UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY SHERROD, Appellee, v. ANDREW BREITBART and LARRY O'CONNOR, Appellants.	)	No. 11-7088

DEFENDANTS-APPELLANTS'
RESPONSE TO DISTRICT COURT'S STATEMENT OF REASONS

In little over a year since it was enacted, the District of Columbia's anti-SLAPP statute (the "Anti-SLAPP Act") has already generated a great deal of litigation. It has been invoked in cases involving sports mogul Dan Snyder and the Washington City Paper; the 3M Company and lawyer Lanny Davis; talk-show host Rachel Maddow; Esquire magazine; WTTG-Fox 5; and in this libel case between former Obama administration official Shirley Sherrod and web journalists Andrew Breitbart and Larry O'Connor.[1] The instant dispute presents the precise circumstances the Anti-SLAPP

[1] *See Snyder v. Creative Loafing, Inc.*, Civil No. 0003168-11 (D.C. Sup. Ct. filed April 26, 2011); *3M Company v. Boutler*, Civil No. 11-01527 (D.D.C. filed Aug. 24, 2011); *Dean v. NBC Universal*, Civil No. 0006055-11 (D.C. Sup. Ct. filed July 27, 2011); *Farah v. Esquire Magazine*, Civil No. 11-01179 (D.D.C. filed June 28, 2011); *Lehan v. Fox Television Stations*, Civil No. 2011 CA 004592 B (D.C. Sup. Ct. filed June 10, 2011).

Act was designed to address. The issues involve matters of public concern and Plaintiff-Appellee's expressly stated goal is to stifle free speech and "shut down" Defendants-Appellants' website. *See* Special Motion to Dismiss, USDC Dkt. No. 24 at 2.

The Anti-SLAPP Act is an important new initiative establishing special free speech defenses in the nation's capital. The District is the most recent addition to the 28 states that have enacted similar anti-SLAPP statutes. Many questions about the adjudication of the District's new statutory protections from defamation suits, including their retroactive effect and applicability in federal court, have yet to be addressed and now are ripe for decision by this Court.

It is essential to resolve these issues at the appellate level because of the constitutional interests at stake for defendants sued in the District on the basis of their exercise of constitutional freedoms. In passing the legislation, the District government intended to provide "quick and efficient dismissal" of lawsuits against individuals furthering their "right of advocacy on issues of public interest."

Libel plaintiffs have attempted to sow uncertainty into the anti-SLAPP statute by attacking its validity on numerous grounds, including under the *Erie* doctrine. These attacks are ill-founded – in no other jurisdiction in the country has such a broad *Erie* challenge to anti-SLAPP protections succeeded – but with the lower court in this circuit mistakenly identifying *Erie* impediments to the implementation of the new District law, it is necessary for this Court in particular – which sits in our nation's

capital where freedom of speech and debate on issues of public concern are paramount and arise frequently – to hear the issue in full and affirm the application of the statute in federal court.

The District Court's Statement of Reasons demonstrates the need for this Court to order full briefing in this appeal. The District Court's first reason – that the statute cannot apply to cases pending on the date of the statute's enactment – fails to address the only ruling from a District of Columbia court actually to have considered the issue. In *Lehan v. Fox Television Stations, Inc.*, Case No. 2011 CA 004592 B (D.C. Sup. Ct. Nov. 30, 2011), the Superior Court determined that "[t]he statute applies not only to acts which occurred before its enactment but also to actions which were pending … ." Moreover, the Statement of Reasons notes that Defendants-Appellants did not cite any appellate authority holding that the D.C. Anti-SLAPP Act is retroactive – which for a brand-new statute is not unusual and only further confirms that this issue of first impression deserves full briefing.

The second reason – that the *Erie* doctrine precludes application of the D.C. Anti-SLAPP Act in federal court – is not at issue at this stage of the appeal and thus should not prevent the appeal from proceeding. Plaintiff-Appellee expressly noted for purposes of her Motion to Dismiss the appeal that the Act applies in federal court. *See* Motion at 3 n.1. In any event, the District Court's *Erie* ruling conflicts with

decisions from the First, Fifth and Ninth Circuits, all of which have held that state anti-SLAPP law may be invoked in federal court.[2] Resolving the *Erie* issue is an important question of first impression for this Circuit and one that should only be decided on full briefing by the parties.

