CASE NOS. 21-CV-283; 21-CV-440

In The
District of Columbia
Court of Appeals

GERMAN KHAN, *et al*,

Appellants,

v.

ORBIS BUSINESS INTELLIGENCE LIMITED, *et al*,

Appellees.

ON APPEAL FROM NO. 2018-CA-002667-B
THE DISTRICT OF COLUMBIA SUPERIOR COURT, CIVIL DIVISION,
THE HONORABLE ANTHONY C. EPSTEIN, JUDGE PRESIDING

BRIEF OF APPELLANTS

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Rule 26.1 Disclosure Statement:	Pursuant to Defendant Orbis Business Intelligence Limited's Rule 7.1 Disclosure Statement filed in the Superior Court, its parent company is Orbis Business International Limited and no publicly held corporation owns 10% or more of the stock of either company.

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JURISDICTIONAL STATEMENT

This appeal is from a final order or judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

Special Circumstances

Under the D.C. Anti-SLAPP Act (the "Act"), as previously interpreted by the Court, an award of legal fees to a successful anti-SLAPP movant is not allowed where "special circumstances . . . make a fee award unjust." *Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016).

1. Did the Superior Court impermissibly dilute and/or fail to meaningfully apply this standard by concluding that special circumstances did not exist to make a fee award unjust based on findings that Plaintiffs employed unspecified "aggressive litigation tactics" and had not adduced "substantial" evidence of Defendants' actual malice, especially where the Superior Court ignored the express findings of a British court and U.S. government investigators that the alleged defamatory statements *were false* and Defendants were *at fault* in publishing them?

First Amendment Right to Petition

2. Did the Superior Court impermissibly burden Plaintiffs' First Amendment right to petition by requiring them to pay Defendants' legal fees *without* considering the basis of Plaintiffs' claims or their good faith in asserting them?

D.C. Code § 11-946

3. Did the Superior Court err in holding that D.C. Code § 11-946—which requires complete adherence to the Federal Rules of Civil Procedure, absent prior approval by the Court of Appeals of any other rule(s) that would modify the Federal Rules—did not apply to the Act and its fee shifting rule?

Fees on Fees

4. Did the Superior Court err in awarding Defendants "fees on fees" by: (a) improperly limiting its own broad discretion to deny that application to "special circumstances"; and (b) holding that Plaintiffs should be saddled with Defendants' "fees on fees" even though Plaintiffs opposed the fee application only to raise important legal issues of first impression of statutory interpretation and constitutional dimension?

STATEMENT OF THE CASE

Plaintiffs bring this appeal to challenge two related judgments for legal fees in favor of Defendants, awarded by the Superior Court pursuant to the Act.

Plaintiffs commenced this action to challenge false allegations Defendants made about them. Defendants, after successfully moving under the Act to dismiss Plaintiffs' defamation lawsuit, sought and obtained a judgment for the legal fees they incurred in prosecuting their anti-SLAPP motion.

In opposition, Plaintiffs made the following arguments, all of which they renew on appeal: (1) the unique circumstances surrounding this case, including another court's determination that the alleged defamatory statements published by Defendants *were false*, qualify as "special circumstances" sufficient under the Act to defeat Defendants' fee motion[1]; (2) in light of Plaintiffs' First Amendment right to petition the courts for redress of the defamatory injury, and given that Plaintiffs'

[1] As explained below, the Superior Court's reasons for not finding special circumstances, such as that Plaintiffs used unspecified "aggressive" litigation tactics and the court's statement that Plaintiffs did not adduce "substantial" evidence of actual malice, so diluted the special circumstances test as to neuter it.

claims had a reasonable basis and were brought in good faith, the judgment to pay Defendants' legal fees was unconstitutional; and (3) the Act (including its fee shifting provision) violates D.C. Code § 11-946 because the Act modifies provisions of the Federal Rules of Civil Procedure and as such was required to be, but was not, approved by the D.C. Court of Appeals.

After obtaining an award for the fees they incurred in connection with their anti-SLAPP motion, Defendants moved for and obtained an award for the fees they incurred in prosecuting their fee motion. Plaintiffs challenge that determination on appeal as both an error of law and an abuse of discretion because the court erred by (a) limiting its broad discretion to deny that application to "special circumstances"; and (b) failing to give any weight to the fact that Plaintiffs opposed the fee application only to raise important legal issues of first impression.

STATEMENT OF FACTS

The Underlying Lawsuit

Plaintiffs sued Defendants for defamation based on their publication of statements accusing Plaintiffs of various misdeeds, including the purported bribery of Vladimir Putin in the 1990s (when he was the Deputy Mayor of St. Petersburg). *See* App. at 10, 26-27. The statements are in a so-called "report" known as "Company Intelligence Report 112" ("CIR 112") that, together with several other reports, became known as the "Trump Dossier" and/or the "Steele Dossier"

(collectively, the "Reports"). *See* App. at 11-12. The Reports, separately dated and with different subtopics, were prepared and published before and after the 2016 U.S. presidential election by Defendants: Orbis, an English company, and Christopher Steele, a former British Intelligence officer, and founder and principal of Orbis. *See* App. at 10-11.

CIR 112 and the other reports were prepared at the direction of Fusion GPS, a Washington, D.C. based firm which was conducting political opposition research into Donald Trump in connection with the 2016 presidential election. *See* App. at 21. Defendants published the reports to multiple members of the media, the FBI, and other individuals. *See* App. at 22-23; 190.

Defendants, relying on the Act, moved to dismiss, and the Superior Court granted that motion. Defendants moved for a fee award, but in light of the pendency of Plaintiffs' appeal, the Superior Court stayed the litigation of the fee motion. Following the affirmance of the dismissal by this Court and the denial of certiorari by the United States Supreme Court, the Superior Court directed Defendants to file a supplemental motion for an award of attorney fees. In its Order, the Superior Court stated that it "expect[ed] the parties to reach agreement on the amount of defendants' reasonable costs of litigation under D.C. Code § 16-5504(a)," and noted that "'[t]he law is well established that, when fees are available to the prevailing party, that party may also be awarded fees on fees.'"

App. at 100 (quoting *Gen. Fed. of Women's Clubs v. Iron Gate Inn, Inc.*, 537 A.2d 1123, 1129 (D.C. 1988)).

The Supplemental Motion for Fees

On February 16, 2021, Defendants filed their supplemental motion for fees. The Act provides:

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

D.C. Code § 16-5504(a).

