Nos. 20-1298, 20-1299

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

JUSTIN E. FAIRFAX,

Plaintiff-Appellant, Cross-Appellee,

v.

CBS CORPORATION and CBS BROADCASTING INC.,

Defendants-Appellees, Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, NO. 1:19-CV-01176-AJT-MSN
THE HONORABLE ANTHONY J. TRENGA, PRESIDING

REPLY BRIEF OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS

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INTRODUCTION

The Virginia anti-SLAPP statute provides immunity from claims for defamation to those exercising their right to speak on matters of public concern so long as the statements are made without "actual or constructive knowledge that they are false or with reckless disregard for whether they are false," *i.e.*, constitutional "actual malice." Va. Code § 8.01-223.2(A) (2017). The law further provides that "[a]ny person who has a suit against him dismissed . . . pursuant to the immunity provided by this section may be awarded reasonable attorney fees and costs." *Id*. at § 8.01-223.2(B). The district court in this action correctly concluded that Fairfax failed plausibly to plead that CBS disseminated the broadcasts at issue with actual malice and that the immunity conferred by Virginia's anti-SLAPP statute therefore is an independent bar to Fairfax's claims. JA392-393. The district court, however, incorrectly declined to award to CBS its attorneys' fees based on its conclusion that such an award is not presumptive under the Virginia statute. *See* JA393.

In its opening brief in this Court, CBS demonstrated that, properly construed, the Virginia statute presumes an award of attorneys' fees to a defendant who obtains dismissal of a defamation claim on the basis of the immunity conferred by the statute. Applying that presumption, CBS demonstrated below that plaintiff Justin Fairfax is unable to overcome such a presumption, particularly

given the strong indicia of improper motive on his part in filing and maintaining this lawsuit.

In his response, Fairfax not only has failed to demonstrate that the fee-shifting provision in the anti-SLAPP statute is merely permissive, but he has added substantially to the evidence of record demonstrating his improper motives: He names in his brief for the first time in this litigation the purported eyewitness to his sexual encounter with Meredith Watson and then boasts that he intentionally failed to identify that eyewitness to CBS before CBS interviewed Watson because he wanted Watson "to commit to the lie before exposing it." Reply Br. at 21, 27 (Dkt. 32). It is precisely this kind of extrajudicial gamesmanship, unrelated to successfully prosecuting a meritorious claim for harm to reputation against a public speaker (here, CBS), that has prompted states around the country to enact anti-SLAPP legislation, including the fee-shifting provisions of such statutes.

CBS therefore respectfully requests that this Court, upon affirming the judgment below in favor of CBS, remand to the district court for its reconsideration under the correct standard the question whether CBS is entitled to an award of its attorneys' fees in this case.

ARGUMENT

Fairfax does not dispute that Virginia's anti-SLAPP statute immunizes the CBS broadcasts at issue from liability for defamation so long as CBS broadcast the

reports in question without actual malice. For the reasons stated by CBS in its opening brief, CBS Br. at 58-61 (Dkt. 31), the district court correctly concluded that Fairfax failed adequately to plead actual malice. Consequently, the only question regarding Virginia's statute before this Court is whether the district court erred in holding that the statute does not presume that an award of attorneys' fees will be made to a successful defendant. Under Virginia law as interpreted by the Virginia Supreme Court, the statute does make such a presumption.

I. AN AWARD OF ATTORNEYS' FEES IS PRESUMED UNDER THE VIRGINIA STATUTE BECAUSE IT PROTECTS IMPORTANT FIRST AMENDMENT RIGHTS

