22-cv-0752 (Cross-Appeal)
22-cv-0721 (Lead), 22-cv-0736, 22-cv-0741, (Consolidated)

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 22-cv-0752 Cross-Appeal Consolidated	TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED, CROSS-APPELLANT, V. RUBY NICDAO, *ET AL.*, CROSS-APPELLEES.
No. 22-cv-0721 Lead	RUBY NICDAO, APPELLANT, V. TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED, *ET AL.*, APPELLEE.
No. 22-cv-0736 Consolidated	LARRY CIRIGNANO, APPELLANT, V. TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED, *ET AL.*, APPELLEE.
No. 22-cv-0741 Consolidated	JONATHAN DARNEL, APPELLANT, V. TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED, *ET AL.*, APPELLEE.

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

BRIEF OF APPELLEE & CROSS-APPELLANT TWO RIVERS PUBLIC CHARTER SCHOOL, INC.

Michael L. Murphy, Esq.
Joshua I. Hammack, Esq.
Bailey & Glasser LLP
1055 Thomas Jefferson Street NW
Washington, DC 20007
T: 202.463.2101
F: 202.463.2103
mmurphy@baileyglasser.com
jhammack@baileyglasser.com

Counsel for Appellee & Cross-Appellant
Two Rivers Public Charter School, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

JURISDICTION

The Court has jurisdiction under D.C. Code § 11-721(a)(1) over this appeal from the Superior Court's September 12, 2022, Order denying in part and granting in part Appellant Nicdao's, Cirignano's, and Darnel's (collectively, "Protesters") respective motions for attorneys' fees and costs under the District of Columbia Anti-SLAPP Act.

ISSUES PRESENTED

1. Will the enactment of the Corrections Oversight Improvement Omnibus Amendment Act of 2022 once it becomes effective on or about May 11, 2023, require this Court to (a) affirm the order denying attorneys' fees and (b) vacate the order as to the grant of costs?

2. Does Two Rivers Public Charter School's immunity from civil liability under D.C. Code § 38-1802.04(c)(17) bar recovery of attorneys' fees and costs under the D.C. Anti-SLAPP Act?

3. Did the Superior Court err in granting Defendants costs under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502(a), despite the presence of "special circumstances"?

SUMMARY OF THE ARGUMENT

This appeal concerns the D.C. Anti-SLAPP Act's fee-shifting provision. The Superior Court denied attorneys' fees under that provision based on its finding that "special circumstances" made such an award unjust. It awarded costs, however, in the amount of $9,187.77. There are three ways to resolve this appeal, and all three ineluctably lead to the same conclusion—the denial of fees must be affirmed, and the award of costs must be vacated.

First, an enacted and soon-to-be-effective change to the D.C. Anti-SLAPP law will remove all doubt about whether fees or costs can be awarded against Two Rivers here. In particular, a recent enactment—which will become effective in May 2023 and will be retroactive to March 2011—specifically exempts D.C. public charter schools from proceedings under the Anti-SLAPP Act. Two Rivers Public Charter School is, as the name suggests, indisputably a public charter school that will be exempt from the Anti-SLAPP Act, including its fee-shifting

provisions. On that basis, and as soon as the law becomes effective, this Court must affirm the denial of attorneys' fees and vacate the award of costs. The new law will resolve this appeal and this matter completely.

Second, this outcome should obtain anyway because the Superior Court correctly analyzed the question and determined that "special circumstances" made an award of fees unjust in this case. In particular, Two Rivers brought this lawsuit to protect children from interference at school. It did not seek to engage in any public debate, on any side, about any topic. Nor did it seek to silence anyone engaging in such debate. Its sole aim was to ensure that children could arrive at and depart from school safely. In addition, the timing of the case's resolution counsels against an award of fees. The underlying case was resolved on the basis of Two Rivers's standing, but it took five years to reach that conclusion. Had the standing issue been resolved earlier in the case, the problem almost certainly could have been cured by amendments, including adding parents or children as parties. Moreover, D.C. law has long granted public charter schools immunity from civil liability. Finally, Two Rivers is a non-profit institution with limited financial resources. For all these reasons, or for any one of them, this Court can affirm that "special circumstances" exist here to make any award of fees (let alone the "grossly excessive" award the Protesters seek here)—as well as any award of costs—unjust.

