To Be Argued By:
PAUL ALAN LEVY
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New York Supreme Court
Appellate Division —First Department

315 WEST 103 ENTERPRISES LLC and
315 W 103 ST. DEVELOPMENT LLC,

Plaintiffs-Respondents,

–against–

RICHARD A. ROBBINS,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

Civil Rights Law

In his opening brief, defendant-appellant Richard A. Robbins argued that the trial court committed errors of law in denying his motion for attorney fees and other sanctions against plaintiffs-respondents, 315 West 103 Enterprises LLC and 315 W 103 St. Development LLC, because their defamation suit against him for having allegedly submitted false complaints to the New York City Building Department was baseless as a matter of law. He argued that the only reason articulated by the court below—that his motion seeking a monetary award became moot when plaintiff voluntarily discontinued the case in an effort to avoid that motion—was wrong as a matter of law, and he addressed a number of alternate grounds that he expected plaintiffs to offer.

Thus, Robbins showed that this lawsuit fell squarely within the provisions of the state anti-SLAPP law. Opening Br. 14-20. He argued that his motion for SLAPP fees and sanctions was a "claim" that properly placed the issues before the Court, both as a matter of strict interpretation of the language of the statute and in light of the policies animating the SLAPP law. *Id.* 20-24. And he argued that the existence of discretion about awarding fees should be cabined by construction of the fees provision analogous to the approach taken in construing federal civil rights laws that similarly use permissible language authorizing but not directing courts to award fees to successful plaintiffs. *Id.* 29-31.

Most important, he showed the significant damage to the protection afforded

by the SLAPP law that would be wrought if plaintiffs were allowed to bring baseless claims, like those here, against New Yorkers who participate in public proceedings, and then drop such claims only after learning that the defendants have the financial wherewithal to retain counsel to defend against the actions. *Id.* 25-28.

In their opposition brief, plaintiffs put forward a number of technical objections to Robbins' appeal; as explained below, none have merit. Moreover, they never explain why plaintiffs who sue their critics ought to be given a free bite at the apple, dismissing claims only after the citizens they pursue show that they can afford to defend themselves and, indeed, that they have valid anti-SLAPP arguments. Nor do plaintiffs articulate any reason why trial judges should be given unfettered discretion to allow such dismissals, and thus allow the failed plaintiffs to avoid facing the financial consequences that the Legislature intended to impose on parties that bring baseless claims against members of the public who participate in public affairs by communicating with their government about government permittees and permit applicants.

I. THE ANTI-SLAPP ISSUE WAS PROPERLY BEFORE THE SUPREME COURT.

Plaintiffs contend (Br. 22-23) that the Supreme Court properly declined to award attorney fees or other monetary amounts under the anti-SLAPP law because

Robbins' anti-SLAPP motion did not constitute a "claim" under that statute, hence no such claim was pending at the time the Supreme Court closed out the case. This contention is belied by the events below: the Supreme Court's determination in the January 5 order that the anti-SLAPP motion was moot. In addition, the court's express denial in that order of attorney fees or sanctions shows its recognition that a demand for a monetary award was indeed pending before it. In any event, plaintiffs' response to the arguments in Robbins' opening brief that anti-SLAPP remedies may properly be sought by motion, in addition to the bringing of a complaint, cross-claim or counterclaim, is unpersuasive.[1]

Robbins' opening brief advanced five reasons for construing the anti-SLAPP law to allow claims for fees and other relief to be advanced by motion: (1) the ordinary dictionary definition of "claim" includes any demand for money; (2) unless

[1] During the proceedings below, plaintiffs made clear their understanding that Robbins had already advanced a "claim" under the anti-SLAPP law, in that their proposed stipulation of discontinuation would have provided that "all claims asserted in this action be discontinued with prejudice." R235 ¶ 9. Because "with prejudice" would have included Robbins' motion for SLAPP awards, Robbins' counsel refused to accede to it, which is why possible agreement on voluntary discontinuance broke down in the Supreme Court. *Id.* In light of plaintiffs' insistence on this clause, and other demands from plaintiffs' counsel that Robbins could have addressed on the record below had plaintiffs preserved in that court their argument here (Br. 21-22) that Robbins' refusal to accede to discontinuance constitutes a valid ground for a discretionary denial of an anti-SLAPP award, Robbins had good reason to refuse to enter the proffered stipulation of discontinuance. Contrary to plaintiffs' assertion, Br. 22, the Supreme Court made no determination about Robbins' good faith.