Defendants argued that special circumstances making a fee award unjust did not exist because their motion to dismiss was granted and Plaintiffs: (a) are wealthy; (b) did not voluntarily dismiss the complaint; (c) appealed; and (d) did not acquiesce to Defendants' fee request. *See* Defs. Christopher Steele and Orbis Business Intelligence Ltd.'s Superseding and Supp. Mem. and Points of Authority in Support of Their Opposed Motion for Award of Costs of Lit., Including Reasonable Attorney Fees Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5504(a), dated Feb. 15, 2021 at 6-7.

In opposition, Plaintiffs did not dispute the reasonableness of *the amount* of fees Defendants incurred. Instead, Plaintiffs: (a) challenged Defendants' argument that Plaintiffs' maintenance of their lawsuit and opposition to fee shifting efforts were dispositive of the special circumstances test; (b) argued that the unique circumstances of this case constituted special circumstances which render a fee

award unjust; and (c) objected to the Act's fee shifting provision as violative of the First Amendment right to petition and D.C. Code § 11-946.

Specifically, Plaintiffs documented facts demonstrating special circumstances, including the findings set forth in a British Court judgment about Defendants and the defamatory statements they published about Plaintiffs. Plaintiffs presented testimony from Defendant Christopher Steele in the United Kingdom's High Court of Justice.[2] Plaintiffs also pointed to several reports released by United States government agencies with findings about the conduct by Defendants about which the underlying lawsuit complained, most prominently the December 2019 report of the Inspector General for the U.S. Department of Justice discussing what was known as the FBI's Crossfire Hurricane Investigation (the "IG Report").

The evidence presented by Plaintiffs included the trial held in March 2020 in the UK Action (the "UK Trial") and a subsequent judgment rendered on August 7, 2020 (the "UK Judgment"). *See* App. at 239-47; 177-232. The UK Judgment was *in favor of Plaintiffs*, specifically holding that Defendants made several inaccurate

[2] Plaintiffs brought that action against Defendants in the United Kingdom's High Court of Justice, Queens Bench Division under the UK's Data Protection Act 1998 (the "UK Action"). Plaintiffs sought remedies in the UK Action which were not available in the D.C. Superior Court, specifically an order requiring Defendants to rectify the incorrect allegations in CIR 112 and to communicate those corrections to those to whom Defendants had published CIR 112. *See* App. at 181.

and harmful allegations about the Plaintiffs entitling Plaintiffs to compensation from Defendants. *See* App. at 222-24; 231-32. Many of the statements that Plaintiffs alleged in this case to be defamatory were among the same statements found to be false and harmful by the UK Court in its judgment. *Compare* App. at 26-29 *with* App. at 180-81; 222-24. The UK Court found that *all* of the challenged allegations in CIR 112 about Plaintiffs were, at a minimum, misleading. The UK Court found Defendants liable for the allegation that Plaintiffs bribed Vladimir Putin in the 1990s because it found that the allegation was false and Steele's "steps taken to verify [that allegation] fell short of what would have been reasonable." App. at 227. Addressing Defendants' state of mind in making that allegation, the UK Court found that Steele "*knew* that his source did not have direct personal knowledge of the underlying facts, [and] *could only be relying on hearsay*," and that Steele conducted only one internet search to try to verify this allegation and his "evidence as to the single relevant internet search he undertook was unimpressive." App. at 227 (emphasis added). Finally, the UK Court found that "the inadequacy of [Steele's] verification effort is illustrated by the fact that [counsel] was so easily able to demonstrate, and obtain Mr. Steele's acceptance, that a key element of this allegation was contradicted by information readily available on the internet." App. at 227.

In addition to the UK Judgment, Plaintiffs also introduced evidence from multiple U.S. government agencies which have investigated the Reports and found serious problems with the methodology used to create the Reports and with their reliability in general. One of these, the IG Report, discussed the "dossier" Reports generally and found that there were "potentially serious problems … with Steele's election reporting," and that interviews conducted by the FBI "raised significant questions about the reliability of the Steele election reporting," and that "[i]n addition to the lack of corroboration, we found that the FBI's interviews of Steele, the Primary Sub-source, and a second sub-source, and other investigative activity, revealed potentially serious problems with Steele's description of information in his election reports." App. at 251, 254.

In addition to the IG Report, the United States Senate's Judiciary Committee issued a release stating that the FBI's interview of Steele's primary sub-source showed "how unsubstantiated and unreliable the Steele dossier was," and that allegations contained in the reports were "second and third-hand information and rumor at best." App. at 257-58. In a written report regarding Russian attempts to interfere in the 2016 election, the Senate Committee found that "the tradecraft reflected in the [Steele] dossier is generally poor relative to IC [Intelligence Community] standards; the Department of Justice (DOJ) Office of the Inspector

General (OIG) and many who the Committee spoke with at the FBI also found serious fault with Steele's tradecraft." App. at 262.

In reply, Defendants argued that the UK Judgment should not be considered on the theory that the UK Court's standards were purportedly inconsistent with the First Amendment. *See* Reply Brief in Support of Defendants Christopher Steele and Orbis Business Intelligence Ltd.'s Opposed Motion for Award of Costs of Lit., Including Reasonable Attorney Fees Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5504(a), dated Mar. 22, 2021 ("Fee Reply") at 5-7. Similarly, Defendants argued against the Superior Court's consideration of the IG Report in connection with the fee motion because this Court had not taken the unusual step of adding it to the appellate record, at Plaintiffs' request, after it was publicly released during the period between oral argument of the underlying appeal and this Court's resolution of that appeal. *See id.* at 9-10.

On April 2, 2021, the Superior Court issued an order granting Defendants' fee motion. *See* App. at 283. The court found no special circumstances warranting denial of the fee motion, stating as follows:

> when plaintiffs filed this case, it was, at a minimum, predictable that the Court would require them to prove actual malice; plaintiffs did not, and still do not, have substantial evidence of actual malice; defendants' advocacy on issues of public interest is protected by the First Amendment; granting the special motion to dismiss was not a particularly close call; plaintiffs' aggressive litigation tactics forced defendants to incur very substantial costs to defend themselves against

> allegations that plaintiffs could not prove; and plaintiffs do not claim that they cannot afford to pay defendants' litigation costs.

See App. at 289.

The court rejected Plaintiffs' arguments, derived from the UK Judgment and the findings of U.S. government officials and bodies, that the proven falsity of the defamatory statements and Defendants' irresponsible decision to publish them constituted special circumstances. In failing to find "special circumstances" based on this Record, the Superior Court simply explained that the "UK court decision, the Inspector General report, and the Senate Committee report do not contain clear and convincing evidence that defendants acted with actual malice." App. at 288.

