Nos. 13-cv-1043, 13-cv-1044 (consolidated)

DISTRICT OF COLUMBIA COURT OF APPEALS

Michael E. Mann, Ph.D.,

Plaintiff–Appellee,

v.

National Review, Inc.; Mark Steyn;
Competitive Enterprise Institute; Rand Simberg,

Defendants–Appellants.

On Appeal from the Superior Court for the District of Columbia

---

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 19 OTHER MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANTS, SUPPORTING A FINDING OF JURISDICTION

Gregg P. Leslie
The Reporters Committee
for Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
Telephone: (703) 807-2100
Counsel for *Amicus Curiae*

Additional counsel listed in Appendix B

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF INTEREST

Pursuant to D.C. App. R. 29, the Reporters Committee for Freedom of the Press, through undersigned counsel, respectfully submit this brief as amicus curiae in support of appellants Mark Steyn *et al.* and Competitive Enterprise Institute *et al.* Pursuant to D.C. App. R. 29 (a), this brief is filed with the consent of all parties.

Media organizations have an interest in ensuring anti-SLAPP statutes remain effective tools in protecting free speech. While all citizens who choose to speak out on public affairs benefit from anti-SLAPP statutes, which aim to deter the use of litigation to silence speech, news organizations have an even greater interest in ensuring that these statutes provide meaningful relief. It is news organizations that choose every day to venture into the thick of every public controversy they can find, to make sure citizens are fully informed about their world. This engagement with important issues makes the news media more liable to be drawn in to court, particularly when a controversial figure decides to use litigation as a weapon to counter thorough reporting.

The amicus parties are: The Reporters Committee for Freedom of the Press, Advance Publications, Inc., Allbritton Communications Company, American Society of News Editors, Association of Alternative Newsmedia, Dow Jones & Company, Inc., The E.W. Scripps Company, First Amendment Coalition, The McClatchy Company, The National Press Club, National Press Photographers Association, NBCUniversal Media, LLC, News Corp, Newspaper Association of America, Online News Association, POLITICO LLC, Society of Professional Journalists, Time Inc., Tribune Company, and The Washington Post. Each is described more fully in Appendix A.

DISCLOSURE STATEMENT

Advance Publications, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Allbritton Communications Company is an indirect, wholly owned subsidiary of privately held Perpetual Corporation and is the parent company of entities operating ABC-affiliated television stations in the following markets: Washington, D.C.; Harrisburg, Pa.; Birmingham, Ala.; Little Rock, Ark.; Tulsa, Okla.; and Lynchburg, Va.

American Society of News Editors is a private, non-stock corporation that has no parent.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones. No publicly held company owns 10% or more of Dow Jones' stock.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The McClatchy Company is publicly traded on the New York Stock Exchange under the ticker symbol MNI. Contrarius Investment Management Limited owns 10% or more of the common stock of The McClatchy Company.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

Comcast Corporation and its consolidated subsidiaries own 100% of the common equity interests of NBCUniversal Media, LLC.

News Corporation has no parent company, and no publicly held company owns more than 10 percent of its shares.

Newspaper Association of America is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

POLITICO LLC is a wholly owned subsidiary of privately held Capitol News Company, LLC.

Society of Professional Journalists is a non-stock corporation with no parent company.

Time Inc. is a wholly owned subsidiary of Time Warner Inc., a publicly traded corporation. No publicly held corporation owns 10% or more of Time Warner Inc.'s stock.

Tribune Company is a privately held company.

WP Company LLC (d/b/a The Washington Post) is a wholly-owned subsidiary of The Washington Post Company, a publicly held corporation. Berkshire Hathaway, Inc., a publicly held company, has a 10 percent or greater ownership interest in The Washington Post Company.

SUMMARY OF THE ARGUMENT

The District of Columbia enacted the anti-SLAPP statute, D.C. Code §§ 16-5501 *et seq.* (2011), to prevent claims based on speech about matters of public interest from advancing past the initial stages of litigation unless the plaintiff can demonstrate a likelihood of success on the merits. Michael Mann, a climate scientist, sued defendants for defamation regarding statements they made on blog posts about the controversy surrounding Mann's research methods and data. Defendants moved to dismiss Mann's complaint under the D.C. anti-SLAPP statute. The D.C. Superior Court denied the motions, prompting this appeal.

