Appeal Number 13-CV-83

THE DISTRICT OF COLUMBIA COURT OF APPEALS

JOHN DOE No. 1,

Appellant

vs.

SUSAN L. BURKE,

Appellee.

On Appeal from the Superior Court for the District of Columbia

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APPELLEE SUSAN BURKE'S SUPPLEMENTAL BRIEF ON THE MERITS

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STATEMENT OF THE ISSUES

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2. Whether the Superior Court abused its discretion in holding that Appellant John Doe No. 1 ("Doe") did not meet his burden to show that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest as required by the D.C. Anti-SLAPP statute, D.C. Stat. §16-5501 – 5505.[1]
3. Whether the Superior Court abused its discretion in holding that Doe did not meet his burden to show that his statements were not directed primarily toward protecting the speaker's commercial interests.
4. Whether the Superior Court abused its discretion in holding that Appellant Susan Burke demonstrated that the underlying claim was likely to succeed on the merits.
5. Whether the Superior Court abused its discretion in denying Doe's motion for a protective order.
6. Whether the Superior Court abused its discretion in rejecting Doe's request for attorney fees.

[1] We refer to Doe as "he" simply for convenience. His identity remains unknown, and it is possible that Doe is female, a corporation, an institute or simply one of several aliases used by the same entity to defame Ms. Burke.

STATEMENT OF THE CASE[2]

John Doe No. 1 (hereinafter referred to as "Doe") admits that he anonymously published factually inaccurate statements on a web page discussing the career and biography of Plaintiff Susan Burke. These statements claimed that a federal judge had sanctioned Ms. Burke for withholding substantial exculpatory evidence from Blackwater defendants and the Court, and presenting distorted versions of testimony before a Grand Jury. It is undisputed that Ms. Burke was never involved in the case in which that order was entered, and has never been sanctioned by a Court. These wholly inaccurate claims are per se defamatory, as they impugn Ms. Burke's professional abilities and standards.[3]

After the defamatory statements continued to be re-posted, Ms. Burke was left with no other recourse but to bring suit to identify and stop the anonymous defamers. She filed suit in D.C. Superior Court on September 19, 2012, and shortly thereafter issued a subpoena to the Wikimedia Foundation to discover the identity of Doe. Doe moved to quash the subpoena by claiming the protection of the recently enacted D.C. Anti-SLAPP statute.[4] In the Superior Court, Doe argued that the D.C. Anti-SLAPP Statute applied because Burke is a public figure (without specifying whether he contended that Burke was a general purpose public figure or a limited purpose public figure and if limited, what that issue was). In support of that claim, Doe listed, but did not submit, press reports regarding cases in which Burke has served as counsel. Doe listed articles about Burke's several different cases against Blackwater, Inc., but he also listed articles about cases involving military rape victims and Iraq torture victims, cases unrelated to

[2] Doe's statement of the case presents an incomplete summary of the procedural history of this dispute and for this reason Ms. Burke submits this supplement to the Statement of the Case.
[3] Doe is only one of the Wikipedia contributors who repeatedly have defamed Ms. Burke on the same web page.
[4] D.C. Stat. §16-5501, et seq. (2012) (hereinafter "D.C. Anti-SLAPP statute").

litigation against Blackwater. Some of the listed stories simply mention these cases, or simply mention Ms. Burke as an attorney involved in these cases, or were published long after Doe's defamatory statements. Actual copies of these stories were not presented to the Superior Court for review.

In addition to seeking a motion to quash the third party subpoena, Doe also sought a protective order under D.C. Rule 26(c), on the basis of unidentified "annoyance, embarrassment, oppression or undue burden."[5] Although Doe's papers at points referred to an injunction, Doe never set forth any basis for an "injunction" against the proposed subpoena, and the statutes and rules of procedure he cited do not address injunctive relief.

Doe's motion to quash came before Judge Ross of the Superior Court on January 17, 2013. After a lengthy hearing during which Doe discussed in detail the press reports regarding Burke's litigation efforts on behalf of a variety of clients, the Superior Court rejected Doe's efforts to quash the subpoena, finding that Doe failed to present a prima facia case that Burke is a public figure, either a general purpose or limited purpose. The Court further found that Doe failed to address the exception in the D.C. Anti-SLAPP Statute applicable to a speaker's effort to protect his own commercial interests. The Superior Court held that even if Doe was able to bring his statements within the scope of the D.C. Anti-SLAPP Statute, Ms. Burke was likely to succeed on the merits because the statements are clearly defamatory. Finally, the Superior Court rejected Doe's effort to seek a protective order, holding that the motion was no more than "unsupported claims of annoyance, embarrassment, oppression or undue burden." Court Order (Jan. 30, 2013).

[5] Rule 26(c) addresses the scope of protective orders available for discovery disputes, and contains no provision for injunctive relief.

Doe sought an immediate appeal of the Superior Court decision, claiming that the Superior Court had denied an injunction, despite an injunction never being discussed before the Superior Court. Notice of Appeal (Jan. 31, 2013). No effort to certify the issue for appeal was made in the Superior Court, and no mention of the collateral order doctrine was made in the Notice of Appeal. Burke filed in this Court a motion to dismiss the appeal, noting that D.C. law did not allow interlocutory appeals of discovery orders, and that no injunction was ever before the Superior Court. Independently, the Court also ordered Doe to show cause why the appeal should not be dismissed. Prior to a hearing on the jurisdiction questions, the Court ordered supplemental briefing on the merits of the dispute regarding the application of the D.C. Anti-SLAPP Statute in this case.

STATEMENT OF FACTS

Ms. Burke is a private attorney licensed to practice law in the District of Columbia, Virginia and Pennsylvania. During a distinguished career, she has litigated numerous cases around the country. She has worked as an attorney for the United States Department of Justice, Covington & Burling LLP, Mintz Levin, and Montgomery McCracken Walker & Rhoads, has operated her own firm and is now of counsel to Katz, Marshall & Banks, LLP in the District of Columbia. In 2009, she was retained by the families of victims of a mass shooting in Iraq to bring a lawsuit against the company that employed the shooters, then known as Blackwater Inc. That lawsuit was filed in the federal District Court for the District of Columbia in 2009, and assigned to Judge Reggie Walton. The case settled on terms favorable to the Plaintiffs in 2010. See Declaration of Susan L. Burke ("Burke Dec.") at ¶¶ 1-4, attached as Exhibit A to Burke's original opposition to Doe's motion to quash.

