DISTRICT OF COLUMBIA COURT OF APPEALS

NO. 23-CV-240

SIMON BRONNER, *et al.*,
Appellants,

v.

AMERICAN STUDIES ASSOCIATION, *et al.*,
Appellees

Appeal from the Superior Court
of the District of Columbia
(Hon. Robert R. Rigsby, J.)

BRIEF OF APPELLEES, J. KEHAULANI KAUANUI AND JASBIR PUAR

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APPELLEES' CORPORATE DISCLOSURE STATEMENT

COME NOW the Appellees, and pursuant to D.C. App. R. 28(a)(2) file their disclosure statement in order to enable the judges of this court to consider possible recusal:

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DISTRICT OF COLUMBIA COURT OF APPEALS

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AMERICAN STUDIES ASSOCIATION, *et al.*,
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Appeal from the Superior Court
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(Hon. Robert R. Rigsby, J.)

BRIEF OF APPELLEES, J. KEHAULANI KAUANUI AND JASBIR PUAR

Appellants/Plaintiffs are four members of the American Studies Association who were on the losing side of a political argument among the members of an academic association, and have sued those who won the argument. The argument was over whether the Association should support a Resolution supporting a boycott of Israeli academic institutions that received targeted government support for specific projects. The Resolution was passed by more than a 2:1 majority of ASA members who voted. Appellants, unhappy that the Resolution passed, have sued

the Association and individual academicians in a 350-paragraph complaint which recycles claims that were already dismissed by the District Court.

The Complaint is a thinly disguised vehicle for the publication of grievances which, if uttered outside of litigation, would be defamatory.

JURISDICTIONAL STATEMENT

The Superior Court (Rigsby, J.) dismissed all of the Counts in the Complaint pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5501 et seq., and/or Rule 12(b)(6) of the Superior Court Rules. That final judgment has been appealed to this Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW[1]

1. Whether the Superior Court properly dismissed Counts 4, 6, 7, and of Plaintiffs' claims as time-barred.

[1] Additionally, Kauanui and Puar make the following cross-assignment of error for the limited purpose of preserving this question in the unlikely event that it should prove necessary:

Whether the Superior Court erred in in failing to grant defendant Drs. Kauanui's and Puar's special motion to dismiss on the grounds that they are immune from liability under the Volunteer Protection Act, 42 U.S. C. §14501, et. seq.

2. Whether the Superior Court properly found that Counts 1, 3-5, and 9-12 of Plaintiffs' claims were acts in furtherance of the right of advocacy on issues of public interest under the D.C. Anti-SLAPP Act.

3. Whether the Superior Court properly dismissed Counts 1, 3-5, and 9-12 of Plaintiffs' claims for Plaintiffs' failure to produce evidence that they were likely to succeed on the merits

4. Whether the Superior Court properly held that Appellants had failed to produce evidence that they were likely to prevail on Counts 1, 3-5, and 9-12 and that those counts should therefore be dismissed.

STATEMENT OF THE CASE

This lawsuit began over seven ago in the U.S. District Court for the District of Columbia, and its history has already been recited in *American Studies Assn. v. Bronner*, 259 A.3d 728 (2021) and need not be repeated here. It nonetheless bears mention that Appellants, after engaging in a selective characterization of the District Court's opinion, entirely omit the fact that the dismissal was affirmed on appeal, *Bronner v. Duggan,* 962 F.3d 596, (D.C. Cir. 2020). (Appellants' Br. 21.)

STATEMENT OF FACTS RELEVANT TO ISSUES ON REVIEW

Nearly all of the facts relevant to the issues on review have been set forth in *American Studies Assn. v. Bronne*r, 259 A.3d 734-737, supra, and have been

amplified by the companion brief being contemporaneously filed by appellee American Studies Association, and need not be repeated here. Especially important to these individual appellees are the following facts:

Dr. Puar never served on the National Council and was merely a new member of the ASA's 6-person nominating committee beginning in July, 2010. (App. 039, ¶25). Appellees nonetheless allege that this new committee member single-handedly controlled the nomination process to pack elected positions with supporters. (App. 046, 051-053, ¶¶ 45, 58, 60, and 62.)

