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TESTIMONY OF LARRY FRANKEL

EXECUTIVE DIRECTOR

AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

ON HOUSE BILL 281 - THE ENVIRONMENTAL

POLICY PARTICIPATION LAW

BEFORE THE SUBCOMMITTEE ON COURTS OF THE

PENNSYLVANIA HOUSE JUDICIARY COMMITTEE

AUGUST 13, 1996

> No right is more important or more basic than the First Amendment right of free speech. And, yet, that essential right is increasingly under assault as companies pursuing projects that prompt opposition adopt aggressive tactics of intimidation to silence their critics. Ordinary citizens who have spoken out at meetings or voiced criticism through letters to the editor published in newspapers are being slapped with lawsuits designed for no other purpose than to discourage further opposition.

Thus observed the editorial writers of the Harrisburg Patriot on Sunday, July 17, 1994, shortly after Representative Bud George first introduced legislation to combat what has become popularly known as SLAPPs - Strategic Litigation Against Public Participation.

The ACLU of Pennsylvania agreed with the opinion expressed by the Harrisburg Patriot two years ago and we continue to support the passage of anti-SLAPP legislation. Such legislation is necessary to protect the right of free speech as well as the right to petition the government for redress of grievances. We think that a careful balance can be struck between the need to provide legitimate access to our courts and the interest in preventing lawsuits directed at inhibiting First Amendment rights.

The Pennsylvania House of Representatives also agreed with the sentiments expressed in the editorial when it passed House Bill 2971, last session's version of this legislation, by a vote of 199-0 on October 5, 1994.

Were this General Assembly to actually enact anti-SLAPP legislation, Pennsylvania would fall in line with other states that have adopted such legislation in the last 7 years. In 1989, Washington became the first state to take legislative action in this area. Since then, California, Delaware, Massachusetts, Minnesota, Nebraska, Nevada, New York and Rhode Island have all enacted legislation that in some way attempts to discourage the filing of lawsuits that seek: "primarily to chill the valid exercise of the constitutional rights of freedom of speech and

petition for redress of grievances." (from the statement of purpose, Rhode Island General Laws, Section 9-33-1.) [Attached to this testimony are copies of the statutes from the other states that have enacted anti-SLAPP statutes.] Besides Pennsylvania, anti-SLAPP legislation has been introduced, but not yet enacted, in Florida, Georgia, New Jersey, Tennessee and Texas.

The term SLAPP was coined by George W. Pring, Professor at the University of Denver College of Law and Penelope Canan, Professor at the University of Denver College of Sociology. Professors Pring and Canan have studied SLAPPs and written extensively about them since the middle of the 1980's. They are deemed to be the experts in this area of the law and they recently published GETTING SUED FOR SPEAKING OUT (Temple University Press 1996). They have defined a SLAPP as a civil claim, for monetary damages and/or an injunction, which is filed against individuals or nonprofit groups because of the defendants' communications to a government body or official on an issue that is of public concern.

A typical SLAPP may involve a real estate developer who sues citizens who have spoken out against a proposed development. However, SLAPPs have also been filed against citizens who voice criticism at school board meetings, report police misconduct or violations of laws to health authorities, file complaints against their labor unions or merely attend public meetings. While a great deal of media attention has been given to SLAPPs arising out of environmental disputes, this phenomenon is not limited to that arena.

Even before the acronym SLAPP emerged, courts had addressed the problem posed by intimidating lawsuits. The Colorado Supreme Court decision in Protect our Mountain Environment, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984) is an excellent example of how the judiciary can discourage such litigation. Protect Our Mountain Environment, Inc. (POME),

had vigorously opposed a large real estate development. They presented testimony at county hearings and even filed a court appeal challenging the county's decision to approve the development. The court denied the environmental group's appeal.

Thereafter the developer brought a civil action against POME and individuals who had challenged the project. The developer's lawsuit was based on claims of abuse of process and civil conspiracy. POME and the individuals moved for a dismissal of the complaint contending that their challenge to the project was constitutionally protected activity. The trial court denied the motion to dismiss. However, the Colorado Supreme Court, in a unanimous opinion, reversed the trial court and announced a new rule to govern motions to dismiss in these kinds of cases.

In its opinion, the Colorado Supreme Court noted that:

> suits filed against citizens for prior administrative or judicial activities can have a significant chilling effect on the exercise of their First Amendment right to petition the court for redress of grievances.

677 P.2d at 1368.

The Colorado Supreme Court held that interest had to be accommodated, however, with the concern that:

> Damages to other persons and society, however, can also result from baseless litigation instigated under the pretext of legitimate petitioning activity.

677 P.2d at 1368.

The Colorado Supreme Court held that those competing interests could be balanced by applying a heightened standard when ruling on a motion to dismiss that raised an absolute defense of right to petition the government. In a case where a plaintiff claims misuse or abuse of the administrative or judicial processes of government and the defendant asserts his or

her constitutional right to petition:

> the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.

677 P.2d at 1369.

The Third Circuit, in its decision in Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155 (3rd Cir. 1988), relied in part on this decision of the Colorado Supreme Court. In that case, a nursing home whose license had been revoked sued private individuals, a state official and United States Senator John Heinz. The nursing home alleged that defendants had engaged in a civil conspiracy to tortiously interfere with its business relations. The trial court granted summary judgment in favor of the defendants and the Third Circuit affirmed the judgment.

Although the Third Circuit never described this particular lawsuit as a SLAPP, the case certainly bore the characteristics of a SLAPP. The private individuals had complained to a variety of public officials about the conditions in the nursing home. As a result of the actions of the private individuals, the state official and Senator Heinz, the nursing home's license was revoked and it lost its Medicare certification. The nursing home instituted its action against the defendants before the revocation actions were completed.

In the decision affirming the trial court's decision on the summary judgment motion, the

Third Circuit wrote:

> The rule that liability cannot be imposed for damage caused by inducing legislative, administrative or judicial action is applicable here. The conduct on which this suit is based is protected by the firmly rooted principle, endemic to a democratic government, that enactment of and adherence to law is the responsibility of all. The problem is not too much citizen involvement but too little. Thus, we hold that as a matter of law, defendants' actions in calling Brownsville's violations to the attention of state and federal authorities and eliciting public interest cannot serve as the basis of tort liability.

839 F.2d at 160.

This Third Circuit decision was recently cited in Judge Anita Brody's opinion in The Barnes Foundation v. Township of Lower Merion, et al., (Civil Action No. 96-0372, E.D. Pa, Opinion dated June 3, 1996). The Barnes Foundation filed a federal lawsuit in January of this year alleging that the Township of Lower Merion, its Commissioners and neighbors had violated the Foundation's constitutional rights. The defendants allegedly discriminated and harassed the Foundation in a variety of ways: discriminatory enforcement of parking, police, fire and zoning ordinances; interfering with the reopening of the Foundation in November of 1995; picketing and videotaping the entrance to the Foundation; preventing the creation of a parking lot; interfering with business relationships; and filing a retaliatory action in state court. Judge Brody granted the neighbors motion to be dismissed from the lawsuit on grounds of first amendment immunity.

Although Judge Brody did not characterize the claims against the neighbors as a SLAPP, she did hold that the citizens could not be sued for exercising their First Amendment right to petition the government. The opinion even cites the recently published book on SLAPPs, SLAPP's - Getting Sued for Speaking Out, by Professors Pring and Canan.

The ACLU of Pennsylvania is familiar with litigation, which could be described as SLAPPs, from the western end of this Commonwealth. A couple of years ago, our Pittsburgh office was contacted by citizens' groups against whom a defamation suit had been filed. The groups had circulated a petition opposing the hours of operation of plaintiff's store and the sale of beer at that store. The ACLU has also provided assistance to residents who were sued by a developer because of their opposition to the developer's proposed shopping mall.