This brief takes no position on the merits of the case; rather, it urges this court to find that denials of anti-SLAPP motions are immediately appealable. This decision would be consistent with at least three federal circuits and two state high courts, which have found that anti-SLAPP statutes are meant to confer immunity and that the right not to be exposed to the costs and delays of litigation will be irreparably lost if not immediately appealable. Furthermore, the high rate at which defamation decisions are overturned and the important role appellate courts play in reviewing defamation cases justify prompt appellate review.

ARGUMENT

I. The right to avoid litigation of meritless claims against speech on a matter of public interest, as provided by the D.C. anti-SLAPP statute, will be irreparably lost if denial of a motion is not immediately appealable.

This court has not yet issued a published opinion determining whether interlocutory orders denying anti-SLAPP motions are immediately appealable. However, other jurisdictions have found that interlocutory orders denying anti-SLAPP motions must be immediately appealable to preserve the very rights conveyed to defendants under the statute.

A. Three federal circuit courts have found, under the collateral order doctrine, that anti-SLAPP statutes fall within the small class of interlocutory orders that are immediately appealable.

Because of the lack of precedent from this court on the issue of appeals, it is appropriate to look to other jurisdictions for guidance, particularly when the law is based on similar laws in other states. Report on Bill 18-893, "Anti-SLAPP Act of 2010," Council of the District of Columbia, Committee on Public Safety and the Judiciary (Nov. 18, 2010), at 4 ("Committee Report") ("[This bill] follows the model set forth in a number of other jurisdictions . . . ."). In fact, the U.S. District Court for the District of Columbia has looked to other jurisdictions for guidance when this issue has surfaced. *See, e.g.*, *Boley v. Atlantic Monthly Grp.*, No. 13–89, 2013 WL 3185154, at *3 (D.D.C. June 25, 2013) ("Where appropriate, then, the Court will look to decisions from other jurisdictions . . . for guidance in predicting how the D.C. Court of Appeals would interpret its own anti-SLAPP law."); *Abbas v. Foreign Policy Grp., LLC*, No. 12–1565, 2013 WL 5410410, at *3 (D.D.C. Sept. 27, 2013).

The First, Fifth, and Ninth Circuits relied on the collateral order doctrine, *see Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), in finding that the anti-SLAPP statutes in Maine,[1] Louisiana,[2] and California,[3] respectively, required the right of immediate appeals to preserve the purpose of the statutes. *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009 (9th Cir. 2013) (reaffirming *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003)); *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009). The collateral order doctrine permits immediate appeal of interlocutory orders "that are [(1)] conclusive, [(2)] that resolve important questions separate from the merits, and [(3)] that are

[1] Me. Rev. Stat. tit. 14, § 556 (1999) (amended 2012).
[2] La. Code Civ. Proc. Ann. art. 971 (1999) (amended 2012).
[3] Cal. Civ. Proc. Code § 425.16 (West 1992) (amended 2011).

effectively unreviewable on appeal from the final judgment in the underlying action." *DC Comics*, *supra*, 706 F.3d at 1013 (brackets in original).

The Ninth Circuit held that the first two criteria of the collateral order doctrine were clearly satisfied. *Id.* Analyzing the third criterion, the court held that the California anti-SLAPP statute, based on the language of the statute and the legislative history behind it, was meant to confer immunity and not merely a defense against liability. *Id.* Immunity from suit is unreviewable on appeal from final judgment; therefore, the third criterion of the collateral order doctrine was met. *Id.* The Ninth Circuit noted that the protection of the right to free speech embedded in the anti-SLAPP statute requires "particular solicitude within the framework of the collateral order doctrine." *Id.* at 1016. The court further noted that "[t]he California legislature's determination, through its enactment of the anti-SLAPP statute, that such constitutional rights would be imperiled absent a right of interlocutory appeal deserves respect." *Id.*

The First Circuit also found that the first two criteria of the collateral order doctrine were met before concluding that the rights created by the Maine anti-SLAPP statute were akin to immunity and therefore unreviewable on appeal from final judgment. *Godin*, *supra*, 629 F.3d at 84-85. Looking at a Maine court's decision granting interlocutory review, the court found that "lawmakers wanted to protect speakers from the trial itself rather than merely from liability." *Id.* at 85.

