COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. APPEALS COURT
NO. 2018-P-0498

LYNNE BLANCHARD, GAIL DONAHOE,
GAIL DOUGLAS-CANDIDO,
KATHLEEN DWYER, LINDA HERR,
CHERYL HENDRICK, KATHLEEN LANG,
VICTORIA WEBSTER, and NYDIA WOODS

Plaintiffs-Appellees

v.

STEWARD CARNEY HOSPITAL, INC.;
STEWARD HOSPITAL HOLDINGS, LLC;
STEWARD HEALTH CARE SYSTEM, LLC.,
WILLIAM WALCZAK;

Defendants-Appellants

ON APPEAL FROM THE
SUPERIOR COURT FOR SUFFOLK COUNTY
No. 1384CV01914

BRIEF FOR APPELLANTS

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CORPORATE DISCLOSURE STATEMENT PER SJC Rule 1:21

Pursuant to Rule 1:21 of the Supreme Judicial Court Rules, Corporate Appellants Steward Carney Hospital, Inc., Steward Hospital Holdings LLC, and Steward Health Care System LLC, by and through their undersigned counsel, hereby make the following statements:

1. Appellant Steward Carney Hospital, Inc. is a nongovernmental corporate party, its parent corporation is Steward Health Care System LLC, and there is no publicly issued stock to be held by a publicly held corporation.
2. Appellant Steward Hospital Holdings LLC is a nongovernmental corporate party, its parent corporation is Steward Health Care System LLC, and there is no publicly issued stock to be held by a publicly held corporation.
3. Appellant Steward Health Care System LLC is a nongovernmental corporate party and there is no publicly issued stock to be held by a publicly held corporation.

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I. STATEMENT OF ISSUES

A. Whether or not the lower court erred when it denied, on remand from the SJC, the Steward Defendants' request to conduct discovery in support of their Special Motion to Dismiss, filed pursuant to G.L. c. 231, § 59H.

B. Whether or not the lower court erred when it found, on remand from the SJC, that the Plaintiffs' defamation claims were not brought primarily to chill the Steward Defendants' legitimate exercise of their right to petition and thus denied the Steward Defendants' Special Motion to Dismiss, filed pursuant to G.L. c. 231, § 59H.

II. STATEMENT OF THE CASE

Plaintiffs'[1] Superior Court Complaint arose out of the termination of the entire staff of nurses and mental health counselors working in the Adolescent Psychiatric Unit (the "Unit") of Steward Carney Hospital (the "Hospital") on May 26, 2011. The

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[1] Appellees will be referred to as "Plaintiffs" and Appellants as the "Steward Defendants." Mass. R.A.P. 16(d). Defendants Proskauer Rose, LLP and Scott Harshbarger, who are not parties to this appeal, will be referred to as the "Proskauer Defendants." "Defendants" will be used when it is necessary to discuss the Steward Defendants and Proskauer Defendants collectively.

terminations were done at the recommendation of an independent investigator, former Massachusetts Attorney General L. Scott Harshbarger, following the Hospital's report to state licensing authorities of a series of incidents in April 2011 involving patient abuse and neglect, which had triggered a review of the Hospital's license to operate the Unit.

In their Complaint, Plaintiffs asserted claims of defamation against the Steward Defendants (Count III) and the Proskauer Defendants (Count IV).[2] The claim of defamation against the Steward Defendants arose out of statements that the Hospital's then-President, William Walczak, made to Hospital staff in an email following the termination of Plaintiffs' employment and statements Mr. Walczak made that were published in *The Boston Globe*. (RA37-40). The claim of defamation against the Proskauer Defendants arose out of a written report that Mr. Harshbarger made to the Hospital. (RA40-43).

The Steward Defendants filed a Special Motion to Dismiss Count III (Defamation) against them pursuant

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[2] Plaintiffs made additional claims against Defendants (Counts I, II, and V) but those claims are not at issue in this Appeal.

to Mass. Gen. Laws c. 231, § 59H (anti-SLAPP statute), on grounds that the alleged defamatory statements made by Mr. Walczak constituted protected "petitioning activity."[3] (RA46-49). The Proskauer Defendants also filed a Special Motion to Dismiss Count IV (Defamation) against them pursuant to the anti-SLAPP statute on the theory that the statements contained in Mr. Harshbarger's report to the Hospital were petitioning activity.[4] (RA113-117).

First Lower Court Decision

A motion hearing on Defendants' Special Motions to Dismiss was held on December 3, 2013. (RA13; RA174 at n.1). On March 3, 2014, the lower court (Giles, J.) issued a Memorandum of Decision and Order on Defendants' Special Motions to Dismiss allowing the Proskauer Defendants' special motion to dismiss and

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[3] The Steward Defendants also filed, in the alternative, a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6), on grounds that the alleged defamatory statements were not "of and concerning" Plaintiffs, were non-actionable statements of opinion, and were conditionally privileged business communications. At the motion hearing, however, the Steward Defendants withdrew their Rule 12(b)(6) motion and, as such, the lower court did not rule on that motion and it is not a subject of this appeal.

[4] The Proskauer Defendants also filed an alternative 12(b)(6) motion to dismiss that was likewise withdrawn at the motion hearing in the lower court.

denying the Steward Defendants' special motion. (Addendum at 1-10).[5]

The lower court determined that the statements in Mr. Harshbarger's report constituted petitioning activity because "they were aimed at persuading the regulatory agencies involved not to revoke Carney Hospital's license." (Addendum at 6-8). As factors supporting her conclusion, Judge Giles observed that:

- The Hospital retained Harshbarger to conduct his review of the Unit and make recommendations to the Hospital and President Walczak at a time when the Hospital was "being investigated by various government agencies; and its license was in danger of being revoked by the DMH." (Addendum 6).

- "Harshbarger was mandated to interface with the agencies and [Hospital] personnel on behalf of Carney Hospital and develop remedies so that the Hospital could retain its license and prevent the Unit from being closed." (Addendum 6).

- Mr. Harshbarger's report was created with the "intention to inform and influence the DMH's decision." (Addendum 7).

The lower court held that Plaintiffs did not meet their burden of showing that the Proskauer Defendants' petitioning activity was "devoid of any reasonable factual support or any arguable basis in law," as

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[5] The lower court's memorandum of decision is also located in the Record Appendix at RA173-82.

required by the anti-SLAPP statute. (Addendum 7). Mr. Harshbarger's report was based on interviews of myriad Hospital employees; his recommendations were communicated to the Hospital and to DMH; and the Hospital was subsequently permitted to retain its license to operate the Unit. (Addendum 7-8). As such, the lower court allowed the Proskauer Defendants' special motion to dismiss and denied the Steward Defendants' special motion. (Id. at 10).

However, as to the Steward Defendants' Special Motion to Dismiss, the lower court found that neither the email Mr. Walczak sent to Hospital employees nor the comments he made in *The Boston Globe* were "petitioning activity." (Id. at 8-10).

The Steward Defendants timely filed their notice of interlocutory appeal pursuant to Fabre v. Walton, 436 Mass. 517, 521-22 (2002) and Benoit v. Frederickson, 454 Mass. 148, 151-52 (2009). (RA183-85).

Appeals Court Decision

On February 24, 2016, the Appeals Court issued a rescript opinion ("rescript opinion") in Blanchard v. Steward Carney Hospital, Inc., 89 Mass. App. Ct. 97 (2016) holding that Walczak's statements to *The Boston*

Globe constituted protected petitioning activity, but that his internal email to hospital staff did not. (Addendum 16, 38-39). As such, the Appeals Court reversed the Superior Court decision "insofar as it denied the Steward defendants' special motion to dismiss count 3 of the plaintiff's complaint (defamation) as to Walczak's statements to the Boston Globe. In all other respects the order is affirmed." (Id.).

Despite having found that the Steward Defendants' anti-SLAPP special motion to dismiss had been meritorious, in part, it nevertheless denied the Steward Defendants' request for reasonable attorney's fees and costs on the sole basis that "count 3 survives in part." (Addendum 39 n.14).

On March 9, 2016, the Steward Defendants filed with the Appeals Court a Petition for Rehearing, which was denied. On March 15, 2016, The Steward Defendants and the Plaintiffs both filed Applications for Further Appellate Review in the SJC, which were allowed.

SJC Decision

On May 23, 2017, the SJC issued its decision in Blanchard v. Steward Carney Hospital, Inc., 477 Mass. 141 (2017) vacating so much of the lower court's

decision as to Walczak's statements to the *Boston Globe* and affirming the lower court's decision in other respects. (Addendum 43). The SJC found that Walczak's statements to the *Boston Globe* constituted protected petitioning activity (Addendum 37).

However, rather than allow the Steward Defendants' Motion under the existing standards, the SJC created a new "augmented" Duracraft Corp. v. Holmes Products Corp., 427 Mass. 156 (1998) standard whereby a nonmoving party may defeat a special motion to dismiss by demonstrating that the claim was not primarily brought to chill the special movant's legitimate petitioning activities. Blanchard v. Steward Carney Hospital, Inc., 477 Mass. at 160. The SJC instructed that:

> To make this showing, the nonmoving party must establish, such that the motion judge may conclude with fair assurance, that its primary motivating goal in bringing its claim, viewed in its entirety, 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.'"

Id. (citation omitted). The SJC then remanded the case to the lower court for further consideration in light of its opinion.

On June 6, 2017, the Steward Defendants filed a Petition for Rehearing, which was denied.

Lower Court Proceedings After Remand

On August 17, 2017, the lower court held a status conference to determine the course of proceedings after remand. (RA335-356). The Steward Defendants requested leave of court to conduct short (two hours maximum) depositions of each of the nine Plaintiffs on issues relevant to the remand. (RA344). The Court rejected the request out of hand, indicating that "I'm not going to allow any discovery. I don't think it's warranted under the circumstances. I just want to establish a briefing schedule for a renewed motion [i.e., anti-SLAPP Special Motion to Dismiss]. (RA345).

On October 4, 2017, the Plaintiff Nurses filed their brief opposing the Special Motion, after remand, and also filed an Affidavit of Dahlia Rudavksy (with exhibits). (RA296-323). On November 1, 2017, the Steward Defendants filed their brief in support of the Special Motion, after remand, and also field an Affidavit of Jeffrey Dretler (with exhibits). (RA324-334). On November 22, 2017, the Plaintiffs filed a Reply Memorandum.

On November 30, 2017, the lower court heard oral argument on the remanded portions of the anti-SLAPP motion. On December 7, 2017, the lower court issued its Memorandum of Decision, after remand, denying the Steward Defendants' Motion. According to the lower court: "I find that this claim is not a so-called SLAPP suit because I find that the plaintiffs' primary motivation in bringing it was to seek relief from allegedly tortious harm, not to interfere with the defendants' petition rights." (Addendum 50).

The Steward Defendants timely filed their notice of interlocutory appeal pursuant to Fabre v. Walton, 436 Mass. 517, 521-22 (2002) and Benoit v. Frederickson, 454 Mass. 148, 151-52 (2009). (RA183-85).

III. STATEMENT OF THE FACTS

The Adolescent Psychiatric Unit

Plaintiffs are registered nurses who worked in the Hospital's Adolescent Psychiatric Unit ("the Unit"). (RA19 at ¶¶ 2-10). The Unit typically treated mentally and physically challenged teenagers who were often in aggressive or acute states. (RA120 at ¶ 7; RA73-74 at ¶ 8). The patients in the Unit are some of the neediest and most vulnerable in the state, often

with severe trauma or abuse histories, often neglected and underserved. (RA87-88). The Unit is licensed by the Department of Mental Health ("DMH") and the Department of Public Health ("DPH") every two years. (RA120 at ¶ 7; RA73 at ¶ 7).

April 2011 Incidents and Hospital's Response

Four incidents involving alleged patient abuse or neglect on the Unit took place in April 2011 (the "incidents"). (RA27-29 at ¶¶ 27-28, 32, 35, 38; Addendum 2). DMH, DPH, and the Department of Children and Families ("DCF") (collectively, the "agencies") were notified. (RA27-29 at ¶¶ 30, 32, 37, 38; RA120 at ¶ 8; RA73-74 at ¶ 9; Addendum 2). Due to the serious nature of the reports, DMH immediately commenced an investigation into each of the reported incidents. (RA85-86; RA88; RA89-93; RA74 at ¶ 10). As a first step, DMH stopped admissions on the Unit and saw that the Hospital took steps to bring down the census. (RA120 at ¶ 9). DMH indicated to the Hospital that it was seriously considering shutting down the Unit and revoking its license unless the Hospital could demonstrate that it had a plan in place to ensure the care and safety of the patients. (RA120 at ¶ 9; RA91-96; RA74 at ¶ 10; Addendum 2).

The Hospital placed all of the Unit's nurses and mental health counselors, as well as two managers, on paid administrative leave. (RA75 at ¶ 13; Addendum 2). The Hospital also hired former Commonwealth of Massachusetts Attorney General L. Scott Harshbarger to conduct a detailed review of the Unit and make recommendations. (RA30 at ¶ 44; RA121-23 at ¶ 12-16; RA75 at ¶ 12; Addendum 2). The Hospital engaged Attorney General Harshbarger in response to the threat of being closed by DMH. (Addendum 6). The Hospital hoped that the hiring of Attorney General Harshbarger and its placement of the Unit nurses and staff on paid administrative leave would convey to the regulatory agencies that the Hospital was taking the incidents and regulatory investigations seriously, and convince the agencies to keep the Unit open. (RA121-23 at ¶ 12-16; RA94-96; RA75 at ¶ 12).[6]

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[6] During a labor arbitration hearing in which the issue of whether the Hospital had "just cause" to terminate the nurses was litigated (Addendum 4 n.2), Elizabeth Kinkead, Director of Licensing for the Department of Mental Health, testified that "the level of concern was very serious" and that "on the table was the option to close the unit." (RA94). Ms. Kinkead further stated that before recommending whether or not DMH should shut down the Unit, she "wanted to be assured that there [was] some really heavy oversight on a regular basis that was occurring." (RA94-96).

As part of the investigation, Mr. Harshbarger and/or his associates interviewed all Hospital staff having any contact with or information about the Unit, almost fifty employees, including administrators, managers, and each of the Plaintiffs. (RA30 at ¶ 45, 47; RA123 at ¶ 17; RA75-76 at ¶ 15; Addendum 2-3). Four of the nine Plaintiffs attended the interview with their union representatives present. (RA298-312). On May 13, 2011, Mr. Harshbarger met with Mr. Walczak to orally relay his recommendations and on May 26, 2011, submitted a written report to the Hospital. (RA31 at ¶ 48; RA76 at ¶ 16; Addendum 3).

In the report, Mr. Harshbarger recommended that the Hospital rebuild the Unit by, among other things, replacing all of the Unit's personnel. (RA76 at ¶ 16; Addendum; RA133-36). Mr. Harshbarger reported that, based on his interviews, he believed there was a culture of mediocrity at the Hospital and a "code of silence" generated by a range of staff, rather than staff reporting problems on the Unit. (RA123-24 at ¶ 19; RA76 at ¶ 18; Addendum 3; RA133-36). Mr.

Learning that the Hospital had removed all Unit staff gave Ms. Kinkead "some options to consider" other than shutting the Unit completely. (Id.).

Harshbarger identified the "code of silence" as "[o]ne of the major underlying sources and causes of the operational and performance dysfunction on the Unit." (RA135 at ¶ 3). Mr. Harshbarger also observed that a tension between the nurses and the mental health counselors caused "teamwork, communication and morale suffer, impacting quality of care," and that "licensed RNs ... do not perform ... *at standards of excellence*." (RA135-36 at ¶¶ 4-5)(emphasis in original).

DMH stayed closely involved with the transition of the Unit and made recommendations to the Hospital of consultants that it could work with to develop a plan for the future. (RA96-97). One of the consultants recommended by DMH was Nan Stromberg, the former Director of Nursing for DMH, where she was responsible for conducting licensing surveys to be sure hospitals were meeting DMH requirements. (RA96-97; RA100-02). Ms. Stromberg was engaged by the Hospital and worked with the Hospital to develop a Strategic Plan to keep the facility open. (RA103-06; RA 107-112).

On May 26, 2011, Mr. Walczak terminated the employment of all mental health counselors and nurses on the Unit, including each of the Plaintiffs, and the

managers (RA31 at ¶ 49; Addendum 3). The next day, Mr. Walczak sent an email to Hospital employees informing all Hospital employees of the termination of the staff of the Unit. (RA37-38 at ¶¶ 82-86; RA77 at ¶ 20; Addendum 3). Mr. Walczak did so not only to communicate to Hospital employees, but also to "give assurances to the regulatory agencies who were in the process of determining whether Carney Hospital's license to operate the Unit should be revoked that the deficiencies which has been reported on the Unit would not continue in that Unit or be tolerated in any other part of Carney Hospital." (RA77 at ¶ 20).

Media Coverage

The *Boston Globe* subsequently published two articles about the termination of Unit staff and the hiring of Mr. Harshbarger, in which Mr. Walczak is quoted. (RA52-53; RA62-63). In the May 28, 2011 article, Mr. Walczak stated that he hired Mr. Harshbarger to review an allegation of sexual assault of a patient and general conditions in the Unit and after reading Mr. Harshbarger's report decided to replace the nurses and other staff on the Unit. (RA52-53; Addendum 3-4). Mr. Walczak described Mr. Harshbarger's report as depicting "serious concerns

about patient safety and quality of care on the unit" and recommending the Hospital "start over on the unit." (RA52-53; Addendum 4). Mr. Walczak "would not provide details of the alleged assault or patient safety concerns, or comment on why the entire staff was dismissed, given that the allegation involved one employee and one patient." (RA52-53).

A June 22, 2011 *Boston Globe* article reiterated that Mr. Walczak's decision to fire the entire staff of the Unit was based upon the investigation by Mr. Harshbarger. (RA62-63; Addendum 4). According to Mr. Walczak, the investigation revealed that the Unit "was not functioning properly and advised him to hire new staff." (Id.). The article also said that Mr. Walczak "would not comment in detail on [the] firings." (Id.). Mr. Walczak also noted that when "initial reports . . . indicated really serious management issues," he decided to terminate management at the hospital." (RA62). Portions of Mr. Walczak's statements were republished in subsequent other media. (RA54-60, RA66-71; Addendum 4).[7]

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[7] The June 22, 2011 *Boston Globe* article identified three other complaints of abuse or neglect which the the newspaper had learned about through a freedom of

As a result of the Hospital's strong response to the incidents - including the termination of the Unit staff, hiring of Mr. Harshbarger, development of a Strategic Plan, and communications with the regulatory agencies (both directly and via the alleged defamatory statements) - the Hospital's license to operate the Unit was not revoked and, in fact, was renewed in August 2011. (RA125 at ¶ 25; RA78 at ¶ 24).

Arbitration, Unconditional Offer of Reinstatement and Settlement

The Plaintiffs, all of whom were members of the Massachusetts Nurses Association ("MNA"), grieved their terminations pursuant to the applicable collective bargaining agreement. When the grievances were denied, the MNA demanded arbitration. The arbitration was scheduled to occur in two parts with five of the Plaintiff Nurses (Hendrick, Douglas-Candido, Herr, Lang and Wood) participating in the first arbitration and the remaining four of the Plaintiff Nurses (Blanchard, Donahoe, Dwyer and

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information act request to DMH. (RA62). Mr. Walczak did not comment on these additional complaints except to say that "[w]hen these were reported to [him] in rapid succession, it required a much deeper look at what was going on in the unit" and he had to "move on this." (Id.).

Webster) scheduled to participate in the second arbitration. (RA140).

In March 2013, after the arbitration hearings for the first group of nurses were complete but before the arbitrator had issued his decision, the MNA and the hospital engaged in settlement discussions concerning all of the Plaintiffs (i.e., not just those who had participated in the first arbitration). By letter dated March 11, 2013, Joseph Ambash, counsel to the hospital, wrote to Alan McDonald, counsel to the MNA, offering full backpay (less interim earnings and unemployment compensation) to all the nurses whose employment was terminated on May 26, 2011 (i.e., inclusive of all the Plaintiffs) and reinstatement to the Adult Psychiatric Unit of the hospital, with the same seniority, similar shifts and similar hours of work/schedules as the nurses had previously worked. (RA324, 328).

In a follow-up letter dated March 14, 2013, Ambash clarified that the offer set forth in the March 11th letter was unconditional - in other words, the nurses could accept reinstatement and backpay while still pursuing their arbitrations. (RA324, 330).

In a letter dated March 25, 2013, MNA attorney Alan McDonald rejected, on behalf of all the Plaintiff Nurses, the hospital's offer of unconditional reinstatement. (RA 324, 332-334).

On April 20, 2013 the arbitrator issued his award ("Arbitration Award") finding in favor of the MNA and directing the hospital to reinstate the nurses to their prior positions on the Unit (i.e., the Adolescent Unit) with all back pay and benefits. (RA325 at ¶ 5). On May 25, 2013, the Plaintiff Nurses filed the instant suit alleging defamation and other claims, seeking reinstatement to the Unit and money damages.

On October 8, 2013, all nine of the Plaintiffs and the MNA entered into Settlement Agreements with the Hospital. The Settlement Agreements provided the Plaintiffs with all back pay and benefits for the period May 26, 2011 (termination date) through August 15, 2013. (RA325 at ¶ 6). In addition, each of the nine Plaintiffs received an additional significant lump sum of money expressly allocated to her declining reinstatement at the hospital in any unit (despite the arbitrator having ordered reinstatement of the first group of nurses). (RA325 at ¶ 6).

As a result of the Settlement Agreements, the second arbitration never occurred. The Plaintiff Nurses proceeded with their civil claims in this case, even though they had received all back pay and had declined reinstatement.

IV. SUMMARY OF ARGUMENT

1. The Lower Court Erred When It Denied, On Remand From The SJC, The Steward Defendants' Request To Conduct Discovery In Support Of Their Special Motion To Dismiss, Filed Pursuant To G.L. C. 231, § 59H.

At a status conference in the lower court in August 2017, the Steward Defendants requested leave of court,[8] as authorized by G.L. c. 231, § 59H, to conduct short (2 hours maximum) depositions of each of the nine Plaintiffs in order to question them as to their motives in bringing the defamation claims – the essential issue remanded by the SJC. The lower court rejected that request out of hand and set a briefing schedule.

As anticipated, the Plaintiffs submitted their own self-serving interrogatory responses alleging

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[8] The Steward Defendants expressed their willingness to file a motion requesting discovery, but the lower court rejected that offer and declined the request for discovery.

"lost income" and emotional distress suffered due to the Steward Defendants' conduct. Without having had the ability to depose the Plaintiffs concerning their motivation, the Steward Defendants were substantially prejudiced.

2. The Lower Court Erred When It Found, On Remand From The SJC, That The Plaintiffs' Primary Purpose In Asserting Claims For Defamation Was To Recover For Harm Allegedly Caused By The Steward Defendants, Rather Than To Chill The Steward Defendants' Legitimate Exercise Of Their Right To Petition.

The lower court erred in determining that the Plaintiffs' defamation claims were "colorable." The lower court appears to have taken the allegations of the Complaint as true and applied a Rule 12(b)(6) standard, rather than requiring the Plaintiffs to prove that their defamation claims had a reasonable likelihood of success.

For example, the lower court ignored substantial defenses available to the Steward Defendants, such as whether the statements were "of and concerning" the Plaintiffs; whether the Hospital had a conditional business privilege to make the statements; whether the statements were ones of opinion which cannot ground a defamation claim; and whether the statements were actually true.

