STATE OF MAINE
SAGADAHOC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.: BATSC-CV-2018-24

MATTHEW POLLACK
and
JANE QUIRION

Plaintiffs,

v.

JESSICA FOURNIER

Defendant.

JUDGMENT ON SPECIAL MOTION TO DISMISS

This matter is before the court on the Defendant's Special Motion to Dismiss brought pursuant to 14 M.R.S. § 556.

BACKGROUND

Fournier brings her Special Motion to Dismiss pursuant to 14 M.R.S. § 556, the Anti-Strategic Lawsuit Against Public Participation (SLAPP) Statute, on all four counts of Plaintiffs' Amended Complaint 3.[1] Count I, abuse of process, is brought by both Pollack and Quirion. Its basis is the Notice of Claim (Notice) dated August 3, 2012, that Fournier served on the Plaintiffs pursuant to 14 M.R.S. § 1602(B)(5).[2] In the Notice, Fournier asserted claims of defamation, negligent and/or intentional infliction of emotional distress, and interference with contractual relations. The remaining counts in

[1] *See* Order on Defendant's Second Motion to Dismiss of even date for a more in depth description of the factual background in this case.

[2] "Prejudgment interest accrues from the time of notice of claim setting forth under oath the cause of action, served personally or by registered or certified mail upon the defendant until the date on which an order of judgment is entered."

Amended Complaint 3 are asserted by Quirion only. Counts II and III allege wrongful use of civil proceedings. Count II is based upon Fournier having "procured" a civil harassment proceeding by Caroline Thibeault (Thibeault).[3] Count III is based on Fournier's harassment notices and civil harassment proceeding that she initiated on her own behalf. Finally, Count IV is an alleged violation of the Maine Civil Rights Act (MCRA) based on the threat of arrest contained within the harassment notices obtained from the Topsham Police Department (TPD) by Fournier, Thibeault, and Rebecca Brooks (Brooks) that were subsequently served on Quirion.

DISCUSSION

SLAPP litigation is generally without merit and filed to dissuade or punish the exercise of a defendant's First Amendment Rights. *Morse Bros. v. Webster*, 2001 ME 70, ¶ 10, 772 A.2d 842. Delay, distraction, punishment, or the defendant's financial burden in defending the suit are the plaintiff's primary goals in a SLAPP case. *Gaudette v. Davis*, 2017 ME 86, ¶ 4, 160 A.3d 1190, 160 A.3d 1190; *Morse Bros.*, 2001 ME 70, ¶ 10, 772 A.2d 842. To deter this behavior, in 1995, the Maine Legislature enacted 14 M.R.S. § 556, the anti-SLAPP statute. The statute permits the filing of a special motion to dismiss when a moving party asserts that the civil claims against her are based on her right of petition under either the state or federal Constitution. § 556. The special motion to dismiss is designed to "minimize the litigation costs associated with the defense of such meritless suits." *Schelling v. Lindell*, 2008 ME 59, ¶ 6, 942 A.2d 1226. Section 556 is employed in more than just run of the mill zoning dispute cases. "Recent precedent suggests that an anti-SLAPP motion is appropriate when the plaintiff's lawsuit or claim is a retaliatory effort

[3] Fournier gave a "Victim Impact Statement" to the Topsham Police Department in support of Thibeault and Brooks (mentioned below) requesting harassment notices against Quirion.

based solely on the moving party's petitioning conduct." *Town of Madawaska v. Cayer*, 2014 ME 121, ¶ 13, 103 A.3d 547. "Accordingly, SLAPP lawsuits have most often taken the form of ordinary tort claims, including defamation, business torts, conspiracy, constitutional-civil rights violations, and nuisance claims." *Id.* n.6.

The statute contemplates a burden shifting framework that allows the court to expedite the process of dismissing a meritless case and mandates that the court grant the special motion unless the plaintiff meets his burden on certain issues. § 556. Over the years, caselaw has refined this burden shifting framework in an attempt to balance the plaintiff's right of access to the court to seek redress for the very same actions that the defendant declares is an exercise of her First Amendment right. *Gaudette*, 2017 ME 86, ¶ 6, 160 A.3d 1190.