As to the First Amendment and D.C. Code § 11-946, the Court held that "[t]o the extent the prospect of an award of litigation costs to a defendant that prevails on a special motion to dismiss deters plaintiffs from filing cases that cannot survive such a motion, the deterrent effect is consistent with the Constitution." App. at 290-91. Finally, the lower court held that the Act and its fee shifting provision were "substantive, not procedural," and based on that reasoning, not governed by D.C. Code. § 11-946. App. at 292.

The Fees on Fees Motion

On April 23, 2021, Defendants moved for an order awarding the fees they had incurred in bringing their fee motion ("fees on fees"). In opposition, Plaintiffs

highlighted that a fees on fees award was discretionary[3] and argued that in this case, such an award should be denied given the "three important issues of law of first impression" which Plaintiffs raised in their fee opposition. *See* Mem. of Points and Authorities in Opposition to Defendants' Motion for Attorney Fees and Costs of Obtaining Judgment Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5504(a), dated May 14, 2021 at 1.

The Superior Court granted Defendants' motion for fees on fees, holding that a non-frivolous basis for an objection to a motion for litigation costs is not "a special circumstance that makes an award for fees on fees unjust." App. at 313.

SUMMARY OF THE ARGUMENT

The Superior Court's decision awarding Defendants their legal fees was erroneous for four independent reasons. First, it improperly assessed the fee motion by the same standard as the underlying motion to dismiss, effectively converting the *special circumstances* test into a requirement that a party opposing a fee award show that the underlying motion was wrongly decided, thus diluting the special circumstances test beyond recognition and transforming a discretionary fee test into one that makes fee shifting virtually automatic. Second, in light of the evidence presented by Plaintiffs demonstrating a strong basis for their defamation

[3] *See Gen. Fed'n of Women's Clubs*, 537 A.2d at 1130 (A court "has discretion to award [a party] the expenses incurred in pursuing the original fee award, [but] the court is not required to do so.").

claims and the Superior Court's failure to conclude that the claims were frivolous or not made in good faith, the imposition of the fee order infringed Plaintiffs' First Amendment right to petition the court. In concluding otherwise, the Superior Court erred by applying legal principles derived from fee shifting statutes governing fee awards sought *from defendants* without recognizing that the application of those same standards when fee awards are sought from *plaintiffs* unduly burdens the First Amendment right to petition. Third, the Superior Court ignored that the Act (including its fee-shifting provision) modifies certain provisions of the Federal Rules of Civil Procedures but was applied in contravention of D.C. Code § 11-946—since it was not first approved by this Court. Finally, the Superior Court erroneously awarded Defendants their fees incurred in prosecuting their fee shifting motion. In doing so, the Superior Court improperly limited its own discretion by requiring Plaintiffs to show special circumstances to defeat an award of fees on fees—effectively making an unwarranted presumption in favor of fees on fees—while also mischaracterizing the nature and importance of the legal issues raised by Plaintiffs in opposition to the initial fee request.

STANDARD OF REVIEW

This appeal presents four distinct questions subject to *de novo* review. Issues one and four—whether the Superior Court erred in holding that special circumstances do not exist to deny the initial fee award and whether the Superior Court erred in holding that fees on fees were warranted—focus "not on the motions judge's findings of fact or exercise of discretion, but on the correctness of the judge's legal conclusions—[the] statement of the applicable law and … articulation of the appropriate standard," and are thus subject to *de novo* review. *See Solers, Inc. v. Doe*, 977 A.2d 941, 947-48 (D.C. 2009) (internal quotation, punctuation, and alteration omitted).

Issues two and three—whether Plaintiffs' First Amendment rights were impermissibly burdened by requiring them to pay Defendants' legal fees and whether the Superior Court erred in holding that D.C. Code § 11-946 did not apply to the Act and its fee shifting procedures—are questions of law and thus also subject to *de novo* review. *See Heard v. Johnson*, 810 A.2d 871, 877 (D.C. 2002).

ARGUMENT

I. THE SUPERIOR COURT MISAPPLIED THE SPECIAL CIRCUMSTANCES TEST, WHICH WHEN CORRECTLY APPLIED WARRANTS DENIAL OF THE FEE REQUEST

"Special circumstances" abound to deny Defendants' fee request. Indeed, the lower court's order granting fees reveals a misunderstanding and dilution of this Court's holding in *Doe v. Burke*. The special circumstances present include:

(1) many of the harmful allegations about Plaintiffs published by Defendants have been found to be false; (2) Defendants were at fault in publishing those allegations (in that Defendants' methodology in creating the reports has been roundly criticized and discredited); and (3) even *if*, as the Superior Court determined, this evidence does not prove that Defendants acted with actual malice, that should not have resolved the distinct question of whether special circumstances would make a fee award unjust. The Superior Court erred by conflating those two questions, incorrectly treating the issue of Defendants' actual malice as determinative of the special circumstances test. That is not what this Court held or even suggested in *Doe v. Burke*. But if the unique facts presented here (that the statements alleged to be defamatory were indeed false and Defendants published them without a sound foundation for believing them to be reliable) do not constitute special circumstances, it is difficult to conceive of how the special circumstances test could be met by any defamation plaintiff.

The Superior Court's holding that special circumstances did not exist to warrant denying Defendants' request for fees under the Act rested on both a misunderstanding of Plaintiffs' argument and an overly expansive interpretation of this Court's decision in *Doe v. Burke*, 133 A.3d 569 (D.C. 2016) which led the Superior Court to effectively conclude that a plaintiff who loses an anti-SLAPP special motion to dismiss can only avoid the imposition of fees by showing that the

underlying special motion to dismiss was wrongly decided. However, that is not the standard. In *Doe*, while this Court held that a defendant who prevails on a motion to dismiss under the Act is "presumptively" entitled to attorneys' fees, it also held that such awards are "discretionary" and fees are not merited if "special circumstances in the case make a fee award unjust." *See* 133 A.3d at 571, 575.

