Appeal No. 15-CV-690

District of Columbia Court of Appeals

John Doe No. 1,

Appellant,

v.

Susan Burke,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S BRIEF

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Includes *Amici* In Prior Appeal (No. 13-CV-83)

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2. John Doe No. 1, Defendant-Appellant
3. William O'Neill, attorney for Plaintiff-Appellee
4. Michael E. Rosman, attorney for Defendant-Appellant
5. Christopher J. Hajec, attorney for Defendant-Appellant
6. The Reporters Committee for Freedom of the Press (Amicus in 13-CV-83)
7. American Civil Liberties Union of the Nation's Capital (Amicus in 13-CV-83)
8. American Society of News Editors (Amicus in 13-CV-83)
9. Digital Media Law Project (Amicus in 13-CV-83)
10. Gannett Co., Inc. (Amicus in 13-CV-83)
11. The McClatchy Co. (Amicus in 13-CV-83)
12. National Press Photographers Association (Amicus in 13-CV-83)
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Respectfully submitted,

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2. Did the trial court properly consider settlement communications in denying John Doe No. 1's motion for attorney fees?

3. Did the trial court err in denying John Doe No. 1's motion for attorney fees?

Statement of The Case

Appellee Susan Burke filed the Complaint in this action against ten anonymous John Doe defendants on September 19, 2012. The Complaint alleged that John Doe Nos. 1 and 2 had edited an article about Ms. Burke on Wikipedia and had made various false statements in those edits. The Complaint alleged that John Doe No. 1 was "a person using the name Zujua" to make these edits and that John Doe No. 2 was "a person using the name CapBasic359." Appendix ("App.") 23-24 (Complaint ¶¶ 6, 9). (The Complaint referred to John Doe No. 2 alternatively as "CapsBasic359" (App. 24-25(¶¶ 9, 11, 14, 16)), "CapBasic359" (App. 24 (¶ 9)), and "CapBasics359" (App. 25 (¶ 12)).) The Complaint alleged, "upon information and belief, and subject to the development of additional fact [sic] pursuant to reasonable discovery," that "John Does Nos. 1 and 2 acted, either directly or indirectly, as agents for a company formerly known as Blackwater or its owners." App. 25 (¶ 15). The Complaint further alleged, also "[u]pon information and belief, and subject to the reasonable opportunity for further investigation and discovery" that "John Doe Defendants 3 through 10 are parties who either provided the

defamatory material to Defendants Zujua and CapsBasic 359 with the intent and instruction to publish such defamatory statements with malice, and/or are parties who paid or otherwise compensated Defendants Zujua and CapsBasic359 to publish such defamatory statements with malice." *Id.* (¶ 16).

The Complaint alleged three claims for relief against all defendants: libel, tortious interference with prospective business advantage, and false light invasion of privacy. Each of the three claims for relief relied on the allegation that the statements at issue were false and defamatory. App. 26-27 (Complaint ¶¶ 19 ("false, untrue and defamatory and libelous on their face"), 29 ("false and defamatory statements about Plaintiff"), and 31 ("false and defamatory statements [were made] publicly")).

Shortly after commencing the action, Ms. Burke issued subpoenas to the Wikimedia Foundation seeking information that would assist her in identifying Zujua. On December 10, 2012, Zujua moved in the Superior Court for an order quashing the requested discovery pursuant to the D.C. Anti-SLAPP statute, D.C. Code § 16-5503, or, in the alternative, for a protective order. The Superior Court denied that motion in a brief opinion and order dated January 30, 2013. App. 32-33. Zujua appealed that order. This Court reversed and remanded, ruling that Zujua was entitled to an order quashing the discovery requested under § 16-5503. *Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014). This Court did not address Zujua's request for attorney fees, but held that he could renew that claim "once the trial court enters its order quashing the subpoena." *Id.* at 1045 n.19.

On remand, the trial court entered a notation on the docket that the subpoena was quashed. App. 7, entry for 9/26/2015. Subsequently, Zujua moved for attorney fees pursuant to

D.C. Code § 16-5504(a). The trial court denied that motion in an opinion and order dated May 15, 2015 (the "May 2015 Opinion And Order"), and entered on the docket on May 18, 2015. App. 255-73. Zujua timely appealed that order on June 10, 2015. App. 276.

Ms. Burke voluntarily dismissed her action on May 22, 2015. App. 274.

Statement of Facts

This Court's previous opinion in this case lays out the underlying facts that form the gravamen of the Complaint. *See Burke*, 91 A.3d at 1034 n.1 ("the relevant facts, as alleged by the parties in their trial court filings, are not in dispute"). Accordingly, the following recitation only summarizes the factual background and procedural history prior to this Court's opinion.

Ms. Burke is an attorney based in the District of Columbia focusing on advocacy for those allegedly harmed by U.S. military personnel and government contractors. *Id.* at 1034. She filed a civil lawsuit on behalf of victims of the 2007 civilian shootings in Baghdad by employees of a company then known as Blackwater. That lawsuit settled in 2010. *Id.*

A webpage for Ms. Burke was created in the fall of 2011 on Wikipedia, a collaboratively edited Internet encyclopedia to which anyone can add or edit content. The webpage initially discussed the civil lawsuit regarding the shootings. In January 2012, Zujua edited that part of Burke's webpage, but the additional information did not have anything to do with the civil litigation, but rather a separate criminal litigation against Blackwater employees. The additional information stated, *inter alia*, that the judge in that criminal litigation threw out the suit in December 2009 because of the government's improper use of the defendants' compelled statements. *Id.* at 1035. As this Court noted in its opinion, the resulting paragraph was a rather

confused jumble. It stated, for example, that the judge "threw out the suit" in 2009, but that the "lawsuit was dismissed in 2010." *Id.* *See also id.* at 1044 ("Zujua's edit introduced internal inconsistencies and, to anyone with a basic understanding of the distinction between a civil suit and a criminal prosecution, appears barely coherent."); *id.* at 1045 ("the edits seems to suggest confusion or honest mistake").

"Ms. Burke saw and removed this information about one month after it was posted. Zujua is not alleged to have taken any further action." *Id.* at 1035.

A. Proceedings On The Motion To Quash And This Court's Opinion

As related in the Statement of the Case, the trial court denied Zujua's motion to quash or for a protective order. It concluded that Zujua had not met his prima facie case of showing that the Complaint involved a "claim arising from an act in furtherance of the right of advocacy on issues of public interest" (D.C. Code § 16-5503(a)) because he had not shown that Ms. Burke was a "public figure" or that his speech was not commercially motivated. It further held that Ms. Burke had demonstrated that her defamation claim was "likely to succeed on the merits" (D.C. Code § 16-5503(b)), which separately required denial of the motion. App. 32.

Zujua appealed. On February 25, 2013, this Court issued an Order to Show Cause why it had jurisdiction to hear the appeal, to which Zujua filed a response on March 18. Burke moved to dismiss the appeal on jurisdictional grounds on February 28, 2013, claiming a lack of jurisdiction over the appeal. Zujua filed an opposition to that motion on March 12, and Burke filed a reply on March 15.

On January 31, 2013, Zujua filed an emergency motion in the Superior Court for a stay

pending appeal of Judge Ross's order. Judge Ross denied this motion on March 8, 2013, and Zujua moved in this Court for a stay pending appeal on March 11, 2013. This Court granted that motion on April 2, 2013 "to the extent that the case is administratively stayed pending further order of this Court."

In an opinion dated May 29, 2014, this Court reversed Judge Ross's January 30, 2013 order and remanded with instructions to enter an order granting Zujua's special motion to quash Ms. Burke's subpoena. *Doe No. 1 v. Burke*, 91 A.3d at 1045.

This Court first concluded that it had jurisdiction over the appeal because the January 30, 2013 order was a "final order" under D.C. Code § 11-721 pursuant to the collateral order doctrine. *Id.* at 1036-40. In so doing, this Court held that the interest protected by the D.C. Anti-SLAPP law was avoidance of a trial that would impair a substantial public interest. *Id.* at 1039. Specifically, it held that "[t]he right the [D.C.] Council sought to protect with the special motion to quash is the right to engage in anonymous speech . . . which is grounded in the First Amendment to the U.S. Constitution." *Id. See also id.* ("We find it significant in our assessment of the public interest in the right at stake that the constitutional right of anonymous speech is specially protected in the District's Anti-SLAPP statute."); *id.* at 1140 ("anonymous speech would be substantially chilled if the denial of a special motion to quash were not immediately appealable.").