Third, the law granting Two Rivers immunity from civil liability is independently sufficient, standing alone, to resolve the case. Because Two Rivers is immune from civil liability, fees and costs cannot be awarded against it.

Put simply, all roads lead to affirming the denial of fees and vacating the award of costs.

PROCEDURAL AND FACTUAL BACKGROUND

Appellee and Cross-Appellant Two Rivers is a District of Columbia public charter school that operates elementary and middle schools for students between pre-K (starting at three years

old) and eighth grade (approximately fourteen years old). App. at 33 (Verified Compl. ¶ 1). Two Rivers's funding is tied directly to the number of students enrolled at the school. *Id.*; *see also* D.C. Code § 38-1804.01(a)(2) (detailing the fixed funding formula, which is defined as the "number . . . of students enrolled" multiplied by "a uniform dollar amount"). Under the applicable statute, Two Rivers has the power to "sue and be sued in the public charter school's own name," D.C. Code § 38-1802.04(b)(8), is required to "maintain the health and safety of all students attending such school," *id.* § 38-1802.04(c)(4)(A), and enjoys "[i]mmunity from civil liability" with three exceptions that have no application in this matter, *id.* § 38-1802.04(c)(17).

Superior Court action and special motions to dismiss under D.C. Anti-SLAPP

This case began with a single belligerent and unprovoked e-mail. On November 1, 2015, Jonathan Darnel e-mailed the school that, if it "fail[ed] to challenge Planned Parenthood," which was building a facility next to the school, he felt a "moral obligation to alert the community (including the parents of your students)." App. at 42 (Verified Comp. ¶ 36). His e-mail went on to assert: "I'm sure you don't want me, my anti-abortion friend[s] and our graphic images any more than we want to be in your neighborhood." *Id.* Shortly thereafter, various groups of protesters (current and former defendants) gathered in and around the elementary and middle school campuses located on the corner of 4th Street NE & Florida Avenue NE. *Id*. at 44-49 (Verified Comp. ¶¶ 37-62). There were also other related incidents that lead up to the filing of this matter, including a protest in August 2015 during the orientation (*id*. at 41-42 (Verified Comp. ¶¶ 33-35)), targeted leafleting (*id*. at 50 (Verified Comp. ¶ 63)), and planned future events (*id*. at 51-52 (Verified Comp. ¶ 68)). Prior to this string of incidents, none of these individuals had any association with or was previously known to Two Rivers.

Two Rivers commenced this action on December 9, 2015, after protesters started to

appear *en masse* on nearby sidewalks and roads to protest the Planned Parenthood, impacting the health and safety of hundreds of students who attend Two Rivers—particularly as they arrived at and departed school each day. Two Rivers pursued this action to enjoin the Protesters from (1) entering school property, (2) blocking the elementary and middle school students' safe passage to and from their school located at 4th & Florida NE, (3) focusing their demonstrations at Two Rivers's students, and (4) using signs larger than 11" x 17" in the presence of students under twelve years of age during narrow time windows in the morning and afternoon when children were going to and leaving school. *Id.* at 39-40 (Verified Compl. at 25-28). Two Rivers chose not to seek money damages from the Protesters and limited its request for relief to valid time, place, and manner regulations tightly wrapped around the times the elementary and middle school students came to and left the buildings at Two Rivers's 4th Street campus—that sit adjacent to and across street from the Planned Parenthood health care facility that the Protesters were upset about.

The Protesters moved to dismiss under Rules 12(b)(1) and 12(b)(6) and separately filed a special motion to dismiss under D.C. Code § 16-5502(a) of the D.C. Anti-SLAPP Act. Under this provision, "[a] party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45-days after service of the claim." D.C. Code § 16-5502(a). On February 26, 2016, Two Rivers filed separate consolidated opposition briefs addressing the general and special motions to dismiss. Relevant to these proceedings, Two Rivers specifically argued that Mr. Darnel failed to make an adequate showing under Section 16-5502 because his special motion did not respond to the allegations against him and was demonstrably derivative of Ms. Nicdao's brief as it repeatedly referred to Mr. Darnel as "she" and "her." *See* App. at 500 n.4; *see also* App. at 351-52.

