IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEPHEN J. NICHOLS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 1758-VCS
	)	
JOANNE B. LEWIS, ANNE M. BARCZEWSKI, STEPHEN J. BARCZEWSKI, GEORGE A. BARCZEWSKI, SUSAN LEWIS ARDAY and DAVID R. ARDAY,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: April 25, 2008
Date Decided: May 29, 2008

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STRINE, Vice Chancellor.

I.

This opinion is a response to the Delaware Supreme Court's remand ordering me to clarify a bench ruling I made on February 6, 2007. This case arises out of the sale of La Grange, a 236-acre historic farm in Glasgow, Delaware (the "Property"). On January 21, 2005, defendants Anne M. Barczewski, and her three children, defendants Stephen J. Barczewski, George A. Barczewski, and Joanne B. Lewis[1] (collectively the "Sellers"), entered into an "Agreement" to sell the Property to plaintiff Stephen J. Nichols for $14,250,000. Nichols planned to develop the Property, and the Agreement required the Sellers to cooperate with Nichols in the process of obtaining certain approvals necessary for Nichols to proceed with his development plan (the "Cooperation Clause").

The Cooperation Clause was particularly important in this transaction because Nichols knew that, in the context of a guardianship proceeding, there had been a family feud over whether the Property should be sold for development or preserved for its historic status. In that family battle, which itself spawned litigation in this court, Joanne Lewis and her daughter, defendant Susan L. Arday, opposed development while Lewis's brothers Stephen and George Barczewski favored developing the Property. Ultimately, the Barczewski family resolved their internal dispute in favor of selling to a developer. Perhaps unsurprisingly, given the historic status of the Property, Nichols' development plan encountered community opposition that allegedly resulted in additional costs and difficulty in developing the Property. Nichols suspected that at least some of the Sellers were fanning the flames of that opposition and brought this action against the Sellers

[1] Regrettably, Joanne Lewis died a few weeks ago.

seeking, among other things, an injunction preventing the Sellers from breaching the Agreement, particularly the Cooperation Clause.

Nichols later amended his complaint to include defendants Susan L. Arday and David R. Arday, the daughter and son-in-law of Joanne Lewis. Nichols' First Amended Complaint, although not felicitously drafted, detailed the family relationships and alleged that the Ardays had violated the Agreement.[2] The First Amended Complaint also added a tortious interference with contract claim against the Ardays alleging that, to the extent they were not considered Lewis's "agents or representatives,"[3] they had interfered with the Agreement between Nichols and the Sellers by causing the Sellers to breach the Agreement.

The Ardays moved to dismiss the complaint for several reasons, including that Nichols had brought baseless claims simply to chill the Ardays from advocating rejection of his development plans by New Castle County. Therefore, the Ardays argued that the suit implicated the anti-Strategic Litigation Against Public Participation ("SLAPP") statute.[4] Because the facts pled in the complaint supported the inference that the Ardays had acted in concert with Lewis in violating the Agreement, I responded by permitting expedited discovery to create a full record and resolve the case promptly, as the anti

[2] First Am. Compl. ¶¶ 8, 24.
[3] *Id.* ¶ 47.
[4] *See* 10 *Del. C.* § 8136-38; *see generally* 71 C.J.S. *Pleading* § 664 (2008) (discussing anti-SLAPP statutes).

SLAPP statute contemplated and as the Ardays themselves ardently desired.[5] Discovery went forward and Nichols again amended the complaint. The Ardays responded by moving to dismiss or, in the alternative, moving for summary judgment. The Sellers also moved for summary judgment. In the bench ruling that is the subject of this remand, I granted summary judgment to all the defendants but denied fee shifting pursuant to 10 *Del. C.* § 8138(a)(1), the discretionary fee shifting provision in Delaware's anti-SLAPP statute. I also permitted Nichols to file a third amended complaint to plead defamation or injurious falsehood against the Ardays.[6] Ultimately, Nichols abandoned those claims.

