COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

APPEALS COURT NO. 2021-P-0791

JONATHAN NYBERG and SARA DOLAN,

Plaintiffs/Appellants,

v.

R. BRUCE WHELTLE and SUSAN WHELTLE,

Defendants/Appellees.

JONATHAN NYBERG AND SARA DOLAN'S APPLICATION FOR FURTHER APPELLATE REVIEW

In accordance with Rule 27.1 of the Massachusetts Rules of Appellate Procedure, the Appellants below, Jonathan Nyberg and Sara Dolan (the "Nybergs"), submit this Application to the Massachusetts Supreme Judicial ("SJC") for Further Appellate Review ("FAR") by the SJC. They do so within 21 days of the issuance of the Appeals Court's opinion, on September 13, 2022.

1. Request for Further Appellate Review

The Appellants, Jonathan Nyberg and Sara Dolan, hereby respectfully request that the SJC take this appeal for further appellate review. The Nybergs submit that further review is required because this case implicates both the interests of justice and the general public interest. Based on the multiple "difficulties" and "concerns" identified by the Appeals Court, together with this Court's recent statement in footnote 5 of Commonwealth v. Exxon Mobil Corp., 489 Mass. 724, 728 (2022), this Court should allow this request and review these issues.[1]

2. Statement of Prior Proceedings

The Nybergs brought this suit against the Defendants/Appellees, R. Bruce Wheltle and Susan Wheltle (hereafter, the "Wheltles") on January 14, 2021 in Middlesex Superior Court. The Nybergs' Complaint contained two tort counts: (i) abuse of process, and (ii) intentional infliction of emotional distress.

The Nybergs claims arose out of the Wheltles' previous lawsuit against the Nybergs, filed in the Land Court on October 26, 2017. That earlier case involved the Wheltles' claims seeking adverse possession of a small portion of the Nybergs' then-empty lot, which lot directly abuts the Wheltles' land in Arlington,

[1] Notably, the Appeals Court's opinion generated front-page coverage in *Massachusetts Lawyers Weekly*, in the September 26, 2022 print edition.

Massachusetts. Crucially, if the Wheltles' adverse possession claim had been successful, that would have rendered the Nybergs' lot unbuildable. After a three-day trial before Judge Speicher, he found and ruled that the Wheltles had **not** proven their adverse possession claim to an extent to prevent the Nybergs from being able to develop and build a house on their lot. The Wheltles only succeeded in proving adverse possession for approximately 10 square feet of land, located directly underneath a cinder block wall that partially encroached over the lot line on to the Nybergs' lot. The loss of this 10 square feet, however, was of absolutely no consequence to the Nybergs — it did not affect the value of their property, it did not physically alter their use of property, and it did not impact their ability to develop the property. Judgment entered on August 5, 2020, and neither party appealed.

Five months later, the Nybergs filed their tort claims in Superior Court and the Wheltles were timely served with the Nybergs' Complaint. The Wheltles filed an Answer and a Special Motion to Dismiss (pursuant to the anti-SLAPP statute, Mass. Gen. L. ch. 231, § 59H). The Superior Court conducted a hearing on the SLAPP motion, via Zoom, on June 9, 2021. On July 27, 2021 the trial court (Barry-Smith, J.) issued its Memorandum of Decision and Order on Defendants' Special Motion to Dismiss Pursuant to Anti-SLAPP Statute. See Addendum ("Add."), *infra* at 26–40.

The trial court applied the augmented framework laid out in Blanchard v. Steward Carney Hospital, Inc., 477 Mass. 141 (2017) ("Blanchard I"), and the factors enumerated in Blanchard v. Steward Carney Hospital, Inc., 483 Mass. 200 (2019) ("Blanchard II"). The court found that the Wheltles satisfied their threshold burden, which the Nybergs had not really challenged. Add. 31. Next, the trial court found that the Nybergs had not cleared the "very high bar" of showing that the Wheltles's Land Court action constituted "sham" petitioning. Id. at 31–33.

As to the second path under the augmented Blanchard framework, the trial court found that the Nybergs had indeed asserted a colorable abuse of process claim. Id. at 33–36.[2] The trial court concluded that the Nybergs had "marshalled sufficient evidence of ulterior purpose to meet their burden at this point in the second path." Id. That evidence included: (i) that the Wheltles had made previous attempts to acquire some or all of the neighboring lot at issue; (ii) that their adverse possession claim sought "only small portions of Lot A upon which existing walls stood," and that if they had succeeded "they would have gained title to an insignificant amount of square footage that was largely useless, other than

[2] In footnote 5, the trial court dismissed the Nybergs' claim for intentional infliction of emotional distress, finding that they had not addressed the colorability of this claim, and that if they had done so it would have been "futile" anyway. Add 33.

rendering Lot A unbuildable under zoning bylaws"; (iii) that the Wheltles' attorney had stated that the Wheltles' adverse possession claim was aimed at blocking the Nybergs' project; and (iv) that the Nybergs had incurred damages on account of the Wheltles' Land Court action. Add. 34–35.

Continuing to the second element of the second path — whether the Nybergs' claim was a disfavored, "retaliatory" SLAPP suit — the trial court concluded that the Nybergs had not met their burden, which burden is stated in the negative. That is, they had **not** demonstrated that their abuse of process claim was **not** brought primarily to "chill or punish" the Wheltles' legitimate petitioning activities. Id. at 36–39. As to the Nybergs' argument that there could not have been any intent to "chill" the Wheltles' petitioning because the Land Court case was already over and resolved by the time they filed their abuse of process tort claim, the trial court latched onto to the word "punish," and found the Nybergs' argument "unavailing." Id. at 36–37.

Turning to the Blanchard II factors, the trial court found that the first factor (whether the case is a "classic" or "typical" SLAPP suit) "only mildly favors a determination that the present matter is a retaliatory SLAPP suit." Id. at 37. The trial court found the second factor (on the timing of the Nybergs' suit) supported the claim that the Nybergs' case was retaliatory. Id. The third factor (on the timing of the Wheltles' SLAPP motion) also weighed in favor of this claim being

retaliatory, "albeit less strongly than other factors." Add. 38. On the fourth factor, the trial court noted that the abuse of process claim "is not weak," but found that "overall" this factor supports a conclusion of retaliation. Id. As to the fifth and sixth factors, the trial court actually found that they did not even apply — relying on the same critical fact emphasized by the Nybergs — that the Land Court case was terminated. Id. at 39. The trial court did ultimately find the sixth factor to weigh "minimally in favor of the present matter being retaliatory," based on the Wheltles' claim that their potential future lawful petitioning activities "may be hampered."[3] Id.

Having referenced the appropriate factors and analysis, the judge then quoted a sentence from an unpublished Appeals Court opinion, stating "the Nybergs have *failed to 'articulate any goal other than to obtain damages* stemming from the Wheltles legitimate exercise of their petition rights.'" Id. (quoting W.R.S. v. R.S., 97 Mass. App. Ct. 1104, 2020 WL 1061808 *3) (Rule 1:28 decision) (emphasis added). But, this statement seems to directly contradict the core holding of Blanchard I — "the nonmoving party must establish … that its

[3] With regard to the actual development of the Nybergs' lot, the dimensions have now been confirmed, the lot is in full compliance with zoning requirements, and the building permit is allowed as a matter of right. As to the Conservation Commission, it has already issued the final Order of Conditions. Thus, there is simply no additional petitioning related to the development of the lot that the Nybergs could pursue in the future.

primary motivating goal in bringing its claim … was 'not to interfere with and burden defendants' … petition rights, *but to seek damages for the personal harm* to it from the defendants' alleged … legally transgressive acts.'" 477 Mass. at 160, quoting Sandholm v. Kuecker, 2012 IL 111443, ¶ 57 (emphasis added).

The trial judge then concluded: "I am *not* fairly assured that the Nybergs' suit is not a SLAPP suit brought to punish the Wheltles for the Land Court Action. Instead, I *am* fairly assured that the Nybergs' suit is retaliatory, in response to the Wheltles' partially successful Land Court Action." Add. 39.

Thus, the Court allowed the Defendants' special motion to dismiss, dismissed both of the Nybergs' tort claims, and directed the Defendants' to submit their request for attorney's fees and costs pursuant to Superior Court Rule 9A. The Wheltles filed their request for attorney's fees (seeking $30,541.50 in fees), which the Nybergs opposed, and the Court ruled on the request, without a hearing, on August 26, 2021. The Court allowed the Wheltles' request for attorney's fees in the amount of $25,000, plus $240.30 in costs.

The Nybergs timely appealed. Oral argument was held at the Appeals Court on March 17, 2022. The Appeals Court issued its opinion on September 13, 2022. See Add. 41–51 (101 Mass. App. Ct. 639, 2022 WL 4137200). The Appeals Court affirmed the trial court's decision, stressing that it was bound by the applicable standard of review — whether the trial judge had abused his discretion or

committed an error of law. Add. 41, 49–50. Notably, the Appeals Court identified several disputed factual issues, listed multiple "difficulties" and "concerns" with the existing state of the post-Blanchard I framework, and highlighted this Court's very recent statement that "reconsideration and simplification" of the SLAPP case law might be "required." Add. 50–51 (citing Commonwealth v. Exxon Mobil Corp., 489 Mass. 724, 728 n.5 (2022)). After listing and discussing these "difficulties" and "concerns," the Appeals Court concluded by emphasizing that "it is for the Supreme Judicial Court or the Legislature to address and resolve these concerns, should they so choose." Id. at 51.

Considering the end result (and their liability for the Wheltles' attorney fees), together with the "difficulties" and "concerns" expressed by the Appeals Court and this Court, the Nybergs are compelled to file this Application for Further Appellate Review, and urge this Court to make the choice to review this case.

In accordance with Rule 27.1 (b)(2) the Nybergs state that they have not sought reconsideration or modification in the Appeals Court.

3. Statement of Facts Relevant to the Appeal

In 2017 the Wheltles filed suit against the Nybergs in Land Court. The Wheltles claimed adverse possession of certain portions of the Nybergs' land. Specifically, they claimed to have acquired by adverse possession about six inches of land along the frontage of the lots (because of a brick wall that allegedly

extended onto the Nybergs' land). They also claimed approximately 70 square feet of land along the boundary line between the two lots, which land was located directly beneath a series of old boulder walls and a newer cinder block wall. If successful, the loss of land and frontage would have deprived the Nybergs of the dimensional requirements for being able to build on their lot.

Trial was held over three days in January 2020; on the big question, the Land Court found in favor of the Nybergs. The judge noted that the purpose of the Wheltles' lawsuit was to prevent the Nybergs from being able to build on the Nybergs' lot, describing the case as **"a pitched legal battle over literally every square inch of the disputed property, with the prize being the buildability or non-buildability of the Nyberg"** property. The Wheltles' adverse possession claims were largely unsuccessful, and did not render the Nybergs' lot unbuildable. In particular, with regard to the brick wall along the frontage of the lots, the Land Court judge found that the Wheltles did not even have standing to bring this claim, as the brick wall had been constructed on the public way. The judge further found that any encroachment was *de minimis* (and thus could not be notorious). With regard to the walls running along the boundary line, the judge found and held that the older boulder walls had been built while the land was in common ownership, and thus the Wheltles failed to meet their burden to prove the element of adversity. The judge found that the Wheltles had proved that the more recent cinder block

wall encroached onto the Nybergs' lot, in the amount of 9.9 square feet. The loss of only about 10 square feet, however, was not enough to make the Nybergs' lot unbuildable. Thus, in the context of the Land Court case and what was really at stake, this result was wholly insignificant and inconsequential to the Nybergs. On the relevant adverse possession claims, it was the Nybergs who were successful, and as a result they could proceed with developing their property. The Wheltles did not appeal from this Decision or the resulting Judgment — thus the Wheltles' "petitioning" that is at issue here was over and done with.

As a direct result of the Wheltles' lawsuit, the Nybergs suffered assorted financial damages, including: attorneys' fees; expert fees; witness fees and costs; litigation costs; plus the carrying costs, interests and taxes for their property (incurred while the case was pending). These damages totaled more than $450,000, not including the emotional distress and disruption the Nybergs suffered from on account of the Wheltles' unsuccessful lawsuit.

Despite the trial court's characterization of the Nybergs as "experienced and successful real estate professionals," the Nybergs' affidavits confirm that the Nybergs, who are brother and sister, are a small, local real estate company, with no office and no employees other than themselves. At that time, they owned eight rental properties, and would usually buy, renovate and then re-sell 1-2 properties a year; though the COVID-19 pandemic had a significant impact on their business

(fewer sales and less rent collected from tenants). (It is worth noting here that the assorted factual issues surrounding the Nybergs and the Wheltles, and specifically whether those facts indicate a classic or typical SLAPP case, were hotly disputed, as the Appeals Court recognized.)

Following the end of the Land Court case initiated by the Wheltles, the Nybergs brought suit against the Wheltles in January 2021, claiming that the Wheltles' Land Court lawsuit against the Nybergs constituted the torts of abuse of process and intentional infliction of emotional distress. That is, the Nybergs alleged that the Wheltles' lawsuit in Land Court was brought for an improper and ulterior purpose (i.e., to prevent the Nybergs from building on their land, and not to acquire essentially unusable land underneath one or more walls along the boundary line), and that the Nybergs were damaged as a result of that suit.

4. <u>Statement of Points on which FAR is being sought.</u>

In the interest of justice, the Nybergs seek further review of the underlying trial court decision— that is, whether the trial court abused its discretion or committed an error of law. The Nybergs maintain that the trial court's decision was wrong, as either an abuse of discretion or an error of law, and that the Appeals Court's review was overly deferential where it overlooked or ignored one of the Nybergs' principal arguments.

