No. 15-CV-690

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

JOHN DOE NO. 1,

Appellant,

v.

SUSAN L. BURKE,

Appellee.

On Appeal from the Superior Court of the District of Columbia
No. 2012 CA 7525 B (Hon. Maurice A. Ross)

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS AMICI CURIAE SUPPORTING THE APPELLANT AND REVERSAL

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September 1, 2015

CERTIFICATE REQUIRED BY RULE 28(A)(2)

I hereby certify as follows:

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AS AMICI CURIAE SUPPORTING APPELLANT

INTEREST OF AMICI[1]

Amicus American Civil Liberties Union of the Nation's Capital is the Washington, D.C., affiliate of the American Civil Liberties Union, a nationwide nonprofit membership organization that has worked to protect First Amendment rights since 1920.

Amicus Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

Based on first-hand experience with SLAPP suits in the District of Columbia and around the nation, amici believe that effective anti-SLAPP statutes are essential to protecting the ability of ordinary citizens to participate in public debate on matters of public concern, because the financial and psychological burden of defending even non-

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[1] No party or counsel for a party authored this brief in whole or in part, and no person or entity other than the amici made any monetary contribution intended to fund the preparation or submission of this brief.

meritorious lawsuits targeting such speech often causes citizens to withdraw from the debate and deters others from ever participating.[2] For that reason, the American Civil Liberties Union of the Nation's Capital was actively involved in the legislative process leading to the enactment of the D.C. Anti-SLAPP Act, as reflected in the Report of the D.C. Council Committee on Public Safety and the Judiciary on Bill 18-893 (November 18, 2010) (hereafter the "Committee Report").[3] One or both of the amici have participated in many of the cases that have arisen under the D.C. Anti-SLAPP Act, including filing amicus briefs at two earlier stages of this appeal. *See also, e.g., Competitive Enterprise Institute v. Mann*, Nos. 14-cv-101 & 14-cv-126 (D.C., argued Nov. 25, 2014) (amicus brief in SLAPP by climate scientist against climate-change critics); *Snyder v. Creative Loafing, Inc.,* No. 2011 CA 3168 B (D.C. Super. Ct.) (amicus brief in SLAPP by owner of Redskins football team against Washington City Paper); *Sherrod v. Breitbart*, 720 F.3d 932 (D.C. Cir. 2013) (amicus brief in alleged SLAPP on issues of interlocutory appealability and applicability of Anti-SLAPP Act in federal court).

This appeal presents important questions regarding the scope and construction of the D.C. Anti-SLAPP Act and its attorneys' fees provision, on which amici hope their analysis will be of assistance to the Court.

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[2] *See, e.g.,* George W. Pring and Penelope Canan, SLAPPS: GETTING SUED FOR SPEAKING OUT (Temple University Press 1996). This was the seminal study of SLAPPS; Professors Pring and Canan coined the acronym. Since the book's publication, 29 states, the District of Columbia, and Guam have enacted anti-SLAPP legislation. *See* http://www.anti-slapp.org/your-states-free-speech-protection/.

[3] The Committee Report is available on the D.C. Council's website, at http://lims.dccouncil.us/Download/2217/B18-0893-COMMITTEEREPORT.pdf, and is also appended to this brief for the Court's convenience.

SUMMARY OF ARGUMENT

The Superior Court's denial of defendant Doe's application for an award of attorneys' fees under the D.C. Anti-SLAPP Act rested on half a dozen legal errors, none of which was harmless.

First, the trial court held that Ms. Burke's lawsuit was not a SLAPP. That ruling was contrary to this Court's prior decision in this case, which was binding on the trial court.

Second, the trial court held that the Anti-SLAPP Act creates no presumption in favor of awarding fees to a party that prevails on a special motion to dismiss or a special motion to quash. That ruling rested on an improper construction of the statute, which was intended to follow the familiar model of fee-shifting provisions in statutes that protect civil liberties and civil rights.

Third, the trial court denied fees on the ground that the lawyers who represented Doe, and the nonprofit organization that employs them, "actively pursue this type of litigation to further their own self-interest and need no encouragement to do so." Opinion at 16, App. 270. That ruling is contrary to clearly established law.

Fourth, the trial court denied fees on the ground that a party must not be "penalize[d]" for "aggressively litigating . . . colorable claims." Opinion at 18, App. 272. But that standard applies to fee awards under the bad-faith exception to the "American rule," not to awards under fee-shifting statutes such as the Anti-SLAPP Act.

Fifth, the trial court denied fees because Doe did not accept a settlement offer. But evidence of that offer should not have been considered, and in any event a settlement offer is not an offer of judgment under Rule 68 and should not have a similar effect.

Finally, the trial court denied fees on the ground that Ms. Burke and various amici had made "equally noteworthy contributions" to the litigation of this case. Opinion at 17, App. 271. That curious theory has no support in caselaw and would seriously undermine the goal of fee-shifting statutes.

