IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

ARTHUR G. NEWMYER, individually and on Behalf of his minor daughter, LN,	)	
Appellants,	)	
v.	)	No.: 12 CV 847
JAMES F. HUNTINGTON,	)	
Appellee.	)	

COUNTER-DEFENDANT/APPELLANT, ARTHUR G. NEWMYER'S, RESPONSE IN OPPOSITION TO MOTION TO DISMISS APPEAL FILED BY COUNTER-PLAINTIFF/APPELLEE, JAMES F. HUNTINGTON

Appellant, Arthur G. Newmyer, by and through his counsel, Jordan Coyne & Savits, LLP and Dwight D. Murray, hereby submits this Response to Appellee James Huntington's Motion to Dismiss.

I. Introduction

Mr. Newmyer initiated this action by filing a Complaint against Dr. Huntington and the Sidwell Friends School, where Dr. Huntington served as school psychologist. Mr. Newmyer seeks to recover damages for negligent supervision, professional malpractice, breach of fiduciary duty, and infliction of emotional distress. These claims arose out of Dr. Huntington's decision to have an openly sexual relationship with Mr. Newmyer's then-wife, while providing psychological services to Mr. Newmyer's minor daughter, L.N. The relationship was carried on in spite of the harmful effects it had on L.N.

In response, Dr. Huntington filed a counterclaim for defamation, false light invasion of privacy, intentional infliction of emotional distress, and tortious interference with a contractual

relationship.[1] Since the counterclaim arises from statements concerning matters of public interest, Mr. Newmyer filed a Special Motion to Dismiss under the D.C. Anti-SLAPP Act. The trial court denied this Motion, stating:

> Without engaging in an analysis of whether Mr. Newmyer's lawsuit extends to matters of importance to the public or whether Dr. Huntington is a public figure, it suffices to note that there is no economic bullying here by Dr. Huntington, and his claims are not likely to deter Mr. Newmyer from being heard on his contentions.

Order Denying Special Motion to Dismiss at 2. In other words, the trial court held that the Anti-SLAPP Act is inapplicable because Dr. Huntington's subjective motives in filing the Counter Complaint were proper, and/or because Mr. Newmyer may prove difficult to intimidate.[2] The trial court also held that the Special Motion to Dismiss was untimely, but stated that a "more flexible interpretation of the forty-five day framework" might be appropriate if the Motion had substantive merit.

Mr. Newmyer seeks to appeal this Order on at least three grounds. First, the Anti-SLAPP Act does not require or permit consideration of the parties' subjective motivations. The only prerequisite for invoking the Anti-SLAPP Act is to show that "the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest."[3] D.C. Code § 16-5502(b). As the Supreme Court of California explained in connection with California's anti-SLAPP statute, "there simply is nothing in the statute requiring the court to engage in an inquiry as to the plaintiff's subjective motivations before it may determine [whether] the anti-SLAPP statute is applicable." *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53 (Cal. 2002) (internal quotations omitted). The trial court erred by focusing entirely on the parties' subjective

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[1] The claims for defamation and false light invasion of privacy were dismissed by Order dated June 6, 2012 on statute of limitations grounds.

[2] While Mr. Newmyer strongly disagrees with the trial court's factual conclusions, this appeal focuses on the legal and procedural errors committed by the trial court.

[3] Once this showing is made, "the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits."

motivations, and failing to conduct "an analysis of whether Mr. Newmyer's lawsuit extends to matters of importance."

Second, even if the standard applied by the trial court were correct, the trial court should not have dismissed the Special Motion to Dismiss without holding a hearing, as required under § 16-5502(d). In this case, given the dearth of evidence submitted in connection with the Special Motion to Dismiss, it was not possible for the trial court to fairly evaluate the parties' subjective motivations without holding a hearing.

Third, as the trial court appeared to recognize, the 45-day deadline set forth in the Anti-SLAPP Act is not jurisdictional. *See Scarborough v. Principi*, 541 U.S. 401 (U.S. 2004) (holding 30-day deadline for claim for attorney's fees under the Equal Access to Justice Act is not jurisdictional). Therefore, the statutory deadline is subject to equitable tolling, and was tolled by Dr. Huntington's consent to extend the deadline for responsive pleadings. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (U.S. 1990) ("time requirements in lawsuits between private litigants are customarily subject to equitable tolling").

