No. 22-CV-0523

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MARK Z. JACOBSON, PH.D.,

APPELLANT,

v.

CHRISTOPHER T. M. CLACK, PH.D., ET AL.

APPELLEES

ON APPEAL FROM DECISIONS OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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CERTIFICATE OF PARTIES

Pursuant to D.C. App. R. 28(a)(2)(A), the following is a list of all parties, intervenors, and their counsel in the proceeding below:

Appellees/Defendants

Appellees/defendants are The National Academy of Sciences (NAS) and Dr. Christopher T.M. Clack. Current counsel for NAS is Evangeline C. Pascal of Hunton Andrews Kurth LLP. Previous counsel for NAS were Joseph Esposito, William E. Potts, Jr., and Eric H. Feiler, of Hunton & Williams LLP, and Audrey Byrd Mosley and Marc S. Gold of the National Academy of Sciences. Counsel for Dr. Clack are Drew W. Marrocco and Clinton A. Vance of Dentons US LLP.

Appellant/Plaintiff

Appellant/plaintiff is Prof. Mark Z. Jacobson. Previous counsel for appellant in the Superior Court as a plaintiff were Paul S. Thaler, Karen S. Karas, and Jackson S. Nichols of Cohen Seglias Pallas Greenhall & Furman, P.C.

Intervenors

None.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. App. R. 26.1, appellant is not a corporate party, so this rule does not apply.

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ASSERTION

This appeal arises from two final orders (JA1343-1352 and JA1428-1436) that dispose of all the parties' claims.

ABBREVIATIONS

In this brief, appellant Prof. Mark Z. Jacobson will be referred to as Prof. Jacobson. Appellees National Academy of Sciences and Dr. Christopher T.M. Clack will be referred to as NAS and Dr. Clack, respectively. The 2015 paper published in the Proceedings of the National Academy of Sciences (PNAS) by Prof. Jacobson and colleagues will be referred to as the Jacobson Paper. The four co-authors of the Jacobson Paper are sometimes referred to as the Jacobson Authors. The 2017 paper published in PNAS by Dr. Clack and 20 co-authors will be referred to as the Clack Paper. The 21 co-authors of the Clack Paper are sometimes referred to as the Clack Authors.

FOIA = Freedom of Information Act

JA = Joint Appendix

NOAA = National Oceanic and Atmospheric Administration

R. = Rule

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. After he *voluntarily* dismissed his complaint *without* prejudice before any ruling, can Prof. Jacobson be charged attorney's fees under the D.C. Anti-SLAPP Act based on California law and the catalyst theory of D.C.'s FOIA, when (a) this court holds the Act cannot be construed using California law, (b) this court "reject[s] the catalyst theory in non-FOIA contexts," (c) two more cases say no, (d) no case says yes, (e) NAS and Dr. Clack obtained no relief they sought, namely *court-ordered* dismissals *with* prejudice, (f) no material alteration of the parties' legal relationship occurred, and (g) the voluntary dismissal was not judicially sanctioned?

2. If California law can be used to set fees, did the Superior Court make clear factual and legal errors by holding his defamation claim might not prevail when it:

(a) applied no legal test to conclude if any of the four statements set forth in the complaint are opinions versus facts but instead interpreted them using a fake meaning of the term "scientific disagreement" supplied by NAS and Dr. Clack?

(b) ignored four experts who unanimously declared all statements to be false facts?

(c) failed to consider that a false fact defames if it "…tends to injure [one] in his trade, profession…" and makes one appear "odious, infamous, or ridiculous"?

(d) failed to consider charges and evidence of actual malice by NAS and Dr. Clack?

(e) gave the benefit of the doubt to NAS and Dr. Clack at almost every turn when D.C. law requires the benefit to be given to Prof. Jacobson?

STATEMENT OF THE CASE

On September 29, 2017, Prof. Jacobson brought a case in D.C. Superior Court against NAS and Dr. Clack for defamation and NAS for breach of contract and promissory estoppel. (JA19-276). The lawsuit arose due to alleged false and defamatory factual statements in a 2017 paper (Clack Paper, JA173-191) published by Dr. Clack and 20 co-authors in the Proceedings of the National Academy of Sciences (PNAS). That paper critiqued a 2015 paper (Jacobson Paper, JA70-103), also published in PNAS, by Prof. Jacobson, two students, and Dr. Mark Delucchi.

On November 27, 2017, NAS and Dr. Clack filed special motions to dismiss the complaint pursuant to the D.C. Anti-SLAPP Act and Super. Ct. Civ. R. 12(b)(6) (JA277-505). Both motions sought *court-ordered* dismissals *with* prejudice (JA277, 415). On January 5, 2018, Prof. Jacobson opposed the motions (JA506-727). NAS and Dr. Clack replied on January 26, 2018 (JA754-773). A hearing was held on February 20, 2018 (JA9). Before a decision was issued or an answer to his complaint was filed, Prof. Jacobson *voluntarily* dismissed his complaint *without* prejudice on February 22, 2018, pursuant to Super. Ct. Civ. R. 41(a)(1)(A)(i). (JA774-775).

On March 7, 2018, after the Superior Court had accepted the voluntary dismissal (JA9), NAS and Dr. Clack moved for costs and attorney's fees under §16-5504(a). (JA776-841). Prof. Jacobson opposed the motions on March 21, 2018. (JA842-870). NAS and Dr. Clack replied on March 30, 2018. (JA871-880). Prof.

Jacobson filed motions to sur-reply on April 6, 2018 (JA881-903), which were opposed on April 11, 2018 (JA904-908), but granted on June 27, 2018 (JA909-911).

On April 20, 2020, the court granted NAS' and Dr. Clack's motions for costs and attorney's fees, but ordered them to propose and justify the amounts. (JA912-947). To arrive at its decision, the court relied on California precedent and the catalyst theory from the D.C. Freedom of Information Act (FOIA) to construe the fee-shifting clause in D.C.'s Anti-SLAPP Act. (*Id*.) On May 18, 2020, Prof. Jacobson moved for reconsideration of this order. (JA948-1026). His motion was opposed on June 1, 2020 (JA1027-1057) and denied on June 25, 2020 (JA1334-1342), notably because the order was not final. On September 13, 2021, the court awarded Dr. Clack $75,000 in attorney's fees. (JA1343-1352). Prof. Jacobson filed a "Motion for Relief…" from this final order on September 24, 2021. (JA1353-1405). The motion included eight declarations by four experts. (JA1371-1402). Dr. Clack responded October 6, 2021 (JA1406-1411). Prof. Jacobson replied October 10, 2021. (JA1412-1421). On July 5, 2022, the court denied Prof. Jacobson's motion (JA1422-1427) and awarded NAS $428,722.92 in fees (JA1428-1436).

STATEMENT OF THE FACTS

This action arose from alleged false facts, some intentional, published by Dr. Clack, in the Clack Paper, and the refusal of Dr. Clack and NAS to correct the false facts to this day, in reckless disregard for the truth (actual malice). The false facts

and lies have "…injure[d] [Prof. Jacobson] in his trade, profession…" and have made him appear "odious, infamous, and ridiculous," thus defaming him (JA1354).

Prof. Jacobson is a Professor of Civil and Environmental Engineering and Director of the Atmosphere/Energy Program at Stanford University. (JA20). He researches air pollution and global warming and large-scale clean, renewable energy solutions to these problems. (JA20). He has performed this research by building and applying computer models for ~32 years. (JA1413).

On December 8, 2015, Prof. Jacobson, two of his Ph.D. students, and Dr. Delucchi published the Jacobson Paper in PNAS. The paper won a Cozzarelli Prize from PNAS, given for "outstanding scientific excellence and originality" to only 6 out of about 16,000 papers submitted to the journal each year. (JA22).

In 2016, Dr. Clack was a researcher at the University of Colorado at Boulder and NOAA. (JA20). On February 29, 2016, soon after PNAS published the Jacobson Paper, Dr. Clack asked Prof. Jacobson by phone to explain differences that Dr. Clack did not understand in hydropower output between figures and a table in the Jacobson Paper. (JA22). Prof. Jacobson replied by email that day with an explanation (Section II.C.2, infra; JA105). Dr. Clack emailed that he understood the explanation, had tested it himself, and only disagreed with cost. (JA109).

Dr. Clack's jealousy of the attention Prof. Jacobson was receiving soon came to light. On November 3, 2016, after actor Leonardo DiCaprio tweeted about a paper

by Prof. Jacobson, Dr. Clack tweeted, "@LeoDiCaprio Why not read my piece on the most cost effective way to remove carbon." (JA1421). Unknown to Prof. Jacobson, Dr. Clack had, earlier in 2016, secretly collaborated with 20 other authors to critique the Jacobson Paper (JA173). Three such authors were professors at Stanford University (JA173), Prof. Jacobson's place of employment, including two who had been on the PhD Dissertation committee of a student on the Jacobson Paper.

The 21 authors submitted the Clack Paper to PNAS on June 26, 2016 (JA173), hiding it from the students and Prof. Jacobson until February 27, 2017 (JA116), three days after its February 24, 2017 acceptance for publication (JA173). Never before the paper's acceptance, did any Clack Author or NAS inform any Jacobson Author of the critique. Never before the paper's June 27, 2017 publication (JA173), did any Clack Author ask Prof. Jacobson for data to test if any Clack-Paper model error claim was true (JA248). Only on July 10, 2017, 13 days post publication and 13 days after Prof. Jacobson told NAS that no Clack Author had checked error claims against data (JA248), did Dr. Clack ask Prof. Jacobson for model data (JA243). Although the data clearly showed no model error - "the three 30-second data sets are all that are needed to disprove your two claims of model error as published in your paper" (JA240) - Dr. Clack and NAS never corrected their fake model error claims.

