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

REPLY 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:

Joseph R. Guerra (Counsel for Karen Thompson)

Joshua J. Fougere (Counsel for Karen Thompson)

Noah T. 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)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

Ms. Thompson's opening brief demonstrated both that the First Amendment and the common law provide her with case-dispositive defenses—precluding liability for statements that are substantially true or non-actionable opinions—and that she was improperly prevented from asserting those defenses in the Superior Court. Thus, the judgment against her should be reversed. Ms. Thompson also showed that, at a minimum, the judgment should be vacated because the trial court erroneously prevented the jury from considering key evidence.

In response, Mr. Armstrong fails to engage on the merits of the common-law defense at all, and argues that the First Amendment does not protect Ms. Thompson because he was not a public figure and her speech did not address a matter of public concern. Neither assertion is correct: law enforcement officers like Mr. Armstrong are public figures for First Amendment purposes, and their fitness for duty is a matter of public concern. Even leaving these dispositive points aside, the First Amendment should still preclude liability for substantially true speech.

Ignoring the important public policy issues raised by this case, Mr. Armstrong engages in personal attacks and invokes the law of the case doctrine to try to prevent Ms. Thompson from presenting her defenses. His criticisms of Ms. Thompson, however, are factually and legally baseless. As a law enforcement officer and federal employee, Ms. Thompson thought she should report Mr. Armstrong's wrongdoing to TIGTA and to USDA. Most critically, the law provides absolute protection to truthful speech regardless of the speaker's motivations, particular where it concerns wrongdoing by a senior law enforcement officer who was applying for another job as a law enforcement officer.

Nor does the law of the case foreclose Ms. Thompson's truth-based defenses. Mr. Armstrong claims that Ms. Thompson is seeking a "fourth bite at the apple," Armstrong Br. 1, but in fact she is filing her *first* appeal (the prior appeal was Mr. Armstrong's), and is seeking to

secure a *first* opportunity to actually be heard on the merits of these defenses. Moreover, as Ms. Thompson's opening brief explained, the law of the case doctrine does not preclude this Court from considering an issue that it expressly *declined* to decide earlier (as with the common-law defense), or one that was not previously before this Court at all (as with the First Amendment defense). This Court's denials of Ms. Thompson's request for a stay are by definition preliminary predictions, not binding final conclusions. Indeed, this Court's subsequent denial of Mr. Armstrong's motion to dismiss the appeal confirms as much. In all events, law of the case is a discretionary doctrine under which this Court can and should consider Ms. Thompson's defenses, which concern important and wide-reaching questions about protections afforded to speech that is substantially true.

In addition to misapplying the law of the case doctrine, the Superior Court committed reversible evidentiary errors as well. First, it refused to admit a decision of the Merit Systems Protection Board (MSPB) that had already determined that Mr. Armstrong's own statements were the cause of USDA's decision not to hire him. In attempting to defend this ruling, Mr. Armstrong points to two MSPB decisions on which Ms. Thompson did not actually rely, but he ignores the MSPB decision on which Ms. Thompson *did* rely, which *did* decide the issue. Second, the Superior Court refused to admit into evidence a TIGTA Report and removal letters demonstrating the societal interest in exposing Mr. Armstrong's conduct, erroneously concluding that both were inadmissible hearsay and that the letters were unduly prejudicial. The Court should reverse—or, at a minimum, vacate—the judgment below.

ARGUMENT

I. MS. THOMPSON CANNOT BE HELD LIABLE FOR HER SUBSTANTIALLY TRUTHFUL STATEMENTS.

A. The First Amendment And Common Law Preclude Liability Based On Ms. Thompson's Statements.

1. As Ms. Thompson explained in her opening brief, her statements cannot serve as the basis for an intentional interference with contract claim under either the First Amendment or the common law. Thompson Br. 18-25.

The First Amendment limits liability for intentional interference with contractual relations to the same extent it limits liability for defamation. *See, e.g.*, *Farah v. Esquire Magazine*, 736 F.3d 528, 540 (D.C. Cir. 2013). That means statements about a public figure addressing a matter of public concern are constitutionally immune from intentional interference liability if they are not provably false. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). Ms. Thompson's statements fall squarely under that protection: as a law enforcement officer, Mr. Armstrong was a public official, and the relevant statements concerned his fitness for duty. *See, e.g.*, *Beeton v. D.C.*, 779 A.2d 918, 920, 924 (D.C. 2001). Indeed, had Mr. Armstrong been a private figure and had Ms. Thompson's speech addressed a matter of private concern, he nonetheless would have had to show that her statements were false, which he cannot do. Thompson Br. 21 n.4 (citing, *e.g.*, *Moss v. Stockard*, 580 A.2d 1011, 1022 n.23 (D.C. 1990); *Wilson v. Scripps Howard Broad. Co.*, 642 F.2d 371, 376 (6th Cir. 1981)).

