24-CV-0062

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

ALLISON McCRACKEN ET AL.,

Appellants,

v.

RAED JARRAR,

Appellee.

On Appeal from the Superior Court of the District of Columbia
Civil Division (2023-CAB-003269)

REPLY BRIEF FOR APPELLANTS ALLISON McCRACKEN & GABRIELLA SMITH

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SUMMARY OF ARGUMENT

Jarrar's opposition brief sidesteps the specific arguments in our opening brief. Our opening brief detailed several specific ways in which the trial court erred in concluding that McCracken's and Smith's advocacy campaign was not protected under the Anti-SLAPP Act; Jarrar summarizes the trial court's analysis but fails to address the specific errors that we identified. Likewise, our brief detailed several specific ways in which the trial court mistakenly concluded that there were credibility determinations to be resolved; Jarrar nods in their direction but fails to directly address his continued, conspicuous failure to assert that his written confession, to physically abusing his wife, was false.

Jarrar continues to insist that this appeal is "frivolous"; even after the Court summarily denied his motion for summary affirmance. Even more remarkably, Jarrar still has not acknowledged that he fabricated dozens of citations and quotations in his summary-affirmance motion, whose arguments his opposition brief largely repeats. *See* Opp. to Mot. for Summ. Aff. 9–20.

Ultimately, Jarrar cannot plausibly claim that a public advocacy campaign to "cancel" him from the human-rights community is nonetheless to private and personal to fit underneath the Anti-SLAPP Act. He likewise cannot plausibly assert that his written confession to physically abusing his wife—combined with his

conspicuous failure to deny similar allegations of abuse against—nonetheless provides for ongoing factual disputes that must be resolved by a jury after onerous discovery. Although Jarrar's brief suggests that he still is furious about McCracken choosing to leave him, there is no plausible basis for him to drag her and her friends into court.

ARGUMENT

I. There is no "personal attacks" exception to the Anti-SLAPP Act.

In his effort to strip McCracken and Smith of Anti-SLAPP Act protection, Jarrar invokes the archaic view that domestic violence, including physical abuse within a marriage, is "deeply personal and private." Jarrar Br. 5. And he appears to suggest that otherwise qualifying public advocacy loses its protection if involves "a personal attack" or is used "to advance personal vendettas." Jarrar Br. 7–8. Not only does this argument ignore that public debate is often harsh and visceral, but the Court has already rejected the dichotomy that Jarrar proposes. Under the Anti-SLAPP Act, "intermixing public and private interests is not disqualifying." *Saudi Am. Pub. Affairs Comm. v. Institute for Gulf Affairs*, 242 A.3d 606, 613 (D.C. 2020) (quoted in Opening Br. 34).

However past societies might have treated domestic violence, in today's society advocacy about domestic violence—and the proper role of domestic

abusers in progressive organizations—is very much the public's concern. *See* Opening Br. 31–32. As we stated in the opening brief, "the movement to end domestic violence has been built and sustained by the voices and stories of survivors and advocates." Domestic Violence Awareness Project, *Sharing Your Story*, https://perma.cc/6SKC-HAXQ (last visited May 6, 2024). Also described in our opening brief is the longstanding, intense debate about the role and presence of abusive men in progressive advocacy organizations. *See* Opening Br. 30–31. Jarrar does not address any of this this.

The Court has already recognized the need for play in the joints: McCracken and Smith need make only a prima facie showing, and their burden is "not onerous." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1043 (D.C. 2014) (quotation marks omitted). Likewise, when Jarrar was still represented by counsel in the trial court, he conceded that the burden "is not onerous" and thus "addresses the primary lingering question of whether he has provided a sufficient showing to support his claims." A152. Jarrar's opposition does not meaningfully address this standard. And while he quotes some of the trial court's analysis, he fails to address our detailed, specific arguments that the trial court was incorrect.

First, under *Saudi American Public Affairs Committee*, the Anti-SLAPP act protects statements "related to issues of community well-being." 242 A.3d at

Those issues include "who should participate in" events and advocacy related to issues affecting the Middle East. Opening Br. 31 (quoting 242 A.3d at 606, 613). Jarrar's own complaint alleges that McCracken and Smith launched a coordinated advocacy campaign to diminish his standing within the human-rights community. Opening Br. 30–31, 35 (citing A41, A51). He even alleges a campaign to "cancel" him (Jarrar Br. 15); that is, "to attain some form of meaningful accountability for public figures who are typically answerable to no one." Aja Romano, *The Second Wave of "Cancel Culture,"* Vox (May 5, 2021), https://perma.cc/5K26-HAQY.

