SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TWO RIVERS PUBLIC CHARTER SCHOOL, INC, *et al*.	:	
v.	:	Case No. 2015 CA 009512 B
ROBERT WEILER JR, *et al*.	:	

ORDER

The Court denies the motions of plaintiffs Ruby Nicdao, Larry Cirignano, and Jonathan Darnell for attorney fees under the D.C. Anti-SLAPP Act, because special circumstances in this case make a fee award unjust. *See Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016)). Plaintiff Two Rivers Public Charter School, Inc. ("Two Rivers") does not make any substantive objection to defendants' requests for costs, and the Court awards the three defendants costs totaling $9,189.77.

I. BACKGROUND

This case arose out of protests by defendants aimed at Two Rivers, its students, and their parents relating to Planned Parenthood's plans to construct a clinic where abortions would be performed next door to the lower and middle public charter school. The Court of Appeals ruled that Two Rivers' special motions to dismiss under the Anti-SLAPP Act should have been granted, and it remanded the case for dismissal. *See Nicdao v. Two Rivers Public Charter School, Inc.*, 275 A.3d 1287 (D.C. 2022).

After the Court dismissed the case on remand, defendants filed motions seeking over $1.1 million in attorney fees and costs. In her motion and supplemental motion, Ms. Nicdao seeks a total of $398.370.16, including $395.283.56 in attorney fees and $3,086.60 in costs. In his motion, Mr. Cirignano seeks a total of $647,758.62, including $643,715.20 in attorney fees and $5,723.23 in taxable and nontaxable costs. In his motion, Mr. Darnell seeks a total of

$67,049.84, including $66,677.90 in attorney fees and $379.94 in costs. On August 1, Two Rivers filed a consolidated opposition ("Pl. Opp."). On August 15, Ms. Nicdao filed a reply. On August 16, Mr. Cirignano filed a reply.[1]

Pursuant to an agreed-on schedule, Two Rivers filed a supplemental brief arguing that the Anti-SLAPP Emergency Amendment Acts of 2021 and 2022 bar an award of attorney fees because they make the Anti-SLAPP Act retroactively inapplicable to "any claim for relief brought by the District." On September 7, defendants jointly filed a reply.[2]

II. ATTORNEY FEES UNDER THE ANTI-SLAPP ACT

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.'" *Fridman v. Orbis Business Intelligence Ltd.*, 229 A.3d 494, 502 (D.C. 2020) (quoting legislative history). "To mitigate 'the amount of money, time, and legal resources' that defendants named in such lawsuits must expend, the Anti-SLAPP Act created substantive rights which accelerate the often lengthy processes of civil litigation." *Id*. (quoting legislative history).

One protection for victims of SLAPPs is the Court's authority under § 16-5504(a) to award litigation costs to a party that prevails on a special motion to dismiss under § 16-5502. Section 16-5504(a) provides, "The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 … the costs of litigation, including reasonable attorney fees." "[A] successful movant under [the Anti-SLAPP Act] is entitled to reasonable

[1] For sufficient cause shown, the Court grants the pending motions concerning extensions of the briefing schedule and increases in page limits.

[2] The Court considers the joint reply even though it exceeds the ten-page limit imposed by the Court. The page limit includes the caption and the signature block.

attorney's fees in the ordinary course – *i.e.*, presumptively – unless special circumstances in the case make a fee award unjust." *Doe*, 133 A.3d at 571. "[T]he Act, by its terms, impliedly but clearly rejects the additional showing of frivolousness or wrongful motivation" before a party who files a special motion to dismiss and prevails may recover attorney's fees. *Id*. at 574.

Doe borrowed the "special circumstances" standard from federal statutes and cases, so federal cases interpreting this standard are instructive. *See Toufanian v. Lorenz*, 2022 D.C. Super. LEXIS 13, at *6-7 (D.C. Superior Ct. Mar. 23, 2022). The Equal Access to Justice Act ("EAJA") applicable to prevailing defendants in cases brought by the federal government incorporates this standard. The EAJA's legislative history includes a passage describing this exception as a "safety valve," and it states that this provision "helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts" and that it "also gives the court discretion to deny awards where equitable considerations dictate an award should not be made." *Air Transportation Association of Canada v. FAA*, 156 F.3d 1329, 1333 (D.C. Cir. 1998) (quoting H. R. Rep. No. 1418, 96th Cong., 2d Sess. at 11, reprinted in 1980 U.S.C.C.A.N. 4953, 4984, 4990). "In that context, 'the scope of a district court's equitable powers … is broad, for breadth and flexibility are inherent in equitable remedies.'" *Brooks v. Berryhill*, 2017 U.S. Dist. LEXIS 222396, at *15 (D.D.C. 2017) (quoting *Brown v. Plata*, 563 U.S. 493, 538 (2011)).[3]

