NO. 20-_____

In the Supreme Court of the United States

SPIELBAUER LAW OFFICE,

Petitioner,

v.

MIDLAND FUNDING, LLC ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the California Sixth District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

THOMAS SPIELBAUER, ESQ.
COUNSEL OF RECORD
SPIELBAUER LAW OFFICE
200 SOUTH MARKET STREET
SUITE 1001
SAN JOSE, CA 95113
(408) 213-7440
THOMAS@SPIELBAUER.COM

JANUARY 19, 2021 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. If a statute appears to reasonably permit the filing of a notice of appeal upon entry of order or entry of judgment, is it a denial of due process of law to arbitrarily interpret the statute with its most restrictive timeline?

2. Does an unconstitutional taking occur when an ambiguous statute is interpreted in a manner so as to deprive a litigant of a meritorious claim or appeal?

PARTIES TO THE PROCEEDINGS

Petitioner

- Spielbauer Law Office

Respondents

- Midland Funding, LLC
- Midland Credit Management, Inc.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

The Spielbauer Law Office is a fictitious business entity. It is not a publicly traded entity and has no managers or owners other than the individuals who comprise the Spielbauer Law Office.

LIST OF PROCEEDINGS

Supreme Court of California

No. S263930

Spielbauer Law Office, *Plaintiff and Appellant,* v. Midland Funding, LLC Et Al., *Defendants and Respondents.*

Final Order: October 21, 2020

Court of Appeal of the State of California
Sixth Appellate District

No. H047393

Spielbauer Law Office, *Plaintiff and Appellant,* v. Midland Funding, LLC Et Al., *Defendants and Respondents.*

Final Order: July 13, 2020

Order Denying Petition for Rehearing: July 29, 2020

Superior Court of California County of Santa Clara

No. 2018-cv-339157

Spielbauer Law Office, a Sole Proprietorship, LLC, *Plaintiff,* v. Midland Funding, LLC, Et Al., *Defendants.* And Related Cross-Action

Final Decision: Signed July 3, 2019
Filed July 5, 2019

Superior Court of California County of Santa Clara

Case No. 18CV339157

Spielbauer Law Office, a Sole Proprietorship, LLC, *Plaintiff,* v. Midland Funding, LLC, Midland Credit Management, Inc.; and DOES 1-10 *Defendants.* And Related Cross-Action

Judgment Entered: August 9, 2019

TABLE OF CONTENTS

TABLE OF CONTENTS – CONTINUED

TABLE OF CONTENTS – CONTINUED

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

OTHER DOCUMENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – CONTINUED

Page

TABLE OF AUTHORITIES – CONTINUED

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – CONTINUED

Page

STATUTES

JUDICIAL RULES

WHY THIS MATTER IS URGENT

The statutory provisions of a plaintiff appealing the grant of a SLAPP (Strategic Lawsuit Against Public Participation), as applied, are vague. These statutory provisions are subject to two reasonable interpretations.

This ambiguity occurs by limiting an appeal only from the entry of order and to the exclusion of from the entry of judgment. This ambiguity, and the manner in which it is consistently enforced, has ensnared many a legal practitioner, delivering them into the jaws of legal malpractice. As Justice Rubin has pointed out, this ambiguity has created an unjust trap for the wary and unwary. [*Russell v. Foglio*, 160 Cal.App.4th 653, 664 (2008).]

OPINIONS BELOW

The decision of the California Court of Appeal, Sixth Appellate District, affirming the judgment on appeal appears as App.3a. The order of the California Court of Appeal denying a petition for rehearing appears as App.2a. The order of the California Supreme Court denying a petition for review appears as App.1a.

JURISDICTION

The judgment of the California Court of Appeal, Sixth Appellate District, granting Respondent's Motion to Dismiss the Appeal as being untimely was entered on July 13, 2020. The Sixth District Court of Appeal summarily denied Petitioner's Petition for Rehearing on July 19, 2020. The Spielbauer Law Office timely filed a Petition for Review with the California Supreme Court on August 17, 2020. The California Supreme Court denied the petition for review on October 21, 2020. This Petition for a Writ of Certiorari is timely.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. XIV § 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure § 425.16(i)

> An order granting or denying a special motion to strike shall be appealable under Section 904.1.

California Code of Civil Procedure § 904.1(a)(1)

> An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following: ¶ From a judgment, except an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or a judgment of contempt that is made final and conclusive by Section 1222.

