22-CV-0721 (Lead)
22-CV-0736, 22-CV-0741, 22-CV-0752 (Consolidated)

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 22-CV-0721 Lead	RUBY NICDAO, Appellant, v. TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED, et al., Appellees.
No. 22-CV-0736 Consolidated	LARRY CIRIGNANO, Appellant, v. TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED, et al., Appellees.
No. 22-CV-0741 Consolidated	JONATHAN DARNEL, Appellant, v. TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED, et al., Appellees.
No. 22-CV-0752 Cross-Appeal Consolidated	TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED, Cross-Appellant, v. RUBY NICDAO, et al., Cross-Appellees.

Appeals from the Superior Court of the District of Columbia
Civil Action No. 2015 CA 009512 B

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JURISDICTION

The Court has jurisdiction, under D.C. Code § 11-721(a)(1), over these consolidated appeals from the Superior Court's September 12, 2022 Order denying Appellants' respective motions for attorney's fees under the District of Columbia Anti-SLAPP Act, D.C. Code §§ 16-5501 to 16-5505.

ISSUES

(1) Whether the Superior Court abused its discretion in denying attorney's fees to which Appellants are presumptively entitled as prevailing movants under the special motion to dismiss provisions of the Anti-SLAPP Act.

(2) Whether the Superior Court abused its discretion in determining that special circumstances justify a total denial of attorney's fees to which Appellants are presumptively entitled as prevailing movants under the special motion to dismiss provisions of the Anti-SLAPP Act.

(3) Whether the Superior Court erred as a matter of law in applying the broad, statutory special circumstances standard of the inapposite federal Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, instead of the narrow, judicial standard adopted by this Court in *Doe v. Burke*, 133 A.3d 569 (D.C. 2016).

(4) Whether the Superior Court erred as a matter of law in applying a novel "totality of factors" standard under which the combination of five factors constitutes

special circumstances justifying the denial of fees even though none of the factors constitutes a special circumstance justifying the denial fees.

(5) Whether the Superior Court based its denial of attorney's fees on clearly erroneous factual findings unsupported by any record evidence.

THE CASE AND FACTS

On December 9, 2015, Plaintiffs–Appellees/Cross-Appellants, Two Rivers Public Charter School ("Two Rivers") and the Two Rivers Board of Trustees, filed their Complaint commencing this action. (App. 31.) Two Rivers sued six named Defendants, including Defendants–Appellants/Cross-Appellees, Nicdao, Cirignano, and Darnell (hereinafter, "Movants"), for exercising their First Amendment rights to speak on the public sidewalks of Washington, D.C. outside Two Rivers' school.[1] (App. 31.) Movants filed special motions to dismiss under D.C. Code § 16-5502(b), a provision of the District of Columbia Anti-SLAPP Act, D.C. Code §§ 16-5501 to 16-5505, and motions to dismiss under SCR Civil 12(b)(1) and (6).

On April 29, 2016, the Superior Court held a hearing on Defendants' respective motions to dismiss and special Anti-SLAPP motions to dismiss.[2] (App. 61.) At the

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[1] Two Rivers named one Defendant pseudonymously as John Doe 1, and additionally joined an unknown number of pseudonymous John and Jane Doe Defendants.

[2] Defendants Lauren Handy, John Doe 1, and unknown John and Jane Does did not file motions to dismiss or otherwise appear in the litigation below. Defendant Robert Weiler, Jr. ultimately settled with Two Rivers and was dismissed from the case.

hearing, the court denied the Anti-SLAPP motions and denied, in part, the motions to dismiss, dismissing only claims brought by the Two Rivers Board of Trustees for lack of standing. (App. 129–143.) Movants appealed to this Court from the Superior Court's denial of their special Anti-SLAPP motions to dismiss.

On May 11, 2016, Two Rivers moved for a preliminary injunction against Cirignano alone, and Cirignano filed his opposition to the motion on June 8, 2016. The Superior Court entered an order holding the motion against Cirignano in abeyance on July 23, 2021, but otherwise never disposed of the motion.

