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

REPLY BRIEF FOR APPELLANT

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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 jointly 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 jointly as the Clack Authors.

CBr. = Appellee's Brief by Dr. Clack

FOIA = Freedom of Information Act

JA = Joint Appendix

JBr. = Appellant's Brief by Prof. Jacobson

NAS = National Academy of Sciences

NBr. = Appellee's Brief by NAS

PNAS = Proceedings of the National Academy of Sciences

R. = Rule

I. Summary of Reply

This court should vacate attorney's fees and costs charged to Prof. Jacobson following his voluntary dismissal, because five cases interpreting D.C.'s Anti-SLAPP Act and/or the catalyst theory, including four from this court and one from the U.S. Court of Appeals for the D.C. Circuit, plus two U.S. Supreme Court cases, hold fees and costs should not be awarded. Not one case says otherwise, and NAS and Dr. Clack misrepresent all cases they try to rebut. NAS further does not deny (NBr. 23) that this court, in *Fraternal Order of Police, Metro. Labor Comm. v. District of Columbia*, 113 A.3d 195, 200 (D.C. 2015), "reject[s] the catalyst theory in non-FOIA contexts," thus this court holds that the D.C. FOIA catalyst theory does not apply to the D.C. Anti-SLAPP Act, shutting off all bases for fees. This court, in *Saudi Am. Pub. Rels. Affs. Comm. v. Inst. For Gulf Affs.,* 242 A.3d 602, 611 (D.C. 2020), further prohibits the use of California law to interpret the D.C. Anti-SLAPP Act, as was done here, and no D.C. case says otherwise. The fees charged to Prof. Jacobson following his voluntary dismissal, which should be zero, far exceed those allowable if he simply asked the Superior Court to dismiss his case under Super. Ct. R. 41(a)(2), indicating another clear error by the Superior Court.

Facts also show NAS and Dr. Clack defamed Prof. Jacobson and his students and colleague. NAS secretly suppressed corrections to the Clack Paper (JA171), refused to correct false facts when given clear evidence (JBr. 41-44), faked the

definition of a "scientific disagreement" and three other terms (Section II, infra), and scarred reputations, even causing a student to "withdraw from academia altogether" (JA1404-1405). NAS **admitted in writing** that a PNAS "Board member" secretly suppressed Prof. Jacobson's requested corrections to the Clack Paper for two months in a clear effort to prevent the corrections from seeing the light of day (JA171). The suppression suggests intent by the member, and thus NAS, to harm Prof. Jacobson's reputation from the get-go. NAS now reaffirms its intent by covering up the event's existence in a misstatement of the record (NBr. 5). Experts confirm NAS' carelessness in publishing: "PNAS did not follow normal publication procedures…" (JA1374), and "the referee process must also be called into question, given the apparent errors by Dr. Clack and his co-authors" (JA 1387-1388).

Facts also show Dr. Clack intentionally lied four times in his paper (JBr. 45-47). Nowhere in his brief does he deny any specific lie. Nowhere does he deny his previous written admissions that (a) the Jacobson Paper includes Canadian hydropower (JBr. 43), and (b) Prof. Jacobson made no hydropower computer modeling error ("I am not disagreeing with the possibility it can be done with CSP, hydro,...") (JBr. 45-48). From these admissions, Dr. Clack agrees Statements 2, 3, and 4 (JBr. 28-29) are false facts, again contradicting the Superior Court's ruling.

Finally, nowhere does NAS or Dr. Clack deny they gave the Superior Court a fake definition of a "scientific disagreement" (JBr. 26-29). Despite the chance to

provide a source of their definition, they fail to do so. Nowhere do they deny the Superior Court wrongly ignored a cause of defamation – when false facts "injure [the] plaintiff in his trade, profession" and the language makes "the plaintiff appear odious, infamous, or ridiculous." *Competitive Enter. Inst v. Mann,* 150 A.3d 1213, 1226 (D.C. 2016)) (JBr. 38-40). Nowhere do they deny the court used an incorrect way to hold if a statement is fact or opinion (JBr. 29-38). Nowhere do they deny the court wrongly gave them the benefit of the doubt at almost every turn (JBr. 49).