"claim" can be brought in some manner other than a complaint, cross-claim or counterclaim, the word "claim" in the anti-SLAPP law would be mere surplusage;[2] (3) in a number of other contexts, New York courts have used the term "claim" to include motions and other proceedings that are not pleadings; (4) several courts have entertained anti-SLAPP claims put forward by motion, albeit without expressly deciding whether a motion is a sufficient method for pursuing such claims; and (5) the rules on irregularities, construction of pleadings, and liberal construction of the CPLR allow the motion to be treated as a complaint or counterclaim even if the Court holds that such a pleading should have been filed.

In responding to this part of Robbins' brief, plaintiffs address reasons 2 and 3 (Response Br. 22 to 25) but ignore reasons 1, 4, and 5, which both individually and together suffice to support reversal of the January 5 order. Moreover, plaintiffs' responses to points 2 and 3 are unpersuasive. Plaintiffs identify two sections of the CPLR that use the word "claim" in contexts where claims are advanced in complaints, Br. 23, but neither section suggests that a claim can **only** be put forward in a complaint or other pleading. They also point out that section 70-a(1) of the Civil

[2] Section 70-a(1) allows a defendant to "maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees . . .."

Rights Law allows plaintiffs to maintain an "action" as well as a cross- or counterclaim to seek SLAPP remedies, but that argument simply repeats our point: Unless the term "claim" in the series "maintain an action, claim, cross claim or counterclaim" means something other than a cause of action in a complaint, the term "claim" does not add anything to the scope of the statute.

As for Robbins' list of cases showing that, in other contexts, New York courts consistently say that claims can be presented by motion, Opening Br. 23, plaintiffs' only response (at 24-25) is that the cases arose in other contexts. That point is entirely consistent with Robbins' invocation of those cases—to show that claims can be made in motions in several contexts in addition to the anti-SLAPP law. Because Robbins' anti-SLAPP motion properly placed his request for an award of attorney fees and other monetary remedies before the Supreme Court for decision, the Court should reverse the denial of an anti-SLAPP award.

II. THE TRIAL COURT ERRED BY DENYING THE ANTI-SLAPP MOTION.

Robbins' opening brief showed that his calls to the 311 hotline represented public participation within the scope of New York's anti-SLAPP law, that plaintiffs' voluntary discontinuation of the complaint after the filing of the anti-SLAPP motion was not a proper basis for denial of his claim for anti-SLAPP remedies, and that

plaintiffs had not made the showing required to avoid an award of attorney fees. Plaintiffs' arguments in their response brief about why anti-SLAPP fees could properly have been denied are unpersuasive.

Before addressing those arguments, Robbins notes that plaintiffs presented **none** of these arguments below, because plaintiffs made a tactical decision not to put forward any arguments against application of the anti-SLAPP law. Their response to Robbins' arguments here represents an effort to secure affirmance on a ground that is alternative to the Supreme Court's mootness holding, and plaintiffs are asking the Court to decide, in the first instance, whether the standards of the anti-SLAPP law have been met here. Robbins, as well, asks the Court to reverse because plaintiffs present insufficient support for their claims to defeat Robbins' anti-SLAPP motion.

As a general matter, alternative grounds can be an acceptable basis for affirmance so long as they were "properly preserved." *Parochial Bus Sys. v. Bd. of Educ. of City of New York*, 458 N.E.2d 1241, 1244 (N.Y. 1983). But in this case, the alternate grounds propounded by plaintiffs have not been properly preserved, and plaintiffs' failure to advance below some of the alternate grounds that they are now arguing as support for affirmance could prejudice Robbins to the extent that he was denied the opportunity to place evidence in the record that would have shown flaws in some of the factual assumptions on which plaintiffs' current arguments are based.

Although Robbins believes that he is entitled to a reversal based on the appellate record as it stands, if the Court is willing to entertain the alternate grounds but concludes that reversal is not justified on the current record, Robbins asks the Court to remand for a plenary consideration of his anti-SLAPP motion by the Supreme Court in the first instance.

A. Robbins' Oral Communications to the 311 Hotline Were Instances of Public Participation Within the Scope of the Anti-SLAPP Law's Protection.

