A096451

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

STEPHEN J. BARRETT, M.D., et al.
Plaintiffs/Appellants,
vs.
ILENA ROSENTHAL, et al.
Defendants/Respondents.

Appeal from Dismissal Pursuant to CCP Section 425.16
Alameda County Superior Court, Case No. 833021-5
Hon. James Richman, Judge

APPELLANTS' OPENING BRIEF

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I.

INTRODUCTION AND STATEMENT OF CASE

Plaintiffs/Appellants Dr. Steven Barrett, Dr. Terry Polevoy and Christopher E. Grell filed a verified complaint for libel, libel per se and conspiracy against Defendants Hulda Clark, Tim Bolen, Ilena Rosenthal and others on November 3, 2000. (Appendix 1. pp. 002-116)

This appeal involves Defendant Ilena Rosenthal only and arises out of the Trial Court's ruling granting Defendant Ilena Rosenthal's Motion to Strike pursuant to the Code of Civil Procedure Section 425.16. (Appendix 2. pp. 117-144). Rosenthal's motion was based on the following grounds: (Appendix 4. p. 150-225)

1) Certain of Rosenthal's Internet posting or republications of the statements at issue are protected by federal law, i.e., 47 USC § 230 of the Communication Decency Act ("§230).
2) Rosenthal's other unprotected statements about Appellants Barrett and Polevoy do not contain probable false assert of fact, i.e. are not libelous.
3) Rosenthal's statements about Barrett and Polevoy are protected by the First Amendment because Appellants/Plaintiffs are public figures and Defendants' statements were not made with actual malice.
4) Rosenthal's statements are protected by the Common Interest Privilege, i.e., 47(c).
5) Rosenthal made no statements about Grell.

Plaintiffs opposed Defendant Rosenthal's motion on the following grounds: (Appendix 5. pp. 343-475 and Appendix 8 pp. 334-671 and Appendix 10 pp. 869-1122):

1) C.C.P. §416.16 does not apply.
2) Section 47 USC § 230 does not grant immunity from liability to an ordinary Internet user who reposts or republishes libelous statements.
3) Rosenthal's republished statement as well as statements identifying Rosenthal as the author, not a republisher, were libelous per se.
4) Plaintiff did not have to prove actual damage in libel per se.
5) Plaintiffs met their burden under CCP 425.16 by showing a <u>probability</u> of success.
6) Plaintiffs are entitled to discovery.
7) Grell did not intend to assert any claim against Rosenthal, i.e., the general allegation as to all defendants was a pleading error and was immediately corrected by Grell, i.e., Grell dismissed any claims that might be construed as a claim by Grell against Rosenthal.
8) The Court lacked jurisdiction to grant the motion as to Grell since Grell's dismissal was filed before the Court granted Rosenthal's motion.

The Trial Court granted Defendants' Motion to Strike as against all Plaintiffs, including Grell, based on the following general grounds: (Appendix 2. pp. 117-144)

1) CCP §425.16 applied. Specifically, the Court held that the statements or publication deal with an issue of public interest covered under, CCP §425.16(e) 4. (Note: Although the Court's ruling mentions §425.16(e)(3), the Court never held that the statements were made in a public forum, i.e., §425.16(e)(3). (See Appendix 2 pp. 117-144)

2) Plaintiffs cannot establish a probability of prevailing on their claim of libel because:
    1) Plaintiff failed to provide proof of actual money damages.
    2) Certain of Rosenthal's statements are protected by 47 USC § 230 of the Communication Decency Act.
    3) Those statements of Rosenthal not protected by 47 USC § 230 are not demonstrably false statements of fact.
    4) Plaintiffs Barrett and Polevoy cannot prove by clear and convincing admissible evidence that the unprotected statements by Rosenthal were made with malice.
3) Plaintiffs have not shown good cause for discovery.
4) Rosenthal made no statements about Grell. (Note: Grell acknowledged this at the hearing. (Appendix 7, pp. 528-531)

Plaintiffs/Appellants filed a timely and proper Notice of Appeal under CCP §425.16 and §904.1.

II.

THE ISSUES ON APPEAL INCLUDE SIGNIFICANT MATTERS OF FIRST IMPRESSION

This is an appeal involves several significant issues of first impression.

First, no prior case ever ruled that 47 USC §230 of the Communication Decency Act ("Section 230") grants immunity to an individual Internet user who reposts or republishes libelous statements on the Internet. (Appendix 13, pp. 1219-1230). Appellants contend that the Court erred in its interpretation and ruling.

Second, this is the first case to challenge the applicability of the Code of Civil Procedure §425.16 ("CCP §425.16") to speech that does not involve a state action limitation pursuant to. Golden Gateway Center v. Golden Gateway Tenants Association (2001) 26 Cal. 4th 1013, wherein the Court held that there is a requirement of state action before speech is entitled to Constitution protection from individual infringement. Since CCP §425.16 is applicable only to constitutionally protected speech, §425.16 is inapplicable to this case since none of the speech involved any state action.

Third, this is the first case to challenge the validity of the prior case law imposing a "clear and convincing" burden of proof in libel cases involving public figures. As will be discussed, based on a holding in Golden Gateway Center, supra, no case has offered any analysis or conclusion that the higher "clear and convincing" burden is constitutionally mandated. Consequently, those cases, which raise the issue, should be disregarded.

In short, Appellants submit that the Court erred in holding that malice must be proven by clear and convincing admissible evidence in an opposition to a CCP §425.16 SLAPP suit.

This appeal also challenges the Court's ruling on several additional grounds.

1) Assuming that CCP §425.16 applies, the Court erred in its ruling that Plaintiffs failed to demonstrate a probability of prevailing under §425.16.
2) The Court erred by weighing the evidence in violation of Appellants' right to a jury trial.
3) The court abused its discretion by denying Appellants' motion for discovery.

4) The court erred in granting Defendant/Respondent Ilena Rosenthal's SLAPP motion against Grell who had dismissed any claim against Rosenthal before the motion was granted.

5) The Court abused its discretion in ordering that Grell pay Rosenthal's costs and attorney fees totaling over $30,000.00. (See Appendix 16, pp. 1444-1456)

III.

BRIEF OVERVIEW OF CCP §425.16 AND WHAT IT PROTECTS

A review of the history of cases involving §425.16 shows that the majority of published SLAPP decisions involve CCP §425.16 (e)(1), (2), and (3) or some combination of the various sections. In this case, the Court ruling was based on CCP 425.16 (e)(4), i.e., the speech at issue involved a matter of public interest or concern. (Appendix 2, pp. 125.) To the extent the Court did refer to Section(e)(3,) the Court provided no analysis explaining how the speech was protected under CCP §416.16 (e)(3), i.e., why the speech occurred in a place that has "unrestricted access" and is freely and openly accessible to the general public. (See Golden Gateway Center, supra at 1035.)

The unambiguous language of CCP §425.16 covers actions, i.e., speech and petition activity, that is constitutionally protected. Under Golden Gateway Center, supra, before speech becomes constitutionally protected, there must be a showing of state action. Here, there was no state action involved in the speech at issue. As a result, the Court's finding the §425.16 applies to the speech at issue and is contrary to the holding in Golden Gateway v. Golden Gateway Tenants supra, which held that speech not involving state action is not entitled to Constitution protection.

In sum, CCP §425.16 requires a showing of state action before the statute applies. Without such a showing, the ruling of the trial court should be reversed on the ground that a CCP §425.16 does not protect the speech at issue.

Even if this Court disagrees, Appellant respectfully submits that there are additional grounds for reversal.

IV.

THE FACTS[2]

As noted, on November 3, 2000, Appellants filed a verified complaint for damages against Hulda Clark, Tim Bolen, Ilena Rosenthal and others for libel, libel per se, and conspiracy. (See Appendix 1, pp. 002-116)

The complaint against Ilena Rosenthal was based in part, on her admitted Internet postings or statements, some of which she authored, some which she republished and at least one was published wherein Rosenthal identifies herself as being the author. (Appendix 3, Rosenthal's Answer, pp. 145, Appendix 10, pp. 879-880, 1139 and Appendix 1, pp. 077.)

