Case No. 14-CV-792

District of Columbia
Court of Appeals

KAREN THOMPSON,

Defendant-Appellant,

v.

WILLIAM H. ARMSTRONG,

Plaintiff-Appellee.

On Appeal from the Superior Court of the District of Columbia, Civil Division, No. 2009 CA 4137 B, Judge Stuart G. Nash

OPENING BRIEF OF DEFENDANT-APPELLANT KAREN THOMPSON

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL
4301 Connecticut Avenue, NW
Suite 434
Washington, DC 20008
Telephone: (202) 457-0800
Facsimile: (202) 457-0805

JOSHUA J. FOUGERE*
JOSEPH R. GUERRA
NOAH T. KATZEN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

Counsel for Karen Thompson

LIST OF ALL PARTIES

The following is a list of all parties, intervenors, amici curiae, and their counsel in the trial court and in the appellate proceeding:

Joshua J. Fougere (Counsel for Karen Thompson)

Joseph R. Guerra (Counsel for Karen Thompson)

Noah H. Katzen (Counsel for Karen Thompson)

Kevin Byrnes (Counsel for William H. Armstrong)

Karen Thompson (Defendant-Appellant)

David Sutkus (Defendant)

William H. Armstrong (Plaintiff-Appellee)

Earl “Trey” Mayfield (trial counsel for Karen Thompson)

George Elfter (trial counsel for Karen Thompson)

Michael Steadman (trial Counsel for David Sutkus)

Arthur B. Spitzer (Co-Counsel for Karen Thompson)

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INTRODUCTION

This is the second appeal in this case, in which William "Harry" Armstrong sued Karen Thompson because she told first her employer, the Tax Inspector General for Tax Administration (TIGTA), and later the United States Department of Agriculture (USDA) that Mr. Armstrong had engaged in the unauthorized use of TIGTA computers. After learning of Ms. Thompson's statements about him, Mr. Armstrong sued her for seven different torts, including defamation and intentional interference with his contractual relations with USDA, which had offered him a job. Ms. Thompson's primary defense all along has been that her statements were substantially true and that nothing she said was provably false.

In the first appeal, this Court held that, as a matter of law, all of Ms. Thompson's statements were substantially true or non-actionable opinions, and it upheld the Superior Court's entry of judgment in Ms. Thompson's favor on all claims except one. JA72-80. On the intentional interference claim, the Court reversed the grant of summary judgment because it held that "reasonable minds could differ on the outcome" of the seven-factor balancing test on which the Superior Court had rested its decision. JA79-80. Because the Court had not received full briefing on whether substantial truth provided an absolute defense to this claim, the Court "decline[d] to consider" the question. JA80.

On remand, a new judge read this Court's opinion to have implicitly issued a singular directive: proceed to trial and a jury verdict. *See, e.g.*, Trial Tr. 30:4-8 ("The Court of Appeals remanded it for a decision by a fact finder."). That erroneous interpretation of this Court's decision prompted a series of mistakes that infected the remainder of the case. When Ms. Thompson moved for summary judgment arguing that substantially true, non-defamatory statements cannot support an intentional interference claim—and that allowing such a claim would open a back door to tort liability and effectively erase important protections against

defamation—the Superior Court responded that this Court's decision not to entertain such an argument *on appeal* meant that it had been waived for good. JA83-86; April 17, 2014 Hearing Tr. ("Hr'g Tr.") 2:12–5:25. When Ms. Thompson sought a stipulation, based on a final judgment in another case, that USDA withdrew Mr. Armstrong's job offer due to his own contradictory statements, the Superior Court responded that it was "not going to allow a resolution of any . . . elements to have been made by any prior judge" because the case was remanded "for a decision by a fact finder." Trial Tr. 30:7-11. And, when Ms. Thompson tried to present that fact finder with a Report of Investigation that this Court had already held to be admissible, JA75, the Superior Court declined to credit that decision, and the Report and related documents never came into evidence. Hr'g Tr. 47:3–52:20; Trial Tr. 8:20-17:17, 38:2-40:13, 437:4–443:5, 450:14–452:3, 465:7–468:9.

These plainly erroneous rulings prevented Ms. Thompson from meaningfully defending herself. As for the case-dispositive substantial truth defenses, this Court's decision not to consider an argument because it had not been fully briefed on appeal did not mean that the argument was precluded on remand. In defending her summary judgment victory on appeal, Ms. Thompson had no obligation to brief additional arguments as alternative grounds for affirmance, and her failure to do so cannot mean that she should find herself worse off on remand than if she had never moved for summary judgment and won in the first place. Nor did this Court's decision necessarily reject substantial truth as an absolute defense to intentional interference for the simple reason that the Court expressly said it was *not* deciding this very issue. JA80. Ms. Thompson should have been allowed to present her defenses on remand, and they should have spelled—and still should spell—the end of this case.

The Superior Court's misreading of this Court's earlier decision did not end there, however. Having interpreted the remand order to require a jury trial, the Superior Court then

prevented the jury from getting the full story. First, a final judgment in another case had concluded that Mr. Armstrong's job offer from USDA was rescinded due to his own misstatements—a critical fact for purposes of causation and damages. But the Superior Court dismissed out of hand Ms. Thompson's contention that this finding deserved preclusive effect, never even considering whether the elements of collateral estoppel were met. In the Superior Court's view, this Court's remand meant that nothing could have been resolved "by any prior judge." Trial Tr. 30:1-12. Second, the Superior Court blocked Ms. Thompson's efforts to introduce TIGTA documents concerning Mr. Armstrong, including a Report this Court had previously held was admissible. Despite that ruling, and despite the fact that the court's own Pretrial Order stated that "[n]o party need produce proof of authenticity of any exhibit at trial," JA131, because there was no serious question that the documents were authentic, the Superior Court denied their admission because Ms. Thompson was unable to get someone else from her agency to lay a foundation that did not need to be laid. Trial Tr. 13:11–14:8, 441:14–18. These missteps compounded the problem and further undercut Ms. Thompson's valid defenses.

Having been erroneously stripped of essential grounds to defend herself, Ms. Thompson now stands liable for over $500,000 for making statements that this Court has already ruled were, as a matter of law, substantially true or non-actionable opinions. That crippling judgment will force her into bankruptcy and, if allowed to stand, could have drastic ramifications. To take just one example, consider the countless interviews that occur during prospective federal employees' background investigations in and around D.C.: this judgment could lead someone with substantially truthful information that could result in the loss of a job offer to hold his or her tongue instead of voluntarily conveying such information to the authorities and risking a ruinous judgment. Surely that is not a tolerable state of affairs. Because Mr. Armstrong's claim is wrong as a matter of law, and because the Superior Court made a series of fatal errors on

remand, the judgment should be reversed and the case should be remanded with instructions to enter judgment for Ms. Thompson.

STATEMENT OF ISSUES

1. Did the Superior Court err when it denied Ms. Thompson's motion for summary judgment and altogether refused to consider her case-dispositive arguments that substantial truth is an absolute defense to intentional interference with prospective contractual relations under the First Amendment and the common law?
2. Did the Superior Court err when it refused to present a critical stipulation and key facts to the jury that may well have affected the outcome by:
    a. declining to give preclusive effect to a final decision of the Merit Systems Protection Board (MSPB), which was affirmed by the Federal Circuit, that USDA put Mr. Armstrong's job offer on hold due to his own contradictory statements, and
    b. refusing to admit into evidence a Report of Investigation and related documents showing TIGTA's view of Mr. Armstrong's conduct, despite the facts that this Court held that the Report was admissible and that the documents were plainly authentic?

STATEMENT OF THE CASE

Mr. Armstrong sued Ms. Thompson and another defendant, David Sutkus, in June 2009 on a host of tort theories, including defamation, intentional infliction of emotional distress, false light, invasion of privacy, intentional interference with prospective contractual relations, fraud, and wrongful involvement in litigation. JA18-30. The Superior Court dismissed certain claims on motions for judgment on the pleadings, JA43-51, and, in 2012, granted summary judgment for Ms. Thompson and Mr. Sutkus on all remaining claims. JA52-71. Mr. Armstrong appealed,

and this Court affirmed the judgment on all but one claim because, among other things, all of Ms. Thompson's statements were substantially true or non-actionable opinions. JA74-78. The Court reversed the grant of summary judgment on the intentional interference claim, finding that a reasonable jury could resolve a seven-factor balancing test differently than the Superior Court had. JA79-80.

On remand, Ms. Thompson moved for summary judgment on the one remaining claim, arguing that it was precluded by the First Amendment and the common law. *See* Def. Thompson's Mot. for Summ. J., Jan. 31, 2014. But the Superior Court did not reach the merits of either argument and instead denied Ms. Thompson's motion because it thought this Court's decision not to address the arguments on appeal meant that they were forever waived. JA83-86. The case thus proceeded to trial, and a jury found Ms. Thompson liable for damages in the amount of $514,110. Trial Tr. 2:20–4:11, June 11, 2014; JA159-60. The Superior Court entered judgment the same day, Trial Tr. 6:1-6, June 11, 2014; JA161, and this appeal followed.

STATEMENT OF THE FACTS

A. Mr. Armstrong's Underlying Conduct.

Ms. Thompson has been a TIGTA agent for over a decade. Trial Tr. 147:1-6. Between 2004 and 2006, Mr. Armstrong was her supervisor—he was an Assistant Special Agent-In-Charge, and she was a special agent. Trial Tr. 148:16–149:2, 237:15-24.

The facts underlying this long-running dispute began in October 2006, when Ms. Thompson filed an anonymous tip with TIGTA alleging that Mr. Armstrong had unlawfully accessed various databases and records. Trial Tr. 150:6-20, 256:10-13; JA72. Based on her tip, TIGTA opened an internal investigation, and, on or about October 31, 2006, told Mr. Armstrong about the investigation and reassigned him to another division. JA72. The agency simultaneously took away Mr. Armstrong's badge, his gun, his credentials, his government

vehicle, his government computer, and his supervisory authority. JA72-73; Trial Tr. 402:7–403:9.

The investigation continued over the ensuing months. Mr. Armstrong admitted that he had improperly used government databases for personal use, and, in April 2007, the Treasury Department issued a Report of Investigation ("ROI" or "Report") detailing its findings. JA73. That Report concluded, among other things, that Mr. Armstrong "had gained unauthorized access to two databases in violation of criminal law and had accessed a report without official need to know." JA73.

Around the same time, Mr. Armstrong began looking for other jobs and applied for a law enforcement position at USDA. Kathy Horsley was the USDA official who interviewed him. She testified that Mr. Armstrong disclosed that he was under investigation by TIGTA but also represented to her "that his internal affairs matter had been cleared up." Trial Tr. 496:11–497:17, 512:17-25. Based upon the latter representation, Ms. Horsley recommended hiring him. Trial Tr. 512:17–513:7. In August 2007, USDA offered him a position, and he quickly accepted. JA73.

Ms. Thompson learned about Mr. Armstrong's new job offer later that month. She then sent six anonymous letters to USDA—two similar versions, each addressed to three recipients. Trial Tr. 189:1-6; JA73, 31-42. She wrote, for example, that Mr. Armstrong had been escorted from the building and forced to turn in his gun, badge, equipment, cell phone, computer and government car keys. *See, e.g.*, JA31, 35. She further reported he had been "removed from all managerial and law enforcement duties and sent to another office where he had no access to computer systems, law enforcement sensitive information, etc.," because he was under investigation "for gross misconduct and integrity violations (some of them criminal)." JA31; *see*

also JA35. And she explained that the investigation stemmed from improperly accessing sensitive law enforcement information for personal use. JA31.