Separate and apart from Ms. Burke's civil action, the United States Department of Justice presented testimony before a Grand Jury that resulted in the criminal indictment of six Blackwater personnel. Those persons were not defendants in Ms. Burke's civil action. Those indictments were later dismissed by the District Court based on, inter alia, the criminal immunity that the State Department had provided the six employees during the State Department's initial investigation of the massacre. The Department of Justice later obtained new indictments. At the time of these actions, Ms. Burke did not work for the Department of Justice and played no part in the prosecution of these Blackwater employees.[6] Burke Dec. at ¶ 6.

In October 2011, an anonymous Wikipedia contributor published a biographical Wikipedia page regarding Ms. Burke, without Ms. Burke's involvement or approval. Doe published five edits to this page on four separate occasions in December 2011 and January 2012, in which he made defamatory statements impugning Ms. Burke's professionalism. Specifically, Defendant stated that Ms. Burke's civil lawsuit was thrown out by Judge Urbina and attributed to Ms. Burke the reckless violation of defendants' constitutional rights. He further stated that Ms. Burke withheld substantial exculpatory evidence from defendants and the Court, and that she presented distorted versions of testimony before a Grand Jury. See Burke Dec. at ¶ 9, Exhibit 1 (Wikipedia print out). As support for these defamatory claims, Doe cited a single New York Times article published on January 1, 2010. That article does not mention Ms. Burke, actually names the prosecutor leading the case described in the story, and notes that there is in fact another civil suit that touches on certain of the same facts underlying the criminal case that is separate and apart from the criminal prosecution. See Burke Dec. at ¶ 10, Exhibit 2 (New York Times article). Doe knowingly or recklessly distorted the facts in defaming Ms. Burke.

[6] Ms. Burke had worked in the Civil Division of the Department of Justice over 10 years earlier.

Ms. Burke brought suit against Doe and another contributor (John Doe No.2) for redress from these wrongs and to determine if others, including Blackwater and those linked with Blackwater, may be involved in the repeated defamation of Ms. Burke's professional standing.[7] Burke Dec. at ¶ 11. Ms. Burke issued a subpoena to the Wikimedia Foundation to learn the identity of her defamers, since both contributors had refused to identify themselves on Wikipedia. To date, Burke has been unable to learn the true identities of John Doe No. 1 or John Doe No. 2, and has been unable to learn if the defamatory statements were made in exchange for payments or other consideration from Blackwater or its owner Erik Prince.

STANDARD OF REVIEW

Judge Ross's denial of the motion to quash a discovery subpoena, issued prior to the defendants even being served with the complaint, is reviewed for an abuse of discretion. "We may reverse a trial court's ruling on discovery issues only if the ruling goes beyond the reasonable exercise of discretion." *Clampitt v. American Univ*., 957 A.2d 23, 28 (D.C.2008); *see also Kay v. Pick*, 711 A.2d 1251, 1256 (D.C. 1998) (citing *In re Q.D.G.,* 706 A.2d 36 (D.C.1998); *Cotton v. United States*, 388 A.2d 865, 869-70 (D.C.1978)). This occurs "if [the trial court's] actions are clearly unreasonable, arbitrary, or fanciful." *Kay* at 1256. The trial court has broad discretion to weigh the factors in deciding whether discovery should be compelled. The questions presented here, namely whether Doe presented sufficient facts to make a prima facia showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, was decided by the Superior Court and that decision should be reviewed for an abuse of discretion, not *de novo* on an incomplete record by this Court.

[7] The founder and prior owner of Blackwater, Erik Prince, has previously threatened Ms. Burke personally.

Other states have similarly found that the determinations made by a lower court in applying anti-SLAPP statutes should be reviewed to determine whether there was an abuse of discretion or error of law. *McLarnon v. Jokisch*, 431 Mass. 343, 727 N.E.2d 813 (2000) (order dismissing lawsuit pursuant to Massachusetts Anti-Slapp statute reviewed for abuse of discretion by appellate court) ; *Platypus Wear Inc. v. Goldberg*, 166 Cal.App. 4th 772, 83 Cal.Rptr.3d 95 (Cal.App. 4th Dist. 2008) (court reviewed lower courts ruling on lateness of filing anti-slapp motion for an abuse of discretion).

While the general rule requires that the Superior Court's factual findings be given deference, certain legal findings upon which the Superior Court relied are subject to de novo review, including the legal standards which determine the qualifications as a public figure for constitutional purposes. *Clampitt v. American Univ*., 957 A.2d 23, 42 (D.C.2008) (whether a party is a limited purpose public figure reviewed *de novo*). To the extent there was any disagreement before the Superior Court on the proper legal delineations of what is a general purpose public figure or a limited purpose public figure, those legal determinations can be reviewed *de novo*. The application of facts to those standards, however, where there is no disagreement on the standards themselves, should be reviewed for abuse of discretion.

ARGUMENT

I. The Court Lacks Jurisdiction Over This Appeal

The Court of Appeals' jurisdiction is limited to a review of "final orders," and it is beyond debate that this requirement is not met here. Before the Superior Court was a motion to quash a discovery subpoena, and the Court's order denying that motion allowed the action to continue. As an alternative, Doe and the amici argue that there are other bases for appellate jurisdiction, but these arguments miss the mark. First, the D.C. Anti-SLAPP Statute provides no

basis for immediate appeal, in contrast to other state's anti-slapp statutes and cases interpreting such statutes. Second, this case does not meet the stringent requirements of the collateral order doctrine. For these reasons, the Court lacks jurisdiction over this appeal.