Plaintiffs argue, based on citations to *Guerrero v. Carva* , 10 A.D. 3d 105, 779 N.Y.S.2d 12 (N.Y. App. Div. 1st Dept. 2004), and *Hariri v. Amper*, 51 A.D.3d 146, 854 N.Y.S.2d 126, 130 (N.Y. App. Div. 1st Dept. 2008), that because the anti-SLAPP law is in derogation of common law and hence narrowly construed, it is appropriate to construe the law to protect only against baseless claims that relate directly to and oppose a permit "application" or "permission." But neither case stands for such a narrow limitation on the statute. In *Hariri*, anti-SLAPP coverage was denied because the plaintiff was not a public permittee in the first place. Hariri had not applied for any permit; the point of the criticism was that Hariri was acting without a license for which he **should** have applied. 51 A.D.3d at 151. In *Guerrero*, although the plaintiff was operating under a permit, the communications did not refer to any permit or ask any administrative agency to take action with respect to such a permit. 10 A.D. 3d

at 117.

But both cases indicate that the anti-SLAPP law provides protection against baseless claims when brought over statements that commented on an application or a permit that has already been granted. *Guerrero*, 779 N.Y.S.2d at 21 (describing question as whether defendants' protests "identif[ied] any particular application or permit that plaintiffs have sought **or received**") (emphasis added); *Hariri*, 854 N.Y.S.2d at 130 (stating anti-SLAPP strictures apply to individuals "within the ambit of an applicant **or permittee**") (emphasis added). Other cases have applied to the anti-SLAPP law to protect criticism of a permittee's operation under a permit. *Edwards v. Martin*, 72 N.Y.S.3d 606 (N.Y. App. Div. 3d Dept. 2018) (holding complaints about plaintiffs' operation under a permit already granted to be within the scope of the anti-SLAPP law); *Int'l Shoppes v. At the Airport*, 16 N.Y.S.3d 72, 75 (N.Y. App. Div. 2d Dept. 2015) (treating complaints about alleged violation of leases already granted as being within the scope of the anti-SLAPP law).

Indeed, the express language of Section 76-a of the Civil Rights law treats as a potential SLAPP any action brought by a "public applicant **or permittee**," § 76-a(1)(a) (emphasis added), which is defined as "any person who has applied for **or obtained** a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act." § 76-a(1)(b). It is not only applicants for permits not yet

received that are subject to anti-SLAPP awards.

The claims in plaintiff's complaint fall easily within the fact patterns recognized in these cases as appropriately within the protection of the anti-SLAPP law. A building permit was issued for construction at plaintiffs' building, R.30 ¶ 8, but needed additional permission in light of intervening events, and permission had not yet been granted. R.31 ¶ 13, 83-84. Plaintiffs had been ordered to stop work, R.94 ¶¶ 6-7, 104 ¶¶ 5-6, 113-114, 120, 123, 124; they were trying to get permission to resume work, R.31 ¶ 13, 83-84; and Robbins was commenting on the actions they had taken under their building permit, asking the Building Department to make plaintiffs both stop violating the limitations on their permit (that is, the various stop work orders), and repair damage to Robbins' property caused by plaintiffs' construction. R.106-108, ¶¶ 9-15. Thus, Robbins' communications to the Building Department were directed both to plaintiffs as applicants and plaintiffs as permittees, and the complaint was easily within the coverage of the anti-SLAPP law as construed in *Guerrero, Hariri* and other cases cited above.[3]

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[3] Although the reasoning in *Hariri* justifies plaintiffs' reliance on the canon of construction that the anti-SLAPP law's abrogation of the common law warrants a rule of strict construction, it is equally true that the anti-SLAPP law is a remedial statute, and remedial statutes should be broadly construed to effectuate their purpose. *See*, *e.g.*, *Scanlan v. Buffalo Pub. Sch. System,* 687 N.E.2d 1334, 1339 (N.Y. 1997); *Tunick v. Shaw*, 842 N.Y.S.2d 395, 397 (N.Y. App. Div. 1st Dept. 2007).

B. Plaintiffs Did Not Make a Sufficient Showing that Their Tort Claims Had Merit to Overcome the Anti-SLAPP Statute.

Plaintiffs next argue that, even assuming that the claims in this case are within the scope of the anti-SLAPP law, their complaint alleged both falsity and "malice," and hence was sufficient to defeat a motion to dismiss. Response Br. 34-35. But that argument is incorrect, for two reasons.

