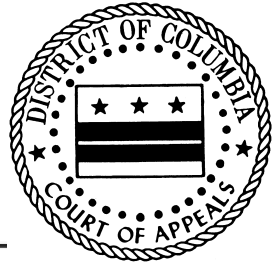


No. 22-CV-0523



In The District of Columbia Court of Appeals

Clerk of the Court
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MARK Z. JACOBSON

APPELLANT,

V.

CHRISTOPHER T. M. CLACK, ET AL.,

APPELLEES.

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

**BRIEF FOR APPELLEE
CHRISTOPHER T. M. CLACK**

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STATEMENT OF ISSUES

1. Whether the Superior Court retained ancillary jurisdiction to award attorney's fees to Dr. Clack after Dr. Jacobson voluntarily dismissed his lawsuit pursuant to Rule 41(a)(1)(A)(i)?

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

3. Whether the Superior Court properly considered 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 Dr. Jacobson based his motion on declarations from four individuals submitted for the first time with that motion that

purported to provide expert opinions on the definition of common words and legal conclusions.

JOINDER AND ADOPTION BY REFERENCE

Pursuant to D.C. App. R. 28(j), Dr. Clack hereby joins and incorporates herein the Appellee Brief filed by the National Academy of Sciences.

STATEMENT OF THE CASE

Pursuant to D.C. App. R. 28(j), Dr. Clack adopts and incorporates herein the Statement of the Case set forth in the Brief of Appellee National Academy of Sciences.

STATEMENT OF FACTS

Plaintiff/Appellant Dr. Mark Jacobson is an expert in energy grid planning and renewable energy.¹ In 2015 he and three co-authors published an article in the Proceedings of the National Academy of Sciences (“PNAS”) claiming that a large-scale U.S. transition to wind water and solar power exclusively could eliminate the need for other energy sources by 2050 (the “Jacobson Paper”). PNAS is published by the National Academy of Sciences (“NAS”).

Defendant, Dr. Christopher Clack is an expert in energy grid planning and renewable energy. He is currently the CEO of Vibrant Clean Energy, LLC and was formerly a research scientist for the Cooperative Institute for Research in

¹ Complaint at ¶1 (JA-2)

Environmental Science at the University of Colorado and the National Oceanic and Atmospheric Administration.² After the publication of the Jacobson Paper, Dr. Clack and twenty other prominent energy and climate scientists (the “Clack authors”), who disagreed with its methodology and its conclusions submitted a paper to PNAS evaluating what they perceived to be flaws in the Jacobson Paper.³ As with all papers published in the PNAS, the Clack Paper went through a rigorous peer review process by anonymous, independent experts and was accepted for publication by NAS in 2017.⁴ Based on the evaluation of the information presented in the Jacobson Paper, the Clack Authors concluded that the feasibility of relying exclusively on a narrowed set of options (wind, water and solar) in the stated time frame were not supported by the Jacobson Paper’s analysis.⁵

After the publication of the Jacobson Paper but before the Clack Paper was published, Dr. Clack contacted Dr. Jacobson to discuss a substantial discrepancy he had identified in the Jacobson Paper relating to its hydroelectric output model.⁶

² Complaint ¶ 9 JA-22.

³ The 20 co-authors of the Clack Paper are identified on the first page of the Clack Paper, (JA-118). The co-authors include scientists from prestigious academic institutions including four of Jacobson’s then colleagues at Stanford University (Dr. Adam Brandt, Dr. James Sweeney, Dr. John Weyant and Dr. Kenneth Caldeira), the then Lead Specialist from the World Bank (Dr. Morgan Brazilian) and a senior contributor from the Environmental Defense Fund (Dr. Jane Lang).

⁴ (JA 472).

⁵ Clack Paper at 6723 (JA-453).

⁶ JA 105-106.

Specifically, Dr. Clack noted that the total output of hydropower from the figures presented was far greater than what was shown in the tables and text and, therefore, was not supported by the model's assumptions.⁷ In response, Dr. Jacobson sent an email to Dr. Clack admitting that the Jacobson Paper failed to disclose a critical assumption he had incorporated into the model – i.e. the model assumed a massive increase in the availability of hydropower by 2050 as compared to currently available levels.⁸ Dr. Jacobson also admitted in his email that his model failed to factor in any cost associated with such an increase, but claimed that he had subsequently determined the costs would not be significant.⁹ Notably, despite having privately admitted to this serious omission in February 2016, in the 16 months between then and the publication of the Clack Paper, Jacobson took no steps to amend his paper to disclose the alleged hydropower assumption nor did he publicly clarify, correct or explain the alleged omission in PNAS or any other publication.¹⁰

In February 2017, after NAS had peer reviewed and accepted the Clack Paper for publication, it provided a courtesy copy to Dr. Jacobson and offered him the opportunity to write a letter responding to the points raised in the Clack

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ November 2017 Clarification (JA-496).