After USDA received the letters, Ms. Horsley and Mr. Armstrong spoke on the phone. Mr. Armstrong verified that his duty weapon and credentials had not yet been restored—a fact Ms. Horsley was "surprised" to learn. Trial Tr. 513:10–514:17. On August 30, 2007, USDA notified Armstrong that his scheduled start date was being postponed. JA172.

The next week, Mr. Armstrong's own agency, TIGTA, sent him a notice of proposed removal. *See* JA173. The notice explained that his termination was justified in light of numerous instances of misuse of government property, unauthorized access of agency files or records, and false statements. JA174, 185, 192. The notice also explained that Mr. Armstrong was a supervisor, "occup[ied] a position of heightened public trust and responsibility" and was therefore held to a "higher standard of conduct" and required to "avoid all situations where [his] usefulness as a criminal investigator could be compromised." JA193. The agency concluded that he "did not meet this high standard when [he] inappropriately and without authority accessed sensitive investigative material," and that his conduct was "particularly egregious because it involved accessing highly sensitive investigative material for personal purposes." JA194. Mr. Armstrong's "willingness to provide false statements in pursuit of information for personal use [was] especially troubling," "demonstrate[d] [a] lack of appropriate judgment," and was "not conduct that can be tolerated of a Federal law enforcement officer." JA194.

Mr. Armstrong filed a response to the notice of proposed removal, but, on December 4, 2007, TIGTA notified him of its decision to proceed with termination effective December 11, 2007. JA157.

Mr. Armstrong appealed the removal decision to the MSPB. JA73. In February 2008, before a decision, he and the agency reached a settlement pursuant to which he made no

admission of liability, fault, or error, but agreed that TIGTA would impose a 30-day suspension, that he would resign within 90 days, and that the official record would "state that the reason for the suspension was misuse of a government computer and unauthorized access to agency files for personal use." JA196-97. The agreement also provided instructions about subsequent communications with USDA regarding the matter. JA197, 199.

TIGTA informed USDA of the settlement pursuant to a letter whose contents Mr. Armstrong and TIGTA had negotiated. *See* JA199, 202; Trial Tr. 375:23–377:17. Eventually, USDA withdrew its employment offer to Mr. Armstrong. JA73.

B. Mr. Armstrong's Prior Lawsuits.

This is the third of three lawsuits that Mr. Armstrong has filed related to his departure from TIGTA. A brief discussion of the others is necessary to put this one in context.

In the first suit, Mr. Armstrong sued the Treasury Secretary and others alleging that the disclosure of information in the anonymous letters violated the Privacy Act. Mr. Armstrong did not initially know who sent the letters, but he found out when, at trial, Ms. Thompson testified that she was the author. *Armstrong v. Geithner*, 610 F. Supp. 2d 66, 69 (D.D.C. 2009). The district court subsequently allowed Mr. Armstrong to take additional discovery, but it proved fruitless. *Id.* Mr. Armstrong could not establish that Ms. Thompson had obtained her information from protected records and, as a result, lost the case after a bench trial. *Id.* at 71-72. The D.C. Circuit affirmed. *Armstrong v. Geithner*, 608 F.3d 854 (D.C. Cir. 2010).

Mr. Armstrong's next target was TIGTA itself. In 2008, while the Privacy Act suit remained pending and after he had settled his original MSPB appeal against the agency, Mr. Armstrong filed petitions for review and enforcement with the MSPB alleging that the settlement agreement had been fraudulently obtained. His petition was founded on the contention that TIGTA had concealed various contacts it had had with USDA in late 2007 and early 2008.

Petition for Review (attached as Exhibit A) at 203-06. Mr. Armstrong argued, among other things, that the failure to disclose those contacts was material to his decision to enter into the agreement because he settled in order to ensure that his employment chances at USDA were not jeopardized, *see id.* at 202-03, 204, 205-06, but TIGTA's undisclosed contacts had already rendered it impossible for him to be hired, *id.* at 210-11.

The MSPB rejected this assertion. The Board found that any failure to disclose prior contacts was not material because (1) Mr. Armstrong's primary concern was that TIGTA not share information about his rescinded removal penalty or express its opinion to USDA on Mr. Armstrong's ability to testify as a law enforcement officer, and TIGTA had not shared such information or expressed such an opinion, and (2) Mr. Armstrong was wrong to maintain that TIGTA's contacts with USDA had defeated his employment chances. JA151-52. On the latter point, the MSPB instead concluded that "the record reflects that *the USDA placed [Mr. Armstrong's] employment offer on hold due to information that [Mr. Armstrong] himself conveyed directly to Ms. Horsley*, circumstances well known to [Mr. Armstrong] at the time he entered into the settlement agreement, and not due to information conveyed by the agency in the contacts he cites on review." JA152 (emphasis added).

The case then went up to the Federal Circuit, back to the Board, and back up again. In January 2010, the Federal Circuit issued an opinion noting that "the MSPB found that the USDA's reason for placing Armstrong's offer on hold was not any information gleaned from improper contacts with TIGTA employees, but was instead Armstrong's own statements to the USDA." *Armstrong v. Dep't of Treasury*, 591 F.3d 1358, 1361 (Fed. Cir. 2010). But the Court reversed on a procedural issue and remanded to reconsider that issue and, if necessary, the merits. *Id.* at 1362-63. On remand, the MSPB again concluded that Mr. Armstrong had failed to show that he was fraudulently induced to enter into the settlement and that "the Department of

Agriculture had placed [Mr. Armstrong's] job offer on hold because [he] had contradicted his initial statement to [Ms. Horsley] that his disciplinary problems had been resolved" and that the cause of his offer being placed on hold was "information conveyed directly to [USDA] by [Mr. Armstrong]." *Armstrong v. Dep't of Treasury*, 115 M.S.P.R. 1, 4-5 (2010). Mr. Armstrong again appealed, and the Treasury Department filed a brief defending the MSPB's decision. In it, Treasury recounted, among other things, Ms. Horsley's statement that, "if the USDA had known that Mr. Armstrong's case had not yet been adjudicated" in August 2007 as he had told her, "the USDA would not have offered him the position." Br. and App. for Resp't, *Armstrong v. Dep't of Treausry*, No. 2011-3015, 2011 WL 1896210, at *3-7 (Fed. Cir. Apr. 28, 2011). The Federal Circuit summarily affirmed. *Armstrong v. Dep't of Treasury*, 438 F. App'x 903 (Fed. Cir. 2011).

C. Mr. Armstrong's Case Against Ms. Thompson.

On June 5, 2009, with both earlier-filed suits still active, Mr. Armstrong filed a complaint against Ms. Thompson and co-worker David Sutkus for defamation, intentional infliction of emotional distress, false light, invasion of privacy, intentional interference with prospective contractual relations, fraud, and wrongful involvement in litigation. After unsuccessfully seeking to remove the case to federal court, *Armstrong v. Thompson*, 759 F. Supp. 2d 89, 97 (D.D.C. 2011), Ms. Thompson moved for judgment on the pleadings for the fraud and wrongful involvement in litigation claims. The Superior Court granted the motion and dismissed the claims. JA43-51.

In April 2012, Ms. Thompson moved for summary judgment on the remaining counts. *See* Def. Karen Thompson's Mot. for Summ. J., Apr. 20, 2012. She argued, first, that she was entitled to judgment as a matter of law on the defamation claim because her statements were substantially true and Mr. Armstrong—who, as a law enforcement officer, was a public official—could not show actual malice. *Id.* at 3-23. As for intentional interference, she began by

arguing that her truth defense should also bar the intentional interference claim and cited, among other things, two prominent First Amendment cases in support. *Id.* at 28-30 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) and *Cohen v. Cowells Media Co.*, 111 S. Ct. 2513 (1999)). She also maintained that the evidence established conclusively that Mr. Armstrong's own contradictory statements to Ms. Horsely—not her letters—were the proximate cause of USDA's decision to rescind his job offer. *Id.* at 30-34.

The Superior Court granted the motion in its entirety. *See* JA52-71. Relying in part on the Report of Investigation, the court held that Ms. Thompson's factual statements were substantially true and therefore not defamatory. JA61-63. The court also held that Ms. Thompson was entitled to judgment as a matter of law on intentional interference because "[n]o reasonable jury could find it improper or unjustified for a citizen to provide substantially true information to a federal agency regarding a prospective employee's prior misconduct that is directly related to his fitness for the potential position." JA69. Relying on Restatement (Second) of Torts § 767's multi-factored balancing test, the court emphasized that "[t]he societal interest in encouraging disclosure of such information is particularly strong when the prospective employer is a government agency and when the position is in law enforcement." JA69. In light of these rulings, the court did not need to reach the questions whether, as a matter of common law or the First Amendment, the substantial truth of Ms. Thompson's statements provided an absolute defense to Mr. Armstrong's intentional interference claim. Nor did the court reach the issue whether Mr. Armstrong's own statements were the proximate cause of his retracted job offer.

Mr. Armstrong appealed, and Ms. Thompson defended the judgment that had been entered in her favor. The appeal focused on defamation, and, on that claim, this Court agreed that Ms. Thompson's statements were all either substantially true or opinions, and thus not

defamatory as a matter of law. JA74-78. In the course of deciding that issue, the Court also rejected Mr. Armstrong's protest concerning the Report and held that the document was admissible. JA75. In addition to defamation, the Court agreed that Ms. Thompson was entitled to judgment as a matter of law on intentional infliction of emotional distress, false light, and invasion of privacy. JA78-79.

The Court reversed on the intentional interference claim, however. The Superior Court had held that Ms. Thompson's conduct was legally justified and not improper—a defense to intentional interference—under § 767's seven-factor balancing test. JA79. This Court, by contrast, concluded that a reasonable jury could assess that balance differently and therefore reversed. JA79-80. Notwithstanding the trial court's emphasis on one factor to conclude that "the societal interest in encouraging the transmission of truthful information about a law enforcement agent to a government agency outweighed Ms. Thompson's malicious motive and the interests sought to be advanced by Ms. Thompson," this Court held that the balancing test was "for the jury to undertake." JA79-80. After oral argument, Ms. Thompson submitted a Rule 28(k) letter arguing that the truthfulness of her statements independently precluded liability, but the Court "decline[d] to consider this claim because Ms. Thompson did not raise it in her appellate brief," and had instead "defend[ed] the trial court's determination" on the grounds that the lower court itself had adopted. JA80.

On remand before a new judge, the Superior Court invited renewed motions for summary judgment. Ms. Thompson filed one, arguing that her non-defamatory statements could not be the basis for liability under the First Amendment or the common law. *See* Def. Thompson's Mot. for Summ. J. 5-11, Jan. 31, 2014. Mr. Armstrong filed a 3-page response. See Pl.'s Opp'n to Def. Thompson's Mot. for Summ. J., Feb. 28, 2014. He maintained that, although Ms. Thompson's First Amendment arguments were "briefed and responded to" in the first round of

summary judgment submissions, she had waived the point by not raising it on appeal. *Id.* at 1-2. Similarly, he argued that this Court had already "rejected" her common-law argument. *Id.* at 3.

