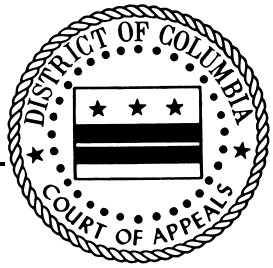
No. 22-cv-0523



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, CIVIL DIVISION
No. 2017 CA 006685 B
(The Honorable Elizabeth C. Wingo)

BRIEF OF APPELLEE NATIONAL ACADEMY OF SCIENCES

September 26, 2022

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Court of Appeals Rule 26.1, the appellee National Academy of Sciences states that it is a private, non-profit organization established by an Act of Congress, to which the disclosure provisions of Rule 26.1 do not apply.

RULE 28(a)(2) DISCLOSURE

Appellant Mark Z. Jacobson was represented by Paul S. Thaler and Karen S. Karas of Cohen Seglias Pallas Greenhall & Furman, P.C. in the trial court proceedings; and is representing himself pro se in this appeal.

Appellee National Academy of Sciences was represented by Joseph P. Esposito and William E. Potts, Jr. of Hunton & Williams LLP n/k/a Hunton Andrews Kurth LLP, with the following attorneys in the Of Counsel role: Audrey Byrd Mosley and Marc S. Gold of National Academy of Sciences, and Eric H. Feiler of Hunton & Williams LLP n/k/a Hunton Andrews Kurth LLP; and then this appellee's trial court was substituted by Evangeline C. Paschal of Hunton Andrews Kurth LLP. The appellee is represented by Evangeline C. Paschal of Hunton Andrews Kurth LLP in this appeal.

Appellee Christopher M. Clack, Ph.D. has been represented in the trial proceedings and is represented in this appeal by Drew W. Marrocco of Dentons US LLP.

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ASSERTION

This appeal arises from two final orders (JA-1343-1352 and JA-1428-1436) that dispose of all the parties' claims.

STATEMENT OF ISSUES

1. Whether the superior court retained ancillary jurisdiction to award attorney's fees to appellee National Academy of Sciences ("NAS") after appellant Mark Z. Jacobson, Ph.D. ("Jacobson") voluntarily dismissed his lawsuit pursuant to Rule 41(a)(1)(A)(i)?

2. Whether NAS "prevail[ed] in whole or in part" in this litigation, entitling it to the award of attorney's fees where Jacobson voluntarily dismissed his SLAPP suit before the superior court could grant NAS's special motion to dismiss?

3. Whether the superior court properly noted California case law awarding attorney's fees following voluntary dismissal when California's Anti-SLAPP statute has the same policy goal as the D.C. law?

4. Whether the superior court correctly determined that Jacobson did not meet his burden of showing a likelihood of success on his defamation claims stemming from a scientific debate as he would have had to do to avoid dismissal of his complaint?

5. Whether the superior court abused its discretion in denying Jacobson's Motion for Relief from a Judgment and to Alter a Judgment challenging its September 13, 2021, Order where Jacobson based his motion on declarations of scientific "experts" that provided no more than definitions of commonly

used words and legal conclusions, and that he did not proffer while the special motion to dismiss was pending?

STATEMENT OF THE CASE

On September 29, 2017, Jacobson sued NAS and Christopher T.M. Clack, Ph.D. ("Clack") in D.C. superior court, bringing claims of defamation against NAS and Clack and claims of breach of contract and promissory estoppel against NAS. (JA-19-276). The allegedly defamatory statements that form the crux of all three claims appeared in a 2017 paper authored by Clack and 20 other scientists. The Clack Paper was written in response to a paper written by Jacobson in 2015, and was published alongside Jacobson's rebuttal to Clack. NAS published all three papers in its peer-reviewed journal, the Proceedings of the National Academy of Sciences ("PNAS").

On November 27, 2017, NAS and Clack each brought special motions to dismiss Jacobson's lawsuit pursuant to D.C.'s Anti-SLAPP Act, D.C. Code § 16-5501 et seq. (JA-277-505) On January 5, 2018, Jacobson opposed both motions and moved to take targeted discovery. (JA-506-742) On January 19, 2018, both NAS and Clack opposed the motion for targeted discovery. (JA-743-753) On January 26, 2018, NAS and Clack filed replies in further support of their special motions to dismiss. (JA-754-773) During a February 2, 2018 status conference, the superior court orally denied Jacobson's motion for targeted discovery. (JA-8) On

February 20, 2018, the superior court conducted a hearing on NAS's and Clack's special motions to dismiss, at which the superior court appeared skeptical of Jacobson's claims. (JA-9; *see generally* 2/20/2018 Tr.)

Two days after that hearing, on February 22, 2018, Jacobson filed a voluntarily dismissal pursuant to D.C. superior court Rule of Civil Procedure 41(a)(1)(A)(i). (JA-774-775)

On March 7, 2018, NAS and Clack each moved for costs and attorney's fees pursuant to § 16-5504(a). (JA-776-841) Jacobson opposed these motions on March 21, 2018. (JA-842-70) NAS and Clack replied on March 30, 2018. (JA-87-880) Then, Jacobson moved for leave to file a sur-reply; the defendants opposed that motion on April 6, 2018, but the superior court granted it on June 27, 2018. (JA-881-911)

On April 20, 2020, the superior court granted NAS's and Clack's motions for attorney's fees and costs, ordering them to furnish documentation for their claimed fees and costs. (JA-912-947) On May 18, 2020, Jacobson moved for reconsideration of this order, which NAS and Clack opposed on June 1, 2020. (JA-948-1057) Also on June 1, 2020, NAS and Clack submitted praecipes including the support for their fee requests. (JA-1058-1166) Jacobson's motion for reconsideration was denied on June 25, 2020. (JA-1334-1342) On September 13,

