

2006

William T. Jacob v. B. Brett Bezzant : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

<p>WILLIAM T. JACOB, an individual, COMMERCIAL PROPERTIES, INC., a Utah Corporation, and PHILLIPS MANUFACTURING COMPANY, INC., a Utah corporation,</p> <p>Plaintiffs/Appellants,</p> <p>VS.</p> <p>B. BRETT BEZZANT, an individual; NEWTAH, INC., dba AMERICAN FORK CITIZEN NEW UTAH, a Utah corporation,</p> <p>Defendants/Appellees.</p>	<p>Case No. 20060856-SC</p>
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REPLY BRIEF OF APPELLANTS

**APPEAL FROM GRANT OF DEFENDANTS' MOTION FOR JUDGMENT ON
THE PLEADINGS AND/OR SUMMARY JUDGMENT, MOTIONS FOR
ATTORNEY'S FEES, AND FROM THE DENIAL OF PLAINTIFFS' MOTION
TO RECONSIDER, IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH
COUNTY, STATE OF UTAH, THE HONORABLE FRED D. HOWARD,
PRESIDING.**

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

UTAH APPEALS

OCT 30 2007

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REPLY BRIEF OF APPELLANTS

SUMMARY OF ARGUMENT

Bezzant fails to acknowledge that this case is not about political speech or a public issue. It is about Defendants (“Bezzant”) maliciously and unnecessarily attacking Plaintiff, William T. Jacob (“Jacob”), a private citizen. Jacob never was a public issue.

Bezzant did not demonstrate that the district court’s dismissal of Jacob’s claims under the anti-SLAPP Act is correct, particularly when accepting Jacob’s allegations as true and drawing all reasonable inferences in his favor. He also cannot show his Notice was published in the process of government. Moreover, even if Bezzant could make such a showing, he has conceded that Jacob’s claims were not wholly without merit. Thus sanctions were not justified even if Jacob had not succeeded on the merits.

Bezzant has also failed to show, when accepting all of Jacob's factual allegations as true and drawing all reasonable inferences in his favor, that Jacob's §1983 claims were insufficiently pled such that sanctions were justified. Further, Bezzant has failed to rebut Jacob's as-applied challenge under the Open Courts provision.

ARGUMENT

I. BEZZANT HAS FAILED TO SHOW THE DISTRICT COURT'S DISMISSAL UNDER THE ANTI-SLAPP ACT IS CORRECT WHEN VIEWING ALL FACTS AND INFERENCES IN A LIGHT MOST FAVORABLE TO JACOB

The district court dismissed Jacob's claims under the anti-SLAPP Act (the "Act") on the ground that Bezzant's Notice was "protected political speech." R1825:12-14. The district court's decision to award Bezzant attorneys' fees was based upon this finding. *Id*; BRIEF OF APPELLANT ("Br. Appt."), Addendum C.

As the proponent of the motion for judgment on the pleadings/motion for summary judgment ("Motion"), Bezzant must show the district court's ruling was correct when accepting Jacob's factual allegations as true and drawing all reasonable inferences in Jacob's favor. *In re. Estate of West*, 948 P.2d 351, 353 (Utah 1997).¹ Bezzant was

¹This Court recently articulated a departure from this heightened standard of review when considering whether a statement is susceptible to a defamatory meaning. *O'Connor v. Burningham*, 2007 UT 58, ¶¶26-7, 165 P.3d 1214. Therefore, the analysis in this section does not apply to that portion of the court's ruling. However, under the analysis in *O'Connor* the district court in this case should have found the statements did convey a defamatory meaning. The publication context was an environment of fear, retaliation and abuse by public officials against private citizens, and a deliberately malicious "Urgent Election Notice," "Apology," and "Correction," initially drafted and approved by public official and candidate Tom Hunter and published by Bezzant to preserve his friendship and business relationship with Hunter and to avoid being sued. Thus the context was an effort to please AFC public officials by holding Jacob out as an object of public contempt, hatred and ridicule. This issue will be addressed in greater depth below.

also required below to present clear and convincing evidence Jacob filed his claims to interfere with or chill Bezzant's participation in the process of government. Utah Code Ann. §78-58-104(1)(b). Bezzant has failed to meet or to acknowledge these burdens.

Jacob, a private citizen and business owner whose reputation for integrity, honesty, and sound judgment is essential to the success of his business, established a long-standing confidential relationship with Defendants in 1993 whereby Jacob periodically provided Defendants with information about current events in exchange for Defendants protecting Jacob's anonymity. R280:5, 11; R1528. It can reasonably be inferred from these facts that Defendants knew Jacob highly valued his anonymity. Thus, it is also reasonable to infer that when Defendants publicly disclosed Jacob's name in the Urgent Election Notice ("Notice"), they did so with malice and a with purpose to hold Jacob out as an object of public ridicule, contempt, and hatred. That Bezzant did not publish the Notice to influence the decisions of any government branch, but did so because Tom Hunter² threatened to sue him, and to preserve his friendship and business relationship with Hunter, must not only be accepted as true, but are facts admitted on the record. R280:39-40; R385; R1457 (Br. Appt. Addendum G).

²Although Defendants now refer to the Notice as the "Editorial," this is a semantic manipulation of unfavorable facts to fit favorable law. Defendants entitled it the "Urgent Election Notice", the "Correction," and the "Apology" until Jacob filed his Complaint. Defendants now strategically avoid these titles. The Notice was published via mail, door-to door delivery, and the non-editorial section of the *Citizen's* website. The undisputed facts that Hunter wrote the first draft and that both he and Storrs approved the final draft undermine any claim the Notice was an editorial, and further reveal Bezzant's claim that he was merely exercising his own free speech rights to be false on its face. R1529-30.

That Bezzant maliciously identified “William T. (Bill) Jacob” and falsely accused him of producing false information and of negative campaigning to hurt candidates must also be accepted as true, as well as the reasonable inference that Bezzant intended to make Jacob a target of public ridicule, contempt, and hatred. R1529-30; R2609-10.

Had the district court accepted Jacob’s factual allegations³ as true and drawn all reasonable inferences in his favor, the court should have concluded the Act did not apply and that Jacob’s claims had both legal and factual merit. Bezzant’s failure to show the court’s ruling was correct when accepting Jacob’s allegations as true defeats his claims.

- A. Bezzant fails to show that a lengthy procedural history is clear and convincing evidence that Jacob’s primary purpose was to interfere with or chill his right to participate in the process of government.

The district court acknowledged Bezzant had to “demonstrate that the primary purpose of Jacob’s lawsuit [was] ‘to prevent, interfere with, or chill [Bezzant’s] proper participation in the process of government.’” R1825:13 (quoting §78-58-104(2)).

Bezzant had to make this showing by clear and convincing evidence (§78-58-104(1)(b)), which is obviously a greater burden than a mere preponderance standard. The district court’s conclusion that this matter was a SLAPP action was based on the following:

[T]he evidence presented to this Court intimates that Jacob filed the litigation at issue for the purpose of chilling Bezzant’s political speech and thereby preventing or interfering with Bezzant’s proper participation in the process of government. The lengthy procedural history set forth in Section I of this opinion supports the proposition that Jacob intended to use this litigation as a means of punishing Bezzant for Bezzant’s publication of the political speech contained in the election notice.

³It is particularly appropriate for the district court accept all factual allegations as true because the anti-SLAPP Act stays all discovery upon the defendant’s motion to dismiss. Utah Code Ann . §78-58-104(1)(a).

R1825:14. A lengthy procedural history⁴ is not clear and convincing evidence of a primary purpose to interfere with or chill government participation; because Bezzant cannot argue that it is, he argues instead that Jacob's good faith is immaterial. BRIEF OF APPELLEE ("Br. Appe.") at 44-5.

Moreover, many litigated cases are lengthy for legitimate reasons. A long history is often the rule rather than the exception and does not, standing alone, support a finding of abuse by either party. In fact, it may support the opposite finding as diligent litigants narrow the issues for trial. Cases settle all the time because litigants agree to avoid typically lengthy litigation and its associated costs. In any event, a lengthy procedural history is insufficient to establish a primary purpose to interfere with or chill Bezzant's right to participate in the process of government by clear and convincing evidence.

B. Bezzant fails to address his own admissions that prove he was not participating in the process of government, arguing instead for a broad construction of the Act that exceeds its plain language and purpose.

Bezzant's affirmations in his Answer that his Notice was published to provide "information and commentary" to American Fork City ("AFC") residents and to "apologize" to Hunter and Storrs (R385, ¶¶16-20) constitute judicial admissions.