ARGUMENT

The Superior Court's ruling on Doe's application for attorneys' fees is reviewed for abuse of discretion, but a court "'by definition abuses its discretion when it makes an error of law.'" *Frankel v. D.C. Office for Planning and Economic Development*, 110 A.3d 553, 558 (D.C. 2015) (quoting *Ford v. ChartOne, Inc*., 908 A.2d 72, 84 (D.C. 2006)).

In denying Doe's application for attorneys' fees, the trial court did violence to basic principles of the law of the case, statutory interpretation, and the admissibility of evidence. Any one of the trial court's legally erroneous rulings would be sufficient grounds for reversal.

I. Ms. Burke's Lawsuit Was a SLAPP Within the Meaning of the Anti-SLAPP Act.

A. It is the Law of the Case that Ms. Burke's Lawsuit was a SLAPP for Purposes of the Anti-SLAPP Act.

The trial court held that this case was not a SLAPP because, in that court's view, it was not a "Classic SLAPP Suit," Opinion at 5, App. 259; it was not "meritless or frivolous," *id*. at 8, App. 262; it did not "seek[] to chill or muzzle Defendant's speech through costly litigation," *id*. at 7, App. 261; and it "is not unreasonable to surmise that Plaintiff filed what she believed to be a meritorious suit." *Id*. at 9, App. 263.

Even if those propositions are accurate, they are irrelevant. As the trial court acknowledged, this Court held in 2014 that Doe was "entitled to protection under the Anti-SLAPP Act." Opinion at 2, App. 256. *See Doe No. 1. v. Burke*, 91 A.3d 1031 (D.C. 2014). By definition, the protections of the Anti-SLAPP Act apply only to lawsuits that the legislature deemed to be SLAPPs. This Court's 2014 ruling that Doe's special motion to quash must be granted under the provisions of the Anti-SLAPP Act therefore necessarily encompassed a holding that Ms. Burke's lawsuit was a SLAPP within the meaning of that Act.[4]

That holding is the law of the case. "'[T]he mandate of an appeals court precludes the [trial] court on remand from reconsidering matters which were either expressly or implicitly disposed of upon appeal.'" *Willis v. United States*, 692 A.2d 1380, 1382 (D.C. 1997) (quoting *United States v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987)) (alternations in original). On remand, "[t]he trial court's obligation was to dispose of the matter in a manner consistent with [this Court's earlier decision]." *Id*. at 1383. Denying Doe's application for fees on the ground that Ms. Burke's lawsuit was not a SLAPP within the meaning of the Anti-SLAPP Act was flatly inconsistent with this Court's earlier decision, and therefore erroneous as a matter of law.

[4] The Anti-SLAPP Act does not in so many words define the term "SLAPP," but it is obvious that the criteria set out in D.C. Code § 16-5501 describe what the Council viewed as a SLAPP. The Long Title of Bill 18-893, which enacted the Act, makes that explicit: "To provide a special motion for the quick and efficient dismissal of **strategic lawsuits against public participation**, to stay proceedings until the motion is considered, to provide a motion to quash attempts to seek personally identifying information; and to award the cost of litigation to the successful party on a special motion." Committee Report at 26 (Committee Print of Bill 18-893) (boldface added).

B. The Plain Language of the Anti-SLAPP Act Indicates that Ms. Burke's Lawsuit was a SLAPP for Purposes of the Act.

On remand, the trial court was not free to re-determine whether Ms. Burke's lawsuit was a SLAPP, but even if it had been free to do so, its decision on that point was erroneous.

The Anti-SLAPP Act does not provide for an award of attorneys' fees only upon a finding that a case was a "Classic SLAPP Suit," or that it was "meritless or frivolous," or that the plaintiff filed it with the subjective belief that it was without merit. In focusing on those issues, the trial court was asking and answering the wrong questions.

The Act, rather, provides for an award of fees to "a moving party who prevails, in whole or in part, on a motion brought under § 16-5503" of the Act. D.C. Code § 16-5504(a). The only finding necessary to qualify a party for an award of fees, therefore, is a finding that the party prevailed on a motion brought under § 16-5503.

It is undeniable that Doe prevailed on a motion brought under § 16-5503, and the trial court so recognized. Opinion at 2-3, App. 256-57. On the question whether Doe came within the category of movants qualified for an award of fees under the fee-shifting provision of the Act, no further analysis was necessary or proper.

C. The Trial Court's Decision that Ms. Burke's Lawsuit was Not a SLAPP Rested on Inappropriate Considerations.

Even were the proper result on this point not compelled by the law of the case and the plain language of the statute, the reasons relied upon by the trial court to find that this case was not a SLAPP had no proper bearing on the question whether a lawsuit is a SLAPP for purposes of the fee-shifting provision of the Anti-SLAPP Act.