For the foregoing reasons, the judgments should be reversed.

II. Reply to NAS' Brief

In the instant case, the Superior Court did not grant a motion to dismiss, so NAS and Dr. Clack are not entitled to fees or costs under D.C.'s Anti-SLAPP Act statute § 16-5504(a). Yet another case, *Am. Studies Ass'n v. Bronner*, 259 A.3d 728, 729 (D.C. 2021), construing § 16-5504(a) and thus its phrase, "prevails, in whole or in part," confirms this unequivocally:

> If the trial court grants the motion, it may award the costs of litigation, including reasonable attorney fees, to the movant.[4]
> [4] § 16-5504(a).

This decision states a "trial court grant[ing] the motion" is the **only** way a movant "prevails, in whole or in part" since this court, like in all prior decisions on this point, sets forth no other basis for a movant to obtain fees under § 16-5504(a). This is such an unambiguous, plain-language interpretation of § 16-5504(a) by this court, that

nothing else should be needed to justify this court vacating the judgments wrongly imposed on Prof. Jacobson when no motion to dismiss was granted.

Bronner re-affirms this court's ruling in *Settlemire v. D.C. Office of Emp. Appeals*, 898 A.2d 902, 907 (D.C.2006), defining a party who "prevails" as a party "…winning the relief that it seeks." (JBr. 15).

Bronner re-affirms this court's holding in *Doe v. Burke*, 133 A.3d 569, 578-579 (D.C. 2016), that a plaintiff who voluntarily dismisses "minimize(s) her potential exposure to a fee award" to zero via § 16–5504(a), because the definition of "minimize" is to reduce to the lowest possible amount, which is zero. (JBr. 19).

Bronner re-affirms *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015), where the court interpreted § 16–5504(a) as meaning attorney's fees may be granted **only** after a court grants or denies a special motion to dismiss, and does **not** "purport to make attorney's fees available to parties who obtain dismissal by other means…" (JBr. 20-22).

Bronner re-affirms *Fraternal Order of Police*, 113 A.3d at 200, where this court "reject[s] the catalyst theory in non-FOIA contexts" and thus rejects the claim that, because § 16–5504(a) uses the term, "prevails, in whole or in part," a party who voluntarily dismisses without prejudice may be penalized with fees. (JBr. 22-24).

Finally, *Bronner* re-affirms *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604-05 (2001) and *CRST Van*

Expedited, Inc. v. EEOC, 136 S. Ct. 1642 (2016), which hold that, for a party to be entitled to attorney's fees and costs, that party must meet **both** the following criteria:

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

NAS and Dr. Clack met neither criteria. Prof. Jacobson's dismissal (1) did **not** materially alter the parties' legal relationship because he could re-file, and (2) was **not** judicially sanctioned because it was effective without a court order (JBr. 16-18).

NAS argues (NBr. 15-16) that, since *Settlemire* uses "prevailing party," but § 16–5504(a) uses "prevails in whole or in part," the term "prevails" doesn't mean "winning relief by the court." NAS is incorrect. *Settlemire* 898 A.2d at 907 also defines the term "prevails" as winning relief: "[A] party…'prevails' by winning the relief that it seeks." *Fraternal Order of Police*, 113 A.3d at 200, confirms this by citing *Settlemire* when stating this court "reject[s] the catalyst theory in non-FOIA contexts," thus rejects the claim a party prevails at all unless it wins relief by a court.

Citing to this court's statement in *Doe,* 133 A.3d at 578-579, "Had Ms. Burke wished to minimize her potential exposure to a fee award, she could have dismissed her lawsuit at any time..," NAS argues (NBr. 22) this court meant that Ms. Burke could have "reduc[ed] the amount of attorney's fees that she was obligated to pay" if she had dismissed. This interpretation is based on two more fake definitions by NAS. The first is that "minimize" means "reduce." Five dictionaries (JBr. 19) prove

"minimize" means "reduce to the smallest amount or degree," which is zero. The second is NAS' claim that "exposure to a fee award" means exposure to "the amount of attorney's fees that she was obligated to pay." To the contrary, this court put the word "a" in front of "fee award," meaning her exposure was to whether she would be subject to "a fee award" at all, not whether an award would be large or small. Nowhere does the statement refer to an award amount. If this court meant fee "amount," it would have said, "minimize her exposure to fees," not "minimize her exposure to a fee award." Regardless, this court used "minimize," which means any risk would have been reduced to zero.