Virginia's anti-SLAPP statute provides that a prevailing defamation defendant "may be awarded reasonable attorney fees and costs." Va. Code § 8.01-223.2(B). Fairfax argues that this Court cannot construe the word "may" in this fee-shifting provision to mean "shall" unless "the clear intention of the legislature demands it," which "generally is not done unless it is necessary to protect the vested right of the litigant." Reply Br. at 40 (quoting *Spindel v. Jamison*, 199 Va. 954, 957 (1958)). Putting aside that CBS contends that an award of fees is presumptive under the statute, *not* that it is mandatory, Virginia law is not as rigid as Fairfax suggests. To the contrary, for more than a hundred years, Virginia courts consistently have recognized that the word "may" should be construed as "shall" to achieve the purpose of legislation not just when vested rights are at

stake, but also when to do so vindicates the public interest. *See, e.g.*, *Supervisors of Botetourt Cty. v. Cahoon*, 121 Va. 768, 779 (1917) ("the general rule in the construction of statutes is that the term 'may,' when used in a statute, means 'must' or 'shall' in cases where the public interest and rights are concerned") (citation omitted); *see also Leigton v. Maury*, 76 Va. 865, 870 (1882) ("may" "is construed as mandatory when the legislature means to impose a positive duty, or when the public is interested, or where third persons have a claim that the act should be done") (emphasis added), *overruled on other grounds*, *Ailstock v. Page*, 77 Va. 386 (1883); *see also Caputo v. Holt*, 217 Va. 302, 305, 228 S.E.2d 134, 137 (1976) (interpreting "may" as "shall" in statute regarding powers of estates' personal representatives in order to further legislative intent to protect interests of beneficiaries); *Gilbert's Corner Ltd. P'ship v. Loudoun Cty. Bd. of Zoning Appeals*, 1990 Va. Cir. LEXIS 472, at *10 (Va. Cir. Ct. Loudon Cty. Sept. 11, 1990) (relying on "when the public is interested" prong from *Leigton* in interpreting zoning statute).

Here, it is significant that, rather than purporting to grant a power to the courts, the Virginia anti-SLAPP statute confers a benefit *on citizens*: "[a]ny *person* who has a suit against him dismissed . . . *may be awarded* reasonable attorney fees and costs." Va. Code § 8.01-223.2(B) (emphasis added). In contrast, in *Spindel*, on which Fairfax relies, the court held that a statute that conferred power on a

government agency (there, that the agency "may" issue a professional license) was permissive, rejecting the would-be licensee's argument that the agency had no discretion to deny his application, because that construction would best serve the public interest. *Spindel*, 199 Va. at 959.

The manifest intent of the Virginia General Assembly in enacting the anti-SLAPP statute was to encourage robust discussion of public issues by protecting the public's rights under the First Amendment and the Virginia Constitution to join in that discussion without incurring liability for defamation for statements made without actual malice. Moreover, the statute's fee-shifting provision "created a right of recovery in a defamation case that did not exist prior to" its enactment. *Will Nesbitt Realty, LLC v. Jones*, 2018 Va. Cir. LEXIS 66, at *44 (Va. Cir. Ct. Fairfax Cty. Apr. 30, 2018) (holding that Va. Code § 8.01-223.2 is substantive, not procedural, and therefore does not apply retroactively). Thus, not only are speakers qualifiedly immune from liability under the statute, they also are provided an affirmative right of recovery to encourage their participation in public debate and to deter meritless defamation lawsuits such as this one. That the Legislature chose to provide such a right of recovery only to prevailing *defendants*, and regardless of at what point in the litigation the dismissal occurs, clearly demonstrates the intent of the Legislature to create a qualified immunity with

"teeth" – the additional protection of a fee award to the defendant when a baseless defamation claim is dismissed.