2021, the court awarded Clack $75,000 in attorney's fees and directed NAS to submit unredacted billing records for the court's further review. (JA-1343-1352)

On September 24, 2021, Jacobson filed a motion seeking relief from the September 13, 2021, order awarding Clack his fee. (JA-1353-1370) Jacobson attached to his motion declarations from individuals he proffered as "experts" to opine as to, among other things, the definition of the word "fact" and the existence of malice—legal questions answered by the superior court. (JA-1371-1405) Clack opposed this motion on October 6, 2021, and Jacobson replied on October 10, 2021. (JA-1406-1421) On July 5, 2022, the superior court denied Jacobson's motion, affirming its fee award to Clack. (JA-1422-1427) On the same day, the superior court awarded NAS $428,722.92 in fees, which reflected a 20 percent reduction from the amount set out in NAS's invoices provided to the superior court. (JA-1428-1436)

STATEMENT OF FACTS

NAS is a private, non-profit organization of distinguished scholars. NAS was established by an Act of Congress to provide independent, objective advice to the nation on matters related to science and technology. NAS publishes the Proceedings of the National Academy of Sciences ("PNAS"), a widely-cited, comprehensive multidisciplinary scientific journal. In December, 2015, PNAS published Jacobson's paper entitled, "*Low-cost solution to the grid reliability problem with*

100% penetration of intermittent wind, water and solar for all purposes." (JA-22 ¶ 9) The paper was subjected to peer review prior to publication. After publication, PNAS awarded Jacobson and his team the Cozzarelli Award in the area of Applied Biological, Agricultural, and Environmental Sciences for the Jacobson article's outstanding contribution to that field. *Id.* The Cozzarelli award is given to only one article each year in each of six substantive areas. *Id.*

In 2016, Dr. Clack and his 20 scientist co-authors submitted to PNAS a paper that challenged some of the methodologies and assumptions in the Jacobson paper. (JA-23 ¶ 11) The paper submitted by Clack and his co-authors (the "Clack Paper")[1] was also subjected to peer review. Before publishing the Clack Paper, PNAS sent drafts of that paper to Jacobson for comment. (JA-116; JA-147-169) It then forwarded Jacobson's comments to Clack and his co-authors, who revised their paper based on Jacobson's comments as they deemed appropriate. (JA-171; JA-116-128; JA-173-191) NAS also offered Jacobson an opportunity to prepare a rebuttal to the Clack Paper, which he did. (JA-116; JA-237)

Dissatisfied with the revisions that Clack and his co-authors made to their paper, Jacobson accused the Clack authors of falsehoods. (JA-147-169) He demanded that NAS not publish the Clack Paper, and at one point threatened to seek

[1] Jacobson's complaints about the Clack Paper were focused on the paper itself, which was the product of the work of 21 scientists, not just Dr. Clack, although Clack is the only individual that Jacobson chose to sue.

a preliminary injunction to prevent publication. (JA-130) He also argued that the Clack Paper was commentary and not original research, and should be limited to a letter of 500 words, even though PNAS has in the past published other comments as research papers. (JA-231-235; JA-310-366)

On June 19, 2017, PNAS published both the Clack Paper and Jacobson's rebuttal in its online edition.[2] Though the guidelines generally provide 500 words for a rebuttal, Jacobson asked for and was permitted 1,300 words. (JA-48 ¶ 69; JA-304-308) The rebuttal, which included a point-by-point response to the Clack Paper, opened: "The premise and all error claims by Clack . . . are demonstrably false." (JA-306) Jacobson told NAS that no response to his rebuttal should be allowed, and no such response was either submitted or published. Indeed, Jacobson himself has acknowledged that "PNAS published our response to Clack equally and simultaneously, giving us the last words by not allowing Clack to respond to us." [3]

Despite the opportunity afforded Jacobson to respond to the Clack Paper, Jacobson demanded that NAS retract the Clack Paper and pay him $10 million in damages. NAS refused. Jacobson then filed his Complaint, which included his claims for defamation. In his Complaint, Jacobson framed as defamatory the Clack Paper authors' criticism of the assumptions and methodologies set out in the

[2] http://www.pnas.org/content/114/26/E5021.full
[3] https://www.ecowatch.com/national-review-mark-jacobson-2454398939.html

Jacobson article. But Jacobson also admitted "that the Jacobson Article was not clear in the actual text . . . about the hydropower assumption and that there was an omission of the cost of the additional hydropower turbines," two of the very criticisms raised in the Clack Paper. Jacobson's Complaint nevertheless avers that neither shortcoming in his article was material. (JA-50 ¶ 72)

Twelve days after filing the Complaint, and 21 months after the publication of his paper, Jacobson submitted to PNAS (and later posted on his website) Errata, which acknowledge omissions about the assumptions he made in his 2015 paper, including two that relate to what he claims are the three allegedly most "egregious" defamatory statements in the Clack Paper. (JA-366-369)

SUMMARY OF ARGUMENT

Through his appeal, Jacobson attempts to avoid both the plain language and the public policy underlying the D.C. Anti-SLAPP Act. The law was crafted to provide courts broad authority to award attorney's fees in cases where a defendant "prevails, in whole or in part" on a special motion to dismiss a defamation claim under the act. Jacobson's construct would enable him to file a SLAPP action demanding retraction of legitimate criticism, cause NAS to incur hundreds of thousands of dollars in fees, publicize his lawsuit, and then strategically dismiss the action before an adverse ruling on a special motion to dismiss without consequence.

If Jacobson had not dismissed his lawsuit voluntarily right after the hearing on NAS's Special Motion to Dismiss, the superior court concluded that it would have. There would be no question that the law would permit the superior court to award NAS its reasonable attorney's fees under that circumstance. And there is no question the superior court *would have* dismissed Jacobson's complaint had he not chosen to dismiss it himself. Jacobson should not be permitted to avoid a fee award that would have been unquestionably within the court's discretion *but for* the fact that he dismissed his lawsuit before the superior court could grant NAS's pending special motion to dismiss.