This Court then analyzed the substance of the January 30, 2013 Order, and concluded that Judge Ross had erred. First, it concluded that Ms. Burke was a "limited public figure" and thus speech about her in the context of the Wikipedia edits fell within the definition of an issue of public interest under § 16-5501(3). *Burke*, 91 A.3d at 1042-43. Further, this Court held that

Judge Ross had erred in concluding that Zujua's *prima facie* burden required him to "disprove commercial motivation, even where such motivation is not apparent from the content of the speech." *Id.* at 1043. It further held that Ms. Burke's "unsubstantiated suspicion" that Zujua was associated with Blackwater "did not increase Zujua's initial burden." *Id.*

Finally, this Court concluded that Judge Ross had erred in concluding that Burke had met her burden of showing a likelihood of success on her defamation claim. This Court first expressed doubt as to whether Zujua's edits even had a defamatory meaning, although it assumed that they did because it concluded that Zujua had not raised that issue. *Id.* at 1044. It concluded that Burke had not met her burden of demonstrating a likelihood of success in proving that Zujua had the requisite "malice" to sustain a defamation claim. *Id.* at 1045 ("[T]he lack of clarity of his revisions provides good evidence of Zujua's state of mind. Zujua's edits do not suggest knowledge of falsity or reckless disregard for whether or not the statement was false. If anything, the edits seem to suggest confusion or honest mistake on Zujua's part."). This Court contrasted the Complaint's allegations against Zujua with the allegations against CapBasic359, whom, according to the Complaint, had published similar edits even after Ms. Burke had apprised him that they were false – an allegation conspicuously omitted against Zujua. *Id.*

B. Proceedings On Remand

Apparently, Ms. Burke was not discouraged by her loss in this Court. On September 24, 2014, she moved for an extension of time of 120 days, through and including January 24, 2015, to serve the defendants. App. 34-38. (This was Ms. Burke's third motion for an extension of time to serve defendants. Previously, she had moved for, and received from the trial court,

extensions of time to serve defendants to March 18, 2013 and to July 16, 2013. The second of her two prior motions was not mentioned in her September 2014 motion. App. 34-38.)

Ms. Burke's September 2014 motion described the various subpoenas she had served, and the fact that she had been unable to identify any of the defendants with the resulting information. App. 36-37 (Motion, ¶¶ 6, 8). She further described how she had "investigated numerous leads regarding the identity of the Defendants, including reports published by third parties" (App. 37 (¶ 9)), and attached one such "report" to her motion. The motion did not state precisely what additional investigation or discovery she would pursue. *Compare* Super. Ct. Rule 4(m).

At a status conference two days after the motion had been filed, Zujua tried to object to the proposed extension but Judge Ross ruled that he lacked standing to do so. App. 50-52. Judge Ross granted the motion on September 26, 2014. App. 58.

On January 26, 2015, Ms. Burke filed another motion for an extension of time to serve defendants. Ms. Burke did not describe any additional investigation that she had accomplished since September, or anything else that she planned to do to ascertain defendants' identities. She blamed Zujua's then-outstanding motion for attorney fees (described below) for this omission, arguing that she could not "risk conducting additional discovery to ascertain the identity of those who defamed her" (App. 217) with the attorney fees motion unresolved. She submitted a proposed order extending the time to serve the summons to ninety days after the resolution of Zujua's pending motion for fees. App. 220.

Zujua filed opposing papers on the same day, January 26, 2015. His opposition argued that (1) Ms. Burke had not complied with Rule 4(m) of the Superior Court rules because, *inter alia*, she had not set forth in detail the efforts which had been made, and would be made in the

future, to effect service, (2) that this Court's decision, and not Zujua's motion for attorney fees, ought to have been the primary deterrent to proceeding, and (3) an additional extension of time would undermine the spirit and purpose of the Anti-SLAPP statute by keeping the potential for liability alive even after this Court had held that Ms. Burke did not have a likelihood of success. App. 224-25.

Judge Ross's order, dated January 28, 2015, noted that it had considered the motion and opposition thereto, and granted Ms. Burke until April 30, 2015 to serve the summons. App. 227. Ms. Burke did not seek an additional extension of time thereafter. One week after Judge Ross denied Zujua's motion for attorney fees, she voluntarily dismissed her lawsuit. App. 274.

C. Zujua's Motion For Attorney Fees

Zujua moved for attorney fees pursuant to D.C. Code § 16-5504(a) on October 8, 2014, seeking $ 186,537 in fees for work through October 1, 2014. Since he was represented by a public interest law firm located in the District of Columbia, Zujua used the Laffey Matrix for the billing rates. App. 79 (¶¶ 5-6) & 157. He included detailed time records, and various breakdowns of the time spent. (Zujua divided the time into ten discrete periods based upon important tasks that were worked on during each period.) App. 80 (¶¶ 8-10); App. 95-156. He exercised billing judgment, and reduced the lodestar, in two ways. First, he eliminated about 25% of the hours reflected in specific time records for various reasons such as duplication of effort or work not sufficiently related to the quashing of the subpoenas. This reduced the lodestar to $ 248,716. App. 81-82 (¶¶ 13-14). Second, because he believed that some explanations for particular tasks were not sufficiently detailed, he reduced that number by an additional 25%.

This yielded the final number for work through October 1, 2014, or $ 186,537. App. 82 (¶¶ 15-16).

Ms. Burke's opposition focused on four arguments. First, she argued that, despite this Court's conclusion that the D.C. Anti-SLAPP statute was applicable, she had not, in fact, filed a SLAPP suit. Specifically, she asserted that she "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." App. 176. The statement she submitted with her opposition (App. 186-87) identified various additional things that unidentified people had told her about Erik Prince. It made no real attempt to dispute this Court's conclusion that her belief that any of the Wikipedia editors were associated with Blackwater or Mr. Prince was an "unsubstantiated suspicion."

Second, Ms. Burke argued that she was "not the typical SLAPP plaintiff, a company intent on punishing members of the public whose voices interfered with their business plans" because she was "an officer of th[e] Court since 1988" and "did not, and would not, file litigation for any purpose other than the lawful purpose of seeking monetary redress for the defamation." App. 177.

Third, Ms. Burke submitted testimony and evidence concerning purported settlement discussions between her and Zujua. According to Ms. Burke, she offered in settlement negotiations to dismiss the lawsuit against him without any cost and without learning his identity if he would sign a statement under penalty of perjury that he had not been acting for, or at the suggestion of, others. App. 177, 194-97.

Fourth, Ms. Burke argued that the public interest law firm representing Zujua, the Center for Individual Rights (CIR), "does not act in the public interest." App. 179. According to Ms.

Burke, CIR "searches for cases that will advance an anti-government, anti-regulatory agenda of certain private, for-profit businesses"; that it "litigates 'reverse discrimination' to benefit those businesses intent on employing white males"; that it "uses litigation to try to eliminate all governmental policies designed to redress historic discrimination against women, African Americans and other minorities"; that it "litigates voting rights cases, seeking to disenfranchise citizens"; that the "Koch Brothers . . . made a $ 40,000 contribution to [CIR]" and that it "receives substantial funding from the Acton Foundation, which has a direct connection to Erik Prince, as his mother's husband sits on its board." App. 179-80. Finally, Ms. Burke concluded that Zujua's refusal to settle implied that either he was, in fact, associated with Blackwater or that CIR "talked [Zujua] out of attesting to the truth via a John Doe declaration because [CIR's] 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." App. 181.

Insofar as the actual time records were concerned, Ms. Burke simply asserted in *ipse dixit* fashion that the amount being sought was "unreasonable on its face." App. 180. The only unreasonable work she mentioned was that Zujua was seeking fees for "a significant number of internal meetings amongst" the attorneys working for him. *Id.* She did not identify any particular time record or date that reflected such internal meetings.