Pennsylvanians would be well served were the General Assembly to enact legislation similar to what has been enacted in other states. While some may think that our courts can deal with this issue, we believe that the legislative branch should not abdicate to the judiciary all responsibility for curing this problem. The General Assembly can play an important role in strengthening the right of Pennsylvanians to petition their government and speak freely on issues of public concern.

While we support the adoption of anti-SLAPP legislation and believe that House Bill 281 is a good bill, we have some recommendations for improving the bill. The scope of the bill should be expanded to protect all public advocacy. The Massachusetts, Minnesota and Rhode Island anti-SLAPP statutes cover a broader range of citizen participation. The Minnesota statute protects any: "speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action." HB 281 should be expanded to apply to any written or oral communication to any government agency and should not be limited to communications regarding environmental concerns.

House Bill 281 begins with a recitation of legislative findings. Subparagraph (4) [page 2, lines 3-7] speaks of "stopping" lawsuits. This language could be construed to unnecessarily

interfere with legitimate access to courts. I would suggest the following substitute language that poses fewer due process problems:

> (4) The interests of the citizens of this Commonwealth are served by the quick resolution of suits seeking to undermine citizen participation in the making of State and local policy and with minimum cost to the citizens who have participated in matters of public concern.

With respect to Section 3 of the bill which provides qualified immunity from suit, the final sentence of that section seems to divert from the real issue in these cases. The focus should be on whether the petitioning activity was genuinely directed at procuring a favorable governmental action, result or outcome. If the answer to that question is no, then it must be determined whether the defendant's actions or speech caused a legally actionable injury to the plaintiff. We would recommend that Section 3 be rewritten thusly:

> SECTION 3. QUALIFIED IMMUNITY FROM SUIT
>
> A person who acts in furtherance of his or her right of petition or free speech under the Constitution of the United States or the Constitution of Pennsylvania in connection with a public issue shall be immune from civil liability in any action regardless of his or her intent or purpose except:
>
> (1) Where the communication to the government agency is not genuinely aimed at procuring a favorable governmental action, result or outcome; and
>
> (2) The communication caused actual injury to the person bringing the action.

In several of the other states with anti-SLAPP legislation the state Attorney General is permitted to intervene on behalf of the party whose free speech and right to petition is being challenged. This legislation would be a more powerful tool if Pennsylvania's Attorney General were also authorized to intervene in these kinds of cases.

Finally, we think that Section 7 should be deleted. That section permits the Environmental Hearing Board to make awards of costs and counsel fees in matters before them. Outside of the workers compensation setting, we know of no other administrative board in Pennsylvania that is authorized by statute to make a losing party pay attorney's fees awards. The Environmental Hearing Board, unlike the courts of this Commonwealth is composed of unelected individuals. The power to order one party to pay another's attorney's fees and costs should not be extended to unelected officials without a much fuller consideration of this issue by the General Assembly.

The ACLU urges you to move forward with anti-SLAPP legislation because it will protect and enhance important First Amendment rights. Such legislation will also serve the public interest because it will help ensure that citizens continue to participate in the process of decision making and that public officials, regulatory agencies, and other policy making entities have complete access to all points of view.

[Carolyn Silver, a law student at the University of Pennsylvania Law School provided invaluable assistance in preparing this testimony.]

(d) For the purposes of this section, "compensation" means remuneration whether by way of salary, fee, or other consideration for services rendered. However, the payment of per diem, mileage, or other reimbursement expenses to a director or officer shall not constitute compensation.

(e) (1) This section applies only to officers and directors of nonprofit corporations that are subject to Part 2 (commencing with Section 5110), Part 3 (commencing with Section 7110), or Part 4 (commencing with Section 9110) of Division 2 of Title 1 of the Corporations Code that are organized to provide charitable, educational, scientific, social, or other forms of public service and that are exempt from federal income taxation under Section 501(c)(1), except any credit union, or Section 501(c)(4), 501(c)(5), 501(c)(7), or 501(c)(19) of the Internal Revenue Code.[1]

(2) This section does not apply to any corporation that unlawfully restricts membership, services, or benefits conferred on the basis of race, religious creed, color, national origin, ancestry, sex, marital status, disability, political affiliation, or age.

(Added by Stats.1992, c. 726 (S.B.1264), § 1.)

1 26 U.S.C.A. § 501(c).

Historical and Statutory Notes

1988 Legislation

Section 11 of Stats.1988, c. 1204, provides:

"Sections 2, 3, and 10 of this act apply only to causes of action based upon acts or omissions occurring on or after January 1, 1989, and before January 1, 1992."

1990 Legislation

Former § 425.15, added by Stats.1988, c. 1204, § 2, amended by Stats.1988, c. 1205, § 2; Stats.1989, c. 864, § 1; Stats.1990, c. 107, § 1, which related to the same subject, was repealed by Stats.1990, c. 107 (A.B.2292), § 1, operative Jan. 1, 1992.

Derivation: Former § 425.15, added by Stats.1988, c. 1204, § 2, amended by Stats.1988, c. 1205, § 2; Stats.1989, c. 864, § 1; Stats.1990, c. 107, § 1.

Law Review Commentaries

Common-law and statutory solutions to the problem of SLAPPS. John C. Barker, 26 Loy.L.A.L.Rev. 395 (1993).

Review of selected 1992 California legislation. 24 Pac. L.J. 665 (1993).

§ 425.16. Actions arising from exercise of free speech or right of petition; legislative findings; motion to strike; stay of discovery; fees, costs; exception; report to legislature

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

(b) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) 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 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.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding

authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

(Added by Stats.1992, c. 726 (S.B.1264), § 2. Amended by Stats.1993, c. 1239 (S.B.9), § 1.)

Historical and Statutory Notes

1992 Legislation

The Senate Journal for the 1991-92 Regular Session, page 8296, contained the following signature message dated Sept. 16, 1992, from the Governor regarding S.B. 1264 (Stats.1992, c. 726):

"I have signed this date Senate Bill 1264.

"This bill would provide that a lawsuit brought against a defendant arising from his or her exercise of free speech rights would be subject to a special motion to strike, unless the plaintiff can demonstrate at the time the lawsuit is filed that the plaintiff has a probability of success on the merits. Also, this measure would reenact specified provisions of law which limit the monetary liability of volunteer directors and officers of nonprofit corporations and medical associations with specified general liability insurance coverage.

"I have received a commitment from the author that subsequent legislation will be introduced to provide for the recovery of attorney's fees for the plaintiff by changing 'may' to 'shall' in Section 425.16 of the Code of Civil Procedure, subparagraph (c) and that a sunset of five years will be placed on the SLAPP suit provisions of this bill.

"With this understanding I am approving SB 1264."

1993 Legislation

The 1993 amendment substituted "shall" for "may" preceding "award costs" in subd. (c), and added subd. (h).

Cross References

Reports to legislature or governor, moratorium and exceptions, see Government Code § 7550.5.

Law Review Commentaries

Common-law and statutory solutions to the problem of SLAPPS. John C. Barker, 26 Loy.L.A.L.Rev. 395 (1993).

Review of selected 1992 California legislation. 24 Pac. L.J. 665 (1993).

SLAPPing down the right to trial by jury: The SLAPP legislation confusion of 1992. Michael D. Stokes, 14 CEB Civ.Lit.Rptr. 485 (1992).

§ 425.20. Repealed by Stats.1973, c. 828, p. 1476, § 1

ARTICLE 2

COMPULSORY CROSS-COMPLAINTS

Section
426.70. Eminent domain; application of article; related cause of action.
426.80. Repealed.

Law Review Commentaries

Civil discovery and the privilege against self-incrimination. Michael E. Wolfson (1984) 16 Pacific L.J. 785.