Here, relying on *Doe* and the Civil Rights cases which outline what can constitute special circumstances, Plaintiffs pointed to the UK Judgment that found Defendants had published false statements about them without due care, and to numerous government investigations that faulted the way Defendants compiled the Dossier.[4] Specifically, Plaintiffs highlighted that during the trial in the UK Action, the allegation that Plaintiffs paid cash bribes to Vladimir Putin when he was the Deputy Mayor of St. Petersburg was proven false. That allegation, as detailed in CIR 112, was that Plaintiffs used an Alfa Bank ("Alfa") employee, Govorun, to deliver alleged cash bribes. But the evidence revealed that Govorun did not even work for Alfa in any capacity until *after* Putin had ceased serving as Deputy Mayor

[4] Defendants have previously argued that the government reports are not applicable because they do not specifically mention CIR 112 when criticizing Steele's reporting. But Defendants' methodology for creating the reports which became known as "the Dossier" did not fundamentally change from one report to the next, and the IG Report profoundly criticizes Defendants for the methodology used to compile that group of reports which includes CIR 112, the defamatory report at issue in this case. There is no reason why the IG Report's criticisms of Defendants' methodology would not also apply to CIR 112.

of St. Petersburg. *See* App. at 223. Additionally, not only was this allegation false, but Plaintiffs also showed that Defendants were at least negligent in publishing it since Steele acknowledged during the UK Trial that he did not think the source was "there in the 1990s," did not know whether the source had spoken to someone who was there, and did not know whether the allegation was "second-hand, third-hand, [or] *fourth-hand*." App. at 241 (emphasis added). That Defendants were at least negligent in publishing this allegation was reinforced by the fact that Steele admitted that he did not ask the primary sub-source *any* questions to determine how the source could have knowledge of the allegations in CIR 112 and simply relied on the source's "reporting track record" and Steele's unverified belief that the source had the necessary access. App. at 242-44.

Adding to the unique circumstances of this case, Defendants' negligence in publishing the allegations at issue is reinforced by the evidence unearthed by and the conclusions of U.S. government investigatory bodies. The FBI conducted an inquiry whose scope encompassed Defendants' election reporting (of which CIR 112 was part), and interviewed Steele's primary sub-source who told the FBI that Steele "misstated or exaggerated … statements in multiple sections of the reporting." App. at 252. Even worse, the United States Senate's Judiciary Committee found that not only was there "ample opportunity" for the information in the Reports to be shaped by the Russian security services, but one of the reports

has been assessed to be "part of a Russian disinformation campaign," while the information in another report was "false" and the result of Russian security sources "infiltrating a source into the network." App. at 266, 267.

Highlighting Defendants' carelessness and unwillingness to consider whether any of the allegations at issue are false, Steele has refused to accept any responsibility for the errors in the reports or his methodology. That is, the UK Court found that when Steele was confronted with documentary proof at the UK Trial that the alleged 1990s bribery involving Plaintiffs was not true, Steele "caviled, suggesting that it might be the case that Govorun was used to deliver illicit cash to Mr. Putin in the late 1990s, after his stint as Deputy Mayor. There is no evidence to support that." App. at 223. Similarly, Steele challenged the statements his primary sub-source made to the FBI, insisting that the U.S. Inspector General must have "got it wrong" because "they have already had to amend their account of that interview." App. at 245.

Defendants' negligence also extended to the ways they described their sources, and thus increased the harmful impact of the defamatory allegations as it made them appear more reliable than they were. The Senate Committee found that "Steele's sources were sometimes several steps removed from the information they provided, and Steele did not adequately convey that separation in the memos. Further, some information Steele logically would have known did not appear in the

documents for unclear reasons, and the Committee found several opportunities for interested parties to insert disinformation." App. at 262. Compounding these problems with Steele's methodology, he exaggerated his access to Russian sources. Defendants touted Steele's experience as a former British intelligence officer, specifically his former experience working in Russia, and suggested that Defendants had access to a reliable source network *in Russia*. App. at 264-65. However, it has been revealed that Defendants' primary sub-source was a Russian-American *living in the Washington, D.C. area*, who was *previously the subject of an FBI counterintelligence investigation*. App. at 269-71; 273. Finally, although the Reports suggest that the sources were high ranking government officials, it has been revealed that Steele's source simply relied on his social network and viewed his "sources" as "friends with whom [he] has conversations about current events and government relations." App. at 265.

The Superior Court rejected the evidence and arguments made by Plaintiffs in support of a finding of special circumstances as contrary to *Doe*, reasoning that, under *Doe*, fee shifting is not limited to "classic" SLAPPS and does not require a showing that the Plaintiff's case was frivolous. *See* App. at 287. But while the fee shifting statute may indeed apply to lawsuits that are not "classic SLAPPS," that does not resolve the question, presented here, as to whether it is a special circumstance making a fee award unjust when a defamation plaintiff, although

unsuccessful, nevertheless demonstrates both that some of the challenged defamatory allegations were false and that the defendant was at least negligent in publishing those allegations (even if the defendant's level of fault was not proven, without access to discovery, to rise to actual malice). Here, the extensive evidentiary record put forth by Plaintiffs shows that not only was Plaintiffs' suit not a classic SLAPP and non-frivolous, but in addition that (1) at least some of the challenged allegations were false; and (2) Defendants were at least negligent in publishing those allegations.[5]

The Superior Court declined to address Defendants' contention that First Amendment principles precluded consideration of the evidence proffered by Plaintiffs from the UK Judgment. *See* App. at 288 (declining to reach issue of

[5] Evidence of negligence is not irrelevant to the actual malice inquiry because actual malice is assessed cumulatively, and the evidence to support actual malice can be based, in part, on negligence. *See Airlie Found., Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 429 (D.D.C. 1972) ("There is no doubt that evidence of *negligence*, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity.") (emphasis added); *Celle v. Filipinio Reporter Enters.*, 209 F.3d 163, 183 (2d Cir. 2000). Thus, for example, "evidence concerning motive" or bias ***is*** a relevant evidentiary building block toward proving actual malice. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989); *Celle*, 209 F.3d at 183. Similarly, although a ***failure to properly investigate*** may not ***alone*** prove actual malice, it ***is*** one piece of evidence that can support a finding of actual malice. *See, e.g.*, *Hunt v. Liberty Lobby*, 720 F.2d 631, 645 (11th Cir. 1983); *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir. 1971).

whether the SPEECH Act, 28 U.S.C. § 4102(a)(1) prevented consideration of UK Judgment). But in any event, the SPEECH Act does not preclude consideration of the UK Judgment. That statute merely prevents a United States court from *enforcing* a foreign judgment for defamation unless certain conditions are met. *See* 28 U.S.C. § 4102. Here, Plaintiffs have not asked an American court to enforce the UK Judgment. Instead, Plaintiffs presented the UK Judgment as persuasive authority for its factual findings and have argued that those findings are relevant to the question of whether special circumstances make a fee award unjust. The SPEECH Act does not prohibit consideration of the evidence unearthed by and the factual findings of the UK Court, when deciding a fee shifting motion under D.C. and U.S. law.