The Ardays appealed, among other things, the denial of their request for fee shifting. Nichols cross-appealed the summary judgment in favor of Lewis and the Ardays. In addressing the appeal, the Supreme Court issued a remand order to this court. In its remand order, the Supreme Court asked me to do two things. First, the Supreme Court asked me to explain why certain evidence that Nichols argues supports an inference that the Ardays were acting as Lewis's agents does not present an issue of material fact precluding summary judgment for the defendants. Broadly speaking, that evidence consists of certain statements made by the Ardays that purport to express Lewis's opposition to the development of the Property. Second, the Supreme Court

[5] *See* 10 *Del. C.* § 8137 (noting that the "court shall grant preference in the hearing" of motions to dismiss and motions for summary judgment in which the moving party has demonstrated that the applicable claim is subject to the anti-SLAPP statute).

[6] The Ardays had questioned publicly whether Nichols had engaged in criminal activity in connection with his development activity. The record contains no support for the idea that the Ardays had a reasonable basis to suggest that the Nichols had done anything of that kind.

asked me to explain whether the anti-SLAPP statute applies and, if so, to justify my denial of the Ardays' application for attorneys' fees in terms of that statute.

II.

Before proceeding with a discussion of why I concluded that summary judgment was appropriate because the Ardays were not agents of Lewis in any sense that could give rise to liability on Lewis's part or theirs, I set forth the facts that the Supreme Court asked me to address on remand:

(a) "[Mrs.] Arday, Anne's granddaughter, is working with her mother, [Joanne B.] Lewis, as a formidable adversary to the possible loss of the [Property]. Arday said she believes Nichols, who has put up a Wawa and Kohl's Department Store in the area, wants to build a Target store there." As printed in *The Review*, a University of Delaware student newspaper on February 11, 2005 and forwarded by the Ardays on February 16, 2005 to Charles Baker, General Manager of the [New Castle County ("NCC")] Land Use Department; B0515;

(b) "God only knows if Nichols has or is intending to pay 'under the table' money to some [Delaware ("DE")] or NCC government employees to get the skids greased to ease his plans for developing the farm." E-mail communication from Mrs. Arday to [Friends of Historic Glasgow ("FOHG")] and Stephanie Bruning of NCC on April 25, 2005, B0528;

(c) "Those creeps know that my Mom and I (and by extension FOHG) don't want that farm developed, so why would the enemy tip of (sic) its opposition?" E-mail communication from Mrs. Arday to FOHG and Stephanie Bruning of NCC on April 15, 2005, B0522;

(d) "The gag clause in the Nichols contract on the Barczewski farm states that the four La Grange Tenants in Common . . . are not allowed to directly do or say anything that would impede or inhibit Nichols' ability to get the farm developed . . . However, for Joanne Barczewski Lewis, the gag clause poses a serious dilemma . . . Lewis is adamantly opposed to the development of the [Property], and Anne Barczewski would be too. However if Lewis overtly says

or does anything that can be construed by Nichols that Lewis is obstructing Nichols' goal of developing the [Property], Nichols can and probably would sue Lewis for breech [sic] of contract and financial damages since Lewis is one of the four sellers on the farm." E-mail communication from Mrs. Arday to Stephanie Bruning of NCC on May 4, 2005, B0535;

(e) "Nichols . . . is in DEFAULT on the contract . . . Tomorrow, Dan McCollom, the attorney who represents my mom (Joanne Lewis), will send a letter to Nichols with a cease and desist order because Nichols is in DEFAULT on the contract." E-mail communication from Mrs. Arday to Stephanie Bruning of NCC on May 10, 2005, B0553;

(f) "What I told him is that it is looking more and more to me like [David J.] Ferry's threat to sue Joanne [Lewis], back in January, was partly if not largely motivated by his learning that the County was trying to put together another deal to buy the farm, something his clients were dead set against." E-mail communication between Mrs. Arday, Dr. Arday, FOHG and Stephanie Bruning of NCC on May 18, 2005, B0556;

(g) "She is NOT GOING TO SIGN the amendment to the contract. My mother is fighting her brothers right now to obstruct development." E-mail communication between the Ardays and FOHG on May 28, 2005, B0562;

(h) "Joanne Barczewski Lewis has been a staunch supporter of preservation for many years, in accordance with her mother's stated wishes." E-mail communication from Dr. Arday to FOHG on May 26, 2005, B0559;

(i) "I have learned from some first hand sources living in the Glasgow, DE, residential subdivision of Perch Creek and Melody Meadows that a number of years ago Steve Nichols struck a shady deal that allowed him to build over wetlands adjacent to the old Paxton farm property in what is now the Perch Creek development. E-mail communication from Mrs. Arday to Stephanie Bruning of NCC on June 9, 2005, B0571;