On February 27, 2017, PNAS asked Prof. Jacobson if he wanted to write a short rebuttal. (JA116). Before writing it, Prof. Jacobson asked PNAS to correct

false facts and misunderstandings in the Clack Paper. (JA130-169; 248). In the end, only minor changes were made (JA26), and the Clack Paper was published with false facts on, June 27, 2017, along with the Jacobson Author rebuttal. (JA306-308).

Upon publishing their paper, the Clack Authors issued two press releases, through the University of California and the Carnegie Institution of Science, that resulted in headlines worldwide that have damaged the Jacobson Authors' reputations to this day. (JA49-50). Despite Prof. Jacobson's multiple requests to Dr. Clack and NAS to correct the false facts before and after publication (JA47-48; 130-169; 228-235; 240; 248; 254-255), both have refused. Even after four experts meticulously showed how the relevant claims in the Clack Paper were false facts (JA1371-1402), NAS and Dr. Clack still refuse to correct the statements.

Dr. Clack wrote his paper with a provable intent to discredit the Jacobson Authors, who had received much attention and the Cozzarelli Prize for their work. This intent is proven by a sarcastic, unprovoked smear Dr. Clack made of a different paper of Prof. Jacobson's in an August 24, 2017 tweet directed at a friend of Prof. Jacobson: "Shame the work by similar authors, on grid reliability, was discredited:" with a link to the Clack Paper (JA272). The "similar authors" are the Jacobson Authors. A third party called this smear "stalking" by Dr. Clack. (JA272).

Whereas, the Clack Paper had several negative opinions of the Jacobson Paper that were not factual thus not defamatory and that were addressed in the Jacobson

rebuttal (JA306-308), the Clack Paper also contained false facts (see Section II.A, infra) and four flat-out lies regarding one of the false facts (see Section II.C.2, infra). Because NAS and Dr. Clack refused to correct their false facts, which have damaged the Jacobson Authors' reputations, Prof. Jacobson filed for defamation (JA19-276).

SUMMARY OF ARGUMENT

The Superior Court's orders granting attorney's fees and costs to NAS and Dr. Clack should be vacated based on clear legal and factual errors.

First, the Superior Court made three clear legal errors by (1) overriding a voluntary dismissal without prejudice, (2) applying the catalyst theory of the D.C. FOIA fee statute to the D.C. Anti-SLAPP Act fee statute, § 16-5504(a), and (3) using California law both to justify this and determine fees. However, this court (1) holds a voluntary dismissal without prejudice "leaves the parties as if the action had never been brought" [*Evans v. Dreyfuss Brothers, Inc.*, 971 A.2d 179, 186 (D.C. 2009)], (2) "reject[s] the catalyst theory in non-FOIA contexts" [*Fraternal Order of Police, Metro. Labor Comm. v. District of Columbia*, 113 A.3d 195, 200 (D.C. 2015)], and (3) refuses to interpret the D.C. Anti-SLAPP Act with California law [*Saudi Am. Pub. Rels. Affs. Comm. v. Inst. For Gulf Affs.,* 242 A.3d 602, 611 (D.C. 2020)]. Three courts disagree, and no court agrees, that the catalyst theory applies to § 16-5504(a). The Superior Court also erred by holding NAS and Dr. Clack 'prevailed within the meaning of the D.C. Anti-SLAPP Act" (JA913) when neither obtained

any relief sought, namely *court-ordered* dismissals *with prejudice* (JA277, 415). In fact, Prof. Jacobson's dismissal was *voluntary* and *without prejudice*, did NOT materially alter the parties' legal relationship*, since he could re-file, and was NOT judicially sanctioned* (*Supreme Court mandates for a party to prevail). Thus, the fee orders should be reversed based on plain statutory language, precedent, and facts.

Second, even if fees could be shifted using California law, the court's finding that "no jury, properly instructed…could find that the statements in this case are defamatory…" (JA938), so NAS and Dr. Clack prevailed, was based on clear errors in fact and law. Prof. Jacobson's complaint properly asserted defamation claims. The first clear factual error is the fake claim that the statements at issue are "scientific disagreements," not false facts. This error is based on a fake definition, provided by NAS and Dr. Clack, of a "scientific disagreement." The term's real definition and testimony by four experts contradict their definition, which no evidence or expert supports. The Superior Court reached its finding because it failed to use any legal test to find first whether each statement at issue is a fact versus an opinion.

The Superior Court then ignored a crucial grounds for defamation - that a false fact defames if it "…injure[s] [one] in his trade, profession…" and makes one appear "odious, infamous, or ridiculous." *Competitive Enter. Inst v. Mann*, 150 A.3d 1213, 1241 (D.C. 2016). Instead, the court held wrongly that only words accusing one of misconduct or impugning one's integrity can defame (JA935), overturning D.C. law.

Next, the Superior Court ignored the allegations and evidence in the complaint of actual malice by NAS and Dr. Clack arising from their reckless disregard for the truth, namely their failure to investigate properly or correct obvious and admitted false statements of fact. The court also dismissed the testimony of four experts who concluded, after detailed analyses, that NAS and Dr. Clack published false facts, not scientific disagreements, "dishonest(ly)" (JA1401), "in bad faith" (JA1395), "with reckless disregard for the truth," (JA1392) "unethical(ly)" (JA1392, 1398, 1402), and/or while "failing to follow due diligence" (JA1398). With no evidence, the court called the experts' findings about false facts "unpersuasive and repetitive" (JA1426).

The Superior Court also ignored Dr. Clack's actual malice through two more intentional lies he wrote in the Clack Paper, beyond two lies the court partly acknowledged. (JA1415). The court then ignored Dr. Clack's written admission that a fact he published was false (JA987), ignored his intent to discredit Prof. Jacobson through a sarcastic smear he posted (JA272), and ignored his motive, jealousy, to discredit Prof. Jacobson (JA1421).

In sum, instead of "construing the complaint in the light most favorable to plaintiff" and determining whether "it appears beyond doubt that [plaintiff] can prove no set of facts in support of his claim which would entitle him to relief" [*Oparaguo v. Watts*, 884 A.2d 63, 77, (D.C. 2005)], the Superior Court, in another error of law, gave the benefit of the doubt to NAS and Dr. Clack at almost every

turn. Thus, this court is asked to vacate the Superior Court's fee orders. If the orders cannot be vacated, this court is asked to limit fees severely, as described herein.

ARGUMENT

Jurisdiction and standard for review

This court should vacate the Superior Court's orders granting costs and attorney's fees to NAS and Dr. Clack because Prof. Jacobson voluntarily dismissed his defamation lawsuit before a decision was rendered on pending special motions to dismiss. This court has jurisdiction to review a trial court's decisions regarding both attorney's fees [*Purcell v. Thomas*, 28 A.3d 1138, 1141 (D.C. 2011); *Anderson v. United States*, 754 A.2d 920, 922-23 (D.C. 2000)] and a special motion to dismiss an Anti-SLAPP lawsuit. *Mann*, 150 A.3d at 1220.

This court reviews the Superior Court's findings of fact for *clear error* [*Davis v. United States*, 564 A.2d 31 (D.C. 1989)] and findings of law related to the D.C. Anti-SLAPP Act de novo. *Close It! Title Services, Inc. v. Nadel,* 248 A.3d 132, 138-139 (2021). This court also interprets the D.C. Anti-SLAPP Act based on the "plain language of the statute," and explicitly NOT on California law:

> Preliminarily, we note that both parties invite us to follow the precedent of other states, **including California** and Texas, interpreting their anti-SLAPP statutes. **We decline to do so**…**Rather than selectively follow other state court decisions**, we return to basic principles of statutory interpretation to construe the D.C. Anti-SLAPP Act and look to the **plain**

> **language of the statute**. See *District of Columbia v. Place*, 892 A.2d 1108, 1111 (D.C. 2006).

Saudi Am. Pub. Rels. Affs. Comm., 242 A.3d at 611 (emphasis added). Here, the Superior Court improperly used California precedent to justify awarding fees and costs through D.C.'s Anti-SLAPP Act.

Finally, when interpreting the D.C. Rules of Civil Procedure, this court relies on both federal and D.C. case law, since D.C. Code § 11–946 mandates:

> The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23) unless it prescribes or adopts rules which modify those Rules…

See also *Woodroof v. Cunningham*, 147 A. 3d 777 (D.C. 2016).

With these standards, the orders should be reversed due to (1) clear errors in law because costs and attorney's fees cannot be charged under D.C.'s Anti-SLAPP Act after a voluntary dismissal, and (2) clear errors in fact and law since Prof. Jacobson properly asserted defamation claims.

I. Attorney's fees and costs cannot be awarded as a matter of law if action is dismissed voluntarily

I.A. Prof. Jacobson properly and timely dismissed his lawsuit voluntarily without prejudice

On February 22, 2018, prior to a decision on two pending special motions to dismiss, Prof. Jacobson voluntarily dismissed his lawsuit without prejudice (JA774-775), pursuant to Super. Ct. Civ. R. 41(a)(1)(A)(i):

> (a) VOLUNTARY DISMISSAL.
> (1) By the Plaintiff.
> (A) *Without a Court Order*. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable statute, the plaintiff may dismiss an action without a court order by filing:
> (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment[.]
> (B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice.

Because neither NAS nor Dr. Clack had served an answer or a motion for summary judgment, Prof. Jacobson was within his right to voluntarily dismiss the action.