(4) "Compensation" is any remuneration, whether by way of salary, fee or otherwise, for services rendered, exclusive of any gift perquisite in form of access to services of the medical clinic at no or a reduced cost or reimbursement for costs actually incurred or the providing of lunch or other meals.

(5) "Employee" is any person who receives compensation from the medical clinic for services rendered in connection with an activity of the medical clinic.

(b) No volunteer or the medical clinic with which he is affiliated shall be subject to suit directly, derivatively or by way of contribution or idemnification for any civil damages under the laws of Delaware resulting from any negligent act or omission performed during or in connection with an activity of the volunteer while serving the medical clinic, unless said volunteer has insurance coverage for such acts or omissions in which case the amount recovered shall not exceed the limits of such applicable insurance coverage.

(c) Notwithstanding those provisions of subsection (b) of this section, a plaintiff may sue and recover civil damages from a volunteer based upon a negligent act or omission involving the operation of a motor vehicle during an activity; provided, that the amount recovered from such volunteer shall not exceed the limits of applicable insurance coverage maintained by or on behalf of such volunteer with respect to the negligent operation of a motor vehicle in such circumstances.

(d) The immunity granted in subsection (b) of this section shall not extend to any act or omission constituting wilful and wanton or grossly negligent conduct. (67 Del. Laws, c. 211, § 1.)

Revisor's note. — This section became effective upon the signature of the Governor on May 14, 1990.

§ 8136. Actions involving public petition and participation.

(a) For purposes of this section, the following terms shall have the meaning ascribed herein:

(1) An "action involving public petition and participation" is an action, claim, cross-claim or counterclaim 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.

(2) "Public applicant or permittee" shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.

(3) "Communication" shall mean any statement, claim or allegation in a proceeding, decision, protest, writing, argument, contention or other expression.

(4) "Government body" shall mean the State and any county, city, town, village or any other political subdivision of the State; any public improvement or special district, public authority, commission, agency or public

benefit corporation; any other separate corporate instrumentality or unit of State or local government; or the federal government.

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

(c) Nothing in this section shall be construed to limit any constitutional, statutory or common-law protection of defendants to actions involving public petition and participation. (68 Del. Laws, c. 391, § 1.)

Revisor's note. — This section became effective upon the signature of the Governor on July 16, 1992.

§ 8137. Standards for motion to dismiss and summary judgment in certain cases involving public petition and participation.

(a) A motion to dismiss in which the moving party has demonstrated that the action, claim, cross-claim or counterclaim subject to the motion is an action involving public petition and participation as defined in § 8136(a)(1) of this title shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

(b) A motion for summary judgment in which the moving party has demonstrated that the action, claim, cross-claim or counterclaim subject to the action is an action involving public petition and participation as defined in § 8136(a)(1) of this title shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion. (68 Del. Laws, c. 391, § 1.)

Revisor's note. — This section became effective upon the signature of the Governor on July 16, 1992.

§ 8138. Recovery of damages in actions involving public petition and participation.

(a) A defendant in an action involving public petition and participation, as defined in § 8136(a)(1) of this title, may maintain an action, claim, cross-claim or counter-claim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:

(1) 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; and

(2) Punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.

(b) The right to bring an action under this section can be waived only if it is waived specifically.

(c) Nothing in this section shall affect or preclude the right of any party to any recovery otherwise authorized by law. (68 Del. Laws, c. 391, § 1.)

Revisor's note. — This section became effective upon the signature of the Governor on July 16, 1992.

PART VI

Fees and Costs

CHAPTER 86. RECOUPMENT OF DEFENSE COSTS

Revisor's note. — This chapter became effective upon the signature of the Governor on July 14, 1977.

§ 8601. Recoupment of costs.

(a) A court may require a convicted defendant who has utilized court-appointed attorneys or the Public Defender's Office to pay the costs of his defense in that court.

(b) Costs shall be limited to expenses specially incurred by the State in defending the convicted person. Such costs shall not include expenses inherent in providing a constitutionally guaranteed jury trial, or expenditures in connection with the maintenance and operation of government agencies if such expenditures must be made by the public irrespective of specific violations of law.

(c) The court shall not require a defendant to pay the costs of his defense unless the defendant is, or will be, able to pay them. In determining the amount and method of payment of such costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Notes of Decisions

1. In general

Plaintiffs, whose motion to vacate was filed more than 30 months after judgment, were not entitled under M.G.L.A. c. 231, § 59G to relief from dismissal of case for failure to timely file request for trial; furthermore, plaintiffs, who asserted that they did not see the notice of judgment and who asserted that they did not receive the notice of judgment, were not excused from failing to file a Rule 60(b)(6) motion within a reasonable time and therefore were not entitled to relief from judgment for mistake, inadvertence or excusable neglect. Seebok v. Bay Yacht, Inc., 1994 Mass.App.Div. 151.

§ 59H. Strategic litigation against public participation; special motion to dismiss

In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) that the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) that the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

The attorney general, on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party on such special motion.

All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion.

Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.

As used in this section, the words "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

Added by St.1994, c. 283, § 1.

Historical and Statutory Notes

1994 Legislation

St.1994, c. 283, § 1, returned by the Governor to the House of Representatives, the branch in which it originated, with his objections thereto, was passed by the House of Representatives, Dec. 29, 1994, and, in concurrence, by the Senate, on the same date, the objections of the Governor notwithstanding, in the manner prescribed by the Constitution; and therefore has the force of law.

Section 2 of St.1994, c. 283, provides:

"The provisions of this act shall apply to all claims, counterclaims, and cross claims that have not been fully adjudicated on, or subsequent to, the effective date of this act. Notwithstanding the provisions of section one of this act, a party may

MINNESOTA STATUTES ANNOTATED

DECLARATORY, CORRECTIVE, ADMINISTRATIVE REMEDIES

Chapter 554

FREE SPEECH; PARTICIPATION IN GOVERNMENT

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

554.01. Definitions

Subdivision 1. Scope. The definitions in this section apply to this chapter.

Subd. 2. Government. "Government" includes a branch, department, agency, official, employee, agent, or other person with authority to act on behalf of the federal government, this state, or any political subdivision of this state, including municipalities and their boards, commissions, and departments, or other public authority.

Subd. 3. Judicial claim; claim. "Judicial claim" or "claim" includes any civil lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing seeking damages for an alleged injury. "Judicial claim" does not include a claim solely for injunctive relief.

Subd. 4. Motion. "Motion" includes any motion to dismiss, motion for summary judgment, or any other judicial pleading filed to dispose of a judicial claim.

Subd. 5. Moving party. "Moving party" means any person on whose behalf the motion described in section 554.02, subdivision 1, is filed seeking dismissal of an action under this chapter.

Subd. 6. Public participation. "Public participation" means speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action.

Subd. 7. Responding party. "Responding party" means any person against whom a motion described in section 554.02, subdivision 1, is filed.

Laws 1994, c. 566, § 1.

Historical and Statutory Notes

1994 Legislation

Laws 1994, c. 566, § 6, provides in part that § 1 (enacting this section) is effective May 6, 1994 and applies to judicial claims commenced on or after that date.

554.02. Protection of citizens to participate in government

Subdivision 1. Applicability. This section applies to any motion in a judicial proceeding to dispose of a judicial claim on the grounds that the claim materially relates to an act of the moving party that involves public participation.

Subd. 2. Procedure. On the filing of any motion described in subdivision 1:

(1) discovery must be suspended pending the final disposition of the motion, including any appeal; provided that the court may, on motion and after a hearing and for good cause shown, order that specified and limited discovery be conducted;

(2) the responding party has the burden of proof, of going forward with the evidence, and of persuasion on the motion;

(3) the court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03; and

(4) any governmental body to which the moving party's acts were directed or the attorney general's office may intervene in, defend, or otherwise support the moving party.