Separately, under the common law, "[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). Although this Court has not decided whether to adopt § 772(a),

other courts have concluded that it is a correct statement of District of Columbia common law. *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). This is consistent with Maryland law, *e.g.*, *Ziemkiewicz v. R+L Carriers, Inc.*, 996 F. Supp. 2d 378, 396 (D. Md. 2014), and accords with the law of the vast majority of jurisdictions to have addressed the issue, *see* Thompson Br. at 22-23 and n.5 (collecting cases). Because Ms. Thompson gave USDA "truthful information," her statements did not constitute intentional interference.

2. Besides erroneously arguing that this Court has already rejected § 772(a), *infra* § I.C, Mr. Armstrong is silent on the merits of the common-law argument. He does, however, contend that First Amendment protections should not apply to Ms. Thompson's speech for several reasons. *See* Armstrong Br. 9-13. All lack merit.

To begin, Mr. Armstrong contends that although he was a law enforcement officer, he was not the kind of officer who is a public official because he did not possess "the classic powers of a law enforcement agent." *Id.* at 11. In his view, a law enforcement officer is a public figure only if the officer's "misuse of … authority can result in significant deprivation of constitutional rights and personal freedoms," *id.* (quoting *Coughlin v. Westinghouse Broad. and Cable Inc.*, 603 F. Supp. 377, 386 (E.D. Pa. 1985)), and if the officer has "substantial responsibility for or control over the conduct of governmental affairs," *id.* (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)). And, he asserts, he had no such powers. *Id.* at 10-11.

Mr. Armstrong is wrong on the law and on the facts. As for the law, Mr. Armstrong takes two cases that discuss what is *sufficient* to qualify as a public official and argues that those decisions establish what is *necessary* for the designation. But *Rosenblatt* could not be clearer: having previously declined to "'determine how far down into the lower ranks of government

employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included,'" the Supreme Court again determined that "[n]o precise lines need be drawn for the purposes of this case." 383 U.S. at 85. Instead, the Court held that "the 'public official' designation applies *at the very least* to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.* (emphasis added). The same is true of *Coughlin*, which held only that police officers *are* public officials and said nothing about who is not a public official. 603 F. Supp. at 386.[1]

Mr. Armstrong thus has no answer to this Court's dispositive decision in *Beeton*. Armstrong Br. 11 n.2. *Beeton* held that a correctional officer is a law enforcement officer and thus a public figure. 779 A.2d at 920 ("[A]s a District corrections officer, Mrs. Beeton was a public official …"); *id.* at 924 (approving the trial court's reliance on "several cases from other jurisdictions holding that law enforcement officers are public officials"). It did so, moreover, without analyzing the correction officer's specific duties, or determining whether those duties were those of a "classic" law enforcement officer, or asking whether the correctional officer had "substantial responsibility for or control over the conduct of governmental affairs." *Contra* Armstrong Br. 11. Here, as there, a law enforcement officer is a public official.

Even if the precise nature of Mr. Armstrong's law enforcement duties were relevant—and they are not—his attempt to downplay his duties as "essentially [those of] an investigator," Armstrong Br. 11, is unavailing. In fact, he was "responsible for managing a group of Special Agent's [sic] tasked with investigating procurement fraud committed with respect to Internal

[1] Mr. Armstrong cites no case to support his suggestion that "the ability to exercise force" is a necessary part of being a public official. Armstrong Br. 11. And, in any event, he carried a firearm, *infra* at 6, which by definition gave him "the ability to exercise force."

Revenue Service (IRS) procurements" and had access to sensitive, confidential information contained in government databases. JA173-74. While Mr. Armstrong testified that his duties did not include making determinations as to "liability" or "wrongdoing," Trial Tr. at 329:4-9, the record contains no support for his contention in his brief that he lacked authority to make arrests. In any event, the record is clear that he carried a firearm and wrote reports in criminal investigations that U.S. Attorneys consulted in determining whether to pursue criminal charges. Trial Tr. 329:10-23, 351:2-3. He therefore qualified as a public official whose "[m]isuse of … authority [could] result in significant deprivation of constitutional rights and personal freedoms." Armstrong Br. 11 (quoting *Coughlin*, 603 F. Supp. at 386). That is presumably why TIGTA itself concluded that, as a law enforcement agent, he "occup[ied] a position of heightened public trust and responsibility" and was therefore "expected to exercise the highest degree of sound judgment and to avoid all situations where [his] usefulness as a criminal investigator could be compromised." JA193.

