



# Public Participation Project

Fighting for Free Speech

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March 25, 2014

Senator Lawrence M. Farnese, Jr.  
543 Main Capitol Building  
Harrisburg, PA 17120

Re: Support for Senate Bill No. 1095

Dear Senator Farnese:

The Public Participation Project (PPP) is a national non-profit organization dedicated to protecting citizens from lawsuits designed to chill their ability to communicate with their government or speak out on issues of public interest. These lawsuits are known as Strategic Lawsuits Against Public Participation (SLAPPs). SLAPPs are brought not to vindicate legal rights, but to harass and intimidate, and to divert attention and resources away from the underlying public issue. Such lawsuits turn the justice system into a weapon and have a serious chilling effect on free speech.

Because many states still do not provide sufficient protections for such speech and petitioning activities, PPP is working to pass federal anti-SLAPP legislation in Congress. A federal anti-SLAPP bill will provide a streamlined procedure to dismiss lawsuits designed to chill public participation. PPP has built a coalition including over one hundred organizations and businesses, as well as prominent individuals, who support federal anti-SLAPP legislation. PPP also assists in efforts to pass anti-SLAPP legislation in the states, and it monitors SLAPP developments in legislatures and courts across the country. PPP provides online educational resources, including a collection of state speech laws and First Amendment scholarship, and provides commentary on current SLAPP cases and legislation.

## **SB 1095 Would Add Important Protections to Pennsylvania's Anti-SLAPP Law**

The Pennsylvania Legislature recognized the problem of SLAPPs when it enacted its anti-SLAPP legislation in 2000, noting, "[i]t is contrary to the public interest to allow lawsuits ... to be brought primarily to chill the valid exercise by citizens of their constitutional right to freedom of speech and to petition the government for the redress of grievances." H.B. No. 393, 184th Reg. Sess. (2000).

However, Pennsylvania's anti-SLAPP law is exceedingly narrow, protecting only against lawsuits brought on the basis of statements made about ongoing environmental regulation and compliance. To be protected, statements must be geared toward affecting a favorable government outcome, whether addressed to the government body with jurisdiction, or to a third party if there is a reasonable likelihood the statements will result in a favorable government outcome. 27 Pa. Cons. Stat. §§ 7707, 8301-05. Although this is important protection, it leaves those who speak out on issues other than the environment vulnerable to lawsuits designed to silence their public participation.

This is why PPP supports SB 1095. SB 1095 will protect Pennsylvanians who engage in petition and speech in connection with an issue of public interest, no matter where they speak out. Specifically, SB 1095 protects against SLAPPs by:

1. Broadly defining protected speech to include statements about any public issue, not just environmental issues;
2. Providing a procedure for quick dismissal, and limiting or prohibiting discovery in a SLAPP;
3. Providing for potential attorney's fees and costs for a defendant who successfully has the case dismissed.

Organizations and individuals from Pennsylvania have publicly supported federal anti-SLAPP legislation, which includes broad protections similar to those contained in SB 1095. Among those supporters are the Pennsylvania Center for the First Amendment, Pennsylvania Freedom of Information Coalition, Pennsylvania NewMedia Association, and Robert D. Richards, Distinguished Professor of Journalism and Law at Penn State University.

### **SLAPPS in Pennsylvania**

Pennsylvania has been home to troubling SLAPP suits over the past 20 years that demonstrate the tremendous need for this important legislation. If Pennsylvania had a strong anti-SLAPP law on the books, these SLAPP targets could have potentially gotten these baseless suits dismissed quickly and relatively painlessly. Below are just a few examples of SLAPPs that have affected citizens of Pennsylvania:

In 2009, parents of children in an online charter school raised issues in their online chat room about management and improper relationships between management and the board of directors. The head of the school responded by suing six of the parents for defamation, alleging \$150,000 in damages. See attached Exhibit A.

In December of 2008, the Philadelphia Inquirer ran a story about Chester Charter School, raising issues of the school's use of public funds. In January of 2009, the operator of the charter school sued the paper, along with an editor and three reporters, for defamation and other claims. See attached Exhibit B.

In 1996, medical services provider Beverly Enterprises sued a nurses union for malicious defamation in the publication of fliers and radio statements about safety issues and the ongoing labor dispute between the union and the medical services company. See attached Exhibit C.