Laws 1994, c. 566, § 2.

Historical and Statutory Notes

1994 Legislation

Laws 1994, c. 566, § 6, provides in part that § 2 (enacting this section) is effective May 6, 1994 and applies to judicial claims commenced on or after that date.

554.03. Immunity

Lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights.

Laws 1994, c. 566, § 3.

Historical and Statutory Notes

1994 Legislation

Laws 1994, c. 566, § 6, provides in part that § 3 (enacting this section) is effective May 6, 1994 and applies to judicial claims commenced on or after that date.

554.04. Fees and damages

Subdivision 1. Attorney fees and costs. The court shall award a moving party who prevails in a motion under this chapter reasonable attorney fees and costs associated with the bringing of the motion.

Subd. 2. Damages. (a) A moving party may petition the court for damages under this section in conjunction with a motion under this chapter.

(b) If a motion under this chapter is granted and the moving party demonstrates that the respondent brought the cause of action in the underlying lawsuit for the purpose of harassment, to inhibit the moving party's public participation, to interfere with the moving party's exercise of protected constitutional rights, or otherwise wrongfully injure the moving party, the court shall award the moving party actual damages. The court may award the moving party punitive damages under section 549.20. A motion to amend the pleadings under section 549.191 is not required under this section, but the claim for punitive damages must meet all other requirements of section 549.191.

Laws 1994, c. 566, § 4. Amended by Laws 1995, c. 186, § 98.

under the influence of intoxicating liquor or (2) the gross negligence of the owner or operator in the operation of such motor vehicle.

For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor but shall not be construed to apply to or include any such passenger in a motor vehicle being demonstrated to such passenger as a prospective purchaser. Relationship by consanguinity or affinity within the second degree shall include parents, grandparents, children, grandchildren, and brothers and sisters. Should the marriage of the driver or owner be terminated by death or dissolution, the affinial relationship with the blood kindred of his or her spouse shall be deemed to continue.

Source: Laws 1931, c. 105, § 1, p. 278; C.S.Supp.,1941, § 39-1129; R.S.1943, § 39-740; Laws 1981, LB 54, § 1; R.S.1943, (1988), § 39-6,191; Laws 1993, LB 370, § 5.

25-21,238. Liability to guest passenger; applicable; when. Section 25-21,237 shall apply only to injuries or deaths occurring on or after August 30, 1981.

Source: Laws 1981, LB 54, § 2; R.S.1943, (1988), § 39-6,191.01; Laws 1993, LB 370, § 6.

(z) LEASED TRUCK AND TRAILER LIABILITY

25-21,239. Leased trucks, truck-tractors, and trailers; liability of owner for damages. The owner of any leased truck, truck-tractor, whether with or without trailer, or trailer shall be jointly and severally liable with the lessee and the operator thereof for any injury to or the death of any person or persons, or damage to or the destruction of any property resulting from the operation thereof in this state.

Source: Laws 1957, c. 170, § 1, p. 591; R.R.S.1943, § 39-7,135; R.S.1943, (1988), § 39-6,193; Laws 1993, LB 370, § 7.

(aa) DIRECTORS AND OFFICERS OF INSURED FINANCIAL DEPOSITORY INSTITUTIONS

25-21,240. Claim or action for money damages; limitation. No claim or action seeking to recover money damages shall be brought by the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, or any other federal banking regulatory agency against any director or officer, including any former director or officer, of any insured financial depository institution as defined in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 unless such claim or action arises out of the gross negligence or willful or intentional misconduct of such director or officer during his or her term of office with such insured financial depository institution.

Source: Laws 1993, LB 253, § 1.

(bb) PUBLIC PETITION AND PARTICIPATION

25-21,241. Legislative findings and declarations. The Legislature finds and declares that:

(1) It is the policy of the state that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. The infor-

mation, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy. The laws, courts, and other agencies of this state must provide the utmost protection for the free exercise of these petition, speech, and association rights;

(2) Civil actions for damages have been filed against citizens and organizations of this state as a result of the valid exercise of their constitutional rights to petition, speech, and association. There has been a disturbing increase in such strategic lawsuits against public participation in government;

(3) The threat of strategic lawsuits against public participation, personal liability, and burdensome litigation costs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This abuse of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs; and

(4) It is in the public interest and it is the purpose of sections 25-21,241 to 25-21,246 to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speech, and association, to protect and encourage public participation in government to the maximum extent permitted by law, to establish an efficient process for identification and adjudication of strategic lawsuits against public participation, and to provide for costs, attorney's fees, and actual damages.

Source: Laws 1994, LB 665, § 1.
Effective date April 13, 1994

25-21,242. Terms, defined. For purposes of sections 25-21,241 to 25-21,246:

(1) Action involving public petition and participation shall mean an action, claim, cross-claim, or counterclaim for damages that is brought by a public applicant or permittee and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge, or oppose the application or permission;

(2) Communication shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention, or other expression;

(3) Government body shall mean a city, a village, a political subdivision, a state agency, the state, the federal government, or a public authority, board, or commission; and

(4) Public applicant or permittee shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate, or other entitlement for use or permission to act from any government body or any person with an interest, connection, or affiliation with such person that is materially related to such application or permission.

Source: Laws 1994, LB 665, § 2.
Effective date April 13, 1994.

25-21,243. Defendant in action involving public petition and participation; action authorized; costs, attorney's fees, and damages; authorized; waiver; section, how construed. (1) A defendant in an action involving public petition and participation may maintain an action, claim, cross-claim, or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action. Costs and attorney's fees 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. Other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of petition, speech, or association rights.

(2) The right to bring an action, claim, cross-claim, or counterclaim under this section may be waived only if it is waived specifically.

(3) Nothing in this section shall affect or preclude the right of any party to any recovery otherwise authorized by common law or by statute, rule, or regulation.

Source: Laws 1994, LB 665, § 3.
Effective date April 13, 1994.

25-21,244. Action involving public petition and participation; damages; standard of proof; section, how construed. (1) In an action involving public petition and participation, the plaintiff may recover damages, including costs and attorney's fees, only if he or she, in addition to all other necessary elements, has established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, if the truth or falsity of such communication is material to the cause of action at issue.

(2) Nothing in this section shall be construed to limit any constitutional, statutory, or common-law protections of defendants to actions involving public petition and participation.

Source: Laws 1994, LB 665, § 4.
Effective date April 13, 1994.

25-21,245. Action involving public petition and participation; motion to dismiss; when granted; duty to expedite. A motion to dismiss based on a failure to state a cause of action shall be granted when the moving party demonstrates that the action, claim, cross-claim, or counterclaim subject to the motion is an action involving public petition and participation unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification, or reversal of existing law. The court shall expedite and grant preference in the hearing of such motion.

Source: Laws 1994, LB 665, § 5.
Effective date April 13, 1994.

25-21,246. Action involving public petition and participation; motion for summary judgment; when granted. A motion for summary judgment shall be granted when the moving party has demonstrated that the action, claim, cross-claim, or counterclaim subject to the motion is an action involving public petition and participation unless the party responding to the motion demonstrates that the action, claim, cross-claim, or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification, or reversal of existing law. The court shall grant preference in the hearing of such motion.

Source: Laws 1994, LB 665, § 6.
Effective date April 13, 1994.

(cc) HEALTH CARE PAYORS

25-21,247. Health care payor or employee; immunity from criminal or civil liability; when. (1) For purposes of this section, health care payor shall include, but not be limited to:

(a) An insurer;

(b) A health maintenance organization;

(c) Medicare or medicaid;

(d) A legal entity which is self-insured and provides health care benefits for its employees; or

(e) A person responsible for administering the payment of health care expenses for another person or entity.