Next, Mr. Armstrong argues that Ms. Thompson's speech did not address matters of public concern. Armstrong Br. 11-13. But Ms. Thompson's statements directly concerned Mr. Armstrong's fitness for duty as a public official law enforcement officer and his on-the-job conduct, and such subjects plainly are matters of public concern. *See, e.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (a matter of public concern includes "anything which might touch on an official's fitness for office"); *Ayala v. Washington*, 679 A.2d 1057, 1067 (D.C. 1996) ("[S]peech [that] concerns the conduct of government [is] properly treated as of 'public concern.'").

Mr. Armstrong mischaracterizes Ms. Thompson's arguments. For example, she has not asked this Court to "issue a blanket ruling that all statements about a law enforcement agent's

character involve a matter of public concern." Armstrong Br. 12. But Ms. Thompson does argue, consistent with the precedent above, that "statements bearing on a public official's conduct and fitness for office" address matters of public concern. Thompson Br. 20.

Mr. Armstrong's reliance on *Connick v. Myers*, 461 U.S. 138 (1983), is likewise misplaced. There the Court observed that speech that does not "seek to bring to light actual or potential wrongdoing or breach of public trust" or focus on "the performance" of an agency may not be of public concern. *Id.* at 148. But that observation is irrelevant to speech like Ms. Thompson's, which concerns an abuse of law enforcement authority and an agent's performance, "wrongdoing," and "breach of public trust."

Finally, and in all events, Ms. Thompson's opening brief explained that, even if this Court were to decide, contrary to the above, that the speech at issue concerned a private figure and a private matter, the First Amendment would nonetheless apply. Thompson Br. 21 n.4. Mr. Armstrong ignores this argument, claiming that the First Amendment "would only have bearing to the extent Mr. Armstrong is a public figure and the speech is of public concern." Armstrong Br. 10. But the First Amendment also prohibits private plaintiffs from pursuing claims based on statements made without fault, *e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), of which "falsity logically is a component." *Moss*, 580 A.2d at 1022 n.23.

As this Court has already held, Mr. Armstrong cannot show that Ms. Thompson's statements were false, JA74-78, and judgment should thus be entered in Ms. Thompson's favor.[2]

[2] Mr. Armstrong is also wrong to claim that Ms. Thompson "equate[s] defamation principals [sic] with intentional interference with a contract" and "would simply abolish the second tort altogether." Armstrong Br. 4. The fact that statements which are substantially true may not support more than one tort does not mean that the two torts collapse into one another. A false statement that is not defamatory may, for example, give rise to intentional interference liability, and someone could interfere with a contract through conduct that does not entail provably true or false speech—by trying, for instance, to pay a prospective employer not to hire someone.

B. Preventing Liability For Substantially True Statements Is Critically Important.

Ms. Thompson's opening brief described the significance the law attaches to protecting the dissemination of truthful information and the unacceptable consequences of legal rules that risk stifling or chilling such speech. Thompson Br. 23-25. It would, for example, "defeat th[e] purpose" of laws designed to encourage speech to permit liability "for substantially true reports," *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 862 (2014), and create a "substantial" "potential chilling effect upon robust debate and freedom of expression," *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 602 (D.C. 2000). Respect for these principles is critically important in Washington, D.C., the seat of the federal government, where law enforcement officers reside in a host of government agencies, and where background investigations about prospective federal employees occur constantly. Thompson Br. 23-25.

Mr. Armstrong does not challenge these legal points. Instead, he responds by trying to smear Ms. Thompson and criticize her motives. *See, e.g.*, Armstrong Br. 3, 12-14. His attack is unfair and legally irrelevant. It is unfair because the name-calling does not accurately depict Ms. Thompson's intentions. Ms. Thompson testified under oath, for example, that she thought she was serving a "public purpose," Trial Tr. 188:10-13, and that, "[i]n this particular case," as a federal employee, she "felt that the Department of Agriculture should know about Mr. Armstrong's misconduct at TIGTA so they would have the information they needed to make a hiring decision, especially since he is a law enforcement officer who was being offered a job as a law enforcement officer at the USDA." Trial Tr. 227:22-228:6; *see also, e.g.*, Trial Tr. 186:1-5 ("At the time I sent these letters, I felt I was handling this in the best possible way and that was to notify [USDA] of misconduct that Mr. Armstrong had engaged in so they would have

information that they could verify."); Trial Tr. 164:2-10; Tr. 31:1-5, 34:13-16, 35:9-10, 97:6-8, *Armstrong v. Paulson*, No. 1:07-cv-01963-JR, Dkt. No. 49 (D.D.C. Feb. 3, 2010).