On June 17, 2016, this Court consolidated Movants' appeals, and stayed the consolidated appeals pending its decision in *Competitive Enterprise Institute v. Mann*, No. 14-CV-101, and related appeal *National Review v. Mann*, No. 14-CV-126, both of which presented this Court with the novel question of whether denials of special Anti-SLAPP motions to dismiss are immediately appealable. After the consolidated decision in the *Mann* appeals became final, *see Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016), *as amended* (Dec. 13, 2018), the Court lifted the stay of Movants' consolidated appeals on March 29, 2019, and set a briefing schedule.

The Court heard oral argument in the consolidated appeals on March 11, 2020. On June 9, 2022, the Court issued its decision reversing the Superior Court's denial of Movants' special Anti-SLAPP motions to dismiss and remanding to the Superior

Court for dismissal of the case. *See Nicdao v. Two Rivers Public Charter Sch., Inc.*, 275 A.3d 1287 (D.C. 2022). On July 5, 2022, the Superior Court entered an order dismissing the case, with prejudice, pursuant to this Court's mandate and D.C. Code § 16-5502(d) of the Anti-SLAPP Act.

On July 19 and 20, 2022, Movants filed motions for attorney's fees and nontaxable expenses as prevailing movants under the Anti-SLAPP Act, D.C. Code § 16-5504. (App. 152–315.) Their motions included declarations in support of the amounts sought for attorney's fees and costs, including the reasonableness of the hours worked and hourly rates. (App. 152–315.) After the motions were fully briefed, the Superior Court ordered supplemental briefing to address the applicability of the Anti-SLAPP Emergency Amendment Act of 2021, which was a temporary emergency act barring recovery of attorney's fees by prevailing movants on any claim brought by the District of Columbia. (App. 378–491.)

In an Order dated September 12, 2022, the Superior Court denied Movants' motions as to attorney's fees but granted Movants recovery of taxable costs and nontaxable expenses. (App. 492.) The court concluded:

> (A) [Movants] are presumptively entitled to attorney fees, (B) the exemption from the Anti-SLAPP Act for claims brought by the District of Columbia does not apply to claims by a public charter school, but (C) special circumstances in this case make an award of attorney fees unjust.

(App. 495.) Movants each appealed the Superior Court's order. (App. 506–526.)

SUMMARY OF THE ARGUMENT

The Superior Court's denial of Movant's attorney's fee motions should be reversed because there are no cognizable special circumstances to defeat Movants' presumptive entitlement to attorney's fees as prevailing movants under the District of Columbia Anti-SLAPP Act, D.C. Code §§ 16-5501 to 16-5505. Under the applicable standard of review, the Superior Court abused its discretion in denying the fee motions because it applied a legally erroneous interpretation of the controlling "special circumstances" test adopted by this Court in *Doe v. Burke,* 133 A.3d 569 (D.C. 2016), for prevailing movants under the Anti-SLAPP Act. Under the controlling "special circumstances" standard, the Superior Court has very narrow discretion to deny a fee award. Moreover, the court must focus only the prevailing movant's efforts in the case and results obtained, and not on the circumstances of the losing respondent. The Superior Court did the opposite, focusing exclusively on Two Rivers' circumstances as the losing respondent, and exercising unauthorized discretion under a legally inapposite standard to find special circumstances from a "totality of factors" where none of the factors constitutes a cognizable special circumstance justifying the denial of fees.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews the Superior Court's ultimate decision to deny a fee motion for abuse of discretion, *see Kenda v. Pleskovic*, 39 A.3d 1249, 1257 (D.C. 2012),

and the Court reviews the underlying legal questions de novo and underlying factual questions for clear error. *See C.R. Calderon Constr., Inc. v. Grunley Constr. Co., Inc.*, 257 A.3d 1046, 1051, 1059 (D.C. 2021); *Caison v. Project Support Services, Inc.*, 99 A.3d 243, 248 (D.C. 2014). Specifically,

> in reviewing whether a trial court abused its discretion—or, less pejoratively but more aptly, exercised its discretion erroneously—[the Court's] task is to determine whether the decision maker failed to consider a relevant factor, whether he relied upon an improper factor, and whether the reasons given reasonably support the conclusion. A discretionary judgment must be founded upon correct legal principles, and a court by definition abuses its discretion when it makes an error of law.

