

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

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NO. SJC-12150

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477 HARRISON AVE., LLC  
Plaintiff-Appellee,

v.

JACE BOSTON, LLC  
AND ARTHUR LEON  
Defendants-Appellants.

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APPEAL FROM DENIAL OF SPECIAL MOTION TO DISMISS  
PURSUANT TO MASS. GEN. LAWS CH. 231, §59H  
BY THE SUPERIOR COURT FOR SUFFOLK COUNTY

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REPLY BRIEF OF APPELLANTS  
JACE BOSTON, LLC AND ARTHUR LEON

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Defendants, consistent with the purpose and language of the anti-SLAPP statute, have properly invoked the statute to avoid being forced to defend themselves against claims which are based only on their petitioning activity.<sup>1</sup> The timing of the filing of this action shows that its purpose was to chill Defendants' petitioning activity, namely, their opposition to the variances 477 Harrison Ave. needed to add a sixth floor and three luxury penthouses to its property which it had already redeveloped as of right into commercial space and 12 luxury residential units. R. at A90. 477 Harrison Ave., knowing that Defendants opposed the zoning relief it sought, filed its original complaint the day before the Board of Appeal's hearing on 477 Harrison Ave.'s requested variance. R. at A3; A8; A255-A257. Moreover, within days of Defendants' filing the 2015 Zoning Appeal, 477 Harrison Ave. filed the Amended Complaint to add this further act of petitioning as a basis for its claims. R. at A3; A793.

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<sup>1</sup> Defendants incorporate by reference the definitions and citation forms defined and used in their principal brief.

**A. DEFENDANTS SATISFIED THEIR BURDEN TO SHOW THAT  
477 HARRISON AVE.'S CLAIMS ARE BASED ONLY ON  
DEFENDANTS' PETITIONING ACTIVITY.**

The premise of a number of 477 Harrison Ave.'s arguments is that the anti-SLAPP statute cannot be understood or applied so as to eliminate a claim for abuse of process. Defendants do not contend that the anti-SLAPP statute eliminates claims for abuse of process. That being said, the anti-SLAPP statute and the Court's interpretation of it make clear that a party moving to dismiss a claim for abuse of process under the anti-SLAPP statute necessarily satisfies its burden under the first prong. Because process - i.e., petitioning activity - is an indispensable element of an abuse of process claim, there cannot be a substantial other basis which can independently support the claim. No unfairness results from shifting the burden to the non-moving party to show that the petitioning activity which forms the basis of its abuse of process claim was devoid of a reasonable basis in fact or law and caused the non-moving party actual injury. Mass. Gen. Laws ch. 231, § 59H.

No part of the analysis under the anti-SLAPP statute focuses on the merits of the non-moving party's claim. As the Court has explained, the

statute "makes no provision for a plaintiff to show that its own claims are not frivolous." Duracraft Corp. Holmes Prods. Corp., 427 Mass. 156, 165 (1998).

Even at the second prong of the special motion to dismiss analysis, the "focus . . . is not on the plaintiff's claim, but rather on the petitioning activity that the special movant asserts bars the plaintiff's claim." Id. (emphasis in original).

As the Court acknowledged in Duracraft, in enacting the anti-SLAPP statute, the Legislature could have narrowed the range of cases to which the anti-SLAPP statute applies, but chose not to do so. Instead, the Legislature, in response to SLAPP suits, "intended to enact very broad protection for petitioning activities," Duracraft, 427 Mass. at 162, and "ignored [the anti-SLAPP statute's] potential uses in litigation far different from the typical SLAPP suit." Id. at 163; see also Baker v. Parsons, 434 Mass. 543, 548-49 (2001). Indeed, since Duracraft, the Court has held that the anti-SLAPP statute applies to a variety of cases which do not fit the mold of the "typical" SLAPP suit. See, e.g., Town of Hanover v. New England Reg'l Council of Carpenters, 467 Mass. 587 (2014) (reversing denial of labor union's special

motion to dismiss where abuse of process claim was based on union's support of litigation in which it was not named); N. Am. Expositions Co. Ltd. P'Ship v. Corcoran, 452 Mass. 852 (2009) (applying anti-SLAPP statute to case involving two competitors which had previously been involved in litigation with each other, even where the movant might have acted with a commercial motive); Office One, Inc. v. Lopez, 437 Mass. 113 (2002) (affirming grant of special motion to dismiss where trustees of condominium association opposed plaintiff's purchase of commercial units, even where at least one of the defendants was a competitor of the plaintiff with respect to the purchase of the commercial condominium units at issue).