The trial court believed that Ms. Burke's lawsuit was not "meritless or frivolous," Opinion at 8, App. 262, but the Anti-SLAPP Act eschews reliance on those criteria in defining the cases to which its protection extends. The statute asks only whether the plaintiff's claim "arises from an act in furtherance of the right of advocacy on issues of public interest," and, if it does, whether the plaintiff can show that the claim "is likely to succeed on the merits." D.C. Code §§ 16-5502(b); 5503(b). A claim arising from an act in furtherance of the right of advocacy on issues of public interest may be non-frivolous, and may perhaps even be meritorious, but is still subject to early dismissal (or to the quashing of discovery) if the plaintiff cannot establish a likelihood of success.

The Council had good reason not to equate SLAPPs with frivolous or meritless lawsuits. There was no need for a special Anti-SLAPP statute to protect defendants against frivolous lawsuits; lawsuits that plainly fail to state a claim for either legal or factual reasons can promptly be dismissed under the Rules of Civil Procedure. *See, e.g., Lewis v. Fulwood*, 569 A.2d 594, 595 (D.C. 1990) ("If the complaint is frivolous, the trial court may dismiss it upon proper application."); *see also* Superior Court Rule 11. On the other hand, the determination whether a lawsuit that adequately states a claim is or is not meritorious usually requires discovery and often requires trial. It was precisely to avoid the need for lengthy and expensive litigation to determine meritoriousness *vel non* that the Anti-SLAPP Act substituted the "likely to succeed" standard.[5] In equating SLAPPs

[5] The Council specifically recognized that a lawsuit need not be meritless to be a SLAPP. As the Committee Report noted, "Such cases [*i.e.,* SLAPPs] are often without merit." Committee Report at 1. "Often" does not mean "always."

The early dismissal of a possibly meritorious lawsuit may seem draconian, but is not actually rare. For example, statutes of limitations, notice-of-claim requirements, and rules about burdens of proof, privilege, and qualified immunity necessarily create situations where possibly meritorious lawsuits will be defeated on motions to dismiss or motions for summary judgment.

with frivolous or meritless lawsuits, the trial court therefore misunderstood the purpose of the Anti-SLAPP Act and applied an improper standard.

In holding this lawsuit not to be a SLAPP, the trial court also found that "it is not unreasonable to surmise that Plaintiff filed what she believed to be a meritorious suit." Opinion at 9, App. 263. But the Anti-SLAPP Act does not call upon the courts to make findings (much less "surmises") about plaintiffs' subjective beliefs, because those beliefs are not relevant. The purpose of the Anti-SLAPP Act is not to deter only bad-faith litigation, but to deter litigation that chills advocacy on issues of public interest and is not based on such clear facts that a plaintiff can show a likelihood of success at the threshold (or at least a likelihood that "targeted discovery" that is not "unduly burdensome" will enable the plaintiff to make such a showing, *see* D.C. Code § 16-5502(c)). Most SLAPP plaintiffs—like almost all parties in almost all lawsuits—probably believe that their cases are meritorious. The human capacity for self-justification is difficult to overestimate. A judicially manufactured exemption from the Anti-SLAPP Act for plaintiffs as to whom it would be "not unreasonable to surmise that [they] filed what [they] believed to be a meritorious suit," would therefore undermine the purposes of the statute.[6]

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[6] Apparently for the purpose of demonstrating that she would not file a SLAPP, Ms. Burke asserted in her opposition to Doe's application for fees that she and her husband "regularly donate to the American Civil Liberties Union and Amnesty International, both organizations supporting the human right to speech and dignity." Declaration of Jamison Koehler ¶ 6, App. 190. Amicus ACLU sincerely appreciates Ms. Burke's financial support, and her good work as a lawyer, and hopes that both will continue. But the Anti-SLAPP Act's fee-shifting provision does not apply only to bad people, nor does it contain an exemption for good people. Many of the plaintiffs in what the trial court referred to as "classic" SLAPP cases—such as real estate developers, mining companies, and the like—could persuasively claim to have done good things for society. Indeed, in one local SLAPP specifically identified by the Council, the plaintiff was Father Flanagan's Boys Home, the well-known charity dedicated to caring for needy children and families. *See* Committee Report at 3 & n.8.

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For all these reasons, the trial court's ruling that Ms. Burke's lawsuit was not a SLAPP for purposes of the fee-shifting provision of the Anti-SLAPP Act was incorrect as a matter of law.

II. The Anti-SLAPP Act Creates a Strong Presumption that Fees Should be Awarded When a Special Motion to Dismiss or to Quash is Granted.

The Anti-SLAPP Act provides that a court "may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 [a special motion to dismiss] or § 16-5503 [a special motion to quash] the costs of litigation, including reasonable attorney fees." D.C. Code § 16-5504(a).