The publication in which Rosenthal listed herself as the author, was not considered by the court as a publication by Rosenthal. In fact, the Court appears to have rejected Appellants'

[2] Rosenthal did not raise any evidentiary objection to Plaintiff's verified complaint, declarations or exhibits submitted by Appellants. Consequently, Rosenthal has waived all evidentiary objections.

affidavits and pleadings and relied only on the complaint in the ruling on this motion. (See Appendix 7, pp. 525-527 especially page 527 lines 2-9.)

In short, the libelous statements published and republished by Ilena Rosenthal are much more numerous than what was considered by the trial court and mentioned in its ruling (See Appendix 2, Courts Ruling, pp. 002-116.)

The main reason these republication were never considered or given only a cursory review, is because the Court ruled that 47 USC §230 of the Communication Decency Act granted immunity for any of Rosenthal's libelous internet republications.

Because of the publicity involved in this case, the background leading up to the complaint is important. First, this case is not close to the paradigm case that CCP §425.16 was designed to protect. In fact, this is a case that has taken CCP §425.16 to the extreme. As noted by the Courts' in reference to CCP 425.16, "I have been blown away since I took this job as to how far SLAPP has gone." (Appendix 7, p. 517).

Appellants Steve Barrett, M.D. and Terry Polevoy have for many years spent considerable amounts of time gathering and evaluating information about nonstandard healthcare practices and products. Appellant Barrett's efforts have culminated in the editing or co-authoring of 48 books, 10 textbook chapters, and hundreds articles in lay and scientific publications. Dr. Barrett received the 2001 Distinguished Service to Health Education Award from the American Association for Health Education for his work. (See Appendix 5, Barrett declarations, pp. 437-475).

Over the years, Appellants' writings have criticized products, services, and theories that are marketed with claims that are false, unsubstantiated, and/or illegal. Appellants' work has aroused great concern and hostility among the promoters and profiteers of such practices and products, many of whom believe that destroying Appellants reputation would increase their success and profits in the marketplace. (Appendix 5, Barrett declarations, pp. 437-475)

Between May 22, 1999, and May 21, 2001, Ilena Rosenthal began posting numerous messages in discussion groups owned and run by privately owned Internet service providers. The main newsgroup involving the statements at issue was Déjà Vu, now controlled by Google. (See Appendix 1 Complaint Exhibits, pp 075-085.) Google, like Déjà Vu, is a privately owned company, which requires, as a condition of use, that the Internet user registers and agrees to be bound by the limits of use of the discussion group. (See http://groups.google.com "terms of service".)

In short, the speech at issue occurred on privately owned Internet sites accessible by permission only, not at a place that is "unrestricted" and "openly and freely accessible" to the public as defined in Golden Gateway v. Golden Gateway Tenants, supra at 1033 and deemed necessary to satisfy the threshold "state action limitation."

Moreover, Appellant's lawsuit suit is no more than Appellant's response to Rosenthal's false and libelous portrayal of Appellants as liars, dishonest, professionally incompetent, and emotionally disturbed statements, which she refused to withdraw after Appellants privately contacted her. It is not about silencing any opinions regarding alternative health.

In short, this suit does not arise out of any public debate or issue of public concern that Rosenthal was either involved in or knew anything about. Instead, Rosenthal's statements, is a clever attempt to injure Appellants by weaving her defamatory statement aimed directly at Appellants around a public issue. Did the legislature, in enacting CCP 425.16(e)(4) intend to allow a clever libeler to wrap his or her libelous statements about individuals around a public issue? If so, every clever libeler could easily qualify their libelous statements for protection under

§425.16(e)(4) the same way an author can get around the "obscenity laws" by claiming that his book has "socially redeeming values."

From May 22, 1999 to May 21, 2001, Ilena Rosenthal posted 212 messages that mentioned Appellants, nearly all of which were intended to injure Appellant's reputation not debate their views on alternative medicine. Many of these messages were repeated in part or in full by others who responded. (Appendix 5, Barrett declaration, p. 438) Ilena Rosenthal continues to post and republish defamatory and offensive messages on the Internet about Appellants. (Appendix 5, Barrett Decl., p. 444. See Appendix 1 pp. 78-80.)

Because of Rosenthal's animosity towards Appellants, Ilena Rosenthal decided to be a part of Defendant Bolen and Hulda Clark's crusade whose mission was also to attack Appellants through libelous statements.

Who are Hulda Clark and Tim Bolen? Hulda Clark is one of the main defendants involved in this case but not with this appeal. Hulda Clark is a self-proclaimed healer of cancer and other diseases. Hulda Clark is an unlicensed naturopath who, until recently, operated a clinic in Mexico. Hulda Clark's claims and her treatments are based on the notion that all cancers, AIDS, and many other diseases are caused by "parasites, toxins, and pollutants" and can be cured within a few days by administering a low-voltage electric current, herbs, and other nonstandard modalities. (Appendix 5, Barrett declaration, pp. 438-439 and Appendix 1, Complaint pp. 002)[1]

Various Internet postings indicate that in September 1999, Hulda Clark's son, Geoffrey, who runs Hulda Clark's multi-million dollar sales operation, hired defendant Tim Bolen to assist Hulda Clark after she was arrested on a fugitive warrant from Indiana for practicing medicine without a license. Bolen and his wife Jan do business as JuriMed, an entity whose stated purpose is to assist so-called "alternative" health practitioners faced with regulatory action, criminal prosecution, or other matters that threaten their financial well being or freedom to practice. (Appendix 5, Barrett declaration, p. 437.) In this case, Bolen has admitted to being Hulda Clark's war leader. (See Appendix 1, pp. 025-112.)

In November 1999, the Bolens began distributing false and defamatory statements to the effect that Dr. Barrett and Dr. Polevoy are liars, arrogant, emotionally disturbed, "de-licensed," professionally incompetent, intellectually dishonest, dishonest, unethical, a quacks, thugs, bullys, a Nazi, a hired gun for vested interests, the leader of a subversive organization, and has engaged in an assortment of criminal activity (conspiracy, extortion, filing a false police report, and other unspecified criminal acts). (Appendix 1, Complaint, pp. 002-116).

The Bolens targeted Dr. Polevoy and Dr. Barrett because Appellants posted information to their Web sites indicating why Hulda Clark's treatments were a fraud. Bolen also attacked Grell because Grell had filed a lawsuit against Clark on behalf of the Figueroa family as a result of Hulda Clark's negligent and fraudulent care and treatment of Mrs. Figueroa. Defendants also targeted Dr. Polevoy for his criticism of Christine McPhee, who also appears to be a Bolen client. Others, who either sympathized with Clark or McPhee, who felt critically toward Appellants for other reasons or had a financial stake in quieting Appellants, have redistributed Bolen's messages widely. Ilena Rosenthal is one such person.