The Superior Court agreed with Mr. Armstrong and refused to consider Ms. Thompson's arguments because it thought this Court had held, as law of the case, that the arguments were improper and waived.[1] *See, e.g.*, JA84-85 (finding no "possibility that this Court could, consistent with the Court of Appeals decision, grant summary judgment to the defendants on the ground that the communications contained exclusively truthful information"); JA85 ("this Court does not believe that it is appropriate to accept defendant Thompson's invitation to address the argument that the Court of Appeals explicitly found to be waived on appeal"). The Superior Court repeated these points throughout the remainder of the case. In a pretrial hearing, the court again declared Ms. Thompson's argument waived for purposes of jury instructions, a motion for a directed verdict, or for anything that might entitle her to judgment as a matter of law. Hr'g Tr. 3:18-23 ("[I]f I were to allow the argument to be advanced at trial that truth is a complete defense and we have an appellate ruling that in this case there's no material issue on the issue of truth, then I don't think there would be a point to the trial."); Hr'g Tr. 4:13-16 ("My reading of the Court of Appeals' decision in this case is that those are all matters that should have been submitted to the fact finder, in this case the jury."). The Superior Court reached the same conclusion for the First Amendment argument, even though this Court had not even mentioned it in connection with the intentional interference claim. Hr'g Tr. 26:23–27:2 ("[The First Amendment argument] is one of the arguments that I've found to have been waived. Again, it

[1] The Superior Court also granted Mr. Sutkus's motion for summary judgment because there was "no evidence in the record upon which a reasonable fact-finder could find that defendant Sutkus intentionally interfered with plaintiff's prospective contract with USDA, or aided and abetted or conspired with defendant Thompson to accomplish such interference." JA89. He is thus no longer a party to this case.

wasn't my ruling. It was the Court of Appeals' ruling, but I think the only way to effectively implement the Court of Appeals' ruling is to preclude that argument at trial.").

The Superior Court's belief that this case was headed to a jury trial—no matter what—had additional consequences for Ms. Thompson. Before trial, she sought to introduce as a stipulated fact that, based on the earlier MSPB and Federal Circuit decisions, Mr. Armstrong's own statements led to USDA's decision to revoke his job offer. JA142-44. Mr. Armstrong opposed and contended that he had never raised or litigated the issue, that "[t]he MSPB never ruled on why he didn't get hired by the USDA," and that "[t]here was no evidence presented to the MSPB in any brief filed by [Mr. Armstrong] or filed by the government that the reason he didn't get the job was because of his own statements." Trial Tr. 32:25–33:23. The Superior Court did not address, much less endorse, these assertions and instead ducked the substantive collateral estoppel question entirely by ruling that this Court had required that "all the elements of this claim . . . be resolved by the jury," so it would be improper to "allow a resolution of any of those elements to have been made by any prior judge." Trial Tr. 30:1-12.

The case thus proceeded to trial with Ms. Thompson precluded from putting forward key parts of her defense. Making matters worse, the government did not voluntarily produce any employees as witnesses, so the only witnesses were the two parties and Ms. Horsley by deposition. Despite the Superior Court's apparent certainty that this was a case for the "fact finder," the fact finder was denied access to several pieces of evidence. In particular, Ms. Thompson tried to admit the Report, the notice of proposed removal, and the final notice of removal to show how TIGTA viewed Mr. Armstrong's conduct. Hr'g Tr. 47:3–52:20; Trial Tr. 8:20–17:17, 38:2–40:13, 437:4–443:5, 450:14–452:3, 465:7–468:9. Notwithstanding this Court's prior decision finding that the Report was admissible and the Superior Court's own Pretrial Order that "[n]o party need produce proof of authenticity of any exhibit at trial," JA131,

the court concluded that the documents all needed to be authenticated. Trial Tr. 13:3–14:8, 441:9–19. And, when Ms. Thompson argued that, at a minimum, the documents could be authenticated by Mr. Armstrong as a former TIGTA agent who had conducted internal investigations, the court held that authentication through another TIGTA agent was required. Trial Tr. 13:11–14:8, 441:14-18. The documents were never admitted.

Working with an incomplete record, the jury found Ms. Thompson liable and awarded $514,110 in damages. JA159-60, 161-62. She appealed and, in the meantime, sought a stay of the judgment because it will force her into bankruptcy. The Superior Court denied her motion, and she tried again in this Court. This Court likewise denied her motion as well as a subsequent motion for reconsideration. JA163-64, 165-66. The Court stated that Ms. Thompson was not likely to prevail on the merits because it appeared that (1) her common-law defense was precluded by law of the case and (2) it was "unclear whether the First Amendment has any bearing at all on this appeal" because Mr. Armstrong may not have been a public figure.[2] JA165-66.

SUMMARY OF ARGUMENT

The Superior Court misconstrued this Court's previous decision in this case and, as a result, committed several errors that render the jury's verdict and the judgment against Ms. Thompson unsustainable.

First and foremost, the Superior Court refused to even consider dispositive defenses premised on the substantial truth of her statements. The First Amendment applies to intentional interference claims and forbids liability unless the plaintiff can prove that the relevant statements were false. That follows from settled First Amendment doctrine and a line of cases holding that

[2] In part based on this ruling, Mr. Armstrong moved to dismiss the appeal and argued that, among other things, both truth-based defenses were barred by law of the case. This Court summarily denied his motion. *See* Order, Jan. 28, 2015.

heightened scrutiny applies to statements about law enforcement officers (because they are public officials) concerning their fitness for duty. In addition to the First Amendment, moreover, the common law prohibits intentional interference liability for "truthful statements." That principle is reflected in Restatement (Second) of Torts § 772(a) and is the majority rule around the country. Both of these rules ensure that truthful speech is promoted—not chilled—and both of these rules require judgment for Ms. Thompson.

Notwithstanding the force of those arguments, which should have decided the case in Ms. Thompson's favor, the Superior Court did not entertain either one. Alternatively suggesting that this Court had deemed the issues waived as law of the case and that this Court had necessarily decided them, the Superior Court refused to consider any argument that would have entitled Ms. Thompson to judgment as a matter of law because it thought that this Court required a jury trial no matter what. That belief was unfounded. This Court never so much as mentioned the First Amendment in connection with the intentional interference claim. And the Court's only mention of the common-law defense was in a footnote "declin[ing] to consider" the question because it had not been fully briefed on appeal. The Court never suggested that *the Superior Court* was forbidden to reach either issue on remand, and Ms. Thompson as appellee had no obligation to brief either issue on appeal. Law of the case is applicable only to an issue decided either expressly or by necessary implication, but this Court could not possibly have decided an issue that it expressly declined to decide. The Superior Court's application of law of the case was wrong, and that error improperly blocked Ms. Thompson from presenting defenses that command a different outcome.

In another twist on the same theme, even assuming this case should have gone to a jury—and it should not have—the Superior Court blocked Ms. Thompson from presenting crucial evidence to that jury. First, Ms. Thompson sought a stipulation that Mr. Armstrong's own

statements to USDA caused the agency to put his job offer on hold. The basis for Ms. Thompson's proposal was a final judgment in another case that warranted preclusive effect. But the Superior Court again did not even consider the issue, including whether the elements of collateral estoppel were satisfied. It simply declared the issue foreclosed on the untenable rationale that this Court's remand order meant that no prior judge could be allowed to have decided any of the issues in this case. Working backwards from the mistaken assumption that the case must go to the jury, the Superior Court erroneously failed to apply collateral estoppel.

The Superior Court likewise unduly hampered Ms. Thompson's defense when it refused to admit important TIGTA documents. Despite this Court's previous holding that the Report was not hearsay and was thus admissible, the Superior Court did not credit that holding or its own Pretrial Order about authenticity and instead required the Report to be authenticated. Worse still, the court did not let Ms. Thompson authenticate the document through Mr. Armstrong, despite the fact that he was a former TIGTA agent who had received the Report and had participated in comparable internal investigations as an employee. Similar errors arose when Ms. Thompson tried to introduce Mr. Armstrong's removal letters. Based on these mistakes, the jury was deprived of key evidence concerning TIGTA's view of Mr. Armstrong's conduct in a trial that already contained a relatively small record.

These manifest errors mean that the judgment below cannot stand. Because Ms. Thompson is entitled to judgment as a matter of law under the First Amendment and the common law, this Court should reverse and remand with instructions to enter judgment in her favor. At a minimum, however, the Court should vacate the judgment and remand for further proceedings.

STANDARD OF REVIEW

This Court reviews a grant or denial of a motion for summary judgment *de novo*. *Clampitt v. Am. Univ.*, 957 A.2d 23, 28 (D.C. 2008). The Court reviews evidentiary rulings for abuse of discretion, *e.g.*, *Wilson v. Hayes*, 77 A.3d 392, 409 (D.C. 2013), but "'it is an abuse of discretion if the trial judge rests his or her conclusions on incorrect legal standards,'" *Jones v. United States*, 17 A.3d 628, 631 (D.C. 2011) (quoting *Blackson v. United States*, 979 A.2d 1, 6 (D.C. 2009)).

ARGUMENT

I. MS. THOMPSON CANNOT BE LIABLE FOR INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS BASED ON HER NON-DEFAMATORY STATEMENTS.

Under both the First Amendment and the common law, Ms. Thompson cannot be liable for her non-defamatory statements. Recognition of those protections comports with the law's longstanding interest in encouraging truthful speech and forecloses an all-too-easy end-run for tort plaintiffs who cannot make out a defamation claim because the relevant statements were substantially true. The Superior Court's belief that this Court's decision in the first appeal somehow precluded her from raising those defenses on remand was wrong.

A. The First Amendment Precludes Liability For Ms. Thompson's Statements.

That the First Amendment protects Ms. Thompson from intentional interference liability follows from well-established principles. To begin with, the First Amendment shields speakers not just from defamation claims, but from other torts as well. *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265, 269 (1964) ("civil lawsuit between private parties" may not result in liability that amounts to an "invalid restriction[] on [the] constitutional freedoms of speech and press"); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52-53 (1988). Indeed, "a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim." *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 319-20

(D.C. Cir. 1994); *see also Blodgett v. Univ. Club*, 930 A.2d 210, 222–23 (D.C. 2007); *Klayman v. Segal*, 783 A.2d 607, 619 (D.C. 2001). For that reason, courts have routinely recognized that First Amendment restrictions apply to intentional interference with contractual relations claims. *See, e.g.*, *Farah v. Esquire Magazine*, 736 F.3d 528, 540 (D.C. Cir. 2013); *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investors Servs., Inc.*, 175 F.3d 848, 856-58 (10th Cir. 1999); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196-97 (8th Cir. 1994); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990); *cf. Delloma v. Consolidation Coal Co.*, 996 F.2d 168, 172 (7th Cir. 1993) (noting the "significant First Amendment problems" that would be raised by "permitting recovery for tortious interference based on truthful statements").

It is equally clear that the First Amendment precludes liability for speech about public figures that is not provably false: the Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice,'" *N.Y. Times Co.*, 376 U.S. at 279-80, and that "entails falsity," *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 861 (2014). In other words, "a public-figure plaintiff must show the falsity of the statements at issue," *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986), because, "where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth," *Garrison v. Louisiana*, 379 U.S. 64, 72-73 (1964).

And, as this Court has already held, these constitutional protections apply when a plaintiff law enforcement officer seeks to recover damages based on co-workers' statements related to the plaintiff's work as a law enforcement officer. Looking to cases "holding that law enforcement officers are public officials," this Court has concluded that a corrections officer

"was a public official" and thus had to overcome the requisite heightened First Amendment requirements in order to prevail. *Beeton v. District of Columbia*, 779 A.2d 918, 924 (D.C. 2001). And *Beeton* is no outlier. On the contrary, "[a] long line of cases demonstrates that police officers are public figures," *Coughlin v. Westinghouse Broad. and Cable Inc.*, 780 F.2d 340, 346 n.6 (3d Cir. 1985),[3] and "anything which might touch on an official's fitness for office" is a matter of public interest, *Garrison*, 379 U.S. at 77. Courts have thus frequently held that statements bearing on a public official's conduct and fitness for office require heightened constitutional protection. *See, e.g.*, *Garrison*, 379 U.S. at 77 ("[f]ew personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character"); *Lewis v. Elliott*, 628 F. Supp. 512, 521 (D.D.C. 1986) ("Here, the subject of the speech was the ethics of a government employee and thus his fitness for office. This subject matter is quintessentially one of public concern.").