The lower court also erred in concluding that the primary motivation of the Plaintiffs was to recover damages for personal harm allegedly suffered. The evidence introduced by the Steward Defendants showed that, prior to filing suit, four of the nine Plaintiffs had already been ordered by an arbitrator to be reinstated with full back pay and benefits and that all nine Plaintiffs had rejected an unconditional offer of reinstatement to a substantially equivalent position. The Steward Defendants also showed that shortly after filing suit, all nine Plaintiffs entered into Settlement Agreements with the Steward Defendants pursuant to which they were paid all back pay and benefits and an additional sum expressly for declining reinstatement.

The lower court also erred in implicitly finding that the Plaintiffs supported the Steward Defendants' petitioning activity by participating in the Harshbarger investigation (which they had no choice but to do) and exercised restraint by not voicing opposition to the Steward Defendants' petitioning activity. The lower court erred in not finding that the filing of a defamation lawsuit itself, even after the Steward Defendants' petitioning had concluded, has

a chilling effect on future petitioning. Lastly, the lower court erred by not requiring the Plaintiffs to offer enough evidence to satisfy the "fair assurance" standard established by the SJC as necessary to protect the Steward Defendants' petitioning rights.

V. ARGUMENT

A. Standard Of Review.

This Court may reverse the decision of the lower court if it finds that the decision constituted an abuse of discretion or other error of law. Kobrin v. Gastfriend, 443 Mass. 327, 330-31 (2005); Wynne v. Creigle, 63 Mass. App. Ct. 246, 251(2005).

B. The SJC's Augmented Duracraft Test.

In Blanchard v. Steward Carney Hospital, Inc., the SJC held unequivocally that Walczak's statements to the *Boston Globe* constituted protected petitioning activity. 477 Mass. at 151. The SJC reasoned that "it can reasonably be inferred that Walczak's statements to the *Boston Globe* were intended to demonstrate to DMH the hospital's public commitment to address the underlying problems at the unit." Id. at 150. The SJC found that the statements were neither "tangential" nor "unrelated to government involvement . . ., but

rather went to the heart of a government agency's decision whether to terminate the hospital's license to operate the unit." Id. at 150-151 (citing Global NAPS, Inc. v. Verizon New England, Inc., 63 Mass. App. Ct. 600, 607 (2005)).

Under the express language of the anti-SLAPP statute, Mass. Gen. Laws c. 231, § 59H, once the Steward Defendants had shown that the statements to the *Boston Globe* were protected petitioning activity, the only way the Plaintiffs could have defeated the Steward Defendants' special motion to dismiss was by showing that the Steward Defendant's "petitioning activity was not legitimate but instead a sham, i.e., lacking any reasonable basis in fact or law." Blanchard v. Steward Carney Hospital, Inc., 477 Mass. at 156.[9]

While this would have been the end of the analysis under the then existing paradigm, the SJC introduced a new "augmented" test. The SJC held that even though the Steward Defendants had met their

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[9] The Plaintiffs did not even try to address that issue when this case was first put to the lower court (See Blanchard v. Steward Carney Hospital, Inc., 89 Mass. App. Ct. 97, 109 n. 10 (2016), nor did they attempt to do so in the lower court after remand.

burden of showing that the Plaintiffs' defamation claim premised on the *Boston Globe* statements was "based on" protected petitioning activity, and even though the Plaintiffs had not shown that the petitioning activity lacked a basis in fact or law, they could still defeat the special motion by showing that the defamation claim was not "brought primarily to chill" the Steward Defendants' legitimate petitioning activity. Blanchard v. Steward Carney Hospital, Inc., 477 Mass. at 159-160.

The SJC made clear that the burden of making such a showing in this case falls upon the Plaintiffs, who "must establish, such that the motion judge may conclude *with fair assurance*," that the Plaintiffs' "primary motivating goal" in bringing their claims was not to "interfere with" and "burden" the Steward Defendants' petition rights, "but to seek damages for personal harm" to them from the Steward Defendants' alleged acts. Blanchard v. Steward Carney Hospital, Inc., 477 Mass. at 160 (citation omitted) (emphasis added).

Contrary to the decision rendered by the lower court, the Plaintiffs failed to meet their burden.

C. The Lower Court Erred When It Denied, On Remand From The SJC, The Steward Defendants' Request To Conduct Discovery In Support Of Their Special Motion To Dismiss, Filed Pursuant To G.L. C. 231, § 59H.

The anti-SLAPP statute provides that, after hearing and for good cause shown, specified discovery may be conducted. Mass. Gen. Laws c. 231, § 59H. Accord Blanchard v. Steward Carney Hospital, Inc., 477 Mass. at 159 (recognizing that limited discovery is available with leave of court).

When the anti-SLAPP motion was first presented to the lower court (Giles, J.) in 2013, the Steward Defendants did not seek leave to conduct discovery as it was not necessary. Instead, the Steward Defendants relied on affidavit and other evidence to demonstrate their own petitioning activities. Similarly, the Plaintiffs did not seek any discovery to oppose the Steward Defendants' motion.

Given the SJC's new augmented standard, however, which directed the lower court on remand to make a determination concerning the "primary motivation" of the Plaintiffs in bringing their defamation claims, the Steward Defendants realized that they could not sufficiently address that issue without taking some discovery.

Thus, in August 2017, at the status conference after remand, the Steward Defendants sought leave from the lower court to conduct short (2 hours maximum) depositions of each of the Plaintiffs in aid of their anti-SLAPP motion. However, the lower court rejected that request out of hand and set a briefing schedule. (RA345).

As the Steward Defendants had anticipated, the Plaintiffs submitted an Affidavit of their counsel, Dahlia Rudavsky, which attached the Plaintiffs' own interrogatory responses claiming to have been damaged by the Steward Defendants' alleged defamatory statements. (RA296-297, 314-323). Without having had the opportunity to depose the Plaintiffs, the Steward Defendants had no ability to ask each of them why they filed their defamation claims after having already received significant settlement monies following the arbitration <u>and</u> after having been paid for declining reinstatement <u>and</u> after having rejected an unconditional offer of reinstatement to an equivalent position. The Steward Defendants also could not make inquiry of the Plaintiffs as to the existence, if any, and extent of their claimed harm.

In its Memorandum and Order, even the lower court expressed the difficulty of reaching a determination on the Plaintiffs' "primary motivation" on the limited record before it. As stated by Judge Leighton: "Without doubt, this determination is the most challenging task for the court on remand because insight into any party's primary purpose is difficult to come by, especially at the motion to dismiss stage of the proceedings." (Addendum 50).

The lower court committed an abuse of discretion in denying the Steward Defendants' request for discovery. As such, the order denying the special anti-SLAPP motion should be vacated and the case remanded for discovery. See Nicholson v. Woolf, 92 Mass. App. Ct. 1104 (2017) (unpublished 1:28 opinion) (vacating lower court's denial of anti-SLAPP motion and remanding for discovery).

D. The Lower Court Erred When It Found, On Remand From The SJC, That The Plaintiffs' Primary Purpose In Asserting Claims For Defamation Was To Recover For Harm Allegedly Caused By The Steward Defendants, Rather Than To Chill The Steward Defendants' Legitimate Exercise Of Their Right To Petition.

1. The Plaintiffs' Defamation Claim Is Not Colorable

The SJC directed that "[a] necessary but not sufficient factor in this analysis [i.e., determining primary motivation] will be whether the nonmoving party's claim at issue is 'colorable or … worthy of being presented to and considered by the court.'" Blanchard v. Steward Carney Hospital, Inc., 477 Mass. at 160 (citation omitted). According to the SJC, "colorable" means whether the claim "offers some reasonable possibility" of a decision in the party's favor. Id. (citations omitted).

The standard is higher than the Rule 12(b)(6) standard of simply stating a claim or plausible entitlement to relief and is more akin to the likelihood of success on the merits" standard used by courts when assessing whether or not to issue a temporary restraining order or preliminary injunction.[10]

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[10] The following two cases were cited by the SJC as the basis for using the "colorable" standard. In L.B. v Chief Justice of Probate and Family Court Dept., 474 Mass. 231 (2016), the SJC held that an unrepresented litigant/parent petitioning for the guardianship of a minor child to be removed or modified has a right to counsel if the litigant/parent can show that her grounds for seeking the relief are "meritorious" and "worthy of being presented to and considered by the court." In Commonwealth v. Levin, 7 Mass. App. Ct. 501 (1979), the Appeals Court held that in order for a

The lower court determined that the Plaintiffs' defamation claim was "colorable" because "[t]he facts demonstrate that the allegedly false published comments were of and concerning the plaintiffs and were of a type that reasonably exposed them to public hatred, ridicule or contempt." (Addendum 49-50). This conclusion was erroneous for several reasons.

First, while the lower court declared that it found the defamation claim to be "colorable," it is clear from the Memorandum of Decision that the lower court simply assessed whether the claim was frivolous or satisfied a Rule 12(b)(6) standard. The lower court appears to have taken all the allegations of the Complaint as true and did not address any of possible defenses. For example,

- The lower court did not explain why it concluded that the news articles (or internal email) which did not identify any of the Plaintiffs by name were nevertheless "of and concerning" them. See Driscoll v. Board of Trustees of Milton Academy,

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criminal defendant in a non-capital case to obtain a stay of execution of sentence pending appeal, she must show that her appeal from the conviction was not only not frivolous, but had a reasonable likelihood of success, although she need not show a substantial certainty of success.

70 Mass. App. Ct. 285, 296 (2007) (no actionable defamation claim where plaintiff's name was not mentioned and it was clear that not every member of the group was involved in the incident in question).

- The lower court did not consider whether Walczak's email to Hospital staff was protected by the conditional business privilege. See Bratt v. International Business Machines Corp., 392 Mass. 508, 512-13 (1984) (recognizing a conditional privilege to publish defamatory material in furtherance of a legitimate business interest).
- The lower court did not address whether or not the statements in the email or news articles were "fact" or "opinion." See Driscoll v. Board of Trustees of Milton Academy, 70 Mass. App. Ct. 285, 296 (2007) (statements of pure opinion are not subject to a defamation claim).
- The lower court did not consider whether the statements, if fact, were substantially true. See Reilly v. Associated Press, 59 Mass. App. Ct. 764, 770 (2003)(a substantially true statement will not support a defamation claim).

Each of these arguments was made by the Steward Defendants in their Memorandum in Support of Their Anti-SLAPP Special Motion to Dismiss at pp. 10-11, which was submitted to the lower court on November 1, 2017.[11]

Further, the lower court drew conclusions which are unsupported by the facts. The lower court found that Walczak's comments in the *Boston Globe* "implicated the plaintiffs in patient abuse and described their work as unacceptable and as contributing to an unsafe medical environment," (Addendum 50) but the article does not say that at all. (RA52-53, 62-63).

As such, the lower court erred in concluding that the Plaintiffs' defamation claim was "colorable."

2. The Plaintiffs' Primary Motivation Was Not To Recover Damages.

The SJC instructed that even though the statements in the *Boston Globe* constituted protected petitioning activity, the Plaintiffs could try to

[11] The Steward Defendants' Memorandum is attached as Exhibit A to the Plaintiffs' Motion to Dismiss Interlocutory Appeal, filed May 18, 2018 and incorporated by reference the arguments made in its Rule 12(b)(6) Motion to Dismiss and Memorandum in Support of that motion, filed in 2013.

defeat the anti-SLAPP motion by proving that their primary motivating goal in bringing the defamation claim was to "seek damages for the personal harm" they suffered on account of the Steward Defendants' conduct. Blanchard v. Steward Carney Hospital, Inc., 477 Mass. at 160.[12] The Plaintiffs failed to meet that burden.

In support of their argument that they brought their defamation claims to recoup losses from the Steward Defendants' defamatory actions, the Plaintiffs rely on their own interrogatory responses claiming, as a group, that "we suffered lost earnings and the benefits of employment, embarrassment, humiliation, and emotional distress." (RA296-297, 314-323).

The Plaintiffs' interrogatory responses should have been given little weight by the lower court as they are purely subjective and are no different from statements made by any plaintiff in any complaint seeking damages for defamation case or any employment-related cause of action. If those statements were

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[12] The SJC also gave Plaintiffs renewed chance to argue that the Steward Defendants' petitioning activity was without basis in law or fact, but the Plaintiffs have waived that argument by not raising it with the lower court.

sufficient to prove that the motivation for bringing a claim was to be made whole for damages suffered, the non-moving party could defeat any and every anti-SLAPP special motion to dismiss.

As for the "lost earnings" evidence supported by Attorney Rudavsky's Affidavit, there are several reasons why it should not have been relied upon by the lower court as probative of actual harm suffered by the Plaintiffs. Even assuming, as I do for purposes of the anti-SLAPP motion, that Attorney Rudavsky has accurately stated the earnings of each Nurse during the relevant period based on their W2s (using the methodology she has articulated), there is a fatal flaw. There is no evidence whatsoever to show that any diminished income was caused in whole or in part by the alleged defamatory statements of the Steward Defendants.[13]

More importantly, Attorney Rudavsky's Affidavit sets forth the alleged lost earnings that each of these

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[13] In addition to the defamation claims, the Plaintiffs have asserted causes of action alleging that the termination of their employment was retaliatory and in violation of two different Massachusetts statutes, but neither of those claims is part of this anti-SLAPP special motion.

Plaintiffs incurred during the period from May 11, 2011 through May 23, 2013. However, each of these Plaintiffs has already been fully compensated for those lost earnings pursuant to the Settlement Agreements entered into by each of them on October 8, 2013. Also, as a part of those Settlement Agreements, each of the Plaintiffs also expressly declined reinstatement to the Unit in exchange for an additional significant lump sum of money.

It is axiomatic that a plaintiff can only recover once for actual harm caused by the same acts. See Garshman Co., Ltd. v. General Electric Co., 176 F.3d 1, 5 (1st Cir. 1999) ("A plaintiff is not entitled to duplicative damages; it may recover only the amount of damages it actually suffered."); Mailman's Steam Carpet Cleaning Corp. v. Lizotte, 415 Mass. 865, 870 (1993) ("Recovery of duplicative damages under multiple counts of a complaint is not allowed.") (citing Calimlim v. Foreign Car Ctr., Inc., 392 Mass. 228, 235 (1984)). See also Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 21 n. 19 (1st Cir. 1999) (parties may negotiate an agreement whereby the employee accepts a front-pay settlement in lieu of reinstatement).

Moreover, in March 2013, during the pendency of the arbitration and before the Plaintiffs filed their defamation claim, the Steward Defendants made an unconditional offer of reinstatement to all Plaintiffs to a reasonably equivalent position in addition to back pay. However, this offer was flatly rejected by the MNA on behalf of all the Plaintiffs. (RA324, 332-334).

The Plaintiffs' rejection of this unconditional offer of reinstatement that they could not have brought suit to recover actual damages as it is well-established that "a plaintiff's rejection of an objectively reasonable offer of reinstatement terminates an employee's eligibility for an award of damages based upon lost pay accruing after such a rejection." Conway v. Electro Switch Corp., 402 Mass. 385, 389-90 (1988).

The lower court did not even consider this unconditional offer of reinstatement and its import when reaching its erroneous decision that the Plaintiffs' primary motivation was to seek damages for harm suffered. (See Addendum 50) (lower court lists arguments he considered and the offer of reinstatement is not among those issues listed).

Based on the above, the Plaintiffs' bald assertion that their primary motivation for bringing the defamation claims was to recover for actual harm suffered must be rejected.

3. The Plaintiffs Did Not Support The Steward Defendants' Petitioning Activities.

The Plaintiffs assert that their defamation suit does not bear the indicia of a traditional SLAPP suit because the Plaintiffs actually shared the Steward Defendants' petitioning goal of keeping the Unit open. The Plaintiffs' subjective statements of their intent are not supported by any objective facts and, in fact, run contrary to logic.

As the record evidence demonstrates, while the goal of the Steward Defendants' petitioning activity was to keep the Unit open, the content of the petitioning statements (which is the subject of the defamation claims) was that the licensing agencies should keep the unit open because the Hospital was taking active steps to increase safety on the Unit by terminating the employment of those the Hospital believed were not up to the task. Certainly the Plaintiffs did not support that message. In fact, they have alleged that it is defamatory.

As the SJC stated when finding that Walczak's statements to the *Boston Globe* were, in fact, petitioning: "it can reasonably be inferred that Walczak's statements to the Boston Globe were intended to demonstrate to DMH the hospital's public commitment to address the underlying problems at the unit." Blanchard v. Steward Carney Hospital, Inc., 477 Mass. at 150. As further stated by the SJC:

> By making clear that the hospital was following Harshbarger's recommendations, the statements [in the Boston Globe] communicated to readers, likely including some of the licensing decision makers at DMH, that progress was occurring at the hospital, and that its license to operate the unit should not be revoked.

Id. at 151. The Appeals Court agreed that the Plaintiff Nurses did not share the Steward Defendant's petitioning goals. See Blanchard v. Steward Carney Hospital, Inc., 89 Mass. App. Ct. 97, 109 n. 10 ("While the plaintiffs may have had an interest in preservation of the license, they did not share the goal of staffing the unit with new staff.").

As evidence that they supported the Hospital's goal of keeping the Unit open, the Plaintiffs contend that they assisted in the investigation by former Attorney General Harshbarger. This assertion

mischaracterizes the Plaintiffs' role in the investigation. Harshbarger and his team interviewed all Hospital staff having any contact with the Unit and its operations – almost fifty employees. (RA30 at ¶¶ 45, 47; RA123 at ¶ 17; RA75-76 at ¶ 15). The Plaintiffs were required to participate in the interviews just like other employees whom Harshbarger sought to interview – it was not optional. In fact, refusal to participate in the hospital's investigation in the cause of several serious safety incidents would have constituted just cause for termination.

Also, four of the nine Plaintiffs participated in the interview only with their MNA union representative present. (RA298-312). The Plaintiffs' participation certainly cannot be viewed as evidence that they shared the Steward Defendants' petitioning goals.

Further, the *Boston Globe* article contains references to a letter submitted by the MNA which spoke on behalf of the Plaintiffs which said the Unit was physically rundown and that the Plaintiffs had complained about unsafe/unsatisfactory conditions for years, but their concerns were ignored. These type of public statements by the Plaintiffs' union certainly

were not supportive of the Hospital's petitioning activity.

Thus, the lower court erred in considering as a factor favorable to the Plaintiffs their representation that they did not speak out during the relevant time period to interfere with the petitioning.

4. The Plaintiffs' Defamation Claims Have Had A Chilling Effect Not Only On The Steward Defendants But Likely On The Petitioning Activity Of Others.

The Plaintiffs cite to the timing of their defamation claims as evidence that they did not seek to "chill" the Steward Defendants' petitioning activity. The Plaintiffs point to the fact that they did not file suit while the Hospital was petitioning the agencies, but instead waited two years to file suit in May 2013. The timing of the Plaintiffs' civil action, however, does not support an inference that the Plaintiffs patiently waited until the Steward Defendants' petitioning was finished in order not to disturb the petitioning goals.

Here, the Plaintiffs and the MNA were embroiled in the grievance process and arbitration from the time of their terminations in May 2011 through October 2013

when they entered into the Settlement Agreements. The civil suit was filed in May 2013, just one month after the Arbitration Award was issued. Thus, the timing of the Plaintiffs' filing of their defamation claims should be attributed to strategic litigation goals, not an effort to avoid interfering with the Hospital's petitioning goals.

Also, in order for a lawsuit to have a "chilling effect," it need not be brought while the behavior sought to be chilled is still ongoing. Even lawsuits brought much later still have the ability to have a chilling effect on future similar conduct.

Certainly, any entities or groups that may have an interest in publicly speaking out to a newspaper about an issue under consideration by a government agency may be chilled from speaking where they cannot know whether or not those who did not like their speech will later file lawsuits alleging defamation.

5. The Lower Court Committed An Error Of Law By Not Applying The "Fair Assurance" Standard.

In order to defeat the Steward Defendants' anti-SLAPP special motion to dismiss, the SJC stated that:

> [T]he nonmoving party [Plaintiffs] must establish, *such that the motion judge may conclude with fair assurance*, that [their] primary motivating goal in bringing [their]

> claim, viewed in its entirety, was "not to interfere with and burden defendants' . . . petition rights, but to seek damages for the personal harm to [them] from [the] defendants' alleged [legally transgressive] acts."

Blanchard v. Steward Carney Hospital, Inc., 477 Mass. at 160 (emphasis added) (citation omitted). A review of the lower court's Memorandum and Order reveals that the lower court did not apply the fair assurance standard when determining, erroneously, that the Plaintiffs had satisfied their burden.

First, the words "fair assurance" are nowhere to be found in the lower court's Memorandum and Order. Instead, the lower court simply concluded: "I find that plaintiffs' primary purpose in asserting the claim for defamation is to recover for the harm allegedly caused by the Hospital." (Addendum 50).

Second, the lower court's discussion of the evidence upon which its "finding" was based does not reveal that a fair assurance standard was applied. Rather, the lower court simply set forth, in a list, the arguments of the parties which he had considered, without explaining how he weighed them. (Addendum 50).

The SJC's directive that the motion judge require the nonmoving party to satisfy the *fair assurance*

standard is significant and cannot be ignored. The "fair assurance" standard is one that is primarily used for appellate determination of whether trial court error is harmless or not, and mostly used in criminal, not civil, cases. See, e.g., Commonwealth v. DePina, 476 Mass. 614, 624 (2017)("An error is prejudicial if we cannot find with fair assurance that it did not substantially sway the verdict.")(internal citations and quotations omitted); Commonwealth v. Rodriguez, 92 Mass. App. Ct. 774, 782 (2018) ("The improper use of the field test result clearly prejudiced the defendant, and we cannot say with fair assurance that the error had but slight effect.")

By requiring the Plaintiffs to introduce sufficient evidence such that the motion judge may conclude, *with fair assurance*, that Plaintiffs' primary motivation was not to chill the Steward Defendants' petitioning activity, the SJC appears to have been trying to carefully balance competing constitutional interests (i.e., both parties' petitioning rights). The lower court's decision, however, is devoid of any ability of this reviewing

court to determine whether the Steward Defendants' petitioning rights were adequately protected.

VI. CONCLUSION

For all of the reasons set forth above, the Steward Defendants respectfully request that the Court reverse the lower court's ruling and enter an order dismissing so much of the Plaintiff's claim for defamation as is grounded on the *Boston Globe* articles and award the Steward Defendants reasonable attorney's fees and costs.

Alternatively, the Steward Defendants respectfully request that this Court vacate the lower court's order denying the special motion to dismiss and remand the motion back to the lower court with instructions to permit the Steward Defendants to conduct short (two hours) depositions of each of the nine Plaintiffs and then re-brief and re-hear the motion.

Respectfully submitted,

Dated: May 25, 2018

_/s/ Jeffrey A. Dretler___

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CERTIFICATE OF COMPLIANCE WITH APPELLATE RULES

I, Jeffrey A. Dretler, Crawford, attorney for Defendants Steward Carney Hospital, Inc., Steward Hospital Holdings, LLC, Steward Health Care System, LLC, and William Walczak, in the above-referenced matter, hereby certify, pursuant to Mass. R.A.P. 16(k), that the within document complies with the rules of court that pertain to the filing of briefs, including, but not limited to Mass. R.A.P. 16(a)(6), 16(e), 16(f), 16(h), 18, and 20.