The superior court's analysis in awarding NAS its attorney's fees was thorough and sound. It first examined the plain language and legislative history of § 16-5504(a) and found that NAS was a party that had "prevail[ed], in whole or in part" on its special motion to dismiss, despite Jacobson's voluntary dismissal of his complaint. The superior court determined that the D.C. Council deliberately used the term of art "prevails, in whole or in part" to permit fee awards in a broader set of circumstances than permitted in statutes using the more common term "prevailing party." This broader term effectuates the purpose of the Anti-SLAPP Act, namely, bringing a swift end to SLAPP suits that seek to chill speech on important issues of public debate and discouraging the filing of such suits.

The superior court did not end its analysis there then looked to the well-developed body of case law in California as persuasive authority that was also consistent with its analysis of the statutory language. The California anti-SLAPP law was enacted to effect the same policy as the D.C. law. The California courts held that attorney's fee awards are proper after a voluntary dismissal.

In awarding NAS its attorney's fees following Jacobson's voluntary dismissal, the superior court crafted an approach that both is consonant with the language and purpose of D.C.'s Anti-SLAPP Act, and ensures that fees are awarded only in response to true SLAPP lawsuits. Using the test set forth in § 16-5502, the superior court first concluded that NAS had made a prima facie showing of a protected activity and that Jacobson had not met his burden of showing a likelihood of success in his lawsuit. In essence, the superior court determined that NAS would have prevailed on its special motion to dismiss had Jacobson not short-circuited that process by voluntarily dismissing his lawsuit after the special motion to dismiss was fully briefed and argued. The superior court's correctly concluded that NAS "prevail[ed] in whole or in part."

Following this determination, the superior court determined that there were no special circumstances making the award of fees to NAS unjust. *Doe v. Burke*, 133 A.3d 569, 571-75 (D.C. 2016) (requiring court to examine circumstances of the case before awarding fees to party who prevailed in whole or in part). Thus, the

superior court correctly applied the anti-SLAPP law, and did not erroneously construe anything against Jacobson in evaluating NAS's special motion to dismiss as Jacobson suggests on appeal.

In the face of the thoroughly litigated and reasoned fee award, Jacobson offers makeweight arguments for reversal. For example, he suggests that superior court erred in looking to California law. But just last year, this court has looked to California cases when interpreting other provisions of the Anti-SLAPP Act. In addition, Jacobson relies primarily on cases permitting attorney's fees to be awarded only to a "prevailing party." But here the legislature intentionally avoided that term and instead opted for the broader term "prevail[ing], in whole or part". The cases cited by Jacobson are inapposite.

Jacobson's other arguments fare no better. He asks this court to reverse the superior court's decision based largely on selective quotations taken out of context and misrepresentations or misinterpretations of the cases he cites. He also devotes fully half of his argument to rehashing his failed effort to convince the superior court that NAS and Clack defamed him. But he focuses on statements about him made by third parties, not by NAS or Clack; such statements are not actionable. He also claims that the superior court used a "fake definition" of a scientific disagreement to conclude that he was unlikely to succeed on his defamation and defamation-related claims. For this argument, he relies on declarations from four individuals that he

purports are "experts" offering legal conclusions and proposed definitions of commonly used words. The declarations were also first presented on a motion to set aside the court's judgment and the court correctly determined that they were untimely in in any event. It was not an abuse of discretion for the superior court to have declined to consider these post-ruling declarations.

In the end, Jacobson has not provided reason to reverse the decision of the superior court, made after the submission of numerous briefs, oral argument, and motions for reconsideration, relief and rehearing.

ARGUMENT

I. Standard of Review

This court reviews the superior court's exercise of jurisdiction over the request for attorney's fees and statutory construction of the term "prevails, in whole or in part" in § 16-5504(a) de novo. *See Chamberlain v. Am. Honda Fin. Corp*., 931 A.2d 1018, 1023 (D.C. 2007) (questions of statutory construction reviewed de novo); *see also Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 138 (D.C. 2021) (reviewing definitional provisions of § 16-5501 de novo). Likewise, this court reviews de novo the superior court's determination that NAS's special motion to dismiss met the requirements for dismissal set forth in § 16-5502(b), including the superior court's application of the burden of proof. *See Nadel*, 248 A.3d at 138, 143. This court reviews the superior court's denial of Jacobson's Motion for Reconsideration for

abuse of discretion. *See Jones v. Nat'l R.R. Passenger Corp.*, 942 A.2d 1103, 1106 (D.C. 2008).

II. The superior court retained ancillary jurisdiction to award attorney's fees after Jacobson voluntarily dismissed his lawsuit

NAS does not dispute that Jacobson properly dismissed his lawsuit voluntarily and without prejudice pursuant to D.C. Superior Court Rule of Civil Procedure Civil 41(a)(1)(A)(i). Jacobson essentially argues that the superior court lost jurisdiction once he dismissed his lawsuit and thus had no basis on which to award attorney's fees. But neither the face of that Rule nor the case law he cites support this proposition. Indeed, this very argument was rejected by the Supreme Court in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). In *Cooter & Gell*, the district court sanctioned the petitioner law firm, despite the firm's voluntary dismissal of its complaint pursuant to Federal Rule of Civil Procedure 41(a)(1)(i). The dismissal came after the defendants had moved to dismiss and for Rule 11 sanctions. In affirming the award of sanctions, the Supreme Court held motions for costs or attorney's fees are "independent proceeding[s] supplemental to the original proceeding," and "may be made after the principal suit has been terminated." *Id.* at 395-96 (alteration in original) (citation omitted).