NAS then claims (NBr. 23), with regard to *Abbas,* 783 F.3d at 1337 n.5, that the statement, "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)" means that only a dismissal by Federal Rule 12(b)(6) prevents attorney's fees from being made available. NAS is providing yet a fourth fake definition, this time of "by other means." NAS is claiming that the only possible "other means" is Federal Rule 12(b)(6), although the rule is used only as an example: "such as Federal Rule 12(b)(6)." Also, *Abbas* states (783 F.3d at 1337 n.5) D.C.'s Anti-SLAPP Act permits a court to charge fees **only** "[a]fter granting or denying a special motion to dismiss…." This is yet another case that obliterates the claim Prof. Jacobson is liable for fees since neither NAS nor Dr. Clack was granted a special motion to dismiss.

Next, NAS does not dispute (NBr. 23-24), that this court in *Fraternal Order of Police* 113 A.3d at 200 "reject[s] the catalyst theory in non-FOIA contexts." Yet, in its request for attorney's fees, NAS claimed the opposite, that the Superior Court should apply the catalyst theory of the D.C. FOIA to the D.C. Anti-SLAPP Act (JA873). The court relied on that claim to give NAS fees (JA917-918):

> In their pleadings, Defendants offer two primary arguments for finding that they have prevailed…(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.

Instead of admitting it was wrong, NAS now pivots by claiming the D.C. FOIA catalyst theory is irrelevant since (NBr. 23): "the superior court explicitly did not adopt the catalyst theory recognized in the *Fraternal Order of Police*" but from California law. However, the court's decision to "follow the case law of California" (JA927) to determine how to allocate fees was not possible until it decided that the D.C. FOIA catalyst theory applied to the Anti-SLAPP Act (JA921):

> 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…In *Frankel*,…, the Court of Appeals specifically found that the language encompassed awards to parties who were not awarded relief by the Court, who could "demonstrate a causal nexus… between the actions [brought in court] and the agency's surrender of information.

That decision itself improperly (*Saudi,* 242 A.3d at 611) used case law from California to interpret the D.C. Anti-SLAPP Act (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.

Because NAS no longer denies the D.C. FOIA catalyst theory does not apply to the D.C. Anti-SLAPP Act, its claim (NBr. 16) the D.C. Council meant the catalyst theory to apply to the Act cannot be true. In fact, the only evidence NAS provides that the D.C. Council intended the catalyst theory to apply to § 16–5504(a) is the fact the Council changed "substantially prevails" to "prevails, in whole or in part." But *Settlemire*, 898 A.2d at 907, defines "prevails" to mean: "winning the relief that it seeks." NAS and Dr. Clack won no relief they sought (court-ordered dismissals with prejudice, JBr. 2), so did not prevail, even in part. In sum, NAS no longer says the FOIA catalyst theory applies to the Anti-SLAPP Act, shutting all bases for fees.

NAS then claims wrongly (NBr. 21) that it prevails, since a material alteration in the parties' legal relationship arose (thus *Buckhannon* no longer applies), since Prof. Jacobson can no longer re-file due to D.C. statutes of limitations. This is false: (1) *Buckhannon* has two requirements, not one, for a party to prevail, and both must be met. Even if a material alteration did occur, Prof. Jacobson's voluntary dismissal was not judicially sanctioned, so NAS can **never** prevail. (2) the D.C. statutes of

limitations (NBr. 21, n.7) are not relevant, since parties re-file in other state or federal courts, not D.C. court. (3) At the time of his dismissal (Feb. 22, 2018) and of NAS' fee request (Mar. 7, 2018), no D.C. limitations had expired. Regardless, his dismissal was not judicially sanctioned, so the issue is moot.