_/s/ Jeffrey A. Dretler___
Jeffrey A. Dretler
BBO#558953

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. APPEALS COURT
NO. 2018-P-0498

LYNNE BLANCHARD, GAIL DONAHOE,
GAIL DOUGLAS-CANDIDO,
KATHLEEN DWYER, LINDA HERR,
CHERYL HENDRICK, KATHLEEN LANG,
VICTORIA WEBSTER, and NYDIA WOODS,

Plaintiffs-Appellees,

v.

STEWARD CARNEY HOSPITAL, INC.;
STEWARD HOSPITAL HOLDINGS, LLC;
STEWARD HEALTH CARE SYSTEM, LLC;
WILLIAM WALCZAK;

Defendants-Appellants.

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Part III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

Title II ACTIONS AND PROCEEDINGS THEREIN

Chapter 231 PLEADING AND PRACTICE

Section 59H STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION; SPECIAL MOTION TO DISMISS

Section 59H. In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the

court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

The attorney general, on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party on such special motion.

All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion.

Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.

As used in this section, the words "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other

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governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 13-1914-B

LYNNE BLANCHARD, GAIL DONAHOE,
GAIL DOUGLAS-CANDIDO, KATHLEEN DWYER,
LINDA HERR, CHERYL HENDRICK, KATHLEEN LANG,
VICTORIA WEBSTER, and NYDIA WOODS

VS.

STEWARD CARNEY HOSPITAL, INC.;
STEWARD HOSPITAL HOLDINGS, LLC;
STEWARD HEALTH CARE SYSTEM, LLC;
WILLIAM WALCZAK; PROSKAUER ROSE LLP;
and L. SCOTT HARSHBARGER

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' SPECIAL MOTIONS TO DISMISS PURSUANT TO G. L. c. 231, § 59H

INTRODUCTION

The plaintiffs, Lynne Blanchard, Gail Donahoe, Gail Douglas-Candido, Kathleen Dwyer, Linda Herr, Cheryl Hendrick, Kathleen Lang, Victoria Webster, and Nydia Woods (collectively, "plaintiffs"), who worked as registered nurses ("RN's") and mental health counselors in defendant Steward Carney Hospital's Adolescent Psychiatric Unit ("Unit"), brought this complaint after their termination from employment on May 26, 2011. An independent investigator, defendant L. Scott Harshbarger ("Harshbarger"), who worked at the defendant law firm, Proskauer Rose LLP (collectively, "Proskauer Defendants"), recommended the terminations. Defendants Steward Carney Hospital, Inc. ("Carney Hospital" or "Hospital"); Steward Hospital Holdings, LLC; Steward Health Care System, LLC; and William Walczak ("Walczak"), then president of Carney Hospital (collectively, "Steward Defendants"), had hired

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the Proskauer Defendants.

The plaintiffs have brought claims for violation of G. L. c. 149, § 187 (Count One); violation of G. L. c. 119, § 51A (Count Two); and defamation (Count Three) against the Steward Defendants and defamation (Count Four) and the intentional infliction of emotional distress (Count Five) against the Proskauer Defendants. Pursuant to G. L. c. 231, § 59H, both sets of defendants have moved specially to dismiss the respective counts against them, which motions the plaintiffs oppose.[1] After hearing, and for the reasons set forth below, the Proskauer Defendants' motion is **ALLOWED**; and the Steward Defendants' motion is **DENIED**.

BACKGROUND

This matter arises out of the termination of the various plaintiffs from their employment as RN's at the Carney Hospital. In April 2011, following four incidents of alleged patient abuse or neglect on the Unit at Carney, the Hospital placed all regularly assigned Unit RN's and mental health counselors and two managers on paid administrative leave. Carney Hospital reported the incidents to the Massachusetts Department of Mental Health ("DMH"), the Department of Public Health ("DPH"), and the Department of Children and Families ("DCF"). DMH communicated to Steward Health Care that it was considering revoking Carney Hospital's license to operate the Unit and closing the Unit as a result of the incidents.

Thereafter, Carney hired the Proskauer Defendants to conduct an overall management review of the Unit and make recommendations. Harshbarger, the former Massachusetts Attorney General, conducted an investigation in which he interviewed Unit staff, including each of the

[1] At the motion hearing on December 3, 2013, all defendants affirmatively waived their additional motions to dismiss pursuant to Mass. R. Civ. P. 12(b)(6).

plaintiffs. The various plaintiffs identified specific issues which affected patient care and areas for improvement. Harshbarger's investigation did not identify any further instances of abuse or neglect. The four April incidents had all been reported by Unit RN's or staff.

On May 13, 2011, Harshbarger met with Walczak to relay his recommendations. On May 26, 2011, Harshbarger submitted a written report, in which he recommended that Carney rebuild the Unit by replacing all of its personnel. Harshbarger told Walczak and Carney Hospital that the Unit's RN's failed to report mental health counselors' misconduct and adhered to a "code of silence" rather than reporting problems. That same day, Walczak sent each of the plaintiffs an identical letter terminating her employment.

On May 27, 2011, Walczak sent an email to all Carney Hospital employees. The email stated, in part:

> As you all know, Carney Hospital has a rich tradition of providing excellent care to our patients. Our performance on national quality and safety standards is exceptional, and in many cases superior to competing hospitals. The reason for this performance is simple--you the employees and caregivers at Carney, are dedicated to providing the best possible care to every patient that comes through our doors. It is your dedication that makes Carney Hospital such a special place.
>
> Recently, I have become aware of the alleged incidents where a number of Carney staff have not demonstrated this steadfast commitment to patient care. I have thoroughly investigated these allegations and have determined that these individual employees have not been acting in the best interest of their patients, the hospital, or the community we serve. As a result, I have terminated the employment of each of these individuals.

In a *Boston Globe* article on May 28, 2011, Walczak was quoted as saying that he had hired Harshbarger to look into an instance of an employee's alleged sexual assault of the patient

and conditions in the Unit and that Harshbarger had produced a report. The article stated that the Harshbarger report had set out "serious concerns about patient safety and quality of care on the Unit." Walczak cited the Harshbarger report as the reason for his decision "to replace the nurses and other staff on the Unit."

In June 2011, the DMH issued reports on the four incidents. The reports of the first three incidents found wrongdoing by a single mental health counselor. The report on the fourth incident found that unspecified staff on duty during the incident had acted improperly. On June 22, 2011, an article in the *Boston Globe* reported that DMH had investigated the incidents of abuse and neglect. In the article, Walczak stated that "the Harshbarger report indicated that it wasn't a safe situation" and that the reports of additional incidents "underscored his decision to fire the entire staff on the until on May 26." Walczak's statements were quoted further in other articles in different media outlets.[2]

On May 24, 2013, the plaintiffs filed their complaint alleging defamation against the Proskauer and Steward Defendants. The bases of the plaintiffs' defamation claim against the Proskauer Defendants are the statements made by Harshbarger in his written report to Carney Hospital and his oral conveyance of the statements to the Steward Defendants. The plaintiffs' complaint further alleges that, because Proskauer was Harshbarger's employer, it is liable vicariously for his alleged defamatory statements. The claim against the Steward Defendants concerns the email sent by Walczak to hospital employees, as well as the two *Boston Globe*

[2] On May 27, 2011, the Massachusetts Nurses Association, the union representing the plaintiffs, filed grievances on behalf of each of the Unit's nurses, including the plaintiffs. Carney Hospital denied each of the grievances. Pursuant to the collective bargaining agreement ("CBA"), the grievances were submitted to arbitration; and several arbitrators were engaged to adjudicate the grievances. Regarding the grievances of five of the plaintiffs, the arbitrator found that the CBA was violated by discharging the plaintiffs and ordered reinstatement, among other remedies. Arbitration of the remaining grievances is pending. None of the plaintiffs has been reinstated.

articles, in which Walczak is quoted discussing the Harshbarger report.

DISCUSSION

I. Special Motion to Dismiss Standard

General Laws c. 231, § 59H, the "anti-SLAPP" statute ("Statute"), states, "In any case in which a party asserts that the civil claims . . . against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the Commonwealth, said party may bring a special motion to dismiss . . . ." It is the moving party's burden to make a threshold showing that the claims against it are based on the "party's petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." *Baker* v. *Parsons*, 434 Mass. 543, 550 (2001). Once the moving party has made this showing, the burden shifts to the non-moving party to show by a preponderance of the evidence that the moving party's petitioning activity was "devoid of any reasonable factual support or any arguable basis in law" and that the petitioning activities "caused actual injury to the responding party." G. L. c. 231, § 59H; *Duracraft Corp.* v. *Holmes Products Corp.*, 427 Mass. 156, 167-168 (1998). In determining whether to grant a 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." G. L. c. 231, § 59H.

The Statute, in part, defines a party's exercise of its right to petition as "any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding . . . ." G. L. c. 231, § 59H. Petitioning includes "statements made to influence, inform, or at the very least, reach

governmental bodies — either directly or indirectly." *Global NAPS, Inc.* v. *Verizon New England, Inc.*, 63 Mass. App. Ct. 600, 605 (2005). Statements should be considered in the overall context in which they were made. *North Am. Expositions Co. Ltd. P'ship* v. *Corcoran*, 452 Mass. 852, 862 (2009).

II. Proskauer Defendants' Special Motion to Dismiss

The Proskauer Defendants argue that, taking the statements contained in Harshbarger's report in the context in which they were made, shows that they constitute petitioning activity protected under G. L. c. 231, § 59H. The court agrees.

It is clear that the statements in Harshbarger's report constitute petitioning activity in that they were aimed at persuading the regulatory agencies involved not to revoke Carney Hospital's license. See *Kobrin* v. *Gastfriend*, 443 Mass. 327, 333 (2005) (anti-SLAPP statute applies only where "party seeks some redress from the government"). At the time that Carney Hospital retained Harshbarger to conduct the review of the Unit and make recommendations, the Hospital was being investigated by various government agencies; and its license was in danger of being revoked by the DMH. According to Michael Bertoncini ("Bertoncini"), Deputy General Counsel of Steward Health Care System, Steward and Carney Hospital engaged Harshbarger in response to the threat of being closed by DMH. Harshbarger was mandated to interface with the various regulatory agencies and personnel on behalf of Carney Hospital and develop remedies so that the Hospital could retain its license and prevent the Unit from being closed.[3] In his affidavit, Harshbarger states that, during his initial discussions with Steward and Carney Hospital, he was

[3] The court also notes that Bertoncini recommended that the Steward Defendants retain Harshbarger because, as the former Massachusetts Attorney General, he had significant experience dealing directly with various state agencies and regulators.

informed that Carney Hospital wanted to be prepared to work to persuade the DMH not to take adverse action against the Unit or the Hospital. Carney Hospital asked Harshbarger to conduct an independent investigation and review the incidents and operation of the Unit and to share his conclusions with Walczak and, if needed, with DMH and DCF. Thus, Harshbarger's actions in creating the report reflected this intention to inform and influence the DMH's decision. See *North Am. Expositions Co. Ltd. P'ship*, 452 Mass. at 862 (statements made in an effort to convince a governmental body to not take certain action considered petitioning). Indeed, Harshbarger spoke with counsel for DMH regarding his findings while DMH was performing its own investigation into the Unit.

The plaintiffs' argument that the Proskauer Defendants cannot seek the protections of G. L. c. 231, § 59H because Harsbarger was not personally aggrieved by the DMH investigation into Carney Hospital is unavailing. Carney Hospital hired Harshbarger to conduct an investigation to influence the regulatory agencies on behalf of Carney Hospital. Harshbarger's statements, made on behalf of the Hospital, which was seeking to petition governmental bodies, are considered petitioning activity. See *Plante* v. *Wylie*, 63 Mass. App. Ct. 151, 156 (2005) (statement by attorney representing citizens which were made "in connection with" issues under consideration by town planning board were petitioning activity).

Consequently, the court finds that the Proskauer Defendants have met their burden in establishing that the claims against them are based on petitioning activities. It is the plaintiffs' burden to show that the moving party's petitioning activity was "devoid of any reasonable factual support or any arguable basis in law" and that the petitioning activities "caused actual injury to the responding party." G. L. c. 231, § 59H. In this, the instant plaintiffs have failed. Harshbarger's

report was based on interviews of nearly fifty Carney Hospital employees. His recommendations regarding what steps the Hospital had to take to ensure patient safety were communicated to both Carney Hospital and the DMH. Thereafter, Carney Hospital was permitted to retain its license to operate the Unit. The plaintiffs have failed to show that Harshbarger's statements were devoid of factual support or any arguable basis in law. Therefore, the Proskauer Defendants' special motion to dismiss is allowed.

III. Steward Defendants' Special Motion to Dismiss

The Steward Defendants contend that both the email that Walczak sent to all Carney Hospital employees and his comments in the *Boston Globe* were designed to communicate to regulatory agencies that the Hospital was taking strong remedial action and to influence the decision about revoking the Hospital's license. Neither of these statements, however, can be considered petitioning activity under Massachusetts law.

With respect to the email which Walczak sent to the internal employees of Carney Hospital, this communication cannot be considered petitioning activity protected by G. L. c. 231, § 59H. The Steward Defendants have not shown how the statements in the email, communicated only to Carney Hospital employees, were intended to influence, inform, or reach, directly or indirectly, governmental agencies. See *Global NAPS, Inc.*, 63 Mass. App. Ct. at 605. The statements cannot be considered petitioning activity merely because they communicated to the Hospital staff what remedial action the Hospital was taking as a response to a regulatory agency investigation.

Similarly, Walczak's remarks in the *Boston Globe* articles also were not petitioning activity. The Steward Defendants submit that, because Walczak's comments were made "in

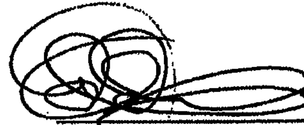
connection with" the review of the regulatory agencies, then they are petitioning activity. However, in order for these statements to be protected under G. L. c. 231, § 59H, the defendants must show not only that the statements were made "in connection with" an issue under consideration but that they were aimed at reaching governmental bodies. See *Global NAPS, Inc.*, 63 Mass. App. Ct. at 607 (c. 231, § 59H "does not protect tangential statements intended, at most, to influence public opinion in a general way unrelated to governmental involvement"). The Steward Defendants have not shown how the statements made to the *Boston Globe* were an attempt to reach the regulatory agencies investigating Carney Hospital, particularly when the defendants already were in communication with the agencies regarding their investigation. Furthermore, the Harshbarger report was communicated directly to the DMH, so the Steward Defendants' argument that they intended to inform the DMH of its actions through the *Boston Globe* articles is unpersuasive.

The fact that Walczak's comments to the *Boston Globe* regarded in part the Harshbarger report, which this court has determined *is* petitioning activity, does not entitle Walczak to seek the protection of G. L. c. 231, § 59H for any remarks made about the report. While statements to newspapers regarding matters under consideration by government entities may be considered petitioning activity, the statements must be "essentially mirror images" of those made in connection with an issue under consideration to be considered petitioning activity. See *Burley* v. *Comets Cmty Youth Center, Inc.*, 75 Mass. App. Ct. 818, 821-823 (2009) (while sending copies of no-trespass orders to police and court was petitioning activity, statements that the plaintiff was banned from the business for inappropriate behavior were not made in conjunction with the petitioning activity nor were they mirror images of those communicated to the police and court).

Here, the Steward Defendants have not demonstrated that Walczak's statements to the *Boston Globe* were mirror images of Harshbarger's petitioning activity. Indeed, Walczak's remarks, which form the bases of the plaintiffs' claim, do not appear in Harshbarger's report.[4] Compare *Wynne* v. *Creigle*, 63 Mass. App. Ct. 246, 253-54 (2005) (defendant's statements to newspaper that were "mere repetition" of statements made in connection with government investigation were petitioning activity). Therefore, the Steward Defendants have failed to meet their burden of establishing that Walczak's comments to the *Boston Globe* fell within the ambit of statements made "in connection with" administrative agency proceedings. Accordingly, their special motion to dismiss must be denied.

ORDER

For all the foregoing reasons, the Proskauer Defendants' special motion to dismiss is hereby **ALLOWED**; and the Steward Defendants' motion is hereby **DENIED**.



Linda E. Giles,
Justice of the Superior Court

DATED: March 3, 2014

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[4] In their complaint, the plaintiffs specifically allege that Walczak made defamatory statements in the May 28, 2011, *Boston Globe* article when he said that he had hired Harshbarger to look into an instance of an employee's alleged sexual assault on a patient and conditions on the Unit, that Harshbarger had produced a report describing "serious concerns about patient safety and quality of care on the unit [which] was not functioning properly," and that, when he read the report, Walczak "decided to replace the nurses and other staff on the unit." It further alleges that Walczak defamed the plaintiffs in the June 22, 2011, *Boston Globe* article when he said that "the Harshbarger report indicated it wasn't a safe situation" and when, in explaining why he fired the nurses, he said that, "when [the cases of patient abuse] were reported to me in rapid succession, it required a much deeper look at what was going on in the unit . . . I had to move on this."

notice sent
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KeyCite Red Flag - Severe Negative Treatment
Order Affirmed in Part, Vacated in Part by Blanchard v. Steward Carney Hospital, Inc., Mass., May 23, 2017

89 Mass.App.Ct. 97
Appeals Court of Massachusetts,
Suffolk.

1 Gail Donahoe, Gail Douglas–Candido, Kathleen Dwyer, Linda Herr, Cheryl Hendrick, Kathleen Lang, Victoria Webster, and Nydia Woods.

Lynne BLANCHARD & others [1]

v.

STEWARD CARNEY HOSPITAL, INC., & others. [2]

2 Steward Hospital Holdings, LLC; Steward Health Care System, LLC; and William Walczak.

No. 14–P–717.
|
Argued Jan. 14, 2015.
|
Decided Feb. 24, 2016.

Synopsis

Background: Nurses who were terminated from their positions on hospital's adolescent psychiatric unit filed defamation claim against hospital and its former president in connection with statements by president as quoted in a newspaper and statements by president in an e-mail to hospital staff. The Superior Court Department, Suffolk County, Linda E. Giles, J., denied defendants' special motion to dismiss under the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. Defendants appealed.

Holdings: The Appeals Court, Katzmann, J., held that:

[1] hospital president's statements as quoted in newspaper constituted protected petitioning activity under anti-SLAPP statute; but

[2] president's statements in e-mail to hospital staff were not protected petitioning activity.

Affirmed in part and reversed in part.

Sullivan, J., filed an opinion concurring in the result.

West Headnotes (7)

[1] Pleading
Frivolous pleading

To invoke the protection of the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, the special movants seeking dismissal must show, as a threshold matter, through pleadings and affidavits, that the claims against them are based on their petitioning activities alone and have no substantial basis other than or in addition to their petitioning activities; if the special movants make such a showing, the burden then shifts to the nonmoving party to demonstrate by a preponderance of the evidence that the moving party's activities were devoid of any reasonable factual support or any arguable basis in law and that the petitioning activities caused actual injury. M.G.L.A. c. 231, § 59H.

3 Cases that cite this headnote

[2] Pleading
Frivolous pleading

In order to determine if statements are petitioning under the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, court considers them in the overall context in which they were made. M.G.L.A. c. 231, § 59H.

3 Cases that cite this headnote

[3] Appeal and Error
Anti-SLAPP laws

Appellate court reviews a judge's decision to grant a special motion to dismiss under the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute for abuse of discretion or error of law. M.G.L.A. c. 231, § 59H.

2 Cases that cite this headnote

[4] **Pleading**
Frivolous pleading
Hospital president who was petitioning on behalf of his employer had standing to bring special motion to dismiss defamation claim under the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, even if he was not personally aggrieved by governmental agencies' actions. M.G.L.A. c. 231, § 59H.

1 Cases that cite this headnote

[5] **Pleading**
Frivolous pleading
Hospital president's statements to newspaper concerning termination of staff members from hospital's adolescent psychiatric unit were protected petitioning activity under anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, as necessary to support special motion by president and hospital to dismiss defamation claim by nurses terminated from their employment in unit, even though statements were not made directly to regulatory agencies; unit was being investigated by regulatory agencies following allegations of patient abuse and neglect, the media essentially became a venue to express the perspectives of each side, and, as such, the newspaper articles in which president's statements appeared were available to, and likely considered by, the regulatory agencies. M.G.L.A. c. 231, § 59H.

Cases that cite this headnote

[6] **Pleading**
Frivolous pleading
Hospital president's statements to newspaper concerning termination of staff members from hospital's adolescent psychiatric unit were protected petitioning activity under anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, as necessary to support special motion by president and hospital to dismiss defamation claim by nurses terminated from their employment in unit, on the basis that those statements were essentially mirror images of statements in a report that hospital commissioned a law firm to prepare to assure investigating agencies that hospital was taking requisite action to fix problems of purported patient abuse and neglect; while report was significantly more thorough and detailed, president's statements maintained the same tone and content. M.G.L.A. c. 231, § 59H.

Cases that cite this headnote

[7] **Pleading**
Frivolous pleading
Statements in e-mail that hospital president sent only to hospital staff, to the effect that certain employees had not been acting in the best interest of their patients, the hospital, or the community, and that he had terminated their employment as a result, was not protected petitioning activity under the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute so as to support special motion by president and hospital to dismiss defamation claim by nurses who were terminated from their employment in adolescent psychiatric unit of hospital; there was no indication that e-mail was provided to regulators who were investigating psychiatric unit or that the regulators were told about it. M.G.L.A. c. 231, § 59H.

Cases that cite this headnote

Attorneys and Law Firms

****81** Jeffrey A. Dretler, Boston (Katharine A. Crawford & Joseph W. Ambash, Boston, with him) for the defendants.

Dahlia C. Rudavsky, Boston, for the plaintiffs.

Present: KATZMANN, SULLIVAN, & BLAKE, JJ.

Opinion

KATZMANN, J.

***98** In this case we consider whether the defendants' special motion to dismiss the plaintiffs' defamation claim pursuant to G.L. c. 231, § 59H, widely known as the "anti-SLAPP"[3] statute, was properly denied. The central question is whether, during a period of crisis when Steward Carney Hospital (Carney Hospital or hospital) faced the loss of its license to operate an in-patient adolescent psychiatric unit (unit) because of purported patient abuse and neglect, statements quoted in a newspaper made by the president of the hospital, and an electronic mail message (e-mail) the president sent to hospital staff announcing the dismissal of unnamed employees in the unit under review, constituted protected petitioning activity. A judge in the Superior Court denied the motion because she found that the statements upon which the claim was based did not qualify as protected petitioning activity and, therefore, the defendants could not seek protection of the anti-SLAPP statute. We conclude that the statements quoted in the newspaper constitute protected petitioning activity, but that the internal e-mail does not. Accordingly, we affirm in part and reverse in part.

3 " 'SLAPP' is an acronym for Strategic Lawsuit Against Public Participation." *Office One, Inc. v. Lopez,* 437 Mass. 113, 121 n. 13, 769 N.E.2d 749 (2002).