In reply, Zujua objected to Ms. Burke's use of purported settlement negotiations, noting that they were inadmissible and that, in any event, Ms. Burke had given an incomplete and misleading description of the settlement discussions. App. 205; App 211-12 (¶ 2). He also submitted evidence refuting Ms. Burke's speculation that he had been manipulated and her false assertions concerning CIR, its work, and its contributors (including the assertions that the "Koch

Brothers" and the "Acton Foundation" had contributed to CIR). App. 212-14 (¶¶ 5-10).

D. The May 2015 Opinion And Order

In the May 2015 Opinion And Order, Judge Ross denied Zujua's motion for attorney fees in its entirety. App. 255-73.

Judge Ross's analysis began by stating that "the Court must first determine whether Plaintiff in fact filed a SLAPP suit within the meaning of the D.C. statute." App. 259. He concluded that she had not because her lawsuit was not "frivolous" and did not "seek[] to chill or muzzle Defendant's speech through costly litigation." *Id.* 261. In reaching this conclusion, he relied on the fact that Ms. Burke "saw and removed the false information Defendant posted to her Wikipedia page" prior to filing suit. *Id.* In addition, Judge Ross relied on the settlement discussions that Plaintiff had submitted and concluded that she "was thus willing to dismiss the lawsuit regarding [Zujua] and proposed a settlement that would not require [Zujua] to reveal his identity" but that "[Zujua] remained unwilling to sign a statement under penalty of perjury to that effect." *Id.* at 261-62. Further, Judge Ross found, Ms. Burke "set forth a plausible argument that she had reason to believe [Zujua] was acting as an agent for Blackwater" because "Blackwater founder Erik Prince threatened her personally" and that she had "learned" that Mr. Prince spent money to post negative information about those who have angered him. *Id.* at 262-63. *See also id.* at 272 ("Plaintiff had reason to believe that Blackwater had set out to defame her because of threats made to her by a Blackwater agent, Mr. Prince.").

Judge Ross then examined § 16-5504(a) of the D.C. Anti-SLAPP law, and concluded that it did not call for any presumption, limiting the court's discretion, that a successful moving party

should receive fees. Instead, he agreed with Plaintiff's contention that the "Court must consider whether there is evidentiary support . . . that Plaintiff filed a SLAPP, and if Plaintiff filed a frivolous suit with an intent to inflict costly litigation fees as a means to stifle speech." App. 263. In concluding that there should be no presumption in favor of a successful moving party, the court relied upon "[t]he permissive language of [the statute], coupled with the absence of legislative history that indicates otherwise . . . ." *Id.* at 265. *See also id.* at 270 ("The unique reasons for adopting a fee-shifting presumption in civil rights actions do not warrant adopting the presumption in this case. . . [N]either the language of the Anti-SLAPP Act, nor its legislative history imply the presumption.").

Finally, Judge Ross concluded that the statute called for an award of attorney fees only if it furthered the purpose of the statute. He concluded that the purpose of awarding fees under the D.C. Anti-SLAPP statute "is to discourage those seeking to chill protected speech by imposing the litigation costs on the party that files a SLAPP suit." App. 267. He held that a fee award would not be appropriate in this case because (1) Ms. Burke's "action was apparently intended to vindicate her legally cognizable rights rather than to chill [Zujua's] free speech rights to express an opposing point of view" (*id.* at 269); (2) Zujua's "counsel needed no incentive to take on [Zujua's] case" (*id.* at 270) because it was a public interest firm that specialized in high-impact litigation protecting individual freedom; (3) awarding fees to Zujua's counsel for its work "would necessarily diminish the equally noteworthy contributions of [Ms. Burke] and *amici* who submitted compelling arguments to the Court of Appeals during this complex litigation" (*id.* at 271); and (4) the "relative merits of [Ms. Burke's] suit" militated against an award of fees because she had reason to believe that Blackwater was behind the Wikipedia edits and "[her]

suspicions were heightened" when Zujua "declined to accept a good faith settlement offer." *Id.* at 272.

Judge Ross concluded that "the court must scrupulously avoid penalizing litigants for aggressively litigating their claims or discouraging good faith assertions of colorable claims and defenses." App. 272. Because he could not "leap to the conclusion that [Ms. Burke] set out to stifle [Zujua's] right to free speech by filing a frivolous claim," *id.*, he denied Zujua's motion.

Argument

This Court reviews a ruling on attorney fees for abuse of discretion. *Frankel v. District of Columbia Office for Planning and Economic Development*, 110 A.3d 553, 558 (D.C. 2015). "A court 'by definition abuses its discretion when it makes an error of law.'" *Id.* (quoting *Ford v. ChartOne, Inc.*, 908 A.2d 72, 84 (D.C. 2006)). Legal conclusions are reviewed *de novo*. *Fraternal Order of Police v. District of Columbia*, 52 A.3d 822, 827 (D.C. 2012) (holding that preliminary questions of law regarding whether a trial court must automatically award attorney fees under the D.C. FOIA law and, if not, what criteria should be used, should be reviewed *de novo*). A trial court makes an error of law constituting an abuse of discretion when its decision fails to apply appropriate factors, or applies those that are inappropriate. *Jung v. Jung*, 844 A.2d 1099, 1109 (D.C. 2004) (holding that Court of Appeals will review "trial court's ultimate decision to deny attorney's fees . . . to . . . determin[e] . . . 'whether the [trial court] failed to consider a relevant factor, whether [it] relied upon an improper factor, and whether the reasons given reasonably support the conclusion.'") (quoting *Johnson v. United States*, 398 A.2d 354, 365 (D.C. 1979)) (brackets in internal quotation as in *Jung*); *L.J. v. Wilbon*, 633 F.3d 297, 304

(4th Cir. 2011) (stating that a district court abuses its discretion when it "'has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises.'") (quoting *United States v. Hedgepath*, 418 F.3d 411, 419 (4th Cir. 2005)).

Judge Ross badly misconstrued the D.C. Anti-SLAPP statute and its provision for fees, and, accordingly, abused his discretion. In determining that there was no presumption favoring an award of fees, he ignored the important purposes underlying the protection of anonymous speech that the statute provides as well as the overall structure of the statute itself. His conclusion that Ms. Burke did not file a SLAPP suit flies in the face of both this Court's prior decision and the language of the statute. Furthermore, his reliance on settlement negotiations, and his unfathomable refusal even to acknowledge Zujua's objections to the submission of that evidence and disputes as to its accuracy, would be reversible error on its own.

I. BECAUSE THE TRIAL COURT'S LEGAL CONCLUSIONS WERE ERROR, IT ABUSED ITS DISCRETION IN DENYING ZUJUA REASONABLE FEES

Judge Ross made a series of legal errors which amount to an abuse of discretion. He erroneously concluded that there should be no presumption in favor of awarding fees under the D.C. Anti-SLAPP statute. In addition, he misconstrued the purposes of the special motion to quash statute and thus failed to consider the important role that anonymous defendants like Zujua have in fulfilling the purposes of that provision.

A. A Successful Moving Party On A Special Motion To Quash Is Presumptively Entitled To Fees

Section 16-5504 states:

> (a) 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.
>
> (b) 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.[1]

Zujua met the specific requirements under § 16-5504(a) for an award of costs including reasonable attorney fees. He was a moving party on a special motion to quash under § 16-5503, and he prevailed in whole in that the motion was granted. The underlying purpose of § 16-5504, the legislative history of the act, the statutory structure, and this Court's case law all support a finding that a prevailing moving party on a special motion to quash under § 16-5503 is presumptively entitled to a reasonable fee under § 16-5504(a). That presumption should result in a fee award unless there are special circumstances warranting denial of the fee.

1. Purpose

As this Court noted in its previous decision in this case, the specific right protected by § 16-5503 is the right to anonymous speech grounded in the First Amendment. *Burke*, 91 A.3d at 1039 ("[t]he right the [D.C.] Council sought to protect with the special motion to quash is the right to engage in anonymous speech . . . which is grounded in the First Amendment to the U.S. Constitution."). The purpose of the statute, then, is the protection of an important civil right grounded in the Constitution. Vindicating that right upholds an important public interest. *Id.*

[1] The Addendum sets forth the D.C. Anti-SLAPP law as a whole.

("[B]efore we exercise our appellate jurisdiction under the collateral order doctrine we must confirm what is at stake is the 'avoidance of a trial that would impair a "substantial public interest."'") (quoting *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132, 1137 (D.C. 2010)).