(j) "I told her that I was 'a member of the family' and that there was no valid contract on the property, at the moment. She was interested in that fact." E-mail communication from Dr. Arday to Mrs. Arday

and FOHG on July 11, 2005 discussing a conversation Dr. Arday had with Dorothy Morris at the DE Office of State Planning, B0660; and,

(k) "Joanne B. Lewis has not signed the paperwork for the Major Land Development Plan for La Grange. It is not clear if Nichols has proceeded without Joanne's signature and submitted his Major Land Development & Rezoning plans for La Grange to the NCC Department of Land Use." E-mail communication from Mrs. Arday to Stephanie Bruning of NCC on September 26, 2005, B0666.[7]

These facts are relevant to both aspects of this remand decision. At the inception of this case, it was apparent that this was an unusual case. Lewis had signed a contract promising her millions of dollars if she cooperated in the development of the Property, a family farm dear to her and which she had not wanted to see developed. The complaint alleged that Lewis's daughter, Susan Arday, who had previously supported her mother in court in opposing a sale of the Property for development purposes, had expressed opposition to development of the Property. Therefore, there existed a pleading stage inference that mother and daughter had cooperated in duping Nichols by having him sign an Agreement in which Lewis promised to cooperate with his development plans, meanwhile intending to have Arday act as a voice for her mother in the community by opposing Nichols' development plans.[8] If that was in fact what mother and daughter did, that sort of concerted activity seemed to support several causes of action, including breach of contract, tortious interference with contract, and civil conspiracy. At a pleading stage, the fact that Lewis and Arday were mother and daughter was also relevant, as it

[7] Nichols Ans. Br. on Appeal at 15-17.
[8] *See, e.g.*, Tr. of Oral Arg. on Summ. J. (Feb. 6, 2007) ("Tr.") at 120-21 (noting this theory and concluding that "[t]here was a legitimate ground for Mr. Nichols to inquire into whether there was essentially a plan between Mrs. Lewis and Mrs. Arday").

supported the plaintiff-friendly inferences of a loving and trusting relationship, and therefore of concerted action.[9] Likewise, I also believed it justifiable to assume, at the pleading stage, that a daughter would not purport to speak in her mother's name without her mother's permission. Discovery has now revealed that Susan Arday operates differently in that domain, but that is not something that could be known to Nichols or the court before discovery.[10]

But the pleading stage of a case is very different from the summary judgment stage. After a plaintiff like Nichols has had discovery and faces a summary judgment motion, he must be able to point to record evidence that would support a rational finding in his favor after trial.[11] Nichols was unable to do that.

For starters, Nichols was forced to admit that he was unable to prove that Lewis authorized Susan Arday to speak for her in opposing Nichols' development plans. Indeed, Nichols indicated that he did not doubt Lewis's word that she had not authorized Arday's statements or otherwise plotted with Arday to subvert the Nichols' development plans.[12] In other words, Nichols admitted that Lewis had no actual authority to speak for Arday. Thus, the main reason I let the case go forward did not pan out for Nichols; there

[9] *Cf. Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 889 (Del. Ch. 1999) (explaining that "[c]lose familial relationships between directors can create a reasonable doubt as to impartiality" for the purpose of pleading that demand is excused in a derivative action).
[10] *See* Nichols Op. Br. on Remand Ex. 8 ("Lewis Deposition") at 25-26 (discussing her daughter's uncontrollable nature).
[11] See, e.g., Cerberus Int'l. Ltd. v. Apollo Mgmt., L.P., 794 A.2d 1141, 1150 (Del. 2002).
[12] *See*, *e.g.*, Tr. at 95-97 (Counsel for Nichols admitting that there was no evidence that Lewis had plotted with the Ardays, was lying, or intended to subvert the Cooperation Clause and that Nichols' agency theory was based on the notion that Arday was Lewis's agent and Lewis failed to control her or disaffirm her conduct).

was no concerted activity between Lewis and Arday to obtain funds from Nichols on a false pretense.

