SUPERIOR COURT OF DISTRICT OF COLUMBIA
CIVIL DIVISION

SUSAN L. BURKE, Plaintiff, vs. JOHN DOES 1-10, Defendants.	)	Civil Action No. 2012 CA 007525 B

OPPOSITION TO JOHN DOE NO. 1'S MOTION FOR ATTORNEYS FEES

Plaintiff Susan L. Burke respectfully requests that this Court deny the Center for Individual Right's motion for attorneys fees. This Court should exercise its discretion and hold that the Center is not entitled to any fees for two reasons: ***First***, as explained in Section I, below, the evidence establishes that Plaintiff did not file a strategic lawsuit against public participation (hereinafter "SLAPP"). The Center has not – and cannot – come forward with any evidence to support its theory that Plaintiff Burke, an officer of this Court, filed a lawsuit as a mechanism to stifle political speech about her legal work. Quite the contrary: Plaintiff Burke repeatedly offered to settle the lawsuit against John Doe No. 1 without learning his identity. ***Second***, as explained in Section II, below, the Center does not litigate in the public interest, and is not entitled to a reap a windfall from its own decision to prolong litigation to advance an anti-public agenda.

I. PLAINTIFF BURKE DID NOT FILE A SLAPP.

At the outset, it is clear that this Court has the discretion to determine whether or not to award fees to the Center. *See Lively v. Flexible Packaging Association*, 930 A.2d

984 (Aug. 23, 2007)(explaining that the scope of appellate review is limited because attorney fee motions are "firmly committed to the information discretion of the trial court. Therefore, it requires a very strong showing of abuse of discretion to side aside the decision of the trial court.") The language of the D.C. Anti-SLAPP statute preserves this Court's discretion and role as the arbiter of whether fees should be awarded. Indeed, as explained in the Declaration of Arthur B. Spitzer appended to the Center's Memorandum as Exhibit 16, City Council considered but rejected the notion of making the award of fees mandatory by using the mandatory "shall" language, and instead used the discretionary "may" language. As a result, the Anti-SLAPP law itself permits the Court to exercise its own discretion.

In exercising that discretion, the Court first needs to decide whether Plaintiff Burke actually filed a SLAPP. As explained by Mr. Spitzer's testimony before the City Council, "a SLAPP plaintiff's real goal is not to win the lawsuit but to punish his opponents, and intimidated them and others into silence. Litigation itself is the plaintiff's weapon of choice: a long and costly lawsuit is a victory for the plaintiff even if it will end in a formal victory for the defendant. That is why anti-SLAPP legislation is needed: to enable a defendant to bring a SLAPP to an end quickly and economically." *See also* John Doe No. 1 (Zujua) Memorandum at 3, citing Committee Report at 3 (SLAPP cases lack merit but achieve their filer's intention of punishing or preventing opposing points of view.)

The Court of Appeals did not find that Ms. Burke filed a SLAPP. Rather, the Court found that John Doe No. 1 (Zujua) "established a *prima facie* case that his speech was worthy of protection under the statute." This holding permits John Doe No. 1

(Zujua) to hide behind his anonymity, and refrain from revealing his professional affiliation or other identifying information. Obviously, this holding, combined with the Court of Appeals' holding that Ms. Burke is a public figure, makes it difficult for Ms. Burke to win the defamation lawsuit. But this holding on who bears the burden of establishing the *prima facie* case does not adjudicate the issue of whether Ms. Burke actually filed a SLAPP.

On this motion seeking fees, the Center bears the burden of proof and persuasion, yet the Center fails to provide any evidentiary support for its contention that Plaintiff Burke filed a SLAPP. *See* Memorandum at 8. Instead, the Center reasons that Plaintiff acted "on the flimsiest of speculative bases" and therefore must have intended to "put fear into those who would dare to comment about plaintiff, by making them believe that they, like Doe No. 1, would face losing their anonymity and going to court." The problem with this line of *ipse dixit* reasoning is that it is flatly contradicted by the record evidence.