The Nybergs submit that in the circumstances here, under the Blanchard framework, the trial Court was bound to conclude that the Nybergs had met their burden and demonstrated that their abuse of process claim was **not** a disfavored SLAPP suit. The Appeals Court expressed some level of doubt about the trial court's decision, noting that "a different judge may have reached a different result." Add. 50. If this Court agrees with the Nybergs, it can reverse the trial court (and order that the Wheltles' SLAPP motion be denied), and need go no further.

If necessary, the Nybergs also seek further review of the existing augmented framework and factors spelled out in Blanchard I and Blanchard II, specifically the second element of the second path of the second stage of the analysis. As it did in Blanchard I, this Court can spell out a new standard and then apply it to the facts of this case.

As to the need for a new standard, the Appeals Court described various "difficulties" and "concerns" with the Blanchard framework, including the "inherent difficulty and, in some cases, prematurity in requiring a judge to make credibility determinations and discern a party's primary motivation predicated on affidavits, pleadings, and proffers, and not on a more complete evidentiary record scrutinized through cross-examination." Add. 49. There is also the "notable tension between the standard of review, which requires the judge, in his or her

discretion to be 'fairly assured' that the challenged claim is not a SLAPP suit before denying a special motion to dismiss" and the SJC's "apparent restraint on that discretion in its admonition to proceed with caution before allowing the special motion to dismiss." Add. 49. As to these broader issues and questions, they affect the public interest and thus warrant this Court's review.

And where this Court very recently noted its continuing concern with the scope and effect of the anti-SLAPP statute, and expressly indicated that "reconsideration and simplification" may be "required," the Nybergs submit that this case is an appropriate vehicle for doing so. Accordingly, this Court should address the concerns articulated by the Appeals Court, and modify, revise and/or simplify the augmented Blanchard framework. The Court can then apply that new framework to the evidentiary record here, or, remand the case back to the trial court for reconsideration of the Wheltles' motion under the new standard.

The Nybergs also seek further review of their argument that the result here amounts to a radical constriction of the common law tort of abuse of process. Despite having a "colorable" claim, the Nybergs have now been left without any remedy. Their own petitioning rights have been unfairly restricted and restrained, and they face the prospect of being liable for the Wheltles' attorney fees. This is a gross injustice that calls out for rectification.

5. Statement why FAR is appropriate.

Further appellate review is appropriate because of the unfair and unjust result as to the Nybergs, particularly where the appellate courts are aware of the continuing challenges in the operation of the Blanchard framework. Thus, above and beyond the interests of justice for the Nybergs, there are the multiple questions affecting the public interest that need answering in this complex legal area — for citizens, litigants, and their attorneys, particularly in the context of land use, zoning and real estate development.

A. The Nybergs' abuse of process claim is not a retaliatory SLAPP suit brought primarily to chill the Wheltles' petitioning activity.

The trial court's allowance of the Wheltles' SLAPP motion was the wrong result. Although the trial court proceeded through the sequential steps of the augmented framework and appeared to consider all of the Blanchard II factors, the Nybergs suggest that close scrutiny of the analysis demonstrates significant shortcomings.

First, the trial court minimized several of the Blanchard II factors. For the first factor, the trial court found it "only mildly favors a determination that the present matter is a retaliatory SLAPP suit." Add. 37. For the third factor, the court found that it supported a conclusion that the case is retaliatory, "albeit less strongly than other factors." Add. 38. And for the sixth factor, the court found it "weighs minimally in favor of the present matter being retaliatory." Add. 39.

Then, the trial court found that one factor did not even apply, despite its plain meaning. Specifically, the fifth factor asks whether "there is evidence that the petitioning activity *was chilled*," and whether "the moving party's petitioning activity *was or was not affected* by the nonmoving party's lawsuit." Blanchard II, 483 Mass. at 207, n.12 (emphases added). The Nybergs submit that rather than not apply at all, this factor clearly favors them (and indicates a claim that is not brought *primarily* to chill or burden petitioning). That is, where the Wheltles' Land Court petitioning was over and done with (and the appeal period had run), and then the Nybergs brought their abuse of process claim based on that (now terminated) Land Court petitioning, the Nybergs' abuse of process claim could not have been brought with the "primary motivation" to chill the Wheltles' petitioning activity. Neither the trial court nor the Appeals Court were persuaded by this temporal argument that the Nybergs have emphasized. Add. 36–37, 48. However, on this point, see note 5 from Harrison II, which appears to clearly distinguish between the abutters' abuse of process counterclaim involving *concurrent* litigation (which was a SLAPP suit) and an abuse of process claim like the developers' claim, involving "petitioning activities that *have concluded*." 477 Harrison Ave., LLC v. JACE Boston, LLC, 483 Mass. 514, 529 (2019) (emphasis added). As noted, the *abutters'* special motion to dismiss was denied initially, and again on remand. Id. at 518. Thus, it appears that this Court has indeed identified

this chronological factor as potentially decisive, which is wholly consistent with the language this Court used in describing the fifth factor.

The trial court also stated that the Nybergs' claims were "in response to the Wheltles' partially successful Land Court action." Add. 39. This was wrong, as there is no objective basis to link the Wheltles' partial but insignificant and inconsequential "success" in the Land Court to the motivation for the Nybergs' claims. And the trial court's acceptance of the Wheltles' claims that their potential future petitioning "may be hampered" was also wrong and an abuse of discretion. Id.

Furthermore, in its concluding paragraph the trial court quoted an unpublished Appeals Court case, W.R.S. v. R.S., stating that "the Nybergs have failed to 'articulate any goal other than to obtain damages stemming from the Wheltles legitimate exercise of their petition rights.'" Id. This seems to directly contradict the core holding of Blanchard I.[4] That is, if the trial court concluded that the Nybergs *only* goal is seeking damages, then it necessarily follows that the Blanchard test has been satisfied — they have proved that their claim is **not**

[4] "[T]he nonmoving party must establish … that its primary motivating goal in bringing its claim … was 'not to interfere with and burden defendants' … petition rights, *but to seek damages for the personal harm* to it from the defendants' alleged … legally transgressive acts.'" Blanchard I, 477 Mass. at 160 (emphasis added).

brought *primarily* to chill petitioning (it was brought primarily to recover damages).

The Nybergs maintain that this apparent confusion clearly undermines the confidence in the trial court's ultimate conclusion. Moreover, in its detailed opinion, the Appeals Court never discusses or grapples with this argument about the W.R.S. v. R.S. Rule 1:28 case (which the Nybergs emphasized in their briefing).[5] The Nybergs assert that the trial court's apparent confusion about a key aspect of the Blanchard I holding was both an abuse of its discretion and an error of law, requiring reversal. Thus, even under the existing framework, the trial court Decision was incorrect and should be reversed.

B. The SLAPP framework requires reconsideration and simplification.

Beyond the reasons listed above, further review is appropriate because of all the "difficulties" and "concerns" highlighted by the Appeals Court, which follow closely on this Court's May 2022 opinion and its acknowledgment that "reconsideration and simplification" of the SLAPP motion framework may be "required." Exxon Mobil Corp., 489 Mass. at 728 n.5. These "difficulties" and "concerns" include:

[5] Tellingly, in their appellate brief, the Wheltles never mentioned, cited or discussed the W.R.S. v. R.S. case, nor defended the trial court's reliance on it.

- The "notable tension" between this Court's direction to be "cautious" about dismissing a claim at the early stage of the litigation and the applicable standard (which places the burden of proof on the non-moving party and requires that the trial judge be "fairly assured" the burden has been met);
- That the SLAPP motion to dismiss standard does not allow the judge to view the evidence in the light most favorable to the non-moving party, which is the standard in similar situations (such as a motion to dismiss and a motion for summary judgment), Add. 50–51;
- That the "fair assurance" standard "seemingly reverses the usual rule in that doubts about the viability of a claim are typically resolved by allowing it to be developed through the next stage of the proceedings, not by dismissing it," Add. 51;
- Whether cases involving a party's "motivation" can be fairly resolved at an early stage of the litigation based on competing affidavits, disputed facts and a "holistic" consideration, without the benefit of cross-examination and the ability to resolve "critical credibility disputes";
- The level of "discretion" for appellate review of a SLAPP motion, and whether the L.L. v. Commonwealth standard should apply. Add. 46, 49 (footnotes 8, 14 and 15); and

- Whether the word "punish" should be stricken from the case law, where Blanchard I was so clearly focused on "chilling" petitioning. (The Nybergs count 14 uses of "chill" or "chilling" in Blanchard I, but zero uses of "punish.")

Accordingly, the Nybergs propose the following options as potential ways to reform and simplify the Blanchard framework. Space limitations of this Application prevent a full discussion. If accepted for further review, the parties (and potentially *amicus curiae*) can expand on the ways this Court could modify, recalibrate or simplify the Blanchard framework.

1. The trial court should view all or part of the evidence in favor of the non-moving party.

One way to level the playing field in the SLAPP context would be to allow the trial court to view the relevant evidence in favor of the non-moving party. As the Appeals Court noted, this is the usual analysis at early stages of litigation, such as a motion to dismiss.

2. An appellate court reviewing a trial court's decision on a SLAPP motion should review that decision de novo.

Another way to level the playing field would be to allow an appellate court to conduct a *de novo* review of the trial court's decision. This is what appellate courts regularly due when reviewing the allowance of a motion to dismiss or summary judgment motion.

3. *The framework for the second path of the second stage should be simplified*.

The Nybergs submit that part of the challenge for parties like them, and for a trial court in applying the Blanchard I framework, is that the second path is phrased in the negative and the burden is on the non-moving party to prove a negative. It would be simpler, and fairer, for this last part of the analysis to be stated in the positive and be on the moving party to prove. That is, once a non-moving party has established that they have a colorable claim, the trial court should review all the evidence and ask if he or she is fairly assured that the claim is a disfavored, retaliatory SLAPP suit that has a primary goal of burdening, chilling or interfering with specific petitioning activity? The Blanchard II factors would continue to be relevant to this question, and perhaps others can be added.

4. *The framework could be modified to resemble the test for determining standing in a zoning dispute*.

Considering that the original purpose of the SLAPP suit reflected concern about powerful land developers retaliating against regular citizens who opposed their projects, and that this case also arises out of a land use dispute, it would be fitting if the familiar legal analysis used to determine *standing* could be used and/or modified to apply in the SLAPP context.

In a chapter 40A zoning appeal, the plaintiff must be a "person aggrieved." Abutters to the land at issue enjoy a rebuttable presumption that they are aggrieved

persons. The defendant can rebut the presumption of standing, and if it does so the presumption recedes, and the standing issue is decided on the basis of all the evidence. See 81 Spooner Road, LLC v. Zoning Board of Appeals of Brookline, 461 Mass. 692, 701 (2012). The Nybergs submit that this framework could be adapted to the Blanchard framework to better reflect the main goal in Blanchard — to enable more non-SLAPP claims to avoid dismissal and survive for full adjudication.

C. The viability of the tort of abuse of process.

Finally, although the Appeals Court rejected the argument that the abuse of process tort has been abrogated or severely limited, Add. 50, the Nybergs submit that in these circumstances they do appear to be tort victims — with a "colorable" claim and substantial damages — who have been wholly denied their own right to petition for a redress of *their* grievances. Surely our judicial system should not tolerate when a harmed party is left without any remedy whatsoever. If this Court means to eliminate this type of 'pure' abuse of process claim, it should say so explicitly, so as to put all real estate developers and property owners on notice that their neighbors may well be wholly immune from abuse of process claims seeking to recover from losses caused by illegitimate and bad faith petitioning of those neighbors.

This Court is well aware of the inherent dueling back-and-forth of petitioning that happens in many of these cases, and also aware of potential problems if too much (retaliatory, chilling) petitioning is allowed or if too much (legitimate, non-retaliatory) petitioning is stifled. This Court's 2017 modification of the SLAPP statute analysis in Blanchard I, for the express purpose of allowing **more** claims to survive an anti-SLAPP motion, clearly indicates the direction where the pendulum was meant to swing. Yet, in practice the augmented framework requires additional finetuning and calibration to fulfill that goal.

While no test or standard will work perfectly and cover every conceivable situation, the Nybergs contend (and the Appeals Court seems to agree) that the current state of the Blanchard framework is not fair and further modification and/or "simplification" is needed. This case, and these facts, call out for this Court's involvement.

6. Conclusion

For all these reasons, the Nybergs request that this Honorable Court ALLOW this application for further appellate review.

Respectfully submitted,

JONATHAN NYBERG and
SARA DOLAN,

/s/ Robert E. McLaughlin, Sr.

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Dated: September 30, 2022

CERTIFICATE OF SERVICE

In accordance with Rules 13 and 27.1 of the Massachusetts Rules of Appellate Procedure, undersigned counsel hereby certifies that a copy of the within FAR Application was filed via e-filing on September 30, 2022, and that the following counsel who are registered with the e-filing service will be automatically served via email by the Court's e-filing system:

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RULE 16 (k) CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this Rule 27 Application complies with the rules of appellate procedure that pertain to the filing of Applications for Further Appellate Review, including Rules 16(k), 20(a), 21 and 27.1. Counsel further certifies that this Application complies with the length limitations of Rule 27.1(b)(5); specifically, the Application is produced in the proportionally spaced font of 14-point Times New Roman, and according to the Word Count function of Microsoft Word, the applicable section contains 1,985 words.

/s/ John G. Hofmann
John G. Hofmann

F.A.R. ADDENDUM

10

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2181CV000145

JONATHAN NYBERG & another[1]

vs.