Therefore, Nichols began to shift ground. During discovery, evidence emerged that Arday had acted as a courier between her mother and her mother's attorney during the negotiations with Nichols over the Agreement. Consistent with her assertive and intrusive manner, Arday used this role to make her views about many things known to Lewis's lawyer. But the only authority entrusted in Arday by Lewis was to act as a courier, and Nichols did not even know that Arday had this role until he learned about it in discovery. This courier role was natural, given that Lewis was an elderly woman, living in rural Pennsylvania, who did not use electronic mail. By having her daughter perform this role, Lewis did not grant Arday authority to speak for her, privately or publicly. Likewise, Lewis did not hold Arday out as her spokesperson. No doubt the record reveals that Arday uses any opportunity given to her to espouse her own views, but that does not make her an agent with the authority to speak on behalf of anyone, even her mother, who simply had her carry documents.

Nonetheless, what seemed during the summary judgment proceedings to have most bothered Nichols was that Arday used information received in her role as courier to make trouble for him in the development process.[13] Nichols therefore attempted to ground his claims in Lewis's duty to control her agent.[14] But the problem was that nothing that Arday said was protected by any cloak of confidentiality. The Agreement

[13] *See, e.g.*, Nichols Ans. Br. on Summ. J. at 15-17, 23, 42-43; Tr. at 62.
[14] Tr. at 62-63, 97 (Counsel for Nichols stating that "[o]ur theory is based on agency that remained unchecked").

did not have a confidentiality clause and nothing Arday said revealed a trade secret or other proprietary information that Nichols had entrusted to Lewis on condition that she keep it private.[15] Indeed, Nichols' development plans were such that they would have to become public.[16] For these reasons, I saw no basis to hold Lewis responsible on this ground.[17]

After having lost below, it seems that Nichols shifted ground on appeal and has come to rely on the doctrine of apparent authority.[18] This is a doctrine that he cursorily cited in the summary judgment papers he filed before me without actually explaining how that doctrine applied separate and apart from his argument that Lewis had a duty to control Arday and prevent her from using confidential information.[19] Most importantly,

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[15] *Id*. at 100 (Counsel for Nichols acknowledging this).
[16] *Id*. (Counsel for Nichols acknowledging this).
[17] *Id*. at 125, 127 (making this conclusion).
[18] Nichols Op. Br. on Remand at 2 ("The issue is one of apparent authority"). Thus, Nichols' arguments that Lewis gave mixed signals to Susan Arday about her authority to speak for Lewis creates a "material issue of fact as to authorization" are not relevant as authorization is only applicable to actual authority. Nichols Ans. Br. on Remand at 3; *see* RESTATEMENT (THIRD) OF AGENCY § 2.01. Moreover, the so-called "mixed signals" were simply statements Lewis made about Lewis's subjective view on the development of the Property and Nichols' failure to make a required payment under the Agreement. Tr. at 11-12. Even if Lewis told Arday that she subjectively preferred that the Property not be developed, such a statement would not have sent any reasonable signal to Arday that she was authorized to broadcast her mother's views to the public. Indeed, all the evidence is that once Lewis signed the Agreement she recognized her obligations under the Cooperation Clause and honored those duties. Lewis signed the New Castle County Application For Plan Review Form (SLD-1) Nichols asked her to and never spoke a public word against his plans. *See* Lewis Op. Br. in Support of Summ. J. Ex. 65. Moreover, Lewis's relationship with her daughter was rendered virtually non-existent by her decision to sign and abide by the terms of the Agreement, a decision her daughter did not respect. *See* Lewis Deposition at 31.
[19] Nichols Ans. Br. on Summ. J. at 40. Frankly, much of the confusion throughout this case has resulted from Nichols' and the Ardays' briefs focusing on emotional appeals and adjectival assaults to the exclusion of a calm discussion of the relevant law and how that law applies to the facts in the record. Fortunately, Lewis's briefs have identified the relevant law and pointed out how the law applies to the pertinent facts in this case, or more accurately, the lack thereof.

Nichols never explained who it was that thought Arday had apparent authority to speak for Lewis or provided any evidence that anyone held that belief. Therefore, I believe he has waived the ability to rely on that doctrine,[20] but that is a judgment that the Supreme Court will have to make for itself.

