MAINE SUPREME JUDICIAL COURT

Sitting as the Law Court

No. Was-10-678

RALPH NADER, CHRISTOPHER DROZNICK, NANCY ODEN and ROSEMARY WHITTAKER,

Appellants,

-v.-

THE MAINE DEMOCRATIC PARTY, THE DEMOCRATIC NATIONAL COMMITTEE, KERRY-EDWARDS 2004, INC., THE BALLOT PROJECT, INC., DOROTHY MELANSON, TERRY MCAULIFFE and TOBY MOFFETT,

Appellees.

ON APPEAL FROM THE DECISIONS AND ORDERS ENTERED BY THE SUPERIOR COURT OF WASHINGTON COUNTY ON NOVEMBER 16, 2010 AND DECEMBER 29, 2010 AT NO. CV-09-57

BRIEF OF APPELLANTS

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

This action was commenced in the Superior Court for Washington County, Maine, on November 25, 2009, when Plaintiff-Appellants filed their Complaint ("Comp.") stating claims for wrongful use of civil proceedings, abuse of process and civil conspiracy arising from Defendant-Appellees' groundless and abusive litigation against Plaintiff-Appellants during the 2004 presidential election. A27-A81. Plaintiff-Appellants are consumer advocate and former independent presidential candidate Ralph Nader ("the Candidate") and his 2004 Maine presidential electors Christopher Droznick, Nancy Oden and Rosemary Whittaker ("the Voters"). A33; Comp. ¶¶ 16-20. Defendant-Appellees are the Maine Democratic Party, the Democratic National Committee ("DNC"), Kerry-Edwards 2004, Inc., Dorothy Melanson and Terry McAuliffe (collectively, the "DNC Defendants"), a Section 527 organization called The Ballot Project, Inc. and Toby Moffett (collectively, the "Moffett Defendants," and, together with the DNC Defendants, "Defendants").

The Complaint alleges that Defendants orchestrated a concerted effort, in Maine and 17 more states nationwide, to prevent Plaintiffs from participating in the 2004 presidential election as qualified candidates and voters. A27-A32; Comp. ¶¶ 1-13. To achieve their improper purpose, Defendants and their agents filed 29 complaints before 19 tribunals in less than 12 weeks, purporting to challenge the nomination petitions filed by the Candidate and his running mate, the late Peter Miguel Camejo, as well as their compliance with campaign finance laws. A28-A30, A45-A71; Comp. ¶¶ 4-5, 9, 56-134. As Defendants admitted on numerous occasions, however, the true purpose of their complaints was not to vindicate valid claims, but rather to use the burden of litigation itself as a means to drain the Candidate's campaign of time, money and other resources. A35, A36, A41; Comp. ¶¶ 29, 31, 46-47. Specifically, Defendants admitted, their

intent was to "drain," "distract" and "neutralize" the Candidate's campaign, by "forcing him to spend money and resources defending these things." A35, A41; Comp. ¶¶ 29, 46.

In Maine, Defendants caused two baseless complaints to be filed, both of which were dismissed. A45-A50; Comp. ¶¶ 56-66. Defendants used these baseless complaints as a pretext for making false allegations of fraud against the Candidate and Voters, and for subpoenaing the Voters. A45, A47; Comp. ¶¶ 56, 59-60. Defendants never presented any evidence to support their false allegations, because such evidence did not exist, and Defendants had no reason to believe it did. A47, A49; Comp. ¶¶ 59-60, 62-63. Instead, Defendants' intent was to harass and discourage the Voters from serving as the Candidate's electors. A30, A42, A45, A47; Comp. ¶¶ 8, 51, 56, 59-60.

Every Maine elections official and court that heard Defendants' complaints unanimously concluded that they were without merit, and that Defendants' allegations of fraud were baseless. A49; Comp. ¶¶ 62-64. Defendants nevertheless exhausted the appeals process. A49; Comp. ¶ 64. Ultimately, as in each prior proceeding, the Law Court unanimously concluded that Defendants' claims had no merit. A49; Comp. ¶ 64. Defendants made similarly false and baseless allegations of fraud in connection with their challenges in other states. A50, A51, A53, A60, A62-A63, A65, A68-A69; Comp. ¶¶ 67, 71, 77, 101-02, 107-08, 115, 126-29.

Despite retaining or recruiting no fewer than 95 lawyers from 53 law firms to join their effort nationwide, A40-A41; Comp. ¶¶ 45-46, Defendants lost 24 out of 29 complaints that they filed. A28-A31; Comp. ¶¶ 4, 6, 9. Four more challenges were "successful" only because they relied on unconstitutional statutes, unlawful interference with Plaintiffs' efforts to comply with state election laws, or both. A42-A45; Comp. ¶¶ 51-55. Further, a Grand Jury investigation by the Pennsylvania Attorney General revealed, in July 2008, that Defendants' challenge in that

state was produced by means of a criminal conspiracy that has yielded 10 felony convictions or guilty pleas thus far, as well as sworn, undisputed trial testimony implicating Defendants' lead counsel by name. A45, A65, A66; Comp. ¶¶ 54, 114-15, 119.

In the proceedings below, on February 19, 2010, the Moffett Defendants moved to dismiss the Complaint pursuant to Maine Rules of Civil Procedure 12(b)(2), 12(b)(4), 12(b)(5) and 12(b)(6). On February 22, 2010, the DNC Defendants filed a second motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6), which incorporated a special motion to dismiss pursuant to Maine's anti-SLAPP statute,[1] 14 M.R.S. § 556. On March 5, 2010, the Moffett Defendants filed another special motion to dismiss pursuant to the anti-SLAPP statute.

The anti-SLAPP statute states, in relevant part:

> When a moving party asserts that the civil claims, counterclaims or cross claims against the moving party are based on the moving party's exercise of the moving party's right of petition under the Constitution of the United States or the Constitution of Maine, the moving party may bring a special motion to dismiss. The court shall advance the special motion so that it may be heard and determined with as little delay as possible. The court shall grant the special motion, unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleading and supporting and opposing affidavits stating the facts upon which the liability or defense is based. 14 M.R.S. § 556.

