IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

RICHARD K. LEHAN, Plaintiff, v. FOX TELEVISION STATIONS, INC., et al. Defendants.	)	Civil Action No. 2011 CA 004592 B Judge Joan Zeldon Next Event: Initial Scheduling Conference September 30, 2011 9:30 a.m.

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS

COMES NOW, Plaintiff, Richard K. Lehan, by counsel, and submits this Memorandum of Points and Authorities in Opposition to Defendants' Special Motion to Dismiss as follows:

I. BACKGROUND

The negligence and acts of defamation committed by the Defendants which gave rise to the present cause of action occurred on or before January 3, 2011. On January 3, 2011, Fox Television Stations, Inc. ("Fox News") ran a television news story, and published an internet transcript of that story, authored by Defendant reporter Roby Chavez ("Chavez"), entitled "Allegations of Overtime Abuse in the D.C. Fire and EMS Department." The story repeatedly and inaccurately details private information about Mr. Lehan to intentionally place him in a negative light. The figures cited by the Defendants in the news story were deceptive, inaccurate and clearly wrong. After accusing Mr. Lehan of abusing the overtime process, the story further defames him by stating falsely that he and his brother were actually in **charge** of the computerized overtime scheduling system (giving them control to abuse the process).

Prior to the airing of the Fox News story, Mr. Lehan had a distinguished reputation in the community, having served as a firefighter for twenty-two (22) years. He received numerous

recognitions and awards for service to the community as a firefighter, including a Bronze Bar for Valor and a certificate of award for heroic duty as a result of the September 11, 2001, terrorist attacks. Mr. Lehan is one of only a few members employed by FEMS who has a Commercial Driver's License (CDL) and who is a Certified Fire Investigator.

On June 10, 2011, Mr. Lehan filed the present cause of action based on the above news story, alleging Libel *Per Se* and Libel against Chavez and Fox News, on theories of direct liability and *respondeat superior.* On July 22, 2011, Defendants filed a Special Motion to Dismiss based upon the recently enacted District of Columbia Anti-SLAPP Act of 2010. For the reasons set forth herein, this motion should be denied.

II. ARGUMENT

A. The D.C. Anti-SLAPP Act was not in effect at the time the incident at issue occurred and there is no evidence of legislative intent to give it Retroactive Effect.

Although titled the District of Columbia "Anti-SLAPP Act of 2010," it is undisputed that the statute did not become effective until ***March 31, 2011*** – approximately three (3) months after the defamatory news story aired on **January 3, 2011**, by the Defendants in the present action; *see* D.C. Law 18-351 §8 ("This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register."); Notice 1036947, D.C. Law 18-351, 58 D.C. Reg. 17 (April 29, 2011), *available at*,

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http://www.dcregs.dc.gov/Gateway. The statute on its face is therefore inapplicable to this case.[1]

The D.C. Court of Appeals recently addressed retroactivity of statutes when it faced the question of whether a *lis pendens* statute was retroactive. *Bank of America, N.A. v. Griffin*, 2 A.2d 1070 (D.C. 2010). The appellant in that case, citing *Montgomery v. District of Columbia*, 598 A.2d 162 (D.C. 1991), argued that the new statute was "procedural, rather than substantive" and therefore should apply to pending cases. *Bank of Am.*, 2 A.3d at 1075. In rejecting that argument, the D.C. Court of Appeals explained that *Montgomery* was distinguishable "because the statute in that case was clearly procedural– it established a new tribunal for administrative appeals. In contrast, [the *lis pendens* statute] is not so easily categorized as either a 'procedural' or 'substantive' law". *Id.* at 1076. The D.C. Court of Appeals made clear that when a statute is not readily categorized as either procedural or substantive, or when it would have substantive consequences, the *Montgomery* rule does ***not*** apply:

> In sum, because D.C. Code §42-1207 is not easily categorized as either procedural or substantive, and because its retroactive application would certainly have substantive consequences, we decline to follow the reasoning outlined in *Montgomery, Supra*, that laws "which pertain ***only to procedure*** are generally held to apply the *Wolf* presumption that "statutes are to be construed as having only a prospective operation, unless there is a clear legislative showing that they are to be given a retroactive or retrospective effect."

