Appeal No. 13-CV-83

THE DISTRICT OF COLUMBIA COURT OF APPEALS

JOHN DOE No. 1,

Appellant,

v.

SUSAN L. BURKE,

Appellee.

On Appeal from the Superior Court for the District of Columbia

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APPELLANT'S SUPPLEMENTAL BRIEF ON THE MERITS

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LIST OF PARTIES AND AMICI CURIAE

Parties (in both the Superior Court and the Court of Appeals):

Susan L. Burke, Plaintiff/Appellee

William T. O'Neil, attorney for Susan Burke

John Doe No. 1, Defendant/Appellant

Michael E. Rosman, attorney for John Doe No. 1

Christopher J. Hajec, attorney for John Doe No. 1

Amici Curiae (Court of Appeals only):

The American Civil Liberties Union of the Nation's Capital, *amicus curiae* in support of John Doe No. 1

Arthur B. Spitzer, attorney for the American Civil Liberties Union of the Nation's Capital

Reporters Committee for Freedom of the Press

Cindy Gierhart, attorney for Reporters Committee for Freedom of the Press

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3. Is Zujua entitled to reasonable attorneys' fees?

STATEMENT OF THE CASE

Appellee Susan Burke filed the Complaint in her defamation action against anonymous "John Doe" defendants in the Superior Court of the District of Columbia on September 19, 2012. Exhibit 1 to appellant's Memorandum in Opposition to appellee's Motion to Dismiss, filed in this Court on March 12, 2013 ("Opp. to MTD"), Exhibit 1 thereto ("Complaint"). Shortly thereafter, Ms. Burke issued subpoenas to the Wikimedia Foundation seeking the identity of defendant John Doe No. 1, referred to in the Complaint and the subpoenas as "Zujua." Opp. to MTD, Exhibit 2; Complaint ¶ 6. On December 10, 2012, Zujua moved in the Superior Court to quash these subpoenas pursuant to D.C.'s anti-SLAPP statute and for a protective order enjoining Ms. Burke from enforcing the subpoenas pursuant to Superior Court Civil Rule 26(c). On January 30, 2013, after a hearing on Zujua's motion, Judge Maurice A. Ross of the Superior Court issued a very brief opinion and order denying the motion (the "Order"). Zujua filed a notice of appeal of Judge Ross's order on January 31, 2013. On February 25, 2013, this Court issued an Order to Show Cause why it had jurisdiction to hear Zujua's appeal, to which Zujua filed a response on March 18. On February 28, Ms. Burke filed a motion to dismiss in this Court, claiming that the Court lacks jurisdiction over this appeal. Zujua filed an

opposition to that motion on March 12, and Ms. Burke filed a reply on March 15.

On January 31, 2013, Zujua filed an emergency motion in the Superior Court for a stay pending appeal of Judge Ross's Order. Judge Ross denied this motion on March 8. On March 11, Zujua moved in this Court for a stay pending appeal.

On April 2, this Court issued an order both granting Zujua's motion for a stay and accepting the parties' papers on Ms. Burke's motion to dismiss as briefs in this appeal, subject to any further briefing that might be ordered. On September 6, this Court issued an order for supplemental briefing on the merits of the Order denying Zujua's motion for a protective order and to quash.

STATEMENT OF FACTS

As shown by the following facts, Ms. Burke's lawsuit against Zujua is a meritless defamation claim, brought by a public figure, that is calculated to chill the speech of those who might wish to comment about her role in public controversies. That is to say, Ms. Burke's suit is just the sort of action the anti-SLAPP statute, as reflected in its legislative history, was designed to check.

A. DC's Anti-SLAPP Statute

The Committee on Public Safety and the Judiciary of the District of Columbia Council, in its Committee Report on the anti-SLAPP bill (attached as an exhibit to Zujua's response, dated March 18, 2013, to this Court's Order to Show Cause) ("Committee Report") explained the purpose of that bill as follows:

> Bill 18-893, the anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public participation — or SLAPPs — have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantial amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

Committee Report at 1. As Arthur B. Spitzer, Legal Director of the American Civil Liberties Union of the Nation's Capital, testified in support of the bill, SLAPP suits create substantial chilling effects on free debate. *See id.*, Attachment 2 at 2

("The lawsuit[s] often name[] 'John or Jane Doe defendants. We have found whole communities chilled by the inclusion of Does, fearing "they will add my name to the suit."'") (quoting George W. Pring and Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* (Temple University Press, 1996), at 151).

Because of this chilling effect on vitally important free speech rights, the District of Columbia structured its anti-SLAPP statute to provide defendants protection not just from liability, but from the burden of litigation itself. Committee Report at 4 ("[I]n recognition that SLAPP plaintiffs frequently include unspecified individuals as defendants – in order to intimidate large numbers of people that may fear becoming named defendants if they continue to speak out – the legislation provides an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893."); *id.*, Attachment 2 (Spitzer testimony) at 3 *("Litigation itself* is the appellee's weapon of choice; a long and costly lawsuit is a victory for the appellee even if it ends in a formal victory for the defendant.").

