IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

RICHARD K. LEHAN, Plaintiff, v. FOX TELEVISION STATIONS, INC., et al, Defendants.	)	Case No. 2011 CA 004592 B Judge Joan Zeldon Next Event: Anti-SLAPP Motion Hearing November, 17, 2011 1:30 PM

DEFENDANTS' SUPPLEMENTAL BRIEF ON RETROACTIVITY OF THE ANTI-SLAPP ACT IN SUPPORT OF THEIR SPECIAL MOTION TO DISMISS

Pursuant to the Court's instructions at the September 30, 2011 scheduling conference, Defendants Fox Television Stations, Inc. ("FOX 5") and Roby Chavez (collectively "Defendants"), respectfully submit this Supplemental Brief On Retroactivity of the Anti-SLAPP Act, and in further support of Defendants' Special Motion to Dismiss filed pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code §16-5502(a).

ARGUMENT

The District of Columbia Anti-SLAPP Act did not require Plaintiff Lt. Richard Lehan to plead any new elements for the defamation claims in his Complaint. Nor did the law change Lt. Lehan's burden to prove those elements. Lt. Lehan has the *same* burden to plead and prove the *same* elements as any defamation plaintiff had before passage of the Anti-SLAPP law. He just has to meet his burden earlier under the new law. As for Defendants, their broadcast will be judged under the same legal test for defamation that existed before the statute. The statute makes it no harder for either Lt. Lehan or Defendants to prevail on the merits.

The Anti-SLAPP Act, therefore, is not "substantive," and is "procedural." Because the statute is procedural, it applies retroactively to this lawsuit, which was filed after the statute's

enactment and after the airing of the FOX 5 news report at issue. Under established District law, a new statute that has no impact on a plaintiff's substantive right of recovery, and simply sets out new court procedures, applies to claims that accrued before the statute was enacted.

Since Lt. Lehan must prove the exact same elements of his defamation claim (falsity, statements of fact and not opinion, lack of privilege, actual malice and damages) before and after the enactment of the Anti-SLAPP Act, the statute applies this case and the Court must decide Defendant's anti-SLAPP special motion to dismiss.

I. Procedural Statutes Like the Anti-SLAPP Act Are Retroactive.

Settled law in the District generally holds that statutory provisions that are procedural apply retroactively to claims airing prior to the date of enactment. No legislative directive is required for a court to retroactively apply a procedural statute. *Lacek v. Washington Hosp. Center Corp.*, 978 A.2d 1194, 1197 (D.C. 2009) ("laws which provide for changes in procedure may properly be applied to conduct which predated their enactment") (quoting *Duvall v. United States,* 676 A.2d 448, 450 (D.C. 1996)); *Montgomery v. District of Columbia,* 598 A.2d 162, 166 (D.C. 1991) ("Unless a contrary legislative intent appears, changes in statute law which pertain only to procedure are generally held to apply to pending cases. This is true although the transaction which precipitated the dispute took place prior to the enactment of the statute.").

The U.S. Supreme Court and the D.C. Circuit have similarly recognized the principle that procedural acts apply retroactively. *Landgraf v. USI Film Products*, 511 U.S. 244, 275 (1994) ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. . . . [given] the diminished reliance interests in matters of procedure."); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711(1974) ("We anchor our holding in this case on the principle that a court is to apply the law in effect at the

time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."); *Moore v. Agency for Int'l Dev.*, 994 F.2d 874, 879 (D.C. Cir. 1993) (holding that "a procedural rule" that "does not alter substantive law" is to be applied retroactively); *Federal Broadcasting System v. FCC*, 239 F.2d 941, 944 (D.C. Cir. 1956) ("If the amendment is either procedural or remedial in character the settled rule permits its retroactive application."); *Lee v. Reno*, 15 F. Supp. 2d 26, 44 (D.D.C. 1998) ("In other situations, involving, for example, statutes that affect prospective relief, change procedural rules, or confer or oust jurisdiction, retroactive application is proper.").[1]