In 1997, the same medical services provider sued the local president of the Service Employees International Union, accusing her of defaming an executive of the company in a one-on-one confrontation at a rally and at an informal town hall meeting called by five members of Congress. See attached Exhibit D.

In 1998, Dominick Morgan had LASIK surgery performed by father and daughter doctors, the Nevyas. Thereafter, he was left legally blind. Morgan started a website, Lasiksucks4u.com, on which he chronicled his treatment and experience, and made specific references to the Nevyas. The Nevyas sued. The Nevyas then added Morgan's attorney as an additional defendant in a second amended complaint, alleging defamation based on letters his attorney wrote to the U.S. Food and Drug Administration that Morgan had posted on his website. See attached Exhibit E.

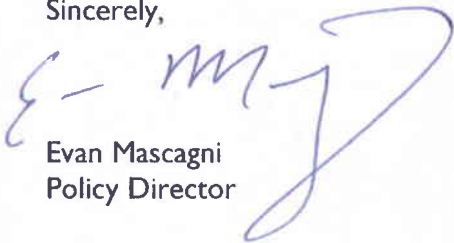
If Pennsylvania had a strong anti-SLAPP law, defendants like those above could have filed an anti-SLAPP motion early on in the case, potentially getting it dismissed early without incurring substantial attorney's fees.

### Conclusion

In today's world, financial health, public safety, environmental well-being, national security, and government accountability all demand an active, engaged citizenry. Technology now facilitates this vital discourse and, makes it possible for everyone to don the hat of journalist, editor, town crier or anonymous pamphleteer. SB 1095 is particularly timely: it protects and encourages critical open dialogue, whether that speech takes place in the town square, on a cable news network, or a blog or consumer review website.

The Public Participation Project is proud to support SB 1095.

Sincerely,

A handwritten signature in blue ink, appearing to read 'E- MJ', is written over the typed name and title.

Evan Mascagni  
Policy Director

EXHIBIT A

# Slander or freedom of speech? A charter school's founder sued parents over pointed e-mails. Some see First Amendment issues.

By Martha Woodall INQUIRER STAFF WRITER  
POSTED: February 09, 2009

For months, parents from the Agora Cyber Charter School in Devon were e-mailing about their difficulties obtaining information on the financial arrangement between the school's founder and her management company.

"I have not given up my fight to clean up this mess. As a taxpayer, I will not rest . . . until legal authorities have dealt with June Brown and her funneling of public funds directly into her pocket," parent Gladys Stefany of Milford, Pike County, wrote in a Dec. 17 message to an online group of Agora parents.

Stefany says she thought she was making a legitimate comment about the woman who founded her daughter's taxpayer-funded school.

Dorothy June Brown responded by suing Stefany and five other parents for defamation, accusing them of slander, libel and civil conspiracy. The suit also names the Agora Parent Organization and unnamed others.

The suit, which seeks more than \$150,000 in damages, raises questions: When does criticism of a public official cross the line? And when does a lawsuit against the critics become an attempt to stifle free speech?

A suit aimed at quashing public debate or stopping criticism of officials is known as a "strategic lawsuit against public participation" (SLAPP). First Amendment experts and some legal scholars say such suits have a chilling effect on free speech.

"They are often going after people who have no money to pay damages or anything," said David Kalrys, a professor of constitutional law at Temple University. "They have nothing to gain but to shut them up. It's the classic chilling effect."

Such suits "strike at the very core of our democracy because they do discourage ordinary citizens from participating in matters of public importance," said Paul K. McMasters, former First Amendment ombudsman at the Freedom Forum in Arlington, Va.

The Agora parents said they believe they are targets of a SLAPP.

The attorney who represents Brown and her management company disagreed.

"It is a defamation suit," attorney Wendy Beetlestone said. "The defendants have the right to defend themselves like anybody else. It isn't a SLAPP lawsuit."

Other lawyers and First Amendment scholars, though, said that SLAPPs are often defamation cases and that the Agora suit seemed to fit the pattern.

"That is certainly how a SLAPP suit looks," said Robert D. Richards, a professor of journalism and law, who codirects the Pennsylvania Center for the First Amendment at Pennsylvania State University.

Filed Jan. 21 in Montgomery County, the suit is an outgrowth of parents' efforts to obtain answers to questions about the financial relationship between Brown and her management company, Cynwyd Group L.L.C., and the cyber charter school.