Accordingly, there is no merit to 477 Harrison Ave.'s attempt to graft onto the anti-SLAPP statute limitations which otherwise do not exist. For example, the Court has not refused to apply the anti-SLAPP statute to an entire class of cases, including claims between competitors, a rule 477 Harrison Ave. advocates the Court should adopt.<sup>2</sup> Appellee's Br. at

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<sup>2</sup> 477 Harrison Ave.'s argument is based on the faulty premise that Defendants and 477 Harrison Ave. are competitors. Mr. Leon is not a real estate

16, 27. Indeed, Duracraft involved claims between competitors. To address its concerns about the overbreadth of the statute, the Court did not adopt 477 Harrison Ave.'s proposed rule. Rather, the Court adopted a narrowing interpretation of the statute's "based on" language, imposing on the moving party the burden to show that the claims asserted against it are "'based on' the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities."<sup>3</sup> Duracraft, 427 Mass. at 167-68.

Similarly, 477 Harrison Ave. appears to ask the Court to limit the applicability and protection of the

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developer and never had any intention to purchase the 477 Harrison Avenue Property. R. at A877; A878.

<sup>3</sup> 477 Harrison Ave. curiously relies on footnote 20 of Duracraft in support of its argument that anti-SLAPP statute does not eliminate abuse of process claims. Appellee's Br. at 21. 477 Harrison Ave.'s reading of footnote 20 is untenable. The footnote specifically references counterclaims. The intent of footnote 20 was to make clear that the special motion to dismiss should not become the knee-jerk reaction to the assertion of a counterclaim. Rather, the non-moving party's claims need to be analyzed to assess whether they are based on the movant's petitioning activity or if they have some substantial other basis. The filing of a counterclaim in an existing action does not mean that the counterclaim is automatically "based on" the petitioning activity of the party who filed the original action.

anti-SLAPP statute to one act of petitioning. Appellee's Br. at 27 n.6. While there is no basis in the Court's decisions to support this argument, it is consistent with 477 Harrison Ave.'s inaccurate characterization of what is indisputably Defendants' petitioning activity as a "pattern" or as "harassment." That is, 477 Harrison Ave. asks the Court to adopt the reasoning of the trial court and hold that Defendants' petitioning activity itself can constitute the substantial other basis for Defendants' claims. The Court should decline 477 Harrison Ave.'s invitation.

477 Harrison Ave.'s false assertion that Defendants have engaged in some kind of pattern of litigation against it is wrong based on the undisputed facts. Moreover, whatever the number of legal challenges involved does not change that the basis of 477 Harrison Ave.'s claims is Defendants' petitioning activity. If Defendants' petitioning activity were truly without merit, then 477 Harrison Ave. could have attempted to carry its burden under the second prong of the special motion to dismiss analysis.

For example, the 2012 Zoning Appeal challenged the variance granted to 477 Harrison Ave. in 2012

which would have permitted 477 Harrison Ave., among other things, to add a sixth floor and two penthouse units to the 477 Harrison Avenue Property.<sup>4</sup> R. at A309-A315; A312-A339. The 2012 Zoning Appeal was resolved by an Agreement for Judgment under which 477 Harrison Ave. and JACE agreed, among other things, that (a) 477 Harrison Ave. reserved the right to seek zoning relief in the future; (b) JACE reserved the right to object to and challenge any zoning relief granted to 477 Harrison Ave. in the future; and (c) the parties both reserved their rights as to the Declaratory Judgment Action. R. at A434-A437. In the Agreement for Judgment, JACE further agreed to waive and abandon any objection to the groundwater recharge permit 477 Harrison Ave. needed, thereby facilitating