Appellant first became aware of Ms. Rosenthal activities in mid-August 2000 after she posted or republished an article to the Déjà Vu newsgroup misc.health.alternative. The article,

[1] In Melaluca v. Clark (1998) 66 Cal.App.4th 1344, the Court held that there was no scientific basis for Hulda Clark's claims. The FTC also filed an injunction for fraudulent and deceptive advertising involving Hulda Clark's treatments and cures. (See Appendix 10, pp. 1022-1074.) The FTC also filed a complaint charging that Hulda Clark's treatment and cures were false and presented a public health risk. (Appendix 10 pp. 1052-1071.)

titled "Sleazy Quackbuster' Scam Shuts Down Canada's Number One 'Alternative Medicine Show" (Appendix 1, Complaint, p. 077), included many factual statements, including, but not limited to the following:

(a) Quackbusters provided false information. .
(b) The "Quackbuster" organization, headed by de-licensed MD Stephen Barrett. (Dr. Barrett has never had his license taken away. He simply retired and did not renew it.)
(c) Barrett is in "bad health." .
(d) Barrett operates a murderous attack organization out of his basement. .
(e) Operating in the way Barrett teaches, Polevoy . . . barraged Canadian Broadcast Standards with bombacity, lies and misrepresentations. .
(f) All the Quackbusters have are those "deep pockets" behind them.
(g) Health Freedom fighters believe that the attack comes from bonded subversive groups, conspiratorially formed into attack units, and funded directly and indirectly by the sleaziest elements of the pharmaceutical drug cartel. . .
(i) Polevoy . . . is pure fraud. . .
(j) In Polevoy's attack on McPhee, first he tried to shut her own with scare tactics; stalking, and intimidation techniques.
(k) A good case can be made that Canadian broadcast executives, coupled with the subversive "quackbuster" organization, are engaged in a civil and criminal conspiracy to eliminate 'Alternative medicine' from Canadian broadcasting.

Accompanying this statement were several form letters which Rosenthal encouraged the reader to mail out. (See Appendix 1, p. 077 and Appendix 10, pp. 1109-1117.) These letters were also libelous.

In fact, almost every statement in the Rosenthal statements at issue is false and misleading. For example, Appellants did not provide false information nor is Dr. Barrett "de-licensed" any more than a retired attorney would be considered disbarred. (See also California Code of Regulation, Professional and Vocation Regulation Section 1339.5, et al, wherein delicensing refers to an involuntary loss of license versus an inactive licensure, like Dr. Barrett.)

Dr. Barrett is not in poor health and he does not teach others to lie or misrepresent. (See Appendix 5, Barrett Decl., pp. 437-445.) Dr. Polevoy is not pure fraud, he did not stalk or attempt to intimidate Christine McPhee, and is not engaged in any criminal conspiracy. (See Appendix 5, Decl. Of Polevoy, pp. 459-60). This list of other statements and list of why these statements are false goes on and on and is outlined in the pleadings. (See Appendix 1. Complaint, pp. 002-116.)

Rosenthal's call to action resulted in the sending of her republished form letters to various individuals. As a result, there was hearing by the University. (Appendix 1, Complaint, p. 069.)

In addition to republishing Bolen's letter, Ilena Rosenthal took it upon herself to edit Bolen's article and published it on the Internet identifying herself as the author. (Appendix 1 Complaint p. 077 and Appendix 10, pp. 1109-1117.) As with the first publication, the second posting included many of the same defamatory statements, the same call to action and the same form letters noted above.

Shortly after Ilena Rosenthal posted her first defamatory message, Dr. Barrett sent her an e-mail requesting that she remove these libelous postings. Rosenthal responded that she did not think that posting or republishing someone else's message could make you liable for damages. Rosenthal, with reckless disregard for the truth, posted Dr. Barrett's private letter along with the full text of the libelous article Dr. Barrett asked that she remove. Dr Barrett sent another private

e-mail formally demanding that Rosenthal remove the messages and pay damages. Ilena Rosenthal responded to this private e-mail, by posting Dr. Barrett's message along with another libelous publication that "Polevoy, police reports show, STALKED Canadian Radio Personality Christine." Rosenthal message also stated that she was "not a stranger to Cyber libel and was "researching and writing on this matter." (Appendix 5, Barrett Declaration, pp. 437-444.)[2]

Once it became apparent that informal resolution with Rosenthal was impossible, the complaint was filed.

Rosenthal answered the complaint on April 4, 2001. (Appendix 3, pp. 145-148.) On or about May 3, 2001, Ilena Rosenthal filed a Motion to Dismiss pursuant to CCP §425.16 (a SLAPP suit). (See Appendix 4, p. 150 and Appendix 13, pp. 1318-1334.) At no time prior to the filing of this motion did Rosenthal or her counsel ever notify Appellants or their counsel that unless the complaint was dismissed or amended, a motion with a request for sanction would be filed. (Compare CCP §128.7, which provides a "safe harbor" provision before similar sanctions can be imposed. As noted in De Young v. San Diego (1983) 147 Cal.App.11, 17, Court's should consider legislation on the same subject in interpreting statutes.

In Ms. Rosenthal's affidavit submitted with special motion to strike, which she and her attorneys spent over 40 hours working on (see Appendix 16 pp. 1444-56) Rosenthal alleges that her messages were intended to "debate" appellant's views. (Appendix 4, p. 173.) However, a review of these statements at issue shows that no such attempt was made. In fact, Rosenthal has never attempted to discuss or rebut the content of any of Appellant's writings or opinions. (Appendix 5, Barrett declaration pp. 437-475.) Moreover, a review of the first six pages of Rosenthal's declaration is devoted to the breast implant issue, which is not even mentioned in the statements at issue. (Appendix 5, pp.174-180.) Indeed, in Rosenthal's declaration she slips and reveals her true intent behind her publications by the statement that "this lawsuit was brought to silence my critical opinions of Plaintiffs Barrett and Polevoy. (See Appendix 4 p. 187, lines 15-17.)

In short, Rosenthal's declaration, which she and her lawyer spent forty hours drafting, was a clever and successful attempt to create a "public issue" for her libelous statements when in fact no such issue was involved. Instead, the relevant messages consisted of libelous statements, expressions of malice, and repetitions of libelous messages attacking Appellants. (Appendix 5, Barrett declaration, pp. 437-475.)

An example, of Rosenthal's contrary and unsupported statements are as follows: "The debate I have been engaged in and been sued for by plaintiffs concerns the public's right to free access to information regarding what is commonly known as the 'alternative' versus "conventional" medicine controversy." (Appendix 4, pp. 186.) As noted, Appellants have never engaged in any debate with Ms. Rosenthal on this or any other topic. Any exchange between Rosenthal and Barrett and Polevoy was entirely one-sided, i.e., Rosenthal posted one libel after another for months after being told the statements were defamatory. (Appendix 5, Barrett declaration pp. 437-475.) Further, a review of Rosenthal's declaration fails to reveal that she knew anything about the broadcasts of Canada's local radio host Christine McFee or alternative medicine.

Instead of stopping after being told that the statements were false, Rosenthal continued to gather and facilitate the spread of additional defamations by others against Appellants. For

[2] As set forth in her declaration, Rosenthal admits that she is a researcher, writer and author. (See Appendix 4, Rosenthal declaration, pp. 173-177). In other words, Rosenthal is not an ordinary Internet user she is an author, writer and researcher who should be held to the same standard of care as any other writer, author, or researcher.

example, on May 15, 2001, defendant Rosenthal posted a defamatory letter from Julian Whitaker, M.D., with full knowledge that Dr. Barrett had sued Dr. Whitaker for libel. The letter (falsely) stated that Dr. Barrett had made false charges against a dietitian and that deposition testimony had shown that Dr. Barrett did not have thorough grounding in the scientific research relevant to these charges. On May 18, Rosenthal posted another link to a defamatory magazine article about Dr. Barrett. Rosenthal has also been attempting to obtain a list of libelous statements published in a book, whose publisher Dr. Barrett sued, so that Rosenthal could post them also. (Appendix 5, Barrett declaration, pp. 430-475.)

In sum, Rosenthal has continued to maliciously defame Appellants. In fact, in one posting, she stated that she "hated" Dr. Barrett because of his association with the American Council on Health, which has published a report on breast implants that Rosenthal did not like. In another (January 10, 2001), posting, Rosenthal states: "I despise bullies like Quacks Barrett & Polevoy." In another (March 16, 2001) posting, Rosenthal responded to someone's message about an anti-Semite by stating: "I am a blatant anti-Barrett and anti-Polevoy and I have a right to express those opinions. So do anti-Semites . . . that's what free speech is all about." (Appendix 5, Barrett declaration, pp. 437-475.)