In his misguided effort to deprive the superior court of this authority, Jacobson cites a number of cases that do not deal with the award of attorney's fees after a Rule 41(a)(1)(A)(i) voluntary dismissal. In *Miniter v. Sun Myung Moon*, 736 F. Supp.

2d 41, 44 n.7 (D.D.C. 2010), attorney's fees were not at issue at all. Rather, the court made the unremarkable observation in a footnote that a pending motion to dismiss no longer encompassed voluntarily dismissed defendants. Likewise, *Evans v. Dreyfuss Brothers, Inc*., 971 A.2d 179 (D.C. 2009) did not address the award of attorney's fees, but rather considered whether an order dismissing a complaint in favor of arbitration pursuant to a settlement agreement was a final, appealable order. In *Thoubboron v. Ford Motor Co.*, 809 A.2d 1204, 1210 (D.C. 2002), the court addressed the *res judicata* effect of a dismissal without prejudice under Rule 41(a)(2), saying nothing about Rule 41(a)(1)(A)(i). As Jacobson notes, *Thoubboron* did find that the attorney's fees and costs recoverable under a voluntary dismissal pursuant to Rule 41(a)(2) "are limited to the amount expended for work that cannot be applied to [a] subsequent lawsuit [involving] the same claims . . . ." *See id*. at 1211. But that case involved court-imposed conditions on dismissal, not a statutory fee provision.

Jacobson's mis-citing and cherry-picking language from cases devoid of context cannot overcome established precedent making clear that the superior court had the authority to award NAS its attorney's fees following Jacobson's voluntary dismissal of his complaint.

III. The Superior Court Correctly Found That NAS Had Prevailed In Whole Or In Part For Purposes Of Awarding Attorney's Fees Under The Anti-SLAPP Act

Looking to plain language and legislative history, the superior court found that the definition of a party who "prevails, in whole or in part" is sufficiently broad to encompass NAS here. Jacobson acknowledges the definition of that term is clear. But he then cites cases using a different term and cites three key cases that he erroneously reads to state "that a voluntary dismissal of a defamation case puts a plaintiff at no risk of attorney's fees." Br. at 18. Next, he asks this court to reverse the superior court's decision because the superior court looked to California law when applying that state's anti-SLAPP statute to award attorney's fees after a voluntary dismissal. *Id*. at 13-14. None of his arguments require reversal.

A. The plain language of the statute and its legislative history that the term "prevails, in whole or in part" entitled NAS to attorney's fees

Jacobson argues that the superior court failed to analyze correctly the plain language of the cost and fee clause of the Anti-SLAPP Act, § 16-5504(a) authorizing an award to a party who "prevails, in whole or in part."[4]

[4] Jacobson first argues the superior court erred because it did not construe the clause "in the context of a R. 41(a)(1) dismissal", which he claims "render[s] §16-5504(a) moot . . . ." Br. at 13. The superior court retained ancillary jurisdiction for purposes of awarding fees and costs after Jacobson's voluntary dismissal. *See supra* pp. 12-13.

In arguing that the superior court misapplied that plain language, Jacobson cites inapposite cases that apply statutes authorizing attorney's fee awards only to a "prevailing party," a different term of art, and a standard that generally is met only by a judicial award of relief.

The main case on which Jacobson relies, *Settlemire v. D.C. Office of Employee Appeals*, 898 A.2d 902 (D.C. 2006) involved a request for attorney's fees pursuant to D.C. Code § 1-606.08. That section provides for a fee award to a "prevailing party" in an appeal to the Office of Employee Appeals. In *Settlemire*, the petitioner's appeal was dismissed as moot because by the time of the hearing on the petitioner's appeal, he had retired and his former position had been converted to an at-will position outside the protection of the Comprehensive Merit Personnel Act. The court ruled that the petitioner was not the "prevailing party" because he had not won the relief that he sought, namely restoration to his prior position. *Id*. at 907.

Jacobson argues that NAS obtaining dismissal of his lawsuit does not count because it was not "awarded" by the court. But the cases he cites use different, narrower, language. The superior court looked to the plain language of the statute and its legislative history and concluded that "prevail in whole or in part" is intended to be broader than the term "prevailing party" used in various other statutes. *See Davis v. Moore*, 772 A.2d 204, 233 (D.C. 2001) (Ruiz, J., concurring in part and dissenting in part) (A court may look to the statute's legislative history to "give effect

to the legislative will by divining what the legislative enactment means."); (*see also* JA-920).

At the final reading of then-proposed Anti-SLAPP Act, Councilmember Mendholson amended the applicable language from "substantially prevails" to the more permissive language "prevails, in whole or in part." (JA-920-921) The change was made in order to "better reflect the intent of this section." (JA-920-921 (citing Council of the District of Columbia, Report of Committee on Public Safety and the Judiciary on Bill 18-893 at 3 (Nov. 18, 2010); and Dec. 7, 2010 Legislative Meeting Hr'g at 1:37:10, http://dc.granicus.com/MediaPlayer.php?view_id=&clip_id=498&caption_id=846692 (last visited Sept. 26, 2022))) The court should reject Jacobson's effort to amend judicially the deliberately drafted fee provision in the D.C. Anti-SLAPP Act.

