SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

LUKASZ GOTTWALD, P/K/A DR. LUKE, KASZ MONEY, INC., AND PRESCRIPTION SONGS, LLC,,

Plaintiffs-Appellants,

—*against*—

KESHA ROSE SEBERT P/K/A KESHA,

Defendant-Respondent,

—*and*—

PEBE SEBERT, VECTOR MANAGEMENT, LLC AND JACK ROVNER,

Defendants.

KESHA ROSE SEBERT P/K/A KESHA,

Counterclaim Plaintiff-Respondent,

—*against*—

LUKASZ GOTTWALD, P/K/A DR. LUKE, KASZ MONEY, INC., AND PRESCRIPTION SONGS, LLC,

Counterclaim Defendants-Appellants,

—*and*—

DOES 1-25, INCLUSIVE,

Counterclaim Defendants.

Appellate Division,
First Department
Case No.: 2021-03036

New York County Index
No. 653118/2014

NOTICE OF MOTION OF LEGAL MOMENTUM, EQUAL RIGHTS ADVOCATES, AND THE NATIONAL WOMEN'S LAW CENTER FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF REHEARING OR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that upon the annexed affirmation of Joseph M. Sanderson, dated April 15, 2020, and all exhibits attached thereto including the accompanying proposed brief of *amicus curiae*, and upon all papers, pleadings, and proceedings had herein, Legal Momentum, Equal Rights Advocates, and the National Women's Law Center will move this Court, on April 25, 2022 at 10:00 a.m., or as soon thereafter as counsel may be heard, at the courthouse located at 27 Madison Avenue, New York, NY 10010, for an order granting them leave, pursuant to 22 N.Y.C.R.R. § 1250.4(f), to serve and file an *amici curiae* brief, in support of Defendant-Counterclaim Plaintiff-Respondent Kesha Rose Sebert's motion for rehearing or leave to appeal to the Court of Appeals, and for such other relief as the Court may deem just and proper.

Dated: April 15, 2022
New York, NY

Respectfully submitted,

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Via NYSCEF

SUPREME COURT OF THE STATE OF NEW YORK
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New York County Index
No. 653118/2014

AFFIRMATION OF JOSEPH M. SANDERSON IN SUPPORT OF MOTION OF LEGAL MOMENTUM, EQUAL RIGHTS ADVOCATES, AND THE NATIONAL WOMEN'S LAW CENTER FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF REHEARING OR LEAVE TO APPEAL TO THE COURT OF APPEALS

Joseph M. Sanderson, pursuant to CPLR 2106, affirms the following under penalty of perjury:

1. I am an attorney in good standing admitted to the Bar of the State of New York and an associate of the law firm of Steptoe & Johnson LLP, counsel to the proposed *amici curiae* Legal Momentum, Equal Rights Advocates, and the National Women's Law Center.

2. Legal Momentum, the Women's Legal Defense and Education Fund, is the first and longest-serving national nonprofit civil rights organization dedicated to advancing the rights of women and girls, including survivors of gender-based violence. For over 50 years, Legal Momentum has worked to achieve gender equality through impact litigation, policy advocacy, and education. Legal Momentum has worked for decades to ensure that the survivors of gender-based violence have access to legal protections and remedies and an unbiased justice system. Legal Momentum regularly appears before state and federal courts, including the Supreme Court, as *amicus curiae* on issues related to sexual harassment and sexual assault. The prominence of the #MeToo movement that encouraged many sexual harassment and sexual assault survivors to publicly voice their experiences was met by a

spike in defamation lawsuits filed by abusers trying to further silence their victims. In response, Legal Momentum created *A Guide to Defamation for Survivors of Sexual Assault or Harassment*, available at https://www.legalmomentum.org/library/guide-defamation-survivors-sexual-assault-or-harassment.

3. Equal Rights Advocates (ERA) is a national nonprofit legal organization that advocates for gender justice in workplaces and schools across the country. Since its founding in 1974, ERA has been fighting on the front lines of social justice to protect and advance rights and opportunities for women, girls, and people of all gender identities through litigating groundbreaking legal cases on behalf of workers who have experienced civil rights violations, including sexual harassment and other forms of discrimination. ERA has also led bold policy reform to strengthen protections against sexual harassment in California as well as in other states and at the federal level. ERA has participated as *amicus curiae* in scores of cases involving the interpretation and application of legal rules and laws affecting workers' rights and access to justice. ERA has a strong interest in ensuring that victims of sexual assault and sexual harassment remain able to exercise their right to

speak freely and openly about sexual harassment and abuse without fear of retaliation and intimidation—particularly retaliation and intimidation by perpetrators who seek to use the legal system to silence such victims.

4. The National Women's Law Center ("NWLC") fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to lives of women and girls. It uses the law in all its forms to change culture and drive solutions to the gender inequities that shape our society and to break down barriers that harm all of us—especially women and girls of color, LGBTQ people, and low-income women and families. Since 1972, NWLC has worked to advance educational opportunities, income security, access to child care, workplace justice, and health and reproductive rights for women and girls and has participated as counsel or *amicus curiae* in a range of cases—including defamation cases filed by abusers against sexual assault survivors—before federal and state courts to secure protections against sex discrimination. The NWLC Fund houses and administers the TIME'S UP Legal Defense Fund, which improves access to justice

for those facing workplace sex harassment, including through grants to support legal representation.

5. Each of the *amici* thus has extensive experience representing and advocating for survivors of sexual harassment, including sexual assault, and intimate partner abuse, and specifically including survivors who have faced retaliatory lawsuits after speaking up about their experiences—or even reporting crimes committed against them to law enforcement authorities—and threats of litigation to attempt to silence them.

6. The *amici* are thus familiar with the precise issues of "SLAPP" lawsuits against survivors that the sponsors of New York's amended Anti-SLAPP law identified in passing the bill—and in rejecting then-Governor Cuomo's proposed chapter amendment that would have eliminated the applicability of the statute to pending suits continued after the law's effective date.

7. *Amici* seek leave to file this brief to assist this Court with understanding the substantial negative effect of its decision on survivors of sexual assault, sexual harassment, and intimate partner abuse. Sexual assault and other forms of sexual harassment affect

millions of people in this country, disproportionately women and girls and LGBTQ+ individuals. Survivors face substantial hurdles to reporting, and when they do report the abuse, whether to an employer, to a school or to law enforcement, they frequently face retaliation. One increasingly common form of retaliation is that the named harasser threatens to sue them if they report the incident. All too often, the threat of a retaliatory defamation lawsuit has its desired effect: survivors do not report; sexual harassers abuse more people, threatening to ruin them if they report; and the cycle repeats. That was precisely what the legislature sought to tackle in amending New York's Anti-SLAPP law.

8. *Amici* are also ideally placed to assist the Court with understanding why it was so crucial for the legislature to recognize speech about sexual assault as speech of public importance and thus subjecting it to the actual malice standard. For too much of our history, sexual violence was treated as a private matter, to be kept behind closed doors and ignored. When survivors spoke up, they would be confronted with a society and legal system that presumed them to be liars, demonstrated by its history of instructing jurors that victims were

probably lying and deeming their own testimony worthless as a matter of law unless there were corroborating witnesses. New York's amendments to its Anti-SLAPP law, with the specific purpose of protecting survivors, thus marked a key step in moving away from a system that privileges abusers' reputations over survivors' ability to tell the truth.

7. This Court's decision clearly split from a substantial body of case law in the lower courts statewide and federal courts that had interpreted the amendments to the Anti-SLAPP law to apply if a case was continued after the amendments' effective date. Indeed, it may have split from the Third Department, which a week before this Court's ruling affirmed an order that had found the Anti-SLAPP amendments applied to pending cases in awarding fees, finding the plaintiff's remaining contentions (which included whether the Anti-SLAPP amendments applied to pending cases) were "without merit." (*Reus v. ETC Hous. Corp.*, 2022 NY Slip Op 01363, at *6 [3d Dept 2022].) Further, it conflates the amendments to the standard for libel liability with the other provisions of the amendments. Given that and given the significant public interest in protecting the ability of survivors to tell

their stories—to friends or employers, to law enforcement, or to the wider public, as they choose—the Court of Appeals should be permitted to weigh in to resolve the interpretation of the statute conclusively if this Court does not grant reargument.

8. The accompanying brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the Amicus Curiae, its members or its counsel, contributed money that was intended to fund preparation or submission of this brief.

9. A copy of the proposed *amici curiae* brief is annexed hereto as **Exhibit A**.

10. A copy of this Court's decision is annexed hereto as **Exhibit B**.

11. A copy of the notice of appeal is annexed hereto as **Exhibit C**.

12. A copy of the motion court's decision is annexed hereto as **Exhibit D**.

9. The *amici* have thus demonstrated their interest in this matter and that they can provide special assistance to the Court in resolving this motion. For the foregoing reasons, and for those stated in the proposed *amici curiae* brief, the *amici* respectfully seek the Court's permission to serve and file the attached proposed *amici curiae* brief.

Dated: April 15, 2022
New York, NY

Respectfully submitted,

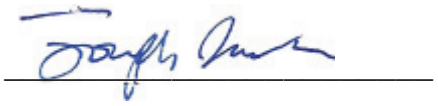

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EXHIBIT A

New York County Clerk Index No. 653118/2014—First Dep't Case No. 2021-03036

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

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Counterclaim Defendants.

BRIEF OF LEGAL MOMENTUM, EQUAL RIGHTS ADVOCATES & THE NATIONAL WOMEN'S LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF REHEARING OR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

New York's recent amendments to its Anti-SLAPP law were a landmark for survivors of sexual harassment, including sexual assault, and intimate partner violence. Passed in the wake of a slew of retaliatory defamation lawsuits against survivors who spoke up about their experiences to friends, employers, or the media or reported their assaults to law enforcement, the legislature made clear that enough was enough. Abusers were using the courts as instruments of their abuse; that needed to stop. As the legislative leaders noted in passing the bill, New York provided too many weapons to those who wanted to use meritless litigation to punish survivors who spoke out and threaten those considering it. The bill's lead Senate sponsor made clear: "This bill is going to protect survivors."[1] "Survivors in New York," he said, "must be able to speak without threat of impoverishment and intimidation."[2] The legislative leaders of both chambers called New York's libel law a "broken system," that had led to, among others,

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[1] Senator Brad Hoylman (@bradhoylman), Twitter (July 22, 2020), https://twitter.com/bradhoylman/status/1286002032701210626?s=20.
[2] Senator Brad Hoylman (@bradhoylman), Twitter (July 22, 2020), https://twitter.com/bradhoylman/status/1286032867152334851?s=20

"survivors of sexual abuse and others being dragged through the courts on retaliatory legal challenges solely intended to silence them."[3]

This Court's decision holds that the legislature meant to fix this "broken system" only for those who happened to be sued after the amendments' effective date—and did not intend to help the very people whose plight it cited as the reason for amending the law, since they had already been sued. In so doing, it departed from a substantial consensus in trial courts across the state and federal courts applying New York law that the statute was intended to apply at least to pending cases continued after its effective date. It may also have departed from the Third Department's recent affirmance of an order that had found that the amendments applied to pending cases, which summarily rejected the appellant's argument to the contrary as a contention that was "without merit." (*Reus v. ETC Hous. Corp.*, 2022 NY Slip Op 01363, at *6 [3d Dept 2022].) It also undermined the stated intent of the amendments, as expressly stated in the sponsors' memorandum, to "better advance the purposes that the Legislature originally identified

[3] New York State Legislature, Press Release, Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech (July 22, 2020), https://nyassembly.gov/Press/files/20200722a.php).

in enacting New York's anti-SLAPP law" and to remedy the fact that the prior law had been "narrowly interpreted by the courts." (Sponsor Mem. of Sen. Hoylman, L. 2020, Ch. 250 [July 22, 2020].)

