

"The Big Chill": Business Use of the Tort of Defamation To Discourage the Exercise of First Amendment Rights

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Although first amendment rights are among the most cherished of those guaranteed by our Bill of Rights, in some cases the exercise of the freedoms of speech and of petition has been interdicted by lawsuits that discourage their exercise. This has happened in recent years when developers have brought lawsuits sounding in defamation against individuals and civic associations. While many of these actions fail at the earliest stages of the civil process, they have the effect of chilling public participation. This Article will discuss several of these cases and possible remedies to discourage such lawsuits.

The late 1970s and 1980s saw an unprecedented building boom in many parts of the United States. This building frenzy affected not only commercial development, but also residential areas due to zoning changes, special exceptions, and variances granted by compliant local officials. In many cases, these proposed developments—commercial and condominium—affected residential neighborhoods.

A lawsuit no doubt may be used . . . as a powerful instrument of coercion or retaliation. . . . Regardless of how unmeritorious the . . . suit is, the [defendant] will most likely have to retain counsel and incur substantial legal expenses to defend against it. Furthermore, . . . the chilling effect upon [a defendant's] willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief.¹

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1. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740-41 (1983) (citations omitted) (addressing such suits in the context of employer-employee relations).

Lisa Mackey, a Valley Stream, New York, resident, was slapped with a \$3 million libel suit for circulating fliers that called a local developer "greedy."²

Betty Blake, a New York homemaker, was sued for \$6.5 million for trying to stop a developer from knocking down trees and building two houses on her street.³

Elaine Capobianco, also of New York, was sued for \$1 million when she fought the builder of a twenty-one unit townhouse project.⁴

The private citizens described above stepped forward to oppose the influx of condominium and office buildings that encroached on their neighborhoods and threatened to change their characters forever. In many similar cases, the residents mounted unsophisticated informational public relations and lobbying campaigns designed to thwart the machinations of developers.⁵ As a result, these individuals or groups sometimes found themselves the defendants in defamation lawsuits brought by developers. Developers have also asserted other causes of action including: 1) interference with advantageous relations;⁶ 2) malicious interference with contract rights;⁷ 3) abuse of process;⁸ and 4) violation of civil rights

2. Boccella, *Expensive Free Speech*, NEWSDAY, Mar. 18, 1988, at 3.

3. *Id.*

4. *Id.*

5. Residents are becoming more sophisticated. For example, an article in a recent issue of the *New York Times* began: "Neighborhood groups allied with environmental organizations are mounting sophisticated new campaigns to influence planning and real estate development across New York City. Groups have sprung up in almost every Manhattan neighborhood and in many parts of other boroughs." Lueck, *Citizens Gain in Anti-Developer Wars*, N.Y. Times, May 14, 1989, Home Section, at 1.

6. Carr v. Brown, 395 A.2d 79 (D.C. 1978) (real estate developer brought an action alleging that a property owner and his attorney maliciously interfered with his development project); Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972) (Humboldt Fir, Inc. filed an action against Sierra Club, alleging that it sought to induce the United States to breach a contract that allowed the Company to harvest timber. The Court held that "nothing more was alleged than that Sierra Club intentionally exercised its constitutional right to petition the government . . .").

7. Great Western Cities v. Binstein, 476 F. Supp. 827 (N.D. Ill. 1979); *aff'd*, 614 F.2d 775 (7th Cir. 1979) (land development corporation unsuccessfully sued an association of allegedly defrauded lot owners).

8. Protect Our Mountain Environment, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984) (environmental group sued by a developer for opposing the rezoning of a 507 acre tract from "Agricultural Two" to "Planned Development," which caused delays and increased financing and construction costs); Anchorage Joint Venture v. Anchorage Condominium Association, 670 P.2d 1249 (Colo. Ct. App. 1983) (AJV sought a variance to allow construction of a condominium complex on an irregularly shaped parcel of land. The Association opposed the project, so AJV sued, seeking damages resulting from a delay in the project that caused an increase in legal fees and interest on an outstanding debt.).

under 42 U.S.C. § 1983.⁹

This nation prides itself on free speech. The United States Supreme Court has held that "the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of liberties safeguarded by the Bill of Rights."¹⁰ But this statement is cold comfort to anyone who has become a defendant in the labyrinthine processes of the civil lawsuits described in this Article.

Although most observers agree "that the probability of an adverse judgment is small,"¹¹ the price of civil involvement can be very high, not only in terms of attorney's fees and general litigation expenses, but also through the disruption of families, physical illness and emotional upheaval.¹² Such protracted vexation can have the effect of discouraging even the hardest souls from exercising their first amendment rights. In short, the cases discussed in this Article have been dubbed "nuisance" suits. Plaintiffs file such suits to obtain positive results from the defendants, even though both parties realize that the plaintiffs' cases are so

9. *Lange v. Nature Conservancy, Inc.*, 24 Wash. App. 416, 601 P.2d 963 (1979) (Landowner brought an action against a non-profit environmental organization, which was in the process of listing 75 potentially significant nature areas including Lange's property. The court found no conspiracy to deprive Lange of his property); *Weiss v. Willow Tree Civic Association*, 467 F. Supp. 803 (S.D.N.Y. 1979) (Plaintiffs purchased underdeveloped land with the intent to build a planned development, which was opposed by Willow Tree Civil Association because of drainage and sewage problems. The court rejected plaintiff's civil rights claim as far-fetched because civic association was not part of the government.); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (Developer planned to build an apartment complex on a parcel zoned for multi-family housing units. The area residents petitioned the planning commission and board of directors to rezone the land for single family duplexes. The court held that the residents' attempt to prevent the construction of the complex by demanding a zoning amendment and by spreading derogatory and false statements about the proposal were absolutely privileged activities immune to an action under 42 U.S.C. § 1983.); *Bell v. Mazza*, 394 Mass. 1974, 474 N.E.2d 1111 (1985) (Bell brought state and federal civil rights actions against several neighbors, alleging that the neighbors had conspired to prevent the landowner from constructing a tennis court on his property, which abutted wetlands.); *Miller and Sons Paving v. Wrightown*, 443 F. Supp. 1268 (E.D. Pa. 1978) (Plaintiff argued that local civic associations conspired in violation of the Sherman Antitrust Act and the Civil Rights Act by filing an appeal with the Pennsylvania Environmental Hearing Board from the Board's grant of a permit to plaintiff to surface mine and drain. The court dismissed the complaint because the defendant associations' activities were not of the type that the Sherman Act and Civil Rights Act were designed to prohibit.).

10. *United Mine Workers v. Illinois Bar Association*, 384 U.S. 217, 222 (1967).

11. Sive, *Countersuits, Delay, Intimidation Caused by Public Interest Suits*, Nat'l L.J., June 19, 1989, at 27, col. 1.

12. Pring and Canan, *Intimidation Suits Against Citizens: A Risk for Public Policy Advocates*, at 16 (1986) (unpublished article) (courtesy of authors). One woman interviewed for this Article said, "I don't want to talk about it. It's disgusting. Small people don't count." Interview, name withheld (Oct. 28, 1989).

weak that they will be unlikely to pursue the cases to trial or to win.¹³

The plaintiff in these cases has the advantage. By filing a claim, even a plaintiff with a weak case forces the defendants to defend themselves or be held liable for a full judgment.¹⁴ Such a lawsuit inevitably will be expensive, and few individuals or public interest groups will have the resources to fight on two fronts: in the political arena and in the courts. As one lawyer characterized the situation:

There is no question that lawsuits can intimidate. Certain it is [sic] that lawsuits that expose ordinary citizens with multi-million dollar claims for alleged damage, more than intimidate, they freeze the blood cold and "thus do make cowards of us all." . . . Few average citizens have the wherewithall [sic] to defend themselves against the armoire of monies expended by well-monied persons[,] companies, [and] corporations—who not only may have the means to mount suits, but can claim further tax advantages for the legal expenses involved. Not so the poor defendants, the citizens who face this might¹⁵

By bringing a lawsuit, the developers succeed in moving the battle from the political arena, where it belongs, to the courthouse, where they hold the advantage because they have more money. Moreover, the stakes are smaller in each individual case. Over time, developers will become "repeat players" in subsequent cases and powerful adversaries: larger, richer and more savvy than their opponents.¹⁶

Individual homeowners or small neighborhood groups may be characterized as one-shot defendants who have little taste for litigation. By initiating any type of legal proceeding, developers place the homeowners or civic groups at a great disadvantage.

