Prepared Testimony of Professor David Kairys
In Support of Pennsylvania Anti-SLAPP Legislation,
SB 95 and HB 95, 2019-2020 Session
Hearing before the House Judiciary Committee
December, 2019

Introduction

I am James E. Beasley Professor of Law, Emeritus, at the Beasley School of Law, Temple University. I have taught constitutional law and civil rights for over 25 years. Previously, I practiced fulltime in the same areas for over 20 years. One of my main areas of scholarship and practice has been freedom of speech and the 1st Amendment, and has included arguing free speech cases before the Supreme Court of Pennsylvania, the United States Court of Appeals for the Third Circuit, and the Supreme Court of the United States.[1] I have testified as an expert on SLAPP cases before the Superior Court of New Jersey.[2] My resume is attached.

I support Senate Bill 95 and House Bill 95 (SB 95/HB 95), which extend the statutory protection from SLAPP lawsuits, currently limited to environmental issues, to a general protection against SLAPP lawsuits related to the range of issues of public interest or social significance.

SLAPP Lawsuits

A SLAPP suit – standing for strategic lawsuit against public participation – is a lawsuit that seeks to impose civil liability based on expression, communication, participation in, or an attempt to petition or influence government and the public on a substantive issue of public

[1] See *Greer v. Spock*, 424 U.S. 828 (1976) (I represented Dr. Benjamin Spock) and other free speech cases cited in my resume. See generally David Kairys, PHILADELPHIA FREEDOM, MEMOIR OF A CIVIL RIGHTS LAWYER (2008).
[2] *Baglini v. Lauletta*, Superior Court of New Jersey, Gloucester Co., No. GLO-L-1716-92, appeal, 338 N.J. Super. 282 (2001).

interest or social significance. SLAPP suits gained public attention, and got their distasteful reputation and moniker, after real estate developers in the 1980s regularly brought civil lawsuits against people who opposed their developments. The suits most often claimed defamation, interference with businesses or contracts, civil conspiracy or abuse of process based on, for example, a person's simply filing a complaint with zoning or environmental agencies asking that the agencies enforce established law. The suits, though they had little or no chance of success, sought large sums in damages and required opponents of development to hire lawyers and face litigation costs that are unaffordable by people of ordinary means. These lawsuits – soon to be named SLAPPS – had the desired effect: community organizations and individual critics of the developments were silenced.[3]

Most states[4] provide a remedy for defendants sued in SLAPP lawsuits by statute or by judicial decisions based on the 1st Amendment, because SLAPP suits intimidate, punish, and deter exercise of 1st Amendment rights, particularly the right to public participation in and to "petition" government, and thereby undermine freedom of speech and petition and participatory democracy.

Any civil action can be a SLAPP lawsuit; the most common are defamation and torts related to interference in businesses. SLAPP suits are usually brought without regard for the

---

[3] See generally George Pring and Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* (1996). It turned out that these developer SLAPPS were explicitly planned and designed throughout the industry to silence critics. Id. at chapter 3. For an example of a successful SLAPP in Pennsylvania, see *'Us vs. Them' in Pa. Gaslands*, Philadelphia Inquirer, Dec. 13, 2011, p. A1.

[4] See Note, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Courts after* Shady Grove, 114 COLUM. L. REV. 367, 375, 375 n. 52 (2014), citing the laws of the various states, and referring to a current online list maintained by the Public Participation Project, http://www.anti-SLAPP.org.

prospects for success. The law in most states provides for their dismissal and/or a counter action for damages and costs, usually called a "counter-SLAPP" or "SLAPP-back" lawsuit.[5]

Anti-SLAPP Decisions and Legislation

The law of SLAPP suits is derived from and associated with two antitrust cases that recognized a 1st Amendment limit on consideration of speech- or petition-protected conduct as a basis for antitrust liability, usually referred to as the "Noerr-Pennington doctrine."[6] This association and application of the doctrine are sound, but a broader analysis and history are most revealing and analytically helpful. The law of SLAPP suits and the Noerr-Pennington doctrine in antitrust cases are both part of a larger and longer development in 1st Amendment law.

