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.	:	

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

John Doe No. 1 submits this reply memorandum of law, along with the accompanying reply statement of Michael E. Rosman, in further support of his motion, pursuant to D.C. Code § 16-5504, for an award of attorneys' fees incurred in prevailing on his special motion to quash plaintiff's subpoena, brought under D.C. Code § 16-5503.

I. INTRODUCTION

In opposing Doe No. 1's motion for fees, Susan Burke puts herself squarely at odds with the ruling of the District of Columbia Court of Appeals in this very case.

Specifically, according to the Court of Appeals, it is "far from clear" that Doe No. 1's edit about Burke was even

defamatory, because it "appears barely coherent" to "anyone with a basic understanding of the distinction between a civil suit and a criminal prosecution." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1044 (D.C. 2014). Attorney Susan Burke nonetheless continues to insist that she has been defamed. Statement of Susan L. Burke ¶ 1 (asserting that she was harmed financially "as a result of these defamatory statements"); Declaration of Jamison Koehler ¶ 7 ("When the anonymous poster .... defamed my wife .... "); Burke's Opposition Memorandum ("Opp. Memo.") at 4 (falsely asserting that Doe No. 1 was represented to plaintiff as "an innocent person who posted defamatory statements merely as a hobby"), 5 (arguing that a denial of costs and fees will balance First Amendment rights "and protecting person harmed by intentional defamation"). Similarly, according to the Court of Appeals, Burke's belief that Doe No. 1 was associated with Blackwater was an "unsubstantiated suspicion." *Burke*, 91 A.3d at 1043. But Burke continues to insist that her belief in the Blackwater connection is "reasonable." Opp. Memo. 3-4 ("Burke reasonably believes (and continues to believe) that the Wikipedia editor or editors were acting as agents for [Blackwater founder Erik] Prince.").[1]

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[1] This "reasonable" belief appears to be based on the following syllogism. Blackwater does not like Ms. Burke. Therefore, anyone who criticizes her - or even appears to criticize her - must be associated with Blackwater. To state

Ms. Burke, of course, is free to disagree with the Court of Appeals and reject its conclusions. This Court does not have that option.

II. THIS COURT'S DISCRETION IS LIMITED

Contrary to Burke's suggestion (Opp. Memo. at 2) that this Court has unfettered discretion to deny fees to Doe No. 1 altogether, the legislative history of § 16-5504 shows that its discretion to do so is limited. As explained in Doe No. 1's opening papers (*see* Spitzer Statement), the word "may" was used in place of "shall" in that provision to harmonize it with other D.C. and federal statutes that had been construed for years, despite their use of the term "may," to all-but-require that fees be awarded to eligible parties. Such harmonization was intended to make the same construction applicable to § 16-5504, while avoiding the implication, which would have arisen had "shall" been used, that it was no longer a valid construction of these other statutes.

III. BURKE'S DISCLAIMER OF BAD INTENT MISSES THE MARK

The anti-SLAPP statute never defines the term "strategic lawsuit against public participation." Rather, it provides the means for defendants engaged in public controversies to free

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this logic is to refute it. *See also* Exhibit to Koehler Declaration ("It is not surprising that, along with the fans, her high-profile public interest and human rights cases have also attracted her share of detractors").

themselves from meritless lawsuits based on their speech in such controversies. A party's entitlement to fees depends on whether he has prevailed under the terms of the statute. D.C. Code § 16-5504. Burke cites no authority for the proposition that a further inquiry should be made into her subjective intent in bringing her particular meritless lawsuit.

In any event, the purpose of Burke's lawsuit, by her own admission, was directly contrary to the purpose of D.C. Code § 16-5503, the special motion to quash provision Doe No. 1 prevailed under: to protect the important First Amendment right to anonymous speech on matters of public interest. By her own account, she sought to unmask Doe No. 1 in hopes of quelling or possibly supporting her "unsubstantiated suspicion" (*Burke*, 91 A.3d at 1043) that Blackwater was behind his edit. Opp. Memo. at 3-4.

Furthermore, basing a lawsuit on an "unsubstantiated suspicion" amounts to the kind of sanctionable litigation that would warrant fees even in the absence of the SLAPP statute. Sup. Ct. Rule 11(b)(1),(3) (providing that the signature of an attorney on a pleading, written motion, or other filing certifies that "it is not being presented for an improper purpose" and that the "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable

opportunity for discovery"). Because Doe No. 1 used the special motion to quash provision for *its* intended purpose - to fend off a meritless lawsuit designed to infringe on his important right to anonymous speech on matters of public concern - his entitlement to fees is clear.

IV. BURKE'S EVIDENCE OF POSITIONS TAKEN IN SETTLEMENT IS INADMISSIBLE, AND IN ANY EVENT STRENGTHENS THE CASE FOR FEES

Burke's evidence about settlement discussions (O'Neil Statement ¶¶ 1-7; Opp. Memo. at 4-5) is inadmissible in this context and should be stricken. *Lively v. Flexible Packaging Ass'n,* 930 A.2d 984, 993-94 (D.C. 2007) (holding, in accordance with D.C. case law and Federal Rule of Evidence 408(a)(1), that the trial court had abused its discretion by reducing a fee award based on evidence from settlement negotiations).[2]

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[2] Similarly, a great amount of the other evidence Burke submits with her opposition is not only irrelevant, but inadmissible hearsay. *See, e.g.*, Burke Statement ¶ 5 (stating that unnamed persons, after she had filed this suit (she does *not* say how long after), told her that Erik Prince had paid to have her followed); ¶ 3 (stating that another unnamed individual, at an unspecified time, had told her about the practice of creating an illusion of spontaneous commentary about an issue in social media); ¶ 2 (stating that unnamed witnesses had told her about Erik Prince's business practices); ¶ 1 (stating client told her she was uncomfortable with her because she had been sanctioned by a federal judge). *See, e.g, O'Donnell v. Associated General Contractors of America, Inc.*, 645 A.2d 1084, 1089 (D.C. 1994) (holding an out-of-court statement by an unnamed person inadmissible on summary judgment because it was "pure hearsay").