(2) Any health care payor or employee thereof who has reasonable cause to believe that there has been a violation of section 71-147 or 71-148 or a fraudulent insurance act as defined in subdivision (1) of section 44-3,132 may discuss or inquire of other health care payors about such violation or act. Any health care payor or employee so discussing or inquiring or responding to such an inquiry from another health care payor shall be immune from criminal penalty or from civil liability for slander, libel, defamation, or breach of the physician-patient privilege if the discussion, inquiry, or response is made in good faith without reckless disregard for the truth.

Source: Laws 1994, LB 1223, § 131.
Operative date April 16, 1994.

ARTICLE 22
GENERAL PROVISIONS

(a) PROCESS

Section.
25-2203. Process; special process server; return; appointed on motion; fees.

(b) CLERKS OF COURTS; DUTIES

25-2209. Clerk of district court; required records enumerated; compilation and filing; methods authorized.
25-2210. Clerk of district court; records; contents; appearance docket; general index; judgment record; transcripts from inferior courts; discharge of judgments.
25-2212. Repealed. Laws 1992, LB 1059, § 29.
25-2213. Clerks of courts of record other than district courts; duties.

and who fails to pay the amount in cash to the payee, issuer or other creditor within 30 days after a demand therefor in writing is mailed to him by certified mail, is liable to the payee, issuer or other creditor for the amount of the check, draft or extension of credit, and damages equal to three times the amount of the check, draft or extension of credit, but not less than $100 nor more than $500.

2. As used in this section, unless the context otherwise requires:

(a) "Credit card" has the meaning ascribed to it in NRS 205.630; and

(b) "Issuer" has the meaning ascribed to it in NRS 205.650.

(Added to NRS by 1985, 1021; A 1987, 134, 1191)

WEST PUBLISHING CO.
Damages ⇐ 227.
Fraud ⇐ 28, 62.

WESTLAW Topic Nos. 115, 184.
C.J.S. Damages § 195.
C.J.S. Fraud §§ 46 et seq., 142 et seq.

LIABILITY OF PERSONS WHO OFFICIATE SPORTING EVENTS

41.630 Limitations of liability.

1. A sports official who officiates a sporting event at any level of competition in this state is not liable for any civil damages as a result of any unintended act or omission, not amounting to gross negligence, by him in the execution of his officiating duties within the facility where the sporting event takes place.

2. As used in this section:

(a) "Sporting event" means any contest, game or other event involving the athletic or physical skills of amateur or professional athletes.

(b) "Sports official" means any person who serves as a referee, umpire, linesman or in a similar capacity, whether paid or unpaid.

(Added to NRS by 1989, 677)

WEST PUBLISHING CO.
Theaters and Shows ⇐ 6(1) to 6(17).

WESTLAW Topic No. 376.
C.J.S. Theaters and Shows §§ 39 to 47.

LIABILITY OF PERSON WHO COMMUNICATES CERTAIN INFORMATION TO PUBLIC OFFICER OR EMPLOYEE

41.640 "Political subdivision" defined. As used in NRS 41.640 to 41.670, inclusive, "political subdivision" has the meaning ascribed to it in NRS 41.0305.

(Added to NRS by 1993, 2848)

41.650 Limitation of liability. A person who in good faith communicates a complaint or information to a legislator, officer or employee of this state or of a political subdivision, or to a legislator, officer or employee of the Federal Government, regarding a matter reasonably of concern to the respective governmental entity is immune from civil liability on claims based upon the communication.

(Added to NRS by 1993, 2848)

REVISER'S NOTE.

Ch. 653, Stats. 1993, the source of this section, became effective on July 13, 1993, and contains the following provision not included in NRS:

"This act becomes effective upon passage and approval and applies to actions commenced before the effective date of this act if a final judgment has not been entered in the action."

WEST PUBLISHING CO.
Libel and Slander ⇐ 37.
WESTLAW Topic No. 237.

C.J.S. Libel and Slander; Injurious Falsehood §§ 69, 76.

41.660 Action for damages: Defense of action by attorney general or other legal representative of state or legal representative of political subdivision authorized. In any civil action brought against a person who in good faith communicated a complaint or information to a legislator, officer or employee of this state or of a political subdivision regarding a matter reasonably of concern to the respective governmental entity, the attorney general or other legal representative of the state or the legal representative of the political subdivision may provide for the defense of the action on behalf of the person who communicated the complaint or information. If the legal representative of a political subdivision does not provide for the defense of such an action relating to a communication to a legislator, officer or employee of the political subdivision, the attorney general may provide for the defense of the action.

(Added to NRS by 1993, 2848)

REVISER'S NOTE.

Ch. 653, Stats. 1993, the source of this section, became effective on July 13, 1993, and contains the following provision not included in NRS:

"This act becomes effective upon passage and approval and applies to actions commenced before the effective date of this act if a final judgment has not been entered in the action."

WEST PUBLISHING CO.
Attorney General ⇐ 6.
WESTLAW Topic No. 46.
C.J.S. Attorney General §§ 7 to 15.

41.670 Action for damages: Awarding of reasonable costs and attorney's fees to prevailing party required.

1. Except as otherwise provided in subsection 2, the party prevailing in an action brought against a person who in good faith communicated a complaint or information to a legislator, officer or employee of this state or of a political subdivision, or to a legislator, officer or employee of the Federal Government, regarding a matter reasonably of concern to the respective governmental entity is entitled to reasonable costs and attorney's fees.

2. If a legal representative of this state or of a political subdivision provides the defense in such an action, the state or political subdivision:

(a) If the legal representative prevails, is entitled to reasonable costs and attorney's fees; or

(b) If the legal representative does not prevail, must pay reasonable costs and attorney's fees.

(Added to NRS by 1993, 2848)

REVISER'S NOTE.

Ch. 653, Stats. 1993, the source of this section, became effective on July 13, 1993, and contains the following provision not included in NRS:

"This act becomes effective upon passage and approval and applies to actions commenced before the effective date of this act if a final judgment has not been entered in the action."

WEST PUBLISHING CO.
Libel and Slander ⇐ 129.
WESTLAW Topic No. 237.
C.J.S. Libel and Slander; Injurious Falsehood § 186.

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paternal grandparents, in whose household father resided; grandmother testified that child desired to have her father's last name and she insisted on using the name when she started school despite being told repeatedly that her last name was her mother's maiden name; grandmother expressed concern that her grandchild would be subjected to ridicule and questioning from other children over fact that she had a different surname from not only one, but both of her parents. Learn by Houck v. Haskell (3 Dept. 1993) 194 A.D.2d 859, 598 N.Y.S.2d 595.

26. Transsexuals

Petitioner failed to set forth sufficient facts to warrant grant of application to change first name from William, an obvious male name, to Veronica, an obvious female name; he failed to submit medical and psychiatric evidence as to whether he was a transvestite or transsexual and, if a transsexual, whether he had undergone a sex change operation. Application of Anonymous, 1992, 155 Misc.2d 241, 587 N.Y.S.2d 548.

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447, § 2.

ARTICLE 7—MISCELLANEOUS RIGHTS AND IMMUNITIES

Section
70–a. Actions involving public petition and participation; recovery of damages.
76–a. Actions involving public petition and participation; when actual malice to be proven.
79–e. Right to breast feed.

§ 70. Vexatious suits

West's McKinney's Forms

The following forms appear in the Selected Consolidated Laws under Civil Rights Law § 70:

Article 78 proceeding petitioner's notice of motion for order granting renewal or reargument with respect to order and judgment decreeing proceeding vexatious and upon renewal or reargument vacating such order and judgment, see SCL, CIV RTS § 70, Form 1.