On April 13, 2016, in conjunction with its opposition to the special motions to dismiss, Two Rivers sought leave from the court to serve targeted discovery on the Protesters. In response to the Superior Court's April 28, 2016, Order for a "Motion Hearing and Initial Conference," Two Rivers filed a Notice of Plaintiffs' Pre-Marked Exhibits for the April 29, 2016, Hearing. Two Rivers submitted a CD-ROM containing numerous videos of Defendants' activities, several declarations, and a newspaper article concerning then-Defendant Weiler. In that Notice, Two Rivers stated that it had "gathered a number of declarations from parents of Two Rivers students." App. at 15. The Superior Court opted not to conduct an evidentiary hearing, despite Two Rivers's suggestion that it hold one accordance with this court's practice and procedures. *See* App. at 109-10 (Apr. 29, 2016, Hearing Tr. ("Apr. 29 Tr.") at 49:17-50:7.)[1] Indeed, the Superior Court considered none this evidence in reaching its conclusions at the hearing. App. at 66 (Apr. 29 Tr. at 6:11-18).

On April 29, 2016, after a full hearing on the Protesters pending motions, the Superior Court issued a bench ruling (1) dismissing the Two Rivers Board of Trustees as a plaintiff; and (2) denying the special motions to dismiss. After addressing each of Two Rivers's claims and the relief sought, the Superior Court concluded that Two Rivers had standing to pursue its claims and was "likely to succeed on the merits." App. at 138 (Apr. 29 Tr. at 78:17-25). As the Superior Court later explained it, "this Court denied [the Protesters]' Special Motions to Dismiss and determined, as a matter of law, that [the Protesters'] conduct was not protected by the Anti-SLAPP Act." *Id.* at 138 (Apr. 29 Tr. 78:3-6); *see* App. at 18 (Omnibus Order Granting Defs.'

[1] The transcript incorrectly refers to the "Cowboy" case, which is a reference *Center For Advanced Defense Studies v. Kaalbye Shipping Int'l*, No. 2014 CA 002273 B, 2015 WL 4477660 (D.C. Sup. Ct. Apr. 7, 2015). The *Kaalbye* court conducted four evidentiary hearings and subsequently heard oral argument on the issues raised at those hearings. *Id*.

Mots. for Stay Pending Appeal at 4 (June 14, 2016)). Again, the Superior Court never conducted an evidentiary hearing or issued a full written opinion.

The Protesters then sought to take an interlocutory appeal of the denial of their special motions to dismiss under the collateral order doctrine.[2] Protesters also sought to stay discovery pending resolution of their appeals. On June 14, 2016, the Superior Court issued a stay of discovery. *See* App. at 18 (Omnibus Order Granting Defs.' Mots. for Stay Pending Appeal at 4 (June 14, 2016)). Because of the interlocutory appeal and resulting stay of the matter, Two Rivers was never afforded the opportunity to amend the complaint to incorporate the additional evidence it had gathered and attempted to present to the trial court.

On May 11, 2016, Two Rivers filed a motion for preliminary injunction against Larry Cirignano. App. at 15 (Pl.'s Mot. for a Preliminary Injunction (May 11, 2016)). The motion detailed Mr. Cirignano's additional efforts to direct his picketing efforts at Two Rivers's students, along with a non-defendant, and noted that "[o]ne middle school student arrived at school in tears after seeing the protester's images and told a school administrator that she didn't want to see the awful pictures anymore." App. at 15 (Pl.'s Mot. for a Preliminary Injunction at 1-3 (May 11, 2016)). Two Rivers subsequently filed Praecipes supplement its preliminary injunction motion. These filings further detailed additional incidents where Mr. Cirignano showed up when elementary and middle school aged children were arriving to start school.[3] The Superior Court's held the motion in abeyance.

---

[2] Mr. Weiler resolved the matter before the interlocutory appeal of the Superior Court's denial of the special motions to dismiss commenced, and the parties submitted an Agreed Order of Permanent Injunction on July 26, 2016.

[3] *See* Praecipe (May 25, 2016) (including a Facebook post stating "Workers start at 6 am. school starts at 7:30 am through rush hour at 8:30 am. Then school and workers get out at 2-3:30 pm."); Praecipe (June 7, 2016) (detailing June 6 picketing); Praecipe (Sept. 6, 2016) (detailing August efforts to appear on same day of "Family Orientation Meetings" and on first day of school).