In short, Ms. Rosenthal libelous statements were intended to attack Appellants, not Appellants' views or opinions on a alternative medicine. Subsequently, she became part of organized campaign whose mission was to try and destroy Appellants' reputation by posting one defamatory message after another. Contrary to her declaration, Appellants had not entered into any public discussion with Rosenthal on any public issue nor has there ever been any debate, let alone any public or heated debate to justify the Court's conclusion that Rosenthal's statements are constitutionally-protected "rhetorical hyperbole." (Appendix 2, Court's ruling, pp. 117-144.) Indeed, to construe Rosenthal's publications, which encouraged people to "take action" and write libelous letters, as "rhetorical hyperbole," is incomprehensible.

Appellants filed their opposition to Rosenthal's motion on May 21, 2001 (Appendix 5, p. 343.) and Supplemental Opposition on June 11, 2001 (Appendix 8, p. 554). Rosenthal filed her reply on May 25, 2001 and June 22, 2001. (Appendix 6 and Appendix 9.) As noted, at no time did Rosenthal raise any evidentiary objection to Appellant's opposition, declarations, or documents in opposition to Rosenthal's motion.

A hearing on the motion took place on May 30, 2001. (Appendix 7, p. 513.)

On July 25, 2001, the trial court issued its ruling granting Ilena Rosenthal's motion against all plaintiffs/appellants, including Christopher E. Grell, despite the fact that Grell previously filed a dismissal as to Ilena Rosenthal.[3] (Appendix 2, p. 117.)

On August 6, 2001, Appellants/Plaintiffs filed a Motion for Reconsideration (Appendix 10, p. 869). The trial court denied it.

On October 5, 2001, the Court ordered Appellants to pay Rosenthal's attorney's fees and costs in the amount of $33,536.00. (Appendix 16, p. 1444.)

[3] Paragraph 28 of the complaint pertains to Appellant Grell. (Appendix 1, p. 18.) As the complaint shows, there is no specific allegation made by Grell against Rosenthal. Grell admitted this at the hearing. When it was pointed out that the complaint referred to "Defendants'" which included Rosenthal, Grell corrected this pleading mistake and filed a dismissal as to Rosenthal. The dismissal was filed on June 4, 2001 before the trial court issued its ruling, (Appendix 10, p. 1107.) Although Grell argued that naming Rosenthal was a pleading error, not an attempt to silence her, the Court rejected Grell's claim and not only granted the motion as to Grell but included Grell in the Court's order awarding Rosenthal her fees and costs. The specific allegations relevant to Dr. Barrett and Dr. Polevoy involving Rosenthal are set forth in Appendix 1, pp. 20-22.

Appellants filed this appeal.

IV.

STANDARD OF APPELLATE REVIEW

In Church of Scientology v. Wollersheim (1996) 42 Cal.App.4th 628 the Court held that "on appeal, we independently review the entire record to determine whether Plaintiff made a prima facie showing that it would prevail in light of the applicable law relative to the claim (citations omitted)."

In M.G. v. Time Warner, Inc. (2001) 89 Cal.App. 4th 623 the Court held that "on appeal we conduct a de novo review to analyze whether Plaintiffs have demonstrated sufficient facts to establish a prima facie case." The standard used in this determination is like that for determining a motion for non-suit, directed verdict, or summary judgment. See also Hak Fu Hung v. Warren Wang (1992) 8 Cal.App. 4th 908 and Wilcox v. Superior Court (1994) 27 Cal.App.4th 809.

V.

THE TRIAL COURT FAILED TO CONSIDER MANY OF THE GENERAL RULES OF STATUTORY AND CASE LAW INTERPRETATION IN IT'S RULING

Appellants contend the trial court's interpretations of 47 USC § 230 was in error. Appellants also contend that the trial court's interpretation of CCP 425.16 was in error. Consequently, an overview of the general rules pertaining to case law and statutory interpretation involved is both necessary and appropriate in assessing Appellants' claims of error.

A. Case Law – General Rules of Interpretation That The Court Did Not Consider

In Golden Gateway Center v. Golden Gateway Tenants (2001) 26 Cal. 4th 1013, the Supreme Court set forth the general rule for interpreting case law. As stated by the Court:

> A decision is not authority for everything said in the opinion but only for the points actually involved and actually decided. The absence of any analysis renders dictum unpersuasive. (Citations omitted.) We must view with caution seemingly categorical directive not essential to earlier decisions and be guided by this dictum only to the extent it remains analytically persuasive. (Emphasis added.) Supra at 1029.

As will be discussed, most of the case law relied by the Court concerning the specific CCP §425.16 issues involved in this Appeal consist of cases whose holdings constitute categorical directives without any serious analysis. For example, no case has ever explained why the burden of proof in this kind of libel case is the stricter "clear and convincing burden." Consequently, Appellants respectfully submit that, many of the cases relied on by the Court should be viewed with this rule of caution in mind.

Appellants also submit that because many of the cases cited and relied on by the Court were decided prior to Golden Gateway Center v. Golden Gateway Tenants, supra, these prior rulings must not only be viewed with caution, these cases must also be viewed in a manner that is consistent with Golden Gateway Center supra.

In short, as a result of Golden Gateway Center, the notion that California's free speech clause runs against the world including private parties, is no longer the law.

B. Statutory Interpretation – General Rules of Interpretation That The Court Did Not Consider

In DeYoung v. San Diego (1983) 147 Cal.App.3d 11, 17, the Court pointed out that the fundamental rules of statutory construction are as follows:

> (1) Ascertain the intent of the legislative so as to effectuate the purpose of the law; (2) give a provision a reasonable and common sense interpretation consistent with the apparent purpose, which will result in wise policy rather than mischief or absurdity; and (3) give significance, if possible, to every word or part, and harmonize the parts considering a particular clause or section in the context of the whole. (Emphasis added).

The Court should also note that matters such as context; object in view, evils to be remedied, legislation on the same subject,[4] public policy, and contemporaneous construction shall be taken into account. (We give great weight to consistent administrative construction.) (See Granberry v. Islay Investments (1984) 161 C.A.3d 382, 388 [avoid absurd result]; Moyer v. Work. Comp. App. Bd. (1973) 10 C.3d 222, 232 [word susceptible of different meanings construed in conformity with general purpose of statute]; Wotton v. Bush (1953) 41 C.2d 460, 467 [consideration of objective sought to be achieved and evil to be prevented].

In Welton v. Los Angeles (1976) 18 C.3d 497, 134 C.R. 668, 556 P.2d 1119 (infra, §241), the court offered the following suggestions on how construction of a statute should be construed so as to avoid conflict with the Constitution.

> First, the court should construe the enactment so as to limit its effect and operation to matters that may be constitutionally regulated or prohibited." (Supra at 505.)
>
> Second, "that judicial construction must not create uncertainty inhibiting exercise of a constitutional right." (Supra at 506.) (Emphasis added.)

Article IV, §9 of the California Constitution also provides a factor to consider. It provides in part that "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void."

In Briggs v. Echo (1999) 19 Cal.4th 1106, the Court held that "legislative intent is not gleaned solely from the preamble of the statute; it is gleaned from the statute as a whole which includes the particular directives. Every statute could be construed with reference to the whole system of law of which it is part so that all may be harmonized and have effect." See also

[4] Given the Safe Harbor provision for sanctions built into CCP §128.7, Appellant Grell respectfully submits that this provision should be considered as a factor in this Court's determination of whether the Court abused in discretion in granting sanctions against Grell.

Morehouse v. Chronicle Publishing II (1995) 39 Cal.App.4th 1379, and Braun v. Chronicle Publishing Company (1997) 52 Cal.App.4th 1036.

In Robertson v. Rodriquez (1995) 36 Cal.App.4th 347, 361, the Court held that "The rules of statutory construction also require Courts to construe a statute to promote its purpose, render it reasonable, and avoid absurd consequences. (Emphasis added.) The Court also noted that "we are well aware of the axiom that when the drafters of a statute have employed a term in one place and omitted it in another, it should not be inferred where it has been excluded." Supra at p. 361. (Emphasis added).

