Nauman Smith

Attorneys At Law

Please remit to:
P.O. Box 840
Harrisburg, PA 17108-0840

Joshua D. Bonn, Esquire
Email: jbonn@nssh.com
(717) 236-3010, Ext 129

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Via Electronic Mail
mfink@pahouse.gop.com

House Judiciary Committee
c/o Mike Fink
26 Ryan Office Building
Harrisburg, PA 17120

RE: Public Hearing on House Bill 95 and Senate Bill 95 anti-SLAPP
Written Testimony of Joshua D. Bonn, Esq., Nauman, Smith, Shissler & Hall, LLP

The House should enact the Free Speech Protection Act (HB/SB 95) to protect individuals from frivolous lawsuits, known as strategic lawsuits against public participation (SLAPP suits). SLAPP suits are filed by powerful entities for the illegitimate purpose of silencing individuals who dare to criticize them with constitutionally protected speech.

I have seen first-hand the tremendous burden caused by a SLAPP suit. One of my clients was SLAPPED for criticizing a quasi-public entity's use of public funds. Although the lawsuit was filed more than 2 ½ years ago, and even though a federal court has ruled that the suit is objectively baseless, the suit remains pending. My client remains at the peril of the present legal system, which provides no mechanism for quick disposition of SLAPP suits.

HB/SB 95 contains a critical feature that will save individuals from the nightmare suffered by my client. It will empower individuals to file an expedited motion to dismiss SLAPP suits. The court must promptly hold a hearing to determine if the lawsuit is based upon constitutionally protected speech and if the plaintiff can prevail on any portion of the lawsuit not based upon constitutionally protected speech.

I. If enacted, the Free Speech Protection Act (HB/SB 95) will not violate the Pennsylvania Constitution.

Three other state supreme courts have ruled those states' anti-SLAPP laws to be unconstitutional because those statutes violated those states' constitutions.[1] All three decisions are identical in the sense that they held the statutes violated those states' constitutional right to trial by jury. None of these decisions are germane to an analysis of HB/SB 95 for several reasons.

As a threshold matter, it is well established that statutes are presumed to be constitutional. Pennsylvania School Boards Ass'n, Inc. v. Commonwealth Ass'n of School Adm'rs, 805 A.2d 476, 479 (Pa. 2002). A statute will not be declared unconstitutional unless it "clearly, palpably and plainly violates the Constitution." Id. Therefore, any party challenging a statute has a heavy burden to overcome the validity of the statute. Id.

The Pennsylvania Constitution is different from the aforementioned three states' constitutions in terms of the right to trial by jury. Both the WA (Art. 1 Sec. 21) and MN (Art. 1 Sec. 4) constitutions contain forward-looking language that reads in relevant part "the right of trial by jury shall remain inviolate"; and the NH constitution (Part 1 Art. 20) states that "the parties have a right to trial by jury". By contrast, the right to trial by jury in Pennsylvania is guaranteed by Article I, Section 6 of the Pennsylvania Constitution, which provides, "Trial by jury shall be as heretofore, and the right therof remain inviolate."[2]

The PA Supreme Court interprets the word "heretofore" to mean that Article I, Section 6 merely preserves the right to trial by jury in cases where the right existed at common law. Blum by Blum v. Merrell Dow Pharm., Inc., 626 A.2d 537, 543 (Pa. 1993). See also Wertz v. Chapman Township, 741 A.2d 1272, 1275-76 (Pa. 1999) ("The article and section preserving the right of a trial by jury has appeared in each version of Pennsylvania Constitutions. In construing this provision, **this court's case law makes clear that our Constitution preserves the right to a trial by jury only in those cases where it existed for the particular cause of action at the time our Constitution was adopted**"); also Mishoe v. Erie Insurance Company, 824 A.2d 1153,

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[1] Davis v. Cox, 351 P.3d 862 (Wash. 2015); Leiendecker v. Asian Women United of Minnesota, 848 N.W.2d 224, 233 (Minn. 2014); Opinion of the Justices, 641 A.2d 1012, 1013 (N.H. 1994).

