SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SUSAN L. BURKE,	:	
Plaintiff,	:	Civil Action No. 2012 CA 007525 B
v.	:	
JOHN DOE No. 1 (using the name "Zujua"), et al.,	:	The Hon. Maurice Ross
Defendants.	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DOE No. 1'S MOTION FOR ATTORNEYS' FEES

John Doe No. 1 submits this memorandum of law in support of his motion, pursuant to Superior Court Rule 54(d)(2) and DC Code § 16-5504, for an award of attorneys' fees incurred in prevailing on his special motion to quash plaintiff's subpoena, brought under DC Code § 16-5503. In addition to this memorandum, Doe No. 1 also submits the accompanying statements of Michael E. Rosman ("Rosman St."), Christopher Hajec ("Hajec St."), and Arthur B. Spitzer ("Spitzer St.") in support of his motion.

At first glance, this litigation may appear to have been about the "mere" quashing of a subpoena - a minor, even routine matter. It was anything but that. The quashing of the subpoena

was necessary for the peace of mind of an anonymous Wikipedia editor who found himself the target of a classic SLAPP suit. This litigation was also important in another way: it was, and was widely recognized to be, a complex, precedent-setting case, in which several issues of first impression in the interpretation of an important civil rights statute were settled in a lengthy, unanimous opinion of the District of Columbia Court of Appeals. The litigation received national press attention, including three in-depth articles in the *National Law Journal*.

Not only was movant's anonymity protected, but his litigation served the public by clarifying and strengthening DC's Anti-SLAPP Act with precedents ensuring that it would work effectively.

BACKGROUND

A. DC's Anti-SLAPP Statute

Plaintiff's lawsuit against Doe No. 1 is just the sort of action the anti-SLAPP statute, as reflected in its legislative history, was designed to check. The Committee on Public Safety and the Judiciary of the District of Columbia Council, in its Committee Report on the anti-SLAPP bill (attached as an exhibit to Doe No. 1's response, dated March 18, 2013, to the Order to Show Cause issued by the District of Columbia Court of Appeals)

("Committee Report") explained the purpose of that bill as follows:

> [SLAPP] cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantial amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

Committee Report at 1. SLAPP suits against "John Doe" defendants can be particularly effective at chilling free debate. *See id.*, Attachment 2 at 2 ("The lawsuit[s] often name[] 'John or Jane Doe defendants. We have found whole communities chilled by the inclusion of Does, fearing "they will add my name to the suit."'") (quoting George W. Pring and Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* (Temple University Press, 1996), at 151.

Because of this chilling effect on vitally important free speech rights, the District of Columbia structured its anti-SLAPP statute to provide defendants protection not from liability, but from the burden of litigation itself. Committee Report at 4 ("[I]n recognition that SLAPP appellees frequently include unspecified individuals as defendants - in order to

intimidate large numbers of people that may fear becoming named defendants if they continue to speak out - the legislation provides an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893."); *id.*, Attachment 2 (Spitzer testimony) at 3 ("*Litigation itself* is the appellee's weapon of choice; a long and costly lawsuit is a victory for the appellee even if it ends in a formal victory for the defendant.").

B. This Action

1. *The Initial Complaint And This Court's Denial Of Doe No. 1's Motion To Quash*

In her Complaint, plaintiff alleged that Doe No. 1 made an erroneous edit to her Wikipedia page in January 2012. She also alleged that she removed the erroneous bolded language in February 2012 (one month after the edit complained of). Complaint ¶¶ 6, 8. The Complaint makes no further allegations against Doe No. 1.

Plaintiff further alleged in her Complaint that "Blackwater or its owners" were behind Doe No. 1's edit. Complaint ¶ 15. Her only basis for this assertion was that Erik Prince had once said to her, "I'm coming after you." *Id.*

Plaintiff filed the Complaint on September 19, 2012. Shortly thereafter, plaintiff issued a subpoena to the Wikimedia Foundation seeking information that would help her determine the identity of defendant John Doe No. 1. Doe No. 1's Emergency Motion for a Stay Pending Appeal, filed in this Court on January 31, 2013 ("Sup. Ct. Stay Mot."), Exhibit A. On December 10, 2012, Doe No. 1 moved in this Court to quash the subpoena pursuant to D.C.'s anti-SLAPP statute. On January 30, 2013, after a hearing on the motion, this Court issued an order denying it ("Order").