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<sup>4</sup> In its recital of the facts, the trial court incorrectly identified the timing of 477 Harrison Ave.'s purchase of its property. The trial court stated that 477 Harrison Ave. "bought the property located at 477 Harrison Avenue in 2011." ADD2. 477 Harrison Ave. signed the purchase and sale agreement with the seller in December 2011, but did not close on the purchase of the property until July 30, 2012. R. at A77; A85. The timing of the closing is significant because prior to the closing, 477 Harrison Ave. was aware of the Indenture as well as JACE's opposition to the zoning relief granted to 477 Harrison Ave., and further that the period to appeal the Board of Appeal's decision had not run. R. at A878.

477 Harrison Ave.'s redevelopment of its property as of right. R. at A90; A435.

The Declaratory Judgment Action sought to protect JACE's affirmative easement in the northeasterly wall of 477 Harrison Ave.'s building, a right which could not be finally determined in the 2012 Zoning Appeal.

R. at A439-A456. Determining the validity and enforceability of JACE's easement was critical to JACE because JACE's building does not have its own wall along the property line with the 477 Harrison Avenue Property; rather, it uses the northeasterly wall of 477 Harrison Ave.'s building as its wall in that area.

R. at A235. As part of its development plan, 477 Harrison Ave. planned to demolish the majority of the northeasterly wall in an area in which JACE claimed its easement. R. at A241-A242.

The application for a criminal complaint arose out of the ongoing trespass on the roof of JACE's building. R. at A249-A252; A723-A757. Defendants' objection to the presence of 477 Harrison Ave.'s contractor on JACE's roof and Defendants' efforts to remove the contractor from JACE's roof were not "contrary to explicit court orders." ADD7-ADD8. The Stipulated Order entered in December 2013 did not

permit 477 Harrison Ave. or its agents to trespass on JACE's property for any purpose, including for the purported purpose of protecting JACE's building. R. at A504-A505. Even 477 Harrison Ave. did not rely on the Stipulated Order as authorizing 477 Harrison Ave.'s trespass on JACE's property. Rather, 477 Harrison Ave., in the absence of JACE's permission, asserted that Mass. Gen. Laws ch. 266, § 120B authorized its trespass to put down protection on JACE's property. R. at A507. Therefore, JACE's position in January 2014 in response to 477 Harrison Ave's plan to trespass on JACE's property was not contrary to the Stipulated Order. R. at A246-A247; A506-A685.

Similarly, the application for criminal complaint was not contrary to the order entered in January 2014 which only permitted 477 Harrison Ave. to trespass on JACE's property for the limited purpose of laying down protection. R. at A687. By December 2014, the continued presence of 477 Harrison Ave.'s contractor on JACE's roof exceeded the scope and duration of what the January 2014 order permitted. R. at A249-A252; A723-A757. As a result, the filing of the application

for a criminal complaint was not contrary to that order.

In late 2014, 477 Harrison Ave. applied for and was denied a building permit to add a sixth floor and three penthouse units to its building. R. at A255; A777. The 2015 Zoning Appeal arose out of the Board of Appeal's decision granting 477 Harrison Ave. the variance needed to proceed with its proposed expansion of its building. R. at A785-A791; A793-A811. Both 477 Harrison Ave., in seeking the variance, and JACE, in opposing the variance, exercised the right they each agreed the other reserved under the Agreement for Judgment filed in the 2012 Zoning Appeal.