Dr. Kauanui ran for and was elected to the National Council in 2013, after openly proclaiming her membership on the Advisory Committee for the United States Academic Boycott of Israel. (App. 054, ¶67; App. 062-63, ¶¶ 24, 90.)

Plaintiffs' denial that their lawsuit is purely in retaliation for acts furthering speech in the public interest is belied by the conduct of their selected champions Jerome M. Marcus and Lori Lowenthal Marcus of The Deborah Project, who have filed a 255-paragraph complaint suing a group of schoolteachers and others for seeking to include material about Palestine in public schools' ethnic studies curriculum (*Concerned Jewish Parents and Teachers of Los Angeles, et al. v. Liberated Ethnic Studies Model Curriculum Consortium , et. al*., Case No. 2:22-cv-03243, Central District of California.) They have also recently threatened

Princeton University with revocation of its nonprofit status because a professor Dkt. No. 119, one of Dr. Puar's books in a syllabus.

STANDARD OF REVIEW

Both Anti-SLAPP motions and motions to dismiss under 12(b)(6) are reviewed de novo. *Doe No. 1. v. Burke*, 91 A.3d 1031, 1040 (D.C. 2014, *Fourth Growth, LLC v. Wright* 183 A.3d 1284, 1288 (D.C. 2018). The plaintiffs' complaint "must contain sufficient factual matter ... to state a claim to relief that is plausible on its face." *BEG Invs. L.L.C v. Alberti*, 85 F.Supp.3d 15, 24-25 (D.D.C. 2015) (internal quotation marks and citations omitted). A claim is facially plausible only when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (internal quotation marks omitted). "A court need not accept a plaintiff's legal conclusions as true, nor must a court presume the veracity of legal conclusions that are couched as factual allegations." Id., (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007). Conclusory allegations of law and unwarranted inferences are insufficient to avoid dismissal under this standard. Id. at 569. Where facts are merely consistent with possible misconduct a court may reject claims as implausible and thus dismiss a complaint. *BEG Invs. L.L.C v. Alberti* at 43-44 (holding that bad faith is notoriously easy to allege and difficult to prove, and that more must be provided before the doors to discovery swing open.)

ARGUMENT

Because there is substantial overlap between the issues on appeal for each of the appellees, Dr. Kauanui and Puar adopt, rather than repeat, the arguments raised by their co-appellees. We here write separately to emphasize a limited number of points:

A. The Superior Court Correctly Dismissed Plaintiffs' Claims for Their Failure to Produce Evidence

Once the court below found that Counts 1-3, 5, and 9-12 related to acts "in furtherance of the right of advocacy on issues of public interest" the burden shifted to the Plaintiffs to demonstrate, through the proffer of evidence that those claims were likely to succeed on their merits. D.C. Code § 16-5502(b), *Competitive Enter. Inst. v. Mann,* 150 A.3d 1213, 1232-33 (D.C. 2016) *as amended* (Dec. 13, 2018), *cert denied sub nom. Nat'l Review, Inc. v. Mann,* 140 S.Ct. 344 (2019). What must be proffered, or course, is actual evidence.

It is settled law that a party opposing summary judgment must provide "receivable facts" to avoid dismissal. *Atlantic States Constr. Co. v. Robert E. Lee & Co.,* 406 F.2d 827, 829 (4th Cir. 1969); *E.C. Ernst., Inc. v. General Motors, Corp.,* 482 F.2d 1042, 1049 (5th Cir. 1973); *Forbo Flooring, Inc. v. Falcone Global Sols., LLC* 2022 U.S. Dist. LEXIS 182032 (N.D. GA July 22, 2022). To be considered, the evidence must be admissible at trial. *Pink Supply Corp. v. Hiebert,*

Inc., 612 F.Supp. 1334, 1338 (D. Minn. 1985), aff'd 788 F.2d 1313 (8th Cir. 1986). A proffer of evidence requires testimony or affidavits on which plaintiffs' claims are based. Inadmissible evidence may not be considered; the material must be admissible or usable at trial. *Horta v. Sullivan,* 4 F.3d 2, 7-8 (1st Cir. 1993)[2]

Unauthenticated documents cannot be considered by a court in determining a summary judgment motion. Authentication is not onerous. Plaintiffs need only attach the document with an affidavit that conforms to Super.Ct..R. 56(c). The affiant must be a competent witness through whom the document can be received into evidence. A party may properly authenticate a document "through a supporting affidavit or deposition excerpt from anyone with personal knowledge of the facts contained in the exhibit." Without proper authentication for deposition exhibits, the Court may not consider these documents. *Bell v. City of Topeka*, 496 F. Supp. 2d 1182, 1184-85 (D. Kan. 2007), aff'd, 279 Fed. Appx. 689 (10th Cir. 2008).