B. <u>This Action</u>

In her Complaint in this action, Ms. Burke alleges that Zujua made an edit on Ms. Burke's Wikipedia page on

January 9, 2012, adding the bolded text to the section entitled "Abtan v. Blackwater":

> Burke represented plaintiffs Talib Mutlaq Deewan and the estates of Himoud Saed Abtan, Usama Fadil Abbass and Oday Ismail Ibraheem in a lawsuit against Blackwater. The lawsuit stemmed from the firefight in Nisoor Square in Baghdad. The lawsuit alleged Blackwater violated the federal Alien Tort Statute in committing extrajudicial killing and war crimes, and that the company was liable for assault and battery, wrongful death, intentional and negligent infliction of emotional distress, and negligent hiring, training and supervision. **Judge Urbina threw out the suit in December 2009, saying that "the court declines to excuse the government's reckless violation of the defendants' constitutional rights as harmless error," after they attempted to use as evidence the defendants' compelled statements taken under threat of the loss of their jobs. Judge Urbina went on to criticize prosecutors for withholding "substantial exculpatory evidence" from the grand jury, and presenting "distorted versions" of witness' testimony.** The lawsuit was dismissed in 2010.

Complaint ¶ 6; http://en.wikipedia.org/w/index.php?title=Susan_L._Burke&oldid=470414413. A citation after the bolded text is to a news article about the dismissal by federal district judge Ricardo M. Urbina, of the U.S. District Court for the District of the District of Columbia, of a criminal prosecution of Blackwater-affiliated security guards for the Nisour Square shootings

in 2007. Charlie Savage, *Judge Drops Charges From Blackwater Deaths in Iraq*, N.Y. Times, December 31, 2009, at http://www.nytimes.com/2010/01/01/us/01blackwater.html. Zujua made just one subsequent edit to Ms. Burke's page, in which he altered the bolded text by deleting the first Judge Urbina quote. http://en.wikipedia.org/w/index.php?title=Susan_L._Burke&oldid=473119382.

Ms. Burke also alleges that she removed the erroneous bolded language in February 2012 (one month after the edit complained of). Complaint ¶ 8.

The Complaint contains no further allegations against Zujua regarding any edits he made to Ms. Burke's Wikipedia article. Rather, Ms. Burke goes on to allege that in April 2012, a different editor and defendant, CapBasics359, republished the statements that Ms. Burke had removed and added a new false statement; that Ms. Burke specifically apprised CapBasics359 of the falsity of the statements; that CapBasics359 republished the statements again after this notification; and that a lawyer working with Ms. Burke repeatedly tried to remove the statements at issue only to have CapBasics359 restore them on each occasion. Complaint ¶¶ 9-14.

There are no allegations that Ms. Burke specifically apprised Zujua of the error in the statements (as she did with CapBasics359), that Zujua had any role in perpetuating or restoring his edits after Ms. Burke removed them in February 2012, or that Zujua has any connection at all with CapBasics359.

C. Ms. Burke's Public Campaign Against Blackwater, And Her More General Role As A Critic Of Violent Misconduct By The Military And U.S. Contractors

The portion of Ms. Burke's Wikipedia page Zujua edited concerned her representation of victims of the shootings of Iraqi civilians in Al Watahba and Nisour Square in 2007. *Abtan v. Blackwater Lodge and Training Center*, 611 F. Supp. 2d 1, 3 (D.D.C. 2009). In the complaints in those consolidated cases, Ms. Burke (on behalf of her Iraqi clients) alleged that Blackwater is a company that obtained a contract to provide security services to State Department officials in Iraq during the hostilities there. *Id*. at 4. Ms. Burke further alleged that Blackwater employees habitually shot innocent bystanders without justification, a practice not discouraged at all by Blackwater because it benefitted financially from such killings (*id*. at 5); that Blackwater shot the plaintiffs and/or their decedents without provocation along with other innocent civilians

(*id*. at 5-6); and that Blackwater's conduct constituted war crimes (*id*. at 6). She alleged that Blackwater had procured the contract to provide security services in Iraq through misrepresentations to the State Department (*id*. at 8), and that, in fact, the contract to procure such services was invalid because Blackwater was a mercenary or quasi-mercenary organization (*e.g.*, Amended Complaint in *Estate of Albazzaz v. Blackwater Lodge and Training Center*, D.D.C. Civ. No. 07-cv-02273-RBW, D.E. 16-1, ¶¶ 54-55).

Ms. Burke also alleged at length (and wholly unnecessarily with respect to defendants' liability) that Blackwater's actions harm the United States (*id*. ¶¶ 43-53). She pointed out that Blackwater was being investigated by a Congressional committee, and that the shooting incidents were being investigated by the Department of Justice, the FBI, and the Iraqi government. *See also Abtan*, 611 F. Supp. 2d at 8. The shootings in Nisour Square had resulted in criminal charges being brought against Blackwater employees. *Id*. at 9 n.6.