In all events, Mr. Armstrong's attacks on Ms. Thompson are legally irrelevant. He criticizes her for speaking anonymously, Armstrong Br. 2-3, 13-14, but she had every right to do so. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."). No doubt that is why federal agencies like TIGTA have *anonymous* tip hotlines—someone does not need to publicly raise her hand in order to report wrongdoing or to benefit from the concomitant legal protections. Trial Tr. 150:6-20, 256:10-13; JA72.

The public has an interest in the dissemination of truthful information about public officials and law enforcement misconduct no matter what the motivations of the speaker are. As a result, the First Amendment requires falsity, and the common law protects "truthful information"; neither bar to liability for speech depends on a speaker's motives. Ms. Thompson's speech was substantially true, and is therefore protected as a matter of law.

C. Law Of The Case Should Not Have Precluded Ms. Thompson's Defenses.

Mr. Armstrong relies almost entirely on the law of the case doctrine to argue that *his* appeal from *Ms. Thompson's initial victory* on summary judgment precluded Ms. Thompson from raising certain defenses on remand. This view is mistaken.

To recap briefly, the Superior Court relied on two theories in refusing to consider the merits of Ms. Thompson's defenses. First, the court believed that this Court had held in Mr. Armstrong's appeal that Ms. Thompson had "waived" those defenses. *See* Thompson Br. 25 (citing JA85 and Hr'g Tr. 26:23-27:7). Alternatively, the court indicated this Court's first

decision had "necessarily decided" that truth cannot be an absolute defense to intentional interference with contractual relations. *Id.* at 27 (citing JA84-85). Neither theory is correct.

As for the first, Mr. Armstrong's brief elects not to defend the conclusion that Ms. Thompson had "waived" her defenses for purposes of remand. *See, e.g.*, JA85, Hr'g Tr. 26:23-27:2. Indeed, this Court held only that Ms. Thompson raised her common-law defense too late to be addressed in *Mr. Armstrong's* appeal. The Court did *not* hold that the First Amendment and common-law defenses could not be raised on remand, where they could be adjudicated with the benefit of full briefing. Nor would such a ruling have been appropriate because, as appellee, Ms. Thompson was entitled to defend the Superior Court's grant of summary judgment on the grounds the trial court gave and had no obligation to do so on alternative grounds as well. Thompson Br. 26. Law of the case is not a doctrine designed to force appellees to raise every conceivable basis for affirmance—thereby potentially burdening appellate courts with unnecessary arguments—and punishing those who fail to do so by stripping them, on remand, of potential defenses that have not previously been addressed. *See, e.g.*, *Independence Park Apartments v. United States*, 449 F.3d 1235, 1240 (Fed. Cir. 2006) (not required to raised "all possible alternative grounds for affirmance"); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740-41 (D.C. Cir. 1995) ("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").

Instead of arguing waiver, Mr. Armstrong maintains that law of the case bars the "truth" defenses because this Court "necessarily decided" that substantially true statements can be the basis for a viable intentional interference claim. Armstrong Br. 6-9. His arguments over-read this Court's prior opinion and its decisions on Ms. Thompson's stay motions.

1. Starting with the common law, Mr. Armstrong argues that this Court "addressed, considered and decided" that § 772(a) does not apply. Armstrong Br. 7. More than that, his position appears to be that this Court "refus[ed]" to adopt § 772(a), precluding Ms. Thompson and all future litigants from arguing for its adoption before a division of this Court. *See id.* at 7 (accusing Ms. Thompson of "ignoring the Court's expression on section 772"), *id.* at 14 (accusing Ms. Thompson of asking this Court to "reverse itself").

But Mr. Armstrong ignores this Court's carefully worded statements. Specifically, the relevant footnote in the opinion on Mr. Armstrong's appeal states that the Court "declines to consider this argument *because Ms. Thompson did not raise it in her appellate brief*," JA80 (emphasis added)—not because the Court was deciding that D.C. would not adopt § 772(a). A few sentences later, the Court says that "this court has never explicitly adopted § 772," *id.*—not that the Court decides *not* to adopt it, as Mr. Armstrong's argument requires. These assertions, accompanied by this Court's recognition that the question is "not an uncomplicated one," *id.*, would make little sense if the law in D.C. were settled, either prior to or by the first appeal.