Moreover, there is nothing about an American court's acceptance of the factual findings from the UK Action that would offend First Amendment principles. Significantly, since the UK Action consisted of a claim under the UK Data Protection Act (the "DPA"), and not a claim for defamation, Plaintiffs bore the "burden of pleading and proving [the] inaccuracy" of the challenged allegations. *See* App. at 217. Additionally, the DPA is not a strict liability tort and the UK Court considered the Defendants' fault in publishing the defamatory allegations. *See* App. at 227. Both requirements are thus in line with First Amendment jurisprudence which requires a defamation plaintiff to prove, *inter*

alia, that a "defendant made a false and defamatory statement concerning the plaintiff," and "the defendant's fault in publishing the statement amounted to at least negligence." *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005). Thus, the Court may and should consider the factual findings from the UK Judgment in assessing whether special circumstances make a fee award unjust.

The "special circumstances" test adopted by this Court in *Doe* comes from Civil Rights Acts cases. *See Doe*, 133 A.3d at 576-78. This Court has not yet provided guidance on what factors courts should consider when assessing whether special circumstances warrant denying a fee award. However, the Civil Rights Acts cases teach that factors which should be considered are the relative fault of the parties, the rights sought to be protected, and whether a fee award was necessary to protect the rights at issue. In the civil rights context, courts find special circumstances and deny fees where the defendants' actions were unintentional, plaintiffs unnecessarily engaged in costly litigation, a plaintiff was primarily seeking to vindicate private, individual rights, or the potential monetary judgment was sufficient to encourage the plaintiff to seek judicial relief. *See*, *e.g., Peter v. Jax*, 187 F.3d 829, 837-38 (8th Cir. 1999) (holding in the alternative that special circumstances warranted no fee award where defendant followed binding Supreme Court precedent and plaintiff continued to litigate claims in face of pending Supreme Court case which could change law); *Buxton v. Patel*, 595 F.2d 1182, 1185 (9th Cir. 1979) (affirming denial of fees where, although defendant's

"conduct was reprehensible," action enforced "single violation of [plaintiffs'] private rights," "chance of success was sufficiently high … to attract competent counsel," and counsel was adequately compensated from damages); *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978) ("principal factor" to be considered in awarding fees is whether plaintiff "would have been deterred or inhibited from seeking to enforce civil rights without an assurance" that fees would be paid if successful); *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976) (finding special circumstances merited no fee award because, *inter alia*, discriminatory retirement plan pre-dated Civil Rights statute at issue); *Martin v. Hancock*, 466 F. Supp. 454, 456 (D. Minn. 1979) (fee award unjust in case which "is little more than a disguised common law negligence, personal injury damages action").[6] These factors are also relevant in the anti-SLAPP/defamation context,

[6] Defendants faulted Plaintiffs for citing to these cases because they are not anti-SLAPP cases. *See* Fee Reply at 3. However, the special circumstances test this Court adopted in *Doe* comes from Civil Rights Acts cases, accordingly it is appropriate to look to Civil Rights Acts cases in articulating what constitutes "special circumstances." Moreover, it is of no import as Defendants suggested that Plaintiffs are unable to cite a decision where courts have disallowed fees to a successful anti-SLAPP movant. *See* Fee Reply at 3. Many anti-SLAPP statutes provide for *mandatory* fees to a successful movant, *see*, *e.g., Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 2001) (defendant who brings successful anti-SLAPP motion "is entitled to mandatory attorney fees"); *Fabre v. Walton*, 436 Mass. 517, 525 (2002) ("The anti-SLAPP statute requires the payment of attorney's fees and costs if the judge allows a special motion to dismiss."); and while the Act provides for a discretionary award of fees to a prevailing movant, there is a presumption in favor of such fees, *see Doe*, 133 A.3d at 578. However, just because courts have so far infrequently declined to award successful anti-SLAPP movants fees, they must do so if "special circumstances would render such an award unjust," and this is such a case.

and Plaintiffs respectfully suggest that factors which should be considered in assessing special circumstances in the anti-SLAPP context should include, *inter alia*: (1) a defamation plaintiff's motives in bringing the underlying suit; (2) whether any of the challenged statements have been shown to be false; and (3) whether the defendant(s) bears any fault in publishing the challenged statements.

The Superior Court did not expressly disagree with the relevancy of the Civil Rights Acts cases but stated that to the extent its analysis was inconsistent, then it was employing "the analysis mandated by *Doe*." App. at 6. However, an examination of the Superior Court's decision shows that it analyzed the evidence put forth by Plaintiffs against the standard on the underlying motion to dismiss, and not under the "special circumstances" test articulated in *Doe*. That is, the Superior Court rejected the evidence put forth by Plaintiffs and found that special circumstances did not merit denying the Defendants' fee request because (1) it was purportedly predictable that Plaintiffs would need to prove actual malice; (2) Plaintiffs did not prove actual malice; (3) Defendants' actions were protected by the First Amendment; [and] (4) it believed that the special motion to dismiss was "not a particularly close call." *See* App. at 289. However, not only do these justifications relate to the merits of the underlying anti-SLAPP motion to dismiss, but also they do not address the arguments put forth by Plaintiffs, namely (1) that

although Plaintiffs were unable to prove the actual malice element, without the ability to obtain any discovery and under the heightened standard of the Act, their claims had substantial merit in that the statements were ultimately proven to be false, and (2) although Plaintiffs had been unable to meet the high burden to show (pre-discovery) that Defendants had acted with actual malice (as the Superior Court required them to do to defeat the special motion to dismiss), the evidence did show that Defendants had acted with fault, at least *negligently*. That is, the fact that Plaintiffs showed in opposition to the motion for fees that the challenged statements were false, *and* that Defendants published those statements negligently, are a set of circumstances that are quite unusual in the context of a dismissed defamation lawsuit. If those unusual circumstances are not "special" circumstances sufficient to defeat a fee shifting application, it is difficult to conceive of what other circumstances would qualify.