Ms. Burke did much more than just file legal papers. She held press conferences to publicize the lawsuit and spoke out generally against Blackwater's role (as well as the use of private contractors for security services more

generally) in Iraq. *See, e.g.*, http://www.workers.org/2007/world/blackwater-1025/ (reporting on a press conference Ms. Burke held to announce the suit); http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR2007101101030.html (quoting Ms. Burke as decrying the "cowboy culture" that contractors have fostered in Iraq); http://burkepllc.com/category/press-releases (containing six press releases issued by Ms. Burke about the lawsuit, and stating, *e.g.*, "Susan L. Burke, of Burke O'Neil LLC, stated, 'The culture of lawlessness created and fostered by Blackwater has exacted a terrible toll on innocent people in Iraq. Once again, Blackwater "shooters" senselessly ended the innocent life of Mr. Albazzaz. We continue to believe that the ongoing government investigations and this litigation will prove that Blackwater's interests are contrary to the interests of the U.S. military, the State Department, and the nation of Iraq.'").

Ms. Burke sought and received widespread press attention to her crusading, public policy-oriented lawsuit. For example, at the launch of her suit against Blackwater in 2007, National Public Radio reported:

> Details of the Blackwater shooting in September are achingly familiar by now. A convoy of Blackwater vehicles entered a Baghdad traffic circle on Sept. 16 and, a short time later, shots rang out.

> Blackwater has said its guards began firing into oncoming cars in self-defense. A subsequent FBI inquiry reportedly determined that the shootout was unprovoked. What everyone agrees on is that 17 Iraqis died in the incident.
>
> Philadelphia attorney Susan Burke filed a civil suit this week against Blackwater on behalf of five families who lost relatives in the incident and two people who actually survived the shooting.
>
> "We have not found anyone, anyone at all, who has come forward to say there were any shots fired or any kind of threat made upon these Blackwater shooters," she said.
>
> **Determining Accountability**
>
> Burke's name may seem familiar. She was the lead attorney in another notable case. She has brought a civil suit against civilian contractors who took part in the prisoner abuse at Abu Ghraib. She says the cases strike many of the same chords.
>
> "These cases pose a very important issue for us as Americans," she said. "When a company makes millions of dollars in providing services to the American government, is the company nonetheless still responsible for ensuring its workers do what they are supposed to do?"

http://www.npr.org/templates/story/story.php?storyId=16717292. *See also, e.g.*, http://www.msnbc.msn.com/id/34752336/ns/world_news-mideastn_africa/ (mentioning Ms. Burke in an article about the settlement of these cases); http://abcnews.go.com/Blotter/505-games-blackwater-videogame-courts-controversy-critic-calls/story?id=13812778 (quoting Ms. Burke decrying a Blackwater video game); http://ccrjustice.org/files/Blackwater_07.10.11_NYT.pdf (posting a *New York Times* article about the Blackwater suit that mentions Ms. Burke); http://breakthruradio.wordpress.com/2009/12/09/citizen-radio-with-attorney-susan-burke/ (featuring Ms.

Burke as a special guest on radio show); http://www.washingtonpost.com/wp-dyn/content/article/2009/08/28/AR2009082803782.html (posting a *Washington Post* article, quoting Ms. Burke, about the Blackwater case); http: //www.cbsnews.com/2100-215_162-5257759.html (mentioning Ms. Burke in a major article about the Blackwater case); http://www.prnewswire.com/news-releases/xe-blackwater-personnel-shot-iraqi-children-others-in-multiple-incidents-according-to-burke-oneil-llc-62094127.html (quoting Ms. Burke in a major article on the Blackwater case and stating media inquiries are to go to Ms. Burke's public relations firm).

The allegations against Blackwater in Ms. Burke's case were nothing if not attention-getting. *See Estate of Abtan v. Blackwater Lodge and Training Center,* 611 F. Supp. 2d 1, 4-5, 10 (D.D.C. 2009) (recounting allegations that, *inter alia,* Blackwater condoned drug use by its personnel, hired known human rights abusers, and lied to the State Department to obtain contracts to protect State Department officials). Not only are these allegations of significant public interest, but, as widely reported in the press, Ms. Burke introduced evidence, in the form of affidavits by anonymous Blackwater employees, that Erik Prince, the founder of Blackwater, was personally involved in murder, weapons smuggling, and other crimes. http://www.thenat

ion.com/article /blackwater-founder-implicated-murder#; http://my.firedoglake. com/libbyliberal/2009/08/08/stunning-charges-against-blackwaterxe-erik-prince-aka-the-ugly-satanic-american-and-his-hired-war-criminals/; http://www.dailykos .com/story/2009/08/ 04/761882/-Erik-Prince-of-Xe-Blackwater-Implicated-in-Killing-of-Cooperative-Govt-Witnesses#; http://www.motherjones.com/mojo/ 2009/08/blackwater-erik-prince-assassinations-weapons-smuggling-wife-swapping; http:// boards.straightdope.com/sdmb/showthread.php?t=526983. The negative publicity about Blackwater was such that Blackwater sought a gag order — a motion Ms. Burke contested. http://www.thenation.com/article/blackwater-seeks-gag-order.