⁴ Not only is Bezzant's Statement of Facts inaccurate and misleading, he fails to inform the Court about his own significant contributions to the procedural history of this case. He was the first party to initiate and aggressively pursue costly discovery. *See e.g.* R26; R54; R56. Bezzant's Motion also should have been filed even before his Answer, not nearly two years (R426) after raising the Act as a defense. R385. Utah Code Ann. §78-58-104 (a party files a motion for *judgment on the pleadings* which the district court must determine "as expeditiously as possible"). Bezzant's lengthy delay in filing his Motion, during which both parties' legal costs increased substantially, is his own fault, not Jacob's. While Jacob attempts herein to clarify additional facts Bezzant has

Bezzant also admitted he published the Notice to preserve a friendship and business relationship. R1457. Notwithstanding his hope that this Court will ignore these statements, they are admissions that summarily defeat his claim that his Notice was participation in the process of government, and now estop him from making that claim.

Bezzant claimed Jacob's complaint was filed "as a retributive action designed to punish Bezzant's use of *political speech* and his legitimate *participation in the political process*." R1825:12 (emphasis added). This political activity, even if true, does not fall under the statutory definition for "process of government." This Court's analysis of the judicial privilege in *O'Connor v. Burningham, supra*, is analogous. For that privilege to apply, material must be presented in the course of a judicial proceeding; the material must have some reference to the subject matter of the judicial proceeding; and the party claiming the privilege must be acting in a recognized capacity in the judicial proceeding. *Id.* Similarly, for statements to be made in the "process of government," they must be presented as part of a legislative or executive proceeding; the statements must reference the subject matter of the government proceeding; and the individual making the statements must be acting in a recognized capacity in the proceeding.

Bezzant's argument that an election is an activity leading up to future unknown government decisions is unpersuasive. He asks this Court to extend the meaning of "process of government" to statements that may have some unintended and unforeseen influence on future nebulous government decisions. This would require a broad

misconstrued in his favor, to preserve needed space for argument, Jacob has attached **Addendum C**, a comparison between several of Bezzant's facts and the record.

construction of the term beyond its plain language and would be unwise. It would also violate rules of statutory construction.

Because this Court will read the Act “as a whole and interpret its provisions in harmony with other provisions of the statute and with other statutes under the same and related chapters” (*Sill v. Hart*, 2007 UT 45, ¶7, 162 P.3d 1099), Bezzant’s Notice cannot be considered government participation as a matter of law. This is true even if the facts and their reasonable inferences are not construed in Jacob’s favor.

Section 78-58-102(2) defines “government” to include a branch or other government body, an employee, or a person acting in their official capacity. Notably, “government” does not include an election campaign or political speech. Section 78-58-104(3) states, “Any government body *to which the moving party’s acts were directed* or the attorney general may intervene to defend or otherwise support the moving party” (emphasis added). Interpreting these provisions in harmony with the statutory definition for “process of government,” Bezzant’s conduct had to be directed toward a branch, agency, department, or person acting in their official capacity for the Act to apply.

Bezzant’s Notice was not directed to any government branch or person acting in their official capacity, nor was it intended to influence any legislative or executive decision. As discussed in Jacob’s opening brief, the fundamental purpose of anti-SLAPP legislation is to protect private citizens’ rights to petition government by giving them a tool to defeat meritless lawsuits brought by large private interests for the sole purpose of chilling or interfering with that fundamental right. Bezzant asks this Court to extend the scope of the plain language of Utah’s Act beyond this explicit purpose.

In his brief, Bezzant claims publication of the Notice constituted his proper government participation for three reasons unrelated to the fundamental right to petition government. First, he inaccurately⁵ claims the Notice “addressed a significant issue before American Fork City regarding the interpretation of its ordinances”; second, Bezzant claims the Notice “was directly responsive to Jacob’s Flyer on the same subject which Jacob has expressly claimed to be his own participation in the process of government”; and third, the Notice “was published in the course of an election campaign” which would eventually lead up to government decisions. Br. Appe. at 23-4.

None of these activities involve “process of government” nor do they involve the First Amendment right to petition government. Therefore, they hardly merit a response. The mere fact that a publication includes a legal issue does not bring it within the Act’s scope, particularly when the legal issue is not even pending before a government body. Otherwise, every publication about abortion or gay rights, for example, would be deemed participation in the process of government. It would be both unwise and inaccurate to construe every such publication as an attempt to influence government decisions. If the Act encompassed every publication involving a public issue, whether or not it was responsive to another publication, it would chill potential litigants from seeking a judicial remedy for defamatory statements couched therein. Such a broad construction would exceed the purpose of the Act and be subject to abuse by would-be defamers.

⁵ Bezzant misconstrues this fact. Any government decision to ignore Hunter’s and Storrs’ conflicts of interest were made long before Bezzant published his Notice. **Addendum C**, ¶¶3, 5. Interpretation of the ordinances relating to Hunter’s and Storrs’ conflicts of interest was clearly not pending before the AFC government.

Bezzant's claim that the Notice constituted government participation because it was published during an election campaign argues for an overbroad definition that is anticipatory of future government decisions. Under his rationale, any publication that could have any unintended impact upon election outcomes would be government participation because election outcomes affect government decisions. So do births, deaths, marriages, divorces, career choices, and illicit encounters between state senators and private citizens in airport bathrooms. However, defamatory statements about private citizens made in these contexts are not included within the scope of the Act simply because they may have some unpredictable impact on future government decisions.

Bezzant's "process of government" analysis is also misleading as he attempts to shoehorn unfavorable facts within the statutory definition. He claims the Notice was "an activity leading up to the decisions that would be made by the newly constituted City Council ... he was [] influencing those decisions in the most direct way a citizen can – by engaging in political speech directed at who those decision-makers should be." Br. Appe. at 31. This self-serving claim suggesting an intent that Bezzant never had is misleading and false. R1457 (Br. Appt., Addendum G).

Also inconsistent with the argument that his intent is immaterial (Br. Appe. at 28, 44-5), Bezzant claims for the first time it is "undisputed" that he delivered the Notice to Mayor Ted Barratt, "the public official with the authority to enforce those Ordinances – as well as the other members of the City Council." Br. Appe. at 25, 29. This new claim is both disputed and demonstrably false. R516, Tab E, 136-38 (Deposition testimony of

Ted Barratt that he did not discuss the Notice with anyone and he did not see it until after it was delivered to his home in the same manner it was delivered to other AFC residents).

Thus, the delivery of Bezzant's Notice to the AFC mayor or other public officials was incidental, not intentional. Bezzant's contrary suggestion lacks candor. While his misconstruction of the facts is misleading, it also evidences the lack of factual support for a finding that Bezzant's Notice was intended to influence government decisions.

Bezzant also relies upon the district court's factually unsupported finding that the Notice was directed to "those in the city's executive and legislative positions who had the power to disqualify candidates" (Br. Appe. at 25), which Jacob challenged in his opening brief. Bezzant's only response to Jacob's challenge is an unsupported assertion that it "is both factually incorrect and uncivil." Br. Appe. at 25. While Jacob intended no disrespect to the district court in pointing out there are no facts to support this inconsistent finding,⁶ Bezzant can cite no evidence to support it.

Even the Rhode Island statute Bezzant mischaracterizes as "similar" to the Utah provision (Br. Appe. at 33) expressly precludes such abuse. While it is broader than the Utah Act because it gives conditional immunity for statements "made in connection with an issue of public concern," it does not protect statements that are a "sham." R.I. Gen. Laws §§9-33-1 and 9-33-2 (**Addendum A**). "Sham" statements are defined as:

⁶ The Notice was addressed, "To: All American Fork Residents" (R1825:9). "Bezzant's publication of the election notice was primarily directed to citizens of American Fork who had a direct interest in the upcoming election." R1825:16. AFC public officials testified there were no City Council discussions about the conflict of interest issue, and Ted Barratt refused to allow private citizens to discuss the issue during those meetings. R516, Tab E, at 109-1; *see also*, citations in Paragraphs 3 and 5 of **Addendum C**.

- (1) Objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring the government action, result, or outcome, and
- (2) Subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.

Under these provisions, not only would Bezzant's intent be highly significant, his statements are both objectively and subjectively baseless. He admittedly did not expect them to influence government decisions. R1457. That AFC government officially supported Hunter's and Storrs' candidacies while turning a blind eye to the conflicts of interest is undisputed. *See, e.g.*, R516, Tab E, 109-10. Assuming without agreeing that "process of government" should encompass any statement about an election, Bezzant used that process not to influence government decisions, but to avoid being sued and to preserve his friendship and business relationship with the public official candidates. Therefore, Bezzant's Notice is a "sham" under the Rhode Island statute.