The trial court ruled that this provision creates no presumption in favor of awarding fees to a party that prevails on such a motion. Opinion at 9, App. 263 ("attorneys' fees are not presumed, but instead are discretionary"). In the court's view, the "permissive language of § 16-5504(a), coupled with the absence of legislative history that indicates otherwise, leads the Court to conclude that an award of fees is in the Court's discretion." Opinion at 11, App. 265. But in reaching that conclusion, the court misapplied basic principles of statutory construction and ignored the relevant legislative history. The court's ruling was incorrect as a matter of law, and its exercise of discretion based on that mistaken legal conclusion requires reversal.

A. The Language and Structure of the Fee-Shifting Provision Shows that there is a Presumption in Favor of Fee Awards to Prevailing Movants.

The most persuasive evidence that the Anti-SLAPP Act enacts a presumption in favor of fee awards for prevailing movants is the text and structure of the Act itself.

Fee-shifting provisions in other statutes protecting individual rights similarly use

the "may award" phraseology. Those provisions have been interpreted by the courts to mandate fee awards to prevailing civil rights claimants in all but exceptional circumstances, and to prohibit fees to prevailing civil rights defendants in all but exceptional circumstances, for the reasons set out in the leading case of *Christiansburg Garment Co. v. Equal Employment Opportunity Commission,* 434 U.S. 412 (1978). *See also Tenants of 500 23rd Street N.W. v. D.C. Rental Housing Comm'n*, 617 A.2d 486, 489 (D.C. 1992) (following *Christiansburg*).

The D.C. Anti-SLAPP Act explicitly adopts this dichotomy by codifying the parties' divergent eligibility for fee awards. It provides, first, that

> The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees.

D.C. Code § 16-5504(a). It then separately provides that

> The court may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay.

D.C. Code § 16-5504(b). This formulation confirms that the Council intended to follow the *Christiansburg/Tenants of 500 23rd Street* model when it provided for fee-shifting under the Anti-SLAPP Act.

The language and structure of the statute also make clear that the trial court erred in analogizing the fee-shifting provisions of the Anti-SLAPP Act to the fee-shifting provisions of ERISA and other statutes protecting purely economic interests. *See* Opinion at 10-11, App. 264-65 (citing as an example *Eddy v. Colonial Life Ins. Co. of America*, 59 F.3d 201 (D.C. Cir. 1995)). As our federal circuit has observed, "[i]n statutes protecting economic interests . . . the same standards are usually applied to fee

awards to both plaintiffs and defendants." *Board of Trustees of Hotel and Restaurant Employees Local 25 v. JPR, Inc*., 136 F.3d 794, 804 (D.C. Cir. 1998) (also citing *Eddy* as an example). But the plain language of the Anti-SLAPP Act makes it entirely clear that the Council did *not* intend the same standards to be applied to parties filing special motions to dismiss or to quash (covered by § 16-5504(a)) and to their opponents (covered by § 16-5504(b)).

Moreover, the Anti-SLAPP Act is emphatically not a statute protecting purely economic interests. As the Council explained, the purpose of the Act is "[t]o prevent the attempted muzzling of opposing points of view, and to encourage . . . civic engagement." Committee Report at 4. And this Court has already recognized that the right protected by the special motion to quash "is the right to engage in anonymous speech . . . which is grounded in the First Amendment." *Doe No. 1. v. Burke*, 91 A.3d at 1039.

B. The Legislative History Also Supports a Presumption in Favor of Fee Awards to Prevailing Movants.

Although the trial court found an "absence of legislative history" on point, Opinion at 11, App. 265, the Committee Report supports the conclusion that the Council enacted a presumption that reasonable attorneys' fees would be awarded to a party that prevailed on a special motion to dismiss or quash.

The Committee Report's Section-by-Section Analysis indicates that the bill "[p]rovides for the awarding of fees and costs for prevailing on a special motion to dismiss or a special motion to quash." Committee Report at 8. While not dispositive, the use of the term "provides," rather than, *e.g.,* "allows," "permits," or "authorizes," suggests that the Council expected fees to be awarded to prevailing movants. Likewise, the Long Title of Bill 18-893 states that the purposes of the Act include: "To . . . award

the cost of litigation to the successful party on a special motion." Committee Report at 26 (Committee Print of Bill 18-893). This Court has "agreed . . . that in determining the extent and reach of an act of the legislature, the court should consider not only the statutory language, but also the title." *Mitchell v. United States*, 64 A.3d 154, 156 (D.C. 2013), and the Long Title here also strongly suggests that fee awards were to be the norm.