Ford v. Chartone, Inc., 908 A.2d 72, 84 (D.C. 2006) (cleaned up); *see also Vining v. D.C.*, 198 A.3d 738, 745 (D.C. 2018) (applying *Ford* standard to review of Superior Court attorney's fee decision).

In the context of this case, the Superior Court abuses its discretion "**if it applies an erroneous interpretation of 'special circumstances' to justify denial of fees to an otherwise prevailing party**." *Grisham v. City of Fort Worth, Texas*, 837 F.3d 564, 567–68 (5th Cir. 2016) (cleaned up) (emphasis added). Because the Superior Court committed clear legal and factual errors and otherwise erroneously interpreted the controlling "special circumstances" standard, the court abused its discretion in denying Movants' fee motions.

II. The Superior Court abused its discretion in denying Appellants' fee motions because no cognizable special circumstances displace their presumptive entitlement to attorney's fees as prevailing movants under the D.C. Anti-SLAPP Act.

The Superior Court acknowledged that "the Anti-SLAPP Act is designed to protect defendants in strategic lawsuits against public participation (SLAPPs) that are utilized as a means to muzzle speech on issues of public interest and that result in a chilling effect on the exercise of constitutionally protected rights." (App. 493 (cleaned up) (quoting *Fridman v. Orbis Business Intelligence Ltd*., 229 A.3d 494, 502 (D.C. 2020)). The Superior Court found (and Two Rivers has never seriously disputed) that Movants' speech in opposition to abortion was on a matter of public concern. (App. 138.) Such speech receives the highest First Amendment protection:

> Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (cleaned up). Moreover, among the various modes of protected speech, "handing out leaflets in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression; no form of speech is entitled to greater constitutional protection." *McCullen v. Coakley*, 573 U.S. 464, 488–89 (2014) (cleaned up); *see also Schenck v. Pro-Choice*

Network of W. New York, 519 U.S. 357, 377 (1997) ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.")

Two Rivers' lawsuit targeted Movants' speech on public sidewalks. Its sole purpose was to obtain an injunction restricting Movants' constitutionally protected "[l]eafletting and commenting on matters of public concern." *Schenck*, 519 U.S. at 377. Movants are entitled to a complete fee recovery under the Anti-SLAPP Act because, after litigating for seven years, Movants won a complete victory in obtaining dismissal of Two Rivers' claims under the Act's protections. The Superior Court essentially nullified those protections by contriving a novel and legally inapposite interpretation of the narrow, "special circumstances" exception to Movants' presumptive entitlement to attorney's fees under the Anti-SLAPP Act.

A. The Superior Court applied the wrong special circumstances standard to Movants' fee motions as a matter of law.

1. The Anti-SLAPP Act's presumptive attorney's fee provision is subject to the narrow judicial "special circumstances" exception applicable to federal civil rights attorney fee statutes.

Under the Anti-SLAPP Act, the Superior Court "may award a moving party who prevails, in whole or in part, on a [special motion to dismiss or quash a subpoena] the costs of litigation, including reasonable attorney fees." D.C. Code § 16-5504(a). Though couched in discretionary terms, this Court held that a prevailing movant

under the Act is entitled to fees and expenses "in the ordinary course, *i.e.*, presumptively, on request." *Doe v. Burke*, 133 A.3d 569, 575 (D.C. 2016). Thus, "[t]he Anti–SLAPP Act gives the defendant the option to up the ante early in the litigation, by filing a special motion to dismiss that will require the plaintiff to put his evidentiary cards on the table and makes the plaintiff liable for the defendant's costs and fees if the motion succeeds." *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1238 (D.C. 2016), *as amended* (Dec. 13, 2018) [hereinafter *Mann*]. The only exception to the presumptive fee award for a prevailing movant is where "special circumstances make a fee award unjust." *Id.* (citing *Burke*, 133 A.3d at 571).