Still these developers, as plaintiffs, may have legitimate complaints. Many developers who have sued for defamation have claimed that excessive criticism and delays have wreaked havoc on their projects. They contend that they have a right to defend against malicious attacks and protracted delays in their plans, which may lead to bankruptcy. As one developer, the object of a civic association protest, stated, "We nearly went bankrupt. People have a perception that anybody out there build-

13. Rosenberg and Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INTER. REV. OF LAW AND ECONOMICS 3, 3 (1985). In an interview with the author, William Cohn, a lawyer for a plaintiff in a pending case, was asked if he expected to win. "Realistically, no," was his reply. Interview with William Cohn, in Baldwin, New York (Oct. 19, 1989).

14. 5 INT'L. REV. OF LAW AND ECON. at 3.

15. Notice of Motion to Amend Answer, *Terra Homes, Inc. v. Blake*, Index No. 1563/88, at 3 (George Nager, attorney for defendants).

16. Galanter, *Why The "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, LAW AND SOC'Y, Fall 1974, 98-100.

ing is a multi-millionaire. That's not true."¹⁷

The first Part of this Article will analyze cases that were based on the theory of defamation and their outcomes. The second Part will recommend steps the courts and the legislatures may take to discourage these nuisance suits that "put a quiet chill on the First Amendment."¹⁸

I. The Defamation Cases

Of the important cases in which the plaintiffs used defamation as a weapon against the opponents of their development projects,¹⁹ *Okun v. Superior Court of Los Angeles County*,²⁰ *Walters v. Linhof*,²¹ *Karnell v. Campbell*,²² *SRW v. Bellport Beach Property Owners*,²³ and *Myers v. Plan Takoma Inc.*²⁴ have the most similar facts and outcomes. Defamation was also used as a weapon in *Sherrard v. Hull*²⁵ and *Webb v. Fury*,²⁶ where the courts recognized the "sham exception" doctrine.

A. The *Okun* Line of Cases

The *Okun* case is perhaps the most typical of the defamation cases. A group of concerned citizens organized a successful campaign to repeal a city ordinance that would have allowed condominium development on a choice ten-acre site in Beverly Hills, California.²⁷ In the course of their

17. Boccella, *Expensive Free Speech*, *NEWSDAY*, Mar. 14, 1988, at 19.

18. Interview with Attorney George Nager, in Wantaugh, New York (Oct. 16, 1989).

19. In some cases, developers have by-passed individuals and associations, instead suing the news organization for publishing an allegedly defamatory statement made by citizens. The United States Supreme Court decided such a case in *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6 (1970). In *Greenbelt*, a real estate developer, Bresler, was engaged in negotiations with the City Council of Greenbelt for a zoning variance that would have allowed him to build high density housing on his land. The city concurrently was trying to acquire another tract of land from Bresler to construct a high school. Both sides had bargaining leverage in the negotiations. The defendant newspaper accurately reported the debate at the City Council meeting in which residents denounced Bresler's negotiating tactics as "blackmail." Bresler sued, alleging that the article imputed a crime to him. The Supreme Court held, as a matter of constitutional law, that the word "blackmail" was in these circumstances not libel, but a "rhetorical hyperbole" or "vigorous epithet." *Id.* at 14. The Court concluded that the context in which the words appeared was such that no one reading it would believe that Bresler was charged with a crime. See also *Diamond v. American Family Corp.*, 186 Ga. App. 681, 368 S.E.2d 350 (1988); *Riley v. Moyed*, 529 A.2d 248 (Del. 1987); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317 (1982).

20. 29 Cal. 3d 442, 629 P.2d 1369, 175 Cal. Rptr. 157 (1981).

21. 559 F. Supp. 1231 (D. Colo. 1983).

22. 206 N.J. Super. 81, 501 A.2d 1029 (1985).

23. 129 A.D.2d 328, 517 N.Y.S.2d 741 (1987).

24. 472 A.2d 44 (D.C. 1983).

25. 53 Md. App. 553, 456 A.2d 59 (1983).

26. 167 W.Va. 434, 282 S.E.2d 28 (1981).

27. 29 Cal. 3d 442, 447-48, 629 P.2d 1369, 1372, 175 Cal. Rptr. 157, 160 (1981).

lobbying efforts, citizens wrote letters and made statements accusing a real estate developer, both directly and indirectly, of a corrupt relationship with city officials, enabling him to "buy" the right to develop condominiums.²⁸ The developer had in fact discussed with city officials the possibility of a "land exchange," so that he and the city would each own adjoining land.

These negotiations concluded successfully on November 28, 1978, when the city council agreed to the swap and adopted a zoning ordinance allowing the plaintiff to build its condominiums.²⁹

To prevent the construction, the defendants circulated and filed a petition to allow voters to accept or reject the ordinance. As a result, the city council placed the ordinance on the ballot for a vote held on March 9, 1979. The voters rejected the ordinance and it was repealed.

The developer brought suit, complaining that the defendants were motivated by ill-will toward him. He alleged that the campaign against the ordinance defamed him because the defendants falsely accused him of corrupt activities in collusion with city officials.³⁰ One of the three Beverly Hills Council members was a real estate developer who was obviously sympathetic to fellow builders and realtors, although he had no business interests in the city.

The plaintiff also objected to the contents of a letter written by the defendants to the *Los Angeles Times* and an open letter to the Mayor of Beverly Hills published in the *Beverly Hills Courant*. In the *Times* letter, the defendants pejoratively referred to the plaintiff as a "developer" and implied that Councilman Stone and other City Council members were motivated by a selfish interest rather than by the public good.³¹

The plaintiff further objected to the fact that the letter entitled "To Set The Record Straight" contained words like "mysteriously" and "amazingly" in the penultimate paragraph. Thus, the writers suggested knowledge of unstated or inappropriate behavior between the plaintiff and Stone.³²

The plaintiff also alleged that the last six paragraphs in the open letter to the Mayor that appeared in the *Beverly Hills Courant* on October 13, 1978, were libelous. These paragraphs, however, were taken from a John D. MacDonald novel, *Condominium*, which concerned a fictional

28. *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 49 (D.C. 1983) (summarizing the facts in *Okun v. Superior Court*, 29 Cal. 3d 442, 629 P.2d 1369, 175 Cal. Rptr. 157).

29. 29 Cal. 3d at 448, 629 P.2d at 1372, 175 Cal. Rptr. at 160.

30. *Id.* at 448, 629 P.2d at 1371, 175 Cal. Rptr. at 160.

31. *Id.* at 451, 629 P.2d at 1374, 175 Cal. Rptr. at 163.

32. *Id.* at 451, 629 P.2d at 1374, 175 Cal. Rptr. at 163.

Florida company that bribed public officials and engaged in other illegal activities in order to construct defective buildings.³³

The California Supreme Court held that both letters were statements of opinion protected by the First Amendment. The court noted that the statements were part of a debate over whether the city should permit the plaintiff's condominium project, a setting in which an audience "may anticipate efforts . . . to persuade . . . by use of epithets, fiery rhetoric or hyperbole."³⁴

Regarding the *Times* letter, the Court determined that the plaintiff's claimed innuendo and allegations were not supported by words in the letter because "it did not constitute libelous charges of bribery and corruption."³⁵ The court concluded that:

[t]he implications deprecatory to plaintiff are mere opinions, not libelous. An essential element of libel is that the publication in question must contain a false statement of *fact*. . . . This requirement . . . is constitutionally based. The reason for the rule, well stated by the high court is [as follows:] "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."³⁶

Nor did the *Okun* court believe that the open letter to the Mayor comparing the actions of the developer and city council members to those in a novel could be fairly read as charging bribery or any other crimes.³⁷

Moreover, the court found that statements in a handbill opposing the ordinance allowing the condominium construction could not reasonably be interpreted by readers as libelous. Even the statement that the developer entered into a corrupt relationship with a councilman was more an expression of opinion than an actual accusation of a crime.³⁸

Two aspects of this decision are particularly noteworthy. First, short of a criminal accusation or personal dishonesty, the First Amendment protects even sharp attack on a person's motive or the moral qualifications of public officials. Second, there is also leeway for criticism of an individual who voluntarily injects himself into public controversy,

33. *Id.* at 453, 629 P.2d at 1376, 175 Cal. Rptr. at 164.