A Super. Ct. Civ. R. 41(a)(1)(A)(i) voluntary dismissal is final. It "renders the proceedings a nullity and leaves the parties as if the action had never been brought." *Evans,* 971 A.2d at 186, citing *Thoubboron v. Ford Motor Co*., 809 A.2d 1204, 1210 (D.C. 2002). Super. Ct. Civ. R. 41(a)(1)(A)(i) mimics Fed. R. Civ. P. 41(a)(1)(A)(i). Federal cases apply to interpret the D.C. rule (D.C. § 11–946). As *Miniter v. Sun Myung Moon*, 736 F. Supp. 2d 41, 45 n.7 (D.D.C. 2010) states, "[o]nce the plaintiff has filed a notice of voluntary dismissal pursuant to Rule 41(a)(1)(A)(i), 'there is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play.' "

Based on these cases, the Superior Court exceeded its authority to consider attorney's fees against appellant when it had "*no more role to play*" after a voluntary dismissal. This becomes more obvious when comparing Super. Ct. Civ. R. 41(a)(1) with R. 41(a)(2). Unlike with a R. 41(a)(1) dismissal, a R. 41(a)(2) dismissal gives

the court discretion to charge costs and fees as a condition of dismissal ("on terms that the court considers proper") (*Thoubboron,* 809 A.2d at 1210-11). A R. 41(a)(1) dismissal gives no such discretion. Yet, any costs and fees under R. 41(a)(2) are "limited to the amount expended for work that cannot be applied to [a] subsequent lawsuit…" in case a plaintiff re-files (*Thoubboron,* 809 A.2d at 1211). Here, the Superior Court not only violated appellant's right to voluntarily dismiss under R. 41(a)(1) without fees and costs, but also charged him more fees than those under a court-ordered dismissal, contradicting even R. 41(a)(2). So, if any fees are awarded here, Prof. Jacobson requests this Court to ensure they are below "those that cannot be applied to [a] subsequent lawsuit," if he re-filed. *Thoubboron,* 809 A.2d at 1211.

I.B. Definition of a party who prevails in whole or in part is clear

The cost and fee clause of the D.C. Anti-SLAPP statute §16-5504(a) states,

> 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.

Instead of construing §16-5504(a) in the context of a R. 41(a)(1) dismissal, which "*leaves the parties as if the action had never been brought*" (*Evans,* 971 A.2d at 186), rendering §16-5504(a) moot, the Superior Court ignored R. 41(a)(1) entirely and instead held, "Defendants have prevailed within the meaning of the D.C. Anti-SLAPP Act." (JA913). Specifically, the court held that (1) D.C. should copy California's Anti-SLAPP Act, which allows a defendant to seek fees after a

voluntary dismissal since the defendant "achieved the purpose of the motion, that is a swift end to the litigation" (JA922), and (2) the catalyst theory should apply to §16-5504(a), just as it does to FOIA statute §2-537(c), since §16-5504(a) uses the same term, "prevails, in whole or in part," as does §2-537(c). The ruling originates exactly from two arguments offered by NAS and Dr. Clack:

> In their pleadings, Defendants offer two primary arguments for finding that they have prevailed and are presumptively entitled to a fee award: (1) that persuasive Anti-SLAPP authority from other jurisdictions suggests Defendants have 'prevailed' in this case… and (2) that under the 'catalyst theory' applied to the identically worded fee-shifting provision of another act, the District of Columbia's FOIA, would dictate that these Defendants have prevailed under the D.C. Anti-SLAPP Act.

(JA917-918). The court agreed with both arguments, holding (JA 927): "…it is appropriate to follow the case law of California" and (JA922):

> Here, the Court concludes that caselaw supports an interpretation of the statutory language that effectuates the purpose statute and encompasses awards to parties who were not awarded relief by the Court, but nonetheless achieved the purpose of the motion, that is, a swift end to the litigation.

The court found no D.C. case to support either ruling. The ruling is in clear error since **this court has already held against both reasons** for it. First, in *Saudi Am. Pub. Rels. Affs. Comm,* 242 A.3d at 611*,* this court held that California precedent cannot be used to construe D.C.'s Anti-SLAPP Act. Second, in *Fraternal Order of Police,* 113 A.3d at 200, this court rejected the catalyst theory in non-FOIA contexts: "…this court rejecting the catalyst theory in non-FOIA contexts," citing *Settlemire*

v. D.C. Office of Emp. Appeals, 898 A.2d 902, 907 (D.C.2006). The fee awards should be reversed on these grounds alone.

What is more, NAS and Dr. Clack did not "prevail in whole or in part" at all based on the plain meaning of the term, as used in D.C.. This court in *Settlemire* 898 A.2d at 907 defined both a "prevailing party" and a "party (who) prevails:"

> …the term "prevailing party" is understood to mean a party "who has been awarded some relief by the court"…("[A] party…'prevails' by winning the relief that it seeks.");… Since none of the relief that Settlemire sought is available to him, he cannot prevail, and attorney's fees are not available to him either.

Citations omitted. As such, a party cannot prevail at all, let alone "in part" unless it is "awarded some relief." The plain meaning of prevailing in "part" from *Settlemire* is for a party to win "relief by the court*"* for at least one action. Here, NAS and Dr. Clack won zero actions from their special motions to dismiss, so did not prevail, even "in part." *Settlemire* at 907: "Since none of the relief Settlemire sought is available to him, he cannot prevail…." In its special motion, NAS sought

> …pursuant to D.C. Code § 16-5502…an order dismissing plaintiff's complaint, with prejudice,…. In the alternative,…, pursuant to SCR Civil 12(b)(6), for an order dismissing plaintiff's complaint with prejudice…

(JA277). Dr. Clack sought the same relief (JA415). The court granted no such relief. To the contrary, Prof. Jacobson's dismissal was neither by court order *nor* with prejudice *nor* through either law. The fact that it was without prejudice matters, as

discussed next. *Settlemire* cites *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res*., 532 U.S. 598, 604-05 (2001). *Buckhannon* clearly states that a prevailing party entitled to attorney's fees and costs must:

> (1) obtain a "material alteration of the legal relationship of the parties"
> (2) that is "judicially sanctioned."

Wood v. Burwell, 837 F.3d 969, 973 (9th Cir. 2016). A voluntary dismissal does *not* confer prevailing party status. See, e.g., *O.F. Mossberg & Sons, Inc. v. Timney Triggers, LLC*, 955 F.3d 990, 990 (Fed. Cir. 2020) ("plaintiff had voluntarily dismissed the action without prejudice and the Federal Circuit found that such a dismissal was not a 'final court order' sufficient to confer prevailing-party status") and *D.C. Healthcare Sys., Inc. v. Dist. of Columbia*, Civil Case No. 16-1644 (RJL), 2017 WL 6551184, at *1, *2. (D.D.C. 2017) (since plaintiff voluntary dismissed under Fed. R. Civ. P. 41(a)(1)(A)(i), defendant was not a "prevailing party," so its fee motion under 42 U.S.C. § 1988(b) as a prevailing party was denied).

The conditions for a prevailing party from *Buckhannon* were confirmed in *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642 (2016). There, the Supreme Court unanimously held that a party could be a "prevailing party" by obtaining a non-merits judgment, but it did not hold that the material-alteration requirement no longer existed. *Id* at 1646. In fact, after *CRST*, the material-alteration requirement still applied. For example, *Wood v. Burwell,* 837 F.3d at 974, citing *CRST,* analyzed

whether a plaintiff seeking attorney's fees obtained "a material alteration in the parties' legal relationship". Similarly, in *Robinson v. O'Rourke*, 891 F.3d 976 (Fed. Cir. 2018), the court stated, "The Court [in CRST] reiterated that the 'touchstone' of the prevailing-party inquiry is whether there has been a 'material alteration of the legal relationship of the parties.'"

In the present case, NAS and Dr. Clack met neither criteria required by *Buckhannon*. Prof. Jacobson's voluntary dismissal (1) did NOT materially alter the legal relationship of the parties and (2) was NOT judicially sanctioned.

First, a dismissal without prejudice does not materially alter the parties' legal relationship since the plaintiff can re-file, keeping the defendant at risk:

> The Seventh Circuit reached a similar conclusion in *Szabo Food Service, Inc. v. Canteen Corp*., 823 F.2d 1073, 1076 (7th Cir. 1987). There, the court concluded that "[a] dismissal without prejudice under Rule 41(a)(1)(i) does not decide the case on the merits" **because a plaintiff may refile and "[t]he defendant remains at risk."** *Id.* Although these cases involve voluntary rather than involuntary dismissal without prejudice, the risk of re-filing underlying their reasoning applies in both procedural postures. **Thus we are persuaded that dismissal without prejudice does not alter the legal relationship of the parties because the defendant remains subject to the risk of re-filing**.

Oscar v. Alaska Dept, 541 F.3d 978, 981 (9th Cir. 2008) (emphasis added). This has been confirmed in D.C.: "a dismissal without prejudice has no res judicata effect" (so the lawsuit can be re-filed) (*Thoubboron,* 809 A.2d at 1210) and in *Semtek Int'l, Inc. v. Lockheed Martin Corp*, 531 U.S. 497, 505 (2001):

> The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim. That will also ordinarily (though not always) have the consequence of not barring the claim from other courts, but its primary meaning relates to the dismissing court itself.