Thus, the evidence presented in opposition to a motion for summary judgment must be based on personal knowledge, properly authenticated and

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[2] District of Columbia courts follow the caselaw of federal district courts where the Superior Court rules track the language of the federal rules. *See Walden v. United States*, 366 A.2d 1075, 1076-77 (D.C. Ct. App. 1976) applying caselaw interpreting Fed.R. Crim P. 35 because the federal rule's language is tracked by Super.Ct. R.R. 35(a), *accord*, *Sellars v. United States* 401 A.2d 974, 978 (D.C. Ct. App. 1979), and *Doe v. Georgetown Synagogue*, 2018 D.C. Super. LEXIS 17 (Super. Ct. 2018) **10-11, fn. 1, applying caselaw based upon Fed.R. Civ. P. 23(a)(1) to interpret Super.Ct. R. Civ.P. 23(a)(1).

admissible under the Federal Rules of Evidence. FED. R. CIV. P. 56(e). "The requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." FED. R. EVID. 901(a). Evidence that is not properly authenticated will not be considered by the court when reviewing a motion for summary judgment. *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002).

> Courts have consistently refused to excuse failures to supply evidence known to a party facing summary adjudication. *See In re Exodus Commc'ns, Inc.,* 2006 U.S. Dist. LEXIS 81098, 2006 WL 3050829, at 2 (failure to supply adequate evidence to rebut a motion to dismiss); *Hilton v. City & County of San Francisco*, 1998 U.S. Dist. LEXIS 16562, 1998 WL 738000, at *5 (N.D. Cal. Oct. 14, 1998) (failure to address issues raised by defendant in its motion for summary judgment); *see also Satterlee v. Allen Press, Inc.,* 455 F. Supp. 2d 1236, 1243 (failure to provide supporting documents with a summary judgment response) (citing *Wright v. Hickman*, 36 Fed. Appx. 395, 400 (10th Cir. 2002); *Thomas v. Timko,* 2006 U.S. Dist. LEXIS 3772, 2006 WL 229045, at *3 (N.D. Ind. Jan. 30, 2006) (failure of *pro se* plaintiff to attach admissible evidence to its

summary judgment opposition); *Richardson v. Nat'l Rifle Ass'n,* 879 F. Supp. 1, 2 (D. D.C. 1995) (failure to present evidence known to plaintiff at time of motion).

Edwards v. Princess Cruise Lines, Ltd., 471 F. Supp. 2d 1027, 1031 (N.D. Cal. 2007)

Appellants' first suit was filed in the U.S. District Court for the District of Columbia in April 20, 2016 and discovery commenced in May of 2017. The district court did not dismiss their case until February 4, 2019. *See Bronner v. Duggan*, 364 F.Supp.3d 9, 23 (D.D.C. 2019). Appellants thus had nearly two years to conduct discovery and they admit that they pursued it diligently. (Pltffs' Omnibus Opposition to Defendants' Motions to Dismiss, June 14, 2019, pp. 10, 13, 15.) That discovery included the demand for and receipt of tens of thousands of documents and extensive deposition testimony. Yet during those nearly two years Appellants did not authenticate even one document to or from any of the defendants.

Defendants' special motions to dismiss under the Anti-SLAPP act were filed on May 6, 2019 At that time discovery was stayed upon filing of the motions. Yet the Act also provided that "[w]hen 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. D.C.

Code § 16-5502(c)(1), (2). Appellants never sought discovery to authenticate any of the emails the claim are helpful. Having forgone such relief, they cannot now protest that limitations on their previously diligent discovery affect these proceedings.[3] As the Court below held, "allegations and references to unattached documents in an unverified pleading are not evidence." (JA 371).

B. Cross-Examination of Error

The Superior Court erred in failing to grant Defendants Dr. Kauanui and Dr. Puar's special motion to dismiss on grounds that they are immune from liability under the Volunteer Protection Act, 42 U.S.C. §14503.