[3] For two reasons, "special circumstances" may be more circumscribed in cases under the EAJA than in other cases. First, the EAJA permits an award of attorney fees only if the government's position was not substantially justified, and it may be less appropriate to deny attorney fees to the prevailing party when the losing party did not have substantial justification for its position. Second, one reason why the EAJA provides for private parties to recover attorney fees from the government is the "imbalance of resources": "The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government." *Democratic Senatorial Campaign Committee v. FEC*, 1997 U.S. Dist. LEXIS 24171, at *7 (D.D.C. 1997) (quoting H.R.

"The question of fairness centers not on" the losing party but on the prevailing party because "the award of attorneys' fees is not designed merely to penalize [the prevailing party], but to encourage injured individuals to seek relief." *See Boos v. Barry*, 704 F. Supp. 5, 8 (D.D.C. 1989) (cleaned up). In § 1983 cases, special circumstances "have been held to be quite rare and the exception is narrowly construed." *Taucher v. Ranier,* 237 F. Supp. 2d 7, 15 (D.D.C. 2002). Although "courts are not limited to application of equitable principles in determining the appropriateness of the exception, the equitable doctrine of 'unclean hands' pervades the jurisprudence of 'special circumstances' under EAJA." *Brooks*, 2017 U.S. Dist. LEXIS 222396 at *15.

Courts may consider the losing party's inability to pay the prevailing party's attorney fees, but "when a court chooses to consider the unsuccessful party's financial hardship, it should require substantial documentation of a true inability to pay," and "unsubstantiated assertions of financial hardship are an insufficient basis on which to deny costs." *Toufanian*, 2022 D.C. Super. LEXIS 13, at *8-9 (cleaned up).

III. DISCUSSION

The Court concludes that (A) defendants 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.

Rep. No. 1418, 96th Cong., 2d Sess. 5-6 (Sept. 26, 1980)). No inherent imbalance of resources necessarily exists between plaintiffs and defendants in SLAPPs. For example, a media defendant in a strategic lawsuit against public participation may have much deeper pockets than the plaintiff.

A. Presumptive entitlement

Two Rivers argues that under *Doe*, defendants are not presumptively entitled to attorney fees because, as prevailing *defendants*, they are entitled to fees only on a showing that the plaintiff's action was frivolous, unreasonable, or without foundation, and the Court's initial denial of defendants' special motions to dismiss demonstrates that Two Rivers' action was neither frivolous nor unreasonable nor without foundation. Pl. Opp. at 14-21. This argument rests on a clear misreading of *Doe*.

Section 16–5504(a) provides that the Court "may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees," while subsection (b) provides that the Court "may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay." Consistent with the statutory text, *Doe* analogized (but did not equate) prevailing defendants on special motions to dismiss to prevailing plaintiffs in civil rights cases, and *Doe* analogized plaintiffs who defeated special motions to dismiss with prevailing defendants in civil rights cases. *Doe* emphasized that defendants who file successful special motions to dismiss are presumptively entitled to attorney fees even if they do not demonstrate frivolousness or wrongful motivation by the plaintiff. *Doe*, 133 A.3d at 574. Two Rivers' crabbed and contorted interpretation of *Doe* would effectively turn *Doe*'s holding on its head. Two Rivers would apparently have the Court treat special motions to quash under § 16-5503 different from special motions to dismiss under § 16-5502, *see* Pl. Opp. at 19, but § 16–5504(a) treats successful moving parties under both sections exactly the same.

This explains why the Court of Appeals has summarized *Doe*'s holding in the following way:

> the successful movant is presumptively entitled to an award of fees unless special circumstances make a fee award unjust. *See* [*Doe*], 133 A.3d at 571. The Act is much less generous to a plaintiff who successfully defends against a special motion to dismiss, allowing the award of costs and fees "only if the court finds that [the] motion … is frivolous or is solely intended to cause unnecessary delay." D.C. Code § 16-5504 (b).

Competitive Enterprise Institute v. Mann, 150 A.3d 1213, 1238 (D.C. 2016). Two Rivers' contrary interpretation is untenable.