Next, NAS claims (NBr. 12-13) the Superior Court retained jurisdiction over attorney's fees under the Anti-SLAPP Act after Prof. Jacobson's voluntary dismissal. The sole basis for this argument is a 1990 case, *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384 (1990). In that case, both a motion to dismiss and a request for Rule 11 sanctions was made. The Court held (496 U.S. at 385) that

> As the "violation of Rule 11 is complete when the paper is filed," [citation omitted], a voluntary dismissal does not expunge the Rule 11 violation. In order to comply with the Rule's requirement that it "shall" impose sanctions "[i]f a pleading, motion, or other paper is signed in violation of this rule," a court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal of the underlying action.

Cooter & Gell is irrelevant because fees were not considered for the motion to dismiss, only for Rule 11 sanctions, and such sanctions were mandatory because the Rule 11 violation "is complete when the paper is filed." *Id*. Here, even NAS argues that no fee basis arises until a party "prevails, in whole or in part," so it could not "prevail" until Prof. Jacobson's dismissed on February 22, 2018, five months **after** he filed his complaint (September 29, 2017), not when the complaint was filed.

Cooter & Gell is also moot since, even if it allowed a court to retain jurisdiction, it was overridden for cases with a prevailing party clause by *Buckhannon* and *CRST*. Those two cases hold that a legal fee statute with a prevailing party clause does not apply to a voluntary dismissal without prejudice since such a dismissal is not judicially sanctioned and does not materially alter the legal relationship between the parties (*Buckhannon,* 532 U.S. at 604-05). This court interprets D.C. Rules of Civil Procedure with both federal and D.C. cases (§ 11-946). Pursuant to *Buckhannon* and *CRST*, a Super. Ct. Civ. R. 41(a)(1)(A)(i) dismissal prevents courts from assigning fees under § 16-5504(a). This argument is supported by *Bronner, Settlemire, Doe, Abbas,* and *Fraternal Order of Police.*

Next, NAS admits (NBr. 13) that fees following a voluntary dismissal under Super. Ct. R. 41(a)(2) "are limited to the amount expended for work that cannot be applied to the subsequent lawsuit concerning the same claims,. . . ." *Thoubboron v. Ford Motor Co*., 809 A.2d 1204, 1211 (D.C. 2002), but then claims *Thoubboron* "involved court-imposed conditions on dismissal, not a statutory fee provision." However, nothing in *Thoubboron* prevents the ruling from applying to a "statutory fee provision," particularly as the purpose of the court-imposed conditions in Super. Ct. R. 41(a)(2) is to allow a plaintiff to re-file without giving the defendant fees for work the defendant can still use in a re-filed case. The fees charged Prof. Jacobson following his voluntary dismissal, which permit no fees, far exceed those allowed if

he simply asked the Superior Court to dismiss his case under Super. Ct. R. 41(a)(2), indicating another clear error by the court.

Next, NAS claims (NBr. 24-25) this court, in *Saudi* "did not hold that it is never appropriate to refer to California's anti-SLAPP statute." However, *Saudi* 242 A.3d at 611, is clear: the D.C. Anti-SLAPP Act must be construed from "the plain language of the statute," **not** from 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).

NAS cites *Bronner*, 259 A.3d at 741-742 as the reason a trial court may use California law to interpret the D.C. Anti-SLAPP Act. However, *Bronner* does not contradict *Saudi*. Instead, in *Bronner*, this court first ruled based on the plain meaning of the D.C. Anti-SLAPP Act and then merely stated: "Courts in other jurisdictions have reached the same conclusion in interpreting similar anti-SLAPP laws." Here, the Superior Court wrongly used California law **both** to interpret the D.C. Anti-SLAPP Act and to decide how to assign fees (JA927): "Thus, the Court concludes that it is appropriate to follow the case law of California,…"

Next, NAS misstates the testimony of Prof. Jacobson's four unpaid experts by falsely stating that they gave only

> 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.

(NBr. 30). However, the experts not only defined a "fact" versus "scientific disagreement" [which is not a basic, but a contested, term, given NAS' and Dr. Clack' fake definition of it (JBr. 27-32)], but they also provided (JA1371-1402) their opinions as to whether: (a) Statements 1-4 are facts or scientific disagreements, (b) each fact is false, (c) Dr. Clack and NAS followed norms of scientific research and review, respectively, and (d) refusing to correct a false fact is unethical.