The Superior Court held a hearing on Defendants' motions to dismiss on August 6, 2010, following which it entered an Order, on August 9, 2010, reserving decision on the pending Rule 12(b) motions, and directing the Candidate and Voters to submit affidavits and evidence in response to the pending special motions to dismiss filed pursuant to the anti-SLAPP statute, showing that the Defendants' asserted petitioning conduct "was devoid of any reasonable factual support or any arguable basis in law," and that such conduct caused them "actual damage." In response, on September 20, 2010, Plaintiffs submitted the following:

- Affidavit of Candidate Ralph Nader (describing, inter alia, financial injury the Candidate incurred as a result of Defendants' conduct, including the attachment of his personal bank accounts by attorneys implicated in Pennsylvania Attorney General's Grand Jury investigation), A86-A90;

- Affidavit of Campaign Manager and Attorney Theresa Amato (describing Defendants' concerted nationwide effort to "drain," "distract," and "neutralize" Candidate and Voters' campaign, including examples of demonstrably false and baseless claims that Defendants filed in numerous states, as well as evidence of the actual injury that such acts caused), A91-A110;

- Affidavit of Attorney Harold Burbank (describing the Candidate and Voters' unanimous victory at each stage of Defendants' Maine challenge, from the initial hearing before the Maine Secretary of State's Administrative Officer, through the final appeal to the Law Court), A110-A118;

- Affidavit of Maine Elector J. Noble Snowdeal (rebutting Defendants' demonstrably false allegation that Mr. Snowdeal is a "fictitious" person), A119-A120;

- Affidavit of Maine Elector Nancy Oden (describing Defendants' demonstrably false and baseless allegations of "fraud" in Maine challenge, which Defendants used as a pretext for obtaining subpoenas against Candidate's Maine electors, as well as actual injury resulting therefrom), A121-A124;

- Affidavit of Attorney Gregory Kafoury (describing Defendants' Oregon challenge, including unlawful disruption of the Candidate's nomination conventions, harassment of the Candidate's nomination petition circulators, and sabotage of Candidate's nomination petitions), A125-A130;

- Affidavit of Attorney Daniel Meek (describing "unwritten rules" the Oregon Secretary of State invoked to disqualify the Candidate, despite his "full compliance with all statutes and all written rules"), A131-A132; A129;

- Affidavit of William Gillis (providing an eyewitness account of concerted effort by Defendants' agents to sabotage Candidate's Oregon nomination petitions), A133;

- Affidavit of Attorney Mark R. Brown (describing Defendants' Ohio challenge, including "unfounded allegations" Defendants' agents made to obtain subpoenas against Candidate's Ohio petition circulators), A134-A139;

- Affidavit of Julie Coyle (describing harassment and subpoenaing of Candidate's Ohio petition circulators by Defendants' agents), A140-A144;

- Affidavit of Amy Hanmer (describing harassment and subpoenaing of Candidate's Ohio petition circulators by Defendants' agents), A145-A147;

[1] SLAPP is an acronym for Strategic Litigation Against Public Participation.

- Affidavit of Patricia Fridrich (describing harassment and subpoenaing of Candidate's Ohio petition circulators by Defendants' agents), A148-A150;

- Affidavit of Attorney Basil Culyba (describing Defendants' Pennsylvania challenge, as well as Pennsylvania Attorney General's subsequent Grand Jury investigation and prosecution, including sworn, undisputed testimony implicating Defendants' lead counsel, Reed Smith partner Efrem Grail), A151-A156;

- Affidavit of Attorney Bruce Afran (describing Defendants' five complaints filed against the Candidate with the Federal Election Commission ("FEC"), all five of which were unanimously dismissed, as well as actual injury resulting therefrom), A158-A160.

In support of the above-referenced affidavits, the Candidate and Voters submitted extensive evidentiary exhibits attached thereto, including, for example: the sworn testimony of Defendant Melanson, as Maine Democratic Party Chair, who admitted that Defendant DNC officials in Washington, D.C., had directed her to sue the Candidate and Voters in Maine, and that Defendant DNC had retained and was paying her attorneys, A113-A116; email records and other internal documents of Defendants DNC and Kerry-Edwards 2004, Inc., demonstrating that, contrary to their public denials, both Defendants coordinated and directly participated in Defendants' litigation against the Candidate, A95-A98; campaign finance reports submitted to the FEC, demonstrating that Defendant DNC – again contrary to its public denials – retained several law firms that sued the Candidate and Voters' campaign in several states besides Maine, A96-A97; Defendants' numerous admissions – which they have never disputed – that the purpose of their nationwide effort was to use the burden of litigation itself, as opposed to its outcome, as a means to "drain," "distract," and "neutralize" the Candidate and Voters' campaign, A95; eyewitness reports demonstrating that in the few states where Defendants prevailed, such as Arizona, Ohio, Oregon and Pennsylvania, their challenges relied on unlawful interference with the Candidate and Voters' campaign, unconstitutional statutes, or both, A104-A105; and finally,

of special relevance to Defendants' anti-SLAPP motions, several examples of demonstrably false and baseless allegations in formal pleadings filed by Defendants or their agents, A98-A102.[2]

On October 12, 2010, the DNC Defendants submitted their Reply to Plaintiffs' Evidentiary Submission, which failed to dispute the validity of a single piece of evidence submitted by the Candidate and Voters. On the same day, the Moffett Defendants submitted a separate Reply to Plaintiffs' Evidentiary Submission, which again failed to dispute the evidence submitted by the Candidate and Voters, including the numerous examples of demonstrably false and baseless claims filed by Defendants or their agents, which were attached as exhibits. A98-A102. On November 5, 2010, the Superior Court held a hearing on Defendants' special motions to dismiss, and the Candidate and Voters' evidentiary submission.

In a Decision and Order entered on November 15, 2010, the Superior Court concluded that the Candidate and Voters had not met their "heavy and difficult burden" under the anti-SLAPP statute, and granted Defendants' special motions to dismiss. A16, A22. On November 22, 2010, the Moffett Defendants filed a Motion for Attorneys' Fees, pursuant to 14 M.R.S. § 556. In a Decision and Order entered on December 29, 2010, the Superior Court stated:

> The broad interpretation and application of this statute, 14 M.R.S. § 556, by the Law Court, compels the decision reached by this Court in its decision of November 15th. However, this case…raises significant questions concerning the appropriate judicial interpretation of 14 M.R.S. § 556 in the context of the Maine and Federal Constitutions and the competing interests represented therein. … But for the impact of legal authority in this State relating to 14 M.R.S. § 556, this Court is of the opinion that Plaintiffs' action warranted further analysis and development through the evolution of normal civil litigation process.