Before addressing the arguments raised in Dr. Huntington's Motion to Dismiss, it is important to note that Dr. Huntington does not seek summary affirmance under Rule 27(c). Therefore, the substantive merits of the trial court's decision are not relevant at this stage. The issue at hand is whether the Court of Appeals has jurisdiction over this appeal pursuant to the collateral order doctrine (addressed in Part C of the Argument section of the Motion to Dismiss, pp. 9-13).[4]

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[4] Mr. Newmyer calls the Court's attention to an analogous case that is currently before the Court of Appeals for the D.C. Circuit, *3M v. Boulter*, Nos. 12-7012 and 12-7017 (D.C. Cir. filed Feb. 24, 2012). The District of Columbia Attorney General has intervened in that case, and has taken the position that an order denying a Special Motion to Dismiss filed pursuant to the D.C. Anti-SLAPP Act can be immediately appealed under the collateral order doctrine. *See* District of Columbia's Opposition to 3M Company's Motion to Dismiss (attached hereto as Exhibit A).

II. Argument

The Court of Appeals "will treat certain interlocutory orders as final and 'collateral,' and hence appealable, when they have a final and irreparable effect on important rights of the parties." *Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith v. Beards*, 680 A.2d 419, 425 (D.C. 1996) (internal quotations omitted). A trial court's order can be appealed under the collateral order doctrine when it (1) conclusively resolves a disputed question; (2) the disputed question is "completely separate from the merits of the action"; and (3) the issue is "effectively unreviewable on appeal from a final judgment." *Stein v. United States*, 532 A.2d 641, 643 (D.C. 1987). In addition, the trial court's order must "impair a substantial public interest." *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1136 (D.C. 2010).

For example, in *McAteer v. Lauterbach*, 908 A.2d 1168, 1170 (D.C. 2006), the plaintiff appealed from an order cancelling a notice of *lis pendens* that the plaintiff had filed in order to secure his interest in land owned by the defendants. The Court accepted jurisdiction of the interlocutory appeal, finding that "the order conclusively resolves whether the *lis pendens* should or should not be cancelled because nothing further in the suit can affect the validity of the notice." *Id.* Further, "[t]he order cancelling the *lis pendens* does not address the merits of the underlying claim." *Id.* Finally, "if the movant had to wait until final judgment on the underlying claim, the realty could be sold before the issue was resolved, thereby rendering the order unreviewable." *Id.*

In this case, Dr. Huntington appears to concede that the issues on appeal were conclusively resolved by the Order denying Mr. Newmyer's Special Motion to Dismiss. The Order conclusively established that Mr. Newmyer cannot invoke the protection of the Anti-SLAPP Act in this case. Likewise, the issues on appeal go to the legal standard to be applied

under the Anti-SLAPP act, and the proper procedures to be followed under the Act. These issues are unrelated to the substantive merits of the action.

Dr. Huntington's arguments against application of the collateral order doctrine in this case are (1) that the trial court's Order can be effectively reviewed on appeal from a final judgment, and (2) that the Order does not impair an important interest. Neither argument has merit.

a. The Order Cannot be Effectively Reviewed on Appeal from a Final Judgment

The trial court's Order cannot be effectively reviewed on appeal from a final judgment, because the purpose of the Anti-SLAPP Act is to *prevent* frivolous cases from proceeding to a final judgment after a trial on the merits, and to protect SLAPP defendants from the costs and burdens of litigation. The Committee Report pertaining to the Anti-SLAPP Act noted that "defendants of a SLAPP must dedicate a [substantial] amount of money, time, and legal resources," and recognized that the goal of a SLAPP suit "is not to win the lawsuit but to punish the opponent and intimidate them into silence."[5] A SLAPP plaintiff can succeed in punishing the defendant even if he loses at trial or on appeal, because "*litigation itself* is [his] weapon of choice." Committee Report at 4.

Therefore, the right to appeal from a final judgment after a trial on the merits does not adequately protect the First Amendment interests implicated by the Anti-SLAPP Act. As the court explained in *Fabre v. Walton*, 436 Mass. 517, 521 (Mass. 2002), "[t]he protections afforded by the anti-SLAPP statute against the harassment and burdens of litigation are in large measure lost if the petitioner is forced to litigate a case to its conclusion before obtaining a definitive judgment through the appellate process." *See Morse Bros. v. Webster*, 2001 ME 70,

[5] *See* Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, the "Anti-SLAPP Act of 2010," (Nov. 18, 2010) (hereinafter "Committee Report") at 2, 4. The Committee Report is attached as Exhibit B.

P15 (Me. 2001) ("precluding the moving party from appealing a decision on the motion would result in continued litigation, which is the precise harm that the statute seeks to prevent").

