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TENNESSEE'S ANTI-SLAPP ACT

by William "Jay" J. Harbison II

Retaliatory lawsuits that attack the exercise of free speech and public criticism are known as “strategic lawsuits against public participation” or “SLAPP” lawsuits. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Envtl. L. Rev. 3, 8-9 (1989). These lawsuits are filed to “send a clear message” to critics: the “price for speaking out” is “a multi-million-dollar lawsuit.” *Id.* at 6.

In 2019, the Tennessee Legislature recognized the growing problem of SLAPP lawsuits attacking the exercise of free speech rights by consumers, reviewers, and the news media. These lawsuits are not designed to be won—instead, they are designed to chill critical commentary by imposing massive litigation costs on the speaker (even when they ultimately fail on the merits).

In response to this problem, Tennessee has recently joined the majority of states and enacted laws designed to protect free speech by punishing and deterring SLAPP lawsuits. Like other states, Tennessee now has a mechanism for courts to dismiss speech-chilling lawsuits at the threshold—and before costly discovery. This mechanism requires the plaintiff to identify *at the outset* facts establishing a *prima facie* case for recovery, rather than resting on a complaint’s conclusory allegations and using discovery to fish for factual support. And it permits the defendant to provide a basic factual defense, so the court can evaluate whether further proceedings are genuinely likely to result in liability. Thus, unless the plaintiff in this threshold proceeding can show it already possesses facts sufficient to support each element of its claims, Tennessee’s Anti-SLAPP Act requires: (1) dismissal with prejudice; and (2) an award of attorney’s fees and costs to the defendant.

California was one of the first states to combat these cases by enacting an “Anti-SLAPP” statute, which addresses “lawsuits brought primarily to chill the valid exercise of the constitutional right[] of freedom of speech.” Cal. Civ. Proc. Code § 425.16(a). The California statute authorizes parties

sued for exercising free speech rights to move for early dismissal, without incurring costly and time-consuming discovery. *Id.*; see *Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 967 (Cal. 2005).

The California statute “has been a primary model or influence on similar laws subsequently enacted in other states.” *Serafine v. Blunt*, 466 S.W.3d 352, 386 (Tex. App. 2015). “Many States have enacted anti-SLAPP statutes to give more breathing space for free speech about contentious public issues.” *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015). Like California’s, these statutes aim to secure added protection for the robust “exchange of idea[s]” and “citizen participation” envisioned by the First Amendment, whether in the form of “petitioning the government, writing a traditional news article, or commenting on the quality of a business.” *Cheniere Energy, Inc. v. Lotfi*, 449 S.W.3d 210, 218 (Tex. App. 2014) (Jennings, J., concurring) (quotation omitted). In particular, “[n]ewspapers and publishers, who regularly face libel litigation, were intended to be one of the ‘prime beneficiaries’” of Anti-SLAPP statutes. *Sonoma Media Invs., LLC v. Superior Court*, 34 Cal. App. 5th 24, 34 (2019) (quotation omitted).

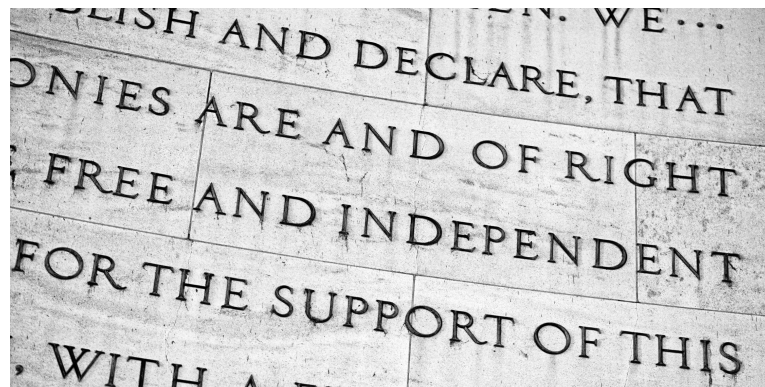
Before 2019, Tennessee had a narrow version of an Anti-SLAPP law, which only addressed lawsuits seeking to hold the defendant liable for communicating with a government agency. In 2019, however, a bipartisan group of Tennessee legislators introduced a bill providing much broader protecting, expanding the law to follow other states in protecting speech critical of corporations and other matters of public concern. See S.B. 1097, 111th Sess. (Tenn. 2019). The legislation passed with virtually unanimous support in both chambers, was signed into law by the Governor, and became effective in July 2019. Tenn. Code Ann. §§ 20-17-101 *et seq.* (2019); see also Tennessee General Assembly, SB1097.

