STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. CUM-24-82

PETER MASUCCI, et al.

Plaintiffs-Appellants

v.

JUDY'S MOODY, LLC, et al.

Defendants-Cross-Appellants

On Appeal from the Order of the
Cumberland County Superior Court

Reply Brief of Appellees and Cross-Appellants Edward Page, Christine Page, James Li, Kim Newby, and Robin Hadlock Seeley

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Appellees and Cross-Appellants Edward Page, Christine Page, James Li, Kim Newby, and Robin Seeley (collectively "PLNS Appellees") submit this reply brief in support of their cross-appeal challenging the Trial Court's denial of PLNS Appellees' request for attorney's fees pursuant to Maine's Anti-SLAPP statute.

ARGUMENT

It was legal error for the Trial Court to invent and apply a "malintent" standard to the PLNS Appellees' request for attorney's fees under the Anti-SLAPP statute, 14 M.R.S. § 556 ("Statute"). If the Law Court affirms the Trial Court's denial based on a lack of "malintent," it will be introducing a new, unsupported criterion to be demonstrated to obtain attorney's fees under the Statute. Application of the appropriate existing factors that have been articulated by the Law Court leads to a conclusion that attorney's fees must be awarded in this instance. Appellants' opposition to the PLNS Appellees' cross-appeal does nothing to cure the Trial Court's error.

I. It Was Legal Error for the Trial Court to Deny Attorney's Fees on the Basis that Plaintiffs/Appellants' Suit Was Not Brought with "Malintent"

Appellants' opposition to the PLNS Appellees' cross-appeal consists of one paragraph of argument. (Plfs. Grey Br. 40-41.) Appellants fail to address the PLNS Appellees' position that the Trial Court committed legal error by reading a new "malintent" standard into the Anti-SLAPP statute to determine whether to award

attorney's fees. Neither the text of the Anti-SLAPP statute nor the cases interpreting it set forth "malintent," or any similar concept, as a factor to be weighed in the award of attorney's fees under the Statute. As such, the Trial Court applied the wrong legal standard.

"To the extent that interpretation of a statute is required in conjunction with the award or denial [of attorney's fees], we review the statutory construction de novo." *Pollack v. Fournier*, 2020 ME 93, ¶ 21, 237 A.3d 149, 155. Interpretation of a statute is required in this case because "The question of whether to award costs corresponds to the policy goals of the anti-SLAPP statute." *Stanley Cottage, LLC v. Scherbel*, 2015 WL 4977716, at *5 (Me. Super. June 10, 2015). The Trial Court found that "the Anti-SLAPP [statute] was enacted to punish and dissuade" suits filed with "malintent." (A. 90.) Thus, this is a question of law that the Court reviews de novo.

The Court has articulated two primary policy goals of the Statute. First, the Statute seeks to safeguard the constitutional right to seek redress or assistance from the government. *See Desjardins v. Reynolds*, 2017 ME 99, ¶ 18 (Anti-SLAPP statute enacted "to provide protection for a citizen's fundamental right to petition the government, a right that the Legislature has given priority by enacting the anti–SLAPP statute."). Second, the Statute seeks to protect defendants from meritless litigation. *See, e.g.*, *Pollack*, 2020 ME 93, ¶ 24 ("[A] court may use the merit of a

case as a measure of whether attorney fees are appropriate . . . because the anti-SLAPP statute is aimed at preventing litigation that has no chance of succeeding on the merits.").

The Court has never identified a requirement that a plaintiff's suit be filed with "malintent" or similar bad faith for a defendant to obtain attorney's fees after prevailing on an Anti-SLAPP motion to dismiss. Nor does such a requirement further the two primary purposes of the Statute discussed above.

A finding of "malintent" would be an appropriate factor to consider where the legal authority to impose attorney's fees is the trial court's "inherent authority to sanction parties and attorneys for abuse of the litigation process." *Linscott v. Foy*, 1998 ME 206, ¶ 16, 716 A.2d 1017, 1021. This inherent authority to award attorney's fees may be exercised only in "extraordinary circumstances" of "bad faith" or "egregious conduct." *Id*. ¶ 16-17.