34. *Id.* at 459, 629 P.2d at 1379, 175 Cal. Rptr. at 167 (citation omitted).

35. *Id.*

36. *Id.* at 450, 629 P.2d at 1374, 175 Cal. Rptr. at 162 (citing *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976), quoting *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 339-40 (1974)).

37. *Id.* at 453, 629 P.2d at 1376, 175 Cal. Rptr. at 164.

38. *Id.* at 457-59, 629 P.2d at 1378-79, 175 Cal. Rptr. at 166-67.

thus becoming a public figure. The court accepted the notion that the developer's participation in a land exchange with the city and the adoption of a zoning ordinance allowing his development made him a public figure for defamation purposes.³⁹

A few years later, a libel claim was used as a weapon in *Walters v. Linhof*.⁴⁰ Walters, a developer, brought a suit against Eric Linhof and others, alleging defamation based on their statements in letters to the county land use department, county officials, and editors of the local newspaper.⁴¹

Walters sought recommendations and approvals from Colorado county agencies and from the Board of County Commissioners for a construction project near Monument, Colorado. These approvals would have granted requests for rezoning. Linhof objected to the developer's plans in a variety of communications.⁴²

On November 9, 1981, Linhof sent a letter to the El Paso County Land Use Department that referred to Walters as an options speculator posing as a developer, stating:

This application for a massive re-zoning of what is mostly pristine grazing land calls into question the usefulness of the whole Land Use Planning apparatus. Is it of any use? Or is it sterile, merely based on noble sentiments, such as local citizens['] participation in guiding their future, and on golden words about appropriate use of the land? Can it stand the test? The test is whether a developer, even a land options speculator posing as a developer, in fact overrides the land use planning process and the citizens and their desires. Does the developer, or a purported developer, simply sweep it all aside when he spends enough money to put together a comprehensive brochure? The result is permanent, irreversible. Does the developer in reality govern the result?⁴³

The El Paso County Land Use Department is the primary object of this diatribe, not Walters. But Linhof went on to say:

Further, we have reason to urge that the County Commissioners examine thoroughly the financial capability and technical knowledge of this developer to finance this project and see it through to completion as proposed. His own resume shows that he has had no experience in developing and completing a project of this nature.⁴⁴

39. *Id.* at 451, 629 P.2d at 1374, 175 Cal. Rptr. at 162.

40. 559 F. Supp. 1231 (D. Colo. 1983).

41. *Id.* at 1233.

42. *Id.*

43. *Id.* at 1235.

44. *Id.* at 1236.

Walters also alleged that a letter to the editor of the *Monument Tribune* by another defendant, Woodruff, was defamatory. Woodruff's letter recited her concern for the community, her involvement in the rezoning proposal, and her attendance at numerous meetings. She then added:

I was shocked to learn that many of the California towns where Walters claims to have had experience were very familiar to me. My thoughts wandered to overbuilt and crowded subdivisions, rundown and vacant shopping centers and industrial complexes which are real eye-sores.⁴⁵

Woodruff's letter continued its denunciation of Walters, questioning his experience and qualifications and outlining the research she had done on him in California.⁴⁶

Walters also claimed a letter that was circulated by the defendants to various public officials in El Paso County was defamatory. This letter, written by Robert Cruise, allegedly contained untrue statements about Walters and was accompanied by a photograph of Walters' California headquarters. This latter claim perplexed the court, which said, "The exact nature of the statements in the letter or whether the photograph was in fact a photograph of the plaintiff's headquarters is not articulated."⁴⁷

The defendant moved for summary judgment. The court held that, like the developer in *Okun*, Walter's participation in the rezoning proceeding was sufficient to qualify him as a public figure. Even if Walters did not expressly consent to the public comment, he was deemed to have constructively consented by virtue of his rezoning applications. The plaintiff's constructive consent barred recovery for statements that, *even if* defamatory, were made in response to requests by the Board of County Commissioners for comment and public participation. Therefore, even if defamatory, the defendants' communications were absolutely privileged. The court also found, as a matter of law, that the statements contained in the letters to the Land Use Department and the local newspaper were protected.⁴⁸

Unlike *Okun*, the district court in this case discussed at length the issue of the developer as a public figure. The plaintiff, Walters, argued that he was not a public figure even though he was the proponent of a zoning change that invited public attention and comment. The plaintiff conceded that he may have invited public comment, but not abuse in

45. *Id.*

46. *Id.*

47. *Id.* at 1233.

48. *Id.* at 1236-37.

print.⁴⁹ The court acknowledged that Walters was not a public figure for *all* purposes because he did not “occupy a position having persuasive power and influence.”⁵⁰ The court went on to find that Walters’ and his associates’

[p]articipation in the re-zoning proceeding was significant enough to qualify them as public figures. One does not become a public figure simply because the media’s attention was attracted, but plaintiffs here thrust themselves to the forefront of a particular public controversy to affect its resolution.⁵¹

Writing letters to the editor created problems similar to those in *Okun* and *Walters* in a 1985 New Jersey case, *Karnell v. Campbell*.⁵² Robert L. and Wayne L. Karnell, doing business as a real estate development firm named Central Leasing Company, purchased a vacant lot near the former New Market school, which they planned to develop into retail stores. The plan drew much criticism, not only concerning the development of the land, but also for an alleged underappraisal of the vacant lot which led to its being undervalued for sale to the Karnells.⁵³

Among the critics were the defendants, Rita Campbell, John Penna, Carrollee Rosenblatt, and Eileen Wolfskehl, who, the Karnells alleged, had maliciously written letters containing false and defamatory statements about them that were published in the *P.D. Review*, a local newspaper.⁵⁴ Rosenblatt wrote a letter that appeared in the newspaper on December 16, 1982, stating that, on December 8, 1982, Piscataway had been “raped” because the town had been “stupid enough” to trust the Karnells and rezone New Market with resulting disadvantage to the residents. The letter further stated that the town had been “robbed” because undeveloped commercial land could sell for \$200,000, and the price paid for the New Market property with its structure and improvement “amounts to theft.” She voiced the hope that Piscataway would fight the planned alteration and void the zoning change “obtained by the developer under false pretenses.” She characterized the town as being not a rape victim, but a “cheap prostitute” if it did not fight the developers.⁵⁵

John Penna wrote a lengthy letter to the newspaper which expressed his distrust of the town Planning Board. He criticized the Board for allowing the Karnells’ plan to pave over the grassland and develop the

49. *Id.* at 1235.

50. *Id.*

51. *Id.* at 1235 (citations omitted).

52. 206 N.J. Super. 81, 501 A.2d 1029 (1985).

53. *Id.* at 85, 501 A.2d at 1031.

54. *Id.* at 85, 501 A.2d at 1030-31.

55. *Id.* at 85-86, 501 A.2d at 1031.

New Market property into another shopping center. Penna opined that the development would cause traffic jams, air pollution and storm sewer overload.⁵⁶ Penna wrote that Piscataway and New Market had been “duped by the clever maneuvering of very shrewd businessmen,”⁵⁷ According to Penna, “[a]llowing the Karnell group the right to build retail stores on our grassland only serves to fatten the Karnell bank account (I can see the smiles on their faces) while, once again, the New Market area gets dumped on.”⁵⁸

Eileen Wolfskehl also wrote a letter that appeared in the *P.D. Review*. She not only criticized the Karnells’ development plans, but also the Planning Board that approved it despite public opposition. She commented, “Mr. Karnell seems to have no difficulty in getting what he wants, e.g. a variance to build more parking spaces.”⁵⁹ Wolfskehl claimed that she and other citizens had been misinformed by the planning board clerk who said that retail stores were not part of the Karnell’s project. She also questioned whether the Planning Board continued the meeting late into the night so it could make its decision after many citizens had left. Wolfskehl stated her belief that the Planning Board feared there would be a greater turnout if another meeting were held.⁶⁰

Of all the defendants, Rita Campbell wrote the lengthiest letter to the *P.D. Review*, which was published on February 24, 1983. Her letter stated in part:

At the Piscataway Township Council meeting of February 1, Robert Karnell, purchaser of a 0.9-acre lot adjacent to the New Market School, portrayed himself as a much put-upon man. He said that he had been slandered and libeled and he attempted to win sympathy by stating that his wife had been hospitalized for a year and that he himself had had a heart attack and had also been hospitalized. He said that he had been unaware of the restrictive clause in the sale ordinance limiting use of the land to parking.