Here, the new anti-SLAPP law is plainly procedural and applies in this lawsuit.[2] It permits defendants to file a "special motion to dismiss" in which the defendant must show that the "act" sued upon is of the type encompassed by the Anti-SLAPP Act, *i.e.*, an act in furtherance of the right of advocacy that addresses "an issue of public interest." *Id.* D.C. Code § 16-5502. Upon that factual showing, the court must grant the special motion to dismiss unless the plaintiff demonstrates that "the claim is likely to succeed on the merits[.]" *Id.* This simply means that a defamation plaintiff must show evidence meeting the essential elements of his claims—falsity, statements of fact and not opinion, lack of privilege, actual malice and damages—the same elements that a defamation plaintiff had to show before the enactment of

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[1] The commentators and the model rules agree. *See, e.g.*, Singer & Singer, Statutes and Statutory Construction [Sutherland], § 41.4, at 429 (7th ed. 2009) ("Retroactive application is particularly appropriate where a procedural rule is changed after a suit arises, because rules of procedure regulate secondary rather than primary conduct."); *id.* at 434-35 ("Courts presume that procedural statutes apply retroactively."); Uniform Statute and Rule Construction Act, § 16 (1995) ("procedural provisions" "affect a pending action or proceeding or a right accrued before the amendment or repeal takes effect").

[2] Contrary to statements made by Lt. Lehan's counsel at the Court's status conference, the federal court in D.C., in ruling this summer on a motion brought under the D.C. Anti-SLAPP statute, did not reach the issue of retroactivity. *See* the Honorable Richard Leon's July 28, 2011 Minute Order, *Sherrod v. Breitbart et al.*, Case No. 1:11-cv-00477-RJL (D.D.C.), the docket of which is attached as Exhibit A.

the statute.[3] In short, the Anti-SLAPP law permits defendants to call for an early testing of a plaintiff's claims—instead of awaiting a summary judgment proceeding—to enable courts to swiftly weed out frivolous lawsuits seeking to quell public discussion of public issues.

Even at this juncture, if Lt. Lehan were able to demonstrate a prima facie case that FOX 5's report was false, unprivileged, made with First Amendment actual malice, and that he suffered actual injury—all of which he has failed to do—this lawsuit would continue even under the new law. Thus, because the law did not affect Lt. Lehan's substantive opportunity to establish his claims, or his substantive right to recover, it is purely procedural and applies here.

II. The Anti-SLAPP Act Does Not Change the Legal Consequences of FOX 5's Allegedly Wrongful Conduct.

The distinction between "procedural" and "substantive" is often confusing and misinterpreted.[4] Indeed, as Justice Frankfurter observed, "substance and procedure are the same keywords to very different problems. Neither substance nor procedure represents the same invariants. Each implies different variables depending upon the particular problem for which it is used." *Guaranty Trust Co v. York*, 326 U.S. 99, 108 (1945).

But in the District, the distinction is clear: substantive law, which "*changes the legal consequences of acts completed before its effective date*," cannot be applied retroactively. *Nixon v. District of Columbia Dep't of Employment Servs.*, 954 A.2d 1016, 1022 (D.C. 2008) (emphasis added). In other words, a law is not substantive so long as it does not "impair vested rights."

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[3] The Anti-SLAPP statute did not alter settled law in the District that, to prevail in any defamation action, a plaintiff must allege and prove: "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third-party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Armenian Assembly of America, Inc. v. Cafesjian*, 597 F. Supp. 2d 128, 136-37 (D.D.C. 2009) (*citing Crowley v. North Am. Telecomms. Ass'n*, 691 A.2d 1169, 1173 n. 2 (D.C. 1997).

[4] *See* Bryan A. Garner, *Garner's Dictionary of Legal Usage*, at 713 (3d. Ed. 2011) ("Separating these two phrases presents no small conundrum.").

Edwards, 558 A.2d at 1146; *see also Lacek*, 978 A.2d at 1197 (citing *Landgraf*, 511 U.S. at 269 n. 3). The retroactivity doctrine ensures that people who conform their behavior to existing law are judged by those standards, and that no one is measured by, or deprived of redress under, rules enacted after the fact. *See Edwards*, 558 A.2d at 1146-47 ("statutes that create additional remedies, relate to the modes of procedure or confirm or clarify existing rights do not contravene the general proscription against the retrospective operation of legislation.").