Background. The key facts of this case, as derived from the judge's decision below, the newspaper articles at issue, affidavits by those involved in the investigation, testimony in a related arbitration proceeding (see note 4, *infra*), and relevant reports, are as follows. The plaintiffs are all registered nurses (RNs) who had been working in the unit for a number of years. In April, 2011, complaints were made concerning four incidents of alleged patient abuse or neglect within the unit. None of the alleged incidents involved abuse or neglect of a patient by any of the plaintiffs (or any other RN). The incidents were reported to the Department of Mental Health (DMH), the Department of Public Health (DPH), and the Department of Children and Families ***99** (DCF) by unit RNs or other staff. The unit is licensed by DMH and DPH. After the April complaints, the agencies, especially DMH, were regularly on site to investigate the incidents and to determine whether to revoke the license to operate the unit. The director of licensing at DMH reported making unannounced visits on different occasions, including weekends and holidays, ****82** so that she could "see in fact what was happening."

In late April, 2011, in response to the incidents, Carney Hospital placed all mental health counselors, all regularly assigned unit RNs (including the plaintiffs), and two managers on paid administrative leave. The hospital then hired Attorney Scott Harshbarger and his law firm, Proskauer Rose, LLP (Proskauer defendants), to conduct an overall management review of the unit and make recommendations. Harshbarger interviewed unit staff, including each of the plaintiffs. The plaintiffs identified specific issues that affected patient care and areas for improvement. On May 13, 2011, Harshbarger made an oral report of his conclusions to the hospital's then president, William Walczak; Harshbarger submitted his written report on May 26, 2011. In the report, which made no specific allegations of abuse or neglect against any of the individual plaintiffs or any member of the nursing staff, Harshbarger recommended that the hospital "rebuild" the unit by replacing all of its personnel. The report cited "serious weaknesses" in the supervisory and managerial structure of the unit, including, inter alia, "lack of a clear reporting structure, lack of accountability, oversight of patient care and quality, patient and staff safety concerns, and a flawed and rarely invoked disciplinary process." The report cited a "code of silence" as one of the underlying sources and causes of operational and performance dysfunction. "This code results in a failure to report issues or concerns, and to reinforce a general attitude that reporting can trigger retaliation, intimidation, and/or be ignored or unsupported by others." The report concluded that "it would be prudent to replace the current personnel in order to ensure quality care" for the patients.

The day that Walczak received Harshbarger's report, he sent a letter to each plaintiff terminating her for her "conduct at work."[4] ***100** On May 27, 2011, Walczak sent an e-mail to all hospital staff, which stated in pertinent part:

4 In their complaint against the hospital, two related entities, and Walczak (Steward defendants), alleging defamation, the plaintiffs stated that the Massachusetts Nurses Association, a union

representing the plaintiffs, had filed grievances on their behalf, that the hospital had denied those grievances, and that an arbitrator had "found that [the Steward defendants] had violated the [collective bargaining agreement] by discharging the grievants." According to the complaint, the arbitrator stated that "the concept of collective guilt and responsibility does not suffice to establish just cause to terminate any particular member of the group," and ordered reinstatement, removal of any allegations or findings of wrongdoing from the grievants' personnel files, and payment to them of all lost back wages and benefits, with interest. The complaint stated that the Steward defendants have appealed the award and have not reinstated any of the plaintiffs.

"As you all know, Carney Hospital has a rich tradition of providing excellent care to our patients. Our performance on national quality and safety standards is exceptional, and in many cases superior to competing hospitals. The reason for this performance is simple —you[,] the employees and caregivers at Carney [Hospital], are dedicated to providing the best possible care to every patient that comes through our doors. It is your dedication that makes Carney Hospital such a special place.

"Recently, I have become aware of alleged incidents where a number of Carney [Hospital] staff have not demonstrated this steadfast commitment to patient care. I have thoroughly investigated these allegations and have determined that these individual employees have not been acting in the best interest of their patients, the hospital, or the **83 community we serve. As a result, I have terminated the employment of each of these individuals."

The following day, on May 28, 2011, the Boston Globe published an article stating that Walczak said he had hired Harshbarger to investigate an allegation that an employee had allegedly sexually assaulted a teenager on the locked adolescent psychiatry unit, and that Harshbarger had recommended "to start over on the unit." The article included Walczak's statement that Harshbarger's report "described 'serious concerns about patient safety and quality of care.' " The article reported that Walczak further stated, "We will have top-notch employees replace those who left. My goal is to make it the best unit in the state." In the article, a spokesman for the Massachusetts Nurses Association, a union representing the plaintiffs, said that the "hospital fired 29 employees, including 13 nurses who are members of the union."

In June, 2011, DMH issued reports on the incidents, finding wrongdoing by a single mental health counsellor for the first three *101 incidents and finding improper actions by unspecified staff for the fourth incident. In a June 22, 2011, Boston Globe article, it was reported that the firing of twenty-nine nurses and mental health counsellors at Carney Hospital followed five complaints of abuse or neglect in the adolescent psychiatry unit, not just the one complaint as initially disclosed, and that four of the complaints had been validated. While declining to provide details on the cases, Walczak was quoted in the article as stating that "[t]he Harshbarger report indicated that it wasn't a safe situation." The article explained that Walczak based his decision to fire the entire staff "on an investigation by former Attorney General Scott Harshbarger and his law firm." The article quoted a letter from the Massachusetts Nurses Association to Carney Hospital nurses as stating that the nurses "adamantly deny any allegations of wrongdoing."

On May 24, 2013, the plaintiffs filed their defamation claims against the Proskauer defendants[5] and against Carney Hospital, two related entities, and Walczak (collectively, Steward defendants).[6] Relevant to the instant appeal, pursuant to the anti-SLAPP statute, the Steward defendants filed a special motion to dismiss count 3 of the complaint (defamation), which alleged that Walczak "made false and defamatory statements about the plaintiffs to the general public in his remarks in the Boston Globe articles of May 28, 2011, and June 22, 2011," and "made false and defamatory statements about the **84 plaintiffs to Hospital staff in his email of May 27, 2011." The judge denied this motion, *102 finding that neither Walczak's statements to the Boston Globe nor his e-mail to the hospital staff constituted protected petitioning activity. The Steward defendants now appeal from the denial of their motion.

5 Counts 4 and 5 of the complaint were against the Proskauer defendants, for defamation and infliction of emotional distress. The defamation claim was based on Harshbarger's statements in his written report and oral presentation to the Steward defendants. The Proskauer defendants filed a special motion to dismiss the defamation claim pursuant to the anti-SLAPP statute. The judge allowed this motion, finding that the statements contained in Harshbarger's report, in the context in which they

were made, constituted petitioning activity protected under G.L. c. 231, § 59H. Subsequently, all claims against the Proskauer defendants were dismissed with prejudice on the parties' stipulation; judgment entered for the Proskauer defendants on May 27, 2014.

6 Counts 1–3 of the plaintiffs' complaint are against the Steward defendants. Of these, only count 3 (defamation) is at issue in this appeal. At the motion hearing, the Steward defendants waived their motion to dismiss counts 1 and 2 pursuant to Mass.R.Civ.P. 12(b)(6), 365 Mass. 754 (1974), subject to renewal as a motion for summary judgment. (Count 1 alleges retaliatory discharge based on whistleblower activity; count 2 alleges violations of G.L. c. 119, § 51A, for the discharge of two of the plaintiffs after they reported abuse or neglect of patients on the unit.)

[1] *Discussion.* 1. *Overview.* a. *The anti-SLAPP statute.* The anti-SLAPP statute, G.L. c. 231, § 59H, "protects the 'exercise of [the] right of petition under the constitution of the United States or of the [C]ommonwealth,' by creating a procedural mechanism, in the form of a special motion to dismiss, for the expedient resolution of so-called 'SLAPP' suits." *Office One, Inc. v. Lopez,* 437 Mass. 113, 121, 769 N.E.2d 749 (2002) (*Office One, Inc.*). "In the preamble to 1994 House Doc. No. 1520, the Legislature recognized that ... 'there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances.' " *Duracraft Corp. v. Holmes Prods. Corp.,* 427 Mass. 156, 161, 691 N.E.2d 935 (1998) (*Duracraft*). Under the "well-established [two-part] burden-shifting test," *Hanover v. New England Regional Council of Carpenters,* 467 Mass. 587, 595, 6 N.E.3d 522 (2014), "[t]o invoke the statute's protection, the special movant[s], [here, the Steward defendants, must] show, as a threshold matter, through pleadings and affidavits, that the claims against [them] are ... 'based on' [their] petitioning activities alone and have no substantial basis other than or in addition to [their] petitioning activities." *Office One, Inc., supra* at 122, 769 N.E.2d 749, citing *Duracraft, supra* at 167–168, 691 N.E.2d 935. *Wenger v. Aceto,* 451 Mass. 1, 5, 883 N.E.2d 262 (2008) (*Wenger*). This is the first prong of the test. Under the second prong, if the special movants make such a showing, the burden then shifts to the nonmoving party to demonstrate by a preponderance of the evidence that the moving party's activities were "devoid of any reasonable factual support or any arguable basis in law" and that the petitioning activities caused actual injury. *Benoit v. Frederickson,* 454 Mass. 148, 152–153, 908 N.E.2d 714 (2009) (*Benoit*), quoting from G.L. c. 231, § 59H.

[2] "In order to determine if statements are petitioning, we consider them in the over-all context in which they were made." *North Am. Expositions Co. Ltd. Partnership v. Corcoran,* 452 Mass. 852, 862, 898 N.E.2d 831 (2009) (*Corcoran*). " '[P]etitioning' has been consistently defined to encompass a 'very broad' range of activities in the context of the anti-SLAPP statute." *Id.* at 861, 898 N.E.2d 831, citing *Duracraft, supra* at 161–162, 691 N.E.2d 935. "The statute identifies five types of statements that comprise 'a party's exercise of its right of petition':

> ***103** '[1] [A]ny written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; [2] *any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding;* [3] any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; [4] any statement reasonably likely to enlist public participation in an effort to effect such consideration; or [5] any other statement falling within constitutional protection of the right to petition government.' G.L. c. 231, § 59H." (Emphasis added.)

Cadle Co. v. Schlichtmann, 448 Mass. 242, 248, 859 N.E.2d 858 (2007) (*Cadle Co.*). ****85** The second category is of particular relevance to the instant case.

[3] b. *Standard of review.* As has been stated, we review the judge's decision to grant the special motion to dismiss for abuse of discretion or error of law. See *Marabello v. Boston Bark Corp.,* 463 Mass. 394, 397, 974 N.E.2d 636 (2012); *Hanover v. New England Regional Council of Carpenters,* 467 Mass. at 595. We note that while this formulation appears in various anti-SLAPP decisions, there are other cases where it is absent. See, e.g., *Corcoran, supra,* 452 Mass. 852, 898 N.E.2d 831; *Benoit,* 454 Mass. 148, 908 N.E.2d 714; *Ehrlich v. Stern,* 74 Mass.App.Ct. 531, 908 N.E.2d 797 (2009) (*Ehrlich*). In any event, with respect to the first prong of the test—whether conduct as alleged on the face of a complaint qualifies as protected petitioning activity—it does not appear that the courts have deferred to the motion judge but rather have made a fresh and independent evaluation. See, e.g., *Corcoran,* 452 Mass. at 863–864, 898 N.E.2d 831 (discussing *Cadle*

Co., 448 Mass. 242 [, 859 N.E.2d (2007)]); *Plante v. Wylie,* 63 Mass.App.Ct. 151, 160–161, 824 N.E.2d 461 (2005) (*Plante*). Where the motion judge's determination of the second prong of the two-part test does not implicate credibility assessments, it is arguable that appellate review should be similarly de novo. See, e.g., *Benoit,* 454 Mass. at 154 n. 7, 908 N.E.2d 714 (discussing the appropriate standard of review with respect to the analysis of the second prong of the two-part test). [7]

7 In *Benoit,* the Supreme Judicial Court explained:

> "The anti-SLAPP statute requires the judge to consider the pleadings and supporting and opposing affidavits. The question to be determined by a judge in deciding a special motion to dismiss is not which of the parties' pleadings and affidavits are entitled to be credited or accorded greater weight, but whether the nonmoving party has met its burden (by showing that the underlying petitioning activity by the moving party was devoid of any reasonable factual support or arguable basis in law, and whether the activity caused actual injury to the nonmoving party)."

454 Mass. at 154 n. 7, 908 N.E.2d 714.

***104** We conclude that whether we review the judge's denial of the motion to dismiss de novo or with discretion, the ruling was in error with respect to the statements to the Boston Globe, but was not in error with respect to the e-mail sent to hospital employees.

[4] 2. *Standing.* At the outset we briefly address and reject the plaintiffs' standing argument. The plaintiffs contend that the anti-SLAPP statute does not apply because Walczak is not personally aggrieved by the agencies' actions and was not petitioning them on his own behalf. *Keegan v. Pellerin,* 76 Mass.App.Ct. 186, 191–192, 920 N.E.2d 888 (2010), is dispositive on this issue. Here, Walczak, who engaged in petitioning activity on behalf of the hospital while he was its president, is protected by the anti-SLAPP statute because "when a nongovernmental person or entity is the petitioner, the statute protects one who is engaged to assist in the petitioning activity under circumstances similar to those this record reveals." *Id.* at 192, 920 N.E.2d 888, citing *Plante,* 63 Mass.App.Ct. at 156–157, 824 N.E.2d 461. See *Office One, Inc.,* 437 Mass. at 121–124, 769 N.E.2d 749. See also *Corcoran,* 452 Mass. 852, 898 N.E.2d 831 (2009) (underlying suit named defendants' principal, whose statements were challenged, as individual defendant). [8] Walczak thus has standing.

8 The cases upon which the plaintiffs rely to contest standing—*Kobrin v. Gastfriend,* 443 Mass. 327, 332, 821 N.E.2d 60 (2005); *Fisher v. Lint,* 69 Mass.App.Ct. 360, 364–365, 868 N.E.2d 161 (2007); and *Moriarty v. Mayor of Holyoke,* 71 Mass.App.Ct. 442, 447, 883 N.E.2d 311 (2008)—were specifically distinguished by the *Keegan* court because those cases "rest on the commonsense principle that a statute designed to protect the constitutional right to petition has no applicability to situations in which the government petitions itself." *Keegan v. Pellerin,* 76 Mass.App.Ct. 186, 192, 920 N.E.2d 888 (2010). This is not a case in which the government was petitioning itself; rather, Walczak was petitioning on behalf of his employer, the hospital. See *ibid.*

****86** 3. *The statements to the Boston Globe.* By way of overview, we note our conclusion, discussed below, that the judge erred in concluding that Walczak's statements to the Boston Globe "can[not] be considered petitioning activity under Massachusetts law." We disagree with the stark contrast the judge drew between the Proskauer defendants' statements in the report and the statements the Steward defendants made in the Boston Globe articles. ***105** The judge, citing *Kobrin v. Gastfriend,* 443 Mass. 327, 333, 821 N.E.2d 60 (2005) (*Kobrin*), for the proposition that the anti-SLAPP statute applies only where a "party seeks some redress from the government," found it "clear that the statements in Harshbarger's report constitute petitioning activity in that they were aimed at persuading the regulatory agencies involved not to revoke Carney Hospital's license." The judge noted that, in response to DMH's threat to close the unit, Harshbarger was recruited and was required to "interface with the various regulatory agencies and personnel on behalf of Carney Hospital and develop remedies so that the Hospital could retain its license and prevent the Unit from being closed." The pleadings and affidavits indicate that the Steward defendants' overarching goal was the same as that of the Proskauer defendants: to ensure that the hospital retained its license and to prevent the unit from being closed. [9] The strategy was to take a

comprehensive approach to fixing the problems at the unit to demonstrate to DMH that the unit should maintain its license. In short, with respect to the statements to the Boston Globe, we do not discern a consequential distinction between the conduct of the Steward defendants and the Proskauer defendants. Walczak's statements were made and designed to achieve the same goal and also qualify as protected petitioning activity.

9 The affidavit of Michael R. Bertoncini, deputy general counsel of one of the Steward defendants during the relevant time period, explained, "The leadership of [his client] and Carney Hospital believed that swift and decisive action was necessary to ensure the safety of patients in the Unit, to respond to the concerns of the DMH/DCF personnel on the scene, and to work with and persuade the relevant regulatory agencies not to suspend Carney Hospital's license to operate the Unit and not to close the Unit." Bertoncini also stated that his client and the hospital hoped that the hiring of Harshbarger to conduct the review and the "corresponding response would provide clear and convincing evidence and support for the position that the Unit should not lose its license to operate, should not be closed [,] and should be given the opportunity to effect a comprehensive remedy."

a. Specifically, the parties disagree as to whether Walczak's statements in the Boston Globe articles on May 28, 2011, and June 22, 2011, qualify as protected petitioning activity. We conclude, as this court did in *Wynne v. Creigle,* 63 Mass.App.Ct. 246, 254, 825 N.E.2d 559 (2005) (*Creigle*), that Walczak's statements "were sufficiently tied to and in advancement of" the maintenance of the license to operate the unit. In *Creigle,* there were two independent bases on which the defendant's statements to the newspaper were found to be protected petitioning activity. One basis was that the ***106** statements "were sufficiently tied to and in advancement of" the defendant's petition for benefits then under consideration by the Legislature, and, "thus, they fall within the ambit of ****87** statements made 'in connection with' legislative proceedings within the meaning of G.L. c. 231, § 59H, and constitute protected petitioning activity on that basis." *Ibid.* The second basis was that the context in which the defendant's statements to the newspaper occurred was as a response to the materials the plaintiff had earlier provided to the newspaper, and the fact that the defendant's statements were "essentially mirror images" of statements she had made in an earlier governmental investigation of the plaintiff. *Ibid.* In *Cadle Co.,* 448 Mass. at 251, 859 N.E.2d 858, the court further emphasized the importance of context when, in distinguishing *Creigle,* it noted that unlike *Creigle,* in *Cadle Co.,* there was "nothing in the record [to] support a finding that the [defendant's] challenged statements ... were either a response to statements that [the plaintiff] had made to the press or repetitions of statements initially made in a governmental proceeding."

We similarly conclude from the content of the Boston Globe articles, particularly the June 22 article, and from Walczak's affidavit, which was not challenged by the plaintiffs, that the "defendant's statements were not unsolicited," but, rather, were responsive. In his affidavit, Walczak states that he "understood that representatives from the nurses' union were commenting to the media on the terminations and that the media was also seeking commentary from current and former officials from the very regulatory agencies who were in the process of reviewing Carney Hospital's licensing status. As such, I felt that it was important that I explain to the media, and hence to the general public and the agencies themselves, why Carney Hospital took the actions that it did, and what our plans were for ensuring the safety and care of our patients going forward." The relevant Boston Globe articles include statements and perspectives from the nurses' representatives that demonstrate that they were actively informing reporters about the nurses' side of the story, denying any allegations of wrongdoing. Harshbarger noted in his affidavit that there was public pressure on the agencies to close the unit and withdraw its license. Walczak's comments, when viewed in this context, qualify as protected petitioning activity because the investigation was ongoing, and it is clear that DMH, which was regularly on site at the hospital, would be paying attention, or at least would have access to these articles. If Walczak did not ***107** respond, there would have been a serious risk that the situation would be reported in a manner that did not take into account the Steward defendants' perspective. Walczak's statements to the Boston Globe were designed to communicate to the regulatory agencies that the hospital was taking action to avoid losing its license to operate the unit. Even within the articles at issue here, professionals in the local health care arena, including some former and current officials of the reviewing agencies, commented on and evaluated Walczak's course of action, commending the serious steps he took to address the incidents, and noting DMH's

approval of his actions. Indeed, in Walczak's affidavit, he stated that it was his

> "sincere belief that [his] comments to the media would reach the regulators with the message that Carney Hospital had taken the incidents very seriously, implemented immediate remedial action, and developed a plan of action, all of which would contribute to convincing the agencies that patient safety was a priority and that the Unit should remain licensed and open."

[5] With the agencies continuously monitoring the situation and the unavoidable publicity that developed around it, the media essentially became a venue to express ****88** the perspectives of each side; as such, the Boston Globe articles were available to, and likely considered by, the regulatory agencies. The judge erred in concluding that the statements to the Boston Globe were not protected activity on the ground that the Steward defendants, both directly and through Harshbarger, "already were in communication with the agencies regarding their investigation." This conclusion ignored Harshbarger's averments regarding those communications. His affidavit stated, "At this point, DMH's investigation was ongoing and the possibility that the Unit's license to operate would be revoked and the Unit would be closed was still not only being considered, but highly likely. There was some public pressure on the agencies to close the Unit and withdraw the necessary license."

Walczak's statements in the Boston Globe describing the actions the hospital had taken—particularly where there was ongoing public pressure on the agencies to close the unit and to withdraw the hospital's license to operate the unit—were important affirmations, as they came from the president of the hospital himself in support of the urgent goal of influencing DMH ***108** to preserve the license, and were thus legitimate protected activity. Cf. *Benoit,* 454 Mass. at 153, 908 N.E.2d 714 (motion judge erred in concluding that petitioning activities were not "legitimate"). In attempting to reach and educate through the media the opponents in the public who had been pressuring the agencies to revoke the license, Walczak's statements possessed the characteristics of petitioning activity. Contrast *Burley v. Comets Community Youth Center, Inc.*, 75 Mass.App.Ct. 818, 823–824, 917 N.E.2d 250 (2009) (*Burley*) (statements made to the defendant's employees that the plaintiff was banned from a skating rink for inappropriate behavior were not protected petitioning activity where there was no link shown between the employees and the relevant governmental body).

In context and in totality, Walczak's statements to the Boston Globe were in furtherance of the overriding strategic mission of bringing to bear upon the regulatory decisionmakers the seriousness of the hospital's effort to reform the institution. As such, the Steward defendants have satisfied their burden of making a threshold showing that the plaintiffs' "claims [are] 'based on' [the] petitioning activit[y] alone and have no substantial basis other than or in addition to [the] petitioning activit[y]." *Office One, Inc.*, 437 Mass. at 122, 769 N.E.2d 749, citing *Duracraft,* 427 Mass. at 167–168, 691 N.E.2d 935. Contrast *Global NAPS, Inc. v. Verizon New England, Inc.*, 63 Mass.App.Ct. 600, 605, 828 N.E.2d 529 (2005) (*Global NAPS, Inc.*). That the statements in the media were not made directly to the regulatory agencies does not remove them from protected petitioning activity, given that the ultimate audience was those agencies. Walczak's statements to the Boston Globe were protected petitioning activity because they were made "to influence, inform, or at the very least, reach governmental bodies—*either directly or indirectly*" (emphasis added). *Corcoran,* 452 Mass. at 862, 898 N.E.2d 831, quoting from *Global NAPS, Inc.*, 63 Mass.App.Ct. at 605, 828 N.E.2d 529.