I. The Anti-SLAPP Burden Shifting Framework.

Gaudette provides the trial court with a three-step burden shifting framework to determine whether a defendant's special motion to dismiss under section 556 should be granted. *Id.* ¶¶ 16-22. First, the defendant, as the moving party, has the burden to show based on pleadings and affidavits that the anti-SLAPP statute applies by demonstrating that the claims against her are based on her constitutional right to petition. *Id.* ¶ 16. This petitioning activity is a question of law for the court to decide. *Id.* If the defendant does not meet her burden to show that the plaintiff's claims are based on her petitioning activity, "the court must deny the special motion to dismiss without any need to review any opposition by the plaintiff." *Id.*

Next, if the defendant has met her burden to show that the claims are based on her petitioning activity, the court then considers the plaintiff's opposition. *Id.* ¶ 17. In his opposition, the plaintiff must present prima facie evidence, via pleadings and affidavits, "that the defendant's petitioning activity was devoid of any reasonable factual support

or any arguable basis in law *and* that the defendant's petitioning activity caused actual injury to the plaintiff." *Id.* (quoting *Nader v. Me. Democratic Party* (*Nader I*), 2012 ME 57, ¶¶ 20-25, 41 A.3d 551 (internal quotation omitted). If the plaintiff does not meet his prima facie burden, whether due to lack of evidence "on either element or based on some other legal insufficiency, the special motion to dismiss must be granted, either partially or wholly, with no additional procedure." *Gaudette*, 2017 ME 86, ¶ 17, 160 A.3d 1190.

Finally, in departure from *Nader I*, and applicable only if the plaintiff meets his prima facie burden regarding "any or all of the defendant's petitioning activities, the special motion to dismiss is not then automatically denied." *Id.* ¶ 18. Instead, an "additional procedural component" requires the trial court, upon request of either the plaintiff or the defendant, to allow the parties "to undertake a brief period of limited discovery, the terms of which are determined by the court after a case management hearing." *Id.* Next, after the discovery period, the court is required to hold an evidentiary hearing. *Id.* At the hearing, the plaintiff has the burden to show by a preponderance of the evidence that the defendant's petitioning activity was without factual support or any arguable legal basis and that the plaintiff suffered actual injury as a result of the petitioning activity. *Id.* If neither party avails himself of the evidentiary hearing, the court must decide whether the plaintiff met his burden by a preponderance of the evidence based solely on the pleadings and affidavits submitted by both parties for and against the special motion to dismiss. *Id.*

II. Does Fournier Meet Her Burden to Show that Her Actions were Petitioning Within the Meaning of Section 556?

In this first step of the burden shifting procedure, Fournier must show that her

activities amount to petitioning. The Legislature has protected petitioning activity by broadly defining it under section 556. *Desjardins v. Reynolds*, 2017 ME 99, ¶ 18, 162 A.3d 228. Section 556 clarifies that "a party's exercise of its right of petition"

> means any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other 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.

(emphases added). In its broad construction of petitioning activities, the Law Court has determined that petitioning includes a letter written to a newspaper for the purpose of "expand[ing] the public consideration of a controversial issue recently considered by the Legislature," *Schelling v. Lindell*, 2008 ME 59, ¶ 12, 942 A.2d 1226, and letters to a newspaper to influence the outcome in a dispute between a city and a contractor, *Maietta Constr., Inc. v. Wainwright*, 2004 ME 53, ¶ 7, 847 A.2d 1169. Regarding reports to law enforcement, the Court stated that "there can be no legitimate argument" that a defendant's report to a sheriff's office of a town official's alleged history of arriving at town meetings drunk after having driven his vehicle there, "qualify as petitioning activity." *Desjardins*, 2017 ME 99, ¶ 11, 162 A.3d 228. Additionally, the District Court of Maine has stated that reports to law enforcement could clearly be covered by section 556. *Lynch v. Christie*, 815 F. Supp. 2d 341, 346 n.6 (2011) (favorably cited by *Camden Nat'l Bank v. Weintraub*, 2016 ME 101, ¶ 4, 143 A.3d 788).

