APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 18-CV-1112

ROBERT "BOB" KING, APPELLANT,

v.

SPECIALTY HOSPITAL OF WASHINGTON, ET AL.,
APPELLEES.

Appeal from the Superior Court of the
District of Columbia
(CAB-3742-14)

(Hon. Anthony C. Epstein, Trial Judge)

(Submitted March 10, 2020 Decided September 8, 2021)

Before EASTERLY and BECKWITH, *Associate Judges*, and LONG, *Senior Judge of the Superior Court of the District of Columbia.**

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: In this defamation case, King challenges two Superior Court rulings resulting in a judgment against him in favor of appellees, Specialty Hospital of Washington, LLC ("SHW") and the Capitol Hill Nursing Center at Specialty Hospital of Washington. In a comprehensive order of September 19, 2018 (hereinafter "Order"), the Hon. Anthony Epstein granted what is known as a "special motion to dismiss" several of appellant's claims pursuant to the District

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* Sitting by designation pursuant to D.C. Code § 11-707(a) (2012 Repl.).

of Columbia Anti-SLAPP Act, D.C. Code §§ 16-5501 to 5505 (2012 Repl. & 2021 Supp.) and granted a motion for partial summary judgment in favor of appellees on the claims not covered by the special motion to dismiss. We conclude that although the trial court erroneously granted the special motion without convening a statutorily required hearing, such error was harmless and the grant of the motion was appropriate. As a separate matter, we conclude in our de novo review that the trial court correctly granted the motion for partial summary judgment on claims not related to the Anti-SLAPP motion.

I. Background

On June 17, 2014, King filed a civil action against appellees (collectively known hereafter as "the Hospital") and two individual defendants. The two individuals were Susan Bailey and Frank Wilich, the Chief Executive Officer and the President of SHW, respectively.[1] The civil action embraced two causes of action directed against all four defendants: defamation (Count I) and false light invasion of privacy (Count II). King sought both compensatory and punitive damages.

King asserted in his civil action that he is a "public figure" due to his service as an ANC (Advisory Neighborhood Commission) Commissioner for many years. He also noted a lengthy connection to the Hospital

[1] Bailey and Wilich are not parties in this appeal because they were dismissed from the case for separate reasons, and appellant did not seek to appeal those rulings.

based upon his status as the stepfather of LaShawn M. Wynn, who had been a patient there for more than fifteen years. She died there on November 21, 2013.

King further alleged that he met with Bailey at the Hospital on December 9, 2013, on the subject of alleged problems with medical care at the Hospital. He disclosed to Bailey his belief that Wynn's death had resulted from the Hospital's negligence. Despite assuring appellant that she would provide him with an investigative report, Bailey informed King by phone on January 30, 2014, that she would not produce the report and was not prepared to meet with him any further. According to appellant, Bailey explained that she was taking this position after learning that King's wife was retaining counsel to sue the Hospital.

King put forth two factual scenarios as the underpinnings of his claims. In the first scenario, he alleged that on January 30, 2014, Bailey telephoned the Metropolitan Police and accused King of threatening her and a list of other Hospital staff with a bomb detonation and gun violence. On the following day, January 31, 2014, as a follow-up to the police report, Bailey and SHW filed a complaint and a motion for a temporary restraining order (TRO) against King. In the complaint, they accused King of making the aforementioned threats as reported to the police, and they sought emergency relief in the form of a TRO. The TRO was granted.

The second scenario involves an incident allegedly occurring on Sunday, February 2, 2014. King contends

that he was then under contract with the re-election campaign of Mayor Vincent Gray. On that day, according to King, someone from the Hospital telephoned Chuck Thies, then campaign manager and treasurer for Mayor Gray and for whom King was working as a consultant, and threatened to "report that fact and substance of the TRO" if King pursued any action to expose the medical malpractice of the Hospital regarding the treatment of his step-daughter. The caller predicted that this could cause the Mayor to lose his bid for re-election. In his complaint, King did not identify any particular individual he knows or suspects of placing the phone call to Thies.

The litigation was interrupted by a bankruptcy stay, due to the Hospital's petition in bankruptcy. The stay was lifted after a lengthy delay. Then, in the comprehensive Order of September 19, 2018, Judge Epstein granted a "special motion to dismiss" the claims based on the alleged call to Thies, pursuant to the Anti-SLAPP Act, and granted the motion for partial summary judgment in favor of appellees regarding the claims arising out of the police report and TRO application. For the reasons set forth below, we affirm.

II. The Motion for Partial Summary Judgment

The motion for partial summary judgment concerned claims based solely on the first scenario, i.e., the police report, civil action, and motion for TRO. Judge Epstein concluded that those statements were privileged as a matter of law. He drew this conclusion

based upon the earlier grant of summary judgment by the previously assigned judge, resulting in the dismissal of Bailey as a defendant. The Hon. Thomas J. Motley had determined that the police report and related court filings were privileged as a matter of law. In his written decision, Judge Motley relied upon well-established case law of the District of Columbia, holding that statements made incidental to judicial proceedings are absolutely privileged as to defamation as long as they are relevant to the proceeding. Judge Motley emphasized that statements made to police for the purpose of initiating a criminal proceeding are absolutely privileged because they are statements made preliminary to or during the course of judicial proceedings. In turn, Judge Epstein applied the law of the case doctrine.