A26 (emphasis added). Expressly rejecting the Moffett Defendants' assertion that it had found the Candidate and Voters' claims to be "meritless," the Superior Court stated, "the merits of

[2] In order to comply with the page limit requirements prescribed by Maine R. App. P. 8, the evidentiary exhibits submitted in support of the above-cited affidavits, which are part of the record on appeal, are not included in the Appendix. Maine R. App. P. 6(b), 8(i).

Plaintiffs' underlying claims have yet to be evaluated." A26. Accordingly, the Superior Court concluded, "an appropriate award of attorneys' fees is in the amount of One Dollar ($1), in total, to both Defendants." A26.

The Candidate and Voters timely filed a Notice of Appeal from the Superior Court's November 15, 2010 Decision and Order granting the Defendants' special motions to dismiss. The Moffett Defendants also submitted a Notice of Appeal, on January 11, 2011, from the Superior Court's December 29, 2010 Decision and Order awarding them attorneys' fees. Both Decisions and Orders entered by the Superior Court are the subject of this consolidated appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the Superior Court erred by dismissing the Complaint pursuant to Maine's anti-SLAPP statute, where such dismissal abrogated common law and violated the Candidate and Voters' First Amendment right to petition the courts for redress of grievances, and where the Candidate and Voters submitted undisputed evidence demonstrating that Defendants engaged in numerous acts of purported "petitioning" conduct that were devoid of any reasonable factual support or any arguable basis in law?

II. Whether the Superior Court abused its discretion by awarding the Moffett Defendants $1 in attorneys' fees, where the Superior Court concluded that "Plaintiffs' action warranted further analysis and development through the evolution of normal civil litigation process," but that this Court's "broad interpretation and application" of the anti-SLAPP statute compelled dismissal?

SUMMARY OF ARGUMENT

Issue I.

In the proceedings below, the Superior Court dismissed the Complaint in spite of its express finding that the Candidate and Voters' claims for wrongful use of civil proceedings and abuse of process warranted further development, based on its conclusion that the Law Court's decisions construing the anti-SLAPP statute compelled that result. This was error. The anti-SLAPP statute was never intended to, and does not in fact, abrogate any common law cause of action. The Superior Court misconstrued the anti-SLAPP statute to abrogate common law, however, because it failed to apply the proper standard to determine whether the anti-SLAPP statute protects Defendants' conduct. It does not, and Defendants do not and cannot meet their initial burden of showing that it does. Therefore, they cannot invoke the anti-SLAPP statute's protection.

Further, because the Superior Court incorrectly determined that the anti-SLAPP statute protects Defendants' conduct, despite Defendants' failure to show that their specific acts constitute petitioning conduct, the Superior Court's application of the anti-SLAPP statute violated the Candidate and Voters' First Amendment right to petition. Therefore, the anti-SLAPP statute is unconstitutional as applied in this case.

Finally, the Superior Court also erred by imposing an improper evidentiary burden upon the Candidate and Voters, which was impossible for any litigant to meet. Specifically, the Superior Court misconstrued the anti-SLAPP statute to require that the Candidate and Voters prove that every single claim and allegation in Defendants' 29 complaints against them was devoid of any reasonable factual support or any arguable basis in law. Neither the statutory text, nor the Law Court's decisions construing it, support such a sweeping construction of the anti-

SLAPP statute. Therefore, the Superior Court incorrectly determined that the evidence submitted by the Candidate and Voters was insufficient to meet their evidentiary burden.

The standard of review for a special motion to dismiss pursuant to the anti-SLAPP statute resembles the standard for reviewing a motion for summary judgment. *See Morse Bros., Inc. v. Webster*, 772 A.2d 842, 848-49 (Me. 2001) (citations omitted). The Law Court reviews the Superior Court's decision regarding such a motion to determine whether the Superior Court abused its discretion or committed an error of law. *See id.* Although the evidence is viewed in the light most favorable to the moving party, *see id.*, all matters of statutory construction are questions of law, which are entitled to *de novo* review. *See Schelling v. Lindell*, 942 A.2d 1226, 1231 (Me. 2008) (citations omitted).

Issue II.

Because the Superior Court expressly found that the Complaint should not be dismissed, but for its conclusion that the Law Court's decisions construing the anti-SLAPP statute compelled that result, the Superior Court did not abuse its discretion by awarding the Moffett Defendants attorneys' fees in the amount of one dollar, in total. The Law Court reviews the Superior Court's award of attorneys' fees for an abuse of discretion. *See Maietta Const. Corp. v. Wainwright*, 847 A.2d 1169, 1174 (Me. 2004).

ARGUMENT

I. THE SUPERIOR COURT ERRED BY DISMISSING THE COMPLAINT PURSUANT TO THE ANTI-SLAPP STATUTE.

Since the enactment of Maine's anti-SLAPP statute in 1995, courts have raised substantial concern that it could be applied improperly to dismiss valid claims. As the trial court observed in a decision affirmed by the Law Court in *Maietta*:

> The anti-SLAPP statute, as drafted, and as applied by the Law Court in *Morse Bros., Inc.*, though conceived as a shield, is open to abuse: a defendant, by merely "asserting" the broadly defined right to petition can use the anti-SLAPP statute as a sword to preempt legitimate complaints. The anti-SLAPP statute stays discovery yet places virtually an impossible burden on the Plaintiffs to show that the Defendants' petitioning lacked "any arguable basis in law," or lacked "any reasonable factual support," the facts being viewed most favorably to the Defendants. Further, the Plaintiffs must show that the Defendants' acts caused the Plaintiffs "actual injury." It is not difficult to imagine that the cumulation of these obstacles to the Plaintiffs could become insurmountable, irrespective of the merit of their underlying claims.