Further, the Rhode Island case Bezzant cites, *Global Waste Recycling, Inc. v. Mallette*, 762 A.2d 1208 (R.I. 2000) (**Addendum B**), is inapposite to the facts here and further demonstrates how and when anti-SLAPP legislation is properly applied – when large and powerful private interests bring meritless lawsuits against private citizens to harass and intimidate them because they threaten their pecuniary interests.

Global Waste was in continuing violation of government directives to clean up its property. It was improperly stockpiling hazardous construction waste and demolition material. Many local residents, spearheaded by Marcia and Henry Mallette, feared these

hazards were harming the community and signed a petition seeking government enforcement against Global Waste. When a fire broke out on the property spewing billows of black smoke into the surrounding community, a news reporter interviewed several local residents, including the Mallettes, who were quoted as saying Global Waste was burning lead and asbestos. Global Waste sued the Mallettes for defamation and lost on a motion for summary judgment brought under Rhode Island's anti-SLAPP statute.

In upholding the district court's ruling, the Rhode Island Supreme Court first reprimanded Global Waste for lying in their brief about their noncompliance and noted its violations were a well-documented matter of public concern. The Rhode Island court specifically found Global Waste's ongoing violations "might constitute an actionable private nuisance to the Mallettes and their neighbors." *Id.* at 1213.

Unlike this case, Global Waste was a large private interest suing private citizens who had petitioned the government in a manner adverse to its pecuniary interests. The Mallettes comments, which were elicited during a highly publicized fire, did not unnecessarily identify a private citizen or make him an object of public contempt. Nor were they carefully crafted to preserve a friendship and business relationship. Unlike the Utah Act, the controlling statute in *Global Waste* expressly includes matters of public concern under its broad language. However, even under this broad language that is advisedly⁷ not a part of the Utah Statute, Jacob is not a matter of public concern.

⁷ In interpreting statutory language, it is assumed that each term was used advisedly. *Sill v. Hart*, 2007 UT 45, ¶11, 162 P.3d 1099. Had the Utah legislature intended matters of public concern to be included within the scope of proper participation in the "process of government," it would have said so.

Unlike the Mallettes, Bezzant ridiculed a private citizen to please AFC public officials. Bezzant's proposed broad construction of "process of government" exceeds the Act's plain language and its underlying purpose. Adopting it would create confusion in the law and a concomitant chilling effect on those who would otherwise legitimately seek redress for injuries to their reputations, in violation of Article I, Section 11 of the Utah Constitution. *See Berry v. Beech Aircraft Corp.* 717 P.2d 670 (Utah 1985) (implicitly supporting a narrow construction of any statute restricting remedies to persons who have been injured in their reputation).

Bezzant's anti-SLAPP counterclaim is an abuse of the intent and purpose of the Act. This dispute was never about what Bezzant said about Hunter or Storrs or the applicability of the AFC ordinances to their respective candidacies. This lawsuit was not designed to punish Bezzant's use of political speech or to chill or interfere with Bezzant's government participation. Had Bezzant not identified Jacob and called him a liar, there would be no complaint against Bezzant. But not naming Jacob would have defeated the primary purpose of the Notice, which was to appease Hunter and Storrs by exposing Jacob to public contempt, hatred and ridicule. The Act was never intended to shield such statements from liability. Rather than address his personal and unnecessary attack on Jacob, Bezzant attempts to hide behind the purported public issue.

As a matter of fact and law, Bezzant was not participating in the process of government when he falsely accused Jacob of lying about the issues to harm candidates. These statements did not involve an exercise of free speech or the right to petition government. However, it is not Jacob's burden to prove Bezzant was not participating in

the process of government, even though he has. Rather, it is Bezzant's task to demonstrate by clear and convincing evidence that even when accepting all of Jacob's factual allegations as true and drawing all reasonable inferences in his favor, Bezzant's publication of the Notice was a proper participation in the process of government. Not only has Bezzant failed to meet this burden, he cannot meet it on these facts.

Like the district court below, Bezzant has failed in his brief to construe all factual allegations and inferences in a light most favorable to Jacob. Accordingly, Bezzant has failed to meet his burden on this appeal. Jacob respectfully requests this Court to reverse the district court's ruling and to find "process of government" does not encompass Bezzant's publication of the Notice.

II. BEZZANT'S CONCESSION THAT JACOB'S CLAIMS HAVE MERIT UNDER SEEGMILLER SUMMARILY DEFEATS BEZZANT'S ANTI-SLAPP COUNTERCLAIM.

Bezzant concedes, "This Court's precedent on this issue [of whether the statements in this case are defamatory per se] is somewhat unclear." Br. Appe. at 41. Bezzant then minimizes this concession by referring to it as an "isolated point" that "may make for an interesting discussion[.]" *Id.* at 41-2. Bezzant's admission that controlling precedent is unclear concedes the point. Jacob's claims had sufficient merit to preclude sanctions under §78-58-105. Bezzant's characterization of this conflict in the law as an "isolated point" is disingenuous. It was the focus of Bezzant's Motion and the basis for the district court's finding that Jacob's defamation and false light claims lacked legal merit. R1825:15. Thus, it was the basis for the court granting Bezzant's Motion under the anti-SLAPP Act. *Id.*

Noting this Court's seemingly contradictory opinions in *Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981),⁸ and *Larson v. Sysco Corp.*, 767 P.2d 557 (Utah 1989), the district court incorrectly concluded Jacob's claims lacked any merit because this Court implicitly overruled *Seegmiller* with its subsequent dicta in *Larson* that libel per se "constitute[s] allegations of criminal conduct, a loathsome disease, unchaste behavior, or operation of an unlawful business." R1825:15. However, *Seegmiller* is still good law. See, *O'Connor v. Burningham*, 2007 UT 58, ¶10, 165 P.3d 1214 9 (citing *Seegmiller*).

Bezzant has effectively conceded that under *Seegmiller*, Jacob's claims were not wholly lacking in merit. This concession requires reversal of the district court's rulings dismissing Jacob's complaint as a SLAPP action and awarding sanctions.

III. ACCEPTING JACOB'S FACTUAL ALLEGATIONS AS TRUE AND DRAWING ALL REASONABLE INFERENCES IN HIS FAVOR, HIS §1983 CLAIMS HAVE MERIT AND THE AWARD OF ATTORNEYS FEES WAS IN ERROR

The district court dismissed Jacob's 42 U.S.C. §1983 claims, which were based on the allegation Bezzant acted under the direction of AFC public officials when he published the Notice, finding Bezzant was not acting under color of law. *Id.* at 21-3. The district court found Jacob had "not met the heightened pleadings standard applied to §1983 conspiracy claims" because his claims were "nothing more than conclusory

⁸ In *Seegmiller*, this Court explained that libel and slander per se are "distinct concepts" and that "libel is classified as per se if it contains defamatory words specifically directed at the person claiming injury, which words must, on their face, and without the aid of intrinsic proof, be unmistakably recognized as injuries." *Seegmiller* at 977; see also *Prince v. Peterson*, 538 P.2d 1325, 1328 (Utah 1975) ("to hold a person up to hatred, contempt or ridicule, or to injure him in his business or vocation, they are deemed actionable per se; and the law presumes that damages will be suffered therefrom").

allegations that lack the requisite factual undergirding necessary to survive summary judgment.” R1825:22 (citing *Scott v. Hern*, 216 F.3d 897 (10th Cir. 2000) (when a plaintiff alleges complicit action between private defendants and state officials, “mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action”)). Jacob’s pleadings meet this standard.

Discovery was automatically stayed under the Act when Bezzant filed his Motion (R426) less than two months after Jacob’s Amended Complaint was filed (which added §1983 claims against AFC public officials), making it particularly important for the district court to construe Jacob’s factual allegations as true and to draw all reasonable inferences in his favor. However, the district court did not do so.

Particularly, the district court found Jacob’s averments that Storrs acted for his own pecuniary benefit undermined Jacob’s claim that Storrs acted in his official capacity as an AFC councilman when he “convinced Bezzant to publish the alleged defamation.” R1825:22. The district court further found that because Jacob alleged AFC public officials procured the Notice by coercive threats, Bezzant could not be implicated in the alleged conspiracy. R1825:22-3. Defendants have failed to demonstrate the district court’s ruling is correct when accepting all of Jacob’s factual allegations as true and drawing all reasonable inferences in Jacob’s favor.

Defendants cannot meet this burden on these facts. The district court’s ruling also did not accept Jacob’s allegations as true, nor construe all reasonable inferences in Jacob’s favor. Rather, the district court speculated about genuinely disputed material

facts under a summary judgment standard. Had the district court correctly accepted Jacob's allegations as true, Jacob's §1983 claims would have survived Bezzant's Motion.

