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

REPLY BRIEF OF APPELLANTS

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Defendants' brief fails to address many of Plaintiffs' core arguments for reversal of the Superior Court's fee-shifting orders. Defendants ignore Plaintiffs' argument that the Superior Court erroneously conflated the "special circumstances" standard (applicable to motions *for legal fees* by a successful movant of an anti-SLAPP special motion to dismiss), with the standard that governs adjudication of such a motion to dismiss. And Defendants barely respond to Plaintiffs' argument that an English court's determination that Plaintiffs proved both the falsity of the defamatory statements published by Defendants and that Defendants published some of those statements at least negligently is a special circumstance making a fee award unjust. Defendants' only response is their meritless contention that courts in the United States presiding over defamation claims should not consider the factual findings of foreign courts for any purpose. Otherwise, Defendants fail to explain why the findings of the English court, if considered, would not constitute special circumstances. Defendants also mischaracterize the standard of review on appeal and devote much of their brief to irrelevant subjects such as Defendants' wealth and the fact that they have brought other defamation lawsuits. In the aggregate, Defendants' arguments only reinforce the conclusion that the Superior Court's fee orders must be reversed.

STANDARD OF REVIEW

Plaintiffs' opening brief demonstrated that the question of whether the Superior Court correctly applied the special circumstances standard is subject to *de novo* review. In attempting to argue otherwise, Defendants attempt to recast the issue before the Court as whether the Superior Court had *authority* to award fees. *See* Opp. at 3-4. But the Superior Court's authority to award legal fees to an anti-SLAPP movant is not at issue. *If* the Superior Court had correctly applied the governing legal standard to the fee application, its assessment would be afforded deference. But, as demonstrated in Plaintiffs' opening brief, the Superior Court did *not* apply the governing legal framework for such fee claims, and therefore, its decision is not afforded deference. That is, because Plaintiffs' argument focuses "not on the motions judge's findings of fact or exercise of discretion, but on the correctness of the judge's legal conclusions," it is subject to *de novo* review. *See* Br. at 13 (quoting *Solers, Inc. v. Doe*, 977 A.2d 941, 947-48 (D.C. 2009)).

Defendants try to sidestep the review standard for Plaintiffs' other claims—e.g., whether the Anti-SLAPP Act's fee-shifting provision violates the First Amendment and whether the Anti-SLAPP Act and its fee provision needed to be approved by this Court in accordance with D.C. Code § 11-946—by asserting that these questions have purportedly "already been answered by this Court." *See*

Opp. at 4-5. To the contrary, the Court has never settled these issues, and in any event, as purely legal claims, they too are subject to *de novo* review.

ARGUMENT

I. BECAUSE THE STANDARD ACTUALLY APPLIED BY THE SUPERIOR COURT TO DEFENDANTS' FEE APPLICATION WAS THE SAME STANDARD IT APPLIED TO DEFENDANTS' MOTION TO DISMISS—INSTEAD OF THE APPLICABLE SPECIAL CIRCUMSTANCES TEST—ITS FEE ORDERS MUST BE REVERSED

In granting Defendants' fee application, the Superior Court applied the "special circumstances" test governing that application *in name only*. That is, and as Plaintiffs' opening brief demonstrated, the Superior Court conflated the standard that governs when the maker of a successful special motion may be awarded fees with the different standard that governs the adjudication of the underlying special motion to dismiss. The Superior Court evaluated Defendants' application for legal fees by focusing on whether it had correctly or incorrectly granted Defendants' underlying motion to dismiss. *See* Br. at 23-25.