Whether a party is entitled to summary judgment is a question of law that we review de novo. *Phillips v. Fujitec America, Inc.*, 3 A.3d 324, 327-28 (D.C. 2010). King states, "In granting . . . partial summary judgment . . . the trial court judge . . . determined that no material facts existed on which Plaintiff could prevail at trial" but in so doing "ignored the prior determination by Judge Motley" that there was a material issue of fact as to whether an agent of SHW called Thies. The core weakness in King's position is that he misidentifies the scope and basis of Judge Epstein's partial summary judgment ruling. Judge Motley's grant of partial summary judgment addressed only clams against Bailey arising from the police report and TRO application, *not* any claims pertaining to the alleged

phone call to Thies. In granting partial summary judgment in favor of the Hospital *on the same claims related to the police report and TRO application*, Judge Epstein applied the law of the case doctrine, i.e., recognizing as controlling Judge Motley's conclusion that any statements made in the police report and TRO application were absolutely privileged as a matter of law.[2] For this reason, King's argument regarding the effect of Judge Motley's reference to the phone call claims is inapposite. When the two partial summary judgment decisions are read together, it is clear that Judge Epstein's ruling is fully consistent with Judge Motley's prior resolution of the privilege issue.

King does address the issue of absolute privilege, but only in a part of his brief that is irrelevant to the summary judgment issue, i.e., in his Anti-SLAPP Act analysis. Even here, King does not assert that the statements of Bailey and the Hospital to police or in court filings were not absolutely privileged. Instead, he seems to concede that the trial court's ruling was correct on the issue of privilege. *See Park v. Brahmbhatt*, 234 A.3d 1212, 1215 (D.C. 2020); *Stith v. Chadbourne & Parke, LLP*, 160 F. Supp 2d 1, 8 (D.D.C. 2001); *see also* Restatement (Second) of Torts § 587 & cmt. b (1977). His only other argument challenging Judge Epstein's ruling is that other state legislatures have

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[2] *See Tompkins v. Washington Hosp. Ctr.*, 433 A.2d 1093, 1098 (D.C. 1981) (explaining how the doctrine bars a trial court from reconsidering the same question of law that was presented to and decided with finality by another court of coordinate jurisdiction).

carved out exceptions to the protections offered by their own Anti-SLAPP statutes for false statements. This is a nonsequitur, since Judge Epstein clearly did not dismiss the claims related to the call to the police or statements made in the TRO proceedings under the Anti-SLAPP Act.

For the reasons noted above, we discern no error in the trial court's partial summary judgment ruling, based on the arguments King presented to the trial court.

III. The Special Motion to Dismiss

The trial court granted the Hospital's special motion to dismiss the claims founded upon the alleged phone call to Chuck Thies after the Hospital had obtained the TRO. Specifically, the trial court determined that the Hospital had carried its burden to make a prima facie showing that the alleged phone call was a protected "act in furtherance of the right of advocacy on issues of public interest" under D.C Code § 16-5502(b), and that King had failed to carry his resulting burden to demonstrate that his claim was likely to succeed on the merits. Order at 4, 5.

Whether a party is entitled to dismissal under the Anti-SLAPP Act is a question of law subject to de novo review. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1240 (D.C. 2016).

We begin with King's argument that the trial court erroneously ruled on the motion without holding a

hearing, as required by D.C. Code § 16-5502(d). We agree. As we explained in *Saudi American Pub. Relations Affairs Comm. v. Inst. for Gulf Affairs ("SAPRAC)*, 242 A.3d 602 (D.C. 2020), the statute mandates, without exception, that the trial court afford the parties "a real-time, interactive proceeding . . . to ensure that both parties ha[ve the] opportunity to flesh out their arguments" and present evidence to the court, "as is appropriate under the circumstances." *Id.* at 609-10.

However, as we also explained in *SAPRAC,* "[o]ur analysis does not end with the determination that a hearing should have been held"; we must still consider "whether remand is required." *Id.* at 610. King has not identified a reason to remand the case, and based on our review of this appeal, we discern none. Two points inform our conclusion.

First, without citing to the statute, King indicates a desire to challenge the determination that he has a public figure status, thereby triggering the coverage of the statute, *see* D.C. Code § 16-5501(3); *see also Doe No. 1 v. Burke*, 91 A.3d 1031, 1041 (D.C. 2014).[3] Yet King identified himself as a "public figure" in his complaint (asserting he "has been the subject of local and national press"), and thus cannot argue that the trial

[3] King's challenge to only the trial court's determination that he is a public figure leaves unchallenged the other bases on which the trial court determined that the alleged statement to Thies was "in connection with an issue of public interest." Those factors included whether the alleged call "implicated[d] health, safety, and community well-being" and whether it "related[d] to the District of Columbia.

court was wrong to accept this representation. *See Mason v. United States*, 956 A.2d 63, 66 (D.C. 2008) (observing that judicial estoppel may be appropriate based on consideration of three factors: "First, [whether] a party's later position . . . [is] clearly inconsistent with its earlier position. Second, . . . whether the party has succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. . . . [T]hird[,] . . . whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.") (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)). We are persuaded that the facts herein warrant the application of judicial estoppel.[4]

Second, to the extent that King argues that he is entitled to a hearing on remand to demonstrate that he is likely to succeed on the merits of his claims, we also disagree that he is entitled to such. The reason is simple, i.e., he is unable to prove that an employee or other agent of the Hospital actually made a false or defamatory statement about him to Thies. *See Competitive Enter. Ins. v. Mann*, 150 A.3d at 1240; *Armstrong v. Thompson*, 80 A.3d 177, 188 (D.C. 2013).