Taken together, these principles mean that the First Amendment safeguards Ms. Thompson's conduct from liability for intentional interference with contract. As a law enforcement officer, Mr. Armstrong was a public figure, and Ms. Thompson's statements

[3] *See also, e.g.*, *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971) (accepting determination that a deputy chief of detectives was a public official); *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) (same); *N.Y. Times Co.*, 376 U.S. at 256 (treating police supervisor as a public official); *Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981) (law enforcement officials "have uniformly been treated as public officials within the meaning of New York Times"); *Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73, 88 (1st Cir. 2007) (police officers are public figures); *Mercer v. City of Cedar Rapids*, 308 F.3d 840, 848 (8th Cir. 2002) ("police officer . . . was a 'public figure'"); *Rattray v. City of National City*, 51 F.3d 793, 800 (9th Cir. 1994); *Hildebrant v. Meredith Corp.*, No. 13-cv-13972, 2014 WL 5420787, at *10 (E.D. Mich. Oct. 23, 2014) (law enforcement officers are public officials for purposes of defamation, regardless of whether they set department policy); *Lynch v. Ackley*, No. 3:12cv537 (JBA), 2012 WL 6553649, at *9 (D. Conn. Dec. 14, 2012) (holding that a police officer was a public figure); *Young v. Gannett Satellite Info. Network, Inc.*, 837 F. Supp. 2d 758, 763 (S.D. Ohio 2011) ("[A]s a police officer, Young is a public figure for purposes of his defamation claim."); *Carroll v. City of Westminster*, 52 F. Supp. 2d 546, 565 n.35 (D. Md. 1999) ("[I]t is well settled that a police officer of any rank is a public figure for purposes of a defamation cause of action.").

concerned his performance and fitness for duty. This Court, moreover, has already held that Mr. Armstrong could not and did not show that those statements were false; rather, they were all substantially true or non-actionable opinions. JA74-78. On that basis alone, the Court should can and should reverse the judgment below and remand with instructions to enter judgment in favor of Ms. Thompson.[4]

B. The Common Law Precludes Liability For Ms. Thompson's Statements.

Separate and apart from the First Amendment bar on Mr. Armstrong's claim, the common law also recognizes that there cannot be liability for intentional interference with prospective contractual relations based on truthful statements. Consistent with the Restatement (Second) of Torts, this Court has made clear that a defendant is not liable if she establishes that her conduct was not "improper" or, stated differently, was "legally justified or privileged." JA79 (quoting *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 326 (D.C. 2008)). And, the Restatement continues, "[o]ne who intentionally causes a third person . . . not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person . . . truthful information." Restatement (Second) of Torts § 772(a). That is so whether or not the information was solicited from the speaker. *Id.*

[4] This Court's decision on Ms. Thompson's stay motion suggested in passing that this case may implicate "truthful statements involving private figures on matters of private concern." It does not, for reasons explained above. *Supra* pp. 19–21. But even if it did, the First Amendment should still require Mr. Armstrong to show falsity, which he cannot do, because falsity remains a separate requirement under the First Amendment for cases involving private figures. *See, e.g.*, *Moss v. Stockard*, 580 A.2d 1011, 1022 n.23 (D.C. 1990) (considering First Amendment limitations set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and concluding that "falsity logically is a component" of *Gertz*'s constitutional requirements on fault for private figures); *Wilson v. Scripps-Howard Broad. Co.*, 642 F.2d 371, 376 (6th Cir. 1981) ("[f]alsity is an element of fault under the First Amendment"); *Ayala v. Washington*, 679 A.2d 1057, 1067 (D.C. 1996) ("speech [that] concerns the conduct of government . . . [is] properly treated as of 'public concern'"). Neither the Supreme Court nor this Court has held that a State could, consistent with the First Amendment, *lower* the common law's core requirement for defamation or intentional interference, *e.g.*, JA166; *infra* Part I.B, that only false statements, not truthful ones, might give rise to liability.

at cmt. b; *see also* Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 Stan. L. Rev. 789, 829 (1964) ("[T]he plaintiff should not be allowed to complain if the truth has deterred third parties from entering into advantageous dealings with him, regardless of what motivated [the] defendant's statement.").

This Court has twice declined to decide whether to adopt section 772(a). *See* JA80; *Dyer v. William S. Bergman & Assocs., Inc.*, 657 A.2d 1132, 1137 n.5 (D.C. 1995) ("'truthful statement' theory would have some appeal"). Ms. Thompson urges it to do so now. For one thing, other courts have assumed that § 772(a) is a correct statement of D.C. law. *See Int'l City Mgmt. Ass'n Ret. Corp. v. Watkins*, 726 F. Supp. 1, 6 (D.D.C. 1989); *Weiss v. Lehman*, 713 F. Supp. 489, 503 (D.D.C. 1989). For another, Maryland law—which this Court considers absent binding D.C. law, *see Johnson v. Fairfax Village Condo. IV Unit Owners Ass'n*, 641 A.2d 495, 506 n.22 (D.C. 1994)—has been understood to deem truthful information non-actionable under § 772(a). *See Ziemkiewicz v. R+L Carriers, Inc.*, 996 F. Supp. 2d 378, 396 (D. Md. 2014) (applying Maryland and New Jersey law and holding that § 772(a)'s privilege for truthful information applied in both); *Weiss*, 713 F. Supp. at 503 (applying both District of Columbia law and Maryland law).

These decisions reflect the clear majority rule: "many other courts have adopted section 772 and have refused to find improper means based on a defendant's disclosure of truthful but embarrassing or damaging facts about the plaintiff." *Brule v. Blue Cross and Blue Shield of N.M.*, 455 F. App'x 836, 839 (10th Cir. 2011).[5] Indeed, even jurisdictions that had decided *not*

[5] *See, e.g.*, *Brule*, 455 F. App'x at 839 (holding that the New Mexico Supreme Court "has arguably implicitly adopted, and would likely explicitly adopt, section 772's rule that disclosure of truthful information cannot constitute interference by improper means"); *Walnut St. Assocs., Inc. v. Brokerage Concepts, Inc.*, 20 A.3d 468, 478 (Pa. 2011) ("[W]e hold that . . . Section 772(a) should apply . . . ."); *Recio v. Evers*, 771 N.W.2d 121, 133 (Neb. 2009) ("[A]s stated in § 772(a), a person does not incur liability for interfering with a business relationship by giving truthful information to another."); *Commonwealth Constr. Co. v. Endecon, Inc.*, No. 08C-01-266

to follow section 772(a) are changing their views. This Court's prior opinion cited a Third Circuit case applying Pennsylvania law for the proposition that "other jurisdictions have declined to" adopt section 772, JA80 (citing *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 185 (3d Cir. 1997)), but Pennsylvania has expressly adopted § 772(a) since that Third Circuit case came down. *See Walnut St. Assocs.*, 20 A.3d at 478. Similarly, during the pendency of this appeal, another jurisdiction to have previously rejected § 772(a) (Utah) overruled its earlier decision on that score. *Eldridge v. Johndrow*, 345 P.3d 553, 565-66 (Utah 2015) (overruling *Pratt v. Prodata*, 885 P.2d 786 (Utah 1994)). Section 772 thus reflects an increasingly prevailing view under the common law.

Appellant submits that District of Columbia law should align with that of Maryland and the majority of other jurisdictions and make clear that truthful statements cannot be the basis for an intentional interference with contract claim. Because Ms. Thompson's statements were not defamatory precisely because they were substantially true, they should not form the basis for a valid intentional interference claim either.

C. Preventing Intentional Interference Liability For Substantially Truthful Statements Properly Protects Whistleblowers Like Ms. Thompson.

The protections embodied in the First Amendment and the common law rest on deep-seated principles that both place enormous value on the dissemination of truthful information and

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RRC, 2009 WL 609426, at *6 n.34 (Del. Super. Ct. Mar. 9, 2009) (expressly adopting § 772(a)); *Thompson v. Paul*, 402 F. Supp. 2d 1110, 1117 (D. Ariz. 2005) ("This was a true statement, and therefore, '[t]here is of course no liability for interference with a contract . . . on the part of one who merely gives truthful information to another.'") *rev'd in part on other grounds*, 547 F.3d 1055 (9th Cir. 2008); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 593 (W. Va. 1998) ("[W]e now adopt § 772 of the Restatement in its entirety."); *Kutcher v. Zimmerman*, 957 P.2d 1076, 1091 (Haw. Ct. App. 1998) (adopting "the privilege of communicating truthful information, as set forth in section 772(a)"); *Francis v. Dun & Bradstreet, Inc.* 4 Cal. Rptr. 2d 361, 364 &.n4 (1992) (expressly adopting § 772(a) and observing that a "the admitted truth of [the defendant's statements] eviscerates [the plaintiff's claim for interference with prospective economic advantage]"); *Four Nines Gold, Inc. v. 71 Constr., Inc.*, 809 P.2d 236, 238 (Wyo. 1991) ("[T]ruthful statements, whether solicited or volunteered, are not actionable as intentional interference with prospective contractual relations.").

recognize the intolerable consequences that could flow from a contrary rule. "[W]histleblowing provides an important public benefit that must be encouraged when necessary by taking away fear of retaliation." *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012). As for the First Amendment, for example, such encouragement is secured by imposing exacting requirements "when necessary to ensure that truthful speech is not chilled." *United States v. Alvarez*, 132 S. Ct. 2537, 2563 (2012) (Alito, J., dissenting). In analogous settings, too, the Supreme Court has held that it would "defeat th[e] purpose" of laws designed to encourage speech to permit liability "for substantially true reports." *Air Wisconsin Airlines Corp.*, 134 S. Ct. at 862. And this Court has similarly emphasized the "substantial" "potential chilling effect upon robust debate and freedom of expression" that could accompany a rule that contemplates possible liability in such circumstances. *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 602 (D.C. 2000).

These precepts are equally powerful in this context. Ms. Thompson's statements were not defamatory and were not provably false as a matter of law. If such statements can nevertheless leave an individual on the hook for over a half a million dollars (and force that individual into bankruptcy), there is every reason to be concerned about the judgment's potential to chill truthful speech going forward. Everyone interviewed in a background investigation for a prospective federal employee, for example, may well think twice before voluntarily conveying substantially truthful information that could lead to the loss of that job offer because the truth alone may not be enough to foreclose tort claims. That should not be the law in D.C., where such investigations and interviews take place all the time. The constitutional and common-law protections for truthful speech exist because it was long ago decided that the law should encourage, rather than discourage, statements of this nature. Ms. Thompson's statements are no

exception, and Mr. Armstrong's intentional interference claim based on those statements should be rejected.

D. Nothing About The First Appeal In This Case Barred Ms. Thompson From Raising Truth-Based Defenses Under The First Amendment And The Common Law.

Notwithstanding the strength of these defenses, the Superior Court never even considered them, believing both to have been barred by this Court's decision in the first appeal. That belief appears to rest on one of two theories: (1) the first appeal decided that she had waived the defenses and could not raise them again, or (2) the first appeal, by reversing a summary judgment decision that was based in part on the substantial truth of her statements, necessarily decided that truth cannot be an absolute defense to an intentional interference claim. Neither proposition withstands scrutiny.