The third reason – the timeliness of the anti-SLAPP motion – similarly was not raised by Plaintiff-Appellee in her Motion or in her oral argument before the District Court. As the District Court explained, it rarely holds oral argument in matters of this nature and, obviously, none would have been necessary if Defendants-Appellants failed to timely file their anti-SLAPP motion. Not only did the District Court not address any issue of timeliness, at the conclusion of the hearing it complimented the parties for what it said was high-quality argument and pleadings and indicated that it needed to further review the transcript of the hearing and the briefing. Hr'g Tr. (7/19/11) at 57-58 (attached hereto at Ex. 1). The District Court's actions support what the record confirms; namely, that Defendants-Appellants filed their motion within the time frame fully authorized by the District Court.

As the record shows, Plaintiff-Appellee filed her complaint on February 11, 2011, in the D.C. Superior Court and effected service on Defendants-Appellants the next day. On March 4, 2011, Defendants-Appellants timely removed the action to

---

[2] *See Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010); *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009); *Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963 (9th Cir. 1999).

federal court. Under Rule 81(c)(2) of the Federal Rules of Civil Procedure, Defendants-Appellants were required to answer, move, or otherwise plead in response to the complaint by March 11, 2011. Under the time period proscribed in the new Anti-SLAPP Act, Defendants-Appellants further had 45 days from service of the Complaint (*i.e.*, until March 30, 2011) to file a special motion to dismiss. The parties subsequently agreed to, and the District Court thereafter entered, orders granting two successive consent motions to extend the deadline until April 18, 2011 for Defendants-Appellants "*to answer, move, or otherwise plead in Response to Plaintiff's Complaint*." USDC Dkt. No. 17 and March 15, 2011 Minute Order.

The express language of the Court's consent orders – particularly, the words "move, or otherwise plead" – is unambiguous and unqualifiedly broad. The terms of these Orders simply cannot be interpreted to *exclude* Defendants-Appellants' right to file *any* responsive motion to the Complaint (including a special motion to dismiss the Complaint under the Anti-SLAPP Act). On the basis of the foregoing, Defendants-Appellants timely filed their special motion to dismiss under the Anti-SLAPP Act on April 18, 2011, in full compliance with express terms of the District Court's orders.

Respectfully submitted,

By: /s/ Bruce W. Sanford

Bruce W. Sanford (356568)
Mark I. Bailen (459623)
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, NW, Suite 1100
Washington, DC 20036
Tel: 202-861-1500
Fax: 202-861-1783
bsanford@bakerlaw.com
mbailen@bakerlaw.com

Attorneys for Appellant Larry O'Connor

By: /s/ Eric A. Kuwana

Eric A. Kuwana (440424)
KATTEN MUCHIN ROSENMAN LLP
2900 K Street, NW, Suite 200
Washington, DC 20007
Tel: 202-625-3700
Fax: 202-295-1107
eric.kuwana@kattenlaw.com

Alan D. Croll (admission pending)
Harrison J. Dossick (admission pending)
KATTEN MUCHIN ROSENMAN LLP
2029 Century Park East, Suite 2600
Los Angeles, CA 90067
Tel: 310-788-4400
Fax: 310-788-4471

Attorneys for Appellant Andrew Breitbart

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY SHERROD,	:	Docket No. CV11-477(RJL)
	:	
Plaintiff,	:	July 19, 2011
	:	
	:	2:30 p.m.
v.	:	
	:	
ANDREW BREIBART, ET AL,	:	
	:	
Defendants.	:	

. . . . . .

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
THOMAS D. YANNUCCI
MICHAEL D. JONES
BETH A. WILLIAMS
PETER A. FARRELL
THOMAS A. CLARE
Kirkland & Ellis LLP
655 15th Street, NW
Suite 100
Washington, DC 20005

For the Defendant Breitbart:
ALAN D. CROLL
HARRISON J. DOSSICK
TIMOTHY J. LYNES
Katten Muchin Rosenman LLP
2029 Century Park East

Suite 2600

Los Angeles, California 90067

For Defendant O'Connor: BRUCE BROWN
MARK I. BAILEN
BRUCE W. SANFORD
Baker Hostetler
1050 Connecticut Avenue, NW
Washington, DC 20036

Court Reporter: PATTY ARTRIP GELS, RMR
Official Court Reporter
Room 4700-A, U.S. Courthouse
Washington, D.C. 20001
(202) 962-0200

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

P R O C E E D I N G S

COURTROOM DEPUTY: Civil Action 11-477 Shirley Sherrod versus Andrew Breitbart et al. The case set for oral argument. Counsel, would you please approach the microphone and introduce yourselves for the record?