Additionally, the Committee Report states that the bill "mirrors language found in federal law." Committee Report at 1. But as there is no federal anti-SLAPP law, the Committee Report can only have been referring to the bill's fee-shifting provision, which is the only language in the bill (or the Act) that mirrors "language found in federal law." And, in fact, the "may" language of the Act's fee-shifting provision reflects the language of many well-known federal fee-shifting laws.[7]

The federal courts "have interpreted these fee-shifting provisions consistently," *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 603 n.4 (2001), and, as the D.C. Circuit pointed out just

[7] *See, e.g.,* the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988(b) ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee …"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) ("the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee …"); The Voting Rights Act, 42 U.S.C. § 1973*l*(e) ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee …"); the Americans with Disabilities Act, 42 U.S.C. § 12205 ("the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee . . . "); the Fair Housing Act, 42 U.S.C. § 3613(c)(2) ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs"); Title II of the Civil Rights Act of 1964 (public accommodations), 42 U.S.C. § 2000a-3(b) ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee …"); the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(3)(B) ("the court, in its discretion, may award reasonable attorneys' fees . . .").

a few weeks ago, these provisions have consistently been interpreted, "notwithstanding the[ir] apparently permissive language . . . to mean that the prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Price v. District of Columbia*, 792 F.3d 112, 114 (D.C. Cir. 2015) (quoting *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968)). In *Price*, the D.C. Circuit rejected an argument by the District of Columbia that the permissive statutory language "entails near-plenary discretion" on the part of the trial court. 792 F.3d at 114. That is the very argument the trial court accepted here, and this Court, like the D.C. Circuit, should reject it, as this Court often "look[s] to th[e] federal courts for guidance" when construing local laws based on federal models. *Employers Mutual Casualty Co. v. Keene Corp*., 629 A.2d 581, 582 n.1 (D.C. 1993); *see also Tenants of 500 23rd Street N.W. v. D.C. Rental Housing Comm'n*, 617 A.2d 486, 489 (D.C. 1992) (following federal interpretation of attorneys' fees provisions of federal civil rights laws in construing attorneys' fees provision of D.C. Rental Housing Act of 1985).

C. Unofficial Legislative History Also Supports a Presumption in Favor of Fee Awards to Prevailing Movants.

The trial court refused to consider, "as part of the formal record of the statute's legislative history," certain facts that bear directly on the meaning of the fee-shifting provision. Opinion at 11 n.2, App. 265. Although those facts may not be part of the formal legislative history, they are nevertheless highly relevant, and undisputed, and should be considered in arriving at an accurate understanding of the statute. *See, e.g., Public Investment Ltd. v. Bandeirante Corp*., 740 F.2d 1222, 1228 (D.C. Cir. 1984) (citing "unofficial legislative history" as an aid to statutory meaning); *ACLU of Ohio v.*

Capitol Square Review and Advisory Bd., 243 F.3d 289, 309 (6th Cir. 2001) (referring to "the informal legislative history of the relevant statute").

This unofficial history consists of email correspondence dated December 2, 2010, on the question whether the phrase "may award" in the fee-shifting provision of the Anti-SLAPP bill should be changed to "shall award" at the second reading of the bill, to make the intent clear. *See* App. 164-168.[8] The Committee Clerk of the Council's Committee on Public Safety and the Judiciary posed that question to Arthur Spitzer of the ACLU and Laura Hankins of the D.C. Public Defender Service, who, he noted, "had provided great input on the bill prior to mark-up." App. 165. In response, Mr. Spitzer pointed out that "other DC and federal laws about attorneys' fees generally use 'may,'" App. 166, and that "[c]aselaw interpreting the discretionary language makes the fees all-but-mandatory in most cases." App. 167.[9] He noted that "the possible danger of using 'shall' in the Anti-SLAPP Act is that courts may say, "aha, if the Council used mandatory language in this law, it must mean that the Council intended fee awards in all the other laws to be less automatic. . . . So perhaps keeping 'may' would be better[.]" *Id*. The Committee Clerk—who is the main staffer on bills from the committee—replied, "it is good to know there are valid reasons not to go that route." App. 166.

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[8] December 2, 2010, was nine days after the bill had passed on first reading and five days before it passed on second reading. *See* http://lims.dccouncil.us/ (search for B18-893). The email correspondence was prompted by the possibility of an amendment being offered on second reading. *See* App. 165 ("I am anticipating language being sent to [us] to amend the bill . . . .").

[9] For example, this Court had analogized the fee-shifting provision of the D.C. Human Rights Act to the federal Civil Rights Attorney's Fees Awards Act. *See Daka, Inc. v. McCrae*, 839 A.2d 682, 686 n.1 (D.C. 2003) (citing *Henderson v. District of Columbia*, 493 A.2d 982, 999 (D.C. 1985), a case awarding fees under 42 U.S.C. § 1988).

This email correspondence, while neither "part of the formal record of the statute's legislative history," Opinion at 11 n.2, App. 265, nor dispositive, provides strong confirmation of the evidence from the statutory structure, the Committee Report, and the bill's Long Title that the Act was intended to enact the same presumption favoring fee awards as was already well established under federal laws using the "may" language.