As will be discussed, if any of these rules appear to have been considered by the Court in its interpretation of 47 USC 230 and CCP § 425.16.

VI.

GENERAL CONSTITUTIONAL CONSIDERATIONS THAT THE TRIAL COURT FAILED TO CONSIDER

A number of Constitutional considerations which must also be taken into account were ignored or overlooked by the Court in its ruling. For example, the Court's interpretation of §230 failed to balance Rosenthal's free speech rights, if any, against Appellants' rights of petition for libel, two equally protected provisions under both the United States and California constitution. (See Rosenblatt v. Baer (1965) 383 US 75, 86 S.Ct 669, 675 "…Society has a persuasive and strong interest in preventing and redressing attacks upon reputation"). See also California Civil Code §43, which gives individuals statutory protection from defamation.

As noted by Justice Stewart in his concurring opinion:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system. Rosenblatt supra p. 678. (Emphasis added.)

Where is the decency in allowing unbridled Internet republications of defamatory statements?

In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749 105 S.Ct. 2939, 2943, the Court held that the State's interest in compensating private individuals against defamatory statements was "strong and legitimate" and that "a state should not be lightly required to abandon it". (Emphasis added.) Query, is there any evidence to suggest that in enacting §230, Congress intended to eliminate that aspect of state law holding a republisher of a defamatory statement immune from liability or to eliminate individual rights not to be defamed?

As noted in McCoy v. Hearst Corporation (1986) Cal. 3d 835, 856:

> Libel laws recognize that each person has a right not to be disparaged by false statements. (citation omitted) Society's interest in redressing the harm done to one's reputation is strong. (citation omitted) Moreover, this court is not unmindful that "[t]he harm done to one's reputation by erroneous charges of corruption or dishonesty can never be fully undone, … For even an erased question mark still

suffices to raise the question, where perhaps none existed before." (Bird, The Role of the press in the First Amendment Society (1980) 20 Santa Clara L.Rev. 1, 8.

Good Character, or reputation, consists of the general opinion of people respecting one. It is built up by a lifetime of conduct. It is probably the dearest possession that a man has, and once lost is almost impossible to regain. The possession of a good reputation is conducive to happiness in life and contentment. The loss of it, … brings shame, misery and heartache. (citation omitted.)

The Court's interpretation of CCP §425.16 was also contrary to other constitutional considerations. For example, in Golden Gate Center v. Golden Gateway Tenants (2001) supra, the Court repudiated the express language in Gerawan Farming Inc. v. Lyons (2000) 24 Cal. 4th 468 holding that "California's free speech clause runs against the world, including private parties as well as governmental actors" by holding that California's free speech clause (Cal. Const., art. I, §2) contains a state action requirement, i.e., speech is not Constitutionally protected without a showing of state action. (In Golden Gateway, the Court held that a tenants association had no Constitution right under California's free speech clause to distribute its newsletter in a privately owned apartment complex. As a result, the landlord had a right to file for an injunction.)

As noted by the Court, "our extensive review of the history behind the adoption of California's free speech clause reveals no evidence suggesting that the framers intended to protect against private encroachment." Supra at 1029. "[T]he fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of the people vis-vis each." Supra p. 1029.

As noted by the Court:

"[B]y exempting private action from the reach of the Constitution's prohibitions, [the state action limitation] stops the Constitution short of preempting individual liberty-of denying to individuals the freedom to make certain choices…. Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the constitution's demands." (Tribe, American Constitutional Law (2d ed. 1988) p. 1691.)

Second, a state action limitation safeguards the separation of powers embodied in every American constitution by recognizing the limited ability of courts "to accomplish goals which are essentially legislative and political." (Woodland v. Michigan Citizens Lobby, (1985) 378 N.W.2d 337.) "Without a state action *1031 limitation, the courts will possess the same authority as the legislature to limit individual freedoms, but will lack the degree of accountability which should accompany such power." (Citation omitted.) As a result, absent a state action requirement, "the 'rule of law' would approach in Sir Ivor Jennings' caustic but realistic phrase, 'rule by the judges alone.'

Accordingly, we hold that article I, section 2, subdivision (a) only protects against state action. Supra p. 1031.

In Golden Gateway, the Court also held that "Federal free speech decisions do not preclude a different result under the California Constitution." Supra at 1035.

The Court also held that filing suit for relief, "does not, by itself, constitute state action." Supra at 1034. See New York Times v. Sullivan 376 U.S. 254 (1964); and Shelly v. Kraemer 334 U.S. 1 (1948) the "state action" requirement was found only because the lawsuits asked the Court to enforce an unconstitutional law, statute and/or contract. Here, no such issue is involved.

In short, absent a showing of state action, a condition precedent to the applicability of CCP §425.16 is that for a speech to be protected under §425.16, the speech must be constitutionally protected. Absent such a showing, CCP §425.16 does not apply. As expressly set forth in CCP §425.16(a)(b):

> 425.16. (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.
>
> (b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Here, Rosenthal's publications were not in furtherance of any constitutionally protected right entitled to constitutional protection against individual infringement because the speech was unconnected to any state action. (Compare CCP §425.16(e)(1)(2) which involves state action and CCP §425.16(e)(3) which would involve state action if the public forum satisfied the Golden Gate requirement, i.e., it is a place that is "unrestricted" and "freely and openly accessible to the public.")

In short, the trial court erred in holding that CCP §425.16 (e)(4) applied.

Additional constitutional considerations are set forth in Hak Fu Hung v. Warren Wang (1992) 8 Cal.App.4th 908, a case involving the statutory construction of Civ. Code Section 1714.10, and a case that it is frequently cited as analogous authority for the rules governing CCP §425.16. (See Wilcox v. Superior Court (1994) 23 Cal. App. 4th 809.)

In Hung, the Court held that "the right of a potential litigant to the use of judicial procedures is constitutionally protected by the prohibitions against state deprivation of property without due process of law." Supra at 921 (emphasis added).

As noted by the Court, this right to a jury trial "has always been regarded as sacred and has been jealously guarded by the courts." Supra at 927.

The Hung Court also established the following rules which have been used in ruling on §425.16 motions and in interpreting statutes:

1) That it is the function of the jury to determine questions of fact. Supra at 927.

2) Unless the language of a statute is ambiguous, there is no need for construction. Supra at 929.

3) If the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be

given that meaning, rather than another in conflict with the Constitution. Consequently, if feasible within bounds set by their words and purposes, statutes should be construed to preserve their constitutionality. This follows from the presumption that the legislative body intended to enact a valid statute. The rule in favor of a construction which upholds a statute's validity plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the court's duty is to adopt the latter. Supra at 930-931. (Emphasis added)

4) The trial court may not make findings as to the existence of facts based on a weighing of competing declarations. Whether or not the evidence is in conflict, if the petitioner has presented a sufficient pleading and has presented evidence showing that a prima facie case will be established at trial, the trial court must grant the petition. Supra at 933-934

5) Subjecting the allegations to a fact adjudication screen would violate the right to a jury trial. Supra at 931, Cal. Const., art. I.§16.

Here, the Court failed to consider a number of these rules in its interpretations of CCP §425.16 as well as in its interpretation of §230. For example, the Court's construction of §230 gives rise to grave and doubtful constitutionally questions. The Court, rulings on CCP §425.16 involved a weighing of the evidence and a disregard of much of Appellants evidence thereby violating Appellants' right to jury trial and due process.[5]

VII.

THE COURT ERRED IN FINDING THAT CCP §425.16 APPLIES TO THIS CASE

Without intending to be redundant, Appellant respectfully submits that the "speech" involved in this case was not constitutionally protected because there is no state action, i.e., the speech did not occur in a place that was "unrestricted and freely and openly" accessible to the public. As a result, the Trial Court erred in holding that CCP 425.16 applied to this case. (See Golden Gateway v. Golden Gateway Tenants 26 Cal.4th 1013 (2001).) In Golden Gateway, the tenants were involved in distributing "newsletters," an activity which undoubtedly involving a public concern. However, instead of being able to file a SLAPP suit against the landlord, the landlord was allowed to enjoin the tenants since the speech was not protected. Here, the facts support a similar finding.