Id. (emphasis in original). Thus, the D.C. Court of Appeals held that a clear legislative showing of retroactive intent is required where the statute is substantive, is not easily categorized as either procedural or substantive, or has substantive consequences. This is in accord with the "general rule"

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[1]Lest Defendants maintain that the Complaint in this case was not filed until June 10, 2011, it is important to note that retroactivity of a statute refers to the date of the acts themselves, not the date the litigation was filed. Application of new legislation is **retroactive if it changes the legal consequences of acts completed before its effective date.** *Bank of America, N.A. v. Griffin*, 2 A.2d 1070, 1073 (D.C. 2010)

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that statutes are construed to be prospective unless there is a clear legislative showing of an intent to give them retroactive effect. *See Wolf v. District of Columbia Rental Accommodations Comm'n*, 414 A.2d 878, 880 n.8 (D.C.1980); *Accord Windsor v. State Farm Ins. Co.*, 509 F. Supp. 342, 344 (D.D.C. 1981) ("[S]tatutes are not to be applied retroactively unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot otherwise be satisfied.").

Here, there is little question that the D.C. Anti-SLAPP Act is substantive. Indeed, the Court need look no further than Defendants' own brief and exhibits to support this point. In attempting to make the argument that the D.C. Anti-SLAPP Act was intended to apply to this type of action, Defendants quote from the report of the Council on the District of Columbia Committee on Public Safety and the Judiciary, Report on Bill 18-893, Anti-SLAPP Act of 2010 (Nov. 18, 2010) (the "Committee Report") stating that the D.C. Anti-SLAPP Act is designed, among other things, to "provide a defendant to a SLAPP with **substantive rights** to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest." Defendants' Brief, Page 7 (emphasis added). Thus, Defendants very own brief makes plain that the D.C. Anti-SLAPP Act was described as incorporating substantive rights.

This language is echoed in the *very first sentence* of the Committee Report. In describing the "Background and Need" of the new statute, the Council states: "Bill 18-893, the Anti-SLAPP Act of 2010, ***incorporates substantive rights*** with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." Committee Report at 1. Far from being a minor procedural fix, the legislative intent here was clearly and unequivocally to create new substantive rights for defendants sued in such lawsuits.

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Even putting aside the admissions in Defendants own brief and exhibits, it is plain from the statutory text itself that the D.C. Anti-SLAPP Act is substantive in nature and effect. To begin with, the statute re-allocates the burden of proof at the motion to dismiss stage in a manner fundamentally different than Federal Rule of Civil Procedure 12(b)(6). Section 3(b) of the statute provides: "If a party filing a special motion to dismiss under this section makes a *prima facie* showing that the claim at issue arises from an act in furtherance of the right to advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied." D.C. Law 18-351 § 3(b). Courts have found that a reallocation of the burden of proof is substantive. *See, e.g., Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010) ("And it is long settled that the allocation of burden of proof is substantive in nature and controlled by state law.").

Moreover, the D.C. Anti-SLAPP Act provides provisions for attorneys' fees and costs for the prevailing party on a special motion. Numerous courts have held that the statutory provision of attorneys' fees is a substantive, not procedural, right. *See Id.* at 85 n.10 ("we have held that a nominally procedural state rule authorizing an award of attorneys' fees as a sanction for obstinate litigation is substantive for purposes of *Erie* analysis."); *CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1111 (9th Cir. 2007) ("We have held that when state statutes authorize fee awards to litigants in a particular class of cases, the statutes are substantive for *Erie* purposes if there is 'no direct' collision with the Federal Rules."); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F3d. 963 971-73 (9th Cir. 1999) (concluding that California Anti-SLAPP statute's provision allowing attorneys' fees to a party successfully striking suit under the statue was substantive and could be applied in diversity cases).