A. Are Fournier's Activities Petitioning Within the Meaning of Section 556?

The activities that Plaintiffs take issue with, but Fournier claims are petitioning are (1) serving them with the Notice, and (2) "procuring" civil proceedings through Thibeault

by way of a harassment notice and temporary protection order.[4] Whether these actions amount to petitioning are discussed below.

1. **Does Fournier's Notice of Claim Amount to Petitioning?**

Fournier argues that her Notice is petitioning activity, in part based on the Plaintiffs' assertions in their opposition to her Second Motion to Dismiss that the Notice is a "court document or process." Plaintiffs maintain that the Notice does not fit within the definition of petitioning set forth in Section 556, specifically that it was not "reasonably likely to encourage consideration or review" by a governmental body because it was never communicated to any person that might bring it to that body's attention. Moreover, they argue that it actually did not encourage any consideration or review of Fournier's claims.

The Notice is petitioning activity. The Law Court has recognized the broad definition that the Legislature has provided for petitioning activity. It is reasonably likely that the Notice could eventually lead to consideration or review by a judicial body. The Law Court has never held that activity cannot be petitioning because it does not actually lead to review by a governmental body. Because the Notice was sent pursuant to statute, and could have reasonably led to review or consideration by a judicial body, it is petitioning activity that falls within section 556.

2. **Do Fournier's Actions Relating to Thibeault's Protection From Harassment Requests and Harassment Notices that She Obtained from the TPD Amount to Petitioning?**

Preliminarily Fournier argues, based on the allegations listed in Plaintiffs' Amended Complaint 3, that her providing a written "Victim Impact Statement" to the

[4] Fournier asserts that the Plaintiffs' claim is based on her providing the Victim Impact Statement to the police, but the Plaintiffs assert that their claim is based on her encouraging and convincing Thibeault to commence and carry on the civil proceeding. This is discussed below.

TPD in support of Thibeault's and Brooks's harassment notices against Quirion is petitioning as it is a statement submitted to the executive body.[5] Fournier is correct that a victim impact statement provided to police is petitioning under the protection of section 556. However, in response, the Plaintiffs state that Count II is "not based on the victim impact statement at all. It is based on Fournier's actions in convincing Thibeault to commence an action for a protection from harassment order." In a footnote to this contention they maintain that their claim is "based on Fournier's encouragement of *Thibeault's* exercise of *her* right to petition."

Plaintiffs point to *Gaudette*, where a newspaper published an article written and edited by newspaper staff, but contained many statements of a member of the public. 2017 ME 87, ¶¶ 4-6, 160 A.3d 539. The newspaper filed a special motion to dismiss the plaintiffs' complaint, which the trial court granted. *Id.* ¶ 8. On appeal, the newspaper argued that the article was petitioning activity under section 556. *Id.* ¶ 9. The Court emphasized that the anti-SLAPP statute "applies when the moving party asserts that claims 'against the moving party are based on the moving party's exercise of *the moving party's* right of petition.'" *Id.* ¶ 15 (quoting 14 M.R.S. § 556). Therefore, "[u]nless a newspaper is petitioning on its own behalf, the newspaper is not exercising its own right of petition." *Gaudette*, 2017 ME 87, ¶ 15, 160 A.3d 539. A defendant only engages in petitioning activity when she is exercising her own right to petition.[6] *See id.* ¶ 17.

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[5] Plaintiffs concede that Fournier obtaining her own harassment notices from the TPD and a temporary Protection From Harassment Order ("PFH") is petitioning covered by the statute.

[6] The Law Court alluded that in a prior case it allowed an attorney's statements on behalf of a client to amount to that client's petitioning under section 556. *Gaudette*, 2017 ME 87, ¶ 16, 160 A.3d 539. However, it explained that an attorney-client relationship includes agency duties, whereas a newspaper is unlikely to have any relationship, let alone a special relationship, with the subjects of its articles. Regardless, there is no special relationship alleged here between Fournier and Thibeault or Brooks.