Amici submit this brief to alert this Court to the substantial negative impacts its decision will have on survivors of sexual harassment, including assault, and intimate partner violence. These forms of abuse are driven by the perpetrator's desire to control, to deprive victims of agency and—as this Court has previously recognized—inherently involve gender-based animus. (*See Breest v Haggis*, 180 AD3d 83 [1st Dept 2019].) It is unsurprising then, that when survivors dare to speak up or report, exercising control and agency, abusers retaliate. And when the abusers have money to hire lawyers, that retaliation often comes in the form of turning the law that is supposed to protect survivors into the instrument to torment and threaten. Retaliatory litigation by abusers has grown drastically, motivating the legislature to amend the Anti-SLAPP law. Sexual assault is already drastically underreported, as survivors fear disbelief or punishment for speaking up—an often-founded result. This Court's

decision substantially weakens one of the crucial tools that the legislature gave survivors to fight back and reclaim their agency.

Indeed, the practical effect of this Court's decision may be to deprive survivors of the ability to defend themselves at all. The mandatory fee-shifting provisions of the Anti-SLAPP amendments have made it more possible for survivors to obtain counsel on contingency: once the survivor defeats the retaliatory lawsuit, the abuser is likely on the hook for the fees. That is especially important in defamation litigation over sexual assault, since New York's short statutes of limitation for intentional torts mean that a survivor who—as is common—delays reporting due to fear of retaliation or being trapped under an abuser's control often loses her ability to bring affirmative tort or antidiscrimination claims. When an abuser can afford a lawyer but a survivor cannot—which is most often the case given the inherent nature of such abuses being fueled by the abuser's power over the victim—that is a recipe for silence.

Amici ask this Court to protect survivors of sexual harassment, including sexual assault, and intimate partner violence by granting leave to reargue its decision and finding the statute, or at least certain

provisions, applies—as the legislature intended—to pending cases continued after its effective date. Or, this Court should at least differentiate between the modified standard for libel liability and the amendments' other provisions. Alternatively, given the high stakes and this Court's divergence from the majority of judges to have addressed this issue, this Court should grant leave to appeal to the Court of Appeal so that this question can be resolved with certainty.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Legal Momentum, the Women's Legal Defense and Education Fund is first and longest-serving national nonprofit civil rights organization dedicated to advancing the rights of women and girls, including survivors of gender-based violence. For over 50 years, Legal Momentum has worked to achieve gender equality through impact litigation, policy advocacy, and education. Legal Momentum has worked for decades to ensure that the survivors of gender-based violence have access to legal protections and remedies and an unbiased justice system. Legal Momentum regularly appears before state and federal courts, including the Supreme Court, as *amicus curiae* on issues related to sexual harassment and sexual assault. The prominence of the

#MeToo movement that encouraged many sexual harassment and sexual assault survivors to publicly voice their experiences was met by a spike in defamation lawsuits filed by abusers trying to further silence their victims. In response, Legal Momentum created *A Guide to Defamation for Survivors of Sexual Assault or Harassment*, which is available at https://www.legalmomentum.org/library/guide-defamation-survivors-sexual-assault-or-harassment.

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the TIME'S UP Legal Defense Fund, which improves access to justice for those facing workplace sex harassment, including through grants to support legal representation.

ARGUMENT

This Court's decision holds that the reforms that the legislature made to New York law in cases involving public petition and participation in response to courts' narrow interpretation of the prior version of the statute and high-profile abuse of the legal system to silence or punish those who spoke out about powerful people abusing them apply only to cases arising after the amendments' effective date. It holds that they leave unprotected those whose maltreatment at the hands of the legal system, whose function is to protect every individuals' rights, predated then-Governor Cuomo's signature of the bill intended to redress that maltreatment.

That is not what the bill says. The legislature repeatedly referred to *continuation* of meritless SLAPP suits precisely because it intended to cover the pending suits that inspired the amendments' passage. It rejected a push for a chapter amendment that would have made the law prospective only. And it did so precisely because of the pervasive trend

of retaliatory defamation litigation and the realization that abuse was being swept under the rug because the mere threat of a lawsuit meant survivors had to choose between telling the truth and protecting themselves from abuse of the legal process to retraumatize and financially destroy them.

I. Abusers Are Increasingly Misusing the Courts As Instruments of Abuse.

People commit sexual assault and other forms of gender-based violence because they believe they are entitled to exercise power, to control or punish their partner, and to negate their partner's agency.[4]

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[4] *See, e.g.*, Jeffrey Fagan & Angela Browne, *Violence Between Spouses and Intimates: Physical Aggression Between Women and Men in Intimate Relationships*, *in* 3 Understanding and Preventing Violence: Social Influences 115, 202-03, 205 (Albert J. Reiss Jr. & Jeffrey A. Roth eds. 1994) (collecting studies showing that views regarding "attitudes regarding male dominance, objectification of women as chattel," and "power of males over women in the home" were associated with intimate partner violence); Richard B. Felson & Steven F. Messner, *The Control Motive in Intimate Partner Violence*, 63 Soc Psych Q 86, 91 (2000) (presenting quantitative evidence of the use of threats before violence "suggesting that males' assaults on female partners are especially likely to involve a control motive" and "the observed interaction effect is quite strong"); Diana Scully & Joseph Marolla, *'Riding the Bull at Gilley's': Convicted Rapists Describe the Rewards of Rape*, 32 Social Problems 251, 255-59 (1985) (describing interviews with men who committed rape to "conquer[]" women who turned down sex, to have sex with women that the rapists "believed . . . would not be sexually attracted to them," or as a form of "impersonal" sex in order to be "totally dominant" and to

Abusers are particularly likely to lash out when their victims reassert their agency by speaking up and demanding accountability or protection.[5]

The legal system is a way to invoke the state's power for one's own ends—so it should come as little surprise that scholars have for decades recognized that it is often corrupted by abusers as a tool to continue abuse, especially when survivors seek to challenge the abuser's power.[6] The cost of defending tort claims is also a lever to assert other forms of

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have "the ability to have sex without caring about the woman's response," as well as to punish or degrade, and noting that many rapists expressed the belief that "men have the right to discipline and punish women").

[5] Joan Zorza, *Batterer Manipulation and Retaliation in the Courts: A Largely Unrecognized Phenomenon Sometimes Encouraged by Court Practices*, 3 Domestic Violence Report 67, 67 (1998) ("Men who abuse women minimize or deny their abuse or falsely blame their circumstances or others, especially their victims, for their behavior. . . . When batterers feel that their authority is being threatened, they escalate their violent and terroristic tactics.").

[6] *Id.* at 68, 74; Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 Seattle J Soc Just 1053, 1084 (2011); Susan L. Miller and Nicole L. Smolter, *"Paper Abuse": When All Else Fails, Batterers Use Procedural Stalking*, 17 Violence Against Women 637 (2011); Kim Y. Slote et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 Violence Against Women 1367, 1387-88 (2005).

power, such as extorting concessions in child custody or child support proceedings.[7]

The amendments to New York's Anti-SLAPP law came in the wake of a growing awareness of how threats to sue for speaking the truth—whether to the media, to employers or educational administrators, or law enforcement—silence survivors. The public and legislators discovered that the decades-long conspiracy of silence surrounding Harvey Weinstein was a conspiracy of litigators. When the dam finally broke, countless articles and two book-length accounts told of how threats—to sue for libel, to enforce non-disclosure agreements themselves often extorted through the threat of abusive litigation tactics, to sue for tortious interference with those non-disclosure tactics, and more—tried, successfully for years, to keep the truth hidden.[8]

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[7] *See, e.g.*, Andrea Vollans, *Court-Related Abuse and Harassment: Leaving an Abuser Can Be Harder Than Staying*, YWCA Vancouver (2010), https://ywcavan.org/sites/default/files/resources/downloads/Litigation%20Abuse%20FINAL.pdf; Jessica Klein, *How Domestic Abusers Weaponize the Courts*, The Atlantic, July 19, 2019, https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/.

[8] *See generally* Jodi Kantor & Megan Twohey, *She Said: Breaking the Sexual Harassment Story That Helped Ignite A Movement* (2019); Ronan Farrow, *Catch and Kill: Lies, Spies, and a Conspiracy to Protect*

And yet, even as a movement grew to root out the ways in which society, including laws and the courts, protect predators at the expense of the people they target, retaliatory litigation has grown too as a reaction. Dubbed the "legal backlash to the MeToo movement," libel cases "have been filed at a faster rate" as more survivors spoke out and as cultural pressure for abusers to face consequences grew.[9] "In a

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Predators (2019). *See also* Neil Fulton, Book Review, *All the News That's Fit to Hide: Sexual Assault and Silence in Hollywood and the Lawyers Who Let It Happen*, 40 Loy LA Ent L Rev 395 (2020) (discussing the legal ethics implications of the conduct by lawyers discussed in *Catch and Kill*).

[9] Madison Pauly, *She Said, He Sued*, Mother Jones (Mar. 2020), https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault; *see also* Hazel Cills, *Students Accused of Misconduct Are Increasingly Filing Defamation Suits Against Their Accusers*, Jezebel (Dec. 5, 2017, 5:15 PM), https://jezebel.com/students-accused-of-sexual-misconduct-are-increasingly1821026491; Tyler Kingkade, *As More College Students Are Saying "Me Too," Accused Men Are Suing for Defamation*, BuzzFeed News (Dec. 5, 2017, 11:26 AM), https://www.buzzfeednews.com/article/tylerkingkade/as-more-college-students-say-me-too-accused-men-are-suing (noting a significant increase in the number of libel claims filed against survivors reporting sexual assault); Bruce Johnson, *Worried About Getting Sued for Reporting Sexual Abuse? Here Are Some Tips*, American Civil Liberties Union Blog (posted Jan. 22, 2018, 4:00 PM), https://www.aclu.org/blog/womens-rights/worried-about-getting-sued-reporting-sexual-abuse-here-are-some-tips ("The #MeToo movement has drawn an outpouring of testimony by the victims of sexual harassment

perverse twist in the #MeToo age," the U.N. Special Rapporteur on Freedom of Expression reports, "women who publicly denounce alleged perpetrators of sexual violence online are increasingly subject to defamation suits or charged with criminal libel or the false reporting of crimes."[10] These cases are expensive[11]—and just as importantly, retraumatizing[12]—for survivors to defend. They have been recognized by the U.N. Special Rapporteur on Violence Against Women as "a form of G[ender] B[ased] V[iolence] in and of itself."[13] And experts have

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and sexual abuse. In response, there has been a surge in retaliatory defamation lawsuits by their abusers.").

[10] Irene Khan, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, A/76/258 (July 30, 2021), https://undocs.org/en/A/76/258.

[11] *See* Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 First Am L Rev 441, 448-49 (2019) (describing studies on costs of defending libel litigation and citing one survivor's experience of a defamation lawsuit *after* a university quasi-judicial process found that abuser had committed rape that cost the survivor "twice her monthly income, reaching $20,000 even in the early stages of the lawsuit" to defend).

[12] *See* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum L Rev 1, 103 (1977) (discussing traumatic experience of sexual assault trials for survivors); Leader, 17 First Am L Rev at 448 ("Survivors are likely to face stress and trauma from the continued interaction with an abuser required by the process of litigation.").

[13] Jorie Dugan, *Defamation Lawsuits: Another Tactic to Silence Survivors*, Ms. Magazine (Jan. 18, 2022),

expressed concern that the rise in retaliatory defamation lawsuits "will further discourage reporting."[14]

All too often, these suits are brought by abusers who *know* that the litigation will not succeed on the merits.[15] They are process as punishment, pure and simple, for daring to speak or report. Indeed, because New York provides only a qualified privilege for reporting crimes to law enforcement, this abuse of the legal system is not simply about high-profile reports in newspapers or on television; it is about the survivor who goes to the precinct because she needs an order of protection and criminal proceedings are often the only way to get one in New York. (*See Sagaille v Carrega*, 194 AD3d 92 [1st Dept 2021] [defamation claim by former Kings County ADA for survivor's report to NYPD].) Or it is about the student who reports abuse to school

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https://msmagazine.com/2022/01/18/defamation-lawsuit-sexual-assault-rape-me-too/.