California Code of Civil Procedure § 904.1(a)(13)

> An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following: ¶ From an order granting or denying a special motion to strike under Section 425.16.

JUSTICE RUBIN'S ADMONITION

It is in the context of avoiding a construction that would produce absurd consequences that Justice Rubin's admonition in *Russell v. Foglio* (2008) 160 Cal.App.4th 653 should be considered.

Justice Rubin recognized the ambiguity in his concurring opinion in the matter of *Russell v. Foglio* (2008) 160 Cal.App.4th 653. He recognized that the ambiguity contained within California Code of Civil Procedure § 425.16(i) and the thirteen subsections of California Code of Civil Procedure § 904.1(a) are traps for the wary, and even for the sophisticated.

Justice Rubin wrote, "Moreover, splitting the proceedings into two appeals [Order and Judgment] creates a trap for the unwary, who may lose their right to appeal from the order granting the motion to strike while they await the final judgment. This is especially true in cases in which the trial court, as what happened here, grants the motion to strike the entire complaint. It is hard to imagine any benefit to the plaintiff in requiring it to appeal before final judgment is entitled. ¶ And the trap is not limited to the unwary." [*Russell v. Foglio* (2008) 160 Cal.App.4th 653, 664.]

Justice Rubin concluded his opinion with the plea, "I respectfully suggest, however, that the Legislature consider changing the statute." [*Russell v. Foglio* (2008) 160 Cal.App.4th 653, 664.]

Justice Rubin's admonition, and plea, demonstrate the error, with constitutional dimensions, which a separate and exclusive reading of the statutes cause.

Judge Rubin's admonition, and plea, demonstrate why the Petitioner's position is correct.

PETITIONER'S POSITION

Petitioner maintains that California Code of Civil Procedure § 425.16(i) is not ambiguous if it is harmoniously read as a whole with California Code of Civil Procedure § 904.1(a)(1) and § 904.1(a)(13). If these statutes are read together, and in light of the discretionary "may" of California Code of Civil Procedure § 904.1(a), the reasonable and common sense interpretation is that a plaintiff may take an appeal either from the entry of an order, or from an entry of the judgment when an anti-SLAPP motion is granted. If read separately, it is ambiguous, and constitutionally flawed.

COMPLEMENTARY V. IN ISOLATION

California Code of Civil Procedure § 904.1(a)(1), California Code of Civil Procedure § 904.1(a)(13), and California Code of Civil Procedure § 425.16(i), harmoniously read as a whole are not ambiguous as to the timely filing of a notice of appeal from the grant of an anti-SLAPP motion.

They are harmonious if they provide two times in which an appeal may be filed. On the other hand, they are ambiguous if they are considered exclusive and separate, as has occurred in this matter.

This Petition for a Writ of Certiorari presents "the crucial question—almost invariably present—of how much ambiguousness constitutes . . . ambiguity." [*United States v. Hansen*, 772 F.2d 940, 948 (1985) (Scalia, J.), cert. denied, 475 U.S. 1045 [106 S.Ct. 1262, 89 L.Ed.2d 571] (1986).]

Petitioner posits that a reasonable, unambiguous, and common-sense interpretation of these statutes, read together, would permit a timely notice of appeal to be filed by a plaintiff from the grant of an Anti-SLAPP motion either upon entry of judgment (CCP § 904.1(a)(1) or upon entry of the order granting the motion (CCP § 904.1(a)(13).

CODE CIV. PROC. § 904.1(A)(1), CODE CIV. PROC. § 904.1(A)(13),AND CODE CIV. PROC. § 425.16

The central statute is California Code of Civil Procedure § 425.16(i). That section states, "An order granting or denying a special motion to strike shall be appealable under Section 904.1." This code section, CCP § 425.16(i), does not specify under which of the thirteen (13) subsections of CCP § 904.1(a) the appeal must be taken.

Relevant to this Petition are California Code of Civil Procedure § 904.1(a)(1) and California Code of Civil Procedure § 904.1(a)(13).

California Code of Civil Procedure § 904.1(a), using the permissive language of "may," provides, "An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case,

may be taken from any of the following: [Emphasis added.]"

California Code of Civil Procedure § 904.1(a)(1) provides, "From a judgment, except an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or a judgment of contempt that is made final and conclusive by Section 1222."

California Code of Civil Procedure § 904.1(a)(13) provides, "From an order granting or denying a special motion to strike under Section 425.16."