D. A Strong Presumption Favoring Fee Awards is Essential to Achieving the Objectives of the Anti-SLAPP Statute

A presumption that fees will be available to a successful movant is also essential to achieving the objectives of the anti-SLAPP statute, for three reasons.

First, a presumption of obtaining attorneys' fees if an anti-SLAPP motion is granted can create strong incentives for individuals who have been sued for their speech on matters of public interest to defend themselves instead of immediately capitulating to demands for the retraction of truthful criticism or defensible opinions, self-debasing apologies, and non-disparagement agreements. Amici's experience in consulting with defendants in such lawsuits is that when a defendant does not have substantial financial resources and will be unable to pay a lawyer even after a successful defense, there is an enormous financial incentive to give up the right of free speech and to agree to truth-suppressing remedies in return for dismissal of a lawsuit that usually seeks massive damages. A presumption that fees will be awarded after the grant of an anti-SLAPP motion gives defendants the financial ability to stand up for their own free speech rights, and thus to further the public's interest in maintaining a free marketplace of ideas—the underlying goal of the Anti-SLAPP Act.

Second, a presumption in favor of fee awards helps to ensure that lawyers will have the financial ability to represent defendants in SLAPPs. SLAPP defendants are

usually individuals, community groups, or small publications that lack the financial resources to hire lawyers for the sustained defense of litigation. And unlike plaintiffs in civil rights cases, who can hope to recover damages from which a contingent fee could be paid, defendants in SLAPPs seek only the dismissal of claims or the quashing of discovery. A lawyer will have a financial incentive to represent a SLAPP defendant if the lawyer believes that a special motion to dismiss or quash will probably be granted, and that an award of fees will follow. Otherwise, most SLAPP defendants will be left to seek only pro bono representation, which is not usually available.

It was the likelihood of receiving fee awards in successful civil rights cases that fostered the growth of a private civil rights bar. In the experience and observation of amici, the likelihood of receiving a fee award under the Anti-SLAPP statute will likewise be an important factor in having counsel available to represent defendants in SLAPPs.

Third, a presumption in favor of fee awards also affects potential plaintiffs in lawsuits involving speech on matters of public interest. Knowing that prospective defendants will be less likely to capitulate and more likely to retain counsel and defend, and knowing that the plaintiff will likely have to pay defendants' legal fees if an anti-SLAPP motion succeeds, creates a financial disincentive to filing such lawsuits. Imposing that disincentive serves the D.C. Council's purpose, in enacting the Anti-SLAPP Act, of "encourage[ing] . . . civic engagement." Committee Report at 4. Lawsuits are a disfavored way of responding to speech on matters of public interest, and such lawsuits properly face high hurdles.

Thus, a presumption in favor of fee awards for successful motions to dismiss or quash creates the right financial incentives for all parties. As under other statutes

protecting individual rights, such a presumption helps ensure that the right protected by the statute will exist in reality, not just on paper.

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For all these reasons, the trial court's ruling that the Anti-SLAPP Act creates no presumption in favor of awarding fees to a party that prevails on a special motion to dismiss or a special motion to quash was incorrect as a matter of law.

III. The Public Policy Goals of a Party's Attorneys are Irrelevant to the Party's Entitlement to Fees.

The trial court ruled that Doe's counsel "should not be entitled to an *additional* award of attorneys' fees," Opinion at 17, App. 271 (emphasis added), because "counsel has already achieved an award by succeeding in its own interest." Opinion at 16, App. 270. Of course, Doe's counsel were not seeking "an additional award of attorneys' fees." Whatever personal satisfaction Doe's counsel may have received from prevailing on the special motion to quash cannot properly be equated with an award of attorneys' fees.

Even if the trial court was speaking metaphorically, its ruling was legal error in two separate ways. First, as a matter of law, the Anti-SLAPP Act provides for an award of fees to "a moving *party* who prevails . . . ," not to a party's counsel. D.C. Code § 16-5504(a) (emphasis added). Analyzing similar statutory language, the Supreme Court has held that a fee award belongs to the "prevailing *party,*" *Evans v. Jeff D.*, 475 U.S. 717, 729 (1986) (emphasis in original), and that under such a provision the legislature has not "bestowed fee awards upon attorneys." *Id*. at 731. The trial court therefore erred in denying fees on the theory that it was Doe's counsel, rather than Doe, who was seeking fees. The trial court knows nothing about Mr. or Ms. Doe's public policy objectives, and it goes without saying that most parties in litigation—including most prevailing plaintiffs

in civil rights cases—act in their own self-interest. Acting in one's own self-interest does not disqualify a party from receiving an award of fees.