In their May 6, 2019, Special Motion to Dismiss, p. 7, Defendants Dr. Kauanui and Dr. Puar raised their claim of immunity under the Volunteer Protection Act (VPA), 42 U.S.C. §14501 et seq. They have consistently preserved their claim that as volunteers for the American Studies Association (ASA), they were entitled to immunity arising from their good faith performance of their service. See, for example, May 6, 2019, Motion to Dismiss, pp. 4-8.

The Superior Court did not address this defense in its March 1, 2023, Order. Out of an abundance of caution, should this Court find merit in any of the

[3]On September 7, 2023 a panel of the District of Columbia Court of Appeals ruled that the discovery stay in the Anti-SLAPP Act violated the Home Rule Act and are therefore inoperative or unenforceable. *Salem Media Grp., Inc. v. Awan*, 2023 D.C. App. LEXIS 257, *4 (D.C. App., 2023)

Appellant's claims, then Dr. Kauanui and Dr. Puar ask this Court to find that they were entitled to this immunity and the judgment below should be affirmed on this alternative ground.

Suits against volunteers of nonprofit associations imperil a cornerstone of American society, community-based volunteerism. Accordingly, Congress enacted the Volunteer Protection Act to clarify and limit the liability of volunteers and keep this important part of society vigorous and flourishing. 42 U.S.C. §14501(a), (b). The Act provides in general that a volunteer of a nonprofit organization or governmental entity is not liable for harm which he or she caused if the volunteer was acting within the scope of the volunteer's responsibilities at the time of the act or omission, and the harm was caused by mere negligence and not willful or reckless misconduct intended to harm individuals. 42 U.S.C. §14503.

The VPA immunizes all volunteer conduct other than intentional misconduct directed towards individuals or, in claims brought by the organization, harm to the organization on behalf of which they volunteer. Therefore, assuming arguendo that Appellants had adequately alleged that Dr. Kauanui or Dr. Puar had intended to harm the ASA, this intent is still insufficient to bring the alleged action outside the scope of the VPA because there is no allegation that they acted with malice to any individuals, and certainly not to the specific individual plaintiffs who now claim they were harmed.

Further, the appellants have failed to put forward any evidence meeting Rule 56(c) standards of admissibility and thus taking their allegations out of the realm of mere guesswork.

Accordingly, in the event Appellants prevail on any of their claims in this appeal, Dr. Kauanui and Dr. Puar ask this Court to affirm on the basis of their immunity under the VPA.

CONCLUSION

The main purpose of the DC Anti-SLAPP ordinance is to deter plaintiffs from misusing DC courts as vehicles to punish others for expressing views the plaintiffs dislike. This vindictive suit, brought by lawyers who specialize in punishing speech about Palestine, perfectly fits that purpose. Dr. Kauanui and Dr. Puar ask this Court to affirm the Superior Court's Order granting relief under this ordinance.

Dated: October 20, 2023

Respectfully submitted,

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STATUTES AND RULES RELIED UPON

42 USCS § 14501

Current through Public Law 118-19, approved October 6, 2023.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 — 164) > CHAPTER 139. VOLUNTEER PROTECTION (§§ 14501 — 14505)

§ 14501. Findings and purpose

(a) Findings. The Congress finds and declares that—

(1) the willingness of volunteers to offer their services is deterred by the potential for liability actions against them;

(2) as a result, many nonprofit public and private organizations and governmental entities, including voluntary associations, social service agencies, educational institutions, and other civic programs, have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities;

(3) the contribution of these programs to their communities is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating;

(4) because Federal funds are expended on useful and cost-effective social service programs, many of which are national in scope, depend heavily on volunteer participation, and represent some of the most successful public-private partnerships, protection of volunteerism through clarification and limitation of the personal liability risks assumed by the volunteer in connection with such participation is an appropriate subject for Federal legislation;

(5) services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities that operate in interstate commerce;

(6) due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities; and

(7) clarifying and limiting the liability risk assumed by volunteers is an appropriate subject for Federal legislation because—

(A) of the national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits;

(B) the citizens of the United States depend on, and the Federal Government expends funds on, and provides tax exemptions and other consideration to, numerous social programs that depend on the services of volunteers;