In addition, cases in which the moving party's conduct has been found to constitute "harassment," and therefore a substantial other basis for the non-moving party's claim, are distinguishable because in those cases the harassing conduct was undeniably not petitioning activity.<sup>5</sup> As a result, this case in not

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<sup>5</sup> 477 Harrison Ave.'s reliance on In re Discipline of an Attorney, 442 Mass. 660 (2004), is misplaced. As the Court acknowledged, the resolution of that case "turn[ed] on specific facts." In re Discipline of an Attorney, 442 Mass. at 661. Moreover, in that case, the Court affirmed the dismissal of the claims on the merits. As a result, the only practical effect of deciding the special motion to dismiss was to

"on all fours with Garabedian." Appellee's Br. at 31.

In Garabedian v. Westland, 59 Mass. App. Ct. 427 (2003), the Appeals Court recognized that the plaintiff's claims for declaratory judgment and injunctive relief were based on both the defendants' petitioning activity and non-petitioning activity, specifically "harassing" the plaintiff's contractor by telling its truck drivers that they were engaged "in an illegal operation" and photographing them.

Garabedian, 59 Mass. App. Ct. at 431, 432. The Appeals Court reversed the grant of the defendants' special motion to dismiss because it concluded, based on these facts, that the latter forms of non-petitioning conduct did not involve any "supplication to higher authority" and therefore constituted a substantial other basis for the plaintiff's claims.<sup>6</sup> Id. at 433.

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determine whether the attorney was entitled to the recovery of fees. Id. at 673-74. In this context, the Court assumed both that the anti-SLAPP statute applied and that petitioning activity was involved. Id. Defendants, however, have not been able to identify a decision of this Court arising under the anti-SLAPP statute that has relied on or cited In re Discipline of an Attorney. That decision should be expressly limited to its facts.

<sup>6</sup> 477 Harrison Ave.'s reliance on Ayasli v. Armstrong, 56 Mass. App. Ct. 740 (2002), is similarly

In contrast, 477 Harrison Ave. falsely labels Defendants' protected petitioning activity as "harassment." For example, 477 Harrison Ave.'s effort to recast Mr. Leon's filing of a police report and application for a criminal complaint as "harassment" of Mr. Holland should be rejected. Appellee's Br. at 32. It cannot be reasonably disputed that Mr. Leon's conduct is protected petitioning activity. Wenger v. Aceto, 451 Mass. 1, 5 (2008) (holding that defendant met initial burden where plaintiff's claims for abuse of process and malicious prosecution were based on defendant's filing of criminal complaint); Keegan v. Pellerin, 76 Mass. App. Ct. 186, 190 (2010)

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misplaced. In Ayasli, the plaintiffs brought a claim under the State Civil Rights Act, alleging that the defendants were interfering with the plaintiffs' right to use and enjoy their property. Ayasli, 56 Mass. App. Ct. at 741, 746. The Appeals Court affirmed the denial of the defendants' special motion to dismiss. In addition to the defendant's statements regarding her intent to oppose the re-building of the house on the plaintiffs' property, the plaintiffs identified other non-petitioning activity which formed the basis of their claims. For example, the defendants posted a sign directing visitors to the plaintiffs' property over an impassable way, placed their threatening dogs near the plaintiffs' property, and hit golf balls from their property into an area used by the plaintiffs' children. Id. at 749. This non-petitioning conduct, standing alone, was sufficient to support the civil rights claim asserted by the plaintiffs in that case. Id.

("[R]eporting suspected criminal activity to the police and filing criminal complaints are activities the anti-SLAPP statute firmly protects.").

Nor does JACE's submission of insurance claims to Holland Construction's insurer constitute "harassment" capable of giving rise to a substantial other basis for 477 Harrison Ave.'s claims. 477 Harrison Ave.'s argument is flawed for several reasons. First, Mr. Holland represented to Mr. Leon - incorrectly, as it turned out - that JACE was an additional insured under Holland Construction's insurance policy. R. at A507; A516. As a result, 477 Harrison Avenue has no grounds to complain about or characterize as harassing JACE's submission of claims under an insurance policy which Mr. Holland offered to provide to JACE. R. at A507. Second, 477 Harrison Ave.'s argument fails because of the nature of the claims it has asserted against Defendants. To state a claim for abuse of process, 477 Harrison Ave. must allege the use of process. The submission of insurance claims is not process and therefore cannot be an independent basis for its claims. Third, any claim based on JACE's submission of insurance claims would belong to Holland Construction, not 477 Harrison Ave.