[14] Chesley N. Whynot, *Retaliatory Defamation Suits: The Legal Silencing of the #MeToo Movement*, 94 Tulane L Rev Online 1 (2020) (collecting examples of the trend and quoting Sarah Friedmann, *Reporting Sexual Assault on Campus Is Becoming Riskier Than Ever—Here's Why*, Bustle (Dec. 6, 2017), https://www.bustle.com/p/reporting-sexualassault-on-campus-is-becoming-riskier-than-ever-heres-why-7209692.).

[15] Leader, 17 First Am L Rev at 447.

administrators so they can be moved out of classes with their abuser and in order to receive other measures aimed at ensuring a safe learning environment. (*Cf. Vander-Plas v. May*, No. 07-15-00454-CV, 2016 WL 5851913, at *1 [Tex App Oct. 4, 2016] [defamation claim against student who requested that university prevent attacker from stalking her repeatedly outside classrooms].) And it is all too often survivors who are least able to fight back who are targeted.[16]

II. The Legislature Acted To Redress Use of the Courts As Instruments of Abuse.

It was against this backdrop that the legislature acted. It made no secret of the fact that it was specifically motivated by the growth of abusive and retaliatory litigation for speaking up or reporting sexual violence. Touting support from advocates for survivors of sexual assault and harassment, Senator Hoylman, the bill's lead state senate sponsor, promised: "This bill is going to protect survivors."[17] "Survivors in New York," he said, "must be able to speak without threat of impoverishment

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[16] Lesley Wexler et al., *#metoo, Time's Up, and Theories of Justice*, 2019 U Ill L Rev 45, 58 (2019) (noting that most of those requesting representation from the Time's Up Legal Defense Fund are low-income wage-earners).

[17] Senator Brad Hoylman (@bradhoylman), Twitter (July 22, 2020), https://twitter.com/bradhoylman/status/1286002032701210626?s=20

and intimidation."[18] A joint press release by the leadership of both chambers called for a change to New York's "broken system" of anti-speech litigation that had led to, among others, "survivors of sexual abuse and others being dragged through the courts on retaliatory legal challenges solely intended to silence them."[19] That is a classic remedial statute: "[T]he term remedial is especially applicable to statutes giving a mode of remedy for a wrong not available or ineffective under the prior system of law." (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 35; *see also Nelson v HSBC Bank USA*, 87 AD3d 995, 998 [2d Dept 2011] ["Remedial statutes are those 'designed to correct imperfections in prior law, by generally giving relief to the aggrieved party'"].) The legislature identified how abusers were, under the prior law, bringing meritless claims to make the courts themselves into instruments of abuse; it sought to give relief to those being abused.

The amendments, moreover, bear all the hallmarks of remedial legislation that the legislature intends to apply to pending cases. (*See In*

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[18] Senator Brad Hoylman (@bradhoylman), Twitter (July 22, 2020), https://twitter.com/bradhoylman/status/1286032867152334851?s=20

[19] "New York State Legislature, Press Release, Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech (July 22, 2020), https://nyassembly.gov/Press/files/20200722a.php).

re Gleason (Michael Vee, Ltd.), 96 NY2d 117, 122 [2001] ["[R]emedial legislation should be given retroactive effect in order to effectuate its beneficial purpose."].) It sought to remedy process-as-punishment, so many of the changes it wrought were procedural. (*Id.* [giving retroactive effect to procedural change to CPLR Article 75].) It identified crabbed judicial interpretation of the prior version of the Anti-SLAPP law as a reason for its passage. (*Id.* [noting similar language in sponsor's memorandum for changes to Article 75 and identifying "whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be" as considerations favoring application to pending cases].) Notably, the bill jacket also indicates that the final bill *rejected* a push for a chapter amendment to make the bill prospective only—a tell-tale sign that all concerned viewed it as applicable to pending cases.[20]

Indeed, in SLAPP suits, it is courts themselves that are the instrument of abuse. The court's process is what tells a sexual assault

[20] Letter of Rent Stabilization Ass'n to Gov. Cuomo (Nov. 4, 2020), Bill Jacket, L. 2020, Ch. 250.

survivor that she must spend more than she earns to hire a lawyer. The court's process is what retraumatizes her by compelling her testimony at deposition or trial, often in the physical presence of her abuser. At bottom, abuse-by-litigation works because when the abuser invokes the court's process, that carries the threat of the court ordering the sheriff to take a person's property or even her body. That is what a money judgment is, and that is what contempt is. (*See* David Gray Carlson, *Critique of Money Judgment Part One: Liens On New York Real Property*, 82 St John's L Rev 1291, 1293 [2008] ["Debt enforcement, however, is what all of civil procedure aims for. It is the very *telos* of private law."].) The legislature directed that litigants seeking to invoke courts' substantial powers, backed by the force of the state, to suppress speech on matters of public interest pass thresholds of merit. Else, it directed, courts withhold that aid.

Viewed through that lens, this Court's decision misapprehends what the legislature was directing. The legislature told courts to stop allowing themselves to be weaponized and gave them a tool to do so. This Court's decision holds that courts may continue exercising their power against survivors and other targets of retaliatory litigation

without meeting the thresholds the legislature set so long as the exercise of the court's power today is in aid of a lawsuit filed a couple years ago. That is fundamentally what the legislature sought to stop and why this Court's divergence from the series of prior decisions holding otherwise was in error. It is no coincidence that at least two of the series of trial court cases finding the amendments retroactive—from which this Court departed—involved defamation claims brought in retaliation for #MeToo revelations about abusive behavior. (*Coleman v Grand*, 523 F Supp 3d 244, 257-60 [EDNY 2021] [finding amendments retroactive in a case involving "sexual impropriety and power dynamics in the music industry," which "as in others, were indisputably an issue of public interest."]; *Goldman v Reddington*, 18CV3662RPKARL, 2021 WL 4755293, at *3 [EDNY Apr. 21, 2021] [allowing Anti-SLAPP counterclaim in defamation case arising from statements about campus sexual assault], *report and recommendation adopted,* 18CV3662RPKARL, 2021 WL 4099462 [EDNY Sept. 9, 2021].)

Indeed, it is also why this case is nothing like *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*. (35 NY3d 332 [2020].) There, the Court of Appeals confronted a statute

that would have exposed landlords to treble damages and extended a lookback period beyond the period for which they had been required to keep records under the prior law. Here, the effect of this Court's decision is to condemn parties, including survivors of sexual assault, sexual harassment, and intimate partner violence, to suffer at the hands of a process that the legislature has decided should not continue and, as relevant to this case, face liability under a standard that the legislature considers unjust. That is much more analogous to cases like *People v Dyshawn B.*, where the Second Department found that repeal of certain surcharges and fees on youthful offenders applied to pending cases. (196 AD3d 638 [2d Dept 2021].) The legislative history, much as here, expressed the view that the prior law had been oppressive and imposed disproportionate burdens on the most vulnerable, and "[e]limination and waiver of these surcharges and fees was meant to remedy these negative impacts." (*Id.* at 640.) So too here; the legislature acted to alleviate the burden of meritless retaliatory lawsuits, and it is illogical and inconsistent with the statute to hold that it cared only about retaliatory lawsuits not yet filed.

III. This Court's Decision Erroneously Conflates Multiple Different Provisions of the Anti-SLAPP Amendments.

This Court's decision holds that the "2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law" do not "apply retroactively to pending claims." (*Gottwald v Sebert*, 2022 NY Slip Op 01515, at * 1 [1st Dept 2022].) It also denied Ms. Sebert leave to amend to plead a cause of action under Civil Rights Law § 70-a, even as to the post-2020 continuation of this action. (*Id.*) This Court thus appears to have held that *all* of the amendments, whether characterized as substantive or procedural, do not apply to pending cases that are continued after the effective date of the law.

That, at the very least, is facially inconsistent with the statute. Civil Rights Law § 70-a creates a cause of action against "any person who commenced or continued" a SLAPP suit without substantial basis, with certain conclusive presumptions for suits dismissed under CPLR 3211(g) and 3212(h). Whether or not the legislature intended to apply the actual malice standard to pending cases, there is no plausible reading of "continued" that excludes continuing pending suits. Pre-amendment plaintiffs were on notice: if they chose to continue to prosecute suits involving public petition and participation, as defined by

the amendment, without a substantial basis, then they faced the tougher new cause of action for bringing a meritless suit.

This Court's apparent determination that *everything* in the statute does not apply to pending suits is especially troubling because it threatens survivors' ability to retain counsel. One of the beneficial effects of the Anti-SLAPP amendments was that mandatory fee-shifting under Civil Rights Law § 70-a(a) for suits determined to be without substantial basis encouraged lawyers to represent defendants in SLAPP suits on a contingency or partial contingency basis. (*Cf. Ketchum v Moses*, 24 Cal 4th 1122 [2001] [discussing a similar Anti-SLAPP contingency fee arrangement under California's Anti-SLAPP statute].) That is particularly important to survivors of sexual harassment and intimate partner abuse. Given the dynamics that breed such abuses, retaliatory lawsuits for reporting sexual harassment most often involve a plaintiff-abuser who is more powerful, financially and otherwise, such as an executive who harasses a more junior employee by abusing the power disparity inherent in the employment relationship. And since intimate partner abuse frequently involves financial abuse as well as violence, survivors are frequently unable to afford an apartment, let

alone a lawyer. For these targets of retaliatory litigation, the availability of lawyers willing to work on Anti-SLAPP contingency terms is essential.

This Court's decision is thus in error to the extent that it finds Section 70-a entirely unavailable to Ms. Sebert. Even if this Court (erroneously) adheres to its decision as to level of fault necessary for substantive libel liability and even if it finds that Section 70-a provides no remedy for *filing* a suit without a substantial basis pre-amendment absent its post-amendment continuation, Ms. Sebert's proposed amendment to assert a Section 70-a counterclaim would still be viable if she shows that Mr. Gottwald *continued* his suit after the effective date of the statute without a substantial basis—for example, if a jury found that he knew that the challenged statements were true.

The same goes for the availability of motions under CPLR 3211(g) and CPLR 3212(h). Even cases that this Court cited in finding the expansion of the actual malice standard prospective only hold that "statutes governing procedural matters should be applied retroactively." (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998].) While no such motion was before the Court in this case, its

decision broadly refers to the "amendments," implying that even the procedural reforms of the statute are non-retroactive. The legislature's judgment that people facing litigation in retaliation for speaking out should have more favorable standards for a motion to dismiss and a motion for summary judgment—or conversely, that a plaintiff must make a greater preliminary showing of merit—can stand separate from its expansion of the actual malice standard. Under settled law, they are procedural reforms that apply to pending suits, and to the extent that this Court's decision implies otherwise, it should be clarified or leave to appeal granted.

CONCLUSION

This Court's decision undoes much of what the legislature did to tackle abusers' perversion of the courts into instruments of retaliation and control against survivors of sexual assault, sexual harassment, and intimate partner violence. The legislature made plain its intent that the courts stop lending their aid to abusive and retaliatory litigation by requiring higher showings of merit to proceed, higher standards before courts impose liability, mandatory fee-shifting for lawsuits brought without a substantial basis, and other remedial reforms. This Court

should grant reargument and affirm the motion court's order, or at least differentiate between the modified standard for libel liability and the amendments' other provisions, or in the alternative grant leave to appeal to the Court of Appeals.

Dated: April 15, 2022
New York, NY

Respectfully submitted,

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* Application for admission *pro hac vice* to be filed

Counsel for Amici

CERTIFICATION PURSUANT TO 22 NYCRR § 1250.8(f) & (j)

I hereby certify pursuant to 22 NYCRR § 1250.8(f) and (j) that the foregoing brief was prepared on a computer.