Jacob extensively and in great detail alleged AFC public officials used private entities and individuals to abridge fundamental rights of AFC citizens, including Jacob, and public officials employed a "code of silence" to shield them from detection. R280:6; *see also id* at 13-18; *see* R280 generally. Jacob further alleged private individuals acting on behalf of AFC public officials were acting under color of state law, and his fundamental rights were violated through AFC's "use of the nongovernmental defendants Bezzant and Newtah" (*id* at 7-9). He also duly alleged both Hunter and Storrs were AFC public officials at all times relevant to his claims. *Id.* at 36.

Jacob alleged AFC public officials, including Hunter and Storrs, abridged private citizens' fundamental rights in various ways including unlawful meetings with a private developer that were closed to the public, and this abuse was manifest as an ongoing pattern and policy as early as 1992. *Id.* at 12, 14, 17. Jacob quickly became a target in June 1997 during a City Council meeting when he attempted to question the City's closed-meeting decision to build a new City Hall Complex contrary to a prior publicly approved plan. *Id.* at 19. In July 1997, public official Storrs held a news conference with Defendant Newtah and falsely accused Jacob of "grilling" AFC Council members without factual basis. *Id.* at 21. Jacob was also attacked in a Newtah letter to the editor authored by an unknown "H Stillman" and publicly criticized by Hunter who was serving as an appointee to the City Board of Adjustments. *Id.* at 24, 35-6. To borrow a term

from Defendants, the list of AFC public officials' documented abuses against Jacob and other private citizens continues *ad nauseum*. See R280, generally; Br. Appe. at 19.

It must be accepted as true that AFC public officials engaged in an ongoing practice of threats, intimidation, and retaliation against private citizens who legitimately questioned the legality of their activities. R280:19-25, 28. AFC public officials and those acting under their direction perpetuated a climate of fear and retaliation, and many AFC citizens, including Jacob and his wife, were harmed and feared for their safety; and it was the common practice of AFC public officials and their friends to violate the law when it suited their public and private ambitions. R280:20-9, 30-1, 33-7. Further, it is true and may be reasonably inferred that public officials engaged Bezzant and the *Citizen* as instruments in their ongoing retaliatory conduct against Jacob and other private citizens. R280:24-5, 27, 35.⁹ It is also true that Hunter and Storrs and other AFC public officials threatened and colluded with Bezzant in drafting and publishing the alleged defamatory Notice in an extraordinary effort to “blacken ... [Jacob’s name] all over the state” (quoting Mayor Ted Barratt). R280:39-41.

⁹When an employee of the *Citizen* published an editorial entitled “A City In Fear,” which discussed AFC public officials’ use of AFC police to retaliate against private citizens, AFC public officials sent him a threatening message. R280:28-9; R1459. The public perception of the AFC police and their abuse was so terrible, it was the hot topic in the November 1997 AFC municipal election when Ted Barratt was elected as mayor only after promising an independent investigation of the police department. R280:29-30. When Jacob later requested documents relating to the promised investigation (which never was conducted), Mayor Barratt threatened Jacob and his family with having someone break into one of their homes and planting illegal contraband. R280:30-3.

Not only did Jacob allege in detail that Defendants acted on behalf and under the direction of AFC public officials Hunter and Storrs in publishing the Notice, but Bezzant himself admitted his agreement and willing complicity in that publication. R280:39; R1457 (Br. Appt. Addendum G). Construing these facts as true and drawing all reasonable inferences in Jacob's favor, he presented detailed facts tending to show agreement and concerted action between Bezzant and AFC public officials.

Bezzant's failure to demonstrate how the district court's ruling is correct when construing these facts in Bezzant's favor is fatal to Bezzant's arguments on this appeal. Accordingly, Jacob's §1983 claims were sufficiently pled and the district court's award of attorneys fees and costs under §1988 was in error and an abuse of discretion.

IV. BEZZANT MISSTATES BOTH THE LAW AND THE FACTS IN ARGUING JACOB'S CLAIMS FOR DEFAMATION AND FALSE LIGHT WERE PROPERLY DISMISSED

Bezzant cites *Buckley v. Valeo*, 424 U.S. 1 (1976) as supporting authority for his argument that his unnecessary and malicious statements about Jacob were protected because they were carefully imbedded within the context of purported political speech. The facts of that case are inapposite. *Buckley* was about the propriety of placing caps on campaign contributions. The Court stated, "A limitation on the amount of money a person may give to a candidate or campaign organization [] involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss *candidates* and *issues*." *Id.* at 21 (emphasis added). The Supreme Court never

suggested alleged defamatory statements about private citizens strategically placed within the context of purported political speech should be immune from prosecution.

Bezzant's statements about Jacob were not about either a candidate or a public issue. They were about a private citizen who wished to remain anonymous and had nothing to do with the correct interpretation of the City Ordinances. Bezzant never addresses the fact that it is not political speech that is at issue in this case. It is the alleged defamatory statements about a private individual that were completely unnecessary to the political issue Bezzant now seeks to hide behind.¹⁰

A. Utah's public interest privilege does not immunize Bezzant from liability for deliberately harming Jacob's reputation.

Jacob has never disputed that matters of public interest should be open for public debate. Jacob has only maintained that identifying him contrary to long-standing agreement and then publicly accusing him of lying and negative campaigning was unnecessary, malicious, and deliberately designed to hold him out as an object of public ridicule. In other words, Jacob is not "a matter of public interest."

Bezzant does not spend a lot of time on this argument and for good reason. Bezzant concedes matters of public interest are limited to statements about "the functioning of governmental bodies, officials, or public institutions, or with respect to

¹⁰ Without citing to the record, Bezzant argues in a footnote that the district court granted his motion to dismiss both under the anti-SLAPP Act and for failure to state a claim upon which relief may be granted under Rule 12(c). Br. Appe. 34-5, fn. 8. However, the district court only discussed the Act and the alternative bases for dismissing Jacob's claims, with no mention of Rule 12(c). R1825. Moreover, Jacob's meritorious claims would not be dismissed under that rule.

matters involving the expenditure of public funds.” Br. Appe. at 37 (citing *Seegmiller*). Bezzant’s statements about Jacob, a private citizen, clearly do not fit within that limitation. If a private citizen is falsely accused of being a rapist or a liar within the context of a public debate about the correct interpretation of municipal ordinances, the public interest privilege was never intended to shield the defamer from liability. A malicious defamer cannot hide behind the First Amendment or the privileges created under it by couching hate-driven defamatory speech within a purported public issue.

The district court concluded Utah’s public interest privilege applied because the Notice was not excessively published and was not published with malice.¹¹ Given the extraordinary measures Bezzant took to publish the Notice worldwide and the facts showing Bezzant’s statements about Jacob were false and malicious, both in the sense they were mean-spirited and knowing, intentional and reckless, the district court’s ruling is in error. Jacob made this argument in his opening brief. Br. Appt. 39-40.

Bezzant conclusorily asserts Jacob has not sufficiently alleged malice then only briefly acknowledges those facts establishing malice (*see e.g.*, Br. Appt. at 10-12, 18) when he argues his intent is immaterial. Br. Appe. 44-5. It must be accepted as true that the false statements in the Notice were not the result of Bezzant’s careful research about Hunter’s and Storrs’ conflicts of interest; they were knowingly, intentionally, and recklessly published under the direction of Hunter and Storrs. *Id.* But even without accepting these allegations as true, the public interest privilege does not apply as a matter

of law because Bezzant's statements about Jacob were not an issue of public concern. Accordingly, the district court's ruling should be reversed.

B. The Notice is not an editorial and the statements therein are verifiable.

This section of Bezzant's brief is also short for a reason. The legal question of whether the City Ordinances at issue disqualified Hunter and Storrs from the election is certainly verifiable, as are the statements that Jacob deliberately misled the public to hurt the candidates and to engage in negative campaigning. Moreover, Jacob has maintained both below and throughout this appeal that the Notice was never an editorial and was only characterized as such in Bezzant's attempt to fit unfavorable facts within favorable law. Br. Appt. 41-2. Therefore, the district court's ruling should be reversed.

C. The context of the malicious statements makes them defamatory, and they are defamatory per se because they accuse Jacob of lying and were designed to hold him out as an object of public contempt and ridicule.

Whether Bezzant's statements about Jacob convey a defamatory meaning depends upon the context in which they were made. *O'Connor v. Burningham, supra*. "Context" is defined as "the whole situation, background, or environment relevant to a particular event" (WEBSTER'S NEW WORLD DICTIONARY, Second College Edition (1980) at 307).