More generally, Ms. Burke and her series of public campaigns against the U.S. military and U.S. contractors, including Blackwater, have been the subject of countless reports in the media. One media company alone, Fox News, has published at least 28 print articles about Ms. Burke and her lawsuits. http://www.foxnews.com/search-results/search?q=%22susan+burke%22 (linking to 28 such articles, ten of them about Ms. Burke's suit against Blackwater). *See also, e.g.*, http://today.msnbc.msn.com /id/46637869#.T1e4rvHOXjs (posting a story by Michael

Isikoff on Ms. Burke's sexual assault suits, quoting Ms. Burke); http://www.huffingtonpost.com/2012/10/06/ military-sexual-assault-defense-department_n_1834196.html (posting a long article, quoting Ms. Burke, about sexual assault in the military, with a photo of Ms. Burke speaking to reporters in Abu Dahbi in 2010 about one of her Blackwater cases). She was a guest on the television program *Real Time with Bill Maher,* http: //vidgrids.com/susan-burke, and according to her law firm's website, she and her work are the subject of *Invisible War,* a documentary about sexual assault in the military that has an Oscar-nominated director, won the "Audience Award" at the Sundance Film Festival, and was screened across the country and reviewed in many major news publications. http://burkepllc.com/ attorneys/susan-l-burke/ ("Ms. Burke is spearheading a nationwide series of lawsuits designed to reform the manner in which the military prosecutes rape and sexual assault. Her work on this project is the subject of a documentary premiered at Sundance called The Invisible War."); http: //invisiblewarmovie.com/index.cfm; http:// invisiblewar movie.com/page.cfm?id=12; http://www.notinvisible.org /screenings. Quite recently, *Self* magazine named her "*Self's* 2013 Women Doing Good Honoree" because of her

sexual assault cases, and quoted her as saying, under the heading "My proudest moment," "I won't have one until bills by either Sen. Gillibrand or Rep. Speier, which would remove sexual assault cases from the chain of command, are passed.... [W]e're delivering a second-class system to the men and women who put their lives on the line for us." http://www.self.com/health/2013/09/women-doing-good-protect-our-defenders. On September 3, 2013, because of these same cases, she was also profiled on Page 1 of the *Washington Post's "Style"* section. http://www.washington post.com/lifestyle/style/lawyer-leads-charge-against-sexual-assault-in-military/2013/09/02/839f1668-130c-11e3-b182-1b3bb2eb474c_story.html.

Ms. Burke's fame in this area is recognized by press and public alike. On the website of the law practice of her husband, Jamison Koehler, a posting by Koehler dated May 24, 2010, reads:

> I am proud to say that the Spring 2010 issue of Ms. Magazine features my wife, Susan Burke, and her class action suit against the military on behalf of rape victims. Entitled "Culture of Rape" and now available on newsstands (but not online), the article cites a 2003 study by the Veteran Affairs Medical Center which estimates that at least one-third of all female veterans experienced rape or sexual assault during their service. Of my wife, the article includes the following:
>
> *Susan Burke wants to dramatically change this brutal, unjust state of affairs*.

> *The Washington, D.C. attorney, who heads the firm Burke PLLC, is preparing to file a class-action lawsuit this summer to revamp how the U.S. military deals with sexual violence and assault committed by its personnel. The suit.... will ask for damages as well as changes in the military's practices. As Burke puts it, "You shouldn't have to agree to be raped in order to sign up and serve your country."*
>
> *Burke already has a well-deserved reputation as a crusader against violence by the military and its contractors. She spearheaded a series of lawsuits in 2004 against private security forces who allegedly committed torture and abuse on behalf of the U.S. military in Iraq's notorious Abu Ghraib prison. Later, she sued the infamous Blackwater firm on behalf of Iraqis killed and wounded in two allegedly unprovoked 2007 attacks on civilians in Baghdad. (The Blackwater suits were settled for a confidential amount; the Abu Ghraib ones are pending.)*

http://koehlerlaw.net/2010/05/ms-magazine-article-on-rape-in-the-military/ (italics in original). In the "comments" section of this post, a reader wrote:

> Who knew that you are married to the famous Susan Burke? I studied her Abu Ghraib case when I was in law school. I also went to see her speak one time at some function in New York. She is a great public speaker and a brilliant and committed lawyer. She is also very courageous to take on big interests, such as Blackwater and the U.S. military.

Id.

ARGUMENT

The provision governing the special motion to quash in the District of Columbia's anti-SLAPP statute is clear and unequivocal: a motion to quash a subpoena seeking personally identifying information in a case arising from an act in

furtherance of the right of advocacy on issues of public interest will be granted, unless the opposing party can show the likelihood of success on the merits. Under this standard, which was chosen to prevent the threat of meritless lawsuits from chilling public discussion, subpoenas seeking identifying information about anonymous speakers can be enforced only if issued in suits that are likely to be successful. Therefore, to protect Zujua's important First Amendment rights, the Superior Court's ruling should be reversed, and both the special motion to quash and the protective order should be granted under the standard provided for in the anti-SLAPP statute.