B. Applicability of the Anti-SLAPP Act

Recent emergency and temporary legislation provides retroactively that the Anti-SLAPP Act "shall not apply to any claim for relief brought by the District." *See generally Public Media Lab, Inc. v. District of Columbia*, 276 A.3d 1, 6-7 (D.C. 2022). By its plain language, this statutory exemption does not apply to this case because this case was not brought by "the District." Instead, it was brought by Two Rivers Public Charter School, Inc., an incorporated entity separate from the District. D.C. Code § 38-1802.04(a)(8) empowers a public charter school "[t]o sue and be sued in the public charter school's own name." Two Rivers exercised this authority and sued in its own name. This case was not brought by the District in fact or in appearance.

Two Rivers acknowledges, as it must, that it is not part of the D.C. government. After all, the portion of the D.C. Code concerning public charter schools – specifically D.C. Code § 38-1800.02(10)(B) – provides, "The term 'District of Columbia Government' neither includes the Authority nor a public charter school." Two Rivers argues that this fact is irrelevant because the statute exempts any claim brought by the District, not by the District of Columbia government. However, D.C. Code § 1-102 provides, "The District is created a government by

the name of the 'District of Columbia.'" In context, the reference in the exemption statute to "the District" is plainly a reference to the District of Columbia government. In any event, Two Rivers cannot reasonably be equated with "the District." If "the District" in the exemption statute includes any entity created by D.C. law, the exemption would tend to swallow the rule. If the D.C. Council intended to exempt any entity that was created under D.C. law or that gets benefits from the D.C. government, it would have made this intention clear.

Moreover, the legislative history indicates that the Council was focused on "lawsuits by the Attorney General," *see Public Media Labs*, 276 A.3d at 6 (quoting the legislative history), but the Attorney General does not represent public charter schools in general or Two Rivers in particular. Two Rivers chose to bring this case without any authorization, encouragement, or involvement by the Attorney General or by any D.C. government agency. The intent of the exemption is to ensure that the Anti-SLAPP Act is "not used to inhibit government enforcement actions," *Public Media Labs*, 276 A.3d at 10, and Two Rivers' case does not qualify as a government enforcement action.

It is also reasonable to infer that one reason for the exemption is to limit the District's financial exposure and thereby protect the public fisc. Two Rivers does not contend that District of Columbia taxpayers would be liable for any award of attorney fees or that the D.C. government has any statutory or other responsibility to cover an award of attorney fees. To the contrary, Two Rivers recognizes that it, and it alone, would be responsible for any award. *See* Opp. at 10 n.7 ("such an award here would have severe negative impact on the school's ability to staff and operate at full capacity"). *Cf. Idea Public Charter School v. Belton*, 2006 U.S. Dist. LEXIS 13321, at *17 (D.D.C. 2006) (holding that the District is not a necessary party in a case against a public charter school for special educational services because if the plaintiff prevails,

"the School – not DCPS – will be required to provide the special services and to pay attorneys' fees and costs").

Because the statutory exemption for claims brought by the District does not apply to suits brought by D.C. nonprofit corporations in their own name, the Court need not decide whether, as defendants argue, Two Rivers waived this argument or whether retroactive application would infringe defendants' vested rights.

C. Special circumstances

Exercising its equitable discretion (*see Brooks*, 2017 U.S. Dist. LEXIS 222396, at *15), the Court concludes that special circumstances make an award of attorney fees unjust in this case. The Court relies on the totality of the following factors. None of these factors individually constitutes special circumstances, but cumulatively and collectively, they do.

The Court accepts that the losing party has a relatively heavy burden to establish special circumstances, and few cases find special circumstances. *See* Part II above. Furthermore, several factors make it just to award attorney fees in the circumstances of this case. First, defendants unquestionably prevailed, obtaining dismissal with prejudice of both of Two Rivers' claims. Second, an award of attorney fees at the market rate would benefit the prevailing defendants to the extent they actually paid any fees, and it would encourage attorneys and entities like Thomas More Society and Liberty Counsel to represent defendants who face a meritless suit arising out of their advocacy on an issue of public interest. *See Toufanian*, 2022 D.C. Super. LEXIS 13, at *11 (citing *Link v. District of Columbia*, 650 A.2d 929, 934 (D.C. 1994)). The weight of this factor may be reduced in this case because defendants do not contend that their lawyers were willing to represent them only because of the possibility that they would get attorney fees under the Anti-SLAPP Act. Third, Two Rivers does not contend that

defendants' hands are unclean, which is an important factor in the jurisprudence of "special circumstances." *See Air Transportation Association of Canada*, 156 F.3d at 1333.[4]

However, when the Court takes the following factors into account, it concludes that special circumstances make an award of attorney fees unjust.