First, Robbins' opening brief explained the difference between common law malice and actual malice—statements made with knowledge of falsity or reckless disregard of probable falsity. Robbins Br. 17-18. Plaintiffs apparently now argue on appeal that the complaint's allegation that Robbins made false statements on several occasions (during each of his five telephone calls to 311) should be accepted as implicitly charging Robbins with actual malice, but the making of five allegedly false statements creates no inference of actual malice. Indeed, many libel suits over newspaper articles identify multiple statements that are said to be false, and if that were enough to overcome the actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), that case would provide little support for robust speech on matters of public interest.

Moreover, even if the complaint properly alleged actual malice, the New York anti-SLAPP law does not allow a plaintiff to rest on the unverified allegations of its

complaint to withstand an anti-SLAPP motion. Once a case falls within the scope of the anti-SLAPP law, the plaintiff must show a substantial basis for concluding that they will have evidence of actual malice, and indeed clear and convincing evidence of actual malice. Section 76-a(2) of the Civil Rights Law.[4] In the court below, Robbins supplied an affidavit showing his sincere belief in the truth of what he has said on his 311 calls (the precise content of which was unknown to plaintiff, who could only show the characterizations made by the telephone representatives who take 301 calls, which are recorded on the Building Department web site), as well as an evidentiary basis for his belief with respect to each of his statements. Although plaintiffs rely on evidence in the record as part of others of their alternate grounds for affirmance, they have offered no evidence on the issue of actual malice. Indeed, just as a plaintiff in a libel action will not avoid summary judgment unless it points to evidence that would suffice to prevail at trial on a clear and convincing evidence standard, *Kipper v. NYP Holdings Co.*, 912 N.E.2d 26, 29 (N.Y. 2009), a plaintiff resisting an anti-SLAPP motion must provide reason to believe that it will be able to

[4] Civil Rights Law § 76-a(2): "In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue."

meet that standard of proof. And, to the extent that plaintiffs seek to base their contentions about actual malice on inferences that they say should be drawn from the making of multiple false statements (as noted above, that is not sufficient to show actual malice), the lack of any evidence of falsity precludes the drawing of any such inference on appeal.[5]

C. The Court Should Consider the Reasoning of Courts Applying Anti-SLAPP Laws in Other States Where a Voluntary Dismissal of a Complaint After Plaintiff Has Filed an Anti-SLAPP Motion Is Not Alone Sufficient to Defeat Anti-SLAPP Remedies.

Robbins' opening brief cited appellate rulings from state courts in Texas and California, and a pair of trial court rulings in Massachusetts, holding that a plaintiff who files a SLAPP suit cannot avoid the imposition of anti-SLAPP remedies by dismissing its lawsuit while an anti-SLAPP motion to dismiss is pending. Br. 26-28. Plaintiffs' effort to respond to some of these citations is unpersuasive.

Plaintiffs seek to distinguish the California cases by suggesting that, in one of the decisions, *Kyle v. Carmon*, 71 Cal. App. 4th 901 (Cal. App. 1999), the court said that if the plaintiff discontinues the action for some reason other than a motivation

[5] To the extent that plaintiffs are offering evidence submitted below as part of their argument for affirmance on the alternate ground that the SLAPP motion was properly denied, their failure to interpose evidence on actual malice is fatal. CLPR § 3211(c)*; Gilligan v. Farmer*, 289 N.Y.S.2d 846, 849 (N.Y. App. Div. 1st Dept. 1968).

unrelated to a pending motion, that reason is a sufficient basis for denying the anti-SLAPP motion. Br. 28. But plaintiffs provide no page citation for this supposed holding, and the California court did not so hold. Although the court noted, in passing, that the plaintiff had not shown that it had a reason other that the anti-SLAPP motion to dismiss, 71 Cal. App. 4th at 919, it did not state that such a showing would have been sufficient. Indeed, in a case decided three years after *Kyle v. Carmon*, the California Supreme Court held that a plaintiff's intent has no bearing on whether the California anti-SLAPP statute applies, because liability for attorney fees rests on an objective assessment of the statements of defendants alleged in the complaint and on plaintiff's evidence that those statements were actionable, not on the plaintiff's profession of innocent intentions. *Equilon Enterprises v. Consumer Cause*, 52 P.3d 685, 688 (Cal. 2002).[6]