Finally, although the cases clearly involved different Anti-SLAPP acts of other states, other

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courts have recognized those statutes to be substantive. California in particular has a well-developed Anti-SLAPP statute which is recognized as substantive. *See Batzel v. Smith*, 333 F3d 1018, 1025-26 (9th Cir. 2003) ("Because California law recognizes the protection of the Anti-SLAPP statute as a substantive immunity from suit, this Court, sitting in diversity, will do so as well."); *Whitty v. First Nationwide Mortg. Corp.*, No. 05-CV-1021 H(BLM), 2007 WL 628033, at *11 (S.D Cal. Feb. 26, 2007) (California's Anti-SLAPP law is substantive in nature, and therefore a federal court exercising diversity jurisdiction follows California's law."). Similarly, other federal courts– in choosing to apply state anti-SLAPP acts under *Erie*– have found those acts to be substantive. *See Containment Techs. Grp., Inc.* v. *American Soc'y of Health Sys. Pharms.*, No. 1:07-cv-0997-DFH-TAB, 2009 WL 838549, at *8 (S.D. Ind. Mar. 26 2009) ("[T]he Anti-SLAPP statue has a distinctly substantive flavor. The Anti-SLAPP statute provides a complete defense to defamation and also provides the remedy of attorney fees to a victorious defendant. These are substantive provisions of Indiana law that govern in this diversity jurisdiction case."); *Godin*, 629 F.3d at 86 (Maine Anti-SLAPP statue "governs both procedure and substance in the state courts").

Because the D.C. Anti-SLAPP Act is substantive in nature and effect, under D.C. law, Defendants must point to "a clear legislative showing that [it is] to be given a retroactive or retrospective effect." *Bank of Am.*, 2 A.3d at 1076. Defendants point to nothing in either the statute or legislative history to support such a showing. That is because none exists. Indeed, there is nothing in the D.C. Anti-SLAPP Act that would in any way indicate a retroactive intent with its passage. For these reasons, there is simply no basis to support any presumption of retroactivity.

Given the above, Defendants' Special Motion to Dismiss based on the Anti-SLAPP act should be denied. The acts at issue in the Complaint occurred on or before January 3, 2011, almost three (3) months prior to the enactment of the Anti-SLAPP act on March 31, 2011.

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B. **Assuming, *Arguendo*, The D.C. Anti-SLAPP Act Is Retroactive, Defendants' Special Motion To Dismiss Will Still Fail.**

If Defendants are somehow able to show retroactivity of the D.C. Anti-SLAPP Act, their motion to dismiss should still fail because (1) The Anti-SLAPP act was not intended to apply to the present action; and (2) Plaintiff's claim is likely to succeed on the merits.

1. **The Anti-SLAPP Act Does Not Apply To The Present Action.**

Unlike some other defamation claims, Plaintiff's Complaint in this action is specific, well-pled, and replete with actionable facts – all compiled before discovery has even begun. This case is therefore entirely distinguishable for the type of action the District of Columbia had in mind when it enacted the D.C. Anti-SLAPP Act.[2] As was recognized by the U.S. District Court for the District of Columbia, "SLAPP suits are often brought for purely political purposes in order to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff." *Blumenthal v. Drudge,* 2001 U.S.Dist. LEXIS 1749, *10-11 (D.D.C. Feb. 13, 2001).

> One of the common characteristics of a SLAPP suit is lack of merit. But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished . . . thus, while SLAPP suits "masquerade as ordinary lawsuits" the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal right or to punish them for doing so. Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPPS.

[2]See, Sherrod v. Breitbart, et. al., United States District Court for the District of Columbia, Civil Action No. 11-00477(RJL), Defendants' Special Motion to Dismiss Complaint Under Anti-SLAPP Act of 2010 was denied on July 28, 2011.

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Id.