No one an (sic) believe that a developer who has purchased as much land in Middlesex County as Mr. Karnell has could fail to be aware of that restrictive clause. Moreover, he has a lawyer. Indeed, a lawyer was sitting beside him at the meeting. . . .

Does Mr. Karnell expect us to believe that he was not aware of this grave error in the appraisal of which he got a copy and for which he paid \$300? Do you pay \$300 for something and not look at it carefully?

56. *Id.* at 86, 501 A.2d at 1031.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 87, 501 A.2d at 1031-32.

The whole matter raises many questions and *I have complained to the Middlesex County Prosecutor. At the council meeting of February 15, Mr. Paley, township counsel, said that he did not know how this error had occurred. Perhaps the prosecutor can find out and whether it was, in fact, an error.*⁶¹

Before reaching its decision, the court analyzed the contents of all the letters. The court viewed Wolfskehl's letter as not actionable because it merely said that Robert Karnell had no trouble getting his development plan approved by the town. The letter did not suggest that Karnell got his way through dishonest or criminal behavior.⁶² Nor did the court find Penna's letter defamatory although it suggested that the township had been "duped" by Karnell's maneuvering. The court said, "In essence Penna portrays plaintiffs as clever businessmen who are profiting at the expense of the citizens We view this as pure opinion couched in terms of pejorative rhetoric. . . ." ⁶³

The court was also satisfied that Rosenblatt's letter was "pure opinion" and that she did not accuse the Karnells of the crimes of rape or theft. The court had more trouble with her claim that the Karnells had obtained a zoning change under "false pretenses." The plaintiffs had argued that this was not a protected expression of opinion, but a statement charging them with dishonest conduct or at least an opinion based on undisclosed facts.⁶⁴

The court disagreed, stating that a "contextual reading of [her] words leads only to the conclusion that her idea of an appropriate commercial use for the New Market school property is different from plaintiffs."⁶⁵

The court had the most difficulty with the Campbell letter because it contained statements regarding Karnell's purchase of the property at a low price because of an incorrect appraisal.⁶⁶ Her letter voiced disbelief that Karnell paid for an appraisal and yet did not know that the land had been rezoned and underappraised, and it expressed her dissatisfaction with the town. Her incredulity about Karnell's testimony before the

61. *Id.* at 87, 501 A.2d at 1032 (emphasis added by court). On February 24, 1984, an article in the *P.D. Review*, a local newspaper serving Piscataway and Dunellen, "reported that the prosecutor was investigating Campbell's charge that after the New Market property was rezoned for commercial use the Karnells purchased it at a 'dishonestly' low cost' because its appraisal value had been 'deliberately underestimated' at \$35,000 for the plaintiffs' gain." 206 N.J. Super. at 88, 501 A.2d at 1032.

62. *Id.* at 92, 501 A.2d at 1035.

63. *Id.* at 92-93, 501 A.2d at 1035.

64. *Id.* at 93, 501 A.2d at 1035.

65. *Id.*

66. *Id.*

Town Council led to her complaint to the county prosecutor.⁶⁷ The court concluded, however, that Campbell's statements were not defamatory because she disclosed all the facts which formed the basis of her opinion.⁶⁸

Thus, the court found all of the letters to be protected speech, stating, "The citizens of our state must be free, within reason, to speak out on matters of public concern. So long as they state the facts implicated fairly and express their opinions, even in the most colorful and hyperbolic terms, their speech should be protected by us. . . ."⁶⁹

In the 1986 case of *SRW Assocs. v. Bellport Beach Property Owners*,⁷⁰ it was handbills, pamphlets, and board-hearing statements that brought the defendants into court. SRW sought to build thirty-six clustered condominiums on a bay-front site in New York. The Brookhaven Town Board favored clustered development (apartment buildings, town houses, or garden apartments), which was permitted, if approved, under Brookhaven Town Law section 281 (no zone change required). Civic associations and individuals, however, opposed this plan. They feared increased noise, traffic, and sewage would change the character of their neighborhood.⁷¹

A stormy public hearing on this project was held on October 3, 1984. The civic associations' pamphlet and radio advertisements described the development as "multi-family condominium housing." Three hundred angry, hostile people descended on a Town Board meeting to voice concerns regarding changes in the community from family homes on one-acre lots to a cluster-type development and the concomitant effects of such a change on sewers and water supplies.⁷²

The elected Town Board officials agreed with the civic associations and unanimously rejected the SRW plan. Subsequently, SRW brought suit against nine civic associations and sixteen individuals for 11 million dollars, alleging injurious falsehood over the manner in which the civic associations protested its plan. SRW claimed that it was damaged because some residents incorrectly described its proposals to develop high density housing as a plan to build condominiums! SRW complained that this swayed public opinion, and encouraged the town board to turn down

67. *Id.* at 94, 501 A.2d at 1036.

68. *Id.*

69. *Id.* at 94-95, 501 A.2d at 1036.

70. 129 A.D.2d 328, 517 N.Y.S.2d 741 (1987).

71. Telephone interview with Donna Gallo, defendant in *SRW Assoc. v. Bellport Beach Property Owners* (Oct. 19, 1989).

72. *Id.*

the zoning SRW requested.⁷³

SRW's attorney, Frederick W. Block, said civic groups knew the proposal was for single-family homes and deliberately misled the public to induce the Town Board to kill the project. Block stated:

"They sent out circulars saying come down and oppose the garden apartments. They packed the auditorium and the Town Board was scared to death." The Town Board members . . . "were afraid the 500 [sic] people there would vote them out of office, so they acted like a political body is expected to act."⁷⁴

Attorney Block's statements gave rise to the prevailing feeling that SRW had sought to punish the civic associations opposed to the plan by bringing a lawsuit. The punishment might also intimidate local citizens from speaking out in the future.⁷⁵ This inference of SRW's purpose was borne out by Block's statements:

"We'll test the waters with this case Where is the line going to be drawn? They want to put the white hat on the heads of the civic leaders under the banner of the First Amendment, but it's my clients who should be wearing the white hat. My clients were ready to comply with what the Planning Board unanimously approved, but all that was rejected in favor of rallying behind the forces."⁷⁶

Richard Hamburger, another lawyer for SRW, said his plaintiff viewed the case as a "business tort." The product was housing and false information killed the sale. He commented that his client "was mad and had a right to be angry because the tumultuous hearing had denied SRW the opportunity to be fairly heard."⁷⁷ The defendants not only answered the complaint, but also filed a counterclaim charging SRW with an attempt to misuse the legal process to intimidate defendants from exercising their first amendment rights.⁷⁸ The defendants also asked the Court to dismiss the complaint. In their motion, the defendants argued that the First Amendment clearly protected the expression of their views in a public forum. They contended that "such speech is at the heart of this country's commitment to a democratic form of government and cannot be punished in a civil action for libel."⁷⁹

73. *Id.*

74. Ketcham, *Libel Suit: Tool Against Activism*, N.Y. Times, Apr. 7, 1985, § 11 (LI), at 10, col. 3.

75. Press Release South County Alliance, Dec. 14, 1984, at 2 (courtesy Donna Gallo).

76. Ketcham, *supra* note 74.

77. Telephone interview with Richard Hamburger, attorney for plaintiff, SRW Assocs. v. Bellport Beach Property Owners (Oct. 23, 1989).

78. Press Release of South County Alliance, *supra* note 75.

79. Suffolk Life, Dec. 19, 1984. Defense attorney Harriette K. Dorsen relied on *Blackhawk Corp. v. Ewing*, 94 Cal. App. 3d 640, 156 Cal. Rptr. 581 (1979), in which the court

The New York Supreme Court refused to grant the defense motion to dismiss but dismissed the counterclaim by the civic groups that would have charged the developer for costs incurred by the civic groups during the case.⁸⁰

The New York Appellate Division disagreed with the lower court. The appellate court held, as a matter of law, that there was no causation between the defendants' alleged misrepresentation to the members of the public prior to the hearing and the Town Board's denial of SRW's application.