R. BRUCE WHELTLE & another[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO ANTI-SLAPP STATUTE

The plaintiffs, Jonathan Nyberg and Sara Dolan (collectively, "Nybergs"), filed this action against the defendants, R. Bruce Wheltle ("Bruce") and Susan Wheltle (collectively, "Wheltles"), seeking damages for abuse of process and intentional infliction of emotional distress after the Nybergs were unsuccessful in seeking to build a single family home on a lot next to the Wheltles' home. The action is now before the court on the Wheltles' special motion to dismiss under the anti-SLAPP statute, G. L. c. 231, § 59H. This motion asks whether the Wheltles are entitled to the protections of the anti-SLAPP statute when they are sued for their petitioning activity—filing a lawsuit for adverse possession—which was partially, though minimally, successful but which also was plainly motivated by the Wheltles' desire to block construction on an undeveloped parcel next to their home. I conclude they are, because the Nybergs' lawsuit is retaliatory and thus warrants the protection provided by the anti-SLAPP statute. After hearing and consideration of the submitted materials, the motion is **ALLOWED**.

[1] Sara Dolan.
[2] Susan Wheltle.

FACTUAL BACKGROUND

The following facts are taken from the complaint and the affidavits (some with attachments) submitted in connection with the special motion to dismiss. The court briefly outlines the relevant background here and reserves further facts for the discussion below.

The Wheltles live at 94 Coolidge Road, Arlington, Massachusetts ("94 Coolidge"). There is an empty lot ("Lot A") on one side of 94 Coolidge, which was formed when two adjacent lots were subdivided. Lot A (also known as 88 Coolidge Road) has sixty feet of frontage on Coolidge Road and a total area of 6,035 square feet. The Town of Arlington ("Arlington") zoning bylaws require lot frontage of at least sixty feet and lot sizes of at least 6,000 square feet.

There are five walls on or immediately adjacent to the boundary line between 94 Coolidge and Lot A. One wall runs parallel to Coolidge Road at the front of 94 Coolidge, while the other four run in the same direction as the boundary line, i.e., perpendicular to Coolidge Road, one after the other in a line.

The Nybergs purchased Lot A in September 2015. They subsequently filed with the Arlington Conservation Commission ("Conservation Commission") a Notice of Intent, dated June 30, 2016, to build a single-family home on Lot A. The Notice of Intent incited strong opposition from neighbors, including the Wheltles, and the Conservation Commission held nineteen hearings over more than a year on the Nybergs' proposed development. The Conservation Commission eventually approved the development with certain conditions. Bruce and two other neighbors appealed the Conservation Commission's decision to the Superior Court.

On October 27, 2017, the Wheltles filed an action against the Nybergs in the Land Court ("Land Court Action"), asserting claims for declaratory judgment and adverse possession, and to quiet title, based on their assertion that they had obtained title via adverse possession to those portions of Lot A over which four of the boundary walls stood. After a three-day bench trial, the Land Court found that the Wheltles had proven adverse possession of the portion of one of the walls that encroached on Lot A, which totaled approximately ten square feet,[3] and had failed to prove adverse possession of the other claimed encroachments. Judgment entered on August 5, 2020. Neither the Wheltles nor the Nybergs appealed the judgment.

Bruce asserts in an affidavit that the Wheltles did not pursue an appeal of the adverse portions of the judgment in the Land Court Action because of the expense of litigating that action through trial. He also asserts that, for the same reason, he and his co-plaintiffs voluntarily dismissed their appeal of the Conservation Commission's approval of the Nybergs' proposed development of Lot A.

The Nybergs filed the present action on January 21, 2021, asserting claims of abuse of process (Count I) and intentional infliction of emotional distress (Count II). On May 11, 2021, the Wheltles filed their special motion to dismiss under G. L. c. 231, § 59H.

DISCUSSION

1. Standard for Special Motion to Dismiss under the Anti-SLAPP Statute

The anti-SLAPP statute, G. L. c. 231, § 59H, is directed at "'meritless suits' that use litigation to 'intimidate opponents' exercise of rights of petitioning and speech.'" *Vittands v. Sudduth*, 49 Mass. App. Ct. 401, 413 (2000), quoting *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 161 (1998). It "was designed to immunize parties from claims based on their

[3] The Land Court's decision therefore did not render Lot A unbuildable under Arlington's zoning bylaws.

petitioning activities by allowing a party to file a special motion to dismiss." *Id.* at 413. In reviewing a special motion to dismiss under the statute, courts apply a burden-shifting framework, described below. In applying the framework, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." G. L. c. 231, § 59H.

a. Threshold Stage

A party seeking dismissal under the anti-SLAPP statute must "demonstrate, through pleadings and affidavits, that the claims against it are 'based on the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities'" (internal quotations omitted). *Cadle Co. v. Schlichtmann*, 448 Mass. 242, 249 (2007), quoting *Duracraft*, 427 Mass. at 167-168. "The focus solely is on the conduct complained of, and, if the *only* conduct complained of is petitioning activity, then there can be no other 'substantial basis' for the claim" (emphasis in original). *Office One, Inc. v. Lopez*, 437 Mass. 113, 122 (2002), citing *Fabre v. Walton*, 436 Mass. 517, 524 (2002).

b. Second Stage

If the moving party meets its burden, the burden shifts to the nonmoving party (here, the Nybergs) to show that the anti-SLAPP statute does not require dismissal. There are two alternative paths for the nonmoving party to meet its second stage burden.

Under the first path, the nonmoving party must "establish by a preponderance of the evidence that the [moving party] lacked any reasonable factual support or any arguable basis in law for its petitioning activity, . . . and that the . . . sham petitioning activity caused the [nonmoving party's] actual injury" (internal citations and quotations omitted; alterations added). *Blanchard v. Steward Carney Hosp., Inc.*, 477 Mass. 141, 148 (2017) ("*Blanchard I*").

Satisfying this path, which essentially requires the nonmoving party to prove that the moving party's petitioning activity was a sham, presents a high bar. *Id.* at 156 n.20.

Under the second path, the nonmoving party must demonstrate, "such that the motion judge may conclude with fair assurance, two elements: (a) that its suit was colorable; and (b) that the suit was not brought primarily to chill the [moving party's] legitimate exercise of its right to petition, i.e., that it was not retaliatory" (internal citations and quotations omitted; alteration added). *Blanchard v. Steward Carney Hosp., Inc.*, 483 Mass. 200, 204 (2019) ("*Blanchard II*").

The court's task regarding the second prong of the second path "is to assess the totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim, and to determine whether the nonmoving party's claim constitutes a SLAPP suit" (internal citations and quotations omitted). *Id.* at 205. It must be "fairly assured" in its conclusion. See *id.* To determine whether the nonmoving party's suit is a SLAPP suit under the second prong of the second path, the court considers the following factors: (1) whether the case is a "classic" or "typical" SLAPP case, i.e., "a lawsuit[] directed at individual citizens of modest means for speaking publicly against development projects"; (2) whether the suit was commenced shortly after the petitioning activity; (3) whether the special motion to dismiss was filed promptly; (4) the significance of the challenged claim to the litigation as a whole, and the strength of the nonmoving party's claim; (5) evidence that the moving party's petitioning activity was in fact chilled; (6) whether the nonmoving party's requested damages (e.g., attorney's fees under an abuse of process claim) burden the moving party's petitioning. *Id.* at 206-207 (citations and internal quotations omitted). It is within the court's sound discretion to determine whether it is fairly assured that the challenged claim is not a SLAPP suit. See *id.* at 207.

2. The Nybergs' Suit

Applying the above framework, the court concludes that the Nybergs cannot meet their second stage burden. Nonetheless, the court first addresses the Wheltles' threshold burden, and then addresses the Nybergs' first and second paths.

a. Threshold Stage

While the Nybergs concede that the Wheltles have met their threshold burden of showing that the Nybergs' suit is based on their petitioning activities alone, the court nonetheless must consider this stage. See *477 Harrison Ave., LLC v. JACE Boston, LLC*, 483 Mass. 514, 519 (2019) ("*Harrison II*"). It is clear that the Wheltles have met their burden, as both of the Nybergs' two claims cite the Land Court Action as the sole basis for the Wheltles' purported liability. See *id.* at 520 ("Commencement of litigation is quintessential petitioning activity."). While the Nybergs' complaint describes some additional conduct by the Wheltles, none of that conduct forms the basis of the Nybergs' claims; only the Land Court Action does. See *477 Harrison Ave., LLC v. Jace Boston, LLC*, 477 Mass. 162, 170-171 (2017) ("*Harrison I*") (moving party's alleged statements suggesting ulterior purpose explained motive behind use of process but were not themselves basis for nonmoving party's abuse of process claim).

Because the Wheltles have met their threshold burden, the court next considers whether the Nybergs have met their second stage burden under either the first or second path described above.

b. Second Stage: First Path

i. *Whether the Land Court Action was Devoid of Reasonable Factual or Legal Support*

The court concludes that the Nybergs are unable to show that the Land Court Action was devoid of reasonable factual or legal support, which is a "very high bar." *Harrison II*, 483 Mass.

at 522. As noted above, judgment entered for the Wheltles in the Land Court Action. The Nybergs did not appeal or otherwise challenge the judgment, making it final. As such, the Land Court Action was reasonably supported as a matter of law. See *Fabre*, 436 Mass. at 524-525 & n.11 (where nonmoving party failed to appeal underlying abuse prevention order obtained by moving party, "that judgment is conclusive evidence that the petitioning activity was not devoid of any reasonable factual support or arguable basis in law");[4] *W.R.S. v. R.S.*, 2020 WL 1061808 at *2 (Mass. App. Ct. 2020) (rule 1:28 decision) (nonmoving party failed to show lack of reasonable factual or legal basis for petitioning activity where moving party obtained final judgment allowing permanent harassment prevention order). Contrast *Harrison I*, 477 Mass. at 174 (moving party's criminal complaint for trespass lacked any reasonable basis in fact or law where it was dismissed for lack of probable cause and it was filed after judge explicitly granted to nonmoving party right to trespass); *Vittands*, 49 Mass. App. Ct. at 414-415 (moving parties' declaratory judgment action challenging construction of sewage disposal system lacked any reasonable basis in fact or law where nonmoving party had obtained proper permits for system, moving parties failed to appeal permits, and moving parties failed to join board of health, which was necessary party for relief sought).

Contrary to the Nybergs' assertion, the fact that the Wheltles did not obtain all the relief they sought does not render the Land Court Action devoid of *any* factual or legal support. See *Wenger v. Aceto*, 451 Mass. 1, 7 (2008) (critical determination at this point is not whether petitioning activity in question was successful, but whether it contained any reasonable factual or

[4] The Nybergs cite *Van Liew v. Stansfield*, 474 Mass. 31 (2016), in an attempt to distinguish *Fabre*. In *Van Liew*, however, the underlying harassment prevention order was *ex parte* and only temporary, not final; it was vacated after a full hearing at which the purported harasser had his first opportunity to be heard. See *id.* at 40. Further, the deficiency in the purported victim's request for a harassment prevention order was obvious on the face of her complaint, see *id.*, whereas the Land Court Action was resolved after three days of trial, forty-nine fact findings, and eleven pages of analysis.

legal merit at all). See also *Donovan v. Gardner*, 50 Mass. App. Ct. 595, 600 (2000) (fact that legal challenges resolved in nonmoving party's favor does not mean no colorable basis existed for moving party's petitions).

The Nybergs attack the strength of the Wheltles' adverse possession claims by asserting that their true motivation in bringing the claims was to prevent the Nybergs from being able to develop Lot A. However, the Wheltles' alleged motives in bringing the Land Court Action are not relevant at this stage of the anti-SLAPP motion to dismiss framework. See *Wenger*, 451 Mass. at 7.

Because the Nybergs have failed to meet their burden of showing that the Land Court Action was devoid of any reasonable factual or legal basis, I need not address the second part of the first path – whether the Land Court Action caused Nybergs actual injury. See *Hanover v. New England Reg'l Council of Carpenters*, 467 Mass. 587, 597 n.13 (2014). I will next consider whether the Nybergs have met their burden under the second path of the second stage.

c. Second Stage: Second Path

i. *Whether the Nybergs' Abuse of Process Claim is Colorable*[5]

[5] In their opposition memorandum, the Nybergs do not address the colorability of their intentional infliction of emotional distress claim, despite the Wheltles' challenge to the claim in their motion to dismiss memorandum. As such, that claim must be dismissed. See *Amato v. Perlera*, 2021 WL 2010813 at *3 (Mass. App. Ct. 2021) (rule 23.0 decision) (judge properly dismissed nonmoving party's claims where he failed to make showing that each of his claims was colorable). Even if they attempted to oppose the dismissal, the attempt would be futile. To sustain an intentional infliction of emotional distress claim, the claim's proponent must show that the defendant's conduct was extreme and outrageous. See *Polay v. McMahon*, 468 Mass. 379, 385 (2014). It is not extreme and outrageous for abutters to pursue all available legal avenues in order to challenge a developer's plans, including an adverse possession action that was ultimately successful, albeit minimally. See *id.* at 386 ("Conduct qualifies as extreme and outrageous only if it "go[es] beyond all possible bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community" [citation and internal quotations omitted; alterations in original]). See also *Beecy v. Pucciarelli*, 387 Mass. 589, 591-592, 596 (1982) (filing of erroneous collections action not extreme and outrageous); *Sena v. Commonwealth*, 417 Mass. 250, 263-264 (1994) (applying for arrest warrant and making arrest pursuant to issued warrant cannot be considered "utterly intolerable in a civilized community"). Contrast *Vittands*, 49 Mass. App. Ct. at 410-411 (jury question whether neighbors' conduct, including filing meritless litigation to challenge development of defendant's property, was extreme and outrageous); *Lepp v. M.S. Realty Trust*, 2008 WL 375971 at *5 (Mass. App. Div. 2008) (affirming judgment for homeowner plaintiffs on intentional infliction claim where defendant builder engaged in persistent campaign of sexual harassment, humiliation, and slander; threatened

A claim is colorable if it is "worthy of being presented to and considered by the court" because it "offers some reasonable possibility of a decision in the party's favor" (citations omitted). *Blanchard I*, 477 Mass. at 160-161. The Nybergs have asserted a colorable claim of abuse of process.