A. The D.C. Anti-SLAPP Statute Does Not Grant This Court Jurisdiction

Nothing in the D.C. Anti-SLAPP Statute grants this court jurisdiction to hear this appeal. An early draft of the bill specifically included a provision allowing immediate appeals of denied motions to dismiss under the statute, but this provision was removed by the city council prior to passage. See Committee on Public Safety and the Judiciary, Committee Report, Nov. 18, 2010, at 7 (removing draft section 3(e) right of interlocutory appeal).[8]

By contrast, certain other jurisdictions which have passed anti-slapp legislation have included in such statutes a right of interlocutory appeal. This is a substantial difference between the D.C. Anti-SLAPP Statute and other state anti-slapp statutes. *See, e.g.*, *Englert v. MacDonell*, 551 F.3d 1099 (9th Cir. 2009) (contrasting California and Oregon anti-slapp statutes and noting that Court lacked jurisdiction to review interlocutory order under the Oregon statute because Oregon statute lacked a right of interlocutory appeal and that collateral order doctrine did not apply); *Metabolic Research, Inc. v. Ferell*, 696 F.3d 795 (9th Cir. 2012) (rejecting interlocutory appeal because Nevada statute did not include a right of immediate appeal). Recently, the D.C. Circuit addressed this precedent without deciding the jurisdictional issue, but noted that an earlier panel of this Court had refused to allow an interlocutory appeal under the D.C. Anti-SLAPP Statute. *Sherrod v. Brietbert*, --- F.3d ----, 2013 WL 3185062 (D.C. Cir. 2013) (citing

[8] In fact, the Attorney General of the District of Columbia had concerns that both section 5502 and 5503 similarly violated the Home Rule Act. See Committee on Public Safety and the Judiciary, Committee Report, Nov. 18, 2010 (including letter from Attorney General Peter Nickles to Phil Mendelson, dated September 17, 2010, stating that anti-slapp legislation providing procedures conflicted with section 602(a)(4) of the Home Rule Act).

Newmyer v. Sidwell Friends Sch., No. 12–CV–847 (D.C. Dec. 5, 2012) (unpublished order refusing to apply collateral order doctrine and noting no right of immediate appeal under D.C. Anti-SLAPP Statute)). Other courts considering the issue relied on state court procedures which allowed immediate appeal, *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 178 (5th Cir.2009), or prior precedent which recognized a right of interlocutory appeal, *Godin v. Schencks*, 629 F.3d 79, 84 (1st Cir.2010). These justifications do not exist under D.C. law.

B. The Stringent Requirements of the Collateral Order Doctrine Are Not Satisfied

Doe and the amici fail to establish that the stringent, three-part test required by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) is satisfied in this case. Under Cohen and its progeny, a party invoking the collateral order rule must prove three requirements. The underlying order (1) it must be effectively unreviewable on appeal from a final judgment, (2) must resolve an important issue that is separate from the merits of the case and (3) must conclusively determine a disputed question of law. *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132 (D.C. 2010) (declining jurisdiction under the collateral order doctrine and overruling *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 339 (D.C.2001)). As the Supreme Court has warned, a broad application of the *Cohen* rule will "overpower" the rule of finality. *Will v. Hallock*, 546 U.S. 345, 349–50 (2006). This Court has recognized that the Supreme Court views the collateral order doctrine as "modest" in scope and described the conditions required for its application as "stringent." *McNair*, at 1136 (citing *Will v. Hallock*, 546 U.S. 345 (2006)). The stringent requirements have not been met here.

1. Orders Denying Motions Under The D.C. Anti-SLAPP Act Are Reviewable After Final Judgment.

Orders denying motions under the D.C. Anti-SLAPP Statute are not "effectively unreviewable" because they "can be adequately vindicated on appeal from final judgment." *See*

Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 869 (1994) (refusing to allow appeal under Cohen when claimed right to avoid trial can be effectively reviewed on final appeal). An order is effectively unreviewable only when two conditions are met. First, immediate appeal must be necessary to preserve a true "right not to stand trial"—not just a claim for pretrial dismissal. *See id.*, 511 U.S. at 871-73. Second, even where a true claim to immunity from suit is threatened, appeal still is not permitted unless it is also necessary to preserve "some particular value of a high order." *Will*, 546 U.S. at 352. "The crucial question, however, is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009).

The D.C. Anti-SLAPP Statute did not confer immunity on those who invoke it and no such "right not to stand trial" is at stake when a motion under the D.C. Anti-SLAPP Act is denied. Instead, Anti-SLAPP motions are like Rule 12(b)(6) and Rule 56(a) motions in that they merely provide a procedural vehicle to assert some independent ground to limit litigation in light of the applicable standard of review. *See, e.g., Englert v. MacDonell*, 551 F.3d 1099, 1102 (9th Cir. 2009) (no appeal from orders denying motions under Oregon's anti-SLAPP statute because the act "does not alter the substantive law of defamation" and the motion "serves the same purpose as a motion for summary judgment").[9]

[9] In the present case, the procedure at issue is a motion to quash, rather than a motion to dismiss, but the legal standard for both remains the same – whether the "claim arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Stat. 16-5503(a). The interest Doe identifies is an interest in remaining anonymous rather than an interest not to stand trial, but the effect remains the same – if he remains anonymous no summons will issue and the claim will be subject to dismissal. It should be noted that Doe's claimed interest in anonymity has no application to a defamation action. *Solers v. Doe*, 977 A.2d 941, 951 (D.C. 2009) (defamatory speech is entitled to no Constitutional protection, and an anonymous speaker is entitled to no greater protection than a known one).

Doe suggests that other courts have allowed interlocutory appeal because of the interests at stake, but this ignores the D.C. Anti-SLAPP Act's text while focusing instead on cases from other jurisdictions that dealt with different anti-SLAPP statutes. Each statute is distinguishable due to "significant differences" in the statutes' provisions such that "each state's statutory scheme must be evaluated separately." *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 799 (9th Cir. 2012). For example, some anti-SLAPP statutes expressly provide immunity from liability (though not necessarily immunity from trial). See, e.g., 735 Ill. Comp. Stat. § 110/15; R.I. Gen. Laws § 9-33-2(a); Tenn. Code § 4-21-1003(c). The D.C. Anti-SLAPP Act does not. See D.C. Code § 16-5502(b). And some other anti-SLAPP statutes expressly provide for interlocutory appeal. See, e.g., Cal. Civ. Proc. Code § 425.16(i). Again, the D.C. Anti-SLAPP Act does not.