The minutes of the public hearing on the plaintiffs application . . . undisputedly show that the plaintiff's subdivision proposal for cluster zoning of detached single-family residences was accurately represented to the Town Board and to the members of the public who attended the hearing by an attorney and architect retained by the plaintiff.⁸¹

The court concluded that the direct cause of the plaintiff's injury was the Town Board's decision to deny the application, not citizen comments at the hearing.⁸² The court also stated that malice was not the sole motivating factor because the neighbors merely wanted to protect their neighborhood from perceived detrimental changes.

SRW Assocs. emphasized the rule on damage recovery in defamation actions. In order "to recover damages for injurious falsehood, special damages must be proved to be the direct and natural result of the falsehood."⁸³

The defendants claimed a victory although it must be regarded as Pyrrhic.⁸⁴ The court did not rule that citizens had an unlimited right to speak, but that in order to establish tort liability, the plaintiff must show

found statements made by a civic association in connection with the circulation of referendum petitions were not defamatory because they did not impugn the developer's honesty or accuse the developer of a crime. The court determined that the statements were addressed to the electorate and concerned a matter of intense public interest. 94 Cal. App. 2d at 643, 156 Cal. Rptr. at 583.

80. Telephone interview with Donna Gallo, *supra* note 71.

81. 129 A.D.2d 328, 331, 517 N.Y.S.2d 741, 743 (1987).

82. *Id.* at 332, 517 N.Y.S.2d at 744. Subsequently, SRW Associates filed a lawsuit against the Brookhaven Town Board, which eventually overturned the Board's denial of permission for the project. Telephone interview with Richard Hamburger, *supra* note 77.

83. *Id.* at 331, 517 N.Y.S.2d at 743.

84. The legal fee in the defendant's protracted victory reached nearly \$18,000, a fraction of which was covered by one defendant's automobile insurance policy. The rest was raised by local contributions, fund-raising breakfasts, and other local efforts. The defendants' attorney was Harriette K. Dorsen of New York City, who performed some work in the case *pro bono*. The civic association and the individuals were reluctant to hire local attorneys closely associated with Suffolk County politics. They "thought it best to go into the city." Telephone interview with Donna Gallo, *supra* note 71.

that the defendants acted maliciously.⁸⁵

SRW's lawyer, Hamburger, said of the unanimous ruling:

It's a license to lie. It's very disturbing. It says that a civic association or anyone can say anything[;] so long as there is a hearing and the applicant is represented, there can be no claim for damages. The action of the Board or public body breaks the causal connection.⁸⁶

Despite the defendants' victory, both attorney Hamburger and the author of this Article predict that the "case will come" in which a plaintiff will be successful.⁸⁷

Finally, in *Myers v. Plan Takoma, Inc.*,⁸⁸ a neighborhood association and various individuals were targets of a libel suit. Myers, Poling, and Miller, operators of a neighborhood bar, sued a group called Plan Takoma, Inc., a neighborhood association. The plaintiffs asserted that a statement made in an association leaflet was defamatory.⁸⁹

Plan Takoma, Inc. had stated in its leaflet that the plaintiffs were a "shady group of bar owners."⁹⁰ This circular was part of an effort to influence the Alcoholic Beverage Control Board to deny the plaintiffs a license to operate a bar or restaurant in the defendant's neighborhood.⁹¹

The plaintiffs argued that the word "shady" implied dishonesty and illicit activities, and was an actionable defamatory statement.⁹² The association filed a motion to dismiss the complaint on the grounds that the statement was not capable of a defamatory meaning and, as a statement of opinion, was protected by the First Amendment.⁹³

The court first embarked on a lengthy analysis of the leaflet, focusing on the use of the term "shady." The court recognized that the term might be considered an "offensive epithet in another context," but in this situation it was unlikely that any reader would have taken it as other than "rhetorical hyperbole."⁹⁴ The court noted, as did the *Karnell* court with respect to Rosenblatt's letter, that the statement did not rely on the existence of undisclosed defamatory facts or any privately held information.⁹⁵

85. *SRW Assocs.*, 129 A.D.2d at 332, 517 N.Y.S.2d at 744.

86. Ketcham, *Libel Suit Dismissed*, Long Island Journal, N.Y. Times, Aug. 9, 1987, at 5.

87. Interview with Richard Hamburger, *supra* note 77.

88. 472 A.2d 44 (D.C. 1983).

89. *Id.* at 46.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 48.

95. *Id.*

Next, the court analyzed whether the term "shady" was an opinion or a fact that could be proved true or false. The court stated, "If the content of the term used is so debatable, loose and varying, that [the terms] are unsusceptible to proof of truth or falsity, the use of the terms will ordinarily be held to be within the realm of protected opinion."⁹⁶ The court accordingly viewed "shady" as not susceptible to being proved true or false and not a term that charges serious, criminal conduct.⁹⁷

The court termed the use of "shady" as an erroneous opinion, stating that such opinions "are inevitably put forward in free debate but even erroneous opinion must be protected so that debate on public issues may remain robust and unfettered"⁹⁸

The court held that the bar owners had failed to state a claim because the so-called defamatory statement was a constitutionally protected statement of opinion. In reaching its holding, the court expressly identified the most damaging aspect of these defamation cases as the threat of prolonged litigation, which has the potential to chill those who wish to criticize public figures or public affairs.⁹⁹ "[T]he prospect of delay attendant upon *any* defamation trial, no matter how expeditiously handled, may inhibit the full and free exercise of constitutionally protected activities."¹⁰⁰

B. The "Sham Exception" Doctrine

Sometimes the plaintiff's use of a defamation claim can raise disquieting issues as to whether the defendant's protest of the speech may be a sham, which is a major exception to the first amendment right of petition. Two cases raised this specter: *Sherrard v. Hull*¹⁰¹ and *Webb v. Fury*.¹⁰²

The *Sherrard* case involved a sixty-six year old woman, Edith Hull, who, over the years, had participated in a variety of local political disputes. Warwick Sherrard was a locally prominent businessman and occasional politician in Cecil County, Maryland. At a hearing before a Board of County Commissioners, Sherrard sought to change the zone of some property located near Mrs. Hull's farm.¹⁰³

96. *Id.* (citations omitted).

97. *Id.*

98. *Id.* at 48 (citations omitted).

99. *Id.* at 50.

100. *Id.*

101. 53 Md. App. 553, 456 A.2d 59 (1983).

102. 167 W. Va. 434, 282 S.E.2d 28 (1981).

103. 53 Md. App. at 554, 456 A.2d at 60.

Hull testified in opposition to the proposed zone change, but a week later learned the Board granted Sherrard's rezoning application. Later Hull appeared at an open Board meeting and gave her opinion on a variety of issues. In the course of her comments, she said to a county commissioner who had voted affirmatively for the Sherrard rezoning, "I would like to know how much money it cost Warwick [Sherrard]." ¹⁰⁴ This exchange was recorded in the official minutes of the Board. Sherrard learned of Hull's comment and on May 23, 1980, filed a suit alleging defamation. The jury found in favor of Hull and the Maryland Court of Appeals upheld the jury's decision, saying, "Within this [case's] limited factual framework, we hold that remarks made by an individual in the course of petitioning for a redress of grievances before a legislative body are absolutely privileged under the First Amendment to the United States Constitution." ¹⁰⁵

The Court noted that "[i]n order for a democratic government to govern democratically, it is necessary that an atmosphere be created whereby facts may be freely presented to the governing legislative body." ¹⁰⁶ The Court believed Mrs. Hull's activities constituted petitioning and were protected from liability for defamation because she appeared at a regular meeting of a legislative body with the power to address her concerns. ¹⁰⁷

Perhaps the most important aspect of the court's decision was the court's statement that the petitioning privilege has its limits. In Judge Alpert's words, "Inherent in the words 'petitioning for redress of grievances' is the concept that the words contained in the petitioner will relate to the redress sought and that the petition is genuinely seeking redress." ¹⁰⁸ The judge's caveat concerns the one major exception to the petitioning privilege: the so-called "sham exception," which removes petitioning activity from the protection of the First Amendment.

The "sham exception" doctrine is drawn from two United States Supreme Court cases: *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.* ¹⁰⁹ and *United Mine Workers v. Pennington*, ¹¹⁰ which hold

104. *Id.* at 555, 456 A.2d at 61.

105. *Id.*

106. *Id.* at 558, 456 A.2d at 62.