On June 17, 2016, this Court issued an Order holding the appellate proceedings in abeyance pending resolution of *Competitive Enterprise Institute v. Mann*, which was briefed on an emergency basis and argued in November 2014. This Court issued its initial *Mann* decision on December 22, 2016, and later issued a slightly revised opinion on December 13, 2018. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), *as amended*, Dec. 13, 2018.

The Court of Appeals conducted a hearing on the Protesters' original appeal in this case on March 11, 2020. On June 9, 2022, this Court issued its ruling reversing the Superior Court and remanding it for dismissal. *See Nicdao v. Two Rivers Public Charter Sch., Inc*., 275 A.3d 1287 (D.C. 2022). In its ruling, this Court stated, *inter alia*, that under a prudential standard, Two Rivers did not meet one of the three factors for third-party standing because there was no financial hindrance. Therefore, it could not maintain its claims against the Protesters—even though the students it sought to protect may have had valid claims against the same Protesters. On July 5, 2022, Superior Court issued a dismissal order. App. at 27.

Dispute over attorneys' fees and costs under D.C. Anti-SLAPP

On August 16, 2022, in response to this Court's dismissal, the Protesters filed their respective fee petitions collectively seeking nearly than ***$1.1 million in attorneys' fees and costs*** from the Two Rivers Public Charter School. App. at 152-315. Two Rivers filed its opposition – need to cite the conclusion where we say fees and costs. App. at 316-55. And the Protesters filed their respective replies. App. at 365-77.

Additionally, Two Rivers submitted briefs on the emergency amendment to D.C. Anti-SLAPP. App. at 378, 479. The emergency act was the precursor to the Improvement Act.

On September 12, 2022, the Superior Court issued an Order denying the Protesters' request for attorneys' fees and granting the requests for costs. App. at 492-505. In doing so, the

Superior Court made the following finding:

- The D.C. Anti-SLAPP's emergency amendment in effect—the pre-cursor to the Improvement Act that did not expressly reference charter schools—did not apply to the fee dispute. App. at 497-99.

- The court identified five "special circumstances" that would make an award of $1.1 million in fees unjust in the matter. App. at 499-503.

- The court noted that a $1.1 million request for attorneys' fees was "grossly excessive" considering the fact the underlying dispute was resolved on standing. App. at 500 n.9.

- The court treated Two Rivers's "immunity from civil liability" under D.C. Code § 38-1802.04(c)(17) as a "special circumstance" and did "not decide whether this statutory provision protects Two Rivers from liability for attorney fees under the Anti-SLAPP Act." App. at 503.

- The court found that "Two Rivers [did] not make any argument against awarding costs" and, therefore, "has conceded defendants' argument for costs." App. at 504.

In conclusion, the court denied the Protesters' requests for nearly $1.1 million in attorneys' fees and collectively awarded them $ 9,189.77 in costs. App. at 504-05.

On September 21, 2022, the Protesters filed their respective notices of appeal based on the September 12, 2022, Order. Then on September 30, 2022, Two Rivers also filed their notice of appeal. App. at 29. On January 20, 2023, the Protesters filed their Joint Brief seeking a reversal of the Superior Court's denial of attorney fees.

During this intervening period, on December 28, 2022, the Council of the District of Columbia passed B24-0076, the "Corrections Oversight Improvement Omnibus Amendment Act of 2022," wherein Council amended D.C. Anti-SLAPP's § 16-5505 exemptions to include "[a]ny claims brought by . . . District public charter schools." *Id.* § 16-5505(a)(2). And this exemption applies retroactively. *Id.* § 16-5505(b). This amendment was enacted without D.C. Mayor's signature. B24-0076 was then transmitted to United States Congress. Barring a dramatic and unforeseen development, where both Houses of Congress and the President of the

United States block B24-0076, this exemption will become law on May 11, 2023, and will be determinative on this appeal's issues.[4]

STANDARD OF REVIEW

This Court must affirm the Superior Court's denial of attorneys' fees and/or costs unless it finds the Superior Court abused its discretion. *See Assidon v. Abboushi*, 16 A.3d 939, 942 (D.C. 2011). This Court reviews any underlying legal questions *de novo* with underlying factual issues reviewed for clear error. *See C.R. Calderon Constr., Inc. v. Grunley Constr. Co., Inc.*, 257 A.3d 1046, 1051, 1059 (D.C. 2021).