The whole situation, background, and environment relevant to Bezzant's publication of the Notice was one of corrupt municipal public officials utilizing the local police force, news media, and other improper means to threaten and intimidate private citizens including Jacob. It was an environment where public officials hid their activities

¹¹ See district court's analysis at R1825:16 (citing *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 904-05 (Utah 1992)) where the court finds the privilege protected

from their constituents and supported candidates who were ineligible for public office under pertinent municipal ordinances, and who publicly and privately attacked any private citizen who raised questions about these activities. Further, Bezzant's Notice was published not to engage in protected First Amendment activity, but as a sham to further his own interests, which Bezzant admits. R 1457 (Br. Appt., Addendum D).

Given this context of municipal corruption, abuse, and power mongering, Bezzant's self-serving and malicious statements about Jacob were and are defamatory. If Bezzant's true purpose were simply to engage in political speech, he would not have violated his long-standing agreement and disclosed Jacob's name. That disclosure was unnecessary to any alleged political debate but was a purposeful, malicious act calculated to harass and hurt Jacob. The accompanying false allegations that Jacob was a liar and negative campaigner were purposefully included to hold him out as an object of public hatred, contempt, and ridicule. Accordingly, the self-serving and abusive context surrounding Bezzant's statements makes them defamatory as a matter of law.

V. BEZZANT HAS FAILED TO DEMONSTRATE HE IS ENTITLED TO ATTORNEYS FEES AND COSTS UNDER THE ANTI-SLAPP STATUTE

The parties' dispute on this issue centers on whether §78-58-105(1)(a) allows an award of attorneys fees not for bad faith or for filing claims wholly lacking in merit, but for not succeeding on the merits. Bezzant earnestly contends the statute requires no

Bezzant's statements because they were not excessively published or with malice.

showing of bad faith (Br. Appe. at 44-5), which is inconsistent with his former position,¹² but is consistent with his tendency to construe the most unfavorable facts and law in his favor. Thus, Bezzant argues, affidavits from Jacob's attorneys explaining how they assessed the merits of Jacob's claims in good faith are not relevant. Br. Appe. at 45.

This is actually a compelling concession on Bezzant's part. He does not even argue Jacob filed his complaint in bad faith. Nor can he. Rather, Bezzant effectively concedes that when Jacob filed his complaint for the alleged primary purpose of chilling Bezzant's proper participation in the process of government, this Court can assume he did so in good faith. *Id.* This concession makes no sense, particularly given the nearly \$200,000 that Jacob has been sanctioned for filing his complaint in the first place.

At a minimum, it is bad policy to severely sanction a party not for bad faith, which Bezzant concedes is not a factor here, but for not accurately predicting the outcome of a good faith dispute. Bezzant asks this Court to conclude that a lack of success on the merits, not bad faith, is evidence of a primary purpose to interfere with or chill a defendant's right to participate in government processes. Bezzant cannot have it both ways. He cannot argue Jacob's motive in filing his complaint was both improper and in good faith. Regardless of whether Plaintiffs or Defendants ultimately prevail on the merits, Jacob has demonstrated from the beginning that his claims have at least some merit and are not so wholly lacking in merit that sanctions are appropriate. Accordingly, the district court's award of attorneys fees was improper and should be reversed.

¹² See, R3069:90 (Bezzant's counsel argued, "When you get attorney's fees is under that 105 portion of the statute which require you to prove additional elements, essentially bad

VI. BEZZANT MISCONSTRUES JACOB'S ARGUMENT UNDER THE OPEN COURTS CLAUSE AND THUS FAILS TO REBUT IT


Bezzant appears to misunderstand Jacob's argument under the Open Courts clause. Jacob did not ask this Court to strike the anti-SLAPP Act as unconstitutional. Rather, he argued the Act was unconstitutional because it violates Utah's Open Courts clause as applied to these facts. Br. Appt. at 43-7 (arguing the Act is unconstitutional as applied because it abrogates Jacob's remedy for harm to his reputation and because the evil the Act was designed to eliminate does not exist here). Therefore, Bezzant has failed to rebut Jacob's as-applied arguments, which thus continue to stand on their own merits.

CONCLUSION

Defendants have failed to meet their burden on this appeal. Plaintiffs respectfully request this Court to reverse the trial court's ruling and to remand this matter for trial.

Respectfully submitted this 30th day of October, 2007.

FILLMORE SPENCER, LLC

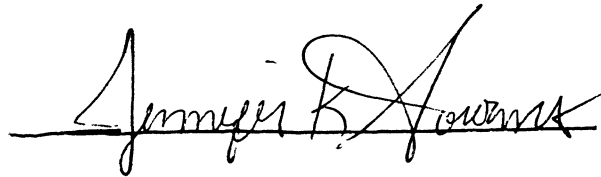

Jennifer K. Gowans
Attorneys for Appellant

faith and no legal good faith basis for bringing the claim.”).

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of October, 2007, I caused to be hand-delivered a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** to the following:

JEFFREY J. HUNT
DAVID C. REYMANN
Parr Waddoups Brown Gee & Loveless
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

A handwritten signature in black ink, reading "Jennifer K. Houtman", written over a horizontal line.

ADDENDA

Tab A

LEXSTAT R.I. GEN. LAWS 9-33-1

General Laws of Rhode Island

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*** Current through the January 2006 Session ***
*** Annotations current through November 14, 2006 ***

TITLE 9. COURTS AND CIVIL PROCEDURE--PROCEDURE GENERALLY
CHAPTER 33. LIMITS ON STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION

Go to the Rhode Island Code Archive Directory

R.I. Gen. Laws § 9-33-1 (2007)

§ 9-33-1. Findings

The legislature finds and declares that full participation by persons and organizations and robust discussion of issues of public concern before the legislative, judicial, and administrative bodies and in other public fora are essential to the democratic process, that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances; that such litigation is disfavored and should be resolved quickly with minimum cost to citizens who have participated in matters of public concern.

HISTORY: P.L. 1993, ch. 354, § 1; P.L. 1993, ch. 448, § 1.

NOTES:

LAW REVIEWS. 2000 Survey of Rhode Island Law, see 6 *Roger Williams U. L. Rev.* 593 (2001).

NOTES TO DECISIONS

Analysis

1. Constitutionality.
2. Freedom of Speech.

1. CONSTITUTIONALITY.

This chapter is constitutional. *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996).

2. FREEDOM OF SPEECH.

Since a citizen's letters to the editor of a newspaper voicing his opinion on a public school construction project were exercises of free speech, summary judgment in favor of the citizen was appropriate as to the Limits on Strategic Litigation Against Public Participation Act (anti-SLAPP statute), *R.I. Gen. Laws § 9-33-1 et seq.* defense to the political representative's libel and false light suit. *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 2004 R.I. LEXIS 163 (R.I. 2004).

LEXSTAT R.I. GEN. LAWS 9-33-2

General Laws of Rhode Island

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*** Current through the January 2006 Session ***

*** Annotations current through November 14, 2006 ***

TITLE 9. COURTS AND CIVIL PROCEDURE--PROCEDURE GENERALLY
CHAPTER 33. LIMITS ON STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION

Go to the Rhode Island Code Archive Directory

R.I. Gen. Laws § 9-33-2 (2007)

§ 9-33-2. Conditional immunity

(a) A party's exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims. Such immunity will apply as a bar to any civil claim, counterclaim, or cross-claim directed at petition or free speech as defined in subsection (e) of this section, except if the petition or free speech constitutes a sham. The petition or free speech constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose. The petition or free speech will be deemed to constitute a sham as defined in the previous sentence only if it is both:

(1) Objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring the government action, result, or outcome, and

(2) Subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.

(b) The court shall stay all discovery proceedings in the action upon the filing of a motion asserting the immunity established by this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion.

(c) The immunity established by this section may be asserted by an appropriate motion or by other appropriate means under the applicable rules of civil procedure.

(d) If the court grants the motion asserting the immunity established by this section, or if the party claiming lawful exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern is, in fact, the eventual prevailing party at trial, the court shall award the prevailing party costs and reasonable attorney's fees, including those incurred for the motion and any related discovery matters. The court shall award compensatory damages and may award punitive damages upon a showing by the prevailing party that the responding party's claims, counterclaims, or cross-claims were frivolous or were brought with an intent to harass the party or otherwise inhibit the party's exercise of its right to petition or free speech under the United States or Rhode Island constitution. Nothing in this section shall affect or preclude the right of the party claiming lawful exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions to any remedy otherwise authorized by law.

(e) As used in this section, "a party's exercise of its right of petition or of free speech" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a

legislative, executive, or judicial body, or any other governmental proceeding; or any written or oral statement made in connection with an issue of public concern.

HISTORY: P.L. 1993, ch. 354, § 1; P.L. 1993, ch. 448, § 1; P.L. 1995, ch. 386, § 1.