107. *Id.* at 572, 456 A.2d at 70.

108. *Id.* at 574, 456 A.2d at 71.

109. 365 U.S. 127 (1961). *Noerr* interpreted the Sherman Antitrust Act as inapplicable to a conspiracy by railroad presidents to foster the passage and enforcement of laws to destroy the trucking business. But *Noerr* left open the possibility that the political processes may be so abused that the efforts to influence the government are mere "shams" intended to cover anticompetitive aims. *Id.* at 144.

that coalitions intended to influence public officials do not violate the Sherman Act.

In *Sherrard*, the Maryland Court of Appeals concluded that, in Edith Hull's case, the "sham exception" would not apply because there was not the slightest suggestion that Hull was a competitor or that she was attempting to interfere with the business relationship of Sherrard. As the Court put it, "so long as Hull's principal purpose . . . was to obtain some favorable governmental action, any consequential injury to Sherrard being merely incidental thereto, no defamation action may lie for exercising her right to petition her local legislative body."¹¹¹

The issue of the "sham exception" also arose in *Webb v. Fury*, which involved an environmental group sued by a coal company.¹¹² On July 1, 1980, DLM Coal Corporation, a West Virginia Mining Company, filed a libel action for \$200,000 against Rick Webb, a farmer, the managing agent of Braxton Environmental Action Program, Inc., and a member of Mountain Stream Monitors. Braxton was a nonprofit West Virginia corporation with the express purpose of "ensuring that coal development is conducted with full regard for creation and the rights of future generations."¹¹³ Mountain Stream Monitors was an unincorporated association concerned with the effects of coal mining on water quality. Webb, Braxton, and Mountain Stream were also sued by DLM for damaging DLM commercial interests with a series of petitions to the Environmental Protection Agency and the Office of Surface Mining (OSM), and by a Mountain Stream newsletter. The defendants had alleged that DLM had polluted the Buckhannon River, causing many trout to die.¹¹⁴

Webb and others complained to the OSM, which is required under the Reclamation Act to conduct an inspection whenever any person provides information giving rise to a reasonable belief of a violation of the Act. The person who provides the information may accompany federal officials on the inspection.¹¹⁵

110. 381 U.S. 657 (1965). The *Pennington* court discussed the scope of *Noerr. Pennington* involved a suit brought against the United Mine Workers by certain coal companies alleging that the defendants had lobbied the Secretary of Labor to obtain adjustments to the Tennessee Valley Authority coal purchasing policy in order to drive small coal companies out of business. The Supreme Court held that combinations intended to influence public officials do not violate the Sherman Act, even though the intended result of such influence is to destroy competition. *Id.* at 670.

111. 53 Md. App. at 566, 456 A.2d at 67.

112. 167 W. Va. 434, 282 S.E.2d 28 (1981).

113. *Id.* at 436, 282 S.E.2d at 31.

114. *Id.* at 437-40, 282 S.E.2d at 31-33.

115. *Id.* at 438, 282 S.E.2d at 31.

Webb, two OSM inspectors, and DLM employees tested several seeps in the area of DLM's operations. All the testings revealed that the water contained acid or iron above the limits established by federal regulations. Despite these facts, the OSM could not establish conclusively that the water in the seeps was runoff from the area mined by DLM. Consequently, OSM decided not to take any action against DLM. OSM told both Webb and DLM of its decision and its reasons.

The four-page newsletter that DLM claimed was defamatory discussed the association's activities and provided information about such matters as the levels of certain pollutants in streams.¹¹⁶

The newsletter and the separate communications with the federal agencies constituted the entire defamation case. The defendants maintained that their activities were absolutely privileged under the right of petition provided by the First Amendment.¹¹⁷ DLM argued that the communications were defamatory, and saw the case as "a simple matter of a corporation trying to vindicate its reputation through the legal system."¹¹⁸ The issue of the "sham exception" became the central focus in this case. The question was raised whether plaintiff Webb's request for administrative and investigative aid was initiated to harass DLM, to interfere with its relationship with the government regulatory authority, or to destroy its business.¹¹⁹

The West Virginia court stated that any conduct that prevents another from participating in the policy-making function of government is not protected by the right to petition the government. Thus, such conduct may give rise to a cause of action for damages.¹²⁰

The *Webb* court noted that DLM had never claimed it was denied access to or was prevented from participating in the proceedings of federal agencies. In fact, the company had ample opportunity to participate in the EPA and OSM investigations. The court emphasized that not only were DLM employees present during the inspection of the seeps, but no citation or adverse agency action had ensued.¹²¹ Moreover, DLM never alleged that the defendants used politics or economics to encourage the OSM to act in an illegal manner.¹²²

116. *Id.* at 440, 282 S.E.2d at 33. The only page of the newsletter incorporated in the complaint was the first page, which contained an editorial and a map of the Buckhannon River. A shaded area on the map contained permit numbers, designating DLM mines.

117. *Id.*

118. *Id.* at 441, 282 S.E.2d at 33.

119. *Id.* at 451-52, 282 S.E.2d at 39.

120. *Id.* at 452, 282 S.E.2d at 39.

121. *Id.*

122. *Id.* at 453, 282 S.E.2d at 39.

The court reached two conclusions in this case. First, as a number of courts have stated, even proof of malicious intent or knowing falsity does not defeat the first amendment right to petition. "[The] cases make it clear that permitting proof of malicious, fraudulent or deceitful intention to overcome the right to petition would so discourage the exercise of the right as to constitute an impermissible burden."¹²³ In *Webb*, the petition merely supplied information directly to the agency in an effort to get DLM's permits revoked.

Second, the court held that the statements published in the newsletter were absolutely privileged communications under the First Amendment and article III, section 16 of the West Virginia Constitution.¹²⁴

II. Preventing Defamation Cases

The seven primary cases discussed in this Article have a common theme: businesses and real estate developers used defamation as a weapon to discourage defendants' protests. In each case, the defendants won.

Yet to defend such lawsuits is expensive. As Judge Neely, dissenting in *Webb v. Fury*, observed, "[W]e have ordinary citizens who are being sued by a well-financed corporation for activities which appear to be not only constitutionally privileged but statutorily solicited and welcomed."¹²⁵

In virtually all of these nuisance cases, the plaintiffs spent large amounts of money on the litigation, while the defendants were hard-pressed to find legal representation at all. With this inequity, there is an enormous opportunity for the chilling of first amendment rights.

This Article proposes several judicial and legislative steps that can be taken to discourage the filing of nuisance cases.

A. Judicial Remedies

Some judicial steps have already been taken. For instance, the Colorado Supreme Court has adopted a number of rules that can interdict such nuisance suits. By the first such rule, any motion to dismiss that raises the issue of first amendment rights must be dealt with expeditiously by the trial court. Second, the burden of proof on a motion to dismiss must be shifted from the defendant to the plaintiff, who then must show that the defendant's petitioning activities were not protected

123. *Id.* at 454-55, 282 S.E.2d at 40.

124. *Id.* at 459, 282 S.E.2d at 43.

125. *Id.* at 466, 282 S.E.2d at 46.

by the First Amendment. Third, the trial court must apply a heightened level of review to the plaintiff's proof.¹²⁶

The Colorado courts also have a policy of employing three substantive tests to a motion to dismiss. First, the plaintiff must prove baselessness, showing that the suit was devoid of reasonable factual support or lacked any basis in law. The plaintiff must then show that the primary purpose of the defendant's conduct was improper, seeking either to harass the plaintiffs or to effect some improper purpose. Finally, the plaintiff must prove that the defendant's conduct "*had the capacity to adversely affect a legal interest of the plaintiff.*"¹²⁷

Judge Neely's proposals focus on the high cost of discovery and the attendant legal fees, which may chill the exercise of first amendment rights because available resources are grossly imbalanced. He suggests a rule permitting the trial court to order the plaintiff to pay the defendant's discovery costs in advance. If the plaintiff succeeded on the merits, the payment would be refunded.¹²⁸

If a plaintiff is able to get to trial on the merits but loses, Neely would require without exception that the defendant be awarded the full costs of defense. Such a remedy would permit the defendant to hire a lawyer on a contingent fee basis, as plaintiffs hire counsel in tort actions.¹²⁹

Under the current rule, the so-called American Rule, a victorious party in a law suit is not entitled to recover the attorney fees expended in gaining the favorable result.¹³⁰ Perhaps the most feasible solution to this problem is to adopt the British system, under which the winner obtains costs and fees from the loser. Similarly, if a defendant defends against a plaintiff who then withdraws, the defendant, as the winning party, would recover all defense costs. The defense would be cost-free, and the plaintiff would not gain a settlement, therefore not profiting at all by filing a claim. Under this model, if the probability of prevailing is low, the plaintiff's litigation costs are likely to be high.¹³¹ The British system thus encourages the filing of only meritorious claims.