Based on this well-established authority, the D.C. Circuit of Appeals held in *Lacek v. Washington Hosp. Center Corp.*, 978 A.2d 1194, 1197 (D.C. 2009) that a statute establishing a new legal procedure for medical malpractice plaintiffs could be applied retroactively In that case, the plaintiff's medical malpractice claim arose from a medical procedure in 2004, well before the District enacted the pre-suit notice law in 2006. *Id.* The Court of Appeals held that the rule was procedural because, "the Act did nothing to curtail the right of medical malpractice plaintiffs to sue, but simply added the procedural requirement that 90-days prior notice be given...before a suit may be filed." *Id.* It further held that the statute could be applied to the claim retroactively, and affirmed dismissal of the lawsuit, because the plaintiff failed to file notice 90 days before filing suit, as required under the new law. *Id.* As the Court of Appeals explained, the statute was procedural because it was "not a case of a statute 'operating retrospectively to bar the enforcement of pre-existing rights.'" *Id.* at 1198, n.4.

Similarly, in *Montgomery v. District of Columbia,* 598 A.2d 162, 166 (D.C. 1991), the Court of Appeals retroactively applied a new law divesting original jurisdiction to hear D.C. government employment appeals from the Superior Court, and granting it to a separate tribunal, even where the plaintiff's case was filed prior to enactment. *Id.* at 165-67. The Court held that a statute providing for a different tribunal "is deemed procedural in nature, for it merely alters

the remedy and does not impair vested rights." *Id.* at 166. The Court relied on the rule that "the procedure in an action is governed by the law regulating it at the time any question of procedure arises," and concluded that the application of a different procedure depending on the time of the filing of the action would lead to "chaos." *Id.* at 166 (quoting *Lazarus v. Metropolitan Ry. Co.*, 40 N.E. 240, 241 (N.Y. 1895) and *People ex rel. Central New England Ry. Co. v. State Tax Comm'n*, 26 N.Y.S.2d 425, 426 (N.Y. 1941)).

The converse is of course true. Where a statute changes the legal consequences of an act, it may not be applied retroactively. For example, in *Bank of America v. Griffin*, 2 A.3d 1070, 1071 (D.C. 2010), in the middle of the underlying litigation, the District enacted a statute that made a *lis pendens* effective only upon the *recording* of notice of a lawsuit, and not, as existing law had provided, merely upon its *filing*. *Id.* at 1073. Bank of America asserted that its sponsorship of a second mortgage, during the pendency of the litigation, gave it a priority interest over the first mortgage because that notice of *lis pendens* was never recorded. *Id.* The Court of Appeals disagreed, holding the statute could not be applied retroactively because "it would most certainly affect the substantive rights of litigants who had cases pending on [the effective date of the act]," changing the outcome of the case. *Id.* at 1076.

Here, the D.C. Anti-SLAPP statute does not change the outcome of this case. The legal standards under which FOX 5's broadcast will be measured, and any redress for actionable defamations under D.C. law, remain exactly the same. Contrary to Lt. Lehan's suggestion (Opposition to Defendants' Special Motion to Dismiss ("Opposition"), at 3-5), D.C. Code Section 16-5502 has had no impact whatsoever on the elements he needs to prove to establish a prima facie claim of defamation. If the conduct alleged to be defamatory was actionable as of January 2011, then the Anti-SLAPP Act does nothing to prevent this suit from proceeding on the

merits. Rather, it equips the Court and defendants with a simple procedure to promptly dispose of meritless lawsuits seeking to silence speech on matters of public concern.