(C) it is in the interest of the Federal Government to encourage the continued operation of volunteer service organizations and contributions of volunteers because the Federal Government lacks the capacity to carry out all of the services provided by such organizations and volunteers; and

(D)

(i) liability reform for volunteers, will promote the free flow of goods and services, lessen burdens on interstate commerce and uphold constitutionally protected due process rights; and

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(ii) therefore, liability reform is an appropriate use of the powers contained in *article 1, section 8, clause 3 of the United States Constitution*, and the *fourteenth amendment to the United States Constitution.*

(b) Purpose. The purpose of this Act [*42 USCS §§ 14501* et seq.] is to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities.

History

HISTORY:

June 18, 1997, *P. L. 105-19*, § 2, *111 Stat. 218*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Short titles:

Effective date of section:

Other provisions:

Short titles:

Act June 18, 1997, *P. L. 105-19*, § 1, *111 Stat. 218*, provides: "This Act [*42 USCS §§ 14501* et seq.] may be cited as the 'Volunteer Protection Act of 1997'.".

Effective date of section:

This section took effect 90 days after enactment pursuant to § 7 of Act June 18, 1997, *P. L. 105-19*, which appears as a note to this section.

Other provisions:

Effective date and application of *42 USCS §§ 14501* et seq. Act June 18, 1997, *P. L. 105-19*, § 7, *111 Stat. 223*, provides:

"(a) In general. This Act [*42 USCS §§ 14501* et seq.] shall take effect 90 days after the date of enactment of this Act.

"(b) Application. This Act [*42 USCS §§ 14501* et seq.] applies to any claim for harm caused by an act or omission of a volunteer where that claim is filed on or after the effective date of this Act but only if the harm that is the subject of the claim or the conduct that caused such harm occurred after such effective date.".

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42 USCS § 14503

Current through Public Law 118-19, approved October 6, 2023.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 — 164) > CHAPTER 139. VOLUNTEER PROTECTION (§§ 14501 — 14505)

§ 14503. Limitation on liability for volunteers

(a) Liability protection for volunteers. Except as provided in subsections (b), (c), and (e), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if—

(1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

(2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;

(3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

(4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to—

(A) possess an operator's license; or

(B) maintain insurance.

(b) Liability protection for pilots that fly for public benefit. Except as provided in subsections (c) and (e), no volunteer of a volunteer pilot nonprofit organization that arranges flights for public benefit shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization if, at the time of the act or omission, the volunteer—

(1) was operating an aircraft in furtherance of the purpose of, and acting within the scope of the volunteer's responsibilities on behalf of, the nonprofit organization to provide patient and medical transport (including medical transport for veterans), disaster relief, humanitarian assistance, or other similar charitable missions;

(2) was properly licensed and insured for the operation of the aircraft;

(3) was in compliance with all requirements of the Federal Aviation Administration for recent flight experience; and

(4) did not cause the harm through willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.

(c) Concerning responsibility of volunteers to organizations and entities. Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.

(d) No effect on liability of organization or entity. Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.

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(e) Exceptions to volunteer liability protection. If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

(1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.

(2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.

(3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

(4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

(f) Limitation on punitive damages based on the actions of volunteers.

(1) General rule. Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

(2) Construction. Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

(g) Exceptions to limitations on liability.

(1) In general. The limitations on the liability of a volunteer under this Act [*42 USCS §§ 14501* et seq.] shall not apply to any misconduct that—

(A) constitutes a crime of violence (as that term is defined in *section 16 of title 18, United States Code*) or act of international terrorism (as that term is defined in section 2331 of title 18) for which the defendant has been convicted in any court;

(B) constitutes a hate crime (as that term is used in the Hate Crime Statistics Act (*28 U.S.C. 534* note));

(C) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;

(D) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

(E) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

(2) Rule of construction. Nothing in this subsection shall be construed to effect subsection (a)(3) or (e).

History

HISTORY:

D.C. Code § 16-5501

The Official Code is current through June 30, 2023

District of Columbia Official Code > Division II. Judiciary and Judicial Procedure. (Titles 11 — 17) > Title 16. Particular Actions, Proceedings and Matters. (Chs. 1 — 56) > Chapter 55. Strategic Lawsuits Against Public Participation. (§§ 16-5501 — 16-5505)

§ 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)*.