The "malintent" criterion applied by the Trial Court is akin to the "bad faith" element that must be shown for a court to award attorney's fees absent clear statutory authority or contractual agreement. *See Indorf v. Keep*, 2023 ME 11, ¶ 15, 288 A.3d 1214, 1219 (court has authority to "award attorney fees under the following exceptions to the American rule: (1) [a] contractual agreement of the parties, (2) clear statutory authority, or (3) the court's inherent authority to sanction egregious conduct in a judicial proceeding."). In the case of the PLNS Appellees'

request for fees, attorney's fees are expressly authorized under the Statute. Thus, the "malintent" or "bad faith" requirement imposed by the Trial Court is unsupported and inappropriate in the context of a fee request under the Statute.

Because neither the text nor the purpose of the Statute supports the Trial Court's adoption of a "malintent" test for the award of attorney's fees, it was legal error for the Trial Court to deny the PLNS Appellees' request on that basis. Appellants' opposition fails to address this error.

II. Under Application of the Correct Legal Standard, the PLNS Appellees' Request for Attorney's Fees pursuant to the Anti-SLAPP Statute Should be Granted

Appellants' opposition to the PLNS Appellees' cross-appeal does not address the factors articulated by the Court for considering attorney's fees under the Statute. (Plfs. Grey Br. 40-41.) As such, Appellants apparently do not challenge whether an award of attorney's fees would further the Statute's policy goals of protecting citizens' right to petition the government and shielding defendants from the burden of meritless litigation. *See, e.g.*, *Desjardins*, 2017 ME 99, ¶ 18; *Franchini v. Investor's Bus. Daily, Inc.*, 981 F.3d 1, 7 (1st Cir. 2020). Application of these recognized factors to the PLNS Appellees' fee request demonstrates that, had the Trial Court applied the correct legal framework, it would have been an abuse of discretion to deny the PLNS Appellees' request.

A. Protection of Petitioning Activity under the Statute

As found by the Trial Court, "The reason for the Pages and Li & Newby's involvement [as defendants in the litigation], as evidenced by the complaint itself, is their respective reports to Maine Marine Patrol." (A. 65.) The trial court also found that "it is clear from the complaint that the Plaintiffs' decision to name [Robin] Seeley as a Defendant in the instant suit is a direct result of her rockweed conservation advocacy."[1] (*Id*.) Thus, the facts as found by the Trial Court are unequivocal that Appellants sued the PLNS Appellees because of their petitioning activity. The PLNS Appellees' petitioning activity was based entirely on this Court's unanimous, unambiguous holding in *Ross v. Acadian Seaplants, Ltd*., 2019 ME 45, that intertidal landowners have the right to give or withhold permission for the public to harvest living, attached seaweed on their property. (A. 347-48.)

Citizens of the State should be able seek help from the government in good faith reliance on this Court's clear directives without fear of being sued. When such good-faith reliance results in becoming a defendant in unwanted litigation, as was the case when Appellants filed suit against the PLNS Appellees, confidence in the Court's pronouncements and the rule of law are eroded. *See McGarvey v. Whittredge*, 2011 ME 97, ¶ 63, 28 A.3d 620, 637 (Levy, J., concurring) ("respect

[1] Appellants do not challenge the Anti-SLAPP dismissal of Robin Seeley on appeal (Plfs. Grey Br. 31.), thereby acknowledging that such dismissal was warranted under the Statute. At a minimum, fees should be awarded pursuant to the dismissal of Ms. Seeley, as Appellants' suit against her was particularly egregious. (PLNS Red Br. 28-29.)

for legal precedent lends stability to the law and enables the public to place reasonable reliance on judicial decisions affecting important matters.") Without such confidence, the petitioning activity protected by the Statute is likely to be "chilled or deterred." *See Schelling v. Lindell*, 2008 ME 59, ¶ 6 (anti-SLAPP statute "is designed to guard against meritless lawsuits brought with the intention of chilling or deterring the free exercise of the defendant's First Amendment right to petition the government by threatening would-be activists with litigation costs.").

