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Important Opinions

Tort

SLAPP - Abuse Prevention Order

A right to interlocutory appellate review exists from the denial of a special motion to dismiss filed pursuant to the anti-SLAPP statute, holds the Supreme Judicial Court.....page 6.

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Evidence

Peer Review Privilege

In a suit filed against a defendant hospital by a plaintiff physician whose contract had not been renewed, a judge erred in suppressing a letter from the defendant's president to the chief of surgery, as the defendant had not demonstrated that the letter was protected by the peer review privilege, the Appeals Court rules.....page 7.

Criminal

'No Contact' Order

A defendant cannot be convicted of violating a "no contact" order issued under G.L.c. 209A, where the contact occurs in circumstances where the defendant did not know, and could not

Inadvertent Violation Of 209A Order Not A Crime

Jury Instruction Must Include Voluntariness

BY TONY WRIGHT

A defendant could not be convicted of a crime for *inadvertently* violating a Chapter 209A "no contact" order, the Appeals Court has ruled.

The defendant argued that there was prejudicial error because the state District Court judge failed to instruct the jury on the "voluntariness" of his actions.

The Appeals Court agreed, reversed the conviction and remanded the case to the District Court.

"A defendant cannot be convicted of violating a 'no contact' order issued under c. 209A where the contact occurs in circumstances where the defendant did not know, and could not reasonably have been expected to know, that the protected person would be present," wrote Judge William I. Cowin.

The 10-page decision is *Commonwealth*

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Abuse-Of-Process Claim Nixed Under Anti-SLAPP Man Contested 209A Restraining Order

BY JASON M. SCALLY

Where a woman successfully obtained a Chapter 209A restraining order against her ex-boyfriend and he later filed an abuse-of-process claim against her, his suit must be dismissed pursuant to the anti-SLAPP law, the Supreme Judicial Court has ruled.

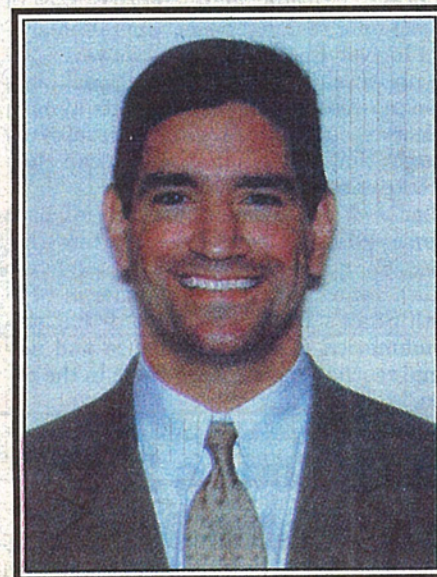
The man argued that he filed his complaint for abuse of process against the woman for her "ulterior motive" and not solely because she had sought a restraining order against him.

But the court disagreed and found that there was no proof that the man's claim was brought for any other reason than to challenge the woman's petitioning activities — which had led to a final judgment entered in her favor.

"A special motion to dismiss will not succeed against a meritorious claim[] with a substantial basis other than or in addition to the petitioning activities implicated," said Justice Robert J. Cordy. "[The plaintiff's] claim does not meet this test."

The judge added that because the plaintiff had not appealed the abuse protection order, "that judgment is conclusive evidence that the petitioning activity was not devoid of any reasonable factual support or arguable basis in law."

Cordy also explained that the defendant



JOHN P. FULGINITI
Defense attorney says ruling will allow certain expedited appeals

had a right to an interlocutory appeal on her special motion to dismiss because, the 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

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Abuse-Of-Process Claim Nixed Under Anti-SLAPP

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case to its conclusion before obtaining a definitive judgment through the appellate process."

The 12-page decision is *Fabre v. Walton, et al.*, Lawyers Weekly No. 10-078-02.

Deterrent Effect

John P. Fulginiti of Boston, the defendant's attorney, said that he was pleased with the decision because it "sends a clear message to abusers that if they retaliate against their victims for obtaining an abuse protection order by filing a retaliatory lawsuit, their case will be dismissed quickly and the abusers will be responsible for all of the victim's costs including attorney's fees."

He remarked that it was also significant that the court said it will allow expedited appeals regarding special motions to dismiss, because it showed that the court "recognized that the greatest harm to an individual is being unnecessarily put on trial."

Fulginiti added that he hoped the decision would act as a "deterrent" to abusers bringing retaliatory claims.

A press release issued by the Women's Bar Association, which filed an amicus brief in the case, also commended the SJC's decision for letting special motions to dismiss "survive as a meaningful tool in discouraging the misuse of lawsuits to punish constitutionally protected access to the courts and speech."