While civil actions for defamation and other torts are a matter of private law and the 1st Amendment is a limit on government, the Supreme Court of the United States has long recognized a series of free speech limits on private rights and private causes of action. *New York Times v. Sullivan*,[7] which adopted a free-speech limit on defamation cases brought by public figures, is perhaps the most widely known of these. But they go back at least as far as the recognition in the 1940s that a "company town," though wholly owned and controlled by private, non-governmental entities, must accord the public free speech rights on its streets, sidewalks and parks.[8] Most recently, the Supreme Court, with only one justice dissenting, recognized free

---

[5] See Pring and Canan, supra note 3; Note, supra note 4.

[6] See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern RR. v. Noerr*, 365 U.S. 127 (1961).

[7] 376 U.S. 254 (1964).

[8] See *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (protecting protest at the funeral of a soldier killed in war by invalidating a civil recovery by the soldier's family); *NAACP v. Claiborne*, 458 U.S. 886 (1982) (protecting an economic boycott aimed at affecting government policy); *New York Times v. Sullivan*, supra; *City of Columbia v. Omni*, 499 U.S. 365 (1991) (antitrust); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (invalidating civil recovery for a parody); *Noerr* and *Pennington*, supra note 6; *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town).

speech limits on a claim for intentional infliction of emotional distress, stating that "[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits."[9]

These 1st Amendment limits on private rights are part of and necessary to freedom of speech, liberty, open debate, and unimpeded democracy, which would be unduly burdened and restricted if speakers are deterred and hesitant because their speech on public issues may result in a large civil liability and large litigation costs.

Jury Trial Rights

Some state and federal courts in other jurisdictions have held that some anti-SLAPP statutes violate the anti-SLAPP defendant's constitutional right to a civil jury trial, while others reject the jury trial challenge.[10]

---

[9] *Snyder v. Phelps*, 131 S.Ct. at 1215.

[10] See *Gaudette v. Davis*, 160 A.3d 1190 (Maine Supreme Court 2017) (sustains anti-SLAPP statute; analyzes as conflict between jury trial right and speech or participation right; establishes shifting burdens); *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623 (Minn. Supreme Court 2017)(invalidates anti-SLAPP statute); *Steinmetz v. Coyle & Caron*, 2016 U.S. Dist. LEXIS 99631 (D. Mass. 2016)(sustains anti-SLAPP statute); *Davis v. Cox*, 351 P.3d 862 (Washington Supreme Court en banc 2015)(invalidates anti-SLAPP statute); *Opinion of the Justices*, 641 A.2d 1012 (New Hampshire Supreme Court 1994)(invalidates anti-SLAPP statute); *Lee v. Pennington*, 830 S.2d 1037 (La. Ct. of App. (2002)(sustains anti-SLAPP statute); *Graves v. Chronicle Printing*, 2018 Conn. Superior LEXIS 3795 (2018)(sustains anti-SLAPP statute); *Schnorbus v. Meehan*, 2015 Nev. Dist. LEXIS 2888 2015)(sustains anti-SLAPP statute); *Hi-Tech Pharma. v. Cohen*, 208 F. Supp.3d 350 (D. Mass. 2016) (conflict between speech and jury rights based in the 7th Amendment; sustains anti-SLAPP statute).

In Pennsylvania, the issue[11] presents a conflict between two important rights: the civil jury trial right under Pennsylvania law, PA. CONST., art. I, §6;[12] and speech and petition rights under the state and federal constitutions, PA. CONST., art. I, §7; U.S. CONST., 1st Amendment.

The best analyses in the cases focus on the particular terms of the statute, recognize that there are important constitutional rights and interests on both sides, and seek to reconcile the conflict and preserve both to the extent possible. See particularly the Supreme Judicial Court of Maine decision in *Gaudette v. Davis*.

The courts invalidating anti-SLAPP statutes tend to view the civil jury trial right in absolute terms, instead of weighing the two rights, and often explicitly or implicitly discount the speech and participation rights.

In this balance, the speech and participation rights and interests are fundamental (but not absolute either). On the civil jury trial side, it is less clear. The right to a civil jury trial is often not treated as a fundamental right under federal or Pennsylvania law.