1. The Superior Court believed that this Court held, as law of the case, that Ms. Thompson had waived her truth-based absolute defenses. *See, e.g.*, JA85 ("this Court does not believe that it is appropriate to accept defendant Thompson's invitation to address the argument that the Court of Appeals explicitly found to be waived on appeal"); Hr'g Tr. 26:23-27:7 ("it was the Court of Appeals' ruling" that the First Amendment argument was waived).

But this Court did no such thing. The Court never even mentioned the First Amendment defense in connection with its determination on the intentional interference claim and, therefore, obviously could not have affirmatively found that argument to have been waived. On the common-law defense, moreover, the Court simply decided not to consider the argument "because Ms. Thompson did not raise it in her appellate brief" but instead "defend[ed] the trial court's determination" on the grounds decided. JA80. That decision in no way meant that Ms. Thompson had waived the argument forever or that the Superior Court was barred from considering the point on remand with the benefit of full briefing.

The Superior Court's contrary conclusion rests on a series of misunderstandings about the respective positions and obligations of this Court and of Ms. Thompson. This Court, of course, may affirm a grant of summary judgment on any ground supported by the record, but it need not and often does not decide important issues without the benefit of full briefing. *See, e.g.*, *Franco v. District of Columbia*, 3 A.3d 300, 307 (D.C. 2010); *Fairman v. District of Columbia*, 934 A.2d 438, 445-46 (D.C. 2007) (court will affirm on a different basis rather than remand if, among other things, "the issue has been fully briefed"). For her part, as appellee in the prior appeal, Ms. Thompson was "not required to raise all possible alternative grounds for affirmance in order to avoid waiving any of those grounds." *Independence Park Apartments v. United States*, 449 F.3d 1235, 1240 (Fed. Cir. 2006); *see also Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) ("[t]he urging of alternative grounds for affirmance is a privilege rather than a duty"). That makes good sense, as "forcing appellees to put forth every conceivable alternative ground for affirmance might increase the complexity and scope of appeals more than it would streamline the progress of the litigation." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740-41 (D.C. Cir. 1995).

Thus, this is not a case in which the *appellant* did not raise an argument—because Ms. Thompson was the *appellee*.[6] Instead, Mr. Armstrong as appellant defined the battleground by devoting 16 pages in his principal brief—more than half of the argument section—to attacking the Superior Court's decision on defamation. Appellant's Br. 21-36. He devoted a mere two-and-a-half pages to intentional interference. *See id.* at 39-41. It was therefore entirely reasonable for Ms. Thompson to respond in kind, focusing on a defense of the defamation judgment and defending the intentional interference judgment on the basis that the Superior

[6] *Dyer v. William S. Bergman & Assocs., Inc.*, 657 A.2d at 1137 n.5, cited in the Court's earlier opinion, JA80, is inapposite because, there, the *appellant* had waived a truth-as-an-absolute-defense argument that he never once raised in the trial court.

Court had decided it—a basis that did not address either the First Amendment or common law truth-based absolute defenses. Nothing about that approach or about footnote 8 of this Court's prior opinion meant that she had waived other arguments for all time, including on remand. Such a rule would punish Ms. Thompson for not doing what she did not have to do as appellee in the first appeal by leaving her worse off on remand than if she had never moved for summary judgment and won to begin with. That is not what law of the case requires or what this Court's prior decision meant.

2. The only other potential way to read this Court's decision as barring Ms. Thompson's arguments is to conclude that the Court, by reversing the grant of summary judgment that rested in part on the fact that the statements were substantially true, necessarily decided that substantial truth could never provide Ms. Thompson with an absolute defense. *See, e.g.*, JA84-85 (finding no "possibility that this Court could, consistent with the Court of Appeals decision, grant summary judgment to the defendants on the ground that the communications contained exclusively truthful information"). Indeed, this Court suggested such a view when it denied Ms. Thompson's stay request and stated that its first "opinion . . . , which held that 'reasonable minds could differ . . . on the question whether [appellant] was legally justified in intentionally interfering with [appellee's] prospective employment' by providing a truthful statement . . . , necessarily contemplates that under this jurisdiction's common law, truthful statements are not per se protected from tort liability." JA165.

Respectfully, however, that is not a correct application of the law of the case doctrine. It is certainly true that law of the case may bar reconsideration of a question when, among other things, the issue was "considered and decided by the first court, either expressly or by necessarily implication." *Karr v. C. Dudley Brown & Assocs., Inc.*, 567 A.2d 1306, 1310-11 (D.C. 1989) (internal citation omitted); *see also Kleinbart v. United States*, 604 A.2d 861, 867

(D.C. 1992) (law of the case applies only when an issue is "thoroughly aired and definitively resolved"). But that rule does not apply to either of Ms. Thompson's truth-based defenses. The First Amendment argument was not even considered, let alone definitively resolved, in the first appeal. And the common-law argument was not decided "either expressly or by necessary implication" for the simple reason that the Court expressly stated it was *not* deciding it. JA80 n.8. As the Court recognized in that footnote, concluding that a reasonable jury could assess a multi-factored balancing test that considers many factors, including society's interest in protecting the conduct as well as potential motives, to decide whether Ms. Thompson's conduct was "improper" does not resolve whether "truthful statements" are not "improper" under the common law notwithstanding other factors implicated in the otherwise-applicable balancing test.

This circumstance does not arise often, but, when it does, courts have correctly recognized that an appellate court decision expressly declining to decide an issue means that law of the case is inapplicable. *See, e.g.*, *Keenan v. Donaldson, Lufkin & Jenrette, Inc.*, 575 F.3d 483 (5th Cir. 2009); *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392 (3d Cir. 2003) (Alito, J.). In both *United Artists* and *Keenan*, the appellee in the first appeal failed to defend a grant of summary judgment on a particular basis, and the appellate courts noted the issue while expressly declining to reach it. When the cases returned for a second appeal, both courts held that the law of the case doctrine did not apply, even though parts of the earlier holdings might have been read to suggest a contrary view. *United Artists*, 316 F.3d at 397; *Keenan*, 575 F.3d at 487. This case is no different: the Court expressly "decline[d] to consider" an issue that had not been fully briefed, JA80, and, whether or not other parts of the opinion could be construed to suggest a view on the issue, this Court cannot have necessarily decided something it said it was not deciding.

3. In all events, however, should this Court conclude, contrary to the foregoing cases and arguments, that law of the case applies here, that conclusion still should not foreclose consideration of Ms. Thompson's defenses because law of the case is a discretionary doctrine. JA165. The Court has, moreover, been reluctant to apply the rule when doing so would decide an issue with "significant constitutional implications," *Kleinbart*, 604 A.2d at 866–67, and that is plainly the case here. The Court should therefore exercise its discretion to consider the issues even if it thinks they would otherwise be barred by law of the case.

The Superior Court erred in failing to reach the merits of either the First Amendment or common-law truth defenses. This Court should do so now. For the reasons stated above, the Court should reverse with instructions to enter judgment in Ms. Thompson's favor.[7]

II. THE SUPERIOR COURT ERRONEOUSLY INTERPRETED THIS COURT'S DECISION TO PRECLUDE MS. THOMPSON FROM INTRODUCING KEY STIPULATIONS AND FACTS.

The Superior Court's erroneous interpretation of this Court's earlier decision did not end with its refusal to rule on Ms. Thompson's First Amendment and common-law defenses. On the contrary, the Superior Court invoked an implausibly cramped reading of the 2013 decision to prevent the jury from receiving key evidence. Specifically, the Superior Court (1) rejected Ms. Thompson's effort to tell the jury about the cause of Mr. Armstrong's loss of the job offer based on the preclusive effect that was owed to the final judgment in another case, and (2) bypassed this Court's holding that a TIGTA report was admissible and instead imposed unnecessary conditions on Ms. Thompson's ability to admit that report and related documents. These rulings

[7] Even if Ms. Thompson had never moved for summary judgment, she sought, JA105, and should have been entitled to, a jury instruction that truthful statements were not actionable, because a party is entitled to a jury instruction correctly stating the law on any defense fairly raised by the evidence. *Simms v. District of Columbia*, 612 A.2d 215, 219 (D.C. 1992); *see also Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) ("A party is entitled to an instruction about his or her theory of the case if it is supported by law and has foundation in the evidence.").

were wrong, and each requires at a minimum vacating the judgment against Ms. Thompson. The erroneous exclusion of evidence requires a new trial if it "may well have affected the outcome of the trial," *Weiner v. Kneller*, 557 A.2d 1306, 1312 (D.C. 1989), and that is decidedly the case here.

A. The Superior Court Erroneously Construed This Court's Decision To Preclude Ms. Thompson From Offering Evidence Based On A Prior Judgment That Deserved Preclusive Effect.

Having mistakenly concluded that Mr. Armstrong's intentional interference claim required a jury trial, the Superior Court then used that conclusion to further restrict Ms. Thompson's defense in a way that made no sense. In particular, Ms. Thompson sought to offer as evidence a stipulated fact, rooted in the preclusive effect of a final judgment in an earlier case, that Mr. Armstrong did not get the USDA job because of his own statements to USDA. JA121, 131, 144. That fact was directly relevant to the issues of proximate cause and damages, and the fact that Ms. Thompson's statements helped bring Mr. Armstrong's own contradictory statements to light does not detract from the significance of recognizing that he—and not Ms. Thompson—caused his own injury. Indeed, Mr. Armstrong's own lawyer thought that the earlier finding could have doomed his client's case: "Either what she said caused it, in which case he gets to argue the tortious interference, or he caused it himself, which is her argument, which means even if there was tortious interference, who cares, and I think that's what this case comes down to." Hr'g Tr. 20:10–21:18.

The Superior Court, however, did not even engage Ms. Thompson's collateral estoppel argument. Instead, returning to its flawed reading of the remand decision, the court tersely concluded that it would not "allow a resolution of any . . . elements to have been made by any prior judge" because it believed all elements should go to the jury. Trial Tr. 30:1-12. But this

Court in no way held that anything and everything needed to be decided by the jury on remand. *See supra* Part I.D.

And Ms. Thompson's proposal was entirely proper. The doctrine of collateral estoppel, or issue preclusion, bars reconsideration of an issue decided in prior litigation where "(1) the issue [was] actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum." *Modiri v. 1342 Rest. Grp., Inc.*, 904 A.2d 391, 395 (D.C. 2006). This Court has held that issue preclusion may be raised defensively against a plaintiff on the same issues litigated in a prior suit by the same plaintiff. *Jackson v. District of Columbia*, 412 A.2d 948, 952 (D.C. 1980).

That is the situation here, and the MSPB's determination that Mr. Armstrong's own statements were the reason he never began his job at USDA satisfies all four elements. *First*, the question of what caused Mr. Armstrong not to be hired by USDA was litigated in the MSPB proceedings and before the Federal Circuit. Mr. Armstrong told the Superior Court that he had never raised or litigated the issue, that "[t]he MSPB never ruled on why he didn't get hired by the USDA," and that "[t]here was no evidence presented to the MSPB in any brief filed by [Mr. Armstrong] or by the government that the reason he didn't get the job was because of his own statements." Trial Tr. 32:25–33:1, 33:20-23. In fact, however, Mr. Armstrong himself put the matter at issue in the MSPB proceeding when he contended that TIGTA had misrepresented its contacts with USDA and that these misrepresentations were material because those contacts had deprived him of an opportunity to be hired. Petition for Review 202-11. The MSPB twice considered and rejected that argument, *see* JA152 ("the record reflects that the USDA placed [Mr. Armstrong's] employment offer on hold due to information that [Mr. Armstrong] himself conveyed directly to Ms. Horsley); *Armstrong*, 115 M.S.P.R. at 3-5 (2010) (cause of his offer

being placed on hold was "information conveyed directly to [USDA] by [Mr. Armstrong]"), and the Federal Circuit affirmed the Board's ruling, *Armstrong*, 438 F. App'x at 903.

