

No. 19A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH R. MULLINS,

Applicant,

v.

JOSEPH E. CORCORAN AND GARY JENNISON,

Respondents.

**APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT**

Jonathan M. Albano

Counsel of Record

MORGAN, LEWIS & BOCKIUS LLP

One Federal Street

Boston, MA 02110

T: (617) 341-7700

F: (617) 341-7701

jonathan.albano@morganlewis.com

Counsel for Joseph R. Mullins

**APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS**

To the Honorable Stephen G. Breyer, Associate Justice for the United States Court of Appeals for the First Circuit:

1. In accordance with this Court's Rules 13.5, 22, and 30.3, applicant Joseph R. Mullins respectfully requests an extension of 30 days to file a petition for a writ of certiorari. The petition will challenge the decision of the Massachusetts Appeals Court in *Mullins v. Corcoran*, 95 Mass. App. Ct. 1107, 124 N.E.3d 706, *review denied*, 482 Mass. 1106, 127 N.E.3d 266 (2019) (attached as Exhibit A). The Massachusetts Appeals Court issued its opinion on April 10, 2019. The Massachusetts Supreme Judicial Court entered an order denying further appellate review on June 27, 2019 (attached as Exhibit B). Without an extension, the petition for a writ of certiorari would be due on September 25, 2019. With the requested extension, the petition would be due on October 25, 2019. This Court's jurisdiction will be based on 28 U.S.C. § 1257(a).

2. The decision below affirmed a \$17.5 million damages award (inclusive of interest) against the applicant, a minority shareholder in a closely held corporation, for the act of filing a breach of fiduciary duty lawsuit against respondents, the corporation's majority shareholders. The basis for the decision was an assessment of the applicant's subjective motivations in filing suit, without regard to the objective merits of the claims he asserted.

3. Under the First Amendment, unless litigation is a "sham" both "objectively and subjectively," it may not form the basis for a damages award. *BE & K*

Constr. Co. v. NLRB, 536 U.S. 516, 525-26 (2002); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). *See generally E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v Pennington*, 381 US 657 (1965). A claim is not objectively baseless unless “no reasonable litigant could expect success on the merits” of the claim. *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). “Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation[.]” *Id.* at 60-61 (citing *E. R.R. Presidents Conference*, 365 U.S. at 144).

4. By affirming the award of damages based solely on an assessment of the applicant’s “subjective motivation” for filing suit—without regard to whether the claims were objectively reasonable—the decision deepens a conflict between courts of different states and circuits concerning whether and the extent to which the *Noerr-Pennington* doctrine preempts the common law tort of abuse of process and other state law theories of recovery for allegedly abusive litigation. The issue has divided courts and commentators. *See, e.g., Protect Our Mountain Env't, Inc. v. Dist. Court*, 677 P.2d 1361, 1365, 1369 (Colo. 1984) (recovery of damages based on the filing of a lawsuit requires proof that the claims were both objectively and subjectively baseless); *Pound Hill Corp. v. Perl*, 668 A.2d 1260, 1264 (R.I. 1996) (two-part objective and subjective test applies to tort claims of abuse of process and interference with contractual relations); *DeVaney v. Thriftway Mktg. Corp.*, 124 N.M. 512, 520, 953 P.2d 277, 285 (1998) (the filing of a proper complaint with probable cause, and without any overt misuse of process, will not subject a litigant to liability for malicious abuse of

process, even if it is the result of a malicious motive), *overruled on other grounds*, *Durham v. Guest*, 145 N.M. 694, 204 P.3d 19 (2009), *abrogated on other grounds*, *Fleetwood Retail Corp. of N.M. v. LeDoux*, 142 N.M. 150, 164 P.3d 31 (1997). *Compare Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471 (7th Cir. 1982) (“It takes a rather free-wheeling imagination to extrapolate from the *California Motor Transport* opinion a principle that if applied across the board would, as we have suggested, make the tort of abuse of process invalid under the First Amendment; and we decline to do so[.]”); *Drill Parts & Serv. Co. v. Joy Mfg. Co.*, 619 So. 2d 1280, 1288 (Ala. 1993) (“lack of probable cause is not a necessary element of abuse of process”); *Anchorage Joint Venture v. Anchorage Condominium Ass’n*, 670 P.2d 1249, 1250-51 (Colo. Ct. App. 1983) (“The right of access to the courts seeking redress from actions of a governmental entity ... [is] distinguished from suits between private parties”). *See generally* Joseph B. Maher, Comment, *Survival of the Common-Law Abuse of Process Tort in the Face of a Noerr-Pennington Defense*, 65 U. Chi. L.Rev. 627, 640 (1998) (*Noerr-Pennington* defense properly applies only to certain federal statutory claims).

5. The applicant intends to file a petition for a writ of certiorari challenging both of these rulings. The petition will address whether the First Amendment permits the award of damages based upon the filing of a lawsuit concerning a commercial dispute absent proof that the action was both objectively and subjectively baseless.

6. Extraordinary circumstances justify the grant of a 30-day extension. On May 8, 2019, the applicant filed a petition for protection under Chapter 11 of the

United States Bankruptcy Code. *In re Joseph R. Mullins*, Bankr. Mass. No. 19-11574. On June 21, 2019, his wife of 50 years died. He has since been required to devote a substantial portion of his time attending to his obligations as a Chapter 11 debtor-in-possession. The extension will permit him to adequately prepare a petition for certiorari while also discharging his obligations as a Chapter 11 debtor.

7. For all of these reasons, the applicant respectfully requests that the due date for his petition for writ of certiorari be extended by 30 days, to and including October 25, 2019.

Respectfully submitted,

/s/ Jonathan M. Albano

Jonathan M. Albano

Counsel of Record

MORGAN, LEWIS & BOCKIUS LLP

One Federal Street

Boston, MA 02110

T: (617) 341-7700

F: (617) 341-7701

jonathan.albano@morganlewis.com

Counsel for Joseph R. Mullins

Dated: September 19, 2019