Second, NAS and Dr. Clack did not prevail at all because Prof. Jacobson's voluntary dismissal was not judicially sanctioned, since it required no court order:

> Under Rule 41(a)(1), a plaintiff has an absolute right to voluntarily dismiss his action prior to service by the defendant of an answer or a motion for summary judgment. *Concha v. London*, 62 F.3d 1493, 1506 (9th Cir. 1995) (citing *Hamilton v. Shearson-Lehman American Express*, 813 F.2d 1532, 1534 (9th Cir. 1987))…**The dismissal is effective on filing and no court order is required**. *Id*.…The filing of a notice of voluntary dismissal with the court automatically terminates the action as to the defendants who are the subjects of the notice. *Concha*, 62 F.2d at 1506. Unless otherwise stated, the dismissal is ordinarily without prejudice to the plaintiff's right to commence another action for the same cause against the same defendants. *Id.* (citing *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 934-35 (9th Cir. 1987)). Such a dismissal **leaves the parties as though no action had been brought**.

Wilson v. City of San Jose, 111 F.3d 688, 692 (9th Cir. 1997) (emphases added).

In sum, NAS and Dr. Clack did not satisfy the two *Buckhannon* requirements for them to prevail, even in part.

I.C. Three courts: No D.C. Anti-SLAPP fees after voluntary dismissal

Three courts interpreting the plain language of D.C.'s Anti-SLAPP Act or the catalyst theory conclude that a voluntary dismissal of a defamation case puts a plaintiff at no risk of attorney's fees. No court says otherwise.

First, in *Doe v. Burke*, 133 A.3d 569, 578-579 (D.C. 2016), this court unambiguously states that a plaintiff who voluntarily dismisses has zero exposure to legal fees under D.C. Code § 16-5504(a):

> The fee-shifting provision is plain on the face of the Anti–SLAPP statute. Had Ms. Burke wished to minimize her potential exposure to a fee award, she could have dismissed her lawsuit at any time rather than continue after [Zujua] rejected her settlement offer.

The definition of "*minimize*" from five dictionaries is to (1) "reduce to the smallest possible amount or degree" (Dictionary.com); (2) "reduce something, especially something bad, to the lowest possible level" (Oxford Learner's Dictionary); (3) "reduce something harmful or unpleasant to the smallest amount or degree" (MacMillan Dictionary); (4) "reduce something to the least possible level or amount" (Cambridge Dictionary), and (5) "make (something bad or not wanted) as small as possible" (Britannica). The smallest possible amount or degree of exposure is zero, so by definition, this court unambiguously meant that Ms. Burke's exposure to a fee award would have been reduced to zero if she had dismissed her case. If this court had meant reduce her exposure to above zero, instead of to "minimize" her exposure, it would have used "reduce." But it didn't.

In interpreting *Doe*, the Superior Court stated (JA919),

> …the Court of Appeals did not use the word 'avoid,' as Plaintiff does, but instead used the word 'minimize' to describe the effect of voluntary dismissal on her potential exposure to a fee award.

> In this Court's view, 'minimize' either suggests, or at least leaves open the possibility, that some exposure would already have been incurred.

This is a clear error in construing *Doe*, as the definition of "minimize" is to reduce to the smallest possible amount, which is zero. This means the same as to "avoid." Also, by taxing Prof. Jacobson despite his voluntary dismissal, the Superior Court held his dismissal did not reduce his risk of exposure to a fee award one bit, let alone minimize it. *Doe*'s decision, that if Ms. Burke had voluntarily dismissed before a ruling, her fee exposure would be zero, is also consistent with *Doe* at 575 n.7:

> [T]his jurisdiction follows the American Rule under which ... every party to a case shoulders its own attorneys' fees, and recovers from other litigants only in the presence of statutory authority, a contractual arrangement, or certain narrowly-defined common law exceptions...." *Oliver T. Carr Co. v. United Techs. Commc'ns Co.*, 604 A.2d 881, 883 (D.C. 1992) (internal quotation marks omitted).

That D.C. Courts follow the American Rule is dispositive. Once Prof. Jacobson voluntarily dismissed his complaint, the special motions to dismiss were no longer pending (*Evans* at 186; *Thoubboron* at 1210; *Miniter* at 45 n.7; *Wilson* at 692), and the Superior Court had **no statutory authority** to depart from the American Rule to award fees. Thus, the Superior Court contradicted *Doe*'s ruling.

In a second unambiguous case, the U.S. Court of Appeals for the D.C. Circuit in *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015) interpreted D.C.'s Anti-SLAPP Act as follows (at 1337 n.5):

> After granting or denying a special motion to dismiss under the Anti–SLAPP Act, a court may grant attorney's fees and costs to the prevailing party. See D.C. Code § 16–5504. The Act does not purport to make attorney's fees available to parties who obtain dismissal by other means, such as under Federal Rule 12(b)(6).

This ruling, like with *Doe*, unambiguously indicates that a voluntary dismissal (i.e., a "dismissal by other means") prevents Prof. Jacobson from being taxed attorney's fees under the D.C. Anti-SLAPP Act. Similarly to in *Buckhannon*, the *Abbas* court explains that attorney's fees in D.C. are available only *after* the court has "grant(ed) or den[ied] a special motion to dismiss." A dismissal due to Prof. Jacobson's right to voluntarily dismiss under Super. Ct. Civ. R. 41(a)(1)(A)(i) is *not* a dismissal due to a court decision. It involves no judicial involvement at all. See *Wilson v. City of San Jose,* 111 F.3d. at 692. The Superior Court misconstrued *Abbas* 783 F.3d at 1337 n.5 by stating (JA919) that the *Abbas* Court

> was also not specifically addressing the question at issue here, but instead, was addressing whether, having decided that the D.C. Anti-SLAPP Act's special motion to dismiss provision does not apply in the District's federal courts, attorney's fees were available.

This is a clear error since the *Abbas* Court directly addressed the "question at issue here." The quoted language from *Abbas* was NOT limited to the circumstances in that case but was on its face (at 1337 n.5) written as a general rule applicable to D.C.'s Anti-SLAPP Act: "The Act does not purport to make attorney's fees available

to parties who obtain dismissal by other means,…" Also, by referencing D.C. Code § 16–5504 at 1337 n.5, *Abbas* defines a "prevailing party" as a "party who prevails, in whole or in part." This is because §16-5504 uses, "party who prevails, in whole or in part," and *Abbas* refers to such a party as a "prevailing party."

In sum, the *Abbas* Court unambiguously held a defendant can secure fees from D.C.'s Anti-SLAPP Act *only* if he or she prevails (wins) on a special motion to dismiss. A defendant does not prevail, even in part, if the plaintiff voluntary dismisses. This conclusion is consistent with those from *Settlemire* and *Doe*.

Third, in *Fraternal Order of Police,* 113 A.3d at 200, this court, citing *Settlemire*, "reject[s] the catalyst theory in non-FOIA contexts":

> In *Frankel v. District of Columbia*, 110 A.3d 553 (D.C.2015), we reaffirmed that the "catalyst theory" applies to determine whether a party is eligible for fees under D.C. FOIA. Op. at 200–01. We rejected the District's argument that *McReady v. Department of Consumer and Regulatory Affairs*, 618 A.2d 609 (D.C.1992), which recognized the catalyst theory for D.C. FOIA cases, was undercut by intervening opinions of the United States Supreme Court and **this court rejecting the catalyst theory in non-FOIA contexts.** Id. at 6–10 (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res*., 532 U.S. 598, 601, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), and *Settlemire*, 898 A.2d at 907).

(Emphasis added). Thus, this court rejects the following Superior Court ruling that the D.C. Council intended the catalyst theory to apply to § 16-5504(a) as with FOIA:

> "The Court therefore concludes that the use of the specific language was deliberate and was intended to reflect the

> interpretations such language has been given within other District of Columbia statutes, such as FOIA.

(JA921). Instead, *Fraternal Order of Police*, 113 A.3d at 200, affirms that, only in FOIA cases, such as in *Frankel v. D.C. Office for Planning & Economic Dev.*, 110 A.3d 553 (D.C. 2015), can D.C. courts apply the catalyst theory. The reason is stated clearly in *Frankel* at 557: "we note that *Buckhannon* does not apply to federal FOIA suits and we interpret the D.C. FOIA similarly." *Frankel* says more:

- "When drafting FOIA, the D.C. Council stated its intention to craft enforcement sanctions mirroring the 'federal model,'…, and in 1976 this included attorney's fee awards based on the catalyst theory." *Id.* at 557.
- After *Buckhannon*, "…Congress amended the federal FOIA to codify the catalyst theory, explicitly authorizing attorney's fees when a plaintiff obtains relief through 'a voluntary or unilateral change in position by the agency…'" *Id*. at 557.
- Thus, "Congress acted to 'clarif[y] that the Supreme Court's decision in *Buckhannon*…does not apply to [federal] FOIA cases." *Id.* at 558.

In sum, Congress stopped *Buckhannon* from applying to federal FOIA cases, and the D.C. Council mimicked the federal FOIA. D.C.'s Anti-SLAPP Act has no federal counterpart and may even conflict with federal rules. *3M Co. v. Boulter*, 842 F. Supp. 2d 85 (D.D.C. 2012). So, unlike with the D.C. FOIA, no act of Congress, D.C. Council history, or catalyst-theory words like in 5 U.S.C. § 552(a)(4)(E)(ii)(II):

> "…a complainant has substantially prevailed if the complainant has obtained relief through either…(II) a voluntary or unilateral change in position by the agency…"

proves a D.C. Council intent to apply the catalyst theory to the Anti-SLAPP Act.