I. Standard of Review

In his order denying Zujua's motion to quash and for a protective order, Judge Ross stated four grounds for that denial in summary fashion:

> Defendant fails to present a prima facia case that the writings at issue are protected under the D.C. Anti-Slapp statute. First, Ms. Burke, a private attorney, is not a "public figure" as that term is used in the D.C. statue. Although the statute does not define "public figure," Ms. Burke is not a "general purpose public figure" or a "limited purpose public figure" as those terms are typically employed in the defamation case law. Second, Defendant has not provided prima facia evidence that his comments were not commercially motivated thus barring the application of the D.C. statute. Third, even if the Defendant is able to bring statements within the scope of the D.C. statute, Appellee's claims are likely to succeed on the merits, and are therefore excluded from the D.C. statute. Finally, Defendant also seeks a protective order based

> on unsupported claims of annoyance, embarrassment, oppression or undue burden. Defendant offers no authority supporting a claim that the subpoena asking an anonymous person to identify himself is grounds for a protective order.

Order at 1.

The standard of review of a motion to quash in the First Amendment context is *de novo*. As this Court explained in *Solers, Inc. v. Doe,* 977 A.2d 941 (D.C. 2009), in which it set forth a standard for quashing subpoenas seeking personally identifying information about an anonymous speaker, whether or not the speech in question concerned an issue of public concern:

> While trial court determinations on motions to quash typically are reviewed for abuse of discretion, this case does not present the typical situation of quintessentially discretionary judgment calls that turn on fact-specific determinations of unreasonableness and oppressiveness. Rather, our analysis in this case must focus not on the motions judge's findings of fact or exercise of discretion, but on the correctness of the judge's legal conclusions — her statement of the applicable law and her articulation of the appropriate standard. A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.

Id. at 947-948 (internal citations and quotation marks omitted).

Here, the Superior Court made no findings of fact. At least two of its legal conclusions — *viz.*, the court's reading of the statute to require that a SLAPP defendant show that the plaintiff is a "public figure" and that such a plaintiff also must present evidence that he was not paid for his speech — were

bereft of any elaboration or specific support, and also inconsistent with the text and purpose of the statute. *Clampitt v. American University,* 957 A.2d 23, 42-43 (D.C. 2008) ("[W]hether Clampitt is a limited-purpose public figure subject to the *New York Times* [malice] standard is a question of law to be resolved by the court") (internal citation and quotation marks omitted); *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transp. (SMART),* 698 F.3d 885, 889-890 (6th Cir. 2012) ("When considering a motion for a preliminary injunction .... in the First Amendment context, the other factors are essentially encompassed by the analysis of the movant's likelihood of success on the merits, which is a question of law that must be reviewed *de novo.")*. The third ground is stated *ipse dixit* without any support, and without acknowledgement that it was Ms. Burke's *burden* to show likelihood of success on the merits. Even in the last ground, pertaining to the court's denial of Zujua's motion for a protective order, the court, by ignoring the burdens to Zujua's constitutionally- and statutorily-protected rights he had urged in his papers, based its ruling on an erroneous view of the law. *See, e.g., District of Columbia v. Sierra Club,* 670 A.2d 354, 361 (D.C. 1996) ("[In reviewing a] decision to grant or deny a preliminary injunction .... we review the judge's legal rulings

de novo .... [W]e must determine whether the trial court abused its discretion or rested its analysis upon an erroneous interpretation of the law.") (internal citations and quotation marks omitted). For these reasons, the standard of review for each issue in this appeal is *de novo*.

II. The Superior Court Improperly Denied Zujua's Special Motion To Quash

The District of Columbia anti-SLAPP statute provides for a special motion to quash a subpoena seeking personally identifying information. If a person whose personally identifying information is sought moves to quash and makes a prima facie showing that the underlying claim arises from "an act in furtherance of the right of advocacy on issues of public interest," the motion will be granted, unless the party seeking the information demonstrates that the underlying claim "is likely to succeed on the merits." DC Code § 16-5503.

"An act in furtherance of the right of advocacy on issues of public interest" is defined in DC Code § 16-5501, which states that it means:

> (A) Any written or oral statement made:
>
> (1) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(2) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

DC Code § 16-5501(1).

The phrase "issue of public interest" is defined as follows:

> "Issue of public interest" means an issue related to health or safety; environmental, economic, or community well-being; the District Government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

DC Code § 16-5501(3).

Here, Zujua made the required prima facie showing, and Ms. Burke failed to make any demonstration that her claim is likely to succeed on the merits.

A. Zujua Made The Required Prima Facie Showing

Zujua's edit on Ms. Burke's Wikipedia page was both a "written .... statement" that was "[i]n a .... public forum" (DC Code § 16-5501(1)(A)(ii)) and an "expression .... that involves .... communicating views to members of the public." D.C. Code § 16-5501(1)(B). Thus, it met the requirements of a "act in furtherance of the right of advocacy on issues of public

interest" if it was "in connection with an issue of public interest." As shown below, it was.