An abuse of process claim has three elements: (1) process was used, (2) for an ulterior or illegitimate purpose, (3) resulting in damage. See *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 636 (2010). There is no question that the Wheltles invoked process by filing the Land Court Action. See *Harrison II*, 483 Mass. at 527.

As to the second element, the Nybergs allege in their complaint that the Wheltles brought the Land Court Action "intentionally and maliciously for the ulterior illegal purpose of preventing the Nybergs from pursuing their legitimate right to build a single-family house on [Lot A]." As an initial matter, it is not illegal to seek to ensure that a developer has met applicable zoning requirements before it can develop a property. Here, the Land Court Action ultimately sought to determine whether Lot A met the total square footage and frontage amounts required by Arlington, a lawful use of process. Further, seeking to show that one has obtained title to portions of another's property by adverse possession is not unlawful.

However, the Nybergs have marshalled sufficient evidence of ulterior purpose to meet their burden at this point in the second path. That evidence includes the following. First, in the 1990s, the Wheltles reached out to the then-owner of the abutting lot (a portion of which became the challenged Lot A, after subdivision) three times in an attempt to acquire some or all of the abutting lot. The Wheltles' letters referred to the "beautiful bucolic space" next to their home and indicated their purchase of the lot "would enable us to preserve the lilac, dogwood, cherry,

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rape and other physical attacks on female plaintiff; and had violent outbursts at construction site and plaintiffs' rental house).

cedar, and may other trees" and "retain[] some of the essential character of our houses and their relationship to the natural surroundings."

Second, the Land Court Action, while lawful, sought adverse possession of only small portions of Lot A upon which existing walls stood; had the Wheltles prevailed fully in that action, they would have gained title to an insignificant amount of square footage that was largely useless, other than rendering Lot A unbuildable under the zoning bylaws.

Third, the Nybergs assert in an affidavit that during a meeting at Lot A, the Wheltles' attorney told them "[m]y clients are prepared to go straight out on their adverse possession case in order to block the project."

This evidence is not necessarily sufficient to prove the Nybergs' abuse of process claim, but it is sufficient to state a colorable claim that the Wheltles used the Land Court Action in an attempt to obtain a collateral advantage, namely, preventing the Nybergs from developing Lot A. See *Harrison II*, 483 Mass. at 527 (citation and internal quotations omitted) (abuse of process in essence is "form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money"). See also *id.* at 527 (abutters satisfied ulterior purpose element where they alleged, with supporting affidavits, that developer filed lawsuit to force abutters to cease opposing development and to surrender their property interests); *Vittands*, 49 Mass. App. Ct. at 407 (genuine issue of material fact whether neighbors had ulterior purpose of preventing defendant from building on lot where they told defendant they considered lot their own "private park," would take her land, and would prevent construction "at all costs," and they involved lot in protracted litigation); *Powers v. Leno*, 24 Mass. App. Ct. 381, 383, 384 (1987) (jury issue as to whether defendant's statement "if I don't get what I want, I'll make sure these condominiums are never built[,] I'll delay it in court

forever, even if I have to spend one million dollars" evidenced abutter defendant's ulterior motive of preventing sale to others of land that he sought to purchase). Stating a colorable claim is all that is required to meet the Nybergs' burden at this point. See *Blanchard II*, 483 Mass. 208 n.14 (nonmoving party not required to demonstrate challenged claim has reasonable likelihood of success).

As to the third element of the Nybergs' abuse of process claim, they have alleged, and supported with an affidavit, damages they incurred in connection with the Land Court Action, e.g., attorneys fees and costs. This satisfies their burden on the third element. See *Millennium Equity Holdings, LLC*, 456 Mass. at 645 (abuse of process damages include cost of defending against improper action).

Having concluded that the Nybergs have asserted a colorable abuse of process claim, the court must consider whether that claim is retaliatory. See *Blanchard II*, 483 Mass. at 209.

ii. *Whether the Nybergs' Abuse of Process Claim is Retaliatory*

The Nybergs meet their burden here if they demonstrate that their suit is not retaliatory, i.e., it was not brought primarily to chill or punish the Wheltles' legitimate petitioning activities. See *id.* Applying the factors outlined in *Blanchard II*, the court concludes that the Nybergs have not met their burden.

As an initial matter, the Nybergs assert that none of the *Blanchard II* factors favor the Wheltles because the Land Court Action has been resolved, i.e., there is no more petitioning activity to be burdened. However, ongoing petitioning activity is not required for the nonmoving party's suit to be retaliatory; it is enough if the suit seeks to punish the moving party for prior petitioning activity. See, e.g., *Wenger*, 451 Mass. at 4, 7 n.6 (objective of SLAPP suit is not to win, but to use litigation to chill, intimidate, or punish citizens who have engaged in petitioning

activity); *Fisher v. Lint*, 69 Mass. App. Ct. 360, 363 (2007) (same). See also *Duracraft*, 427 Mass. at 161 (citation omitted) (SLAPP suits are generally meritless suits brough to deter common citizens from exercising petitioning rights or punish them for doing so). Accordingly, the Nybergs' attempt to meet their burden at this point by citing repeatedly the termination of the Land Court Action is unavailing.

The court turns now to the *Blanchard II* factors. As to the first factor, the Nybergs' suit has characteristics of a typical SLAPP suit. While the two sides quibble over the extent of each other's respective economic worth, the materials before the court indicate that the Nybergs are experienced and successful real estate professionals while the Wheltles are retired, septuagenarian homeowners who forewent certain lawful means of challenging the development of Lot A (e.g., appealing the Land Court Action) due to the expense. However, the Nybergs' claims are based only on the Wheltles' filing and pursuit of the Land Court Action, not on their direct challenges to the development of Lot A raised at the Conservation Commission, which makes the Wheltles' targeted conduct less about speaking publicly against a development project. Thus, the Nybergs' suit has characteristics of a typical SLAPP suit, but this factor only mildly favors a determination that the present matter is a retaliatory SLAPP suit.

As to the second factor, the Nybergs filed the present matter approximately five and one-half months after judgment entered in the Land Court action. This relatively close temporal proximity weights in favor of a conclusion that the present matter was filed in retaliation for the Land Court Action. See *Blanchard II*, 483 Mass. at 206 n.9 (relatively close proximity may suggest claim was retaliatory). Compare *Aldana v. Worcester Digital Mktg., LLC*, 2020 WL 5993103 at *6 (Mass. Super. 2020) (plaintiff's suit was filed more than two and one-half years after petitioning activity, suggesting plaintiff was not retaliating).

The third factor also weighs in favor (albeit less strongly than other factors) of a conclusion that the present matter is retaliatory. The Wheltles filed their special motion to dismiss approximately one and one-half months after being served with the complaint, giving rise to an inference that the Wheltles viewed the Nybergs suit as being retaliatory. See *Blanchard II*, 483 Mass. at 206 n.10 (timing of special motion to dismiss may give rise to inference regarding how moving and nonmoving parties view suit).[6]

As for the significance of the challenged claim to the litigation as a whole and the strength of the nonmoving party's claim—the fourth factor—the Nybergs' suit is based solely on the Land Court Action; there are no other claims that are based on other allegedly wrongful conduct of the Wheltles. Thus, the sole focus of the suit is on the Wheltles' petitioning activity, suggesting a retaliatory motive to the suit. Indeed, despite the involvement of other Arlington residents in challenges to the Nybergs' development of Lot A, the Nybergs brought suit only against the Wheltles. On the other hand, the Nybergs' abuse of process claim—at least as reflected in the materials presently before the court—is not weak, as the Nybergs point to several indicia of ulterior motive. However, their intentional infliction of emotion distress claim is meritless, as reflected by the fact that the Nybergs made no effort in their opposition memorandum to establish its colorability. Overall, then, this factor also supports a conclusion of retaliation.

[6] The *Blanchard II* court noted that if the special motion to dismiss is filed more than sixty days after service of the complaint, see G. L. c. 231, § 59H (special motion to dismiss may be filed within sixty days of service of complaint), "the judge may consider whether the delay in asserting the claim supports an inference that the moving party does not regard the claim as a SLAPP suit and that the nonmoving party likewise did not intend it as such." 483 Mass. at 206 n.10. Where the Wheltles filed their special motion to dismiss less than sixty days after service of the complaint, the court draws the opposite inference from the one the Supreme Judicial Court noted.

The fifth factor—evidence that the moving party's petitioning activity was in fact chilled—does not apply given that the Land Court Action had already terminated by the time the Nybergs filed the present matter.[7]

Similarly, the sixth factor—whether the nonmoving party's requested damages burden the moving party's petitioning activity—is not facially applicable where the Land Court Action previously terminated. However, the Wheltles have averred that they abandoned several lawful avenues for challenging the development of Lot A due to the cost of such measures, which suggests that potential future lawful petitioning activities (e.g., challenging a building permit for Lot A) may be hampered. As such, this factor weighs minimally in favor of the present matter being retaliatory.

In weighing these factors and all the facts and circumstances surrounding the Nybergs' lawsuit in my discretion, and considering that the Nybergs have failed to "articulate any goal other than to obtain damages stemming from the [Wheltles'] legitimate exercise of [their] petition rights," *W.R.S.*, 2020 WL 1061808 at *3 [alterations added], I am *not* fairly assured that the Nybergs' suit is not a SLAPP suit brought to punish the Wheltles for the Land Court Action. Instead, I *am* fairly assured that the Nybergs' suit is retaliatory, in response to the Wheltles' partially successful Land Court Action.

Accordingly, the Nybergs have failed to meet their burden under either path of the second stage of the anti-SLAPP motion to dismiss framework, and the Wheltles' special motion to dismiss must be allowed.

[7] However, as noted above, ongoing petitioning activity is not required for the nonmoving party's suit to be retaliatory.

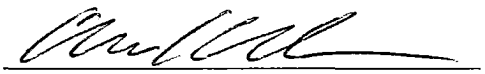
3. Attorney's Fees

General Laws c. 239, § 59H mandates an award of costs and reasonable attorney's fees to the successful moving party. Thus, the Wheltles shall utilize Superior Court Rule 9A to submit to the court a request for costs and reasonable attorney's fees, by serving that request on plaintiff's counsel within twenty (20) days of the date of this order and thereafter filing with this court the request and any opposition.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the defendants, R. Bruce Wheltle and Susan Wheltle's, special motion to dismiss pursuant to the anti-SLAPP law be **ALLOWED**. The Wheltles shall submit to the court a request for costs and reasonable attorney's fees, pursuant to G. L. c. 231, § 59H, in conformance with Superior Court Rule 9A and this memorandum of decision and order.

So ordered.



Christopher K. Barry-Smith
Justice of the Superior Court

DATE: July 27, 2021

101 Mass.App.Ct. 639
Appeals Court of Massachusetts,
Middlesex.

Jonathan NYBERG & another[1]

v.

R. Bruce WHELTLE & another.[2]

1 Sara Dolan.

2 Susan Wheltle.

No. 21-P-791
|
Argued March 17, 2022
|
Decided September 13, 2022

"Anti-SLAPP" Statute. Constitutional Law, Right to petition government. Practice, Civil, Motion to dismiss. Abuse of Process.

Civil action commenced in the Superior Court Department on January 21, 2021.

A special motion to dismiss was heard by Christopher K. Barry-Smith, J.

Attorneys and Law Firms

Robert E. McLaughlin, Sr. (John G. Hofmann also present), Boston, for the plaintiffs.

Jeffrey J. Pyle, Boston, for the defendants.

Present: Neyman, Shin, & Hand, JJ.

Opinion

NEYMAN, J.

****1** This case involves yet another example of the "ever-increasing complexity of the anti-SLAPP case law," and the "difficult and time consuming" resolution of special motions ***640** to dismiss pursuant to the "anti-SLAPP" statute, G. L. c. 231, § 59H. Commonwealth v. Exxon Mobil Corp., 489 Mass. 724, 728 n.5, 187 N.E.3d 393 (2022). Here, we are asked to review a Superior Court judge's application of the augmented anti-SLAPP framework crafted in Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 75 N.E.3d 21 (2017) (Blanchard I), and amplified in Blanchard v. Steward Carney Hosp., Inc., 483 Mass. 200, 130 N.E.3d 1242 (2019) (Blanchard II). The plaintiffs, Jonathan Nyberg and Sara Dolan (collectively, Nybergs), contend that the judge erred in concluding that the Nybergs' lawsuit for abuse of process and intentional infliction of emotional distress against the defendants, R. Bruce Wheltle and Susan Wheltle (collectively, Wheltles), was a retaliatory strategic lawsuit against public participation (SLAPP suit), and in allowing the Wheltles' special motion to dismiss. Although we have some concerns with the allowance of the special motion to dismiss under the contested facts detailed herein, we cannot say that the judge erred or abused his discretion, see Blanchard I, supra at 160, 75 N.E.3d 21, in allowing the special motion to dismiss where he sedulously followed the augmented framework, made the step-by-step determinations required by Massachusetts precedent, and

considered and weighed the requisite Blanchard II, supra at 206-207, 130 N.E.3d 1242, factors before rendering his conclusion. Accordingly, we affirm.

Background. "We summarize the relevant facts from the pleadings and affidavits that were before the motion judge." 477 Harrison Ave., LLC v. JACE Boston, LLC, 477 Mass. 162, 164, 74 N.E.3d 1237 (2017) (Harrison I). See G. L. c. 231, § 59H (in ruling on special motion to dismiss, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based").