1) The Speech Did Not Occur in a Place That Is Freely and Openly Accessible to the Public Even If §425.16(c)(3) Is Found Applicable.

In Golden Gateway, the Court reluctantly agreed to uphold Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899 because of stare decisis. However, the Court did make it clear that

[5] One example of the Court's violation of Appellant's constitution right to a jury trial is when it weighed the evidence concerning Rosenthal's statement about how she despised Appellants with the comment "This Court surmises..." (See Appendix 2, p.139.)

Robins will be limited to the narrow set of facts involved. As a result, the Court reluctantly kept Robin in force but limited its "unrestricted" and holding to the facts, i.e., that for there to be State action, the speech must occur on property that is "freely and openly accessible to the public."

Here, even assuming arguendo that the Court applied §425.16(e)(3) to the case, the ruling would still be in error since the speech at issue took place in a privately owned Internet newsgroup which requires that its users both identify themselves and agree to the terms of use.[6] If this Court were to find that the speech occurred in a place freely and openly accessible to the public notwithstanding the restrictions of use, that site would be an unconstitutional state action infringement on the individuals right by compelling the users to identify themselves. See James Carey v. Nevada Gaming Control (2002 9th Cir.) 2 CDOS 1040

Thus, consistent with the rules of statutory construction, i.e., to avoid any constitutional concerns, the privately owned Internet discussion boards, should be deemed private and not "freely and openly accessible to the public," such as to constitute a public forum involving state action.

VIII.

THE TRIAL COURT'S INTERPRETATION OF 42 USC §230 OF THE COMMUNICATION DECENCY ACT WAS INCORRECT

A. Preliminary Statement

Assuming arguendo that CCP §425.16 is found to apply, the Court's ruling should still be reversed on the grounds that the Court erred in its ruling that §230 provides immunity for defamatory Internet republications.

For example, to uphold this interpretation of §230 will lead to absurd results that are contrary to the fundamental rights granted to both individuals and to the states to protect individuals from injuries caused by republication of defamatory publications.

The Court's interpretation is also contrary to the very purpose of the Communication Decency Act. In other words, if the trial court's interpretation is upheld, a "clever libeler" could easily escape liability by having some other Internet user who is not subject to the jurisdiction of the Court, or who is anonymous, or who is judgment proof, publish libelous statements which another "Internet user" is free to republish.

Moreover, this interpretation would obliterate California's well established laws that, anyone who republishes another's defamatory statement is liable. See Gilman v. McClatchy (1986) 111 Cal. 606 at 612, "a false statement is not less libelous because of its repetition". See also BAJI (8th Ed., No. 7.02.1).

In sum, to uphold the trial courts interpretation of §230 would obliterate California libel law on liability for republications of defamatory statements as well as California Civil Code Section 43 which grants every person protection from defamation. In the process, it would also obliterate all individual rights to protect their reputation, "one of the cornerstones of a decedent society." (See Rosenblatt v. Baer supra p. 678.)

[6] Everyone of Rosenthal's posting took place in places that were privately owned, not freely and openly accessible to the public since. Déjà vu, the Internet service provider Rosenthal used, expressly conditions and limits an individual's free speech rights (see http://www.google.com/terms_of_service.html) which requires that a person must register and identify themselves and abide by all terms. In other words, it is not "unrestricted" and freely and openly accessible to the public.

For this reason alone, the Court's interpretation of §230 cannot stand. However, there are additional other reasons why the trial court interpretation of §230 is erroneous.

B. The Legislative History and the Express Language On §230 Is Contrary To The Court's Ruling

A review of the Communication Decency Act history suggests that the reason for §230 stems from the fact that the electronic transmission of information created a substantial opportunity to distribute false information. (Appendix 10, pp. 890-1016.)

Prior to the enactment of §230, courts considering defamation claims involving Internet information service providers tended to look to the service provided and then analogize it to traditional legal categories.

For example, under the common law, one who only delivers or transmits defamatory matter published by a third person, i.e., "a distributor" was subject to liability only if he knows, or has reason to know, of its defamatory character. (Restatement of the Law (Second) Torts § 581(1), p. 231, (1977)).

In contrast, one who republished a libel was subject to liability as if he had originally published the statement. Id., § 578, p. 212. Thus, a republisher of defamatory material is treated as a "publisher" of the material under the common law.

Congress' decision to enact §230 and establish a distinction between parties who distributed defamatory statements and those that published them was further influenced by two cases: Cubby Inc. v. CompuServe, Inc., (776 F.Supp. 135 (S.D.N.Y. 1991), and Stratton Oakmont, Inc. v. Prodigy Services Co., (1995 WL 323710 (N.Y. Sup. Ct. (1995)). The plaintiffs in Cubby sued CompuServe, a computer information service that users could access from a computer. The plaintiffs accused CompuServe of posting defamatory statements about them on its computer service in a publication that CompuServe had posted for a third party. CompuServe moved for summary judgment on the grounds that it was a distributor, and not a publisher, of the defamatory statements at issue. Accordingly, CompuServe argued, it could not be held liable because it did not know or have reason to know of the defamatory statements. The District Court granted CompuServe's motion for summary judgment, reasoning that CompuServe was like "an electronic, for-profit library." The Court further reasoned that CompuServe would not possibly know the full contents of all of the publications that were carried on its service. Therefore, CompuServe should be held to the standards of a distributor rather than a publisher. Id., 776 F.Supp. at 140-141.

In the subsequent case of Stratton Oakmont, Prodigy, a company that ran a computer network, was sued for defamatory statements that were placed anonymously on one of the "computer bulletin boards" that Prodigy ran. Because Prodigy had editorial control over the content of its computer bulletin boards, the Court reasoned, Prodigy was more like a publisher than a distributor, and accordingly should be held to the standards of liability for a publisher. Id. Prodigy was held liable.

After Stratton Oakmont, Congress became very concerned that Internet providers who did nothing to protect their users from obscene, offensive material or libelous publications would be free from civil liability, just as the defendant in Cubby was free from liability for defamation. (See 141 Cong. Rec. H8469-72 (August 4, 1995). (Appendix 10, p. 890.) In contrast, Internet providers who tried to protect their users from pornography, offensive and/or libelous publication would be liable for their failure, just as the defendant in Stratton Oakmont was liable. Fearing that such a situation would encourage Internet providers to do nothing to protect their users from

offensive material, etc. Section 230 of the CDA was enacted to give "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or enable restriction of access to objectionable on line material." (Appendix 10, p. 890.) H.R. Conf. Rep. 104-458, p. 194; S. Conf. Rep. 104-230, p. 194.) (One of Congress' specifically stated purposes for enacting §230 was to overrule Stratton Oakmont.)

In short, Congress enacted the immunities in §230 because it did not want to expose responsible Internet providers and users to civil liability for trying, but failing, to protect others from on-line harm, not to protect those Internet users who intentionally placed libelous material on line as either a publisher or republisher, which caused others harm.

The very name of the legislation also reinforces the conclusion that Congress' intended that protections of §230(c)(1) apply only to users and providers who tried to prevent the spread of malicious material not the user who republished libelous statements. 47 USC §230 is entitled **"Protection for private blocking and screening of offensive material."**

The pertinent provisions of 42 USC §230 are as follows:

Section 230 Protection for Private Blocking and Screening of Offensive Material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.[7]

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States

(1) To promote the continued development of the Internet and other interactive computer services and other interactive media; (Note: There is no mention of individual users.)

(2) To preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (Again, no mention of Internet users.)

(3) To encourage the development of technologies which maximize user control, over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) To remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) To ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer. (Note: Is granting

[7] Appellants provided the emphasis and notes.

immunity to republishers of libelous statements that only involve civil liability consistent with this policy?)