[2] This analysis is limited to the constitutionality of the Act under the Pennsylvania Constitution because the right of trial by jury protected by the Seventh Amendment to the United States Constitution does not apply to the states. See Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996). Moreover, the Pennsylvania Supreme Court has noted differences between the right to trial by jury under the federal and state constitutions and has refrained from adopting interpretations of the Seventh Amendment when interpreting Article I, Section 6. Blum by Blum v. Merrell Dow Pharm., Inc., 626 A.2d 537, 549 (Pa. 1993).

1156 (Pa. 2003) ("Accordingly, the very factors that led us to conclude that there was no right to a jury trial in Wertz are also present in this case").

Article I, Section 6 "does not limit the power of the legislature to furnish modes of civil procedure in courts of justice." Blum at 544. Rather, it provides, "that a jury shall continue to be the tribunal for the determination of all questions of fact in controversies between individuals." Id. at 545 (quoting Commonwealth v. Collins, 110 A. 738, 738-39 (Pa. 1920)).

In certain legal proceedings, litigants are entitled to have juries decide disputed factual matters. But HB/SB 95 will not violate the right to trial by jury because the preliminary determination to be made by the trial court—whether speech is constitutionally protected—is a question of law. Courts already make this determination under Pennsylvania's current anti-SLAPP law. There is no logical reason to believe (or to presume) that HB/SB 95 would be found unconstitutional given that Pennsylvania's current anti-SLAPP law – a law that has been on the books for nearly two decades – has not been ruled unconstitutional. HB/SB 95 merely extends Pennsylvania's current anti-SLAPP law to include all constitutionally protected speech, regardless of political orientation.

A. HB/SB 95 is distinguishable from other anti-SLAPP laws stricken in other states.

HB/SB 95 will empower a person to file a motion to dismiss any legal action that is based on, relates to or is in response to that person's constitutionally protected speech. [Proposed Section 8340.4(a)].

Upon filing of a motion to dismiss, the court must promptly schedule a hearing. [Proposed Section 8340.4(d)(1)]. The court must determine, first, if the moving party establishes by a preponderance of the evidence that the claim is based upon a constitutionally protected communication. Id. If such determination is made, the court must determine, second, if the nonmoving party has not demonstrated a probability of prevailing on the portions of the claim which are not based upon, in whole or in part, or are not separable from, a constitutionally protected communication. Id. If the court makes both determinations, it must dismiss the legal action. Id.

Notably, 28 states, including Pennsylvania, have enacted anti-SLAPP legislation. No one disagrees that Pennsylvania needs a stronger anti-SLAPP law. The Pennsylvania Bar Association (PBA) has taken the position that "Pennsylvania should have anti-SLAPP legislation because anti-SLAPP legislation can be an important protection of the rights that encourage public citizen participation in public issues." Report of Civil and Equal Rights Committee of the Pennsylvania Bar Association, approved by the House of Delegates, as amended, November 20, 2015 (PBA Report).

The PBA questioned the constitutionality of a prior version of the Act because it contained similar language to Washington's anti-SLAPP law, which has been declared to violate

the right to trial by jury guaranteed by the Washington Constitution. The pending version of the Act has been revised to eliminate this concern.

Washington's anti-SLAPP law contained the following procedure to adjudicate motions to dismiss:

> When a party brings such a motion, the moving party has "the initial burden of showing by a preponderance of the evidence" that the claim is based on an action involving public participation and petition. [RCW 4.24.525 (4)(b)]. If the moving party meets this burden, the burden shifts to the responding party "to establish **by clear and convincing evidence** a probability of prevailing on the claim." Id.

Davis v. Cox, 183 Wash. 2d 269, 276, 351 P.3d 862, 865 (2015) (emphasis supplied).