Accordingly, an award of attorney's fees in this in this case would reinforce the Statute's goal of protecting legitimate, good faith petitioning activity.

B. Protection from Meritless Suits under the Statute

Appellants bring two substantive claims that implicate the PLNS Appellees: 1) that all intertidal land in Maine is owned by the State, and 2) that *Ross v. Acadian Seaplants, Ltd*. was wrongly decided and must be vacated. (Plfs. Blue Br. 66.) ("Upland landowners do not own the intertidal land they claim to own, and even if they did, they have no right to deny the harvesters access for the purpose of harvesting rockweed."). There is not one iota of support in existing law for either of these claims. On the contrary, Appellants' justification for their lawsuit is a hypothetical legal framework that is the exact opposite of settled, unambiguous law in Maine.

The Red Brief filed on behalf of the PLNS Appellees (and Jeffery and Margaret Parent) sets forth the unbroken line of cases holding for centuries that intertidal land in Maine can be privately or publicly owned, presumptively by the adjacent upland owner or, if it has been conveyed separately, by another landowner. (PLNS Red Br. 2-7.) Appellants' argument that every single one of those cases just got it wrong has been raised and rejected by the Court and continues to lack merit. (PLNS Red Br. 7-12.)

And in *Ross v. Acadian Seaplants*, the Court definitively held that the public does not have the right to cut rockweed without the permission of the intertidal landowner. *Ross* was unanimously decided in 2019. It held that under any test the Court has considered, including the test Appellants ask the Court to adopt in this case, the public's removal of living, attached intertidal seaweed overburdens the fee owner's property rights. *Ross*, 2019 ME 45, ¶¶ 33, 43. Appellants have not identified any new fact or law that calls the validity of Ross into question. (PLNS Red Br. 12-25.)

Appellants' demand that "this Court must overrule *Ross*" (Blue Br. 57) needs to be distinguished from Appellants' challenge to the holding in *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989), that the public does not have the right to recreate on private intertidal land. Since *Bell* was decided, the Law Court has repeatedly signaled disease with *Bell's* 4-3 holding on recreational use and an

eagerness to reexamine it.[2] By contrast, *Ross* was unanimously decided, applied the common law balancing test that Appellants request, and has not been subject to any criticism or reexamination by the Court. As such, Appellants' attempt to overturn *Ross* by suing the PLNS Appellees is entirely unsupported and without merit.

As discussed above, Appellants' claims against the PLNS Appellees are meritless and likely have had or will have the effect of "chilling or deterring" landowners from exercising their right to contact Marine Patrol to report unauthorized rockweed harvest. Appellants' opposition does not resolve or even address application of these relevant factors. Accordingly, an award of attorney's fees would further the principal goals of the Anti-SLAPP statute and it would be an abuse of discretion for such fees to be denied.

CONCLUSION

For the foregoing reasons, the Rockweed Appellees respectfully request that the Court VACATE the Superior Court's denial of the PLNS Appellees' request for reasonable attorney's fees pursuant to Maine's Anti-SLAPP statute, 14 M.R.S.

[2] *See, e.g.*, *Ross*, 2019 ME 45 (all seven justices applying common law balancing test to determine public intertidal rights); *McGarvey v. Whittredge*, 2011 ME 97, ¶ 56, 28 A.3d 620, 635 ("In short, our judicial unease with a rigid interpretation of the public trust rights urges clarification of the *Bell II* holding's scope.") (Saufley, J., concurring); *Eaton v. Town of Wells*, 2000 ME 176, ¶ 54 ("I would conclude that the judicial unease with the *Bell* analysis far outweighs the admittedly important policy of following precedent.") (Saufley, J., concurring).

§ 556, and REMAND for a determination of reasonable fees.

Dated at Portland, Maine this 13th day of September 2024.

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