In response, Fournier points to the thin allegations within Amended Complaint 3 which she claims do not state a plausible claim for relief, or show that Fournier "procured" or "caused" Thibeault or Brooks to initiate harassment actions against the Plaintiffs. The following paragraphs are the extent of the allegations contained within the Complaint to support that Fournier procured the civil proceedings.

- "Fournier also informed [] Thibeault and [] Brooks, parents of two of Fournier's then-students, of Quirion's presence at Target at the same time as the field trips." ¶ 57.

- "On June 5, 2014, Fournier gave to Topsham Police Department a 'Victim Impact Statement' in support of the requests of Thibeault and Brooks for harassment notices." ¶ 67.

- "Fournier procured the civil proceedings by Thibeault without probable cause to believe that Quirion had harassed Thibeault of her son." ¶ 109.

- "Quirion's constitutionally and statutorily protected activities were a substantial and motivating factor in Fournier's causing Thibeault and Brooks to obtain a harassment notice from the Topsham Police Department . . . ." ¶ 127.

Despite the Complaint being light on how Fournier allegedly procured, convinced, or encouraged Thibeault and Brooks to obtain civil proceedings against the Plaintiffs, Maine's notice pleading requirements are forgiving. *Desjardins v. Reynolds*, 2017 ME 99, 17, 162 A.3d 228. Notwithstanding these forgiving requirements, a special motion to dismiss under section 556 is "a more precise mechanism." *Id.* Litigants are "limited in their anti-SLAPP filings to the universe of facts as actually alleged in the plaintiff's complaint" and may not state new allegations for the first time in response to a special motion to dismiss. *Id.* ¶ 19.

Here, Amended Complaint 3 very briefly alleges that Fournier procured the harassment actions. Therefore, the Plaintiffs are not stating new allegations, but are fleshing out the allegations in their Complaint. Although Fournier is correct that a Victim Impact Statement provided to the TPD is petitioning, to the extent that Plaintiffs allege

that she convinced Thibeault or Brooks to obtain civil actions against the Plaintiffs, that is them exercising their right of petition, not Fournier exercising hers. Therefore, Count II is not based on petitioning activity. Fournier's special motion to dismiss is denied so far as it relates to the Plaintiffs' allegations that she procured civil proceedings via Thibeault.[7]

III. Do Plaintiffs Meet Their Burden to Show Prima Facie Evidence that Fournier's Exercise of Her Right to Petition was (1) Devoid of Any Reasonable Factual Support or Any Arguable basis in Law; and (2) That it Caused Them Actual Injury?

At the next step in the burden shifting framework, the court must consider the Plaintiffs' opposition to the Special Motion to Dismiss. The burden shifts to Plaintiffs to show two things regarding Fournier's petitioning. First, they must show through their pleadings and affidavits "prima facie evidence that the defendant's petitioning activity was devoid of any reasonable factual support or any arguable basis in law." *Gaudette*, 2017 ME 86, ¶ 17, 160 A.3d 1190. Second, they must show that the defendant's exercise of her right to petition caused them actual injury. *Id.* A plaintiff may fail to meet his burden by an absence of evidence on either of the two elements. *Id.* If the plaintiff does not meet his burden, the special motion must be granted either partially or wholly. *Id.*

Similar to any other motion to dismiss, and in line with section 556, the court "is permitted to infer that the allegations in the [plaintiff's] pleading and factual statements in affidavits in its response to a special motion to dismiss are true." *Camden Nat'l Bank v. Weintraub*, 2016 ME 101, ¶ 11, 143 A.3d 788. A plaintiff showing "some evidence" satisfies