It is true that § 16-5504(a) states that a court "may" award a moving party attorney fees, and the word "may" often implies discretion. But in many similar statutes involving important federal civil rights, the law is that a court's discretion is quite limited; an attorneys' fees award should be made in the absence of special circumstances. *E.g.*, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) ("one who succeeds in obtaining an injunction under [Title II of the Civil Rights Act of 1964] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust"); *Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989) (same for 42 U.S.C. § 1988); *Hescott v. City of Saginaw*, 757 F.3d 518, 523 (6th Cir. 2014) ("Although § 1988 uses permissive language regarding fee awards, 'the Supreme Court has read [§ 1988] as mandatory where the plaintiff prevails and special circumstances are absent.'") (quoting *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty. Tenn.*, 421 F.3d 417, 420 (6th Cir. 2005)); *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 293 (1st Cir. 2001) ("Although [§ 1988] is couched in permissive terminology, awards in favor of prevailing civil rights plaintiffs are virtually obligatory"). This is so, even though the federal statutes – unlike the attorney fees statute at issue here – made explicit reference to the courts' discretion. *Newman*, 390 U.S. at 401 n.1 ("'the court, in its discretion, may allow . . . '") (quoting 42 U.S.C. § 2000a-3(b)); *Blanchard*, 489 U.S. at 89 n.1 (same language in § 1988).

Given the D.C. Anti-SLAPP statute's purpose of protecting an important civil right, a similar interpretation should be given to § 16-5504(a). *See Tenants of 500 23rd St., N.W. v.*

District of Columbia Rental Housing Comm'n, 617 A.2d 486, 489 (D.C. 1992) ("[T]his court has . . . looked to the [federal civil rights laws] in interpreting our fee award provision.").

2. Legislative History

Legislative history, although not extensive, supports the proposition that a strong presumption favoring fees should apply. The main Committee Report on the proposed bill states that the Anti-SLAPP statute "mirrors language found in federal law." D.C. Council, Comm. On Pub. Safety and the Judiciary, Report on Bill 18-893 ("Comm. Report") at 1 (Nov. 18, 2010). The attorney fees provision is the only one in the statute that "mirrors language found in federal law." Indeed, the use of "may" in other statutes, in which a presumption favoring fee-shifting was found, appears to be the motivation for its use in § 16-5504(a). *See* App. 161-68.

The D.C. Council also emphasized that the *impact* of the claims covered under the Anti-SLAPP statute is widespread. Comm. Report at 1 ("The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well."). Thus, the Council viewed a defendant who successfully defends a claim covered under the statute as achieving a benefit for the entire community by facilitating others' free speech and upholding D.C.'s policy of protecting acts in furtherance of the right of advocacy on issues of public interest.

3. Structure

The bifurcated structure of § 16-5504 also mirrors federal law and further supports a presumption favoring a reasonable fee to a successful movant. Section 16-5504(a) provides that a court may award costs and fees to "a moving party who prevails, in whole or in part, on a motion brought under . . . § 16-5503." In contrast, § 16-5504(b) provides that a court may award

costs and fees to the responding party only if it "finds that a motion brought under . . . § 16-5503 is frivolous or is solely intended to cause unnecessary delay."

Thus, § 16-5504(a) provides that a court may award fees to a *moving* party even if that party prevails only "in part," mirroring the case law that a plaintiff in a federal civil rights action is a prevailing party even if it is successful on only one claim out of many. *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 791 (1989) (rejecting "central issue" test for the award of fees under § 1988, whereby a court would award fees to a plaintiff only if it prevailed on the central issue in the case; "A prevailing party must be one who has succeeded on *any* significant claim affording it some of the relief sought . . . .") (emphasis added). So, too, the standard under subsection (b) for *responding* parties – and the fact that it is a *different* standard from the one under subsection (a) – reflects the case law that limit fee awards to prevailing defendants in civil rights cases to those where the plaintiff's case was frivolous or improperly motivated, a much different standard than the one for plaintiffs. *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978) (interpreting Title VII attorneys' fees provision, and limiting awards to prevailing defendants to those cases where the plaintiff's case was frivolous, unreasonable, or groundless, or where it was brought or continued in bad faith).

Finally, it deserves mention that the "moving party" under § 16-5504(a) will be a defendant, and thus will be unable to recover damages or anything else from a plaintiff who filed a claim based upon an act in furtherance of the right of advocacy on issues of public interest. *Newman*, 390 U.S. at 402 (noting that "[w]hen a plaintiff brings an action under [Title II of the Civil Rights Act of 1964], he cannot recover damages."). Attorney fee awards, then, are the prime deterrent under the statute to claims involving such acts.

4. Case Law

This Court's case law interpreting the D.C. Rental Housing Act of 1980 also supports a presumption. That statute provided that "a court of competent jurisdiction may award reasonable attorney's fees to the prevailing party . . . " D.C. Code § 45-2592 (1990) (currently codified at D.C. Code § 42-3509.02). In *Ungar v. District of Columbia Rental Housing Comm'n*, 535 A.2d 887 (D.C. 1987), this Court noted that that statute "does not automatically repeal the American rule" (*id.* at 891). Further, this Court was unable to glean any guidance from the statute's legislative history. Nonetheless, it concluded that the purpose of the fee provision could be gleaned from the statutory scheme itself: "to encourage tenants to enforce their own rights, in effect acting as private attorneys general, and to encourage attorneys to accept cases brought under the Rental Housing Act of 1980." *Id.* at 892. Accordingly, this Court held that the statute requires a "presumptive award" of attorney's fees to a prevailing tenant, which could be withheld only if the equities indicate that it should be. *Id. See also Tenants of 500 23rd St., N.W.*, 617 A.2d at 488 ("prevailing tenants . . . should generally be awarded attorney's fees").

Furthermore, in *Tenants of 500 23rd St., N.W.*, the housing provider argued that federal civil rights laws should *not* be the model for interpreting the attorney's fee provision in the Rental Housing Act because "the underlying policies of the former – combatting discrimination – are not those of the Rental Housing Act . . ." *Id.* at 489. This Court rejected that argument. "To accept this argument . . . would be to ignore the remarkable similarities of language and intent between the attorney's fee provisions of the two laws, and the fact that this court has heretofore looked to the former in interpreting our fee award provision." *Id.*

B. The Trial Court Erred In Rejecting A Presumption Favoring An Award Of Fees

Judge Ross's analysis rejecting a presumption in favor of a moving party under § 16-5504(a) failed properly to analyze the considerations just described. His conclusion was thus legal error, and an abuse of discretion.

Judge Ross rejected a presumption favoring fees under § 16-5504(a) because of the permissive language of that provision and the absence of legislative history. App. 270 ("[N]either the language of the Anti-SLAPP Act, nor its legislative history imply the presumption . . . ."); *see also id.* 265 ("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."). But the fee-shifting provisions of the federal civil rights statutes and the Rental Housing Act all have the same permissive language ("may award") as § 16-5504(a); indeed, the federal statutes, as already noted, specifically mention the courts' discretion. Nonetheless, the courts interpreting those provisions all adopted a presumption favoring an award of fees to successful plaintiffs (federal civil rights laws) and tenants (Rental Housing Act) based upon the underlying purpose of the statutes.

Moreover, as shown above, although there is not a great deal of legislative history, what there is supports the adoption of a presumption of fees to a moving party. The D.C. Council recognized that § 16-5504(a) mirrors language from the fee-shifting statutes under the federal civil rights laws, and its report specifically noted how the lawsuits covered under the Anti-SLAPP statute impact more than just the named defendants. More importantly, the key cases adopting a presumption under the federal civil rights laws and the Rental Housing Act did not

rely upon legislative history. *See, e.g.*, *Newman*, 390 U.S. at 402 (no reference to legislative history); *Ungar*, 535 A.2d at 892 ("The parties have not referred us to any legislative history, nor have we, ourselves, found any that is informative . . . ."). Thus, its absence is hardly dispositive.