Defendants do not challenge or even directly address this point. Instead, making the same unwarranted leap as the Superior Court (from the merits of the underlying motion to the standard for adjudicating the fee application) Defendants argue that Judge Epstein was correct to hold that "Plaintiffs 'did not, and still do not, have substantial evidence of actual malice' and 'defendants' advocacy on issues of public interest is protected by the First Amendment.'" Opp. at 12-13

(quoting App. at 289). But by applying the standard for the granting of an anti-SLAPP motion to dismiss to the motion *for fee shifting*, the Superior Court, and now Defendants, take the position that a fee award is unjust only if a plaintiff produces "substantial evidence" that the underlying motion to dismiss was wrongly decided. However, the standard is whether there are "special circumstances" which make the fee award "unjust," not whether the underlying motion should not have been granted. *See Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016).

In pointing to the Superior's Court's "admonish[ment]" (in a scheduling order) that it expected "agreement [from Plaintiffs] on a fee award," Defendants suggest that Plaintiffs' opposition to fees somehow defeats the presence of special circumstances. *See* Opp. at 2. But by signaling to Plaintiffs a judicial expectation that they *agree* to pay Defendants' legal fees, the court laid bare its preconceived bias against finding special circumstances. That the court saw fit to do so before it knew what special circumstances (and other arguments in opposition to a fee award) Plaintiffs might assert underscores its view that there was not merely a presumption in favor of an award of fees but rather that fees are always granted to a successful anti-SLAPP movant.

Citing one case suggesting that a plaintiff's voluntarily dismissal of its lawsuit in response to a motion to dismiss could constitute special circumstances, Defendants seem to suggest that special circumstances should be limited to

voluntary dismissals by plaintiffs. *See* Opp. at 8, n.3. But that would effectively eliminate the special circumstances test whenever a plaintiff fails to surrender in the face of a special motion to dismiss. While a voluntary dismissal may be *one* special circumstance making a fee award unjust, no court has ever held that it is the *only* such special circumstance. *Doe*'s use of the plural—"circumstances"—makes it clear that the special circumstances test is not rigid and instead encapsulates various kinds of circumstances, not limited to voluntarily dismissing one's lawsuit.[1]

While the Court has yet to provide comprehensive guidance as to what factors constitute special circumstances, Plaintiffs pointed to the factors relied on by courts assessing fee awards in the Civil Rights Acts context (where the special circumstances test comes from) and suggested that special circumstances should include, *inter alia*: (1) a 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 bears any fault in publishing the challenged statements. *See* Br. at 21-23. In arguing that special circumstances are present here, Plaintiffs pointed to a unique and voluminous record showing that: (a) Plaintiffs' motive for

[1] Defendants' position that the presumption in favor of fees should be automatic if a plaintiff litigates the special motion to dismiss is laid bare when they fault Plaintiffs for even contesting their entitlement to fees, *see* Opp. at 2, as if doing so disentitles Plaintiffs to a finding of special circumstances.

bringing the lawsuit was vindication for harm resulting from the publication of damaging claims about them; (b) at least some of the challenged statements were adjudicated as false; and (c) that Defendants were negligent in publishing them.[2]

The Superior Court also found that a fee award would not be unjust because Plaintiffs' litigation strategy was "aggressive." *See* App. at 289. But as noted in Plaintiffs' opening brief, the Superior Court failed to explain what, in its opinion, made Plaintiffs' litigation approach "aggressive" or what the connection is between that characterization and the application of the special circumstances test. *See* Br. at 25-26. While Defendants also complain generally about the fact that Plaintiffs have commenced a few different but related lawsuits, Defendants fail to otherwise address this point. That is, when special circumstances exist (as Plaintiffs' demonstrate here), the court's subjective and otherwise unexplained use of the word "aggressive" to characterize Plaintiffs' approach to litigation cannot defeat or undo the presence of those special circumstances that make a fee award unjust. Defendants effectively concede this point by failing to challenge it.

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[2] Defendants suggest that the Court has already rejected the use of some of this evidence—the IG Report. *See* Opp. at 12, n.7. Not so. The Court only declined to consider the IG Report in connection with Plaintiffs' appeal of the underlying motion to dismiss because the IG Report was not part of the special motion to dismiss record in Superior Court and Plaintiffs sought to introduce it into the appellate record by filing a motion to supplement the appellate record after oral argument. By contrast, Plaintiffs *did* make the IG Report (which was first released to the public in December 2019) part of the fee application record below.