Maietta Const. Co. v. Wainwright, 2003 Me. Super. LEXIS 248, *10-*11 (Me. Super., July 29, 2003) (citations omitted), *aff'd*, 847 A.2d 1169 (Me. 2004). The risk that the trial court foresaw in *Maietta* – that the anti-SLAPP statute might be misapplied to preempt legitimate claims – has been realized in this case.

A. The Superior Court Erred By Construing the Anti-SLAPP Statute to Abrogate Common Law Tort Claims.

The Candidate and Voters commenced this action only after Defendants and their agents caused 29 complaints to be filed against them during the 2004 presidential election. Comp. ¶¶ 4, 29-50. Defendants took such action not because they had probable cause, but because, as they admitted, they hoped to "drain," "distract" and "neutralize" the Candidate and Voters' campaign, by "forcing [them] to spend money and resources defending these things." Comp. ¶¶ 29, 46. Defendant Moffett even expressed "astonishment" when Defendants' multi-million-dollar legal team, comprising no fewer than 95 lawyers from 53 law firms, prevailed in a small number of

cases. Comp. ¶¶ 45-46. Such conduct is the very definition of wrongful use and abuse of judicial processes. *See generally* 52 AM. JUR. 2D *Malicious Prosecution* § 1; 1 AM. JUR. 2D *Abuse of Process* § 1.

In the proceedings below, the Superior Court expressly concluded that "Plaintiffs' action warranted further analysis and development through the evolution of normal civil litigation process." A26. Nevertheless, the Superior Court dismissed the Complaint, on the ground that the Law Court's "broad interpretation and application of" the anti-SLAPP statute "compels" that result. A25. This was error.

1. The Anti-SLAPP Statute Does Not Abrogate Any Common Law Tort Claim.

The claims raised in this case, for wrongful use of civil proceedings and abuse of process, have been firmly established in the common law of Maine for nearly a century or more. *See Saliem v. Glovsky*, 172 A. 4, 6 (Me. 1934) (citing early cases recognizing cause of action for both torts). Indeed, in its first case construing the anti-SLAPP statute, the Law Court recognized that "suits for malicious prosecution and abuse of process" are the "traditional safeguards against meritless actions." *Morse Bros.*, 772 A.2d at 846. Insofar as the anti-SLAPP statute is construed to compel dismissal of such claims, therefore, it is in derogation of the common law.

It is a matter of settled law that the Legislature cannot abrogate the common law by statute unless it adopts "clear and unambiguous language" stating its intent to do so. *Picher v. Roman Catholic Bishop of Portland*, 974 A.2d 286, 294 (Me. 2009). As the Law Court has said:

> We have long embraced the well-established rule of statutory construction that the common law is not to be changed by doubtful implication [or] overturned except by clear and unambiguous language, and that *a statute in derogation of it will not effect a change thereof beyond that clearly indicated either by express terms or by necessary implication.*

Id. (quoting *Batchelder v. Realty Resources Hospitality, LLC*, 914 A.2d 1116, 1124 (Me. 2007) (citation omitted) (emphasis added). Accordingly, to determine whether the anti-SLAPP statute may be properly construed to abrogate a cause of action for wrongful use of civil proceedings or abuse of process, a court must "look first to the plain meaning of the statutory language." *Batchelder*, 914 A.2d at 1123.

Nothing in the anti-SLAPP statute's text indicates a legislative intent to abrogate a valid cause of action for wrongful use of civil proceedings, abuse of process, or any other tort. *See* 14 M.R.S. § 556. The express terms of the anti-SLAPP statute do not even address any particular cause of action. *See id*. Further, its statutory language does not suggest, by necessary implication, an intent to abrogate any tort claim. *See id.*; *Picher*, 974 A.2d at 294. On the contrary, by establishing a procedure for defending against such claims, by means of a "special motion to dismiss," the anti-SLAPP statute recognizes their continued validity. 14 M.R.S. § 556. As a matter of law, therefore, the anti-SLAPP statute cannot be construed to abrogate any common law cause of action. *See Picher*, 974 A.2d at 294; *Batchelder*, 914 A.2d at 1124; *Maietta*, 847 A.2d at 1174 (anti-SLAPP statute was drafted "against the backdrop of the common law, and [cannot] displace it without directly addressing the issue").

2. The Superior Court Misconstrued the Anti-SLAPP Statute to Compel Dismissal of the Candidate and Voters' Claims for Wrongful Use of Civil Proceedings and Abuse of Process.

In all three of its decisions construing the anti-SLAPP statute, the Law Court has explicitly recognized that the Legislature's intent was to provide protection from "meritless" litigation only. *Morse Bros.*, 772 A.2d at 846 (emphasis added); *Maietta*, 847 A.2d at 1173; *Schelling*, 942 A.2d at 1229; *see also Duracraft Corp. v. Holmes Prod. Corp.*, 691 N.E.2d 935, 941-42 (Mass. 1997) ("SLAPPs are by definition meritless suits") (emphasis added) (citations

omitted). As the Law Court has explained, the anti-SLAPP statute "targets plaintiffs who do not intend to win their suits," but sue "solely for delay and distraction, and to punish activists by imposing litigation costs on them." *Maietta*, 847 A.2d at 1173. In such cases, the anti-SLAPP statute allows defendants to move for dismissal on an expedited basis, thus avoiding the burden of defending meritless claims, "which is the precise harm that the statute seeks to prevent." *Morse Bros.*, 772 A.2d at 848.

In this case, the Superior Court made no finding that the Candidate and Voters do not "intend to win" their lawsuit, nor that they sued "solely for delay and distraction" or "to punish activists." *Maietta*, 847 A.2d at 1173. Further, the Superior Court flatly rejected the assertion that it had found the Candidate and Voters' claims to be "meritless." A26. The Superior Court thus acknowledged that "the character of this litigation…is significantly different in tone and tenor from *Morse* or *Maietta* or *Schelling*." A24. Unlike a "typical" SLAPP suit pitting "a wealthy developer against a citizen of modest means," the Superior Court observed:

> this case involves a candidate for national elective office seeking to put forth his ideas to the national electorate for their consideration and approval, and the defendants' alleged calculated efforts to interfere, discourage and impede public exposure to that candidacy and those ideas.