Dr. Huntington argues that in this case, it will not be very costly or burdensome for Mr. Newmyer to defend against the counterclaims, since he is also prosecuting affirmative claims against Dr. Huntington. That is not true as a matter of fact, and it is irrelevant as a matter of law. The jurisdictional inquiry "is not directed at the individual case, but to the entire category to which a claim belongs." *McNair Builders*, 3 A.3d at 1141 (D.C. 2010). Courts applying the collateral order doctrine "do not engage in an individualized jurisdictional inquiry" based on the facts and circumstances of each case. *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 605 (U.S. 2009). Therefore, in this case, the only relevant question is whether the First Amendment interests protected by the Anti-SLAPP Act can be vindicated through appeal of a final judgment. They cannot.

b. <u>The Order Would Impair a Substantial Public Interest</u>

In *Will v. Hallock*, 126 S.Ct. 952, 959 (U.S. 2006), the Supreme Court held that in order to invoke the collateral order doctrine, "some particular value of a high order [must be] marshaled in support of the interest in avoiding trial." The court further explained that "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Id.*

The paradigmatic case of a "substantial public interest" is an assertion of absolute or qualified immunity by a public official. *McNair Builders*, 3 A.3d at 1136 (citing *Cohen v. Benefit Indus. Loan Corp.*, 337 U.S. 541 (U.S. 1949)). By contrast, an assertion of the judicial proceedings privilege does not merit interlocutory review. *Id.* Likewise, an order requiring an

attorney to disclose privileged information cannot be appealed until a final judgment is entered. *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599 (U.S. 2009).

In this case, the Anti-SLAPP Act implicates First Amendment concerns of paramount importance. As the Committee Report explained:

> Such lawsuits, often referred to as strategic lawsuits against public participation—or SLAPPs—have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights.

Committee Report at 2. Critically, Dr. Huntington does not even attempt to argue that the interests protected by the Anti-SLAPP Act are unimportant as a general proposition. That would be a difficult argument to make in the context of the First Amendment.

Instead, Dr. Huntington claims that the interests at issue *in this case* are not sufficiently important to merit interlocutory review. He asserts that "Newmyer's effort to invoke the protections of the Anti-SLAPP Act arises from his desire to insulate himself from his malicious and intentional misconduct," and therefore no important interest is at stake. While it is tempting to attack the flawed factual premise of this claim, there is no need to do so for jurisdictional purposes. As explained above, the jurisdictional inquiry "is not directed at the individual case, but to the entire category to which a claim belongs." *McNair Builders*, 3 A.3d at 1141.

Therefore, in this case, the only relevant issue is whether the First Amendment interests protected by the Anti-SLAPP Act are important enough to merit interlocutory review. Most other courts to decide this question have held that interlocutory review is available under anti-SLAPP statutes. *See Godin v. Schencks*, 629 F.3d 79, 85 (1st Cir. 2010); *Henry v. Lake Charles*

Am. Press LLC, 566 F.3d 164 (5th Cir. 2009); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Fabre*, 436 Mass. at 521; *Morse Bros.*, 2001 ME 70, P15.

In addition, this Court recently indicated, in *dicta*, that interlocutory review would be permitted under these circumstances. In *McNair Builders*, the Court addressed an appeal from an order rejecting the defendant's assertion of the judicial proceedings privilege. The Court began its analysis by citing the Supreme Court's holding in *Will*, 126 S.Ct. 952, 959. Seeking to refine this analysis, the *McNair Builders* court looked to the Fifth Circuit's decision in *Henry v. Lake Charles Am. Press LLC, supra*. The D.C. Court of Appeals stated:

> Following *Will*, the Fifth Circuit in [*Henry*] identified another public interest worthy of protection on interlocutory appeal, that of enforcing a statute that aim[s] to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights.... In *Henry*, the court considered Lousiana's anti-SLAPP... statute, which was designed to bring an early end to meritless claims brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances, noting that in enacting the statute, the Louisiana legislature had declare[d] that it is in the public interest to encourage continued participation in matters of public significance....

McNair Builders, 3 A.3d at 1138 (emphasis added, internal citations and quotations omitted). Following this discussion, the Court of Appeals determined that the judicial proceedings privilege is not sufficiently important to justify an immediate appeal. The Court explained that "when compared with the examples noted by the [Supreme] Court in *Will* and the interests at issue in *Henry*...the judicial proceedings privilege asserted in this case does not protect a substantial public interest." This is because, *inter alia*, "the interest protected by the judicial proceedings privilege [does not] approximate the public's interest in the full exercise of First Amendment rights to free speech and to petition for redress of grievances concerning matters of public significance." *Id.* at 1139.