With the proper term in mind, the superior court looked to D.C.'s FOIA statute, which uses the identical term of art as in the Anti-SLAPP Act to assess whether the legislature intended that a fee award is authorized following a voluntary dismissal. As the superior court noted, the term "prevails, in whole or in part" in D.C's FOIA statute has been interpreted as authorizing "[fee] awards to parties who were not awarded relief by the Court" but "'demonstrate[ ] a causal nexus . . . between the action [brought in court] and the agency's surrender of the

information.'" (JA-921 (alteration in original) (quoting *Frankel v. D.C. Office for Planning & Econ. Dev.*, 110 A.3d 553, 558 (D.C. 2015)))

The superior court thus concluded that use of phrase "prevails, in whole or in part" in § 16-5504(a) was "deliberate and was intended to reflect the interpretations such language has been given within other District of Columbia statues, such as FOIA." (JA-921 (citing *1618 Twenty-First St. Tenants' Ass'n, Inc. v. The Phillips Collection*, 829 A.2d 201, 203 (D.C. 2003) ("explaining that as a general rule, the court of appeals presumes that where a legislature adopts a term of art, it 'knows and adopts the cluster of ideas that were attached to each borrowed word'")) The superior court found that the statute "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." (JA-922) This court should reject Jacobson's effort to replace the plain language of the statute with a different, more restrictive grant of authority.

B. Awarding attorney's fees to NAS effectuates the public policy and legislative intent behind § 16-5504(a)

After determining that the plain language of the statute authorizes an award of attorney's fees following voluntary dismissal, the superior court then determined that such an outcome was also mandated by the public policy behind the law.

> The purpose of the District's Anti-SLAPP Act is to "provide substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of political or

> public policy debate aimed to punish or prevent the expression of opposing points of view." Comm. Report at 1. Mounting legal costs are a key characteristic of a SLAPP suit. *See id.* To address that issue, the District adopted provisions providing for attorney's fees to "successful" parties anti-SLAPP motions. *Id*. at 4. In this Court's view, given the language used by the D.C. Council in the attorney's fee provision, this Court must interpret the statute in light of the purpose of the Anti-SLAPP statute and its legislative history. *See Mann*, 150 A.3d at 1237 (adopting an interpretation of language within the Anti-SLAPP Act that "comports with the legislative aim of building special protections for a defendant who makes a prima facie case that the claim arises from advocacy on issues of public interest").

(JA-927)

NAS's special motion to dismiss falls squarely within the purpose of the anti-SLAPP Act. Unable to handle a peer-reviewed critique of his paper by a robust roster of fellow scientists, Jacobson sued not only the lead author of that critique, but also the well-respected scientific academy that published his paper, the critique, and Jacobson's rebuttal. His effort was clearly aimed to punish or prevent the expression of opposing points of view.

And NAS was punished. Even with the superior court's reduction in fees awarded, the superior court still found that NAS was entitled to recover over $420,000 in legal fees incurred in bringing its special motions to dismiss under the Anti-SLAPP statute. And Jacobson's scorched-earth litigation strategy only increased NAS's legal fees. NAS incurred fees in responding to Jacobson's motion

for broad discovery, which was inappropriate given the discovery stay contained in the Anti-SLAPP Act. Jacobson even moved to file a surreply to his unsuccessful discovery motion, adding to the reams of paper devoted to his personal crusade against NAS. Then, just two days after the hearing on the special motion to dismiss, he suddenly withdrew his lawsuit. By that point, he had inflicted serious financial damage on NAS, while avoiding a potential judgment finding that he had misused the legal process to attempt to chill speech on a matter of public interest. This case history places NAS's fee request well within the ambit of the text and policy of § 16-5504(a) by providing NAS substantive rights with respect to its ability to fend off SLAPP actions such as this.

Jacobson's argument that NAS is not entitled to fees because it was not "awarded some relief" by the superior court fares no better in avoiding the policy of the statute than the language. Jacobson ensured that judicially awarded relief was impossible by voluntarily dismissing his lawsuit two days after the hearing on NAS's fully-briefed special motion to dismiss but before the court had rendered its decision. No plaintiff should be able to file a SLAPP lawsuit, force a defendant to incur costs and publicity regarding the matter, read the tea leaves after a hearing on an anti-SLAPP special motion to dismiss and avoid both a court-ordered dismissal and an assessment of attorney's fees by strategically retracting his lawsuit.

C. Jacobson cannot avoid the superior court's award by arguing there has been no material alteration of the parties' legal relationship

Jacobson next asks this court to reverse the superior court's decision because there has not been a "material alteration of the legal relationship of the parties . . . ." Br. at 16. Jacobson first argues that such alteration must be "judicially sanctioned." *Id.* (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res*., 532 U.S. 598, 604-05 (2001)).[5] He does concede that a party can "prevail" when it obtains a non-merit judgment, but argues that the "material alteration" requirement still applies. *Id.* (citing *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419 (2016)).[6] According to Jacobson, a voluntary dismissal without prejudice does not satisfy this requirement because he is free to re-file his lawsuit. As discussed,

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[5] In *Buckhannon*, the Supreme Court held that the '"catalyst theory' is not a permissible basis for the award of attorney's fees under the [Fair Housing Amendments Act]," which uses the term "prevailing party." 532 U.S. at 610. But over a decade later, this court in *Frankel* recognized the catalyst theory as a basis for recovery of attorney's fees under D.C.'s FOIA statute, which uses the same language as § 16-5504(a).

[6] Jacobson glosses over *CRST Van Expedited* too quickly. In that case, the Supreme Court rejected the argument that the defendant was not the "prevailing party" because the dismissal of the claims was not a ruling on the merits. Rather, the Court looked to the legislative intent of the fee-shifting provision of Title VII, finding the fee provision evinced the intent to "deter the bringing of lawsuits without foundation." *Id*. at 431-32 (citation omitted). This same rationale applies to § 16-5504(a) and voluntary dismissal.

these cases address the term "prevailing party" not a party who "prevails, in whole or in part" and are thus inapposite. *See supra* pp. 14-17.

But, in any event, Jacobson is wrong that there has been no "material alteration" in the parties' legal relationship because he can re-file his lawsuit. The limitations periods for his defamation, breach of contract, and promissory estoppel claims have long since expired.[7] Thus, his legal claims against NAS have been extinguished, and the legal relationship between the parties *has* been materially altered. Accordingly, NAS would be entitled to its fees even under Jacobson's strained read of the statute and cases.