In *Burke*, this Court recognized that "the [D.C.] Council's concern to protect SLAPP targets engaged in political or public policy debates by special motions and related reimbursement for litigation costs strongly suggests its intent to define the court's discretion as to fee awards in the same way as do federal laws protecting basic rights." 133 A.3d at 577 (cleaned up). The *Burke* Court further explained the boundaries on the Superior Court's discretion in awarding fees by reference to U.S. Supreme Court precedents interpreting federal civil rights laws:

> The paradigmatic example . . . are the federal Civil Rights Acts, as interpreted in *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968), and *Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n,* 434 U.S. 412 (1978). Thus, whereas a prevailing plaintiff under Title II of the Civil Rights Act of 1964 "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," the trial court may "award attorney's fees to a prevailing defendant in a case under Title VII of the Civil Rights Act only upon a finding that

> the plaintiff's action was frivolous, unreasonable, or without foundation." The parallel to D.C. Code § 16-5504 is apparent when we replace the *Newman/Christiansburg* distinction with the contrast between "a moving party who prevails" on a special motion and "the responding party."

Burke, 133 A.3d at 577 (cleaned up) (emphasis added). The *Burke* Court also expressly adopted the "special circumstances" exception to presumptive prevailing party fees under the federal civil rights laws: "We now read D.C. Code § 16-5504(a) in similar fashion: it entitles the moving party who prevails on a special motion . . . to a presumptive award of reasonable attorney's fees on request, 'unless special circumstances would render such an award unjust.'" *Id.* at 578 (quoting *Christiansburg*, 434 U.S. at 416–17).

Under the "special circumstances" standard adopted by this Court in *Burke*, "the [trial] court's discretion to deny a fee award to a prevailing plaintiff is narrow." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980); *see also Boos v. Barry*, 704 F. Supp. 5, 8 (D.D.C. 1989) ("[T]his Court is unaware of any case in which the Supreme Court found unjust circumstances to be present or explained what criteria should be used to evaluate such a claim. In its recital of the unjust circumstances exception, the [Supreme] Court has stressed that any exception is quite limited . . . ."). Indeed, "it is now axiomatic that the discretion of a district court in deciding *whether* to award such fees to a prevailing party is narrowly limited." *Turner v. D.C. Bd. of Elections & Ethics*, 354 F.3d 890, 895–96 (D.C. Cir. 2004) (cleaned up).

Moreover, the non-movant bears the burden of showing special circumstances warranting a denial of fees, and the "showing must be a strong one." *Herrington v. County of Sonoma*, 883 F.2d 739, 744 (9th Cir.1989); *see also Shelton v. Louisiana State*, 919 F.3d 325, 328 (5th Cir. 2019) ("Given the strong policy behind [the federal Civil Rights Attorney's Fees Act, 42 U.S.C.] § 1988 of awarding fees to prevailing plaintiffs, defendants must make an extremely strong showing of special circumstances to avoid paying attorneys' fees and . . . the discretion to deny § 1988 fees is extremely narrow." (cleaned up)). Furthermore, because a prevailing movant on a special motion to dismiss under the Anti-SLAPP Act is like a prevailing federal civil rights plaintiff for purposes of presumptive entitlement to fees, the prevailing Anti-SLAPP movant must also be like the prevailing civil rights plaintiff for purposes of applying the "special circumstances" exception to presumptive fees. Thus, "whether it is just for the [losing respondent] to pay turns not on the [the losing respondent's] ability to pay or on whether the [losing respondent] engaged in conduct deserving of penalty, but on the degree of participation by the [prevailing movant] in the action and the relief that was secured." *Boos*, 704 F. Supp. at 8. "[T]he question of fairness centers not on the [the losing respondent], but on the [prevailing movant]." *Id.*

As shown below, the Superior Court greatly exceeded the narrow boundaries on its discretion imposed by the judicial "special circumstances" standard adopted by

this Court, and instead applied a legally inapposite statutory standard. Also, instead of focusing its analysis on Movant's efforts and their results obtained, the Superior Court focused exclusively—an improperly—on Two Rivers' circumstances. Whether couched in terms of legal error or application of an improper factor, the Superior Court's erroneous interpretation of the narrow "special circumstances" exception is an abuse of discretion requiring reversal. *See Grisham*, 837 F.3d at 567–68 (Pt. I, Standard of Review, *supra*).