These "significant differences" are why the Ninth Circuit itself has repeatedly declined to allow interlocutory appeal in cases where the anti-SLAPP statute at issue did not provide for immediate interlocutory appeal. *Metabolic Research*, 693 F.3d at 796; *Englert*, 551 F.3d at 1102. As the Ninth Circuit explained in Metabolic, "the major distinguishing feature" of California's anti-SLAPP act is the statutory right to interlocutory appeal in state court. For this reason, the court in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) allowed an interlocutory appeal under California law. The very terms of the statute was the primary basis for Batzel's conclusion that the California act provided a right akin to immunity. *Metabolic Research*, 693 F.3d at 801. Metabolic recognized that Batzel's reasoning does not apply to anti-SLAPP statutes—like the D.C. Anti-SLAPP Act—that do not provide for interlocutory appeal. See *id.*; see also *Englert*, 551 F.3d 4. Metabolic correctly distinguished the Fifth Circuit's Henry decision for a similar reason, 693 F.3d at 801 n.7, and held that orders denying motions to

dismiss under Nevada's anti-SLAPP statute are not immediately appealable—even though the statute expressly provided "immun[ity] from civil liability"—because "immunity from 'civil liability' is unquestionably different than immunity from 'suit' or 'trial.'" *Id*. at 802.

The D.C. Anti-SLAPP Act provides even less than the Nevada statute because the D.C. Anti-SLAPP Act does not even provide immunity from civil liability (let alone a true right not to stand trial). Indeed, neither the words nor the notion of "immunity from trial" appear anywhere in the Act. Amici contend, however, that this Court should nevertheless hold that the Act impliedly creates the strongest type of immunity—a right not to stand trial typically afforded only to government officials and sovereign entities, because a few sentences of legislative history refer to the immunity provided by statutes in other jurisdictions and a right to interlocutory appeal that the D.C. Council omitted from the Act. Even in ordinary circumstances, these references to immunity and appeal would not be a sufficient basis to find that the Act provides immunity from suit. *See, e.g., Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 755 & n.5 (D.C. 1983) (en banc) (single sentence of legislative history could not change plain meaning of statutory text); *Carter v. State Farm Mut. Auto. Ins. Co*., 808 A.2d 466, 472 (D.C. 2002) ("This court will not read into an unambiguous statute language that is clearly not there."). If the District had wanted to provide immunity from suit, it could have written such a requirement into the law. See, e.g., D.C. Code 7-1231.08(f) (stating that parties "shall be immune from suit"). It chose not to. [10]

Although the Supreme Court has allowed interlocutory appeals in limited circumstances to address certain claims of immunity, it did so to "preserv[e] the efficiency of government and the initiative of its officials" or to protect some other "high order" governmental interest. See

[10] For this reason, arguments by the reporters Committee for Freedom of the Press regarding policy reasons for allowing interlocutory appeal are better presented to the D.C. council.

Will, at 352. No similar governmental interest is at stake when an Anti-SLAPP motion to quash is denied. See *id*. at 353. There is no right to anonymous defamation, and avoiding the disclosure of your identity has never been sufficient on its own to allow the immediate appeal of a pretrial order. *Solers v. Doe*, 977 A.2d 941, 951 (D.C. 2009) (defamatory speech is entitled to no Constitutional protection, and an anonymous speaker is entitled to no greater protection than a known one). Doe's appeal must await final judgment.

2. Orders Denying Motions Under The D.C. Anti-SLAPP Act Do Not Resolve An Issue Completely Separate From The Merits.

The second Cohen factor requires Doe to demonstrate that orders denying Anti-SLAPP motions "resolve an important issue completely separate from the merits of the action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Collateral-order appeals are not permitted if the order at issue "involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Id. at 469. Here the issue at stake is the identity of the defendant rather than his alias, and nothing could be less "collateral" that the name of the defendant defaming the plaintiff.

Interlocutory appeals involving claims of qualified immunity are not subject to a different rule. Claims of immunity that turn on fact-intensive inquiries are not immediately appealable because they are not completely separate from the merits. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). An interlocutory appeal "concerning this kind of issue" wastes appellate courts' time "by forcing them to decide in the context of a less developed record[] an issue very similar to one they may well decide anyway later, on a record that will permit a better decision." Id. at 317. Orders denying Anti-SLAPP motions are not "completely separate from the merits" for this reason. To determine whether the plaintiff's claim "is likely to succeed on the merits,"

D.C. Code § 16-5503(b), the appellate court has no choice but to answer "the questions underlying [the] plaintiff's claim on the merits." *Johnson v. Jones*, 515 U.S. 304, 314 (1995).

A court's review of whether a plaintiff's claim "is likely to succeed on the merits," D.C. Code § 16-5503(b), is inextricably tied with an evaluation of the merits. As a result, the issues that arise in Anti-SLAPP appeals "will substantially overlap [the] factual and legal issues of the underlying dispute, making such determinations unsuited for immediate appeal." *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988). By its terms, a court cannot apply the D.C. Anti-SLAPP Statute without involving itself in the factual issues of the dispute, and for this reason the decision is not separate from the merits.

3. Orders Denying Motions Under The D.C. Anti-SLAPP Act Do Not Conclusively Decide A Disputed Question.

Finally, Doe must establish that orders denying Anti-SLAPP motions "conclusively determine the disputed question" decided by the court below. *Livesay*, 437 U.S. at 468. This Cohen requirement saves appellate courts from resolving questions that become moot, perhaps because the lower court subsequently revised its ruling, the issue did not affect final judgment in a manner warranting reversal, or the party that lost the ruling prevailed on the merits. *See, e.g., United States v. Cisneros*, 169 F.3d 763, 768 (D.C. Cir. 1999); *Banks v. Office of Senate Sergeant-At-Arms*, 471 F.3d 1341, 1344-45 (D.C. Cir. 2006). Anti-SLAPP motions implicate each of these concerns because the "disputed question" at hand—the plaintiff's ability to succeed on the merits—will recur throughout the lower court proceedings.