The Superior Court's entire basis for applying the catalyst theory to the Act is the use of "prevails in whole or in part," instead of "prevailing party," in both the Act and FOIA. But this cannot show legislative intent when there is no federal or D.C. version of the Act with words like in 5 U.S.C. § 552(a)(4)(E)(ii)(II); when *Fraternal Order of Police*, 113 A.3d at 200 makes clear that this court "reject[s] the catalyst theory in non-FOIA contexts;" and when *Abbas* (at 1337 n.5) and *Doe* (at 578-9) reject applying the catalyst theory to the Act. Instead, "prevails…in part" means one must *win* by court order at least part of the relief sought, since *Settlemire* 898 A.2d at 907 defines "prevails" and "prevailing" as *winning* relief by a court.

Lastly, one cannot re-file a voluntarily-dismissed FOIA case if the documents sought are obtained. But one can re-file a dismissed defamation case. So, even if the catalyst theory applied to the Anti-SLAPP Act, fees must be limited to those that "cannot be applied to [a] subsequent lawsuit." *Thoubboron,* 809 A.2d at 1211.

I.D. California law does not apply to the D.C. Anti-SLAPP Act

Finally, the Superior Court's justification for and method of determining attorney's fees relied entirely on California case law (JA927-928):

> Thus, the Court concludes that it is appropriate to follow the case law of California, as the cases are generally analogous, well-reasoned and consistent with the legislative purpose of the act in question.

This decision was a clear legal error, as D.C.'s Anti-SLAPP Act must be interpreted form "the plain language of the statute," NOT from California law. See *Saudi Am. Pub. Rels. Affs. Comm.,* 242 A.3d at 611, where this court expressly "declined" to interpret D.C.'s Anti-SLAPP Act using any other state's precedent.

In sum, California precedent and the catalyst theory cannot be used to construe D.C.'s Anti-SLAPP Act. Three post-2014 cases (*Fraternal Order of Police*, *Doe, Abbas*) unambiguously find that one who voluntarily dismisses is not liable for fees. A voluntary dismissal without prejudice does NOT materially alter the legal relationship of the parties and is NOT judicially sanctioned. Plus, neither NAS nor Dr. Clack obtained even part of the relief they sought, which was a court-ordered dismissal with prejudice. Thus, the fee awards were in error.

II. Clear errors in fact and law about defamation

Based on the preceding analysis, the Superior Court's orders against Prof. Jacobson for costs and attorney's fees should be vacated as a matter of law, so the facts and law around the defamation claim are not relevant. However, if the awards are accepted, this court is asked to vacate them due to clear errors in fact and law by the Superior Court in finding that defamation likely did not occur [that "a jury properly instructed…could not reasonably find that Dr. Jacobson's claims are

supported in light of the evidence that has been produced…" (JA-944)]. To the contrary, Prof. Jacobson properly asserted defamation claims.

The clear factual and legal errors made by the Superior Court are as follows:

1) The court used a fake definition of the term "scientific disagreement" provided by NAS and Dr. Clack to incorrectly conclude that the statements at issue are statements of opinion rather than fact. The court did not use any legal test to determine if the statements are of opinion versus fact.
2) The court applied an incorrect, narrow definition of what constitutes defamation, failing to include statements that "…injure [one] in his trade, profession…" and that make one appear "odious, infamous, or ridiculous."
3) The court failed to consider actual malice by NAS and Dr. Clack, including reckless disregard for the truth and Dr. Clack's full knowledge that some statements were false. The court also ignored evidence of Dr. Clack's motive.
4) In virtually all of its decisions, the court gave NAS and Dr. Clack the benefit of the doubt, contrary to D.C. law.

II.A. Clear errors in fact based on a fake definition

D.C. defamation law requires four elements:

> (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a

> matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

Oparaguo v. Watts, 884 A.2d 63, 76 (D.C. 2005). If a public figure, plaintiff must also prove that the defendant acted with actual malice, which is "with knowledge that [the statement] was false OR with reckless disregard of whether it was false or not." *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016).

Here, the Superior Court first held that the statements at issue were not false facts but instead reflected mere "scientific disagreement":

> …the three asserted "egregious errors" are statements reflecting scientific disagreements, which were appropriately explored and challenged in scientific publications;... Whether the Clack Article's challenge to the Jacobson article's methodology would qualify as scientifically "good" or "bad" is a question best resolved in the scientific or academic forum, not the court.

(JA935-936). Because the statements were held to be opinions, the court held they could not defame. The claim that the statements were "scientific disagreements" did not originate from a legal test, but from briefing by NAS and Dr. Clack (e.g., JA292):

> The Academy therefore provided its readers with both plaintiff's and the Clack authors' positions on how the data should be interpreted, which is how scientific disagreements are supposed to be addressed and resolved.

Based on this definition of a "scientific disagreement," any position, even one containing a falsified fact, is a "scientific disagreement," thus an opinion, and not actionable. In fact, even the most fraudulent "position on how data should be

interpreted" is a "scientific disagreement." The flaws in the court's reasoning are (1) it falsely assumes that misrepresenting data and changing the definition of data, as occurred here, are forms of data interpretation, and (2) the four statements at issue are unambiguously false statements of fact, or opinions that imply a verifiably false fact, based on the (a) legal standard for determining if a statement is a fact or opinion, (b) true definition of a "scientific disagreement," and (c) testimony by four experts. From the complaint, the Clack-Paper statements at issue are:

> **Statement 1:** Similarly, as detailed in SI Appendix [to the Clack Article], section S1.2, the total amount of load labeled as flexible in the figures of [the Jacobson Article] is much greater than the amount of flexible load represented in their supporting tabular data. In fact, the flexible load used by LOADMATCH is more than double the maximum possible value from table 1 of ref. 11. The maximum possible from table 1 of ref. 11 is given as 1,064.16 GW, whereas figure 3 of ref. 11 shows that flexible load (in green) used up to 1,944GW(on day 912.6). Indeed, in all of the figures in ref. 11 that show flexible load, the restrictions enumerated in table 1 of ref. 11 are not satisfied.

(JA35-36) in the complaint and (JA175) in the Clack Paper.

> **Statement 2:** Fig. 1. This figure (figure 4B from [the Jacobson Article]) shows hydropower supply rates peaking at nearly 1,300 GW despite the fact that the proposal calls for less than 150 GW hydropower capacity. This discrepancy indicates a major error in their analysis…This error is so substantial that we hope there is another explanation for the large amounts of hydropower output depicted in these figures.

(JA41, 39) in the complaint and (JA175, 180) in the Clack Paper.

> **Statement 3:** generation proposed in ref. 11 is 402.2 TWh, 13% higher than the 25-y historical maximum of 356.5 TWh (1997).

(JA49) in the complaint and (JA176) in the Clack Paper.

> **Statement 4:** (a) Modeling Errors. (b) …this work…contained modeling errors,…

Statement 4 includes two false statements. The first (a) is a Clack Paper section title, "Modeling Errors." (JA175). The second (b) is a statement in the Clack Paper abstract. (JA173). The alleged errors in Statements 1 and 2 are listed in the Clack Paper "Modeling Errors" section, as pointed out in the complaint (e.g., JA41-42):

> Thus, despite knowing that the so-called "discrepancy" was consistent with the assumption made by Dr. Jacobson and his co-authors, and that it was not an error in the analysis or model, Dr. Clack and his co-authors intentionally listed this "discrepancy" under "Modeling Errors" in the main text of the Clack Article, and deceitfully claimed they "hope there is another explanation" when they knew that there was one.

In multiple places (JA34, 36, 38, 39, 41), the complaint also points to the false modeling error claims arising from Statements 1 and 2. For example (at JA38),

> As explained above, Dr. Clack falsely claimed the Jacobson Article contained a modeling error because Dr. Clack falsely asserted that a number in a table was a maximum value…

The legal tests for determining if a statement is of opinion or fact are "whether a reasonable juror could conclude that…statements expressed or implied a verifiably false fact…" [*US Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42, 58 (D.D.C. 2021)] and/or whether the statement is "susceptible to proof or refutation by reference to

concrete, provable data" [*Gould v. Maryland Sounds Ind., Inc.*, 31 Cal.App.4th 1137, 1154 (1995)]. Also, "statements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false." *Rosen v. Amer. Israel Public Affairs Com., Inc*., 41 A.3d 1250, 1256 (D.C. 2012).

In *Dominion*, 554 F. Supp. 3d at 58, the court reeled off these examples:

> These statements are either true or not; either Powell has a video…or she does not…either Dominion was created to produce altered voting results…or…it was not…either Dominion did so or…it did not. In sum, Dominion has adequately alleged that Powell made a number of statements that are actionable because a reasonable juror could conclude that they were either statements of fact or statements of opinion that implied or relied upon facts that are provably false.

Based on these tests, the four statements are all statements of fact since:

Statement 1: values in "table 1 of ref. 11" are either "maximum possible value(s)" or they are not, and "the restrictions enumerated in table 1 of ref. 11" are either satisfied or they are not"

Statement 2: Prof. Jacobson's model either produced a "substantial" error resulting in "large amounts of hydropower output" or it did not;

Statement 3: Either NAS and Dr. Clack compared modeled U.S. plus Canadian hydropower generation (402.2 TWh) with U.S.-only data (365.5 TWh), thereby changing the definition of data and omitting data, or they did not;

Statement 4: Prof. Jacobson's model either produced errors or it did not.

Even if Statement 2 ("This error is so substantial…") is an opinion, it relies on a provably false fact (that a model "error" occurred), so is actionable (*Rosen,* 41 A.3d at 1256). The Superior Court used no stated test to determine if any of the four statements are of opinion or fact; it just adopted NAS' and Dr. Clack's fake definition of a "scientific disagreement," and called them that.