Specifically, Zujua's edit, both in itself and because Ms. Burke is a limited-use public figure, was on an issue of public interest as the statute defines that term, and Zujua made any required showing that his edit was not "directed at" commercial interests.

i. *Zujua's edit concerned an issue of public interest*

Zujua's edit met the statutory definition of an "issue of public interest" for at least four separate and independent reasons. (The court below asserted that the statements were unprotected by the statute because Ms. Burke is not a public figure. Not only is that characterization of Ms. Burke incorrect, but the statute's plain language demonstrates that there is no requirement that the statement be about a public figure to receive the statute's protection. That is only one of many ways a statement can qualify as being about an "issue of public interest.")

First, if the words Zujua wrote have defamatory meaning it can *only* be because they were about a "service in the market place," *viz.*, Ms. Burke's services as an attorney. In the context of the surrounding paragraph, Zujua's edits would seem to indicate that Ms. Burke's lawsuit against Blackwater had been

"thr[own] out" by Judge Urbina because of misconduct by government prosecutors. A reader — albeit only one without legal sophistication or training, who did not understand the distinction between civil and criminal cases, and between plaintiff's attorneys and government prosecutors — might infer that Judge Urbina had criticized Ms. Burke's conduct, though she is neither named as one of the prosecutors nor previously identified as a government prosecutor. To the extent, then, that Zujua's edit could carry a defamatory meaning, it concerned Ms. Burke's conduct of her suit against Blackwater.

Indeed, that is the entirety of Ms. Burke's case: that Zujua's comments maligned her work in the *Blackwater* cases. If they were not about that, and thus about her "service in the market place," then Ms. Burke has no case at all.

Second, Zujua's comments were at least tangentially about *Blackwater's* "service in the market place." The lawsuit, after all (as the previous parts of the Wikipedia paragraph stated), was about what Blackwater did in Iraq as a hired contractor. The suit condemned Blackwater's practices there. Judge Urbina's comments about one of the cases against it or its employees, quoted by Zujua, at least implies that the accusations against Blackwater may have been based upon improper evidence and a violation of constitutional rights. Thus, the statements imply

that Blackwater's "service in the market place" may not have been as outrageous as Ms. Burke contended. Indeed, the fact that Judge Urbina's dismissal of the criminal charges against Blackwater employees made the *New York Times* demonstrates that the character of Blackwater's services was a matter of public interest generally (outside of any statutory definition).

Third, Blackwater's work in Iraq was a matter related to the "safety" and "community well-being" of Iraqis (who Ms. Burke alleges were callously murdered by Blackwater employees), and also the State Department personnel whom Blackwater was hired to protect. Again, if the accusations against Blackwater were based on improper prosecutorial conduct, it implies that the safety and well-being of those in Iraq were not as gravely endangered by Blackwater as the accusations against it would suggest.

Finally, Ms. Burke herself is a limited "public figure," as that term is used in the case law. As *Ms*. magazine stated, she "has a well-deserved reputation as a crusader against violence by the military and its contractors." http://msmagazine.com/blog/2011/02/15/culture-of-rape/. In *Moss v. Stockard*, 580 A.2d 1011, 1029-1031 (D.C. 1990), this Court applied a three-part test, developed by the District of Columbia Circuit in *Waldbaum*

v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980), for whether a person is a limited public figure.

> Under the *Waldbaum* test, the court should first decide whether there is a public controversy, and determine its scope.... [T]his inquiry has two components: (1) whether the controversy to which the defamation relates was the subject of public discussion *prior* to the defamation; and (2) whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. A public controversy is not simply a matter of interest to the public but a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. It is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.
>
> Having defined the controversy, the court must next consider the plaintiff's role in it. The plaintiff must have achieved a special prominence in the debate, and either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution. If he is shaping or is trying to shape the outcome of a particular public controversy, he is a public figure for that controversy; if not, he remains a private individual.

Id. (internal citations, quotation marks, and footnotes omitted). *See also Clampitt v. American University*, 957 A.2d 23, 43 n.25 (D.C. 2008) ("Limited-purpose public figures are individuals who are not deemed public figures for all purposes, but who assume roles in the forefront of particular public controversies in order to influence the resolution of the issues involved, and who are deemed public figures only for purposes of

the controversy in which they are influential.") (internal citations and quotation marks omitted).

By the above standards, Ms. Burke is a public figure for the purpose of her crusade, both in and out of court, against Blackwater (as well as for her larger series of public campaigns against alleged violent misconduct by both the U.S. military and U.S. contractors in wartime). A public controversy over the Nisour Square shootings already existed prior to her suit. *E.g.*, http://www.npr.org/templates/story/story.php?story Id=16717292 (maintaining a National Public Radio article, posted during the same week in which Ms. Burke brought her suit, about that suit; "Details of the Blackwater shooting in September are achingly familiar by now."); Amended Complaint in *Estate of Albazzaz v. Blackwater Lodge and Training Center*, D.D.C. Civ. No. 07-cv-02273-RBW, D.E. 16-1, ¶¶ 43-53 (pointing out that Blackwater was being investigated by a Congressional committee, and that the shooting incidents were being investigated by the Department of Justice, the FBI, and the Iraqi government). By bringing her lawsuit and seeking, and receiving, widespread publicity about the shootings, Ms. Burke sought to influence the outcome of the controversy over responsibility for the shootings, as well

as the larger public controversy, growing out of it, over the role of Blackwater in the Iraqi war. http://burkepllc.com/category/press-releases (containing six press releases issued by Ms. Burke about the lawsuit, and stating, *e.g.*, "Susan L. Burke, of Burke O'Neil LLC, stated, 'The culture of lawlessness created and fostered by Blackwater has exacted a terrible toll on innocent people in Iraq. Once again, Blackwater "shooters" senselessly ended the innocent life of Mr. Albazzaz. We continue to believe that the ongoing government investigations and this litigation will prove that Blackwater's interests are contrary to the interests of the U.S. military, the State Department, and the nation of Iraq.'").