Second, the denial of fees on the ground that Doe's counsel and their nonprofit employer "actively pursue this type of litigation to further their own self-interest and need no encouragement to do so," Opinion at 16, App. 270, was contrary to clearly established law.[10] As this Court explained in *Link v. District of Columbia*, 650 A.2d 929 (1994):

> The trial judge also stated that he was awarding only a token counsel fee . . . because [the plaintiff] was represented by the Neighborhood Legal Services Program at no cost to herself. We explicitly held in *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985), however, that
>
> > [t]he identity of the party against whom the fees will be charged, *i.e.,* individual vs. governmental defendants, or whether representation was provided by private or nonprofit counsel, is irrelevant.
>
> *Id.* at 1000 (citing *Blum v. Stenson*, 465 U.S. 886 (1984)); *see also Martin v. Tate,* 492 A.2d 270, 274 (D.C. 1985); *Frazier v. Franklin Investment Co.,* 468 A.2d 1338, 1340 n.1 (D.C. 1983). In *Blum,* the Supreme Court made the same point just as emphatically:
>
> > In determining the amount of fees to be awarded, it is not legally relevant that plaintiffs' counsel . . . are employed by . . . a privately funded non-profit public interest law firm. It is in the interest of the public that such law firms be awarded reasonable attorneys' fees to be computed in the traditional manner when its counsel perform

[10] The trial court cited no authority in this portion of its opinion, *see* Opinion at 16-17, App. 270-71, and its deprecatory view of cause litigation is difficult to understand. The history of nonprofit organizations actively pursuing litigation to further their public policy goals is long and distinguished, from the litigation campaign of the NAACP Legal Defense and Educational Fund, Inc., in the 1940s and 1950s to desegregate public schools to the recent litigation campaign of the ACLU, Lambda Legal, and others to establish same-sex marriage as a constitutional right.

On the trial court's theory, public interest organizations, such as amici, that litigate cases because of their importance for freedom of speech, open government, or other causes they support, or private-sector lawyers who take pro bono cases because they believe in the causes that the cases seek to advance, would for that very reason be disqualified from being awarded fees under the Anti-SLAPP Act.

> legal services otherwise entitling them to the award of attorneys' fees.

Id., 465 U.S. at 895 [internal quotation omitted].

Link, 650 A.2d at 934 (first ellipsis added). *See also Thanos v. District of Columbia*, 109 A.3d 1084, 1091-92 (D.C. 2014); *Saxon v. Zirkle*, 97 A.3d 568, 576 (D.C. 2014) ("In a wide variety of contexts, however, this court and others have held that attorney's fees may be awarded even though representation was provided on a pro bono basis.").

The trial court stated that it was making "no judgment regarding the nature of counsel's work, and does not seek to penalize [Doe] because of counsel's motivations." Opinion at 16, App. 270. Taking the court at its word, that leaves as the court's basis for denying fees the fact that Doe's representation was by "counsel . . . employed by . . . a privately funded non-profit public interest law firm." *Blum v. Stenson*, 465 U.S. at 895 (ellipses in original). Denying fees on that basis was error. *Id*.[11]

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[11] While the trial court may have expressed "no judgment regarding the nature of counsel's work," Ms. Burke had no such compunctions. Her opposition to Doe's application for fees portrays Doe's counsel as pursuing a *pro malo publico* agenda:

> [A]s the Center [for Individual Rights] makes clear on its website, the Center does not actually work for the public interest. Rather, the Center searches for cases that will advance the anti-government, anti-regulatory agenda of certain private, for-profit businesses. The Center litigates "reverse discrimination" [cases] to benefit those businesses intent on employing white males. The Center uses litigation to try to eliminate all governmental policies designed to redress historic discrimination against women, African-Americans and other minorities. The Center litigates voting rights cases, seeking to disenfranchise citizens.
>
> . . .
>
> . . . The fact that the Center does not attempt to serve the public interest should disqualify it from seeking fees for *pro bono* work.

Opposition to John Doe No. 1's Motion for Attorneys Fees at 6-7, App. 179-80.

Should Ms. Burke advance this argument again to this Court, the Court should make clear that the political, social or economic viewpoints advanced by a nonprofit entity (or for that matter by any lawyer) are irrelevant to its (much less its clients') entitlement to a fee award.

IV. Applying "American Rule" Standards to Doe's Fee Application was Legal Error.

The trial court also explained its refusal to award fees on the ground that it "'must scrupulously avoid penalizing litigants for aggressively litigating their claims or discouraging good faith assertions of colorable claims and defenses.'" Opinion at 18, App. 272 (quoting *Jung v. Jung*, 844 A.2d 1099, 1108 (D.C. 2004)). But the question in *Jung* was whether fees should be imposed pursuant to the "bad faith exception to the American rule," which allows a court to award attorneys' fees to a party "if the defeated opponent acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Jung*, 844 A.2d at 1107. *Id*. As this Court's decision in *Jung* explains, no fee-shifting statute is needed for an award of fees under that standard.