Considering the permissive "may" of CCP § 904.1 (a), a common sense interpretation would appear to permit Plaintiff to file a timely notice of appeal either upon entry of judgment (CCP § 904.1(a)(1) or entry of order (CCP § 904.1(a)(13).

APPEALS IN AN ANTI-SLAPP MOTION CAN BE TAKEN EITHER FROM ENTRY OF ORDER OR ENTRY OF JUDGMENT

Petitioner submits that the intent of both California Code of Civil Procedure § 904.1(a)(1) and of California Code of Civil Procedure § 904.1(a)(13) as well as California Code of Civil Procedure § 425.16(i) is to provide two time frames in which an appeal can be taken from an Anti-SLAPP motion. One is from the date of entry of the order (§ 904.1(a)(13)) and the second is from the date of entry of judgment (§ 904.1(a)(1)). Petitioner understands that *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242 and *Russell v. Foglio* are in disagreement with this position.

California Code of Civil Procedure § 904.1(a)(1) provides, "An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following: ¶(1) From a judgment, ... "

California Code of Civil Procedure § 904.1(a)(13) provides, "An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following: ¶(13) From an order granting or denying a special motion to strike under Section 425.16." [Emphasis added.]

California Code of Civil Procedure § 425.16(i) provides, "An order granting or denying a special motion to strike shall be appealable under Section 904.1." This language appears to be designed to get around the past history of the Anti-SLAPP statutes that the order, being interlocutory in nature, was not appealable until an entry of judgment. [(Stats.1999, ch. 960, § 1; *Grewal v. Jammu* (1st Dist. 2011) 191 Cal. App.4th 977, 1000.] There is nothing in the amendment of California Code of Civil Procedure § 425.16(i) forbidding the wait for the entry of judgment, should the appealing party so desire, to file a notice of appeal from the grant of Anti-SLAPP motion. That code section does not specify under which provision of § 904.1 is it to be appealable, *i.e.*, § 904.1(a)(1) or § 904.1(a)(13). This Court's attention is drawn to the permissive nature of the word, "may."

It appears that the legislature intended the order to be appealable under both sections of CCP § 904.1 (a)(1) and CCP § 904.1(a)(13). Otherwise, the language of § 425.16(i) is ambiguous and misleading.

In other words, there are two timelines upon which an appeal may be taken from the granting of a Anti-SLAPP motion. In this case, 60 days from the entry of the order (July 5, 2019) or 60 days from the entry of the judgment (August 9, 2019). The Legislature could have used the term, "shall, if at all . . . " if it wanted California Code of Civil Procedure § 904.1(a)(13) to be exclusive and mandatory.

There is nothing in the legislative history of the Anti-SLAPP statutes which contradicts Petitioner's argument. In fact, the legislative history appears to corroborate Petitioner's position. The mentioned cases of *Maughan v. Google* and *Russell v. Foglio* do not engage in any discussion on this issue.

WHY TWO 60 DAY PERIODS TO APPEAL

Under normal circumstances, an appeal can only be taken from the entry of judgment, not from an interlocutory appeal. Relief granted through a writ review is deemed extraordinary, equitable and completely discretionary, and not available as a matter of course. [*Omaha Indem. Co. v. Sup.Ct. (Greinke)* (1989) 209 Cal.App.3d 1266, 1268; *see also In re Reno* (2012) 55 Cal.4th 428, 453; *Roden v. Amerisource Bergen Corp.* (2005) 130 Cal.App.4th 211, 213 — "extraordinary relief is supposed to be extraordinary" and "not available as a matter of course."] On the other hand, an appeal is a matter of right. [*Ibid.*]

As a result, writ petitions are rarely granted. Over 90% of writ petitions are summarily denied, although in some Appellate Courts the rate of denial reaches

95%. [*See Brown, Winfield & Canzoneri, Inc. v. Sup.Ct.* (*Great American Ins. Co.*) (2010) 47 Cal.4th 1233, 1241, fn. 3 — as of 2/1/10, approximately 94% of writ petitions summarily denied.]

On the other hand, the purpose of Anti-SLAPP motions is intended to provide an expedited screening procedure for cases involving free speech issues. Anti-SLAPP motions provide early and fast summary judgment-like procedures that allow defendants to seek to dismiss an entire complaint. "[T]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights." [*People ex rel. Lockyer v. Brar* (4th Dist. 2004) 115 Cal.App.4th 1315, 1317.]