After giving the Superior Court a fake definition of a scientific disagreement (JBr. 27-32), NAS now tries to exclude experts who exposed its fake definition (NBr. 29), thus NAS tries to ensure the fake meaning is retained. In its brief, NAS continues to fake the meaning of a scientific disagreement (NBr. 31):

> 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.

NAS did not present a "classic disagreement" among scientists, and no evidence or experts suggests it did. NAS presented fake factual definitions and characterizations of Prof. Jacobson's own data to make Prof. Jacobson appear as if he had committed

computer modeling errors. This view was corroborated by four unpaid experts (JBr. 30-37; JA1371-1402; JA 1404-1405). Dr. Clack has also admitted in writing that three of the four sets of false facts listed by Prof. Jacobson (JBr. 28-29) are indeed false facts. He admitted that Prof. Jacobson included Canadian hydropower (JBr. 43; JA987), thus Prof. Jacobson was correct about false Statement 3 (JBr. 29). He also admitted that Prof. Jacobson made no hydropower computer modeling error, and Dr. Clack even tested the hydropower assumption himself ("I am not disagreeing with the possibility that it can be done with CSP and hydro etc") (JBr. 45-46; JA109), thus admitting Prof. Jacobson was correct about false Statements 2 and 4 (JBr. 28-29). Despite these admissions and the experts confirming Statements 1-4 are all false facts, NAS again pretends false facts are scientific disagreements.

The false claim by NAS that Statements 1-4 are disagreements, is consistent with NAS' carelessness in reviewing the Clack Paper, as concluded by the experts:

> In my professional opinion, the publication of the Clack Paper falls outside of the bounds of scientific debate. PNAS did not follow normal publication procedures, defined either in terms of general norms in our field or the specific guidelines of their own journal. I believe this caused harm to the reputation of Dr. Jacobson.

JA1374

> I am astonished that the Dr. Clack et al. (2017) paper was published by PNAS as a research article. The PNAS publication guidelines are publicly available, with the Dr. Clack et al. (2017) paper apparently contravening these guidelines, as there is no original research in the Dr. Clack et al. (2017) paper, which in my perception must call into question the commissioning as well

> as the referee process for the paper. I am dismayed that the commissioning editor never identified this important point prior to sending the paper to referees. Furthermore, the referee process must also be called into question, given the apparent errors by Dr. Clack and his co-authors

JA1387-1388.

NAS not only published the Clack Paper irresponsibly, but it also admits in writing that a PNAS Board member secretly suppressed Prof. Jacobson's comments on the Clack Paper for two months (JA171). This was a *prima facie* attempt by the member to prevent material corrections requested by Prof. Jacobson from seeing the light of day. This member, in all probability, was "B.L. Turner," who was listed as "editor" overseeing the review of the Clack Paper (JA173). One construction of the suppression is it shows intent by the member, thus NAS, to damage Prof. Jacobson's reputation from the get-go. Only after Prof. Jacobson discovered the scheme (JA147, JA171), was the member removed from the process. However, NAS now re-writes history to cover up the event, misstating the record.

Specifically, NAS now misstates what occurred following acceptance of the Clack Paper (NBr. 5), falsely saying, "Before publishing the Clack Paper, PNAS sent drafts of that paper to Jacobson for comment…It then forwarded Jacobson's comments to Clack…" This is not what the record shows. On February 27, 2017 (JA116, JA234-235), PNAS did send the Clack Paper to Prof. Jacobson for the first time, telling Prof. Jacobson that the paper "has been accepted for publication in

PNAS." But PNAS did not request Prof. Jacobson to submit comments to the Clack Authors at all. Instead, PNAS asked Prof. Jacobson, "Please let us know if you would like to submit a letter to the editor commenting on the paper." Prof. Jacobson responded, asking PNAS (a) to investigate whether authors violated policies related to conflicts of interest and not contributing to the paper in a meaningful way (JA233-234), (b) to correct false facts in the paper (JA234), (c) and to publish the Clack Paper as a Letter rather than Research Report (JA232) since it was a comment, not a research article. On February 28, 2017, Prof. Jacobson then provided a list of "30 false statements and 5 egregiously misleading statements" that he asked PNAS to send to the Clack Authors to address in their manuscript (JA231). On March 2, 2017, PNAS agreed (JA130).

