**STATE OF MINNESOTA**
**IN COURT OF APPEALS**

Steve Quest,

Respondent,

v.

Nicholas Robert Rekieta, et al.,

Appellants.

App. Case No. A23-1337
District Court File No. 34-CV-23-12

**DEFENDANTS NICHOLAS REKIETA AND REKIETA LAW, LLC'S JURISDICTIONAL STATEMENT**

Defendants Nicholas Robert Rekieta and Rekieta Law, LLC (collectively, "Appellants") hereby provide their jurisdictional memorandum pursuant to the Order of September 13, 2023, in the above-captioned appeal. Specifically, the Court ordered the parties to each file a memorandum addressing the following:

(a) Are the district court's July 10, 2023 order and July 11, 2023 judgment denying appellants' special motion to dismiss immediately appealable under the collateral-order doctrine?

(b) If the answer to (a) is no, must this appeal be dismissed?

The answer to (a) is "yes:" the order and judgment are immediately appealable under the collateral-order doctrine. If the Court finds that the answer to (a) is "no," this appeal would have to be dismissed.

## 1.0 PROCEDURAL BACKGROUND

Plaintiff-Respondent Steve Quest filed a SLAPP[1] suit against Defendants-Appellants.

[1] "SLAPP" is short for a Strategic Lawsuit Against Public Participation. Its purpose is to silence critics by burdening

Respondent is a Colorado citizen. Amended Complaint at ¶ II. The alleged harm to Respondent took place in Colorado. *See id.* at ¶¶ XII, XIII, and XXVI. Colorado law applies to this claim.

Respondent filed his original Complaint on December 5, 2022. Respondent filed his Amended Complaint on February 6, 2023. Appellants filed their summary judgment motion, styled a Special Motion to Dismiss Pursuant to Colo. Rev. Stat. § 13-20-1101, invoking immunity from suit under Colorado law, on February 13, 2023. The District Court issued the Order and Memorandum denying the Anti-SLAPP motion on July 10, 2023, and a judgment thereon on July 11, 2023. Appellants now appeal the District Court's Order and Judgment.

## 2.0 LEGAL ARGUMENT

A party may bring an immediate appeal from a trial court's denial of a motion for summary judgment based upon a claim of immunity. *See McGovern v. City of Minneapolis*, 475 N.W.2d 71, 73 (Minn. 1991). "[I]mmunity from suit is lost if the case goes to trial." *Id.* at 72. In *McGovern*, the Minnesota Supreme Court referred to *Anderson v. City of Hopkin*s, 393 N.W.2d 363 (Minn. 1986), which relied on *Mitchell v. Forsyth*, 472 U.S. 511 (1985). 475 N.W.2d at 72. In *Anderson*, the Minnesota Supreme Court referred to the immunity from suit being "collateral to[] rights asserted in the action," rendering interlocutory appeal proper. 393 N.W.2d at 363-64. In the qualified immunity context, Minnesota courts allow an immediate appeal from an order denying qualified immunity which preserves immunity from suit which the law affords. *Stone v. Badgerow*, 511 N.W.2d 747, 750 (Minn. Ct. App. 1994).

As noted by the Court in its order, the Minnesota Supreme Court adopted the federal collateral order framework. *Kastner v. Star Trails Ass'n,* 646 N.W.2d 235, 240 (Minn. 2002). For the doctrine to apply, the order appealed from must "(1) conclusively determine the disputed question, (2) resolve

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them with the cost of a legal defense.

an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." Order at 2, citing *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). The court in *Kastner* noted that the same analysis applies regardless of which type of immunity the defendant claimed, whether immunity from liability or immunity from suit, and that the doctrine applies with equal force regardless of whether the party claiming immunity is a governmental or non-governmental party. 646 N.W.2d at 240-41.

Denial of a summary judgment motion on the issue of immunity satisfies all three criteria and is immediately appealable. *Id*. at 239-40; *Mumm v. Mornson*, 7089 N.W.2d 475, 481 (Minn. 2006). The order appealed from satisfies all three criteria: (1) it conclusively determines, albeit erroneously, the question of whether Appellants are entitled to substantive immunity; (2) the question of immunity is separate from the merits of the action; and (3) the order is effectively unreviewable on appeal from a final judgment because, once the suit proceeds, the immunity from suit will already be forever lost.

In *Kastner*, the Minnesota Supreme Court cited both *Anderson* and *Mitchell* approvingly, noting that an immunity from suit that is denied is immediately appealable, as it is "a right that is lost if the case is permitted to proceed." 646 N.W.2 at 239. Similarly, *P.R. Aqueduct* was a case in which the U.S. Supreme Court held that the denial of a claim of immunity from suit (there, Eleventh Amendment immunity) was a collateral order subject to immediate appeal. 506 U.S. at 147. Thus, there is widespread agreement that an order denying immunity from suit is immediately appealable under the collateral order doctrine.

Colorado's Anti-SLAPP statute protects a defamation defendant from the burden and expense of litigation. Colo. Rev. Stat. § 13-20-1101. The Anti-SLAPP law provides substantive immunity from suit when claims are targeted at specific categories of speech, and they fail to overcome an early challenge. Colo. Rev. Stat. § 13-20-1101(3). And it provides for an interlocutory appeal. Colo. Rev. Stat. § 13-20-1101(7). The immunity from suit and fees-shifting provisions are substantive rights,

they are not procedural rights. *See Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018). That Anti-SLAPP statutes provide immunity from suit is the general consensus among courts that have applied Anti-SLAPP statutes in federal court. *See, e.g.*, *Franchini v. Investor's Business Daily, Inc.*, 981 F.3d 1, 7, 8 n.6 (1st Cir.) (considering Maine Anti-SLAPP law); *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 666-67 (10th Cir.) (considering New Mexico Anti-SLAPP law); *Henry v. Lake Charles American Pres, LLC*, 566 F.3d 164, 178, 180-81 (5th Cir. 2009) (considering Louisiana Anti-SLAPP law).