Second, the MSPB decision constitutes a valid, final judgment on the merits. The doctrine of collateral estoppel "appl[ies] to the results of administrative proceedings 'when the agency is acting in a judicial capacity, resolving disputed issues of fact properly before it which the parties have an adequate opportunity to litigate.'" *Borger Mgmt., Inc. v. Sindram*, 886 A.2d 52, 59 (D.C. 2005) (quoting *Oubre v. Dist. of Columbia Dep't of Emp't Servs.*, 630 A.2d 699, 703 (D.C. 1993)). That includes a decision of the MSPB, *Flores v. Dep't of Treasury*, 25 F. App'x 868, 871 (Fed. Cir. 2001), especially when, as here, that decision was affirmed by the Federal Circuit. *See, e.g.*, *Machulas v. United States*, 107 Fed. Cl. 119, 125 (2012); *Grayton v. United States*, No. 10-cv-02608-AJB-WVG, 2011 WL 6259978, at *3 (S.D. Cal. Dec. 14, 2011).

Third, Mr. Armstrong had a full and fair opportunity to litigate this issue. He is the one who raised the point in support of his materiality assertion, the MSPB considered it, and there is no evidence that his MSPB proceeding was in any way unfair.

Fourth, the MSPB's resolution of this issue was essential to the judgment. Mr. Armstrong argued that TIGTA's alleged misrepresentations about its contacts with USDA were material because, had he known about those contacts, he would not have agreed to the settlement. Petition for Review 202-11. In support of that contention, he argued that those contacts deprived him of the very thing he sought to achieve in the settlement—an ability to obtain employment with USDA. The MSPB rejected this argument precisely because it was Mr. Armstrong's own contradictory statements that deprived him of that ability. JA151-52; *Armstrong*, 115 M.S.P.R. at 4. The fact that the MSPB also concluded that TIGTA did not misrepresent the facts and that Mr. Armstrong failed to show that the agency knowingly concealed a material fact or intentionally misled him, *see Armstrong*, 115 M.S.P.R. at 4, does not

strip the decision of preclusive effect. Rather, when, as here, a tribunal asserts multiple independent grounds for a decision, and an appellate court affirms without limiting its affirmance to one particular ground, *all* grounds are properly considered essential to the judgment and entitled to preclusive effect. *See, e.g.*, *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 255 (D.C. Cir. 1992); *cf. Sanchez-Llamas v. Oregon*, 548 U.S. 331, 333 (2006) (rejecting argument that alternative holdings were dicta and that one "holding was unnecessary simply because the petitioner had several other ways to lose").

The Superior Court's refusal to enter or even meaningfully consider Ms. Thompson's proffer of evidence on this issue was wrong. If the Court disagrees with Ms. Thompson on the first issue presented, therefore, it should still vacate the judgment and remand with instructions to address rather than ignore Ms. Thompson's potentially dispositive argument.

B. The Superior Court Erroneously Blocked The Admission Of Critical TIGTA Documents.

The same result is warranted with respect to another evidentiary ruling that only spotlights the extent to which the Superior Court misread this Court's earlier decision. Having strained to find a ruling in the decision that was not there, *supra* Part I.D, the Superior Court then ignored a ruling that this Court actually *did* make. In particular, Ms. Thompson sought to admit TIGTA's Report of Investigation and removal notices in order to establish the agency's view of Mr. Armstrong's conduct. The Superior Court conceded that the evidence was relevant but deemed it inadmissible. That was error.

1. As for the Report, this Court already held that the document was admissible. In the first appeal, Mr. Armstrong challenged the Superior Court's reliance on the Report and argued that the document was inadmissible hearsay. This Court squarely rejected that argument and concluded that the Report was an agency record made in the regular course of business and *not* in anticipation of litigation. JA75 (citing Super. Ct. Civ. R. 43-1 and Fed. R. Evid.

803(8)(A)(iii)); *contra., e.g.*, 2 Kenneth S. Broun, McCormick On Evidence § 288 (7th ed. 2013) (records made in anticipation of litigation often but not always demonstrate a lack of trustworthiness because they are not made in the regular course of business). Hearsay exceptions are designed to decide whether a document is admissible and to ensure that it is trustworthy. Here, however, this Court already answered the admissibility question and, in doing so, implicitly and correctly acknowledged that there can be no serious question about the Report's trustworthiness.

Rather than regarding this Court's decision as conclusive, however, the Superior Court thought that the Report needed to be authenticated and that an agency employee needed to provide such authentication. Trial Tr. 13:3–14:8, 441. Both propositions are wrong. The Report did not need to be authenticated because this Court had already decided it was admissible and there was never any real question that it was authentic. *See, e.g.*, *Haack v. City of Carson City*, No. 3:11-cv-00353-RAM, 2012 WL 3638767, at *8 (D. Nev. Aug. 22, 2012) (finding no need to authenticate a document that "the court can plainly determine . . . is a genuine copy"); *Umbenhower v. Copart, Inc.*, No. 03-2476-JWL, 2004 WL 2660649, at *2 (D. Kan. Nov. 19, 2004) ("[D]efendants were not required to authenticate the arbitration agreement in the absence of any evidence disputing the authenticity of the agreement."); *In re Enron Corp. Securities, Derivatives & "Erisa" Litig.*, No. MDL 1446, Civ.A. H-01-3624, Civ.A. H-02-3185, 2003 WL 23316646, at *4 (S.D. Tex. Mar. 27, 2003) ("[T]here is no need to authenticate documents when there is no genuine controversy or reasonable doubt about their authenticity."). Indeed, the Superior Court's *own Pretrial Order* acknowledged this when it plainly stated that "[n]o party need produce proof of authenticity of any exhibit at trial." JA131. Ms. Thompson prepared for and entered trial with that Order in place, and there was no reason to inexplicably change course in the middle of trial.

But to the extent the Superior Court suddenly felt that authentication was needed—and it was not—the court was wrong to suggest that Mr. Armstrong could not provide it. *See* Trial Tr. 441:14-19 (stating "an agent could come in and . . . satisfy those foundational elements"). Any witness can authenticate a document so long as the witness can "g[i]ve adequate reason to trust the authenticity and the accuracy of the documents" at issue. *Dutch v. United States*, 997 A.2d 685, 689 (D.C. 2010); *see also id.* ("'no requirement that the witness who lays the foundation be the author of the record or be able to personally attest to its accuracy'" (internal citation omitted)). Mr. Armstrong was such a witness because he was the subject of the Report and a former agent who had personally conducted internal investigations and produced reports of investigations. Trial Tr. 396:12–400:11. He even testified as to how information about "normal internal investigations" was kept. Trial Tr. 369:13-15. There was simply no basis for concluding that the Report could not be admitted or, in the very least, authenticated by Mr. Armstrong.

2. The Superior Court's decision to exclude Mr. Armstrong's removal letters was similarly misguided. It held, first, that the notices should be excluded as overly prejudicial and, second, that they were inadmissible hearsay. Trial Tr. 440:20–441:19. Neither rationale is correct.

To begin with, the Superior Court was wrong to rely on Rule 403 because evidence that would otherwise be excluded under Rule 403 should be admitted if the party seeking to exclude the evidence "accentuate[s] [its] relevancy" through "self serving testimony." *United States v. Pierson*, 544 F.3d 933, 941 (8th Cir. 2008). That is just what Mr. Armstrong did here. TIGTA's view of Mr. Armstrong's conduct was relevant to "the general societal view of [that] conduct." Trial Tr. 440:20-22. And any potential danger that the jury might view the notices as evidence that TIGTA had terminated Mr. Armstrong when it had in fact settled the dispute, Trial Tr.

440:22–441:8, evaporated when Mr. Armstrong stated that that the author of the December notice, Timothy Camus, never expressed an opinion about his removal or about his conduct, Trial Tr. 464:14–468:19. The refusal to acknowledge that Mr. Camus and others at TIGTA viewed his conduct negatively opened the door to admitting the notices to contradict Mr. Armstrong's self-serving testimony. The letters were not excludable under Rule 403.[8]

Nor was the Superior Court right to separately conclude that the notices were inadmissible hearsay. "Hearsay is an out-of-court assertion of fact offered into evidence to prove the truth of the matter asserted," but an out-of-court statement offered "for the limited purpose of showing the state of mind of the declarant" is not hearsay. *Jones*, 17 A.3d at 631. Ms. Thompson made it crystal clear that she sought to admit the notices in order show TIGTA's state of mind, which was probative of, among other things, the societal interest in protecting Ms. Thompson's statements. *See* Trial Tr. 437:19–438:8; JA80. The fact that a federal agency views a particular type of behavior entirely improper for a law enforcement officer plainly bears on the "societal interest in protecting the freedom of action" of someone who brings such behavior to light. The notices were important evidence for that purpose—not for the truth of any facts contained in them—and it was therefore error to exclude them as hearsay.[9]

In this two-day trial, where the jury saw limited live testimony and already had a small record to go on, the Superior Court's decisions to foreclose Ms. Thompson from adding to that record by introducing important and admissible pieces of evidence substantially prejudiced her defense and "may well have affected the outcome of the trial." *See Weiner*, 557 A.2d at 1312. If

[8] The fact that the notices were withdrawn as part of the settlement does not diminish their relevance or admissibility. *See English v. District of Columbia*, 651 F.3d 1, 7–8 (D.C. Cir. 2011) (final report of public official conducting an investigation authorized by law is admissible under the exception even if the agency does not adopt the finding).

[9] For the same reasons explained above, the court was also wrong to require authentication for the records, including whether they were a type of regularly kept record or prepared in anticipation of litigation. *Supra* pp. 33-35.

the Court does not reverse on the first issue presented, therefore, these additional errors demonstrate why it should vacate the judgment and remand for a trial in which these documents and the MSPB's causation finding can be admitted.

CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's the judgment and remand with instructions to enter judgment in Ms. Thompson's favor because her statements cannot support an intentional interference claim under the First Amendment or the common law. In the alternative, the Court should vacate the judgment and remand for further proceedings consistent with the Court's decision.

Dated: May 1, 2015

Respectfully submitted,

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION
OF THE NATION'S CAPITAL
4301 Connecticut Avenue, NW
Suite 434
Washington, DC 20008
Telephone: (202) 457-0800
Facsimile: (202) 457-0805

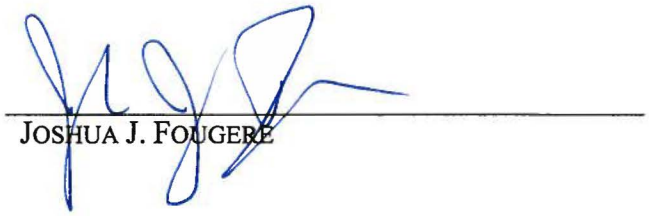
JOSHUA J. FOUGERE
JOSEPH R. GUERRA
NOAH T. KATZEN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

Counsel for Karen Thompson

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 2015, I caused the foregoing Opening Brief of Defendant-Appellant Karen Thompson and accompanying Joint Appendix to be served on the following by email and with written consent, and by first-class mail:

Kevin E. Byrnes
Williams Lopatto, PLLC
1707 L Street, N.W., Suite 550
Washington, D.C. 20036
202-558-4629
kbyrnes@williamslopatto.com



JOSHUA J. FOUGERE

Exhibit A

EXHIBIT 6

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

WILLIAM H. ARMSTRONG Appellant Plaintiff, v. DEPARTMENT OF THE TREASURY Agency	)	DOCKET NUMBER DC-0752-08-0188-1-1 DATE: August 12, 2008

Exhibit 6

PETITION FOR REVIEW

Comes now the Appellant, William H. Armstrong, and files this Petition for Review with the Merit System Protection Board on the grounds that the Settlement Agreement itself was a product of fraud and misrepresentation.