477 Harrison Ave.'s reliance on JACE's submission of insurance claims as a purported substantial other basis for its claims exposes a further flaw in 477 Harrison Ave.'s argument. 477 Harrison Ave. refuses to acknowledge that context matters; whether certain conduct can constitute a substantial other basis for a claim, thereby defeating a special motion to dismiss at the first prong, depends on the nature of the claim asserted by the non-moving party. For example, 477 Harrison Ave. argues in broad terms that "[s]tatements are sufficient independent conduct to provide a substantial other basis warranting the denial of an anti-SLAPP motion." Appellee's Br. at 35. Where the non-moving party asserts a claim for defamation against the moving party, then a statement which is not petitioning activity could support a claim. See, e.g., Cadle Co. v. Schlichtmann, 448 Mass. 242, 250 (2007). Statements of the type attributed to Mr. Leon, in contrast, cannot independently support a claim for abuse of process. The statements 477 Harrison Ave. alleges Mr. Leon made and/or others attributed to him, if anything, are what 477 Harrison Ave. would rely on as evidence of Defendants' ulterior motive.

**B. 477 HARRISON AVE. HAS NOT, AND CANNOT, SATISFY ITS BURDEN, HOWEVER DEFINED, UNDER THE SECOND PRONG OF THE SPECIAL MOTION TO DISMISS ANALYSIS.**

477 Harrison Ave. complains that the burden of proof under the second prong of the special motion to dismiss analysis is unconstitutional, an argument which it did not raise below. R. at A826-A847. As a result, the Court need not decide this issue. See, e.g., Weiler v. PortfolioScope, Inc., 469 Mass. 75, 86 (2014) (stating that “[h]aving failed to raise the issue below, he has waived it”).

Even if the Court were inclined to entertain such a constitutional challenge, this is not the appropriate case in which to do so. Whatever burden of proof is applied, whether a preponderance of the evidence standard or the lesser *prima facie* standard for which 477 Harrison Ave. advocates, 477 Harrison Ave. has not satisfied its burden of showing that Defendants' petitioning activity did not have a reasonable basis in fact or law.

Before the trial court, 477 Harrison Ave. failed even to attempt to satisfy its burden on the second prong of the special motion to dismiss analysis. In short, 477 Harrison Ave. is not entitled to a "do over." 477 Harrison Ave.'s opposition to Defendants'

special motion to dismiss rested on 477 Harrison Ave.'s assertion that Defendants did not meet their burden on the first prong. R. at A839-A844. 477 Harrison Ave.'s argument was devoted to showing that a substantial other basis for its claims existed. R. at A839-A844.

477 Harrison Ave., however, claims that in footnote 9 of its opposition to Defendants' special motion to dismiss, it carried its burden under the second prong of the special motion to dismiss analysis. Appellee's Br. at 42. In footnote 9, 477 Harrison Ave. argued that, "since two of Leon's lawsuits [the 2012 Zoning Appeal and 2015 Zoning Appeal] are expressly contradictory to his stated goal of developing his property and the third [the Declaratory Judgment Action] is purported to protect an unusable right, these lawsuits are 'devoid of any reasonable factual support or any arguable basis in law.'" R. at A846. 477 Harrison Ave.'s alleged attempt to satisfy its burden under the second prong of the special motion to dismiss analysis falls short.