1. Two Rivers brought the case not for its own benefit but for the sake of the young children who attended the school and for whom the school was responsible, including when they were entering or leaving the school grounds. Two Rivers did not seek damages, and sought only injunctive relief setting reasonable time, place, and manner restrictions on protests by the three prevailing defendants and others. For discussion of time, place, and manner restrictions on abortion protesters, *see, e.g., Hill v. Colorado*, 530 U.S. 703 (2000); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

2. Two Rivers did not seek out any dispute with defendants. Two Rivers and its students were essentially caught in the middle of a dispute between defendants and Planned Parenthood. Two Rivers, a school that generally did not participate in public controversies, was

[4] Although the Court does not rely on this factor with respect to unclean hands, the $1.1 million in attorney fees sought by defendants is grossly excessive. The issues on which defendants prevailed were simple and limited: Two Rivers' lack of standing to pursue its students' claims for intentional infliction of emotional distress because of insufficient hindrance to the students' ability to bring these claims; and the derivative nature of its private nuisance claim, which also was not based on sufficiently continuous and permanent acts. *See Nicdao*, 275 A.3d at 1292. Defendants' briefs were often overlapping and duplicative. The three defendants could have litigated this case for less than the $395,283.56 in attorney fees claimed by Ms. Nicdao alone, yet Mr. Cirignano seeks an additional $647,758.62, and Mr. Darnell an additional $67,049.84 for "me too" briefs. In addition, at least some of the rates are excessive: defendants do not justify rates exceeding the rates in the *Laffey* Matrix; and the Court questions whether this case involving two common-law tort claims is sufficiently complex to justify use of the *Laffey* Matrix. For discussion of use of the *Laffey* Matrix in complex federal litigation, *see Reed v. District of Columbia*, 843 F.3d 517, 521 (D.C. Cir. 2016); *Salazar v. District of Columbia*, 809 F.3d 58, 64 (D.C. Cir. 2015); *Thomas v. Moreland*, 2022 U.S. Dist. LEXIS 107187, at *11-12 (D.D.C. 2022); *Spanski Enterprises v. Telewizja Polska S.A.*, 278 F. Supp. 3d 210, 219 (D.D.C. 2017).

neutral in this dispute, and the problem arose because defendants objected when Two Rivers chose not to take their side in this dispute.

3. As the Court's initial decision denying defendants' special motions to dismiss indicates, Two Rivers' claims had a substantial basis, although Two Rivers was not able to nudge them across the line from possible to plausible. *See Tingling-Clemons v. District of Columbia*, 133 A.3d 241, 246 (D.C. 2016). Two Rivers operates a lower and middle public charter school serving children as young as three years old, and Two Rivers had a reasonable concern that the alleged actions of various defendants, including boisterous protests by angry demonstrators, some of whom displayed graphic images of aborted fetuses, were upsetting and even traumatic for young children. One defendant, who previously served a prison sentence for plotting to blow up an abortion clinic, agreed to a permanent injunction restricting protest activity in the vicinity of the school. *See* Permanent Injunction (docketed on July 28, 2016). Another defendant, who defaulted, was convicted of trespassing in connection with a different anti-abortion protest.

With respect to the claim for intentional infliction of emotional distress, the Court of Appeals acknowledged that the children themselves "may have a valid claim against the abortion protestors." *Nicdao*, 275 A.3d at 1293. Two Rivers met two of the three requirements for third-party standing: it plausibly claimed that it was injured by potentially unlawful interference with their students' right not to be harassed by abortion protesters; and as a school, Two Rivers has a close relationship with its students and their parents. *Id*. at 1292. If 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, especially

given the Court of Appeals' conclusion that there was no evidence of a substantial hindrance preventing parents from bringing such claims. Two Rivers represents that it "gathered a number of declarations from parents of Two Rivers students," Opp. at 7, and defendants 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.[5]

For the same reasons the children or their parents may have had a valid claim for intentional infliction of emotional distress, they may have had a valid claim for nuisance based on this tort. *See Nicdao*, 275 A.3d at 1293. The other shortcoming the Court of Appeals identified in the nuisance claim was that the three protests did not involve a degree of permanence sufficient to amount to an unreasonable use, and this analysis implicitly acknowledged that defendants' alleged conduct caused some injury to Two Rivers, just not enough to constitute a private nuisance. *See id*. at 1293-94.

That Two Rivers had a reasonable basis for its claims is by itself not a basis to deny attorney fees, *see Doe*, 133 A.3d at 574, but whether Two Rivers had substantial justification for its claim is relevant to whether special circumstances make an award of attorney fees unjust.

