SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Mark Z. Jacobson, Ph.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	2017 CA 006685 B
	)	Judge Elizabeth Wingo
Christopher T.M. Clack, Ph.D.	)	Next Court Date: None Scheduled
	)	
and	)	
	)	
National Academy of Sciences,	)	
	)	
Defendants.	)	
	)	

DEFENDANT CHRISTOPHER CLACK'S OPPOSITION TO PLAINTIFF'S MOTION FOR RELIEF FROM A JUDGMENT AND TO ALTER JUDGMENT

Defendant Christopher Clack hereby opposes Plaintiff's motion for post judgment relief under Rules 60(b)(1)-(3) and Rule 59(e). Plaintiff has simply reargued points he has made to the Court on numerous prior occasions all of which have been previously considered and rejected. Plaintiff argues (again) that issues raised by the Clack Paper do not constitute "scientific disagreements" but instead were "bad faith," "dishonest", "unethical" or "reckless" misrepresentations meant to make him appear ridiculous. Plaintiff has not identified any "clear error" of fact or law and has not otherwise met any of the criteria that would justify the requested relief.

ARGUMENT

I. **Defendant Cannot Meet the Requirements Under Rule 60(b) or Rule 59(e).**

In order to obtain relief under Rule 60(b)(1) a plaintiff must show "mistake", inadvertence or excusable neglect; under Rule 60(b)(2) a plaintiff must show newly discovered

evidence that withreasonable diligence could not have been discovered in time to move for a new trial under rule 599b) and under Rule 60(b)(3) a plaintiff must show that Dr. Clack engaged in fraud relating to the proceeding. " A motion under Rule 60(b) may not be utilized as a substitute for an appeal." *State Farm Mut. Auto. Ins. V. Brown*, 593 A.2d 184 (D.C. 1994)(quoting Joseph v. Parekh, 351 A.2d 204, 205 (D.C. 1976). In order to obtain relief under Rule 59(e) the plaintiff must show a clear error of law or fact. Plaintiff makes essentially the same arguments with respect to his requests for relief under Rule 60(b) or 59(e) and has failed to establish a basis for relief..

A. Alleged Factual and Legal Errors

Plaintiff claims the following factual errors: (1) the Court did not understand the meaning of the term "scientific disagreement" and; (2) Clack's refusal to agree with Plaintiff's position and change the Clack Paper somehow shows the disputed issues were published in bad faith or recklessly. Plaintiff has submitted four declarations of individuals located in various parts of the world whom he proffers as experts purporting to provide "expert opinions" on the meaning of the term "scientific disagreement" and the definition of what "a fact" is. These four declarations form the entire basis for Plaintiff's claim that the Court made clear errors of fact requiring post judgment relief. Plaintiff correctly cites the Court of Appeals holding that "neither Rule 59(e) nor rule 60(b) is designed to 'enable a party to complete presenting [its] case after the court has ruled against it." *Dist. No. 1 v. travelers Casualty,* 782 A.2d 269, 278 (D.C. 2001), but then proceeds to offer brand new "expert" declarations in purported further presentation of his case. Even if these declarations were not untimely by a matter of years,[1] they are irrelevant, repetitive

[1] There is no reasonable explanation presented as to why such "expert opinions" could not have been proffered to the Court at the time of Plaintiff's initial submissions in this case in 2018 or even at the time of his initial motion for reconsideration filed in May of 2020. Plaintiff's reference to the Caldeira Declaration submitted by Clack in response to Plaintiff's fist Motion for Reconsideration is misplaced. That Declaration was submitted for the sole

of arguments already made, heard and rejected by the Court and are not the proper basis of expert testimony. The meaning of the term "scientific disagreement" and whether something is or is not "a fact" are not questions that require scientific, technical, or other specialized knowledge that is outside this Court's knowledge. Indeed, courts deal with such issues on a daily basis. Finally, the declarants conclusory opinions that the Clack authors were "dishonest," "unethical" "acted in bad faith" etc. are completely baseless and improper. The Court provided a reasoned analysis for its rulings and its determination that the matters at issue are scientific disagreements. Plaintiff obviously disagrees with the Court's position but the fact that he has been able to locate four individuals who apparently agree with his views to simply regurgitate the same arguments he has made throughout this litigation is not a basis for finding a clear error of fact.