As CBS noted in its opening brief, because there is no controlling precedent regarding construction of the fee-shifting provision in Virginia's anti-SLAPP statute, the analysis of courts interpreting similar provisions enacted by other jurisdictions can offer persuasive insight. Most on-point is the District of Columbia Court of Appeals' interpretation of the District's anti-SLAPP statute. Like its Virginia counterpart, the District's statute provides that courts "*may* award a moving party who prevails, in whole or in part . . . the costs of litigation including reasonable attorney fees." D.C. Code § 16-5504(a) (emphasis added). And the District's highest court has held that this provision contemplates a *presumptive* award of fees. *Doe v Burke*, 133 A.3d 569, 575 (D.C. 2016). Fairfax, however, contends that *Burke* is distinguishable because, in contrast to the District's statute, Virginia's fee-shifting provision is not limited to cases dismissed at the pleading stage. *See* Reply Br. at 42-43. But Fairfax misunderstands the import of this distinction: That the Virginia Legislature chose to create a right of recovery for a defendant who prevails at *any* point in the litigation because of an absence of actual malice evidences a *stronger* intent on the part of the Virginia Legislature to deter SLAPP suits that chill speech than the District's statute.

Fairfax also argues that looking to Title VII case law for guidance on how to construe Virginia's fee-shifting provision would lead to an "inequitable and punitive" result. Reply Br. at 43. To the contrary, a prevailing Title VII plaintiff is presumptively entitled to recover attorneys' fees – despite the similarly permissive language of that federal statute – precisely because such a plaintiff has vindicated an important public policy against a defendant who violated federal law. *Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 418 (1978). The Virginia General Assembly's decision to grant a right to recover attorneys' fees to a prevailing defamation defendant where that defendant's speech is protected by the First Amendment, and to not grant a similar right of recovery to a prevailing defamation plaintiff, similarly reflects a strong intent to vindicate an important public policy – here, the constitutional interest in uninhibited public debate on matters of public concern.

As multiple courts in other states with similar speech-protective statutes likewise have acknowledged, such an award of attorneys' fees is intended to deter "chilling" of speech on matters of public concern, *see Metabolife Int'l, Inc. v. Wornick*, 213 F. Supp. 2d 1220, 1221 (S.D. Cal. 2002), and to discourage future SLAPP litigation, *see Clifford v. Trump*, 2018 U.S. Dist. LEXIS 211297, at *17-18 (C.D. Cal. Dec. 11, 2018); *see also, e.g.*, *Barry v. State Bar of Cal.*, 386 P.3d 788, 794 (Cal. 2017) (fee-shifting provision is meant to "compensate[e] the prevailing

defendant for the undue burden of defending against litigation designed to chill the exercise of free speech . . . rights"); *Nexus Grp., Inc. v. Heritage Appraisal Serv.*, 942 N.E.2d 119, 124 (Ind. Ct. App. 2011) (statute, including fee-shifting provision, "is intended to reduce the number of lawsuits brought primarily to chill the valid exercise of the constitutional right[] of freedom of speech," and to "fully compensate[]" defendants sued for "lawfully exercis[ing] [their] First Amendment rights" (citations omitted)).

Virginia law, therefore, not only permits but requires that, in this context, the word "may" in its statute, like the analogous language in the District's statute, is properly construed as providing for a presumptive award of attorneys' fees.

II. EVIDENCE OF FAIRFAX'S IMPROPER MOTIVE IN FILING THIS LAWSUIT MAKES AN AWARD TO CBS OF ITS ATTORNEYS' FEES ESPECIALLY APPROPRIATE

The Virginia statute does not require a prevailing defendant to prove bad faith on the part of the plaintiff in order to recover attorneys' fees. As this Court has observed in the context of Title VII, however, evidence of improper motive is properly considered when determining whether to award fees. *Arnold v. Burger King Corp.*, 719 F.2d 63, 66 (4th Cir. 1983) (plaintiff's motivation "may shed light on the degree of frivolousness" in determining whether to award fees to prevailing Title VII defendant). That is especially so where, as here, the district court's only basis for declining to award fees, albeit under an incorrect legal standard, was that

Fairfax's claims, although not plausible, were not objectively frivolous. JA396.[1] Simply put, on remand, the indicia of bad faith and collateral motive that infect this litigation will be directly relevant to the district court's determination of whether the statutory presumption is overcome simply because of its conclusion that the claims themselves did not cross the line from implausible to frivolous.