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[7] Because Count IV, violation of the MCRA, is based in part on Thibeault's and Brooks' harassment notices from the TPD that contained the threat of arrest, the court also denies Fournier's Special Motion to Dismiss as it relates to those notices because they are not based on Fournier's petitioning. This Judgment later addresses whether Count IV is able to go forward to the extent that it is based on Fournier's own petitioning activity in obtaining the harassment notices and PFH on her own behalf.

the burden of establishing a prima facie case. *Id.* The prima facie standard is low, and "does not depend on the reliability or the credibility of evidence, all of which may be considered at some later time in the process." *Id.* In *Gaudette*, the Court described the plaintiff's burden under section 566 as requiring him to show "that the petitioning activity was baseless."[8] 2017 ME 86, ¶ 15, 160 A.3d 1190. Finally, the level of evidence necessary at this stage in the burden shifting framework has been recently described as "meeting merely a burden of producing evidence that, *if* believed, would satisfy the greater burden of persuasion." *Davis v. McGuire*, 2018 ME 72, ¶ 18, 186 A.3d 837.

A. Do Plaintiffs Meet Their Burden Regarding Fournier's Petitioning?

This judgment now addresses whether Plaintiffs can meet their burden to show that Fournier's Notice of Claim and her PFH and harassment actions were devoid of any factual support or any arguable basis in law.

1. Do the Plaintiffs Show Some Evidence that Fournier's Notice of Claim was Devoid of Any Factual Support or Arguable Basis in Law?

The Plaintiffs argue that because Fournier did not read the letter sent from Quirion to the District[9] that contained the allegedly defamatory statements, she had no reasonable factual basis for her Notice. They additionally contend that she had no arguable legal basis for the claims because Fournier cannot meet the elements of the torts she alleged in the Notice.

The court is unconvinced by Plaintiffs' argument that because Fournier did not read the letter, she therefore cannot have had any reasonable factual support for her

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[8] Because of *Gaudette*'s clarification of the burden shifting analysis, now, when conflicting facts are alleged there is no requirement to automatically grant or deny the special motion to dismiss as was the case in *Morse Brothers* and *Nader I* respectively. *Id.* ¶ 13.

[9] Fournier is employed by Maine School Administrative District 75 (the District).

claims. A supervisor told her that the claims were accusatory, would be upsetting, and were potentially "slanderous."[10] A District attorney wrote to the Plaintiffs stating that she thought the statements in the letter were defamation per se. Fournier also provided the letter to her own attorney who prepared the Notice based on it. Just because Fournier did not read the letter herself until sometime later does not mean that her Notice was without factual support or an arguable basis in the law.[11]

Plaintiffs next allege that Fournier had no legal basis for any of the claims in the Notice. They go through the elements of each of Fournier's claims and state why Fournier cannot prove them. For the defamation claim, they argue that there was no false statement, their statements were privileged, and they were not made with malicious intent. Regarding intentional infliction of emotional distress, they contend that letters to a supervisor alleging an employee's incompetence cannot amount to extreme and outrageous conduct which would support an emotional distress claim. For negligent infliction of emotional distress (NIED), they assert that because Plaintiffs owed no special duty to Fournier, and because she did not witness physical harm to someone closely related to her, that there is no way she could maintain a claim for NIED. Finally, regarding

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[10] Fournier supports her motion with many portions of the proceedings from the prior suits – trial testimony, depositions, prior complaints, and so on. Plaintiffs take issue with this as Fournier does not provide her own affidavit addressing each of these documents. Her attorney, however, submitted an affidavit that the materials are true and correct copies from the prior proceedings and available to the public. Plaintiffs do not raise any concerns to the documents' trustworthiness, and, in fact, most of the information contained in those documents was given under oath. The court has considered parts of these documents in coming to its conclusion.

[11] Plaintiffs contend that because neither the District nor Fournier claim that their statements about Fournier being incompetent, unable to communicate effectively with Quirion and Pollack, dishonest, retaliatory, and intentionally harming B.P. are untrue that Fournier had no factual basis for her defamation claim. Despite Plaintiffs' contention, Fournier's failure to state that these allegations are false does not amount to "some evidence" that her petitioning was without a factual basis.

interference with contractual relations, Plaintiffs argue that Fournier never alleged fraud or intimidation on their behalf, and point out that Fournier kept her job, and received tenure even after Quirion's letters to the District.