The statements are factual based also on the unpaid testimony of four senior scientists from three continents: Prof. Howarth (Cornell Univ.), Prof. Diesendorf (UNSW, Australia), Prof. Ingraffea (Cornell Univ.), and Prof. Strachan (Robert Gordon Univ., Scotland). The experts have over 100 years of experience combined. (JA1358). Howarth is a member of the Committee on Publication Ethics (JA1358).

As an example of how the experts meticulously arrived at their findings, consider Prof. Diesendorf, who first defined the difference between a "fact" and a "scientific disagreement." He then stated why Table 1 of the Jacobson Paper contains *average* values (as claimed by Prof. Jacobson) rather than *maximum* values (as claimed by NAS and Dr. Clack) and why that is an error of fact (JA1378-1379):

> As a scientist, I understand that a fact is something that has either been proven to be true or is true by definition or logical argument…As a scientist, I understand that a scientific disagreement can occur when we have incomplete information about the system of interest and different scientific hypotheses can be held that are consistent with the available data, logic and existing scientific facts.

> My assessment is that Question 11.1 is a question of fact that I have verified from studying both the Jacobson PNAS paper itself and its reference 22 (also by Jacobson), which is the source of the data in Table 1 of Jacobson's PNAS paper. Furthermore, the latter reference states clearly on page 2095 that "The table is derived from a spreadsheet analysis of annually *averaged* end-use load data" (my italics). Therefore, the answer to Question 11.1 is "average", as stated by Jacobson.

In fact, all four experts declared that NAS and Dr. Clack published **false facts** and NOT scientific disagreements with respect to all statements at issue:

> **The issues I address in points #10 and #11 above are questions of fact**, and are examples where the Clack Paper failed to follow due diligence. In my professional judgement, these facts can be correctly determined from evidence in the Jacobson et al. paper and in the sources cited there.

Howarth (JA1373).

> My assessment is that Question 11.2 is a **question of fact** that I have verified from both the Jacobson PNAS paper itself together with its reference 22, which states clearly on page 2102 that 'In addition, 23 U.S. states receive an estimated 5.103 GW of delivered hydroelectric power *from Canada*' (my italics). Therefore, the answer to Question 11.2 is 'yes', as stated by Jacobson.

Diesendorf (JA1379).

> Clearly, Clack et al. incorrectly assessed the numbers in Table 1 as "maximum" values… **This is not a matter of scientific disagreement. Rather, it is a matter of fact**: the numbers in Table 1 are either maximum values, or they are average values. 9. Claim #2: Clack alleges that it is only "scientific disagreement" concerning the Jacobson paper use of Canadian hydropower in its calculations. **Again, this is a matter of fact, not opinion: either it does or it does not include such imports**. **The Clack paper clearly errs in fact** in asserting that hydroelectric output used in the Jacobson paper calculations is from U.S. facilities only.

Ingraffea (JA1383-1384).

> ….it is clear that the answer to the question contained in 10.1 is average, as correctly stated by Dr. Jacobson…**This is a point of fact**. 12. Therefore, I am again perplexed as to why Dr. Clack and his co-authors made yet another basic error…**This is another point of fact**.

Strachan (JA1388).

> The Clack Paper then stated that Jacobson et al. had made a "modeling error," when in fact the **Clack Paper was simply mis-stating what Jacobson et al. had presented.** The Clack Paper was not making informed "interpretation of judgement of data," but rather was making changes to the factual definition of the data and omitting information, **and then interpreting/judging based on these altered and omitted data**.

Howarth (JA1392).

> This is not an interpretation/judgment of data but instead is altering the factual definition of data.

Diesendorf (JA1394).

> This is clearly another instance of apparently **purposeful obscuring of the factual definition of data**…This is an instance where authors of the Clack paper made an incorrect inference about the model based on their own altering and obscuring of factual data…The unsupported inference of "modeling error" should have been obvious to the authors had they thoroughly checked for mathematical computer modeling error.

Ingraffea (JA1397).

> The Clack paper makes spurious claims in this respect. **There is no evidence of "modelling errors**.

Strachan (JA1401).

Even without the experts, common sense dictates the statements are not "scientific disagreements," because the definition of a "scientific disagreement" is

> people disagreeing about scientific explanations (claims) using empirical data (evidence) to justify their side of the argument

FAU/CES (http://www.ces.fau.edu/nasa/introduction/scientific-inquiry/why-do-scientists-argue-and-challenge-each-others-results.php)

It is a disagreement about the interpretation of data and arises

> when we have incomplete information about the system of interest and different scientific hypotheses can be held that are consistent with the available data, logic and existing scientific facts.

Diesendorf **(**JA1378). Scientists disagreeing about whether it will rain tomorrow based on their analyses of today's weather is a scientific disagreement. Scientists disagreeing about whether enough lithium exists to supply the world's batteries in 2050 is a scientific disagreement. However, a scientist changing the definition of data, omitting data, claiming an error occurred after changing the definition of data or omitting data, or not checking their work, as done by NAS and Dr. Clack, does not create a scientific disagreement. Here, NAS and Dr. Clack:

Statement 1: changed the definition of data from average to maximum values: "This is not an interpretation/judgment of data but instead is altering the factual definition of data." Diesendorf (JA1395);

Statement 2: failed to check model output data: "The unsupported inference of 'modeling error' should have been obvious to the authors had they thoroughly checked for mathematical computer modeling error." Ingraffea (JA1397);

Statement 3: omitted data and changed the definition of data by excluding Canadian hydropower: "This is clearly another instance of apparently purposeful obscuring of the factual definition of data." Ingraffea (JA1397);

Statement 4: inferred erroneous factual conclusions, that model errors occurred, based on their own errors: this is "an incorrect inference about the model based on their own altering and obscuring of factual data." Ingraffea (JA1397).

NAS and Dr. Clack argued, and the court concurred, that they were merely interpreting data to come up with their statements (JA292):

> The Academy therefore provided its readers with both plaintiff's and the Clack authors' positions on how the data should be interpreted, which is how scientific disagreements are supposed to be addressed and resolved.

Yet, this is another use of a fake definition. "Interpreting data" is defined as

> the process of reviewing data through some predefined processes which will help assign some meaning to the data and arrive at a relevant conclusion

Formplus (https://www.formpl.us/blog/data-interpretation). For example, if 90% of cold days are cloudy, one interpretation of the data is that cloudy days lead to cold days. Interpreting data has nothing to do with re-defining data, omitting data, or drawing conclusions after re-defining or omitting data, which is what NAS and Dr. Clack did. All experts agree, declaring, in the case of Statement 1, that NAS and Dr. Clack did NOT interpret data but instead changed the definition of data:

> The Clack Paper was not making informed 'interpretation of judgement of data,' but rather was making changes to the factual definition of the data and omitting information, and then interpreting/judging based on these altered and omitted data.

Howarth (JA1392).

> This is not an interpretation/judgment of data but instead is altering the factual definition of data.

Diesendorf (JA1395).

> This is clearly an instance of altering the factual definition of data.

Ingraffea (JA1397).

> This is an instance of altering the factual definition of data. With erroneous conclusions then arising.

Strachan (JA1400).

The experts drew similar conclusions for the other statements. Whether Statement 1 is a statement of fact and whether the values it refers to are average or maximum values is important because, if the values are average, then the error claim, "…the flexible load…is more than double the maximum possible value...." (Statement 1) together with "…this work…contained modeling errors,…" (Statement 4), is false and actionable (*Rosen*, 41 A.3d at 1256). Per the experts, the values are averages, and NAS and Dr. Clack' error claim is a false fact. This court is asked to hold that the Superior Court ruling that these statements are opinions (scientific disagreements) rather than false facts is a clear error.

In its July 5, 2022 "Order Denying Plaintiff's Motions…", the Superior Court dismissed the experts' conclusions with no evidence (at JA1426):

> To the extent that Plaintiff asserts that, based on the scientists' declarations, "the Court made a clear factual error when it found that 'the three asserted 'egregious errors' are statements reflecting scientific disagreements, which were appropriately explored and challenged in scientific publications;…'"…, the Court also finds such arguments unpersuasive and repetitive…

The court also stated that the submission of these declarations was late, since *Dist. No. 1 v. Travelers Casualty*, 782 A.2d 269 (D.C. 2001) says, "neither Rule 59(e) nor Rule 60(b) is designed to enable a party to complete presenting its case after the court has ruled against it," and Prof. Jacobson could have submitted the declarations earlier (JA 1425). However, the court still commented on the declarations, and *Dist. No. 1.* also states (at 278) that new evidence can be included if "…a party show good reason for the failure to take appropriate action sooner." One reason given is (at 278) "incomplete discovery." In his Sept. 24, 2021 Motion (JA1356), Prof. Jacobson gave this reason since *Dist. No. 1.* included both discovery and a trial, whereas this case included neither. Also *Oparaguo v. Watts*, 884 A.2d 63, 77 (D.C. 2005) indicates Prof. Jacobson should have received the benefit of the doubt:

> In reviewing an order dismissing a claim for defamation, we continue to adhere to the standard of whether, construing the complaint in the light most favorable to the plaintiff, "it appears beyond doubt that [plaintiff] can prove no set of facts in support of his claim which would entitle him to relief.

This court is asked to accept the declarations from the four scientists.