Article 78 proceeding petitioner's affidavit in support of motion for order granting renewal or reargument with respect to order and judgment decreeing proceeding vexatious and upon renewal or reargument vacating such order and judgment, see SCL, CIV RTS § 70, Form 2.

§ 70–a. Actions involving public petition and participation; recovery of damages

1. A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:

(a) costs and attorney's fees 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;

(b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and

(c) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.

2. The right to bring an action under this section can be waived only if it is waived specifically.

3. Nothing in this section shall affect or preclude the right of any party to any recovery otherwise authorized by common law, or by statute, law or rule.

(Added L.1992, c. 767, § 2.)

Historical and Statutory Notes

Effective Date. L.1992, c. 767, § 6, provided: "This act [enacting this section and § 76–a and amending CPLR 3211 and 3212] shall take effect on the first day of January next succeeding the date on which it shall have become a law [eff. Jan.

1, 1993], provided that this act shall not affect any action, claim, cross claim or counterclaim commenced prior to the effective date of this act."

Law Review Commentaries

Legislation provides prompt review of SLAPP suits. Terry Rice, 210 N.Y.L.J. 1 (1993).

§ 73. Code of fair procedure for investigating agencies

Notes of Decisions

Disclosure 6a

6a. Disclosure

Provision of Civil Rights Law setting forth procedure by which investigative agency may disseminate certain testimony or other evidence to public does not prohibit court from ordering disclosure of such material when relevant discovery privileges or protections do not attach. Mahoney v. Staffa (3 Dept. 1992) 184 A.D.2d 886, 585 N.Y.S.2d 543, leave to appeal dismissed 80 N.Y.2d 972, 591 N.Y.S.2d 140, 605 N.E.2d 876.

§ 74. Privileges in action for libel

Notes of Decisions

Summary judgment 36

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3. Absolute or qualified privilege

Slander of title claim against town regarding property it had contractually agreed to sell was properly dismissed; while town board members' statement during election debate that town had sold property because it was "a potential environmental disaster" may have affected value of property, statement did not render title unmarketable in the legal sense, statements did not tend to cast doubt on validity of town's title to property, board members' statements were entitled to qualified privilege, and it was not alleged that statements were made with intent to injure potential purchaser or with reckless disregard for truth or falsity. Hirschhorn v. Town of Harrison (3 Dept. 1994) 210 A.D.2d 587, 619 N.Y.S.2d 810.

4. Fair and true report—Generally

Exception to statute protecting true and fair reports of judicial proceedings, applicable where one maliciously institutes judicial proceeding alleging false and defamatory charges and then circulates press release or other communication based thereon, did not apply where university student sued another student alleging rape and thereafter organization issued a press release complaining of university's handling of disciplinary proceeding against alleged offending student and press was able to identify the student from materials in the civil action. Cuthbert v. National Organization for Women (3 Dept. 1994) 207 A.D.2d 624, 615 N.Y.S.2d 534.

Newspaper article which reported on dismissal of individual's lawsuit against newspaper was privileged report of judicial proceeding, where article was substantially accurate, and "fair and true" within meaning of civil rights law; accuracy of report was not altered by fact that article did not contain individual's "side of judge's decision," or by fact that article did not report that individual had appealed. Glendora v. Gannett Suburban Newspapers (2 Dept. 1994) 201 A.D.2d 620, 608 N.Y.S.2d 239, leave to appeal denied 83 N.Y.2d 757, 615 N.Y.S.2d 875, 639 N.E.2d 416.

Newspaper article indicating that employee of securities firm had received award from arbitrator for wrongful discharge, and setting forth contentions made by firm in arbitration proceeding, was substantially accurate description of claims made in arbitration proceeding, rendering applicable statutory defense to libel action for fair and true report of a judicial proceeding. Mulder v. Donaldson, Lufkin & Jenrette, 1994, 161 Misc.2d 698, 611 N.Y.S.2d 1019, affirmed 208 A.D.2d 301, 623 N.Y.S.2d 560.

5. —— Inaccuracies

Newspaper publisher was not liable for its mistaken substitution of suffix "Jr." for "Sr." which resulted in article's inaccurately reporting that 13–year-old juvenile, not his father, had been charged with second-degree sodomy; rea in context of entire article, er would recognize paper' dentifying 13–year-old ju man v. Tonawanda Pub. 1992) 186 A.D.2d 1028, 58

Newspaper articles rep defendant indictment in and other offenses were leged under statute as fa ports of judicial proceedi that newspaper was shield in libel action alleging th only been charged with n making apparently false in second degree and con mit that crime; although articles may have created in mind of reader as to had been charged with br would have been succe upon reading full article. Pub. Co., Inc. (3 Dept. 1 230, 589 N.Y.S.2d 644.

7. —— Source of infor

Under New York law work's segment on inter corporation was not "fair of a judicial proceeding" work was not immune f defamation, even though ment involved reports proceedings at which con client were tried and con ping; segment was suc views with participants i ping incident, thus belyin work was even attemptir and true report of juc Corporate Training Unli tional Broadcasting Co. F.Supp. 501.

8. Fair headline

Allegedly defamatory Enemy No. 1," as ampl line "City moves to yank 'worst taxi driver'," was it was fair index of tru tained in related news that plaintiff had receive es and violations that an in City and, according Limousine Commission, and abused customers. York Post Co., Inc. (1 A.D.2d 294, 590 N.Y.S.2

9. Judicial proceedin

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statement was made, average
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ıtroversy surrounding agency's
nt of regulations. Samuels v.
Dept. 1993) 191 A.D.2d 627, 595
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1993) 191 A.D.2d 243, 595
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tions for court

Co., Inc. v. De Pasquale, 1977,
370, 401 N.Y.S.2d 756, 372
4, [main volume] reargument de-
.Y.2d 846, 402 N.Y.S.2d 1029,
2d 998, certiorari granted 98
435 U.S. 1006, 56 L.Ed.2d 387,
9 S.Ct. 2898, 443 U.S. 368, 61
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el action based on claim there
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Audenaere v. Nightingale (3
) 199 A.D.2d 716, 605 N.Y.S.2d

§ 76. Action for libel: evidence, separate verdicts

Notes of Decisions

1. Opinions

Town officer's use of word "extortion" in newspaper interview while discussing plaintiff mortgagee's attempts to evict local manufacturer to which town had advanced funds was "pure opinion," rather than "mixed opinion," and was thus not actionable; considering context of officer's statement, no reasonable reader could understand statement as saying that mortgagee committed criminal act of extortion. Trusteo Bank of New York v. Capital Newspaper Div. of Hearst Corp. (3 Dept. 1995) ___ A.D.2d ___, 624 N.Y.S.2d 291.

Statements made by associate attorney in the course of levying on judgment to repossess medical equipment, that physician was "liar," "cheat," and "debtor," in presence of patients in physician's waiting room, were not statements of fact which were reasonably susceptible of defamatory meaning, but rather constituted personal opinion and rhetorical hyperbole, and thus were constitutionally protected. Ram v. Moritt (2 Dept. 1994) 205 A.D.2d 516, 612 N.Y.S.2d 671.

Statements about subsequently discharged employee made by officers of not-for-profit corporation at meetings were statements of mixed fact and opinion, rather than pure opinion, and as such were actionable in defamation; persons present at meetings had reason to believe that officers making statements possessed information to support accusations made against employee. Brown v. Albany Citizens Council on Alcoholism, Inc. (3 Dept. 1993) 199 A.D.2d 904, 605 N.Y.S.2d 577.

4. Sufficiency of evidence

Defendant who allegedly offered and distributed a libelous document could not be held liable in libel action, absent showing that the documents were published to two citizen's groups as claimed by plaintiff. Barber v. Daly (3 Dept. 1992) 185 A.D.2d 567, 586 N.Y.S.2d 398.