Paper.¹¹ Upon receipt of the draft, Jacobson sent NAS a list of reasons why he contended the Clack Paper's criticisms were wrong, false or misleading.¹² NAS reviewed Jacobson's comments and provided him with a slightly revised version of the Clack Paper.¹³ NAS sent a finalized version of the Clack Paper to Dr. Jacobson in May 2017.¹⁴ Dr. Jacobson again complained to NAS about the substantive content of the Clack Paper and NAS agreed to send his list of issues to all of the Clack Authors.¹⁵ The 21 Clack Authors thereafter reviewed Jacobson's list of issues but none of them felt that Jacobson's arguments warranted any change to the Clack Paper's findings or conclusions.¹⁶ NAS sent Jacobson a final version of the Clack Paper on May 9, 2017.¹⁷

On June 19, 2017, NAS published the Clack Paper in PNAS and in the same online edition also published a Letter Response from Jacobson addressing the Clack Paper and defending his own paper's conclusions.¹⁸ The Clack Authors published their own substantive reply to Jacobson's letter response online.¹⁹

¹¹ Complaint ¶ 12 (JA-23-24).

¹² *Id.*

¹³ Complaint ¶ 16 (JA-25)

¹⁴ Complaint ¶ 18 (JA-26)

¹⁵ Complaint ¶17 (JA-7-8) .

¹⁶ JA-474-478.

¹⁷ Complaint ¶18 (JA-26).

¹⁸ Complaint ¶65; ¶69 (JA-29-30).

¹⁹ JA-474-488.

On September 29, 2017 Dr. Jacobson filed this lawsuit demanding that the Clack Paper be withdrawn and that Dr. Clack personally pay \$10 million in damages plus punitive damages and attorney fees. Shortly after filing this lawsuit, in November of 2017, Jacobson publish a clarification on his Stanford University website addressing among other omissions the hydropower error identified by Dr. Clack almost 20 months earlier in their 2016 email exchange²⁰.

Pursuant to D.C. App. R. 28(j), Dr. Clack also adopts in full and incorporates herein the Statement of Facts in the Brief of Appellee the National Academy of Sciences.

SUMMARY OF THE ARGUMENT

Pursuant to D.C. App. R. 28(j), Dr. Clack adopts in full and incorporates herein the Argument section in the Brief of Appellee the National Academy of Sciences. Below Dr. Clack also separately addresses arguments made in Section II.C of Jacobson's Brief relating to Dr. Jacobson's allegations of recklessness or malice on the part of Dr. Clack.

I. The Superior Court Find That None of the Alleged Statements Were Defamatory and that it Did Not Need to Reach the Issue of Malice.

As a threshold matter, having found that none of the statements identified by Jacobson were defamatory there was no need for the Superior Court to even reach

²⁰ JA-496.

the issue of malice. *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001) (applying additional factor of malice to otherwise defamatory statements); *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016). The Superior Court correctly concluded that “no jury properly instructed on the law, could find that the statements in this case are defamatory in light of the evidence that has been produced or proffered in connection with the motion, the court need not address the remaining factors of the test.”²¹

Dr. Jacobson nevertheless argues that – if any of the statements were defamatory - he produced sufficient evidence to establish malice. He has not. “Even at the special motion to dismiss stage, “appellants must proffer evidence capable of showing by the clear and convincing standard that appellees acted with actual malice in publishing.” *Fridman v. Orbis Business Intelligence Ltd.*, 229 A.2d 494, 509 (D.C. 2020). “This constitutional standard is a daunting one which very few public figures can meet.” *Id.*

A. The Record Does Not Support A Finding That Dr. Clack or NAS Acted Recklessly.

To the extent that any statement, contrary to the findings of the Superior Court, could be deemed defamatory, Dr. Jacobson claims that the record demonstrates that Dr. Clack and NAS acted with reckless disregard for the truth

²¹ JA-938.

and failed to properly investigate the issues raised. The record on that point squarely refutes Dr. Jacobson. First, Dr. Clack was one of twenty-one authors all of whom contributed to, reviewed, and agreed with the contents of the Clack Paper. Notably, to date not a single one of the Clack Authors has expressed any doubt or misgivings about any statement in the Clack Paper. The Clack Paper was subject to independent peer review by the National Academy of Sciences. The Clack Paper was provided in draft form to Dr. Jacobson and all of the issues he raised were reviewed by the NAS and all twenty-one authors of the Clack Authors (who also published a response to the points he raised). Further, in light of Dr. Jacobson's threats of litigation, NAS took the additional step of having an editorial board review of the Clack Paper before it was published. Dr. Jacobson was also afforded the opportunity to respond in print to the issues raised in the Clack Paper in conjunction with its publication. Dr. Jacobson had over 16 months to address issues he himself acknowledged existed in the Jacobson Paper prior to the Clack Paper's publication. Dr. Jacobson's remaining argument is essentially that because the Clack Authors and NAS did not accept his *post hac* explanations and continued to disagree with the content of the Jacobson Paper they were reckless. That does not approach the standard as set out by Dr. Jacobson in his brief.