The legal and factual underpinnings of Defendants' petitioning activity on which 477 Harrison Ave.'s claims rest involve issues such as whether JACE

had standing to bring the 2012 Zoning Appeal and the 2015 Zoning Appeal and whether 477 Harrison Ave. is legally entitled to the variances challenged in those cases. In response to the substantial record Defendants developed below demonstrating the legal and factual basis for their appeals of the variances granted to 477 Harrison Ave., 477 Harrison Ave. failed to present either to the trial court or to this Court any evidence beginning to suggest that these zoning appeals were devoid of a reasonable basis in fact or law.<sup>7</sup>

Similarly, while 477 Harrison Ave. seeks to ignore the outcome of the trial and appeal in the Declaratory Judgment Action, it cannot avoid that the trial court's judgment in favor of JACE, R. at A711, which was affirmed on appeal, necessarily demonstrates that JACE's claim in that case had a reasonable basis in fact and law. N. Am. Expositions Co. Ltd. P'ship,

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<sup>7</sup> 477 Harrison Ave. provides no legal support for its assertion that "the use of petitioning activities that are contrary to the petitioning parties' interests necessarily must be devoid of factual support or an arguable basis in law." Appellee's Br. at 45. 477 Harrison Ave.'s failure to cite a case to support its position is not surprising given it is entirely detached from the analysis which is required at the second prong.

452 Mass. at 865-66 ("The plaintiff must show that no reasonable person could conclude that there was an arguable basis in law that would support the defendant's position."). Moreover, JACE's experts testified at trial that under the building code, JACE can expand its building upward by attaching to the northeasterly wall of the 477 Harrison Avenue Property for support. R. at A691-A692; A695-A696.

In an attempt to avoid its "difficult" burden as the non-moving party, Keegan, 76 Mass. App. Ct. at 190, 477 Harrison Ave. stretches Justice Cordy's concurring opinion in Benoit v. Frederickson, 454 Mass. 148 (2009), beyond recognition. No reasonable reading of Justice Cordy's concurring opinion in Benoit supports 477 Harrison Ave.'s position that Justice Cordy "necessarily recognized that the current preponderance of the evidence standard requires judges to weigh evidence, and make credibility determinations." Appellee's Br. at 47.

Justice Cordy explained that his reason for writing separately was "to underscore the authority provided in the anti-SLAPP statute for a judge to permit limited discovery when confronted with the type of credibility issues presented in this case."

Benoit, 454 Mass. at 155 (Cordy, J., concurring).

Where the record includes competing affidavits on material issues, but little else to "assist in determining which are credible," Justice Cordy advised the trial court to exercise its discretion under the anti-SLAPP statute to permit limited discovery if requested by the non-moving party. Id. at 156, 157. Even after this discovery, the non-moving party will still "bear the burden of demonstrating that the defendant's petitioning conduct was 'devoid of any reasonable factual support.'" Id. at 157.

Justice Cordy did not take issue with either the majority's conclusion regarding the disposition of the special motion to dismiss in that case or the majority's application of the preponderance of the evidence standard. Benoit, 454 Mass. at 152. The majority decision demonstrates that when a trial judge is faced with conflicting affidavits, the non-moving party must come forward with sufficient evidence to trump the moving party's affidavit, if believed. Id. at 154 n.7.

This case does not implicate Justice Cordy's fundamental concern regarding how to deal with conflicting affidavits on the material issues relating

to the merits of Defendants' petitioning activity which forms the basis of 477 Harrison Ave.'s claims. For example, 477 Harrison Ave. did not submit any evidence challenging JACE's standing to bring the 2012 Zoning Appeal and the 2015 Zoning Appeal or to show, among other things, that it could not make reasonable use of its property without the variances sought. With respect to the Declaratory Judgment Action, the trial court's judgment in favor of JACE provides the sort of corroborating evidence that a trial judge, according to Justice Cordy, could rely on to determine that 477 Harrison Ave. had not carried its burden under the second prong.

#### CONCLUSION

For these reasons and for the reasons set forth in Appellants' Brief, Defendants JACE Boston, LLC and Arthur Leon respectfully request that the Court reverse the trial court's denial of Defendants' special motion to dismiss and award Defendants' their attorneys' fees incurred both before the trial court and on appeal.

Respectfully submitted,  
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Dated: November 7, 2016

**CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)**

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs.

Emily C. Shanahan  
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