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[4] We do not pause to discuss whether the alleged telephone statement to Thies was a communication "to members of the public" as an anti-SLAPP motion would require, because King did not raise this issue below as a challenge to the motion and has not raised this issue in his briefing before this court.

The trial court firmly identified the problem of lack of evidence. Judge Epstein observed that the Hospital had specifically denied that any agent or employee made such a call and that King had "not offer[ed] any evidence that anyone called the mayoral campaign on the Hospital's behalf to accuse Mr. King of threatening violence against the Hospital." Order at 5.[5]

Furthermore, King effectively conceded before the trial court that he did not have any evidence to present substantiating that a phone call had ever taken place, and he made this concession by requesting to take discovery on this subject, pursuant to D.C. Code § 16-5502(c)(2) (2012 Repl.) *See* Order at 7-8. The trial court denied this request, concluding that King had not demonstrated that discovery would be helpful. *Id.* at 8. Judge Epstein explained that, although discovery against appellees had been stayed due to the bankruptcy case, King still "had a full and fair opportunity to get discovery from Bailey and other current or former Hospital employees and from third parties like Mr. Thies," and yet had not done so. *Id.* King has not challenged the trial court's discovery ruling on appeal.

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[5] The assessment by Judge Epstein that there was no proof of any phone call to Thies was not in tension with Judge Motley's earlier observation in footnote one of his order that there was a disputed issue of material fact with respect to the hospital's communications. Judge Epstein was considering a different legal question, namely, whether King had carried his burden under the Anti-SLAPP Act to show he was likely to succeed on the merits.

We also note King's explicit admission in his Reply Brief that he did not attempt to depose Thies during the Bailey phase of the case and that he "did not include specific evidence in his opposition to the Defendant's Motion to Dismiss that . . . Mr. Thies of the Gray campaign had received the alleged defamatory communication." But King asserts for the first time on appeal (1) that he has an email from Thies confirming that such a call was made to Thies and (2) that he "has since procured telephone records for Mr. Thies showing calls from telephone numbers emanating from the Hospital on the day that the TRO was obtained against[] Mr. King."

This email only states, "I protected you from public scrutiny when your restraining order could have created political problems for the campaign."[6] King's proffer concerning telephone records is insufficient to warrant a remand hearing, for three reasons. First, the language he quotes from the email does not say anything about a communication from an employee or agent of the Hospital to Thies concerning the TRO. Second, the relevance of the phone records is unclear because appellant alleged that an agent of the Hospital called Thies "on the morning of Sunday, February 2, 2014," *two days after* the TRO was issued on January 31, 2014. *See* Complaint at ¶¶ 40, 42. For this reason, the phone call referenced in the belated proffer could not have been the same phone call that contained the alleged threat. Third, even if the email and phone

[6] The Hospital provides us with a copy of the email with its surreply. It says what King represents it to say.

records contained some evidence that Thies had been contacted by the Hospital concerning the TRO, King's proffer comes far too late and is made in the wrong forum.[7] D.C. Code § 17-305(a); D.C. App. R. 10(a) (the record on appeal consists of "the original papers and exhibits filed in the Superior Court," "the transcript of proceedings, if any," and a "certified copy of the docket entries prepared by the Clerk of the Superior Court"); *see also Hawkins v. Hall*, 537 A.2d 571, 573-74 (DC. 1988) (collecting cases for the proposition that this court will not consider factual contentions not presented to the trial court).[8]

IV. Other Issues

We briefly address two additional issues raised by King. One, on August 2, 2018, King requested a 30-day extension to obtain counsel before responding to the

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[7] By way of explanation, King asserts for the first time that he had "very limited resource[s] as a retiree"; but, as a plaintiff who was not proceeding in forma pauperis, it was his obligation to gather his evidence and prosecute his case. *Mann*, 150 A.3d at 1233. ("[O]nce the burden has shifted to the claimant, [D.C. Code § 16-5502(b)] requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim.").

[8] King also argues that the trial court should not have entertained the special motion to dismiss because it was untimely filed. However, he did not make that argument below. Absent a showing of a clear miscarriage of justice, which has not been argued or shown to us, this court does not consider unpreserved arguments in civil cases on appeal. *See Pajic v. Foote Properties, LLC*, 72 A.3d 140, 145-46 (D.C. 2013) ("In general, this court's review on appeal is limited to those issues that were properly preserved.").

Hospital's motion for partial summary judgment and special motion to dismiss under the Anti-SLAPP Act, and that the trial court granted him an extension of time to file until September 1, 2018. King argues that the trial court "violated [his] due process [rights] by failing to award him the requested time in order to obtain counsel" after the bankruptcy stay was lifted. King cites no law to support his due process argument. He raises no argument as to how the trial court's decision to grant him only a portion of the requested extension amounted to a constitutional violation. *But see Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.") (brackets and internal quotation marks omitted).

Two, King complains that Judge Epstein granted him an extension of thirty days from the date of the motion, instead of thirty days from the issuance of the order (as King had requested). We certainly would not reverse the judgment based upon this procedural issue, because King has failed to explain why the judge's choice of how to calculate the thirty days, or whether to grant the full thirty days at all, was an abuse of discretion. King suffered no harm because he met the deadline prescribed in the grant of his motion.