2. The broad, statutory "special circumstances" standard of the federal Equal Access to Justice Act does not apply as a matter of law.

The Superior Court began its analysis correctly enough, acknowledging that "a successful movant under the Anti-SLAPP Act is entitled to reasonable attorney's fees in the ordinary course – *i.e.*, presumptively – unless special circumstances in the case make a fee award unjust." (App. 493–94 (quoting *Burke*, 133 A.3d at 571).) The court also correctly observed that, because this Court in *Burke* adopted the special circumstances exception from federal law, it is appropriate to look to federal cases for guidance in applying the rule. (App. 494 (citing *Toufanian v. Lorenz*, No. 2020 CA 35 B, 2022 D.C. Super. LEXIS 13, at *6–7 (D.C. Super. Ct. Mar. 23, 2022).)

The Superior Court quickly veered off course, however, by invoking the statutory "special circumstances" standard of the federal Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which presumes entitlement to fees for prevailing *defendants* in

certain cases brought by the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). According to the Superior Court, the EAJA standard "gives the court discretion to deny awards where equitable considerations dictate an award should not be made," and, "in that context, the scope of a [trial] court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies." (App. 494 (citing EAJA cases).) As described by the Superior Court, this *statutory* EAJA "special circumstances" standard—broad equitable discretion characterized by "breadth and flexibility"—could not be more different from the narrowly confined, *judicial* "special circumstances" standard applicable to prevailing civil rights plaintiffs and adopted by this Court for prevailing special movants under the D.C. Anti-SLAPP Act. *Cf. Hatfield v. Hayes*, 877 F.2d 717, 720 (8th Cir. 1989) ("Because the language of § 1988 does not include the 'special circumstances' exception, this judicially created exception should be narrowly construed.").

As a matter of law, the statutory EAJA "special circumstances" standard is the wrong standard. Thus, the Superior Court's entire "special circumstances" analysis, explicitly invoking broad "equitable discretion" under EAJA (App. 499) was legal error. Specifically, the "totality of factors" analysis contrived by the court, under which "none of the[] factors individually constitutes special circumstances, but

cumulatively and collectively they do" (App. 499), necessarily depends on broad discretion by the court to deny fees, and is directly contrary to the narrowly circumscribed discretion of the controlling judicial standard adopted by this Court. Moreover, because all of the factors focus on the circumstances of Two Rivers—the losing respondent—instead of the prevailing litigation efforts and good results of Movants, the Superior court's analysis is invalid under the controlling standard. *See Boos*, 704 F. Supp. at 8 (Pt. I.A.1, *supra*). If, despite Movants' rights having been "soundly vindicated" by this Court, Two Rivers was "absolved of its obligation to pay the award, [Movants] or their counsel would have to absorb the costs, which would be unjust to them . . . ." *Id.* at 9.

Because the Superior Court's legally erroneous interpretation of the controlling "special circumstances" standard was dispositive of Movants' fee motions, the Superior Court's denial of the fee motions was an abuse of discretion requiring reversal. *See Grisham*, 837 F.3d at 567–68 (Pt. I, Standard of Review, *supra*).

3. None of the "factors" considered by the Superior Court satisfy the applicable "special circumstances" standard as a matter of law.

a. Any good faith by Two Rivers is not a special circumstance justifying the denial of fees.