[6] We also conclude that Walczak's statements in the Boston Globe articles qualify as protected petitioning activity on the alternative basis that they are "essentially mirror images" of statements in the report. In essence, the plaintiffs argue that in order to qualify as "mirror images," the statements in the Boston Globe and the report must be identical. The case law, however, indicates that the contested ****89** statements do not have to be an exact match but rather must be only "essentially" mirror images of the protected statements. *Creigle,* 63 Mass.App.Ct. at 254, 825 N.E.2d 559. See *Burley,* 75 Mass.App.Ct. at 823, 917 N.E.2d 250. We interpret the qualifier "essentially" as requiring only that the statements be close to or ***109** very similar to the protected statements. While the report is significantly more thorough and detailed, Walczak's statements maintain the same tone

and content, summarizing the report to respond succinctly and effectively to press inquiries and statements by the nurses' representatives. Walczak's statements to the Boston Globe convey the content of the report, which the hospital commissioned specifically to assure the investigating agencies that it was taking the requisite action to fix the problem. Taken in context, Walczak's repetition of the report's content to the media also possessed the characteristics of petitioning activity. See *Creigle, supra* at 253–254, 825 N.E.2d 559.

b. Our focus now shifts to the plaintiffs, because even though we conclude that with respect to the statements to the Boston Globe, the plaintiffs' claim was "based on" the defendants' protected petitioning activity, the plaintiffs have the opportunity to defeat the special motion to dismiss the defamation count based on those statements by showing, "by a preponderance of the evidence, that ... the defendants' petitioning activity [was] devoid of any reasonable factual [or legal] support ... and that ... the activity caused the plaintiffs actual harm." *Office One, Inc.*, 437 Mass. at 123, 769 N.E.2d 749. See *Duracraft*, 427 Mass. at 165, 691 N.E.2d 935; *Wenger*, 451 Mass. at 5, 883 N.E.2d 262, citing G.L. c. 231, § 59H; *Chiulli v. Liberty Mut. Ins., Inc.*, 87 Mass.App.Ct. 229, 233–234, 28 N.E.3d 482 (2015). See also *Baker v. Parsons*, 434 Mass. 543, 554–555, 750 N.E.2d 953 (2001) (*Baker*) (to defeat a special motion to dismiss defamation claims, the plaintiff had the burden of showing "by a preponderance of evidence that the defendants lacked any reasonable factual support for their petitioning activity").

The plaintiffs have failed to show that the defendants' petitioning activity, as constituted by the statements to the Boston Globe, was devoid of factual or legal support.[10] "Because the plaintiffs failed to show that the petitioning activity in issue was devoid of any reasonable factual basis or basis in law, it is not necessary to reach the question whether the activity caused the plaintiffs actual injury." *Office One Inc.*, 437 Mass. at 124, 769 N.E.2d 749. See ***110** *Creigle*, 63 Mass.App.Ct. at 255, 825 N.E.2d 559. See also *Dickey v. Warren*, 75 Mass.App.Ct. 585, 592, 915 N.E.2d 584 (2009). In drafting G.L. c. 231, § 59H, the "Legislature intended to immunize parties from claims 'based on' their petitioning activities," *Duracraft*, 427 Mass. at 167, 691 N.E.2d 935, and we conclude that the claims in the instant case concerning the Boston Globe articles are exactly the type that the Legislature had in mind. See *Baker*, 434 Mass. at 551, 750 N.E.2d 953 (noting that defamation is the "most popular SLAPP cause of action," the court concluded that the "initial showing by the defendants that the claims against them were based on their petitioning activities ****90** alone is not defeated by the plaintiff's conclusory assertion that certain statements made by the defendants in petitions to government officials constitute defamation" [quotation and citation omitted]).

10 The plaintiffs acknowledge that "no such showing was made—or attempted" because "they in fact supported Steward's advocacy goal: the preservation of the Unit's license." We do not agree that this explains the plaintiffs' silence on this point. While the plaintiffs may have had an interest in preservation of the license, they did not share the goal of staffing the unit with new staff. It was thus incumbent upon the plaintiffs to show the absence of factual or legal support for the statements they assert were defamatory.

4. *The e-mail sent to Carney Hospital staff.* We turn now to the e-mail that Walczak sent on May 27, 2011, to the Carney Hospital staff. In that e-mail, he noted the hospital's "rich tradition of providing excellent care to our patients," that he had "become aware of the alleged incidents where a number of Carney [Hospital] staff have not demonstrated this steadfast commitment to patient care," "that these individual employees have not been acting in the best interest of their patients, the hospital, or the community we serve," and that "[a]s a result, I have terminated the employment of each of these individuals." In his affidavit filed in the litigation below, Walczak avers that the e-mail was sent "not only to communicate to the hospital employees what was happening, but to give assurances to the regulatory agencies who were in the process of determining whether Carney Hospital's license to operate the Unit should be revoked that the deficiencies which has [*sic*] been reported on the Unit would not continue in that Unit or be tolerated in any other part of Carney Hospital."[11]

11 Walczak's affidavit further states:

> "On May 27, 2011, I sent an email to all Carney Hospital employees reaffirming Carney Hospital's commitment to providing the best possible care to every patient that comes through

> the doors and explaining the reasons why I decided to terminate the employment of individuals who, in my view, had not lived up to that standard."

Regarding whether the e-mail could qualify as petitioning activity, the Superior Court judge ruled: "With respect to the email which Walczak sent to the internal employees of Carney Hospital, this communication cannot be considered petitioning activity protected by G.L. c. 231, § 59H. *The Steward Defendants* ***111** *have not shown how the statements in the email, communicated only to Carney Hospital employees, were intended to influence, inform, or reach, directly or indirectly, governmental agencies.* See *Global NAPS, Inc.*, 63 Mass.App.Ct. at 605, 828 N.E.2d 529." (Emphasis added.)

[7] During the hearing on the anti-SLAPP motion to dismiss, the judge appropriately indicated that she could "look at the[ ] affidavits." There was no allegation or averment in Walczak's affidavit, or in any of the other affidavits presented to the judge, that the e-mail sent to the Carney Hospital staff was provided to the regulators, or that the regulators were told about it. That the e-mail may have been part of an over-all strategy to address the conditions in the unit in the hope of influencing the regulators is not sufficient to qualify as petitioning activity where there is no evidence in the record that the e-mail was transmitted to the regulators or that they were informed of that communication. In sum, we cannot say that the judge erred in her determination that the Steward defendants had "not shown [that] the statements in the email, communicated only to Carney Hospital employees," qualified as protected petitioning activity. [12] Compare *Burley*, 75 Mass.App.Ct. at 823, 917 N.E.2d 250 (moving party failed to show that statements to employees were made "in conjunction with its protected petitioning activity").

12 Having determined that the Steward defendants have not satisfied the first prong of the two-part test, we need not address the second prong regarding proof of factual or legal support.

Conclusion. The order of the Superior Court is reversed insofar as it denied the ****91** Steward defendants' special motion to dismiss count 3 of the plaintiffs' complaint (defamation) as to Walczak's statements to the Boston Globe. In all other respects the order is affirmed. [13, 14]

13 See *Wenger*, 451 Mass. at 2, 9, 883 N.E.2d 262 (denying a special motion to dismiss with respect to a G.L. c. 93A claim and allowing the special motion to dismiss as to malicious prosecution and abuse of process claims). Under the circumstances here, where the e-mail and statements to the Globe were distinct actions clearly set forth in the defamation count and could readily have been the subject of separate counts, the complaint differs from that presented in *Ehrlich*, 74 Mass.App.Ct. at 534, 908 N.E.2d 797, where such delineation was absent. But see *Burley*, 75 Mass.App.Ct. at 821–824, 917 N.E.2d 250.

14 As count 3 survives in part, the Steward defendants' motion for attorney's fees and costs pursuant to the anti-SLAPP statute is denied.

So ordered.

***112** SULLIVAN, J. (concurring in the result).

The motion judge denied the special motion to dismiss the plaintiffs' defamation claim against the Steward defendants [1] because, in her judgment, the defendants failed to meet their burden to show that the count for defamation was based *solely* on petitioning activity. See *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 167, 691 N.E.2d 935 (1998) (*Duracraft*) (moving party must make a threshold showing that the complaint is based on petitioning activity "alone"). Because the judge did not make a clear error of law or judgment in declining to dismiss the defamation claim with respect to the e-mail, I agree that the special motion to dismiss must be denied as to the e-mail. I do not agree that the statements made to the Boston Globe constituted *solely* petitioning activity. However, based on the "mirror image" doctrine, I also must agree that the statements to the Boston Globe are petitioning activity. I write separately to emphasize material differences in the reasons for which I arrive at these conclusions, reasons which impact both the standard of review of decisions on "anti-SLAPP" motions and the scope of protection afforded litigants in the Commonwealth under the First Amendment to the United States Constitution.

1 Steward Carney Hospital, Inc. (Carney Hospital or hospital); Steward Hospital Holdings, LLC; Steward Health Care System, LLC; and William Walczak.

Standard of review. A threshold question is the proper application of the standard of review. We review the motion judge's decision for an abuse of discretion. See *Kobrin v. Gastfriend,* 443 Mass. 327, 330–331, 821 N.E.2d 60 (2005) (*Kobrin*); *Marabello v. Boston Bark Corp.,* 463 Mass. 394, 397, 974 N.E.2d 636 (2012) (*Marabello*).[2] Whether the appellate courts have functionally conducted (or should conduct) a "fresh and independent evaluation" of anti-SLAPP motions to dismiss, albeit under the umbrella of the abuse of discretion standard, is a different question, one left largely unanswered by existing precedent. See *ante* at 103, 46 N.E.3d at 85. To be sure, an appellate court reviews errors of law de novo, and an error of law is an abuse of discretion. See *Kobrin, supra* at 330–331, 821 N.E.2d 60; *Marabello, supra* at 397, 974 N.E.2d 636. With some frequency the existence of petitioning activity ****92** has been decided as a matter of law on the basis of the complaint.[3] See *Fabre v. Walton,* 436 Mass. 517, 522–523, 781 N.E.2d 780 (2002); *Office One,* ***113** *Inc. v. Lopez,* 437 Mass. 113, 122–123, 769 N.E.2d 749 (2002) (*Office One, Inc.*); *Wenger v. Aceto,* 451 Mass. 1, 5, 883 N.E.2d 262 (2008) (*Wenger*); *North Am. Expositions Co. Ltd. Partnership v. Corcoran,* 452 Mass. 852, 864–865, 898 N.E.2d 831 (2009) (*Corcoran*). Where the pertinent allegations suggest that there may be both petitioning activity and nonpetitioning activity, the motion must be denied. See *Garabedian v. Westland,* 59 Mass.App.Ct. 427, 432, 796 N.E.2d 439 (2003); *Ehrlich v. Stern,* 74 Mass.App.Ct. 531, 536–537, 908 N.E.2d 797 (2009) (*Ehrlich*); *Burley v. Comets Community Youth Center, Inc.,* 75 Mass.App.Ct. 818, 821–822, 917 N.E.2d 250 (2009) (*Burley*).

2 See also *Office One, Inc. v. Lopez,* 437 Mass. 113, 121, 769 N.E.2d 749 (2002) (*Office One, Inc.*); *Cadle Co. v. Schlichtmann,* 448 Mass. 242, 250, 859 N.E.2d 858 (2007) (*Cadle*); *Hanover v. New England Regional Council of Carpenters,* 467 Mass. 587, 595, 6 N.E.3d 522 (2014).

3 For example, where a complaint is based solely on the filing of a police report, the special motion to dismiss has been allowed as a matter of law. See *Benoit v. Frederickson,* 454 Mass. 148, 153, 908 N.E.2d 714 (2009); *Keegan v. Pellerin,* 76 Mass.App.Ct. 186, 190, 920 N.E.2d 888 (2010). See also *McLarnon v. Jokisch,* 431 Mass. 343, 347, 727 N.E.2d 813 (2000) (application for an abuse prevention order). The cases cited *ante* at 103, 46 N.E.3d at 85 arose as a question of law based on a review of the complaint. The sole exception is *North Am. Exposition Co. Ltd. Partnership v. Corcoran,* 452 Mass. 852, 854 & n. 5, 898 N.E.2d 831 (2009), where the court supplemented its review of the allegations of the complaint, but with uncontested evidence only. This case arises in a different posture.

In this case, we also have the moving parties' affidavits. How must those affidavits be treated? The answer lies in the hornbook principle, as applicable in anti-SLAPP suits as in other areas of the law, that the judge may look to the entire record and is not required to credit a defendant's affidavit. See *Cadle Co. v. Schlichtmann,* 448 Mass. 242, 250–251, 859 N.E.2d 858 (2007) (*Cadle*). In the context of an anti-SLAPP motion, this means that the judge is not required to accept at face value either party's "self-serving characterization" of conduct as petitioning or nonpetitioning activity. See *ibid.* (holding that the judge was permitted to determine as a factual matter that the defendant had failed to meet his burden to show that the purpose in setting up a litigation Web site was petitioning rather than commercial).[4] In my view, this determination on appeal falls under the more deferential standard of review for abuse of discretion, *id.* at 250, 859 N.E.2d 858, that is, whether the motion judge ***114** made "a clear error of judgment in weighing the factors relevant to the decision, ... such that the decision [fell] outside the range of reasonable alternatives." *L.L. v. Commonwealth,* 470 Mass. 169, 185 n. 27, 20 N.E.3d 930 (2014) (quotation and citation omitted).

4 Alternatively, there is the approach taken in *Benoit v. Frederickson,* 454 Mass. at 154 n. 7, 908 N.E.2d 714. In *Benoit,* the court cautioned against fact finding on the second prong of the two-part test. This caution makes sense in the context of ensuring that the applicable standard—whether the petitioning activity is utterly devoid of reasonable factual support or an arguable basis in law—is not usurped by a shadow trial on the merits on a motion to dismiss. The interest at stake in the first prong of the test—determining whether a defendant has met his burden of proving that his statements were solely for petitioning purposes—is a different one. However, even if a factual dispute were found to exist on the first prong, under the *Benoit* approach, the dispute itself would be the basis for denying the motion, because

the existence of the dispute means that the defendants have not met their burden to show that their conduct was solely for a petitioning purpose.

The defamation claim. Turning to the defamation claim, the complaint alleges and Walczak's affidavit confirms that he sent an e-mail to all Carney Hospital employees. The e-mail contained a stern warning about patient care, hospital standards, ****93** and his reasons for the mass termination. There was no allegation or averment in this or any other affidavit that the e-mail was provided to the regulators, or that the regulators were told about it. The judge concluded that the Steward defendants "have not shown how the statements in the email, communicated only to Carney Hospital employees, were intended to influence, inform, or reach, directly or indirectly, governmental agencies.... The statements cannot be considered petitioning activity merely because they communicated to the Hospital staff what remedial action the Hospital was taking as a response to a regulatory agency investigation."

The judge did not abuse her discretion. As a matter of law, the hospital's decision to terminate the employment of all employees in the adolescent psychiatric unit (unit) was conduct, not speech, and is not entitled to the protection of the anti-SLAPP statute. See *Marabello,* 463 Mass. at 398–400, 974 N.E.2d 636. The fact that the hospital explained its actions to its employees does not transform conduct into petitioning activity. A "tangential statement[ ]" that "concerns a topic that has attracted governmental attention ... does not give that statement the character contemplated by the statute." *Global NAPS, Inc. v. Verizon New England, Inc.,* 63 Mass.App.Ct. 600, 605, 607, 828 N.E.2d 529 (2005). That the e-mail may have been part of an over-all strategy to address the conditions in the unit and thereby avoid the wrath of the regulators is not enough. "[A]n over-broad construction of the anti-SLAPP statute would compromise the nonmoving party's right to petition—the same right the statute was enacted to protect." *Kobrin,* 443 Mass. at 335, 821 N.E.2d 60.[5]

5 It is particularly important to note that the e-mail went further than the report prepared by Attorney Scott Harshbarger and could be read to suggest that the fired employees were responsible for the incidents leading to the investigation. It is these statements in particular which the plaintiffs allege were defamatory.

It is not clear from the judge's decision whether she did not credit Walczak's affidavit or whether, even if she accepted it at ***115** face value, she found the affidavit was insufficient to show that petitioning activity was the sole basis for the e-mail, or both. See *Wenger,* 451 Mass. at 5, 883 N.E.2d 262, quoting from *Duracraft,* 427 Mass. at 167–168, 691 N.E.2d 935 (movant must show that the claim "[is] based on 'petitioning activities alone and ha[s] no substantial basis other than or in addition to the petitioning activities' "). The judge's decision is properly sustained on either basis.

First, for the reasons stated above, the judge did not abuse her discretion to the extent that she declined to credit Walczak's affidavit. See *Cadle,* 448 Mass. at 250, 859 N.E.2d 858. The judge considered the affidavit[6] and found it unpersuasive in light of the complete absence of any evidence that the e-mail was sent to the regulators. In this factual context, the judge did not engage in a clear error in judgment in concluding that the affidavit, crafted after the fact for purposes of supporting the special motion, failed to sustain the defendants' burden to show that Walczak engaged in petitioning activity. The statements in the affidavit concerning the defendants' motives and beliefs are not relevant. "We care not whether a defendant seeking dismissal under the anti-SLAPP statute is 'sincere' in his or her statements; rather, our only concern, as ****94** required by the statute, is that the person be truly 'petitioning' the government in the constitutional sense." *Kobrin,* 443 Mass. at 338 n. 14, 821 N.E.2d 60.

6 The affidavits were discussed at length in the motion hearing, and the judge stated on the record her intention to consider them.

Second, even if the judge were to give weight to Walczak's statement that he hoped to influence the regulators (which she clearly did not in view of the lack of any indication that the regulators knew of the e-mail's existence), or to simply accept the statements at face value, Walczak also stated that he "sent this email ... to communicate to the hospital employees what was happening."[7] On its face, the e-mail served patient care and labor relations purposes separate and independent of any claimed attempt ***116** to influence regulators. The anti-SLAPP statute protects a narrow range of conduct based solely and exclusively on petitioning activity. See *Ehrlich,* 74 Mass.App.Ct. at 536–537, 908 N.E.2d 797. See also *Duracraft,* 427 Mass. at 167–168, 691 N.E.2d 935. Even if one were to accept the defendants' view that the e-mail must be

viewed as petitioning activity as a matter of law (which both the majority and I do not), the e-mail also served nonpetitioning purposes. Thus, the plaintiffs' complaint "[did] not concern solely the defendants' pursuit of legal rights." *Ayasli v. Armstrong,* 56 Mass.App.Ct. 740, 748, 780 N.E.2d 926 (2002), quoting from *Bell v. Mazza,* 394 Mass. 176, 183, 474 N.E.2d 1111 (1985).

7 In his affidavit, Walczak stated that he sent the e-mail for the purpose of

> "*reaffirming Carney Hospital's commitment to providing the best possible care to every patient that comes through the doors and explaining the reasons why I decided to terminate the employment of individuals who, in my view, had not lived up to that standard. I sent this email not only to communicate to the hospital employees what was happening, but to give assurances to the regulatory agencies* who were in the process of determining whether Carney Hospital's license to operate the Unit should be revoked that the deficiencies which has [*sic*] been reported on the Unit would not continue in that Unit or be tolerated in any other part of Carney Hospital" (emphasis added).

For this reason above all others, the judge also correctly ruled as a matter of law that the motion should be denied. It bears remembering that the "sole purpose" doctrine came about as a judicial gloss—a gloss designed to save the statute from constitutional infirmity.[8] In *Duracraft,* 427 Mass. at 167, 691 N.E.2d 935, the Supreme Judicial Court "adopt[ed] a construction of [the words] 'based on' that would exclude motions brought against meritorious claims with a substantial basis *other than or in addition to* the petitioning activities implicated" (emphasis added). By limiting anti-SLAPP motions to those cases where the *only* basis for the plaintiffs' complaint is the defendants' nonfrivolous petitioning activity, the court resolved the "conundrum [that had] troubled judges and bedeviled the statute's application"—that is, how to protect the defendants' right to petition the government, provided the petition is not a sham, while at the same time also protecting an adverse party's right to petition. *Id.* at 166–167, 691 N.E.2d 935. See *Kobrin,* 443 Mass. at 335, 821 N.E.2d 60.

8 The cases emphasizing the importance of the "sole purpose" test are legion. See, e.g., *Fabre v. Walton,* 436 Mass. at 524, 781 N.E.2d 780; *Office One, Inc.,* 437 Mass. at 122, 769 N.E.2d 749; *Cadle,* 448 Mass. at 250, 859 N.E.2d 858; *Wenger,* 451 Mass. at 5, 883 N.E.2d 262; *Fustolo v. Hollander,* 455 Mass. 861, 865, 920 N.E.2d 837 (2010); *Ehrlich,* 74 Mass.App.Ct. at 536–537, 908 N.E.2d 797.

The statements attributed to Walczak in the newspaper articles suffer from precisely the same defects as the e-mail. The judge found the statements to the Boston Globe to be tangential, "particularly when the defendants already were in communication ****95** with the agencies." In addition, the Walczak affidavit states that his comments to the Globe were an appeal to the public, an understandable purpose in light of the potential impact of the allegations on the confidence of patients, donors, insurers, and ***117** business partners, but still a nonpetitioning purpose.[9] On its face, the Walczak affidavit demonstrates that the statements to the press encompass substantial nonpetitioning purposes.[10]

9 In his affidavit, Walczak stated that he spoke to the newspaper because "I felt that it was important that I explain to *the media, and hence to the general public and the agencies themselves,* why Carney Hospital took the actions that it did, and what our plans were for ensuring the safety and care of our patients going forward" (emphasis added).

10 In this regard, there is a "consequential distinction" between Harshbarger and his law firm (Proskauer defendants) and the Steward defendants. See *ante* at 105, 46 N.E.3d at 86. The Proskauer defendants were hired to assist in influencing the regulators. The Steward defendants had safety, labor relations, institutional, and commercial interests apart from the regulatory proceedings.

It matters not that the statements to the press (like the e-mail) may have been part of an over-all strategic mission to influence regulators. See *ante* at 105, 46 N.E.3d at 88. Nor does it matter, for First Amendment purposes, that a single act—the statements to the Globe—may arguably serve both petitioning and nonpetitioning purposes. If the conduct complained of serves a substantial nonpetitioning purpose (such as persuading patients, future patients, donors, future donors, insurers, and the public at large of the quality of patient care), the complaint must go forward. Otherwise, the scope of the anti-SLAPP statute would expand exponentially to include protected First Amendment petitioning activity. The result would be an interpretation of the statute that renders it constitutionally infirm. See *Duracraft,* 427 Mass. at 166–167, 691 N.E.2d 935; *Kobrin,* 443 Mass. at 335, 821 N.E.2d 60.

However, because I agree with the majority that the statements in the press, made in response to the Massachusetts Nurses' Association's comments on the terminations, were protected by the mirror image doctrine, I also must agree, based on our existing precedent, that the statements to the Globe acquired the status of protected petitioning activity. See *Wynne v. Creigle,* 63 Mass.App.Ct. 246, 825 N.E.2d 559 (2005). Contrast *Cadle,* 448 Mass. at 251, 859 N.E.2d 858 ("Here, nothing in the record would support a finding that the challenged statements made by Schlichtmann were either a response to statements that Cadle had made to the press or repetitions of statements initially made in a governmental proceeding"). Other than the brief reference in *Cadle,* the mirror image doctrine has not been considered in any depth by the Supreme Judicial Court, and its parameters have not been much explored by this court. Whatever those parameters may be, I concur with the majority that the fact that the hospital was responding to (not initiating) a ***118** press inquiry, *and* that the response essentially mirrored the statements in the report prepared by Attorney Scott Harshbarger, compels the conclusion that this much of the claim is petitioning activity under existing precedent.