In addition, King contends that Judge Epstein committed reversible error in denying King's motion

for default judgment as to Capitol Hill Nursing Center. This motion is based solely upon the alleged failure of Matthew M. Davey, Esq. to file a praecipe in order to enter his appearance on behalf of the nursing home, pursuant to Rule 101(b) of the Superior Court Rules of Civil Procedure. King argues that this matters because it means that the nursing home failed to respond to his complaint and, thus, he was entitled to a default judgment. This argument is frivolous. The nursing home was plainly represented at all stages by counsel, as evidenced by counsel's identification of themselves as "Attorneys for Defendants" on the answer, the partial motion for summary judgment, and the special motion to dismiss. *See* D.C. Superior Court Civil Rule 101 (providing that"[a]n attorney *may* enter an appearance on behalf of a party by . . . including the attorney's name on the first pleading or paper filed on behalf of the party") (emphasis added).

For the foregoing reasons, the trial court's judgment is

Affirmed.

ENTERED BY DIRECTION
OF THE COURT:

/s/ Julio A. Castillo
JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Anthony C. Epstein

Director, Civil Division

Copies e-served:

William H. Brammer, Jr., Esquire

Andrew Butz, Esquire

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

ROBERT "BOB" KING	:	
v.	:	Case No. 2014 CA 003742 B
SPECIALTY HOSPTIAL OF WASHINGTON, LLC, *et al.*	:	

ORDER

(Filed Sep. 19, 2018)

The Court grants the special motion to dismiss and the summary judgment motion filed by the two remaining defendants, Specialty Hospital of Washington, LLC ("SHW") and Capitol Hill Nursing Center ("CHNC") (collectively the "Hospital"). The Court is entering a separate judgment in favor of the Hospital. The Court also denies plaintiff Robert "Bob" King's motion for a default judgment against CHNC.

I. INTRODUCTION

Mr. King filed his complaint alleging defamation and false light on June 17, 2014 against the Hospital, the Hospital's CEO Susan Bailey, and the Hospital's President Frank Wilich. On October 3, 2014, the Court dismissed Mr. Wilich under Rule 4(m) for lack of service. On April 14, 2017, the Court granted Ms. Bailey's motion for summary judgment.

On July 19, 2018, the Hospital filed a special motion to dismiss the allegations in ¶¶ 41-44 of the complaint ("MTD"), and a motion for summary judgment on the remaining claims ("MSJ"). On August 31, after an extension of time, Mr. King, representing himself, filed his combined opposition ("Opp."). On September 7, the Hospital filed its reply ("Reply").

On September 15, Mr. King filed a motion asking that the Court enter a default judgment against CHNC because CHNC did not reply to his opposition. Although this motion is not yet ripe, the Court denies it for two reasons. First, the grant of CHNC's and SHW's motions to dismiss and for summary judgment makes it moot. Second, CHNC (and SHW) did not have a duty to file a reply to Mr. King's opposition, and they in fact did file one.

II. SPECIAL MOTION TO DISMISS

A. Legal standard

"A 'SLAPP' (strategic lawsuit against public participation) is an action 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) (quoting legislative history). The Anti-SLAPP Act tries "to deter SLAPPs by 'extend[ing] substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court.'" *Id.* at 1235 (quoting legislative history). "Consistent with the

Anti-SLAPP Act's purpose to deter meritless claims filed to harass the defendant for exercising First Amendment rights, true SLAPPs can be screened out quickly by requiring the plaintiff to present her evidence for judicial evaluation of its legal sufficiency early in the litigation." *Id.* at 1239.

"Under the District's Anti-SLAPP Act, the party filing a special motion to dismiss must first show entitlement to the protections of the Act by 'mak[ing] a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest.'" *Mann*, 150 A.3d at 1227 (quoting D.C. Code § 16-5502(b)). The burden to make prima facie showing is "not onerous." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1043 (D.C. 2014).

"Once that prima facie showing is made, the burden shifts to the nonmoving party, usually the plaintiff, who must 'demonstrate[] that the claim is likely to succeed on the merits.'" *Mann*, 150 A.3d at 1227 (quoting § 16-5502(b)). "[O]nce the burden has shifted to the claimant, the statute requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim." *Id.* at 1233. "[I]n considering a special motion to dismiss, the court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Id.* at 1232. "This standard achieves the Anti-SLAPP Act's goal of weeding

out meritless litigation by ensuring early judicial review of the legal sufficiency of the evidence, consistent with First Amendment principles, while preserving the claimant's constitutional right to a jury trial." *Id.* at 1232-33.

"If the plaintiff cannot meet that burden [to establish a likelihood of success], the motion to dismiss must be granted, and the litigation is brought to a speedy end." *Mann*, 150 A.3d at 1227. Section 16-5502(d) provides, "If the special motion to dismiss is granted, dismissal shall be with prejudice." Section 16-5502(d) also requires the Court to hold an "expedited hearing" on the motion and to issue a ruling "as soon as practicable after the hearing."

Under D.C. Code § 16-5502(c)(1), the filing of a motion to dismiss generally results in an automatic stay of discovery "until the motion has been disposed of." Section 16-5502(c)(2) provides for an exception: "When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted."

B. Discussion

Mr. King's claims arise out of three alleged actions by the Hospital. First, on January 30, 2014, the Hospital reported to the Metropolitan Police Department ("MPD") that Mr. King had threatened the Hospital and several of its employees with bomb and gun violence. *See* Complaint ¶ 33; Statement of Material Facts

("SOMF") ¶ 14 (MSJ Ex. C). Second, on January 31, the Hospital filed a motion for a temporary restraining order ("TRO") based on the same allegation. *See* Complaint ¶ 39; SOMF ¶ 39. Third, Mr. King alleges that on February 2, 2014 when he was working on a contract basis for then-Mayor Vincent Gray's reelection campaign, an "agent or employee [of the Hospital] telephoned Mayor Gray's Campaign Manager and Treasurer, Mr. Chuck Thies, and stated to him that if Mr. King pursued any action to expose medical malpractice by [the Hospital] on behalf of his late stepdaughter . . . , they (presumably agent(s) and/or employees of [the Hospital]) would report the fact and substance of the TRO filed in D.C. Superior Court and predicted that this action would cause the Mayor to lose his reelection bid." Complaint ¶¶ 41-42.