5. Measure of damages

Allegation that former employee suffered damages of $1 million when he was discharged as alleged result of defamatory statements was not sufficient allegation of special damages necessary to support defamation action. Boyle v. Stiefel Laboratories Inc. (3 Dept. 1994) 204 A.D.2d 872, 612 N.Y.S.2d 469, leave to appeal denied 84 N.Y.2d 803, 617 N.Y.S.2d 137, 641 N.E.2d 158.

§ 76–a. Actions involving public petition and participation; when actual malice to be proven

1. For purposes of this section:

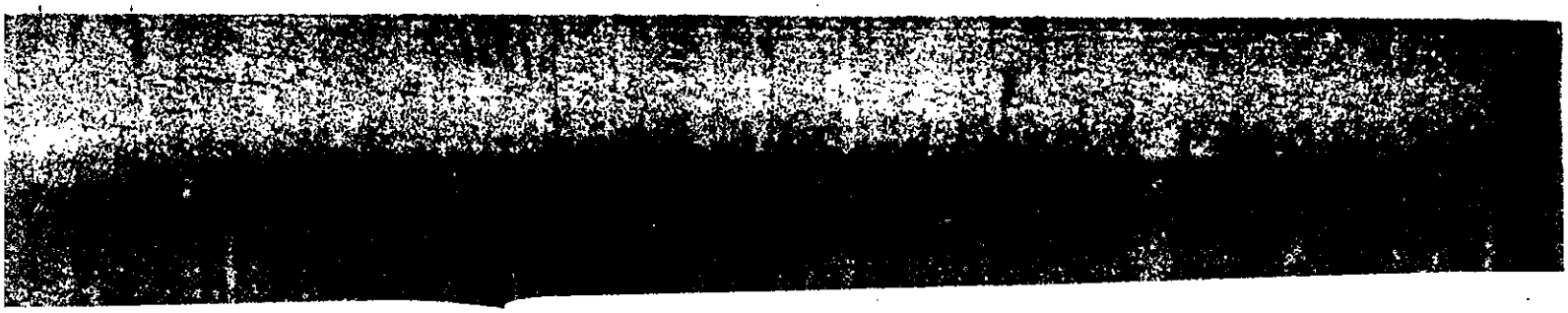
(a) An "action involving public petition and participation" is an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.

(b) "Public applicant or permittee" shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.

(c) "Communication" shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.

(d) "Government body" shall mean any municipality, the state, any other political subdivision or agency of such, the federal government, any public benefit corporation, or any public authority, board, or commission.

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



— State.

ECISIONS

1. Private Bills.
The General Assembly did not violate the equal protection provisions of the Rhode Island and United States constitutions by enacting legislation that authorized plaintiff to bring suit against the state of Rhode Island for an amount in excess of the limitation on damages set forth in the Governmental Tort Liability Act. Kennedy v. State, 654 A.2d 708 (R.I. 1995).

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section shall not apply.

Section 2 of P.L. 1989, ch. 128 provides, in pertinent part, that this section shall not apply to all cases in which the cause of action arises after June 30, 1989.

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provides, in pertinent part, that this section shall apply to all cases in which the cause of action arises after June 30, 1989.

DECISIONS

minimum-vote requirements set forth in R.I. Const., art. VI, § 11 are met. Kennedy v. State, 654 A.2d 708 (R.I. 1995).

9-31-8. Defense of state employees — Attorney general.

Collateral References. Construction and application of Westfall Act provision providing federal employee immunity from ordinary tort suits if attorney general certifies that employee was acting within scope of office or employment at time of incident out of which claim arose (28 USCS § 2679(d)). 120 A.L.R. Fed. 95.

9-31-12. Indemnification — Reservation of obligation — Certification. — (a) The state reserves the right to determine whether or not it will indemnify any employees defended pursuant to §§ 9-31-8 — 9-31-11, inclusive, if a judgment is rendered against said employee.

(b) Upon certification by the court in which the tort action against a state employee is pending that (1) the defendant employee was acting within the scope of his or her office or employment when the claim arose and (2) the claim does not arise out of actual fraud, willful misconduct or actual malice by the employee, any civil action or proceeding commenced upon such claim under this statute shall be deemed to be an action or proceeding brought against the state of Rhode Island under the provisions of this title and all references thereto, and the State of Rhode Island shall be substituted as the party defendant.

History of Section.
P.L. 1979, ch. 259, § 1; P.L. 1995, ch. 45, § 1.

9-31-13. Arbitration of claims. — (A) All actions brought under this chapter may, upon agreement of all parties to the action, be submitted to arbitration in accordance with § 8-6-5 and the rules and regulations promulgated thereunder, except that the State of Rhode Island, its departments, agencies, boards and commissions shall not be required to pay a filing fee for objecting to the arbitrator's award and demanding a trial.

History of Section.
P.L. 1988, ch. 401, § 1; P.L. 1991, ch. 159, § 1.

Compiler's Notes. As amended by P.L. 1991, ch. 159, § 1, this section contains a subsection (A), but does not contain a subsection (B).

CHAPTER 33

LIMITS ON STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION

Compiler's Notes. P.L. 1993, ch. 354, § 1, and P.L. 1993, ch. 448, § 1 enacted identical versions of this chapter.

9-33-1. Findings. — The legislature finds and declares that full participation by persons and organizations and robust discussion of issues of public concern before the legislative, judicial, and administrative bodies and in other public fora are essential to the democratic process, that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances; that such litigation is disfavored and should be resolved quickly with minimum cost to citizens who have participated in matters of public concern.

History of Section.
P.L. 1993, ch. 354, § 1; P.L. 1993, ch. 448 § 1.

Compiler's Notes. P.L. 1993, ch. 354, § 1, and P.L. 1993, ch. 448, § 1 enacted identical versions of this section.

Section 2 of P.L. 1993, ch. 354, and Section 2 of P.L. 1993, ch. 448, provide that the act shall take effect upon passage [July 27, 1993] and shall apply to all claims, counterclaims, and cross claims that have not been fully adjudicated on, or subsequent to, the effective date of the act. The acts further provide that a party may file a special motion to dismiss a claim, counterclaim, or cross claim in existence on the effective date of the act within sixty days of the effective date of the act.

9-33-2. Conditional immunity. — (a) A party's exercise of his or her right of petition or of free speech under the United States or Rhode Island Constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims. Such immunity will apply as a bar to any civil claim, counterclaim, or cross-claim directed at petition or free speech as defined in subsection (e) herein, except if said petition or free speech constitutes a sham. Petition or free speech constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result or outcome, regardless of ultimate motive or purpose. Petition or free speech will be deemed to constitute a sham as defined in the previous sentence only if it is both:

(1) objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring such government action, result, or outcome, and

(2) subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.

(b) The court shall stay all discovery proceedings in the action upon the filing of a motion asserting the immunity established by this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion.

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the motion.

(c) The immunity established by this section may be asserted by an appropriate motion or by other appropriate means under the applicable rules of civil procedure.

(d) If the court grants such motion asserting the immunity established by this section, or if the party claiming lawful exercise of his or her right of petition or of free speech under the United States or Rhode Island Constitutions in connection with a matter of public concern is, in fact, the eventual prevailing party at trial, the court shall award the prevailing party costs and reasonable attorney's fees, including those incurred for the motion and any related discovery matters. The court shall award compensatory damages and may award punitive damages upon a showing by the prevailing party that the responding party's claims, counterclaims, or cross claims were frivolous or were brought with an intent to harass said party or otherwise inhibit said party's exercise of its right to petition or free speech under the United States or Rhode Island Constitution. Nothing in this section shall affect or preclude the right of the party claiming lawful exercise of his or her right of petition or of free speech under the United States or Rhode Island Constitutions to any remedy otherwise authorized by law.