1. The parties. The Nybergs are brother and sister and were engaged in the real estate development business. In 2015, they acquired an undeveloped lot at 88 Coolidge Road in Arlington (Nyberg lot). The Arlington zoning bylaws require that a buildable lot for a single-family home in the Coolidge Road section of Arlington have lot frontage of at least sixty feet and lot size of at least 6,000 square feet. At the time the Nybergs acquired the Nyberg lot, it had exactly sixty feet of frontage on Coolidge Road and the lot size was 6,035 square feet.

The Wheltles are husband and wife and have resided at 94 Coolidge Road in Arlington from 1971 to the present. The Wheltle property abuts the Nyberg lot. As discussed below, the Wheltles opposed the proposed development of the Nyberg lot.

***641** 2. Initial dispute and Land Court action. The Nybergs intended to construct a single-family house on the Nyberg lot. However, they needed permission from the Arlington conservation commission because the Nyberg lot is located near a wetland. Thus, the Nybergs filed a notice of intent and sought an order of conditions establishing terms to protect the environment. The Wheltles and other neighbors opposed the Nybergs' request for the order of conditions, and according to the Nybergs, "the Wheltles pressed each and every objection to the Nybergs' buildable plans imaginable" throughout the approval process. On September 7, 2017, the Arlington conservation commission approved the Nybergs' application to build a single-family home on the Nyberg lot and issued an order of conditions.[3]

3 Bruce Wheltle and two additional neighbors filed suit in the Superior Court challenging the order of conditions under Arlington's wetlands protection bylaw and regulations. Separately, neighbors -- not including the Wheltles -- appealed from the Arlington conservation commission approval to the Department of Environmental Protection. Neither of those matters is before us.

****2** On October 27, 2017, the Wheltles filed a complaint in the Land Court, which included a claim for declaratory judgment, an action to quiet title, and a claim for adverse possession of portions of the Nyberg lot. The Land Court complaint alleged, inter alia, that the Wheltles had "acquired title by adverse possession to several disputed slivers of land adjacent to their" property. The Land Court complaint alleged that a brick wall "encroached .52 feet onto the [Nyberg lot]" and that the Wheltles "owned the land under the Brick Wall [by adverse possession,] thereby reducing the Nybergs' frontage to approximately [fifty-nine feet and six inches] and rendering the [Nyberg lot] no longer in compliance with the Arlington zoning building code requirement of a minimum of [sixty] feet of frontage." In addition, the Land Court complaint alleged that a "Boulder Wall encroached [seventy] square feet onto the [Nyberg lot]" and that the Wheltles "owned the land under the Boulder Wall [by adverse possession,] thereby reducing the Nybergs' total square footage to approximately 5,965 square feet and rendering the [Nyberg lot] no longer in compliance with the Arlington zoning building code requirement of a minimum of 6,000 square feet."[4]

4 In response to the Wheltles' Land Court complaint, the Nybergs filed a special motion to dismiss pursuant to G. L. c. 231, § 59H. A Land Court judge, who was also the trial judge in that matter, denied the motion in a written memorandum and order. The correctness of the judgment in the Land Court action and the resolution of the special motion to dismiss in that matter are not before us on appeal.

Following a three-day bench trial, a Land Court judge concluded ***642** that the Wheltles had proved adverse possession as to "an area of encroachment of approximately 9.9 square feet," but had "failed to establish rights by adverse possession with respect to the other [claimed] encroachments." Although the Wheltles prevailed in part at trial, the result did not render the Nyberg lot unbuildable as it still contained sixty feet of frontage and more than 6,000 square feet. Judgment in the Land Court action entered on August 5, 2020. Neither party appealed from the Land Court judgment.

3. The present action. On January 21, 2021, approximately five and one-half months after judgment entered in the Land Court action, the Nybergs commenced the present action in the Superior Court (present action) against the Wheltles alleging abuse of process and intentional infliction of emotional distress, and seeking damages including the costs of defending the Land Court action, the carrying costs of the Nyberg lot, and the diminution in value of their investment. In their complaint, the Nybergs contended, inter alia, that the Wheltles did not bring the Land Court complaint for the purpose of acquiring seventy square feet of the Nyberg lot. Instead, the Nybergs asserted that the Wheltles used legal process "intentionally and maliciously for the ulterior illegal purpose of preventing the Nybergs from pursuing their legitimate right to build a single-family house on the property they had acquired," because the Nybergs' proposed development would "depriv[e] the Wheltles of the view of the undeveloped lot and natural vegetation existing thereon and the privacy afforded to them by the undeveloped lot along the northern border of their property."

The Nybergs alleged that evidence of the Wheltles' ulterior purpose included the following: on December 6, 2017, at the conclusion of a Department of Environmental Protection site visit to the Nyberg lot, counsel for the Wheltles asked Jonathan Nyberg if he and his sister would be willing to sell their lot to her clients. The Wheltles' offer was much less than what the Nybergs had paid for the Nyberg lot, and thus the parties did not reach agreement. During this conversation, counsel for the Wheltles purportedly stated to Jonathan Nyberg, "My clients are prepared to go straight out on their adverse possession case in order to block the project."

***643** The Nybergs further averred that the Wheltles "aggressively prosecuted" their adverse possession claims in the Land Court, "requiring the Nybergs to mount a rigorous and expensive defense." The Nybergs also alleged that "[t]he Wheltles knew or should have known they had no legal basis to claim title by adverse possession to" certain portions of the Nyberg lot. Finally, the Nybergs alleged that the Wheltles' acts, which were intended to render the Nyberg lot unbuildable, constituted "conduct that was extreme and outrageous" and caused "extreme emotional distress."

****3** 4. The special motion to dismiss. In response to the Nyberg complaint, the Wheltles filed an answer and a special motion to dismiss under the anti-SLAPP statute, G. L. c. 231, § 59H. Through their motion, affidavits, and pleadings, the Wheltles argued that the present action was based solely on the Wheltles' legitimate, and partially successful, petitioning activity. They maintained that they opposed the Nybergs' proposed development and brought the Land Court action because they believed that the development "would harm wetlands and natural resources, and ... would place a new boundary wall reaching [ten] feet in height right against [their] property, in place of [their] existing retaining wall." The Wheltles and other residents attended the Arlington conservation commission hearings and spoke out against the Nybergs' proposed project, exercising their legal rights as abutters. R. Bruce Wheltle further averred that he and his wife spent a considerable sum of money to litigate the Land Court claims through trial, and that they "became economically unable to appeal from the adverse portions of the [Land Court judgment] or to maintain [their] appeal from the Arlington Conservation Commission's Bylaw decision." At the time they filed the special motion to dismiss, the Wheltles were seventy-nine and seventy-seven years old and retired. They claimed that during the Land Court proceedings, counsel for the Nybergs told counsel for the Wheltles that if the Nybergs prevailed in the Land Court action, they would bring an abuse of process claim against the Wheltles. The Wheltles argued that the Nybergs had considerable means, that they operated a substantial real estate development business through which they had completed numerous real estate transactions in Arlington since 2013, and that in the two years prior to the filing of the present action, "[Jonathan] Nyberg was a realtor on transactions in the total amount of $46,194,000." The Wheltles ultimately contended that the present action is retaliatory, ***644** and a classic or typical SLAPP suit brought to chill or punish their legitimate petitioning activity, and that having to respond to it has caused them anxiety and distress.

Unsurprisingly, the Nybergs' response to the special motion to dismiss painted a different picture. Through their supporting affidavits and pleadings, including the allegations in their Superior Court complaint, the Nybergs contended that the Wheltles' Land Court action was predicated on illegitimate and ulterior motives, and caused the Nybergs financial damages exceeding $460,000 in the form of attorney's fees, expert fees, other litigation costs and expenses, taxes, and interest. The Nybergs further responded that the Wheltles presented inflated, exaggerated, or inaccurate allegations regarding the Nybergs' real estate business and income. The Nybergs insisted that they were not wealthy and powerful property developers, but brother and sister who lived

locally in Arlington and operated a small local company with no office and no other employees. As of May of 2021, the Nybergs owned eight rental properties along with the vacant land at 88 Coolidge Road. The Nybergs averred that Sara Dolan was a homemaker, not a high-end real estate developer. They also averred that the Wheltles were not so-called victims of a typical or classic SLAPP suit, but rather people of substantial means as evidenced by their "free and clear" ownership of the property at 94 Coolidge Road and another residential property at 100 Coolidge Road in Arlington, which had a combined market value of more than $2 million. The Nybergs emphasized that in the Land Court action the Wheltles established adverse possession solely as to a sliver of land located underneath a concrete block wall, and that the result of the Land Court action was that the Nybergs could proceed with their plan to build a single-family house on their lot. Thus, the Nybergs argued, the Wheltles' adverse possession claims were unsuccessful when viewed in context of what the parties sought to achieve. According to the Nybergs, "it was the Wheltles who played the role of bully in these circumstances." The Nybergs argued that far from being a SLAPP suit, the Superior Court action they brought was to recoup the money spent defending the Wheltles' improper and pretextual Land Court claim, and not to retaliate against the Wheltles' petitioning activity.

Following a hearing, a Superior Court judge allowed the Wheltles' special motion to dismiss. In a comprehensive memorandum and order, the judge applied the augmented framework ***645** delineated in Blanchard I, 477 Mass. at 159-161, 75 N.E.3d 21, and the nonexclusive factors enumerated in Blanchard II, 483 Mass. at 206-207, 130 N.E.3d 1242. "In weighing th[o]se factors and all the facts surrounding the Nybergs' lawsuit in [his] discretion," the judge concluded that he was "not fairly assured that the Nybergs' suit is not a SLAPP suit brought to punish the Wheltles for the Land Court [a]ction," and further concluded that he was "fairly assured that the Nybergs' suit is retaliatory, in response to the Wheltles' partially successful Land Court [a]ction." Accordingly, the judge allowed the Wheltles' special motion to dismiss. The Nybergs appeal therefrom.

****4** Discussion. 1. Legal standards. a. Overview of the augmented framework. General Laws c. 231, § 59H, provides a procedural remedy -- the special motion to dismiss -- for early dismissal of SLAPP suits, i.e., "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Blanchard I, 477 Mass. at 147, 75 N.E.3d 21, quoting Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 161, 691 N.E.2d 935 (1998) (Duracraft). See Duracraft, supra, quoting Wilcox v. Superior Court, 27 Cal. App. 4th 809, 816-817, 33 Cal.Rptr.2d 446 (1994) ("SLAPP suits have been characterized as 'generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so' "). The Supreme Judicial Court has delineated the following burden-shifting process for evaluating a special motion to dismiss under the anti-SLAPP statute:

> "Under G. L. c. 231, § 59H, a party may file a special motion to dismiss if 'the civil claims ...' against it are based solely on its exercise of the constitutional right to petition. The burden-shifting framework devised in Duracraft, 427 Mass. 156 [691 N.E.2d 935], and augmented in Blanchard I, 477 Mass. at 159-161 [75 N.E.3d 21], is used to evaluate such motions. At the threshold stage, the moving party (here, the [Wheltles]) must demonstrate, through pleadings and affidavits, that each claim it challenges is based solely on its own protected petitioning activity, and that the claim has no other substantial basis.... If the moving party meets its burden, the burden shifts at the second stage to the nonmoving party (here, the [Nybergs]), to demonstrate that the anti-SLAPP statute nonetheless does not require dismissal.
>
> "A nonmoving party may satisfy its burden at the second stage in one of two ways. See ***646** Blanchard I, 477 Mass. at 159-160 [75 N.E.3d 21]. The first path, which tracks the statutory language, requires the nonmoving party (here, the [Nybergs]) to establish 'by a preponderance of the evidence that the [moving party, here the (Wheltles)] lacked any reasonable factual support or any arguable basis in law for its petitioning activity,' Baker v. Parsons, 434 Mass. 543, 553-554 [750 N.E.2d 953] (2001), and that the moving party's acts caused 'actual injury to the responding party,' G. L. c. 231, § 59H. The second path, laid out in Blanchard I, requires the nonmoving party (here, the [Nybergs]) to establish, such that the motion judge can conclude with fair assurance, that its claim is not a 'meritless' SLAPP suit 'brought primarily to chill the special movant's [here, the (Wheltles')] legitimate petitioning activities.' Blanchard I, supra."

477 Harrison Ave., LLC v. JACE Boston, LLC, 483 Mass. 514, 518-519, 134 N.E.3d 91 (2019) (Harrison II).

A judge must apply the augmented framework sequentially. See Harrison II, 483 Mass. at 519, 134 N.E.3d 91. "Beginning at the threshold stage, the motion judge 'consider[s] the pleadings and supporting and opposing affidavits stating the facts upon which

the liability or defense is based,' and evaluates whether the party that has the burden of proof has satisfied it." Id., quoting G. L. c. 231, § 59H. "Sequential application of the framework is especially significant for purposes of the ... augmented second stage of the framework."[5] Harrison II, supra. "We review the judge's ruling for an abuse of discretion or error of law." Blanchard II, 483 Mass. at 203, 130 N.E.3d 1242.

5 The Supreme Judicial Court has explained that in applying the augmented framework sequentially, "by the time the motion judge reaches the last step, he or she will be in a more informed position to make an assessment of the 'totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim,' as the augmented framework requires." Harrison II, 483 Mass. at 519, 134 N.E.3d 91, quoting Blanchard I, 477 Mass. at 160, 75 N.E.3d 21.

**5 Before proceeding to our discussion of the judge's application of each stage, we review in more detail the requirements of the second path of the second stage of the augmented framework.

b. Second path of the second stage. Under the second path of the second stage of the augmented framework the nonmoving party (here, the Nybergs) bore the burden to demonstrate, "such that the motion judge may conclude with fair assurance," two elements: (1) that the claims in the present action were "colorable"; and (2) that the present action "was not brought primarily *647 to chill the special movant's [(here, the Wheltles')] legitimate exercise of [their] right to petition, i.e., that it was not retaliatory" (citations and quotation omitted).[6] Blanchard II, 483 Mass. at 204, 130 N.E.3d 1242.