The Supreme Court of Washington took issue with the "clear and convincing evidence" language—finding that it "require[d] the trial judge to weigh the evidence and dismiss a claim unless it makes a factual finding that the plaintiff has established by clear and convincing evidence a probability of prevailing at trial." Id., 351 P. 3d at 871. The court concluded that such procedure violated the right to trial by jury under the Washington Constitution because it "invade[d] the jury's essential role of deciding debatable questions of fact." Id., 351 P. 3d at 874.[3]

HB/SB 95 is clearly distinguished from other states' anti-SLAPP laws. The "clear and convincing evidence" language has been deleted from pending version of the Act. [Proposed Section 8340.4(d)(1)]. The omission of this phrase eliminates any assumption that trial courts will be tasked with making factual determinations in violation of the right to trial by jury.

B. Whether speech is constitutionally protected is a question of law for a Court to decide not a jury.

HB/SB 95 codifies constitutional protections for free speech including the right to petition the government. The Act defines the term a "constitutionally protected communication" to include "a … statement or writing that falls within the protection of the right to petition government or the right to free speech under the Constitution of the United States or the Constitution of Pennsylvania." [Proposed Section 8340.4(g)].

Under the Noerr-Pennington doctrine, an individual is immune from liability for exercising his or her First Amendment right to petition the government. Firetree, LTD. V.

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[3] The Minnesota and New Hampshire Supreme Courts struck down their respective states' anti-SLAPP laws for the same reason. Leiendecker, 855 N.W.2d at 233 ("we conclude that the anti-SLAPP statutes require the responding party produce evidence to defeat an anti-SLAPP motion and that, in evaluating such a motion, the district court must make a finding regarding whether the responding party has met its burden to show by clear and convincing evidence that the acts of the moving party are not immune"); Opinion of the Justices, 641 A.2d at 1015 ("the trial court that hears the special motion to strike is required to weigh the pleadings and affidavits on both sides and adjudicate a factual dispute.").

Fairchild, 920 A.2d 913, 919 (Pa. Commw. 2007) (citing E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-140 (1961) and United States Mine Workers v. Pennington, 381 U.S. 657, 669-670 (1965)). This is an absolute right that does not depend on whether the speaker has a proper motive or intent. Id. Whether a statement is absolutely privileged is a question of law. Pawlowski v. Smorto, 588 A.2d 36, 41 (Pa. Super. 1991).

The determination of whether speech is immune under HB/SB 95 is similar to a determination of whether a public employee's speech is constitutionally protected, which is a question of law. Carr v. Commonwealth, Dept. of Transportation, 189 A.3d 1, 10 (Pa. Commw. 2018). Likewise, the determination as to whether a statement is capable of defamatory meaning is a question of law for the trial court to decide. Feldman v. Lafayette Green Condo. Ass'n, 806 A.2d 497, 500 (Pa. Commw. 2002) (affirming grant of preliminary objections and dismissal of defamation complaint at pleading stage). The applicability of the sham exception to the Noerr-Pennington doctrine is a matter of law. See, Trustees of Univ. of Pennsylvania v. St. Jude Children's Research Hosp., 940 F. Supp. 2d 233, 242 (E.D. Pa. 2013) (applying Pennsylvania law) (dismissing complaint over Plaintiff's objection that sham exception to Noerr-Pennington doctrine presented questions of fact that could not be resolved at pleading stage).

This decisional law makes clear that judges, not juries, decide whether speech is constitutionally protected. Furthermore, dismissal of cases prior to trial by jury is appropriate where trial court determines as a matter of law that the plaintiff cannot establish a *prima facie* case. Washington v. Baxter, 553 Pa. 434, 450, 719 A.2d 733, 741 (1998) ("Where a plaintiff has failed to establish that he has a cause of action, the constitutional right to a jury trial is not violated when that plaintiff's suit is dismissed."); Com. v. All That Certain Lot or Parcel of Land Located at 605 Univ. Drive, 104 A.3d 411, 429 (Pa. 2014) ("Where summary judgment is proper because of the lack of factual dispute, the right to proceed to a jury trial is foreclosed.").

C. HB/SB 95 extends the protections of Pennsylvania's current anti-SLAPP law, the Environmental Immunity Act, 27 Pa. C.S. §§ 8301-8305, to all constitutionally protected speech.