The Fifth Circuit analyzed each criterion of the collateral order doctrine, ultimately finding that interlocutory orders denying an anti-SLAPP motion fall under the "small class" of orders that are immediately appealable. *Henry*, *supra*, 566 F.3d at 173-81. Regarding the third criterion, the court found that anti-SLAPP statutes "provide defendants the right not to bear the costs of fighting a meritless defamation claim" and are therefore unreviewable on appeal from

final judgment. *Id.* at 177-78. "[I]mmunity is not simply a right to prevail, but a right not to be tried," and that right is lost if the case proceeds to trial. *Id.* at 177. Echoing the Ninth Circuit, which held that free speech protections should be given greater import under the collateral order doctrine, *DC Comics*, 706 F.3d at 1016, the Fifth Circuit noted that the importance of protecting First Amendment rights "weighs profoundly in favor of appealability," *Henry*, *supra*, 566 F.3d at 180. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

B. At least two states have found that anti-SLAPP statutes create immunity from suit, a right that is irreparably lost if denials of anti-SLAPP motions are not immediately appealable.

Maine and Massachusetts[4] have likewise held that denial of anti-SLAPP motions are immediately appealable, even though each of their statutes does not explicitly provide for that right. *Morse Bros. v. Webster*, 772 A.2d 842 (Me. 2001); *Fabre v. Walton*, 781 N.E.2d 780 (Mass. 2002). Both courts focused their analyses on whether the right in question will be irreparably lost if not immediately appealable, which is essentially the third element of the collateral order doctrine. *Morse Bros.*, *supra*, 772 A.2d at 847; *Fabre*, *supra*, 781 N.E.2d at 784.

The Massachusetts high court held that the right to avoid "the harassment and burdens of litigation" is similar to government immunity in that the right is lost if the defendant is forced to litigate a case beyond its initial stages. *Id.* Not only did the high court find that defendants *may* immediately appeal the denial of an anti-SLAPP motion, *id.*, but an appellate court held defendants *must* immediately appeal the interlocutory order or they lose their right to appeal after final judgment. *Wendt v. Barnum*, 2007 Mass. App. Div. 93, 96 (App. Div. 2007). In *Wendt*, a defendant fully litigated his case after his anti-SLAPP motion was denied, and then he appealed

[4] The Massachusetts anti-SLAPP statute can be found at Mass. Gen. Laws ch. 231, § 59H (1994) (amended 1996).

the anti-SLAPP order along with other claims of error. 2007 Mass. App. Div. at 93-97. The judge dismissed the anti-SLAPP appeal as moot because the defendant failed to appeal the interlocutory order immediately after it was issued. *Id.* at 96. Therefore, in Massachusetts, it is not mere speculation that a defendant loses his right under an anti-SLAPP statute if he cannot immediately appeal the denial of his motion – it is a certainty.

Much like the Massachusetts high court and the First, Fifth, and Ninth Circuits, the Maine high court found that anti-SLAPP statutes create a right to avoid the "cost and delay of litigating [a] claim," and forcing a defendant to continue litigation is the "precise harm that the statute seeks to prevent." *Morse Bros.*, *supra*, 772 A.2d at 848; *see also Schelling v. Lindell*, 942 A.2d 1226 (Me. 2008). The court noted that the statute was "designed to protect certain defendants from meritless litigation," as indicated by its provisions offering an expedited hearing on the motion and temporarily switching the burden of proof to the plaintiff. *Id.* Ultimately, the court held that not immediately hearing an appeal of the denial of an anti-SLAPP motion would result in the "loss of a substantial right." *Id.*