In contrast, the authority cited by Judge Ross (App. 265-66), *Fraternal Order of Police*, involved the D.C. Freedom of Information Law. This Court found that the D.C. FOIA law had been based upon, and sought the same goals as, the federal FOIA law. Accordingly, it adopted the four-part test that had been employed in the federal courts in determining whether fees should be shifted in a FOIA suit. *Fraternal Order of Police*, 52 A.3d at 831-32. The use of the word "may" in the statute was utilized by this Court only to reject an *automatic* award of fees (*id.* at 827-28), an argument Zujua does not make here.[2]

Moreover, the unique purpose of the fee-shifting statute in the FOIA statute renders precedents under that provision particularly poor guides to interpreting the fee-shifting provision here. *See McReady v. Dept. of Consumer & Regulatory Affairs*, 618 A.2d 609, 613 (D.C. 1992) ("The [fee provision in the] federal FOIA was intended to encourage those seeking documents to obtain legal advice before proceeding with litigation in the hope that unnecessary litigation might be either avoided or maintained within reasonable bounds. . . . We see no reason why the rationale underlying the federal FOIA fee provision should not apply to DC FOIA proceedings as

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[2] The other authority cited by Judge Ross, the Magistrate Judge's opinion in *Summers v. Dep't of Justice*, 477 F. Supp. 2d 56 (D.D.C. 2007), *motion for reconsideration denied*, 2007 WL 2111049 (D.D.C. July 23, 2007), *aff'd*, 569 F.3d 500 (D.C. Cir. 2009) – which Judge Ross erroneously attributed to the Circuit Court for the District of Columbia (App. 266) – involved the federal FOIA statute. Following the Supreme Court's opinion in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598 (2001), the magistrate judge first held that the plaintiff, who had settled his FOIA case, was not a prevailing party entitled to fees. *Summers*, 477 F. Supp. 2d at 64-65. That was the only holding of the district court and court of appeals. *Summers v. Dep't of Justice*, 569 F.3d 500, 505 (D.C. Cir. 2009).

well."). By definition, defendants invoking the Anti-SLAPP law already have been sued.

Judge Ross concluded that "[t]he unique reasons for adopting a fee-shifting presumption in civil rights action do not warrant adopting the presumption in this case" and "fee-shifting is less necessary as an incentive in this case, not because the Anti-SLAPP protects unimportant interests, but because the interests it protects here are somewhat different." App. 270. This assertion echoes the argument that this Court rejected in *Tenants of 500 23rd St., N.W.*, where the housing provider argued that the fee-shifting provisions of the federal civil rights laws should not be used as a model for the Rental Housing Act because the underlying policies were different. *Tenants of 500 23rd St., N.W.*, 617 A.2d at 489. This Court rejected that argument, relying upon the similarities of language in the fee-shifting provisions themselves and its precedents looking to the federal fee-shifting provisions as guidance.

In any event, the statement that the interests underlying the Anti-SLAPP statute are "somewhat different" is both wrong and irrelevant. The interests underlying the D.C. Anti-SLAPP statute are First Amendment interests, and are certainly among the many interests that 42 U.S.C. § 1983, for example, protects. (A fee-shifting presumption for § 1983 claims seeking redress for a violation of First Amendment rights would apply under § 1988.) Even if the interests were "somewhat" different, that would be true, by definition, of most new statutes. And Judge Ross provided no justification whatsoever for his suggestion that an incentive is "less necessary" for attorneys to take on cases for defendants sued because of acts involving the right of advocacy on issues of public interest. (To be sure, he asserted that the attorneys representing Zujua in *this* case did not need an incentive, but, in addition to being an improper factor in general – *see* discussion *infra*, Part II.B – that contention is certainly irrelevant to whether a fee-

shifting presumption should apply in general.) Contrary to Judge Ross's claim, those representing plaintiffs in federal civil rights cases might sometimes be able to earn a contingency fee, something unavailable to attorneys representing defendants under the D.C. Anti-SLAPP statute. *Blanchard*, 489 U.S. at 90 (attorney had 40% contingency fee arrangement).

Not only did Judge Ross err in holding that there is no presumption favoring fee-shifting, he actually applied its opposite: a presumption *against* fee-shifting. Specifically, he held that "[i]n vindicating its authority, the court must scrupulously avoid penalizing litigants for aggressively litigating their claims or discouraging good faith assertion of colorable claims and defenses." App. 272. Judge Ross cited two authorities for this proposition, *Jung v. Jung*, 844 A.2d 1099 (D.C. 2004) and the Fourth Circuit opinion in *Newman v. Piggie Park Enterprises*, 377 F.2d 433 (4th Cir. 1967), *aff'd as modified*, 390 U.S. 400 (1968). *Jung* involved application of the general American Rule that parties generally pay their own fees in the absence of a fee-shifting statute, subject only to the court's power to award fees in the case of bad faith litigation. Fee awards under those circumstances, this Court held, should "punish abuses of the judicial process and deter future misconduct"; accordingly, "[j]udicial circumspection . . . is necessary to safeguard a litigant's right of access to the courts." *Jung*, 844 A.22d at 1108. *Jung* has nothing to do with the proper interpretation of a fee-shifting statute.

And while the Fourth Circuit's opinion in *Newman* did involve a fee-shifting statute, *its interpretation was rejected by the Supreme Court*. *Newman*, 390 U.S. at 401 ("We granted certiorari to decide whether this subjective standard [adopted by the Fourth Circuit, permitting an award of fees only where defenses had been advanced for purposes of delay and not in good faith] properly effectuates the purposes of the counsel fee provision of Title II of the Civil Rights

Act of 1964. . . . We hold that it does not."). Conspicuously, Judge Ross's citation of the Fourth Circuit opinion in *Newman* entirely omitted its subsequent history. App. 272.

C. No Special Circumstances Warrant Denial Of A Fee Here

Judge Ross's legal error was essential to his denial of fees because, when there is a presumption favoring fee-shifting, an award of fees should be denied only if special circumstances warrant. But no such circumstances are present here.

As shown in Part II of the Argument, the factors that Judge Ross considered are entirely inappropriate in general. In any event, they would not constitute the narrow "special circumstances" that warrant a denial of fees under the aforementioned fee-shifting statutes. Moreover, Zujua's litigation here amply served the function of a "private attorney general." Many of the issues litigated in this lawsuit were ones of first impression, including whether the denial of a special motion to quash is immediately appealable, whether a defendant making a special motion to quash bears the burden of disproving a commercial motivation, and whether an attorney who advocates for more general policy positions in public as part of a litigation strategy is a limited public figure. Zujua's victories on these points will benefit other defendants in later cases involving acts in furtherance of the right of advocacy on issues of public interest. *E.g.*, *Hampton Courts Tenants' Ass'n v. District of Columbia Rental Comm'n*, 573 A.2d 10, 13 (D.C. 1990) (holding that tenants were entitled to attorney's fees under the Rental Housing Act on an unsuccessful petition by a landlord for an increase in rent ceilings; "In addition to vindicating the statutory policy generally advanced by prevailing tenants, we note in this case that the tenants here specifically have served to advance this policy by causing the [Rental Housing] Commission

to clearly rule, for the first time (correctly in our view) that this type of [landlord] petition is a contested case within the meaning of the District of Columbia Administrative Procedure Act . . . and that the landlord has the burden of proof, which it could only meet by affirmatively presenting evidence."). *Cf. Diaz-Rivera v. Rivera-Rodriguez*, 377 F.3d 119, 125 (1st Cir. 2004) (upholding award of attorneys' fees to plaintiffs who had been fired from their jobs, even though they lost their claim that their firings were politically motivated and won only nominal damages on their claim that their firings were effected without due process; "[A]lthough plaintiffs' victory was *de minimus* as to the extent of relief, . . . the determination that the municipality violated plaintiffs' constitutional rights represented a significant legal conclusion serving an important public purpose.").

Judge Ross concluded that the precedent-setting nature of this case did not favor an award of fees because "attorneys for all sides contributed to the jurisprudence on this statute." App. 271. He held:

> Although the result of the case is without question vital, several others, in addition to [Zujua's] counsel, substantially contributed to the goals of the statute by the nature of their involvement. Indeed, *amici* and [Ms. Burke's] counsel rendered important aid to the interpretation and implementation of the D.C. Anti-SLAPP Act. To grant attorneys' fees in this case based on the significance of the contributions made by [Zujua's] counsel alone would necessarily diminish the equally noteworthy contributions of [Ms. Burke] and *amici* who submitted compelling arguments to the Court of Appeals during this complex litigation.