The Superior Court's mistaken belief that it should award fees unless the underlying motion was wrongly decided was laid bare when it stated that "to survive a special motion to dismiss under the Anti-SLAPP Act, plaintiffs were required to offer evidence not just of negligence but of actual malice," and found that the evidence put forth by Plaintiffs in opposition to the motion for fees "do not contain clear and convincing evidence that defendants acted with actual malice…." App. at 287-88. There is no reason why, in opposition to a motion for fees,

Plaintiffs should be required to demonstrate that Defendants acted with actual malice. By judging Plaintiffs' evidence on special circumstances against this standard, the Superior Court essentially held that unless Plaintiffs could come forward with evidence to suggest that the motion to dismiss had been wrongly decided, special circumstances would not exist to warrant denying the fee motion. Such a test goes against this Court's holding, in *Doe*, where the Court held that although there is a presumption in favor of awarding a prevailing movant under the Act legal fees, such fees should not be awarded if "special circumstances would render such an award unjust." *Doe*, 133 A.3d at 578. If these special circumstances were judged by the same standard as that used in deciding the underlying motion (as the Superior Court did here), then special circumstances would never exist unless the underlying decision was reversed.

The other reasons the Superior Court proffered for finding no special circumstances are similarly unavailing. That is, the Superior Court also found that a fee award would not be unjust because Plaintiffs' litigation strategy was "aggressive," and Plaintiffs did not claim that they could not afford to pay Defendants' litigation costs. *See* App. at 289. It is unclear what "aggressive" litigation tactics the Superior Court was referring to—Plaintiffs simply filed a complaint, defended against motions to dismiss brought by Defendants, and then sought appellate review of the decision dismissing their complaint. There has been

no suggestion that Plaintiffs engaged in unnecessary motion practice or engaged in any bad faith conduct. Simply filing a complaint and pursuing lawful appeals should not be a reason to require Plaintiffs to reimburse Defendants' legal fees, especially when Plaintiffs have shown that the allegations were false and negligently made. Nor should it matter that Plaintiffs have the financial ability to repay those fees; while a defamation plaintiff's inability to pay fees might constitute a special circumstance against awarding fees, a plaintiff's ability to pay should not render an otherwise unjust fee award just.

In sum, Plaintiffs have introduced a significant evidentiary record showing that the challenged allegations were both false and that Defendants bore blame in publishing them. Accordingly, Plaintiffs have shown that special circumstances render a fee award unjust in this case.

II. BY REQUIRING PLAINTIFFS TO PAY DEFENDANTS' LEGAL FEES, WITHOUT CONSIDERING THE BASIS OF THEIR CLAIM OR THEIR GOOD FAITH, THE SUPERIOR COURT PLACED AN IMPERMISSIBLE BURDEN ON PLAINTIFFS' EXERCISE OF THEIR FIRST AMENDMENT RIGHT TO PETITION

The right "to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). Included within the right to petition is the "right of access to the courts." *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (citation omitted); *see also Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) ("This Court's precedents

confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."). By awarding a prevailing defendant on a special motion to dismiss attorneys' fees without regard to the basis or good faith behind the plaintiff's claims, the Act imposes an undue burden on a plaintiff's First Amendment right of access to the courts.

The Superior Court rejected Plaintiffs' argument that the Act unduly burdens a plaintiffs' right to access the courts by finding that "[t]o the extent the prospect of an award of litigation costs to a defendant that prevails on a special motion to dismiss deters plaintiffs from filing cases that cannot survive such a motion, the deterrent effect is consistent with the Constitution." App. at 290-91. However, this minimizes the deterrent effect an award of fees can have. In addition to deterring those plaintiffs whose claims cannot survive the special motion to dismiss, the fee-shifting provision will likely also deter plaintiffs whose claims *can* survive a special motion to dismiss but who believe it is a close call whether they will be able to do so or who do not have the financial resources to pay a potential judgment. Indeed, it is for this reason that courts require "breathing room" for First Amendment rights. *See NAACP v. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter [exercise of First Amendment freedoms] almost as potently as the actual application of sanctions. Because First Amendment

freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.") (citations omitted). By allowing fee awards in almost all instances where a defendant prevails on a special motion to dismiss, the Act places an impermissible burden on a defamation plaintiff's right to petition the courts and will almost certainly deter meritorious claims as well as those that are unable to survive a special motion to dismiss.

The special circumstances test this Court adopted in *Doe* arises from Civil Rights Acts cases where prevailing *plaintiffs* are awarded fees. *See Doe*, 133 A.3d at 576-78. Notably, a very different test is used when deciding whether to award fees to a prevailing defendant in a Civil Rights Act case. *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978) (prevailing defendant in Title VII case only entitled to attorneys' fees "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"). Civil Rights Acts plaintiffs are awarded fees more liberally as they have been cast as "private attorney general[s]" to "vindicat[e] a policy that Congress considered of the highest priority." *Id.* at 416.

This Court justified applying a test usually restricted to prevailing Civil Rights Acts plaintiffs to determine whether a prevailing defendant is entitled to fees under the Act by rationalizing that the Act was passed to protect a

constitutional right. *See Doe*, 133 A.3d at 577. But the Court was not confronted with the question of whether the fee shifting provision violates a plaintiff's First Amendment rights, and did not acknowledge the different concerns raised when awarding a prevailing defendant attorneys' fees as opposed to a prevailing plaintiff because a plaintiff is exercising his constitutional right to access the courts. *See, e.g., Borough of Druyea*, 564 U.S. at 387 ("The right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.") (quotation omitted).

The Superior Court also defended the fee shifting provision by stating that the First Amendment rights sought to be protected by a defamation plaintiff are not akin to other First Amendment rights such as "free speech or marriage" which have come to be regarded as "fundamental." *See* App. at 291. This ignores the Supreme Court's admonishment that the right "to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers*, 389 U.S. at 222. Indeed, any significant impairment of First Amendment rights must survive "exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). This type of scrutiny is required even if any deterrent effect arises not from direct government action, but "indirectly as an unintended but inevitable result of the government's conduct." *Id.* (quotation omitted).

Not only did the Superior Court minimize the First Amendment rights being exercised by a defamation plaintiff, but the Superior Court ignored that in *Doe*, this Court explained that the constitutional right protected by the Act is less deserving of protection than the rights being protected by the Civil Rights Acts. *See Doe*, 133 A.3d at 577 ("it is too much to equate the successful movant under D.C. Code § 16-5503 with the prevailing Civil Rights Act plaintiff"); *accord id.* at 581 ("the Supreme Court concluded that prevailing plaintiffs should presumptively be awarded fees under the civil-rights statutes not because of the structure of the fee provisions in those statutes but rather because successful civil-rights plaintiffs act as private attorneys general") (McLeese, J., concurring in part and dissenting in part). Thus, even if Plaintiffs' First Amendment right to access the courts is somehow less deserving of other constitutional rights, which it is not, this lessened right must be balanced against the Defendants' lessened right being protected by the Act and its fee shifting provision.