The bottom line here is that this Court can effectively review the Superior Court's Anti-SLAPP order after the factual record on which it was based has been fully developed, after Doe exhausts his opportunities to convince the Superior Court that he is entitled to dismissal, and after final judgment has been entered. The Anti-SLAPP statute allows a party an early look at

the claims, much like a motion under Rule 12(b)(6). But that decision, like a decision under a motion to dismiss, which "finally" determines whether 12(b)(6) dismissal is justified, is not immediately appealable. Accordingly, because the Superior Court's order was not a final decision or an immediately appealable collateral order, this appeal should be dismissed.

II. The Superior Court Correctly Ruled that the D.C. Anti-Slapp Statute Does Not Authorize Quashing Burke's Subpoena

Doe's motion to quash the subpoena issued by Burke in an effort to learn his name and serve the lawsuit, is a misuse of the letter and spirit of the D.C. Anti-SLAPP Statute. The District of Columbia passed its anti-SLAPP statute to allow participants in political or public policy debates to fend off suits designed to punish or prevent such participation. The statute did not, however, abrogate D.C.'s long recognized adherence to a strong defamation law that allows person to protect their reputations, particularly their professional reputations, from libel and slander. *Solers, Inc. v. Doe*, 977 A.2d 941, 951 (D.C. 2009) (recognizing right of plaintiff in defamation action to protects its reputation). Doe's defamatory comments were never part of any political or public policy debate, and Ms. Burke's resulting lawsuit is not a "Strategic Lawsuit to Prevent Public Participation" of the type the law was designed to prevent. Doe was not speaking out on political issues, participating in a legislative or judicial debate, or seeking to have his elected representatives take any action. Instead, he was commenting on Ms. Burke, a non-governmental official acting within the requirements of her profession, on a biographical web entry on Wikipedia.

Ms. Burke is not trying to silence public debate. She is attempting to defend her reputation, earned over many years of hard work. To a lawyer, that reputation is a most important asset, and D.C. law has always recognized the high value of defending one's reputation. *Moss v. Stockard*, 580 A.2d 1011, 1030 (D.C. 1990). If the D.C. Anti-SLAPP

Statute is stretched beyond its breaking point to cover the defamation at issue here, it will be open season on everyone who lives or works in the District of Columbia to have lies, libels and falsehoods published at will. The D.C. Anti-SLAPP Statute was never meant to be a complete abrogation of defamation law as urged by Doe and the amici in this case.

In addition to falling well clear of the concerns the led to the passage of the D.C. Anti-SLAPP Statute, Doe fails to meet the narrow requirements of the law. Doe failed to establish that Burke is a public figure, or that he was commenting on an issue of public interest.

A. Doe Failed to Present a Prima Facia Case that the Defamatory Speech Addressed an "Issue of Public Interest" as Required by the D.C. Anti-Slapp Statute.

The D.C. Anti-SLAPP Statute requires that those seeking its protection first set forth a prima facia case that the statute applies, and Doe fails this test. A prima facia case requires Doe to establish that the discovery sought is in connection with a claim arising "from an act in furtherance of the right of advocacy on issues of public interest." D.C. Stat. § 16-5503(b). Both "an act in furtherance of the right of advocacy" and an "issues of public interest" are defined in section 5501 of the Act. "An act in furtherance of the right of advocacy on issues of public interest" means:

> (A) Any written or oral statement made:
> (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or
> (ii) In a place open to the public or a public forum in connection with an issue of public interest;

16-5501(1). At issue here is a written statement that Doe contends was made "in a place open to the public or a public forum in connection with an issue of public interest."

An "Issue of Public Interest" is defined as:

> an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

16-5501(3).

In seeking his motion to quash, Doe only argued that Ms. Burke was a "public figure." Now before the Court of Appeals, Doe claims that his defamatory comments also qualify as an "issue of public interest" because his comments were "related to goods in the marketplace," or addressed "health and safety or community well being." His comments satisfy none of these requirements, and thus he fails to set forth a prima facia showing that the D.C. statue applies.

1. Doe Fails To Establish that Burke is a Public Figure.

Doe failed to prove that Ms. Burke, a private attorney, is a "public figure" as that term is used in the D.C. Anti-SLAPP Statute. The D.C. Anti-SLAPP Statute does not define "public figure." Constitutional limitations on defamation law, which have been carefully honed over the years by the Supreme Court, dictate two types of public figures. A "general purpose public figure" is one that is famous in the community, equivalent to a public official, and carries "pervasive fame or notoriety." *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 347-50 (1974). In *Gertz*, the Supreme Court stated that "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." 418 U.S. at 352. The Superior Court had no difficulty finding that Ms. Burke is not a general purpose public figure, and it appears that

Doe has abandoned any such claim. See Appellant's Brief at 24 (arguing only that Burke is a limited purpose public figure).[11]

Without addressing the actual wording of the statute, Doe now argues that Ms. Burke is a "limited purpose public figure" on the issue of "her crusade" against "Blackwater, … the U.S. military… and U.S. contractors in wartime." Appellant's Brief at 26. The breadth of that description belies the error in Doe's analysis. It appears that Doe is arguing that Ms. Burke is a public figure with respect to every lawsuit she files. Such a broad list contradicts the Gertz court's instruction that Courts examine "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Waldman v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980) (quoting *Gertz*, at 352 (emphasis added)).

As noted by Doe himself in his merits brief, the *Waldman* Court discussed the method by which a particular public controversy gives rise to limited use public figures.

> As the first step in its inquiry, the court must isolate the public controversy. A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. The Supreme Court has made clear that essentially private concerns or disagreements do not become public controversies simply because they attract attention. *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55, 96 S.Ct. 958, 965-66, 47 L.Ed.2d 154 (1976). Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.