As grounds for this motion, Mr. Armstrong alleges as follows.

I. FACTS

This petition arises out of a complicated series of maneuvers conducted by officials at the Treasury Inspector General's Office for Tax Administration (TIGTA) against William H. Armstrong, a former Assistant Special Agent in Charge at TIGTA's Washington, DC, Inspector General's office, which were hidden from Mr. Armstrong and his counsel and which vitiated the entire premise and benefit on which Mr. Armstrong agreed to enter a settlement with the Agency in the first instance.

The facts of Mr. Armstrong's tortured employment history with TIGTA are lengthy, but they essentially boil down to the fact that Mr. Armstrong drew the ire of certain supervisory officials at TIGTA when he complained to senior management of managerial waste and abuse and the fact that his immediate supervisor, Rodney Davis, was sleeping on duty and, thus, may

have had a condition that affected his ability to serve as a GS-1811 Series law enforcement agent.

Following these complaints, Mr. Armstrong became a target of Mr. Davis' venom along with that of other officials who supported Mr. Davis. Mr. Davis initiated investigations into Mr. Armstrong's claims of injury due to an automobile accident, began heavily scrutinizing and criticizing Mr. Armstrong's work, and displayed an animus that had racial discrimination and whistleblower reprisal overtones. Faced with a series of seeming retaliatory inquiries, Mr. Armstrong turned first to senior officials in his chain at TIGTA. When the officials turned a deaf ear or added fuel to the discriminatory fire, Mr. Armstrong accessed Agency files to determine whether he was a target of disparate treatment, discrimination or reprisal.

These actions drew first an attempted and failed criminal prosecution which was summarily rejected in a one-line refusal by federal prosecutors, followed by a jaundiced and highly overblown administrative investigation into Mr. Armstrong's "unauthorized access for personal use."

Faced with constant harassment and desirous of a new start, Mr. Armstrong applied for and received a job offer with the Department of Agriculture Office of Inspector General at a similar grade and step to his position with TIGTA. On August 16, 2007, Rodney Davis was notified via email of Mr. Armstrong's offer with Agriculture; and on August 20, 2007, Mr. Davis and Agriculture, through the Bureau of Public Debt, agreed on a release date of August 30, 2007.

On August 24, 2007, days before Mr. Armstrong was to commence employment, members of TIGTA, with knowledge and access to Mr. Armstrong's personnel files, submitted six "anonymous" letters to the Department of Agriculture's Office of Inspector General. These letters specifically sought to interfere with Mr. Armstrong's prospective employment with

Agriculture, accused him of severe criminal misconduct and stated that he was, and should be, prohibited from testifying as a law enforcement officer.

On August 30, 2007, the Department of Agriculture placed an immediate hold on Mr. Armstrong's employment and has subsequently, all but formally, withdrawn the job offer.

Not coincidentally, immediately after the Department of Agriculture abrogated the starting date of Mr. Armstrong's employment, TIGTA filed a notice of proposed removal against Mr. Armstrong on the charge of misuse of government computer, unauthorized access to Agency files and purportedly making false statements.

On October 30, 2007, Mr. Armstrong filed a combined Privacy Act suit against the Agency and a defamation suit against TIGTA individual officials; Armstrong v. Paulson, 1:07-cv-01963. *See,* Exhibit 1 of Motion to Set Aside Settlement Agreement, filed 5/28/08. Service was then effected and a reply was due no later than December 14, 2007. On December 4, 2007, with full knowledge of the suit against it and the facts contained in that suit, TIGTA rubber stamped the proposed removal and issued a decision removing Mr. Armstrong.

Mr. Armstrong appealed the removal, citing fourteen separate grounds for reversal. These included race and age discrimination, retaliation, reprisal, whistleblower reprisal, reprisal for the filing of the Privacy Act lawsuit, violations of Mr. Armstrong's First Amendment rights, reprisal for previously filed tort claims, failure to follow the Douglas factors, and excessive punishment that exceeded the Agency's own table of penalties.

Mr. Armstrong then commenced discovery and specifically requested production of statements made to third parties concerning Mr. Armstrong.

Prior to the date responses were due, the Agency indicated a willingness to settle the matter by withdrawing the termination and allowing Mr. Armstrong to secure the employment

offered by the Department of Agriculture. Mr. Armstrong requested and received assurances that TIGTA would provide the Department of Agriculture with a letter that would attempt to explain any resolution in a way that would minimize any concerns expressed by Agriculture.

The parties then conducted negotiations with the assistance and input of Administrative Law Judge Elizabeth Bogel. During the discussions, it was repeatedly conveyed that the purpose of Mr. Armstrong accepting any settlement was to avoid further disclosure of the allegations and cross charges arising out of the MSPB appeal and to allow him to continue as a federal law enforcement agent with Agriculture.

On February 7, 2008, the parties entered into a Settlement Agreement (the "Agreement") which rescinded Mr. Armstrong's removal from the Treasury's Office of Inspector General for Tax Administration (TIGTA) and replaced it with an agreed upon set of facts that allowed Mr. Armstrong to both resign from TIGTA and pursue an employment opportunity with the Inspector General for the Department of Agriculture. *See,* Exhibit 2 of Motion to Set Aside Settlement Agreement, filed 5/28/08).

Under the explicit terms of the agreement, the Agency rescinded its removal and entered a thirty-day suspension to Mr. Armstrong for "misuse of government computer and unauthorized access to agency files for personal use."[1] *See,* Exhibit 2 of Motion to Set Aside Settlement Agreement, filed 5/28/08, ¶2 of Settlement Agreement. Mr. Armstrong, however, remained until the time of his resignation on May 7, 2007, on the roll of TIGTA as a senior law enforcement agent holding the position of an Assistant Special Agent in Charge.

The Agreement specifically contemplated Mr. Armstrong's employment with the Department of Agriculture. Id. ¶3. The Agreement specifically limited the disclosure of

[1] These charges were far milder than those initially proposed and marked a significant concession in favor of Mr. Armstrong. As any suspension would be made academic by Mr. Armstrong's commencement of employment with Agriculture, Mr. Armstrong agreed to a thirty-day period.

information to the Department of Agriculture or other potential employers. Id. ¶6. TIGTA agreed only to act through its supervisory Human Resources Specialist, Bureau of Public Debt, and stated that the Agency would provide only "dates of employment, grade and salary levels and classification series" to potential employers. Id. The Agency expressly stated that, "If the prospective employer seeks additional information, the employer will be told that no further information would be provided without a written release from the Appellant." Id. ¶6.

The sole exception with respect to disclosures is that TIGTA could respond in the future to any law enforcement agency conducting a "suitability or a security clearance background investigation." *See,* Exhibit 2 of Motion to Set Aside Settlement Agreement, filed 5/28/08, ¶6 of Settlement Agreement. (Both suitability investigations and security clearance investigations are specific types of inquiries that have an independent and separate meaning from a simple employee reference check.)

Both paragraph 6 of the Settlement Agreement and the letter submitted to Kathy Horsley (*see*, Exhibit 2-A of Motion to Set Aside Settlement Agreement, filed 5/28/08), were specifically designed to limit the universe of information to be disclosed to Agriculture by TIGTA. *See,* Exhibit 2, ¶10 of Motion to Set Aside Settlement Agreement, filed 5/28/08.

Mr. Armstrong was not apprised of any contacts between Ms. Horsley and TIGTA, nor was he apprised of any of the information provided by Agency personnel to Ms. Horsley. It was only subsequent to entering the agreement, when over strenuous Agency objection in the Privacy Act suit, that Mr. Armstrong learned that the letter to Ms. Horsley was a ruse and the Settlement Agreement itself was a fraud. As Mr. Armstrong was to learn, the Agency, prior to entering the Settlement Agreement, had actively and repeatedly spoken to Ms. Horsley about Mr. Armstrong

in disparaging terms and communicated to her information which served to negate any benefit in the settlement.

In entering the Settlement Agreement, Mr. Armstrong specifically and expressly relied on the Agency's legal representative that there had been no contact with Agriculture other than that specified in the Agreement: that is, the letter. As the electronic mail communications between counsel reflect (Exhibit 3 of Motion to Set Aside Settlement Agreement, filed 5/28/08), Mr. Armstrong pointedly asked the Agency whether any communications had occurred between the Agency and Department of Agriculture before entering the Agreement.

The Agency responded as follows: "The only information that was conveyed to the USDA by Agency management/officials concerning the proposal or decision memorandum and any disciplinary action is 'no comment.'" This email was sent on February 5, 2007.

In the discussions surrounding the settlement negotiations, the Agency disclosed that in August, 2007, Ms. Horsley sent a request for information concerning Mr. Armstrong to TIGTA. This request was made at the time Mr. Armstrong was initially applying to the Department of Agriculture. The request coincided with the submission to Agriculture of six "anonymous" letters which falsely accused Mr. Armstrong of criminal misconduct. The Agency claimed it did not produce any response until it issued a letter on January 2, 2008 (Exhibit 4 of Motion to Set Aside Settlement Agreement, filed 5/28/08). Again that letter stated that the Agency would not comment on Mr. Armstrong's situation. Indeed, Agency counsel explicitly stated, "with the exception of this letter ... we are unaware of any individual employed by TIGTA who has spoken with or corresponded with Director Horsley." *See*, email communication from Lori Creswell, dated February 5, 2008 (Exhibit 3 of Motion to Set Aside Settlement Agreement, filed

5/28/08). Believing that TIGTA had not contacted Agriculture so as to "poison the well" for his new employment opportunity, Mr. Armstrong signed the Settlement Agreement.

The Settlement Agreement acknowledged this lawsuit implicitly and authorized the Appellant, and the Appellant alone, "to bring suit or seek any legal, statutory or equitable award or remedy for any claims made by the Appellant in any previously or subsequently filed claim under the Federal Tort Claims Act or Privacy Act." ¶7, 8. Further, the Settlement Agreement stated that it did not have any effect on "any cause of action Appellant may have against any individual on any claim, including any allegation of defamation or tortious interference with employment, arising out of any alleged unauthorized disclosures made to the Department of Agriculture or any third party." Id.

The inclusion of such language reflected the fact that Mr. Armstrong had already filed his Privacy Act/defamation suit against TIGTA and its senior officials. This suit arose out of the submission of the six "anonymous" letters sent to the Department of Agriculture by TIGTA employees. In that suit, Mr. Armstrong alleges that employees of TIGTA acted out of malice to defame him before the Department of Agriculture and to impede his obtaining a position with that Agency.

The Settlement Agreement acknowledged the right of Mr. Armstrong to pursue his suit. Neither the plain reading of the Agreement or any logical extension of it can be read to authorize the Agency to violate the Settlement Agreement in any response to that suit, particularly since the suit was filed on October 30, 2007, and the Settlement Agreement in the MSPB matter was entered later on February 7, 2008.