D. None of the "three cases" Jacobson relies on bar NAS's recovery of the attorney fees it incurred defending against his SLAP lawsuit

Jacobson claims that three courts have interpreted DC's Anti-SLAPP Act or the "catalyst theory" and concluded "that a voluntary dismissal of a defamation case puts a plaintiff at no risk of attorney's fees." Br. at 18. He has misrepresented all three cases, none of which stands for this proposition.

[7] The Clack Paper, which forms the crux of Jacobson's defamation-related claims, was published in PNAS on June 19, 2017. The limitations period for a defamation claim (including libel and slander) is one year. D.C. Code § 12-301(4). The limitations period for Jacobson's breach of contract and promissory estoppel claims was three years. *Id.* § 12-301(7)-(8).

1. *Doe v. Burke*

First, Jacobson cites *Doe v. Burke*, 133 A.3d 569 (D.C. 2016) for the proposition that voluntary dismissal at any stage of the litigation shields a plaintiff from liability for attorney's fees. He leans on the unsurprising statement from the court that had the plaintiff there "wished to minimize her potential exposure to a fee award, she could have dismissed her lawsuit at any time." *Id.* at 578-79. But Jacobson misconstrues what the court said. The court referred to voluntary dismissal as a way that the plaintiff could have ended the litigation sooner, thereby reducing the amount of attorney's fees that she was obligated to pay. The court did *not* suggest that by voluntarily dismissing her subpoena she could have avoided the award of fees altogether.

The superior court properly rejected Jacobson's argument that *Burke*'s reference to minimizing a fee award by voluntarily dismissing a defamation lawsuit means avoiding a fee award altogether. As the superior court pointed out, "minimize" is not synonymous with "avoid," but rather implies that some exposure remains. Jacobson's resort to dictionary definitions of "minimize" cannot override the plain import of the *Doe* decision and the superior court's common sense interpretation.

2. *Abbas v. Foreign Policy Group, LLC*

Next, Jacobson cites *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015), relying on the court's statement that "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)." *Id.* at 1337 n.5. In *Abbas*, the D.C. Circuit found that DC's anti-SLAPP's special motion to dismiss provision does not apply in federal court. Accordingly, while it dismissed the plaintiff's complaint, it did so pursuant to Rule 12(b)(6). It would be beyond the scope of the anti-SLAPP statute to award attorney's fees for non-SLAPP claims dismissed pursuant to Rule 12(b)(6).

3. *Fraternal Order of Police, Metro. Labor Comm. v. District of Columbia*

Finally, Jacobson cites *Fraternal Order of Police, Metropolitan Labor Committee v. District of Columbia*, 113 A.3d 195 (D.C. 2015), to argue that the superior court erred by importing the "catalyst theory" from D.C. FOIA cases. Jacobson cannot prevail based on his argument that the superior court improperly imported the catalyst theory from cases applying D.C.'s FOIA because the superior court explicitly did *not* adopt the catalyst theory recognized in the *Fraternal Order of Police*. (*See* JA-928) Moreover, the court reaffirmed the principle that in a FOIA case, the production of documents cannot moot a request for attorney's fees because a plaintiff is eligible for fees when its lawsuit caused that production. The case is distinguished on its facts because the court found that the District of

Columbia produced the requested documents in question soon after the document request, and that the District's FOIA response was underway well before the litigation. Moreover, the case clearly distinguished between "prevails, in whole or in part" from "prevailing party." Section 16-5504(a) of the Anti-SLAPP Act uses the same "prevails, in whole or in part" language as the D.C. FOIA.

E. The Superior Court Properly Referred to California Case Law and Its Treatment of the Same Statutory Language Designed to Effect the Same Policy Goal of § 16-5504(a)

Jacobson argues that the superior court erred in looking to California's well-developed body of case law considering attorney's fees under that state's anti-SLAPP act. Jacobson argues that *Saudi American Public Relations Affairs Committee v. Institute for Gulf Affairs*, 242 A.3d 602 (D.C. 2020), essentially imposed a categorical prohibition on looking to California cases. Br. at 24-25. Jacobson misconstrues the court's conclusion. The court declined to look to California's anti-SLAPP statute *in that particular case.* The court was able to resolve the question before it by applying the plain language of the D.C. Anti-SLAPP Act, while the corresponding provisions of anti-SLAPP statutes in other states such as California varied in language and scope.

As is clear from reading the case, the court did *not* hold that it is never appropriate to refer to California's anti-SLAPP statute. Indeed, only one year later, a different panel looked to California's anti-SLAPP act and case law to conclude

that the SLAPP lawsuit before it had no likelihood of success on the merits. *Am. Studies Ass'n v. Bronner*, 259 A.3d 728, 741-42 (D.C. 2021). Further, as discussed above, the superior court did not rely solely on case law construing California's anti-SLAPP act or treat it as binding precedent. *See supra* pp. 9-11. Rather, the superior court referred to it in conjunction with a plain reading of § 16-5504(a) and its legislative history.

IV. The superior court did not improperly construe against Jacobson the question of whether NAS was entitled to attorney's fees

While Jacobson complains that the superior court erred in construing the defamation finding against him, the superior court in fact crafted a test that built in protections for Jacobson as a plaintiff. The superior court did not merely accept that NAS "achieved" its purpose of getting rid of Jacobson's lawsuit when he voluntarily dismissed it. Nor did the superior court attempt to divine Jacobson's intent in determining whether NAS's special motion to dismiss was a catalyst for the voluntary dismissal.