In any event, though Burke complains that Doe No. 1 declined to settle this lawsuit on her terms, she herself could have ended her suit against him at any time, simply by dismissing him from the case. Despite having no evidence that he was associated with Blackwater, she pursued her lawsuit. Moreover, Burke was a dedicated opponent of the anti-SLAPP act before the Court of Appeals, arguing, *inter alia*, that denials of special motions to quash are unappealable and seeking to burden anonymous defendants who would make such motions with the crippling requirement that they first disprove commercial motivation for their speech. Burke had every right to make such arguments, and to seek to weaken the anti-SLAPP act because she disagreed with its emphasis or the policy behind it (or for any other reason), but her voluntarily-undertaken and unsuccessful effort to weaken the Act is hardly an argument that she should be exempt from fees under it.

V. BURKE'S ATTACK ON THE AMOUNT OF FEES IS INADEQUATE

Burke's attack on the amount of fees Doe No. 1 seeks is notably lacking in specificity. Aside from generally noting billings for "a significant number of internal meetings amongst" Doe No. 1's counsel, and even then offering no explanation for why such billings should be considered unreasonable, Burke merely claims that the amount sought is "unreasonable on its face" and reflects wholly-unspecified "inefficiency and

overbillings." Opp. Memo. at 7. Such utter lack of specificity provides no ground for reducing a fee award. *See, e.g., Frazier v. Franklin Inv. Co., Inc.,* 468 A.2d 1338, 1341 (D.C. 1983) ("The failure to articulate the reasons for a particular fee award renders the trial court's determination effectively unreviewable and has been held to constitute an abuse of discretion warranting reversal.") (citing *Evans v. Sheraton Park Hotel,* 503 F.2d 177, 188 (D.C. Cir. 1974)).

VI. BURKE'S *AD HOMINEM* ATTACK ON DOE NO. 1'S ATTORNEYS IS MISPLACED

Burke's unprofessional assault on the Center for Individual Rights ("CIR") (Opp. Memo. at 6-8) is wholly beside the point. Since the right to attorneys' fees belongs to the party, not his attorneys, the character of the latter has no bearing on whether they should be awarded. D.C. Code § 16-5504 ("The court may award a moving *party* who prevails .... the costs of litigation, including reasonable attorney fees") (emphasis added). *See also, 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); *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"). Whether Doe No. 1 was represented by a private for-

profit firm or Legal Aid lawyers is irrelevant to the propriety of his entitlement to costs and fees.

As for *this* litigation, Burke cannot deny that it served an important public interest as the first significant exposition of the D.C. anti-SLAPP statute by the D.C. Court of Appeals. Indeed, a host of *amici* - including the Reporters' Committee for Freedom of the Press, the American Civil Liberties Union of the Nation's Capital, and the Washington Post - filed a brief in this case in the Court of Appeals. They supported Doe No. 1. (Burke has submitted an affidavit from her husband saying that he and she are regular contributors to the ACLU. Koehler Declaration ¶ 6.) Further, it was Susan Burke who bullied a hapless Wikipedia editor, frightening him away from editing *any* Wikipedia page from the time he learned of the suit until today; in this lawsuit, all CIR did was defend him and advance the interests of the anti-SLAPP statute, supported by a distinguished roster of *amici*.

Burke's political screed against Doe No. 1's attorneys, unsupported by competent evidence, seeks to infect this Court's decision-making with improper bias. Her transparent attempt to influence this Court's judgment is disrespectful and should be rejected.

VII. DISCOVERY ABOUT CIR'S FUNDRAISING IS NOT WARRANTED

Burke seeks "limited discovery" about the amount of donations Doe No. 1's attorneys' employer, CIR, received from fundraising about this case, and to offset the fee award by that amount. Opp. Memo. at 8. This request for discovery should be denied; any such information would be irrelevant. Doe No. 1 has no right to have donations given to his attorneys' employer passed along to him, in whole or in part, and the fee award belongs to him, not to his attorneys. *Venegas, supra; cf. Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 672 F.2d 42, 59 (D.C. Cir. 1982) (holding, for purposes of determining the rate due for Environmental Defense Fund attorneys' work, in light of relevant legislative history indicating that fees were due to parties whose attorneys did not "stand to gain significant economic benefits through participation in the proceeding," that EDF attorneys did not stand so to gain, because EDF was "a public interest group, relying heavily on private donations and attorneys' fees in cases such as this one").

Apart from being pointless, Burke's requested discovery should also be deemed inappropriate in the interests of avoiding a "satellite litigation" over the amount of fees. *See, e.g., City of Burlington v. Dague*, 505 U.S. 557, 566 (1992) (relying on the "interest in avoiding burdensome satellite litigation" in

finding contingency enhancement of fees inappropriate) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 443 (1983)).

CONCLUSION

For all of these reasons, and those stated in Doe No. 1's opening brief, his motion for reasonable attorneys' fees should be granted.

Respectfully submitted,

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