Despite Plaintiffs' contentions, Fournier was not required to support her Notice with specific allegations in support of her claims that would withstand potential legal defenses asserted by them. That is, however, exactly what the Plaintiffs present for "some evidence" that Fournier's petitioning was without any arguable basis in law. Plaintiffs' assertions support plausible defenses to the claims, or point out some of the claims' weaknesses. They do not offer "some evidence" to show that Fournier's claims were devoid of any arguable basis in the law. Therefore, the Plaintiffs have not met their burden to show "some evidence" that the Notice was devoid of any reasonable factual support or arguable basis in law.

2. Do the Plaintiffs Show Some Evidence that Fournier's Harassment Actions were Devoid of Any Factual Support or Arguable Basis in Law?

The Plaintiffs argue that Fournier had no factual support or arguable basis in law to seek a harassment notice from the TPD against Quirion, or to initiate a PFH proceeding in the District Court. They contend that because Fournier occasionally used the word "coincidence" to describe when Quirion was at the same locations as her class field trips, [12] and behind the school bus, that her seeking the actions was without factual basis. Additionally, they maintain that Fournier's affidavit in support of her temporary PFH was inconsistent with her testimony at the hearing, and she therefore had no factual or legal support for her claims. Further, any fear she had of the Plaintiffs was not the type that the statute is designed to protect.

[12] Quirion's son, B.P., did not attend these field trips.

Fournier asserts that because a District Court judge granted her a temporary PFH after reviewing her complaint and affidavit shows that she had factual support and an arguable basis in law.[13] She also points to the observations of other parents and the bus driver who described Quirion's presence at the field trips and behind the bus as disturbing, creepy, that it occurred frequently, and was not coincidental. They also point to Plaintiffs' Amended Complaint 3 which provides that "most of the time" Quirion being in the same place as the field trips was coincidental, to infer that sometimes Quirion's presence was intentional.

After comparing Fournier's affidavit in support of her temporary PFH with her hearing testimony, the court finds no meaningful inconsistencies. The affidavit outlines how Fournier used to teach B.P., she no longer teaches B.P. at Quirion's request, and lists eleven instances from 2012 through 2014 when she has seen Quirion on field trips that B.P. did not attend, or when she saw Quirion acting peculiarly on school grounds. Although the District Court judge ultimately granted Quirion's motion for judgment as a matter of law after Fournier presented her evidence at the PFH hearing[14] and declined to grant her a permanent PFH, does not mean that her request for such was without factual support or any arguable basis in law. Indeed, the judge questioned Fournier on whether she was basing her claims on Quirion intending to cause her emotional distress

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[13] The court may enter a temporary order if "[i]t appears clearly from a verified complaint or an affidavit accompanying the complaint that . . . the plaintiff . . . may be in immediate and present danger of physical abuse from the defendant or in immediate and present danger of suffering extreme emotional distress as a result of the defendant's conduct . . . ." 5 M.R.S. § 4654(2)(A)(1).

[14] Fournier was represented during this hearing. Attorney Amber Collins provided a declaration that she is familiar with PFH proceedings, she assisted Fournier in preparing and filing the complaint against Quirion, and she believed that Fournier's claim had both a factual and legal basis to seek the PFH. Though not dispositive, this supports the notion that Fournier had factual support and an arguable basis in the law to seek a temporary PFH.

under the statute. Ultimately, the judge determined that Quirion's actions did not violate the law and that Fournier could not show that Quirion intended to cause her fear or intimidation, or that she intended to cause Fournier emotional distress. Notwithstanding the grant of judgment as a matter of law, insufficient evidence to successfully obtain a PFH is different than a request for a PFH being wholly devoid of factual or legal support.