The clear implication of this Court's opinion in *McNair Builders* is that the interests protected by anti-SLAPP statutes are important enough to qualify for interlocutory review under the collateral order doctrine.[6] While the relevant analysis is in *dicta*, it has great persuasive value.

c. Huntington Fails to Distinguish the Fifth Circuit's Decision in *Henry*

Huntington attempts to explain away the *Henry* case—and, by extension, this Court's analysis in *McNair Builders*—arguing that "by statute, in Louisiana state courts, an unsuccessful movant can obtain immediate appellate review of the trial court's denial of the Article 971 motion." This argument is somewhat misleading, and must be clarified before it can be refuted.

In *Henry*, the Fifth Circuit held that a federal court's denial of a motion to dismiss pursuant to Louisiana's anti-SLAPP statute can be appealed under the collateral order doctrine. The court reasoned that the purpose of the statute was to "free defendants from the burden and expense of litigation that has the purpose or effect of chilling the exercise of First Amendment rights," and the anti-SLAPP statute "thus provides a right not to stand trial, as avoiding the costs of trial is the very purpose of the statute." *Henry*, 566 F.3d at 178.

In a footnote, the *Henry* court noted that its ruling was "not wholly in line" with the Ninth Circuit's decision in *Englert v. MacDonell*, 551 F.3d 1099 (9th Cir. 2009). *Henry*, 566 F.3d at 178, n1. *Englert* held that "the denial of a special order to strike under Oregon law was not effectively unreviewable" based on "the absence of a provision allowing immediate appellate

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[6] Assuming, *arguendo*, that the D.C. Court of Appeals disagreed with the Fifth Circuit's holding in *Henry*, one would have expected the *McNair Builders* court to cite *Englert v. MacDonell*, 551 F.3d (9th Cir. 2009), in which the Ninth Circuit held that interlocutory review is unavailable under the Oregon anti-SLAPP statute. Since the D.C. Court of Appeals took the position that the First Amendment interests protected by anti-SLAPP statutes are more important than the considerations implicated by the judicial proceedings privilege, the *Englert* case would have supported the Court of Appeals' holding that interlocutory review is unavailable to a defendant asserting the judicial proceedings privilege.

review of such an order in Oregon state court." *Henry*, 566 F.3d at 178, n1 (internal quotations omitted). The *Henry* court then explained:

> Like Oregon's anti-SLAPP statute, Article 971 does not include a provision expressly authorizing immediate appeal. But the practice of Louisiana courts appears to allow immediate appeals through writs of supervision. In any event, for the above-stated reasons, we hold that Article 971 creates a right not to stand trial, and denial of this right is therefore "effectively unreviewable."

Id. (emphasis added).

Therefore, it is misleading for Dr. Huntington to suggest that "by statute, in Louisiana state courts, an unsuccessful movant can obtain immediate appellate review of the trial court's denial of the Article 971 motion." The Louisiana anti-SLAPP statute does not provide for immediate appellate review. Rather, Louisiana state courts have granted supervisory writs in cases involving Louisiana's anti-SLAPP statute pursuant to statutory rules of procedure that applicable in all cases. *See e.g. Darden v. Smith*, 879 So. 2d 390 (La.App. 3 Cir. 2004), *writ denied*, 887 So. 2d 480 (La. Nov. 15, 2004).

The standard for obtaining a writ of supervision under Louisiana law is quite different from the federal law standard under the collateral order doctrine. Article 2201 of the Louisiana Code of Civil Procedure provides: "Supervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction." Under Louisiana law, supervisory writs are granted when "irreparable harm" will result from the trial court's order or when (1) "the overruling of the exception is arguably incorrect"; (2) "a reversal will terminate the litigation"; and (3) "when there is no dispute of fact to be resolved." *Herlitz Constr. Co. v. Hotel Investors of New Iberia*, 396 So. 2d 878 (La. 1981). After a statutory amendment in 2005, Article 2201 became the sole basis for obtaining interlocutory review in Louisiana state court (in the absence of a statutory provision

explicitly permitting immediate appeal). La. C.C.P. Art. 2083. Thus, Louisiana does not currently recognize the collateral order doctrine.