It is clear from a plain reading of the Settlement Agreement and the discussions between the parties that Mr. Armstrong reasonably and rationally believed that he had secured an agreed

upon set of facts that removed references to his removal from the Agency to any outside parties and replaced that termination with a voluntary resignation. It is also clear that the agreement set in stone a set of facts concerning Mr. Armstrong's conduct and imposed limitations on the disclosure of information to third parties. It is also clear that Mr. Armstrong reasonably believed and was induced by the Agency to believe that there had been only a single contact with the USDA and that TIGTA had not communicated more than the substance of the letter to his potential new employer (Exhibit 2-A of Motion to Set Aside Settlement Agreement, filed 5/28/08). The Agency, perhaps out of spite or sheer ineptitude, not only discarded the actual terms of the Agreement but hid from Mr. Armstrong contacts its employees had made to Agriculture which precluded Mr. Armstrong from any real hope of obtaining employment with that Agency.

As Ms. Creswell's statement reveals (Exhibit 5 of Motion to Set Aside Settlement Agreement, filed 5/28/08), senior management officials had had contact with Ms. Horsley at the time of Mr. Armstrong's application for employment. Ms. Horsley spoke with Michael Delgado and Rodney Davis, both persons cited by Mr. Armstrong in his MSPB Appeal as officials who engaged in discrimination and reprisal. In addition, Ms. Creswell herself spoke to Ms. Horsley and advised her to "put her request in writing." That request, however, was for information pertaining to the disciplinary action against Mr. Armstrong and that was precisely the "no comment" letter which was supposed to evidence the sole contact between TIGTA and Agriculture regarding Mr. Armstrong. Mr. Davis, in his statement to "investigators," contends this contact was on August 28, 2007.

II. FRAUD; DECEPTION IN SECURING AGREEMENT

The discovery of the Agency's fraud came to Mr. Armstrong's attention in May, 2008, when the Agency was forced over its objection to surrender evidence of its contacts with the Department of Agriculture. As a result, Mr. Armstrong learned that Assistant Inspector General Michael Delgado, Special Agent in Charge Rodney Davis, Agent Kenneth Casey and Attorney-Advisor Lori Creswell had all been in contact with Kathy Horsley, the hiring official at the Department of Agriculture.

Believing that this, along with certain court disclosures, violated the terms of the Settlement Agreement reached betweens the parties in February, 2008, Mr. Armstrong filed a Motion to Enforce the Settlement with Administrative Law Judge Elizabeth Bogle. After reviewing the motion, Judge Bogle ruled the Agency had not violated the terms of the Settlement Agreement itself because all its undisclosed contacts with Ms. Horsley preceded the signed agreement. Judge Bogle ruled that the proper form for the Complainant to seek relief was before the Board since Mr. Armstrong was arguing that the underlying agreement itself was a product of fraud.

With this in mind, Mr. Armstrong now appeals to the full Board to reinstate his Appeal since, for reasons discussed below, it is clear the Settlement Agreement was procured by active fraud and deception by the Agency and its legal counsel.

The multiple contacts and the nature of the information disclosed establish that the Agency mislead Mr. Armstrong as to the extent of its contacts with the Department of Agriculture and with Ms. Horsley, the actual hiring official who was making the decision with respect to Mr. Armstrong, and as to the nature and extent of information concerning Mr. Armstrong.

When confronted with these glaring inconsistencies, the Agency sheepishly claimed that its own counsel was unaware of the very contacts with Ms. Horsley which were done at the purported behest of that same Agency counsel. Indeed, Agency counsel initially tried to claim that the memorandum evidencing contacts between TIGTA and Ms. Horsley were attorney-client privileged. The Agency then mislead not only counsel but the federal court itself when it claimed initially the only contacts between the Agency and Ms. Horsley were done by Special Agents investigating defenses and facts pertinent to the civil suit. However, the statements of Rodney Davis, Michael Delgado and Lori Creswell show that the Agency had additional contacts with Ms. Horsley which extended well beyond the actions of the Special Agents and Ms. Horsley.

The fact remains that the Agency initially denied any substantive contact with Ms. Horsley when it was negotiating the Settlement Agreement, although it clearly had written memorandum evidencing numerous contacts. The Agency has now been forced by the District Court action to admit first that it contacted (once) an official of the Department of Agriculture. Second, that the contact was not simply a one-time occurrence, but happened several times. Third, that the contact involved the actual decision maker on the issue of Mr. Armstrong's employment and, finally, that it was not only investigative agents who spoke with or corresponded with Director Horsley, to paraphrase Ms. Creswell, but supervisory officials, whom Mr. Armstrong claimed engaged in reprisal, discrimination and retaliation against him, who spoke with Ms. Horsley.

During the course of Mr. Armstrong's Privacy Act case, he discovered for the first time that Agency officials and Ms. Creswell, as legal counsel, had had multiple contacts with Kathy Horsley, the hiring official at the U. S. Department of Agriculture who had extended an employment offer to Mr. Armstrong. Over strenuous Agency objection, Federal Judge James

Robertson ordered the disclosure of these contacts and the deposition of numerous TIGTA officials, including its legal counsel to the administrative action before the MSPB, Ms. Lori Creswell.

Under oath, Ms. Creswell acknowledged that while aware of multiple contacts with Ms. Horsley by herself (*See,* Exhibit A, attached hereto -- Creswell Deposition 10:6-10:13), Deputy Michael Delgado (*See,* Exhibit A, attached hereto -- Creswell Deposition 20:06-21:03), and Agency investigators (*See,* Exhibit A, attached hereto -- Creswell Deposition 44:01-44:10). She hid that fact from Mr. Armstrong and his counsel while negotiating a Settlement Agreement whose specific input was to allow Mr. Armstrong to secure his employment offer at Agriculture (*See,* Exhibit A, attached hereto -- Creswell Deposition 46:20-48:05).

Ms. Creswell also admitted that she employed a slight of hand in securing the Settlement Agreement itself. Under repeated questioning, she acknowledged that the Settlement Agreement produced a letter to Agriculture outlining the agreed upon set of facts to be told to Agriculture and that Agreement produced an SF-50, both of which were designed to reflect agreed upon conduct for the personnel action. Ms. Creswell boldly stated the Settlement Agreement freely allows TIGTA to set forth the original allegations proposed and decided by the Agency despite an agreement that precluded an actual objective hearing on that fact and a Settlement Agreement that specifically negated the "facts" contained in the original proposal and decision (*See,* Exhibit A, attached hereto -- Creswell Deposition 50:17-56:15).

Ms. Creswell also admitted that she was at least negligent in failing to accurately respond to a communication sent to her that specifically inquired whether TIGTA had made contact with the Department of Agriculture. Posing the request to include only post December, 2007, contacts, Ms. Creswell determined that subsequent contacts with Ms. Horsley discussing Mr.

Armstrong had in fact occurred and these had not been disclosed to Mr. Armstrong until after he entered the Settlement Agreement (*See,* Exhibit A, attached hereto -- Creswell Deposition 133:12-137:05; 151:16-153:04; 156:08-157:12).

In addition to Ms. Creswell's deposition, Ms. Kathy Horsley has testified under oath that agency officials led her to conclude that she could not hire Mr. Armstrong. (This transcript is being prepared and will be included as a supplement upon receipt).

Thus, it is clear that at the time the Agency entered into the settlement agreement, it was both hiding the fact that it had contacted Ms. Horsley and that it had negated all possibility of Mr. Armstrong obtaining a position with Agriculture.

Without question, the Agency employed fraud, deception or gross negligence to blindside Mr. Armstrong and his counsel and to obtain a Settlement Agreement where the bargained for promise of confidentiality and agreed upon set of facts was a ruse. The Agency knew or should have known at the time it negotiated, drafted and entered the Agreement that the facts relied upon by Mr. Armstrong, as stated by a duly licensed attorney at law for the Agency, were untrue.

The fact that the Agency negotiated this Agreement through the MSPB Judge assigned to the case without disclosing these facts to that Judge is equally disturbing as has been the lack of candor toward the federal court in written disclosures. Separately and independently, the Agency has shown that Mr. Armstrong's belief that he was the victim of a malicious and fraudulent assault on his character was well founded and that his defenses to the underlying action have merit.

It is clear the Agency procured the settlement by actual or constructive fraud and misrepresentation. Second, it is clear that prior to its signing the Settlement Agreement, the Agency had already contacted the Department of Agriculture in a manner that rendered the

January 2, 2008, letter a fraud and a nullity. Mr. Armstrong could not have secured employment with Agriculture, or the protections he sought in the Settlement Agreement, because TIGTA had already conveyed disparaging facts. There was no meeting of the minds here because Mr. Armstrong was materially misled as to what the facts were.

The fact that this fraud was perpetrated with either the actual knowledge or gross negligence by Agency counsel is highly disturbing. If counsel cannot rely on each other's promises, then all settlement negotiations, and the contracts that result from them, become exercises in gamesmanship and deceit. To allow the Treasury to use the slight of hand it used here rewards misconduct, undercuts implicitly the necessity of good faith and fair dealing in contracts and lowers the bar for legal practitioners overall.

Ms. Creswell, her supervisors and senior agency personnel either knew or should have known that when entering into this agreement, Plaintiff was relying on the express statement that there had been no discussions with the Department of Agriculture concerning Mr. Armstrong other than a "no comment" claim in response to a request for information. Were the facts that TIGTA had continuous, undisclosed contact with Agriculture concerning Mr. Armstrong's employment at TIGTA made known, Mr. Armstrong would have both continued his challenge to the personnel action and added these contacts between TIGTA and Agriculture as further evidence of reprisal and harassment.

TIGTA's actions are outrageous and unconscionable and express the very malice that led to the selective prosecution and retaliatory use of charges of unauthorized access in the first instance. At the core of Mr. Armstrong's purported "misconduct" was a desire by Mr. Armstrong to determine whether Agency officials were acting in a retaliatory fashion toward him. Whatever the impropriety of the access conducted by Mr. Armstrong, it is clear Mr. Armstrong's

perhaps imperfect motive was not curiosity, personal gain or misuse, but self defense. Mr. Armstrong has claimed that TIGTA officials were maliciously not only trying to drive him from the Agency, but to criminally prosecute him and end permanently his career. Mr. Armstrong's pleas to upper management were not only ignored but were twisted to justify further retaliation. The Agency's use of deception in its negotiations, its cavalier and dismissive attitude and its outright fraud show Mr. Armstrong's concerns were indeed legitimate. Mr. Armstrong's "misconduct" pales before the Agency's own misdeeds.

CONCLUSION

This Board should grant the Petition for Review and allow this case to be reopened. Equity, justice and a concern for the validity of proper settlements require that result; and the Agency should not be rewarded for its unconscionable tactics.

Respectfully submitted,

WILLIAM H. ARMSTRONG,
Appellant by Counsel

GRAD, LOGAN & KLEWANS, P.C.

FOR Kevin Byrnes, VSB #47623
3141 Fairview Park Drive, Suite 350
Falls Church, VA 22042
Telephone: (703) 548-8400
Facsimile: (703) 836-6289
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August 2008, a true copy of the foregoing Petition for Review was hand-delivered and/or electronic email to:

Via Hand-Delivery
The Clerk of the Board
Merit Systems Protection Board
1615 M Street, N.W., 5th Floor
Washingon, DC 20419
Telephone: (202) 653-7200

Via Hand-Delivery
The Honorable Elizabeth B. Bogle
Merit System Protection Board
Washington Regional Office
1800 Diagonal Road, Suite 205
Alexandria, VA 22314-2840
Telephone: (703) 756-6250
Facsimile: (703) 756-7112
Administrative Judge for Board

Via Electronic Email
Lori L. Creswell
Assistant Chief Counsel
Treasury Inspector General for Tax Administration
1125 15th St., NW, Suite 700A
Washington, DC 20005
Telephone: (202) 927-7046
Facsimile: (202) 622-3139
Counsel for Agency

Counsel