First, Plaintiff Burke did not file a lawsuit based on flimsy speculation. Plaintiff Burke knows with certainty that Erik Prince planned to inflict harm on her because he made the threat directly to her face after the conclusion of his deposition. Plaintiff Burke also knows that Erik Prince is wealthy and spends substantial sums paying people to go on the Internet and "fix" any negative information about Blackwater, and post negative information about persons who have angered him. (Plaintiff Burke also learned subsequent to filing the lawsuit that Erik Prince paid to have her followed.) Given all these facts, as well as the context and timing of the various Wikipedia edits, and the repeated reposting of the falsehoods, Plaintiff Burke reasonably believes (and continues

to believe) that the Wikipedia editor or editors[1] were acting as agents for Prince. *See* Exhibit A (Declaration of Susan L. Burke).[2]

Second, the evidence contradicts any conclusion that Plaintiff Burke acted in bad faith with an intent to inflict costly litigation fees as a means to stifle speech. As an initial matter, Plaintiff Burke is not the typical SLAPP plaintiff, a company intent on punishing members of the public whose voices interfered with their business plans. As an officer of this Court since 1988, Plaintiff Burke did not, and would not, file litigation for any purpose other than the lawful purpose of seeking monetary redress for the defamation. Plaintiff Burke does not have any pattern of trying to rebut or eliminate negative comments made on the Internet or other media about her, her views, or her legal work. *See* Exhibit B (Declaration of Jamison Koehler).

Further, as set forth in the Declaration of William T. O'Neil (Exhibit C), the manner in which Plaintiff Burke acted during this litigation establishes beyond dispute that the lawsuit is not a SLAPP. As soon as Plaintiff Burke learned that the Center claimed to be representing an innocent person who posted defamatory statements merely as a hobby, she immediately offered to dismiss the lawsuit claims against him without any cost and without ever learning his identity. All that Ms. Burke asked in exchange for this dismissal was that John Doe No. 1 provide the Court with a statement signed under penalty of perjury attesting that he was not acting as an agent for others. The settlement

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[1] Plaintiff Burke does not know whether two persons posted, or whether John Doe No. 1 and John Doe No. 2 are the same person.

[2] Note, the Center's own submission of legal bills reveals that the Center never bothered to investigate their client's claims that he was acting on his own initiative, or Plaintiff Burke's claim that he was working for Mr. Prince. *See* Center's Memorandum, Exhibits 6-16, which memorialize that the Center never engaged in any fact-finding, such as calling Mr. Prince or his counsel. Nor does Mr. Spitzer have any knowledge pertinent to that issue. *See* Exhibit D (Declaration of Arthur B. Spitzer).

offer did not require John Doe No. 1 to reveal his identity. Instead, Plaintiff Burke proposed that he sign the declaration as John Doe, as Counsel from the Center would be able to affirm to the Court that a real person signed the declaration. (Plaintiff Burke submitted such John Doe declarations during the lawsuits brought against Blackwater, as witnesses feared physical and economic retaliation from Mr. Prince.) Plaintiff Burke offered such terms both in April 2013, and then again in September 2013, before the initial argument before this Court. *See* Exhibit C.

The Center, purporting to act on behalf of the John Doe No.1, consistently refused to settle on these terms, which would have ended the lawsuit as to their client. John Doe No. 1 could have been free and clear of this lawsuit without ever having to reveal his identity. Obviously, if Plaintiff Burke had filed a SLAPP and wanted to force costly litigation on others as a way to shut them up, she would never have offered such an easy and cost-free end to the litigation.

This Court has the discretion to make a reasoned judgment as to whether the purposes of the D.C. Anti-SLAPP statute would be furthered by penalizing an attorney who acted in good faith with no intent to stifle First Amendment rights. The Court should consider the record evidence, and make an express finding of fact that Plaintiff Burke did not file a SLAPP. Based on that finding of fact, the Court should then deny the Center's request for attorneys fees, as the Center has failed to carry its burden of proof and persuasion. Such a ruling will best serve the balance between protecting First Amendment rights, and protecting persons harmed by intentional defamation.