Which leads to the final conundrum—the ultimate disposition of the defamation claim. In *Wenger,* 451 Mass. at 9, 883 N.E.2d 262, the Supreme Judicial Court, without discussion, parsed a complaint, count by count, dismissing some counts under the anti-SLAPP statute and preserving others. This approach has borne some criticism, on the theory that parsing claims undermines the "sole purpose" doctrine ****96** and results in expensive and complicated litigation contrary to the purpose of the anti-SLAPP statute. See One Claim at a Time: The Inherent Problems with Piecemeal Application of the anti-SLAPP Statute, Vol. 11–n1 Mass. Bar Assn. Section Rev. (2009). *Wenger* remains good law, however, and we follow it.[11]

11 Indeed, the defamation count here is but one of many counts, and has been considered separately at all stages of the litigation in accordance with *Wenger.*

This case is different in that it involves a single count alleging two separate acts of defamation. One of our cases since *Wenger* has explicitly stated that "the anti-SLAPP inquiry produces an all or nothing result as to each count the complaint contains. Either the count survives the inquiry or it does not, and the statute does not create a process of parsing counts to segregate components from those that cannot." *Ehrlich,* 74 Mass.App.Ct. at 536, 908 N.E.2d 797, and cases cited. Accord *Burley,* 75 Mass.App.Ct. at 821, 917 N.E.2d 250. The majority holds that the statements to the Globe could have as easily been pleaded as two counts rather than one, and that it would elevate form over substance to permit the count based on the statements to the Globe to go forward, thus distinguishing *Ehrlich.* Whether *Wenger* governs in this circumstance as well, or whether *Ehrlich* is the correct statement of the law turns, as does much of this case, on further clarification of the reach of the "sole purpose" doctrine first articulated in *Duracraft.*

Accordingly, I concur in the result solely because I agree with those portions of the majority opinion that hold that the e-mail was not petitioning activity and the statements to the Boston Globe were protected by the mirror image doctrine under existing precedent.

All Citations

89 Mass.App.Ct. 97, 46 N.E.3d 79

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477 Mass. 141
Supreme Judicial Court of Massachusetts,
Suffolk..

Lynne BLANCHARD & others [1]
v.
STEWARD CARNEY HOSPITAL, INC., & others. [2]

SJC-12141
|
Argued November 7, 2016.
|
Decided May 23, 2017.

1 Gail Donahoe, Gail Douglas-Candido, Kathleen Dwyer, Linda Herr, Cheryl Hendrick, Kathleen Lang, Victoria Webster, and Nydia Woods.

2 Steward Hospital Holdings, LLC; Steward Health Care System, LLC; and William Walczak.

Synopsis

Background: Dismissed hospital nurses brought action asserting a unitary defamation claim against hospital and hospital president regarding statements about the nurses' dismissal that hospital president made in an e-mail to hospital employees and to an area newspaper. The Superior Court Department, Linda E. Giles, J., 2014 WL 6606752, denied hospital and hospital president's special motion to dismiss under the anti-SLAPP statute. Hospital and hospital president appealed. The Appeals Court, 89 Mass.App.Ct. 97, 46 N.E.3d 79, affirmed in part and reversed in part. All parties appealed.

Holdings: The Supreme Judicial Court, Lenk, J., held that:

[1] hospital president's statements to an area newspaper were protected petitioning activity under the anti-SLAPP statute;

[2] hospital president's e-mail to hospital employees was not protected petitioning activity under the anti-SLAPP statute;

[3] under the anti-SLAPP statute, where a claim structured as a single count readily could have been pleaded as separate counts, a special movant can meet its threshold burden with respect to the portion of that count based on petitioning activity; abrogating *Ehrlich v. Stern*, 74 Mass.App.Ct. 531, 908 N.E.2d 797; and

[4] as matter of apparent first impression, under the anti-SLAPP statute, a nonmoving party's claim is not subject to dismissal as one "based on" a special movant's petitioning activity if the suit was not brought primarily to chill the special movant's legitimate exercise of its right to petition.

Vacated in part, affirmed in part, and remanded.

West Headnotes (24)

[1] Pleading
Frivolous pleading

The Legislature enacted the anti-SLAPP statute to counteract "SLAPP" suits, defined broadly as lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. Mass. Gen. Laws Ann. ch. 231, § 59H.

4 Cases that cite this headnote

[2] Pleading
Frivolous pleading

The main objective of SLAPP suits is not to win them, but to use litigation to intimidate opponents' exercise of rights of petitioning and speech. Mass. Gen. Laws Ann. ch. 231, § 59H.

1 Cases that cite this headnote

[3] Pleading
Frivolous pleading

To forestall suits whose main objective is to intimidate opponents' exercise of rights of petitioning and speech, the anti-SLAPP statute provides a procedural remedy for early

dismissal of the disfavored lawsuits. Mass. Gen. Laws Ann. ch. 231, § 59H.

Cases that cite this headnote

[4] **Pleading**
Frivolous pleading
Pleading
Application and proceedings thereon

The remedy under the anti-SLAPP statute is the special motion to dismiss, which can be brought prior to engaging in discovery, and is intended to dispose of civil claims, counterclaims, or cross claims that are based solely on a party's exercise of its right to petition. Mass. Gen. Laws Ann. ch. 231, § 59H.

Cases that cite this headnote

[5] **Pleading**
Frivolous pleading

In determining whether statements constitute "petitioning" under the anti-SLAPP statute, the Supreme Judicial Court considers them in the overall context in which they are made. Mass. Gen. Laws Ann. ch. 231, § 59H.

Cases that cite this headnote

[6] **Pleading**
Frivolous pleading

To fall under the "in connection with" definition of "petitioning" under the anti-SLAPP statute, a communication must be made to influence, inform, or at the very least, reach governmental bodies, either directly or indirectly. Mass. Gen. Laws Ann. ch. 231, § 59H.

2 Cases that cite this headnote

[7] **Pleading**
Frivolous pleading

The key requirement of the definition of "petitioning" under the anti-SLAPP statute is the establishment of a plausible nexus between the statement and the governmental proceeding. Mass. Gen. Laws Ann. ch. 231, § 59H.

Cases that cite this headnote

[8] **Pleading**
Frivolous pleading

The archetypical demonstration of a plausible nexus between the statement and the governmental proceeding, which is a key requirement of the definition of "petitioning" under the anti-SLAPP statute, involves a party's statement regarding an ongoing governmental proceeding made directly to a governmental body. Mass. Gen. Laws Ann. ch. 231, § 59H.

Cases that cite this headnote

[9] **Pleading**
Frivolous pleading

Failing having a party's statement regarding an ongoing governmental proceeding made directly to a governmental body, courts look to objective indicia of a party's intent to influence a governmental proceeding when determining whether a statement constitutes "petitioning" under the anti-SLAPP statute. Mass. Gen. Laws Ann. ch. 231, § 59H.

Cases that cite this headnote

[10] **Pleading**
Frivolous pleading

The intent to influence an ongoing governmental proceeding, as part of the determination of whether statements constitute "petitioning" under the anti-SLAPP statute, is manifested in statements that are closely and rationally related to the governmental proceeding and in furtherance of the objective served by governmental consideration of the issue under review. Mass. Gen. Laws Ann. ch. 231, § 59H.

Cases that cite this headnote

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[11] **Pleading**
Frivolous pleading

Hospital president's statements to an area newspaper concerning his decision to "replace the nurses and other staff" in hospital's adolescent psychiatric unit had a plausible nexus to the Department of Mental Health's investigation of the unit for alleged patient abuse, and thus the statements were protected petitioning activity under the anti-SLAPP statute, despite argument that the statements were primarily to defend unit's reputation to the public; statements communicated to readers, who likely included some of the licensing decision-makers at the Department who would decide whether to pull unit's license, that progress was occurring at the hospital, and ulterior motives did not bear on the petitioning nature of the statements. Mass. Gen. Laws Ann. ch. 231, § 59H.

Cases that cite this headnote

[12] **Pleading**
Frivolous pleading

Hospital president's e-mail to hospital employees concerning the termination of nurses in hospital's adolescent psychiatric unit, which was the subject of allegations of patient abuse, was not protected petitioning activity under the anti-SLAPP statute; the e-mail's audience was hospital staff, the e-mail had no plausible nexus to the hospital's efforts to say the Department of Mental Health's licensing decision regarding the unit, and e-mail neither reached the Department nor was reasonably likely to reach the Department. Mass. Gen. Laws Ann. ch. 231, § 59H.

Cases that cite this headnote

[13] **Pleading**
Frivolous pleading

A private statement to a select group of people does not, without more, establish a plausible nexus to a governmental proceeding, so as to make the statement protected petitioning activity under the anti-SLAPP statute. Mass. Gen. Laws Ann. ch. 231, § 59H.

Cases that cite this headnote

[14] **Pleading**
Frivolous pleading

Statements cannot be in furtherance of petitioning the government, so as to make them protected activity under the anti-SLAPP statute, if they are not reasonably geared to reaching the government. Mass. Gen. Laws Ann. ch. 231, § 59H.

Cases that cite this headnote

[15] **Pleading**
Application and proceedings thereon

Under the anti-SLAPP statute, where a claim structured as a single count readily could have been pleaded as separate counts, a special movant can meet its threshold burden with respect to the portion of that count based on petitioning activity; abrogating *Ehrlich v. Stern*, 74 Mass.App.Ct. 531, 908 N.E.2d 797. Mass. Gen. Laws Ann. ch. 231, § 59H.

2 Cases that cite this headnote

[16] **Constitutional Law**
Right to Petition for Redress of Grievances

Both the United States Constitution and the Massachusetts Declaration of Rights provide a right to petition that includes the right to seek judicial resolution of disputes. U.S. Const. Amend. 1; Mass Const. pt. 1, arts. 11, 19 (Declaration of Rights).

Cases that cite this headnote

[17] **Pleading**
Application and proceedings thereon

Under the anti-SLAPP statute, 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. Mass. Gen. Laws Ann. ch. 231, § 59H.

4 Cases that cite this headnote

[18] **Pleading**
Application and proceedings thereon
At the first stage of an expedited special motion to dismiss under the anti-SLAPP statute, a special movant must demonstrate that the nonmoving party's claims are solely based on its own petitioning activities. Mass. Gen. Laws Ann. ch. 231, § 59H.

3 Cases that cite this headnote

[19] **Pleading**
Application and proceedings thereon
At the second stage of an expedited special motion to dismiss under the anti-SLAPP statute, if the special movant meets its initial burden that the nonmoving party's claims are solely based on its own petitioning activities, the burden will shift to the nonmoving party, who may still prevail by demonstrating that the special movant's petitioning activities upon which the challenged claim is based lack a reasonable basis in fact or law, i.e., constitute sham petitioning, and that the petitioning activities at issue caused it injury. Mass. Gen. Laws Ann. ch. 231, § 59H.

9 Cases that cite this headnote

[20] **Pleading**
Application and proceedings thereon
After the party moving for an expedited special motion under the anti-SLAPP statute has shown that the nonmoving party's claims are solely based on its own petitioning activities, and the nonmoving party cannot show that the special movant's petitioning activities upon which the challenged claim is based lack a reasonable basis in fact or law, i.e., constitute sham petitioning, and that the petitioning activities at issue caused it injury, then the nonmoving party may henceforth meet its burden and defeat the special motion to dismiss by demonstrating in the alternative that each challenged claim does not give rise to a SLAPP suit, which the nonmoving party may do by demonstrating that each such claim was not primarily brought to chill the special movant's legitimate petitioning activities. Mass. Gen. Laws Ann. ch. 231, § 59H.

15 Cases that cite this headnote

[21] **Pleading**
Application and proceedings thereon
To make a showing on an expedited special motion to dismiss under the anti-SLAPP statute that each of nonmoving party's challenged claims was not primarily brought to chill the special movant's legitimate petitioning activities, the nonmoving party must establish, such that the motion judge may conclude with fair assurance, that its primary motivating goal in bringing its claim, viewed in its entirety, was not to interfere with and burden special movant's petition rights, but to seek damages for the personal harm to it from special movant's alleged legally transgressive acts; the nonmoving party must make this showing with respect to each such claim viewed as a whole. Mass. Gen. Laws Ann. ch. 231, § 59H.

4 Cases that cite this headnote

[22] **Pleading**
Application and proceedings thereon
On an expedited special motion to dismiss under the anti-SLAPP statute, in applying the standard of whether the nonmoving party's claim was or was not based on the special movant's legitimate petitioning activity, the motion judge, in the exercise of sound discretion, is to assess the totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim. Mass. Gen. Laws Ann. ch. 231, § 59H.

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4 Cases that cite this headnote

[23] **Pleading**
Application and proceedings thereon
The course and manner of proceedings, the pleadings filed, and affidavits stating the facts upon which the liability or defense is based may all be considered in evaluating whether the claim is a SLAPP suit. Mass. Gen. Laws Ann. ch. 231, § 59H.

Cases that cite this headnote

[24] **Pleading**
Application and proceedings thereon
A necessary but not sufficient factor in the analysis of whether a claim is a SLAPP suit will be whether the nonmoving party's claim at issue is colorable or worthy of being presented to and considered by the court, i.e., whether it offers some reasonable possibility of a decision in the party's favor. Mass. Gen. Laws Ann. ch. 231, § 59H.

1 Cases that cite this headnote

****25** "Anti-SLAPP" Statute. Constitutional Law, Right to petition government. Practice, Civil, Motion to dismiss. Words, "Based on."
CIVIL ACTION commenced in the Superior Court Department on May 24, 2013.
Special motions to dismiss were heard by Linda E. Giles, J.
After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Attorneys and Law Firms

Jeffrey A. Dretler (Joseph W. Ambash also present), Boston, for the defendants.

Dahlia C. Rudavsky (Ellen J. Messing also present), Boston, for the plaintiffs.

Donald J. Siegel & Paige W. McKissock, for Massachusetts AFL–CIO, amicus curiae, submitted a brief.

Present: Gants, C.J., Botsford, Lenk, Hines, Gaziano, Lowy, & Budd, JJ.[3]

3 Justice Botsford participated in the deliberation on this case prior to her retirement.

Opinion

LENK, J.

***142** In the spring of 2011, following reports of abuse at the adolescent psychiatric unit (unit) of Steward Carney Hospital, Inc., then president of the hospital, William Walczak, fired all of the registered nurses and mental health counsellors who worked in the unit. Walczak subsequently issued statements, both to the hospital's employees and to the Boston Globe Newspaper Co. (Boston Globe), arguably to the effect that the nurses had been fired based in part on their culpability for the incidents that took place at the unit. The plaintiffs, nine of the nurses who had been fired, then filed suit against the defendants for, among other things, defamation.

The hospital defendants[4] responded by filing a special motion to dismiss the defamation ****26** claim pursuant to G. L. c. 231, § 59H, ***143** the "anti-SLAPP" statute. A Superior Court judge denied the motion, concluding that the hospital defendants had failed to meet their threshold burden of showing that the claim was based solely on their petitioning activity. The hospital defendants filed an interlocutory appeal in the Appeals Court as of right. See Fabre v. Walton, 436 Mass. 517, 521–522, 781 N.E.2d 780 (2002). The Appeals Court then reversed the motion judge's decision in part. See Blanchard v. Steward Carney Hosp., Inc., 89 Mass.App.Ct. 97, 98, 46 N.E.3d 79 (2016). We granted the parties' applications for further appellate review. We conclude that a portion of the plaintiff nurses' defamation claim is based solely on the hospital defendants' petitioning activity. The hospital defendants as special movants thus having satisfied in part their threshold burden under Duracraft v. Holmes Prods. Corp., 427 Mass. 156, 167–168, 691 N.E.2d 935 (1998) (Duracraft), the matter must be remanded to the Superior Court where the burden will shift to the plaintiff nurses to make a showing adequate to defeat the motion.

4 For convenience and, in particular, to distinguish them from other defendants who were named in the

complaint but are not part of this appeal, we refer to Steward Carney Hospital, Inc. Steward Hospital Holdings, LLC, Steward Health Care System, LLC, and William Walczak as "the hospital defendants" or "the defendants."
We refer to the plaintiffs as "the plaintiff nurses," "the nurses," or "the plaintiffs" interchangeably as well.

Under current case law, the plaintiff nurses, as nonmoving parties, could defeat the special motion only by showing that the hospital defendants' petitioning activity upon which a portion of the plaintiff's defamation claim is based was a sham, i.e., without a reasonable basis in fact or law, a showing that the record suggests may be difficult to make. Insofar as the record also suggests the possibility that the plaintiff nurses' claim may not have been brought primarily to chill the hospital defendants' legitimate exercise of their right to petition, however, the case underscores a long recognized difficulty in the statute. It is one rooted in the fact that both parties enjoy the right to petition, including the right to seek redress in the courts. The anti-SLAPP statute is meant to subject only meritless SLAPP suits to expedited dismissal, yet it nonetheless may be used to dismiss meritorious claims not intended primarily to chill petitioning.

Because the statute as thus construed remains at odds with evident legislative intent, and continues to raise constitutional concerns, we take this opportunity to augment the framework set forth in the Duracraft case (Duracraft framework) by broadening the construction of the statutory term "based on." While a nonmoving party may still defeat a special motion to dismiss by demonstrating that the special movant's petitioning activity is a sham, we hold that a nonmoving party's claim also is not subject to dismissal as one solely based on a special movant's petitioning activity if the nonmoving party can establish that its claim was ***144** not "brought primarily to chill" the special movant's legitimate exercise of its right to petition. See Duracraft, 427 Mass. at 161, 691 N.E.2d 935 (1998), quoting 1994 House Doc. No. 1520. On remand, the plaintiff nurses may attempt to make such a showing in satisfaction of their burden.

1. Background. The unit at Steward Carney Hospital, Inc., in Boston (hospital), is licensed by the Department of Mental Health (DMH) and the Department of Public Health (DPH).[5] In April, 2011, ****27** there were four incidents involving alleged patient abuse or neglect at the unit. The hospital immediately reported these incidents to DMH, DPH, and the Department of Children and Families. DMH commenced an investigation into the incidents, and required that there be no new admissions to the unit. DMH also considered revoking the hospital's license to operate the unit pending the hospital's response to the reports of abuse.

5 The unit typically treats mentally and physically challenged teenagers in "acute states," who are admitted from other facilities as a "last resort." Many of them are under the custody of the Department of Children and Families and have little involvement with their families.

The hospital soon placed all but a small number of unit employees, including managers, nurses, and mental health counsellors, on paid administrative leave. It also hired Scott Harshbarger, then senior counsel at the law firm Proskauer Rose LLP, to conduct an investigation into the incidents, to recommend remedial actions, and to represent the hospital's interests in its dealings with the State agencies. Upon concluding his investigation, Harshbarger recommended to Walczak that, in light of what he termed a "code of silence" amongst the unit's staff, "it would be prudent to replace the current personnel in order to ensure quality care for these vulnerable patients."

After reviewing Harshbarger's recommendation, Walczak informed each of the plaintiff nurses that he was terminating her employment. The following day, he sent an electronic mail (e-mail) message to all hospital employees, which began by noting that the hospital "has a rich tradition of providing excellent care to [its] patients." After providing the hospital's employees with credit for this successful commitment to patient care, the message continued, in relevant part:

> "Recently, I have become aware of the alleged incidents where a number of [hospital] staff have not demonstrated this steadfast commitment to patient care. I have thoroughly investigated ***145** these allegations and have determined that these individual employees have not been acting in the best interest of their patients, the hospital, or the community we serve. As a result, I have terminated the employment of each of these individuals."

In a Boston Globe article about the incidents two days after the plaintiff nurses were fired, Walczak was quoted as saying that, when he read Harshbarger's report, he "decided to replace the nurses and other staff on the unit."[6] Walczak said that the report recommended that he "start over on the unit" and that his "goal [was] to make it the best unit in the state." The article noted that Walczak "would not provide details of the alleged assault or patient safety concerns, or comment on why the entire staff was dismissed, given that the allegation involved one employee and one patient." Approximately one month later, the Boston Globe published another article on the incidents at the hospital, quoting Walczak as stating that "[t]he Harshbarger report indicated it wasn't a safe situation" and stating that the report "underscored his decision to fire the entire staff of the unit."

6 The article stated that Harshbarger had been investigating an employee's alleged sexual assault of a patient and "conditions on the 14-bed locked unit for extremely troubled teens."

In June, 2011, DMH issued its reports on each of the four incidents. The reports concerning the first three incidents concluded that there had been wrongdoing by a single mental health counsellor, while the fourth report concluded that unspecified **28 staff on duty during the incident had acted improperly.[7]

7 In May, 2011, the union that represented the plaintiff nurses, the Massachusetts Nurses Association, filed grievances on behalf of each of the unit's nurses, including each of the plaintiff nurses. Pursuant to the collective bargaining agreement between the hospital and this nurses association, the grievances were subject to arbitration. The first arbitration involved five of the plaintiff nurses: Douglas, Hendrick, Herr, Lang, and Woods. The arbitrator found in favor of the nurses and ordered, inter alia, their reinstatement. The hospital appealed from that ruling; the appeal is apparently still pending.

2. Prior proceedings. In May, 2013, in a five-count complaint brought against the hospital defendants, along with Harshbarger and Proskauer Rose LLP (Proskauer defendants),[8] the plaintiff *146 nurses claimed that the hospital defendants and the Proskauer defendants had each defamed them. The plaintiff nurses alleged, in one count of their complaint, that the hospital defendants defamed them both by the e-mail message sent to hospital employees announcing their terminations, as well as by communications made to and published by the Boston Globe. The plaintiff nurses asserted that such statements falsely suggested that "after a thorough investigation, [Walczak] had determined ... that each of the terminated plaintiffs had demonstrated inadequate commitment to patient care and that each had provided such deficient patient care that her employment had to be terminated."[9]

8 The complaint also included a claim against the hospital defendants for violation of the healthcare provider whistleblower statute, G. L. c. 149, § 187, and plaintiffs Lang and Donahoe claimed that the hospital defendants retaliated against them for performing their obligations under the mandatory reporting statute, G. L. c. 119, § 51A. In addition, all of the plaintiff nurses asserted a claim of intentional or reckless infliction of emotional distress against Harshbarger and Proskauer Rose LLP.

9 The plaintiff nurses claimed that Walczak's "statements implied the existence of undisclosed facts, namely, that the decision to terminate each of the plaintiff nurses was based on her actions in connection with undisclosed incidents involving patients in the unit, which were known to Walczak and had been 'thoroughly investigated.' "

In their defamation claim against the Proskauer defendants, the plaintiff nurses asserted that Harshbarger's preliminary and final written reports had defamed them by falsely suggesting that they had "adhered to a 'code of silence,' " had failed to report "a variety of problems, ... including misconduct," of which they were aware, and had been derelict in their duties in a number of other respects.

Both sets of defendants responded by filing special motions to dismiss the defamation counts under the anti-SLAPP statute. See G. L. c. 231, § 59H.[10] A Superior Court judge allowed the Proskauer defendants' special motion to dismiss, but denied the hospital defendants' motion. The hospital defendants appealed.[11] The Appeals Court reversed in part, allowing the defendants' special motion to dismiss with respect to Walczak's comments to the Boston Globe, affirming the denial with respect to the e-mail message, and denying the hospital's motion for attorney's fees and costs. Blanchard, 89 Mass.App.Ct. at 98, 111 & n.14, 46 N.E.3d 79. We

granted the parties' cross applications for further appellate review.

10 Both sets of defendants also filed motions to dismiss the other claims under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). At a hearing on the motions to dismiss, the defendants waived their motions under rule 12 (b) (6).

11 Defendants Harshbarger and Proskauer Rose LLP filed a stipulation of dismissal prior to the proceedings in the Appeals Court, and they have no role in this appeal.