B. Alleged Clear Errors of Law.

Plaintiff fares no better on his alleged clear errors of law. His first alleged error of law is that the Court held that Plaintiff was required to show that their must be an accusation of misconduct or dishonesty in order to prove defamation. Plaintiff is simply mistaken regarding the Court[s holding. The Court expressly set out the requirements for a claim of defamation and noted that where the plaintiff is a public figure (as plaintiff admittedly is) he must show the defendant acted with actual malice or reckless disregard for the truth. April Op. at 23. Further, the Court found (and Plaintiff does not dispute) that that the Defendants made a prima facie showing that Plaintiff's claims arise from protected advocacy rights shifting the burden to Plaintiff to establish he is likely to prevail on the merits. The Court's conclusions regarding the non-defamatory nature of the statements at issue are based expressly on the Court of Appeals

purpose of rebutting and clarifying Plaintiff's selective use of incomplete and misleading quotations attributed to Dr. Caldeira himself.

reasoning in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 9D.C. 2016), a case Plaintiff has relied on throughout this litigation. In *Mann* the Court of Appeals clearly stated that in the context of a scientific debate statements that "take issue with the soundness of [plaintiff's] methodology and conclusions [are] protected by the First Amendment. *Id.* at 1242. This Court based its decision squarely on this holding in *Mann*.[2] This Court then went on to distinguish the facts of this case from the *Mann* court's further holding that statements that "are personal attacks on an individual's honesty and integrity and assert or imply as fact that [plaintiff] engaged in professional misconduct and deceit to manufacture the results he desired, if false, do not enjoy First Amendment protection." *Id.* The Court concluded--and explained in detail the reasons why—the Clack Paper's statements could not reasonably be read as such "personal" attacks.[3] The Court's April 20, 2020 opinion is based on controlling Court of Appeals precedent and Plaintiff has not identified a "clear error of law." Finally Dr. Jacobson seems to argue that because large parts of the press appeared to side with the Clack Paper authors' views with respect to the scientific disagreements he was made to appear "odious," "infamous" or "ridiculous." As noted above, based on a thorough review of the record the Court concluded that none of the statements were directed at Dr. Jacobson himself or sought to make him look odious etc. Obviously, the reaction of the scientific community to the relative merits of the arguments is not a basis for defamation.[4]

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[2] April 20, 2020 Opinion at 24 – 25 ("The Court has reviewed the Complaint, the motion and the related pleadings as well as the attachments thereto, and finds that the three asserted "egregious errors" are statements reflecting scientific disagreements, which are appropriately explored and challenged in scientific publications;…"

[3] Id. ("[T]hey simply do not attack Dr. Jacobson's honesty or accuse him of misconduct."); see also n.11 detailing the specific claims and the Court's analysis).

[4] Dr. Jacobson includes a number of quotes in which he appears to assert that the mistakes pointed out by the Clack authors imply he "is stupid" "incompetent", "deserving to be laughed at" etc. (Pl. Brief at p. 13) Again, as the Court found none of those statement can reasonably be read into the scientific analysis in the Clack Paper.

Plaintiff's second alleged error of law claims the Court should have provided him more of a benefit of the doubt and improperly dismissed his claim because "multiple sets of facts support Plaintiff's case." This simply repeats the arguments above that the Court made factual errors relating to the meaning of "scientific disagreement", did not adequately address the evidence and applied the wrong defamation law.

Plaintiff has failed to meet his burden under Rule 60(b) or Rule 59(e).

Conclusion

For the reasons set forth above, the Court should deny Plaintiff's Motion for Relief From Judgment and to Alter a Judgment.

Dated: October 6, 2021

Respectfully submitted,

/s/ Drew W. Marrocco

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2021, I caused the foregoing Opposition to Plaintiff's Motion for Relief From Judgment and to Alter A Judgment, to be served via CaseFileXpress on the following:

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