The Supreme Court of the United States has held that the 7th Amendment civil jury trial right is one of the few Bill of Rights provisions not incorporated by the 14th Amendment and therefore not applicable to the states.[13]

---

[11] An alternative way to view the issue not addressed in the cases is to focus on the substantive "immunity" from SLAPP suits and pre-trial "motion to dismiss" procedure set out in SB 95/HB 95. If the immunity is established and the pre-trial motion to dismiss is granted, there is no need for a trial, before a jury or judge. See *Feldman v. Hoffman*, 107 A.3d 821 (Pa. Commw. 2014) (high-ranking public official immunity); *Myers v. Comm., Dept. of Labor and Industry*, 458 A.2d 235 (Pa. Super. 1983) (judicial and prosecutorial immunity); *Pa.R.C.P. 1030.*

[12] The 7th Amendment to the federal Constitution addresses a civil right to a jury trial, but it has not been incorporated by the 14th Amendment and thus does not apply against the states. See Suja Thomas, *The Bill of Rights after McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159 (2002); *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916). It does apply as a "procedural" rule in cases tried before federal courts.

[13] The fundamental 6th Amendment jury trial right in criminal cases has been incorporated but limited based on the administrative needs of the courts. *Duncan v. La.*, 391 U.S. 145 (1968) (6th

Under Pennsylvania law, while the constitution refers to the civil jury trial right as "inviolate," the right is not presumed; it is easily waived, and must be timely demanded. Further, under Pennsylvania law a statutorily created civil claim or right and remedy, such as Pennsylvania's consumer rights statute, is not subject to the right to a jury trial unless it is common-law based or the legislature has expressly provided for a jury trial in the statute.[14]

In any event, SB 95/HB 95 adopts a formulation of the burdens of proof that minimizes the impact on jury trial rights: "The court shall dismiss any action arising from a constitutionally protected communication" *if* (1) "the moving party establishes *by a preponderance of the evidence* that the claim is based upon a constitutionally protected communication" *and* (2) the "nonmoving party has not demonstrated *a probability of prevailing*" on the claim.[15] SB 95/HB 95, §§2(d)(1)-(3) (emphasis added). Most of the cases that invalidate an anti-SLAPP statute reviewed a statute that places a much higher burden on the SLAPP defendant – often evidence establishing a "clear and convincing probability of prevailing" on their claim, as opposed to "a probability" of prevailing. See, e.g., *Davis v. Cox*, 351 P.3d at 864-66.

Conclusion

If we continue to allow SLAPP lawsuits to proceed, the message and impact will be devastating to freedom, liberty and democracy in Pennsylvania. Anyone with the financial resources to pay for lawyers and lawsuits – with little or no concern for the merits or unlikely success of litigation – would be encouraged to shut up their critics by filing lawsuits demanding

---

Amendment right to jury in criminal cases incorporated but limited to crimes with a possible sentence of more than six months).

[14] See *Mishoe v. Erie Ins. Co.*, 824 A.2d 1153, 1160-63 (Pa. Supreme Ct. 2003) (no jury trial on bad faith insurance claim); *Fazio v. Guardian Life Ins.*, 62 A.3d 396, 400-403 (Pa. Superior Ct. 2012) (no jury trial on Unfair Trade Practices and Consumer Protection Law claim).

[15] The claims or parts of claims that are not dismissed or limited as violations of the 1st Amendment proceed with discovery and the usual process, including a jury trial.

large recoveries. They are currently able to pursue such lawsuits at great cost and inconvenience to citizens whose only "offense" is to openly differ with government officials or policies, to speak out against impropriety, or to petition their government with their grievances.

Statutory remedies for SLAPP suits like SB 95/HB 95 provide the most significant relief because they enable the SLAPPed speakers to quickly stop SLAPP suits, to recover their counsel and litigation costs, and to avoid a SLAPP suit hanging over them for an extended period. The costs of a SLAPP lawsuit are substantial under SB 95/HB/95, which serves as a deterrent.

In jurisdictions without anti-SLAPP legislation, the remedy for a SLAPP suit is a counter-suit that often has difficult burdens and cannot be brought until after defeating the SLAPP suit, which comes after large counsel fees and costs and an extended period in which the pending SLAPP suit has its intended intimidating effect.

Current Pennsylvania law recognizes the need for this anti-SLAPP protection, but limits it to environmental issues. The protection should be extended to all issues of public interest or social significance, and it should expedite the process and impose substantial costs to minimize the toll on SLAPP targets and to serve as a deterrent – all of which SB 95/HB 95 does.