As far as Ms. Thompson is aware, this Court has mentioned § 772(a) twice and in both instances declined to decide whether the provision applies because the argument was not properly presented. The first time, in *Dyer v. William S. Bergman & Assocs., Inc.*, 657 A.2d 1132 (D.C. 1995), the appellant had waived the argument in the trial court. This Court observed, however, that, "[i]f [the appellant] had preserved the issue, the 'truthful statement' theory would have some appeal." 657 A.2d at 1137 n.5. The second time was this case, where the Court again expressly "decline[d] to consider" whether § 772(a) should apply, "because Ms. Thompson did not raise it in her appellate brief." JA80. In light of this context, Mr. Armstrong's contention that this Court has settled the question is plainly wrong. And most importantly, nothing this

Court said in resolving Mr. Armstrong's appeal resolves whether § 772 applies in this case. Mr. Armstrong's arguments to the contrary are unavailing.

For the same reasons, the Court's statement that "reasonable minds could differ … on the question whether Ms. Thompson was legally justified in intentionally interfering with Mr. Armstrong's prospective employment," JA79, did not "necessarily decide" that § 772(a)'s protections do not apply in the District of Columbia or that Ms. Thompson could not seek to invoke those protections on remand. Because this Court declined to decide, on the basis of a Rule 28(k) letter, the "not … uncomplicated" question whether to adopt § 772(a), JA80 n.8, it could only address the issue properly before it: whether, under a multi-factor balancing test, the societal interest in truthful information could be outweighed by evidence bearing on the other seven factors. And it decided only that "reasonable minds could differ" over how to weigh the value of truthful information *in the context of the existing legal framework, which called for a balancing of one factor (societal interests) against a variety of other factors*.

It is illogical, however, to treat this disposition of the issue before it as "necessarily decid[ing]" an issue that *was not* before it. This is particularly so when (a) the Court itself expressly *declined* to decide whether to adopt § 772(a), which eschews balancing when the cause of interference is the provision of truthful information, and (b) the Court did so precisely because the issue is complicated. The proper reading of this Court's prior opinion, therefore, is that Ms. Thompson was not entitled to summary judgment under this Court's "*existing case law*," but the issue whether existing case law should be changed "was not briefed by the parties" and was properly left "for consideration in the first instance by the [Superior] Court and then, if necessary, by a subsequent panel." *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 397 (3d Cir. 2003) (per Alito, J.) (emphasis added); *see also Keenan v.*

Donaldson, Lufkin & Jenrette, Inc., 575 F.3d 484, 487 (5th Cir. 2009). Mr. Armstrong's reading, by contrast, improperly gives no meaning to footnote 8 of the prior decision.

Finally, Mr. Armstrong claims that this Court's decisions on Ms. Thompson's stay requests were also "rulings fully addressing Ms. Thompson's defenses." Armstrong Br. 1, 6, 9. Although those decisions included language suggesting that Ms. Thompson's § 772(a) defense was foreclosed, *e.g.*, JA165, that language is not the law of this case. The Court's stay orders were, by their own terms, predictions about whether Ms. Thompson's § 772(a) arguments were foreclosed. JA163 (§ 772(a) argument "*appears* to [be] preclude[d]") (emphasis added), JA165 ("*it appears* the law of the case doctrine would preclude appellant from raising" the argument) (emphasis added). Indeed, even if the stay orders did not include such qualifying language, such decisions are, by their very nature, predictions concerning the merits, and thus do not bar a party from fully briefing and pressing her arguments through the full briefing and argument. *See, e.g.*, 18B Charles Alan Wright, Arthur R. Miller, *et al.*, Fed. Practice & Procedure Jurisdiction § 4478.5 (2d ed. 2015) ("law of the case is not established by … denial of a stay …") ("Wright & Miller"). That is why, when trial courts issue preliminary injunctions, they are not bound in later proceedings by the predictions they previously made concerning a party's likelihood of success on the merits, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), and why a merits division of this Court may "depart[] from a motion division's ruling in the same case," *Kleinbart v. United States*, 604 A.2d 861, 867 (D.C. 1992).

In fact, Mr. Armstrong previously argued in support of his motion to dismiss this appeal that law of the case applied and cited the stay orders. Appellee's Mot. to Dismiss, at 3. Ms. Thompson's opposition to that motion explained that a stay decision is not final, and the Court summarily denied Mr. Armstrong's motion. *See* Order, Jan. 28, 2015. This Court has not

resolved the propriety of Ms. Thompson's invocation of § 772(a), and the Superior Court erred in precluding her from raising it on remand.

