it lacks authority over

the case. Pishev v. City of Somerville, 95 Mass. App. Ct. 678, 683 (2019) Subject matter jurisdiction like standing is a nonwaivable issue which can be raised at any time even for the first time on appeals. Abate v. Fremont Inv. & Loan, 470 Mass. 821, 828 (2015). Based on subrogation rights, plaintiff had no legal standing and the Appeals Court lacked subject matter jurisdiction as the surety was the proper party.

SINCE THE SURETY PAID THE BOND, THE APPEAL WAS MOOT.

Since the surety that issued the bond had already made a disbursement of the funds under the surety bond on August 19, 2022 "It is a "general rule that courts decide only actual controversies ... and normally do not decide moot cases." Boston Herald, Inc. v. Superior Court Dep't of the Trial Court, 421 Mass. 502, 504 (1995).

INSTEAD OF APPLYING THE APPLICABLE ENABLING ACT, THE APPEALS COURT ERRONEOUSLY MISAPPLIED M.G.L.C. 231, § 117 AND THE AMERICAN RULE, WHICH WAS ERROR.

In this appeal, the Appeals Court erroneously held that the applicable statute for the establishment and payment of the bond was not the Enabling Act, but was M.G.L.C. 231, § 117 authorizing interlocutory order "such as surety bonds" "pending an appeal" citing the case of Deaskos v. Board of Appeal, 361 Mass. 55, 64-65 (1971) decided years prior to the 1993 Amendments to the Enabling Act Since the bond was issued pursuant to the Enabling Act and since the bond provided for recovery of "damages and costs" unlike M.G.L.C. 231, § 117, the Enabling

Act was the applicable statute. The 1993 amendments to Enabling Act § 11stated:

> The court may in its discretion require the person or persons ... appealing to file a bond with sufficient surety, for such a sum as shall be fixed by the court, **to indemnify and save harmless the person or persons in whose favor the decision was rendered from damages and costs** which he or they may sustain in case the decision of [the] board [of appeal] is affirmed.(emphasis added).

This provision allowed the amount of the bond to be based on two factors— "damages and costs" in posting and calculating the amount of the bond. Cambridge Street Realty, LLC v. Stewart, 481 Mass. 121,136-138 (2018). M.G.L.C. 231, § 117 makes no mention of "damages and costs" and was the wrong statute applied by the Appeals Court.

The phrases "to indemnify and save harmless" "from damages and costs" can only be construed to mean indemnification for either or both damages and costs. The S.J.C. defined damages as "the money payable by a tortfeasor who is liable for injuries caused by his tortious act." Meyers v. Bay State Health Care, 414 Mass. 727, 729 (1993).

The proper application of the term "damages" in § 11 of the Enabling Act in addition to the word "costs" means that if a zoning appeal is held to be tortious in nature then damages are recoverable. That is to be construed together with the underlying concept for the issuance of a surety bond including the strength of the plaintiff's case and the potential harm to the defendant if a bond is not furnished and in particular the bond's purpose, which is to discourage "frivolous and vexatious" appeals without prohibiting meritorious ones. Feldman v. Bd. of Appeal of Bos., 29

Mass. App. Ct. 296 (1990).). This is also to be construed even broader and more inclusive with the wording of § 11 as to indemnifying and save and hold harmless the defendant of damages, which is much broader in scope and more inclusive in nature without any words of limitation.

Thus, damages mean any and **all** damages without limitation. See Feldman v. Bd. of Appeal of Bos., Id. at 298:

> A bond provision designed to discourage frivolous and vexatious appeals from the grant of zoning relief and to indemnify persons who have received zoning relief against **all damages and losses flowing from such appeals...relating to Boston zoning.**

As to whether a Boston zoning appeal is "frivolous and vexatious" the word "frivolous" was defined in Marabello v. Boston Bark Corp., 463 Mass. 394, 400 (2012) as "An appeal is frivolous, so as to risk potential imposition of a sanction, where there can be no reasonable expectation of a reversal under well-settled law.... "

Vexatious under State Realty Co. of Boston v. MacNeil, 341 Mass. 123, 124 (1960) means 'without legal grounds. These factors included the strength of the plaintiff's case, the extent of the plaintiff's resources, and the potential harm to the defendant if a bond is not furnished. The words "indemnify and save harmless" from damages and costs are to be given their plain and ordinary meaning requiring plaintiff to indemnify and save harmless defendant from all "damages" coupled with no limitation on "damages."