Defendants complain about Plaintiffs' "*ex post facto*" reliance on "extrajudicial" materials but never attempt to provide support for their implication that the record on the motion for fees should somehow be limited to the record on the underlying motion to dismiss. There is no restriction on the introduction of additional evidence on a motion for fees and courts routinely consider such evidence. *See*, *e.g.*, *Cornelious v. District of Columbia Employees' Compensation Appeals Bd.*, 704 A.2d 853, 855 (D.C. 1997) (considering sworn evidence and news reports submitted in connection with challenge to types of fees allowed); *accord Oguachuba v. Immigration & Naturalization Serv.*, 706 F.2d 93, 99 (2d Cir. 1983) (on application for fees pursuant to 28 U.S.C. § 2412 court must not limit its "scrutiny to a single action or claim on which the applicant succeeded but must view the application in light of all the circumstances").

Continuing to conflate the special circumstances fee-shifting standard with the different standard for deciding a special motion to dismiss, Defendants proclaim that the evidence of falsity unearthed in the UK Trial and the related UK Judgment "do[] not change the affirmed success of Defendants' special motion to dismiss." *See* Opp. at 9. That may be true—but it is irrelevant. The question before the Superior Court, and now this Court, is whether there are special circumstances which make it unjust for Plaintiffs to be required to reimburse Defendants for their legal fees, not whether the special motion to dismiss was

properly granted. *See Doe*, 133 A.3d at 571. The evidence proffered by Plaintiffs—evidence from the UK Trial, the UK Judgment, and U.S. government investigations—is relevant to this question because it sheds light on the good faith of Plaintiffs in bringing their claim, the falsity of the statements Defendants published, and on Defendants' fault in publishing those defamatory allegations.

In the UK Judgment, the UK Court found that Defendants published false and damaging allegations about Plaintiffs and did so at least negligently. Defendants do not dispute this. Nor do Defendants argue that proven falsity of challenged defamatory statements alone, or in combination with negligence, cannot constitute special circumstances. Instead, Defendants ask the Court not to consider the UK Trial or UK Judgment. In this vein, Defendants proclaim that courts in the United States have constitutional limitations that apply in defamation cases, and that the decision under the UK's Data Protection Act does not change the "application of firmly established District of Columbia law." *See* Opp. at 9-10. However, Defendants nowhere explain why consideration of *factual* findings made by the UK Court and the related underlying evidence could undermine District of Columbia law. Plaintiffs are not asking this Court to *enforce* the UK Judgment. It cannot undermine District of Columbia law for this Court to consider the UK Judgment, and the evidence adduced in the UK Trial, since ultimately a District of Columbia court would apply District of Columbia law to that evidence.

Similarly, Defendants claim that the UK Judgment should not be used "to change the outcome of a free speech case" in the United States. *See* Opp. at 10. But consideration of the findings of fact from the UK Judgment will not change the outcome of this case—it has been dismissed and that dismissal is final. Moreover, Plaintiffs are not seeking to have this Court adopt any *legal* findings from the UK Judgment. Rather, Plaintiffs are pointing to it as *part of the record* this Court may consider while *this Court applies D.C. law*.