In its special motion to dismiss, the Hospital seeks dismissal of the claim concerning the alleged call to the mayoral campaign. The Court grants the motion because (1) the Hospital has made a prima facie showing that any such call is covered by the Anti-SLAPP Act, (2) Mr. King has not carried his burden to demonstrate a likelihood of success on the claims based on this allegation, and (3) Mr. King has not shown that targeted discovery will likely enable him to defeat the motion.

1. Prima facie showing

The Hospital has carried its limited burden to make a prima facie showing that the alleged call was

an act in furtherance of the right of advocacy on an issue of public interest.

D.C. Code § 16-5501(1)(B) defines an "act in furtherance of the right of advocacy on issues of public interest" to include "expression or expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest." Section 16-5501(3) defines an "issue of public interest" to include "an issue related to health or safety; . . . community well-being; the District government; [or] a public figure."

The alleged statement by a Hospital employee to the mayoral campaign was in connection with an "issue of public interest." First, Mr. King himself alleges that he is a public figure, due to his long involvement in District politics. *See* Complaint ¶¶ 11-13. Second, the statement that Mr. King had made a bomb threat to a hospital implicates health, safety, and community well-being. Third, the statement to a mayoral campaign in which Mr. King was involved relates to the District government. The crux of Mr. King's claims is that the Hospital's alleged threat to disclose the fact and substance of the TRO was effective and damaging precisely because the public had an interest in whether Mr. King threatened violence against the Hospital.

The unidentified Hospital employee "communicat[ed] views to members of the public" within the meaning of § 16-5501(1)(B). Mr. Thies, the recipient of the call, is a member of the public. It is not clear that § 16-5501(1)(B) requires a communication to more

than one member of the public, but if it does contain this requirement, Mr. King's allegations imply that the caller expected Mr. Thies to relay the Hospital's threat to other members of the Mayor's campaign staff, if not to the Mayor himself. Mr. King does not dispute that members of the campaign staff were members of the public, and the Court knows of no authority supporting a different conclusion.

2. Likelihood of success on the merits

Because the Hospital has made a prima facie showing, the burden shifts to Mr. King to show that he is likely to succeed on the merits of his defamation, false light, or punitive damages claims. Mr. King has not carried this burden because he does not offer any evidence that anyone called the mayoral campaign on the Hospital's behalf to accuse Mr. King of threatening violence against the Hospital.

a. Defamation (Count I)

"To succeed on a claim for defamation, a plaintiff must prove (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement met the requisite standard; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Mann*, 150 A.3d at 1240 (quotation and brackets omitted).

Mr. King has not offered evidence from which a reasonable jury could find that the Hospital made a false and defamatory statement about him to the mayoral campaign. Mr. King does not offer an affidavit or declaration by Mr. Thies stating that he got a call from a person whom Mr. Thies can reliably identify as a Hospital employee. Nor does Mr. King offer any evidence from a person employed by the Hospital who has first-hand knowledge that Ms. Bailey, Mr. Wilich, or anyone else instructed or authorized a Hospital employee to put pressure on the campaign to terminate Mr. King's contract. Indeed, Mr. King admits that he does not know who called Mr. Thies. *See* Opp. 11 ¶ 1 (referring to "alleged false statements made by an unknown employee" of the Hospital); King Dep. 31:16-17 (MSJ Ex. H).

b. False light (Count II)

"To succeed on a claim of false light invasion of privacy, a plaintiff must show: (1) publicity (2) about a false statement, representation, or imputation (3) understood to be of and concerning the plaintiff, and (4) which places the plaintiff in a false light that would be offensive to a reasonable person." *Armstrong v. Thompson*, 80 A.3d 177, 188 (D.C. 2013) (quotation and citation omitted). "These elements are similar to those involved in analysis of a defamation claim, and a plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." *Id.* (quotation and citation omitted).

For the reasons explained in the preceding section, Mr. King has not offered evidence from which a reasonable jury could find that anyone called the campaign on the Hospital's behalf and made statements that placed him in a false light. In addition, Mr. King has not shown that the Hospital "published" the accusation against him. "'[P]ublicity' for the purposes of invasion of privacy torts means that the matter is made public by having been communicated to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Armstrong*, 80 A.3d at 189 (quotation, emphasis, and citation omitted). A single telephone call is not a communication to the public at large, and Mr. King does not offer evidence from which a reasonable jury could infer that the one call to Mr. Thies made it substantially certain that the negative information about Mr. King would become public knowledge.

c. Punitive damages (Count III)

In Count III, Mr. King seeks punitive damages. However, he has no claim for punitive damages unless he can prove that the Hospital defamed him and put him in a false light, and for the reasons explained in Section II.B.1 and II.B.2 above, Mr. King does not have evidence supporting an essential element of each of these claims.