THE STATEMENT IN THE OPINION THAT THE TRIAL COURT FAILED TO CONDUCT THE PROPER BOND HEARING WAS ERRONEOUS;

AND IF ERRONEOUS SHOULD HAVE BEEN REMANDED FOR FURTHER HEARINGS.

The Appeals Court stated that the Judge failed to conduct the proper bond hearing and "limited her consideration in deciding the amount of damages and losses flowing from the appeal." That was incorrect, as the Judge in allowing the motion stated the "reasons...on the record" including those set forth in the motion that the plaintiff failed to establish standing, failed to set forth a particularized injury, and "failed nevertheless" with the grant by the Board being "wholly justified" notwithstanding "The plaintiff's wild accusations" for a pro se plaintiff "who is an habitual appealer of zoning decisions who sought to unduly delay the within project without any legal basis." If the findings were insufficient, the Court should have remanded it to the Superior Court for further findings.

PLAINTIFF'S APPEAL IN THE SUPERIOR COURT WAS FRIVOLOUS, VEXATIOUS, AND MERITLESS.

The Trial Judge noted that "Porter is a habitual appealer of zoning decisions." Plaintiff was involved in about ten zoning appeals in Boston, and as a habitual appealer of zoning appeals was familiar with the requisites for showing legal standing for a zoning appeal. Not only was the entire appeal of the plaintiff frivolous and vexatious and lacking in merit but t it was devoid of settled zoning law such that it may be reasonably deemed to have been brought in bad faith. Marengi v. 6 Forest Rd. LLC, 491 Mass. 19, 31 (2022).

Defendant,
By its attorneys,

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February 2, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Jose C. Centeio hereby certify that the foregoing motion complies with the rules of court that pertain to the filing of briefs, motions including, but not limited to:

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and M.R.A.P. 27 (b) as to pages and words

Mass. R. A. P. 21 (redaction).

I further certify that the foregoing motion complies with the applicable length limitation in Mass. R. A. P. 20 and M.R.A.P. 27 (b) and because it is produced in the proportional font Arial at size 12, and contains 1980, total non-excluded words as counted using the word count feature of Microsoft Word.

Dated: January 31, 2024

/s/ Jose C. Centeio
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CERTIFICATE OF SERVICE

I, Jose Couto Centeio, Esquire, Attorney for the Defendant Fung & Hsu Realty Associates, LLC do hereby certify that a copy of the Further Appellate Review was served on all parties by email and mailing same, first-class mail, postage prepaid to the following:

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Signed under the pains and penalties of perjury this 2nd day of February 2024.

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Only the Westlaw citation is currently available.
Appeals Court of Massachusetts,
Suffolk

Eric PORTER

v

BOARD OF APPEAL OF BOSTON & another [1]

No 22-P-974

Argued September 11, 2023

Decided January 18, 2024

Zoning, Appeal, Board of appeals decision, Person aggrieved, Variance, Bond Surety Practice, Civil, Appeal, Bond, Zoning appeal, Standing, Attorney's fees

CIVIL ACTION commenced in the Superior Court Department on August 17, 2017

Following review by this court, 99 Mass App Ct 1123 (2021), a motion for an order to pay fees from a surety bond was heard by Maureen Mulligan, J

Attorneys and Law Firms

Eric Porter, pro se

Jose C Centeio, Boston, for Fung & Hsu Realty Associates, LLC

Present Milkey, Blake, & Sacks, JJ

Opinion

BLAKE, J

***1 Eric Porter** filed a complaint in the Superior Court challenging a decision of the Board of Appeal of Boston (board) that granted variances to the defendant Fung & Hsu Realty Associates, LLC (Fung & Hsu) The variances permitted Fung & Hsu to construct an addition on a residential building in the Allston section of Boston After a trial in the Superior Court, the judge (trial judge) concluded that **Porter** lacked standing and dismissed the complaint with prejudice After **Porter** filed a notice of appeal (first appeal), Fung & Hsu filed a motion to compel **Porter** to post a surety bond as a condition thereof The trial judge allowed the motion and issued an order requiring **Porter** to post a surety bond in the amount of $25,000 (bond order)