(e) As used in this section, "a party's exercise of its right of petition or of free speech" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; or any written or oral statement made in connection with an issue of public concern.

History of Section.
P.L. 1993, ch. 354, § 1; P.L. 1993, ch. 448, § 1; P.L. 1995, ch. 386, § 1.

Compiler's Notes. P.L. 1993, ch. 354, § 1, and P.L. 1993, ch. 448, § 1 enacted identical versions of this section.

9-33-3. Intervention. — Any governmental agency or subdivision to which the party's petition or free speech were directed or the attorney general may intervene to defend or otherwise support the party claiming lawful exercise of its right of petition or of free speech under United States or Rhode Island Constitution.

History of Section.
P.L. 1993, ch. 354, § 1; P.L. 1993, ch. 448, § 1; P.L. 1995, ch. 386, § 1.

Compiler's Notes. P.L. 1993, ch. 354, § 1, and P.L. 1993, ch. 448, § 1 enacted identical versions of this section.

9-33-4. Construction of act. — Nothing contained herein shall be construed to limit or affect any additional constitutional, statutory or common law protections of defendants in actions involving their exercise of rights of petition or of free speech.

Historical and Statutory Notes

Severability—Laws 1988, ch. 42: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [Laws 1988, ch. 42, § 19.]

4.24.490. Indemnification of state employees

(1) The state shall indemnify and hold harmless its employees in the amount of any judgment obtained or fine levied against an employee in any state or federal court, or in the amount of the settlement of a claim, or shall pay the judgment, fine, or settlement, if the act or omission that gave rise to the civil or criminal liability was in good faith and occurred while the employee was acting within the scope of his or her employment or duties and the employee is being represented in accordance with RCW 4.92.070.

(2) For purposes of this section "state employee" means a member of the civil service or an exempt person under chapter 41.06 RCW, or higher education personnel under chapter 28B.16 RCW.

Enacted by Laws 1989, ch. 413, § 3.

4.24.500. Good faith communication to government agency—Legislative findings—Purpose

Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

Enacted by Laws 1989, ch. 234, § 1.

4.24.510. Good faith communication to government agency—Immunity

A person who in good faith communicates a complaint or information to any agency of federal, state, or local government regarding any matter reasonably of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency. A person prevailing upon the defense provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense.

Enacted by Laws 1989, ch. 234, § 2.

4.24.520. Good faith communication to government agency—When agency or attorney general may defend against lawsuit—Costs and fees

In order to protect the free flow of information from citizens to their government, an agency receiving a complaint or information under RCW 4.24.510 may intervene in and defend against any suit precipitated by the communication to the agency. In the event that a local governmental agency does not intervene in and defend against a suit arising from any communication protected under this act,[1] the office of the attorney general may intervene in and defend against the suit. An agency prevailing upon the defense provided for in RCW 4.24.510 shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense. If the agency fails to establish the defense provided for in RCW 4.24.510, the party bringing the

ction shall be entitled to recover from the a[…] ttorney's fees incurred in proving the defense i[…]

Enacted by Laws 1989, ch. 234, § 4.

[1] Reviser's Note: "This act" [1989 c 234] consists of […] 24.510, and 4.24.520, and a vetoed section.

4.24.530. Limitations on liability for e[…] tions

Unless the context clearly indicates otherwise, […] pply to RCW 4.24.500, 4.24.510, and section 3, […]

(1) "Equine" means a horse, pony, mule, donk[…]

(2) "Equine activity" means: (a) Equine show[…] mances, or parades that involve any or all bree[…] quine disciplines, including, but not limited to, […] horse shows, grand prix jumping, three-day even[…] driving, pulling, cutting, polo, steeplechasing, […] western games, and hunting; (b) equine training […] boarding equines; (d) riding, inspecting, or eval[…] another whether or not the owner has received […] or other thing of value for the use of the equine […] purchaser of the equine to ride, inspect, or eval[…] trips, hunts, or other equine activities of an[…] impromptu that are sponsored by an equine ac[…]

(3) "Equine activity sponsor" means an indiv[…] ship, or corporation, whether or not the spon[…] nonprofit, which sponsors, organizes, or provid[…] activity including but not limited to: Pony clubs […] clubs, school and college sponsored classes and […] programs, and, operators, instructors, and p[…] including but not limited to stables, clubhouse[…] arenas at which the activity is held.

(4) "Participant" means any person, whether […] directly engages in an equine activity, whet[…] participate in the equine activity.

(5) "Engages in an equine activity" means […] drives, or is a passenger upon an equine, wheth[…] does not mean a spectator at an equine activity […] the equine activity but does not ride, train, dri[…] an equine.

(6) "Equine professional" means a person e[…] instructing a participant or renting to a partici[…] of riding, driving, or being a passenger upon […] equipment or tack to a participant.

Enacted by Laws 1989, ch. 292, § 1.

[1] For Laws 1989, ch. 292, § 3, see Historical and S[…] Laws 1989, ch. 292, §§ 1 and 2.

Historical and Statuto[…]

Application—Laws 1989, ch. 292, §§ 1 […] only t[…] and 2: "Sections 1 and 2 of this act apply […] July 2[…]

action shall be entitled to recover from the agency costs and reasonable attorney's fees incurred in proving the defense inapplicable or invalid.

Enacted by Laws 1989, ch. 234, § 4.

[1] Reviser's Note: "This act" [1989 c 234] consists of the enactment of RCW 4.24.500, 4.24.510, and 4.24.520, and a vetoed section.

4.24.530. Limitations on liability for equine activities—Definitions

Unless the context clearly indicates otherwise, the definitions in this section apply to RCW 4.24.500, 4.24.510, and section 3, chapter 292, Laws of 1989.[1]

(1) "Equine" means a horse, pony, mule, donkey, or hinny.

(2) "Equine activity" means: (a) Equine shows, fairs, competitions, performances, or parades that involve any or all breeds of equines and any of the equine disciplines, including, but not limited to, dressage, hunter and jumper horse shows, grand prix jumping, three-day events, combined training, rodeos, driving, pulling, cutting, polo, steeplechasing, endurance trail riding and western games, and hunting; (b) equine training and/or teaching activities; (c) boarding equines; (d) riding, inspecting, or evaluating an equine belonging to another whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine; and (e) rides, trips, hunts, or other equine activities of any type however informal or impromptu that are sponsored by an equine activity sponsor.

(3) "Equine activity sponsor" means an individual, group or club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for, an equine activity including but not limited to: Pony clubs, 4–H clubs, hunt clubs, riding clubs, school and college sponsored classes and programs, therapeutic riding programs, and, operators, instructors, and promoters of equine facilities, including but not limited to stables, clubhouses, ponyride strings, fairs, and arenas at which the activity is held.

(4) "Participant" means any person, whether amateur or professional, who directly engages in an equine activity, whether or not a fee is paid to participate in the equine activity.

(5) "Engages in an equine activity" means a person who rides, trains, drives, or is a passenger upon an equine, whether mounted or unmounted, and does not mean a spectator at an equine activity or a person who participates in the equine activity but does not ride, train, drive, or ride as a passenger upon an equine.

(6) "Equine professional" means a person engaged for compensation (a) in instructing a participant or renting to a participant an equine for the purpose of riding, driving, or being a passenger upon the equine, or, (b) in renting equipment or tack to a participant.

Enacted by Laws 1989, ch. 292, § 1.

[1] For Laws 1989, ch. 292, § 3, see Historical and Statutory Notes, post, Application—Laws 1989, ch. 292, §§ 1 and 2.

Historical and Statutory Notes

Application—Laws 1989, ch. 292, §§ 1 and 2: "Sections 1 and 2 of this act apply only to causes of action filed on or after July 23, 1989." [Laws 1989, ch. 292, § 3.]