The Counsel of the District of Columbia Committee Report attached to Defendants' Motion as Exhibit 3 supports this view of SLAPPs. In commenting on the reasons behind the adoption of the D.C. Anti-SLAPP Act, the Committee Report points to "SLAPPs in the District of Columbia." Committee Report at 3. As its primary example, the Committee Report focuses on "the efforts of two Capitol Hill advocates that opposed the efforts of a certain developer." Id. According to the Committee Report, "[w]hen the developer was unable to obtain a building permit, the developer sued the activists and the community organization alleging they 'conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs and gave statements and interviews to various media." Id. The Committee noted that "[s]uch activism ... was met with years of litigation and, but for the ACLU's assistance, would have resulted in outlandish legal costs to defend." Id. The Committee concluded: "Though the action of these participants should have been protected, they, and any others who wished to express opposition to the project, were met with intimidations." Id. at *3-4.

The view of SLAPPs described in the Committee Report is thus exactly in line with the definition offered by the Court in *Drudge* – and completely different from the case Mr. Lehan has brought. Much like this case, the Court in *Drudge* reasoned that the suit "[bore] little resemblance" to a SLAPP action and concluded that it could not "characterize the suit as meritless . . . or conclude at this stage that plaintiffs have not been injured in their reputations or that 'winning is not [their] primary motivation', so far as it appears, they have brought this suit to 'vindicate a legally cognizable right.'" *Drudge*, 2001 U.S.Dist. Lexis at *12.

Unlike in a traditional SLAPP suit, there is no economic bullying here, and Mr. Lehan is

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certainly not a large private interest aiming to deter common citizens from exercising their political or legal rights. *See generally*, D.C. Committee Report at 3-4, attached as Exhibit 3 to Defendants' Special Motion to Dismiss. Rather, Mr. Lehan is a private citizen, blue-collar, working father of five (5) children, who enjoyed an excellent reputation in his community which was well-earned by his twenty-two (22) years of dedication as a firefighter. His reputation was irreparably harmed by the Fox News report that is the subject of this lawsuit. Mr. Lehan has been injured and is interested in the outcome of this lawsuit. He has not filed this lawsuit to chill the defendants' exercise of free speech – and this lawsuit clearly has not done so as Fox News has continued in exactly the same manner of reporting as they did before this lawsuit was filed.

2. Plaintiff's Claim Is Likely To Succeed On The Merits.

D.C. Anti-SLAPP Act Section 3(b) provides: "If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issue of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied." D.C.Law 18-351 § 3(b). The claims at issue in this action meet that test.

The merits of Mr. Lehan's claim are made clear in his well-plead Complaint and are further buttressed by the attached affidavits of Mr. Lehan (Exhibit A) and his brother, Edwin Lehan (Exhibit B) who was also mentioned in the Fox News story that is the subject of this action.

Contrary to Defendants contention, Mr. Lehan is not a public official. He is a private citizen and firefighter for the District of Columbia. *See*, Exhibit A. According to the United States Supreme Court, "the 'public official' designation applies *at the very least* to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 86 S. Ct. 669,

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15 L. Ed.2d 597 (1966) (italics added). This is the standard for the *very least* level of control which would allow for the designation of "public official." Mr. Lehan is a firefighter. He has obtained, over the past 22 years of firefighting, the position of Lieutenant. However, this position does not raise his designation to that of "public official." He is not a political appointee. He does not "have, or appear to the public to have, substantial responsibility for control over the conduct of governmental affairs." Id. To hold otherwise would be to subject an extremely large portion of federal, state and local government employees to a "public official" designation.

As a private citizen, Mr. Lehan must prove by a preponderance of the evidence that: (1) the Defendants published a false statement about the Plaintiff; (2) the statement was defamatory; (3) the Defendants were negligent in publishing the statement; and (4) the Plaintiff suffered actual injury as a result. *See generally*, Standardized Civil Jury Instructions for the District of Columbia, §17.02; *Oparaugo v. Watts,* 884 A.2d 63, 76 (D.C. 2005).

Taking each of the above four (4) elements in turn, it is evident that Mr. Lehan is likely to prevail in this action. First, the Defendants published a number of false statements about the Plaintiff. The false statements are enumerated – and the truth provided – in Mr. Lehan's Affidavit attached hereto as Exhibit A. *See also*, Edwin Lehan's Affidavit attached hereto as Exhibit B. The deceptive and distorted figures in the Fox News story are used to sensationalize the story and paint Mr. Lehan as the chief abuser of the overtime system. The Defendants state clearly that he is in charge of the Telestaff System. The overall slant of the Fox News story is that Mr. Lehan is corrupt and has abused the overtime system which he is in charge of.