NOTES:

LAW REVIEWS. 2000 Survey of Rhode Island Law, see 6 *Roger Williams U. L. Rev.* 593 (2001).

NOTES TO DECISIONS

Analysis

1. Assertion of Immunity.
2. Sham Petitions.
3. Right of Petition.
4. Zoning Appeals.

1. ASSERTION OF IMMUNITY.

The "appropriate motion" or "or other appropriate means" described in the 1995 amendment of subsection (c) is a motion for summary judgment that will allow the hearing justice to consider information extrinsic to the pleadings. *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996).

Since a citizen's letters to the editor of a newspaper voicing his opinion on a public school construction project were exercises of free speech, summary judgment in favor of the citizen was appropriate as to the Limits on Strategic Litigation Against Public Participation Act (anti-SLAPP statute), *R.I. Gen. Laws § 9-33-1 et seq.* defense to the political representative's libel and false light suit. *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 2004 R.I. LEXIS 163 (R.I. 2004).

2. SHAM PETITIONS.

The legislature intended the 1995 amendment to clarify and not to cloud the material provisions of this section, and intended that the term "tortious conduct" in the 1993 act be synonymous with the term "sham petitioning" in the 1995 amendment. *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996).

3. RIGHT OF PETITION.

In a suit by the owners of a city landfill against a city resident alleging tortious interference with contractual relations and defamation, the defendant's written statements, submitted to an executive body as well as to legislators, were made in connection with an issue under consideration by the Department of Environmental Management and in connection with an issue of public concern, namely potential environmental contamination resulting from the plaintiff's activities, and therefore clearly constituted an exercise of her right of petition and free speech within the meaning of subsection (e). *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996).

4. ZONING APPEALS.

Since the plaintiff presented insufficient facts and allegations to create a genuine issue of fact as to whether the defendant had probable cause to appeal a zoning amendment to the Superior Court, and, at trial, the defendant presented expert and lay testimony in support of its position, the defendant's appeal of the zoning decision was not objectively baseless, and the appeal was not a "sham" that would bar the conditional immunity provided by this section. *Cove Rd. Dev. v. Western Cranston Indus. Park Assocs.*, 674 A.2d 1234 (R.I. 1996).

COLLATERAL REFERENCES. Application of Noerr-Pennington Doctrine by state courts. 94 *A.L.R.5th* 455.

Tab B

LEXSEE 762 A.2D 1208

Global Waste Recycling, Inc. v. Henry Mallette, Jr., et al.

No. 98-597-Appeal.

SUPREME COURT OF RHODE ISLAND

762 A.2d 1208; 2000 R.I. LEXIS 224

December 14, 2000, Decided
December 14, 2000, Opinion Filed

PRIOR HISTORY: [**1] Appeal from Superior Court. Kent County. Hurst, J. (KC-97-710).

DISPOSITION: We deny and dismiss Global's appeal, affirm the summary judgment in favor of the Mallettes, and the award of counsel fees made to counsel for the Mallettes for services rendered in the Superior Court.

JUDGES: Weisberger, C.J., Lederberg, Bourcier, and Goldberg, JJ., concurring. Flanders J., did not attend oral arguments, but participated on the basis of the briefs.

OPINION BY: Bourcier

OPINION

[*1208] **OPINION**

Bourcier, Justice. In this case Global Waste Recycling, Inc. (Global), the plaintiff below, appeals from the entry of summary judgment in favor of the defendant on its Superior Court civil action in which Global had sought both "economic damages" as well as punitive damages from the defendants, Henry and Marcia Mallette.

On appeal, Global contends that the trial justice erred in granting summary judgment after finding that its civil action was barred by virtue of the provisions of G.L. 1956 chapter 33 of title 9, the Strategic Litigation Against Public Participation statute (the anti-SLAPP statute). We reject Global's contention and affirm the grant of summary judgment.

[*1209] I

Case Facts/Travel

Since June 30, 1995, Global [**2] has been operating an unlicensed construction and demolition

debris recycling facility located in an area that is zoned for residential use on Colvintown Road in the Town of Coventry. Global has been permitted to operate its debris recycling facility there pursuant to a consent judgment and operation plan entered on June 30, 1995, between the state Department of Environmental Management (DEM), Bettez Recycling, Inc., Bettez Construction Company, Inc., (Bettez), and Global. Some background information concerning the property site in question is helpful.

From 1981 until 1989, Tri County Sand and Gravel, Inc., had operated a construction and demolition debris recycling facility on the land. During that time it had permitted large stockpiles of unsold debris and materials to accumulate on the site. In March 1990, Bettez began operating an unlicensed landfill on the property. Following complaints and on-site inspections, the DEM, Division of Air and Hazardous Materials, issued notices of violation. Following DEM hearings on the violation notices, Bettez was ordered by a final DEM agency decision, entered on March 5, 1991, to "cease receiving materials, dispose of the materials on site [**3] and pay an administrative remedy to the DEM." Bettez filed an administrative appeal from that DEM final decision in the Kent County Superior Court.

While that administrative appeal was pending, Global became interested in operating a construction and demolition debris recycling facility on the Bettez property site and moved to intervene in Bettez's pending appeal. Once in the case, Global then undertook to negotiate a settlement with DEM. On June 30, 1995, a negotiated settlement was reached. The settlement was evidenced by a consent judgment that included an operating plan in which Global would be permitted to operate a construction and demolition debris recycling facility on the Bettez site. The operating plan that was spelled out in the consent judgment contained several conditions that Global was required to comply with and perform. The operation plan, however, did not constitute

a DEM license for the operation; instead, it was in the nature of a conditional permit that required, among other obligations, for Global to immediately process 75 percent of the six then-existing on-site stockpiles of demolition materials left there by Bettez. In addition, Global was required to furnish [**4] DEM with a closure fund and to comply with all applicable state, federal and local requirements, including any new regulations for licensing and regulation of recycling and solid waste management facilities.

On December 16, 1996, Global was notified by the DEM Office of Waste Management that violations of Global's Waste Recycling Operation Plan were observed following a site inspection by DEM officials on December 12, 1996. One of those alleged violations concerned "substantial quantities of processed construction and demolition material" being left on the site. Those expanding construction and demolition material stockpiles had also been observed by many of the local residents living in the area, including Henry Mallette, Jr. and his wife, Marcia Mallette, whose residence unfortunately adjoins the Global site. As the Global stockpiles expanded, so did the Mallette's concern over the possibility of contamination of their well water, of airborne pollutants from composted materials left on the site, and the fire hazard created by the stockpiled demolition debris. The Mallettes, joined by some forty-two other similarly alarmed Colvintown Road residents, filed a petition with the Coventry [**5] Town Council seeking relief from Global's expansion of those conditions at its facility. That petition was presented to the town council in mid July, 1997. The Mallettes, however, were not present at the council meeting.

[*1210] As was feared and anticipated by the Colvintown Road residents, including the Mallettes, on July 30, 1997, a fire did break out on Global's site. Counsel for Global, in attempting to minimize the significance of that incident, has described that fire as being "a small fire *** that was extinguished in less than one hour." That description is certainly at great odds with that recounted by the Coventry fire chief and the Coventry police, who were at the scene, and who described the fire as breaking out "shortly after 5 p.m." and throwing heavy "dark blackish-blue smoke" over the area and prompting the necessity of "fire trucks from Washington, Western Coventry, Chopmist Hill, Potterville, West Greenwich, Scituate, Hope Jackson, Mishnock, West Greenwich [sic], Nooseneck Hill, Hianloland and North Smithfield fire departments." The Coventry fire chief informed the local press that firefighters "had to break [the pile of wood] up with bulldozers" and were required [**6] to douse the pile with water and "class A foam." The firefighters were unable to control and extinguish the fire until 7:30 p.m.

During the ongoing fire, a news reporter from the local Kent County Daily Times newspaper spoke with and interviewed several of the many local residents at the fire scene. One of those persons interviewed was Henry Mallette, Jr., one of the two defendants in this case. Mallette is reported to have said, "who knows what they're burning over there. They say its mulch, but I know what it is. It's lead and asbestos and every other thing." ¹ Some eight days later, while the newspaper was doing follow-up stories on Global's operation and the ongoing neighborhood concern over Global's operation of its yet unlicensed construction and demolition debris recycling facility, one of its reporters spoke with Marcia Mallette, Henry's wife, and codefendant. She told the reporter that "old homes are taken in there and piled up, they just sit there. I don't think any recycling is going on." ² Her comment, along with that of others, was reported in the Kent County Daily Times on August 9, 1997.

1 Mallette, in an affidavit, says he was misquoted. He states that he told the reporter "God knows what's burning. There's lead and asbestos and who knows what else in those piles."