Defendants also attempt to buttress their arguments against consideration of the UK Judgment by pointing to the SPEECH Act. *See* Opp. at 10. But the SPEECH Act governs the *enforcement or recognition* of a foreign judgment in the United States and is thus inapplicable as Plaintiffs are not seeking to enforce the UK Judgment.[3] Additionally, there is nothing in the SPEECH Act which prevents the Court from considering the record from a foreign proceeding while applying U.S. law. Indeed, the SPEECH Act requires that an American court consider the evidentiary record from a foreign proceeding and permits American courts to

[3] Additionally, the SPEECH Act applies to a "foreign judgment for defamation." *See* 28 U.S.C. § 4102. Here, Plaintiffs brought suit under the UK's Data Protection Act. Not only does this provide another reason for finding the SPEECH Act inapplicable, but it also means that Defendants' arguments regarding the differences between U.S. and British defamation law are irrelevant. *See* Opp. at 11. As mentioned in Plaintiffs' initial brief, there are important distinctions between the UK Data Protection Act and UK defamation law, including that under the DPA, Plaintiffs bore the burden of proving the inaccuracy of the challenged statements. *See* Br. at 20.

enforce foreign judgments where the proof of falsity in the foreign proceeding does not offend American constitutional values. *See Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 490 (5th Cir. 2013) (whether judgment could be enforced under the SPEECH Act "depends on whether the facts [plaintiff] proved in the [foreign] proceeding were sufficient to demonstrate falsity under the United States Constitution and Mississippi state law"). Here, because Plaintiffs sustained the burden of proving falsity in the UK Trial, there is no constitutional impediment to a U.S. court's consideration of that finding of falsity and the evidence underpinning it.

Finally, Defendants claim that "Judge Epstein was right to decline Plaintiffs' request to ignore the Court's constitutional duties and embrace findings of an unamerican court under a novel application of complex foreign data privacy legislation." Opp. at 11. However, Defendants utterly fail to explain what constitutional duties there are in adjudicating Defendants' request for fees (as opposed to the merits of the underlying defamation claim) and how an American court's consideration of the UK Court's factual findings (and underlying evidence) *in making its own decision as to how to apply American law* would run afoul of any American legal principle. Since it is ultimately the American court which will be applying American law, there is nothing improper about the American court considering a foreign proceeding—American courts routinely consider foreign

judgments if they are relevant to a matter pending before the court. Indeed, "principles of comity suggest that [a foreign] judgment should be given weight as *prima facie* evidence of the facts underlying it." *Donnelly v. FAA*, 411 F.3d 267, 271 (D.C. Cir. 2005); *accord United States v. Garland*, 991 F.2d 328, 335 (6th Cir. 1993) (so long as foreign judgment does not show lack of trustworthiness, court may treat it as "prima facie evidence of the facts and opinions contained therein"); *Hartford Fire Ins. Co. v. Socialist People's Libyan Arab Jamahiriya*, 2007 U.S. Dist. LEXIS 46657, at *29 (D.D.C. June 28, 2007) (foreign judgment should be given weight as *prima facie* evidence and "challenging party has the burden of impeaching the reliability of such judgment") (citing cases). Accordingly, this Court may look to the findings of the UK Court that Defendants negligently published false allegations regarding Plaintiffs when assessing whether there are special circumstances which make a fee award unjust.

In addition to the UK Judgment (and evidence from the UK Trial), Plaintiffs also pointed to several U.S. government investigations which faulted Defendants for their methodology in compiling the dossier of reports that included the defamatory statements. Defendants attempt to counter this evidence by arguing that Plaintiffs' discussion of it "contain[s] no legal citations," and again highlighting that the Plaintiffs are not named in the IG Report. *See* Opp. at 12, n.7. But neither point is availing. As an initial matter, the IG Report—its conclusions

and underlying evidence—was offered as part of the record demonstrating special circumstances. Thus, it is not surprising that Plaintiffs did not cite *cases* while discussing *facts* from the IG Report which support a finding of special circumstances. Second, Defendants' observation that the IG Report does not mention Plaintiffs "by name" is misleading. *See* Opp. at 12, n.7. The IG Report references Report 112 and unmistakably refers to Plaintiffs as the subjects of that report by speaking of the "leading figures" of Alfa.[4] In any event, the observations and criticisms made in the IG Report of Defendants' methodology in compiling the election reports generally applies to CIR 112 as one of those election reports. Defendants have proffered no reason to believe that CIR 112 differs from all of the other reports in the methodology used to gather and publish the allegations it makes. *See* Br. at 15, n.4.