When these countervailing First Amendment concerns are considered, it is evident that the test articulated by *Doe*, as interpreted by the Superior Court, placed an undue burden on Plaintiffs' right to petition. The Superior Court summarized Plaintiffs' argument as that "the Constitution prohibits the legislative branch from authorizing an award of attorney fees against a losing plaintiff unless the lawsuit was frivolous or brought in bad faith," and rejected it by stating (without support)

that "[t]he Constitution does not enact Rule 11 as the outer bound on awards of attorney fees to prevailing defendants." App. at 289-90. However, this overly simplifies and distorts Plaintiffs' argument. Plaintiffs' argument is not that a court may not impose fees against a plaintiff unless the action was frivolous or brought in bad faith, but rather that unless a lawsuit was frivolous or brought in bad faith, it is deserving of First Amendment protection. *See* Mem. of Points and Authorities in Opposition to Defendants' Motion for Award of Costs of Litig. Including Reasonable Attorney Fees Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5504(a), dated Mar. 8, 2021 at 13; *see also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (suits without a "reasonable basis" "are not within the scope of First Amendment protection"); *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002) ("even unsuccessful but reasonably based suits advance some First Amendment interests").

By distorting Plaintiffs' First Amendment argument to one that a prevailing defendant may only be awarded fees if the Rule 11 conditions are met, the Superior Court was able to dismiss it as unsupported.[7] *See* App. at 290. However, Plaintiffs' argument and the standard proposed follows the test articulated by the

[7] Although Rule 11 does not set a *constitutional* limit on when fees may be awarded to a prevailing defendant, here, as explained *infra* at 33-37, in order for the Act to modify the Federal Rules of Procedure, including Rule 11, it needed to be approved by this Court and since it was not, the Act and its fee shifting provision are unenforceable.

Supreme Court in *Christiansburg* for prevailing defendants which provides fees beyond what is allowed under Rule 11. *See Christiansburg Garment*, 434 U.S. at 419, 421 (stating that if fees were only awarded for bad faith litigation, "no statutory provision would have been necessary" and holding that prevailing defendant is entitled to fees "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"). Limiting fee awards to instances where a claim lacks a reasonable basis or foundation, or was brought in bad faith, adds to the protections afforded by Rule 11 while respecting a defamation plaintiff's First Amendment right to petition. *See Leonardis v. Burns Int'l Sec. Servs., Inc.*, 808 F. Supp. 1165, 1184 (D.N.J. 1992) ("This jurisdiction views its counsel-fee rules as inextricably bound to the question of access to our courts.") (emphasis omitted). Judged against this standard, it is evident that a fee award here unduly burdens Plaintiffs' right to petition. Plaintiffs' claims had a reasonable basis and foundation because, as shown in the UK Judgment and numerous government investigations and reports, Defendants engaged in irresponsible conduct in compiling the reports (including CIR 112) and published false and harmful statements about Plaintiffs.

III. ENFORCEMENT OF THE ACT AND ITS FEE SHIFTING PROCEDURES IS PROHIBITED BY D.C. CODE § 11-946 BECAUSE THE ACT MODIFIES THE FEDERAL RULES OF CIVIL PROCEDURE BUT WAS NOT ADOPTED BY THE COURT

Pursuant to D.C. Code § 11-946, "[t]he Superior Court *shall* conduct its business according to the Federal Rules of Civil Procedure … Rules which modify the Federal Rules *shall be submitted* for the approval of the District of Columbia Court of Appeals." (Emphasis added.) Rules may only be adopted "without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules." *Id.*; *see also Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 63-64 (D.C. 1980) ("Congress mandated the Federal Rules for use in the new Superior Court … 'Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court.'") (quoting D.C. Code § 11-946). Here, the Act modifies the Federal Rules and thus needed to be approved by this Court before being applied in Superior Court.

That the Act modifies the Federal Rules in certain ways is plain to see. The Act's procedures for a motion to dismiss are inarguably different from those laid out in Federal Rule 12, and its mechanism for shifting attorneys' fees is likewise inarguably different from Federal Rule 11. Since D.C. Code § 11-946 applies whenever a new rule would "modify" any of the Federal Rules of Civil Procedures,

it plainly applies here: when the Superior Court determined Defendants' entitlement to fees based on the Act's fee shifting provision, which is different from the fee shifting mechanism set forth in Federal Rule 11, the Superior Court modified the fee shifting regimen that it would otherwise have been required to apply under Federal Rule 11.

In concluding otherwise, Superior Court relied on its assessment of the Act's fee shifting provision as "substantive" rather than procedural. *See* App. at 292 (holding that the fee shifting provision in the Act "modifies substantive law by creating a new remedy for defendants that file a successful special motion to dismiss," and does not specify the procedure to obtain fees). But the applicability of Section 11-946 to the Act does not depend on whether it is plausible to describe some of the Act's provisions as substantive. D.C. Code § 11-946 simply prohibits the application, in Superior Court, of any enactment that would modify any of the Federal Rules of Civil Procedure. Given that Federal Rule 11 limits fee shifting to circumstances in which a plaintiff's claim is frivolous, and given that the Act's fee shifting provision is far broader, and not expressly limited to frivolous claims, it is beyond reasonable dispute that the Act's fee shifting provision modifies, in Superior Court, the Federal Rule's fee shifting provision. Since it was not adopted by this Court, after its legislative enactment, D.C. Code § 11-946 prohibits its enforcement in Superior Court.

Moreover, the Superior Court's characterization of the Act's fee shifting provision as substantive, and not procedural, is irreconcilable with how the D.C. Circuit has interpreted the Act. The D.C. Circuit has twice held that the Act is not applicable in federal court precisely because it conflicts with the Federal Rules of Civil Procedure. *See Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015) ("unlike the D.C. Anti-SLAPP Act, the Federal Rules do not require a plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal," and thus the Act "conflicts with the Federal Rules"); *see also Tah v. Global Witness Pub., Inc.*, 991 F.3d 231, 238-39 (D.C. Cir. 2021) (following *Abbas* and declining to apply the Act in federal court because it conflicts with the Federal Rules of Civil Procedure). Particularly in light of this conflict, the Act and the fee shifting provision needed to be approved by the D.C. Court of Appeals pursuant to D.C. Code § 11-946. Since they were not, the Federal Rules of Civil Procedure control and Defendants are not entitled to their fees where they have not demonstrated entitlement to such fees under the Federal Rules.