It makes sense for a defendant to be able to promptly appeal the denial of its Anti-SLAPP motion in order to avoid the prolonged experience of litigation. That same logic does not apply, however, to a plaintiff.

Petitioner submits that the California Code of Civil Procedure § 904.1(a)(13) was enacted to ensure that an appeal by a defendant who lost an Anti-SLAPP motion was not deemed an interlocutory writ. However, once an Anti-SLAPP motion is granted, the case procedurally comes to an end, and the defendant is no longer burdened by the litigation. Whether judgment is entered immediately, or four months later, is of no real consequence to either party.

NOTICES OF APPEAL ARE TO BE LIBERALLY CONSTRUED

Petitioner reminds this Court of the doctrine that a notice of appeal should be liberally construed. "[A] notice of appeal will be liberally construed to permit a hearing on the merits and avoid a dismissal because of some technical defect or irregularity. [Citations.]" [*People v. Sapienza* (2019) 39 Cal.App.5th 58, 66; *See Also Luz v. Lopes* (1960) 55 Cal.2d 54, 59; *In re J.F.* (2019) 39 Cal.App.5th 70, 75, reh'g denied (Sept. 12, 2019), review denied (Nov. 13, 2019).]

STATEMENT OF THE CASE

Date	Event
12/6/2018	Plaintiff Files Complaint
7/5/2019	Trial Court Grants Anti-SLAPP Motion
8/9/2019	Trial Court Enters Judgment re Anti-SLAPP Motion
10/1/2019	Notice of Appeal Filed
7/13/2020	Sixth District Grants Motion to Dismiss Appeal as Being Untimely
7/29/2020	Sixth District Summarily Denies Petition for Rehearing
10/21/2020	California Supreme Court Denies Petition for Review

STATEMENT OF FACTS

The factual pattern of this matter has a similar, if not near carbon copy, factual pattern of *Mancini & Associates v. Schwetz* (2019) 39 Cal.App.5th 656, which shall be discussed below. The facts are also set forth in detail in the complaint which Plaintiff Spielbauer Law Office filed in this matter on December 6, 2018.

On or about October 2, 2013, Midland Funding, LLC sued Melanie Barr for $20,112.67 in Santa Clara County Superior Court, California, *Midland v. Barr*, case 113CV254015, as a collection action. Midland and its attorneys failed to serve Ms. Barr for almost a year, and only did so after the Santa Clara County Superior Court issued an order to show cause to Midland.

Ms. Barr retained the services of the Spielbauer Law Office to assist her in this matter. The Spielbauer Law Office filed an answer on her behalf on September 25, 2014. The Spielbauer Law Office then conducted a vigorous defense of Ms. Barr.

On July 21, 2015, the Trial Court set the matter, case 113CV254015, for jury trial. The settlement conference was to take place on November 4, 2015 and jury trial was to commence on November 16, 2015.

On September 16, 2015, Midland filed a notice of conditional settlement, doing so under penalty of perjury. It did so even though there was no conditional settlement. As a result of this notice, the jury trial date was vacated.

The notice of conditional settlement stated that Midland would file a request for dismissal by no later than December 30, 2015. MIDLAND never did this. It never filed a request for dismissal, nor restored it to the trial calendar, as required by California Rules of Court, Rule 3.1385(c).

The matter 113CV254015 then sat idle for the nearly three years. MIDLAND did nothing to prosecute its case against Melanie Barr after filing its notice of conditional settlement on September 16, 2015.

As a result of MIDLAND's failure to prosecute its matter, 113CV254015 became subject to the five-year mandatory dismissal pursuant to California Code of Civil Procedure § 583.310. As a result, the matter was subject to the mandatory dismissal with prejudice as of October 2, 2018.

MIDLAND resolved 113CV254015 during April 2018 on an ex parte basis with Ms. Barr by requiring her to pay more than the full amount of $20,112.67 for which it had sued Ms. Barr. It did so on an ex parte basis even though it knew that Ms. Barr was represented by counsel. It did so without advising Ms. Barr that she needed to speak to her counsel about the purported payment to Midland. It did this entirely behind the Spielbauer Law Office's back.

Melanie Barr did in fact pay to Midland in excess of $20,112.67 to resolve 113CV254015 during April-May 2018. She apparently did this in a state of urgency as she was trying to re-finance her home.