Type.	A proportional typeface was used as follows:
Name of Typeface:	Century Schoolbook
Point Size:	14 pt
Line Spacing:	Double Space
Word Count.	The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the title, table of contents, table of authorities, and certificate of compliance, is 5,025.

Dated: April 15, 2022
New York, NY

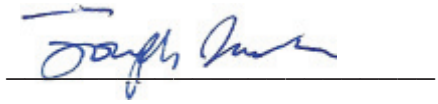

EXHIBIT B

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Manzanet-Daniels, J.P., Mazzarelli, González, Shulman, Rodriguez, JJ.

15495 & M-0497

LUKASZ GOTTWALD professionally known as DR. LUKE, et al.,
Plaintiffs-Appellants,

-against-

KESHA ROSE SEBERT professionally known as KESHA,
Defendant-Respondent,

PEBE SEBERT et al.,
Defendants.

SAMUEL D. ISALY
Amicus Curiae.

Index No. 653118/14
Case No. 2021-03036

Mitchell Silberberg & Knupp LLP, New York (Christine Lepera of counsel), for appellants.

O'Melveny & Myers LLP, New York (Leah Godesky of counsel), for respondent.

Carter Ledyard & Milburn LLP, New York (Alan S. Lewis and John J. Walsh of counsel), for Samuel D. Isaly, amicus curiae.

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about June 30, 2021, which granted defendant's motion for a ruling that Civil Rights Law § 76-a applies to plaintiffs' defamation claims against her and for leave to assert a counterclaim against plaintiffs under Civil Rights Law § 70-a, unanimously reversed, on the law, without costs, and the motion denied.

Contrary to the decision of the motion court and in other nonbinding decisions (*see e.g. Palin v New York Times Co.*, 510 F Supp 3d 21 [SD NY 2020]), there is

insufficient evidence supporting the conclusion that the legislature intended its 2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law (*see* Civil Rights Law § 70 *et seq*.) to apply retroactively to pending claims such as the defamation claims asserted by plaintiffs in this action.

The Court of Appeals has stated, in general terms, that "ameliorative or remedial legislation" should be given "retroactive effect in order to effectuate its beneficial purpose" (*Matter of Marino S.*, 100 NY2d 361, 370-371 [2003], *cert denied* 540 US 1059 [2003]), and this Court, in limited circumstances, has found the requisite legislative intent to apply a statute retroactively based on the remedial nature of the statute (*see e.g. Matter of Jaquan L. [Pearl L.]*, 179 AD3d 457 [1st Dept 2020] [retroactive application of amendment that acts remedially to expand existing benefits to a class of persons arbitrarily denied those benefits by the original legislation]). Nevertheless, in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020]), the Court of Appeals noted that the United States Supreme Court had previously limited "the continued utility of the tenet that new 'remedial' statutes apply presumptively to pending cases" (35 NY3d at 365), and it has otherwise noted that "[c]lassifying a statute as remedial does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998] [internal quotation marks omitted]). In addition, where, as here, the fact that the legislature has provided that amendments shall "take effect immediately," even though that may evince a "sense of urgency," the meaning of that phrase is, at best, "equivocal"

in an analysis of retroactivity (*Majewski*, 91 NY2d at 583; *see Aguaiza v Vantage Props., LLC*, 69 AD3d 422 [1st Dept 2010]).

In light of the above principles and the factual evidence that the amendments to New York's anti-SLAPP law were intended to better advance the purposes of the legislation by correcting the narrow scope of the prior anti-SLAPP law, we find that the presumption of prospective application of the amendments has not been defeated. The legislature acted to broaden the scope of the law almost 30 years after the law was originally enacted, purportedly to advance an underlying remedial purpose that was not adequately addressed in the original legislative language. The legislature did not specify that the new legislation was to be applied retroactively. The fact that the amended statute is remedial, and that the legislature provided that the amendments shall take effect immediately, does not support the conclusion that the legislature intended retroactive application of the amendments.

Given the conclusion that the 2020 amendments expanding the scope of Civil Rights Law § 76-a do not apply retroactively to cover plaintiffs' pending defamation claims, the motion seeking a ruling to that effect and for leave to assert a Civil Rights

Law § 70-a counterclaim premised on plaintiffs' claims being subject to the anti-SLAPP law must be denied in both respects.

M-0497 – *Lukasz Gottwald v Kesha Rose Sebert*

Motion of nonparty Samuel D. Isaly for leave to file brief as amicus curiae, granted.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 10, 2022

Susanna Molina Rojas
Clerk of the Court

EXHIBIT C

INDEX NO. 653118/2014

NYSCEF DOC. NO. 2348 RECEIVED NYSCEF: 07/28/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC,	Index No. 653118/2014
Plaintiffs,	Justice Jennifer Schecter
-against-	IAS Part 54
KESHA ROSE SEBERT p/k/a KESHA,	**NOTICE OF APPEAL**
Defendant.	
KESHA ROSE SEBERT p/k/a KESHA,	
Counterclaim-Plaintiff,	
-against-	
LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., PRESCRIPTION SONGS, LLC,	
Counterclaim-Defendants.	

PLEASE TAKE NOTICE that Plaintiffs and Counterclaim-Defendants Lukasz Gottwald p/k/a Dr. Luke, Kasz Money, Inc. and Prescription Songs, LLC (collectively, "Plaintiffs") hereby appeal to the Appellate Division of the Supreme Court of the State of New York, First Department, the Decision and Order of the Honorable Jennifer Schecter, dated June 30, 2021, which granted Defendant Kesha Rose Sebert's motion for a ruling that Civil Rights Law § 76-a applies to Plaintiffs' defamation claims and for leave to assert a counterclaim under Civil Rights Law § 70-a (the "Order"). The Order was entered in the above-entitled action in the Office of the Clerk of the Supreme Court of the State of New York, County of New York on June 30, 2021

and served with Notice of Entry on July 1, 2021 and July 7, 2021, copies of which are attached hereto as **Exhibit 1** and **Exhibit 2**, respectively.

DATED: New York, New York
July 28, 2021

MITCHELL SILBERBERG & KNUPP LLP

By: /s/ Christine Lepera
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EXHIBIT D

5

DECISION AND ORDER OF THE HONORABLE JENNIFER SCHECTER, DATED JUNE 30, 2021, APPEALED FROM, WITH NOTICE OF ENTRY [5 - 62]

FILED: NEW YORK COUNTY CLERK 07/01/2021 11:42 AM INDEX NO. 653118/2014
NYSCEF DOC. NO. 2344 RECEIVED NYSCEF: 07/01/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC,	Index No. 653118/2014
Plaintiffs,	Hon. Jennifer Schecter
-against-	Part 54
KESHA ROSE SEBERT p/k/a KESHA, PEBE SEBERT, VECTOR MANAGEMENT, LLC, and JACK ROVNER,	**NOTICE OF ENTRY**
Defendants.	**Motion Seq. No. 50**
KESHA ROSE SEBERT p/k/a KESHA,	
Counterclaim-Plaintiff,	
-against-	
LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., PRESCRIPTION SONGS, LLC, and DOES 1-25, inclusive,	
Counterclaim-Defendants.	

PLEASE TAKE NOTICE that the enclosed is a true copy of the Court's Decision & Order, which the New York County Clerk entered on June 30, 2021.

FILED: NEW YORK COUNTY CLERK 07/01/2021 11:42 AM INDEX NO. 653118/2014
NYSCEF DOC. NO. 2348 RECEIVED NYSCEF: 07/01/2021

Dated: July 1, 2021
New York, New York

Respectfully submitted,

/s/ Leah Godesky

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FILED: NEW YORK COUNTY CLERK 06/30/2021 02:35 PM INDEX NO. 653118/2014
NYSCEF DOC. NO. 2342 RECEIVED NYSCEF: 06/30/2021

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** **IAS MOTION 54EFM**

Justice

----------X

INDEX NO. 653118/2014

LUKASZ GOTTWALD, KASZ MONEY, INC.,PRESCRIPTION SONGS, LLC,

MOTION SEQ. NO. 050

Plaintiffs,

- v -

DECISION + ORDER ON MOTION

KESHA SEBERT,

Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 050) 2302, 2303, 2304, 2305, 2306, 2307, 2312, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2335, 2336, 2337, 2338, 2339, 2340, 2341

were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, it is ORDERED that this motion is decided in accordance with the decision on the record. Movant is to e-file the transcript within 30 days.

20210630143546JSCHECTE196605BFFDCD4228B3D4CF37259E2C00

6/30/2021
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [ ] **CASE DISPOSED** [X] **NON-FINAL DISPOSITION**

[X] **GRANTED** [ ] **DENIED** [ ] **GRANTED IN PART** [ ] **OTHER**

FILED: NEW YORK COUNTY CLERK 07/07/2021 03:33 PM INDEX NO. 653118/2014
NYSCEF DOC. NO. 2346 RECEIVED NYSCEF: 07/08/2021

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CIVIL TERM : PART 54

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC,

Plaintiffs,

-against- Index No. 653118/2014

KESHA ROSE SEBERT p/k/a KESHA, PEBE SEBERT, VECTOR MANAGEMENT, LLC, and JACK ROVNER,

Defendants.

KESA ROSE SEBERT p/k/a KESHA,

Counterclaim Plaintiff,

-against-

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., PRESCRIPTION SONGS, LLC, and DOES 1-25, inclusive,

Counterclaim Defendants.

June 30, 2021

Proceedings Held Via Microsoft Teams

B E F O R E:

HON. JENNIFER G. SCHECTER, Justice

A P P E A R A N C E S:

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BY: CHRISTINE LEPERA, ESQ.
JEFFREY M. MOVIT, ESQ.

FILED: NEW YORK COUNTY CLERK 07/07/2021 03:33 PM INDEX NO. 653118/2014
NYSCEF DOC. NO. 2346 RECEIVED NYSCEF: 07/07/2021

A P P E A R A N C E S (Continued)

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7 Times Square
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BY: LEAH GODESKY, ESQ.
MOSHE MANDEL, ESQ.

Anne Marie Scribano
Senior Court Reporter

FILED: NEW YORK COUNTY CLERK 07/07/2021 03:33 PM INDEX NO. 653118/2014
NYSCEF DOC. NO. 2346 RECEIVED NYSCEF: 07/07/2021

THE COURT: Good morning, everyone.

MR. MOVIT: Good morning.

MS. LEPERA: Good morning, your Honor.

THE COURT: It's great to see you all.

I've read your papers and we're going to get started with oral argument.

This is defendants' motion. That said, what I think we'll do is I'd like to start with the plaintiff and hear from Ms. Lepera and then what I'll do, Ms. Godesky, is let you have the final say and respond after that.

Ms. Lepera, let me just say straight from the outset, let's focus, really, most on the retroactivity here. Because I just do not believe that law of the case would have any impact on the ability to amend or to assert 76-a here.

The fact is, this really is the first opportunity that defendant had to meaningfully raise the issue. It should go initially to the trial court before it makes its way to the Appellate Division. That's how our law developed. And I am not going to rule that it's precluded by law of the case.

So, with that said.

MS. LEPERA: Okay. Understood.

I'll give it a little bit of argument on that front after I go through the retroactivity, as you've requested.

And, actually, your Honor, that is where I was planning on starting anyway, because I think that, with respect to the retroactivity analysis, that, you know, that defendant claims we, you know, halfheartedly or agree with. Not so. Not so whatsoever.

We think that the retroactivity analysis that they rely on is completely wrong and it starts from Palin.

THE COURT: Is it eight, now, judges who have addressed the issue; all eight of them are wrong?

MS. LEPERA: Yes.