If the argument has been preserved, I do not believe it aids Nichols. To prove that Arday had the apparent authority to act for Lewis, Nichols has to point to evidence that that would result in a *reasonable belief* by any of the third parties with whom the Ardays interacted that the Ardays had authority to act on Lewis's behalf in making the relevant statements.[21] In essence, the only evidence he has is that Arday was Lewis's daughter, acted as her courier, and purported to speak in her name. Although I believed that the circumstantial facts were such that Nichols was entitled to take discovery about the relationship between mother and daughter in order to prove his case, he came up dry. In the end, all he has is the notion that if a daughter who is not estranged from her mother speaks publicly and attributes a position to her mother, the daughter has, by simple fact of a normal parent-child relationship, apparent authority to speak for the mother.[22]

This, I think, is a rather stark position that I cannot embrace. Traditionally, the doctrine of apparent authority applies when a corporate official, such as a president, takes

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[20] *See, e.g.*, *Nance v. State*, 903 A.2d 283, 285 (Del. 2006) ("To preserve an issue for appeal . . . it must be raised in the trial court.").

[21] RESTATEMENT (THIRD) OF AGENCY § 3.03 ("Apparent authority, as defined in § 2.03, is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party *reasonably believes* the actor to be authorized and the belief is traceable to the manifestation.") (emphasis added); *see also id.* § 2.03 cmt. c (discussing the reasonable belief requirement).

[22] That, of course, is Nichols' best case. As discussed previously, the record here indicates that at some point the relationship between Lewis and Arday deteriorated due to Lewis's decision to sign and abide by the terms of the Agreement.

action in the name of an entity in a situation when he lacks formal authority, but where by dint of his title and other circumstantial facts the entity creates a reasonable impression that the official can bind the entity.[23] Notably, the doctrine of apparent authority requires the principal to take action which supports the third party's reasonable belief in the agent's authority.[24]

Recognizing that he has pointed out no evidence of any statement or affirmative action by Lewis that would create the reasonable impression that Arday had authority to speak for Lewis, Nichols has, for the first time in this case, pulled out an argument based on §§ 1.03 and 3.03 of the Restatement (Third) of Agency, which, taken together, state that silence can create apparent authority.[25] Again, this is a new argument never raised before, and I believe it has therefore been waived.[26]

Even if it has not been waived, I do not think it supports the viability of Nichols' claims. Here, Lewis did nothing to create a reasonable impression that Arday could speak for her. No doubt Arday acted as if she could. But Lewis did not hold Arday out

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[23] *See, e.g., Guyer v. Haveg*, 205 A.2d 176, 180 (Del. 1964) (denying summary judgment because there was an issue of material fact about whether agents who allegedly entered oral contracts on behalf of the corporation had apparent authority to do so based on their executive positions and authority to enter certain types of contracts).

[24] *See, e.g., Billops v. Magness Constr. Co.*, 391 A.2d 196, 198 (Del. 1978) ("Manifestations by the alleged principal which create a reasonable belief in a third party that the alleged agent is authorized to bind the principal create an apparent agency from which spring the same legal consequences as those which result from an actual agency."); *see also* RESTATEMENT (THIRD) OF AGENCY § 3.03.

[25] RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. b ("A principal may make manifestations regarding an agent's authority in many ways. In some settings, the principal's acts speak so loudly that explicit verbal communication is unnecessary."); *see also* RESTATEMENT (THIRD) OF AGENCY § 1.03 cmt. b (noting that silence can manifest assent, but only in situations "when, in light of all the circumstances, a reasonable person would express dissent to the inference that other persons will draw from silence").

[26] *See supra* note 20.

as her representative to Nichols or to others. In reality, all that Lewis did was to be silent in the face of speech by her daughter.[27] The import of that silence should not be exaggerated. Many of Arday's communications were made by e-mail and there is no rational basis to believe that Lewis even saw those communications. The one public statement that was published was included in a college student newspaper of very limited circulation, and there is no record evidence that Lewis saw that either. Perhaps this doctrine would be of use to Nichols if Lewis and Arday had attended a public meeting and sat next to each other, and Arday had stood up and purported to speak for her mother. In that circumstance, persons in the audience could reasonably believe that the daughter's words were ones she was authorized by her mother to utter. By contrast, here, Arday was largely popping off in an electronic medium in which her mother had no presence at all, and was not shown as a "cc" on any of the communications. I cannot believe that silence in circumstances like these qualifies to create a reasonable impression of the purported agent's authority, where there is no evidence that the purported principal was even aware