[**7]

2 On January 31, 1997, the Mallettes had received a copy of DEM's letter to Global advising Global that among other noted site inspection deficiencies, that its DEM

"inspector noted that substantial quantities of processed construction and demolition material is not leaving the site. Please be advised that if this material is not reused then this office regards the material as discarded in a manner as to constitute the unpermitted disposal of solid waste. Please provide this Office with documentation which indicates that the material is being recycled."

Three days later, on August 12, 1997, Global initiated a civil action for defamation against the Mallettes, claiming that its construction and demolition recycling business and reputation had been destroyed by the publication of the Mallettes' statements in the Kent County Daily Times. Global sought both "economic damages" as well as punitive damages from the

Mallettes. Four months later, on December 8, 1997, a Superior Court hearing justice granted summary judgment in favor of the Mallettes after finding that Global's action [**8] constituted an attempt by Global to silence legitimate statements on a matter of public concern. An interlocutory order reflecting that finding was entered on January 12, 1998. Thereafter, on April 23, 1998, following a hearing on the Mallettes' request for counsel fees, an order awarding counsel fees against Global was entered and final judgment in the case entered on that same day. Global's appeal followed on May 5, 1998.

II

The Anti-SLAPP Statute

In *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996), this Court had [*1211] occasion to construe for the first time the provisions of chapter 33 of title 9, as enacted by P.L. 1993, ch. 354, being entitled "Limits on Strategic Litigation Against Public Participation" (the anti-SLAPP statute or the act).

In *Hometown* we determined the act to be constitutional, and intended to emulate the federal Noerr-Pennington doctrine³ by providing conditional immunity to any person exercising his or her right of petition or free speech under the United States or Rhode Island Constitution concerning matters of public concern. That conditional immunity, we held, would render the petitioner or speaker immune from any civil claims [**9] for statements, or petitions, that were not sham by virtue of being objectively or subjectively baseless. Section 9-33-2(a) of the anti-SLAPP statute defines a sham statement or petition as being one that is:

"(1) Objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring the government action, result, or outcome, and

"(2) Subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects."

Conference v. Noerr Motor Freight, Inc. 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961). See also *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993).

[**10] The Mallettes, in their answer to Global's complaint, raised the issue of their conditional immunity provided by § 9-33-2. They subsequently and properly moved for entry of summary judgment pursuant to Rule 56 of the Superior Court Rules of Civil Procedure.

The Superior Court motion hearing justice, after considering the Mallettes' motion for summary judgment, and after viewing the case pleadings and affidavits in the light most favorable to Global and against the Mallettes (see *LaFratta v. Rhode Island Public Transit Authority*, 751 A.2d 1281, 1283 (R.I. 2000)), found that the Mallettes' statements were neither objectively sham nor actionable in light of the immunity protection afforded those statements by virtue of § 9-33-2. The hearing justice noted:

"In the instant case, the Mallettes made comments or remarks about an issue which was clearly one of public concern. Not only is the operation of a 94 acre recycling plant on its face a matter of concern, the issue of this recycling was and had been a matter of public concern. It had been the subject of D.E.M. proceedings as well as a petition presented to the local Town Council. Pollution and environmental [**11] contamination is a matter of concern to the public as well as to the residents of the communities in which the recycling plant and landfill are operated. This is unquestionable.

"The Mallettes' remarks were typical of those frequently made by citizens, taxpayers, neighbors or other residents of the community who wish to spark or spur governmental action or to otherwise obtain a satisfactory resolution of their concerns. Making loud and public complaints to newspaper reporters is a frequently used method for members of a community to affect local matters of interest or concern. Members of the public and residents of neighborhoods often use the news media as a forum for communicating their concerns to whatever governmental authorities may have an interest in or power over the matter at hand. This method is frequently

3 *United Mine Workers of America v. Pennington* 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965); *Eastern Railroad Presidents*

successful in achieving a response from local town administrators to governors, to legislators to presidents. Concerning the American experience, it's undoubtedly [*1212] realistic to expect some success in securing a governmental response when this method is utilized.

"Considering the undisputed facts material to the issues raised by the motion, the criteria for objective baselessness [**12] is not met. The remarks are not objectively baseless in the sense that no reasonable person exercising the right of free speech could realistically expect some success. Given that the remarks were also based on the Mallettes' personal observations as well as the history of information gleaned from the D.E.M., any expectation that favorable governmental action or outcome to be had here could not be deemed to be unreasonable.

"The motion for summary judgment is granted. The Mallettes are entitled to conditional immunity. The remarks were not objectively baseless."

III

Global's Appellate Contentions

On appeal, Global challenges the propriety of the motion hearing justice's grant of summary judgment in favor of the Mallettes. Global asserts here that (a) the policy of the anti-SLAPP statute was not intended to bar claims for tortious actions brought by a litigant who has "suffered actual economic injuries from baseless attacks upon [its] business reputation;" (b) the statements by the Mallettes were not made at a "judicial, administrative or legislative proceeding;" and (c) that the term "issues of public concern as contained in the anti-SLAPP statute is void as being unconstitutionally [**13] vague."

This Court, when reviewing the grant of a motion for summary judgment does so on a de novo basis. See *Macera Brothers of Cranston, Inc. v. Gelfuso & Lachut, Inc.*, 740 A.2d 1262, 1264 (R.I. 1999) (per curiam). In the case at bar, we have reviewed the case pleadings and affidavits submitted by the Mallettes as well as other case file materials and have done so in a light most favorable to Global to determine if the Mallettes were entitled to summary judgment as a matter of law. See *Truk-Away of Rhode Island, Inc. v. Aetna Casualty & Surety Co.*, 723 A.2d 309, 313 (R.I. 1999). Following

that review, we are convinced that the hearing justice did not err and that summary judgment in favor of the Mallettes was appropriate. We conclude that Global's appellate issues, cleverly fashioned to misstate both material facts as well as the provisions of § 9-33-2(a), are without merit. ⁴

4 Global's contention was prefaced by its alerting us that "this Court should be aware that at no time prior to the statements being made [by the Mallettes] was Global going through any form of permitting or licensing process * * * with any state * * * agency." (Emphasis added.) That contention is factually erroneous. A letter dated July 7, 1997, to Global from Leo Hellested, DEM Supervising Engineer, Office of Waste Management, a copy of which is contained in the Mallettes' affidavit, sets out clearly that as a result of earlier site inspections of Global's facility by DEM, it was "noted that a substantial quantity of processed construction and demolition material continues to be stockpiled on the site." Additionally, DEM, in its letter, noted:

"Also please be reminded, as we discussed during the May inspection, that the Department is still awaiting a revised license application submittal that more completely addresses all of the requirements of the revised Rules and Regulations for Composting Facilities and Solid Waste Management Facilities, January, 1997." (Emphasis added and in the original.)

Earlier, on December 16, 1996, DEM had notified Global of its "substantial quantities of processed construction and demolition material" that were not being removed from Global's facility and which could be regarded as "unpermitted disposal of solid waste." Judith Sine, a DEM engineer, also noted that Global recently had acquired a "new shredder and screen" and that pursuant to the June 30, 1995 consent judgment (section 5-C), under which Global was permitted to operate its facility, Global was required to submit any proposed expansion of its site equipment to DEM for approval, and for amendment to the Operation Plan provided for in the consent judgment. Thus, contrary to what Global has asserted to us, both in its appellate brief and at oral argument, there

was indeed both ongoing Global licensing and permit proceedings at the time the Mallettes' statements were made.

[**14] [*1213] (A)

Global, in its initial and rather rhetorically phrased opening appellate contention, asserts that the legislative policy embodied within our anti-SLAPP statute never was intended to bar civil actions brought by a litigant who has "suffered actual economic injuries from baseless attacks upon [its] business reputation." That contention would have merit if the facts in this case were such as to warrant any inference that the statements made by the Mallettes and concerning Global's operation of its construction and demolition debris recycling business were "baseless" or sham statements when made. However, that is not the case here.

The motion hearing justice specifically found that the statements made by the Mallettes were not objectively baseless and thus, not sham and, as a result, Global's suit was barred pursuant to the express immunity provisions of § 9-33-2(a). Because our de novo review of the case filings and affidavits leads us to that same conclusion, we reject Global's initial appellate assertion of error as being meritless.

(B)

As to Global's next contention that "the invocation of the immunity provided by the anti-SLAPP statute" requires that the statement or [*15] statements for which immunity is claimed, "must be made before some type of legislative, judicial or administrative body" and "not to the public via the print media," such contention is both novel and meritless.