And the reason why they're all wrong is they all follow Palin like a herd. They follow Palin -- you know, with all due respect to, Judge Rakoff, I would like to actually walk through the Palin decision with you very carefully because it is in conflict with the higher courts of this state. And I will give you specific references and citations to it. And the cases, of course, which none of them are binding on you, with respect to the post-Palin decisions in the federal court, the lower federal court and the lower state court all rely on Palin and they do very little analysis, if any whatsoever.

So Palin is the leader of the pack and the rest of them follow like a herd and they all get it wrong and here's why.

First, if you look at the Palin case, in no less

than three to four places, Judge Rakoff mistakenly refers to 76-a as applying to public figures.

For example, he says: "This is a motion for an order modifying the opinion" -- previous opinion -- "to reflect the fact that on November 10, 2020, New York amended its anti-strategic litigation against public participation law to expressly require that public figures prove actual malice by clear and convincing evidence."

THE COURT: But there, the provision had -- it didn't dramatically change the landscape of the case by any means --

MS. LEPERA: No, but --

THE COURT: -- but, constitutionally, it was always going to be the same standard no matter what.

And I appreciate that Judge Rakoff does refer to public figures several times in the analysis.

MS. LEPERA: Correct.

THE COURT: But, still, what's wrong with the analysis in terms of focusing on the remedial purpose of the statute and the presumption that, when statutes are enacted for a remedial purpose, they can have -- they will have retroactive effect if it's remedial?

MS. LEPERA: Because that's an incorrect statement of the law of the highest court, the Court of Appeals.

Judge Rakoff relied on Gleason and he cited Gleason

in a cursory manner. But if you look at Gleason and the case on which it relies, which is Majewski, Majewski versus Broadalbin-Pert Cent. School District, 673 New York Sup. 2d in 1998, when Judge Rakoff said that there's a presumption that there's retroactive effect in remedial legislation, he's completely incorrect.

And, in fact, the Court of Appeals has said: "Classifying a statute as remedial does not automatically overcome the strong presumption of prospectivity, since the term may broadly encompass any attempt to supply some defect or abridge some super-fluidity in the former law."

So the presumption against retroactivity, in which the Court of Appeals in that particular case goes into great detail, as does the Regina case, which we cite also from the Court of Appeals, talks about the strength of this presumption against retroactivity. So simply because a statute may or may not be remedial -- and all statutes to some extent are remedial -- that does not create a presumption of retroactivity. Quite to the contrary.

That's an incorrect statement of law that Judge Rakoff made.

THE COURT: Well, one moment.

What about Gleason? Doesn't Gleason say that there are two different applicable principles, right? The principles articulated in Gleason, I think they said there

are two axioms of statutory interpretation, that statutes are presumed to have prospective effects unless the legislative preference for retroactivity is explicit or clearly stated.

MS. LEPERA: Correct.

THE COURT: However -- there's a however there -- remedial legislation should be given retroactive effect in order to effect the beneficial purpose of a statute, right?

And, in Gleason, the Court looked through the legislative history and saw the word "immediate" and said immediate -- well, in Majewski at least, it said -- immediate is -- isn't so helpful --

MS. LEPERA: Correct.

THE COURT: -- in ascertaining whether or not there's definitive legislative intent --

MS. LEPERA: Correct.

THE COURT: -- for retroactive or prospective. But what it does do is it evinces a sense of urgency. And, in Gleason, the Court laid out certain factors in terms of whether or not there should be retroactive application of the statute.

MS. LEPERA: In Gleason, however, there was a decision that spurred the Court to make the change in the legislation. There was a decision that they didn't like, Solartechnik, which they basically said was not good law and

they wanted, you know, to change that case that came down. That factor doesn't apply here at all.

The immediate issue, I think, is the other reason -- the other prong of the Palin case, where Judge Rakoff got it wrong, because not only does Majewski say that, makes, essentially, a neutral -- a neutral statement. It doesn't show a clear expression of intent to go retroactive.

And, in fact, in the subsequent case, Spitzer versus Daicel Chemical Industries, 42 A.D.3d 301, the First Department actually said very specifically that this is not to be deemed -- the language in the statute that it shall take effect immediately does not support retroactive application. Citing Majewski. Even remedial statutes are applied prospectively where they establish new rights or where retroactive application would impair a previously available defense.

So in the two concepts that Judge Rakoff relied on, which we think was a very facile, very sort of knee jerk, not a substantive analysis, a full and fair vetting of all the core principles behind why there's a fundamental body of law, long-standing body of law that retroactivity is viewed with suspicion and you need to have a clear expression of intent.

(Discussion held off the record)

(Record read)

MS. LEPERA: There's a long-standing body of law that makes it very clear that the courts in New York -- and there's cases that say -- should look to legislation being applied retroactively suspiciously, particularly if it does impair rights.

So the two things that Judge Rakoff said, which are his understanding of the expression of the legislative intent, was: One, that it was said to be immediate. The First Department said that's just not enough. Number two, the fact that it's immediate --

THE COURT: Well, Majewsky says that's not enough.

MS. LEPERA: No. So does Spitzer in the First Department --

THE COURT: I agree that immediately is not enough.

MS. LEPERA: Okay.

THE COURT: Though, again, it does convey a certain sense of urgency, but I don't know what "immediately" means in terms of prospective versus retroactive on a dispositive level.

MS. LEPERA: Right.

THE COURT: I'm not even going to focus today on Palin or the seven cases that were decided.

I really want to focus on the Court of Appeals precedent here.

MS. LEPERA: Yes.

THE COURT: But I want to go back to Gleason, because there are many similarities here with Gleason. You know, Gleason did have the word "immediate" and, again, the Court cited Majewski, which does not one way or the other, but it does evince some sense of urgency in terms of the purpose. So that's all I would look at the word "immediately" for.

But let's look at the factors that Gleason looks to in terms of whether remedial legislation should be given retroactive effect. And the one factor it raises is did the legislature make a specific pronouncement.

MS. LEPERA: Correct.

THE COURT: And we'll talk about that in a minute.

But the other thing it looks to is whether or not it conveyed a sense of urgency and, again, it looked to that "immediate". And here I do think there is the sense of urgency.

But the second issue that's a factor that the Gleason court looked at is was the statute designed to rewrite an unintended judicial interpretation or an unintended interpretation.

So, Ms. Lepera, doesn't the legislative history here weigh in favor of finding that that factor is satisfied? Because when they passed the statute, the sponsor's memo says that it was, in fact, to correct or to

further serve the purpose that the statute was originally intended to satisfy.

MS. LEPERA: I think that it broadened it. The language was not unclear. It was applied correctly. It was applied too narrowly. So when you change the law and you create a new body of law and new rights, you are immediately also altering rights that previously exist on the other side.

And that's why I respectfully submit that I do not believe that the Gleason pronouncement, that in looking at the take effect immediately itself, I think that's a neutral comment, and particularly since the First Department in Spitzer, after Gleason, six years later, said it had no effect, does not support retroactive application. So that --

THE COURT: It's not the immediate.

It's if we look at the memorandum, right, it talks about:

Section 76-a of the Civil Rights Law was originally enacted by the legislature to provide the utmost protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern.

MS. LEPERA: Um-hum.

THE COURT: However, as drafted and as narrowly

interpreted by the courts, the application of 76-a has failed to accomplish that objective. In practice, the current statute has been strictly limited to cases initiated by persons or business entities that are embroiled in controversies over a public application or permit usually in a real estate development situation. By revising the definition of an action involving public petition and participation, this amendment to section 76-a will better advance the purposes that the legislature originally identified in enacting New York's Anti-SLAPP law. This is done by broadly widening the ambit of the law to include matters of public interest, which is to be broadly construed, anything other than a purely private matter.

Doesn't that indicate that what they're trying to do is bring this provision into line with what the intent always was?

MS. LEPERA: You know, that is possible.

But what it doesn't do is it doesn't address the retroactivity issue, which it could easily have done in the context of the statute and in the bill. On the other hand, and the cases are very clear, including the Court of Appeals discussion, if there's something in the body of amendment that is different in one place than in the other, and that is 70-a -- and here Judge Rakoff also gave short shrift to the fact that 70-a said "continue" and he said "Well, of

course, because that doesn't matter, because it's for a public figure." But it does matter because it's not in 76-a. You have two separate opportunities in both of these to essentially allow for a statement to be made by the legislation that essentially shows a clearly expressed intent for retroactivity. It is not in 76-a. In 70-a, it says if a case continues, it's going to be subsumed. And it says it specifically. Because one of the things that the legislation talks about a lot is that they didn't like the fact that it said "may" for the legal fee issue, too much discretion, and they changed it to "shall". And that, they said, was erroneously done in the past or not done sufficiently. So I think the fact that, actually, that they speak to this issue in the legislative history and they had the opportunity to clearly express their intent in one side of the amendment and not -- and didn't do it in the other -- and, again, I would submit, under the highest courts of the state, Gleason notwithstanding, the body of law consistently down through Spitzer says that that's a neutral statement, immediately".

You look at that and then you look at the absence of what they put in 70-a and you do not have a clear expression of intent.

But I think, even more importantly, and I know your Honor doesn't like the law of the case argument, but here's

the point on that. If you look at the cases, and even if there's, you know, arguably a remedial purpose to 76-a, you have to still look at the impact on rights and whether or not you are changing -- and also the longevity. Often cases talk about how long is this retroactive period. This case has been going on for eight years and none of the other cases are remotely analogous to the situation of where we are now. And the fact of the matter is that the appellate court has determined that Mr. Gottwald is a private figure, that's his vested right, that, now, a retroactive application --

THE COURT: Isn't that the ultimate question?

MS. LEPERA: -- would deprive him of a vested right of having pursued a matter under a particular burden that has now been confirmed to exist by the Appellate Division.

And all of the cases that we've looked at have absolutely no discussion of the substantive right issue. And in the Palin case, of course it was given short shift because it really didn't matter.

The only argument that defendant has is that "we pled actual malice". Well, that is no longer relevant because now it's been determined by the Appellate Division to have a particular size of duty. And when you change someone's duty retroactively, you are effectively changing a right that has vested. And there's a balance that has to

happen here. And that has not happened in any of those other cases because the circumstances are completely different.

So, I would submit to you --

THE COURT: But, Ms. Lepera, the Appellate Division decision was a three-to-two decision, so I don't know how -- in terms of the vested right, who knows how it would have come out --

MS. LEPERA: Well, it exists, though.

THE COURT: -- it was a very close call in terms of his argument.

But I didn't appreciate, when I read the brief, what his due process argument is.

So, for example, when I look at Matter of Regina, the other Court of Appeals case that you discussed --

MS. LEPERA: Yes.

THE COURT: -- and there, by the way, the Court concluded that the legislature was clear that it was intended to have retroactive effect, but, nonetheless, did not apply it retroactively because it would disturb, you know, the landlord's behavior in terms of they had reason to believe that they were acting in a completely lawful manner. They didn't have the records anymore in accord with perfectly legal practice. And all of a sudden that would undercut that in a substantial way.

And I don't appreciate here what would Mr. Gottwald have done any differently.

MS. LEPERA: Well --

THE COURT: How would --

MS. LEPERA: -- he pursued this case -- he pursued this case -- excuse me, I didn't mean to interrupt.

He pursued this case under a very specific set of guidelines as to what his duty and burden was if he were to be deemed a private figure. And he is now currently vested with that particular set of duties. And if it's an increase in his duty, to now increase his burden, it's similar to essentially changing a defense or giving a new right. So now you have a situation where there's a new right that's being imbued to defendant to challenge his statement, increasing his burden.

Under -- the reason why -- the First Department decision that has come down and the reason why it would have behooved O'Melveny and defendant to have raised it then is that decision did vest him with something more significant than had it been before as did your decision.

Certainly, if that SLAPP statute had been on the books and they didn't raise it in summary judgment, they would have waived it.

The progeny of case law that we do cite in the brief, with all due respect, makes it very clear that they

had a full and fair opportunity to raise it and strategically they decided not to.