ARGUMENT

I. The Improvement Act, which amends the D.C. Anti-SLAPP to clarify it will no longer apply to claims brought by a District of Columbia charter school, will moot this appeal.

On January 12, 2023, the District of Columbia's City Council enacted the Corrections Oversight Improvement Omnibus Amendment Act of 2022 (B24-0076) ("Improvement Act"). The Improvement Act was transmitted to Congress on January 26, 2023, and its Projected Law Date is May 11, 2023.[5] Section 5 of the Improvement Act revises D.C. Code § 16-5505 in the following manner: (a) it exempts "[a]ny claim brought by the District government, including District public charter schools"; and (b) it made this change applicable "[a]s of March 31, 2011." App. at 676.

The Improvement Act implemented permanent changes to the D.C. Anti-SLAPP, which had been revised on an emergency basis on November 8, 2021. The emergency amendment –

---

[4] *See* App. at 529-790; *see also* B24-0076 – Special Education Attorneys for Emerging Adult Defendants Amendment Act of 2021 (enacted as the "Corrections Oversight Improvement Omnibus Amendment Act of 2022"), https://lims.dccouncil.gov/Legislation/B24-0076 (last visited Mar. 27, 2023).

[5] Two Rivers will seek leave to supplement the record and give notice to the Court once the Improvement Act becomes effective. *See* DCCA Rule 28(k).

which were briefed in the Superior Court and addressed in its opinion – by its own terms applied only to "[a]ny claim brought by the District." App. at 379–81. The final version of the amendment clarifies that the D.C. Anti-SLAPP Act "does not apply to claims brought by a District of Columbia charter school." Indisputably, Two Rivers Public Charter School is a "District of Columbia charter school." The Improvement Act —given its retrospective application —makes clear that once it becomes effective the D.C. Anti-SLAPP will no longer apply to this matter that was commenced in 2015.

Thus, once the Improvement Act becomes effective, it requires this Court to (a) affirm the Superior Court's order denying attorneys' fees and (b) vacate the order as to the grant of costs.

II. Two Rivers Charter School's immunity from civil liability under D.C. Code § 38 1802.04(c)(17) bars recovery of attorneys' fees and costs under the D.C. Anti-SLAPP Act.

Section 38-1802.04(c)(17) of the D.C. Code affords public charter schools "immun[ity] from civil liability . . . for act or omission with the scope of their official duties." D.C. Code § 38-1802.04(c)(17). None of the three exclusions are remotely applicable in this matter. *Id*.

As Two Rivers made clear below, "[i]t is well-settled that Sovereign immunity applies equally to claims for attorneys' fees." App. at 327 n.8 (citations omitted). Despite this, and despite the unambiguous grant of immunity, the Superior Court demurred in deciding whether Two Rivers this provision protected Two Rivers from an award and chose instead to treat it as a "special circumstance." App. at 503.

But, as argued before the trial court, "[t]here is nothing in the statutory language of the D.C. Anti-SLAPP Act, or its legislative history, that indicates that Two Rivers would waive its "cloak of immunity" by pursuing this action against the Defendants who had no prior affiliation to Two Rivers. App. at 328 (citing *Potomac Develop. Corp. v. District of Columbia*, 28 A.3d 531

(D.C. 2011) ("But to state a claim, appellants must identify an affirmative statutory basis for courts to award damages against the District and to overcome its sovereign immunity.")). The enactment of the Improvement Act serves only to strengthen this argument.

Thus, this Court should apply the immunity afforded to Two Rivers under D.C. Code § 38-1802.04(c)(17) and (a) affirm the Superior Court's order denying attorneys' fees and (b) vacate the order as to the grant of costs.

III. The Superior Court did not abuse its discretion when it appropriately found there were special circumstance that made an award of attorneys' fees unjust in this matter.[6]

A. There are special circumstances present in this matter.

The Superior Court appropriately found there was at least *five* special circumstances that "collectively" make an award of $1.1 million in attorneys' fees unjust in this matter. App. at 518-22.

First, "Two Rivers brought this case not for its own benefits but for the sake of young children who attended the school and for whom the school was responsible[.]" App. at 519. In doing this, Two Rivers did not seek damages; rather, it "sought only injunctive relief setting reasonable time, place, and manner restrictions on protests by the three prevailing" Protesters. App. at 519. In other words, Two Rivers never sought to limit or discourage the Protesters' free speech rights.