3. Targeted discovery

Mr. King suggests that he should be allowed to conduct discovery. *See* Opp. at 12 ¶ 4. However, he has not carried his burden under § 16-5502(c)(2) to demonstrate that any targeted discovery is likely to enable him to defeat the Hospital's special motion to dismiss. Discovery against SHW and CHNC was stayed due to their bankruptcy case,[1] but Mr. King had a full and fair opportunity to get discovery from Ms. Bailey and other current or former Hospital employees and from third parties like Mr. Thies. Mr. King does not claim that Mr. Thies was unwilling to cooperate with formal or even informal discovery, and Mr. King stated in his deposition that he was looking forward to Mr. Thies' deposition. *See* King Dep. 14:5-15 (MSJ Ex. H). The Hospital specifically denies that any agent or employee made such a call to Mr. Thies (MTD at 9), and Mr. King offers no reason to believe that the Hospital documented any such call in an email or otherwise, or that other discovery from the Hospital would contradict its denial.

III. SUMMARY JUDGMENT

The Hospital seeks summary judgment on Mr. King's two remaining claims involving (1) Ms. Bailey's January 30, 2014 call to MPD stating that Mr. King had threatened the Hospital with bomb and gun violence and (2) the Hospital's January 31, 2014 application for a TRO based on the same alleged threats. *See*

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[1] The bankruptcy stay ended on June 15, 2018. *See* Order Dismissing Chapter 11 Cases (MSJ Ex. F).

Complaint ¶¶ 39-40. The Court previously granted summary judgment to Ms. Bailey on the ground that both disclosures were absolutely privileged as statements made "to initiate a criminal investigation" and as "statements made in connection with judicial proceedings." 4/14/17 Order at 2, 4; *see id.* at 4 n.1 (concluding that the alleged call to Mr. Thies was not absolutely privileged). The Hospital now seeks summary judgment on the same basis as Ms. Bailey.

A. Legal standard

Rule 56(a) provides in relevant part, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [Superior Court rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Mixon v. Washington Metropolitan Area Transit Authority*, 959 A.2d 55, 58 (D.C. 2008) (quotations and citations omitted); *Doe v. Safeway, Inc.*, 88 A.3d 131, 133 (D.C. 2014) (citations omitted).

The moving party has the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1324 (D.C. 1995); *Paul v. Howard University*, 754 A.2d 297, 305 (D.C. 2000). If the moving party carries this

burden, the burden shifts to the non-moving party to show the existence of an issue of material fact. *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 901 (D.C. 2013). "A genuine issue of material fact exists if the record contains some significant probative evidence . . . so that a reasonable fact-finder would return a verdict for the non-moving party." *Brown v. 1301 K Street Limited Partnership*, 31 A.3d 902, 908 (D.C. 2011) (quotation and citation omitted). Viewing the non-moving party's evidence in the light most favorable to it, the Court must decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Hunt v. District of Columbia*, 66 A.3d 987, 990 (D.C. 2013) (quotation and citation omitted); *Biratu v. BT Vermont Avenue, LLC*, 962 A.2d 261, 263 (D.C. 2008).

B. Discussion

As the Court concluded when it granted Ms. Bailey's summary judgment motion, Mr. King does not have evidence that creates a genuine dispute that Ms. Bailey's report to MPD and the Hospital's TRO application are absolutely privileged. The absolute privilege for these actions protects the Hospital as well as Ms. Bailey. The Hospital is therefore equally entitled to summary judgment on Mr. King's claims for defamation, false light, and punitive damages.

"The 'law of the case' doctrine bars a trial court from reconsidering the same question of law that was

presented to and decided by another court of coordinate jurisdiction when (1) the motion under consideration is substantially similar to the one already raised before, and considered by, the first court; (2) the first court's ruling is sufficiently final; and (3) the prior ruling is not clearly erroneous in light of newly presented facts or a change in substantive law. *Kumar v. D.C. Water & Sewer Authority*, 25 A.3d 9, 13 (D.C. 2011) (quotation and citation omitted). The doctrine also applies to relitigation of issues in the same case in the same court. *See Kleinbart v. United States*, 604 A.2d 861, 864 n.6 (D.C. 1992). Here, all three conditions are satisfied. First, the issues raised in Ms. Bailey's and the Hospital's summary judgment motions are substantially similar. Second, the judgment entered in Ms. Bailey's favor makes the ruling sufficiently final. Third, no newly presented facts or change in substantive law render the earlier ruling clearly erroneous.

IV. CONCLUSION

For these reasons, the Court orders that:

1. The Hospital's special motion to dismiss is granted to the extent that Mr. King's claims are based on ¶¶ 41-44 of Mr. King's complaint.

2. The Hospital's motion for summary judgment is granted with respect to Mr. King's other claims.

3. Mr. King's motion for default judgment is denied.

/s/ Anthony C. Epstein
Anthony C. Epstein
Judge

Date: September 19, 2018

Copies to:

Robert "Bob" King
3102 Apple Road, NE
Washington, DC 20018
Plaintiff

Ronald G. Guziak
D'Ana Johnson
Counsel for Defendants

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

ROBERT "BOB" KING	:	
v.	:	Case No. 2014 CA 003742 B
SPECIALTY HOSPTIAL OF WASHINGTON, LLC, *et al.*	:	

JUDGMENT

(Filed Sep. 19, 2018)

For the reasons stated in the order dated September 19, 2018, the Court enters judgment in favor of defendants Specialty Hospital of Washington, LLC and Capitol Hill Nursing Center and against plaintiff Robert King.