A24. Finally, the Superior Court concluded, "this Court is of the opinion that Plaintiffs' action warranted further analysis and development through the evolution of normal civil litigation process." A26 (emphasis added).

In spite of its own findings and conclusion, the Superior Court dismissed the Complaint on the ground that the Law Court's "broad interpretation and application of" the anti-SLAPP statute "compels" that result. A25. Dispelling any doubt as to the basis for its decision, the Superior Court emphasized that it would not have granted dismissal "but for the impact of legal authority in this state relating to 14 M.R.S. § 556." A25-A26 (emphasis added). This was error.

Because the anti-SLAPP statute was never intended to and does not in fact compel dismissal of otherwise valid claims, *see supra* Part. I.A.1, the Superior Court misapplied the anti-SLAPP statute by construing it so broadly as to abrogate two causes of action – wrongful use of civil proceedings and abuse of process – which the common law of Maine has recognized for nearly 100 years or more. *See Saliem*, 172 A. at 6; *Morse Bros.*, 772 A.2d at 846.

B. The Superior Court Failed to Apply the Proper Standard to Determine Whether the Anti-SLAPP Statute Applies in This Case.

The Superior Court incorrectly concluded that it was compelled to dismiss this case because it misconstrued applicable precedent. The Superior Court thus failed to apply the proper standard to determine whether the anti-SLAPP statute applies in this case. It does not.

1. The *Duracraft* Standard Determines Whether the Anti-SLAPP Statute Protects Defendants' Conduct.

In the first Maine case construing the anti-SLAPP statute, the Superior Court sought guidance from the case law construing Massachusetts' "nearly identical" statute. *Millett v. Atlantic Richfield Co.*, 1999 Me. Super. LEXIS 240, *6 & n.4 (Me. Super. Ct. August 30, 1999) (observing that "the only difference between the statutes" is that attorneys' fees are mandatory in Massachusetts but discretionary in Maine). Under the decisions of the Massachusetts Supreme Court, the Superior Court found that:

> the anti-SLAPP statute was not intended to authorize dismissal of legitimate, cognizable claims based on something other than petitioning activity, and that if the statute was to be so construed, then it would violate a plaintiff's own constitutional right to petition a court for redress of their grievances.

Id. (citing *Duracraft*, 691 N.E.2d at 943). In order to avoid finding the anti-SLAPP statute unconstitutional, therefore, the *Duracraft* court held that the party seeking dismissal under the anti-SLAPP statute must "make a threshold showing through the pleadings and affidavits that the claims against it are 'based on' petitioning activities alone and have no substantial basis other

than or in addition to the petitioning activities." *Id.* Further, the *Duracraft* court explained, "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." *Duracraft*, 691 N.E.2d at 943 (emphasis added). The Superior Court expressly adopted this standard in *Millett*. *See id.* at *10.

The Law Court likewise adopted the *Duracraft* standard in its first case construing Maine's anti-SLAPP statute. *See Morse Bros.*, 772 A.2d at 848 n.2, 849. "In deciding a special motion to dismiss," the Law Court concluded, a court "must first determine whether the claims against the moving party are based on the moving party's exercise of the right to petition." *Id.* at 849 (citing *Donovan v. Gardner*, 740 N.E.2d 639, 642 (Mass. 2000) (citing *Duracraft*, 691 N.E.2d 935)). More recently, the Law Court has applied the *Duracraft* standard to affirm the denial of a special motion to dismiss on the ground that the defendants "did not meet their initial burden of showing that those counts were based solely on their petitioning activities." *Copp v. Liberty*, 2010 Me. Unpub. LEXIS 3, *2-*3 (Me. Feb. 2, 2010).

It is therefore settled law in Maine that, in order "to gain the prophylactic effect" of the anti-SLAPP statute, a defendant "must make a threshold showing," as specified in *Duracraft*, "that the asserted claims against it are based on the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." *Demeuse v. WGME, Inc.*, 2010 Me. Super. LEXIS 63, *19 (Me. Super., May 4, 2010) (emphasis added) (citations omitted) (denying special motions to dismiss where defendants were not petitioning for redress of their own grievances); *see Jamison v. OHI*, 2005 Me. Super. LEXIS 161, *8-*10 (Me. Super. Nov. 29, 2005) (denying special motions to dismiss where defendants were not petitioning but complying with statutorily mandated reporting requirements); *Liberty v. Bennett*, 2010 Me. Super. LEXIS 2,

*10 (Me. Super. Jan. 19, 2010) (denying special motion to dismiss where defendant failed to show that claims were based "solely" on defendant's asserted petitioning conduct).

2. The Anti-SLAPP Statute Does Not Protect Defendants' Conduct Because They Did Not and Cannot Meet Their Burden Under *Duracraft.*

In the proceedings below, Defendants incorrectly argued, in direct contradiction of the *Duracraft* standard, that "once Defendants have merely asserted a claim based on the exercise of the right to petition," they may invoke the protection of the anti-SLAPP statute. DNC Defs. Reply to Pl. Evid. Sub. at 6 (emphasis added) (quotation marks omitted). On the contrary, to satisfy their initial burden under the anti-SLAPP statute, Defendants must show, by pleadings and affidavits, that the specific acts alleged in the Complaint constitute an exercise of the right to petition. Pl. Resp. in Opp. to Moffett Defs. Spec. Mot. at 7. In this case, therefore, Defendants were required to show that they have a First Amendment right: 1) to file knowingly false complaints, Comp. ¶¶ 52, 54, 59, 67, 71; 2) to file a pattern of baseless and repetitive complaints with the deliberate intent to use the judicial process itself, as opposed to its outcome, to cause injury, Comp. ¶¶ 1, 5, 13, 29-50; and 3) to sabotage, harass and otherwise interfere with the Candidate and Voters' lawful exercise of their First Amendment rights. Comp. ¶¶ 5, 8, 51-56, 60.