It is unlikely that the Fifth Circuit's holding in *Henry* turned on Louisiana state court decisions, interpreting a different procedural rule, cited in a footnote. The *Henry* court's use of the phrase, "in any event," further demonstrates that the reference to Louisiana state court decisions is a throw-away point, not critical to the court's conclusion. Indeed, the Fifth Circuit recognized that its holding in *Henry* was inconsistent with the Ninth Circuit's decision in *Englert*, despite the fact that Louisiana state courts have a more liberal approach to appellate jurisdiction than Oregon state courts.[7] Likewise, this Court's opinion in *McNair Builders* treats the *Henry* decision as a rule of general application, and makes no mention of Louisiana state court decisions under Article 2201.

d. <u>Interlocutory Review is Available Despite the Absence of an Explicit Statutory Directive</u>

Huntington argues that, since the D.C. Anti-SLAPP Act does not explicitly provide for immediate appellate review, the interests at issue must not be important enough to qualify under the collateral order doctrine. This is a weak inference on its face. The inference is particularly flawed in light of the legislative history of the Anti-SLAPP Act. The original version of the bill that became the Anti-SLAPP Act, introduced on June 29, 2010, provided that "the defendant shall have a right of immediate appeal from a court order denying a special motion to dismiss in

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[7] In a recent case, the Ninth Circuit tried to reconcile *Henry* with *Englert*, noting that "Louisiana appellate courts apparently uniformly and automatically reviewed denials of anti-SLAPP motions under writs of supervision," creating a "risk that failure to grant an immediate appeal in federal court, in every case, might defeat the *Erie* concern about encouraging court shopping." *Metabolic Research, Inc. v. Ferrell*, No. 10-16209, 2012 U.S. App. LEXIS 12280, at *16-18, n7 (9th Cir. 2012). While this distinction can arguably be used to explain the <u>result</u> reached in *Henry*, it is clear from the Fifth Circuit's opinion that the *Henry* decision was not motivated by forum shopping concerns. Likewise, this Court's opinion in *McNair Builders* does not mention anything about forum shopping.

whole or in part." *See* Exhibit C. This provision was later removed from the final bill. The Committee Report accompanying the final bill, dated November 7, 2010, explained as follows:

> As introduced, the Committee Print contained a subsection (e) that would have provided a defendant with a right of immediate appeal from a court order denying a special motion to dismiss. While the Committee agrees with and supports the purpose of this provision, a recent decision of the DC Court of Appeals states that the Council exceeds its authority in making such orders reviewable on appeal.

Committee Report at 7. The "recent decision" referenced by the Committee is *Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010), in which the Court invalidated a statute providing for immediate appeal of an order compelling arbitration under the D.C. Home Rule Act. D.C. Code § 1-206.02.

The Committee Report renders Huntington's proposed inference untenable. The Anti-SLAPP Act's failure to explicitly provide for immediate appellate review was rooted in the limits of the D.C. Council's authority under the Home Rule Act. This omission obviously had nothing to with the importance of the interests protected by the Act. If anything, the Committee Report's statement that "the Committee agrees with and supports the purpose of [the provision for immediate appeal]" demonstrates that the legislature believed the First Amendment interests at stake <u>are</u> important enough to justify interlocutory review.

This case is thus distinguishable from *Metabolic Research, Inc. v. Ferrell*, No. 10-16209, 2012 U.S. App. LEXIS 12280 (9th Cir. June 18, 2012). In that case, addressing the right to immediate appeal under Nevada's anti-SLAPP statute, the Ninth Circuit began its analysis by contrasting two prior decisions: *Englert v. MacDonell*, 551 F.3d (9th Cir. 2009), holding immediate review was not available under the Oregon anti-SLAPP statute; and *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), holding immediate review was available under California's anti-SLAPP statute.

In *Metabolic Research*, the court explained the governing framework as follows. Denial of a motion filed under the California statute could be appealed under the collateral order doctrine because "the purpose of the California law was to provide citizens with a substantive immunity from suit." *Metabolic Research*, 2012 U.S. App. LEXIS 12280, at *13. This determination was based on "the fact that California's law provided for immediate appeal in state court" as well as "legislative history demonstrating that lawmakers wanted to protect speakers from the trial itself rather than merely from liability." *Id.* By contrast, immediate review was not available under the Oregon statute because the statute did not explicitly provide for interlocutory appeal, and this indicated the "legislature's belief that the normal appeal process was adequate to vindicate the anti-SLAPP right." *Id.* at *13-14. Finding Nevada's statute to be more similar to Oregon's than to California's, the *Metabolic Research* court held the defendant had no right to immediate appellate review under the Nevada statute.