Of the five "factors" considered by the Superior Court, the first three—Two Rivers' purported motives and "substantial basis" for bringing suit (App. 500–503)—are merely assertions of Two Rivers' purported good faith. But good faith is

not a special circumstance justifying the denial of attorney's fees. *See, e.g.*, *Harrington v. DeVito,* 656 F.2d 264, 268 (7th Cir.1981) ("the good faith of the defendant is irrelevant because the key issue is the provocative role of the plaintiffs' lawsuit, not the motivation of the defendant" (citation omitted)); *Hescott v. City of Saginaw*, 757 F.3d 518, 525–26 (6th Cir. 2014) (holding neither good faith of defendant nor amount of claims or damages sought by plantiff "constitutes special circumstances that would render a fee award unjust."); *Williams v. Hanover Hous. Auth*., 113 F.3d 1294, 1302 (1st Cir.1997) ("The Civil Rights Attorney's Fees Awards Act is not meant as a 'punishment' for 'bad' defendants who resist plaintiffs' claims in bad faith. Rather, it is meant to compensate civil rights attorneys who bring civil rights cases and win them."); *Wilson v. Stocker*, 819 F.2d 943, 951 (10th Cir.1987) (noting that "the alleged special circumstances amount to no more than assertions that the Attorney General has acted in good faith, a ground overwhelmingly rejected by the courts;" Section 1988 "is not designed to penalize defendants but to encourage injured individuals to seek relief"); *Kirchberg v. Feenstra*, 708 F.2d 991, 999 (5th Cir.1983) ("Good faith is not a special circumstance.").

Moreover, to the extent Two Rivers' purported "substantial basis" for its claims (App. 501–503)—the Court's third factor—is different from good faith, it is only

cognizable under the statutory language of EAJA, *see* 28 U.S.C. § 2412(d)(1)(A), with no corollary under the Anti-SLAPP Act or controlling judicial standard.

b. The inapplicable public charter school immunity statute is not a special circumstance justifying the denial of fees.

For its fourth "factor," the Superior Court did not decide whether Two Rivers could be immune from Movants' attorney's fee claims under D.C. Code § 38-1802.04(c)(17), but decided that the statute "still constitutes a special circumstance that distinguishes Two Rivers from other plaintiffs who bring cases dismissed through special motions to dismiss." (App. 503.) Not only does the immunity statute not shield Two Rivers from fee liability as a matter of law (*see* Nicdao Reply Br., App. 356–360; Cirignano Reply Br., App. 373), but no public policy reflected in the statute can contribute to special circumstances justifying a denial of prevailing movant attorney's fees.

This Court held that Two Rivers had no standing to commence this case at all, and thus commenced the case improperly. *Nicdao v. Two Rivers Public Charter Sch., Inc.*, 275 A.3d 1287, 1290 (D.C. 2022). Therefore, in suing Defendants and losing on Movants' Anti-SLAPP special motions to dismiss, Two Rivers cannot rely on any statutory immunity from attorney's fee liability dependent on Two Rivers' acting "within the scope of its official duties" to protect "the health and safety of all students attending such school" because Two Rivers' lack of standing means it had no legal right or ability to sue Defendants as a matter of law. Two Rivers cannot

claim a legal duty or public policy support to do that which it has no legal right or power to do. Moreover, the statute's immunity exception for intentional torts committed by a public charter school reflects a public policy against immunity for Two Rivers' unjustified, intentional acts. Two Rivers intentionally sued Movants to silence their protected speech on matters of public concern, entitling them to the full protections of the Anti-SLAPP Act.

Furthermore, where public immunities may otherwise apply, allowing recovery of attorney's fees in situations covered by the Anti-SLAPP Act "is particularly important and necessary if federal civil and constitutional rights are to be adequately protected." *Lefemine v. Wideman*, 758 F.3d 551, 555 (4th Cir. 2014) (cleaned up).

c. Unsubstantiated payment difficulty is not a special circumstance justifying the denial of fees.

For its fifth "factor," the Superior Court speculated, without citing record evidence, that Two Rivers would have difficulty paying an attorney's fee award to Movants. (App. 503.) But unsubstantiated ability to pay arguments do not constitute special circumstances "that overcomes the statutory presumption in favor of fee-shifting" under the Anti-SLAPP Act. *Toufanian v. Lorenz*, No. 2020 CA 35 B, 2022 D.C. Super. LEXIS 13, at *8–9 (D.C. Super. Ct. Mar. 23, 2022). Moreover, the complete lack of record evidence supporting this point implicates abuse of discretion for a clearly erroneous factual finding. (*See* Pt. II.B, *infra*.)