Defendants do not really dispute that the evidence put forth by Plaintiffs shows that the published statements contained at least some false and defamatory allegations or that Defendants published some of those allegations negligently—and instead argue that the Court should ignore the relevant evidence. It is difficult to conceive of how the most unusual and powerful fact present in this case—that Plaintiffs *proved* that some of the defamatory statements were false and that at

[4] *See*, *e.g.*, IG Report at 104 n.231, 119 n.259. A full copy of the IG Report is publicly available at https://www.justice.gov/storage/120919-examination.pdf (last accessed Oct. 28, 2021).

least some of those statements were made negligently—could not qualify as a special circumstance. In that light, the Court should respectfully reverse the Superior Court's order and deny Defendants' fee motion. At minimum, the Court should respectfully remand the application to Superior Court for it to assess special circumstances by considering the evidence proffered by Plaintiffs, while faithfully applying the special circumstances limitation on fee awards.

In sum, Plaintiffs are not seeking to re-litigate the special motion to dismiss. Plaintiffs are simply asking that the standard for awarding attorney's fees, and the analysis by which that standard is applied, be consistent with the proper intent and plain meaning of § 16-5504(a).

II. REQUIRING PLAINTIFFS TO REIMBURSE DEFENDANTS' FEES AS PUNISHMENT FOR COMMENCING SUIT WITHOUT CONSIDERATION OF THEIR GOOD FAITH VIOLATES THE FIRST AMENDMENT RIGHT TO PETITION

Defendants do not dispute 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 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). Rather, they attempt to defend the constitutionality of the Anti-SLAPP Act's fee-shifting provision by (1) arguing that this Court has enforced the Act in

the past, and (2) pointing to decisions holding that fee-shifting statutes generally do not raise First Amendment concerns.[5] Neither of these arguments is availing.

While the Court has previously enforced the Anti-SLAPP Act and its fee-shifting provision, it has not ruled on the merits of the argument now advanced by Plaintiffs: that the fee-shifting provision is an impermissible burden on first amendment and due process rights where imposed as a penalty without any consideration of the plaintiffs' good faith in asserting their claim.

Defendants cite cases holding that fee-shifting statutes *generally* are permissible, but while that may be, the legal question involves the constitutional limitations on statutes whose specific purpose is, as here, to prevent certain categories of lawsuits from being brought, even if they are not frivolous. *See*, *e.g.*, *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1239 (D.C. 2016) (noting that the Anti-SLAPP Act's purpose is to "deter meritless claims filed to harass the defendant for exercising First Amendment rights"). Where fees are imposed not merely to shift costs but rather to punish or discourage certain suits from being filed, a higher constitutional standard is required. For example, in *BE&K Constr. Co. v. NLRB*, the Supreme Court addressed whether the NLRB

[5] Defendants also fault Plaintiffs for failing to follow the notice requirements of Fed. R. Civ. P. 5.1. However, the rule itself specifies that failure to file the required notice "does not forfeit a constitutional claim or defense that is otherwise timely asserted." Fed. R. Civ. P. 5.1(d).

could impose liability and require an employer to reimburse legal fees even if the employer could show the suit was not objectively baseless. 536 U.S. 516, 523-24 (2002). In doing so, the Supreme Court stressed that unsuccessful lawsuits can still fall within the scope of the First Amendment's protection because "the genuineness of a grievance does not turn on whether it succeeds," and that "even unsuccessful but reasonably based suits advance some First Amendment interests." *Id.* at 532. Thus, in order to avoid a statutory interpretation which could conflict with the First Amendment right to petition, the Court held that liability could not be imposed due to "reasonably based but unsuccessful suits filed with a retaliatory purpose." *Id.* at 536. Here, the Anti-SLAPP Act imposes fees on an unsuccessful plaintiff to punish the plaintiff for initiating the lawsuit and thus runs afoul of the First Amendment.