[27] Lest there be any confusion, I address Lewis's silence about Arday's statements in the context of whether it creates apparent authority rather than whether it evidences a failure to control Arday because Nichols must first establish that Arday had authority to speak for Lewis before failure to control becomes an issue. The cases cited by Nichols support the proposition that there must be apparent authority — in other words, something causing the third party to have a reasonable belief that authority exists — for the principal to assume risk for her agent's actions. *See*, *e.g.*, *Crumlish v. Price*, 266 A.2d 182, 184 (Del. 1970) (finding that there was apparent authority for an agent to deliver a deed at a real property closing where the principal had given the agent the signed deed); *Guyer v. Haveg*, 205 A.2d at 180; *cf.* RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. c ("A principal assumes the risk that the agents it chooses to interact on its behalf with third parties will, *when actual or apparent authority is present*, bind the principal to the legal consequences of their actions.") (emphasis added). As discussed above, failure to control Arday's use of the information she garnered as a courier could have been an issue if that information was confidential because there was a nexus between Arday's role as a courier and the information.

that the purported agent was purporting to speak in her name, and where the purported principal did not signal, by her presence during or other relationship to the communications, that her silence manifested her approval of the communications. In this respect, it must be remembered that Arday was free to oppose development of the Property in her own name. The only contractual (and therefore tort) issue that arises is if Arday was somehow advancing views as an agent of Lewis, who was bound by the Cooperation Clause.

In this last regard, it is also important to note that this case touches on important communicative rights of citizens of our republic. Impinging speech simply because of family status is not something that should be done lightly, particularly in a circumstance when Nichols had a common contractual tool to protect himself against what happened. That protection is called an "affiliates" clause. Nothing prevented Nichols from demanding that the Cooperation Clause extend to any affiliates of the Sellers, defined to include members of their families. In that event, he could have sued on the contract even if a family member like Arday acted in a way that her mother opposed but could not prevent. With that type of clause, the Sellers would have been at risk for damages if Nichols was deprived of this larger form of peace. But Nichols did not achieve that outcome at the right place, which was the bargaining table. And his efforts to show that Lewis had herself breached the Cooperation Clause were, in the end, unavailing because he could not produce evidence supporting a rational finding that Arday was Lewis's agent, on any recognized theory of agency.

III.

I turn to the remaining questions, which require me to explain whether this suit is covered by Delaware's anti-SLAPP statute and to justify my denial of the Ardays' fee request by reference to § 8138 of that statute. As to the first inquiry, Nichols' complaint is clearly "an action involving public petition and participation" and thus falls within the purview of Delaware's anti-SLAPP statute.[28] Section 8136(a)(1) of the anti-SLAPP statute states that the statute is implicated by "an action involving public petition and participation," which is any "action . . . for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, rule on, challenge or oppose such application or permission."[29] Nichols' First Amended Complaint directly alleges that the "Defendants' actions have had the intended result of instigating organized opposition to the development approvals and processes with which [the] Defendants were obligated to cooperate and affirmatively support under the Agreement."[30]

But the Ardays seem to think that the simple fact that a complaint implicates the anti-SLAPP statute somehow suggests that the complaint lacks merit. That is not what the anti-SLAPP statute does. What it does is select a broad category of potentially vexatious lawsuits and provide the defendants in those actions with certain procedural advantages, to ensure that citizens who exercise their right to oppose certain development

[28] *See* Tr. at 118-20 (explaining that the reason the case reached the summary judgment phase was that the Ardays had made statements in the name of Lewis, who was contractually obligated to support Nichols' development plan, opposing the approval of Nichols' development plan).
[29] 10 *Del. C.* § 8136(a)(1).
[30] First Am. Compl. ¶ 25; *see also id.* ¶ 24 (listing the alleged actions).

activities are not subjected to frivolous lawsuits designed to penalize them from speaking out and to deter them from continuing to do so.[31] For example and most pertinent here, the anti-SLAPP statute provides for discretionary fee shifting when lawsuits meet the following standard:

> Costs, attorney's fees and other compensatory damages *may be recovered* upon a demonstration that the action involving public petition and participation was *commenced or continued without a substantial basis* in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.[32]

Here, the Supreme Court has asked me to explain why I did not award the Ardays their attorneys' fees and costs after granting their motion for summary judgment against Nichols. I have already presaged much of my reasoning in the earlier part of this decision.