Lt. Lehan argues that the new Anti-SLAPP statute is not procedural because the word "substantive" appears in the D.C. Council's Committee on Public Safety and the Judiciary's Report. (Opposition at 4). But the D.C. Council's use of this one word does not bind this Court. This Court is required to analyze the new statute under the test developed under District case law to determine whether a law is "procedural." Under this test, it is without dispute that the Anti-SLAPP Act is procedural, not substantive, because: (1) the Anti-SLAPP Act does not "change the legal consequences" of FOX 5's actions, *see Nixon*, 954 A.2d at 1022; (2) the Committee Report clearly declares that the law "adds new provisions in the D.C. Official Code to provide an *expeditious process* for dealing with [SLAPPS.]" (emphasis added), *see* Report at 6 (attached Exhibit 3 to Defendants' Special Motion), and; (3) the fiscal impact statement accompanying the Committee Report reflects that the statute was designed to have a "beneficial impact on *current* and potential SLAPP defendants." (emphasis added) (*Id.* at Attachment 3 to the Report).

The law also does not, as Lt. Lehan incorrectly asserts, reallocate the burden of proof (Opposition at 5). Instead, it simply asks the plaintiff to make his case at the early stages of litigation. It is always the plaintiff's burden to prove each element of his cause of action; the Anti-SLAPP Act merely accelerates the time at which Lt. Lehan must meet his burden.[5]

Courts also have uniformly rejected Lt. Lehan's argument that the prevailing party attorney's fees provision in the new law renders it non-retroactive and thus inapplicable here. (Opposition at 5). *See e.g., Robertson v. Rodriguez,* 36 Cal. App. 4th 347, 352 (Cal. Ct. App.

[5] Even if the anti-SLAPP law reallocates burdens—which it does not—D.C. law squarely holds that "burden of proof [is] a procedural matter" and that "a statute relating solely to procedural law, such as burden of proof . . . applies to all proceedings after its effective date even though the transaction occurred prior to its enactment." *United Securities Corp. v. Bruton*, 213 A.2d 892, 893-94 (D.C. 1965).

1995) (applying anti-SLAPP law retroactively and awarding fees and costs to prevailing defendant); *Ingels v. Westwood One Broadcasting Services, Inc.*, 129 Cal.App.4th 1050, 1065 (Cal. Ct. App. 2005) (same); *Shoreline Towers Condominium Ass'n v. Gassman*, 936 N.E. 2d 1198, 1208 (Ill. App. 2010) (same). Moreover, this argument is premature as no fees motion is pending, and the new law's procedure on fees is segregable from the remainder of the statute.

As the statute has no impact on the legal consequences of FOX 5's broadcast, and in no way diminishes Plaintiff's right to bring his libel claims, the Anti-SLAPP Act's special motion to dismiss procedure should apply here.

III. Other State Courts Have Applied Similar Anti-SLAPP Laws Retroactively.

Other state courts have applied similar SLAPP laws to lawsuits involving statements published before the effective date of the statute, and even to lawsuits already pending on the effective date of the statute. The most notable example is California's anti-SLAPP law, which, like the District's new law, permits a defendant to file a "Special Motion to Strike" claims arising from acts in furtherance of a person's right of free speech in connection with a public issue. California Code of Civil Procedure § 425.16.

California courts have consistently held that the statute can be applied retroactively because the California anti-SLAPP statute "does not change the legal effect of past conduct. It merely is a procedural screening mechanism for determining whether a plaintiff can demonstrate sufficient facts to establish a prima facie case to permit the matter to go to a trier of fact." *Robertson v. Rodriguez*, 36 Cal.App.4th 347, 356 (Cal. Ct. App. 1995). *See also Ingels v. Westwood One Broadcasting Services, Inc.*, 129 Cal.App.4th 1050, 1065 (Cal. Ct. App. 2005); *Brenton v. Metabolife International, Inc.*, 116 Cal.App.4th 679, 689 (Cal. Ct. App. 2004) ("The anti-SLAPP statute is a procedural statute, the purpose of which is to screen out meritless claims

. . . that 'applying changed procedural statutes to the conduct of existing litigation, even though the litigation involves an underlying dispute that arose from conduct occurring before the effective date of the new statute, involves no improper retrospective application because the statute address conduct in the future'"); *Robertson v. Rodriguez,* 36 Cal. App. 4th 347, 352 (Cal. Ct. App. 1995) (applying California's anti-SLAPP statute even though allegedly libelous statement was published before statute's effective date). Indeed, *a D.C. federal district court applying California law* found that the California anti-SLAPP law applied retroactively, but denied the anti-SLAPP motion to strike as "untimely" under that law. *Blumenthal v. Drudge*, 2001 WL 587860, at *3 (D.D.C. 2001).