Just like similar laws adopted elsewhere, Tennessee's Anti-SLAPP Act seeks "to encourage and safeguard the constitutional rights of persons to . . . speak freely . . . to the fullest extent permitted by law." Tenn. Code Ann. § 20-17-102. As its Senate sponsor explained, the law addresses "a problem in Tennessee" of "frivolous or nuisance lawsuits against individuals who are expressing their First Amendment rights." Tenn. Sen. Floor Proceedings, SB1097, at 1:32:10–33:40 (Mar. 18, 2019) ("Sen. Floor Proceedings"). In response to that problem, the Tennessee Legislature enacted the Anti-SLAPP Act to punish and deter retaliatory lawsuits that seek "to punish media outlets for doing the investigative work that we expect of them." Todd Hambidge et al., *Speak Up: Tennessee's New Anti-Slapp Statute Provides Extra Protections to Constitutional Rights*, 55 Tenn. Bar J. 14, 15 (Sept. 2019). The law "allow[s] a judge to look at the suit before the very expensive discovery portion of the suit comes up, and decide whether the suit has merit." Sen. Floor Proceedings 1:32:10–33:40. Early dismissal is critical because "[t]he cost of defending such lawsuits can be prohibitive," even for "substantial media organizations, which must weigh the expenditure of defense costs against the substantial costs of developing, producing, and distributing new content." Hambidge at 15. The Anti-SLAPP Act thus ensures that media organizations and others "have a right not to be dragged through the courts because [they] exercised [their] constitutional rights." *Varian*, 106 P.3d at 967.

Tennessee's Anti-SLAPP Act achieves that objective through an expedited procedure for dismissing lawsuits filed to inhibit the valid exercise of "constitutional rights of persons to . . . speak freely." Tenn. Code Ann. § 20-17-102. Courts considering an Anti-SLAPP petition apply a three-step analysis:

First, the petitioning party must make "a prima facie case that a legal action is based on, relates to, or is in response to that party's exercise of the right to free speech." Tenn. Code Ann. § 20-17-105(a). "Exercise of the right of free speech" means any "communication made in connection with a matter of public concern," including "issue[s] related to" a "public figure," "the government," "community well-being," or "[a]ny other matter" of public concern. Tenn. Code Ann. § 20-17-103(3), (6).

Second, if the petitioning party meets this threshold burden of showing that the action relates to its exercise of free speech, the burden shifts to the responding party to "establish[] a prima facie case for each essential element of



the claim in the legal action." Tenn. Code Ann. § 20-17-105(b). Tennessee courts have had limited opportunity to construe the new statute, but courts in states with comparable laws recognize that to carry this burden, the responding party must provide enough trial-admissible evidence to prove each element of every claim. *See Wilson v. Parker, Covert & Chidester*, 50 P.3d 733, 739 (Cal. 2002) (requiring responding party to "state and substantiate a legally sufficient claim" and to "support[]" each claim with a "sufficient prima facie showing of facts"); *HMS Capital, Inc. v. Lawyers Title Co.*, 118 Cal. App. 4th 204, 212 (2004) ("In opposing an anti-SLAPP motion, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial."). A responding party's failure to carry this burden requires dismissal with prejudice. Tenn. Code Ann. § 20-17-105.

Third, even if the responding party provides evidence sufficient to establish a prima facie case, the court still must dismiss the action if the petitioning party "establishes a valid defense to the [responding party's] claims." Tenn. Code Ann. § 20-17-105(c). That includes constitutional defenses, such as the defense that the First Amendment and Tennessee Constitution protect the challenged speech. *See De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 855 (2018) (anti-SLAPP statute "contemplates consideration of the substantive merits of the plaintiff's complaint, as well as all available defenses to it, including, but not limited to, constitutional defenses").

Finally, if a case is dismissed under the Anti-SLAPP Act, the court "shall" award the petitioning party its costs and reasonable attorneys' fees. Tenn. Code Ann. § 20-17-107(a)(1). The mandatory fee-shifting provision is essential to the statute's fundamental deterrence objective, ensuring that the law "discourages similar future litigation," Hambidge at 16, "by imposing the litigation costs on the party seeking to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 2001).