B. The February Email Exchange Cited by Dr. Jacobson Does Not Show Malice.

Jacobson argues that the fact that the Clack Authors did not specifically reference a post publication email exchange he had with Dr. Clack is somehow evidence of malice. To the contrary, the email exchange shows Dr. Clack affirmatively – and privately - identifying the issue he discovered with the Jacobson Paper and seeking Jacobson’s explanations. Notably, in that exchange Jacobson acknowledged serious omissions in the Jacobson Paper. Moreover, as the Superior Court found “it is very clear from those emails that Dr. Clack continued to disagree with Dr. Jacobson’s conclusions even after he was provided with an explanation....”²² To the extent that Dr. Jacobson was upset that his *post hac* rationalizations were not credited in the Clack Paper, the Superior Court correctly noted that none of these emails were part of the original publication to which the Clack Paper was responding.²³ It is also telling that Dr. Jacobson had not taken any steps in the 16 months between the email exchange and the publication of the Clack paper to amend or clarify the Jacobson Paper itself. Nevertheless, as the Superior Court correctly noted, the Clack Authors did expressly acknowledge and address Jacobson’s alleged omitted assumption as a

²² JA-937.

²³ *Id.*

possible explanation that is not in the Jacobson Paper itself.²⁴ That the Clack Authors remained skeptical of that explanation is not a basis for a finding of malice.

C. The Twitter Statements Cited By Jacobson Do Not Provide Any Evidence of Malice.

Dr. Jacobson also relies on two Twitter statements from Dr. Clack to purportedly show by clear and convincing evidence that the Clack Paper was drafted with actual malice. The first is a statement in which Dr. Clack characterized the Clack Paper “as discrediting the findings of the Jacobson Paper.” (JA 272). However, Dr. Jacobson may disagree with the opinion that the Clack Paper findings discredited the conclusions in the Jacobson Paper such a statement is neither defamatory nor indicative of malice. Nor does Dr. Jacobson even attempt to explain how that statement supports a finding that Dr. Clack did not believe any statement in the Clack Paper when it was published. *See, e.g. Gertz v. Robert Welch, Inc.* 418U.S. 323, 334 (1974) (actual malice requires a defendant’s subjective belief that the statement was false or with reckless disregard as to its truth.)

²⁴ JA-937-938.

The second example is equally unpersuasive. Dr. Jacobson cites a tweet Dr. Clack directed to the actor Leonardo DiCaprio²⁵ suggesting that he “read my piece on the most cost effective way to remove carbon.” The tweet from Dr. Clack does not refer to Dr. Jacobson, the Jacobson Paper or the Clack Paper. Dr. Jacobson appears to believe the tweet suggests that Dr. Clack wrote the Clack Paper because he was jealous of Dr. Jacobson (who presumably has a professional relationship with Mr. DiCaprio). Thus, the alleged theory is that Dr. Clack somehow cajoled 20 other pre-eminent scientists and the National Academy of Sciences into drafting and publishing a paper they knew to be false for the purpose of discrediting Dr. Jacobson so that Dr. Clack could impress Leonardo DiCaprio. Not surprisingly there is absolutely nothing in the record that remotely supports this figment.²⁶ Nor does the tweet provide any evidentiary support for the contention that Dr. Clack purposefully or recklessly made any defamatory statement with respect to Dr. Jacobson.

²⁵ Mr. DiCaprio is also a well-known advocate for renewable energy policies through the Leonardo DiCaprio Foundation. www.leonardodicaprio.com

²⁶ Even if this tweet were at all relevant, it was not presented to the Superior Court in connection with Dr. Clack’s special motion to dismiss or Dr. Jacobson’s motion for reconsideration. It was raised, improperly, for the first time in Dr. Jacobson’s motion to set aside the judgment under Rule 54.

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

For the reasons set forth in the brief of Appellee the National Academy of Sciences and herein, Dr. Clack respectfully requests that the Court affirm the judgment of the Superior Court awarding Dr. Clack \$75,000 in attorney fees and also requests that the Court remand the case back to the Superior Court so that it can determine the additional fees Dr. Clack is entitled to for responding to Dr. Jacobson's May 18, 2020 Motion for Reconsideration, his September 24, 2021 Motion for Relief From a Judgment and to Alter a Judgment and this Appeal.

Dated: September 26, 2022

Respectfully submitted,

DENTONS US LLP

A handwritten signature in black ink, appearing to read "Drew W. Marrocco", with a long horizontal flourish extending to the right.

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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 designed 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 review the guidelines outline 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 identify of an individual

receiving mental-health services.

3. Any information revealing the identify 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. § 2265(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 my 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.



Signature

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Case No. 22-CV-0523

Date: September 26, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2022, a copy of the Brief of Appellee and Redaction Certificate Disclosure Form was served on the following persons through CaseFileXpress:

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