Porter applied for a bond through United Casualty and Surety Insurance Company (bond company), thereafter, he posted the bond [2] and prosecuted the first appeal In an unpublished memorandum and order issued pursuant to our Rule 23 0, a panel of this court affirmed the judgment See **Porter** v Board of Appeal of Boston, 99 Mass App Ct 1123, 2021 WL 1782927 (2021) [3] In a footnote rejecting **Porter's** challenge to the bond order, the panel noted that "we see no abuse of discretion in the [trial] judge's allowance of the defendant's request for an appeal bond in the amount of $25,000 " Id However, the panel expressly declined to award the appellate attorney's fees and costs that Fung & Hsu had requested on the ground that **Porter's** appeal was frivolous See id

After the rescript issued, Fung & Hsu moved for an "order to pay Fung & Hsu from the surety bond" (motion) Fung & Hsu argued that because a panel of this court upheld the bond order, and Fung & Hsu successfully defended the first appeal, it was entitled to have the $25,000 from the bond disbursed to it A different Superior Court judge (motion judge) allowed the motion In her decision and order (disbursement order), the motion judge limited her role to "decid[ing] the amount of damages and losses flowing from the appeal" (quotation omitted) She then authorized the disbursement of the bond in the amount of $23,979 99, an amount representing the attorney's fees and costs that Fung & Hsu incurred in successfully defending the first appeal [4] **Porter** timely appealed that order For the reasons that follow, we vacate the disbursement order

Discussion In addition to challenging the disbursement order, **Porter** appears to be claiming that the trial judge did not have the authority to enter the bond order [5] Because **Porter** did not raise the issue whether the trial judge had the authority to enter the bond order in his opposition to the motion to disburse the bond, that claim is waived See Imbrie v Imbrie, 102 Mass App Ct 557, 575-576, 209 N E 3d 573 (2023) Moreover, the panel in the first appeal already concluded that issuance of the bond order was not an abuse of the trial judge's discretion See **Porter**, 99 Mass App Ct at 1123 n 3 Nonetheless, some discussion of the bond order is necessary as a framework to our analysis of the disbursement order

***2** 1 Statutory authority for the bond order In its motion, Fung & Hsu cited two statutes in support of its requested

relief The first is the Boston zoning enabling act, St 1956, c 665, § 11, as amended by St 1993, c 461, § 5 (§ 11) Section 11 provides, in part, that

> "[a]ny person aggrieved by a decision of [the board] may appeal to the superior court ... The court may in its discretion require the person or persons so appealing to file a bond with sufficient surety, for such a sum as shall be fixed by the court, to indemnify and save harmless the person or persons in whose favor the decision was rendered from damages and costs which they may sustain in case the decision of said board is affirmed" (emphasis added)

Notably, § 11 further provides that "costs shall not be allowed against the party appealing from the decision of the board unless it shall appear to the court that said party acted in bad faith or with malice in appealing to the court" Because § 11 applies only to an appeal of the board's decision to the Superior Court, it does not by its terms govern here See Schlager v Board of Appeal of Boston, 9 Mass App Ct 72, 75, 399 N E 2d 30 (1980)