2. The Superior Court also erred in foreclosing Ms. Thompson's First Amendment defense as "necessarily decided" in the first appeal. Mr. Armstrong maintains that the "clear expectation of the Court of Appeals decision to reverse the grant of summary judgment on intentional interference was that a jury would assess the matter of legal justification" and that, "[i]n doing so, it necessarily decided that the First Amendment was not an absolute defense in this case." Armstrong Br. 8.

He is mistaken. Even if the Court's prior decision had determined that truth is not a complete defense under the common law—and for all the reasons discussed above, it did not—that issue is distinct from whether the First Amendment bars such liability. *See, e.g.*, *Avins v. White*, 627 F.2d 637, 645 n.2 (3d Cir. 1980). In its prior decision, this Court said nothing at all about whether Ms. Thompson's statements were constitutionally protected, and "the decision of one issue does not ordinarily imply decision of another." Wright & Miller § 4478; *see also A.S. Johnson Co. v. Atl. Masonry Co.*, 693 A.2d 1117, 1121 (D.C. 1997) (decision that there was no arbitration agreement did not necessarily decide related issue of whether someone was a third-party beneficiary). For that reason, an earlier decision that a claim or defense fails under one source of law does not resolve whether a similar claim or defense fails under another. *See, e.g.*, *Horner v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685, 694 (6th Cir. 2000) (earlier decision finding insufficient proof of discrimination to sustain an Equal Protection Clause claim was not law of the case as to Title IX claims); *Thomas v. United States*, 914 A.2d 1, 13 (D.C. 2006) (the fact that evidence qualifies as a "business record" under the rules of evidence does not mean it is admissible under the Sixth Amendment). Thus, here, this Court's prior decision did not

necessarily decide a constitutional issue that the Superior Court did not reach (because it ruled for Ms. Thompson on other grounds) and that was simply not before the Court on appeal.[3]

3. Ms. Thompson's opening brief also argued that even if the Court were to disagree with the above, it can and should reach the merits of her defenses. Thompson Br. 29 & n.7. Application of the law of the case doctrine is "discretionary," JA165, and this Court has been reluctant to apply the doctrine rule when doing so would, as here, implicate "'significant constitutional'" issues, Thompson Br. 29 (citing *Kleinbart*, 604 A.2d at 866–67). This case presents important questions, and application of law of the case to short-circuit Ms. Thompson's defenses based on statements made by the Court in resolving an appeal by Mr. Armstrong from Ms. Thompson's victory on summary judgment would be profoundly unfair.

D. Mr. Armstrong's Request For Sanctions Is Groundless.

In light of the foregoing, Mr. Armstrong's claim that this appeal is frivolous and thus sanctionable (Armstrong Br. 2, 9) is meritless. As this Court has explained, an appeal is not frivolous unless it lacks "'even a faint hope of success on the legal merits of the appeal,'" or is "'utterly without merit.'" *Slater v. Biehl*, 793 A.2d 1268, 1278 (D.C. 2002) (citations omitted). Mr. Armstrong's claim that Ms. Thompson's appeal fails to clear this low hurdle is itself utterly without merit. *See* Order, Jan. 28, 2015 (summarily denying motion to dismiss appeal that had pointed to the stay orders and argued that the law of the case doctrine "foreclosed" Ms. Thompson's First Amendment claim). Indeed, Ms. Thompson has presented strong arguments grounded in existing case law that demonstrate not only that she has substantial grounds for her appeal, but that she should in fact prevail on her argument that the law of the case doctrine did

[3] Mr. Armstrong's citation to this Court's stay order (Armstrong Br. 8) is likewise off-base, as the Court's orders did not suggest that Ms. Thompson's First Amendment argument was likely precluded by law of the case. JA165-66.

not bar consideration of her truth-based defenses on remand. Mr. Armstrong's brief does not even address most of this law.