Midland Funding resolved the matter with Ms. Barr personally without notifying nor in any way notifying counsel for Ms. Barr of these discussions nor of the case settlement. Additionally, Midland did not

undertake actions, specifically with the Spielbauer Law Office, to confirm that the Spielbauer Law Office was no longer representing Ms. Barr. In fact, Midland nor its attorneys never received a substitution of counsel nor any other documentation discharging the Spielbauer Law Office.

The Superior Court of Santa Clara County dismissed MIDLAND's case with prejudice in 113CV254015 on or about May 30, 2018 on a sua sponte basis, apparently due to MIDLAND's failure to prosecute the matter and the approach of the five year limitations period (California Code of Civil Procedure § 583.310) mandating a dismissal with prejudice. That five year period to prosecute MIDLAND's case expired as of October 2, 2018. The Spielbauer Law Office never received notice of the dismissal.

The Spielbauer Law Office became aware of the dismissal of May 30, 2018 when it commenced preparation of its mandatory motion to dismiss in August 2018.

The Spielbauer Law Office generated attorney fees in the amount of $24,428.25 throughout the period of representation of Ms. Barr, and as a direct result of MIDLAND's actions in this 113cv254015. These are fees which Ms. Barr and the Spielbauer Law Office would have been entitled to collect against Midland Funding as a result of the legal action it brought against Ms. Barr in 113CV254015. These are fees which Ms. Barr avoided due to Midland's interference with the contractual relationship between Ms. Barr and the Spielbauer Law Office.

Due to the tortious misconduct of and the concealment of activities by Midland, the Spielbauer Law Office

sued Midland Funding, LLC and Midland Credit Management, Inc. on December 6, 2018. The complaint contained causes of action of intentional interference with contractual relations, negligent interference with prospective economic advantage, unjust enrichment, and unfair business practices.

This case is remarkably similar, a near carbon copy, to the case of *Mancini & Associates v. Schwetz* (2019) 39 Cal.App.5th 656. In *Mancini*, the Court of Appeal held that even if a cause of action has a background of litigation, an Anti-SLAPP motion does not automatically apply. The litigation may merely provide the background or backdrop of the actionable wrongdoing. One has to examine the gravamen of the pled tort. *Mancini* was decided two months after the trial court entered the order, and one month after the trial court entered judgment, on the Anti-SLAPP motion.

In this case, as in *Mancini*, the actions by the defendants Midland were intended to cheat the plaintiff's attorney out of his attorney fees. They also brought excessive profit to Midland.

This was not a situation or matter involving free speech nor the litigation privilege.

MANCINI & ASSOCIATES V. SCHWETZ

The *Mancini* opinion commences with a truism experienced by many plaintiff's attorneys. Justice Gilbert writes, "Of course, on occasion, a client may not fully appreciate the excellent result achieved by his or her attorney. Such an occasion provides the background from which this case arises." *Mancini & Associates v. Schwetz* (2019) 39 Cal.App.5th 656, 657. That is also from where this case arises.

In *Mancini*, an attorney obtained a handsome judgment with a retainer agreement that was a contingency fee agreement. His client, Ms. Rodriguez, developing a fondness for defendant Schwetz, thereafter executed a memorandum to defendant Schwetz in the case, effectively leaving her (Rodriguez's) attorney with nothing. The attorney sued Schwetz for the contingency attorney fees which came out of recovery. Schwetz defended with an anti-SLAPP motion, alleging that all of the misconduct arose out of litigation and thus was protected by the litigation privilege and the anti-SLAPP statutes. The court of appeal recognized that indeed there was a background of litigation in the matter, but it was only a background. The gravamen of the causes of action were tortious in nature and not related to the exercise of litigation nor free speech. Schwetz's misconduct is and was exactly the same as Midland's misconduct.

In another recent case, *Spencer v. Mowat* (2020) 46 Cal.App.5th 1024, the Court of Appeal found that the gravamen of the lawsuit was the tortious conduct

of the defendant even though there were claims of protected speech also involved.

STATEMENT OF PROCEDURE

The trial court entered the order granting Midland's Anti-SLAPP motion on July 5, 2019.[1] The trial court thereafter entered judgment granting the Anti-SLAPP motion a month later, on August 9, 2019. The Petitioner filed its notice of appeal on October 1, 2019. Under CCP § 904.1(a)(1), the 60 day period to file a notice of appeal would have expired on October 8, 2019.