II.B. Clear error in law in determining if words defame

The Superior Court applied an incorrectly-narrow legal test to determine whether a false statement defames. Specifically, the court held (JA935):

> However, defamatory statements made in the scientific arena that attack an individual's honesty and integrity or imply as fact that an individual is engaged in professional misconduct are not constitutionally protected and may be protected. (*Competitive Enter. Inst v. Mann,* 150 A.3d 1213, 1226 (D.C. 2016)).…Here…the statements simply do not accuse Dr. Jacobson of misconduct or impugn his integrity…they simply do not attack Dr. Jacobson's honesty or accuse him of misconduct.

The clear error is that defamation also arises when a false factual statement

> **tends to injure [the] plaintiff in his trade, profession** or community standing, or lower him in the estimation of the community…The statement 'must be more than unpleasant or offensive; the **language must make the plaintiff appear "odious, infamous, or ridiculous**."

Mann, 150 A.3d at 1241 (emphasis added). The Superior Court was informed of these causes (JA1365, 1413) but ignored them. Statements 1-4 defame because they "tend to injure [Prof. Jacobson] in his trade, profession." The "language must make the plaintiff appear "odious, infamous, or ridiculous." (*Id.* at 1241). The Cambridge dictionary defines "ridiculous" as "stupid or unreasonable and deserving to be laughed at;" "infamous" as "famous for something considered bad;" and "odious" as "extremely unpleasant and causing or deserving hate." Although a defamatory

statement must cause a plaintiff to appear either odious, infamous, OR ridiculous, the statements here caused Prof. Jacobson to appear all three, as discussed shortly.

For these quotes, *Mann* references *Howard Univ. v. Best*, 484 A.2d 958 989 (D.C. 1984), which says a defamatory meaning must be determined only after a publication is "considered as a whole in the sense in which it would be understood by the readers to whom it was addressed." That case refers to *Johnson v. Johnson Pub. Co*., 271 A.2d 696, 697 (D.C. 1970), which says words must be read without ignoring "their implications" or "their context." That case refers to *Gariepy v. Pearson*, 207 F.2d 15, 15 (D.C. Cir. 1953), which gives examples of how context matters. E.g., "The words 'Smith got rich fast' would not imply corruption, but the words 'Smith got rich fast while he was a tax assessor' might."

Here, the false fact, "…the flexible load used by LOADMATCH is more than double the maximum possible value…" (Statement 1) plus "…this work… contained modeling errors,…" (Statement 4) imputes Prof. Jacobson to be an incompetent modeler. Same with "This error is so substantial…" (Statement 2) plus the model error claim. The ensuing public smears show the harmful "implications," thus defamatory nature of the words (*Johnson*; *Howard*, supra).

The false claims of modeling error by NAS and Dr. Clack imply that Prof. Jacobson doesn't check his work, is a sloppy researcher, is stupid, and is incompetent. Indeed, that is what worldwide news headlines stated or implied,

making Prof. Jacobson, who is a scientist, teacher, and advisor of young adults, appear "odious, infamous, AND ridiculous." The headlines used terms such as "errors," "tooth-fairy research," "lie," "scam," "fantasy," "wishful thinking," "flawed," "smacked down," and "debunked." (JA49; 968; 1365-1366). These words collectively and individually made Prof. Jacobson, a computer modeler-by-trade for ~32 years, appear stupid, unreasonable, and deserving to be laughed at ("ridiculous"). They made him famous for something bad, namely sloppy research ("infamous"). The words such as "lie" and "scam" subjected him to hate online ("odious"). False facts that make a person appear "odious, infamous, or ridiculous" give rise to a valid defamation claim in D.C. (*Johnson, Mann*, supra).

Although it is a California case, *Gould v. Maryland Sounds Ind., Inc.*, 31 Cal.App.4th 1137 (1995) illustrates precisely how a false claim of professional error, as occurred here, defames because it impute to a person "incompetence in his trade." There, an estimator was accused of a bidding error. The court held (at 1154):

> We reach a different conclusion as to Leister's accusation Gould made a $100,000 mistake in estimating an MSI bid. This statement would tend to injure Gould by imputing to him incompetence in his trade.

The exact same situation arose here. Prof. Jacobson was falsely accused of professional (computer modeling) errors, imputing to him "incompetence in his trade," thereby making him appear "odious, infamous, or ridiculous" and

"…injur[ing] [him] in his trade, profession…" As such, the false factual accusations of modeling error were defamatory, and multiple sets of facts indicate Prof. Jacobson's defamation case would likely have prevailed on its merits.

II.C. Clear error in law in not analyzing actual malice

As a public figure, Prof. Jacobson must also prove that NAS and Dr. Clack acted with actual malice. The Superior Court implied no actual malice arose (JA935): "the statements simply do not accuse Dr. Jacobson of misconduct or impugn his integrity." But this is not the test for actual malice. Actual malice arises when one publishes a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Thompson v. Armstrong*, 134 A.3d at 311. Although the court recognized this definition (JA934), no order analyzed whether actual malice occurred. As such, the court again made a clear error and gave NAS and Dr. Clack the benefit of the doubt, contrary to *Oparaguo,* 884 A.2d at 77. NAS and Dr. Clack acted with actual malice by refusing to correct false facts to this day, even when informed multiple times. Dr. Clack also lied four times in his paper. His goal was to discredit Prof. Jacobson due to jealousy, as the record proves.

1. NAS and Dr. Clack recklessly disregarded the truth

In *Mann*, 150 A.3d at 1252, the court defined "reckless disregard" as refusing to act when provided with the truth or when given "obvious reasons to doubt the veracity" of the source of information:

> [R]eckless conduct....The plaintiff may show that the defendant had such serious doubts about the truth of the statement inferentially, by proof that the defendant had a "**high degree of awareness of [the statement's] probable falsity.**" *Harte – Hanks Commc'ns , Inc.* , 491 U.S. at 688, 109 S.Ct. 2678 (quoting *Garrison v. Louisiana* , 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964)). A showing of reckless disregard is not automatically defeated by the defendant's testimony that he believed the statements were true when published; the fact-finder must consider assertions of good faith in view of all the circumstances. *St. Amant* , 390 U.S. at 732, 88 S.Ct. 1323 ("[R]ecklessness may be found where there are **obvious reasons to doubt the veracity of the informant or the accuracy of his reports**.").

Emphasis added. What is the standard for investigating? The Supreme Court in *Curtis Pub. Co. v Butts*, 388, 388 US 130 (1967) says that defamation arises upon "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." There, the newspaper

> …had published the story without any independent support for his affidavit; that it did not, before publication, view his notes…; that the magazine did not interview a person with Burnett..., view the game films, or check for any adjustments...

By the standards set in both cases, NAS and Dr. Clack committed actual malice by recklessly disregarding the truth. They not only failed to investigate properly, but to this day, they have refused to correct their errors, even after being provided, multiple times, with clear evidence, such as raw output from Prof. Jacobson's model (JA239), detailed analyses of their errors (JA131-145; 149-169; 193-217), and four declarations detailing their errors (JA1371-1402).

Also, NAS and Dr. Clack refuse to correct Statement 3 even after Dr. Clack admitted on September 21, 2017 (JA987), that the Jacobson Paper "Rel[ies] on Canadian hydroelectricity when necessary (in a paper that stated it was contiguous US only). " Thus, Dr. Clack and NAS have known for five years that the Jacobson Paper included Canadian hydroelectricity yet have refused to correct their Statement 3 lie that the hydroelectricity output from Prof. Jacobson's model (402.2 TWh), which included U.S. plus Canadian hydroelectricity, could properly be compared with U.S.-only hydroelectricity output (356.5 TWh). As an expert states, "This is clearly another instance of apparently purposeful obscuring of the factual definition of data." (JA1397). Although Prof. Jacobson showed Dr. Clack's admission to the Superior Court (JA955), the court ignored it (JA1334-1342), again wrongly giving the benefit of the doubt to NAS and Dr. Clack (*Oparaguo*, 884 A.2d at 77).

NAS' and Dr. Clack's altering the definition of data and omitting data, if accidental, would be excusable if they had corrected it after Prof. Jacobson informed them with evidence of the errors, before or after publication, which he did, many times, including through email (JA47-48; 130-169; 228-235; 240; 248; 254-255) and declarations (JA1371-1402). But NAS and Dr. Clack refused to correct their errors. The four experts declare that, because Dr. Clack hid his uncertainties before publication, and NAS and Dr. Clack refused to correct factual errors when informed before and after publication, both acted "dishonest(ly)" (JA1401), "in bad faith"

(JA1395), "with reckless disregard for the truth" (JA1395, 1398), "unethical(ly)" (JA1392, 1398, 1402), and/or while "not following due diligence" (JA1398). Thus, their errors were NOT honest or innocent, but "fundamentally dishonest" (JA1401).

NAS and Dr. Clack acted with reckless disregard in three sets of actions:

a) The Clack Authors hid their uncertainties before publishing. They asked Prof. Jacobson for model output, but only 13 days *after* publishing (JA243), proving they had uncertainties, but hid them. The experts called this failure to clarify uncertainties before publishing "reckless" (JA1392), "acting in disregard for the truth and in bad faith" (JA1395), "not following due diligence expected from reviewers" (JA1398), and "acting in disregard of the truth" (JA1401).

b) NAS and Dr. Clack refused to correct false facts, when informed with evidence before publication. Because of this, the experts found that the Clack Authors "should have either withdrawn their manuscript or completely revise it so as not to perpetuate the error" (JA1392), "act[ed] in reckless disregard for the truth and in bad faith" (JA1395), were in "reckless disregard for the truth" (JA1398), and were "fundamentally dishonest" (JA1401).

c) NAS and Dr. Clack refused to correct their factual errors, when informed with evidence after publication. The four experts believed this was "unethical" (JA1392), "in reckless disregard for the truth and in bad faith" (JA1395), in "reckless disregard for the truth" (JA1398), and "unethical" (JA1402).