From the beginning, this litigation has been transparently focused on using the judicial process to shape a narrative that benefits Fairfax's political aspirations.[2] He devoted several pages of his pleading to detailed but legally irrelevant allegations disparaging his "political rivals," including former Virginia Governor Terry McAuliffe and Richmond Mayor Levar Stoney. JA20-23. He

[1] In this regard, although Fairfax acknowledges that he "must provide allegations that plausibly state a claim for defamation," he nevertheless asserts that "CBS goes beyond the plausibility standard" by arguing that, to the extent any of his factual allegations are subject to an "obvious alternative, lawful explanation," the allegation is not plausible under the *Iqbal*/*Twombly* analysis. *See* Reply Br. at 18 (quoting CBS Br. at 38). As this Court has made clear, however, mere "speculation" is not sufficient to "fill the gaps" of a complaint and where, as here, the complaint leaves "open to speculation the cause for defendant's" conduct, such speculation cannot be deemed "plausible" in the face of an "'obvious alternative explanation.'" *McCleary-Evans v. Md. DOT*, 780 F.3d 582, 586, 588 (4th Cir. 2015) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009)); *see also Iqbal*, 556 U.S. at 682 ("As between that 'obvious alternative explanation' for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.").

[2] Fairfax has formally announced that he is a candidate for Governor in Virginia's 2021 election. *See* www.justinfairfax.com.

then publicly, and repeatedly, cited his pleading on social media and in formal statements to the news media where he described it as "exonerating evidence" of the "behind-the-scenes coordination between Fairfax's political rivals, namely Richmond, Virginia Mayor Levar Stoney's former aide Thad Williamson, Williamson's wife Adria Scharf, and Vanessa Tyson, who claimed Fairfax had assaulted her fifteen years ago." *See, e.g.*, JA325-26, 329, 331, 340, 342-47, 349-69. And because of the privilege to describe legal proceedings to the public, Fairfax could tweet and repeat these allegations against his political opponents without fear of legal liability, despite the irrelevance of those allegations to his purported claim against CBS.

Now, in his final brief before this Court, Fairfax takes two additional steps that betray his true motivation for filing this lawsuit. First, he finally discloses in this litigation the identity of the heretofore mysterious "eyewitness" to his sexual encounter with Watson. Then, he congratulates himself for his "wisdom" in acting "as an experienced prosecutor" by leading "Watson to commit to the lie before exposing it." Reply Br. at 21, 27-28. As he further explains, sharing the identity of the eyewitness with CBS "*before* Watson committed the details of her lies would have been the same as sharing the information with Watson herself." *Id*. at 37. And he does not stop there. Remarkably, Fairfax then tells this Court that, even though he identifies the "eyewitness" in his brief, the eyewitness's identity is

"not relevant at this stage of proceedings," but that, because the eyewitness "fail[ed] to come forward voluntarily," Fairfax "ultimately had no choice" but to identify him. *Id*. at 37 n.9. In other words, Fairfax expressly admits that he has used his public filing in this Court to "out" the alleged eyewitness, while simultaneously maintaining that the identity of the eyewitness is not legally relevant to the matters currently before this Court, and that he did so in retaliation for the eyewitness's refusal to support Fairfax publicly. Setting aside the question of whether this Court should countenance the use of its docket for such purposes, these admissions are further evidence that Fairfax filed this lawsuit against CBS not to vindicate a meritorious claim for defamation *against CBS*, but to advance his political goals and settle personal scores against others.