And we may be in the same place, but, ultimately, this has been delayed and deferred for a significant period of time.

But he has a vested size of a duty, if you would. And the cases talk about what's a substantive right. And a change in duty is a substantive right that's impaired. And a retroactive legislation that impairs a substantive right, size of duty, gives somebody a larger right, takes away something, that is something that needs to be balanced.

And none of these other cases have that quality or characteristic.

So, if you look at the standard of looking to whether the clear intent of the legislature is to be retroactive, with this balancing act, which is not done properly in Palin, I submit, but also has not been done in any other cases.

And in this particular case, where we have a very unique set of circumstances that distinguishes it considerably from anything else that has come before, and you view it in the context of where we are in this litigation and the First Department's ruling, you look, on the one hand, what is it that is supporting retroactivity with a clear intent. Nothing, other than clear -- the

immediacy, which I say is a wash.

Then you have this legislative discussion, okay, but you pair that up with 70-a and they had a clear opportunity to say "Wait a minute, I'd better make sure, since we want this to be retroactive, that we say so, because we've said it for 70-a, why wouldn't we say it for 76-a." They did not. And the cases in the Court of Appeals progeny are very clear that that's a significant difference to evaluate.

THE COURT: But the legislature, Ms. Lepera, isn't always careful and if it were, we wouldn't be here dealing with this today, we'd have a pronouncement that's explicit one way or the other.

But why, necessarily, when they said, you know, commenced or continued in 70-a, why can't I even glean from that that this is the same statutory scheme, the same article, that they had that same intent in terms of the urgency and wanted it to apply here? Why is that dispositively not the case here? They could have said "here too".

MS. LEPERA: I think it's very different. I think it's very different.

And that also relates to the counterclaim, because when you talk about something happening for the future conduct of a case, okay, ultimately, then you're dealing

with how that case projects going forward.

(Discussion held off the record)

(Pause in proceedings)

THE COURT: Do you recall where you were, Ms. Lepera?

MS. LEPERA: I was saying, you just said a minute ago, your Honor, with due respect, you said that it's not clear, you said that the pronouncement's not clear and sometimes they don't say things clearly and here we are and it's vague.

Well, the point is, you cannot have where retroactive application under the Court of Appeals progeny unless it is a clearly expressed intent, particularly if it affects substantive rights. So --

THE COURT: One moment.

What about Gleason? Gleason had, you know, retroactive effect and it wasn't clear --

MS. LEPERA: Because I believe, in that case, all they were doing is essentially saying arbitration provisions had to be consolidated. There wasn't a shred of discussion about taking away substantive rights. It was completely distinct.

In fact, if you look at the Spitzer case, there was a right of action that was given to indirect purchasers to sue, okay, for serious violations to protect New York

consumers. And even in that context, clearly, the legislation was looking to give a remedial effect for consumers to be able to have a broader cause of action, not retroactive.

So, again, if you have to -- if you have to parse it so that you can't see it, okay, there's got to be a balance. And, ultimately, here, the balance, if you take away the immediacy, which I think you have to under the case law, and if you look at a statement by them, there is none, except there's a contrary one in 70-a, I don't see how one could reconcile them as moving that language over to 76-a, when they had a full and fair opportunity to ultimately put that in the statute.

Then you look at the other side of the equation with the presumption against retroactivity and the strong fundamental assessment of whether rights are being changed, duties changed, substantive rights impacted. And here, I would submit, we have such a now -- whether it's three-two or not and whether it changes -- it's now a vested right that the Court of Appeals -- that the First Department has said we only have the burden of proof with respect to preponderance and negligence. That is something that he relied on in bringing the case and pursuing the case and is, in fact, now established that he was correct in that premise. That is something that has to be evaluated.

Whether you look at the law of the case or it's done in the retroactivity analysis, I think that, ultimately, you have a situation here where you do not have a clear expression of intent. And the retroactivity would impair substantial rights. So the presumption of being prospective obtained, it has not been overcome by any -- certainly not by any of the cases.

THE COURT: Ms. Lepera, he would not have brought the action if the statute were in effect when he commenced the case?

MS. LEPERA: Well, what is an interesting situation is, obviously, when you ask anyone that question, and they take a case under current laws and current reliance on laws, that's a hindsight question. But there was a reliance. So you don't -- you can't simply say "Well, okay, now, ultimately, you know, you can't -- just destroy that reliance on pre-existing, you know, case progeny and rights and duties." It has to be evaluated in the context of an impairment analysis, not whether someone would do it or not. It's an objective look at what is occurring by a retroactive application.

And, again, we start with this presumption, which no one seems to be really paying much attention to, including in the current eight cases, that it is prospective. And the only thing that changes that is the

clear expression of legislative intent. You can't --

THE COURT: That's not what Gleason says.

What Gleason says is:

It's presumed to have prospective effects unless the legislative preference for retroactivity is explicit. However, the case continues, remedial legislation should be given retroactive effect in order to effect the beneficial purpose.

And then it goes through the factors, you know. Was there a specific pronouncement? Here, there was not. Was there a conveying a sense of urgency? And, again, there, they looked at the language "immediate" for -- in favor of urgency as opposed to explicit legislative pronouncement. But was the statute designed to rewrite an unintended judicial interpretation? Does the enactment itself reaffirm legislative judgement about what the law should be?

Don't all those factors that are announced in Gleason weigh in favor of applying this retroactively?

MS. LEPERA: No, because there's not a single discussion in Gleason about the substantial -- substantive right issue.

And if you read Spitzer, which I urge you -- the Court to do, it specifically says that even if there's -- remedial statutes are to be applied prospectively -- this is

the First Department -- when they establish new rights or where retroactive implication would impair a previously available defense.

Analogous to that is impairing a duty, changing a duty, creating a new right, which is what now defendant would urge she has, which is to defend in this manner in connection with a lower -- with a higher burden.

So the First Department has said there is no presumption of retroactivity, as the Palin court said and as the Gleason court may seem to be suggesting, there's no presumption of retroactivity just because there's a remedial statute. Quite to the contrary. There's a continuing presumption of prospectivity, unless there's a clear expression of intent.

Here, in this particular statute, it is, I think, quite clear that the legislature chose not to put anything in 76-a, like 70-a, when they could have very easily. It was two words, okay? They didn't do it. So that is -- that goes on the side of the opposite of retroactivity.

Let's put on the columns pro and con for retroactivity.

What they argue for retroactivity, other than these eight cases, which don't mean anything, is the immediacy language. Majewski and Spitzer says that's neutral at best. It's remedial.

THE COURT: I'm not going to buy the immediacy.

MS. LEPERA: Understood, but I'm trying to put everything on the column of what they say is pro retro.

THE COURT: Okay, but you got me at the immediacy.

MS. LEPERA: Pro retro, all they have is immediacy. That's gone. We agree on that.

And then, on the other point, the remedial. As Majewski and Spitzer both say clearly, that's not enough. You have to look at the substantive right. It's not an automatic shifting of going from presumption of prospectivity to presumption of retroactivity just because its arguably remedial. All statutes are remedial.

And if you look at Gleason, Gleason is extremely different in the sense of both what the right was that they were effecting, an arbitration consolidation; no one was being deprived of any substantive right of a burden or a defense or a claim. It was just a consolidation of proceedings for judicial efficiency. There was a case that came down that they took immediate issue to when they basically said "This is a wrong decision. We have to change the law now." So those senses of urgency in Gleason are different.

And there's no substantive right impairment.

So on the pro retroactivity, you have no immediacy, doesn't count; you have remedial, which is not enough to

change the presumption. And that's it.

Oh, excuse me -- right, that's it on the pro retroactivity side.

On the pro prospectivity side, you have, you know, no clear expression of intent in the statute; a contrary expression in 70-a. You also have an impairment of substantive rights.

So when you measure this balance, you have low weighing on pro retroactivity and you have continued support for the presumption of prospectivity.

And I say this because, if you really look at the way that these eight -- and the fact that there's eight courts that did this, all following Palin, which is just wrong on the law and even its interpretation of the statute, gives apparent weight to it, but it's really, effectively, a meaningless body of eight cases that are not thoughtful, are not looking at this issue under the Court of Appeals precedent in Majewski and Spitzer and are not really dealing, in any of those cases, with a substantive impairment of rights, other than here.

And I think, ultimately, it would be error to allow a finding of retroactivity when the pro retroactivity column has nothing, no immediacy, we've agreed on that, and a remedial which doesn't shift the burden.

And on the pro side, a statute that could have said

this applies going forward to retroactive -- cases that are continued, meaning cases that are on the books already this applies to. And they didn't do that. They only did it in 70-a.

And the reason it's, I think, a different concept in 70-a is because, at the conclusion of the case, here, obviously, there's nothing that would support the counterclaim from a matter of fact or law because he has proven, to this juncture, in this case, a substantial basis in fact and law, under both your decision and the Appellate Division decision.

So, in the event down the road, as a -- hypothetically say something magical happened at trial and there will be something new. It's essentially equivalent to a fee shifting that would happen in the event they prevail, but not automatically, because it's not an automatic shifting, it's only in the event they prevail and then the Court would then look to see whether fees should be awarded because, at that point, something occurred in the trial where you could conclude there's no substantial basis in fact and law.

So we think the counterclaim, while it could, theoretically, at some point be ripe, right now it's contrary to all of the jurisprudence in this case. There is, at this moment, a substantial basis in fact and law.

Down the road, I would submit, if they were to renew it, it should be denied without prejudice to renewal after trail.

It's not a jury question, either. They're all wrong on that. It's a judge's decision. The cases they cite are all sanctions cases for post-trial activity.

THE COURT: How do we know it's a judge decision, by the way?

MS. LEPERA: Because it's analogous to the fee shifting statute. And the cases they cite in their own brief where there had been a determination, for example, that the case was solid through summary judgment, but then something happened at trial which rendered it frivolous or the like and, at that point, after that point, then there's a determination by the judge as to whether or not sanctions should be forwarded. And they cite to Title IX cases, they cite to Rule 11 cases. So they're analogizing it. And I think it is somewhat to be analogized. But, for now, that counterclaim has no current merit, because the facts and the law have already been determined at this stage to have substantial basis in fact and law.

I say it's speculative, premature and not ripe. Could it be after trial? Conceivably. But that's not a ground for an amendment now, which would just give us a right to basically amend as well, because there's nothing different.

Frankly, if she has a claim now that seems to stifle his speech for bringing a case, which is a communication, okay, in a forum that is about a right, ultimately, you know, we would be arguing the same thing. So it just seems to me that that should be set for post trial. It's premature. Otherwise, we could be back with summary judgment on the counterclaim prior to trial, because it's -- there is a substantial basis in fact right now, as a matter of fact, as a matter of law and law of the case.

But I digress on the counterclaim and I do want to make it really clear that -- and I know this is -- there's a lot of -- what's the word? -- you know, sentiment about this statute and its application. That doesn't mean it's retroactive. There's a very clear line of demarcation in the case law as to when that can occur. And it is an uphill battle with a presumption of prospectivity. You can't take that uphill battle of prospectivity and basically say it's no longer valid unless you have factors that are sufficient to remove that presumption.

And I will say again, and I submit that under the cases, certainly, that I've read and that I've analyzed, the core fundamental proposition of prospectivity has to be given serious consideration in the context of where we are.

And if you agree with me that the immediacy is irrelevant, the fact that it's remedial is not a change in

the presumption, particularly when there's a substantive right involved.

And the remedial can also be looked at with the legislative intent and the difference between 76 and 70-a. And when Judge Rakoff basically said "Well, of course they didn't have to put it in 76-a because there's actual malice for public figures," again there's this facile sort of suggestion that it's automatically retroactive, maybe because of some sort of public, you know, sentiment that seems to be in this whole movement issue. But that doesn't change the clear body of law and the linear concepts that have to be applied here strategically and sensibly with the presumption in mind and with a substantive right being changed.