Ms. Nicdao asserts that Two Rivers filed a "vindictive action intended to silence her speech on a matter of public concern." Nicdao Motion at 3. Her speech indisputably involved a matter of public concern. But not a shred of evidence indicates that Two Rivers acted out of vindictiveness, and Two Rivers' request for a judge to impose reasonable time, place, and

[5] Mr. Darnel states only that "we do not know if most of the parents agree with the lawsuit or even if a large minority of the parents agreed with the lawsuit." Darnel Motion at 1. None of the defendants requests an evidentiary hearing relating to attorney fees. The Court adds that its decision not to conduct an evidentiary hearing before ruling on defendants' special motions to dismiss does not, contrary to Two Rivers' argument (Pl. Opp. at 23), constitute a special circumstance justifying a denial of attorney fees.

manner restrictions near a school attended by young children cannot fairly be characterized as an attempt to silence her speech.

4. The District of Columbia has adopted by statute a policy to immunize public charter schools from liability unless they engage in conduct constituting gross negligence, an intentional tort, or a crime. *See* D.C. Code § 38-1802.04(c)(17)(A). These three exceptions to the grant of immunity are inapplicable because Two Rivers' decision to bring this case does not involve gross negligence or an intentional tort or crime. The Court does not and need not decide whether this statutory provision protects Two Rivers from liability for attorney fees under the Anti-SLAPP Act. Even if Two Rivers does not have statutory immunity, the statutory policy still constitutes a special circumstance that distinguishes Two Rivers from other plaintiffs who bring cases dismissed through special motions to dismiss.

5. Two Rivers is a non-profit institution with limited ability to pay defendants' attorney fees. Defendants do not contest Two Rivers' representation that "such an award here would have severe negative impact on the school's ability to staff and operate at full capacity." Opp. at 10 n.7. It is reasonable to expect that the impact of any fee award would be felt more by the students than by the school itself. Two Rivers does not contend that it could not afford to pay an award of $1.1 million, and this factor, standing alone, would not constitute a special circumstance making an award of attorney fees unjust. *See Toufanian*, 2022 D.C. Super. LEXIS 13, at *8-9. However, the Court may appropriately consider this factor along with other special circumstances.

C. Costs

The three defendants seek costs totaling $9,189.77. Two Rivers does not make any argument against awarding costs, including on the ground that it is immune from liability for

these costs. Two Rivers has conceded defendants' argument for costs by failing to address it in its opposition to their motions (except for a conclusory assertion that the Court should deny costs). *See Classic Cab v. D.C. Department of For-Hire Vehicles*, 244 A.3d 703, 706-07 (D.C. 2021); *Drake v. McNair*, 993 A.2d 607, 615 n.12 (D.C. 2010) ("Because a party has failed to include in her brief any substantive argument related to this issue, we deem it waived.") (cleaned up).

When a party does not respond at all to a substantive motion, the Court may treat the motion as conceded and grant it if "the movant has established a prima facie entitlement to relief." *See District of Columbia v. Davis*, 811 A.2d 800, 804 (D.C. 2002); *National Voter Contact, Inc. v. Versace*, 511 A.2d 393, 397 (D.C. 1986). Defendants have established a prima entitlement to the costs they seek. It is reasonable to interpret D.C. Code § 16-5502 to provide for the recovery of the same "costs" that are recoverable under Rule 54(d)(1), and Two Rivers does not contend otherwise. Moreover, Rule 54(d)(1) does not permit the Court to deny otherwise taxable costs because special circumstances make an award of costs unjust.

IV. CONCLUSION

For these reasons, the Court orders that:

1. Defendant Ruby Nicdao's July 20 motion is denied with respect to attorney fees and granted with respect to costs.

2. Ms. Nicdao's July 20 supplemental motion is denied with respect to attorney fees and granted with respect to costs.

3. Defendant Larry Cirignano's July 19 motion is denied with respect to attorney fees and granted with respect to costs.

4. Defendant Jonathan Darnell's July 19 motion is denied with respect to attorney fees and granted with respect to costs.

5. Ms. Nicdao is awarded $3,086.60 in costs.

6. Mr. Cirignano is awarded $4,043.42 in nontaxable costs and $1,679.81 in taxable costs.

7. Mr. Darnell is awarded $379.94 in costs.

8. Defendants' July 14 motion for an extension of time is granted.

9. The August 2 motion of plaintiff Two Rivers Public Charter School to exceed page limits is granted.

10. Defendants' August 2 motion for an extension of time is granted.

11. Ms. Nicdao's August 15 motion to exceed page limits is granted.

12. Mr. Cirignano's August 16 motion to exceed page limits is granted.

Anthony C. Epstein
Judge

Date: September 12, 2022

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