2. *The Appeal To The District Of Columbia Court Of Appeals*

An extensive course of litigation followed this denial. Doe No. 1 filed a notice of appeal of this Court's order on January 31, 2013. On February 25, 2013, the DC Court of Appeals issued an Order to Show Cause why it had jurisdiction to hear Doe No. 1's appeal, to which Doe No. 1 filed a response on March 18. On February 28, plaintiff filed a motion to dismiss in the DC Court of Appeals, claiming that that Court lacked jurisdiction over the appeal. Doe No. 1 filed an opposition to that motion on March 12, and plaintiff filed a reply on March 15.

On January 31, 2013, Doe No. 1 also filed an emergency motion in this Court for a stay pending appeal of its Order.

This Court denied this motion on March 8. On March 11, Doe No. 1 moved in the DC Court of Appeals for a stay pending appeal.

On April 2, the DC Court of Appeals issued an order both granting Doe No. 1's motion for a stay and accepting the parties' papers on plaintiff's motion to dismiss as briefs in the appeal, subject to any further briefing that might be ordered.

On September 6, the DC Court of Appeals issued an order for supplemental briefing on the merits of this Court's January 30 Order denying Doe No. 1's motion to quash. After that briefing was completed, oral argument was scheduled for January 29, 2014, and held on that date. On May 29, 2014, the DC Court of Appeals issued a 32-page opinion that reversed this Court's January 30 Order and remanded with instructions to this Court to quash the subpoena. On September 26, 2014, at a status conference in this case, this Court quashed the subpoena by an oral order made on the record. Hajec St. ¶ 2.

ARGUMENT

District of Columbia Code § 16-5504(a) provides that "[t]he court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 [providing for a special motion to quash] the costs of litigation, including reasonable attorney fees." This provision was intended to create a presumption in favor of awarding fees.

See Spitzer St. ¶ 2 (stating that the language was chosen to bring the anti-SLAPP statute into line with federal civil rights statutes that courts had routinely held effectively mandated reasonable fee awards, despite "permissive" language); *Eddy v. Colonial Life Ins. Co. of America*, 59 F.3d 201, 205 (D.C. Cir. 1995) (discussing the presumption in favor of fee-shifting in civil rights cases).

Under the law in the District of Columbia governing the awarding of attorneys' fees, fees are more than appropriate in this civil rights case. As the DC Court of Appeals has noted, "it is important that attorneys who are willing to take on civil rights and other public interest work are adequately compensated, or it will be difficult to find competent counsel to handle this important job. The goal is to attract competent counsel for these cases." *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988 (D.C. 2007).

Two other preliminary points deserve emphasis. First, "the party against whom fees will be charged .... is irrelevant." *Link v. District of Columbia*, 650 A.2d 929, 934 (D.C. 1994) (internal citations and quotation marks omitted). Second, whether the party seeking fees was represented by a private for-profit law firm or a public interest law firm working *pro bono* is also irrelevant. *Id.*

I. PLAINTIFF'S LAWSUIT WAS A CLASSIC SLAPP SUIT

Plaintiff filed this defamation action against Doe No. 1, even after his edit had been removed from Wikipedia, on the flimsiest of speculative bases: that "Blackwater or its owners" were somehow behind his edit. She had no evidence of any link between Doe No. 1 and either Blackwater or anyone associated with Blackwater.

In fact, this suit was, and had the effect of, a classic SLAPP: it put fear into those who would dare comment about plaintiff, by making them believe that they, like Doe No. 1, would face losing their anonymity and going to court. The success of Doe No. 1's attorneys in quashing plaintiff's subpoena, therefore, was just the sort of action DC's Anti-SLAPP Act was designed to facilitate; and deterring suits like plaintiff's here was an important purpose of its fee provision.

Accordingly, the effectiveness of that deterrent, and thus, again, the strength of DC's Anti-SLAPP Act, is at stake in this petition for fees. *See, e.g., Peddlers Square, Inc. v. Scheuermann,* 766 A.2d 551, 558 (D.C. 2001) (stating that one factor in awarding fees under Rule 11 for filing a frivolous claim was the "amount that will serve to adequately deter the undesirable behavior") (internal quotation marks omitted).

II. THIS LITIGATION DEVELOPED INTO AN IMPORTANT CIVIL RIGHTS CASE

Attorneys' fees also are appropriate here because of the importance that this case came to assume. The litigation received national press attention, including three in-depth articles in the *National Law Journal*. Zoe Tillman, Lawyer Wants Wikipedia Editor's Identity Revealed, National Law Journal, Sept. 9, 2013; Zoe Tillman, D.C. Appeals Court Mulls Line between Lawyer and "Public Figure", National Law Journal, Jan. 29, 2014; Zoe Tillman, Anonymous Web Editor Defeats Unmasking Effort, National Law Journal, June 2, 2014. A number of prominent organizations submitted *amicus* briefs, including the American Civil Liberties Union of the Nation's Capital, the Reporters Committee for Freedom of the Press, Gannett Co., Inc., and the Washington Post. The DC Court of Appeals took the unusual step of granting one group of *amici* time at oral argument. *See, e.g., Eddy,* 59 F.3d at 205 ("[T]he presumption favoring fee-shifting in civil rights cases reflects the unique importance of the enforcement of these statutes to the nation as a whole, as well as to their direct beneficiaries"); *Village of Kaktovik v. Watt,* 689 F.2d 222, 225 (D.C. Cir. 1982) ("[C]ourts are allowed to award attorneys' fees to parties who have substantially contributed to the goals of the underlying statute. Whether such a substantial contribution was made is to