Instead, by seeking routine protest guidelines, Two Rivers sought only to protect its very young students from an adult-oriented and sexually explicit anti-abortion protests. *See e.g.,* App.

[6] In *Doe v. Burke*, 133 A.3d 569 (D.C. 2016), this Court held that in the context of a special motion to quash under D.C. Code § 16-5503 there was a presumption of an award of attorney fees to prevailing party. *Id.* at 576. This Court did not decide, however, what standard applies to a prevailing defendant in the context of a special motion to dismiss under D.C. Code § 16-5502 (i.e., "frivolous litigant" or "special circumstances"), which was the issue presented in this matter.

at 520 (discussing that the Protesters had "boisterous protests [with] angry demonstrators, some of whom displayed graphic images of aborted fetuses, [that] were upsetting and even traumatic for young children.").

Second, when the Protesters demanded in e-mails and other communications that Two Rivers support their pro-life values, the Charter School choose not, as it routine for the institution, to enter this heated debate. App. at 519-20. The Protesters did not approve of Two River's neutrality, and "problem[s] arose because [the Protesters] objected when Two Rivers chose not to take their side in this dispute." App. at 519-20.

Third, had this case not been extended over more than five-years, Two Rivers's parents could have intervened to assert claims on behalf of their children, as this Court preferred for standing purposes and the Protesters admit would have successfully crystallized the time, place, and manner claims originally brought by Two Rivers. App. at 520-21. Crucially, this finding means "Two Rivers had substantial justification for its claims"; the only problem was that Two Rivers could not assert the claims on behalf of their students. *Id.* The students' parents needed to assert the claims instead, a fact that the Protesters concede. App. at 520-21.

Fourth, D.C. law immunizes charter schools from liability unless the institution's conduct constitutes gross negligence, an intentional tort, or a crime. App. at 522. D.C.'s exception protections for charter schools "constitutes a special circumstance that distinguishes Two Rivers from other plaintiffs who bring cases dismissed through special motions to dismiss." App. at 522.

Fifth, being a non-profit institution, Two Rivers has limited financial resources—that would certainly be stretched thin if more than a million attorney fees are awarded. App. at 522. Even Defendants admit that such an award would cause "severe negative" consequences on Two

River's ability to function at full capacity. App. at 522.

Again, while each of these circumstances would not alone be special, together these factors constitute a special circumstance, thereby making an award of attorney fees unjust.

B. Alternatively, should the Court believe fees are warranted, the Protesters' $1.1-Million request is "grossly excessive."

The Protesters ask this Court to discard the Superior Court's finding that the Protesters' fee requests are "grossly excessive" because the Superior Court "did not engage[] with [the Protesters]' fee motions or support[ing] evidence, or cite to any authority to support its opinions." Joint Br. at 20. This assertion is false: The Superior Court clearly justified its finding. It held that "[the Protesters'] briefs were often overlapping and duplicative," and their rates were excessive as compared to the needs of common-law tort claims, thereby not justifying exceeding traditional fee rates. *See* App. at 500 (Order at 9 n.9 (citing *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 Enters. v. Telewizja Polska S.A.*, 278 F. Supp. 3d 210, 219 (D.D.C. 2017).

These justifications are exactly how the Superior Court should undertake a "meticulous review" of the Protesters' requests. *See, e.g., Joiner v. City of Columbus*, No. 1:14CV090-SA-DAS, 2016 WL 55336 (N.D. Miss. Jan. 4, 2016) (detailing the process of "meticulously comb[ing] through the billing summary"). While this brief will not undergo piece-by-piece analysis of each of the Protesters' requests, like it did in its Superior Court brief, *see* App. 340–52, it is important to emphasize how Superior Court correctly reviewed the Protesters' fee requests.

This Court has held that the fundamental purpose of the fee award is to fairly compensate an attorney for his or her efforts. *See Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980).

And to limit awards to "fair" compensation, the Court must *never* enter an award that creates a "windfall." *See Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988 (D.C. 2007). To prevent windfalls, the Superior Court must determine if the attorneys spent a reasonable amount of time on a case's tasks. *Id.*; *see also Miller v. Holzmann*, 575 F. Supp. 2d 2, 11 (D.D.C. 2008) (finding that an award of "reasonable attorneys' fees" is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate); *Fred A. Smith Mgmt. Co. v. Cerpe*, 957 A.2d 907, 918 (D.C. Cir. 2008).