Defendants did not make the requisite showing, and they cannot, because the Supreme Court has firmly established that the First Amendment does not protect such conduct. First, knowingly filing false or misleading complaints is not a valid exercise of the right to petition, because "misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). Second, filing "a pattern of baseless, repetitive claims" is not a valid exercise of the right to petition if a factfinder "conclude[s] that the administrative and judicial processes have

been abused." *Id*. Third, any form of illegal or corrupt conduct in connection with administrative or judicial processes – such as sabotage and manufacturing of evidence – "cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *Id.*

In an attempt to gloss over the Supreme Court's categorical rejection of their position, Defendants asserted that their conduct is protected simply because it involves the filing of lawsuits. Moffett Defs. Spec. Mot. to Dismiss at 6-7. But the Supreme Court has rejected this assertion, too. *See McDonald v. Smith*, 472 U.S. 479, 484 (1985) (holding that right to petition is not absolute and does not protect knowingly false petitions). As the Court explained, "filing a complaint in court is a form of petitioning activity; but 'baseless litigation is not immunized by the First Amendment right to petition.'" *Id.* (quoting *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983)).

Thus, both Maine law and the Supreme Court's First Amendment jurisprudence establish that, in order to invoke the protection of the anti-SLAPP statute, Defendants cannot simply label their conduct as an exercise of the "right to petition," and conclude that the First Amendment protects it. Rather, Defendants were required to show, by pleadings and affidavits, that the claims against them were based on their "petitioning activities alone," and that such claims "have no substantial basis other than or in addition to the petitioning activities." *Demeuse*, 2010 Me. Super. LEXIS 63 at *19. Defendants could not possibly meet this burden, because their specific acts as alleged in the Complaint – filing knowingly false complaints, filing a pattern of baseless and repetitive complaints constituting an abuse of process, and unlawfully interfering with the Candidate and Voters' First Amendment rights – do not constitute valid petitioning conduct. *See McDonald*, 472 U.S. at 484; *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 743; *Cal. Motor*

Transport Co., 404 U.S. at 513. Therefore, Defendants cannot invoke the anti-SLAPP statute's protection.

3. The Superior Court Erroneously Concluded That the Anti-SLAPP Statute Protects Defendants' Conduct Because It Failed to Apply the *Duracraft* Standard.

After reviewing the facts in *Morse Bros.*, *Maietta* and *Schelling*, the Superior Court summarily concluded that "existing case law…makes it clear" that the anti-SLAPP statute protects Defendants' conduct. A12. But in finding that "Defendants have satisfied their initial burden" under the anti-SLAPP statute, A15, the Superior Court completely failed to address the *Duracraft* standard as adopted and applied by the Maine courts. A12-A15. This was error. *See supra* Part I.B.1

The Superior Court's failure to apply the proper standard for determining whether Defendants may invoke the anti-SLAPP statute's protection rendered its analysis of the parties' respective burdens flawed from the outset. Specifically, the Superior Court began its discussion by attributing a position to the Candidate and Voters which they did not advance in the proceedings below, and which they do not endorse now:

> Plaintiffs have argued that Defendants' initial burden of showing that Plaintiffs' suit was based on Defendants' activity as an exercise of their First Amendment Rights carries, implicitly, an extra burden. That is, accepting that all efforts at speech or petitioning, thought of as First Amendment Rights, are not covered, Plaintiffs request the Court to interpret the initial burden on the Defendants to include a showing that the Defendants' questioned activity was covered by the First Amendment, not just that it "qualified" as First Amendment activity. Plaintiffs would have this Court look behind Defendants' activities to discern the 'motivations' behind them.

A13. The Candidate and Voters made no such argument. Rather, the Candidate and Voters' position is that Defendants cannot satisfy their initial burden under the anti-SLAPP statute merely by asserting a First Amendment right, without making a showing that their specific acts, as alleged in the Complaint qualify as petitioning conduct. *See supra* Part I.B.2; Tr. 37-38.

Thus, the relevant inquiry is whether the Candidate and Voters' claims for wrongful use of civil proceedings and abuse of process are based on Defendants' "petitioning activities alone," or whether such claims have a "substantial basis other than or in addition to the petitioning activities." *Demeuse*, 2010 Me. Super. LEXIS 63 at *19. Here, the Candidate and Voters established such a basis, and Defendants made no attempt to dispute it, nor could they. *See supra* Part I.B.2. Therefore, the anti-SLAPP statute does not protect Defendants' conduct. *See Demeuse*, 2010 Me. Super. LEXIS 63 at *18 n.7 ("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") (quoting *Duracraft*, 691 N.E.2d at 943).

C. The Anti-SLAPP Statute Is Unconstitutional as Applied By the Superior Court to Dismiss the Candidate and Voters' Valid Tort Claims.

The Superior Court acknowledged that its decision to dismiss the Candidate and Voters' claims "raises significant questions concerning the appropriate judicial interpretation of [the anti-SLAPP statute] in the context of the Maine and Federal Constitutions and the competing interests represented therein." A25. In fact, the Superior Court's decision rendered the anti-SLAPP statute unconstitutional as applied in this case. As the Court explained in *Duracraft*:

> Despite the apparent purpose of the anti-SLAPP statute to dispose expeditiously of meritless lawsuits that may chill petitioning activity, the statutory language fails to track and implement such an objective. By protecting one party's exercise of its right of petition, unless it can be shown to be sham petitioning, the statute impinges on the adverse party's exercise of its right to petition, even when it is not engaged in sham petitioning. This conundrum is what has troubled judges and bedeviled the statute's application. In addition to its constitutional problems, the statute on its face alters procedural and substantive law in a sweeping way.

Duracraft, 691 N.E.2d at 943. Echoing the concerns raised by the trial court in *Maietta*, that the anti-SLAPP statute is prone to abuse because it can be used "to preempt legitimate complaints," *Maietta*, 2003 Me. Super. LEXIS 248 at *10-*11, the *Duracraft* court observed that "literal

application of the statutory test and procedure would create grave constitutional problems where, as here, the plaintiff's action asserts a legitimate, cognizable claim. … The plaintiff, after all, is simply exercising its right of petition." *Duracraft*, 691 N.E.2d at 943.