Second, on Facebook McCracken used her experiences in two ways. She urged her Facebook audience to donate to domestic-violence-prevention organizations; she also urged them to pursue help if they were victims of domestic abuse. *See* Opening Br. 31–32. Jarrar does not address the substance of these statements.

Third, and contrary to the trial court's analysis, McCracken's statements often used her personal experience to introduce the broader topic of domestic abuse and the role of abusers in progressive organizations. Opening Br. 32–33. Personal stories, in fact, are central to most successful advocacy campaigns, and are especially important to advocacy about domestic violence. *See* Opening Br. 34 (quoting The Arc, *Tools for Building Power Through Personal Stories* (2019),

https://perma.cc/XNY5-MTLV; Domestic Violence Awareness Project, *Sharing Your Story*, https://perma.cc/6SKC-HAXQ). Jarrar does not address either the substance of McCracken's statements or the use of personal stories to address public issues.

Fourth, Jarrar repeats the trial court's error in attempting to parse McCracken's use of hashtags or compare her domestic-violence-related posts to her, say, Guantanamo-related posts. Not all issues of public policy are or can be addressed using the same tactics, and nothing about McCracken's substantive tweets—for instance, "I want social accountability and feminist solidarity—reassurances that there is zero tolerance for violence at home or in the workplace" (A119)—suggests that McCracken is concerned only about herself.

Fifth, Jarrar repeats the trial court's mistaken analysis of *Close It! Title Services v. Nadel*, 248 A.3d 132 (D.C. 2021). In *Nadel* the defendant's statements had not addressed the broader issue of cybercrime (*id.* at 144), whereas here the statements had explicitly addressed the broader problem of domestic violence, sought to raise money to help domestic-violence organizations, and lamented the role of abusive men in progressive organizations. *See* Opening Br. 32.

Jarrar understandably wishes that domestic violence were a purely personal topic. But the Anti-SLAPP Act does not require the Court to defer to his view.

II. Jarrar fails to establish that he is likely to succeed in establishing that the defendants made false statements of fact.

On the merits, Jarrar misunderstands the relationship between his failure to state a claim for relief (the standard under Rule 12(b)(6)) and his failure to show that he is likely to succeed on the merits (the standard under the Anti-SLAPP Act). In particular, Jarrar claims that (1) our opening "completely ignor[ed]" the trial court's denial of McCracken's and Smith's Rule 12(b)(6) motions, and (2) as a result, "McCracken and Smith effectively concede they have no grounds to challenge the substantive viability of Jarrar's defamation case." Jarrar Br. 41. Both statements are wrong.

As the Court has clarified—and as we explained in our opening brief—"when, as here, the complaint fails to state a claim upon which relief can be granted, it follows automatically that the plaintiff is unable to demonstrate the claim is likely to succeed on the merits." Opening Br. 37 (quoting *Am. Studies Ass'n v. Bronner*, 259 A.3d 728, 740 (D.C. 2021)). That is why Section II of our opening brief included analysis of why Jarrar's complaint failed to state a claim for relief. *See id.* at 37–43. In any event, under the Anti-SLAPP Act Jarrar is subject to a standard more demanding than Rule 12(b)(6); even if he stated a claim sufficient to satisfy Rule 12, he failed to meet the Act's more rigorous standard.

A. Jarrar's "context-removal" explanation for his confession is itself contradicted by the written confession.

Although he now accuses McCracken and Smith of invoking unspecified "harmful stereotypes" (Jarrar Br. 6), his amended complaint initially tried to dismiss his written confession as a "femininely poetic" work of McCracken or one of her friends. *See* A46. Jarrar's declaration, however, confirms that he drafted the confession. *See* A161 ¶¶ 8–9. And fifteen months into his lawsuit, Jarrar still refuses to state that he lied when he confessed to physically abusing his wife.

Instead, Jarrar hopes to "disavow" his written confession without admitting to drafting and signing a false statement. In an effort to square this circle, Jarrar claims that he was coerced into removing important context from an otherwise truthful account. According to Jarrar, "the original letter contained an acknowledgment that the physical acts occurred during consensual intimacy, but he was instructed to remove any such context." Jarrar Br. 29 (citing his declaration). But the written confession likewise undermines Jarrar's attempt to offer an artful explanation.