Second, Fairfax now asks this Court to reverse the judgment granting CBS's motion to dismiss so that he may conduct discovery to "reveal" the machinations involving the eyewitness. *Id*. at 27. But it is clear from Fairfax's own representations to this Court and in the record below that he deliberately withheld the eyewitness's existence and identity from CBS while it was investigating the two women's claims, stood by while CBS published Watson's allegations, then sued CBS for defamation on the basis that CBS failed to discover on its own the supposed eyewitness (and therefore the alleged falsity of Watson's accusations). Fairfax needs no discovery into *his own* efforts to obfuscate his alleged defense to

Watson's allegations or to use the circumstances surrounding this litigation against CBS as part of his strategy first to set up Watson, to wage war against her on social media, and then to out the alleged eyewitness to his sexual encounter with Watson for failure to take his side. Indeed, affording him the opportunity to use *this lawsuit against CBS* to further these collateral and improper purposes is precisely the kind of attack on public speech about a matter of public concern that the immunity afforded by Virginia's statute was meant to swiftly end.[3]

[3] Fairfax's continued reliance on *Palin v. New York Times Co.*, 940 F.3d 804 (2d Cir. 2019), is, therefore, demonstrably misplaced. As CBS noted in its opening brief, in *Palin*, the district court held an evidentiary hearing prior to ruling on the defendant's motion to dismiss—a hearing the Second Circuit held was procedurally improper. Although the Second Circuit did proceed to consider whether plaintiff's proposed amended complaint stated a plausible claim for relief, based on evidence adduced at the evidentiary hearing, the pleaded allegations in *Palin* are of a different kind than those at issue in this action: Plaintiff there asserted that, over the course of several years as editor of another publication, the author of the allegedly defamatory editorial had overseen the publication of "numerous articles" confirming the falsity of the alleged defamation. *Id*. In contrast, in this case, Fairfax alleges simply that his representative provided to CBS the names of four individuals *without mentioning* that one of them was purportedly an "eyewitness" to his encounter with Watson. He does not, however, allege that CBS had any reason to doubt Watson's claims, nor that the journalists responsible for the broadcasts had any knowledge that one of the four individuals was a purported eyewitness – and, as discussed *supra*, Fairfax boasts that he deliberately *refused* to provide to CBS the information he now says CBS recklessly failed to discover on its own. In short, in contrast to *Palin*, it is the concessions in Fairfax's own pleadings that render his allegations of actual malice in this case implausible.

It bears emphasis in this regard that, after Watson and Tyson came forward with their allegations against him, Fairfax issued multiple public statements in which, among other things, he emphasized that anyone willing to come forward with allegations of sexual misconduct should be heard fairly and fully, and treated respectfully, precisely because he was "aware of the importance that the voices of accusers be heard." JA157. CBS provided an opportunity for the public to do just that – hear the voices of these two women. Fairfax cannot now claim that CBS, which was but one of "many, many news organizations" to report these allegations, *see* Reply Br. at 1, uniquely defamed him by failing to uncover the existence of an eyewitness whose presence and identity Fairfax deliberately concealed from CBS so that he could play a high-stakes game of "gotcha." In attempting to do so, Fairfax has effectively conceded that this litigation was not brought for the purpose of actually redressing injury to reputation *caused by CBS*. As in the context of Title VII cases, the district court in this case should properly consider such motives in deciding whether Fairfax has overcome the statutory presumption in favor of awarding to CBS its attorneys' fees.

CONCLUSION

CBS respectfully requests that the Court affirm judgment in favor of CBS, hold that Virginia's anti-SLAPP statute contemplates a presumptive award of attorneys' fees to a prevailing defamation defendant, and remand the question of

whether to award to CBS its reasonable attorneys' fees to the district court for reconsideration under the correct standard.

Dated: October 15, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

1. This brief complies with the type-volume limits of Fed. R. App. P. 32(a)(7)(B) because, as determined by the "word count" feature of Microsoft Word 2016, the brief contains 3,295 words, excluding the parts of the document exempted by Fed. R. App. R. 32(f).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman.

Dated: October 15, 2020

/s/ Jay Ward Brown
Jay Ward Brown

CERTIFICATE OF SERVICE

I certify that on October 15, 2020, the foregoing Reply Brief of Defendants-Appellees was served on counsel of record for all parties through the CM/ECF system.

Dated: October 15, 2020

/s/ Jay Ward Brown
Jay Ward Brown