/s/ Anthony C. Epstein
Anthony C. Epstein
Judge

Date: September 19, 2018

Copies to:

Robert "Bob" King
3102 Apple Road, NE
Washington, DC 20018
Plaintiff

Ronald G. Guziak
D'Ana Johnson
Counsel for Defendants

APPENDIX D

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLUMBIA

In re: SPECIALTY HOSPITAL OF WASHINGTON, LLC, *et al.*, Debtors.[1]	Case Nos. 14-00279 and 14-00295 through 14-00300 (Chapter 11) (Jointly Administered Under Case No. 14-00279)

ORDER DISMISSING CHAPTER 11 CASES

(Filed Jun. 15, 2018)

Upon consideration of the Debtors' *Motion to Dismiss Chapter 11 Cases* (the "**Motion**");[2] the Court finding that (i) it has jurisdiction over the matters raised in the Motion pursuant to 28 U.S.C. §§ 157 and 1334; (ii) this is a core proceeding pursuant to 28 U.S.C.

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[1] The debtors in these chapter 11 cases and each debtor's federal identification number ("EIN") and chapter 11 case number are: Specialty Hospital of Washington, LLC (EIN: 81-0681352; Case No. 14-00279), Specialty Hospital of America, LLC (EIN: 81-0681347; Case No. 14-00295), SHA Holdings, Inc. (EIN: 20-5741943; Case No. 14-00296), SHA Management, LLC (EIN: 81-0681350; Case No. 14-00297), Specialty Hospital of Washington Nursing Center, LLC (EIN: 81-0681348; Case No. 14-00298), Specialty Hospital of Washington Hadley, LLC (EIN: 20-5752586; Case No. 1400299), and SHA Hadley SNF, LLC (EIN: 20-5741976; Case No. 14-00300).

[2] Capitalized terms not defined in this Order have the meanings given to them in the Motion.

§ 157(b)(2); (iii) adequate notice of the Motion and the hearing thereon was given under the circumstances and that no other or further notice is necessary; and (iv) the legal and factual bases set forth in the Motion establish just cause for the relief granted herein, and it appearing that the relief requested is in the best interests of the Debtors' estates, creditors and other parties in interest,

IT IS HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.

2. Pursuant to sections 105(a) and 1112(b), these chapter 11 cases are dismissed; *provided, however*, that dismissal of these chapter 11 cases will not unwind any settlement agreements entered into by the Debtors during these chapter 11 cases that were approved by this Court or a court of competent jurisdiction.

3. The noticing, claims and balloting services provided by Kurtzman Carson Consultants ("KCC") pursuant to the *Order Granting Debtors' Application for Authority to Employ and Retain Kurtzman Carson Consultants LLC as Noticing, Claims, and Balloting Agent* [Doc. 362] (the "KCC Retention Order") and KCC's employment are hereby terminated. KCC shall have no further obligations under the KCC Retention Order to the Court or any party in interest in these chapter 11 cases.

4. The Debtors are authorized and empowered to take any action necessary to implement and effectuate the terms of this Order.

5. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

6. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Order.

cc:

All attorneys who have entered an appearance and who are registered e-filers.

APPENDIX E

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

ROBERT KING,	:	
Plaintiff,	:	
	:	**Civil Action No. 2014 CA 3742 B**
v.	:	**Judge Thomas J. Motley**
SPECIALTY HOSPITAL OF WASHINGTON, LLC, *et al.*,	:	**Civ. H – Cal. 5**
Defendants.	:	

ORDER GRANTING DEFENDANT BAILEY'S MOTION FOR SUMMARY JUDGMENT

(Filed Apr. 14, 2017)

UPON CONSIDERATION of the Motion for Summary Judgment filed by Defendant Susan Bailey on November 17, 2016, Plaintiff Robert King's opposition filed on November 21, 2016, Defendant Bailey's January 27, 2017 supplemental memorandum, Plaintiff King's February 13, 2017 supplemental memorandum, and for reasons discussed on the record at the December 20, 2016, and March 10, 2017 motion hearings, the motion for summary judgment is granted.

There are facts in dispute as to whether Defendant Bailey falsely reported to the Metropolitan Police Department that Mr. King made threatening statements and whether Defendant Bailey testified falsely

at a hearing on a Motion for a Temporary Restraining Order filed in the District of Columbia Superior Court, *Specialty Hospital of Washington – Nursing Center, LLC v. Robert (Bob) King*, 2014 CA 00621. However, the material facts are not in dispute as to whether these statements were made: (1) to the Metropolitan Police Department in initiating a criminal investigation; and (2) in a court proceeding in the Superior Court of the District of Columbia. Summary judgment is appropriate here because there are no genuine issues as to any material facts and the question remaining is a question of law. Super. Ct. Civ. R. 56. The issue presented in this case is whether statements made by Defendant Bailey during the police investigation and court proceeding, even if false, are protected by the law of the District of Columbia.

In the District of Columbia, statements made in connection with judicial proceedings are absolutely privileged. *Newmyer v. Sidwell Friends Sch.*, 128 A.3d 1023, 1042 (D.C. 2015); *Mazanderan v. McGranery*, 490 A.2d 180, 181 (D.C. 1984). Following *Newmyer* and *Mazanderan*, it is clear that Ms. Bailey's testimony in the Superior Court TRO hearing and statements made in connection with that case are protected by absolute privilege. *Id.*

A slightly more complicated issue is whether Ms. Bailey's statements made to the Metropolitan Police Department to initiate a criminal investigation are absolutely privileged. "It is well-settled that defamatory statements published incidental to judicial proceedings are absolutely privileged, provided the statements

are relevant to the proceeding." *Mazanderan*, 490 A.2d at 181. This privilege also applies to communications made in relation to proposed judicial proceedings, *Brown v. Collins*, 402 F.2d 209, 212 (D.C. Cir. 1968), and has been expanded to quasi-judicial administrative proceedings as well as private arbitration proceeding *Mazanderan*, 490 A.2d at 182. As one district court stated: "As for statements made to the police, it is settled that statements made to police for the purpose of initiating a criminal proceeding are absolutely privileged because they are statements made preliminary to or during the course of judicial proceedings." *Stith v. Chadbourne & Park, LIP*, 160 F.Supp.2d 1, 8 (D.D.C. 2001) (internal quotations and citations omitted).