History

(Mar. 31, 2011, D.C. Law 18-351, § 2, *58 DCR 741*; Sept. 26, 2012, D.C. Law 19-171, § 401, *59 DCR 6190*.)

Annotations

Notes

Legislative history of Law 18-351.

Legislative history of Law 18-351. Law 18-351, the "Anti-SLAPP Act of 2010", was introduced in Council and assigned Bill No. 18-893, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted on first and second readings on November 23, 2010, and December 7, 2010, respectively. Signed by the Mayor on January 19, 2011, it was assigned Act No. *18-701* and transmitted to both Houses of Congress for its review. D.C. Law 18-351 became effective on March 31, 2011.

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D.C. Code § 16-5502

The Official Code is current through June 30, 2023

District of Columbia Official Code > Division II. Judiciary and Judicial Procedure. (Titles 11 — 17) > Title 16. Particular Actions, Proceedings and Matters. (Chs. 1 — 56) > Chapter 55. Strategic Lawsuits Against Public Participation. (§§ 16-5501 — 16-5505)

§ 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.

History

(Mar. 31, 2011, D.C. Law 18-351, § 3, 58 DCR 741; Apr. 20, 2012, D.C. Law 19-120, § 201, 58 DCR 11235; Sept. 26, 2012, D.C. Law 19-171, § 401, 59 DCR 6190.)

Annotations

Notes

Effect of amendments.

D.C. Law 19-120, in subsec. (c)(2), substituted “specified discovery” for “specialized discovery”.

Emergency legislation.

For temporary (90 day) amendment of section, see § 201 of Receiving Stolen Property and Public Safety Amendments Emergency Amendment Act of 2011 (D.C. Act 19-261, December 21, 2011, 58 DCR 11232).

S&R-6

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT.

(1) *In General*. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(2) *Consumer Debt Collection Actions*. In an action initiated by a debt collector to collect a consumer debt as defined in D.C. Code § 28-3814, the plaintiff must provide all documentation and information required by D.C. Code § 28-3814 prior to entry of summary judgment.

(b) TIME TO FILE A MOTION; FORMAT.

(1) *Time to File.* Unless the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(2) *Format: Parties' Statements of Fact*.

(A) *Movant's Statement*. The movant must file a statement of the material facts that the movant contends are not genuinely disputed. Each material fact must be stated in a separate numbered paragraph.

(B) *Opponent's Statement*. A party opposing the motion must file a statement of the material facts that the opponent contends are genuinely disputed. The disputed material facts must be stated in separate numbered paragraphs that correspond to the extent possible with the numbering of the paragraphs in the movant's statement.

(c) PROCEDURES.

(1) *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

COMMENT TO 2022 AMENDMENTS

This rule has been amended to highlight new requirements included in emergency, temporary, and permanent legislation amending D.C. Code § 28-3814. Consistent with the 2022 amendment to Rule 12-I, the reference to a memorandum of points and authorities was deleted from Rule 56(b)(2)(A).

COMMENT TO 2017 AMENDMENTS

This rule is identical to *Federal Rule of Civil Procedure 56*, as amended in 2010, except that 1) a reference to local district court rules is omitted from the language in subsection (b)(1) and 2) subsection (b)(2), which is unique to the Superior Court rule, requires parties to submit statements of material facts with each material fact stated in a separate, numbered paragraph (a requirement previously found in Rule 12-I(k)). In 2010, the federal rule underwent substantial revisions in order to improve the procedures for presenting and deciding summary judgment motions, but the standard for granting summary judgment remained unchanged. Parties and counsel should refer to the Federal Rules of Civil Procedure Advisory Committee Notes for a detailed explanation of these amendments.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-page limitations of D.C. Ct. App. R. 32(a)(3), (6).

1. Exclusive of the exempted portions of the brief, as provided in D.C. Ct. App. R. 32(a)(6) the brief contains 12 pages.

2. The brief, including footnotes, has been prepared in 14-point Times New Roman font.

/s/ Mark Kleiman
Mark Kleiman

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2023, a copy of the Appellees' Brief was served on the following through the Court's electronic filing system:

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

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

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

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23-cv-240
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