We therefore turn to the alternative source of authority cited in Fung & Hsu's motion That authority, now appearing at G L c 231, § 117 (§ 117),[6] authorizes a judge to enter interlocutory orders, such as orders requiring surety bonds, to protect parties' rights pending appeal [7] See Broderick v Board of Appeal of Boston, 361 Mass 472, 475-476, 280 N E 2d 670 (1972) (citing predecessor of § 117) We construe the bond order entered here to be authorized pursuant to § 117 and conclude that the factors outlined in Damaskos v Board of Appeal of Boston, 359 Mass 55, 64-65, 267 N E 2d 897 (1971), governing the setting of a bond under § 11, should be considered in setting a bond under § 117 These include consideration of the purpose of a bond, which is "(a) to discourage frivolous and vexatious appeals from the decisions of the Boston board of appeal, but not (b) unreasonably to prohibit, directly or indirectly (by requiring too large a bond), meritorious appeals from allegedly illegal variances" (quotation and citation omitted) Damaskos, supra at 64, 267 N E 2d 897 [8] "Without a careful balancing of interests [someone] with a meritorious appeal might be barred from bringing a claim if [that person] is without resources to pay for, and provide collateral for, a substantial bond." Feldman v Board of Appeal of Boston, 29 Mass App Ct 296, 298, 559 N E 2d 1263 (1990), citing Damaskos, supra at 58, 267 N E 2d 897

*3 2 The bond The trial judge ruled that **Porter** lacked standing to challenge the board's grant of a variance, and that even if he had standing, his challenge to the board's decision on the merits would fail Some of the language that the trial judge used suggested that she did not see the case as a close call For example, she characterized some of **Porter's** "accusations" as "wild," and found the board's decision to be "clear and well-reasoned" Without question, the trial judge had the discretion to order **Porter** to file a surety bond "in an amount which is sufficient to protect the interests of [Fung & Hsu] and is otherwise appropriate." Schlager, 9 Mass App Ct at 77, 399 N E 2d 30

In requesting a $25,000 bond, Fung & Hsu did not explain why a bond in that amount was justified Rather, it stated only that this was the maximum bond amount permitted by § 11 for a project of this size In turn, the trial judge offered no explanation of why she was entering the bond order or the reasons for the amount However, it seems evident that she believed that it was appropriate for Fung & Hsu to be provided security for the potential compensable damages and costs it faced in defending what the trial judge thought was a weak appeal Notably, however, the trial judge did not find in this case that **Porter** was a vexatious litigant or that his claims were frivolous Such findings may bear on, among other things, the amount of the bond See Damaskos, 359 Mass at 64, 267 N E 2d 897

The motion judge recognized that in requiring a litigant to post a bond, a judge must perform a balancing test of "inhibiting vexatious and frivolous appeals with not unreasonably restraining meritorious appeals" She asserted that "[this] analysis was already performed by the [trial] judge who decided to issue the bond and determined its amount" On this record, it is not at all clear that the motion judge's observation was correct For example, there is nothing in the record to suggest that in ordering that the bond be posted, the trial judge considered **Porter's** ability to post the bond, whether the amount of the bond was necessary to protect Fung & Hsu's interests, and the potential that the requirement to post the bond would chill a nonfrivolous appeal See Schlager, 9 Mass App Ct at 76-77, 399 N E 2d 30.

Having concluded that the trial judge conducted the analysis set forth in Damaskos, the motion judge limited her consideration "to decid[ing] the amount of 'damages and losses flowing from the appeal' " In other words, the motion judge accepted Fung & Hsu's position that it was automatically entitled to disbursement of the bond if it

prevailed in the first appeal, and that the only question before her was the amount to be paid [9] This was error

The purpose of an appeal bond is to provide security to the appellee for compensable damages and costs should it prevail in the appeal See N-Tek Constr Servs, Inc v Hartford Fire Ins Co, 89 Mass App Ct 186, 191, 47 N E 3d 435 (2016) This begs the question what damages and costs are compensable in that event Although Fung & Hsu in part sought reimbursement for cost overruns it claimed had resulted from the first appeal, the motion judge rejected that claim, and Fung & Hsu has not argued that the judge erred in doing so Instead, the motion judge appears to have disbursed money from the bond based on the attorney's fees incurred by Fund & Hsu in defending the first appeal But whether a winning litigant is entitled to attorney's fees is governed by the so-called "American Rule" John T Callahan & Sons, Inc v Worcester Ins Co, 453 Mass 447, 449, 902 N E 2d 923 (2009) Under this rule, in the absence of a statute, court rule, or case law, successful litigants are responsible for their own attorney's fees and expenses See Preferred Mut Ins Co v Gamache, 426 Mass 93, 95, 686 N E 2d 989 (1997) The bond order served to provide Fung & Hsu a means to secure payment of its appellate attorney's fees, but it did not alter the framework for determining whether it was entitled to such fees

