

VERMONT SUPERIOR COURT
Windham Unit
7 Court Street
Newfane VT 05345
802-365-7979
www.vermontjudiciary.org



CIVIL DIVISION
Case No. 21-CV-03586

Erin Kehoe et al v. Lisa Beshay et al

ENTRY REGARDING MOTION

Title: Special Motion to Strike Pursuant to 12 V.S.A. § 1041 (Anti-SLAPP) or in the Alternative Motion to Dismiss (Motion: 2)
Filer: Merrill E. Bent
Filed Date: December 02, 2021

Decision on Special Motion to Strike under Anti-SLAPP Law

Plaintiffs' amended complaint seeks declaratory and injunctive relief relating to Town of Windham election on the question whether to close the Windham Elementary School. Among other claims, the plaintiffs allege the three individual defendants, Lisa Beshay, Alexander Beshay, and Christopher Strecker, voted in this election although they are nonresidents of Windham and were ineligible to participate in voting. In response, the individual defendants filed a special motion to strike the amended complaint under Vermont's Anti-SLAPP law, 12 V.S.A. § 1041, and in the alternative move to dismiss for failure to state a claim and lack of subject matter jurisdiction. They have also moved for an award of costs and fees. The defendants' special motion to strike is denied for the reasons stated below.

"SLAPP" is short for "Strategic Lawsuits Against Public Participation." A SLAPP suit is a civil claim filed against an individual or organization arising out of that party's speech or communication to government about an issue of public concern. A SLAPP suit seeks to shut down speech by burdening the defendant with a lawsuit and litigation costs. In response to a proliferation of SLAPP suits, many states enacted "anti-SLAPP" laws to protect people from lawsuits that may intimidate people from exercising their First Amendment rights.

Vermont's anti-SLAPP law is 12 V.S.A. § 1041. The law is based on two legislative findings:

- (1) There has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and freedom to petition the government for the redress of grievances.
- (2) It is in the public interest to encourage continued participation in matters of public significance, and this participation should not be chilled through abuse of the judicial process.

Felis v. Downs Rachlin Martin PLLC, 2015 VT 129, ¶ 29, 200 Vt. 465 (citing 2005, No. 134 (Adj. Sess.), § 1). SLAPP suits are filed by parties with opposing interests with the financial means “to use litigation to intimidate others into silence.” *Felis*, 2015 VT 129, ¶ 29. The objective of the law “is to help protect Vermonters’ First Amendment rights and to prevent the misuse of the courts as a vehicle to punish people for expressing their opinions on issues of [public interest].” *Id.* (quoting House Judiciary Committee Report).

Section 1041(a) authorizes a defendant to file a special motion to strike “in an action arising from the defendant’s exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont Constitution.” 12 V.S.A. § 1041(a). The motion must be filed and served within 60 days of the complaint and requires a hearing. *Id.* § 1041(b), (d). In evaluating the motion, “the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” *Id.* § 1041(e)(2). The motion shall be granted unless the plaintiff shows “the defendant’s exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law” and that “the defendant’s acts caused actual injury to the plaintiff.” *Id.* § 1041(e)(1)(A), (B); *Felis*, 2015 VT 129, ¶ 32.

The first question, however, is whether Plaintiffs’ action is in fact a SLAPP suit pursuant to § 1041. *Felis*, 2015 VCT 129, ¶ 34. Because an anti-SLAPP law seeks to find the right balance between the right to free speech and the right to petition and access to the courts, it is “construed as limited in scope” and “great caution should be exercised in its interpretation.” *Id.* ¶ 41.

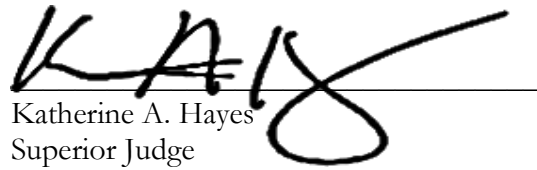
The statute defines “the exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont Constitution” to include:

- (1) any written or oral statement made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
- (2) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
- (3) any written or oral statement concerning an issue of public interest made in a public forum or a place open to the public; or
- (4) any other statement or conduct concerning a public issue or an issue of public interest which furthers the exercise of the constitutional right of freedom of speech or the constitutional right to petition the government for redress of grievances.

33 V.S.A. § 1041(i). The court does not believe, however, that checking a box on a ballot in the privacy of a voting booth is a written or oral statement within the meaning of this law. It not an act of communication, it lacks any expressive value, and it is not speech. The fact that the vote may have social consequences does not turn it into speech. *Nevada Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011).

Further, the act of voting is not conduct that furthers the exercise of free speech or “the right to petition the government for redress of grievances.” A narrow construction of this statute requires that we construe the term petition to mean what it says. A petition is a form of communication with the government, such as lobbying, testifying, or complaining; it is not the same thing as a vote. Further, there is nothing to suggest the purpose of this vote was to redress grievances. The election permitted voters to express their wishes with respect to whether the town’s school should remain open, which is purely a matter of public policy.

In conclusion, the anti-SLAPP statute is not applicable here, and the court denies Defendants’ special motion to strike.

A handwritten signature in black ink, appearing to read 'KAYES', written over a horizontal line. The signature is stylized and cursive.

Katherine A. Hayes
Superior Judge
March 14, 2022