Second, the false statements, as enumerated in the attached exhibits, were defamatory in nature as they injured Mr. Lehan in his trade as a firefighter, injured his reputation within his profession and community, and lowered him in the estimation of the community. In determining

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whether the news story defamed Mr. Lehan, the court must consider what the people of the community reasonably understood when they saw, read, or heard the news story that Mr. Lehan, with the help of his brother, intentionally controlled and abused the department's overtime system in order to obtain additional overtime hours and earn excessive amounts of money. *Moss v. Stockard*, 580 A.2d. 1001, 1002 (D.C.1990).

Third, not only were Defendants negligent in publishing the news story that is at issue in this action, Mr. Chavez intentionally and deliberately published this story with the specific slant of attacking Mr. Lehan in order to create a sensational story. To the extent the errors in the news story were not intentional, they were, at the very least, negligent in stating such clear errors with respect to Mr. Lehan's earnings, the laws regarding the overtime system and their applicability to Mr. Lehan, and his control over the fire department's overtime system.

Finally, with respect to element number four, Mr. Lehan suffered actual injury as a result of the news story. The defamatory statements permanently stigmatize Mr. Lehan as being a dishonest employee who controlled or abused his employer's overtime system. As such, he has been the subject of intense scorn and suspicion within the workplace, affecting his career and his ability to shift careers and his future income stream. Additionally, the story has caused Mr. Lehan to be subjected to intense, widespread disgrace and scorn in his community.

Given the above, Plaintiff is able to show that his claim is likely to succeed on the merits. To the extent the court finds both that (1) the D.C. Anti-SLAPP Act is retroactive, and (2) the Act applies to Plaintiff's cause of action (despite the fact that Plaintiff is not using this suit to freeze Defendants speech), the Plaintiff is able to meet his burden under the Act that his action is likely to succeed on the merits.

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C. Plaintiff Is Entitled To Attorneys' Fees And Costs.

For all the reasons stated above, the D.C. Anti-SLAPP Act is ineffective for purposes of this case: (1) the Act is not retroactive and so it does not apply to the acts that are the subject of this lawsuit; (2) even if the Act is retroactive, the Act was not intended to apply to this cause of action; and (3) even if the Act is retroactive and was intended to apply to this cause of action, Plaintiff has demonstrated that he is likely to succeed on the merits. As such, the Plaintiff is entitled to attorneys' fees and costs for all of these reasons. Section 5(b) of the statute provides: "The court may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under section 3 or 4 is frivolous or is solely intended to cause unnecessary delay." D.C. Law 18-351 §5(b). Given the numerous, significant and obvious procedural and substantive barriers to success on this motion, Plaintiff can only assume that this motion was intended to further delay discovery in this case. Indeed, Plaintiff can imagine no other reason for Defendants suggestion that the Court decline to promptly adjudicate this motion when such a delay would be both contrary to the plain requirements of the statute and would result in an indefinite stay of discovery.

Moreover, should the Court (appropriately) hold that the D.C. Anti-SLAPP Act is inapplicable to this case, attorneys' fees are also proper under well-settled D.C. common law. *See, Hundley v. Johnston,* No. 09-CV-1457, 2011 WL 1584772, at *2 (D.C. April 28, 2011) ("[A] party may recover attorneys' fees from an opposing party by demonstrating that the party acted in bad faith either by filing a frivolous action, or by litigating a properly filed action in a frivolous manner."); D.C. Super. Ct. Civ. R. 54(d).

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendants' Special Motion to Dismiss Under The District of Columbia Anti-SLAPP Act of 2010 be denied, and reasonable

attorneys' fees and costs be awarded.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that, on the 5th day of August, 2011, I will electronically file the foregoing Plaintiff's Memorandum Of Points And Authorities In Opposition To Defendants' Special Motion To Dismiss with the Clerk of the Court using the CaseFileXpress system, which will send a notification of such filing to the following:

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