Like the anti-SLAPP statutes in California, Louisiana, Maine, and Massachusetts, the D.C. anti-SLAPP statute confers a right to avoid the costs and harassment of meritless litigation – a right that will be lost if it is not immediately appealable. *See* D.C. Code §§ 16-5501 *et seq.* The D.C. anti-SLAPP statute is crafted to forestall litigation. *See id.* Much like the statute in Maine, *see Morse Bros.*, *supra*, 772 A.2d at 848, the D.C. statute requires the court to hold an expedited hearing on the special motion to dismiss and shifts the burden to the plaintiff to prove his or her likelihood of success on the merits. D.C. Code §§ 16-5502 (b), (d), -5503 (b). Furthermore, it permits the court to award the costs of litigation to a party who prevails on an anti-SLAPP motion, another deterrent to litigation. § 16-5504 (a). D.C. lawmakers recognized

that the unique problem with SLAPP lawsuits "is that the goal of the litigation is not to win the lawsuit but punish the opponent and intimidate them into silence." Committee Report at 4. The anti-SLAPP statute, then, is a remedy to the litigation itself. This brief takes no position as to whether the underlying merits of this case fall within that class of "intimidating" SLAPP suits; rather, this brief focuses on the importance generally of immediately appealing denials of anti-SLAPP motions. Just as the court in *Godin* stated, "lawmakers wanted to protect speakers from the trial itself rather than merely from liability." 629 F.3d at 85. As the First, Fifth, and Ninth Circuits have found, along with the high courts of Maine and Massachusetts, requiring a party to continue litigation before appealing the denial of an anti-SLAPP motion results in irreparable injury – the exact injury the statute was meant to guard against.

C. Contrary decisions of other courts indicating there is no right to immediately appeal the denial of anti-SLAPP motions are distinguishable from the D.C. anti-SLAPP statute because of the issue of immunity.

The Ninth Circuit distinguished between California's anti-SLAPP statute, *Batzel*, *supra*, 333 F.3d 1018, and Oregon's, *Englert v. MacDonell*, 551 F.3d 1099 (9th Cir. 2009), and Nevada's, *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795 (9th Cir. 2012), finding that appeals of anti-SLAPP motions are immediately appealable under California law but not under Oregon or Nevada law. California lawmakers intended to confer immunity, whereas Nevada's and Oregon's lawmakers did not, the court held. *See Metabolic Research*, *supra*, 693 F.3d at 801. In response to *Metabolic Research*, the Nevada legislature this year amended its statute so that denials of anti-SLAPP motions are immediately appealable. S.B. 286 (Nev. 2013) (amending Nev. Rev. Stat. § 41.637).

Like California lawmakers, D.C. lawmakers intended to confer immunity from suit in the D.C. anti-SLAPP statute. The statute is silent as to whether interlocutory orders are immediately appealable, but the legislative history has much to say.

This court has long recognized the importance of interpreting a statute through the lens of its legislative history. *A.R. v. F.C.*, 33 A.3d 403, 405 (D.C. 2011) ("When interpreting a statute, the judicial task is to discern, and give effect to, the legislature's intent."); *Grayson v. AT&T Corp.*, 15 A.3d 219, 238 (D.C. 2011) (en banc) ("In interpreting statutes, judicial tribunals seek to discern the intent of the legislature and, as necessary, whether that intent is consistent with fundamental principles of law."); *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 754 (D.C. 1983) ("This court has found it appropriate to look beyond the plain meaning of statutory language in several different situations."). While the court must look first at the plain language of the statute, *Peoples Drug Stores*, *supra*, 470 A.2d at 753, "the words [of a statute] 'cannot prevail over strong contrary indications in the legislative history . . . .'" *Grayson*, *supra*, 15 A.3d at 238 (quoting *Citizens Ass'n of Georgetown v. Zoning Comm'n of the District of Columbia*, 392 A.2d 1027, 1033 (D.C. 1978)).