6 We note the sometimes interchangeable terminology used at this stage, including a showing that the suit was "not a 'SLAPP' suit," was "not brought primarily to chill," or was "not retaliatory." Blanchard II, 483 Mass. at 204-205, 130 N.E.3d 1242.

The present case hinges on the second element of the second path of the second stage. Under the second element of the second path analysis, a judge must "assess the 'totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim,' and ... determine whether the nonmoving party's claim constitutes a SLAPP suit." Blanchard II, 483 Mass. at 205, 130 N.E.3d 1242, quoting Blanchard I, 477 Mass. at 160, 75 N.E.3d 21. The judge must be "fair[ly] assur[ed]" in this conclusion, which "requires the judge to be confident, i.e., sure, that the challenged claim is not a 'SLAPP' suit." Blanchard II, supra. "If the judge determines that the nonmoving party's [(the Nybergs')] claim 'was not primarily brought to chill the special movant's [(the Wheltles')] legitimate petitioning activities,' but instead was brought to seek redress for harm caused by the moving party's [(the Wheltles')] conduct, then the anti-SLAPP motion to dismiss the nonmoving party's [(the Nybergs')] claim properly is denied." Id. at 206, 130 N.E.3d 1242, quoting Blanchard I, supra. See Blanchard I, supra at 159, 75 N.E.3d 21, citing Duracraft, 427 Mass. at 161, 691 N.E.2d 935, quoting 1994 House Doc. No. 1520 ("A nonmoving party's claim is not subject to dismissal as one 'based on' a special movant's petitioning activity if, when the burden shifts to it, the nonmoving party can establish that its suit was not 'brought primarily to chill' the special movant's legitimate exercise of its right to petition").

Conversely, if the judge concludes that the nonmoving party's claim is a retaliatory SLAPP suit, or if the judge is unsure whether the claim is or is not a SLAPP suit, the nonmoving party has failed to meet its burden and the special motion to dismiss should be allowed. See Blanchard II, 483 Mass. at 205, 130 N.E.3d 1242 (fair assurance standard "requires the judge to be confident, i.e., sure, that the challenged claim is not a 'SLAPP' suit").[7]

7 In Blanchard II, 483 Mass. at 205-207, 130 N.E.3d 1242, the Supreme Judicial Court explained the application of the fair assurance standard to the special motion to dismiss augmented framework. The court also noted that the "fair assurance standard typically has been applied in the context of criminal proceedings to evaluate whether a preserved error is nonprejudicial." Id. at 205, 130 N.E.3d 1242. See generally Commonwealth v. Reed, 397 Mass. 440, 443 & n.4, 492 N.E.2d 80 (1986) (fair assurance standard not met where "the error possibly weakened [the defendant's] case in some significant way" and court is left with "grave doubt" [citations omitted]); Commonwealth v. Rodriguez, 92 Mass. App. Ct. 774, 781-782, 94 N.E.3d 861 (2018) (no fair assurance where "evidence ... was not overwhelming"); Commonwealth v. Cruz, 53 Mass. App. Ct. 393, 405 & n.14, 759 N.E.2d 723 (2001) (no fair assurance where court is "left with grave doubt").

**6 *648 When analyzing whether a suit is retaliatory, the judge must evaluate the nonmoving party's " 'asserted primary purpose in bringing [its] claim,' Blanchard I, 477 Mass. at 160 [75 N.E.3d 21], in light of the objective facts presented and

any reasonable inferences that may be drawn from them." Blanchard II, 483 Mass. at 209-210, 130 N.E.3d 1242. "If the judge, considering each claim as a whole, and holistically in light of the litigation, is fairly assured that each challenged claim does not give rise to a SLAPP suit, then the special motion to dismiss ... properly is denied" (quotation and citation omitted). Id. at 210, 130 N.E.3d 1242. In making this determination, the judge may consider the following nonexclusive factors (Blanchard II factors): (1) whether the case is a "classic" or "typical" SLAPP case, i.e., "a lawsuit[ ] directed at individual citizens of modest means for speaking publicly against development projects"; (2) whether the suit was commenced shortly after the petitioning activity; (3) whether the special motion to dismiss was "filed promptly"; (4) "the centrality of the challenged claim ... [to] the litigation as a whole, and the relative strength of the nonmoving party's claim"; (5) evidence that the moving party's petitioning activity was in fact chilled; and (6) "whether the damages requested by the nonmoving party, such as attorney's fees associated with an abuse of process claim, themselves burden the moving party's exercise of the right to petition" (citation omitted). Blanchard II, supra at 206-207, 130 N.E.3d 1242. It is left to the judge "to consider and weigh these and other factors as appropriate, in light of the evidence and the record as a whole." Id. at 207, 130 N.E.3d 1242. In doing so, the judge has discretion in determining whether he or she is fairly assured that the challenged claim is not a SLAPP suit. See id. at 203, 205, 207, 130 N.E.3d 1242. See also L.L. v. Commonwealth, 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014) (abuse of discretion occurs where judge makes clear error of judgment "such that the decision falls outside the range of reasonable alternatives").[8]

8 Massachusetts appellate courts have not explicitly stated whether the "discretion" afforded to a judge in deciding a special motion to dismiss is the same as the discretion defined in L.L., 470 Mass. at 185 n.27, 20 N.E.3d 930. The parties do not dispute that the standard enumerated in L.L. should apply, and thus we do not reach that issue.

***649** 2. The judge's application of the augmented framework. Although the present case centers on the second element of the second path of the second stage of the augmented framework, Massachusetts case law mandates the application of the entire framework, sequentially, to each challenged claim. See Harrison II, 483 Mass. at 519, 134 N.E.3d 91; note 5,supra. Accordingly, we review the judge's application and determinations.

The judge followed the augmented framework sequentially. He first considered the "threshold stage" and determined that the Wheltles, as the moving party, met their burden of showing that the Nybergs' claims for abuse of process and intentional infliction of emotional distress were based solely on the Wheltles' petitioning activity in the Land Court action, and had no other substantial basis. See Harrison II, 483 Mass. at 519, 134 N.E.3d 91. The Nybergs do not challenge that determination on appeal.

Next, the judge considered whether the Nybergs had met their burden under the first path of the second stage of the augmented framework to establish that the Wheltles' claims in the Land Court action were "devoid of any reasonable factual support or any arguable basis in law." G. L. c. 231, § 59H. The judge concluded that in view of the Wheltles' partial success in the Land Court action, which the Nybergs did not appeal, the Nybergs had failed to meet the "very high bar" of showing that the Land Court action was devoid of any reasonable factual support or legal basis. See Blanchard I, 477 Mass. at 156 n.20, 75 N.E.3d 21. Again, the Nybergs do not challenge that determination on appeal.

The judge then moved to the first element of the second path of the second stage of the augmented framework and considered whether the Nybergs had demonstrated that the claims in the present action were colorable. Regarding the Nybergs' abuse of process claim,[9] the judge determined that the Nybergs marshaled sufficient evidence to state a colorable claim that the Wheltles' Land Court action was an abuse of process because it was ***650** purportedly brought for an ulterior or illegitimate purpose.[10] See Harrison II, 483 Mass. at 527-528, 134 N.E.3d 91. The Wheltles concede on appeal that the colorability determination was within the judge's discretion.

9 An abuse of process claim has three elements: "(1) process was used, (2) for an ulterior or illegitimate purpose, (3) resulting in damage" (quotations omitted). Harrison II, 483 Mass. at 526-527, 134 N.E.3d 91, quoting Millennium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627, 636, 925 N.E.2d 513 (2010).

10 The judge found that the Nybergs' affidavits and pleadings alleged "sufficient evidence" of an ulterior or illegitimate purpose underlying the Land Court action, including the following: (1) the Wheltles had previously reached out to the prior owner of the abutting lot (at least a portion of which became the Nyberg lot) three times in an attempt to acquire some or all of that land; (2) the Land Court action sought adverse possession of only a small portion of the Nyberg lot, and had the Wheltles prevailed in full they would have gained title to an insignificant amount of "largely useless" square footage; and (3) the Wheltles' attorney told the Nybergs that her "clients are prepared to go straight out on their adverse possession case in order to block the [Nybergs'] project." As the judge noted, the information alleged by the Nybergs in their pleadings and affidavits was not necessarily sufficient to prove an abuse of process claim, but was sufficient, at this stage of the proceedings, to state a colorable abuse of process claim.

****7** As to the intentional infliction of emotional distress count, the judge found that the Nybergs did not address the issue of colorability, and thus allowed the special motion to dismiss that claim. The Nybergs do not contest the judge's dismissal of the emotional distress claim on appeal.

Finally, the judge considered the pivotal issue in the present appeal: whether the Nybergs had met their burden under the second element of the second path of the second stage of the augmented framework to demonstrate that the present action was not brought primarily to chill the Wheltles' legitimate petitioning activity -- "i.e., that it was not retaliatory." Blanchard II, 483 Mass. at 204, 130 N.E.3d 1242. The judge analyzed and applied each of the nonexclusive Blanchard II factors. He found that the first factor "mildly favors a determination" that the present action has characteristics of a typical SLAPP suit because, although the parties dispute each other's net worth, "the Nybergs are experienced and successful real estate professionals while the Wheltles are retired, septuagenarian homeowners who forewent certain lawful means of challenging the development ... due to the expense." As to the second factor, the judge noted that the Nybergs brought the present action five and one-half months after judgment entered in the Land Court action, and that such "close temporal proximity weigh[ ]s in favor of a conclusion that the present matter was filed in retaliation for the Land Court [a]ction." As to the third factor, the judge noted that the Wheltles filed their special motion to dismiss approximately one and one-half months after being ***651** served with the complaint in the present action, and found that this factor weighs in favor of a conclusion ("albeit less strongly than other factors") "that the present matter is retaliatory." As to the fourth factor -- the strength of the litigation as a whole and the strength of the nonmoving party's claim -- the judge noted that the abuse of process action "is not weak," but the intentional infliction of emotional distress claim "is meritless," and the present action is based solely on the Land Court action and thus on the Wheltles' petitioning activity. Accordingly, the judge concluded that the fourth factor supports a conclusion of retaliation. The judge found that the fifth factor, evidence that the moving party's petitioning activity was in fact chilled, did not apply because the Land Court action had terminated and was not appealed. The judge determined that the sixth factor -- whether the damages requested by the Nybergs burdened the Wheltles' exercise of their legitimate petitioning rights -- did not facially apply because the Land Court action had terminated before the commencement of the present action. Nonetheless, the judge found that the factor "minimally" weighed in favor of a finding of retaliation in view of the Wheltles' averment that they abandoned lawful avenues for challenging the development of the Nyberg lot due to the cost of such measures, "which suggests that potential future lawful petitioning activities ... may be hampered."

In addition to analyzing each factor, the judge was cognizant of his obligation to "assess the totality of the circumstances pertinent to the [Nybergs'] asserted primary purpose in bringing [their] claim," Blanchard I, 477 Mass. at 160, 75 N.E.3d 21, and consider "each claim as a whole, and holistically in light of the litigation," Blanchard II, 483 Mass. at 210, 130 N.E.3d 1242. After "weighing [the] factors and all the facts and circumstances surrounding the [present action]," the judge, in his discretion, concluded that he was "not fairly assured that the [present action] is not a SLAPP suit brought to punish the Wheltles for the Land Court [a]ction," and was "fairly assured that the [present action] is retaliatory, in response to the Wheltles' partially successful Land Court [a]ction." Having determined that the Nybergs failed to meet their burden under the second element of the second path of the second stage of the augmented framework, the judge allowed the Wheltles' special motion to dismiss the abuse of process claim.

****8** 3. Analysis. The record shows that the judge followed the augmented framework sequentially, assiduously, and judiciously. His written decision reflects a comprehensive assessment of the ***652** totality of the circumstances and thoughtful consideration

of "each claim as a whole, [examined] holistically in light of the litigation" as mandated by the augmented framework. Blanchard II, 483 Mass. at 210, 130 N.E.3d 1242. Consequently, it is difficult to conclude that the judge abused his discretion.

The Nybergs disagree. They primarily argue that the present action could not have been retaliatory because it was filed more than five months after the Wheltles' petitioning activity in the Land Court had concluded and neither party had appealed from that judgment. Thus, the Nybergs contend, the present action cannot be deemed a SLAPP suit, brought primarily to chill the Wheltles' legitimate exercise of their right to petition, because there was no ongoing petitioning activity to influence, burden, or chill. This argument is unavailing. As the judge ruled, "ongoing petitioning activity is not required for the nonmoving party's suit to be retaliatory; it is enough if the suit seeks to punish the moving party for prior petitioning activity." Our case law supports the judge's conclusion. See Wenger v. Aceto, 451 Mass. 1, 7 n.6, 883 N.E.2d 262 (2008), quoting Fisher v. Lint, 69 Mass. App. Ct. 360, 363, 868 N.E.2d 161 (2007) ("the purpose of filing a SLAPP suit is not to prevail in the matter, but rather to use litigation to chill, intimidate, or punish citizens who have exercised their constitutional right to petition the government to redress a grievance" [emphasis added]). A lawsuit brought to "punish" petitioning activity may constitute as much of a SLAPP suit as a lawsuit brought to deter or chill ongoing petitioning activity. See Duracraft, 427 Mass. at 161, 691 N.E.2d 935 (SLAPP suits are "generally meritless suits brought ... to deter common citizens from exercising their political or legal rights or to punish them for doing so" [citation omitted]). Further, as the judge recognized, punishing past petitioning may serve to burden, if not deter or chill, future petitioning activity.[11]

11 The judge concluded that the Wheltles' averments "suggest[ ] that potential future petitioning activities ... may be hampered." The Nybergs assert that "[t]he combination of these words -- 'suggests,' 'potential,' 'future' and 'may' -- injects far more speculation and ambiguity than permissible to be able to support a conclusion that the Nybergs 'intended' to prevent some unknown future petitioning by the Wheltles." As discussed below, where the Nybergs bore the burden to prove that the challenged claim is not a SLAPP suit, such that the judge is "fairly assured" and "sure" that it is not, we cannot say that the judge erred or abused his discretion.