In particular, Jarrar's written confession includes other affirmative statements that on their face, do not refer to consensual activity, and whose meaning—that Jarrar violently abused his wife—logically could not change by reinstating other sentences referring to "consensual intimacy." For instance, Jarrar

wrote that he was "deeply sorry about the physical abuse that I inflicted on you." A78. That passage affirmatively confesses and apologizes for physical abuse; it does not merely describe physical acts that might or might not have been abusive depending on their context. Likewise, Jarrar wrote that "[t]here is no excuse for what I did." *Id.* Again, the meaning of that sentence would not change merely by adding other sentences about voluntary activities.

In sum, the four corners of Jarrar's confession—which he attached to his amended complaint—undermines Jarrar's attempt to rely on his claim that the meaning of his confession changed after he "was pressured to remove that context." Jarrar Br. 39. It is well settled that if allegations "conflict with an exhibit referenced in that complaint[,] the exhibit prevails." *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991) (quotation marks omitted). His artful explanation cannot survive the pleading stage under Rule 12, let alone meet the Anti-SLAPP Act's requirement of a likelihood of success before a reasonable factfinder.

B. Jarrar fails to plausibly explain his failure to deny other allegations that he physically abused McCracken.

Jarrar offers even less explanation for failing to deny other specific, serious accusations of physical abuse.

First, in our opening brief we observed that his amended complaint describes as "rumors"—but not "false"—accusations that he had "slapped [McCracken's] jaw very hard, choked her, beat her, punched her arms and legs, kicked her entire body, slapped her, dragged her by her hair, and spat on her." Opening Br. 17, 41 (quoting A47). Once again, Jarrar dances around these accusations but refuses to deny them directly: "Merely acknowledging that rumors exist does not equate to accepting them as true." Jarrar Br. 35–36. As in the trial court, then, Jarrar does "not explain the complaint's conspicuous failure to deny." Opening Br. 41.

Second, Jarrar resorts to wishful thinking when confronted with the serious allegations made by Noor Mir—two of which were neither recanted by Mir nor denied by Jarrar. Although Jarrar trumpets Mir's "subsequent retraction and settlement with Jarrar," the details of that settlement reinforce the substantial truth of McCracken's and Smith's statements. According to Jarrar's own exhibit, which he submitted in response to the Anti-SLAPP motion, Mir did not retract her statement that Jarrar beat McCracken naked on the floor. A156. And Mir did not retract her statement that Jarrar threatened to break McCracken's nose. *Id.* Mir's refusal to retract these two serious accusations in no way "refutes Appellants' claim that Jarrar did not dispute these statements." Jarrar Br. 36. On the contrary, it shows that neither Mir nor Jarrar are willing to dispute these accusations of

physical abuse. Even now, Jarrar says only that his complaint "frames [the statements] as part of the larger campaign of defamation against Jarrar." *Id.* Still, there is no clear denial.

What is more, the statements that Mir did retract would not harm his reputation more than the other statements at issue. Given the truth of the statements describing his violent physical abuse of McCracken, there would be no material extra harm to his reputation from statements that his abuse caused broken bones. Jarrar's brief does not suggest otherwise. After all, "[t]he 'sting' of the Appellants' statements was that Jarrar engaged in criminal physical violence" (*id.* at 37)—a category of violence that does not require bones to break.

C. Most of the statements in Jarrar's declaration are inadmissible and hence cannot help him meet his burden under the Anti-SLAPP Act.

The balance of Jarrar's declaration, some of whose contents he refers to in his brief (*see id.* at 16–18), contains statements that would be inadmissible at trial and cannot help Jarrar meet his burden under the Anti-SLAPP Act. To establish the necessary likelihood of succeeding on the merits, the proffered evidence must be admissible: "legally sufficient to permit a jury properly instructed on the applicable constitutional standards to reasonably find in the plaintiff's favor." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1220–21 (D.C. 2016). Yet most of the information in Jarrar's declaration is inadmissible: It is offered without his

personal knowledge, it is inadmissible hearsay, and it violates the best evidence rule. These omissions are especially significant because Jarrar prepared his declaration with the help of counsel, and before he went pro se; if admissible evidence were actually available, his counsel would have known how to present it.

First, declarations "must be made on personal knowledge and set forth facts admissible at trial that show that the affiant is competent to testify about the matters stated in it." *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943, 951 (D.C. 2012). Yet Jarrar's declaration speculates about facts and circumstances beyond his personal knowledge. *See, e.g.*, A158–A159 ("I believe" that "Defendant Siegel and Defendant Smith" helped McCracken develop an accountability demand); A163–A164 ("For reasons I can only speculate about, the same day I received notice from a family member. . . ."). He adds his "understanding" of McCracken's "medical records," but offers no foundation on which to speculate about what McCracken's doctors have found or documented when examining her. A166.