The chief vice of the American system, as exemplified in the cases discussed in this Article, is the opportunity for businesses to force indi-

126. Pring and Canan, *Litigation to 'Chill' Public-Interest Advocacy*, at 11 (1986) (unpublished manuscript).

127. *Id.* (emphasis added).

128. 167 W. Va. at 467-68, 282 S.E.2d at 47.

129. *Id.* at 468, 282 S.E.2d at 47.

130. Epstein, *Malicious Prosecution and Abuse of Process—Don't Get Mad, Get Even*, *Long Island Examiner*, Feb. 17, 1989, at 27.

131. Rosenberg and Shavell, *supra* note 13, at 5.

viduals to defend themselves at little cost to the business. In each case, the plaintiff filed an action at relatively small expense claiming the defendant was liable for all of the plaintiff's injuries.¹³²

In the American justice system, the courts do not exercise much control over the quality of claims, and only "patently frivolous ones" are disallowed.¹³³ Even this occurs only after the case has begun to wend its way through the court system. The only gatekeepers are the lawyers. But in this litigious society many lawyers are only too willing to press claims, even those without genuine value.

If the defendant does not appear and defend, leaving the complaint unchallenged, the plaintiff wins without any further inquiry on the part of the courts.¹³⁴ Thus, to defeat any case, no matter how meritless or unjust, the defendant must pay the expense of gathering evidence to defend against all of the allegations made by the plaintiff.¹³⁵ The hapless defendant is placed in a no-win situation.

To address these inequities, Judge Neely also urges that a punitive rule apply after a trial in which the plaintiffs actually used the legal process in a "despicable way" to oppress citizens who have legitimately exercised first amendment rights. In such a case, the court should exercise its equitable powers to impose costs against the plaintiff in excess of actual loss from defending the case, in essence fining those who file frivolous cases.¹³⁶

B. Defendants' Options

There are some options that might be available to defendants. One is to file a counterclaim for legal harassment. Unfortunately, the time and cost of doing so only adds to the frustration of the original lawsuit.

In some cases, a countersuit is not a feasible alternative. In *SRW Assocs. v. Bellport Beach Property Owners*,¹³⁷ New York state law did not permit the defendant to countersue in a libel case. As one of the defendants said, "[E]ven if we did countersue in such a situation, [the] chances of being reimbursed are slim. We (the defendants) and civics (civic associations) would have to prove that SRW deliberately set out to hurt us financially."¹³⁸

But in one current case, the defendants, undaunted by time and ex-

132. *Id.* at 9.

133. *Id.* at 9-10.

134. *Id.*

135. *Id.*

136. 167 W. Va. 434, 468, 282 S.E.2d 28, 47 (1981).

137. 129 A.D.2d 328, 517 N.Y.S.2d 741, (1987).

138. Telephone interview with Donna Gallo, *supra* note 71.

pense, did countersue the plaintiffs. In *Terra Homes, Inc v. Blake*,¹³⁹ a developer announced plans to build two colonial houses in place of a single-family house on an oversized lot it had purchased. Two of the defendants, Betty Blake and Eva Bressack, viewed the proposed structures as out of character with the neighborhood.¹⁴⁰

The defendants mounted a campaign against the construction of the houses. They held candlelight vigils, tied red ribbons around their own trees and on some of the trees on Terra Homes' property, and put up a sign which bore the legend, "We will not be Terra-ized." The seven neighbors who were sued had attended a July 20, 1987, meeting at the Hempstead Town Hall.¹⁴¹

The plaintiff's lawyer conceded that the defendants' pun "Terra-ized" was a play on the name of the company, not the owner, Anthony Citarilli. Nonetheless, the plaintiff and his lawyer sued Blake, Bressack, and others for 6.5 million dollars, alleging harassment, libel, slander, loss of business and trespass.¹⁴²

The plaintiff's lawyer, William Cohn, said:

They have gone far beyond the limits of lawful protest to the extent that they have libeled my client with signs and damaged the reputation of Terra Homes. In this day and age, calling someone a terrorist, even by implication, is more than an expression of opinion—it denotes something more sinister and harmful.¹⁴³

The defendants countersued, alleging abuse of process and stating their belief that the purpose of the Terra Homes suit was to intimidate them and to deny their rights under the First Amendment and under section 9 of the New York Constitution. Blake and Bressack expressed their belief that Terra Homes used the judicial process "to chill or impede debate and petition on issues of importance, whatever the degree, of citizens participating in the process of government"¹⁴⁴

In short, the developer had ulterior motives—seeking to prevent Betty Blake from continuing her constitutionally protected activities and harassing the defendant—to compel her to forego her constitutionally

139. This case has not yet been tried in a New York Supreme Court.

140. Interview with Betty Blake, defendant in *Terra Homes v. Blake*, in Wantaugh Woods, New York (Oct. 13, 1989).

141. Shaman, *Libel Suits: Protection or Intimidation*, N.Y. Times, Nov. 1, 1987, at 12.

142. Telephone interview with William Cohn, attorney for Terra Homes, Inc. (Oct. 19, 1989).

143. *Libel Suits: Protection or Intimidation*, *supra* note 141, at 12-13.

144. *Terra Homes, Inc. v. Blake*, Index No. 1563/88, Notice of Motion to Amend Answer at 2.

protected rights and incur legal expenses to defend herself.¹⁴⁵

Blake is suing for \$5.1 million, which includes \$5 million for punitive damages "to punish and make an example of the Plaintiff and to deter the Plaintiff and others from engaging in such conduct in the future."¹⁴⁶

In any claim for abuse of process, the plaintiff must show that the adversary has abused the court process to further an ulterior motive. This cause of action is unlike a claim for malicious prosecution, in which one has to show that the prior charge was resolved in one's favor. In an abuse of process case, one is not required to prevail in the prior lawsuit. One need only show that the process of the court has been perverted.

In an abuse of process case, the plaintiff may recover any actual financial loss, and attorney fees and expenses if malice is shown.¹⁴⁷

Defendants who find themselves the objects of these lawsuits and are without the resources to defend themselves might consider turning to established groups such as the National Resources Defense Council (NRDC). Until recently, such groups largely confined their interests to the nation's wilderness areas and other environmental issues. But in 1988, the NRDC opened its first urban law center in Manhattan, providing free legal advice to groups opposing real estate development.¹⁴⁸ In addition, the American Civil Liberties Union has defended in some of these defamation cases.¹⁴⁹

A second possibility is for insurance companies to offer coverage on automobile or homeowner policies. Some policies currently do cover the insured in the event of such suits.¹⁵⁰

C. Legislative Solutions

Perhaps the best remedy to deter these defamation cases from *ever* being brought is to look to the legislature for a solution. The Gaffney-Lavalle bill, introduced recently into the New York State Assembly, is

145. *Terra Homes, Inc. v. Blake*, Index No. 1563/88, Proposed Verified Answer and Counterclaim, at 6.

146. *Id.* at 8.

147. Epstein, *supra* note 130, at 27.

148. Lueck, *supra* note 5. The NRDC said that one reason for its New York City initiative was that "large law firms in New York are afraid of antagonizing the city's powerful real estate interests"

149. The Suffolk County legislature in New York has established a \$100,000 Citizen Legal Defense Fund to deter such suits as those brought in *SRW Assocs.* and *Terra Homes*. Passed in 1985, the law is entitled, "*A Local Law to Authorize a Legal Defense Fund for Citizens.*"

150. In *Terra Homes, Inc. v. Blake*, a portion of Betty Blake's legal costs was covered by her auto insurer. In *SRW Assocs. v. Bellport Beach Property Owners*, only one of the 16 individual defendants was covered for his legal expenses as a defendant in the case.

designed to discourage the kinds of lawsuits discussed in this Article from being filed. It is called *An Act to Amend the Civil Rights Law in Relation to Requiring Proof of Actual Malice in Order for Certain Persons to Recover Damages for a Libelous or Slanderous Statement in Certain Circumstances*.¹⁵¹

The purpose of this proposed law is to require proof of actual malice in an action for libel or slander brought by a plaintiff who has applied for a license, permit, or lease from any government subdivision, and to limit the plaintiff's right of recovery to actual monetary loss.¹⁵²

The Gaffney-Lavalle bill was introduced to protect individuals and civic associations who found themselves subject to libel and slander suits stemming from remarks made at public hearings and community and civic meetings.