Id. Judge Ross cited no support for the proposition that the existence of *amici* supporting Zujua should militate against an award of fees to him, and, as far as Zujua is aware, there is no such authority. Nor did he explain what specific contribution they made to the litigation, *e.g.*, an

argument that they made that Zujua did not and that was adopted by this Court. As for the notion that *Ms. Burke*'s counsel contributed to the rulings in this case favoring the policies of the D.C. Anti-SLAPP Act – presumably by presenting arguments that this Court rejected – this argument could be used in every case as a basis for the denial of fees.

D. Even If A Presumption Favoring Fees Were Not Warranted, Zujua Is Entitled To Fees Because His Defense Served The Purposes Of The Anti-SLAPP Statute And The Special Motion To Quash

Even if a party who successfully made a special motion to quash under the D.C. Anti-SLAPP law were not presumptively entitled to fees in the absence of special circumstances, Zujua was still entitled to fees because his special motion to quash fulfilled the purposes of the statute. The special motion to quash is designed to protect those who have been sued civilly for acts involving the right of advocacy on issues of public interest. This Court already has held that Zujua's Wikipedia edits involved such acts. The D.C. Council created this special protection for anonymous speech because it was concerned that the effects of a suit against John Doe defendants could chill others from participating in an exchange of views.

Moreover, the fact this matter involved Wikipedia is significant and further militates in favor of fees. Wikipedia is now a frequently used and highly cited source of information. It depends upon the contributions of its editors, many of whom would prefer to remain anonymous. A lawsuit that successfully revealed the identity of an anonymous Wikipedia editor would chill the participation of others and diminish the usefulness of this important online resource.

II. THE TRIAL COURT RELIED UPON IMPROPER AND IRRELEVANT FACTORS

Aside and apart from failing to adopt a presumption favoring fees, Judge Ross also abused his discretion by considering factors inappropriate for a determination of whether costs, including reasonable attorney fees, should be awarded under § 16-5504(a). Specifically, Judge Ross heavily weighed (1) his conclusion that Ms. Burke had not filed a frivolous or improperly-motivated suit and (2) the fact that Zujua was represented by a public interest law firm. Even if Judge Ross had properly analyzed these factors – and, as shown in Part III, he did not – they were erroneously given near-dispositive weight on Zujua's motion.

A. The Trial Court Erred In Its Reliance Upon Whether Ms. Burke Had Filed A Frivolous Suit Or One Whose Purpose Was To Inflict Litigation Costs On Zujua

Judge Ross began his analysis by stating that "this Court must first determine whether Plaintiff in fact filed a SLAPP suit within the meaning of the D.C. statute." App. 259. At first glance, it might seem obvious that a plaintiff whose subpoena had been quashed pursuant to a special motion to quash under the D.C. Anti-SLAPP statute had, in fact, filed a SLAPP suit. Judge Ross managed to avoid this conclusion by ignoring the statute and legislative history, and adopting his own idiosyncratic definition of a "SLAPP suit."

The D.C. statute does not define the term "SLAPP suit." Rather, it carefully defines the phrase "[a]ct in furtherance of the right of advocacy on issues of public interest" and the word "claim." D.C. Code § 16-5501. It then authorizes various motions that defendants can make when there is a "claim arising from" such an "act." D.C. Code § 16-5502(a) (special motion to

dismiss), § 16-5503(a) (special motion to quash). If one had to glean a definition for a "SLAPP suit" from the statute, then, it would be a claim arising from an act in furtherance of the right of advocacy on issues of public interest.

The legislative history of the statute provides a possible (although quite similar) alternative. The Committee Report on the statute described a nationwide study of SLAPPs by two professors at the University of Denver. Comm. Report at 2. That study "established the base criteria of a SLAPP": (1) a civil complaint, (2) against non-governmental individuals or groups, (3) because of their communications to a government body, official, or electorate, (4) on an issue of public interest. *Id.* With the substitution of the word "public" or the term "members of the public" (D.C. Code §§ 16-5501(1)(A)(ii), 16-5501(1)(B)) for the word "electorate" (which probably does not change much of substance in any event), this fairly well describes the kinds of claim covered under D.C.'s Anti-SLAPP statute.

Instead of these sources, Judge Ross adopted Ms. Burke's definition of a SLAPP suit (or, as he sometimes referred to it, a "classic SLAPP"). Specifically, he concluded that Ms. Burke had not filed a SLAPP suit because her lawsuit was not frivolous and was not intended to impose costs on those exercising their First Amendment freedoms. *See, e.g.*, App. 259-60:

> [Ms. Burke] maintains the suit was not based on flimsy speculation and was not intended to inflict costly litigation fees on [Zujua] as a means to stifle speech. Furthermore, [Ms. Burke] contends the manner in which she conducted herself during the litigation weighs against viewing this suit as a SLAPP.
>
> The Court agrees with [Ms. Burke], finding overwhelming support for [Ms. Burke's] position in the statute and the record.

See also App. 261 ("[Ms. Burke's] claim can hardly be seen as frivolous or seeking to chill or

muzzle [Zujua's] speech through costly litigation."), 268-69 ("[Ms. Burke] maintains that the case is not reflective of a classic SLAPP suit . . . . The Court agrees, recognizing that [Ms. Burke's] action was apparently intended to vindicate her legally cognizable rights rather than to chill [Zujua's] free speech rights to express an opposing point of view."), and 272 ("Accordingly, the Court finds [Ms. Burke's] suit was not a classic SLAPP, and a balancing of the equities weighs in favor of not awarding attorneys' fees to [Zujua] in this case.").

Thus, Judge Ross's definition of a SLAPP suit focused on two elements: whether the case was frivolous and whether it was intended to stifle speech by imposing litigation costs on the defendant. He derived these factors from legislative history in which the Committee on Public Safety and the Judiciary and/or witnesses before that committee described the worst kinds of lawsuits that the statute was intended to address. But these were not the only examples; indeed, they were not *specific* examples at all.

In fact, in the primary example of an *actual* past D.C. lawsuit that illustrated the need for the Anti-SLAPP law, there was no mention at all of the case being either frivolous or brought with an improper purpose. Rather, the focus was on the *effect* that lawsuit had on the citizens being sued and the community at large. Comm. Report at 3-4 (describing *Father Flanagan's Boys Home v. District of Columbia*, a case brought by an organization providing homes for troubled youths against D.C. citizens); *id.*, Spitzer Testimony at 2 (same).

In any event, the fact that supporters of a bill might point out the most egregious examples of the phenomenon that the bill addresses in order to garner support for the bill is hardly unusual. But an exemplar is simply not a definition. The Congress that passed the federal Racketeering Influenced and Corrupt Organizations statute was surely focused on organized

crime, but it passed a statute much broader in scope. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 243, 245-46 (1989) (rejecting argument that "a defendant's racketeering activities form a pattern only if they are characteristic either of organized crime in the traditional sense, or of an organized-crime-type perpetrator"; "To be sure, Congress focused on, and the examples used in the debates and reports to illustrate the Act's operation concern, the predations of mobsters. Organized crime was without a doubt Congress' major target . . . . But the definition of a 'pattern of criminal conduct' . . . shows that Congress was quite capable of conceiving of 'pattern' as a flexible concept not dependent on tying predicates to the major objective of the law . . .").

A comparison of § 16-5504(a) with § 16-5504(b) further demonstrates Judge Ross's error of law. Section 16-5504(b) specifically limits an award of fees to the *responding* party to instances where a court has found that the "motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay." These considerations are conspicuously absent from § 16-5504(a), and basic maxims of statutory interpretation require the conclusion that they were omitted intentionally. *E.g.*, *Ruffin v. United States*, 76 A.3d 845, 855 (D.C. 2013) (holding that District of Columbia was not a "person" for purposes of statute prohibiting threats to damage the property of any "person," where companion statute prohibited extortion from any "person, firm, association, or corporation"; "'[U]nder ordinary principles of statutory construction, where Congress includes particular language in one section of a statute but omits it in another provision of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'") (quoting *United States v. Bly*, 510 F.3d 453, 461 n.11 (4th Cir. 2007)). Thus, the language of the Anti-SLAPP Act

demonstrates that the D.C. Council did not intend frivolousness or improper purpose to be factors in determining whether a moving party was entitled to fees.