Second, "declarations as to what others said" are "inadmissible hearsay." *Wallace, LLC*, 57 A.3d at 951. Yet nearly all of Jarrar's declaration is hearsay; some of the statements are double hearsay.

Jarrar's Declaration	**Hearsay Problem**
1. Jarrar avers that "[m]y therapist did not believe I have anger management issues." A161.	Jarrar offered no declaration from his therapist.
2. Jarrar describes events at their "marital home" in July 2022. A159–A160.	His alleged understanding depends on statements from "two mediators"—neither of whom has prepared a declaration—because Jarrar "wasn't at the house at the time." A159–A160.
3. Jarrar cites a half-dozen statements from third parties purporting to summarize what McCracken or others told them. *See* A162–A165; A166–A167.	There are no declarations from the sources of these alleged statements: A162–A163 (describing oral statements by Omar Baddar). A163 (describing written statements made by Omar Baddar). A163 (describing oral conversations between McCracken and Laila Mokhiber). A163–A164 (describing conversations between McCracken and Omar Baddar). A164–A165 (describing statements by Omar Baddar). *Id*. (describing statement by Hazami Barmada). A165 (describing oral statement by Omar Baddar).

Jarrar's Declaration	**Hearsay Problem**
4. Jarrar cites multiple statements by unidentified people and unidentified organizations: A163–A164 (describing "notice" received from a "family member"). A165 (describing statements from "my friends"). A166–A167 (citing conversations between McCracken and "my coworkers"). *Id*. (citing communications between "three anonymous women" and "closely affiliated organization"). *Id*. (citing conversation between "my boss" and person from unidentified "closely affiliated organization").	None of the unidentified people or organizations provide declarations—anonymously or otherwise. He cites statements from "[m]any individuals"—none identified. A167.

Finally, under the best evidence rule, "an original writing, recording, or photograph is generally required in order to prove its content." *Callaham v. United States*, 268 A.3d 833, 847 (D.C. 2022) (citation, alterations, and quotation marks omitted). Yet Jarrar's declaration fails to attach the text messages, documents, recordings, and videos that he purports to describe.[*] For example, Jarrar describes

[*] *See* A158–A159 (invoking, but not attaching, "a three-page demand as part of what Defendant McCracken termed an 'accountability process'"); A159 (additional discussion of unattached letter); A161–A162 (invoking, but not

two surveillance videos "reflecting Defendant McCracken's voluntary departure on June 2." A158. He is "in possession" of these surveillance videos, and he promises that they "clearly" support his claim (*id.*), but he did not submit them. Then, he promptly denies that "McCracken was surveilled and monitored." A159.

III. Jarrar's lawsuit epitomizes the concerns motivating the Anti-SLAPP Act.

More generally, Jarrar mistakenly complains that our anti-SLAPP motion was "contrary to the intent of the Anti-SLAPP Act." Jarrar Br. 5. In fact, Jarrar's lawsuit—and the way in which he has pursued it—makes him an Anti-SLAPP Act poster child. At every point in this case, Jarrar has revealed that his "true objective is to use litigation as a weapon to chill or silence speech." *Burke*, 91 A.3d at 1033. Jarrar filed this lawsuit on the anniversary of McCracken's decision to leave him; he has sought a broad injunction against her speech; and he has filled his filings with gratuitous accusations about their sex life—several of which have no

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attaching, "an initial draft" of his apology letter); A162–A163 (stating, "On the day that I presented the signed apology letter to Omar Baddar, I recorded my conversation with him," but not submitting the recording); A163 (invoking, but not attaching, "a group text [sent] to me"); A163–A164 (admitting that after the divorce became final, he "contacted Defendant McCracken's attorney," but not attaching the message); A165 (invoking, but not attaching, the results of an IP address query); A165–A166 (invoking, but not attaching, a January 2020 text message about spanking); *id.* (invoking, but not attaching, an April 2020 text message about BDSM); A166–A167 ¶ 18 (invoking, but not attaching, a February 2023 email to his employer).

conceivable relevance to this case. And this pattern escalated once Jarrar began proceeding pro se.