Waldman v. Fairchild Publications, Inc., 627 F.2d at 1296. Doe's suggested identification of the areas in which Ms. Burke may be a limited use public figure are neither particular nor do they implicate public, rather than private, concerns. Ms. Burke represented the families of shooting

[11] Because the D.C. Anti-SLAPP Statute was drafted narrowly (such as specification of only the "District Government" giving rise to an issue of public interest), there are strong arguments that the Court should apply the narrower interpretation of "Public Figure" and hold that the D.C. Anti-SLAPP Statute, by using the term "Public Figure," was meant only to apply to general purpose public figures.

victims in a private civil lawsuit against a private company. As *Waldman* suggests, the federal government's use of Blackwater, Inc. and the killings they performed while so retained may be public controversies, as these issues raise policy concerns and public policy questions. The public criminal prosecution of those responsible may create particular public disputes. A civil lawsuit for damages by the victims does not. Simply because both issues – the public controversy and the private action -- both involve some common facts does not make the filing and prosecution of a civil lawsuit a public controversy under the Waldman test.[12]

In addition to the requirement that there be a public controversy involving Burke, a limited purpose public figure is one who thrusts themselves into roles "in the forefront of particular public controversies in order to influence the resolution of the issues involved." *Clampitt v. American University*, 957 A.2d 23, 43 n.25 (D.C. 2008; see also *Moss v. Stockard*, 580 A.2d 1011, 1030 (D.C. 1990); *Gertz*, 418 U.S. at 345. It is clear, however, is that an attorney does not thrust themselves into a public debate and thus become a public figure simply by filing a civil action on an issue. The *Gertz* case itself, in which the "limited purpose public figure" was first identified, is instructive. Gertz, an attorney in private practice, brought a civil lawsuit on behalf of the victims of a police shooting. The shootings, and subsequent criminal prosecution of the police involved, drew widespread public attention in Chicago. When Gertz himself became the subject of press reports, he brought a defamation suit against one publisher based on defamatory statements in their reports. The Court held that Gertz could not be a limited

[12] Doe may claim that he was commenting on Blackwater, but it's more accurate to state that he was commenting on Susan Burke. He attributed harsh sanctions handed down by a judge to her. He was not commenting on the controversy over Blackwater, their role in Iraq, the progress of the war or the Nisour Square shooting. Instead, he was commenting on a lawyer who had filed suit against Blackwater. This is a substantive distinction that Doe has continually tried to obscure. Ms. Burke's civil litigation against Blackwater was never a "particular public controversy" that could have given rise to limited purpose public figure status.

purpose general purpose public figure because he had not thrust himself into the vortex of a public issue simply by filing civil litigation related to a very public controversy. *Gertz,* at 352. Applying the *Gertz* standard, the fact that several articles or interviews have been published about cases in which Ms. Burke has been involved is not sufficient to make her a limited purpose public figure. As in Gertz, Burke had filed a civil lawsuit which received public attention, while a separate criminal action arising from the same facts was proceeding, a criminal action in which Burke had no role. Clearly with respect to the criminal prosecution of Blackwater employees, Ms. Burke was not a limited purpose public figure.

Doe suggests that by responding to press inquiries about the civil suit, that Burke has thus "thrust herself" into the public controversy.[13] As the Court in Waldman noted with respect to litigation:

> [P]ublicity surrounding litigation does not by itself elevate the parties to public figures, even if they could anticipate the publicity, unless they are using the court as a forum for espousing their views in other controversies. *Wolston v. Reader's Digest Association*, 443 U.S. 157, 167-69, 99 S.Ct. 2701, 2707-08, 61 L.Ed.2d 450 (1979); *Time, Inc. v. Firestone*, 424 U.S. at 455-57, 96 S.Ct. at 965-66 (1976).

Waldman, at 1296 n. 23. Ms. Burke was bringing a civil action, and not using that "forum" for espousing views on other controversies. Ms. Burke plays no policy role with respect to the public controversies involving Blackwater. Instead, as a lawyer for the victims, she must seek redress in a public forum. Writing up the facts underlying a claim in the civil complaint, when those facts are graphic and shocking, is not placing the lawyer at the forefront of a public issue. Moreover, responding to press inquiries is insufficient to qualify one as a limited purpose public figure. *See, e.g., Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (plaintiff who held press

[13] Many of the cited press reports relied upon by Doe are not regarding the private claims against Blackwater, and many more are simply reports on the cases that mention Burke, but are not interviews or quotations from Burke directly.

conferences during trial not a public figure for defamation purposes); *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999) ("*Firestone* makes clear that voluntary discussion of events with the press does not per se indicate that a defamation plaintiff has "thrust herself to the forefront of [a public] controversy"). Numerous courts have rejected efforts to find attorneys to be public figures. *See, e.g. Ryder v. Time, Inc*., 557 F.2d 824 (D.C.Cir.1976) (attorney and former public official not a public figure when press confused him with another attorney); *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 584 (8th Cir. 1980) (attorney not public figure, court to examine status of person defamed, not the public interest in the issue); *Erickson v. Jones Street Pubishers, LLC*, 629 S.E.2d 653 (S.Car. 2006) (appointed attorney not a public figure); *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982) (well known attorney not a public figure); *Little Rock Newspapers, Inc. v. Fitzhugh*, 330 Ark. 561, 954 S.W.2d 914 (1997) (attorney who had held press conferences related to other litigation not a public figure, as "mere fact of an attorney's representation of a client involved in a matter of public controversy does not, in itself, automatically render the attorney a public figure within the context of the controversy"); *Dodrill v. Arkansas Democrat Co*., 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076, 100 S.Ct. 1024, 62 L.Ed.2d 759 (1980) (public reports regarding attorney do not make him a public figure); *Durham v. Cannan Communications, Inc.,* 645 S.W.2d 845 (Tex.App.1982) (attorney who held press conferences was not a public figure); *Spence v. Flynt*, 816 P.2d 771 (Wyo.1991), cert. denied, 503 U.S. 984, 112 S.Ct. 1668, 118 L.Ed.2d 388 (1992) (attorney Spence not a public figure for limited purpose at issue).[14] Doe's reliance on *Partington*