Defendants also claim that there is an "irony" in Plaintiffs' First Amendment argument since a "SLAPP plaintiff's true objective is to use litigation as a weapon to chill or silence." *See* Opp. at 13 n.8 (quoting *Doe v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014)). But in opposition to Defendants' fee motion, Plaintiffs showed that their lawsuit was not brought to silence an opposing point of view, and instead, because Defendants wrongfully published false defamatory allegations about them. In opposition, Defendants have argued that Plaintiffs' motivations should not be considered on the motion for fees, *see* Opp. at 9. They cannot have it both

ways—if a plaintiff's motivations are irrelevant on the fee motion and fees are available to suits other than classic SLAPPs, Defendants cannot defend the constitutionality of the fee-shifting provision by arguing that it only applies to lawsuits which have been motivated by a goal to chill or silence opposing points of view.

It is precisely because the fee-shifting provision applies regardless of whether a lawsuit is a classic SLAPP that it is constitutionally problematic. Defendants' only burden on a special motion to dismiss is to show that the claim arises from an act in furtherance of the right of advocacy. *See Doe*, 133 A.3d at 571 (quotation omitted). Once the defendant has made such a showing, the burden shifts to the plaintiff, who must demonstrate a likelihood of success on the merits, based on evidence and prior to discovery, to defeat the motion. *Id.* Thus, the statute permits no consideration of the plaintiff's motivations in bringing the lawsuit. Accordingly, the Anti-SLAPP Act's punitive imposition of liability for legal fees applies regardless of whether a claim was brought in good faith— and in that fashion it runs afoul of the First Amendment. *See*, *e.g.*, *Synanon Found. v. Bernstein*, 517 A.2d 28, 30 (D.C. 1986).

In a last ditch effort to avoid the conclusion that the Anti-SLAPP Act's fee-shifting provision infringes on a defamation plaintiff's First Amendment right to petition, Defendants argue that acceptance of Plaintiffs' position would invalidate

all fee-shifting statutes "unless the statute requires proof of bad faith or frivolousness." *See* Opp. at 14. But this is both a misstatement of the test proposed by Plaintiffs and an exaggeration of the effect a finding that the anti-SLAPP fee-shifting provision is unconstitutional.

As explained in Plaintiffs' initial brief, the standard proposed by Plaintiffs follows the test articulated by the Supreme Court in *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978), and adds upon the protections otherwise available under Fed. R. Civ. P. 11. *See* Br. at 31-32. That is, in order to award fees and also respect the First Amendment right to petition, a court need not find that a plaintiff acted in bad faith or that a claim was frivolous, but rather should refrain from awarding fees where a plaintiff's claim had a reasonable basis or foundation. This test need not be applied to all fee-shifting statutes, but merely those, like the Anti-SLAPP Act, whose goal is to deter or punish certain categories of lawsuits.

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

Defendants attempt to deflect Plaintiffs' argument that the Anti-SLAPP Act and its fee-shifting provision needed to be approved by this Court in accordance with D.C. Code § 11-946 by arguing that Plaintiffs waived this argument. In support, they cite a case for the unremarkable proposition that a party may not raise

a new argument on a second appeal *following a remand*. *See* Opp. at 18. But that is not what Plaintiffs are doing here, as there has been no remand. Furthermore, even assuming, *arguendo*, that Plaintiffs could have previously challenged the Anti-SLAPP Act under D.C. Code § 11-946, they could not have specifically challenged the fee-shifting provision before Defendants filed their motion for fees.