The statutory construction adopted in *Duracraft* is therefore necessary to save the anti-SLAPP statute from unconstitutionality. Because the Legislature "did not address concerns over [the anti-SLAPP statute's] breadth and reach, and ignored its potential uses in litigation far different from the typical SLAPP suit," *Duracraft*, 691 N.E.2d at 941, the courts were required to fashion a statutory construction that "avoid[s] unconstitutionality and…preserve[s] as much of the legislative intent as is possible in a fair application of constitutional principles." *Id.* at 943. The *Duracraft* standard accomplishes this purpose by establishing a procedure that "serve[s] to distinguish meritless from meritorious claims, as was intended by the Legislature." *Duracraft*, 691 N.E.2d at 943; *see supra* Part I.B.1.

In light of the constitutional concerns raised by the anti-SLAPP statute, the cases construing it "attempt to restore a modicum of balance to the traditional right of plaintiffs to petition the court for redress of grievances, which is eroded by the anti-SLAPP statute's burden shifting." *Demeuse*, 2010 Me. Super. LEXIS 63 at *16 (citing *Duracraft*, 691 N.E.2d at 943). To that end, Maine courts consider, as a threshold matter, whether the case involves the "typical mischief" that the anti-SLAPP statute was designed to address – *i.e.*, "lawsuits directed at individual citizens of modest means for speaking publicly against development projects." *See Jamison*, 2005 Me. Super. LEXIS 161 at *7 (quoting *Maietta*, 847 A.2d at 1173; *Morse Bros.*, 772 A.2d at 846). Where such "typical mischief" does not appear,

> careful consideration [must] be given before a statute designed to protect one party's exercise of its right to petition is interpreted to impinge on another party's exercise of its own right to petition – specifically, its right to petition the courts for redress of grievances by filing a lawsuit.

Id. at *7-*8. To protect a plaintiff's right to petition the courts for redress of a valid claim, therefore, courts must look beyond a defendant's mere assertions, and examine whether the specific acts complained of constitute petitioning conduct. *See, e.g., id.*; *Demeuse,* 2010 Me. Super. LEXIS 63 at *19; *Liberty,* 2010 Me. Super. LEXIS 2 at *9.

As in *Jamison, Demeuse* and *Liberty,* the Superior Court recognized that this case is "not typical" of a SLAPP suit. A24. By contrast with those cases, however, the Superior Court did not engage in the "careful consideration" necessary to determine whether the anti-SLAPP statute might nevertheless protect Defendants' conduct. A12-A15. Rather, the Superior Court accepted Defendants' mere assertions at face value, *see supra* Part I.B.2, and summarily concluded that Defendants' "activity of challenging nomination petitions in several states is activity manifesting their right to petition." A15. The Superior Court thus failed to make any inquiry into whether the right to petition protects the actual acts alleged in the Complaint – *i.e.*, filing knowingly false complaints, Comp. ¶¶ 52, 54, 59, 67, 71, filing a pattern of baseless and repetitive complaints amounting to an abuse of process, Comp. ¶¶ 1, 5, 13, 29-50, and sabotage and harassment designed to interfere with the Candidate and Voters' lawful exercise of their First Amendment rights. Comp. ¶¶ 5, 8, 51-56, 60. This was error.

The record could hardly provide a more clear confirmation of the Superior Court's error than the following:

> But for the impact of the legal authority in this State relating to 14 M.R.S. § 556, this Court is of the opinion that Plaintiffs' action warranted further analysis and development through the evolution of normal civil litigation process. Defendants … characterize Plaintiffs' litigation as 'meritless.' With all due respect, the merits of Plaintiffs' underlying claims have yet to be evaluated.

A25-A26. The Superior Court thus reached the exact result that provides the *raison d'être* for the *Duracraft* standard – the statutorily compulsory dismissal of otherwise valid claims in violation

of a plaintiff's right to petition. *See Duracraft*, 691 N.E.2d at 943. The Superior Court's application of the anti-SLAPP statute in this case was therefore unconstitutional.

D. The Superior Court Erred By Imposing an Improper Evidentiary Burden on the Candidate and Voters and Failing to Address Evidence in the Record.

In addition to misapplying the anti-SLAPP statute in abrogation of the common law and in violation of the Candidate and Voters' right to petition, the Superior Court also committed clear error by imposing an improper evidentiary burden on the Candidate and Voters. Having concluded that the anti-SLAPP statute applies, the Superior Court determined that the Candidate and Voters' burden was to demonstrate that "Defendants' efforts in the 17 states and before the Federal Election Commission were devoid of any reasonable factual support or any arguable basis in law." A16. But while the Superior Court tracked the language of the anti-SLAPP statute, 14 M.R.S. § 556, its application thereof once again contradicted the case law construing it.

1. The Superior Court Imposed an Improper Evidentiary Burden on the Candidate and Voters.

Because the Complaint alleges that Defendants engaged in a conspiracy, the Superior Court concluded – on that basis alone – that Defendants' conduct must be analyzed as "a single universe of claims." A21. Under this analysis, the Candidate and Voters could not prevail unless they proved, without benefit of discovery, that every single claim and allegation raised in each of the 29 complaints that Defendants filed against them was baseless. A20-A21. In other words, provided that Defendants made just one claim or allegation that was not baseless, the anti-SLAPP statute would immunize all of their conduct. Thus, as the trial court in *Maietta* anticipated, the burden that the Superior Court imposed on the Candidate and Voters was, in fact, "insurmountable, irrespective of the merit of their underlying claims." *Maietta*, 2003 Me. Super. LEXIS 248 at *10-*11.

The Law Court has repeatedly recognized that "a statute in derogation of the common law must be strictly construed." *Ziegler v. American Maize-Products Co.*, 658 A.2d 219, 222 (Me. 1995) (citing *Miller v. Szelenyi*, 546 A.2d 1013, 1020 (Me. 1988)); *see Beaulieu v. The Aube Corp.*, 796 A.2d 683, 689 (Me. 2002); *Batchelder*, 914 A.2d at 1124. In clear violation of that rule, the Superior Court in this case construed the anti-SLAPP statute to immunize tortious conduct, including the knowing filing of false and baseless claims and allegations, provided that such claims and allegations were accompanied by others that were not demonstrably false or baseless. A20-A21. The text of the anti-SLAPP statute cannot support such a sweeping construction. *See supra* Part I.A.1.