Nor is he correct in claiming that Ms. Thompson is seeking a "fourth bite at the apple." Br. 1-2, 6, 9. This is Ms. Thompson's *first* appeal (she had previously prevailed on a motion for summary judgment). To count to four, Mr. Armstrong includes his own appeal and Ms. Thompson's efforts to procure a stay to avoid having to file for bankruptcy. Armstrong Br. 6. Ms. Thompson's motion for a stay and related motion for reconsideration were not "bites" at all; they simply previewed the claims she anticipated making in this appeal as part of her justification for the relief she was seeking—which was a stay, not a ruling on the merits of appeal. *Supra* at 13-14. And, in the first appeal, Ms. Thompson was the *appellee*, defending the judgment in her favor, with no obligation to raise alternative arguments. Thompson Br. 25-27. While she attempted to raise her § 772(a) defense in a Rule 28(k) letter filed after oral argument, this Court declined to entertain that argument. And the Rule 28(k) letter did not include her First Amendment claim. Thus, Ms. Thompson is still seeking her first opportunity to be heard on the merits of her section 772(a) and First Amendment defenses.[4]

II. THE SUPERIOR COURT ERRED IN PREVENTING MS. THOMPSON FROM INTRODUCING CRITICAL EVIDENCE.

This Court should reverse the judgment based on the preceding analysis. Even if this Court disagrees, however, the Superior Court made additional errors that should, at a minimum, result in vacating the judgment against Ms. Thompson.

[4] This is not the first time Mr. Armstrong has requested sanctions in this appeal. Earlier, he moved to dismiss the appeal for failure to prosecute and alleged "a pattern of bad faith efforts to harm Mr. Armstrong by further extending the litigation without legitimate purpose." Appellee's Mot. to Dismiss, at 1. This Court summarily denied his request. *See* Order, Jan. 28, 2015.

A. The Superior Court Erroneously Thought Ms. Thompson Was Precluded From Offering Evidence About A Prior Decision That Deserved Preclusive Effect.

In her opening brief, Ms. Thompson argued that the Superior Court erred in refusing to find that an earlier decision of the MSPB precluded Mr. Armstrong from denying that his own statements to USDA were the cause of USDA's failure to hire him. Thompson Br. 30-33. Issue preclusion applies where (1) the issue was actually litigated in another proceeding, (2) the issue was determined by a valid, final judgment on the merits, (3) the prior proceeding included a full and fair opportunity for litigation by the parties or their privies, and (4) the determination of the issue was essential to the judgment. *Modiri v. 1342 Rest. Grp. Inc.*, 904 A.2d 391, 395 (D.C. 2006). All of these factors were met in litigation of the MSPB decision. Thompson Br. 30-33.

Mr. Armstrong's responses are not on point. First, he contends that the causation issue was not actually decided or essential to the judgment in the MSPB. Armstrong Br. 17-18. His argument seems to be that the MSPB raised the issue of causation on its own in order to decide it *as dicta*. But, it was Mr. Armstrong who raised and litigated the issue of causation (*see* Thompson Br., Ex. A (Petition for Review)). In his Petition for Review, he argued that TIGTA failed to disclose various contacts with USDA, and that this failure was material to his decision to enter into a settlement agreement because those contacts had already rendered it impossible for him to be hired at USDA. Mr. Armstrong's own arguments thus put front and center the question of the basis for USDA's decision not to hire him, and, twice, the MSPB rejected his arguments on this point, finding, instead, that his *own statements* to USDA had caused USDA not to hire him. JA152; *Armstrong v. Dep't of Treasury*, 115 M.S.P.R. 1, 3-5 (2010).

Unable to explain this away, Mr. Armstrong relies on two earlier MSPB decisions. *See* Armstrong Br. 17-18 & Exs. A-B. But this is a red herring. Ms. Thompson did not contend that those decisions had preclusive effect; she argued that the later decision denying the Petition for

Review did. Indeed, in one of the decisions Mr. Armstrong flags, the MSPB informed him that certain arguments needed to be submitted in a Petition for Review. *See* Armstrong Br., Ex. B. Mr. Armstrong took that advice and in his Petition raised the question of the basis for the USDA's decision not to hire him.

Finally, Mr. Armstrong concludes by claiming that Ms. Thompson skipped a step in her preclusion analysis by failing to discuss a discretionary "fairness" inquiry. Armstrong Br. 16-19. Mr. Armstrong, however, erroneously conflates non-mutual *defensive* collateral estoppel (which Ms. Thompson invoked) with non-mutual *offensive* collateral estoppel (which she did not). As the *Parklane* case he cites expressly states, the additional element of fairness is one of the ways non-mutual offensive collateral estoppel differs from the defensive version. *Parklane Hosiery Co., v. Shore*, 439 U.S. 322, 329-31 (1979); *see also Jackson v. D.C.*, 412 A.2d 948, 953 (D.C. 1980) ("When issue preclusion is asserted defensively, there are no inherent considerations of fairness or correct resolution of the dispute that should prompt a court to rehear issues already decided."). Because Ms. Thompson relies on non-mutual *defensive* collateral estoppel, the fairness prong is inapplicable. *Parklane*, 439 U.S. at 329-31.