Agora, which provides online instruction to 4,000 students across the state, rents its headquarters from Cynwyd under a nine-year lease and pays the firm a management fee. Brown owns Cynwyd and serves as its senior consultant to Agora.

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The suit says the parents made misleading statements online and in complaints to the state Department of Education "that give the clear but false impression that Dr. Brown is corrupt, incompetent and possibly criminal."

In one of the e-mails, Stefany complained that Agora and its board of trustees in November banned parents from communicating with one another via school e-mail and an online forum maintained by the school.

"This action is being done for the clear purpose of covering up ineptitude, malfeasance and financial corruption on the part of Ms. Brown and, by their silent acquiescence, the Agora Cyber Charter School Board of Trustees," Stefany wrote to Brown and the board president.

Beetlestone said that when parents refused to heed requests to stop defaming Brown, the educator filed suit because she saw it as the only way to end the defamation.

The suit said Brown and Cynwyd Group's ability "to attract business is dependent on Dr. Brown's reputation within the local educational community, a reputation that defendants' statements have compromised."

The parents have denied the charges. They don't yet have an attorney because they can't afford the \$300- to \$500-per-hour fees lawyers have quoted.

The parents already have received their first round of information requests from Brown's attorney, including all documents and communications they sent to The Inquirer and other news media.

Gene Roberts, former Inquirer editor and a journalism professor at the University of Maryland, has long been concerned about SLAPP suits.

"By and large, they are a well-honed technique to stifle debate," he said. "Unfortunately, they often work because they scare people into silence. They can visualize losing their homes."

He added: "I have long felt there ought to be a legal assistance organization that weighs in on behalf of people who are targets of SLAPP suits."

Legal experts said they knew of no other cases of parents at a publicly funded school in Pennsylvania being sued by school officials for defamation.

"The right to petition the government is a separate right under the First Amendment in addition to freedom of speech, and your right to discuss and ask questions about what some officials are doing," said Temple's Kairys. "The finances of these schools are fair game."

Although the lawsuits have been around for decades, two professors at the University of Denver came up with the term SLAPP about 10 years ago. George W. Pring and Penelope Canan brought attention to their growing use in the book SLAPPs: Getting Sued for Speaking Out, published by Temple University Press in 1996.

SLAPP cases often involve real estate developers and other companies with deep pockets who sue citizens who oppose their proposed developments. They have surfaced all over the country, McMasters said.

He said it is hard to keep track of SLAPP suits, though, because they are filed as defamation suits or as tort claims in local courts.

Pennsylvania and 25 other states have passed some form of anti-SLAPP laws to protect citizens. Many of the laws provide a speedy process for dismissal of suits involving citizens engaged in rights guaranteed by the First Amendment, including freedom of speech and petitioning the government for redress. Many of the laws require the developer or public official who brought the suit to cover citizens' legal fees if the case is tossed out of court.

But Pennsylvania's 2001 statute was so watered down in the state Senate that it only covers citizens who speak out on environmental concerns, according to a prime sponsor, State Rep. Camille "Bud" George (D., Clearfield). New Jersey does not have an anti-SLAPP law.

George said he has been trying to expand the law to protect citizens who make comments in good faith about any issue of public concern.

He began trying to get an anti-SLAPP law passed in 1994 after one of his constituents was sued for complaining that nearby mining had caused her basement to flood.

"Nobody," he said, "should be denied their rights to put forth their position by being buffaloed by the big power interests or the government."

Richards of Penn State, who has worked with George, said Pennsylvania's law, known as the "Environmental Immunity Act," is so narrow it offers little protection.

In fact, the law was no help to residents of Montgomery County's Lower Gwynedd Township who opposed Penlyn Greene, a townhouse development. The developer sued them in 2003, saying their efforts to stop the project had abused the legal process and harassed him and potential buyers.

The courts ruled the residents' statements and actions, including zoning appeals, were not covered because they did not constitute "complaints . . . to a governmental agency" as described in the law.

The state Supreme Court turned down the residents' appeal without comment in 2007. The lawsuit continues.

Contact staff writer Martha Woodall at 215-854-2789 or [martha.woodall@phillynews.com](mailto:martha.woodall@phillynews.com).