Further, the D.C. Council did not have to pass a new fee-shifting provision to authorize courts to make an award of costs and fees in the case of a frivolous claim or one brought with an improper purpose. Courts already have that authority. *See* Super. Ct. Rule 11; *Jung v. Jung*, 844 A.2d at 1107 (describing the American Rule and its bad faith exception). *Cf. Newman*, 390 U.S. at 402 n.4 ("If Congress' objective had been to authorize the assessment of attorneys' fees against defendants who made completely groundless contentions for purposes of delay, no new statutory provision would have been necessary . . . .").

The consideration of a plaintiff's subjective intent in determining whether fees should be awarded would render § 16-5504(a) very difficult to administer. *Cf. Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. at 791 ("Nor does the central issue test have much to recommend it from the viewpoint of judicial administration of § 1988 and other fee shifting provisions. By focusing on the subjective importance of an issue to the litigants, it asks a question which is almost impossible to answer. . . ."; questions raised by the test appear "to depend largely on the mental state of the parties" and are "wholly irrelevant to the purposes behind the fee shifting provisions, and promise[] to mire district courts entertaining fee applications in an inquiry which two commentators have described as 'excruciating.'"). Indeed, as shown in Part III of this Argument, Judge Ross's conclusion that Ms. Burke had a reasonable basis to pursue her lawsuit and was acting solely to recover damages for injuries she suffered ignores a number of factors relevant to that inquiry. A focus on whether a particular plaintiff had a subjective intent to punish speech will inevitably yield idiosyncratic answers.

Finally, Judge Ross relied on case law under New York's Anti-SLAPP law – which he described as "similar to the D.C. Anti-SLAPP Act" (App. 267-68) – to support his conclusion that fees "may be recovered only upon a showing that a frivolous claim has been made against defendants." App. 268. Judge Ross did not cite New York's "similar" law, and with good reason. It specifically limits fee-shifting to instances where "the action involving public petition and participation was commenced or continued without a substantial basis in fact and law, and could not be supported by a substantial argument for the extension, modification or reversal of existing law." N.Y. Civil Rights Law § 70-a(1)(a) (McKinney 2011). The D.C. Council chose not to adopt such language for prevailing moving parties (although it did choose to adopt something similar for prevailing responding parties). This is a reason to interpret D.C.'s law differently.

B. The Trial Court Improperly Considered The Motivations of Zujua's Attorneys

Judge Ross also decided to deny Zujua's motion because "[Zujua's] counsel needed no incentive to take on Defendant's case." App. 270. He then quoted CIR's Internet website to the effect that it carefully selects its cases to achieve its goal of advancing individual liberty, and concluded that "[Zujua's] counsel actively pursue this type of litigation to further their own self-interest and need no encouragement to do so." *Id.* Considering the motivation of Zujua's attorneys was improper and an abuse of discretion.

The first thing to note about this ruling is that it flatly contradicts Judge Ross's prior analysis about the purpose of the attorney fees provision in the Anti-SLAPP statute. After listing

a series of possible purposes for the provision (App. 266), Judge Ross concluded that "the purpose for awarding fees to a prevailing party in a D.C. SLAPP action is to discourage those seeking to chill protected speech by imposing the litigation costs on the party that files a SLAPP suit." *Id.* 267. Of course, if that is so, then who the defendant's attorneys happen to be, or what their motivation for representing the defendant might be, is irrelevant. Judge Ross never bothered to reconcile this inconsistency.

In any event, the focus on the motivation of Zujua's attorneys ignores the words of the statute. Section 16-5504(a) states that "a court may award a moving *party* who prevails" (emphasis added) costs and fees. Again, this is completely consistent with innumerable federal fee-shifting provisions upon which § 16-5504(a) was modeled. They state that it is the party, and not the attorneys, who is entitled to fees. And case law interpreting those provisions emphasizes just that. *E.g.*, *Venegas v. Mitchell,* 495 U.S. 82, 87-88 (1990) (holding that it is the party, not the lawyer, who is eligible for attorneys' fees); *Astrue v. Ratliff,* 560 U.S. 586, 598 (2010) (same under EAJA); *Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co.,* 76 F.3d 114, 116 (7th Cir. 1996) ("[T]he litigant [rather than the attorney] owns the [fee] award" under ERISA).

This Court has held that parties represented by attorneys working *pro bono* are entitled to reasonable fees under fee-shifting provisions. *E.g.*, *Natural Motion By Sandra, Inc. v. District of Columbia Comm'n On Human Rights*, 726 A.2d 194, 197 n.6 (1999) ("[T]his court has consistently held that attorney's fees are recoverable for *pro bono* counsel. . . . The Supreme Court also has concluded that whether plaintiff was represented by private counsel or a non-profit legal services organization is irrelevant to the calculation of fee awards"), and cases cited therein.

Judge Ross claimed that he was "not seeking to penalize [Zujua] because of counsel's motivation," App. 270, but that is exactly what he did. Indeed, his analysis would make it all but impossible for a party represented by a public interest law firm to recover fees under § 16-5504(a). By their nature, public interest law firms have a vision of the public good and work to achieve it by litigating cases consistent with it. If that militated against an award of fees, it would be a substantial hurdle for any public interest law firm to overcome.

Moreover, Judge Ross's reasoning could hardly be limited to public interest law firms. If a private law firm took a case because of its high profile or the firm's need to fulfill a *pro bono* commitment, or because the client was able and willing to pay reasonable fees regardless of the outcome, one could just as easily say that that firm needed no additional incentive to take on the representation. Like Judge Ross's focus on Ms. Burke's subjective intent in bringing the lawsuit, a rule requiring analysis of attorneys' subjective intent would be difficult to administer and hinder the purposes of the statute.

III. THE TRIAL COURT'S CONSIDERATION OF EVIDENCE WAS FLAWED

Even if the questions of Ms. Burke's or CIR's subjective intent, or whether the lawsuit was frivolous, were proper considerations on Zujua's motion for fees, Judge Ross either ignored or misconstrued relevant evidence, or improperly considered evidence that he should not have, in assessing them. This, as well, was an abuse of discretion.

A. Ms. Burke's Edits

In concluding that Ms. Burke's suit against Zujua was not frivolous or improperly motivated, Judge Ross relied upon the fact that Ms. Burke had corrected Zujua's edits prior to filing suit. App. 261 ("Before bringing this suit Plaintiff saw and removed the false information [Zujua] posted on her Wikipedia page."). Judge Ross did not explain how this fact supported his conclusion. As this Court noted in its prior decision, Ms. Burke's correction, and Zujua's acceptance of the correction, cut *against* Ms. Burke's ability to show that Zujua had the necessary malice. *Burke*, 91 A.3d at 1045 ("Ms. Burke admits that after she apprised Zujua of the problems with the paragraph, he apparently accepted the correction and did not seek to re-publish the information. This too demonstrates a lack of malice.").

B. The Settlement Negotiations

Judge Ross also relied on Ms. Burke's recitation of settlement discussions to support his conclusion that she acted in good faith. App. 261-62. Since such evidence was inadmissible as a matter of law, Judge Ross abused his discretion in doing so.

According to Judge Ross, Ms. Burke "was . . . willing to dismiss the lawsuit regarding [Zujua] and proposed a settlement that would not require [Zujua] to reveal his identity." App. 261. *See also id*. 258. Astonishingly, Judge Ross claimed that "[Zujua's] counsel did not object to [Ms. Burke's] representations regarding the nature of the settlement offer." *Id.* Nothing could be further from the truth.

Zujua objected to the submission of any discussions of settlement, citing this Court's

opinion in *Lively v. Flexible Packaging Association*, 930 A.2d 984 (D.C. 2007). App. 205. In *Lively*, this Court concluded that the trial court had abused its discretion in considering statements made during a settlement negotiation to support its conclusion that the moving party's billing records were unreliable and that such unreliability required a reduction in the award of attorneys' fees. This Court held that its "case law provides . . . that as a general rule, statements and admissions made by a party during the course of settlement negotiations are not admissible at trial." *Id.* at 994. The "purpose behind the rule" is to "'encourage unfettered dialogue in negotiations, so as to further the underlying policy favoring out-of-court settlement of disputes.'" *Id.* (quoting *Wayne Insulation Co. v. Hex Corp.*, 534 A.2d 1279, 1281 (D.C. 1987)). Here, Ms. Burke used her attorney's statements during settlement negotiations to bolster her claim that she acted in good faith and to resist Zujua's claim for costs and fees. And she used Zujua's rejection of her offer to suggest that he must be associated with Blackwater. Under *Lively*, the settlement negotiations should not have been admitted.