This court is asked to hold that the Superior Court's failure to consider NAS' and Dr. Clack's actual malice through their reckless disregard was a clear error.

2. Actual malice due to lying by Dr. Clack in his paper

A second type of actual malice arose because Dr. Clack himself had prior "knowledge that [a statement] was false" (*Thompson v Armstrong*, 134 A.3d at 311). Sixteen months before publishing his paper, Dr. Clack asked Prof. Jacobson by phone to clarify Prof. Jacobson's treatment of hydropower in his model due to differences between figures and a table in the Jacobson Paper that Dr. Clack did not understand. Prof. Jacobson emailed back on February 29, 2016 (JA111):

> I looked into the issue of the high discharge rate of conventional hydro, and it turns out the numbers in the figure are correct as simulated; however, I did neglect to clarify that we increased the number of generators/turbines for each hydro plant (without increasing the dam capacity) and neglected to include the additional cost for turbines/generators; however, the additional costs are relatively minor in comparison with other costs as shown here.

Increasing the number of hydropower electricity generators/turbines without increasing dam (water) capacity is referred to as the "hydropower assumption." In response, on March 2, 2016, Dr. Clack agreed that the hydropower assumption was possible and even tested the assumption himself; he just disagreed with cost, but said the cost was "still cheaper than the cost of CO2 and climate change":

> I am not disagreeing with the possibility that it can be done with CSP and hydro etc, I just think that the costs are skewed quite

> badly by getting all this free dispatchable power. I have done tests on the efficacy of hydroelectric dispatch in 100% CF scenarios. I kept the hydrological cycle intact, and it shows that you need to add capacity at high cost to keep the energy flowing -- I will say that I did this one without storage, but the costs came out at 16¢/kWh just to meet the electric demand for 2030. [still cheaper than the cost of CO2 and climate change!].

(JA109). Despite fully understanding and testing the hydropower assumption, Dr. Clack wrote in the Clack Paper 16 months later about the exact same issue:

> Both Figures S4 and S5 of its SI, for example, depict hydroelectric generation rates exceeding 700 GW. This error is so substantial, we hope there is another explanation for the large amounts of hydropower output depicted in these figures.

(JA180). Clearly, this statement contains two intentional lies. (1) Dr. Clack knew the exact "explanation," since he admitted to "not disagreeing with" it and to testing the hydropower assumption himself, so his pretending he didn't know the true explanation was a lie, and (2) he knew there was no computer modeling error because the hydropower assumption explained the high discharge rate, and he tested the assumption and stated it was possible but just disagreed with cost.

Dr. Clack then compounded his lies with two more lies, "One possible explanation for the errors in the hydroelectric modeling is that the authors assume they could build capacity in hydroelectric plants for free with the LOADMATCH model." (JA180). The additional lies are (3) he knew the exact, not "possible," explanation, for the high peak discharge rate and knew it was not a computer

modeling error, but an assumption, and even tested the assumption himself, and (4) suddenly MULTIPLE hydro computer modeling errors arose when he had no proof of even one. Thus, Dr. Clack lied four times in two sentences.

When Prof. Jacobson brought up the first two lies to the Superior Court in his original complaint, the court held (JA937):

> The only even potentially questionable statement is the second asserted error, that "[t]his error is so substantial that we hope there is another explanation for the large amount of hydropower depicted in these figures," as, without context, it arguably suggests that in the absence of another explanation, there could be misconduct. In attempting to bolster his argument that this statement could be found to be defamatory, Dr. Jacobson points out that 16 months prior to publication of the Clack Article, Dr. Jacobson provided an explanation of the figures in question to Dr. Clack by e-mail.

Instead of calling Dr. Clack's statements two clear lies (since Dr. Clack knew the exact assumption and tested it himself), the court defended Dr. Clack (JA938):

> More importantly, in context, no reasonable juror could find this to be a statement that there was in fact misconduct, because the authors of the Clack article immediately provide a possible explanation, two sentences later. See Compl. Ex. 11, at SI p. 2 ("One possible explanation for the errors in the hydroelectric modeling is that the authors assume they could build capacity in hydroelectric plants for free within the LOADMATCH model."). Thus, as a matter of law this statement cannot be taken as defamatory.

But, as stated above, this purportedly exculpatory clause, "One possible explanation…," contained two more lies. Thus, the Superior Court erred, as both statements contained intentional lies. Although Prof. Jacobson brought the added

lies to the court's attention on October 10, 2021 (JA1415), the court ignored them in its July 5, 2022 order denying Prof. Jacobson's motion for relief (JA1422-1427).

3. Dr. Clack's intent and motive to discredit

Dr. Clack published his intent to discredit Prof. Jacobson and his motive for doing so. On August 24, 2017, Dr. Clack tweeted publicly to a friend of Prof. Jacobson, "Shame the work by similar authors, on grid reliability, was discredited:" linking to the Clack Paper (JA272). Thus, Dr. Clack used the Clack Paper to justify a sarcastic, unprovoked smear to discredit Prof. Jacobson's different paper. A third party recognized Dr. Clack's malice (JA272): "What you are doing is called trolling. Criticism is fine, stalking is not."

On Nov. 3, 2016, Dr. Clack tweeted his motive for discrediting Prof. Jacobson. He was envious of the attention Prof. Jacobson's work was receiving: "@LeoDiCaprio Why not read my piece on the most cost effective way to remove carbon" (JA1421), after Mr. DiCaprio tweeted out a paper by Prof. Jacobson.

Although this evidence was brought to the attention of the Superior Court in Prof. Jacobson's Oct. 10, 2021 brief (JA1414), the court ignored it in its July 5, 2022 order denying relief (JA1422-1427). Again, the court improperly gave the benefit of the doubt to NAS and Dr. Clack (*Oparaguo*, 884 A.2d at 77).

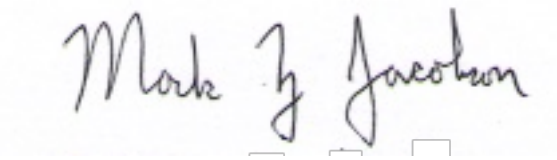
II.D. Clear error in law in construing against appellant

When deciding whether to dismiss Prof. Jacobson's defamation claim, the Superior Court must "construe the complaint in the light most favorable to plaintiff" and conclude whether "it appears beyond doubt that [plaintiff] can prove no set of facts in support of his claim which would entitle him to relief." (*Oparaguo*, 884 A.2d at 77). Instead, the Superior Court improperly gave the benefit of the doubt to NAS and Dr. Clack at almost every turn. The court (1) did not review Statements 1-4 using a legal standard to find if they were questions of fact or opinion, (2) used a fake meaning of a "scientific disagreement" from NAS and Dr. Clack to claim the statements were opinions, (3) dismissed detailed analyses of four experts as "unpersuasive and repetitive" without evidence (4) ignored that false facts that "…injure [one] in his trade, profession…" and make one appear "odious, infamous, or ridiculous" are defamatory, (5) didn't analyze if actual malice arose, (6) didn't address all four intentional Clack Paper lies, (7) ignored Dr. Clack's refusal to correct false Statement 3 despite his admission that the Jacobson Paper "rel(ies) on Canadian hydroelectricity when necessary," and (8) ignored evidence of Dr. Clack's intent and motive to discredit Prof. Jacobson.

CONCLUSION

For the foregoing reasons, Prof. Jacobson humbly asks this court to vacate the cost and fee judgments against him, thus, to reject the Superior Court's ruling that

California law and the catalyst theory apply to §16-5504(a). If the Superior Court's ruling is upheld, this court is asked still to deny costs and fees because Prof. Jacobson properly asserted defamation claims. If costs and fees are still allowed, this court is asked to ensure they are set below those that "cannot be applied to [a] subsequent lawsuit concerning the same claims" if he re-filed, and "this amount 'must be supported by evidence in the record.'" *Thoubboron,* 809 A.2d at 1211. This court is also asked to order (1) Dr. Clack to repay, with interest, the $75,000 Prof. Jacobson paid him for the judgment due October 13, 2021 (JA1352), (2) NAS to repay, with interest, the $428,722.92 Prof. Jacobson will have paid NAS for the judgment due Sept. 3, 2022 (JA1436), and (3) NAS and Dr. Clack to pay costs and fees on appeal.



Mark Z. Jacobson

Dated: August 25, 2022

District of Columbia
Court of Appeals

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.

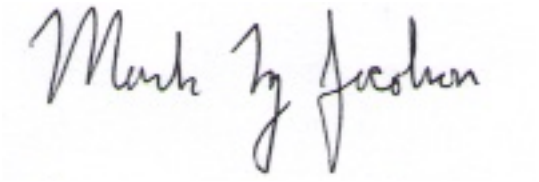
2. Any information revealing the identity of an individual receiving mental-health services.

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.



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Signature

__22-CV-0523____
Case Number(s)

_Mark Z. Jacobson_____
Name

__Aug. 18, 2022___
Date

__jacobson@stanford.edu_____
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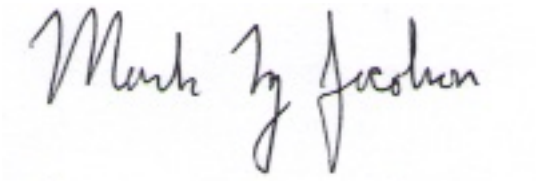

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Mark Z. Jacobson, Appellant