Considering these cases, it is clear that Ms. Bailey's reporting of the plaintiff's alleged statements to the police is absolutely privileged. If the police had presented defendant's complaint to the United States Attorney's Office, and that office had decided to initiate a criminal case alleging misdemeanor threats against plaintiff King, defendant's statements made to the police initiating a criminal investigation and a criminal case would be protected by absolute privilege under the rational of the *Mazanderan* decision. This would be true even if the statements were later determined to be false. This Court is satisfied that the same public interests that support the application of absolute privilege in judicial proceedings are equally served in applying such a privilege to the filing of a police report in an attempt to initiate a criminal proceeding. This is especially true in the instant case, in which the

investigating officer recommended that the hospital file a motion for a Temporary Restraining Order, as a procedure to protect the company's interest.

One argument against making statements made in initiating criminal proceedings protected by an absolute privilege is that unscrupulous individuals would use this protection to make false accusations to the police concerning other individuals. Although Plaintiff King makes this argument, this Court does not find it meritorious. Despite the absolute privilege applying to statements made to police, there are deterrents in place to discourage individuals from making false statements to police officers. For example, an individual who makes untrue statements to the police could be criminally prosecuted under the False or Fictitious Reports to Metropolitan Police Act, D.C. Code § 5-117.05. Furthermore, the law imposes civil liability on individuals who make false statements to the police, if such statements are a basis for a false imprisonment. If an individual plaintiff was falsely imprisoned as a result of a defendant "knowingly and maliciously mak[ing] false reports to the police," the privileged communications would not prevent such a plaintiff from bringing an action for false imprisonment against the defendant. *Doe v. Safeway, Inc.* 88 A.3d 131, 132 (D.C. 2014) (internal quotations and citation omitted). In the instant case, police only invested the allegations, but did not detain or arrest Mr. King.

Finally, contrary to plaintiff's argument, the existence of criminal penalties for filing false police reports under D.C. Code § 5-117.05 is not a basis for civil

liability for such conduct. *See District of Columbia v. White*, 442 A.2d 159, 163-64 (D.C. 1981) (explaining the circumstances under which the violation of a criminal statute provides a basis for civil liability).

Under the circumstances of this case, this Court finds that the absolute privilege applies to (1) statements made by Defendant Bailey in both the temporary restraining order hearing; and (2) statements made by Defendant Bailey to the police on January 30, 2014, which were made preliminary to, and for the purpose of, initiating a criminal proceeding.[1]

Therefore, it is this 14th day of April 2017, hereby

ORDERED that the Defendant Bailey's Motion for Summary Judgment is GRANTED; and it is

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[1] Defendant Specialty Hospital of Washington has also requested that this Court dismiss plaintiff's defamation claim against the hospital. As was discussed at the December 20, 2016 motion hearing, the claim against the hospital is based on the allegation that the hospital gave false information to Mayor Gray and his campaign about the incident, which formed the basis for the report to the police. Mr. King alleges that he was financially injured as a result of these alleged false statements made by an unknown employee of Defendant Specialty Hospital of Washington. Information given to Mayor Gray and his campaign is not covered by the absolute privilege. *See Newmyer v. Sidwell Friends Sch.*, 128 A.3d 1023, 1042 (D.C. 2015) (declining to extend the absolute privilege to statements publicizing the plaintiff's complaint to the media, which the Court of Appeals found "gratuitous" and "bear[ing] no relevance whatsoever to the judicial proceedings."). The truth of the allegations concerning the falsity of this information is a material fact in dispute and is an issue for the jury to decide.

ORDERED that the parties shall appear before Judge Laura Cordero for a Status Hearing on April 21, 2017, at 9:30 a.m.

/s/ Thomas J. Motley
THOMAS J. MOTLEY
Associate Judge

D'Ana E. Johnson, Esq.
Ronald G. Guziak, Esq.

Robert King
3102 Apple Road, N.E.
Washington, DC 20018

APPENDIX F

District of Columbia
Court of Appeals

No. 18-CV-1112

ROBERT BOB KING,

Appellant,

v.

CAB3742-14

SPECIALTY HOSPITAL OF WASHINGTON, LLC, *et al.*,

Appellees.

BEFORE: Blackhurne-Rigsby, Chief Judge; Glickman, Beckwith,* Easterly,* Deahl, Howard, AliKhan, Associate Judges; Long,*† Senior Judge.

ORDER

(Filed Apr. 22, 2022)

On consideration of appellant's petition for rehearing or rehearing *en banc*, and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*, it is

ORDERED by the merits division* that appellant's petition for rehearing is denied. It is

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† Sitting by designation pursuant to D.C. Code§ 11-707(a) (2012 Repl.).

FURTHER ORDERED that appellant's petition for rehearing *en banc* is denied.

PER CURIAM

Associate Judge McLeese did not participate in this case.

Copies emailed to:

Honorable Anthony C. Epstein

Director, Civil Division

Copies e-served to:

William H. Brammer, Jr., Esquire

Andrew Butz, Esquire

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