[14] In any event, press reports published after the defamatory statements made by Doe are irrelevant to determining whether Burke was a limited use public figure at the time of the defamation. *See, e.g., Hutchinson v. Proxmire,* 43 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979) (press reports regarding plaintiff made after the defamation cannot be relied upon to find plaintiff a public figure).

v. Bugliosi, 825 F.Supp. 906 (D. Hawaii 1993) is misplaced. In that case, the defamation plaintiff/lawyer had written a book about a sensational murder trial, and the trial court found him a limited purpose public figure with respect to that murder trial only. That is a very different set of facts. A private lawsuit by private parties against a private company is not "an issue of public interest," and Plaintiff did not become a public figure simply because the press reported on some of her litigated cases.

2. Doe's Attempts to Shoe-Horn His Defamatory Speech Within Other Elements of the Definition of "Public Interest" Fail and Were Never Presented to the Superior Court

Recognizing that his efforts to prove that a private attorney advocating for her clients does not make Burke a public figure, Doe seeks to latch on to any other aspect of the definition of "Public Interest" to bring the D.C. Anti-SLAPP Statute into play, but these categories do not apply. As noted above, the D.C. Anti-SLAPP Statute lists several specific topics than can satisfy the definition of "Public Interest," including "health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." D.C. Stat. §16-5501(3). Doe now argues for the first time that he was commenting on Susan Burke's services as an attorney, or commenting on Blackwater's services as international mercenaries, or, most incredibly, he was commenting on the "safety" and "community well-being" of Iraqis. A review of his comments, however, make it clear that none of these categories apply.

As noted, on the Wikipedia page devoted to Susan Burke's biography, Doe stated – falsely – that Ms. Burke had been sanctioned and her case dismissed for misconduct. He does not state that clients should not hire Ms. Burke or that her fees were excessive. He does not comment that Blackwater did or did not perform well in protecting diplomats or that Blackwater

represented an excellent value in the mercenary marketplace. He does not comment that Iraqis should avoid driving the streets of Baghdad for health reasons. To stretch his actual words to fit these types of "public interests" is to subscribe no meaning whatsoever to the statute's terms, and should be rejected outright.

B. The D.C. Anti-SLAPP Statute Contains an Exception for "Private Interests" Such as Protecting the Speaker's Commercial Interests That Doe Did Not Establish was Inapplicable

The D.C. Anti-Slapp statute's definition of "Issues of Public Interest" contains an over-riding exception that applies to "private" interests, such as the speaker's commercial interests. By its terms, the D.C. Anti-SLAPP Statute states that:

> The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

D.C. Stat. §16-5501(3). Pursuant to §16-5503 regarding motions to quash, Doe bears the burden to establish a prima facia case that the claims are within the scope of the D.C. Anti-SLAPP Statute. Therefore, Doe bears the burden to establish that this private interest exception does not apply. Here Doe made no prima facia case on this point.

Because Doe is an unknown person, his motivations in making the defamatory statements are known only to him. It's possible that Doe works for an organization whose commercial interests include attacking persons that take positions hostile to Blackwater or Erik Prince. It may be that this organization does work on behalf of or in connection with Blackwater or its principals, and the efforts to smear Ms. Burke publicly while hiding behind anonymity works to that organization's commercial advantage. But pursuant to the wording and structure of the D.C. Anti-SLAPP Statute, if that is the case then the issue is a "private commercial interest" and not an "issue of public interest." Doe must come forward with some evidence to establish that the

exception does not apply. Contrary to his claims, his motivation is making the defamatory comments is not in any way clear on the face of the comments. He located a two year old newspaper article and used it to defame Burke, when he could have just as easily commented on Blackwater's Wikipedia page or hundreds of others. Instead, for reasons known only to him, he chose to comment on Ms. Burke, who is not even mentioned in the article he cites in support.

Contrary to suggestions by Doe and amici, Burke has never argued that all paid commentators or those working for commercial interests, including reporters and other professionals, are exempted from the protections of the D.C. Anti-SLAPP Statute by terms of the "private interest" exception. By its terms, however, a party making statements directed primarily toward protecting the speaker's commercial interests cannot be addressing an "issue of public interest." Nothing to the contrary was stated by the Court in *Farah v. Esquire Magazine, Inc.*, 863 F.Supp.2d 29 (D.D.C. 2012). There, the author of the satirical article was not "making statements directed primarily toward protecting the speaker's commercial interests." He was not writing to promote his own market interests against the target of his satire, and therefore the exception did not apply. Burke argues no different rule.

C. The D.C Anti-Slapp Statute Does Not Apply Because Burke Is Likely to Succeed on the Merits of Her Defamation Action.

By its own terms, even if Doe were to satisfy the "public interest" test discussed above, the D.C. Anti-Slapp statute does not apply when the party seeking the identifying information "demonstrates that the underlying claim is likely to succeed on the merits." D.C. Stat §16-5503(b).[15] Pursuant to D.C. law, a claim for defamation requires "four elements: (1) that the

[15] "Likely success on the merits" only requires that Burke "present a sufficient legal basis" for her claim. *See Boley v. Atlantic Monthly Group*, --- F.Supp.2d ----, 2013 WL 3185154 (D.D.C. June 25, 2013) (citing *Price v. Stossel*, 620 F.3d 992, 1000 (9th Cir.2010)) The attempt to

defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Solers, Inc. v. Doe*, 977 A.2d 941, 948 (D.C. 2009) (citing *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005)). Here there is no question of falsehood and publication. Similarly, as the defamatory statements "would adversely affect Plaintiff's fitness for the proper conduct of [her] lawful business, trade or profession, no proof of special harm is required." *Wallace v. Skadden, Arps, Slate , Meagher and Flom*, 715 A.2d 873, 877-78 (D.C. 1998), *citing* Restatement (Second) of Torts §573 (1977). The only issue, and the only issue raised by Doe, is whether Plaintiff is likely to succeed in proving either negligence or malice in the publication.