For instance, on January 8, 2024, the next business day after the trial court denied the Anti-SLAPP motion, Jarrar emailed defense counsel about "pressing issues." A296. Without citing the applicable rules of professional responsibility, or any other authority, Jarrar alleged what "appears to be a conflict of interest in your representation of both Defendants, Allison McCracken and Gabriella Smith" due to "potential diverging defense strategies" with respect to one allegedly false statement discussed in Jarrar's complaint. *Id.* Although he nominally asked "to hear [defense counsel's] thoughts first," Jarrar warned that "[f]ailure to resolve this may necessitate filing a motion for your disqualification from representing both Defendants." *Id.*

In the same email, Jarrar pursued an order that would prevent McCracken and Smith from continuing their online fundraising to help pay for their legal defense. Although he did not share any concrete language or terms, he warned, "If we are unable to reach a mutual agreement, I am prepared to file a preliminary injunction or TRO." *Id.* When pressed for details, Jarrar proposed that McCracken and Smith cease to discuss "the matters of this lawsuit" either "public[ly]" or with Jarrar's "professional network," and that all existing "social media posts

related to this case [be] made private." A293. Defense counsel rejected Jarrar's request to override the defendants' First Amendment rights; Jarrar threatened to file "a motion for preliminary injunction" (A292) and "a lengthy motion" (A298).

Two weeks after the trial court's ruling, McCracken and Smith filed a notice of appeal from the denial of their special motions to dismiss under the D.C. Anti-SLAPP Act. Notice of Appeal (1/19/24). Jarrar, however, insisted that the interlocutory appeal did not pause discovery or any other pretrial proceedings. McCracken and Smith moved for a protective order. A271. McCracken and Smith were forced to move for a protective order; in March 2024, the trial court "(1) quash[ed] Plaintiff's subpoena to Emily Siegel, and (2) issue[ed] a protective order prohibiting Plaintiff from serving, enforcing, or otherwise pursuing discovery requests while the appeal is pending." A370.

When called out on his efforts to raise his opponents litigation costs by filing frivolous motions and asserting baseless positions, Jarrar has rejected those concerns on the ground that McCracken and Smith "were raised in privileged White households" whereas "Jarrar and his children lack similar social and financial support." Jarrar Br. 6. This, too, is dubious: Smith is a Palestinian-American who lives in the West Bank and both Smith and McCracken have spent their careers doing low-paid work for nonprofit human-rights organizations. A361–

A362. Meanwhile, Jarrar is no starving artist; according to an exhibit from his own complaint, he owns "a Mercedes A220." A68.

Finally, and most seriously, is Jarrar's use of fabricated citations and quotations in his recent motion for summary affirmance of the trial court's order. To begin, his motion did not explain why he waited nearly six months to file it, let alone why he waited until after appellants had filed their opening brief. In any event, Jarrar's motion perpetuated a fraud on the Court; he invented quotations, invented citations, and lied about what arguments had been raised below. *See* Opp. to Mot. for Summ. Aff. 9–20.

Jarrar has not disputed these facts, but he remains unrepentant about this misconduct. Meanwhile, his brief casually calls McCracken's and Smith's arguments are "misleading" (Jarrar Br. 5), "a mischaracterization of both the facts and the law" (*id.* at 7–8), and "distortions" (*id.* at 38); and again calls the appeal "frivolous" (*id.*). Notwithstanding his history of fabricated citations and quotations, his brief mistakenly retains what appears to be a prompt from a generative-AI website: "Certainly, let's incorporate those suggestions and further refine the Anti-SLAPP Act arguments section. Here's the enhanced draft." Jarrar Br. 33. This suggests that he is writing his briefs using artificial intelligence. *See,*

e.g., *AI Document Editor*, Just Think, https://perma.cc/9E6J-Z7FU ("Instantly receive the enhanced draft with all improvements highlighted.").

As the D.C. Council recognized, the legal system is not supposed to work this way. The Council warned that a strategic lawsuit against public participation seeks "not to win the lawsuit but to the punish the opponent and intimidate them into silence." Council of the District of Columbia, Report of Committee on Public Safety and the Judiciary on Bill 18-891, at 1 (Nov. 18, 2010). And the Council provided remedies to victims of SLAPP suits. Jarrar's lawsuit epitomizes the Council's concerns, and McCracken and Smith are entitled to relief under the Anti-SLAPP Act.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to dismiss the amended complaint with prejudice under the D.C. Anti-SLAPP Act.

Respectfully submitted,

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On September 16, 2024, I served a copy of this brief, through the Court's electronic filing system, on:

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