***4** Importantly, determining "whether an appeal is frivolous is left to the sound discretion of the appellate court" (citation omitted) Dacey v Burgess, 491 Mass 311, 319, 202 N E 3d 1172 (2023) Thus, whether Fung & Hsu was entitled to its attorney's fees in defending the earlier appeal was not an issue for the motion judge to consider In fact, Fung & Hsu asked this court for such fees in the first appeal, and a panel of this court declined that request That should have ended the matter to the extent that Fung & Hsu's request for disbursement of the bond was based on such fees. Given that the motion judge rejected Fung & Hsu's only other basis for disbursing the bond (the claimed cost overruns), the disbursement order cannot stand

Conclusion The order allowing the motion for an order to pay Fung & Hsu from the surety bond is vacated A new order shall enter requiring Fung & Hsu to pay to **Porter** the sum of $23,979 99 within thirty days Fung & Hsu's request for attorney's fees and costs incurred in the current appeal is denied

So ordered.

All Citations

--- N E 3d ----, 2024 WL 187241

Footnotes

1 Fung & Hsu Realty Associates, LLC

2 The condition of the bond was "that if **[Porter]** shall prosecute the case with effect and shall indemnify and save harmless Fung and Hsu .. in whose favor the [board] decision was rendered, from damages and costs which he or they may sustain in case the decision of said board is affirmed then this obligation to be void, otherwise to remain in full force, power and virtue "

3 **Porter's** request for further appellate review was denied See **Porter** v Board of Appeal of Boston, 488 Mass 1102, 172 N E 3d 727 (2021)

4 **Porter's** motion to stay the disbursement order was denied by a single justice of this court

5 Fung & Hsu contend that **Porter** lacked standing to appeal the disbursement order because the bond company paid the claim We disagree First, it appears uncontested that the bond company paid the funds to Fung & Hsu, and that **Porter** reimbursed the bond company. In addition, "[t]he scope of a surety's liability is determined by the intent of the parties " Wood v Tuohy, 67 Mass App Ct 335, 341, 854 N E 2d 96 (2006) Here, the bond agreement required **Porter** to indemnify the bond company, and thus **Porter** can demonstrate

the potential for injury sufficient to establish standing See Sullivan v Chief Justice for Admin & Mgt of the Trial Court, 448 Mass 15, 21, 858 N E 2d 699 (2006) Cf Mass. R Civ P 65 1, as appearing in 483 Mass 1401 (2019)

6 Section 117 provides that "[a]fter an appeal has been taken from a final judgment of the superior court until such order has been modified or annulled, the justice of the superior court by whom the final judgment appealed from was made, may make any proper interlocutory orders, pending such appeal "

7 The decision in Broderick cited G L c 214, § 22, but that provision was replaced by G L c 231, § 117, as appearing in St 1973, c 1114, § 202 See Schlager, 9 Mass App Ct at 76 n 10, 399 N E 2d 30 Our decision does not turn on this change.

8 We observe that there is a pending appeal about whether the Damaskos standard has been changed by Marengi v 6 Forest Rd LLC, 491 Mass 19, 198 N E 3d 1215 (2022) See Shoucair v Pure Oasis, LLC, SJC-13526 However, that issue is not before us in this appeal

9 The motion judge observed in a footnote that there were three other zoning cases in which **Porter** was the plaintiff These facts alone hardly established that **Porter's** claim here was frivolous or that he is a vexatious litigant Indeed, in one of the referenced cases, **Porter** was successful in obtaining reversal of the trial court judge's decision that he lacked standing. See **Porter** v Board of Appeal of Boston, 99 Mass App Ct 240, 164 N E 3d 911 (2021) And that leaves aside that determining standing in a zoning appeal can be quite complex The motion judge simply labeled **Porter** a "habitual appealer of zoning decisions" without a concomitant analysis See Montgomery v Selectmen of Nantucket, 95 Mass App Ct. 65, 71-72, 120 N E 3d 1246 (2019)

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