MR. YANNUCCI: Good afternoon, your Honor, Thomas Yannucci Kirkland & Ellis representing Shirley Sherrod.

THE COURT: Welcome.

MR. JONES: Good afternoon, your Honor, Mike Jones of Kirkland & Ellis also representing Plaintiff Shirley Sherrod.

THE COURT: Welcome.

MR. CROLL: Hello, your Honor. I am Alan Croll C R O L L Katten Muchin Rosenman. I represent Andrew Breitbart.

THE COURT: Welcome.

MR. CROLL: Thank you, your Honor.

MR. BROWN: Bruce Brown Baker & Hostetler representing Larry O'Connor.

THE COURT: Welcome. All right, counsel. If you want to introduce any of your other people on your team, you are welcome to do that too for the record, but we are going to hear --

MR. BROWN: Introductions. I am joined here by Bruce Sanford of Baker & Hostetler, Mark Bailen also of Baker & Hostetler and, Alan, will you come introduce your colleague?

MR. CROLL: Tim Lynes.

MR. BROWN: Tim Lynes of Katten Muchin Rosenman.

THE COURT: Welcome, everyone.

MR. YANNUCCI: Your Honor, if I could, I just wanted to introduce this Shirley Sherrod and her husband Reverend Charles Sherrod who came up for the argument and my colleague Tom Clare, Peter Farrell and Beth Williams who are here at counsel table with us. Thank you.

THE COURT: Very good. Counsel, we are going to hear arguments on the Motion to transfer venue first and then the Motion To Dismiss which, of course, has two component parts to it. There is the more recent filing regarding the anti-Slapp Act and then, of course, there is the initial filing that involves issues separate and apart from the anti-SLAPP Act, but those will be covered under the same umbrella. On the Motion To Transfer Venue we will hear first from defense counsel. Mr. Croll.

MR. CROLL: Thank you, your Honor. Your Honor, just at the outset if I can make one comment. While thematically they may be similar, the Rule 12(B) and the slap are separate Motions. There are two Defendants. I don't know the Court's pleasure. I would like to briefly be heard on the SLAPP. I am going to argue venue. I don't know perhaps --

THE COURT: This has all been worked out. This has all been worked out. My law clerk was in this room. You had your chance to raise your issue then.

MR. CROLL: I did raise it.

THE COURT: The decision has been made. Move forward.

MR. CROLL: Thank you, your Honor.

THE COURT: These are Joint Motions for both sides.

MR. CROLL: Yes, your Honor.

THE COURT: One speaker per side. Move forward.

MR. CROLL: Yes, your Honor. As to venue, we believe that the case is strong to transfer it to California. Both Defendants live in California, not in D.C. The Plaintiff, of course, lives in Georgia. The blog that is at the heart of this was published in California. We believe the heart of the case belongs in California.

Plaintiff argues that there are substantial ties to D.C. in her brief. She says she was hired by people in D.C., not necessarily hired in D.C., trained by people in D.C., supervised by people in D.C. and fired by people in D.C., but you lay that against California, which is not her home forum, it seems to us that this is not a close case, your Honor.

It seems to us that while the Court has broad discretion, and we acknowledge that, as Deloach said even if California is not the perfect venue or jurisdiction, it is far superior to D.C. In that case it was North Carolina, but the analysis in Deloach seems in our view to apply.

THE COURT: Why did you move to transfer venue here from the Superior Court?

THE COURT: So they knew what they were getting was just excerpts, not the whole speech?

MR. BROWN: They did know that there was a full speech. They did not have the full speech.

THE COURT: So they knew presumably that the excerpts that they were getting were out of context, they didn't know what the context was?

MR. BROWN: Like any journalist who gets any portion of a speech that a public official gives, the journalist would be aware that there might be another half hour of the speech. These journalists had no red flags in front of them that the excerpt that they received was not entirely representative of the whole which it is.