Mr. Armstrong is left with no answer to Ms. Thompson's showing that the Superior Court's failure to consider the preclusive effect of the MSPB's causation finding was a serious error that would have and should have affected the outcome.

B. The Superior Court Erroneously Excluded Certain TIGTA Documents.

In her opening brief, Ms. Thompson also showed that Superior Court erred in excluding TIGTA's Report and Mr. Armstrong's two removal letters. Thompson Br. 33-37. Mr. Armstrong leans on the deferential standard of review here, but fails to offer a persuasive defense of the Superior Court's decision to exclude these documents.

1. The decision on the TIGTA Report should have been straightforward: this Court had already determined that it was admissible under the hearsay exception for agency records, and, in any event, Ms. Thompson should have been permitted to ask foundational questions of Mr. Armstrong. Thompson Br. 33-35.

For present purposes, the first point is sufficient to confirm the Superior Court's mistake. Without any citation, Mr. Armstrong baldly states that "[t]he inclusion of a document in a Motion for Summary Judgment does not render that document admissible at trial" and that "[t]he Court of Appeals … makes no ruling as to the admissibility of a piece of evidence" Armstrong Br. 19-20. But summary judgment motions must be decided on the basis of admissible evidence. *See* Super. Ct. Rule 56(e). This Court held that the Superior Court properly relied on the TIGTA Report in granting Ms. Thompson summary judgment on the defamation claim because "agency records made in the regular course of business are admissible." JA75. This Court's holding that the TIGTA Report could be considered on the motion for summary judgment necessarily meant that it was admissible at trial. Because that report discussed TIGTA's view of Mr. Armstrong's conduct, the Superior Court's error blocked key evidence that Ms. Thompson's statements about that conduct served society's interest.

2. Second, Mr. Armstrong's removal letters should not have been excluded either as unduly prejudicial or as hearsay because (i) Mr. Armstrong opened the door to their admission, and (ii) the letters were offered to demonstrate TIGTA's state of mind and were therefore not inadmissible hearsay. Thompson Br. 35-37.

Mr. Armstrong's response fails to persuade. As for the alleged prejudice, he makes no effort to justify his refusal, under oath, to acknowledge that the letters' author did actually view his conduct negatively. *Id.* at 35-36. Instead, he relies entirely on his view that the letters may

have prejudiced him—hardly a surprise for removal—and the discretionary standard of review. Armstrong Br. 21-22. This is insufficient. Thompson Br. 35-36.

As for the hearsay point, Ms. Thompson argued in her opening brief and in the Superior Court that the letters were admissible because, among other things, they were probative of TIGTA's state of mind and were therefore not, as the Superior Court determined, inadmissible hearsay. Thompson Br. 36-37. Mr. Armstrong's only response is to contend that this argument is waived. Armstrong Br. 22. But that is irreconcilable with the transcript in which counsel says, twice, the documents were being offered to show "the state of mind of his agency." Trial Tr. 437:19-438:8. Ms. Thompson's opening brief cited a decision of this Court stating that "[s]tatements that are not offered at trial to prove the truth of the matter asserted are not hearsay" and that "[f]alling within this category are statements offered under the 'state of mind' exception to the hearsay rule." *Jones v. United States*, 17 A.3d 628, 632 (D.C. 2011). That is what Ms. Thompson argued at trial and what she argued in her opening brief. The argument was thus preserved. The Superior Court's erroneous exclusion of this evidence allowed Mr. Armstrong to paint a misleading picture of how TIGTA viewed his conduct and, again, prevented Ms. Thompson from demonstrating that she acted properly in speaking about that conduct.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment and remand with instructions to enter judgment in Ms. Thompson's favor, or, alternatively, vacate the judgment and remand for further proceedings consistent with the Court's decision.

Dated: August 19, 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

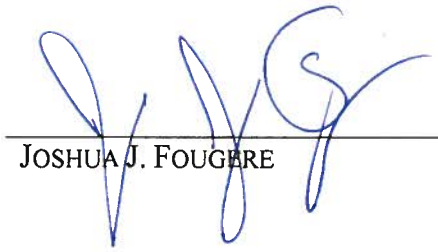
JOSHUA J. FOUGERE
JOSEPH R. GUERRA
NOAH T. KATZEN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

Counsel for Karen Thompson

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2015, I caused the foregoing Reply Brief of Defendant-Appellant Karen Thompson to be served on the following by email 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