The arbitration consolidation in Gleason, no substantive right change. Case came down, it was -- okay, they wanted for judicial efficiency to not have multiple arbitration proceedings. Makes sense. Let's do it right away. Let's apply it to cases that are in the can already. Not analogous.

Majewski is more analogous. Spitzer is more analogous dealing with consumers. Consumers clearly want to sue. They've been given a right by the legislature to sue for Donnelly violations. This is serious. It's a remedial act to help New York consumers. Not retroactive. It's

impairing a right --

THE COURT: Does it matter, the significance of the remedial purpose, in terms of affecting free speech and -- you know, again, I look at some of the things that the legislators have said about this provision --

MS. LEPERA: I understand.

It doesn't make it retroactive -- sorry.

(Discussion held off the record)

THE COURT: For example, that the statute's enacted to provide the utmost protection for the free exercise of speech and how the original legislation intended to do that, but failed to accomplish the purpose.

I mean, it seems so important to the legislature.

And, sure, would it have been better if I had the explicit pronouncement one way or the other? Of course it would be better. It would be better if we had that in all legislation so that it's very clear and these issues don't come up. But we don't have it in a lot of legislation. But it's not just this section, it's we don't have it oftentimes and that's why we have these cases that apply all these different presumptions and principles and rules.

And in trying to harmonize them, you know, I keep seeing the theme remedial legislation should be given retroactive effect to, you know, effectuate the beneficial purpose that was intended. And we have legislators talking

about how -- the fact that, you know, without this, our democracy is threatened.

Why doesn't that evince that this has a significant remedial purpose?

MS. LEPERA: Again, under Spitzer and the First Department language -- excuse me -- "Even remedial statutes are applied prospectively when they establish new rights or where retroactive application would impair a previously available defense." And there's cases that talk about what these rights are that are impaired by retroactive. They speak of duties. They speak of legal claims and rights.

So, again, just because it's remedial doesn't mean it's retroactive. And this is where the facile concept comes down the road, where it can be remedial and prospective. It can be a deterrent for future situations so there aren't frivolous cases brought in the future. It doesn't mean if it's remedial, it's retroactive.

And here's why there needs to be a clear expression of intent, because it tramples on substantive existing rights. And we keep saying the same thing. There is no clear expression here. Because there's no clear expression, the presumption has to obtain her prospectivity. And they had the opportunity to make the presumption -- excuse me -- to make it clear that it's retroactive and they chose not to do that.

THE COURT: What about in the cases where there was a remedial purpose and no explicit one way or the other in those cases? Do I balance the substantive right --

MS. LEPERA: Yes.

THE COURT: Well, in Regina, the Court found there would be a violation of due process.

What if I don't believe --

MS. LEPERA: That's what we're saying --

THE COURT: One moment.

MS. LEPERA: I'm sorry. It's hard for me to tell when there's a lag.

THE COURT: I understand.

Welcome to the world of virtual proceedings.

MS. LEPERA: My apologies.

THE COURT: But if I don't buy the due process argument, that this would work a violation of due process, then why would it be incorrect to do -- go down the remedial road and say remedial presumed retroactive and no due process violation here?

MS. LEPERA: In Regina, they actually struck down as unconstitutional a retroactive application that was in there. Different. It doesn't have to be a violation of due process in order to weigh it. It has to affect substantive rights or impair them, which brings due process concerns. Okay? That is the difference.

And I think that, ultimately, that is where we stand now, having a duty expressed by the Court -- the First Department as to what his legal right is that is going to be vacated or taken away. That is taking away a right, taking away his vested standard of duty. And that is something that is a due process concern.

Is the statute violating -- violating due process? No, because it doesn't say it's retroactive, so it doesn't take that whole analysis that Regina did to determine whether the statute is unconstitutional.

Here, we're just simply looking at the statute and, as the cases make it very clear, there's three things.

One, there's a presumption of prospectivity. No dispute. And it's a strong one. It's valued one. It's a fundamental cannon that goes back prior to the republic. Retroactive legislation is supposed to be looked at suspiciously. These are not my words. These are the words of the Court of Appeals and the First Department.

Two -- so you have the presumption.

Two, to overcome it you have to have a clear expression of legislative intent. Clear. We don't have it. We do not have a clear expression. We have immediacy, which doesn't count. We have a suggestion of remedial. But remedial, as the First Department has said, does not overcome the presumption of prospectivity. Remedial

statutes can be deemed prospective. And so, then, you have very little to establish anything overcoming the presumption of prospectivity.

THE COURT: I feel like "the law is remedial" doesn't work, except for when it does. That's how these cases go.

MS. LEPERA: Everything is remedial, though. Every statute tries to address something to make something better in the law. Every statute is remedial. It's a very vague and conclusory term. If you're remedying something, it doesn't mean it's retroactive. That's why the First Department said that in Spitzer. It doesn't mean it's retroactive. There's a strong remedial purpose for just enacting the statute prospectively.

THE COURT: Let me hear from Ms. Godesky.

MS. GODESKY: I'd like to open by saying that there absolutely is a dispute with regard to this presumption of prospectivity because, as your Honor pointed out, the Gleason case makes clear that that presumption does not apply in cases involving remedial legislation. And the axiom of statutory interpretation is that, when you're dealing a with a remedial statute, a statute that's intended to fix or to cure something, it necessarily applies retroactively.

THE COURT: What about Ms. Lepera's point that all

amendments are remedial, right, otherwise there wouldn't need to be an amendment if the statute was perfect?

MS. GODESKY: That may be true, but I think your Honor hit the nail on the head earlier when you went through the legislative history and you pointed out how it is abundantly clear, when you read the legislative history, that the legislature felt there was a significant problem in New York law that needed to be corrected; there was a serious problem when it came to the protection of free speech rights in this state and they wanted to fix it.

And, your Honor, this is exactly the type of case that they had in mind when they decided to immediately correct the statute. And that's because this is a case where, under the old regime, even if Kesha were to prevail at trial and the jury found that she's telling the truth about her sexual assault, she wouldn't really win. She would have lost 10 years of her life to this litigation with absolutely no consequence to Dr. Luke, whose net worth means that paying legal bills is really no obstacle to continuing this case.

The effect on defendants of a case like this cannot be overstated. When you are sued for money you don't have because you reported a sexual assault, it is an all-consuming source of stress, anxiety, depression, financial stress, even physical pain.

And that's why, when you look at the legislative history, you have one of the sponsors who says this law is intended to fix and cure a problem because we currently have survivors of sexual abuse who are being dragged through the legislative system, the judiciary, through retaliatory litigations. That's what they wanted to fix. That's what they wanted to cure.

And so this needs to apply retroactively.

And your Honor's analysis is dead on under Gleason. Gleason is a Court of Appeals case that is still good law. It is controlling. And that is a case, just like this one, where, you're right, the legislature didn't specifically say this needs to take retroactive effect, but there, just like here, the legislature said it needs to take immediate effect. And that was a factor. That was something --

THE COURT: But, Ms. Godesky, not much was at stake, really, in Gleason. I mean, whether or not you had to buy a new index number doesn't seem like such a big deal.

MS. GODESKY: Well, I think the Court of Appeals laid out three factors that the Court should consider when it's conducting a retroactivity analysis. Right?

You look for urgency. We talked about that at length. The fact that the statute takes immediate effect is relevant to that.

Then you look to see whether the legislators were

intending to correct a problem in judicial interpretation. Your Honor previously read out loud the stated justification for this law, which is to correct the narrow application of this law in the courts. They wanted to fix that and make sure that there was the utmost protection for the free exercise of speech.

And the third factor, your Honor, is whether the amendment reaffirms a legislative judgment about what the law should be. And we have that, too. We have the legislators saying this amendment will better advance the purposes that the legislature originally intended when it enacted New York's Anti-SLAPP law.

All three criteria are satisfied.

And as for whether some sort of substantive rights or due process rights are involved here, they are not. Dr. Luke has not identified a single substantive right, some action, some conduct that he previously undertook in reliance on some idea that he wouldn't have to satisfy an actual malice standard. And that's because this law isn't really about Dr. Luke's conduct, it's about protecting Kesha's conduct and the right to exercise free speech. There is no impaired substantive right here.

And while Ms. Lepera keeps talking about a, quote-unquote, vested right that the actual malice standard will not apply, that is not right.

First of all, from the beginning of this case, plaintiffs have pled that they could satisfy the actual malice standard. That was not something that merely came up at the pleading stage. That was something they used to obtain far-reaching discovery throughout the pendency of this case. We cited in our papers motion to compel after motion to compel where the Court granted them leave to get discovery so that they could prove actual malice. We exchanged a trial exhibit list last year, your Honor. All of the documents that Dr. Luke had continuously cited as saying it proves actual malice, all of those are on his trial exhibit list.

And, yes, most recently the First Department held in a split decision that the actual malice standard won't apply, but Kesha has not exhausted her appellate rights on that issue. And there shouldn't have been a day that went by where Dr. Luke felt that he had a vested right to that legal standard because we filed this motion before the First Department even issued its decision on the public figure issue.

You do not have a right to a particular legal standard. Judge Rakoff got it right in Palin where he said, you know, "I don't need to think about private figures in this case because Ms. Palin is obviously a public figure." But he said "To be sure, states are free to subject to the

actual malice standard rule plaintiffs who otherwise wouldn't fall within it under the First Amendment."

And that is exactly what the New York legislators did here. Right? This is really targeted at private figures, because there was no need to urgently protect defendants in cases involving public figures, who are already subject to the actual malice standard. This was needed to protect plaintiffs in private-figure cases.

And you see this has been applied in the Coleman versus Grand case, where you had a private figure, saxophonist. The Goldman versus Reddington case, where you had a college student, right, this is --

THE COURT: Well, that's the exact issue here.

I don't think anyone disputes that Palin was a different case from this one in terms of changing the trajectory of the case. In this situation, the Civil Rights Law will change the case. And in Judge Rakoff's case, in the Palin case, it did not have that type of impact.

What about the point that plaintiff makes about the legislature could have explicitly said so and it could have used the language that was in 70-a, the commenced or continued, but it didn't do so?

So why shouldn't I take that as a clear indication that maybe it meant take effect immediately, as in starting now forward?

MS. GODESKY: First of all, your Honor, I want to say that this wouldn't really change the case because, again, we've been litigating this case from the beginning under the actual malice standard and there still isn't clarity on that issue.

And this is just like what the courts observed in Coleman and Sackler. When you have hitched your wagon to the actual malice standard from the beginning of the case, it's not really changing anything that now there's a separate, independent vehicle to that same legal standard.

And in response to your question about --

THE COURT: Well, I see it changing the case, because I made the determination that actual malice wouldn't apply without this law and the Appellate Division affirmed that. So until the Court of Appeals speaks, that is clear. And it would have a, you know, tremendous effect on this case as it stands now.

MS. GODESKY: I understand, your Honor, that it would have an effect on the way that the case -- the trial -- the trial goes.

But I just want to make clear that it doesn't have an effect on Dr. Luke's rights to this date because he has litigated this case and found evidence that he says satisfies the standard. That's the point I'm trying to make.

THE COURT: What about the commenced or continued language?

MS. GODESKY: So the commenced or continued language, all that that does is show that Section 70-a, the counterclaim section of the statute, obviously encompasses cases like this one. It is not a magic term of art that somehow signals retroactivity. In fact, that language has been in the statute since its original form in the 1990s. It's not something that was specifically added with the amendment. And as your Honor observed before, you know, sometimes the legislators aren't that careful. They didn't include the language. But we know from Gleason that that is not dispositive. And when you look at the language from the legislators -- we quote this in our brief -- they say "Together these two amendments, Section 70-a and Section 76-a, will work to protect the free speech rights that we want to insure have protection in this state." Together.

And there's really no reason why you would give a defamation defendant the right to assert a counterclaim but not also impose the actual malice standard, because, again, the two sections of the statute really need to work in harmony in order to insure the utmost protection in this state, which is what the legislators so clearly intended.