[1] [2] [3] [4] **29 *147 3. Discussion a. The anti-SLAPP statute. The Legislature enacted the anti-SLAPP statute to counteract "SLAPP" suits, defined broadly as "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Duracraft, 427 Mass. at 161, 691 N.E.2d 935, quoting 1994 House Doc. No. 1520. See G. L. c. 231, § 59H. See also Cardno ChemRisk, LLC v. Foytlin, 476 Mass. 479, 488 n.14, 68 N.E.3d 1180 (2017) (explaining catalyst for legislation). The main "objective of SLAPP suits is not to win them, but to use litigation to intimidate opponents' exercise of rights of petitioning and speech." Duracraft, supra. To forestall such suits, the anti-SLAPP statute provides a "procedural remedy for early dismissal of the disfavored" lawsuits. Id. This remedy is the special motion to dismiss, which can be brought prior to engaging in discovery, and is intended to dispose of "civil claims, counterclaims, or cross claims" that are based solely on a party's exercise of its right to petition. See G. L. c. 231, § 59H. The statute also mandates the award of attorney's fees to successful special movants. Id.

To prevail on such a motion, a special movant, such as the hospital defendants here, "must make a threshold showing 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.' " Fustolo v. Hollander, 455 Mass. 861, 865, 920 N.E.2d 837 (2010), quoting Duracraft, supra at 167–168, 691 N.E.2d 935. See Fabre, 436 Mass. at 524, 781 N.E.2d 780 (special movant must demonstrate that "the only conduct complained of is ... petitioning activity").[12] The anti-SLAPP statute defines a party's exercise of its right to petition broadly to include:

> "[1] any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; [2] any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; [3] any statement reasonably likely to encourage consideration or review of an issue *148 by a legislative executive, or judicial body or any other governmental proceeding; [4] any statement reasonably likely to enlist public participation in an effort to effect such consideration; or [5] any other statement falling within constitutional protection of the right to petition government."

G. L. c. 231, § 59H.

12 The statute also requires a special movant to demonstrate that it was exercising "its own right of petition" in both the statutory and the constitutional sense. See Cardno ChemRisk, LLC v. Foytlin, 476 Mass. 479, 486–489, 68 N.E.3d 1180 (2017); G. L. c. 231, § 59H ("In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the [C]onstitution of the United States or of the [C]ommonwealth, said party may bring a special motion to dismiss").

If the hospital defendants are able to make a threshold showing that the plaintiff nurses' claim is based solely on the hospital defendants' petitioning activities, the burden shifts to the plaintiff nurses to establish "by a preponderance of the evidence that the [hospital defendants] 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 hospital defendants' sham petitioning activity caused the plaintiff nurses "actual **30 injury." G. L. c. 231, § 59H. See Fustolo, 455 Mass. at 865, 920 N.E.2d 837.

b. Petitioning activity. As part of its threshold burden, the hospital defendants must show that the conduct

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complained of constitutes the exercise of its right to petition. See Baker, 434 Mass. at 550, 750 N.E.2d 953. The hospital defendants contend that the motion judge erred in determining that Walczak's communications to the Boston Globe and to the hospital employees did not constitute petitioning activity under the anti-SLAPP statute. The hospital defendants argue that Walczak's statements to the Boston Globe, and his e-mail message to all hospital employees, were the exercise of the hospital defendants' right to petition because such statements were made "in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding." [13] See G. L. c. 231, § 59H. Given that DMH was considering whether to revoke the hospital's license to operate the unit when the statements were made, the hospital defendants contend that both communications were part of the hospital's efforts to maintain its license to operate the unit by demonstrating that it was taking remedial steps.

13 The defendants do not contend that Walczak's communications fall under any of the other definitions of petitioning activity in the anti-SLAPP statute.

[5] [6] [7] The initial question before us is thus whether Walczak's communications to the Boston Globe and to the hospital employees were each made "in connection with" DMH's investigation of the incidents and its decision regarding the hospital's license to operate the unit, such that they constitute petitioning activity ***149** under the anti-SLAPP statute. In determining whether statements constitute petitioning, "we consider them in the over-all context in which they are made." North Am. Expositions Co. Ltd. Partnership v. Corcoran, 452 Mass. 852, 862, 898 N.E.2d 831 (2009). To fall under the "in connection with" definition of petitioning under the anti-SLAPP statute, a communication must be "made to influence, inform, or at the very least, reach governmental bodies—either directly or indirectly." Id., quoting Global NAPs, Inc. v. Verizon New England, Inc., 63 Mass.App.Ct. 600, 605, 828 N.E.2d 529 (2005). The key requirement of this definition of petitioning is the establishment of a plausible nexus between the statement and the governmental proceeding.

[8] [9] [10] The archetypical demonstration of this nexus involves a party's statement regarding an ongoing governmental proceeding made directly to a governmental body. See, e.g., Office One, Inc. v. Lopez, 437 Mass. 113, 123, 769 N.E.2d 749 (2002) (communications with Federal Deposit Insurance Corporation seeking favorable outcome constituted petitioning activity). [14] Failing something this clear cut, courts look to objective indicia of a party's intent to influence a governmental proceeding. See North Am. Expositions Co. Ltd. Partnership, 452 Mass. at 862–863, 898 N.E.2d 831 (statement was petitioning activity where context in which it was made suggested it was intended to influence governmental body). This intent to influence is manifested in statements that are "closely and rationally related to the [governmental proceeding]" and "in furtherance of the objective served by governmental consideration ****31** of the issue under review." Plante v. Wylie, 63 Mass.App.Ct. 151, 159, 824 N.E.2d 461 (2005). Contrast Global NAPs, Inc., 63 Mass.App.Ct. at 607, 828 N.E.2d 529 (statements to newspaper containing oblique reference to defendant's petitioning activity not protected under anti-SLAPP statute); Burley v. Comets Community Youth Ctr., Inc., 75 Mass.App.Ct. 818, 823, 917 N.E.2d 250 (2009) (defendant failed to demonstrate "statements were made in conjunction with its protected petitioning activity ... as opposed to being incidental observations that were not tied to the petitioning activity in a direct way" [quotations and citation omitted]).

14 Such activity also would fall under the first definition of petitioning activity in the anti-SLAPP statute. See G. L. c. 231, § 59H (defining petitioning activity as "any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding....").

We turn to the two types of communications at issue here.

[11] i. Statements to the Boston Globe. Walczak's statements to the ***150** Boston Globe commented on DMH's inquiry into the incidents of abuse at the unit, and the hospital's attempts to address the situation. Walczak's comments had a plausible nexus to DMH's investigation based on their content and the high likelihood that they would influence or at least reach DMH.

Based on their content, it can be reasonably inferred that Walczak's statements to the Boston Globe were intended to demonstrate to DMH the hospital's public commitment to address the underlying problems at the unit. It is undisputed that DMH was considering whether to revoke the hospital's license to operate the unit at the time that Walczak made his comments to the Boston

Globe. DMH's decision whether to do so turned on the hospital's implementation of remedial steps to prevent future incidents.[15] The content of Walczak's statements directly addresses DMH's concern.

15 The then director of licensing at the Department of Mental Health (DMH) testified at an arbitration hearing regarding the nurses' claim for reinstatement to the unit that the decision whether to revoke the hospital's license to operate the unit centered on the hospital's "plan ... to make [the situation] right."

In the first article, published on May 28, 2011, Walczak's statements implied that he had decided to terminate the nurses' employment as a remedial action, based on Harshbarger's recommendation. He is quoted as stating that the Harshbarger report described "serious concerns about patient safety and quality of care on the unit" and that the report recommended he "start over on the unit." Walczak's statements in the second article, dated June 22, 2011, noted that the Harshbarger report indicated "it wasn't a safe situation [at the unit]" and that the reports of additional incidents "required a much deeper look at what was going on in the unit."[16] In both of these statements, Walczak emphasized that he was following the advice contained in the Harshbarger report in addressing the unit's problems.

16 The article noted that, at the time, DMH had confirmed the first three incidents at the unit and was still investigating the fourth asserted incident of abuse.

By making clear that the hospital was following Harshbarger's recommendations, the statements communicated to readers, likely including some of the licensing decision makers at DMH, that progress was occurring at the hospital, and that its license to operate the unit should not be revoked. These statements were neither "tangential" nor "unrelated to governmental involvement," Global NAPs, Inc., 63 Mass.App.Ct. at 607, 828 N.E.2d 529, but rather went to ***151** the heart of a government agency's decision whether to terminate the hospital's license to operate the unit. The statements directly related to DMH's then-pending investigation and, in particular, ****32** to DMH's decision whether to pull the plug on the hospital's license for the unit. Walczak's statements can fairly be said to have been "closely and rationally related" to DMH's investigation and "in furtherance of the objective" of the hospital's petitioning—the preservation of the hospital's license to operate the unit. Plante, 63 Mass.App.Ct. at 159, 824 N.E.2d 461.

Walczak's statements, moreover, were issued in a manner that was likely to influence or, at the very least, reach DMH. He made his statements to the Boston Globe, a newspaper "widely circulated in Boston and throughout the Commonwealth." Brauer v. Globe Newspaper Co., 351 Mass. 53, 54, 217 N.E.2d 736 (1966). Decision makers at DMH, and members of the public wishing to weigh in on the licensing decision, could reasonably have been expected to read Walczak's statements. The timing of Walczak's statements to the Boston Globe indicates, as well, a plausible nexus between the communications and DMH's licensure decision, the statements having been made while DMH's investigation was still ongoing.

The plaintiff nurses contend that Walczak made the statements primarily to defend the unit's reputation to the public. This goal, however, hardly can be seen as unrelated to the hospital's objective of convincing DMH to leave intact the hospital's license to operate the unit. The greater the public's confidence in and support for the hospital, the more complex any decision to revoke the hospital's license to operate the unit would become. Ulterior motives, in any event, do not bear on the petitioning nature of the statements to the Boston Globe. See North Am. Expositions Co. Ltd. Partnership, 452 Mass. at 863, 898 N.E.2d 831 ("the fact that ... speech involves a commercial motive does not mean it is not petitioning"). Accordingly, we conclude that Walczak's statements to the Boston Globe were protected petitioning activity under the anti-SLAPP statute.

[12] ii. Internal e-mail message. In contrast, Walczak's e-mail message to all hospital employees concerning the termination of the plaintiff nurses' employment was not petitioning activity. Neither the content of the e-mail message, nor any evidence offered by the hospital defendants, suggests any audience for the message other than hospital employees. The explanation of troubling events at their workplace that was presented to hospital employees in an e-mail message by the hospital's president has no ***152** plausible nexus to the hospital's efforts to sway DMH's licensing decision.

[13] **[14]** In this regard, the defendants have not shown that the e-mail message to employees had reached, or was

reasonably likely to reach, DMH. A private statement to a select group of people does not, without more, establish a plausible nexus to a governmental proceeding. It stands to reason that statements cannot be "in furtherance of" petitioning the government if they are not reasonably geared to reaching it. Plante, 63 Mass.App.Ct. at 159, 824 N.E.2d 461. The defendants have not shown that the hospital or someone on its behalf had forwarded the e-mail message to DMH or even had informed DMH that it had been sent to hospital employees. Nor have the defendants shown that someone in the hospital's employ receiving the e-mail message reasonably would be expected to or did communicate its message to DMH. Walczak's conclusory affidavit stating that he intended the e-mail message to come to DMH's attention [17] does not indicate any **33 mechanism through which the statement could arrive at the agency. [18] See Burley, 75 Mass.App.Ct. at 823–824, 917 N.E.2d 250 (defendants' message to employees was not petitioning activity despite defendants' contention that they intended message to be conveyed to police). Walczak's intent alone does not suffice in the circumstances to establish the requisite nexus.

17 Walczak attested that he had sent the electronic mail (e-mail) message "not only to communicate to the hospital employees what was happening, but to give assurances to the regulatory agencies" in the process of determining whether to revoke the hospital's license to operate the unit "that the deficiencies which ha[d] been reported on the [u]nit would not continue." Yet the defendants fail to establish that DMH likely would have encountered the message, let alone that what employees were told would influence DMH's decision concerning the hospital's license to operate the unit.

18 The defendants also note that, in his affidavit, Harshbarger stated that he communicated to the general counsel of DMH, "the action [that the hospital's] leadership was taking in response to the [i]ncidents." Harshbarger's summation of the hospital's efforts, however, does not affect the analysis of whether Walczak's e-mail message was intended to or did influence DMH.

Moreover, nothing in the content of the e-mail message itself, stating in essence that the terminated nurses deviated from the hospital's "rich tradition of providing excellent care to [its] patients," suggests that it was intended to influence or reach DMH. The e-mail message begins by lauding the hospital's "performance on national quality and safety standards," and notes that the "employees and caregivers at" the hospital are the reason *153 for its exemplary performance. Walczak then states that he had "thoroughly investigated" allegations concerning the incidents at the unit, "determined that [the plaintiff nurses] have not been acting in the best interest of their patients, the hospital, or the community we serve," and concluded by addressing the plaintiff nurses' termination. There is nothing in this text to suggest that it was intended to influence, inform, or reach anyone other than the hospital employees to whom an explanation of concerning events at their workplace was given.

In light of this, we conclude that while Walczak's statements to the Boston Globe were protected petitioning activity, his e-mail message to hospital employees was not an exercise of the hospital defendants' right of petition.

c. The meaning of "based on." Given the foregoing, the hospital defendants take the view that they have met their threshold burden by showing that the portion of the defamation claim based on the Boston Globe articles is solely based on such petitioning activity. They maintain that, if the nurses cannot show that this petitioning activity was, in essence, a sham, so much of their claim as asserts that the Boston Globe statements defamed them should be dismissed, with the plaintiff nurses made to pay a proportionate amount of the defendants' legal fees and costs. The plaintiff nurses, in contrast, maintain that, because some of their unitary defamation claim rests on non-petitioning activity, the hospital defendants fail to show that the defamation claim is solely based on the defendants' petitioning activity.

Although we have said that a complaint should be evaluated count by count for anti-SLAPP purposes, see Wenger v. Aceto, 451 Mass. 1, 9, 883 N.E.2d 262 (2008) (granting special motion to dismiss with respect to two specific counts in nonmoving party's complaint), we have not had occasion to consider whether, at the threshold burden stage, the special movant can meet its burden by showing that a portion of the nonmoving party's claim is based on petitioning activity. Because the outcome of the threshold burden inquiry so often proves dispositive of the special motion, the permutations of that preliminary stage have largely occupied the field of **34 appellate consideration. [19] This case involves yet another variation on that theme. However, it also involves more than that.

19 Twelve out of the seventeen cases decided by this court and the majority of the cases decided by the Appeals Court that address the anti-SLAPP statute in depth have centered on the special movant's threshold burden. This appellate jurisprudence has split the special movant's threshold burden into three parts. First, the special movant must establish that its complained of conduct is petitioning activity. See, e.g., Hanover v. New England Regional Council of Carpenters, 467 Mass. 587, 590–595, 6 N.E.3d 522 (2014); Marabello v. Boston Bark Corp., 463 Mass. 394, 397–400, 974 N.E.2d 636 (2012); North Am. Expositions Co. Ltd. Partnership v. Corcoran, 452 Mass. 852, 861–862, 898 N.E.2d 831 (2009); Cadle Co. v. Schlichtmann, 448 Mass. 242, 250, 859 N.E.2d 858 (2007); Global NAPs, Inc. v. Verizon New England, Inc., 63 Mass.App.Ct. 600, 606–607, 828 N.E.2d 529 (2005). Second, the special movant must establish that the activity is its own petitioning activity. See, e.g., CardnoChemRisk, LLC, 476 Mass. at 485, 486, 68 N.E.3d 1180 (2017); Fustolo v. Hollander, 455 Mass. 861, 869, 920 N.E.2d 837 (2010); Kobrin v. Gastfriend, 443 Mass. 327, 330, 821 N.E.2d 60 (2005). Third, the special movant must demonstrate that the nonmoving party's claims are solely based on its petitioning activity. See, e.g., Matter of the Discipline of Attorney, 442 Mass. 660, 673–674, 815 N.E.2d 1072 (2004); Office One, Inc. v. Lopez, 437 Mass. 113, 121–123, 769 N.E.2d 749 (2002); Fabre v. Walton, 436 Mass. 517, 522–523, 781 N.E.2d 780 (2002); McLarnon v. Jokisch, 431 Mass. 343, 348, 727 N.E.2d 813 (2000); Duracraft Corp. v. Holmes Products Corp., 427 Mass. 156, 167–168, 691 N.E.2d 935 (1998).

Similarly, Appeals Court cases construing the anti-SLAPP statute center chiefly on the special movant's threshold burden. See Chiulli v. Liberty Mut. Ins., Inc., 87 Mass.App.Ct. 229, 234, 28 N.E.3d 482 (2015); Keystone Freight Corp. v. Bartlett Consol.,Inc., 77 Mass.App.Ct. 304, 316, 930 N.E.2d 744 (2010); Brice Estates, Inc. v. Smith, 76 Mass.App.Ct. 394, 396–397, 922 N.E.2d 800 (2010); Burley v. CometsCommunity Youth Ctr., Inc., 75 Mass.App.Ct. 818, 823–824, 917 N.E.2d 250 (2009); Dickey v. Warren, 75 Mass.App.Ct. 585, 588–589, 915 N.E.2d 584 (2009), cert. denied, 560 U.S. 926, 130 S.Ct. 3333, 176 L.Ed.2d 1223 (2010); Ehrlich v. Stern, 74 Mass.App.Ct. 531, 537–538, 908 N.E.2d 797 (2009); Giuffrida v. High Country Investor, Inc., 73 Mass.App.Ct. 225, 243, 897 N.E.2d 82 (2008); Moriarty v. Mayor of Holyoke, 71 Mass.App.Ct. 442, 447–448, 883 N.E.2d 311 (2008); Fisher v. Lint, 69 Mass.App.Ct. 360, 363–365, 868 N.E.2d 161 (2007); SMS Financial V, LLC v. Conti, 68 Mass.App.Ct. 738, 745–747, 865 N.E.2d 1142 (2007); Kalter v. Wood, 67 Mass.App.Ct. 584, 586–591, 855 N.E.2d 421 (2006); Global NAPS, Inc., supra at 603–607, 828 N.E.2d 529; Wynne v. Creigle, 63 Mass.App.Ct. 246, 251–255, 825 N.E.2d 559 (2005); Plante v. Wylie, 63 Mass.App.Ct. 151, 157–161, 824 N.E.2d 461 (2005); Adams v. Whitman, 62 Mass.App.Ct. 850, 852–858, 822 N.E.2d 727 (2005); MacDonald v. Paton, 57 Mass.App.Ct. 290, 294–295, 782 N.E.2d 1089 (2003); Ayasli v. Armstrong, 56 Mass.App.Ct. 740, 748–749, 780 N.E.2d 926 (2002).

By contrast, only a handful of cases from this court address the nonmoving party's second-stage burden under the anti-SLAPP statute in a substantial way. See Van Liew v. Stansfield, 474 Mass. 31, 36–41, 47 N.E.3d 411 (2016); Benoit v. Frederickson, 454 Mass. 148, 153–154, 908 N.E.2d 714 (2009); Wenger v. Aceto, 451 Mass. 1, 6–9, 883 N.E.2d 262 (2008); Fabre, 436 Mass. at 524–525, 781 N.E.2d 780; Baker v. Parsons, 434 Mass. 543, 553–554, 750 N.E.2d 953 (2001). Similarly, only a smattering of Appeals Court opinions address substantively the nonmoving party's burden. See The Gillette Co. v. Provost, 91 Mass.App.Ct. 133, 137–140, 74 N.E.3d 275 (2017); Demoulas Super Mkts. v. Ryan, 70 Mass.App.Ct. 259, 263–268, 873 N.E.2d 1168 (2007); DePiero v. Burke, 70 Mass.App.Ct. 154, 158–161, 873 N.E.2d 260 (2007); Garabedian v. Westland, 59 Mass.App.Ct. 427, 434, 796 N.E.2d 439 (2003); Donovan v. Gardner, 50 Mass.App.Ct. 595, 599–601, 740 N.E.2d 639 (2000); Vittands v. Sudduth, 49 Mass.App.Ct. 401, 414–415, 730 N.E.2d 325 (2000).

***154** Each of the positions advanced by the parties as to what solely based on should entail at the threshold burden stage has some merit, but our resolution of that issue cannot reach or settle the deeper problem that is laid bare in this appeal. That problem is ***155** whether the plaintiff nurses' ****35** defamation claim is, in fact, a "SLAPP" suit at all. Otherwise put, even if it were shown that the Boston Globe based portion of the nurses' defamation claim arises from and is, in that limited sense, solely based on their hospital employer's quite legitimate petitioning activity, it nevertheless remains unclear whether this qualifies as a disfavored "SLAPP" suit meriting early dismissal. Under current case law, the inquiry ends without permitting confirmation that the fundamental statutory concern is satisfied, much like the proverbial unacknowledged elephant in the room. To ensure that only "SLAPP" suits —those without merit primarily brought to chill legitimate

petitioning activities—are subject to early dismissal and its attendant financial penalties, we conclude that the statutory term "based on" must be accorded broader meaning than it has at present.

[15] We turn first, then, to what the threshold burden demands of the special movant seeking early dismissal under the anti-SLAPP statute. In essence, the Duracraft framework imposes the threshold burden as an initial screening device, requiring the special movant to show in the first instance that the claims against it in fact arose only from its own petitioning activities. It stands to reason that, in doing so, the special movant must take the adverse complaint as it finds it, and cannot fairly be expected to overcome the manner in which a nonmoving party has chosen to structure its complaint. Thus, however reasonable it may have been for the nurses to frame their defamation claim against the hospital defendants as one count including two types of communications, we agree with the Appeals Court that, when ascertaining whether petitioning activity is the sole basis of a claim, the structure of the nonmoving party's complaint ordinarily cannot be dispositive of the matter. See Blanchard, 89 Mass.App.Ct. at 111 n.13, 46 N.E.3d 79. Were it otherwise, nonmoving parties could undercut the anti-SLAPP statute and its salutary purpose by combining into a single count claims that are based on both petitioning and non-petitioning activities. Where, as here, the claim structured as a single count readily could have been pleaded as separate counts, a special movant can meet its threshold burden with respect to the portion of that count based on petitioning activity.

That being said, the plaintiff nurses' contrary position as to the scope of the threshold burden finds support in Ehrlich v. Stern, 74 Mass.App.Ct. 531, 536, 908 N.E.2d 797 (2009), which notes the considerable potency of the sweeping early dismissal remedy provided by the *156 anti-SLAPP statute. In an effort to assure that this remedy is confined only to suits meriting such harsh treatment, the Appeals Court construed the threshold burden strictly, stating that "the anti-SLAPP inquiry produces an all or nothing result as to each count the complaint contains ... and the statute does not create a process for parsing counts to segregate components that can proceed from those that cannot." Id. While, as explained, we depart from the Ehrlich view of the threshold burden, we recognize the well-founded concerns that underlie it and that prompt us now to revisit the Duracraft framework.

Under current law, there are only two ways for a nonmoving party, such as the nurses here, to resist the early dismissal of their claim as a "SLAPP" suit. One way is to argue that the special movant has not met its threshold burden. Failing that, the other way is to argue that the special movant's petitioning activity was not legitimate but instead a sham, i.e., lacking any reasonable basis in fact or law. Because it is often difficult to make the latter showing,[20] the dispositive issue tends to be **36 whether the special movant's threshold burden has been met. But, as this case illustrates, even where that burden has been met and the petitioning activity in question may be entirely legitimate, such inquiry is not entirely adequate to the task of determining whether the special motion should be allowed.