Similarly, the Illinois anti-SLAPP statute, 735 ILCS 110/1 *et seq.* has been applied retroactively as "procedural in nature". *Shoreline Towers Condominium Ass'n v. Gassman*, 936 N.E. 2d 1198, 1208 (Ill. App. 2010) (finding Illinois anti-SLAPP statute procedural in nature, applying retroactively to pending case). And in Washington state, the first state to enact an anti-SLAPP law in 1989, a federal district court applied the law, R.C.W. §4.24.525, retroactively on grounds that it is "procedural and does not affect a vested right." *Nguyen v. County of Clark*, 732 F. Supp. 2d 1190, 1193-94 (W.D. Wash. 2010).

Lt. Lehan urges that this Court make the District of Columbia the outlier jurisdiction in its application of anti-SLAPP law. To the contrary, sound local precedent, based on well-reasoned policy, compel the conclusion that the District's law, like these other jurisdictions', applies retroactively as it does not affect Lt. Lehan's substantive rights.

IV. The *Erie* Substantive/Procedural Test is Inapplicable Here.

Lt. Lehan's erroneous assertion that the Anti-SLAPP Act creates new procedures that are "substantive" is based on his citation of inapposite cases that apply state anti-SLAPP statutes in

federal diversity cases. (*See* Opposition at 6). In these federal cases, the courts are required to conduct an analysis under *Erie v. Tompkins* and its progeny to determine the applicability of state law in federal diversity cases, which is manifestly different from the analysis required for retroactive application, despite the *Erie* cases' traditional use of the same "substantive" and "procedural" nomenclature.

In federal diversity cases applying state procedural laws, the test is simply whether the state law directly conflicts with existing federal procedure. *See Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. __, 130 S. Ct. 1431 (2010). Indeed, numerous federal courts have successfully applied state anti-SLAPP laws because they do not "directly collide" with federal procedure. *See e.g., Godin v. Schencks*, 629 F.3d 79, 85-87 (1st. Cir. 2010) (holding that neither Rule 12(b)(6) nor Rule 56 is so broad as to preclude the special proceedings under Maine's anti-SLAPP law);[6] *Henry v. Lake Charles Am. Press, LLC,* 566 F.3d 164 (5th Cir. 2009) (applying Louisiana's anti-SLAPP law as a "procedural mechanism"); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (holding that California's similar anti-SLAPP law had no "direct collision" the Federal Rules). And federal courts have also applied anti-SLAPP laws retroactively. *Nguyen*, 732 F. Supp. 2d at 1193-94.

Here, the *Erie* analysis applied by federal courts in diversity cases has no application to this case, and the *Erie* cases Lt. Lehan relies on are off-point. In this case, the District's substantive law and the Superior Court's Rules dictate this Court's analysis on retroactivity of the District's Anti-SLAPP Act.

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[6] Unlike the District's anti-SLAPP law, the Maine anti-SLAPP law, Me. Rev. Stat. tit. 14 §556, differs substantially because it materially alters the quantum of proof a plaintiff must meet to prevail. *See Godin*, 629 F.3d at 89 ("Section 556 substantively alters the type of harm actionable—that is, plaintiff must show the defendant's conduct 'resulted in 'actual injury' to the plaintiff.").

CONCLUSION

For the foregoing reasons, this Court should find that the Anti-SLAPP Act provides a purely procedural mechanism that does not disturb the elements of Lt. Lehan's defamation claims, and therefore, that the Anti-SLAPP Act applies retroactively to Lt. Lehan's lawsuit and to the Defendants' conduct alleged in the Complaint. For the reasons expressed in this Memorandum, as well as the arguments previously advanced, Defendants respectfully request that the Court grant the Special Motion to Dismiss and dismiss this action with prejudice.

Dated: October 21, 2011

Respectfully submitted,

/s/ Charles D. Tobin

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2011, a copy of the forgoing was filed with the Court and served via CasefilesXpress on:

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