If California Code of Civil Procedure § 904.1(a)(1) applies, Petitioner filed its notice of appeal in a timely manner, *i.e.*, within 60 days of the entry of judgment. If California Code of Civil Procedure § 904.1(a)(13) (entry of order) exclusively governs, Petitioner filed its notice of appeal late. The 60 day deadline of CCP § 904.1 (a)(13) expired on September 3, 2019.

To aid in the interpretation of these three statutes (*i.e.*, CCP § 425.16(i), CCP § 904.1(a)(1), and CCP § 904.1(a)(13) are common rules of statutory interpretation, which Petitioner will now discuss.

---

[1] Richard Antogini, Esq. represented the Spielbauer Law Office at the Anti-SLAPP motion in the trial court, prepared and filed the opposition, and made oral argument.

THE STANDARD OF REVIEW IS *DE NOVO*

The interrelationship of the three statutes is one of a question of law. The facts are undisputed. The Notice of Appeal was filed on October 1, 2019. The order granting the Anti-SLAPP was filed on July 5, 2019. The judgment was filed a month later, on August 9, 2019.

A notice of appeal must be filed within sixty days. [California Rules of Court, Rule 8.104.] Thus, the notice of appeal was timely if premised on the date of entry of judgment but untimely if premised on date the entry of order.

The standard of review *is de novo*. [*see Waeltz v. Delta Pilots Retirement Plan*, 301 F.3d 804, 806-807 (7th Cir. 2002) ("When, as here, a case involves the statutory interpretation of a venue statute, however, and not the discretionary interpretation of disputed facts, this court reviews the venue determinations *de novo*.")]

TOOLS FOR STATUTORY INTERPRETATION

Courts must try to resolve a statute's ambiguity (assuming ambiguity) by considering the law's text, context, structure, purpose, and legislative history. [*Holloway v. U.S.*, 526 U.S. 1; *U.S. v. Shabani*, 513 U.S. 10 (1999); *People v. Canty*, 32 Cal.4th 1266 (2004); *Guillory v. Superior Court*, 31 Cal.4th 168 (2003); *Hughes v. Board of Architectural Examiners* (1998)

17 Cal.4th 763, 776; *Nguyen v. Western Digital Corporation* (2014) 229 Cal.App.4th 1522, 1540, 1543-1544.]

THE PLAIN MEANING RULE

The Plain Meaning Rule is the starting point for interpreting a statute's text. If the meaning of a statute's language is plain, courts typically interpret the statute according to its terms. [*Tree of Life Christian Sch. v. City of Upper Arlington*, 905 F.3d 357, 367 (6th Cir. 2018); *see Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("We start, of course, with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.") (quotation marks and brackets omitted); *Greenery Rehab. Grp., Inc. v. Hammon*, 150 F.3d 226, 231 (2d Cir. 1998) ("If the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of its words.").)]

This interpretation usually means construing the statute's terms in accord with their ordinary, public meaning at the time the statute was enacted [*Bostock v. Clayton Cnty.*, 2020 WL 3146686, at *4 (U.S. Jun. 15, 2020).] In so doing, courts presume that a statute says what it means. [*Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)]. Courts turn to sources outside the statute (for example, legislative history or other statutes) only where a statute's text is ambiguous. [*Tree of Life Christian Sch.*, 905 F.3d at 367.]

Thus, all arguments regarding statutory interpretation should start with the plain meaning. When

determining what that plain meaning may be, counsel and courts should consider whether the words in question are being used in their ordinary, general sense, or instead in a narrower specialized sense. For example, a statute's text may include words that are terms of art with specific meanings when considered in the context of the business or enterprise in which they are used. [See, for example, *United States v. Lauderdale Cty., Miss.*, 914 F.3d 960, 965 (5th Cir. 2019) ("Words are to be understood in their ordinary, every-day meanings-unless the context indicates that they bear a technical sense.") (quotation marks omitted).]

Absent a clear intent to the contrary, a statute's language is considered conclusive. [*see Cloer*, 569 U.S. at 376).]

In this matter, there are no special terms of art, nor terms with specific meanings. The language comprising these three statutes are words that are used in their ordinary, general sense, and public meaning.

WHOLE ACT RULE

If, for some reason, the plain meaning of the words in the statute do not resolve the interpretation of the statute's text, the second step is that of Statutory Structure, or the Whole Act Rule. Even under this process, the statutory structure supports Petitioner's position that a plaintiff may timely take an appeal from the grant of an Anti-SLAPP motion from either the entry of order, or entry of judgment.

