

## Comments from Mark Jacobson on anti-SLAPP case

1) On June 26, 2022, the California Labor Commissioner ordered Stanford University to reimburse me for \$62, 101.99 in legal costs and \$7,452.24 in interest (thus, a total of \$69,554.23) for the 3 years of legal expenses I incurred prior to that date under California Labor Code 2802 for "necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." The Commissioner also ruled that it would decide on the 75K payment to Clack if I did not win the D.C. Appeal. This would presumably apply to the 428K to NAS as well.

The Commissioner ruled that my filing of lawsuits and defending against attorney's fee lawsuits in D.C. was a necessary work expense. A reason was that a Stanford official acknowledged "with 100% certainty" that "reputation is essential to the career of an environmental researcher." The Commission then stated, "In the course of his duties on behalf of Defendant (Stanford), Plaintiff was working within the scope of his employment to publish journal articles as a condition of employment. The writing and publishing of the Clack paper, to the extreme, tarnished Plaintiff's reputation...As such, Plaintiff brought suit against Clack and PNAS to remedy the damage caused by Clack stating false-facts in his paper, as Stanford refused to mitigate the damage on behalf of Plaintiff..."

Stanford has appealed this ruling and posted a bond for the \$69,554.23.

2) Similarly, I have appealed the D.C. trial Court's. Here is my appeal

<https://web.stanford.edu/group/efmh/jacobson/Articles/I/CombiningRenew/22-08-25-Stamped-Appellant-Brief.pdf>

I believe the trial court's ruling will be overturned for several reasons:

1) The trial court's decision was based almost entirely on its use of California law to interpret D.C.'s Anti-SLAPP statute. However, a recent D.C. appellate case [*Saudi Am. Pub. Rel's. Affs. Comm. v. Inst. For Gulf Affs.*, 242 A.3d 602, 611 (D.C. 2020)] makes clear that the D.C. Appellate Court interprets the D.C. Anti-SLAPP Act based on the "plain language of the statute" and explicitly NOT on California law:

"Preliminarily, we note that both parties invite us to follow the precedent of other states, **including California** and Texas, interpreting their anti-SLAPP statutes. **We decline to do so...Rather than selectively follow other state court decisions**, we return to basic principles of statutory interpretation to construe the D.C. Anti-SLAPP Act and look to the **plain language of the statute**. See *District of Columbia v. Place*, 892 A.2d 1108, 1111 (D.C. 2006)."

Thus, the entire fee award may be reversed for this reason alone.

2) The trial court's decision was further based on its applying the catalyst theory of the D.C. FOIA to the D.C. anti-SLAPP Act. However, the D.C. Appellate Court in [ *Fraternal Order of Police, Metro. Labor Comm. v. District of Columbia*, 113 A.3d 195, 200 (D.C. 2015)] "reject(s) the catalyst theory in non-FOIA contexts." In addition, two other cases interpreting D.C.'s anti-SLAPP law reject charging legal fees following a voluntary dismissal. Zero cases in D.C. allow it. In other words, there is no legal precedent in D.C. for awarding fees in an anti-SLAPP lawsuit following a voluntary dismissal, and California law cannot be used.

This is particularly the case since neither Dr. Clack nor NAS won a single judgment by the court. They did NOT obtain a court-ordered dismissal, let alone a dismissal with prejudice, which is what they asked for. I voluntarily dismissed without prejudice, which means I could re-file the case. Because I could re-file, D.C. case law prohibits me from being charged for their legal defense of a future action *Thoubboron*, 809 A.2d at 1210-11.

3) As evidenced by four experts from three continents, with over 100 years of experience, including one expert who is a member of the Committee on Publication Ethics, who provided eight declarations in this case, I properly asserted defamation claims. My lawsuit was correctly filed, and it correctly asserted that Dr. Clack and NAS defamed me and my students.

The experts concluded that NAS and Dr. Clack published false facts, not scientific disagreements, "dishonest(ly)", "in bad faith", "with reckless disregard for the truth," "unethical(ly)", and/or while "failing to follow due diligence".

Here are the eight declarations:

<https://web.stanford.edu/group/efmh/jacobson/Articles//CombiningRenew/20-07-20-HowarthDeclaration.pdf>

<https://web.stanford.edu/group/efmh/jacobson/Articles//CombiningRenew/20-07-22-IngroffDeclaration.pdf>

<https://web.stanford.edu/group/efmh/jacobson/Articles//CombiningRenew/20-08-04-DiesendorfDeclaration.pdf>

<https://web.stanford.edu/group/efmh/jacobson/Articles//CombiningRenew/20-08-10-StrachanDeclaration.pdf>

<https://web.stanford.edu/group/efmh/jacobson/Articles//CombiningRenew/21-09-14-HowarthDeclaration.pdf>

<https://web.stanford.edu/group/efmh/jacobson/Articles//CombiningRenew/21-09-14-IngroffDeclaration.pdf>

<https://web.stanford.edu/group/efmh/jacobson/Articles/I/CombiningRenew/21-09-18-DiesendorfDeclaration.pdf>

<https://web.stanford.edu/group/efmh/jacobson/Articles/I/CombiningRenew/21-09-17-StrachanDeclaration.pdf>

Of note, all four destroy the fake claim that the issues at hand are issues of "scientific disagreement" versus false facts. For example, Diesendorf, in his first declaration, states,

"As a scientist, I understand that a fact is something that has either been proven to be true or is true by definition or logical argument...As a scientist, I understand that a scientific disagreement can occur when we have incomplete information about the system of interest and different scientific hypotheses can be held that are consistent with the available data, logic and existing scientific facts."

"My assessment is that Question 11.1 is a question of fact that I have verified from studying both the Jacobson PNAS paper itself and its reference 22 (also by Jacobson), which is the source of the data in Table 1 of Jacobson's PNAS paper. Furthermore, the latter reference states clearly on page 2095 that "The table is derived from a spreadsheet analysis of annually *averaged* end-use load data" (my italics). Therefore, the answer to Question 11.1 is "average", as stated by Jacobson."

Similarly, Howarth, in his first declaration, states,

**The issues I address in points #10 and #11 above are questions of fact**, and are examples where the Clack Paper failed to follow due diligence. In my professional judgement, these facts can be correctly determined from evidence in the Jacobson et al. paper and in the sources cited there.