At oral argument, the Nybergs acknowledged that the above cited language from Wenger, Duracraft, and Lint survives the ***653** Blanchard II and Harrison II changes to the anti-SLAPP analysis, and thus that an action brought to "punish" legitimate petitioning activity may still constitute a SLAPP suit. However, they argue that it is neither retaliatory nor punishment to attempt to recover nearly $500,000 for abuse of process when they were wronged by "the Wheltles' illegitimate adverse possession claims." Specifically, the Nybergs contend as follows: (1) the Land Court action was, as the Land Court judge wrote, "a pitched legal battle over literally every square inch of the disputed property, with the prize being the buildability or non-buildability" of the Nyberg lot; (2) viewed in that context, the Wheltles did not prevail by gaining less than ten square feet of "insignificant" land located under a concrete wall, but, in substance, lost the case as the result did not render the Nyberg lot unbuildable; and (3) in such circumstances, the Nybergs' primary motivation underlying the present action could not have been to punish the Wheltles' legitimate petitioning activity, but instead was to recover damages for the financial loss caused by the Wheltles' illegitimate and pretextual adverse possession claims.

****9** There is a measure of persuasiveness in the Nybergs' argument. The Wheltles brought the Land Court action, at least in part, to prevent the development of the Nyberg lot. Although the Wheltles prevailed on a portion of their Land Court action, they succeeded only in recovering a sliver of land, plus they failed to render the Nyberg lot unbuildable. Furthermore, the judge determined that the Nybergs' abuse of process claim was colorable. See Harrison II, 483 Mass. at 527, 134 N.E.3d 91, quoting Gutierrez v. Massachusetts Bay Transp. Auth., 437 Mass. 396, 408, 772 N.E.2d 552 (2002) ("[A]n abuse of process counterclaim may be brought even where the plaintiff has a meritorious claim. It is, indeed, 'immaterial that the process was properly issued, that it was obtained in the course of proceedings which were brought with probable cause and for a proper purpose or even that the proceedings terminated in favor of the person instituting or initiating them' "). In addition, while the Wheltles' motion, pleadings, and affidavits painted them as aging retirees of modest means and the Nybergs as powerful property developers, the Nybergs' pleadings and opposing affidavits disputed those portraits. The Nybergs averred that they were the sole employees of a small family business, while the Wheltles were people of substantial means, as illustrated by their ownership of two considerable properties. The Nybergs presented ***654** averments and evidence that the Wheltles coveted the Nyberg lot and acted as the "bully" here.

In view of the factual disputes at this early stage of the proceedings, the Nybergs argue that this case requires a jury resolution. Consistent with this argument, the Supreme Judicial Court has advised courts to analyze special motions to dismiss with caution in view of the obvious and considerable consequences stemming from the allowance of such a motion. See Harrison II, 483 Mass. at 529-530, 134 N.E.3d 91 ("We caution against the weaponization of the anti-SLAPP statute.... [I]t is not properly used either as cudgel to bludgeon an opponent's resolve to exercise its petitioning rights, or as a shield to protect claims that, although colorable, were brought primarily to chill another party's legitimate petitioning activity"). See also Exxon Mobil Corp., 489 Mass. at 728, 187 N.E.3d 393 ("Filing a special motion has an immediate and important effect on the litigation, short-circuiting and rerouting the ordinary trial and appellate process"). But see Blanchard I, 477 Mass. at 147, 75 N.E.3d 21, quoting Duracraft, 427 Mass. at 161, 691 N.E.2d 935 ("anti-SLAPP statute provides a 'procedural remedy for early dismissal of the disfavored' lawsuits" -- i.e., those targeting legitimate petitioning activity). The Nybergs further maintain that in seeking damages they did what every plaintiff-in-tort does when pursuing a tortfeasor, and that such activity was precisely what the Supreme Judicial Court recognized and endorsed as not being a SLAPP suit in Blanchard I, supra at 160, 75 N.E.3d 21.

The Nybergs' arguments demonstrate some of the difficulties associated with the application of the augmented framework. On one hand, the present action presents as a typical SLAPP case in that a supposedly wealthy developer sued abutters of supposedly modest means for petitioning in court to challenge a development project. See Blanchard II, 483 Mass. at 206, 130 N.E.3d 1242. On the other hand, the Nybergs averred that far from being wealthy and powerful developers, they were a real estate broker and part-time bookkeeper attempting to develop a single-family residential property, while the Wheltles were not the "individual citizens of modest means" contemplated by the anti-SLAPP law. Id. The parties contested each other's motivations and representations. There is an inherent difficulty and, in some cases, prematurity in requiring a judge to make credibility determinations and discern a party's primary motivation predicated on affidavits, pleadings, and proffers, ***655** and not on a more complete evidentiary record[12] scrutinized through cross-examination.[13] Indeed, there is a notable tension between the standard of review, which requires the judge, in his or her discretion,[14] to be "fairly assured" that the challenged claim is not a SLAPP suit before denying a special motion to dismiss, and the Supreme Judicial Court's apparent restraint on that discretion in its admonition to proceed with caution before allowing the special motion to dismiss.[15] See Harrison II, 483 Mass. at 529-530, 134 N.E.3d 91.

12 The parties appended various pleadings and documents to their affidavits in support of or opposition to the special motion to dismiss, many of which stemmed from the Land Court action.

13 General Laws c. 231, § 59H, provides that "discovery proceedings shall be stayed upon the filing of the special motion ...; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted." It does not appear that the parties sought additional discovery before the filing or resolution of the special motion to dismiss. The Supreme Judicial Court has cautioned that "[b]ecause discovery at this stage generally is inconsistent with the expedited procedural protections established by the anti-SLAPP statute, judges should be parsimonious in permitting it" apart from "exceptional cases" such as "to test the veracity of factual allegations" (citation omitted). Blanchard II, 483 Mass. at 212, 130 N.E.3d 1242. That notwithstanding, the parties did supplement the special motion to dismiss with myriad exhibits and documents from the Land Court action. See note 12, supra.

14 At oral argument, the Nybergs suggested that rather than leave the determination of a special motion to dismiss to a judge's discretion at this early stage of the proceedings, the summary judgment standard -- i.e., viewing the evidence in the light most favorable to the nonmoving party -- would be a more fair and appropriate standard of review. Although that standard might provide greater consistency to the analysis of G. L. c. 231, § 59H, motions (but result in more denials of such motions), we are bound by the standard set forth by the Supreme Judicial Court.

15 We note the difficulty in defining the nature of the "discretion" that a judge has under a burden-shifting scheme that places the burden of proof on the nonmoving party and requires the judge to be "fairly assured" that the burden has been met. Blanchard II, 483 Mass. at 203, 207, 130 N.E.3d 1242.

****10** Nonetheless, under the standards enumerated in Blanchard II and Harrison II, we cannot say that the judge abused his discretion or made an error of law. As discussed, the judge applied the augmented framework sequentially,[16] considered "each

claim as a ***656** whole, and holistically ... in light of the pleadings, affidavits, and the record as a whole," and "considered the conflicting evidence." Blanchard II, 483 Mass. at 210, 130 N.E.3d 1242. The judge concluded that he was "not fairly assured that the Nybergs' suit is not a SLAPP suit." Although a different judge may have reached a different result, there was sufficient objective evidence supporting the judge's conclusion that he lacked "fair assurance" -- i.e., that he was not "confident" or "sure" -- that the action was not a SLAPP suit.[17] Id. at 205, 130 N.E.3d 1242. As his determination did not constitute clear error that fell outside the range of reasonable alternatives, we discern no abuse of discretion in the allowance of the special motion to dismiss. See L.L., 470 Mass. at 185 n.27, 20 N.E.3d 930.

16 We note that the judge determined that several of the six nonexclusive Blanchard II factors considered at the second element of the second path of the second stage of the augmented framework were either marginally relevant or facially inapplicable in this case. For example, as discussed above, there was a factual dispute as to the applicability of the first factor that the judge chose to resolve at this early stage. Also, the judge found that the fifth factor -- evidence that the moving party's activity was in fact chilled -- did not apply because the Land Court action had already terminated. Likewise, the judge found that the sixth factor -- whether the damages requested by the Nybergs burdened the Wheltles' petitioning rights -- was not facially applicable. Finally, although the judge found that the second factor applied because the present action was commenced in "relatively close temporal proximity" to the Land Court action, any abuse of process claim or counterclaim is likely to be filed within a "relatively close temporal proximity" to the process being challenged. Moreover, there may be myriad and diverse strategic or other reasons that delay the bringing of a legal action or claim.

17 Here, the judge further concluded that he was "fairly assured that the Nybergs' suit is retaliatory." We do not read the augmented framework to mandate such a determination. Rather, anything short of fair assurance that the action was not a SLAPP suit left the Nybergs' burden unmet and required the judge to allow the special motion. See Blanchard II, 483 Mass. at 205, 130 N.E.3d 1242.

The Nybergs also argue that the import of the judge's decision is to render any abuse of process claim obsolete. We disagree. Although application of the special motion to dismiss may, in certain circumstances, create challenges to sustaining an abuse of process claim, application of the augmented framework has not abrogated the common-law tort of abuse of process. To the contrary, the Supreme Judicial Court has addressed and, in effect, rejected this argument. See Harrison I, 477 Mass. at 169, 174-175 & n.14, 74 N.E.3d 1237.

Of final note, the Supreme Judicial Court recently expressed the following concern with the anti-SLAPP statute and case law:

> "Although originally drafted with a particular purpose in mind -- that is, the prevention of lawsuits used by developers to punish and dissuade those objecting to their projects in the permitting process -- the anti-SLAPP statute's broadly drafted provisions, particularly its wide-ranging definition of ***657** petitioning activity, have led to a significant expansion of its application. The ever-increasing complexity of the anti-SLAPP case law has also made resolution of these cases difficult and time consuming. We recognize that this case law may require further reconsideration and simplification to ensure that the statutory purposes of the anti-SLAPP statute are accomplished and the orderly resolution of these cases is not disrupted." (Citations omitted.)

****11** Exxon Mobil Corp., 489 Mass. at 728 n.5, 187 N.E.3d 393. Consistent with this observation, the instant case raises various concerns. Inasmuch as the present action involves a developer-abutter dispute and abuse of process claim -- traditional indicia of SLAPP matters -- and insofar as the judge sequentially and properly applied the augmented framework, the judge did not abuse his discretion in concluding that he was not fairly assured that the present action is not a SLAPP suit. Yet, the judge made this determination on a record in which several nonexclusive Blanchard II factors were at best marginally applicable. See note 16, supra. Furthermore, we have difficulty reconciling the admonition that a judge should be cautious in ending a party's petitioning activity at the early stage of a litigation with a standard that places the burden of proof on the nonmoving party, requires the judge to be fairly assured that the burden is met, and leaves this determination to judicial "discretion" after considering each claim "holistically in light of the litigation." Blanchard II, 483 Mass. at 203-205, 207, 210, 130 N.E.3d 1242. In other contexts, dismissing a case at an early stage of the litigation requires a far more exacting burden on the moving party and, typically, requires that we view allegations or evidence in the light most favorable to the nonmoving party. See, e.g., Dunn v. Genzyme Corp., 486 Mass. 713, 717, 161 N.E.3d 390 (2021) (in context of motion to dismiss, court must accept facts asserted in complaint as true and draw all reasonable inferences in plaintiff's favor); Casseus v. Eastern Bus Co., 478 Mass. 786, 792, 89 N.E.3d 1184 (2018) (summary judgment standard is "whether, viewing the evidence in the light most favorable

to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law" [citation omitted]). See note 14, supra. Indeed, the fair assurance standard seemingly reverses the usual rule in that doubts about the viability of a claim are typically resolved by allowing it to be developed through the next stage of proceedings, not by dismissing it. We further note the concern regarding a ***658** process that authorizes the dismissal of claims on the basis of competing affidavits, disputed facts, and "holistic[ ]" consideration of the claims, particularly in cases, like the present one, that require resolution of the parties' motivations. Blanchard II, supra at 210, 130 N.E.3d 1242. In this regard, as we have noted, the Nybergs insist that the present action cries out for a jury trial as the only appropriate way to resolve critical credibility disputes and determine the parties' true motivations. This argument has some force in that there are obvious difficulties in applying the latter stages of the augmented framework and requiring judges to be fairly assured that the challenged claim is not a SLAPP suit, id. at 205, 130 N.E.3d 1242, absent full discovery and testimony tested through cross-examination. Yet, the special motion to dismiss remedy exists, in large part, to avoid costly litigation and trial. See, e.g., Blanchard I, 477 Mass. at 147, 75 N.E.3d 21; Duracraft, 427 Mass. at 161, 691 N.E.2d 935. In any event, it is for the Supreme Judicial Court or the Legislature to address and resolve these concerns should they so choose.

For the aforementioned reasons, we conclude that there was no abuse of discretion or error of law in the allowance of the special motion to dismiss, and affirm the judgment.[18]

18 The Wheltles' request for appellate attorney's fees and costs pursuant to G. L. c. 231, § 59H, is allowed. See Benoit v. Frederickson, 454 Mass. 148, 154, 908 N.E.2d 714 (2009). In accordance with the procedure set out in Fabre v. Walton, 441 Mass. 9, 10-11, 802 N.E.2d 1030 (2004), the Wheltles may, within fourteen days of the issuance of this opinion, submit an application for attorney's fees and costs with the appropriate supporting materials. The Nybergs shall have fourteen days thereafter to file a response to that application. The Wheltles' request for double attorney's fees and costs pursuant to Mass. R. A. P. 25, as appearing in 481 Mass. 1654 (2019), is denied.