In this case, the Anti-SLAPP Act's legislative history demonstrates that the D.C. Council wished to provide for immediate appeal, but did not do so because it lacked authority under the Home Rule Act. Moreover, much like the legislative history of California's anti-SLAPP statute, the Committee Report pertaining to the D.C. Anti-SLAPP Act repeatedly speaks of protecting a SLAPP defendant from the onerous costs and burdens of litigation, rather than from liability itself. Committee Report at 2-5. *See Farah v. Esquire Magazine, Inc.*, No. 11-cv-1179, 2012 U.S. Dist. LEXIS 76577, at *16 (D.D.C. June 4, 2012) (describing the Anti-SLAPP Act as providing "immunity to individuals engaged in protected actions"). Therefore, even under the jurisdictional framework developed by the Ninth Circuit in *Metabolic Research, Englert*, and *Batzel*, the interests protected by the D.C. Anti-SLAPP Act would merit immediate review under the collateral order doctrine. Moreover, as explained above, the D.C. Court of Appeals indicated

in *McNair Builders* that it would follow the more lenient jurisdictional standard adopted by the Fifth Circuit in *Henry*.

e. Newmyer's Ability to Recover Attorney's Fees has no Bearing on the Court's Jurisdiction

Huntington's final argument is that, since the Anti-SLAPP Act requires the court to grant attorney's fees to a prevailing SLAPP defendant, Mr. Newmyer does not need the additional protection provided by the collateral order doctrine. A similar argument was raised by the Ninth Circuit in *Metabolic Research*, 2012 U.S. App. LEXIS 12280, at *19-20.

There are several problems with this argument. First, the Nevada statute at issue in *Metabolic Research* provides for mandatory attorney's fees. Nev. Rev. Stat. Ann. § 41.670 ("the court *shall* award reasonable costs and attorney's fees" (emphasis added)). The Nevada statute also permits a successful SLAPP defendant to bring a separate action against the plaintiff for compensatory and punitive damages. By contrast, D.C. Code § 16-5504 is discretionary, providing that "[t]he court *may* award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees," and does not authorize a separate action for damages against the plaintiff.

Moreover, the *Metabolic Research* decision acknowledged that an immediate appeal would be permitted under California's anti-SLAPP statute. *Metabolic Research*, 2012 U.S. App. LEXIS 12280, at *13. The California statute provides for a mandatory award of attorney's fees to a prevailing SLAPP defendant. Cal Code Civ Proc § 425.16. In fact, in all of the above-cited cases holding the collateral order doctrine applicable in the context of anti-SLAPP statutes, the statutes provided for an award of attorney's fees. *See* La. C.C.P. Art. 971 ("a prevailing party on a special motion to strike shall be awarded reasonable attorney fees and costs"); 14 Maine Rev. Stat. § 556 ("if the court grants a special motion to dismiss, the court may award the moving

party costs and reasonable attorney's fees"); Annot. Laws Mass. GL ch. 231, § 59H ("if the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees"). Therefore, *Metabolic Research* plainly does not stand for the proposition that interlocutory review is unavailable when the anti-SLAPP statute permits the defendant to recover attorney's fees.

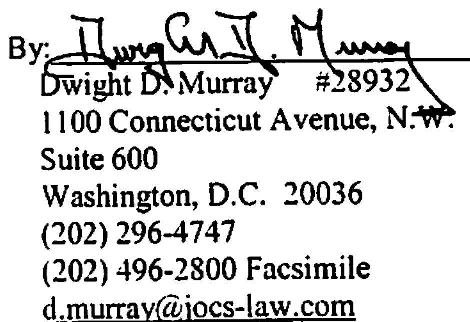
Rather than focusing myopically on the attorneys' fees provision of the Anti-SLAPP Act, the Court should look to the important First Amendment interests protected by Act, the risk that those interests will not be adequately protected by appeal from a final judgment, and the legislative history of the Act. For the reasons explained above, these considerations weigh heavily in favor of permitting this interlocutory appeal to go forward.

III. Conclusion

WHEREFORE, Appellant Arthur G. Newmyer respectfully requests that the Court deny Dr. Huntington's Motion to Dismiss.

Respectfully Submitted,

JORDAN COYNE & SAVITS, LLP



By: ______________________
Dwight D. Murray #28932
1100 Connecticut Avenue, N.W.
Suite 600
Washington, D.C. 20036
(202) 296-4747
(202) 496-2800 Facsimile
d.murray@jocs-law.com

Counsel for Counter-Defendant