Although not dispositive, the court finds weight in an attorney representing Fournier in filing for and seeking a PFH, and in a judge granting her a temporary PFH, even if a permanent order was denied. Despite the Plaintiffs' showing that Fournier sometimes referred to Quirion being in the same place as her field trips as being a "coincidence," the court determined that is not sufficient to meet their burden to show "some evidence" that Fournier's seeking a PFH and a harassment notice from the TPD were devoid of any factual support or arguable basis in law.

Because the court has determined that Fournier's Notice of Claim and her petitioning for harassment notices and a PFH has factual support and an arguable basis in law, her Special Motion to Dismiss is granted for Counts I, III, and to the extent it is based on Fournier's petitioning actions, Count IV. Despite the partial grant of the Special Motion, the court continues its analysis because it has also determined that the Plaintiffs have not met their burden to show that Fournier's petitioning activities caused them actual injury. A discussion of actual injury follows.

IV. Do Plaintiffs Show Some Evidence of Actual Injury Caused by Fournier's Petitioning?

The second stage of the burden shifting analysis requires the plaintiff to show not only that the defendant's petitioning was devoid of reasonable factual support or any arguable basis in law, but also that the defendant's petitioning caused him actual injury. *Camden Nat'l Bank v. Weintraub*, 2016 ME 101, ¶ 11, 143 A.3d 788. The Law Court has

interpreted section 556's actual injury standard to be met when there is evidence in the record that allows damages in a definite amount to "be determined with reasonable certainty." *Id.* ¶ 12 (quoting *Schelling v. Lindell*, 2008 ME 59, ¶ 17, 942 A.2d 1226). Reasonable certainty is distinguished from mathematical certainty, but the damages amount "cannot be left to mere guess or conjecture." *Id.* "[C]laimed loss of sleep, mental suffering, and embarrassment are not legally sufficient to meet the actual injury requirement imposed by the anti-SLAPP statute." *Schelling*, 2008 ME 59, ¶ 18, 942 A.2d 1226. Damages are not allowed for emotional distress alone, "unless it is so severe that no reasonable person could be expected to endure it." *Id.* ¶ 25 (internal quotations omitted).

In this case, the Plaintiffs concede that they have not shown sufficient emotional harm to qualify as actual injury. However, they maintain that attorney fees are an actual injury sufficient to defeat a special motion to dismiss. Fournier argues that Plaintiffs are both licensed attorneys who regularly represent themselves, therefore they cannot claim attorney fees as actual injury. She further maintains that the Plaintiffs are not entitled to attorney fees for responding to her Notice. Also, because attorney fees are not recoverable under the common law of defamation or intentional infliction of emotional distress even if Fournier had filed suit, they cannot support a finding of actual injury as they are not compensable under the law.

The Law Court has not spoken directly to whether attorney fees amount to actual injury for purposes of an anti-SLAPP special motion to dismiss. However, what they have stated about attorney fees supports Fournier's position. The Court has made clear that in the context of a special motion, "the common law doctrines associated with libel and slander[,]" such as damages per se, are not available or sufficient to meet the actual injury prong of the burden shifting framework under section 556. *Schelling v. Lindell*, 2008 ME

59, ¶ 27, 942 A.2d 1226. The Court briefly addressed pre-litigation attorney fees in *Desjardins*. There, in his opposition to the special motion to dismiss, the plaintiff claimed actual injury in the form of a $500 expenditure that he paid to an attorney he hired to investigate reports to a sheriff's office. 2017 ME 99, ¶ 15, 162 A.3d 228. However, in his lengthy complaint, he mentioned this retaining of counsel for investigation purposes only briefly, and did not seek damages for the cost. *Id.* ¶ 16. The Court concluded that the plaintiff was "alleging a new form of harm for the first time solely in response to the special motion to dismiss" and was not permitted to expand the scope of litigation in response to the special motion. *Id.* ¶ 19.

