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## Has Anti-SLAPP Killed Malicious Prosecution and Abuse of Process Counterclaims?

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The acronym "SLAPP," which stands for "Strategic Litigation Against Public Participation," was coined in the 1980s to refer to meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights, or to punish them for doing so. To combat such suits, in 1994 the Massachusetts legislature enacted the Anti-SLAPP statute, G.L. c. 231, §59H, which established a procedure for obtaining the early dismissal of claims seeking to impose liability on individuals for exercising their constitutional rights of petition. This procedure, known as a "special motion to dismiss," has become a frequent subject of the SJC's jurisprudence since §59H was first enacted, largely because while the powerful procedural protections of §59H were designed to target meritless suits brought to discourage individuals from exercising their constitutional right of petition, the statute has frequently been invoked in attempts to dismiss a wide array of other claims, such as abuse of process and malicious prosecution, claims far outside the petitioning activity that the Legislature originally sought to protect.

The primary concern surrounding the application of the Anti-SLAPP statute is, in essence, how to effectively and objectively discern legitimate claims from claims designed to deter individuals from exercising their protected right to petition. §59H defines protected petitioning activity to include: statements made before a legislative, executive, or judicial proceeding; statements made in connection with an issue under consideration by a governmental body; statements reasonably likely to encourage a governmental body's consideration of an issue; statements reasonably likely to enlist public participation in an effort to bring about such governmental consideration; and any other statements protected by the constitutional right to petition the government. G.L. c. 231, §59H.

In attempting to strike this balance, the Supreme Judicial Court has revised the statute's analytical framework several times, most recently on February 29, 2024 in *Bristol Asphalt Co., Inc. v. Rochester Bituminous Products, Inc.*, a landmark decision that jettisoned two prior SJC decisions and revised and greatly simplified the Court's approach to the statute. 493 Mass. 539 (2024). However, as became clear in *Hidalgo v. Watch City Constr. Corp.*, an appeals court case issued on December 26, 2024, although *Bristol* represents a simplified



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approach, this revised framework has effectively eradicated the availability of counterclaims for malicious prosecution and abuse of process. No. 24-P-11, 2024 WL 5218539 \*2 (Mass. App. Ct. Dec. 26, 2024).

Under the revised and simplified *Bristol* framework, the anti-SLAPP statute analysis asks two core questions when evaluating a special motion to dismiss. First, is the complaint based solely on the opposing party's petitioning activity? If it is not, — i.e. the plaintiff is complaining (at least in part) about activity that is not petitioning — then the special motion to dismiss will be denied. Alternatively, if the complaint is based solely on petitioning activity, then the analysis moves to the second question — was the challenged petitioning activity "devoid of any reasonable factual support or any arguable basis in law." If a special motion opponent cannot show, by a preponderance of the evidence, that the challenged petitioning activity was devoid of any reasonable factual support or any arguable basis in law, the special motion to dismiss will be allowed. If the special motion opponent can make this showing, then a judge must consider whether the special motion opponent has shown, by a preponderance of the evidence, that the petitioning activity caused the opponent actual injury. If the special motion opponent can make a showing of actual injury, then the special motion to dismiss must be denied. Conversely if the opponent cannot make this showing, the special motion to dismiss must be allowed.

As Justice Kafker noted in *Bristol*, the "based-on" component of the statutory framework has led to the dismissal of claims outside what the Legislature originally sought to protect. In fact, as made clear in *Hidalgo*, when applying the *Bristol* framework to claims for malicious prosecution and abuse of process, it is evident that in virtually every case, such claims are based solely on the opposing party's petitioning activity and thus are *prima facie* subject to dismissal under the anti-SLAPP statute. *Hidalgo*, 2024 WL 5218539 \*2. The Court noted that even where an abuse of process defendant had an improper subjective motive for filing a lawsuit, this does not alter the fact that the plaintiff's abuse of process claim was based solely upon the abuse of process defendant's prior lawsuit. The subjective motivation for filing a lawsuit is not separable, or separately actionable, from the act of filing suit. Thus, in almost every case, claims of malicious prosecution and abuse of process will satisfy the first *Bristol* prong.

This does not mean, however, that every claim for abuse of process or malicious prosecution must be dismissed; rather, the second *Bristol* prong must still be addressed — can the special motion opponent show that the petitioning activity lacked a reasonable basis in fact or law? Under the *Bristol* framework, it will be quite unlikely that claims for abuse of process or malicious prosecution survive an anti-SLAPP motion to dismiss where they are asserted as counterclaims, because the claim that is alleged to lack reasonable basis has not yet been adjudicated. In other words, claims such as these must ordinarily wait for the outcome of the lawsuit they are challenging. In fact, a claim for malicious prosecution cannot be properly brought before the prior lawsuit is resolved, as one of the elements of such a claim is that the prior suit was unsuccessful. While this is not a required element for abuse of process claims, it will still be extremely difficult to show that a claim has no reasonable basis in fact or law where the challenged claim has not yet been decided.

Accordingly, the effects of the revised *Bristol* framework serve to substantially chill, if not completely undermine, the usefulness of counterclaims for malicious prosecution or abuse of process. It remains to be seen how the judicial and legislative systems will grapple with this result of the revised Anti-SLAPP framework.

Given the importance of the newly simplified Anti-SLAPP framework and its effect on potential counterclaims, our office is prepared to provide guidance on anti-SLAPP litigation. Questions regarding this matter can be directed to [Jeffrey B. Loeb](#) and [Kennedy K. Cameron](#).

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