By applying that standard to the fee application here, the trial court rendered D.C. Code § 16-5504(a) meaningless, for under its construction of the statute, fees would never be available under § 16-5504(a) if they would not have been available in the absence of that provision. The trial court's construction thereby violated "'one of the most basic interpretive canons,'" namely, "'that a statute should be construed . . . so that no part will be inoperative or superfluous, void or insignificant.'" *Ruffin v. United States*, 76 A.3d 845, 855 (D.C. 2013) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

In fact, of course, fee-shifting statutes such as 42 U.S.C. § 1988, Title VII, the D.C. Human Rights Act, and the Anti-SLAPP Act were explicitly intended to create an entirely different set of rules from the American rule, and the trial court's conflation of the two was clear legal error.

V. The Details of Unsuccessful Settlement Negotiations Were Not Properly Before the Court on an Application for Attorneys' Fees.

The trial court also held against Doe the fact that he chose not to accept a settlement offered by Ms. Burke. *See* Opinion at 7, 8, & 18, App. 261, 262 & 272. That was error, because the well-established rule that the contents of unsuccessful settlement negotiations are inadmissible on the merits, *see Lively v. Flexible Packaging Ass'n*, 930 A.2d 984 (D.C. 2007), should also apply on applications for attorneys' fees, and for the same reasons: "to encourage unfettered dialogue in negotiations," because an "offer may be motivated by a desire for peace rather than from any concession," and to promote "the public policy favoring the compromise and settlement of disputes." *Id*. at 994 (internal quotations and citations omitted). Knowledge that settlement discussions will be on the record means that settlement discussions probably will not take place at all.

The trial court's opinion suggests that Doe's failure to accept Ms. Burke's settlement offer made Ms. Burke's continued litigation justified to the point that her lawsuit cannot be considered a SLAPP. *See* Opinion at 18, App. 272 ("When defendant . . . declined to accept a good faith settlement offer, Plaintiff's suspicions were heightened . . ."). But the trial court cannot know why Doe declined the offer, and the public policy favoring settlements does not include the imposition of penalties on parties who do not settle on terms proposed by their opponents, aside from the potential transfer of costs after an unaccepted offer of judgment under Superior Court Rule 68. It was not proper for the trial court to deny fees on the ground that Doe should have accepted Ms. Burke's offer.

Ms. Burke was on notice from the time the special motion to quash was filed that Doe believed her lawsuit was a SLAPP. The fee-shifting provision is plain on the face of

the Anti-SLAPP statute. Had Ms. Burke wished to minimize her potential exposure to a fee award, she could have dismissed her lawsuit at any time, rather than continue after Doe rejected her settlement offer. The trial court's reliance on the settlement offer was legal error.

VI. The Trial Court Erred in Denying Fees Based on the Litigation "Contributions" of Plaintiff and Amici.

Finally, the trial court denied fees to Doe on the grounds that, "[t]o grant attorneys' fees in this case based on the significance of the contributions made by Defendant's counsel alone would necessarily diminish the equally noteworthy contributions of Plaintiff and *amici* who submitted compelling arguments to the Court of Appeals during this complex litigation." Opinion at 17, App. 271. The court cited no authority in support of the novel theory that it is the "significance" of the prevailing party's "contributions" that form the basis for fee awards under civil rights fee-shifting statutes, as opposed to the simple fact that the prevailing party has prevailed. This case was, in fact, precedent-setting, but fees are routinely awarded in run-of-the-mill cases brought under fee-shifting statutes. Nor did the court cite any authority in support of the equally novel theory that fees should be denied because the losing party also "contributed to the jurisprudence" of the case, Opinion at 17, App. 271, or because the prevailing party had the support of amici. Amici are aware of no authority for either proposition.[12]

To the contrary, a losing party's vigorous advocacy typically results in *increasing* the prevailing party's fee award, because—as in this case—a party "'may by militant

[12] The trial court opined that Ms. Burke "submitted compelling arguments" in this case. Opinion at 17, App. 271. This Court, however, obviously did not find her arguments to be compelling, as it ruled against her on every issue. *See Doe No. 1. v. Burke*, 91 A.3d 1031 (D.C. 2014).

resistance increase the exertions required of their opponent and thus, if unsuccessful, be required to bear that cost."' *Bagley v. Foundation for the Preservation of Historic Georgetown*, 647 A2d 1110, 1114 (D.C. 1994) (quoting *Henderson v. District of Columbia*, 493 A.2d 982, 1001 (D.C. 1985)). It would seriously undermine the purpose of fee-shifting statutes to accept the proposition that a prevailing party should be denied fees because a losing party also made "contributions" to the litigation.

CONCLUSION

For the reasons stated above, the judgment of the Superior Court should be reversed.

Respectfully submitted,

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