We noted in *Hometown Properties, Inc.*, that the Legislature's clear intention for enacting the anti-SLAPP statute in 1993 was to allow the "full participation by persons and organizations and robust discussion of issues of public concern before the legislative, judicial, and administrative bodies, and in other public fora." 680 A.2d at 61 (quoting § 9-33-1). (Emphasis added.) Section 9-33-1 of the anti-SLAPP statute makes clear the Legislature's disfavor of lawsuits brought primarily to "chill the valid exercise of the constitutional rights of freedom of speech" by persons making public statements in connection with an issue of public concern. Section 9-33-1 not only encourages but also to protects "robust discussion of issues of public concern" in the "public fora." In 1995, the Legislature specifically amended § 9-33-2 to provide explicit immunity to persons and organizations making statements not objectively or subjectively baseless in the [*16] course of robust discussion of public concern. P.L. 1995, ch. 386, § 1.

In this case, we are satisfied that the hearing justice carefully reviewed and considered whether the statements made by the Mallettes were objectively baseless. She found that they were not, and that the immunity from suit provided by the anti-SLAPP statute protected the Mallettes from Global's alleged defamation claims. We also have reviewed the hearing record and case filings and likewise conclude that the statements by the Mallettes were not objectively baseless and were thus entitled to immunity from civil suit as provided for in § 9-33-2(a). Indeed, we additionally observe that the facility, as found to be conducted by Global, whether licensed, permitted, or in operation before the Mallettes and their neighbors moved to Colvintown Road, actually might constitute an actionable private nuisance to the Mallettes and their neighbors.⁵ See, e.g., *Weida v. Ferry*, 493 A.2d 824, 826-27 (R.I. 1985).

5 The stockpiles, without an adequate closure-fund as required by DEM, apparently still remain on Global's site. See *Reitsma v. Global Waste Recycling, Inc.*, C.A. KC-57.

[**17] (C)

Global's final appellate contention is that the term "issues of public concern" contained in § 9-33-2(a) is "overly broad, ambiguous and without a definable, concrete meaning" and thus "in violation of the due process clauses of both the Rhode [*1214] Island and United States Constitution" requires but scant consideration.

We respond to that constitutional challenge in two ways. First, the term "issues of public concern" is not so "overly broad, ambiguous and without a definable, concrete meaning," as contended by Global, excepting perhaps only to Global. That phrase and wording, we point out, enjoys a long, distinguished and unchallenged career in both state and civil defamation actions as well in tortious conduct actions, pursuant to 42 U.S.C.A. § 1983. See, e.g., *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971); *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Smith v. Fruin* 28 F.3d 646, 650 (7th Cir. 1994); [*18] *Vukadinovich v. Bartels* 853 F.2d 1387, 1390 (7th Cir. 1988); *Kent v. Pittsburgh Press Co.*, 349 F. Supp. 622, 627 (W.D. Pa. 1972); *Caron v. Silvia*, 32 Mass. App. Ct. 271, 588 N.E.2d 711, 714 (Mass. App. Ct. 1992); *Burkes v. Klauser*, 185 Wis. 2d 309, 517 N.W.2d 503, 510 (Wis. 1994).

Secondly, we observe, as did the motion hearing justice, that Global both failed and neglected to comply

with its clear obligation when challenging the constitutionality of a state statute to "serve the attorney general with a copy of the proceedings within such time to afford the attorney general an opportunity to intervene." Super. R. Civ. P. 24(d). See also *G.L. 1956 § 9-30-11*. We do not believe that this Court should undertake to determine the constitutionality of a state statute in a given case without first affording the Attorney General the opportunity to intervene and be heard. See *Crossman v. Erickson*, 570 A.2d 651, 654 (R.I. 1990).

For the reasons herein above set out, we deny and dismiss Global's appeal, affirm the summary judgment in favor of the Mallettes, and the award of counsel fees

made to counsel for the [**19] Mallettes for services rendered in the Superior Court.

Before we remand the papers in this case to the Superior Court, we direct counsel for the Mallettes to furnish this Court with a detailed request for counsel fees and any costs relating to this appeal, and direct that a copy thereof be submitted to counsel representing Global. This Court will, after consideration of counsel's request and any objection filed thereto, award an appropriate fee to Mallettes' counsel for his appellate representation of the Mallettes.

Justice Flanders did not attend oral arguments, but participated on the basis of the briefs.

Tab C

COMPARISON OF BEZZANT'S FACTS TO THE RECORD

The following list is by no means intended to be exhaustive, but does respond to some of Bezzant's most glaring misrepresentations of the facts.

1. Bezzant claims Jacob is a "wealthy businessman and real estate developer" (Br. Appe at 5), citing the district court's ruling granting Bezzant's motion for summary judgment (R1825:7-9) and his own memorandum in support of his Motion (R515:viii-xi). This claim is false and there are no facts on the record to support it. Jacob is a businessman but is not a real estate developer.
2. Bezzant claims this matter was delayed when Jacob opposed "his *own counsel's* motion to withdraw, attempting to 'consolidate' this case with a massive class action filed on behalf of every citizen in American Fork, violating a stay on discovery, and eventually refusing to appear with new counsel for nearly a year." Br. Appe. at 5 (emphasis in original; citing the district court's ruling and Bezzant's own pleadings). These allegations are very misleading. Jacob's former counsel, not Jacob, fought his own firm's motion to withdraw from the case. R582, R607. Bezzant also fails to acknowledge his own strategically complicit role in moving to disqualify Jacob's former counsel. R582, R642. This internal dispute was really between Jacob's former counsel and his own firm. *Id.* In a nutshell, Jacob's former counsel had represented him in this matter for several months when his firm decided to seek business from parties with interests adverse to Jacob's. R582. Further, Jacob never violated the stay on discovery. Jacob had a court order from federal Judge Paul Cassell allowing him to take the deposition of AFC public official, Don Hampton, in a separate case. As a courtesy, Jacob provided notice of that deposition in this case also because the cases were related. Further, Bezzant's claim that this matter was delayed because Jacob refused "to appear with new counsel for nearly a year" is both knowingly and blatantly false; Bezzant took aggressive and ultimately successful measures to disqualify Jacob's former counsel in a strategic and hotly litigated tactic to deprive Jacob of counsel, unnecessarily increase both parties' costs, and unnecessarily delay this matter. *Id.* To now blame Jacob for that dispute truly lacks candor.
3. Bezzant falsely claims that interpretation of the AFC ordinances underlying the dispute in this case was a debate that "came to a head in the days before the 1999 election and has required periodic decisions and interpretations by the City Attorney, Mayor, and City Council" (Br. Appe. at 7, citing his own pleadings). This statement is very

misleading. The truth is interpretation of the ordinances was not a pending issue before AFC public officials as they had already decided to ignore any conflicts of interests created by Tom Hunter's and Ricky Storrs' candidacies. R516, Tab H (Deposition of Ricky Storrs), at 100, 112 (Storrs, who was an AFC councilman since 1991, testified he did not remember the conflict of interest issue ever coming up in AFC council meetings); at 129 (Storrs testified that Bezzant called and told him about the Notice, then Storrs received a copy like every other AFC citizen; he had no other discussions with anyone about the subject); at 130 (Storrs testified, "I seen it [the Notice] when [it] went around the door steps as a flyer."); at 152 (Storrs reiterated he had no other discussions with anyone about the Notice); R516, Tab E at 141 (Ted Barratt testified there were no discussions about the Notice).

4. On pages 14 and 15 of Bezzant's brief, he cites R1285:5, R1969:11, and R2463:ix-x, in support of his claim that federal Judge Paul Cassell terminated a deposition due to Jacob's former counsel asking "irrelevant and harassing" questions. While Jacob adamantly denies that his former counsel's questions in any deposition taken in this matter were irrelevant or intended to harass anyone, Bezzant's record citations are suspect. He cites R1285:5 does not exist, R1969:11 which is Bezzant's own memorandum in support of his motion for partial summary judgment, and R2463:ix-x, which is Bezzant's reply memorandum in support of his motion for partial summary judgment.
5. Bezzant references the deposition testimony of AFC Mayor Ted Barratt in support of his claim that both the Flyer and the Notice were referenced in "a public City Council meeting after the publication of the Editorial in the days before the election." Br. Appe. at 30. The referenced testimony not only does not support Bezzant's assertions, it rebuts them. When asked if he discussed the contents of the Notice with anyone after receiving it, Barratt testified, "Not that I necessarily recall. I may have spoken with Councilman Tom Hunter and Councilman Elect Rick Storrs, but I don't recall those conversations at this time." R516, Tab E, at 141. While there was some discussion in the press after the election about the purported conflict of interest in relation to Hunter and Storrs holding public office, as both Barratt and Storrs testified in their depositions, this was never an issue of public debate in AFC Council Meetings. R516, Tab E, 141; R516, Tab H, 100, 112, 129, 130, 152.