Despite this agreement, **PNAS never sent the comments** to the Clack Authors. (JA171). Two months later, on May 4, 2017, PNAS sent Prof. Jacobson a "new" accepted version of the Clack Paper (JA147-148). After Prof. Jacobson asked, "Did you or did you not provide my previous response to the authors…?" (JA171), **PNAS admitted on May 5, 2017 that it did not** (JA171):

> We provided your previous response to a Board member who took it into consideration during the two rounds of revisions since you last saw the manuscript. The Board member did not to send your response directly to the authors at the time.

In other words, for two months, PNAS pretended it had sent Prof. Jacobson's requested corrections to the Clack Authors, but a Board member sat on the comments, indicating the member's intent to damage Prof. Jacobson by ensuring the Clack Paper's publication without correction. The member's suppression of the comments, PNAS' admission of the suppression, and NAS' coverup of the suppression in its revisionist history, all illustrate NAS's intent to damage Prof. Jacobson's reputation. Even when PNAS later sent Prof. Jacobson's comments to the Clack Authors, no material changes were made (JA246, 248, 252, 254).

Despite NAS' bad faith and negligent review process (JA1374, JA1387-1388), NAS somehow believes that Prof. Jacobson should pay its fees (NBr. 18):

> 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.

This personal attack has no reference to the record. Critiques are normal, and Prof. Jacobson has responded to over a dozen, including another one of the Jacobson Paper published in PNAS (Bistline and Blanford, PNAS, 113, E3989-E3990, 2016), and Prof. Jacobson never sued a previous author. According to four experts, it was NAS who failed to uphold journalistic standards (JA1374; JA1387-1388), and NAS and Dr. Clack who did not publish "opposing points of view" (scientific disagreements),

but false facts about Prof. Jacobson's own data "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).

Further, NAS was informed from the beginning that Dr. Clack published false facts (JA 234, 231; JBr. 30-38). Dr. Clack has also admitted in writing his intent to discredit (JA 272; JBr. 48), thus damage the reputations of the Jacobson Authors. One of his motives was jealousy (JA 272; JBr. 48*).* Yet, NAS did nothing and continues to do nothing to correct the false facts. NAS and Dr. Clack have succeeded in destroying the prospective academic career of one of the former students on the Jacobson Paper, causing her to withdraw from academia altogether (JA1404-1405):

> As an early career scientist, I should have been able to leverage the prestige and accomplishment of the Cozzarelli Prize to obtain a tenured academic position, which was my long-term goal. Instead, my reputation is scarred and I have had to withdraw from academia altogether.

NAS and Dr. Clack's false facts damaged Prof. Jacobson and Dr. Delucchi financially and reputationally (JA1178-1179). For example, they lost a 200,000 Euro joint research award they were slated to receive based on a committee vote when two scientists stood up in front of the entire voting body, humiliating them publicly, saying they shouldn't receive the award due to the Clack Paper, and they did not (JA 1179). Despite Prof. Jacobson's efforts to fix the false statements, even those to which Dr. Clack admits (JBr. 43, 45-48), Dr. Clack and NAS have refused.

NAS then claims (NBr. 7) that because Prof. Jacobson posted an errata (https://web.stanford.edu/group/efmh/jacobson/Articles/I/CombiningRenew/Clarification-PNAS15.pdf), he acknowledges "omissions about the assumptions he made in his 2015 paper, including two that relate to what he claims are three allegedly most 'egregious' defamatory statements." This claim misrepresents the errata. The purpose of the errata was to clarify definitions and the location of information in the paper to prevent others from making the same mistakes as the Clack Authors. It also includes the cost of extra hydropower turbines not included in the Jacobson Paper. Such cost is stated to have "no impact on the conclusions." Such cost also has nothing to do with computer modeling or false Statements 1-4 (JBr. 28-29), none of which refers to cost.