Although statutory interpretation begins with a statute's key words or phrases, courts do not read those statutory provisions in isolation. Instead, under the so-called Whole Act Rule, courts consider the entire statute as one cohesive whole. [*K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

"[T]he whole act rule of statutory construction exhorts us to read a section of a statute not in isolation from the context of the whole Act but to look to the provisions of the whole law, and to its object and policy." [*United States v. Pacheco*, 225 F.3d 148, 154 (2d Cir. 2000)(quotation marks and brackets omitted).]

GRAMMAR CANONS

If the Plain Meaning Rule and the Whole Act Rule do not resolve the interpretation of a statute, federal courts will next turn to grammatical canons.

Grammar canons assume that the drafters of a law are familiar with and apply proper rules of grammar. They are often concerned with grammatical structure, punctuation, and how simple, everyday words can control meaning. As with any other canon of construction, grammar canons are not to be strictly followed if their use contradicts a statute's plain language or there is some other indicia of the provision's true meaning. [*see Barnhart v. Thomas*, 540 U.S. 20, 26 (2003).]

A common grammar canon is the use of the words "may" and "shall." The word "may" indicates decision-making discretion, and the word "shall" is typically mandatory. Petitioner again reminds that the discretionary adverb "may" is used in California Code of Civil Procedure § 904.1.

LEGISLATIVE INTENT

Statutory interpretation is involved in the understanding of and the application of California Code of Civil Procedure §§ 425.16 and 904.1.

What did the California Legislature intend when it enacted California Code of Civil Procedure § 425.16, § 425.17, § 904.1(a)(1) and § 904.1(a)(13)?

Petitioner submits that California Code of Civil Procedure § 904.1(a)(13) was enacted to ensure that an appeal by a defendant who lost an Anti-SLAPP motion was not deemed an interlocutory writ.

It seems clear that the Legislature wanted to expedite a potential appeal on Anti-SLAPP motion but not constrict such appeal. It seems clear that the California Legislature wanted to exempt the denial of an appeal from the sole remedy of a discretionary writ, but not close the door of a normal appeal after judgment.

Prior to enactment of CCP § 904.1(a)(13), the remedy for a party who suffered an adverse anti-SLAPP decision was by special writ, or to await until the conclusion of the case and appeal.

There is no language in any of the above statutes or legislative history that the Legislature intended to deny, limit, or constrict the application of California Code of Civil Procedure § 904.1(a)(1) by the enactment of California Code of Civil Procedure § 904.1(a)(13) or California Code of Civil Procedure § 425.16(i). It's sole objective was to permit expedited appellate review to what was previously a writ, not to limit it.

"The fundamental objective of statutory construction is to ascertain the Legislature's intent and to give effect to the purpose of the statute. (Code Civ. Proc., § 1859.)" [*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1146.]

CONSTITUTIONAL AVOIDANCE

When statutory language is susceptible to multiple readings, federal courts typically avoid interpretations that may raise serious constitutional problems. [*Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 514 (2007).]

CONSTITUTIONAL DIMENSIONS

The consequences of the interpretation of the timeliness of appeal of the three California Code of Civil Procedure sections is not a simple interpretation of civil procedure law. It has significant, and constitutional, consequences.

If a competent lawyer falls into the trap articulated by Justice Rubin, *i.e.*, that this ambiguity is a trap for the wary and unwary, that attorney has opened himself up, on a black and white basis, to a malpractice claim. If he is sued for malpractice because he inadvertently filed the notice of appeal in an untimely manner (*i.e.*, based on entry of judgment), he is subject to a malpractice lawsuit.

In the event that the former client prevails against the lawyer in that litigation, that attorney now becomes subject to state bar disciplinary proceedings, beyond a money judgment. He will be prosecuted in a state bar court by state bar prosecutors who will have no understanding of ambiguity by which he was ensnared, and the kinds of interpretation traps which await even lawyers who are "wary." He will be adjudged by a "state bar disciplinary" system that operates within its own enclosed environment. The consequences of such proceedings can have a devastating impact on his ability to practice law, his reputation, his financial well-being, and ability to earn a living.