From the inception of this case, it has been clear that the Ardays are not the quintessential examples of SLAPP suit defendants. Susan Arday was one of the presumptive heirs of her elderly mother, Lewis,[33] a person who was selling the Property in question and who had promised to support Nichols' plans to develop it. Lewis stood to gain millions of dollars from the sale, as Arday well knew. The Ardays also knew that Lewis's ability to do so was conditioned on Lewis's cooperation with Nichols' development plans. Notwithstanding that, Susan Arday purported to voice her mother's objections to Nichols' plans. Despite their ongoing effort to have this court ignore their

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[31] *See* 71 C.J.S. *Pleading* § 664 (2008) ("The typical mischief that [an anti-SLAPP statute] intends to remedy is lawsuits directed at individual citizens of modest means for speaking publicly against development projects.").
[32] 10 *Del. C.* § 8138(a)(1) (emphasis added).
[33] Lewis had two children, Susan Arday and Chester Stokes Lewis.

own behavior, the reality is that Ardays' own conduct created a reasonable pleading stage inference of a civil conspiracy.

Given the Ardays' behavior and the justifiable suspicions it raised in Nichols about the possibility of concerted activity between mother and daughter, I did not believe that an award of attorneys' fees and costs was justified. In so finding, I believed I was faithfully applying the fee shifting provision of the anti-SLAPP statute, which states that fees "may be recovered" if an action "was commenced or continued without a substantial basis."[34] The crux of my fee shifting analysis was that "[b]ecause there was a legitimate basis for Mr. Nichols to proceed and find out what was going on, there's no fee shifting."[35]

To be clear, my statement that "there was a legitimate basis for Mr. Nichols to proceed" reflected a determination that Nichols commenced and continued the lawsuit with a substantial basis for doing so.[36] The reason is simple. I believed and believe that there was a basis to infer that Lewis and Arday had acted concertedly, in order to extract from Nichols millions of dollars on the false pretense that Lewis would honor the Cooperation Clause and give him the benefit of his bargain. If that theory had panned out, both Lewis and Arday would face liability to Nichols for any damage caused to him.

[34] 10 *Del. C.* § 8138(a)(1).
[35] Tr. at 133.
[36] *Id*. at 133 ("I've taken into account the SLAPP statute. I think there was a substantial basis."); *see also* Tr. at 121 ("There was a legitimate ground for Mr. Nichols to inquire into whether there was essentially a plan between Mrs. Lewis and Mrs. Arday.").

Of course, the Ardays continue to disagree and fervently argue that there was never a substantial basis for this lawsuit. But their argument to that effect is without merit.

For starters, they continue to ignore the concept of notice pleading.[37] At the motion to dismiss stage, the court must determine whether "it appear[s] with a reasonable certainty that a plaintiff would not be entitled to the relief sought under any set of facts which could be proven to support the action."[38] In this case, I determined that at commencement, Nichols could prove a set of facts that would support his claim.[39] In lieu of time wasting pleading practice, I offered the Ardays an expedited route to getting rid of the case against them, in the spirit of the anti-SLAPP statute.

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[37] Court of Chancery Rule 8(a) (requiring only "a short and plain statement of the claim "); *see also* Court of Chancery Rule 8(f) ("All pleadings shall be so construed as to do substantial justice.").

[38] *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985).

[39] The Ardays' assertion that the lawsuit was commenced without a substantial basis is not supported by the Ardays' argument that "Nichols was obligated to plead specific facts establishing agency." Arday Op. Br. on Remand at 2. My determination that there was a substantial basis for the lawsuit at the pleading stage was not premised on an inference of agency, but more broadly on the plausible inference that the Ardays and Lewis were involved in concerted action. Moreover, the cases cited by the Ardays merely suggest that a conclusory assertion of agency will not be given weight where the pled facts clearly undermine the assertion of agency, *see Chrin v. Ibrix Inc.*, 2005 WL 2810599, at *7 (Del. Ch. Oct. 19, 2005) ("[T]he allegations of the complaint clearly show that Chrin both lacked any control over Orszag and was aware of that fact."), and this court has allowed a plaintiff to amend its pleadings to plead facts supporting agency, when its original pleading was conclusory on the point, *see Cochran v. Stifel Fin. Corp.*, 2000 WL 286722, at *5 (Del. Ch. Mar. 8, 2000) ("I will grant Cochran's request that he be given the opportunity to replead and to attempt to set forth facts that are adequate to support his claim that he was Stifel Financial's agent."), *aff'd in pertinent part, Stifel Fin. Corp. v. Cochran*, 809 A.2d 555 (Del. 2002). *See also id.* at *17 n.71 (noting because "certain appellate opinions *sua sponte* grant plaintiffs leave to amend in situations where the plaintiff had not even asked for such leave at the trial court level, a denial of leave to amend in this instance appears to be beyond my authority.").