Finally, a close look at the statutes that the Superior Court cited for its conclusion that it could enforce the Act—the D.C. Human Rights Act and the D.C. Freedom of Information Act—actually undermine rather than support its

conclusion because those statutes are inarguably substantive and do not attempt to regulate ground covered by the Federal Rules of Civil Procedure.

The Superior Court also appeared to rely on the notion that Plaintiffs, by not raising a Section 11-946 challenge to the Act in response to the motion to dismiss, had somehow waived reliance on D.C. Code § 11-946 at the fee application stage of the case. *See* App. at 293. However, in order for a "waiver to be valid, … it must be 'an intentional relinquishment or abandonment of a known right or privilege' [and] a valid waiver cannot be presumed from a silent record." *Thomas v. United States*, 914 A.2d 1, 19 (D.C. 2006) (internal citations omitted). Yet, at best for Defendants, Plaintiffs' opposition to the special motion to dismiss was merely silent on the relevance of D.C. Code § 11-946 to that motion.[8] Moreover, in no fashion did any of Plaintiffs' previous submissions ever address, much less

[8] Additionally, counseling against finding a waiver of Plaintiffs' challenge to the Act under D.C. Code § 11-946 is that the authority for the procedural essence of the Act at the time of Defendants' motion to dismiss was not as strong as it was later, at the time of Superior Court's decision on fees. At the time of the motion to dismiss, the only authority for the procedural essence of the Act was the D.C. Circuit's decision in *Abbas*, but that analysis had been interpreted by this Court as mere *dicta*. *See Competitive Enter. Instit. v. Mann*, 150 A.3d 1213, 1238 n. 32 (D.C. 2016) (referring to "the *dicta* in *Abbas* concerning the applicability of the Anti-SLAPP Act in litigation brought in federal courts"). But, more recently, the D.C. Circuit Court of Appeals has made it clear that the *Abbas* court's pronouncement that "the D.C. anti-SLAPP act does not apply in federal court," because the Act is inherently procedural, is a *holding*, not *dicta*, and *rejected* the notion that the "D.C. Court of Appeals' subsequent decision in [*Mann*] effectively abrogates *Abbas*." *Tah*, 991 F.3d at 238-39.

waive, arguments concerning the relationship between D.C. Code § 11-946 and the requirement that the Act's fee shifting provision be adopted by the Court of Appeals before enforcement in Superior Court. As a result, there is no legal basis for treating that claim as waived when made in response to Defendants' fee application.

IV. FEES ON FEES ARE UNWARRANTED

Whether to award the fees a party has incurred in filing a motion for attorneys' fees is discretionary. *See Gen. Fed'n of Women's Clubs*, 537 A.2d at 1130 ("[A]lthough the trial court has discretion to award [Defendants] the expenses incurred in pursuing the original fee award, the court is not required to do so."). Here, however, the Superior Court constrained its own discretion by applying a presumption in favor of fees on fees and requiring Plaintiffs to show that special circumstances existed to deny the request for fees on fees. *See* App. at 313. There was no legal basis for doing so. By imposing a presumption in favor of fees on fees and requiring Plaintiffs to show special circumstances, the Superior Court impermissibly created another burden for Plaintiffs to meet.

In opposition to Defendants' request for fees, Plaintiffs asserted three important issues of law of first impression: (1) how "special circumstances" should be defined when assessing if a fee award under § 16-5504(a) would be unjust; (2) whether a fee-shifting provision which requires a *plaintiff* to pay the

defendants' legal fees even though the claims were brought in good faith constitutes an undue burden on the First Amendment right to petition the courts; and (3) whether the Act and its fee-shifting provision are procedural and contravene the Federal Rules of Civil Procedure and D.C. Code § 11-946. Accordingly, fees on fees are unwarranted as they will unduly punish Plaintiffs for asserting these important legal arguments.

The Superior Court assessed the arguments put forth by Plaintiffs under the *Doe* standard imposing a presumption in favor of fees on fees and requiring special circumstances. *See* App. at 312-13. The lower court disagreed that fees on fees were not warranted based on its misunderstanding of Plaintiffs' arguments and found that the issues raised by Plaintiffs were not novel because it "applied settled principles in finding no special circumstances," and its belief that Plaintiffs' First Amendment Argument was "unsupported by any case even suggesting that the Constitution enacts Rule 11 as the outer bound on awards of attorney fees to prevailing defendants." *See* App. at 313-14. Finally, the Superior Court reiterated its belief that D.C. Code § 11-946 does not prevent the enactment of "fee-shifting statutes, and to the extent that plaintiffs contended that the statutory provision for a special motion to dismiss violates § 11-946, their objection came too late." App. at 314. However, the lower court ignored that (1) although this Court articulated the special circumstances test in *Doe*, it did not provide guidance as to what factors

constitute special circumstances; (2) Plaintiffs were not arguing that Rule 11 places an outer bounds on fee awards to prevailing defendants and the test put forth by Plaintiffs is well supported in the law, *see supra* at 31-32; and (3) Plaintiffs did not intentionally relinquish any challenge to the Act, and due to the nature of the Act, it and its fee shifting provision modify the Federal Rules and are therefore unenforceable.

The good faith of Plaintiffs and the non-frivolous nature of arguments of first impression made in opposition to Defendants' original fee request weigh against subjecting Plaintiffs to the fees borne by Defendants in the serious and worthy debate that was necessary to litigate these issues. Notably, Plaintiffs did not (and still do not) oppose the reasonableness of the amount of fees incurred by Defendants. Requiring Plaintiffs to pay for Defendants' legal fees in connection with the initial fee motion would penalize Plaintiffs for raising important legal issues of first impression. Accordingly, the Superior Court's May 28 Order should be reversed.

CONCLUSION

Respectfully, for the above reasons, this Court should reverse the Superior Court's decisions requiring Plaintiffs to reimburse Defendants for their legal fees.

Dated: September 3, 2021

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I hereby certify that on this 3rd day of September 2021, the foregoing Brief and Appendix were served electronically upon:

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REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

   (1) the acronym "SS#" where the individual's social-security number would have been included;
   (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
   (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
   (4) the year of the individual's birth;
   (5) the minor's initials; and
   (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Alan S. Lewis	21-cv-283; 21-cv-440
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