Anti-SLAPP in the Appeals Court After Bristol

About a year ago, the Supreme Judicial Court simplified how trial courts should analyze motions brought under G.L. c. 231, § 59H (more commonly known as the anti-SLAPP statute). *See Bristol Asphalt Co. v. Rochester Bituminous Products, Inc.*, 493 Mass. 539 (2024). Under this simplified framework, trial courts use two questions to decide whether to dismiss a case under the anti-SLAPP statute. First, is the complaint based solely on the opposing party's petitioning activity? And if so, was the challenged petitioning activity devoid of any reasonable factual support or arguable basis in law? *See Hidalgo v. Watch City Construction Corp.*, 105 Mass. App. Ct. 148, 150 (2024).

In the year since *Bristol*, the Appeals Court has decided a handful of cases about the anti-SLAPP statute, all of which provide guidance about how trial courts will apply this framework moving forward. Below are some takeaways from those post-*Bristol* decisions.

What Qualifies as Petitioning Activity?

The SJC's decision in *Bristol* reinforced the importance of the first step of the anti-SLAPP analysis. In contrast to the previous framework, trial courts must now consider all the factual allegations for a particular claim and may not "parse" them to see if the alleged non-petitioning activity would be sufficient to state a claim. *See Bristol*, 493 Mass. at 551 (outlining the previous anti-SLAPP analysis). If a claim is based on a mixture of petitioning and non-petitioning activity, then the answer to the first question is "no" and the anti-SLAPP motion should be denied. A defendant may still present defenses about petitioning-related activity, but those arguments are "best addressed in the course of ordinary litigation." *Id.* at 554.

Because of this rule, litigants should understand how courts define "petitioning activity." Petitioning includes any written or oral statement submitted to or made in connection with an issue "under consideration or review" by a legislative, executive, or judicial body, or any other governmental proceeding. G.L. c. 231, § 59H. It also includes statements made to government bodies that are "reasonably likely to encourage" such review, and statements "reasonably likely to enlist public participation" in those reviews. *Id.* The statements must, however, be made to influence, inform, or reach governmental bodies at the end of the day, whether directly or indirectly. *Blanchard v. Steward Carney Hospital, Inc.*, 477 Mass. 141, 149 (2017).

Statements that Qualify as Petitioning. Filing and participating in a lawsuit remain "quintessential" petitioning activity. *See Hidalgo*, 105 Mass. App. Ct. at 151; *Welter v. Whelan*, 104 Mass. App. Ct. 1115, at *2 (July 26, 2024) (23.0 Decision). The same goes for filing complaints with law enforcement. *Wynn v. Delorie*, 105 Mass. App. Ct. 1108, at *3 (Jan. 2, 2025) (23.0 Decision); *Afrasiabi v. President and Fellows of Harvard College*, 105 Mass. App. Ct. 1103, at *2 (Nov. 15, 2024) (23.0 Decision).

Petitioning extends beyond lawsuits and legal complaints though. For example, social media posts can qualify as petitioning. *See D.D.S. Industries, Inc. v. Leftfield LLC*, 105 Mass. App. Ct. 1103 (Nov. 12, 2024) (Rule 23.0 Decision). In *DDS*, the defendant project manager posted an open letter to a city's mayor on a local Facebook page. In that letter, the defendant made allegedly defamatory statements about the plaintiff's work on a public construction project in the city. This Facebook post was petitioning: "it was a statement submitted to a representative of an executive body to inform him of issues related to an ongoing public construction project."

Allegedly false statements in medical reports or notes, or statements to other medical personnel, can also be petitioning. *Hanamura v. Newton*, 104 Mass. App. Ct. 1108, at *4 (May 28, 2024) (Rule 23.0 Decision). In *Hanamura*, the plaintiff argued the defendant doctor "made statements depicting the parents as child abusers and neglectors" in her notes and to other medical personnel. Because G.L. c. 119, § 51A requires medical professionals to report suspected abuse or neglect, those statements had a "plausible nexus" to a government proceeding and were therefore petitioning activity.

Non-Petitioning Statements. The Appeals Court has also offered guidance on what trial courts should not consider petitioning. One important factor is to whom the statements were made. Statements made to private individuals, without expecting any involvement of a government body, are not petitioning, even if they eventually make their way to the government. *See, e.g.*, *Sabatini v. Knouse*, 105 Mass. App. Ct. 174, 182 (2025); *Wynn*, 105 Mass. App. Ct. 1108, at *3-4.

In *Sabatini*, for instance, the defendant's claims about the plaintiff's alleged sexual harassment eventually reached government officials and formed the basis for a lawsuit, but the actionable statements were made only in private, first to colleagues and then to workplace investigators. 105 Mass. App. Ct. at 180-81. Without any government body "involved in the investigation or otherwise reviewing the matter," there was no petitioning. *Id.* Similarly, in *Wynn*, the front desk worker at an apartment complex spoke to building management about complaints raised by other tenants about the plaintiff. Those statements eventually led to litigation (the plaintiff's eviction), but were not petitioning because the defendant was speaking only to a private third party (building management). *See* 105 Mass. App. Ct. 1108, at *3.