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A nonprofit association dedicated to providing free legal assistance to journalists since 1970

EXHIBIT B

## Charter school official sues Philadelphia Inquirer for defamation

Kathleen Cullinan | Libel | Quicklink | January 9, 2009

A charter school official is suing *The Philadelphia Inquirer* for defamation, the paper reports.

Vahan Gureghian, chief executive of the managing company for Chester Community Charter School, claims a series of articles on the school's handling of public funds were fueled by failed business negotiations he says he had with the *Inquirer* publisher. According to the newspaper, the articles pointed out that the charter had spent a consistently high proportion on administration expenses and a consistently low portion on teaching.

*Inquirer* editor William Marimow countered in the paper that the reporting was "accurate . . . thorough . . . and it focuses on an issue of public importance."

"To me, that is what the First Amendment is all about," Marimow said.

A lawyer for *The Inquirer's* parent company, Philadelphia Media Holdings, challenged Gureghian's claims that he and publisher Brian P. Tierney were even in "negotiations regarding a business transaction," as the paper put it.

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EXHIBIT C



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## SEIU Wins Historic Injunction Against Beverly Enterprises; Hundreds of Nursing Home Workers Granted Reinstatement to Work

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WASHINGTON, Jan. 22 /PRNewswire/ -- U.S. District Court Judge D. Brooks Smith yesterday granted an injunction in Pennsylvania against Beverly Enterprises ordering immediate reinstatement of hundreds of workers represented by the Service Employees International Union (SEIU). The injunction was sought by the National Labor Relations Board (NLRB) at the request of the Union. In April 1996, nearly 1,000 nursing home workers employed by Beverly went on strike to protest Beverly's unfair labor practices at its Pennsylvania facilities. The strike lasted only three days but Beverly responded by illegally permanently replacing hundreds of the strikers, and denying other workers their former positions.

The U.S. District Court Order requires that Beverly "reinstate all of the employees who participated in the April 1, 1996 strike at the fifteen health care facilities to their former positions during the pendency of the unfair labor practice charges before the Board." Beverly's refusal to reinstate the hundreds of employees to their former positions "has great potential to jeopardize the integrity of the bargaining process," according to the Judge. The NLRB is currently litigating hundreds of unfair labor practice charges against Beverly, including charges against the company for firing strikers for speaking out about company practices, tearing down union bulletin boards, barring union representatives, and threatening and conducting surveillance against nursing home workers in union nursing homes throughout the state.

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"We feel vindicated by the judge's decision, and by the message it sends to lawbreakers like Beverly who choose to ignore our nation's labor laws and treat nursing home workers with such contempt," said Andrew L. Stern, president of the 1.1 million-member union. "We are proud of our members in Pennsylvania for their patience in waiting for this long overdue order. We question whether a company like Beverly, which operates with taxpayer funds and spends enormous amounts of money trying to break the union should be doing business in Pennsylvania at all. Beverly's ideological opposition to the union harms the residents, workers, and stockholders."

Beverly Enterprises, the nation's largest nursing home chain, operates 632 nursing homes in 33 states and the District of Columbia and took in more than \$3 billion in revenues in 1995.

SEIU Locals 585,668 and District 1199P represent approximately 8,000 nursing home workers including 1,800 employed by Beverly Enterprises in Pennsylvania. SEIU is the largest health care workers Union with 1.1 million members in the United States, Canada and Puerto Rico.

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/CONTACT: Unnia Peltus of the Service Employees International Union, 202-898-3266; or Lenore Friedlaender of the Pennsylvania Dignity Campaign, 717-238-9745/

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**EXHIBIT D**

« back 182 F.3d 183 (3rd Cir. 1999)

**BEVERLY ENTERPRISES, INC.; DONALD L. DOTSON  
APPELLANTS**  
v.  
**ROSEMARY TRUMP; SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 585**

NO. 98-3222

U.S. Court of Appeals, Third Circuit

*Argued December 11, 1998*  
*Opinion Filed June 28, 1999*  
*Corrected July 8, 1999*

1 On Appeal From the United States District Court For the Western District of  
Pennsylvania (D.C. Civil Action No. 97-cv-01490) District Judge: Honorable Gary L.  
Lancaster[Copyrighted Material Omitted][Copyrighted Material Omitted]