Instead, the superior court analyzed the fully briefed and argued special motion to dismiss exactly as it would have done if it had ruled on the motion. This ensured that the conclusion that NAS was entitled to attorney's fees was the same one that the superior court would have reached had Jacobson not dismissed his lawsuit two days after the hearing. In other words, the superior court concluded that but-for Jacobson's conveniently timed dismissal, his lawsuit would have been

dismissed, and NAS's status as a party prevailing in whole or in part would have been beyond cavil. This approach also ensures that the purpose of the Anti-SLAPP Act is not frustrated by a clever plaintiff playing a cat-and-mouse game by strategically withdrawing his lawsuit (after achieving in significant part the SLAPP objectives of intimidation and financial punishment) when it appears that it will be dismissed, but threatening to re-file it later, thereby keeping a defendant on tenterhooks while incurring more and more attorney's fees.

Finally, in keeping with this court's decision in *Burke*, 133 A.3d at 578, the superior court examined whether there were special circumstances that would make an award of fees unjust. Jacobson failed to assert such special circumstances expressly. Nevertheless, the superior court credited his assertion that he "attempted to obtain corrections to the [alleged] defamatory statements before filing suit" as a plea of special circumstance. (*See* JA-945) The superior court then reviewed the countervailing facts before concluding that no special circumstances existed. In particular, the superior court noted that NAS had accommodated Jacobson by giving him the opportunity to comment on the Clack article before publishing it, allowing him to respond to the Clack Paper in a simultaneously published letter, and allowing him more than double the normal word limit for that letter. Noting Jacobson's intransigence in pursuing a $10 million lawsuit notwithstanding these accommodations and his tactical withdrawal after the hearing, the superior court

concluded that there were no special circumstances that would relieve him of his responsibility for NAS's attorney's fees. Jacobson has shown no reason why this conclusion should be disturbed.

V. The superior court Properly Determined That NAS's Special Motion To Dismiss Was Meritorious

Jacobson next tries to avoid attorney's fees by trying to relitigate for the third time his defamation claim against NAS. The parties agree that D.C. Code § 16-5502(b) sets forth a two-part test for granting an Anti-SLAPP special motion to dismiss: (i) whether the movant makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest"; and (ii) whether "the responding party demonstrates that the claim is likely to succeed on the merits . . . ." Jacobson does not dispute that NAS satisfied the first prong of this test. Rather, his quarrel is solely with the superior court's conclusion that he failed to demonstrate that his defamation and defamation-related claims against NAS were likely to succeed on the merits.[8] As explained below, the superior court correctly concluded that Jacobson was not likely to succeed on the merits.

[8] Further, Jacobson does not dispute the superior court's analysis of his claims against NAS for breach of contract and promissory estoppel, choosing instead to focus his appeal solely on whether four statements made in the Clack Paper were defamatory.

The crux of his appeal is that four statements in the Clack Paper are not a matter of scientific disagreement, but are demonstrably "false." And Jacobson argues that those statements have led to him being ridiculed by others, although not by NAS. But these arguments have no more merit on appeal than they did when the superior court properly analyzed and rejected them.[9]

Once the exaggerated framing of Jacobson's arguments is dismantled, what remains is a scientific dispute played out in a respected journal published by the nation's premier science academy. NAS did not take sides in this dispute, but rather published both the Clack Paper's critique and Jacobson's rebuttal side-by-side so that the scientific reader-audience could draw their own conclusions. Jacobson, however, was not satisfied by the right of rebuttal; he wanted freedom from all criticism, which defamation law does not guarantee.

To shoehorn Clack's criticism into a defamation claim, Jacobson argues that the criticisms are actually "false facts." *See* Br. at 26-31. The superior court wisely declined to wade into the morass of whether Clack's criticisms are sound or not,

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[9] At the hearing on NAS's special motion to dismiss, Jacobson's prior counsel conceded that he was proceeding only on the first three allegedly false statements identified by Jacobson in his appeal. (*See* JA-934 (citing 2/20/2018 Tr. at 4)) On appeal, however, Jacobson expands the number of challenged statements to four, and he further claims that the fourth allegedly false statement (that his paper included modeling errors) includes two false assertions. *See* Br. at 28-29. Having conceded that only the first three statements are at issue, Jacobson has waived his challenge to the fourth statement, including its supposed subparts. *See D.D. v. M.T.*, 550 A.2d 37, 48 (D.C. 1988).

concluding, "[w]hether the Clack Article's challenge to the Jacobson article's methodology and conclusions would qualify as scientifically 'good' or 'bad' is a question best resolved in the scientific or academic forum, not the court." (JA-936)[10]

Further, Jacobson's argument that Clack's criticisms are "false facts" rests on the conclusions of so-called "experts" expressed in declarations that Jacobson submitted for the first time in support of his motion for reconsideration/motion to alter. It was not an abuse of discretion for the superior court to decline to consider these declarations as inappropriately submitted after the superior court had ruled against Jacobson. (*See* JA-1425 (citing *Dist. No. 1–Pac. Coast Dist. v. Travelers Cas. & Sur. Co*., 782 A.2d 269, 278 (D.C. 2001) ("[N]either Rule 59(e) not Rule 60(b) is designed to enable a party to complete presenting its case after the court has ruled against it.")))