Moreover, plaintiffs have never made any showing that their voluntary discontinuation was unrelated to the fact that Robbins had moved for the award of anti-SLAPP remedies. To be sure, their counsel represented that plaintiffs had decided that the expense of litigation was too great compared to the anticipated outcome, but counsel cannot testify on personal knowledge about his clients'

[6] New York's anti-SLAPP law similarly distinguishes between objectively baseless lawsuits, which are a basis for awards of attorney fees, and ill-motivated lawsuits, which can be the basis for damages in addition to fees.

intentions or their actual reasons for litigating or not litigating. Moreover, if plaintiffs had ever intended to **litigate** their libel claims—instead of hoping to secure an immediate surrender from a defendant who could not afford to hire lawyers to defend himself—they would have known at the outset that libel suits are expensive to pursue. It was only the anti-SLAPP motion to dismiss that led them to re-assess the expense of litigation, hence their motivation was not unrelated to that motion.

Robbins' opening brief, at 27, quoted at length the reasoning of the Massachusetts Superior Court in *Carr v. Cesari & McKenna*, 2017 WL 2623126 (Mass. Super, Mar. 27, 2017); *see also Winthrop Healthcare Inv'rs, L.P. v. Cogan*, 2010 WL 5891673, at *2 (Mass. Super. Dec. 9, 2010). Plaintiffs seek to avoid having the Court follow the approach taken by *Carr* by arguing that it is inconsistent with **earlier** rulings of the Massachusetts Court of Appeals. Response Br. at 26, *citing Connolly v. Sullivan*, 76 Mass. App. 316, 318 (2010), and *Gray v. Tacason*, 79 Mass. App. Ct. 1107 (2011). However, Massachusetts trial court rulings have no binding authority, *Thurdin v. SEI Boston*, 895 N.E.2d 446, 459 (Mass. 2008); they are cited only for their reasoning, and their authority hangs on the persuasiveness of that reasoning. *Massachusetts Insurers Insolvency Fund v. Smith*, 940 N.E.2d 385, 389 (Mass. 2010). *Carr* reasoned that "allowing a party to file a SLAPP suit and avoid liability if the other side incurs the expense of defending and filing a special motion

to dismiss would perpetrate the harm that [the anti-SLAPP law] seeks to prevent: the object of a SLAPP suit is not necessarily to prevail, but rather, through the difficulty and expense of litigation, to discourage and intimidate individuals from exercising their constitutional right to petition." Robbins Br. 27, *quoting Carr*, 2017 WL 2623126, at *4(internal ellipsis omitted). Plaintiffs never address the reasoning that led the Massachusetts Superior Court in *Carr*, as well as the earlier *Winthrop* decision, to hold that voluntary dismissal of a SLAPP suit should not avoid a pending motion to dismiss.[7]

Similarly, although plaintiffs seek to distinguish the Texas approach by noting that the Texas anti-SLAPP law makes the grant of anti-SLAPP remedies mandatory rather than discretionary, Response Br. at 27, that argument goes to a different point than whether voluntary dismissal is a basis for denying a filed anti-SLAPP motion. In that regard, plaintiffs never respond at all to the argument in Robbins' opening brief that the discretion that the use of the word "may" implies should be cabined by analogy to the approach taken by the courts in applying similarly permissive language

[7] *Winthrop*, a 2010 decision, indicated that the language in *Connolly* on which plaintiffs rely was only dictum, and hence that lower courts in Massachusetts need not follow it. *Id.* at *2. Plaintiffs err in their reliance on *Gray*, a 2011 ruling, as showing otherwise. Not only is *Gray* a summary affirmance that is not citable as binding precedent in Massachusetts, but in that case the plaintiff dismissed its lawsuit only after defendants' anti-SLAPP motion was denied (with leave to replead).

in several federal civil rights statutes providing for awards of attorney fees—by creating a presumption in favor of such awards unless special circumstances render such awards unjust. Robbins Br. 28-31.

D. Arguments About the Impact of Insurance Coverage Are Unpersuasive, and in Any Event Affect Only the Amount of the Award.

Plaintiffs argue, based on a hearsay averment in the record, that Robbins' legal expenses were covered by an insurance carrier, and hence, under New York law, court cannot award fees. However, the case on which they rely (Response Br. 36) says nothing about attorney fee awards, and to the extent that it makes an analogous ruling about damages awards, it actually supports an award of fees here; it does not undermine it.