Likewise, the Ardays failed to convince me that there was no substantial basis for Nichols to oppose their motion for summary judgment after the Second Amended Complaint was filed. In many ways, that argument is belied by the very need for this opinion. Our State's highest court clearly thinks there is enough color to Nichols' position on the agency question to ask me to explain more fully the basis for granting summary judgment against him. And the record evidence of the Ardays' own comments where they purported to be speaking their mother's views and of their involvement in communicating with Lewis's attorney during the negotiation of the Agreement suggests that there was a genuine basis for Nichols to press forward. The anti-SLAPP statute does not require fee shifting simply because a plaintiff who files a suit implicating the statute ultimately fails to prove its claim. Rather, the fee shifting provision is triggered by a showing that the plaintiff has exacted an unjustified toll on a citizen's right to oppose a development plan, by pressing claims that have no substantial basis in fact or law. Given the unusual circumstances created by the Ardays' own unusual behavior,[40] in which they both entangled themselves in Lewis's commercial dealings contemplating development of the Property by Nichols and then opposed the very development contemplated by those dealings, Nichols had the requisite basis to take discovery to prove his claim and to defend a motion for summary judgment.

Finally, unlike the Ardays, I do not believe that § 8138 requires this court to award them their attorneys' fees even if, by contrast to my belief, Nichols had no substantial

[40] As noted, this behavior included making accusations against Nichols that at least facially supported a claim for defamation.

basis to oppose the motion for summary judgment. Rather, I believe that § 8138 simply gives this court discretion to award such fees, if the statutory pre-requisite is established.[41] Had Susan and David Arday made clear to their mother that they would not have anything to do with a sale of the Property to the Nichols, spoken out publicly in their own names against his development plans and made clear that they were speaking out only for themselves, and been sued for that behavior, my decision would be different in many respects. But, that is not what they did. Susan Arday knew full well that her mother was signing a contract with a Cooperation Clause, stood to receive millions of dollars, and then purported to speak out in her mother's name, using words that, if spoken by her mother, would have breached her mother's contractual obligations. That the Ardays had to endure the costs of litigation in these circumstances does not implicate the

[41] The Ardays argue that § 8138(a)(1)'s statement that fees "may be recovered" if the action was commenced or continued without a substantial basis *requires* an award of fees in such a situation. That interpretation ignores the General Assembly's choice of the word "may." *See, e.g.*, *Miller v. Spicer*, 602 A.2d 65, 67 (Del. 1991) (noting that although the analysis is contextual one, "[t]he use of the verb 'shall' in legislation generally connotes a mandatory requirement while the verb 'may' is deemed permissive."). Nothing about the context here suggests the General Assembly intended to use "may" to indicate anything other than that an award of fees is discretionary. That conclusion is bolstered by the fact that the exact same statutory language has been interpreted by other state courts as granting the court discretion in awarding attorneys' fees. *E.g.*, *Matter of West Branch Conservation Ass'n. v. Planning Bd. of Town of Clarkstown*, 222 A.D.2d 513, 514 (N.Y. App. Div. 1995) (determining that use of the word "may" in the "may be recovered" language in New York's anti-SLAPP statute "makes the decision to award attorneys' fees and costs discretionary rather than mandatory"). My interpretation of the "may recover" language is unswayed by the cases the Ardays cite that indicate that that language in statutes other than anti-SLAPP statutes has been interpreted by certain courts as indicating that an award of fees is not discretionary. *See Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998) (noting in general, and without specifically referring that statutes providing that a party "may recover" attorney's fees are not discretionary). *But see Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 603 n.2 (5th Cir. 2000) (following *Bocquet* pursuant to the *Erie* doctrine, but questioning its interpretation of "may recover"); *but see also Army Aviation Heritage Found. & Museum, Inc. v. Buis*, 504 F. Supp. 2d 1254, 1271 (N.D. Fla. 2007) (interpreting the statutory language "may recover" as granting discretion).

core policy concern of the anti-SLAPP statute, which is that citizens not suffer baseless, harassing suits simply because they oppose a developer's plans for property.