hinge on the importance, complexity, and novelty of the issues raised, and on the aid rendered in interpreting and implementing the act") (internal citations, footnotes, and quotation marks omitted); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970) (upholding fee award to prevailing parties in a shareholders' action to stop a merger in part because of "the importance of fair and informed corporate suffrage").

III. THE ISSUES IN THIS CASE

Traditionally, the "time and labor required, [] the novelty and difficulty of the question, [and] the skill requisite to perform the legal service properly" have been considered in awarding fees. *Alexander v. District of Columbia Rental Housing Com'n*, 542 A.2d 359, 361 (D.C. 1988). Each of these factors, considered in each of the multiple issues in this case, militates strongly in favor of a reasonable fee award.

Ultimately, the DC Court of Appeals ruled that Doe No. 1 was entitled to have the subpoena seeking his identity quashed, if the Anti-SLAPP Act was to function as intended to protect his and others' important First Amendment rights to anonymous speech on public issues. But Doe No. 1 had to prevail on several close issues to reach that result, and plaintiff opposed him vigorously on all of them. Indeed, this court, in its Order denying the motion to quash, agreed with all of plaintiff's contentions. Further, on appeal, Doe No. 1 had to overcome the

presumption against piecemeal appeals and demonstrate that the Court of Appeals had jurisdiction to hear an interlocutory appeal of the denial of Doe No. 1's motion. This issue, too, was close and hard-fought; the resulting decision of the Court of Appeals, concluding that it had such jurisdiction, depended substantially on the importance of the underlying rights protected in the anti-SLAPP statute.

The case in the DC Court of Appeals involved a host of separate procedures, each of which Doe No. 1 had to succeed on to stop plaintiff from obtaining his personally identifying information: (a) the *sua sponte* order of the Court of Appeals to show cause on jurisdiction, (b) plaintiff's motion to dismiss on jurisdiction grounds, (c) Doe No. 1's emergency motion for a stay pending appeal,[1] and (d) the substantive merits of the appeal.

The many aspects of the appeal, and the tasks that were necessary in each phase if Doe No. 1 was to prevail, are discussed in the attached statement of Michael Rosman and its exhibits. This section will be focused on the issues that plaintiff's attorney's vigorous advocacy, this Court's Order,

[1] After this Court decided Doe No. 1's motion to quash, the Wikimedia Foundation indicated that it would comply with the subpoena. Sup. Ct. Stay Mot., Exhibit thereto. This possibility necessitated correspondence and phone calls with Wikimedia's counsel, the unsuccessful emergency motion to stay in this Court, and the successful emergency motion to stay in the DC Court of Appeals.

and the Court of Appeals made it necessary for Doe No. 1 to litigate.

1. Whether DC Code § 16-5503 applied

In Doe No. 1's moving papers in this Court on the special motion to quash, he argued that § 16-5503 applied to the facts of this case. Doe No. 1's Memorandum in Support of his Special Motion to Quash ("Doe No. 1's Mot.") at 9-10. In response, plaintiff argued that because Doe No. 1 had put in no evidence that he lacked a commercial motivation for his speech, he had failed to meet his prima facie burden of showing that the statute applied. Plaintiff's Response to Doe No. 1's Special Motion to Quash ("Pl's Resp. to Doe No. 1's Mot.") at 8-9. Doe No. 1 replied to this argument as best he could, citing strong free speech grounds disfavoring plaintiff's view. Doe No. 1's Reply on his Motion ("Doe No. 1's Reply") at 12-13. This Court was unpersuaded, and in its Order agreed with plaintiff that Doe No. 1 had failed to make a prima facie case that the statute applied by failing to show his lack of commercial motivation. This ground alone was sufficient to deny the special motion to quash.