In *Inchaustegui v. 666 5th Ave. Ltd. P'ship*, 96 N.Y.2d 111, 114 (2001), the Court of Appeals drew a distinction between tort actions, in which New York law forbids a court from reducing the appropriate amount of compensation to be awarded in consideration of compensation that the injured person received from a person other than the tortfeasor, and contract actions, in which New York courts must take into account collateral sources of payment when calculating damages. In *Inchaustegui*, the court reduced an award of damages in a landlord's contract action by taking into account money that the landlord sought to recover from its insurance carrier.

Here, Robbins' claim against plaintiffs is not for breach of contract; rather, he invoked a statutory right that sounds in tort: the right not to be subjected to a baseless lawsuit. Under the very tort principles that the Court of Appeals embraced in *Inchaustegui,* putative insurance coverage is irrelevant to Robbins' claim for attorney fees and other sanctions. Moreover, New York courts generally hold that the fact that a party is represented by counsel who are not charging fees to the plaintiff does not prevent an award of statutory attorney fees at the rates provided by the relevant market for legal services. *Humphrey v. Gross*, 522 N.Y.S.2d 213, 214 (N.Y. App. Div. 2d Dept. 1987). Statutory attorney fees are also commonly awarded at market rates when the attorneys have been retained under a contingent fee agreement. *Albunio v. City of New York*, 11 N.E.3d 1104, 1106 (N.Y. 2014). Thus, parties whose lawyers were retained and compensated by an insurance company should also be able to recover statutory attorney fees.

Finally on this point, the question of how much in the way of attorney fees should be awarded for Robbins' pursuit of his anti-SLAPP motion is one that should be addressed below on remand. Even if there were competent evidence in the record about whether Robbins bore any cost for representation by the attorney who appeared for Robbins below, nothing in the record supports plaintiffs' implicit assumption that all of Robbins' representation was provided by that one lawyer. In fact, on remand,

when the Supreme Court addresses the amount of the fee award, Robbins intends to introduce evidence showing that he received pro bono assistance with his anti-SLAPP papers in the Supreme Court both from a non-profit organization and an attorney in private practice.

III. ROBBINS' ALTERNATE GROUND FOR REVERSAL IS PROPERLY BEFORE THIS COURT ON APPEAL.

The entire first section of plaintiffs' brief, at 15-19, is addressed to the question whether this Court can consider the correctness of the Supreme Court's November 13 order. That argument responds to a short footnote in Robbins' opening brief, at 28 n.2, which argued in the alternative that instead of reaching the main legal issues raised on this appeal under the anti-SLAPP law, this Court instead could hold that the Supreme Court erred by allowing the discontinuance without imposing conditions.

As plaintiffs recognize (brief at 17-18), the Court can take that alternate approach so long as it concludes that the discontinuance without express conditions was not a final order, because non-final orders are merged into the final order. And, indeed, the November 13 order was in fact non-final because, although it allowed plaintiffs to discontinue their suit as they requested, that order did not address the question whether plaintiffs would be required to pay attorney fees or sanctions. Plaintiffs argue that the January 5 order denying Robbins' motion for fees was

"ministerial," citing *Burke v. Crosson*, 85 N.Y.2d 10, 15 (1995). Response Br. at 18.

But under the reasoning of *Burke*, the November 13 order was non-final: "an order or judgment that disposes of some but not all of the substantive and monetary disputes between the same parties is, in most cases, nonfinal. Thus, a nonfinal order or judgment results when a court decides one or more but not all causes of action in the complaint against a particular defendant or where the court disposes of a counterclaim or affirmative defense but leaves other causes of action between the same parties for resolution in further judicial proceedings." *Id.* at 15-16. The November 13 order did not dispose of one significant monetary dispute: Robbins' claim for an award under the anti-SLAPP law. At the time of the November 13 order granting discontinuance, Robbins' anti-SLAPP motion remained on the calendar and Robbins had every reason to expect that the motion would be addressed on the merits; hence, he had no reason to appeal. Only on January 5 did the Supreme Court articulate the theory that the motion had become moot. The fact that this reasoning is so plainly wrong that plaintiffs do not try to defend it on appeal does not render its issuance "ministerial."

CONCLUSION

The Supreme Court's order denying any fees for Robbins' defense against plaintiffs' SLAPP suit should be reversed, and the case should be remanded to a

determination of the proper amount of fees to be awarded.

Respectfully submitted,

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