Furthermore, as detailed above, Ms. Burke conducted her suit in a way that invited public attention and comment, making broad allegations against Blackwater, introducing anonymous affidavits into evidence containing inflammatory charges against Erik Prince, issuing numerous press releases, and being quoted in dozens of articles in the media in connection with her suit. *See* above, pp. 9-13. In short, if Ms. Burke is not a public figure for the limited purpose of her suit against Blackwater, or against gratuitous violence in the military more generally, it is

difficult to see how any lawyer could achieve public figure status in any lawsuit. *See, e.g., Partington v. Bugliosi*, 825 F. Supp. 906, 917-918 (D. Hawaii 1993) (holding an attorney appointed by a court to represent a murder suspect was a public figure for purposes of the suspect's trial; "Partington's involvement in the case went far beyond the low-key participation one might expect of someone attempting to avoid the public eye. He actively sought exposure to the media and voluntarily maintained a high profile throughout the trial.... Partington voluntarily engaged in a course of action with respect to the trial that was bound to invite attention and comment. Accordingly, he was a public figure for the purpose of the Walker trial.").

ii. *Zujua's edit was not "directed toward" protecting commercial interests*

In part, the Superior Court based its ruling on Zujua's supposed failure to "provide[] prima facia evidence that his comments were not commercially motivated." Order at 1. The Superior Court did not explain what such a showing would entail above and beyond the showing, already accomplished, that no commercial motive is discernible on the face of his edit or any surrounding circumstances. That, indeed, is all the showing that is required by the provision the court relied on, § 16-

5501(3), which exempts "statements directed primarily toward protecting the speaker's commercial interests." Statements cannot be "directed" at an interest if on their face they have nothing to do with that interest. For the Court to hold otherwise would be to require every person making a motion under this provision to provide special proof that the statement alleged to be defamatory was not made for any kind of monetary or other personal gain – a requirement irrelevant to the First Amendment, and one that would exclude all professional journalists and ghost writers (and would-be professional journalists and ghost writers), as well as all paid speakers (and would-be paid speakers), from the protection of the statute. *See, e.g., Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.").

Recently, and instructively, the U.S. District Court for the District of Columbia addressed this issue, arising in a case in which the plaintiff and defendant were media competitors, as follows:

> Plaintiffs contend that the Blog Post was an attack on Plaintiffs' commercial interests and thus that the speech falls within the commercial speech exception in the Act. Plaintiffs assert that WorldNetDaily.com is

> a commercial competitor to Hearst Communications, that Defendants' statements were directed toward injuring Plaintiffs' commercial interests, and thus that the Act does not apply. The text of the Blog Post belies this assertion. The target of the Blog Post's satiric commentary was the Corsi Book, and Mr. Farah (as publisher) and Dr. Corsi (as author) were named in connection to the Corsi Book. There can be no doubt that the Corsi Book was a topic of public interest.

Farah v. Esquire Magazine, Inc., 863 F. Supp. 2d 29, 38-39 (D.D.C. 2012). Here, even more so, Zujua's edit cannot be construed as speech directed at, much less primarily directed at, protecting his own commercial interests. Rather, it is quite plainly an attempt to share information with the public about a public figure and how she conducted herself in a matter of public concern.

B. Ms. Burke Is Highly Unlikely To Prevail On The Merits

Ms. Burke is unable to meet her burden of showing that she is likely to succeed on her claim against Zujua.[1] On their face, the words "likely to succeed" suggest that she must show that her success on the merits is more likely than not, and at the minimum, she must demonstrate a substantial likelihood of such success. *See, e.g., Ortberg v. Goldman Sachs Group,* 64 A.3d 158, 162 (D.C. 2013) (holding that to prevail on a motion for

[1] The stature makes plain that the burden is Ms. Burke's. Dc Code § 16-5503(b) (providing that if the requisite prima facie case is made, the "motion shall be granted unless the party seeking .... personal identifying information demonstrates that the underlying claim is likely to succeed on the merits").

preliminary injunction, the moving party must clearly demonstrate a substantial likelihood of success on the merits).

To defeat Zujua's motion, Ms. Burke would have to demonstrate that she is likely to provide evidence that either 1) she need not show "actual malice" because she is not a public figure or 2) Zujua made his edit with actual malice, that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-280 (1964); *Clampitt, supra,* at 42.

The standard for actual malice is subjective. Ms. Burke must demonstrate that the author "in fact entertained serious doubts as to the truth of his publication," or acted with a "high degree of awareness of .... probable falsity." *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 510-511 (1991) (internal citations and quotation marks omitted). These subjective states of mind must be proven by clear and convincing evidence, which may be circumstantial. *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 659, 668 (1989).