Lawmakers originally included a provision granting a defendant the right of immediate appeal but later removed it solely because they thought the provision might exceed their authority, based this court's decision in *Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010); *see* Committee Report at 7. Even after lawmakers removed the provision, the report noted that the "Committee agrees with and supports the purpose of this provision." *Id.*

There is no need here, as in past cases, for this court to interpret ambiguous language or attempt to extrapolate the lawmakers' intent. D.C. lawmakers clearly intended the anti-SLAPP statute to include the right to immediately appeal the denial of a special motion to dismiss. The

D.C. anti-SLAPP statute is distinct from the Oregon and Nevada statutes, *see Metabolic Research*, *supra*, 693 F.3d at 801; *Englert*, *supra*, 551 F.3d at 1105-06, as the intent to ensure immediate appeal and confer immunity is clear in D.C.'s legislative history. As this court noted in *Grayson*, "the words [of a statute] 'cannot prevail over strong contrary indications in the legislative history . . . .'" 15 A.3d at 238. Yet this court need not go so far as to seek "contrary" legislative history. The statute may be read together with the legislative history to form a coherent interpretation, absent contradiction.

The clear intention of the D.C. lawmakers to permit immediate appeals leads to a single conclusion: the statute confers immunity from litigation, and that right is irreparably lost if the denial of an anti-SLAPP motion is not immediately appealable.

II. The important role appellate courts play in reviewing defamation cases and the frequency with which defamation decisions are overturned justify prompt appellate review.

At its heart, this case is about getting an action before an appellate court promptly, so that the purpose of an anti-SLAPP motion – avoidance of litigation over non-meritorious claims about speech on issues of public interest – is not frustrated. Such appellate review has even greater import in light of the role appellate courts often play in recognizing First Amendment rights and supports the interest in allowing interlocutory appeals.

The importance of searching appellate review in defamation cases has long been established. *See Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 685-86 (1989); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 (1984). Because of "[o]ur profound national commitment to the free exchange of ideas," *Connaughton*, *supra*, 491 U.S. at 686, and the Court's fear that "decisions by triers of fact may inhibit the expression of protected ideas," *Bose*

Corp., *supra*, 466 U.S. at 505, the Supreme Court has held that appellate judges must independently review trial court findings of defamation, *Bose Corp.*, *supra*, 466 U.S. at 505.

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold . . . .

Bose Corp., *supra*, 466 U.S. at 511.

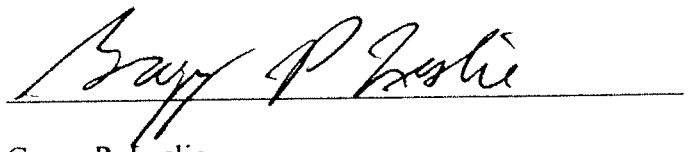
This heightened appellate review has had a significant impact on the number of defamation decisions overturned or modified. Between 1980 and 2011, defamation plaintiffs won 58.7 percent of their cases at trial, but defendants who appealed were able to reverse or modify nearly 70 percent of those decisions. *See MLRC 2012 Report on Trials and Damages*, Media L. Resource Center, Feb. 2012, at 36 tbl.1, 74 tbl.12A (reporting that 145 out of 215 cases that were appealed, or 67.4 percent, were reversed or modified).

The D.C. anti-SLAPP statute was enacted so that defendants in cases involving speech on issues of public interest could quickly have meritless claims dismissed before litigation costs became too burdensome, acting as a punishment in itself. Committee Report at 4. Given that nearly 70 percent of defamation decisions that defendants appeal are overturned or reversed, *see MLRC 2012 Report on Trials and Damages*, *supra*, it is imperative to permit immediate appellate review of denials of anti-SLAPP motions. It is not only burdensome on the parties but a waste of the court's limited time and resources to allow a defamation claim to linger in a lengthy and costly litigation that ultimately leads to an appeals process it is not likely to survive.

CONCLUSION

For the reasons given above, as well as those given in the response of the appellant, the court should accept jurisdiction to hear an appeal of the denial of appellants' anti-SLAPP motions.

Respectfully submitted,



Gregg P. Leslie
The Reporters Committee
for Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
Telephone: (703) 807-2100
Counsel for *Amicus Curiae*