On appeal, plaintiff expanded on her commercial motivation argument, Plaintiff's Supplemental Brief on the Merits ("Pl's Merits Br.") at 23-24, and Doe No. 1 made an expanded response to it. Doe No. 1's Merits Reply Brief at 12-14. The Court of

Appeals agreed with Doe No. 1 on this issue, *Doe No. 1 v. Burke*, 91 A.3d 1031, 1043-44 (D.C. 2014), thus deciding in his favor an important issue of first impression, one vital to the strength of the protection § 16-5503 gives to anonymous speech: as the Court of Appeals put it, "it would turn the statute on its head if a party seeking a special motion to quash had to reveal his professional affiliation or other identifying information to disprove a disqualifying commercial motivation." *Id.* at 1043.

2. Whether plaintiff was a public figure

For Doe No. 1 to prevail, it was probably necessary that plaintiff be held to be a public figure, so that Doe No. 1 would have the benefit of the malice standard. Plaintiff denied being a public figure, and argued that she was acting merely as a private attorney in her Blackwater case. Pl's Resp. to Doe No. 1's Mot. at 6-8. This response necessitated extensive research by Doe No. 1's counsel to identify plaintiff's public activities and also extensive legal research to find cases in which lawyers had been found to be public figures. *See* Doe No. 1's Reply at 4-12. This Court again was unpersuaded, and found that plaintiff was not a public figure.

On appeal, this close, doubtful, and crucial question was hotly contested. In the end, the Court of Appeals agreed with Doe No. 1, holding that plaintiff is a public figure. *Burke*, 91 A.3d at 1042. The discussion by the Court of Appeals of this

issue was extensive, *id.* at 1041-43, and its holding on it was itself a significant precedent in the law of the First Amendment.

3. Malice

Even if the previous three issues were decided Doe No. 1's way, it was still necessary for him to obtain a ruling that plaintiff was unlikely to show that he edited with malice. Indeed, plaintiff argued forcefully that malice was obvious since the article Doe No. 1 had cited to in support of his edit made no mention of plaintiff. Pl's Merits Br. at 25-26. Nonetheless, the DC Court of Appeals agreed with Doe No. 1 on this final, crucial issue. *Burke,* 91 A.3d at 1045.

4. Jurisdiction

After Doe No. 1 filed his notice of appeal, the DC Court of Appeals issued an order to show cause why it should not dismiss the appeal for lack of jurisdiction to hear it prior to a final judgment on the merits. After this order was issued, plaintiff moved to dismiss the appeal on jurisdictional grounds. Doe No. 1's main argument on the jurisdiction question was that the denial of his special motion to quash was appealable under the collateral order doctrine because of the importance of the right to anonymous speech protected by the DC anti-SLAPP statute. Doe No. 1's Response to Plaintiff's Motion to Dismiss at 14-19. Plaintiff made arguments in reply, Plaintiff's Reply on her

Motion to Dismiss at 4-5, but in the end the Court of Appeals adopted Doe No. 1's analysis, devoting an extensive portion of its opinion to supporting its holding that it had jurisdiction under the collateral order doctrine, in large part because of the importance of the right to anonymous speech. *Burke,* 91 A.3d at 1036-40. This, too, was an issue of first impression under this statute.

V. REASONABLE FEES

The attached statement of Michael Rosman sets forth the hours Doe No. 1's attorneys devoted to this case, makes reasonable reductions in these hours, applies the "lodestar" method - *viz.*, multiplies the number of hours reasonably expended by counsel by a reasonable hourly rate - and uses the *Laffey* Matrix to determine that rate according to the experience level of the various attorneys. *See, e.g., Lively,* 930 A.2d at 988-89 ("In the District of Columbia, it has been traditional to apply the so-called *Laffey* Matrix") (internal citations and quotation marks omitted); *Campbell-Crane & Associates, Inc. v. Stamenkovic,* 44 A.3d 924 (D.C. 2012); *id.* at 947 ("We have held that the appropriate means to determine reasonable attorneys' fees is for the trial court to determine [] the so-called lodestar - the number of hours reasonably expended by counsel multiplied by a reasonable hourly rate") (internal quotation marks omitted). *See also 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"). Under this customary "lodestar" method, the total amount of fees is $186,537.

* * *

It is worth reemphasizing that all four of the above issues had to be decided Doe No. 1's way for him to prevail, that each one of them was hard-fought, that each one of them was a close question, on which reasonable legal minds could differ, and that the holdings resolving two of them were significant precedents, under the First Amendment, in themselves. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) ("[E]rroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space that they need to survive") (internal citations and quotation marks omitted). In prevailing, therefore, Doe No. 1 did not merely prevail in quashing the subpoena; he significantly advanced the law and strengthened the DC Anti-SLAPP Act. The effort required to achieve such results deserves compensation by an award of reasonable attorneys' fees.

CONCLUSION

For all of these reasons, Doe No. 1's motion for attorneys' fees should be granted.

Respectfully submitted,

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