Jacobson complains that the superior court should have exercised its discretion to consider these late-filed declarations because it had previously denied him the opportunity to take discovery. *See* Br. at 37. This argument is unconvincing

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[10] Because the superior court concluded that the three statements challenged by Jacobson were not "false facts" but rather statements made in the course of scientific disagreement, it did not need to reach the question of NAS's intent. But even if NAS's state-of-mind is at issue, Jacobson has never identified malicious intent by NAS in publishing his original article, awarding it the Cozzarelli Prize, then publishing both his rebuttal and Clack's critique in the same issue, and providing Jacobson extra word count for his rebuttal Further, the unsupported claim that Clack is "jealous" of Jacobson cannot be imputed to NAS.

for two reasons. First, the Anti-SLAPP Act contemplates that a special motion to dismiss will be decided before discovery so that a defendant is not dragged through expensive discovery by a plaintiff seeking to chill speech through a SLAPP suit. *See Am. Studies Ass'n*, 259 A.3d at 733; *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1230 (D.C. 2016) (citing Council of the District of Columbia, Report of Committee on Public Safety and the Judiciary on Bill 18-893 at 4 (Nov. 18, 2010)). Second, discovery is the process of learning information from the opposing party or a third-party. Here, there was nothing for Jacobson to "discover," as the so-called experts are *his* declarants.[11] Third, all the "expert" declarants did was proffer their own definition of "facts" and "scientific disagreement", which are basic terms that do not require expert opinion because such "opinion" would not be helpful to the trier of fact. *See Motorola, Inc. v. Murray*, 147 A.3d 751, 756-57 (D.C. 2016) (adopting Fed. R. Evid. 702); Fed. R. Evid. 702(a).

Jacobson's characterization of the Clack article as containing false facts also ignores the context of the article, which is crucial to determining whether a plaintiff has stated a claim for defamation. *See Klayman v. Segal*, 783 A.2d 607, 614 (D.C. 2001) ("'Context' is a critical legal concept for determining whether, as a matter of

[11] That Jacobson refers to the declarants as "experts" has no bearing on whether the superior court should have accepted their late declarations. There is a procedure for disclosing experts set forth in D.C. Superior Court Rule of Civil Procedure 26(a)(2), which Jacobson did not follow.

law, a statement is reasonably capable or susceptible of a defamatory meaning."). As this court has explained:

> "Context" serves as a constant reminder that a statement in an article may not be isolated and then pronounced defamatory, or deemed capable of a defamatory meaning. Rather, any single statement or statements must be examined within the context of the entire article. As the Supreme Judicial Court of Massachusetts has stated, the concept of context "requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence."

Id. (citation omitted). Here, Jacobson's rebuttal to the Clack article was published in the same issue of PNAS as Clack's article, allowing the reader to assess fully not only the Clack Paper's critique, but also Jacobson's response to the critique. By being published together, the Clack critique and Jacobson rebuttal present the reader with a classic disagreement among scientists about which the reader can make up her mind, with access to both side's explanations.

As the superior court noted, this dispute over modeling is a far cry from the dispute at issue in *Mann*, where the challenged article did far more than criticize scientific approach, but impugned the integrity of the plaintiff, calling him, among other things, the "Jerry Sandusky of climate science . . . ." (*See* JA-935 (citing *Mann*, 150 A.3d at 1243-49)) Jacobson fails to point to any similar *ad hominem* or derogatory language in the Clack Paper. Instead, he is upset that interested bystanders observing the dispute over his modeling seized the opportunity to heckle

him. It is *their* words that Jacobson cites as proof that he has been made to seem "odious, infamous, or ridiculous." *See* Br. at 38-40. But these third parties' words do not make NAS's publication of the Clack article defamatory. To conclude otherwise would chill debate of scientific disputes, especially those like climate change that have captured the public's interest. Accordingly, the superior court's judgment awarding NAS fees in the amount of $428,722.92 should be affirmed, and the case remanded to the superior court so that NAS may apply for the fees and costs incurred in responding to this appeal.

VI. Jacobson Is Not Entitled To Interest Or Attorney's Fees and Costs Even If Judgment Is Reversed

In the last line of his opening brief, Jacobson requests not only repayment of the $428,722.92 in fees that he paid NAS pursuant to the superior court's Order, but also his costs and fees on appeal. Br. at 50. Even if the court were to reverse the superior court's decision awarding NAS fees, Jacobson would be not be entitled to either interest on the NAS fee award or his own fees.

As to interest, Jacobson chose to pay the fee award to NAS rather than moving for a stay of judgment or supersedeas bond. He cites no authority for the proposition that having chosen to pay the award, he would be entitled to interest on it should the award be reversed. With respect to his own fees, the Anti-SLAPP Act is clear that a party responding to a special motion to dismiss may recover fees and costs only if the superior court determines that the special motion to dismiss was "frivolous or

[was] solely intended to cause unnecessary delay." D.C. Code § 16-5504(b). There was no such finding in the superior court, and Jacobson does not contend that NAS's special motion to dismiss meets either of the two narrow criteria for a fee award. Absent meeting the criteria for § 16-5504(b), Jacobson must bear his own fees under the American Rule. And, in any event, as a pro se litigant he is not entitled to seek attorney's fees, even if he had met the criteria set forth in § 16-5504(b). *See Donahue v. Thomas*, 618 A.2d 601, 605 (D.C. 1992) (provision for attorney's fees in D.C. FOIA does not apply when prevailing plaintiff is pro se); *Upson v. Wallace*, 3 A.3d 1148, 1166 (D.C. 2010) (pro se litigant not entitled to attorney's fees).

VII. Conclusion and Request for Remand to Address Fees Incurred After April 20, 2020.

For the reasons set forth herein, NAS respectfully requests that the court affirm the judgment of the superior court award of attorney fees NAS and also requests that the court remand the case back to the superior court so that it can determine the additional fees NAS is entitled to for responding to Dr. Jacobson's May 18, 2020 Motion for Reconsideration and this Appeal. *See D.C. Metro. Police Dep't v. Stanley*, 951 A.2d 65, 66-67 (D.C. 2008) (per curiam) (remand to trial court the preferred method for presenting appellate fee petitions).

NAS respectfully requests oral argument.

Dated: September 26, 2022

Respectfully submitted,

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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.

Evangeline Paschal
Signature

22-CV-0523
Case Number(s)

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2022, this Brief of Appellee National Academy of Sciences was filed and served via the District of Columbia Court of Appeals' electronic filing system, which will serve a notice of such filing upon all counsel of record, and also a copy was served via email upon the following counsel of record:

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