THE COURT: Okay.

MS. GODESKY: Your Honor, if I can turn to Section

70-a, I do want to say a few things about that.

As I noted before, there is no dispute about retroactivity for 70-a and the legal standard is also not in dispute. Right?

As your Honor held when plaintiffs sought to amend their pleading, the only reason to deny leave to amend is if the claim is clearly devoid of merit. This is not devoid of merit. Dr. Luke's only argument for why she shouldn't be allowed to assert a counterclaim was that he says, well, no one could ever find that he brought this defamation suit without a basis in law or fact because he survived summary judgment and we're headed to trial. That's the argument they made in their papers and it's dead wrong. Right? Because, as everyone has known from the beginning, and no one moved for summary judgment for this reason, this is a he-said-she-said case where you need a credibility determination from a fact finder. Your Honor observed in the summary judgment ruling, by not moving for summary judgment, the parties were, quote, "acknowledging the obvious, it cannot be resolved until the jury hears from Dr. Luke and Kesha."

And I hear Ms. Lepera now sort of retreating from the argument they made in their briefs and she's now asking you, well, the counterclaim may have merit down the road after trial, let's just put it on the back burner.

No. There's no basis to delay. Kesha has shown her entitlement --

THE COURT: One moment.

Does it really make a difference if I put it on the back burner until after trial or allow the amendment now, when there's still going to have to be the assessment of who prevails in this case?

If I allow it now and, you know, and the plaintiff prevails in this case, I just don't understand the difference that it makes.

And you know what? I'll let you, Ms. Lepera, speak to that and then I'll pick up with Ms. Godesky again.

But, Ms. Lepera, what difference does it make if I allow it now versus if you're saying just defer it until after trial? I'm not going to make the determination now.

MS. LEPERA: Exactly.

So here here's the distinction.

THE COURT: Who cares?

MS. LEPERA: I don't really think there's a difference between what I said now and what we said in our papers, because our point is -- and this is where -- you can't assert a claim unless there's a basis in law and fact, right? There's no basis in law and fact right now for her entitlement under 70-a to anything, nothing. It only arises -- so it's speculative, it's premature. And if she

asserts this now, it's going to make us want to assert one back. And, ultimately, it becomes this never-ending -- never-ending set of claims under 70-a that are not ripe because the predicate time to assert one -- and this is why it's devoid of merit now, because of the summary judgment decision affirmed by the Court of Appeals. There is, as a matter of law, right now, a substantial basis in fact and law. There's nothing new in their pleading to change that. So the only time it could be changed and become ripe is if they establish something post trial. I want to keep this case in line. I believe they want to do this so they have the specter that she has some counterclaim out there. And the reality of the situation is this counterclaim only arises in the event of a win by her and not even then an automatic fee.

Because what the 70-a did -- and here's the difference -- the 70-a, you know, which is talked a lot about in the legislative history -- and to Ms. Godesky's prior point about how the money is being siphoned off of these people who have to defend themselves -- was meant to protect them in a case, on an ongoing basis, that they could prove after, whatever the time period was, summary judgment or at trial, that there was no substantial basis in fact and law.

They can never establish that under the current set

of circumstances, so the claim is not ripe, it is speculative under all standards of --

THE COURT: One moment, Ms. Lepera.

The defendant here is asserting that she was, in fact, drugged and sexually assaulted and that her speech was true and she's asserting that the plaintiff knows that what she's saying is true.

MS. LEPERA: Right.

THE COURT: So just because you have a claim doesn't mean you win.

MS. LEPERA: It's not a question of being right. It's also a question of where it stands in the case right now, because the claim is that there is no substantial basis in fact and law for his claim. As it stands right now, you and the Appellate Division have said there is a substantial basis in fact and law for his claim. So she has no entitlement to any fees now. There would have to be new facts and new evidence post trial to give rise to a claim to say that there's no substantial basis in fact and law. It's different than saying what they've been saying all along. It's not that it's he-said-she-said. It's the standard. The standard under 70-a is that there has to be a determination that there's no substantial basis in fact and law. And, right now, the claim is devoid of merit because that's already been determined at this stage.

THE COURT: But who's to say, in that respect, that it should always wait to amend until the end when we know one way or the other who's correct and who's incorrect?

There is no determination in this case as to credibility.

MS. LEPERA: No. There is a determination that there's a substantial basis in fact and law.

And the difference between this case and other cases, where of course in the beginning you can assert claims and counterclaims, here, this counterclaim is currently barred by the existing facts and circumstance and that's why it currently devoid of merit and that's why it is speculative -- there's no new facts in it. You can't assert a claim that is completely incorrect under the law now. Under the law, the standard being substantial basis in fact and law.

THE COURT: I don't know that it's incorrect. I just know that it's undetermined.

MS. LEPERA: It's premature.

THE COURT: The fact that it's -- it's not that it's premature. It's whenever there's this type of situation, there has been no determination. And if what she's saying is true, then there is absolute support for the counterclaim. And I don't know one way or the other as I sit here today.

MS. LEPERA: Only if that's what happens after trial.

Again, the standard is very simply, there's no substantial basis in fact and law to support the claim. The claim now is precluded by the decisions that currently exist, because if she were to seek fees right now -- let's say she was to seek fees right now -- and this is what happens in 3211(g) and (h) or (h) cases, where --

THE COURT: Ms. Lepera, one moment.

I'll ask Ms. Godesky if they're going to seek fees now, but I'll be very clear, I'm not going to award fees now.

And I appreciate what you're saying. Of course I can't award fees in this case. Everyone knows the posture of this case. And everyone knows that it is a he-said-she-said situation. And until that is determined, I don't know whether there's a substantial basis in fact. But that has to be determined.

To be clear, if the next step was to move for summary judgment at this point, on that counterclaim, before a trial -- and I see Ms. Godesky shaking her head no -- that would be nonsense.

But, go ahead, Ms. Godesky, let me let you finish up.

MS. GODESKY: Thank you, your Honor.

Of course not. We're not going to seek an immediate ruling for attorneys' fees or move for summary judgment because we need a jury to decide whether Kesha's counterclaim has merit and all that Kesha --

THE COURT: One moment.

To be clear, there is going to be no determination of this counterclaim until the jury has spoken.

MS. LEPERA: Exactly.

THE COURT: I'm asking.

MS. GODESKY: No, no --

MS. LEPERA: Yes.

MS. GODESKY: What Kesha is asking for, your Honor --

THE COURT: I'm confused.

You're saying you don't agree with that, that your counterclaim will not be determined, as in decided, as in adjudicated, until the jury has spoken?

MS. GODESKY: I do agree with that.

But we are asking -- what we are asking for is leave to assert our counterclaim now, which Kesha is entitled to do under the law, because it is certainly possible under the rulings that exist in this case that the fact finder could eventually find that Dr. Luke brought this case without a basis in law or fact. So we would like leave to assert our counterclaim now.

The Court does not make parties prove their claims before they are allowed to plead them, as Ms. Lepera is suggesting.

It would turn litigation on its head to say that Kesha doesn't have a right to plead a claim at this stage, that she's clearly entitled to, because she may not be able to prove it.

And I'd like to refer the Court, if I could, to the Goldman versus Reddington case, which was very similar to this one. That is a case where there was a college student at Syracuse University who sued a young woman who publicly accused him of sexual assault. And she, like Kesha, recently brought a motion seeking leave to assert a Section 70-a counterclaim. And Judge Lindsay, when she was presented with that motion, the defamation plaintiff, the man in that case, said "Oh, she shouldn't be allowed to assert this counterclaim. The Court has already found that I adequately pleaded defamation per se." And Judge Lindsay emphasized that she absolutely had the right to assert the counterclaim because it is not yet clear whether he will prevail on the merits. And so, in that case, just like in this one, she was allowed to assert her counterclaim and it would be part of the trial, right alongside the underlying defamation claim.

And that's what we're asking for here, your Honor.

The questions presented by Kesha's counterclaim, whether Dr. Luke's lawsuit has a substantial basis in law or fact or whether he initiated the suit simply to harass her, those are questions that are the jury needs to decide. And the same jury that's impaneled to hear all of the testimony about the defamation case should, obviously, also rule on these counterclaims. She's not bringing this as a separate case.

THE COURT: Ms. Godesky, I have another question.

Ms. Lepera, I really just don't think I need more in terms of --

MS. LEPERA: I just have to one make point, your Honor. It's very important.

THE COURT: Please --

MS. LEPERA: It's very important because I think what slipped by here is that intention that the jury is going to decide this counterclaim, i.e. is there a substantial basis in fact and law, as opposed to after the jury speaking and we win or lose, then this counterclaim is decided. That is a critical difference. Because they want to try to bring this counterclaim in front of the jury and there's absolutely no basis for that, including under the cases you just cited.

THE COURT: You know what? You can argue that, who gets to decide it later.

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But the point -- all I'm trying to say now is that it won't be decided until after the jury has spoken. Whether it's the jury deciding it or whether it's me deciding it, it will not be resolved until there is a resolution in this case, whether it's at the same time or whether it's afterward. So, in that respect, I don't see the harm in the amendment at all, so long as everybody understands that. Because that's the practical reality in the case.

I have a question for you, Ms. Godesky.

I wanted to follow up on the Section 70-a, the commenced or continued language.

Was that in the statute before the amendment?

MS. GODESKY: Yes.

THE COURT: So that appeared in Section -- that was there before 2020?

MS. GODESKY: Yes.

MS. LEPERA: I don't think that's right because it was highlighted and underlined in the amendment.

MS. GODESKY: Your Honor, I am almost certain. I am certainly not intending to mislead the Court. We could make a supplemental submission after this argument, but I do believe it is long existing in the statute.

MS. LEPERA: We'll check.

THE COURT: I don't know that it makes that much of

a difference to me, but I found it interesting because I thought I heard you say that.

Because, at the end of the day -- look, again, I've read the cases, I've read your submissions and there is nothing explicit in the legislative history here to give me the clear guidance in terms of there are no words themselves that show whether it was intended to be prospective or whether it was intended to be retroactive.

I am, however, going to follow the case of Matter of Gleason, 96 New York 2d 117, a 2001 case decided by the Court of Appeals.

The legislative history here does establish that the amended statute was intended to conform with the original intent of the provision and to have immediate effect. And while, again, immediacy does not establish retroactive intent, it does show a sense of urgency that I can take into account.

Now, in addition, the statute was designed to rewrite an unintended judicial interpretation or an unintended interpretation altogether. And the enactment reaffirms legislative judgment about what the law was intended to have always been and be. In that sense, the provision is clearly remedial.

And, in this case, it should be applied retroactively in order to give effect to its beneficial

purpose.

I do not find that the plaintiff established that retroactive application would affect his due process rights nor is the Court convinced that use of the commenced or continued language in Section 70-a -- that doesn't establish that the legislature didn't intend for 76-a to have retroactive effect and, given its remedial purpose, it should here. There are many statutes that don't contain explicit direction one way or the other.

But based on the important purpose that this legislation has, it should apply to pending cases.

Additionally, defendant is permitted to amend her answer to assert the counterclaim pursuant to Section 70-a. Leave is freely given.

The amendment is not patently without merit, it is not futile. Again, it will not be decided until there has been a determination by the jury in this case and there would not be any undue prejudice.

The defendant's motion is, therefore, granted.

Section 76-a applies in this action and leave to amend is granted.

Defendant is to e-file the amended answer within 10 days and a copy of this transcript within 30 days.

And with that, I wish you a good summer.

Thank you very much.

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MS. LEPERA: Thank you, your Honor.

MS. GODESKY: Thank you, your Honor.

THE COURT: Be well.

(Proceedings adjourned)

Certified to be a true and accurate transcript of the foregoing proceedings

Anne Marie Scribano

Anne Marie Scribano