(c) Protection for "Good Samaritan" blocking and screening of offensive material. There is no mention of protection for users republishing libelous statements.

(1) Treatment of publisher or speaker.

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. (Note: This provision does not provide protection to a person who intentionally provides information that is a republication of information obtained somewhere and republished somewhere else.)

(2) Civil liability (Note: This is the immunity section)

No provider or user of an interactive computer service shall be held liable on account of.

(a) Any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(b) Any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[8] (Note: This "no liability provision" protects users who remove libelous material. There is no grant of immunity to users who republish libelous statements.

(c) Effect on other laws

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. (Note: Under California law, a republisher of libelous material is liable.) No cause of action may be brought and no liability may be imposed under any State or local law this is inconsistent with this section. (Note: Holding a republisher of libelous material is not inconsistent with §230.)

(f) Definitions

As used in this section:

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service. (Note: A person who republishes a libelous statement is certainly responsible, in part, for the development of the information, i.e., they are reposting the publication. Moreover, if Congress intended to protect users, who are not the original authors, why not say so instead of using language that defines an "information content provider" as someone who is involved "in whole or in part, for the creation or development of information.")

In short, the unambiguous language of §230 reveals that the legislative intent behind civil liability immunity was to protect Internet services providers and other similar types of Internet users, from liability on "account of" "any action taken in good faith to restrict access to material that the provider or user considers to be obscene, harassing or otherwise objectionable whether or not such material is constitutionally protected," not a user who engages in the willful act of republishing libelous statements.

Consequently, granting immunity to any individual Internet user who intentionally republishes defamatory material, like Rosenthal, is contrary to 1) the legislative intent and 2)

[8] So in original. Probably should be "subparagraph (A)."

the constitutional protection afforded to individuals and to states charged with protecting its citizens against injury to their reputation.

Third, to uphold the Court's interpretation would be inconsistent with the individual's constitutional right to petition, which includes access to the Courts. Johnson v. Avery (1969) 393 U.S. 483, 485. California Transport v. Trucking Unlimited 404 U.S. 508 (1972); Dixon v. Superior Court, (1995) 30 Cal.App. 4th 733.

Fourth, such an interpretation is inconsistent with the principle laid out in Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749 (1985) wherein the Court held that a state's interest in compensation of private individuals against defamatory statements is "strong and legitimate" and that "a state should not be lightly required to abandon it." See also Rosenblatt v. Baer, supra and Justice Stewart's comment that "the right of a man to the protection of his own reputation from unjustified and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty." Supra at p. 678.

The very title of the law, i.e., "The Communication Decency Act" is also inconsistent with the trial court's ruling. In other words, where is the "Decency" in granting Internet users immunity for libelous republications?

Finally, to uphold such an interpretation would also lead to absurd results since such a user could even profit from the defamatory message being spread, as the reputation of the hapless subject of the defamatory message is further harmed by the message's continued propagation. Indeed, even if such a defamed plaintiff were to recover from the original author of a defamatory message, there would still be no incentive whatsoever for a malicious republisher to stop spreading the false, defamatory message.[9]

In short, the Court's interpretation of §230 was erroneous.

IX.

THE TRIAL COURT INTERPRETATION OF CCP 425.16 WAS ERRONEOUS FOR SEVERAL ADDITIONAL REASONS

A. The Court Erred In Holding That CCP §425.16 Requires Clear and Convincing Admissible Evidence In Order For a Public Figure to Meet Their Burden

CCP §425.16(b)(1) states that once the moving party proves that the claim arose from a person's exercise of a constitutional right of petition or free speech, the plaintiff must establish that there is a "probability" that the plaintiff will prevail on the claim.

As is readily apparent from the statute, there is no language which states that to defeat a SLAPP motion, a plaintiff must present a probability of prevailing by competent and admissible evidence. (See Appendix 1, Court's Ruling.) Further, there is nothing in the statute which states that if the person is a public figure, in order to prevail on the SLAPP motions, they must prove "malice" by clear and convincing admissible evidence, i.e., "the evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong so as to command the unhesitating assert of every reasonable mind." (See Appendix 2, Court's Ruling p. 117.)

[9] Rosenthal and others, have engaged in a continuous attack on Plaintiffs by republishing the same defamatory statements again and again. (See Appendix 5, Barrett Decl. p. 438.)

To the contrary, CCP §425.16 simply states that in ruling on a SLAPP motion, the Court "shall consider the pleadings, supporting and opposing affidavits stating the facts upon which the liability is based." (Query: Are affidavits and pleadings admissible evidence?)

Moreover, could anyone seriously conclude from the legislative history that any California legislator, who by definition is a public figure, intended to draft a law that would require that a legislator, who is libeled, prove by "clear and convincing admissible evidence" that there was malice, before having any opportunity to conduct discovery?[10]

In addition, the trial court finding that the burden of proof requires "clear and convincing evidence" is also based on prior case law that consists of "categorical directives" which lack any analysis to show why the burden is "clear and convincing evidence." See Golden Gateway, supra. Indeed, by following the trail of cases leading to this issue, it is easy to see how this confusion started.

First, it is important to note that many of the relevant United States Supreme Court cases, were based on state statutes, etc., regarding libel. As a result, the Court's decision was often times based on state statutes the combined issues involving proof of both general and punitive damages under state law. (In California, it is undisputed that a claim for punitive clears requires clear and convincing evidence. In short, it is critical that this Court consider the various Supreme Court cases to see what was actually being decided.

Indeed, Appellants have not found any case, which is persuasive authority for the proposition that in addition to a showing of malice, a public figure must also prove malice by the higher "clear and convincing" burden of proof.

Again, by following the trail, it is easy to see how this confusion occurred in this and other cases.

In this case, the trial court relied on Evans v. Unkow (1995) 38 Cal.App.4th 1490, instead of its own analysis, to conclude that there is "Clear and convincing" burden. Evans, however, relied on Robertson v. Rodriquez 1995) 36 Cal.App.4th 347 without any analysis.

As is readily apparent from Robertson, no analysis was done on this issue either. Instead, the Robertson Court relied on Looney v. Superior Court (1993) 16 Cal.App.4th 521.

In Looney, however, the legal issue involved punitive damages under CCP §425.13. Under California law, a prima facie case for punitive damages requires clear and convincing evidence as part of a prima facie case. (See BAJI 14.71 – Punitive Damages – Recovery and Measure 8th Edition Vol. 1.)

Here, there is no California statute requiring clear and convincing evidence of malice to establish a prima facie libel case involving a public figure. As noted in BAJI 7.04 – "Public Official/Figure Public Matters – Essential Elements July 2001 Pocket Part for 8th Ed. Vol. 1, a prima facie case of a claim for defamation are: 1) The defendant made a defamatory statement about plaintiffs; 2) Defendant published the statement; 3) the defendant, at the time of the publication either a) knew that the statement was false and defamed plaintiff; or b) published the statement in reckless disregard of whether the matter was false and defamed plaintiff; 4) either the publication caused plaintiff to suffer special damages or, the statement was defamatory on its face. As noted in Evidence Code §115, except as otherwise provided by law, the burden of proof is by "preponderance of evidence."

[10] A review of the legislative history of CCP §425.16 also shows that the trial courts interpretation was never intended by the legislature. For example, the legislature rejected the term substantial probability for the burden of proof standard. (See Wilcox v. Superior Court (1994) 27 Cal.App.4th 809, 825.)

In short, the clear and convincing evidence standard required in the Looney case was an essential element of plaintiffs' claim for punitive damages, which somehow worked its way into being burden of proof in subsequent libel cases. For example, in Robertson, the Court simply mentioned, in one sentence, i.e., dicta, that, "In approaching the issue of whether Robertson demonstrated the existence of a prima facie case for libel, we bear in mind the higher "clear and convincing" standard of proof! (See Looney v. Superior Court supra, 16 Cal. 4th at pp. 538-539.) No further explanation was given as to what the Court meant.