Ms. Burke supplied no evidence to suggest that she should not be considered a limited public figure. Regarding actual malice, there is no evidence, let alone clear and convincing evidence, that Zujua entertained serious doubts about the truth

of his edit when he posted it, or had any awareness, let alone a high degree of awareness, that it was probably false. For example, Ms. Burke does not even allege in her Complaint that she provided Zujua with any notice that the statements he posted were false, as she did with CapBasic359, much less that Zujua repeated the statements after such a warning (as is alleged of CapBasic359). To the contrary. The Complaint alleges that Ms. Burke removed the statements Zujua posted the following month, and says nothing about any action by Zujua after she removed them.

As for the edit itself, it breathes confusion rather than malice. For example, the paragraph in question, after Zujua edited it, contains the assertion that Ms. Burke's suit was "thr[own] out" in 2009, only to be "dismissed" in 2010. For her part, Ms. Burke has done nothing to show that Zujua had legal training or otherwise was aware of the distinction between civil and criminal cases, and accordingly did not simply assume that the case Judge Urbina presided over was Ms. Burke's case, on the (perhaps legally unsophisticated) ground that it concerned the same high-profile events, the Nisour Square shootings. Indeed, Ms. Burke cannot very well claim that such lack of sophistication on Zujua's part is at all unlikely; after all, the edit can only carry a defamatory meaning if *readers* of the

edit had the same lack of sophistication. If they did not, they could hardly have believed that a judge's comments about government prosecutors were made in Ms. Burke's case. Ms. Burke thus falls far short of the required showing that she is likely to persuade a fact-finder, with clear and convincing evidence, that all of the elements of defamation have been met.

II. The Superior Court Improperly Denied Zujua's Motion For A Protective Order

The Superior Court based its denial of Zujua's motion for a protective order under Superior Court Civil Rule 26(c) solely on the legal ground that "Defendant offers no authority supporting a claim that the subpoena asking an anonymous person to identify himself is grounds for a protective order." Order at 1. On the contrary, as Zujua urged in his motion papers below, he will suffer annoyance, oppression, and undue burden and expense if he is deprived of his important rights, both under the First Amendment and D.C.'s Anti-SLAPP statute, to anonymous speech by the disclosure of his identity and other personal information to Ms. Burke, and served by her in this lawsuit. *See, e.g.*, *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."); DC Superior Court Civil Rule 26(c)

(providing that court with the power to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"). Indeed, the avoidance of the burdens of litigation by SLAPP defendants, in addition to the protection of First Amendment rights, is the purpose of the anti-SLAPP statute. As the District of Columbia Circuit has explained concerning Federal Rule of Civil Procedure 26(c), on which DC Superior Court Civil Rule 26(c) is modeled, privacy interests, especially those that are protected by statute, are an important consideration in weighing the proper balance under that rule. *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1215-1216 (D.C. Cir. 2004). Having failed to properly address the D.C. Anti-SLAPP statute, the court below failed to take the privacy interests that it seeks to protect into account in properly weighing the balance under Rule 26(c). By ignoring these legal grounds for granting the protective order, the Superior Court based its ruling on an erroneous view of the law and thus abused its discretion.

III. Zujua Is Entitled To Reasonable Attorneys' Fees

Under the standard of DC Code § 16-5503, it is clear that Zujua's motion below should have been granted. By the same token, it is clear that plaintiff was not substantially justified in issuing her subpoenas seeking Zujua's personally

identifying information. Accordingly, as Zujua moved below, pursuant to DC Code § 16-5504, as well as Superior Court Civil Rules 26(c) and 37(a)(4), he should have been awarded reasonable attorneys' fees and costs, to effectuate the protection of important First Amendment rights that is the purpose of the anti-SLAPP statute.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the Superior Court, quash Ms. Burke's subpoenas, enjoin her from enforcing them, and grant Zujua reasonable attorneys' fees.

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Respectfully submitted,

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Certificate of Service

I hereby certify that on October 7, 2013, I served the foregoing Supplemental Brief on the Merits by email on the following:

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Addendum

Chapter 55. Strategic Lawsuits Against Public Participation.

§ 16-5501. Definitions.

For the purposes of this chapter, the term:

(1) "Act in furtherance of the right of advocacy on issues of public interest" means:

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

(2) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.

(3) "Issue of public interest" means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(4) "Personal identifying information" shall have the same meaning as provided in § 22-3227.01(3).

§ 16-5502. Special motion to dismiss.

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If a party filing a special motion to dismiss under this section 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, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

(c)(1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

§ 16-5503. Special motion to quash.

(a) A person whose personal identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest may make a special motion to quash the discovery order, request, or subpoena.

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personal identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

§ 16-5504. Fees and costs.

(a) 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.

(b) The court may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay.

§ 16-5505. Exemptions.

This chapter shall not apply to any claim for relief brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is:

(1) A representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services; and

(2) The intended audience is an actual or potential buyer or customer.