Colorado's statute closely resembles California's Anti-SLAPP law,[2] so Colorado courts look to California Anti-SLAPP case law in interpreting their own Anti-SLAPP law. *See L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 20 (2022). "Because these meritless lawsuits seek to deplete the defendant's energy and drain his or her resources, the Legislature sought to prevent SLAPPs by ending them early and without great cost to the SLAPP target." *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 192 (2005) (cleaned up). The Ninth Circuit addressed this issue 20 years ago and found that the denial of a California Anti-SLAPP motion is immediately appealable under the collateral-order doctrine. *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003), *superseded in part by statute on other grounds as stated in Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766-67 (9th Cir. 2017). The Ninth Circuit reasoned that (1) the disputed issue was "whether the anti-SLAPP statute required dismissal of [Plaintiff's] suit," which denial of the motion conclusively determined; (2) the denial of the motion resolved an issue separate from the merits of the plaintiff's claims, as the court made no determination that the plaintiff might succeed on his claims (indeed, California's statute provides that when a court finds that a plaintiff has a probability of prevailing on his claims, "neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case," Cal. Code

[2] Cal. Code Civ. Proc. § 425.16

Civ. Proc. § 425.16(b)(3));[3] and (3) "[b]ecause the anti-SLAPP motion is designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression, the district court's denial of an anti-SLAPP motion would effectively be unreviewable on appeal from a final judgment," finding that "California lawmakers wanted to protect speakers from the trial itself rather than merely from liability." *Id*., 333 F.3d at 1024-25. The *Batzel* court further addressed California law finding that the Anti-SLAPP statute conferred a substantive immunity from suit, not just liability, and concluded that a denial of such immunity is immediately appealable under federal law. *Id*. at 1025-26. The Ninth Circuit has consistently upheld this reasoning and re-affirmed *Batzel* as recently as this year. *See, e.g., Zamani v. Carnes*, 491 F.3d 990, 994 (9th Cir. 2007); *Hilton v. Hallmark Cards*, 599 F.3d 894, 900 (9th Cir. 2010); *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015 (9th Cir. 2013); *Langer v. Kiser*, 57 F.4th 1085, 1104 (9th Cir. 2023). This reasoning is not based on any particular quirk of California law regarding burdens of proof or summary judgment motions, as federal courts treat Anti-SLAPP motions as motions for summary judgment under Fed. R. Civ. P. 56. *See Planned Parenthood*, 890 F.3d at 834.

Because Colorado's statute is modeled on California's Anti-SLAPP law and because Colorado courts look to California law in interpreting the Colorado statute, Colo. Rev. Stat. § 13-20-1101 should be interpreted likewise: Colorado's statute, like similar Anti-SLAPP statutes, creates a substantive immunity from suit. Such immunity is not merely there to shield a litigant from monetary damages once a case is concluded, but rather to protect the litigant from undergoing the burden of litigation entirely. After all, the very purpose of a SLAPP suit is to subject a defendant to the burden

[3] A comparable provision is found in Colorado's statute. *See* Colo. Rev. Stat. § 13-20-1101(3)(c) ("If the court determines that the plaintiff has established a reasonable likelihood that the plaintiff will prevail on the claim, neither that determination nor the fact of that determination is admissible in evidence at any later stage of the case or in any subsequent proceeding, and no burden of proof or degree of proof otherwise applicable is affected by that determination in any later stage of the case or in any subsequent proceeding").

and expense of litigation, rather than to obtain a favorable judgment after trial. If a SLAPP defendant is required to go through the discovery process, then the plaintiff has achieved their objective in filing suit, regardless of what happens afterward.[4]

The District Court overrode this immunity from suit. It did so by finding that Minnesota, not Colorado, law applied. This is one of the questions to be resolved in the appeal itself, but it does not go to the question of whether this Court has jurisdiction. It is no different from cases in which interlocutory appeals are taken from denials of other claims of immunity from suit, where the underlying denial of the claim of immunity is affirmed on appeal. Thus, for example, the First Circuit entertained the case but still determined that P.R. Aqueduct did not enjoy immunity from suit. *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth*., 991 F.2d 935 (1st Cir. 1993).

Because Colorado's Anti-SLAPP statute creates substantive immunity from suit, and because the purpose of such immunity is to shield a party from the burden of litigation itself, an order denying such immunity is a collateral order from which appeal must be taken.

## 3.0 CONCLUSION

**WHEREFORE** the Court should find it has jurisdiction to hear and decide this case.

[4] Even if the Colorado Anti-SLAPP statute did provide only immunity from liability, however, the District Court's order denying Appellants' Anti-SLAPP Motion would still satisfy the collateral-order doctrine and be immediately appealable. *Kastner,* 646 N.W.2d at 240-41. Further, it is worth noting that there is nothing that the plaintiff in this case could possibly want in discovery. The only thing that the plaintiff has expressed an interest in gathering, fact-wise, is his own medical records – something he should have anyway. *See* Quest Opposition to Anti-SLAPP Motion, attached as **Exhibit 1**, at 22.

Respectfully submitted on September 25, 2023,

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**ACKNOWLEDGEMENT REQUIRED BY MINN. STAT. § 549.211. SUBD. 1**

The undersigned hereby acknowledges that sanctions may be imposed under Minn. Stat.§ 549.211, if factual contentions and legal arguments contained in this pleading are unwarranted or presented for an improper purpose or are lacking in evidentiary support.

Date: September 25, 2023

*/s/ Matt Kezhaya*
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