Even statements made as part of litigation do not always qualify as petitioning. *See Szawlowski v. Price*, 104 Mass. App. Ct. 1118, at *5 (Aug. 16, 2024) (23.0 Decision). In *Szawlowski*, for instance, the plaintiff alleged that a defendant law firm and its attorneys committed a variety of business torts by drafting corporate documents to freeze out the plaintiff from a family business. *Id.* at *2. Even though these documents were drafted with the hope of resolving or narrowing underlying shareholder litigation with the plaintiff, they did not seek

redress from the government, so they did not qualify as petitioning (although those statements were nonetheless protected under the litigation privilege).

Statements made directly to government officials are not always petitioning either. In *Wynn*, the defendant made a comment about the plaintiff to a court officer while the defendant was testifying in related litigation, but the Appeals Court did not consider this statement petitioning. The allegedly defamatory comment was separate from the testimony and did not seek redress from the government, so the plaintiff's claims based on that comment survived an anti-SLAPP motion.

Motive is Irrelevant. In this first stage of the analysis, the speaker's motive is irrelevant. *See Afrasiabi*, 105 Mass. App. Ct. 1103, at *3. The Appeals Court has been clear that the scope of petitioning does not turn on whether the plaintiff alleges a certain statement was made with malice or in retaliation for some other action. *See, e.g. Hidalgo*, 105 Mass. App. Ct. at 151; *D.D.S. Industries*, 105 Mass. App. Ct. 1103, at *2. For instance, in *Hidalgo*, the Appeals Court noted that the "subjective motivation for filing a lawsuit is not separable, or separately actionable, from the act of filing suit." *Hidalgo*, 105 Mass. App. Ct. at 151. The answer to whether a statement is petitioning turns on the statement itself, not any alleged motivation behind the statement.

What is A Reasonable Basis in Fact or Law?

If the defendant shows that the plaintiff's claim is based solely on the defendant's petitioning activity, the burden then shifts to the plaintiff to show, by a preponderance of evidence, that the defendant's petitioning "lacked any reasonable factual support or arguable legal basis." *Bristol*, 493 Mass. at 563. In other words, the plaintiff must show that the defendant's petitioning was frivolous. *Welter*, 104 Mass. App. Ct. 1115, at *2.

Success in Prior Petitioning. If the petitioning activity is a lawsuit, the success of the underlying claim will prove fatal to an anti-SLAPP motion. *See, e.g.*, *Welter*, 104 Mass. App. Ct. at *2. And there can be intermediate indications, short of winning a judgment, that show reasonable factual or legal support. For instance, if a judicial officer finds probable cause to issue criminal charges based on a complaint, that is enough to show a reasonable basis for that complaint. *See Wynn*, 105 Mass. App. Ct. 1108, at *3. And if a court credits statements and relies on them in deciding prior litigation, that can be enough to show a reasonable basis. *Hanamura*, 104 Mass. App. Ct. 1108, at *5.

Supporting Documents. A plaintiff should not rely solely on allegations to argue that a statement lacked reasonable basis, but should submit documents and other supporting evidence as part of the anti-SLAPP briefing. *See, e.g.*, *D.D.S. Industries*, 105 Mass. App. Ct. 1103, at *3. In *Afrasiabi*, for instance, the defendant university submitted an affidavit of counsel with exhibits that supported the university's statements about the plaintiff. 105 Mass. App. Ct. 1103, at *1. The same happened in *DDS*, in which the Appeals Court considered the allegedly defamatory letter, which was attached to the plaintiff's complaint.

G.L. c. 231, § 59H also allows for "specified discovery" to determine if a claim had a reasonable basis. *See Hidalgo*, 105 Mass. App. Ct. at 10 n.5. If necessary, counsel should request it.

Abuse of Process and Malicious Prosecution. The torts of abuse of process and malicious prosecution survive under *Bristol*, although the Appeals Court has cautioned that such claims must overcome some hurdles first.

It is "quite unlikely" that a defendant can assert these torts as counterclaims, "because the claim that is alleged to lack reasonable basis has not yet been adjudicated." *Hidalgo*, 105 Mass. App. Ct. at 153. "Put differently, claims for malicious prosecution or abuse of process must ordinarily await the outcome of the lawsuit they are challenging." *Id*. But once the underlying lawsuit has proved unsuccessful for a plaintiff, these claims are fair game for the erstwhile defendant. The typical anti-SLAPP framework would apply to these torts in a subsequent lawsuit, which will normally turn on whether the defendant-turned-plaintiff can show there was no reasonable basis for the prior lawsuit.

Conclusion

The SJC simplified the anti-SLAPP framework in *Bristol*, but each case presents unique facts that often do not neatly answer the two key questions. The Appeals Court will continue to provide guidance on both questions: if a complaint is based solely on petitioning activity, and if that petitioning activity had a reasonable basis in fact or law.