Specifically, the *Desjardins* Court noted that "[b]ecause [plaintiff's] pre-litigation investigation expenditure constitutes no part of his request for damages in his complaint, we reject that cost as an 'actual injury' within the meaning of section 556 at the special motion to dismiss stage." *Id.* The Court continued on in a footnote that because the Plaintiff had not adequately pled injury in his complaint, he did not meet his burden and therefore it "need not consider whether such self-generated damages otherwise can satisfy the 'actual injury' component of an anti-SLAPP opposition." *Id.* ¶ 19 n.5.

The case before the court is slightly different, as the Plaintiffs have alleged damages in the form of attorney fees from the get-go.[15] Similar to the investigation in *Desjardins*, however, responding to Fournier' Notice was a pre-litigation expenditure. Moreover, the Plaintiffs responded to her Notice by serving their own notice of claim on her. Although Plaintiffs were within their legal right to serve their own notice of claim, it

[15] Fournier claims that the Plaintiffs never alleged attorney fees for Counts II and III, therefore they cannot show actual injury and those claims should be dismissed out of hand. However, as Plaintiffs point out, they alleged damages in the form of attorney fees in paragraph 97 of Amended Complaint 3, which they incorporated by reference in Counts II and III.

was not a required response, and therefore is akin to "self-generated damages." Given this fact pattern and what the *Desjardins* Court stated, attorney fees for the Notice do not amount to actual injury within the meaning of section 556.

It is unknown exactly what attorney fees Plaintiffs have paid in relation to Fournier's harassment actions against Quirion.[16] As Fournier points out, Plaintiffs often represent themselves, but the court notes that Quirion was represented by another attorney during the PFH hearing. However, Fournier is correct that attorney fees are generally not recoverable as damages in tort cases, except in narrow circumstances, or when special exceptions, such as an existing fiduciary duty, apply. *See Estate of Weatherbee*, 2014 ME 73, ¶ 13, 93 A.3d 248 (attorney fees could not be sought when there was no alleged abuse of process that would justify the common law exception to the American Rule); *Murphy v. Murphy*, 1997 ME 103, ¶ 15, 694 A.2d 932 ("Although a prevailing litigant generally has no right to recover attorney fees, a court may award attorney fees for some kinds of tortious conduct . . . including a breach of a fiduciary duty.") (internal citation omitted)).

Plaintiffs have not met their burden to show that Fournier's petitioning activity caused them actual injury. Any response to Fournier's Notice was a pre-litigation expenditure that was self-generated. In relation to Fournier's harassment actions, no exception applies to the general rule that attorney fees are not recoverable. To allow the Plaintiffs to recover attorney fees would allow recovery in an instance where the Legislature has declared it impermissible, as the District Court judge did not determine

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[16] Fournier directs the court to the PFH statute, which states that attorney fees are only recoverable "[i]f a judgment is entered against the plaintiff and the court finds that the complaint is frivolous . . . ." 5 M.R.S. § 4655 (1-A). Although Fournier was unsuccessful, the court, in its Order on Motion for Findings and Conclusions did not find her complaint frivolous.

that Fournier's complaint seeking a PFH was frivolous. If the Plaintiffs could claim attorney fees as actual injury, it would circumvent 5 M.R.S. § 4655(1-A). For all the foregoing reasons, The court determines that the Plaintiffs have not met their burden to show actual injury, within the meaning of section 556, that was caused by Fournier's petitioning activity.

CONCLUSION

The court grants Fournier's Special Motion to Dismiss as it relates to Count I, abuse of process for the Notice of Claim, and Count III, wrongful use of civil proceedings for Fournier's harassment notices and actions against Quirion. The court denies the Special Motion to Dismiss for Count II, Fournier's procurement of Thibeault's harassment actions against Quirion. Finally, regarding Count IV, violation of the MCRA, the court grants Fournier's Motion as it relates to Fournier's harassment actions against Quirion, but denies it to the extent it is based upon Thibeault's harassment actions.

The Defendant is awarded costs and attorney's fees.

The Clerk is directed to incorporate this Order by reference into the docket for this case, pursuant to Rule 79(a), Maine Rules of Civil Procedure.

Dated: June 11, 2019

Daniel I. Billings
Justice, Maine Superior Court