The Environmental Immunity Act immunizes communications made to a government agency in connection with the implementation and enforcement of environmental laws and regulations. Carlson v. Ciavarelli, 100 A.3d 731, 736 (Pa. Commw. 2014). The expedited dismissal procedure under HB/SB 95 mirrors the Environmental Immunity Act, which provides:

> **§ 8303 Right to a Hearing**
>
> A person who wishes to raise the defense of immunity from civil liability under this chapter may file a motion with the court requesting the court to conduct a hearing to determine the preliminary issue of immunity. If a motion is filed, the court shall then conduct a hearing and if the motion is denied, the moving party shall have an interlocutory appeal of right to the Commonwealth Court, during which time all discovery shall be stayed.

27 Pa. C.S. § 8303. It is inexplicable that the expedited dismissal procedure is available only to individuals who engage in speech favorable to environmental regulation and not to those of other political persuasions.

A trial court analyzing an immunity claim under the Environmental Immunity Act must utilize the same two-step determination as proposed under HB/SB 95. See Pennsbury Village Associates., LLC v. Aaron McIntyre, 11 A.3d 906, 912 (Pa. 2011). First, the party seeking immunity must make a threshold showing that the cause of action arose because he engaged in speech protected by the Environmental Immunity Act. Id. Second, if the court determines this threshold is satisfied, the party opposing immunity must then demonstrate one of the statutory exemptions apply or that some other overriding legal basis defeats the immunity claim. Id., citing DaimlerChrysler Motors Company v. Lew Williams, Inc., 142 Cal.App.4th 344, 350, 48 Cal.Rptr.3d 233 (2006) ("If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.").

Importantly, the Pennsylvania Supreme Court in Pennsybury Village Associates, LLC looked to California decisional law when interpreting the expedited dismissal procedure under the Environmental Immunity Act. This is because California's anti-SLAPP statute requires courts to make the same type of legal based determinations as a court applying the expedited dismissal procedure under Pennsylvania's Environmental Immunity Act. California's anti-SLAPP statute provides:

> 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 Constitution or the 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.

Cal. Civ. Proc. Code § 425.16 (b)(1). California appellate courts have determined that this expedited dismissal procedure does not violate the right to trial by jury under the federal and California constitutions because "the trial court's consideration of the defendant's opposing affidivits does not permit a weighing of them against plaintiff's supporting evidence, but only a determination that they do not, as a matter of law, defeat that evidence." Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 37 Cal. App. 4th 855, 867, 44 Cal. Rptr. 2d 46, 53 (1995) (internal citations and quotations omitted).

HB/SB 95 will extend the procedural protections under Pennsylvania's current anti-SLAPP law to all constitutionally protected speech. Since HB/SB 95 will require courts to make the same legal based determinations as required by the Pennsylvania Environmental Immunity Act, HB/SB 95 will not require courts to decide factual issues in violation of the right to trial by jury. The House should adopt HB/SB 95, if for no other reason, than to ensure that all citizens have the same procedures available to escape oppressive and abusive SLAPP suits, regardless of political orientation.

II. Conclusion

The House should enact the Free Speech Protection Act (HB/SB 95). The proposed expedited dismissal procedure will not violate the right to trial by jury guaranteed by the Pennsylvania Constitution. Although SLAPP suits are brought for improper purposes, HB/SB 95 does not require trial courts to weigh competing motives. Rather, courts are tasked to determine if the defendant engaged in constitutionally protected speech. This requires courts to make determinations of law. The expedited procedure to dismiss SLAPP suits should be available to all citizens, regardless of their point of view, not merely those who favor the implementation and enforcement of environmental laws and regulations.

NAUMAN, SMITH, SHISSLER & HALL, LLP

By: _____

Joshua D. Bonn, Esquire
Supreme Court ID# 93967
200 North Third Street, 18th Floor
Harrisburg, Pennsylvania 17108
Telephone: (717) 236-3010

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