The Superior Court did just this, finding the time spend on the case's tasks by the Protesters' attorneys resulted in "overlapping and duplicative" filings. App. at 500 (Order at 9 n. 9). Specifically, the Superior Court found that "[t]he three [Protesters] 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." App. at 500 In turn, the Superior Court satisfied the requirement of evaluating the reasonableness of the Movants' hourly charges. And it found those charges to be "grossly excessive." App. at 500.

By finding the "rates [to be] excessive"— given "[the Protesters] d[id] not justify rates exceeding" traditional hourly rates because "this case involving two common-law tort claims[,]" not some "sufficiently complex" matter typically requiring far more involvement and planning— the Superior Court properly prevented an unjust windfall benefiting the Protesters. App. at 500 n.9.

That said, the D.C. Anti-SLAPP amendments discussed above make this discussion moot because attorney fees and costs cannot be levied against Two Rivers as a District public charter

school. If the above issues do not resolve the appeal entirely, the Court's "grossly excessive" determination should be affirmed.

IV. The Superior Court erred in awarding the Protesters costs under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502(a).

While Two Rivers admittedly did not challenge line-by-line the roughly $9,000 in costs sought by the Protesters– choosing instead to focus on the inappropriateness and "grossly excessive" nature of the nearly $1.1 million request of attorneys' fees—the fact remains that Two Rivers did not concede an award of costs either. App. at 504. In the conclusion of its opposition to the Protesters' motion seeking an award, Two Rivers plainly argued:

- "[T]his Court should deny Defendants' requests for attorneys' fees *and costs* because Two Rivers is immune from civil liability[.]" App. at 352-53 (emphasis added).
- "The record here does not support such a finding [that Two Rivers's claims are frivolous] and, therefore, Defendants' requests should be denied *in their entirety*." App. at 353 (emphasis added).

Thus, the Superior Court erred in awarding the Protesters costs on the ground the Two Rivers conceded the issue. App. at 503-04. Given the issues discussed above—particularly the new law and Two Rivers's immunity from civil liability—the award of costs must be vacated.

CONCLUSION

To the extent the Improvement Act becomes effective during the pendency of this appeal, this Court should immediately affirm the Superior Court's order denying Appellants attorneys' fees in this matter and vacate its award of costs as the D.C. Anti-SLAPP would no longer apply in this matter. Indeed, this Court should affirm the denial of fees and vacate the award of costs even if the new law does not take effect or, for whatever other reason, this Court must reach the merits.

March 27, 2023

Respectfully submitted

/s/ *Michael L. Murphy* `

Michael L. Murphy
BAILEY GLASSER LLP
1055 Thomas Jefferson Street, NW
Suite 540
Washington, DC 20007
T: 202.462.2101
F: 202.463.2103
mmurphy@baileyglasser.com

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Brief of Appellee & Cross-Appellant Two Rivers Public Charter School, Inc. was filed this March 27, 2023, through the Court's EFS system, which will serve counsel of record:

Mathew D. Staver
Horatio G. Mihet
Roger K. Gannam
LIBERTY COUNSEL
P.O. Box 540774
Orlando, Florida 32854
(407) 875-1776
mstaver@LC.org
hmihet@LC.org
rgannam@LC.org

Stephen M. Crampton
THOMAS MORE SOCIETY
P.O. Box 4506
Tupelo, Mississippi 38803
(662) 255-9439
scrampton@thomasmoresociety.org

Patrick G. Senftle
PRESSLER, SENFTLE & WILHITE P.C.
1432 K Street, N.W., 12th Floor
Washington, DC 20005
(202) 822-8384
psenftle@presslerpc.com

John R. Garza
GARZA LAW FIRM, P.A.
Garza Building
17 West Jefferson Street,
Suite 100
Rockville, Maryland 20850
(301) 340-8200
jgarza@garzanet.com

/s/ *Michael L. Murphy* `
Michael L. Murphy
BAILEY GLASSER LLP

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.

No. 22-cv-0752 (Cross-Appeal)
No. 22-cv-0721 (Lead)
No. 22-cv-0736 (Consolidated)
No. 22-cv-0741 (Consolidated)

Case Number(s)

Signature

Michael L. Murphy

Name

March 27, 2023

Date

mmurphy@baileyglasser.com

Email Address