STATE OF MAINE
WASHINGTON, ss.

SUPERIOR COURT
DOCKET NO. CV-09-57

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

Plaintiffs,

v.

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

Defendants.

DECISION and ORDER

This matter is before the court on a Motion for Attorneys fees, dated November 22, 2010, filed by Defendants The Ballot Project, Inc. and Toby Moffett. This Motion was in response to the Court's decision of November 15, 2010, granting the Motions of all Defendants to dismiss the underlying action pursuant to 14 M.R.S. § 556. Plaintiff has filed its opposition to that Motion.

That statute provides in part that "the court may award the moving party costs and reasonable attorney's fees . . . ." In *Maietta Const., Inc. v Wainwright*, 2004 ME 53, ¶¶ 42-47, 847 A.2d 1169, 1181-1183, the dissenting members of the Law Court opined that the term "may" in the statute might well be interpreted as requiring "the imposition of attorney fees to a party who successfully obtains a dismissal of the SLAPP unless the court finds 'special circumstances.'" *Id.* ¶ 45, 847 A.2d at 1182.

Special Circumstances

As noted in the November 15th decision, the context of SLAPP litigation, particularly in Maine has been to identify that litigation as being motivated to protect the exercise of First Amendment Rights. "The typical mischief that the anti-SLAPP legislation intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects." *Morse Bros., Inc. v. Webster,* 2001 ME 70, ¶ 10, 772 A.2d 842, 846 (quoting *Duracraft Corp. v Holmes Products Corp.*, 427 Mass. 156, 691 N.E.2d 935, 940 (1998)).

It is appropriate to pause to look at the three Maine cases that have dealt with the SLAPP statute to better understand how this statute should be applied in considering the issue of awarding attorney fees. The case of *Maietta v. Wainwright*, 2004 ME 53, 847 A.2d 1169, involved a petitioning citizen (Wainwright) who contested the actions of a developer. *Schelling v. Lindell*, 2008 ME 59, 942 A.2d 1226, involved legislator Lindell responding to a citizen's complaints in a newspaper by publishing a rebuttal. *Morse Bros., Inc. v. Webster*, 2001 ME 70, 772 A.2d 842, involved a suit by a developer against neighboring land owners (Webster) who contested issuing of permits through numerous administrative hearings. The Maine litigation would appear to be reflective of the type of "mischief" that was "typical."

This litigation involving Plaintiff Nader et al. is not 'typical' of a contest between individual citizens where there is a disagreement about development or the appropriateness of a position attributed to an elected official. The character of this litigation brought, by a candidate for President of the United States, against one of the two major political parties, is significantly different in tone and tenor from *Morse* or *Maietta or Schelling.* This case does not pit a wealthy developer against a citizen of modest means, where the developer seeks to punish the citizen for 'getting in the way' and causing frustrating and expensive time delays in moving forward with the 'project.'

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. Those efforts are central to the functioning of this democracy. Justice Studstrup in his 80B appeal

decision,[1] which is part of the record in this case, set the context very appropriately as follows:

> . . .(t)he court must consider the guidance provided by the United State Supreme court and Maine's Supreme Judicial Court in similar ballot access cases. The analysis begins with the First Section of the Second Article of the United States Constitution, which designates that the States have the responsibility for selecting presidential electors and have broad powers in determining that selection process. However, these broad powers to regulate the electoral process are subject to other constitutional provisions such as the right to political association, effective voting and Equal Protection. *Williams v Rhodes*, 393 U.S. 23, 29-30 (1968). These contrasting constitutional rights must be given great weight, for, as the Supreme Court has stated, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) The State may attempt to prevent frivolous candidacies from getting to the ballot. However, this legitimate state interest must be balanced with the candidate's interest in the availability of political opportunity. *Lubin v. Parrish*, 415 U.S. 709, 715(1974).

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 involving Candidate Nader, 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. Whether this Court's decision of November 15th provides the opportunity for that to happen is for others to decide.

But for the impact of legal authority in this State relating to 14 M.R.S. § 556, this Court is of the opinion

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[1] *Melanson v. Department of the Secretary of State*, 2004 Me. Super. LEXIS 233, *3-*4 (Sept. 27, 2004), involved an appeal by the Maine Democratic Chair from the decision of the Secretary of State, denying her challenge to Mr. Nader appearing on the Maine ballot.

that Plaintiffs' action warranted further analysis and development through the evolution of normal civil litigation process. Defendants Ballot Project and Moffett characterize Plaintiffs' litigation as 'meritless.' With all due respect, the merits of Plaintiffs' underlying claims have yet to be evaluated.

Given both the legal and factual context of this litigation as demonstrated by the filings on behalf of the Plaintiffs and Defendants, this Court is of the opinion that the special circumstances of this case warrant the granting of Motion for fees filed by Defendants, The Ballot Project, Inc., and Toby Moffitt. However the same evaluation persuades this Court that an appropriate award of attorney fees is in the amount of One Dollar ($1), in total, to both Defendants. In making this award, this Court relies on the language found in 14 M.R.S. § 556 that by use of the work "may," the legislature intended that such an award of fees and costs would be within the discretion of the trial court. This conclusion coincides with the one found by the *Maietta* majority and reflects the prevailing view that an award of attorneys fees under 14 M.R.S. § 556 is "permissive" and "not presumptive." *See Maietta*, 2004 ME 53, ¶ 20, 847 A.2d at 1176 ("Just as we will not infer attorney fees in the absence of an express statutory grant, neither will we infer a presumption of attorney fees in the face of a permissive statutory grant.")

The entry is:

1. The Motion for Fees filed by Defendants The Ballot Project, Inc., and Toby Moffitt is GRANTED and the Court awards to the moving parties a total of $1 in fees and costs.

2. At the direction of the Court, this Order shall be incorporated into the docket by reference pursuant to M.R. Civ. P. 79(a).

December 28, 2010

Kevin M. Cuddy
Justice, Superior Court