THESE DANGERS ARE REAL

Kevin Sullivan, Esq. is an attorney who is a California State Bar certified specialist in malpractice cases. He points out that clients come to attorneys such as himself when appeals are dismissed due to the filing of an untimely notice of appeal. He fully agrees with Justice Rubin's concerns, and the entrapment created. Mr. Sullivan's letter accompanies this petition.

Douglas Appelgate of the Pacific Legal Group, PC noted that there is significant confusion, and conflicting decisions, even within the California Courts of Appeal. He noted that the Court of Appeal in the case of *Tuchscher Development Enterprises v. San Diego Unified Port District* (2003) 106 Cal.App.4th 1219 found that there was a timely notice of appeal from an Anti-SLAPP motion which was taken from the judgment, not the entry of order.

He also points out in his letter that several California Court of Appeal cases found a timely appeal from the date of a denial of a motion for reconsideration of an adverse Anti-SLAPP decision, not from the date of the entry of the original order. [*See Holland v. Jones* (2nd Dist. 2012) 210 Cal.App.4th 378; *Melbostad v. Fisher* (1st Dist. 2008) 165 Cal.App.4th 987; *Cheveldave v. Tri Palms Unified Owners Association* (4th Dist. 2018) 27 Cal.App.5th 1202.]

Mr. Appelgate accurately describes the confused situation when he concludes, "As it stands, this area of the law is an unnecessary trap for diligent attorneys."

Mr. Appelgate's letter accompanies this Petition.

Glen Moss, Esq. notes the ambiguity of the statutes involved and noted the California Supreme Court never addressed this ambiguity. He points out that this is an important issue which arises in literally hundreds of cases every year. The California Supreme Court has allowed this ambiguity to exist, despite the confusion even within the California Courts of Appeal, as Mr. Appelgate has explained in his letter. Mr. Moss' letter accompanies this Petition.

Jon Shepardson, Esq. explains that this ambiguity has even left judges confused about the deadlines involved, particularly when there are other proceedings which occur after the grant of an Anti-SLAPP motion. Mr. Shepardson's letter accompanies this Petition.

CONSEQUENCES IN THIS MATTER

The harm to the Spielbauer Law Office, and Thomas Spielbauer, Esq., has been severe. The Spielbauer Law Office has been deprived of the right to vindicate the wrongdoing of Midland. This has occurred by the narrow and constricted interpretation of when a timely appeal occurs from the grant of an anti-SLAPP motion.

On top of this, the trial court, pursuant to California Code of Civil Procedure § 425.16(c)(1)[2], has already

---

[2] California Code of Civil Procedure § 425.16(c)(1) provides: "Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely

awarded $49,896 to Midland in attorney fees in this matter. Not satisfied with this inflated amount, Midland has returned back to the trial court and is seeking an additional $15,218.50 in attorney fees and costs, and is also seeking $1,034.55 in unspecified costs.

For having interfered with the attorney-client contract, and relationship between Ms. Barr and the Spielbauer Law Office, Midland is looking for a total windfall of $86,261.72 ($20,112.67 (Barr Payment) + $49,896 (Atty Fees) + $15,218.50(Appeal Fees) + $1,034.55 (unspecified costs)) as a reward for its malfeasance.

PRAYER

For the reasons set forth in this Petition for a Writ of Certiorari, Petitioner prays this Supreme Court grant it certiorari. Petitioner prays that this Court find that the Court of Appeal was in error in concluding that California Code of Civil Procedure § 904.1(a)(13) is mandatory and exclusive, irrespective of California Code of Civil Procedure § 904.1(a)(1). Petitioner prays that this Court find that when California Code of Civil Procedure § 425.16(i), California Code of Civil Procedure § 904.1(a)(1), and California Code of Civil Procedure § 904.1(a)(13) are harmoniously read together as a Whole Act, that there are two deadlines under which an eligible party may appeal an adverse Anti-SLAPP decision. One deadline is from

---

intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."

the entry of the order. The other deadline is the entry of judgment.

Petitioner also prays that this Court find that the dismissal of the Petitioner's appeal violated Petitioner's rights under the 5th and Section One of 14th Amendments of the United States Constitution.

Respectfully submitted,

THOMAS SPIELBAUER, ESQ.
COUNSEL OF RECORD
SPIELBAUER LAW OFFICE
200 SOUTH MARKET STREET
SUITE 1001
SAN JOSE, CA 95113
(408) 213-7440
THOMAS@SPIELBAUER.COM

COUNSEL FOR PETITIONER

JANUARY 19, 2021