And when your Honor has the opportunity to view the video and listen to Mrs. Sherrod's speech, you will see that the excerpt concludes with Ms. Sherrod saying that she took Mr. Spooner -- I will just read here -- "I took him to a white lawyer who had attended some of the training that we had provided because Chapter 12 bankruptcy had just been enacted for the family farm so I figured if I take him to one of them that's his own kind, they would take care of him. That's when it was revealed to me that you all -- it is about poor versus those who have, not so much about white. It is about white and black, but it is not, you know, it is opened my eyes."

And so when I say that there was a happy ending for

this story that she recounts, it is because the excerpt that Mr. Breitbart was providing was an excerpt that reveals the whole arc of the narrative, that she had an initial reluctance to help someone on account of his race, that she evaluated or reevaluated what she was going to do, and she made a decision to help him.

To Mr. Breitbart, he is perfectly entitled to have his opinion that that is evidence of racism because quite literally this is a public official who is recounting a story in which the very first instance she evaluates a person not based on need, not based on the merit of his claim, not based on his attachment to the land but based simply on the fact that he walked in the door and he was white.

Now, there are other people who would look at the arc of her story and conclude that it was one of the great stories of American redemption. Well, that's why we have a First Amendment so we can protect both sides of the story.

And I did fail to emphasize in my opening the importance of the overall context in which this blog posting appeared, that there had been months of debate and discussion between the followers of the Tea Party and the followers of the NAACP on the use of the word racism. Was it appropriate to call the Tea Party racist? Would it be appropriate to call the NAACP racist for a double standard in the way it approached race relations.

And one of the great things about the internet is that when you are a blogger like Mr. Breitbart, you can embed links in postings so your readers are able to go and see some of the other articles that formed the backdrop of the discussion you are having, and in Mr. Breitbart's case when you read his post, you will see that he has I think close to ten hyperlinks in the first half dozen paragraphs and those hyperlinks will take you to other articles that form the overall context of this discussion of race and racism and the Tea Party and American politics in the summer of 2010.

I do want to thank Mr. Yannucci for coming forward with my legislative industry from the Chief Financial Officer for D.C. I appreciate that. I would like to note that on the subject of retroactivity, he said we have one case, we have four. I didn't hear him cite a single case supporting his position that there is a state that has denied retroactive application of a SLAPP statute.

THE COURT: All right.

MR. BROWN: Finally, I would just like to conclude by noting that the SLAPP statute does provide for a heightened burden and that the party opposing a moving party has the burden of proving likelihood of success on the merits, and that's a very high burden and --

THE COURT: If it applies.

MR. BROWN: If it applies, it is a very high burden and

that we feel that not only have our papers shown that they failed to state a claim but certainly they have not met their affirmative obligation to show that they have a likelihood of success of it appealing -- of succeeding on the merits. Thank you.

THE COURT: Thank you.

MR. BROWN: That is all we have.

THE COURT: Thank you. Well, we don't get such fine arguments every day around here so I want to thank the parties for their arguments. I appreciate it. Mr. Yannucci is correct we don't usually have arguments around here. There isn't time. I have been on trial for the last nine weeks and I am facing four 6- to 8-week trials in the next six months. That's just one case out of my 300.

So we got lots going and we don't have oral arguments very often on Motions of this kind. Because that's true lest there be some failure of understanding of how this Court operates, I don't want anyone to be shocked to learn the following.

We only write opinions around here when we grant Motions To Dismiss or Summary Judgment, and we do that because we have to. The Court of Appeals requires us to, and that turns out to be 60 to 70 published opinions a year, not to mention trials, sentencings, et cetera, et cetera. So when we deny them, it is a minute order. That's all you will get. There is

only so much time in the life of a District Judge and there is only so much effort that can be expended.

So I will take it under advisement. I will noodle it further. It will be helpful to have the transcript of these arguments today and your pleadings which I must compliment both sides were way above average from the pleadings we get in this Court. So thank you for your efforts, counsel, on a very hot day. Time for recess and get a break. Take care.

(Whereupon, at 4:11 p.m., the proceedings were concluded.)

CERTIFICATE OF REPORTER

I, Patty A. Gels, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____