This bill would stem the tide of lawsuits having no merit other than to silence opposition to projects. In introducing the bill, Representative Robert J. Gaffney, its chief sponsor said, "Civic associations, public interest groups, and concerned citizens have long been the watchdogs and guardians of many communities. Without the protection offered by this legislation, they will become ineffective."¹⁵³

The strategy behind this bill is to make those who file for licenses or permits, or, in other words, those who are the potential plaintiffs, "public figures" for purposes of libel law. Attaching this "status" to potential plaintiffs would require them to prove "actual malice" on the part of defendants before a recovery could be obtained.

The original Gaffney-Lavalle bill was debated in 1985 before the New York Assembly, where it met with rigorous opposition from senators friendly to such interests as the New York Builder's Association. These senators called the bill "evil."¹⁵⁴

During the Senate debate, one particularly vehement opponent of the bill said, "This is a rotten bill. This is a very bad bill What this bill, in effect, says is that you can go into [a] hearing, you can libel and slander the permit applicant and unless he can prove actual malice by clear and convincing evidence[,] . . . he is defenseless."¹⁵⁵

151. *S-1081 A-1593*, re-introduced January 19, 1989 (copy of Bill provided courtesy of Representative Robert A. Gaffney). Both Rep. Gaffney and Senator Kenneth Lavalle sponsored this bill.

152. Telephone interview with Representative Robert A. Gaffney (Oct. 10, 1989).

153. *Id.*

154. News Release by Robert J. Gaffney, 4th Assembly District (March 21, 1988) (courtesy of Robert J. Gaffney).

155. Remarks by Senator Ryan to the New York Assembly, Senate Debate, June 26, 1985, at 5.

The senator found the overbroad sweep of the bill particularly repugnant. He argued that the bill would not just affect a large developer, but "some small guy who wants to buy an apartment house; maybe a duplex, maybe a three or four apartment building, one of which he wants to live in."¹⁵⁶ He also objected to the power that it would give to civic associations or individuals, since:

Under the terms of this bill the neighbors can go out and say practically anything they want relative to this development in trying to stop it for whatever reason they might have; fear of what it might do to their neighborhood, or whatever it might do to the environment and they can be very, very negligent about coming up with facts.¹⁵⁷

The Gaffney-Lavalle bill has many flaws that would appear to undermine its effectiveness as a deterrent to the bringing of defamation suits. Perhaps a more efficacious solution would be a statute like that proposed by a Libel Reform Task Force sponsored by the Annenberg Washington Program of Northwestern University. This model statute would protect flyers, newsletters, and statements disseminated by individuals and public interest groups.¹⁵⁸

The model statute emphasizes retraction as a remedy, not damages.¹⁵⁹ The procedure in applicable cases would be as follows:

1. Within 30 days of the publication of the defamatory statement, the would-be plaintiff would first demand a retraction or an opportunity to reply before he or she could sue. The publication (or broadcast) could absolutely bar litigation by honoring the would-be plaintiff's request within 30 days.
2. If the publication declines to retract, the issue could go to Court. But either side could force the suit into a *declaratory judgment* procedure. In this process, the only issue to be resolved would be whether the statement to which [the] plaintiff objects is false.
3. After a trial, the judge would rule on this issue and make a decision. The media—the original one [that published the objectionable statement]—then would be expected to print this decision but the Court could not force them to do so. This publication would restore either to plaintiff or defendants the

156. *Id.* at 2.

157. *Id.* at 3.

158. Smolla, *A New Idea In Libel: No Cash, Just Truth*, NEWSDAY, Mar. 3, 1989, at 81. Such a bill was introduced into the Conn. Gen. Assembly, January 1989. Committee Bill No. 5932, "An Act Concerning Libel Reform."

159. In most of cases discussed in this Article, the plaintiffs sought multi-million dollar damages from the defendants, which had an unnerving effect on *all* of those interviewed for this Article.

lost reputation. No retraction would have to be printed and the loser would pay the legal costs of the opposition.

4. Even in the absence of a retraction or reply which would bar the suit, the would-be plaintiff (developer) would face some risks designed to force him to reconsider the wisdom of suing. The declaratory judgment process would operate with a bias toward protecting First Amendment rights. The burden of proof on the plaintiff would be to show that the statement was false *by clear and convincing evidence*. If [the] plaintiff does not prove the case, he or she will have to pay the defendant's attorney fees.¹⁶⁰

Perhaps most significant is the fact that the model statute classifies certain types of expression as protected. Options include fiction (*Okun*), satire or parody (*Terra Homes*), letters to the editor (*Walters, Karnell*), and editorial cartoons and political commentary.¹⁶¹ The list should include other types of statements, such as rhetorical hyperbole or characterizations, that might appear in handbills or flyers.

Businesses such as those that brought suit in the cases described in this Article would argue that this model statute is unfair because it impinges on their right to seek money damages. Under this procedure, any defendant would surely opt for the declaratory judgment process.

But a plaintiff may win at this stage, receiving the benefit of a speedy decision to show that he or she was indeed the victim of defamation. In such a case, the plaintiff will obtain attorney's fees. This is surely a better situation than now exists, in which most plaintiffs lose their cases eventually.

Under this model statute, the parties with meritorious claims will likely win, which is as it should be. This law is certainly more effective than the present system, and will succeed in weeding out "intimidation" suits.

D. Practical Solutions

Individuals and civic associations in states with neither the appropriate legislative nor judicial remedies require guidance on how to protest and minimize the risk of a lawsuit.

A common factor of the cases discussed here is the defendants' use of inflammatory rhetoric, or, as some courts have termed it, "rhetorical hyperbole," to advance their causes.

Individuals and associations should focus on the issues—the problems raised by the proposed development: traffic, safety, pollution,

160. Smolla, *supra* note 158.

161. *Id.*

water, and wetlands—as opposed to the mendacity of the developer. A focus on substance instead of *ad hominem* attacks on the builder is a safer, though not foolproof, course of action.

Any letters to the editor, handbills, fliers, and statements made at hearings should be accurate and issue-oriented. In fact, the most prudent course is for individuals and civic associations to consult with an attorney before engaging in protest activities. Such a course may well be less expensive in the long run because an attorney can advise on a course of action that will avoid the inflammatory rhetoric and lawsuits.

In a sense, it seems that citizens should not have to engage in these levels of protest to persuade public officials to enforce zoning rules. Indeed, the people who have invested their lives in a community should work for zoning rules and charter revisions that comport with the character of the community. Even more importantly, citizens should insist that the municipal charter or governing document require that planning and zoning board officials be elected, not appointed. This will assure better responsiveness to the will of the community.¹⁶²

Conclusion

Whether the remedy comes from the judiciary or the legislature, action must be taken to end this tyranny by lawsuit that has existed for the past decade. As one author put it:

There is a strong belief that such suits are designed to scare off the opposition, to clear the way of the developers to proceed smoothly with their plans whatever the impact on the area in which they are proposed. If that is true, we're all in a lot of trouble because there would be no stopping the onslaught of development for profit's sake, and the neighborhoods we enjoy would be defenseless against questionable projects.¹⁶³

There are things in life more precious than money. One is the community in which one has invested one's life and the lives of one's children. Today, a person must invest a generation of work to purchase and pay for a house. A home and a neighborhood is a lifelong investment. Such a way of life should not be sacrificed to the vagaries of the legal process nor to the greed of developers.

A balance must be struck between the right to bring an action for defamation and the right to exercise one's first amendment rights. In this

162. Johnson, *Concerns About Growth Raise Interest in Local Races*, N.Y. Times, Section 12, Nov. 5, 1989, at 1, 12.

163. Willmots, *Willmots and Why-Nots*, Suffolk Life, May 29, 1985, at 4.

collision, the first amendment rights of speech and petition inevitably must prevail.