II. THE CENTER DOES NOT ACT IN THE PUBLIC INTEREST AND IS SEEKING A MONETARY WINDFALL TO ADVANCE BUSINESS INTERESTS.

John Doe No. 1 has not paid any legal fees. Instead, the Center for Individual Rights provided all of its legal services on a *pro bono* basis. John Doe No. 1 could have shut down the litigation immediately merely by anonymously stating under penalty of perjury what the Center has claimed to be true in pleadings ostensibly filed on his behalf. Yet the Center seeks to force Ms. Burke to pay the Center $186,537.00 in fees. This request should be denied.

The underlying reason to award fees when a client has not actually paid any fees is to encourage lawyers to act in the public interest, albeit without awarding them windfalls. As explained in *Lively v. Flexible Packaging Association*, 930 A.2d 984 (Aug. 23, 2007) and *Newman v. Piggie Park Enterprises, Inc.* 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), the "goal is to attract competent counsel for these cases, but not to provide them with windfalls." But here, as the Center makes clear on its website, the Center does not actually work for the public interest. Rather, the Center searches for cases that will advance an anti-government, anti-regulatory agenda of certain private, for-profit businesses. The Center litigates "reverse discrimination" 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 Center admits that it is not seeking to serve the overall public good. The Center's website describes itself as follows: "We are not a legal service firm nor a public

policy institute. Rather, we aggressively litigate and publicize a handful of carefully selected cases that advance the right of individuals to govern themselves according to the natural exercise of their own reason . . . We make no apologies for bringing only those case that overtly advance this agenda." The Center also claims "CIR takes an opportunistic approach to public interest law. Like a venture capital firm, we invest our resources in the area of the law that need reform and where we believe our expertise will help ensure a successful outcome."

In short, the Center uses litigation to further the goals not of the public, but rather conservative businessmen, such as the Koch Brothers, who made a $40,000 contribution to the Center. Notably, it appears that the Center also receives substantial funding from the Acton Foundation, which has a direct connection to Erik Prince, as his mother's husband sits on its board. The fact that the Center does not attempt to serve the public interest should disqualify it from seeking fees for *pro bono* work.

Further, and perhaps not surprisingly given its "venture capital" model, the Center is seeking a windfall here. The amount being sought ($186,537.00) is unreasonable on its face, as it is more than the Center pays it most-highly paid lawyer for an entire year of work. This lawsuit did not result in extensive work, such as reviewing voluminous documents, taking and defending depositions, and going to trial. Rather, litigation to date involved briefing, a hearing before this Court, and then briefing and an oral argument before the Court of Appeals. The Center devoted all three of its lawyers to this case, and then billed for a significant number of internal meetings amongst themselves. Such inefficiency and overbillings should not be rewarded.

In addition, the Center used the ongoing litigation as a way to persuade entities to donate to their organization. The Center disseminated a letter falsely representing that John Doe No. 1 had been sued for making "a single edit to the Wikipedia page of human rights attorney Susan Burke." In the event the Court is inclined to grant the Center some amount of fees (which it should not), Plaintiff respectfully request that the Court first permit a limited amount of discovery to establish the amount of donations obtained via the Center's fundraising letter about this litigation. Any such amounts obtained should be offset against the fee award.

CONCLUSION

In sum, Plaintiff Burke should not be forced to pay any fees here. There is not a shred of record evidence that Plaintiff Burke actually filed a SLAPP suit. If John Doe No. 1 did not act as an agent for Mr. Prince in posting on Wikipedia, he should have settled this matter long ago with the simple signing of a "John Doe" sworn declaration. That he refused to do so is susceptible to two different interpretations, both of which lead to the conclusion that no fees should be awarded: First, he may have been hired by Mr. Prince or other Blackwater-affiliated executives to defame Ms. Burke, and did not want to risk being found to have perjured himself if the truth eventually surfaced. Second, in the alternative, he may have been telling the truth, but the Center talked him out of attesting to the truth via a John Doe declaration because the Center lawyers believed they had found the right vehicle to advance their own political agenda designed to protect not the public citizenry but rather financial and business interests. The Center, not Ms. Burke, should bear the costs of an overtly-political litigation strategy that needlessly consumed judicial resources.

Respectfully submitted this 12th day of December, 2014

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