As noted above, Ms. Burke is not a public figure with respect to the Blackwater litigation, and need only prove that the statements were published negligently. At a minimum, the article Doe cited in support of his statements demonstrates negligence. Ms. Burke is not mentioned in the article, and the attorney in charge of the case is identified as another person. See Burke Dec. Ex. 2. The article also makes clear that the civil action was separate and apart from the criminal prosecution. Id. Doe's defamatory statements are at a minimum negligent.

The same article also provides sufficient proof that Plaintiff is likely to succeed on the merits even if malice is required. If proof of malice is required, Plaintiff must present evidence of an "intentional or reckless disregard for the falsity" of Doe's statements. *Moss v. Stockard*, 580 A.2d 1011, 1029 (D.C. 1990) (citing *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964)). The cited article in the New York Times was written for the general population, and did not

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change the words of the statute to require "substantial likelihood of success" by incorporating the standards for a preliminary injunction find no support in the law.

require special legal knowledge to understand that it did not mention Ms. Burke. See Burke Dec. Ex. 2. Malice can be established by the uncontroverted fact that Defendant recklessly disregarded the very article that he was citing as support. If this is not sufficient to show a likelihood of success as it relates to the malice requirement, discovery on malice should be allowed. Additional evidence regarding potential malice remains in the exclusive control of Doe, and Burke should be allowed discovery on this issue before the Court rules on the evidence available to establish malice. *See Solers v. Doe,* 977 A.2d 941, 958 (D.C. 2008) (approving of authority that recognizes the difficulty of presenting evidence of the Defendants state of mind when the identity of the Defendant remains unknown and allowing discovery). One reason that Burke seeks to identify Doe is to determine whether he was working for or on behalf of others who have stated an intent to harm Burke. Her efforts to seek this evidence should not be dismissed without allowing reasonable discovery of the issue.

III. Doe Failed to Present Any Basis for Entry of A Protective Order.

In addition to seeking to quash the subpoena pursuant to the D.C. Anti-SLAPP Statute, Doe sought a protective order under Superior Court Rule 26(c) on the basis of unenumerated "annoyance, oppression and undue burden or expense." The Superior Court found these claims completely unsupported by the record, and this decision should be reviewed under an abuse of discretion standard. *Clampitt v. American Univ*., 957 A.2d 23, 28 (D.C.2008) (noting that discovery orders are reviewed for an abuse of discretion). The Superior Court's factual finding that the request for a protective order was not supported by facts in the records should be affirmed.

Doe contends that his interest in remaining anonymous justifies a protective order, but there is no such interest protected by statute or the constitution. It has long been established that

defamatory speech is entitled to no Constitutional protection, and an anonymous speaker is entitled to no greater protection than a known one. *Solers v. Doe,* 977 A.2d 941, 951 (D.C. 2009). Doe seeks to find a constitutional basis for his anonymity in *McIntyre v. Ohio*, 514 U.S. 334 (1995), but there is no such right in defamation actions. In that case, the Ohio election commission fined McIntyre for anonymous political speech. The Supreme Court reversed, relying in part on this country's long tradition of anonymous political speech. Importantly, the Court also noted that the case did not involve any allegations of defamation, and stated that had defamation been involved, Ohio courts could rely on the defamation laws to attack libelous speech, and such attacks did not implicate first amendment rights simply because the speaker was anonymous. *McIntyre,* at 1521 n.13.

Similarly, there is no statute that protects Doe's anonymous defamation. The D.C. Anti-SLAPP Statute by its terms does not apply to defamatory speech (i.e., when the victim can prove likelihood of success on the merits). Doe's reliance on *In re: Sealed Case (Medical Records),* 381 F.3d 1205 (D.C. Cir. 2004) is misplaced. In that case, the Court referred to "statutory confidentiality provisions" that must be considered and balanced in the decision to allow or limit discovery. At issue were medical records, many of which were likely to be irrelevant to the proceedings. Here, by contrast, the records requested are held by public companies that Doe either utilized in voluntarily making edits to the Wikipedia entry or otherwise contracted with in accessing the internet. That is far different than the privacy interest inherent in one's medical files. The only requested information is to identify Doe by name so that a summons can issue and the case can proceed. The Superior Court, unlike the court in *Sealed Case,* considered all facts submitted by Doe and found no basis in fact to claims that the privacy interest outweighed the need for discovery. That decision should be granted deference.

IV. Doe is Not Entitled to Attorneys Fees

Doe has no basis for an award of attorney's fees. The D.C. Anti-SLAPP Statute allows, but does not require, the awarding of reasonable attorneys fees to a party that prevails, in whole or in part, on a motion brought under 5502 or 5503. D.C. Stat. §16-5504. As Doe did not prevail in whole or in part before the Superior Court, the Superior Court correctly did not award Doe attorneys fees.

To the extent that the Court of Appeals allows Doe to prevail in whole or in part, then the question of attorney fees should be first decided by the Superior Court. As the statute does not require a fee award, the Superior Court should make that determination based on a complete review of the record. The record before this Court, given the procedural posture of the case, is too limited to allow a fair award of attorney fees.

CONCLUSION

For the reasons noted above, the Superior Court's denial of Doe's motion to quash the subpoena should be affirmed. Doe defamed Burke in an anonymous internet posting about a judge's admonition to the lawyers in a case in which she was not involved. Doe cited a published news article for support of his claims, but this very article contradicts his statement and gives rise to legitimate questions of malice in Doe's posting. Doe's effort to quash Burke's third party subpoena should be denied, as the recently enacted D.C. Anti-Slapp statute does not by its own terms apply here. Doe was not joining in a political debate about the Iraq war or

private contractors, but was instead smearing Burke's reputation built over 25 years of practicing law. Doe should, like any other, be required to defend his statements before the Court.

Dated: November 6, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2013, I served the foregoing Appellee Susan Burke's Supplemental Brief on the Merits by electronic mail on the following:

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/s/ William T. O'Neil
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