Further, the Law Court has rejected the Superior Court's analysis. *See Copp*, 2010 Me. Unpub. LEXIS 3, at *2-*3 (affirming partial denial of special motion to dismiss complaint where defendants "did not meet their initial burden" with respect to certain counts) (citing *Schelling*, 942 A.2d at 1229). As the court explained in *Demeuse*, the Law Court's rejection of the Superior Court's "all or nothing" approach,

> is bolstered by the use of the plural nouns "claims," "counterclaims," and "cross-claims" in the statute. The legislatures could have enacted laws which provided that an anti-SLAPP motion to dismiss may be brought if "any" of the claims against the moving party were based on the moving party's right to petition. Instead, the legislatures made "claims" plural, which suggests that they intended for an anti-SLAPP motion to apply only to those claims against the moving party that were based on the moving party's right to petition.

Demeuse, 2010 Me. Super. LEXIS 63 at *18. Therefore, by requiring that the Candidate and Voters prove that every single claim and allegation made by Defendants was devoid of any reasonable factual support or any arguable basis in law, the Superior Court misconstrued the anti-SLAPP statute, contrary to established rules of construction, the decisions of the Law Court, and the statutory text itself.

2. The Superior Court Failed to Address Almost All of the Evidence That the Candidate and Voters Submitted to Meet Their Evidentiary Burden.

Having misconstrued the anti-SLAPP statute to impose an impossible burden, the Superior Court summarily concluded that the Candidate and Voters "failed to carry their burden of proof." A20. But the Superior Court failed to address almost all of the evidence that they submitted to meet that burden. This was error.

Perhaps most important, the Candidate and Voters submitted several examples of demonstrably false and baseless allegations in formal pleadings filed by Defendants or their agents. A98-A102. The Candidate and Voters also submitted numerous examples of Defendants' own admissions – which they have never disputed – that the purpose of their nationwide effort was to use the burden of litigation itself, as opposed to its outcome, as a means to "drain," "distract," and "neutralize" the Candidate and Voters' campaign. A95. The Candidate and Voters even submitted eyewitness reports demonstrating that in the few states where Defendants prevailed, such as Arizona, Ohio, Oregon and Pennsylvania, their challenges relied on unlawful interference with the Candidate and Voters' campaign, unconstitutional statutes, or both. A104-A105.

The Superior Court did not address any of the foregoing evidence. A16-A21. Indeed, apart from the Maine-specific evidence, the Superior Court reduced its entire analysis of the Candidate and Voters' 275-page evidentiary submission to a pair of footnotes. A20 n.4 & n.5. Therein, the Superior Court explained its conclusion that the anti-SLAPP statute immunizes the baseless claims of "fraud, deceit, forgery and dishonesty" in Defendants' Arkansas complaint, because, it found, "legitimate legal issues" were also raised. A20 n.4. Presumably, the Superior Court applied the same rationale to conclude that the anti-SLAPP statute immunizes Defendants'

other demonstrably false and baseless claims and allegations – none of which the Superior Court addressed. A98-A102. But the anti-SLAPP statute provides no such protection. *See supra* Part I.D.1.

Further, even viewed in the light most favorable to Defendants, *Morse Bros.*, 772 A.2d at 848-49, evidence in the record demonstrates that Defendants made baseless claims and allegations in formal pleadings submitted to Maine courts. A45-A50, A98-A99. Most obvious, Defendants filed a complaint falsely asserting that the Candidate and Voters' "apparent use of a fictitious person as a presidential elector constitutes a misrepresentation to all Maine citizens," A98, when a cursory investigation reveals that the elector was and is a living, breathing, lifelong resident of Washington County, Maine. A119. But if Defendants harbored any doubt as to the elector's existence when they filed their initial complaint, such doubt must have been dispelled when he testified at the hearing on their challenge. A49. Yet, Defendants still appealed the issue of whether he was "fictitious." A49. That appeal was devoid of any reasonable factual support or any arguable basis in law. 14 M.R.S. § 556.

Finally, in reviewing the foregoing evidence, the Superior Court incorrectly stated the basis of Defendants' appeal. A19. Defendants' claim was not, as the Superior Court suggested, that the elector "was not properly identified on the ballot." A19. Rather, Defendants' claim was that the elector was "fictitious," that he did not exist, and that he was invented by the Candidate and Voters to mislead Maine voters – as Defendants' own pleadings confirm. A47, ¶ 59; A98 & Amato Affidavit Exhibit I.

Accordingly, the Candidate and Voters submitted sufficient evidence to satisfy their burden under the anti-SLAPP statute, and the Superior Court erred by dismissing the Complaint.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE MOFFETT DEFENDANTS, COLLECTIVELY, ONE DOLLAR IN ATTORNEYS' FEES.

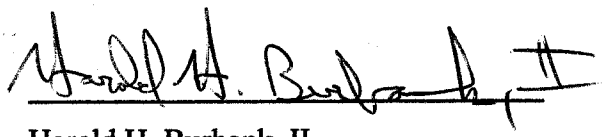
In deciding whether to award attorneys' fees pursuant to the anti-SLAPP statute, a court properly looks to the merits of the underlying claims, because the legislative purpose behind the statute is to discourage meritless litigation only. *See Maietta*, 847 A.2d at 1174. In this case, the Superior Court concluded that "Plaintiffs' action warranted further analysis and development through the evolution of normal civil litigation process," and expressly rejected the Moffett Defendants' assertion that it had found the Candidate and Voters' claims to be "meritless." A26. Therefore, the Superior Court did not abuse its discretion in awarding the Moffett Defendants a total of one dollar in attorneys' fees. *See Maietta*, 847 A.2d at 1174 ("We review the Superior Court's determination of attorney fees for an abuse of discretion").

CONCLUSION

For the foregoing reasons, the Superior Court's Decision and Order entered November 16, 2010 should be reversed, and this case should be remanded to the Superior Court for further proceedings. In addition, the Superior Court's Decision and Order entered December 29, 2010 should be affirmed.

Dated: April 8, 2011

Respectfully submitted,



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I hereby certify that on this 8th day of April, 2011, I served two copies of the foregoing Brief of Appellants by First Class mail, on behalf of all Appellants, upon the following:

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