The statement added that "[l]etting the lower court decision stand ... would have had tremendous ripple effects [such as] a chilling effect on reporting of domestic abuse by victims in what might be life-endangering situations for fear of a responsive lawsuit."

But Bruce T. Macdonald of Cambridge, the plaintiff's attorney, disagreed with the court's ruling and stated that it "has virtu-

ally eliminated the common law tort of abuse of process in Chapter 209A situations. That's a pretty dramatic result."

Citing inconsistencies in the SJC's prior rulings, the plaintiff's attorney recalled how in a previous SJC decision, Cordy had noted the "conundrum" that existed when one person's right to petition was upheld while the other's right to petition was impinged.

"I'm puzzled why he says in [the 2001 SJC decision of *Baker v. Parsons, et al.*] that this is a 'conundrum,' but in this case he doesn't have any problem with essentially creating a mandatory rule of dismissal," Macdonald said. "It just seems inconsistent to me."

The plaintiff's attorney said he was also discouraged that the SJC imposed attorneys' fees on the party who won at the trial-court level.

"This is the first time, to my knowledge, that an appellate court has imposed attorneys' fees on a party who *won* in the trial court," Macdonald said, noting that he plans to petition the court for a rehearing on this issue.

209A Order Issued

Sean Fabre, the plaintiff, and Amalia Walton, the defendant, had been in a relationship during their college years, but they subsequently broke up in February 2000.

After the break-up, Walton filed a Chapter 209A restraining order against Fabre in March 2000 asserting that he had assaulted her during a trip to the Caribbean and that she feared his behavior would continue.

At an ex parte hearing in the Dedham District Court before Judge Lynda M. Connolly, the judge found that Walton was "visibly very frightened," and she ordered a restraining order against Fabre.

At a subsequent hearing, Fabre apparently admitted to grabbing Walton's arm

on one occasion and threatening to kill another man out of jealousy.

At one point, Fabre's attorney attempted to introduce evidence as to Walton's motive for bringing the claim by asking Fabre's roommate about another friend's statement about her motive, but the judge sustained the ex-girlfriend's attorney's objection for hearsay.

At the conclusion of the hearing, Connolly found in favor of Walton and extended the restraining order for six months.

Fabre never appealed the Chapter 209A order, but he filed an abuse of process complaint 16 days later in the Cambridge District Court.

Walton brought a special motion to dismiss under the state's anti-SLAPP statute and a Rule 12(b)(6) motion to dismiss for failure to state a claim of abuse of process, but Judge Severlin B. Singleton denied both motions without issuing an opinion.

She then brought a motion for reconsideration and, in the alternative, a motion that the District Court judge report his ruling to the Appellate Division for interlocutory review, but Singleton denied these motions as well.

Walton then petitioned the SJC under G.L.c. 211, §3 for review by a single justice of the SJC, and after a hearing, Justice Judith A. Cowin stayed further proceedings in the Cambridge District Court until the full panel of the SJC heard the case.

The Attorney General's Office intervened in the suit for the purpose of supporting Walton's request for relief by a single justice of the SJC.

The Women's Bar Association, the Massachusetts Law Reform Institute, Jane Doe, Inc., the American Civil Liberties union of Massachusetts and the Victim Advocacy and Research Group also filed amicus briefs.

Special Motion

Cordy found that the plaintiff's com-

plaint, "which simply recounts and complains of Walton's conduct in bringing and testifying at the 209A proceedings," was evidence that it was based on her "petitioning activities alone."

Although the plaintiff offered two affidavits — one from himself and one from his roommate — in support of his argument that the defendant's petitioning activities were based on an "ulterior motive," the judge held that this evidence alone was not enough to show that his claim was not based on the act of filing the abuse protection order.

"Notwithstanding his allegations concerning the motive behind Walton's conduct, the fact remains that the *only* conduct complained of is Walton's petitioning activity," Cordy observed. "There is no 'substantial basis' for the claim other than the petitioning activity."

After finding that the plaintiff's claim was based on the petitioning activity alone, the judge noted that the burden shifted to the plaintiff to prove that it was "devoid of any reasonable factual support or arguable basis in law."

However, he found that because there had been a final judgment on the Chapter 209A petition that the plaintiff had not appealed, the plaintiff's affidavits were "insufficient to sustain his burden."

Cordy wrote: "By definition, something that has been established by a preponderance of the evidence cannot be devoid of any reasonable factual support or arguable basis in law."

As a result, he reversed the judgment of the District Court and allowed the special motion to dismiss.

Pursuant to the anti-SLAPP statute, the judge also noted that the defendant could be awarded attorney's fees and costs. **MLW**

Questions or comments may be directed to the writer at jscally@lawyersweekly.com.