Next, NAS claims (NBr. 32) that "third parties' words do not make NAS's publication of the Clack article defamatory." False. NAS' publication is defamatory because NAS published four sets of false statements, three that falsely accuse Prof. Jacobson, a computer modeler for ~32 years, of modeling errors, thereby "injur[ing] [him] in his trade, profession" and making him "appear odious, infamous, or ridiculous" to the public. *Mann,* 150 A.3d at 1226. The third party words exemplify how NAS publication made Prof. Jacobson "appear odious, infamous, or ridiculous."

Lastly, NAS argues (NBr. 28) that Prof. Jacobson waived false Statement 4 (JBr. 28-29) because his attorney stated in a hearing he was proceeding on only three

statements from the complaint. However, Prof. Jacobson raised the fourth statement in his complaint (JBr. 29) and Motion for Relief (JA1415-1416), which the court ruled on (JA1422-1427). The false modeling error claims in Statement 4 are also partly in Statements 1 and 2: "…the restrictions enumerated…are not satisfied,…" and "This discrepancy indicates a major error…" (JBr. 28). Statement 4 clarifies the false claims of computer modeling error. *D.D. v. M.T.*, 550 A.2d 37, 40 (D.C. 1988) holds an issue raised during a trial court proceedings can be raised on appeal.

III. Reply to Dr. Clack's Brief

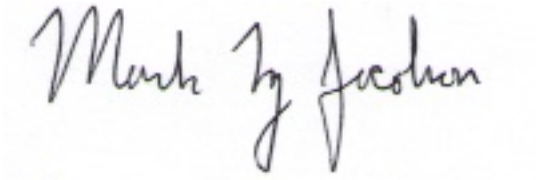
Dr. Clack says (CBr. 6) the Superior Court had no need to address malice since it held that the statements at issue were not defamatory. However, Prof. Jacobson alleges that the court made clear legal errors by (a) not using a legal test to determine if a statement is of fact (JBr 29-31) and (b) ignoring a major cause of defamation (JBr. 38-40).

Dr. Clack does not deny or rebut the specific allegations he lied four times in his paper about the hydropower assumption (JBr. 45-47). He does state he believed everything he wrote in the paper (CBr. 10). This claim, though, is false, as Dr. Clack's admitted he understood and tested the hydropower assumption 16 months before publishing his paper: "I am not disagreeing…" (JA109), making each of his four published statements a lie (JBr. 45-47).

Dr. Clack defends his jealousy of Prof. Jacobson (JA 272; JBr. 48) by claiming Prof. Jacobson must believe Dr. Clack "cajoled" 20 other authors into drafting and publishing a paper they knew to be false (CBr. 11). It was not necessary for Dr. Clack to "cajole" the other authors, since only Dr. Clack knew the four lies he wrote in his paper (JBr. 45-47) were intentional when he "drafted" and submitted the paper. The other authors were made aware of these and other false facts only when Prof. Jacobson informed them after the Clack Paper was accepted for publication.

IV. Conclusions

In sum, NAS and Dr. Clack provide no case or fact justifying fees. Prof. Jacobson thus asks again for the remedies requested in his Appellant Brief (JBr. 49-50). These include reversal of the fee and cost judgments against him, reimbursement of payments he already made to Dr. Clack ($75,000) and NAS ($428,722.92), and costs and fees on appeal under D.C. App. R. 39.



Mark Z. Jacobson

Dated: October 5, 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.

Mark Z. Jacobson
Signature

__22-CV-0523____
Case Number(s)

_Mark Z. Jacobson_____
Name

__Oct. 5, 2022____
Date

__jacobson@stanford.edu_____
Email Address

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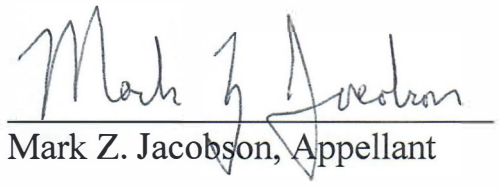

Mark Z. Jacobson, Appellant