2 Michael T. McMenamin (Argued) Walter & Haverfield 50 Public Square 1300  
Terminal Tower Cleveland, OH 44113 Attorney for Appellants

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Office of General Counsel U.s. House of Representatives 219 Cannon House Office  
Building Washington, D.c. 20515-6601 Attorneys for Amicus Curiae Bipartisan  
Legal Advisory Group of the United States House of Representatives

5 Before: Becker, Chief Judge, and Stapleton, Circuit Judges, and HARRIS,\*  
District Judge

**OPINION OF THE COURT**

Stapleton, Circuit Judge

6 This diversity-based defamation action arises from statements allegedly made by  
a union representative about a company official during two separate incidents, one  
at a political rally and another at a "Town Hall meeting." The District Court  
dismissed the plaintiffs' complaint after finding the comments at the rally incapable  
of defamatory meaning and the Town Hall meeting comment protected under the  
doctrine of absolute testimonial immunity. Although for somewhat different  
reasons, we will affirm.

I.

7 There is a long-standing and acrimonious relationship between Beverly  
Enterprises, a national provider of nursing home care, and the Service Employees  
International Union ("SEIU"), whose local affiliates represent a substantial number  
of Beverly's employees. Plaintiffs are Beverly Enterprises and Donald L. Dotson,  
Beverly's Senior Vice President for Labor and Employment. Before joining Beverly

« back nterprises, Dotson had a prestigious career in labor relations, serving as Chairman of the National Labor Relations Board and as Assistant Secretary for Labor-Management Relations at the U.S. Department of Labor. This suit arises from two incidents in which Rosemary Trump, President of Local 585 of the SEIU, allegedly made false and defamatory statements about Dotson and Beverly. Plaintiffs allege that, as a result of the statements uttered by Trump, Dotson and Beverly have suffered damage to their reputations. A district court's order dismissing a complaint is subject to plenary review. *Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.*, 998 F.2d 1192, 1197 (3d Cir. 1993). We accept as true all well-pleaded factual allegations in the plaintiffs' complaint and all reasonable inferences therefrom. *Independent Enterprises v. Pittsburgh Water*, 103 F.3d 1165, 1168 (3d Cir. 1997). The parties agree that Pennsylvania law governs this dispute.

## II.

8 The first set of allegedly defamatory statements were made in August, 1996, at a political rally in Pittsburgh, Pennsylvania, sponsored by the Dole/Kemp presidential campaign. Plaintiffs allege that Trump approached Dotson in the midst of a large crowd, ascertained his identity as a Beverly official, and asked him whether he knew who she was. When Dotson said he did not, Trump became visibly upset, told Dotson he should know her, identified herself, and then began to berate Dotson in a loud and angry voice. Specifically, Trump accused Dotson of being a "criminal" and said that "you people at Beverly are all criminals." When Dotson tried to respond, Trump cut him off and angrily accused him of "devoting [his] entire career to busting unions." Despite Dotson's efforts at reasoned discourse, Trump continued berating Dotson, finally shouting at him: "I know your kind. You're just part of that World War II generation that danced on the graves of Jews."

9 Plaintiffs allege that these statements were false and defamatory as to both Dotson and Beverly Enterprises. Moreover, they allege that Trump uttered the statements with actual malice, and that, as a result of these statements, Dotson suffered damage to his reputation. The District Court concluded that each of the three statements at the rally were incapable of defamatory meaning because they constituted mere hyperbole and insulting rhetoric, all too common in labor disputes.

10 We begin by addressing Trump's alleged statements accusing Dotson of "union-busting" and referring to Dotson and others at Beverly as "criminals." By statute in Pennsylvania, a plaintiff in a defamation action has the burden of proving:

11 "(1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of any conditional privilege."

12 42 Pa. C. S. § 8343(a) (West 1999).

13 The Pennsylvania Supreme Court has held that "[i]n an action for defamation, it is the court's duty to determine if the publication is capable of the defamatory meaning ascribed to it by the party bringing suit." *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996). "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." *Id.* at 1055 (quoting *Thomas Merton Center v. Rockwell Int'l Corp.*, 442 A.2d 213, 215 (Pa. 1981)).

14 Appellants contend that Trump's references to "criminals" and "union busting" were defamatory per se because they imputed criminal conduct to both Dotson and