B. The Superior Court based its special circumstances conclusions on clearly erroneous factual findings.

In addition to the legal error invaliding the Superior Court's entire "special circumstances" analysis (*see* Pt. II.A, *supra*), the court's analysis also fails abuse of discretion for relying on clearly erroneous factual findings. (*See* Pt. I, Standard of Review, *supra*.) Rather than citing record evidence supporting its conclusion that there were special circumstances justifying the denial of fees, the court merely speculated, for example, that "*[i]f* defendants had prevailed on the standing issue in the trial court instead of the Court of Appeals, or *if* the case had not essentially become moot (except for attorney fees) because of the stay during an extended appeal, parents *could have* intervened to assert claims on behalf of their children," and the case *might* have succeeded. (App. 501–502 (emphasis added).) But "to deny attorneys' fees . . . Defendant must present evidence, not supposition." *Romain v. Walters*, 856 F.3d 402, 407 (5th Cir. 2017) (also cautioning that "our precedent requires a defendant arguing special circumstances to make an extremely strong showing of special circumstances to avoid paying attorneys' fees and that the discretion to deny § 1988 fees is . . . extremely narrow." (cleaned up)); *Deja Vu v. Metro. Gov't of Nashville & Davidson Cnty., Tennessee*, 421 F.3d 417, 422 (6th Cir. 2005) ("the burden is on the non-prevailing party to make a strong showing that special circumstances warrant a denial of fees" (cleaned up)); *J & J Anderson, Inc.*

v. Town of Erie, 767 F.2d 1469, 1474 (10th Cir.1985) ("a strong showing of special circumstances is necessary to support a denial of attorney fees").

Two Rivers submitted no admissible evidence in support of its argument concerning special circumstances. This failure alone should be enough to reverse the Superior Court. And despite Two Rivers' lack of evidence, the court blindly accepted Two Rivers' self-serving assertions that it acted altruistically and did not take sides in the differences between Planned Parenthood and Defendants. (App. 500–501 (Two Rivers "generally did not participate in public controversies," and "the problem arose because defendants objected when Two Rivers chose not to take their side in this dispute"). The court also took Two Rivers' word that it "gathered a number of declarations from parents" despite the fact that not a single declaration was ever adduced. (App. 502.)

The Superior Court compounded its error by effectively placing the burden of proof on Defendants rather than on Two Rivers, where it belonged. "[D]efendants do not dispute a significant number of parents shared Two Rivers' belief that time, place, and manner restrictions on defendants' protests were appropriate and constitutional." (App. 502.) It was not Defendants' burden to dispute Two Rivers' naked and self-serving assertion concerning the parents of the school. It was Two Rivers' burden to produce actual evidence, not hearsay and *ipse dixit*. Two Rivers utterly failed to meet its burden, but the Superior Court nevertheless credited all that

Two Rivers claimed and found that special circumstances exist despite the total lack of evidence supporting such a finding. Such clearly erroneous factual findings constitute abuse of discretion requiring reversal.

III. Movants' Hours Worked and Hourly Rates are Reasonable.

The Superior Court did not purport to decide the reasonableness of the amounts of attorney's fees claimed by Movants, or otherwise determine a reasonable fee recovery, because the court decided Movants are not entitled to fees in the first instance. The court did, however, state in a footnote that Movants' claimed fee amounts are "grossly excessive." (App. 500 n.9.) The court did not engage with Movants' fee motions or supporting evidence, or cite to any authority to support its opinions. To the extent this Court interprets the Superior Court's footnote as a finding of unreasonableness, the Court should reverse the Superior Court and remand for a full determination of the reasonableness of Movants' fee claims based on the record evidence and applicable authorities.

CONCLUSION

For the foregoing reasons, the Superior Court abused its discretion in denying Movants' fee motions. This Court should reverse and remand to the Superior Court for determination of the fee amounts to be awarded to each Movant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed this January 24, 2023, through the Court's EFS system, which will effect electronic service on the following parties or counsel of record:

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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 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.

s/Roger K. Gannam	22-CV-0736
Signature	Case Number(s)
Roger K. Gannam	January 24, 2023
Name	Date
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