20 Under current case law, in order to meet its second-stage burden under the anti-SLAPP statute, a nonmoving party must, in essence, demonstrate through pleadings and affidavits that there is no credible factual or legal basis for the special movant's petitioning activities. See Benoit, 454 Mass. at 154 n.7, 908 N.E.2d 714; Wenger, 451 Mass. at 7–8, 883 N.E.2d 262. Given the high bar for nonmoving parties that this generally represents, it is little wonder that the plaintiff nurses focused almost entirely on the hospital defendants' purported failure to meet their threshold burden. See Blanchard, 89 Mass.App.Ct. at 109, 46 N.E.3d 79 (concluding that plaintiff nurses did not attempt to make showing that hospital defendants' statements to Boston Globe were "devoid of factual or legal support" and thus failed to meet their second-stage burden).

Particularly in instances where, as here, the classic indicia of a "SLAPP" suit, see Duracraft, 427 Mass. at 161–162, 691 N.E.2d 935, appear to be absent,[21] the present framework does not provide adequate means *157 to distinguish between meritless claims targeting legitimate petitioning activity and meritorious claims with no such goal.[22] It is only the former, the actual "SLAPP" suit, that the Legislature intended to stop early in its tracks. The Legislature did not intend the expedited remedy it provided, the special motion to dismiss, to be used instead as a cudgel to forestall and chill the legitimate claims —also petitioning activity—of those who may truly be aggrieved by the sometimes collateral damage wrought by another's valid petitioning activity. We are mindful that the threshold burden was itself crafted to address this

underlying concern and its genesis accordingly remains instructive.

21 Contrast Cardno ChemRisk, LLC, 476 Mass. at 480–483 & n.10, 68 N.E.3d 1180, where the plaintiff nonmoving party, an established scientific consulting firm, brought defamation claims in two States against individual environmental activists of modest means, while not having brought such claims against parties of apparent financial capacity and public stature who had published similar allegedly defamatory statements. Following its receipt of discovery from the individual defendants but before responding to the defendants' discovery requests, and during the pendency of the defendants' ultimately successful appeal from the denial of their special motion to dismiss, the plaintiff moved voluntarily to dismiss its lawsuit; the motion was denied. Id. at 483 n.8, 68 N.E.3d 1180.

22 The plaintiff nurses, for their part, maintain that they supported the goal of the hospital defendants' petitioning, which was to preserve the hospital's license to operate the unit.

The threshold burden, not appearing in the anti-SLAPP statute itself, was prudently imposed upon special movants as a means of bridging the discrepancy between the statute's evident purpose and its language and, thereby, of addressing constitutional concerns otherwise raised. Duracraft, 427 Mass. at 167–168, 691 N.E.2d 935. While the Legislature passed the anti-SLAPP statute to counteract "meritless" lawsuits brought to chill a party's petitioning activity, i.e., "SLAPP" suits, id. at 161, 691 N.E.2d 935, the Duracraft court realized that the "statutory language fails to track and implement such an objective." Id. at 166, 691 N.E.2d 935. See id. at 163, 691 N.E.2d 935 ("In the statute as enacted, the Legislature ... did not address concerns over its breadth and reach, and ignored its potential uses in litigation far different from the typical SLAPP suit").

[16] The statute as written does not focus on ascertaining whether the nonmoving party's claim is in fact a "SLAPP" suit. Instead, it looks only to whether the special movant's own legitimate petitioning activity ****37** forms the basis of that claim. This leaves open the possibility that a special movant, whose legitimate petitioning activity forms the basis of a meritorious adverse claim that is not primarily geared toward chilling such petitioning, may nonetheless use the special motion to eradicate that nonmoving party's adverse claim.[23] As has long been recognized, this potential infringement of an "adverse party's exercise of its right to petition, ***158** even when it is not engaged in sham petitioning ... has troubled judges and bedeviled the statute's application." Duracraft, 427 Mass. at 166–167, 691 N.E.2d 935.[24]

23 The Illinois Supreme Court described the problem succinctly when addressing Illinois's anti-SLAPP law, which in many respects mirrors that of the Commonwealth. The court wrote:

> "The sham exception tests the genuineness of the defendants' acts; it says nothing about the merits of the plaintiff's lawsuit. It is entirely possible that defendants could spread malicious lies about an individual while in the course of genuinely petitioning the government for a favorable result. For instance, in the case at bar, plaintiff alleges that defendants defamed him by making statements that plaintiff abused children, did not get along with colleagues, and performed poorly at his job. Assuming these statements constitute actionable defamation, it does not follow that defendants were not genuinely attempting to achieve a favorable governmental result by pressuring the school board into firing the plaintiff. If a plaintiff's complaint genuinely seeks redress for damages from defamation or other intentional torts and, thus, does not constitute a SLAPP, it is irrelevant whether the defendants' actions were genuinely aimed at procuring favorable government action, result, or outcome" (footnote and quotations omitted).

Sandholm v. Kuecker, 2012 IL 111443, ¶ 53, 356 Ill.Dec. 733, 962 N.E.2d 418.

24 Both the United States Constitution and the Massachusetts Declaration of Rights provide a right to petition that includes the right to seek judicial resolution of disputes. Sahli v. Bull HN Information Sys., Inc., 437 Mass. 696, 700–701, 774 N.E.2d 1085 (2002) (noting "constitutional right to seek judicial resolution of disputes under the First Amendment to the United States Constitution and art. 11 of the Massachusetts Declaration of Rights"). See First Amendment ("Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances."); art. 11 ("Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character"); art. 19 of the Massachusetts

Declaration of Rights ("The people have a right ... to request of the legislative body, by the way of ... petitions ... redress of the wrongs done them, and of the grievances they suffer"). See also Kobrin, 443 Mass. at 333, 821 N.E.2d 60.

To ameliorate this constitutional infirmity and to ensure that only "SLAPP" suits are subject to dismissal, the Duracraft court imposed upon special movants the burden of showing that the claims against them are "solely based on" protected petitioning activity. See Duracraft, 427 Mass. at 165, 167, 691 N.E.2d 935 ("Because the Legislature intended to immunize parties from claims 'based on' their petitioning activities, we adopt a construction of 'based on' that would exclude motions brought against meritorious claims with a substantial basis other than or in addition to the petitioning activities implicated"). The goal of this framework was to "distinguish meritless from meritorious claims, as was intended by the Legislature." Id. at 168, 691 N.E.2d 935.

***159** While the Duracraft framework limited the reach of the statute and mitigated the problem, subsequent experience has shown that it did not eliminate it. The statute continues to permit, in certain circumstances, the expedited dismissal of a nonmoving party's meritorious claim that does not seek primarily to chill protected petitioning activity, i.e., non "SLAPP" suits. The reason the statute can still "be misused to allow motions for expedited dismissal ****38** of nonfrivolous claims in contravention of the Legislature's intent," Matter of the Discipline of an Attorney, 442 Mass. 660, 673, 815 N.E.2d 1072 (2004), is its exclusive focus on the special movant's petitioning activity in determining whether the nonmoving party's claim is a "SLAPP" suit. Without also considering the nonmoving party's claim, however, a court cannot adequately assess whether it is a meritless "SLAPP" suit aimed primarily at chilling a special movant's right to petition or, instead, a valid exercise of the nonmoving party's own right to petition.

[17] d. Augmenting the Duracraft framework. To ensure that the anti-SLAPP statute will "distinguish meritless from meritorious claims, as was intended by the Legislature," Duracraft, 427 Mass. at 168, 691 N.E.2d 935, we once again narrow the problematic sweep of the statute by broadening the meaning of the term "based on." 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. See Duracraft, 427 Mass. at 161, 691 N.E.2d 935, quoting 1994 House Doc. No. 1520. In other words, a claim that is not a "SLAPP" suit will not be dismissed.

[18] **[19]** As a practical matter, the expedited special motion to dismiss will proceed as follows, still in essentially two stages, taking place early in the litigation and with limited discovery available only by leave of court. See G. L. c. 231, § 59H. At the first stage, a special movant must demonstrate that the nonmoving party's claims are solely based on its own petitioning activities. This is the familiar Duracraft threshold inquiry, which will remain unchanged. At the second stage, if the special movant meets this initial burden, the burden will shift, as it does now, to the nonmoving party. The nonmoving party may still prevail, as at present, by demonstrating that the special movant's petitioning activities upon which the challenged claim is based lack a reasonable basis in fact or law, i.e., constitute sham petitioning, and that the petitioning activities at issue caused it injury. G. L. c. 231, § 59H.

[20] **[21]** ***160** If it cannot make this showing, however, the nonmoving party may henceforth meet its second-stage burden and defeat the special motion to dismiss by demonstrating in the alternative that each challenged claim does not give rise to a "SLAPP" suit. It may do so by demonstrating that each such claim was not primarily brought to chill the special movant's legitimate petitioning activities. To make this showing, the nonmoving party must establish, such that the motion judge may conclude with fair assurance, that its primary motivating goal in bringing its claim, viewed in its entirety, 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." Sandholm v. Kuecker, 2012 IL 111443, ¶ 57, 356 Ill.Dec. 733, 962 N.E.2d 418. The nonmoving party must make this showing with respect to each such claim viewed as a whole.[25]

25 At the first stage of the anti-SLAPP inquiry, courts assess whether the nonmoving party's claim is solely "based on" the special movant's petitioning activity in the sense that the nonmoving party's claim itself arises only from and complains only of that petitioning activity. See Fabre, 436 Mass. at 524, 781 N.E.2d 780.

> If the special movant meets this threshold burden, and the nonmoving party then fails to show that such petitioning activity was sham petitioning, the nonmoving party may now attempt to establish, under the augmented Duracraft framework, that its claim is not "based on" the special movant's legitimate petitioning activity because its primary motivating goal in bringing the claim was not to chill such petitioning. Because at this stage the motion judge is to assess in a holistic fashion whether the claim at issue is a "SLAPP" suit, the nonmoving party's showing in this regard is as to the entirety of its claim. Otherwise put, the plaintiff nurses on remand may attempt to demonstrate that their primary motivating goal in bringing a purportedly meritorious defamation claim against the hospital defendants—alleging as defamatory both the e-mail message to employees and the Boston Globe articles—was not to chill the hospital defendants' legitimate exercise of their right to petition government in aid of retaining the hospital's licensure of the unit.

[22] [23] [24] **39 In applying this standard, the motion judge, in the exercise of sound discretion, is to assess the totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim. The course and manner of proceedings, the pleadings filed, and affidavits "stating the facts upon which the liability or defense is based," G. L. c. 231, § 59H, may all be considered in evaluating whether the claim is a "SLAPP" suit. See Duracraft, 427 Mass. at 161–162, 691 N.E.2d 935 (listing classic indicia of "SLAPP" suits).[26] A necessary but not sufficient factor in this analysis will be whether the nonmoving party's claim at issue is ***161** "colorable or ... worthy of being presented to and considered by the court," see L.B. v. Chief Justice of Probate & Family Court Dept., 474 Mass. 231, 241, 49 N.E.3d 230 (2016), i.e., whether it "offers some reasonable possibility" of a decision in the party's favor. See Commonwealth v. Levin, 7 Mass.App.Ct. 501, 504, 388 N.E.2d 1207 (1979).

26 This type of inquiry is not unknown in the anti-SLAPP context. In Matter of the Discipline of an Attorney, 442 Mass. 660, 674, 815 N.E.2d 1072 (2004), an attorney facing disciplinary charges for allegedly attempting to influence a witness improperly responded by filing a special motion to dismiss. Because we determined that bar counsel did not have an improper purpose in bringing charges against the attorney, we denied the attorney's special motion. Id. We based our conclusion on two factors: (1) bar counsel had "sought to sanction the respondent for 'conduct that is prejudicial to the administration of justice,' an undoubtedly meritorious charge if a witness had been influenced by improper means;" and (2) "the less than careful means of communication employed by the respondent left his conduct at least open to the interpretation urged by bar counsel." Id.

On remand, then, the plaintiff nurses may seek to demonstrate that the hospital defendants' petitioning activity, i.e., the statements in the Boston Globe article, lacks any reasonable basis in fact or law and caused the nurses injury. Failing this, under the augmented Duracraft framework, they may seek to establish that their defamation claim, viewed as a whole, is nonetheless not a "SLAPP" suit. If the plaintiff nurses cannot meet their second-stage burden under the augmented framework, the hospital defendants' special motion to dismiss shall be allowed as to so much of the defamation claim as is based on the Boston Globe articles, and an appropriate award of attorney's fees and costs shall be made.

4. Conclusion. The denial of the hospital defendants' special motion to dismiss the plaintiffs' defamation claim as to Walczak's statements to the Boston Globe is vacated. In all other respects, the order is affirmed. The matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

All Citations

477 Mass. 141, 75 N.E.3d 21, 2017 IER Cases 171,136

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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

LYNNE BLANCHARD et al.,[1]

Plaintiffs,

vs.

STEWARD CARNEY HOSPITAL, INC., et al.[2]

Defendants

CIVIL ACTION NO. 2013-01914-B

MEMORANDUM AND ORDER ON DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO G. L. c. 231, § 59H UPON REMAND FROM THE SUPREME JUDICIAL COURT

This case is before the court on remand from the Supreme Judicial Court for a determination of whether the plaintiffs' defamation claim against the defendants is a legitimate law suit filed to recover damages for harm suffered as a result of allegedly tortious conduct or a so-called SLAPP suit designed to chill the defendants' legitimate petitioning activity. The SJC recently reviewed a decision of this court (Giles, J) denying defendants' Special Motion to Dismiss the claims at issue pursuant to G. L. c. 231, § 59H, the Massachusetts anti-SLAPP Statute (the "Statute"). See *Blanchard* v. *Steward Carney Hosp.*, 477 Mass. 141 (2017). In a

[1] Gail Donahue, Gail Douglas-Candido, Kathleen Dwyer, Linda Herr, Kathleen Lang, Victoria Webster, and Nydia Woods.
[2] Steward Hospital Holdings, LLC, Steward Healthcare System, LLC, and William Walczak, Proskauer Rose, LLP, Scott L. Harshbarger.

holding relevant to the instant motion, the SJC established a new framework for the resolution of Special Motions to Dismiss under the Statute and remanded part of the motion for consideration under that framework. Applying the new standard to the totality of the circumstances in the record before the court, I find that the plaintiffs have met their burden to establish that their defamation claim is not a SLAPP suit because it was filed primarily to seek redress for the harm alleged, not to interfere with the defendants' right to petition. For this reason, as explained below, the defendants' motion is DENIED.

BACKGROUND

The following facts are drawn from the Record Appendix originally filed in the Appeals Court and cited by both parties in their memoranda pertaining to the instant motion on remand.

The plaintiffs are registered nurses who formerly worked in the Adolescent Mental Health Unit (the "Unit") at Steward Carney Hospital ("Steward Carney" or the "Hospital"). In April of 2011, incidents of suspected patient abuse on the Unit were reported to the Department of Mental Health ("DMH"), Department of Public Health ("DPH"), and the Department of Children and Families ("DCF"). The DMF and DCF investigated the reports and the DMH stopped admissions to the Unit and ordered some patients to be removed in order to decrease the census. DMH also indicated that it was considering revoking the Hospital's license to operate the Unit.

The Hospital retained former Massachusetts Attorney General, Scott Harshbarger ("Harshbarger"), to investigate the incidents and make recommendations as to how Steward Carney should handle the situation. As part of his investigation, Harshbarger interviewed Hospital staff who had contact with the Unit, including the plaintiffs. In May of 2011, in written Preliminary Findings, and orally, he recommended that the Hospital "blow up" the Unit and

"start anew." Based on that recommendation, the Hospital fired all mental health counselors and nurses assigned to the Unit, including the plaintiffs, effective May 26, 2011.

Following the terminations, William Walczak ("Walczak"), the hospital CEO, sent an email to all hospital staff to inform them about the actions taken. He also responded to media inquiries about the terminations.

The plaintiffs are members of the Massachusetts Nurses Association (the "MNA"), who grieved their terminations under the applicable collective bargaining agreement. The grievances ended up in arbitration. Two separate sessions were scheduled with five of the plaintiffs participating in the first session and four scheduled to participate in the second. In March 2013, after the first session hearings were complete, but before any decision was entered, the parties engaged in settlement negotiations but did not settle. On April 20, 2013, the arbitrator found in favor of the MNA and directed the Hospital to reinstate the nurses to their prior jobs on the Unit with back pay and benefits.

On May 25, 2013, the plaintiffs filed the instant suit alleging, among other claims, defamation based upon Walczak's in-house email to the staff of the Hospital described above and his remarks, which were included in two Boston Globe articles.

On October 8, 2013, all nine plaintiffs, the MNA and the Hospital settled the grievances. Under the settlement the plaintiffs received back-pay and benefits from the date of their termination through August 15, 2013. They also received money in lieu of reinstatement. As a result of the settlement, the second arbitration never occurred.

After being served with the complaint in the instant matter, the Hospital brought an anti-SLAPP Special Motion to Dismiss the defamation claims, arguing that the email and the published remarks were both petitioning activity related to the re-licensure of the Unit by the

state. The motion was denied by this court (Giles, J.) on March 5, 2014 and the Hospital appealed.

The Appeals Court reversed this court's decision in part. See *Blanchard* v. *Steward Carney Hosp., Inc.*, 89 Mass. App. Ct. 97, 98 (2016). Thereafter, the Supreme Judicial Court granted the parties' applications for further appellate review and held that Walczak's statements to the Boston Globe were petitioning activity covered by the Statute, but that the internal Hospital email was not an exercise of the Hospital's right to petition and, thus, was not subject to anti-SLAPP protection. The Court then announced a new augmented framework for the analysis of Special Motions to Dismiss, under which the non-moving party may prevail if it can establish that its claim was not brought primarily to chill the moving party's legitimate petitioning activity. The Court remanded the case for consideration of the Hospital's motion and plaintiffs' opposition under the augmented framework.

ANALYSIS

The anti-SLAPP statute, G. L. c. 231, § 59H, "was enacted by the Legislature to provide a quick remedy for those citizens targeted by frivolous lawsuits based on their government petitioning activities." *Kobrin* v. *Gastfriend*, 443 Mass. 327, 331 (2005). In *Kobrin*, the Supreme Judicial Court noted that the anti-SLAPP statute "had its genesis as a legislative attempt to protect private citizens when exercising their constitutional right to speak out against development projects or other matters of concern to them and their communities and to seek government relief." *Korbin*, 443 Mass. at 337. The SJC has also noted that "SLAPP suits [are] generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them from doing so." *Duracraft* v. *Holmes Prods. Corp.*, 427 Mass. 156, 161 (1998). The Court has also recognized that the language of

the statute supports its application to cases beyond the basic example described in *Duracraft*. See *Baker* v. *Parsons*, 434 Mass. 543, 549 (2001) (stating that the legislative history indicates that the anti-SLAPP statute was intended to go beyond the "typical" case).

By its decision in the instant case, however, the SJC has limited the application of the statute to cases primarily motivated by an intent to interfere with petitioning activity. The augmented framework announced in *Blanchard* adds an additional test to apply when evaluating an anti-SLAPP motion, so as "to distinguish between meritless claims targeting legitimate petitioning activity and meritorious claims with no such goal." *Blanchard*, 447 Mass. at 157.

The now augmented framework for analyzing an anti-SLAPP statute is as follows. First, the moving party must make a threshold showing through the 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." *Duracraft*, 427 Mass. at 167–168. If such a showing is made by the moving party, the burden shifts to the non-moving party to show "(1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party." G. L. c. 231, § 59H. The SJC's decision in this case adds an additional element to the analytical framework. The non-moving party may now defeat an anti-SLAPP motion to dismiss by establishing "that its suit was not 'brought primarily to chill' the special movant's legitimate exercise of its right to petition." *Blanchard*, 477 Mass. at 159, quoting *Duracraft*, 427 Mass. at 161. The non-moving party must persuade the court that its "primary motivating goal in bringing its claim, viewed in its entirety, was 'not to interfere with and burden [the moving party's] . . . petition rights, but to seek damages for the personal harm to [it] from

[the moving party's] alleged . . . [legally transgressive] acts." *Blanchard*, 447 Mass. at 160 (internal quotation and citation omitted).

In this case, the plaintiffs' specifically acknowledge that they do not base their opposition to the Special Motion on remand upon either of the two prongs to the original *Duracraft* framework. See "Plaintiffs' Opposition, Pursuant to SJC Remand, to Steward's Special Motion to Dismiss, and Showing that Plaintiffs' Claim is not a SLAPP Suit," at 6 n.2.

Thus, the court will address only the new element of the anti-SLAPP analysis. The plaintiffs may defeat the Special Motion to Dismiss if they can demonstrate that their defamation action in response to Walczak's comments published in the Boston Globe "was not primarily brought to chill the Hospital's legitimate petitioning activity." *Blanchard*, 477 Mass. at 160. To apply this standard,

> [T]he motion judge, in the exercise of sound discretion, is to assess the totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim. The course and manner of proceedings, the pleadings filed, and affidavits 'stating the facts upon which the liability or defense is based,' . . . may all be considered in evaluating whether the claim is a 'SLAPP' suit. A necessary but not sufficient factor in this analysis will be whether the nonmoving party's claim at issue is 'colorable or . . . worthy of being presented to and considered by the court' . . . i.e., whether it 'offers some reasonable possibility' of a decision in the party's favor.

Id. at 160–161 (citations omitted).

Starting with the "necessary but not sufficient factor," I find that the plaintiffs' defamation claim is colorable. The facts demonstrate that the allegedly false published comments were of and concerning the plaintiffs and were of a type that reasonably exposed them to public hatred, ridicule, or contempt. See *Draghetti* v. *Chmielewski*, 416 Mass. 808, 811

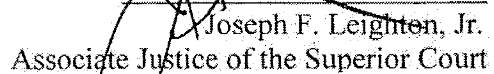
(1994). The comments published in the newspaper implicated the plaintiffs in patient abuse and described their work as unacceptable and as contributing to an unsafe medical environment.

In addition, I find that plaintiffs' primary purpose in asserting the claim for defamation is to recover for the harm allegedly caused by the Hospital. Without doubt, this determination is the most challenging task for the court on remand because insight into any party's primary purpose is difficult to come by, especially at the motion to dismiss stage of the proceedings. I have considered the entire record and taken note of the parties' arguments as to whether, and to what extent, the plaintiffs cooperated with Harshbarger's investigation. I have taken note that the plaintiffs exercised restraint in public comment during the investigation, and I have considered the fact that the claim was filed in reaction to statements that do not constitute petitioning (the emails) as well as the statements published in the Globe, which were a form of petitioning. I have taken into account both sides of the dispute about economic damages as a plausible motivating factor, especially in light of the settlement agreement related to the grievance. I have also considered the plaintiffs' well-established right to sue for reputational damage and emotional distress related to the allegedly false published comments. Based on all of the above, I find that the plaintiffs' petition for damages as a result of alleged defamation is legitimate and should be allowed to proceed. I find that this claim is not a so-called SLAPP suit because I find that the plaintiffs' primary motivation in bringing it was to seek relief from allegedly tortious harm, not to interfere with the defendants' petition rights.

CONCLUSION

Plaintiffs' Special Motion to Dismiss Pursuant to the Anti-SLAPP Statute is **DENIED** on remand from the Supreme Judicial Court.

By the Court,



Joseph F. Leighton, Jr.
Associate Justice of the Superior Court

Date: December 7, 2017