Moreover, the legal landscape in which Plaintiffs could make their D.C. Code § 11-946 argument changed significantly between the appeal on the special motion to dismiss and the instant appeal on the motion for fees. That is, at the time of the special motion to dismiss the D.C. Circuit Court of Appeals had not yet issued its decision in *Tah v. Global Witness Publ., Inc.*, 991 F.3d 231 (D.C. Cir. 2021). Although Defendants attempt to minimize the importance of *Tah* by claiming that "multiple federal courts" had declined to apply the D.C. Anti-SLAPP Act because it is procedural, with one exception those were all non-binding district court decisions. *See* Opp. at 19 n.13. And while the D.C. Circuit Court of Appeals had previously described the Anti-SLAPP Act as procedural in *Abbas*, that decision had been treated as mere *dicta* by this Court. *See Mann*, 150 A.3d at 1238 n.32 (referring to "*dicta* in *Abbas* concerning the applicability of the Anti-SLAPP Act in litigation brought in federal courts"). Thus, at the time the appeal of the motion to dismiss was adjudicated—post *Mann* and pre *Tah*—the state of the law was far less clear. Now, following the D.C. Circuit Court of Appeals' decision in

Tah, the law is clear that the D.C. Circuit defines the Anti-SLAPP Act and its fee-shifting provision as procedural. *See Tah*, 991 F.3d at 238-39.

Finally, Defendants claim that this Court has already addressed this issue in *Mann* and held that the Anti-SLAPP Act creates substantive rights. *See* Opp. at 19-20. However, in other decisions, this Court has described the Anti-SLAPP Act as "provid[ing] a party defending against a SLAPP with *procedural tools* to protect themselves from 'meritless' litigation." *Saudi Am. Public Rel. Affairs Comm. v. Institute for Gulf Affairs*, 242 A.3d 602, 605 (D.C. 2020) (emphasis added).

Otherwise, Defendants do not really dispute Plaintiffs' argument that the Anti-SLAPP Act and its fee-shifting provision modify the Federal Rules of Civil Procedure—and instead fall back on general legal principles that statutes should be construed to avoid invalidating them and cite to legislative history in support of their claim that the Anti-SLAPP Act creates substantive rights. However, the statutory language controls and here, as correctly acknowledged by the D.C. Circuit, the Anti-SLAPP Act does not create a new substantive right but rather creates a *procedure* whereby a defamation defendant can obtain dismissal of claims and recovery of legal fees. For all the reasons set forth in Plaintiffs' initial brief, the Anti-SLAPP Act modifies the Federal Rules and, having not been pre-approved by this Court in accordance with D.C. Code § 11-946, it was error to apply it to Defendants' fee-shifting motion in Superior Court. *See* Br. at 33-36.

IV. FEES ON FEES ARE UNWARRANTED

Defendants do not really respond to Plaintiffs' arguments that the Superior Court erred in requiring Plaintiffs to pay the fees Defendants incurred in moving for their initial fee request. Instead, Defendants simply state in passing that "successful litigants are presumptively entitled to a fee award (and fees on fees) under the D.C. Anti-SLAPP Act." Opp. at 3. Defendants offer no justification as to why fees on fees would be entitled to the same presumption as the initial fee award or why, in the anti-SLAPP context, fees on fees should be awarded unless there are special circumstances when such fees are ordinarily left to the trial court's discretion.

As explained in Plaintiffs' opening brief, the Superior Court impermissibly created an additional burden for Plaintiffs to meet by imposing a presumption in favor of fees on fees and by impermissibly limiting Plaintiffs' ability to defeat the motion for fees on fees to a demonstration of special circumstances. Fees on fees are unwarranted in the instant case as they unduly punish Plaintiffs for asserting important novel legal arguments. *See* Br. at 37-39.

CONCLUSION

Respectfully, for the above reasons and those set forth in Plaintiffs' initial brief, the Court should reverse the Superior Court's decisions requiring Plaintiffs to reimburse Defendants for legal fees.

Dated: October 29, 2021

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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
Signature

21-cv-283; 21-cv-440
Case Number(s)

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