Moreover, Zujua disputed Ms. Burke's description of the negotiations. App. 211-12 (¶ 2). He asserted that Ms. Burke did *not* simply offer to dismiss the case upon the submission of a statement by Zujua that he was not acting "at the direction or suggestion of others, paid or otherwise," App. 197 -- and what a "suggestion" would constitute, and who "others" might be, was never resolved. In addition, she wanted an "enforcement mechanism" whereby she could reopen the lawsuit if she decided, at her own discretion, that Zujua was associated with Blackwater. App. 211-12 (¶ 2). Again, Judge Ross completely ignored this evidence.

Further, Judge Ross did not try to reconcile his understanding of the settlement negotiations with his assertions that Ms. Burke's lawsuit was "intended to vindicate her legally

cognizable rights." App. 269. *See also id*. 263 ("[Ms. Burke] filed what she believed to be a meritorious suit to recover for the harm caused by the false statements made via anonymous Wikipedia edits."); *id.* 177 (Ms. Burke's memorandum stating that she filed the suit only for the purpose of "seeking monetary redress for the defamation"). But if her lawsuit was simply a good-faith attempt to make herself whole, why would she drop it for nothing? The settlement negotiations trope, even putting it in the best light for Ms. Burke, would support the conclusion that the lawsuit was a vendetta against Blackwater or her other enemies rather than a good-faith effort to make Ms. Burke whole.

C. Zujua's So-Called "Association" With Blackwater

Judge Ross's conclusion that Ms. Burke's lawsuit was non-frivolous and properly motivated also relied upon his analysis that she had a reasonable basis for believing that Zujua was associated with Blackwater. App. 262-63 (Ms. Burke "set forth a plausible argument that she had reason to believe [Zujua] was acting as an agent for Blackwater."); *id.* 272 (Ms. Burke "had reason to believe that Blackwater had set out to defame her because of threats made to her by a Blackwater agent, Mr. Prince."). In so doing, he adopted Ms. Burke's own insistent assertion that she was reasonable in this belief – *id.* 176-77 ("Plaintiff Burke reasonably believes (and continues to believe) that the Wikipedia editor or editors were acting as agents for Prince") – and implicitly rejected this Court's finding that Ms. Burke had only an "unsubstantiated suspicion" that Zujua was associated with Blackwater. *Burke*, 91 A.3d at 1043.

Moreover, Judge Ross's analysis only serves to vindicate this Court's conclusion. Judge Ross asserted that Ms. Burke had a reasonable basis for believing that Zujua was acting on behalf

of Blackwater and/or its principals because one of its principals had threatened her. App. 272. But the syllogism – Blackwater does not like me, and therefore anyone who does anything bad to me is probably associated with Blackwater – is hardly a paragon of logic. It makes no sense at all for a litigant who submitted evidence (from her husband) that she has "her share of detractors." App. 191. Nor did Judge Ross explain why any possible enemy would post something to a Wikipedia page that was, at best, contradictory and confused. *Burke*, 91 A.3d at 1044 ("it seems far from clear that Zujua's revisions to Ms. Burke's Wikipedia page even constitute a defamatory statement"); *id.* at 1045 ("the edits seem to suggest confusion or honest mistake").

Finally, Judge Ross never bothered to answer the obvious question that his (and Ms. Burke's) analysis raised: if Ms. Burke had a reasonable basis for believing that Blackwater or Erik Prince orchestrated the Wikipedia edits, *why didn't she just sue them*? The equally obvious answer is that she had no such basis, her protestations to the contrary notwithstanding.

D. The Post-Remand Proceedings

In reaching his conclusion that Ms. Burke's lawsuit was reasonable and filed in good faith, Judge Ross made no mention of the fact that she continued with the lawsuit – and continued to keep the specter of liability over Zujua – even after this Court's ruling. She twice filed for extensions of time to serve the defendants (including Zujua) – despite this Court's conclusion that it was "far from clear" that the Wikipedia edits had a defamatory meaning. *Burke*, 91 A.3d at 1044. Indeed, she did so despite her own concession that this Court's holding made her defamation suit "difficult . . . to win." App. 176 ("this holding [that D.C.'s Anti-SLAPP statute is applicable], 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").[3] And she did so without complying with Super. Ct. Rule 4(m). If frivolousness or improper motivation were appropriate considerations at all on Zujua's motion for fees, this post-remand litigation should at least have been mentioned. *See* Super. Ct. Rule 11(b) ("presenting to the court" includes "later advocating"); *Jung*, 844 A.2d at 1108 ("Bad faith may be found either in the initiation of a frivolous claim or in the manner in which a properly filed claim is subsequently litigated.").

E. CIR's Motivation

Finally, assuming *arguendo* (and contrary to law) that the motivation of Zujua's counsel is a relevant consideration, Judge Ross's reliance on Internet postings was also error. Zujua submitted an affidavit from his attorney that CIR had not emphasized this lawsuit in its fundraising or other communications with donors. App. 212 (¶ 4). That testimony is relevant to CIR's motivations in taking the case, and is entitled to as much weight as the result of a trial court's Google searches. Judge Ross made no mention of that testimony.

IV. THIS COURT SHOULD ORDER THAT ZUJUA'S MOTION BE GRANTED AND AWARD APPROPRIATE POST-MOTION FEES

As noted previously, Zujua's motion carefully analyzed the attorney time spent on the special motion to quash and, exercising billing judgment, reduced those hours in several different ways. Ms. Burke's opposition did not dispute the reasonableness of using the Laffey Matrix for

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[3] Of course, since they were based on the same underlying contention of false Wikipedia edits, both the D.C. Anti-SLAPP statute and the First Amendment would apply to Ms. Burke's other claims for relief just as they do to her defamation claim. *See also* discussion *supra* at 2 (all three claims based on allegations that statements were "false" and "defamatory").

rates and offered no specific opposition to the time spent. *See* Statement of Facts, Part C. Accordingly, this Court should order that Zujua's motion for attorney fees of $ 186,537 be awarded for work up through October 1, 2014.

Moreover, in order to avoid having this request for fees devolve into a second litigation, this Court should exercise its option of having fees incurred since October 1, 2014, to the extent that they relate to Zujua's efforts to recover fees, resolved in this Court. *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992) ("interest in avoiding burdensome satellite litigation"); *General Federation of Women's Clubs v. Iron Gate Inn, Inc.*, 537 A.2d 1123, 1129 (D.C. 1988) ("The law is well established that, when fees are available to the prevailing party, that party may also be awarded fees on fees, *i.e.*, the reasonable expenses incurred in the recovery of its original costs and fees."); *Gay Officers Action League*, 247 F.3d at 299 ("We could . . . remand for a new calculation. . . . But remand is not obligatory . . . .").

Conclusion

For the foregoing reasons, this Court should reverse the order denying Zujua's motion, order that he be awarded $186,537 for costs and fees incurred up through October 1, 2014, and set forth a procedure for determining relevant fees incurred after that date.

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Certificate of Service

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Addendum

Chapter 55. Strategic Lawsuits Against Public Participation.

§ 16-5501. Definitions.

For the purposes of this chapter, the term:

(1) “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; or

(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

(2) “Claim” includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.

(3) “Issue of public interest” means 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.

(4) “Personal identifying information” shall have the same meaning as provided in § 22-3227.01(3).

§ 16-5502. Special motion to dismiss.

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

(c)(1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to

dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

§ 16-5503. Special motion to quash.

(a) A person whose personal identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest may make a special motion to quash the discovery order, request, or subpoena.

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personal identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

§ 16-5504. Fees and costs.

(a) 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.

(b) 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.

§ 16-5505. Exemptions.

This chapter shall not apply to any claim for relief brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is:

(1) A representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services; and

(2) The intended audience is an actual or potential buyer or customer.