So ordered.

All Citations

--- N.E.3d ----, 101 Mass.App.Ct. 639, 2022 WL 4137200

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Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 21-P-791

JONATHAN NYBERG & another

vs.

R. BRUCE WHELTLE & another.

Pending in the Superior Court for the County of Middlesex

Ordered, that the following entry be made on the docket:

Judgment affirmed.

By the Court,

Joseph F. Stanton, Clerk

Date September 13, 2022.

97 Mass.App.Ct. 1104
Unpublished Disposition

Appeals Court of Massachusetts.

W.R.S.

v.

R.S. & others.[1]

1 A.S., B.S., and M.S.

19-P-419
|
Entered: March 5, 2020

By the Court (Desmond, Wendlandt & McDonough, JJ.[2])

2 The panelists are listed in order of seniority.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The plaintiff (son), appeals from a judgment of a Superior Court judge, allowing the special motion to dismiss, pursuant to the anti-SLAPP statute, G. L. c. 231, § 59H (§ 59H), of the defendant (father), and awarding attorney's fees and costs to the defendants. We affirm.

Background. The son, a forty-one year old disabled adult, moved into his parents' home due to medical issues -- an arrangement that, as we previously described, proved to be "inharmonious." W.R.S. v. R.S., 93 Mass. App. Ct. 1104 (2018). In his first amended complaint, the son alleged that the father, along with the other named defendants (his mother and his two brothers), harassed, ridiculed, ignored, and belittled him, forcing him to leave the home.[3] The defendants moved to dismiss all counts of the amended complaint pursuant to Mass. R. Civ. P. 12 (b) (6), and also moved to dismiss the son's abuse of process claim (which had been alleged only against the father) pursuant to § 59H. We affirmed dismissal of all counts pursuant to Mass. R. Civ. P. 12 (b) (6) and affirmed that the father had met his initial burden to show, under the framework established in Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 167-168 (1998), that the son's abuse of process claim was based solely on the father's protected petitioning activity. W.R.S., 93 Mass. App. Ct. at 1104. However, because while the son's appeal was pending, the Supreme Judicial Court augmented the Duracraft framework in Blanchard v. Steward Carney Hosp., 477 Mass. 141 (2017) (Blanchard I), we remanded for the limited purpose of determining whether, under that augmented framework, the abuse of process claim could survive the special motion. Id. On remand, the judge found that it could not and allowed the special motion

to dismiss. Pursuant to § 59H, the judge awarded $55,000 in attorney's fees and costs, reducing the requested fees and costs by approximately $30,000.

3 The first amended complaint included claims of abuse of process, negligence, gross negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, conversion, discrimination, civil rights violations, fraudulent concealment/misrepresentation, and civil conspiracy.

Discussion. 1. Law of the case. On appeal, the son raises arguments unrelated to the propriety of the judge's application of the augmented Duracraft framework and award of fees and costs under the anti-SLAPP statute. Pursuant to the law of the case doctrine, we decline to "reconsider questions decided upon an earlier appeal in the same case." Peterson v. Hopson, 306 Mass. 597, 599 (1940). "[U]nless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice," we should not reopen an issue that was already decided (citation omitted). King v. Driscoll, 424 Mass. 1, 8 (1996). None of those circumstances occurred in this case.[4] Accordingly, we limit our analysis to the narrow scope of our prior remand.

4 The son argues that the father committed a fraud on the court and that justice requires reopening of these issues. In view of the final judgment in the father's G. L. c. 258E matter, which is discussed infra, and our prior affirmance in W.R.S., 93 Mass. App. Ct. 1104, of the dismissal of all of the claims pursuant to Mass. R. Civ. P. 12 (b) (6), we disagree.

***2** 2. Abuse of process. The son's abuse of process claim centers on the father's pursuit of a harassment prevention order (HPO) pursuant to G. L. c. 258E. Briefly, the father obtained a temporary HPO in February 2015, and the son was removed from the family home. After litigation, including two appeals to this court, the father obtained a permanent HPO, which we affirmed.[5] See R.S. v. W.S., 92 Mass. App. Ct. 1110 (2017). The son alleges that the father abused this process by committing perjury, using the HPO to circumvent Housing Court procedures, and forcing him to move prematurely into a hotel without his medications.

5 The father sought an ex parte HPO against the son. A judge issued the order and scheduled a hearing after notice. At the hearing, where both parties testified before a second judge, the judge issued a one-year extension order. After further hearings before the first judge, the HPO was made permanent. Prior to the issuance of the permanent order, the son appealed from the one-year order. On that appeal, a panel of this court remanded the matter for the judge to make findings of fact; on remand, the judge did not make findings because the transcript did not sufficiently refresh his recollection, and we vacated the one-year order. The son then appealed the permanent order, which we affirmed. R.S. v. W.S., 92 Mass. App. Ct. 1110 (2017).

As set forth supra, we previously affirmed the finding that the father met his initial burden under the Duracraft framework to demonstrate that the son's abuse of process claim was solely based on the father's application for an HPO, which is petitioning activity.[6] W.R.S., 93 Mass. App. Ct. 1104. See Fabre v. Walton, 436 Mass. 517, 523 (2002) ("The filing of a complaint for an abuse protection order and the submission of supporting affidavits are petitioning activities encompassed within the protection afforded by" § 59H). On remand, the burden shifted to the son to show that "the anti-SLAPP statute nonetheless does not require dismissal." 477 Harrison Ave., LLC v. JACE Boston, LLC, 483 Mass. 514, 518 (2019). Based on the full record, including written submissions from both parties and oral arguments at two separate hearings, the judge found that the son failed to meet his burden. We review the judge's decision under the second prong of the Duracraft framework for an abuse of discretion. See Blanchard v. Steward Carney Hosp. Inc., 483 Mass. 200, 203 (2019) (Blanchard II).

6 A special motion to dismiss pursuant to § 59H begins with the moving party's threshold burden to show that the conduct complained of is "solely based on" protected petitioning activity. Blanchard I, 477 Mass. at 158, citing Duracraft, 427 Mass. at 165, 167.

The son could satisfy his burden under the second prong in one of two ways or paths. See 477 Harrison Ave., LLC, 483 Mass. at 521. Under the first path, the son must demonstrate that the father's petitioning activity lacked "any reasonable factual support" or "any arguable basis in law" and caused the son injury. Id. at 521-522. See Blanchard I, 477 Mass. at 158-159. The son did not meet this burden because, as set forth supra, the father obtained a final judgment allowing a permanent HPO.[7] See Fabre, 436 Mass. at 524 (final judgment granting c. 209A order "is conclusive evidence that the petitioning activity was not devoid of any reasonable factual support or arguable basis in law").

7 Contrary to the son's argument, the fact that a panel of this Court vacated the one-year extension HPO (on the basis that the judge who issued it did not make the required findings) is an insufficient basis to sustain his burden under the first path in light of final judgment issuing the permanent HPO in favor of the father. R.S., 92 Mass. App. Ct. 1110.

***3** Under the second path, the son must establish "that the motion judge could conclude with fair assurance," based on the totality of the circumstances, the pleadings, and any affidavits,[8] that the challenged claim was colorable and not retaliatory. 477 Harrison Ave., LLC, 483 Mass. at 522-523, citing Blanchard II, 483 Mass. at 204, 209. A claim is colorable if it is "worthy of being presented to and considered by the court" because it "offers some reasonable possibility of a decision in the party's favor" (citations omitted). Blanchard I, 477 Mass. at 160-161.

8 The son's argument that the types of proof required at this second stage is unknown is without merit. See G. L. c. 231, § 59H (requiring consideration of "pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based").

"A [claim] for abuse of process has three elements: (1) process was used, (2) for an ulterior or illegitimate purpose, (3) resulting in damage" (quotations omitted). 477 Harrison Ave., LLC, 483 Mass. at 526-527. Here, the son's abuse of process claim set forth the requisite elements. First, there is no question that the father's application for an HPO is the use of process. Second, the son alleged that his father had an ulterior motive to circumvent the Housing Court procedures and to evict him prematurely. Third, the son alleged he suffered medical damage due to the lack of sufficient time to move out and retrieve his medications. Although the permanent HPO was affirmed, contrary to the father's argument, the meritorious nature of his HPO application is immaterial in determining whether the son's abuse of process claim was colorable. "Proof of the groundlessness of an action is not an essential element," and an abuse of process claim is colorable "even [if] the proceedings terminated in favor of the person instituting or initiating them" (quotation and citation omitted). 477 Harrison Ave., LLC, supra at 527.

However, the son failed to show that his abuse of process claim was not retaliatory. A claim is not retaliatory if the "primary motivating goal in bringing the challenged claim was not to interfere with and burden [the father's] ... petition rights, but to seek damages for the personal harm to [the son] from [the father's] alleged ... [legally transgressive] acts" (quotations omitted). 477 Harrison Ave., LLC, 483 Mass. at 528. Here, the son does not articulate any goal other than to obtain damages stemming from the father's legitimate exercise of his petition rights. The orders the father obtained through the HPO are authorized by the statute. G. L. c. 258E, § 3 (a) (iii). We discern no error in the judge's conclusion that the son failed to meet his burden to show that his abuse of process claim was not retaliatory. The son's only argument in this regard is that the father obtained the HPO through misrepresentations. This argument is unavailing in view of the finality of the permanent HPO, as we have previously explained. See W.R.S., 93 Mass. App. Ct. 1104. In affirming the permanent order, the panel rejected the son's argument that the father had misled the court. R.S., 92 Mass. App. Ct. at 1110. Moreover, as set forth supra, we affirmed the dismissal of all claims, including the abuse of process claim, pursuant to Mass. R. Civ. P. 12 (b) (6); accordingly, no damages are available, and the special motion was properly allowed.

3. Second amended complaint. The son argues that the judge erred in denying his motion for leave to file a second amended complaint.[9] Because the proposed amendment of the abuse of process claim would be futile, the judge did not abuse his discretion. See Mathis v. Massachusetts Elec. Co., 409 Mass. 256, 264 (1991); Mancuso v. Kinchla, 60 Mass. App. Ct. 558, 572 (2004) (no abuse of discretion in denying motion to amend where, "[n]otwithstanding the absence of an explicit statement of reasons for that denial, justification for the judge's action appears in the record before us" [citation omitted]). An amended complaint is futile if it "would not have survived a motion to dismiss on preclusion grounds." Mancuso, supra.

9 The son also makes an argument regarding the Superior Court's return of his rule 9A package concerning his motion to file a second amended complaint. We need not reach the merits of that argument because we conclude, infra, there was no abuse of discretion in denying the motion for leave to file a second amended complaint.

***4** The son failed to provide a copy of the proposed second amended complaint on appeal; however, the son described the amendment as focusing "on the facts and evidence specifically and narrowly relating to the [a]buse of [p]rocess [c]ount and

accompanying proof of damages" and "to adduce the facts which elucidate [the father's] abuse of process before, during, and after [the father's] petitioning activity." This court already found that the judge properly dismissed the abuse of process claim pursuant to Mass. R. Civ. P. 12 (b) (6) based on collateral estoppel because "he had the opportunity to litigate these issues when contesting" the HPO. W.R.S., 93 Mass. App. Ct. 1104. Accordingly, allowing filing of the proposed second amended complaint would have been futile; the son has not shown it would have survived dismissal on preclusion grounds. See Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 679 n.8 (2011) (dismissal appropriate in cases of collateral estoppel).

4. Attorney's fees and costs. The son argues that the judge abused his discretion in awarding attorney's fees and costs. The anti-SLAPP statute mandates the award of a prevailing special movant's "costs and reasonable attorney's fees." G. L. c. 231, § 59H. See North Am. Expositions Co. Ltd. Partnership v. Corcoran, 452 Mass. 852, 872 (2009). The judge has the discretion to determine what is "reasonable" under § 59H and we decline to uphold a fee award only if it is clearly erroneous. Id. at 872.

Here, the judge applied the "lodestar" method in determining the award amount, which is a reasonable method for calculating attorney's fees and costs.[10] See, e.g., Fontaine v. Ebtec Corp., 415 Mass. 309, 325-326 (1993); Brady v. Citizens Union Sav. Bank, 91 Mass. App. Ct. 160, 161-162 (2017). Such an award need not be limited to those fees solely attributable to the special motion to dismiss. See Polay v. McMahon, 468 Mass. 379, 388 (2014) ("A judge [ ] has discretion to award attorney's fees and costs beyond those incurred in bringing the special motion itself"); Office One, Inc. v. Lopez, 437 Mass. 113, 126 (2002) (fee award not "limited to legal work incurred in bringing the special motion itself"). On this record, the son has not shown that the judge abused his discretion.

10 The lodestar method refers to the calculation of reasonable attorney's fees by multiplying the number of hours reasonably spent on the case by a reasonable hourly rate. See Brady v. Citizens Union Sav. Bank, 91 Mass. App. Ct. 160, 161 n.7 (2017).

5. Appellate fees and costs. Pursuant to § 59H, we must allow the defendants' request for reasonable appellate attorney's fees and costs on appeal. The defendants may seek such an award in accordance with the procedure set forth in Fabre v. Walton, 441 Mass. 9, 10-11 & n.1 (2004).[11]

11 We deny the father's requests for sanctions and double appellate costs.

Judgment affirmed.

All Citations

97 Mass.App.Ct. 1104, 141 N.E.3d 457 (Table), 2020 WL 1061808