As noted, the Robertson ruling was adopted in Evans v. Unkow without any analysis. Although the Evans court did cite Wilcox v. Superior Court (1904) 27 Cal. App. 4th 809 in its string cite, Wilcox makes no mention of any clear and convincing evidence burden. To the contrary, the Wilcox court held that Plaintiffs' burden in a §425.16 motion must be commensurate with the statute and the nature of the SLAPP, filed early with no chance for discovery.

Another case cited by the Court in support of a clear and convincing burden was Dixon v. Superior Court (1994) 30 Cal. App. 4th 733, 746. However, no mention of the "clear and convincing" evidence standard is made in this case either.

In short, none of the cases relied on by the Court provide any analysis to justify the "clear and convincing" burden of proof that the Court held applied in this case. Moreover, there is nothing in the statute to suggest such an interpretation.

As noted in Wang supra at 929-930,

> The phrase, "a reasonable probability" may be taken to mean that the petitioner must show that he or she has a case that will survive a motion for nonsuit and that, if successful, will be supported by sufficient evidence to warrant affirmance on appeal. This construction gives to the noun "probability" its literal meaning as descriptive of the relative likelihood of an outcome (see Black's Law Dict. (5th ed. 1979) p. 1081, col. 1). The adjective "reasonable" requires the petitioner to do more than demonstrate *some* chance of winning; the petitioner must show that given the evidence, he or she has a substantial case.
>
> If the Legislature had intended to require a petitioner to not only show a cognizable case but also that it is a winning case, it would have been a simple matter to use language that would have conveyed that meaning unambiguously, or at least with greater clarity. (Citation omitted.) For example, the statute might have required petitioner to demonstrate that it "is reasonably probable" that he or she will win on the conspiracy issue. No such language appears. Nor did the Legislature provide that the petition may be denied only if the petitioner is unlikely to ultimately prevail (Code Civ. Proc. §1094.5 subd, (h)(1)), or require a finding that the petitioner would ultimately win.
>
> Instead the Legislature used the words "reasonable probability," which speak to the relative likelihood of success. The full phrase, "a reasonable probability," connotes a substantial potential for success. The reasonable and literal meaning of this phrase in the context of the statute is that the petition must be granted if the proposed pleading is legally sufficient and the evidentiary showing to support it makes out a prima facie showing of conspiracy between the attorney and the client. It would strain the language to say that "a reasonable probability" has the same meaning as "reasonably probable" in this context.

In short, the legislature intended that the burden of proof in a §425.16 motion be based on "probably" not a "reasonable" or "substantial probability," and not by clear and convincing evidence. As noted earlier, it blinks reality to think that the legislators, who are "public figures," ever intended a "clear and convincing evidence" burden of proof to apply in a CCP §425.16 motion.

In addition to the absence of California case or statutory law, Appellants have not found any U.S. Supreme Court case, which, after any analysis of the burden of proof issue, ever concluded that the higher "clear and convincing" burden is constitutionally mandated in a libel case involving a public figure.

In fact, a review of the Supreme Court cases which were part of the struggle to define the proper accommodation between the law of defamation and the freedom of speech show that no Supreme Court decision has ever concluded, after any analysis, that in addition to the constitutional requirement of malice established in[11] New York Times v. Sullivan (1964) 376 U.S 254, 285-86, that there is an additional constitution mandate that imposes a "clear and convincing" burden of proof.

In fact, if you look at the Court's comment in the New York Times case wherein the Court noted that "applying these standards, we consider that the proof presented (in the case) lacks the convincing clarity which the constitutional standard demands" in the context in which it was made, it becomes clear that this "convincing clarity" language is pure dicta since the Court specifically stated that, "there was no evidence" whatsoever of malice. The Times case also involved an additional Constitution issue, i.e., freedom of the press.

In short, had the United States Supreme Court required the additional constitutional protection that malice be proven by the higher clear and convincing evidence standard, the Court could and would have done so given the Supreme Court's analysis of this issue in numerous other burden of proof decisions.

For example, the burden of proof issue was analyzed in In Re Winship 397 U.S. 368 (1970) wherein Justice Hailan noted the following:

> . . . I begin by stating two propositions, neither of which I believe can be fairly disputed. First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the fact-finder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact-finder can acquire is a belief of what probably happened. The intensity of this belief-the degree to which a fact-finder is convinced that a given act actually occurred-can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases 'preponderance of the evidence' and 'proof beyond a reasonable doubt' are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.
>
> A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the

[11] Since Libel law is within the states jurisdiction, many Supreme Court decisions rely on unspecified state statutes.

plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction [397 U.S. 358, 371] of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems peculiarly appropriate for, as explained most sensibly, it simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before (he) may find in favor of the party [397 U.S. 358, 372] who has the burden to persuade the (judge) of the fact's existence.

What justification is there for imposing a clear and convincing burden in a libel action involving a public figure or official whose reputation is erroneously tarnished by the defamatory statement when he or she already has the burden of showing malice. What justification is there for the requiring that such a plaintiff should bear a greater risk of error through the "clear and convincing" burden of proof, rather than the malicious libeler. Indeed, what justification is there for the "clear and convincing" evidence burden when in free speech right cases pertaining to matters of public interest involving a private person, there is not even the constitutional requirement to prove malice? See Gertz v. Robert Welsh 418 U.S. 323, 345-46, 94 S.Ct. 2997. (See Brown v. Kelly Broadcasting 48 Cal.3d 711.)

In short, Appellant respectfully submits that there is no basis to conclude that freedom of speech is entitled to greater protection from a risk of error, then the state right to protect and the individual rights in being compensated for injury suffered by defamation.

X.

APPELLANTS ESTABLISHED A PROBABILITY OF PREVAILING

Appellants met their burden of proof by establishing a "probability that they will prevail," even if this Court accepts the Trial Court's holding that Plaintiff must come forward with admissible evidence on at least four scores," "to establish defamation" to defeat a SLAPP motion. Appendix 2, p. 117.)

Score 1) Appellants Established That The Matters Complained of Were Published.

As noted above, Rosenthal admits that she published and republished the defamatory statements at issue. (See Appendix 3, Answer, p. 145.)

Score 2) Appellants Established That The Statements at Issue Are False

Based on the uncontested verified complaint, and exhibits, the uncontested declarations, and exhibits submitted by Appellants, there was clear evidentiary support on this issue. In fact, this evidence describes in great deal the facts establishing the falsity of the statements made and republished by Rosenthal. (See Appendix 1 – verified complaint and exhibits, Appendix 5, Barrett Decl. pp. 437-485, Appendix 5, Polevoy Declaration, pp.459-460.)

Since no objections were raised to any of Appellants' statements, exhibits or pleadings, the Court was required to accept Appellants' statements as true. (See Wilcox v. Superior Court (1994) 27 Cal.App.4th 809.)

Score 3) Appellants Established That The Statements At Issue Are Defamatory

The factual statements of Appellants set forth in the verified complaint and exhibits (See Appendix 1 and Appendix 5), in the Declarations of Dr. Barrett (See Polevoy and in the other exhibits, provided clear and convincing evidence as to the defamatory nature of the statements at issue, i.e., why the publication and republications 1) exposed Appellants to hatred, contempt, ridicule and/or 2) caused them to be shunned or avoided and/or had a tendency to injury Appellants in their occupation." (Appendix 2, Court Ruling.)

Moreover, the clear and unopposed evidence contained in Appellants verified complaint and exhibits, declarations and exhibits establish that the statement at issue constituted libel per se, since they 1) charged Appellants with commission of crimes, 2) charged that Appellants are guilty of an acts of dishonesty and defects of character reporting unfitness, as well as attacks on honesty and integrity. (See Witkin, Summary of California Law, 9th Ed. Torts Section 481-482.)

Further, as set forth in Morris v. National Federation of the Blind (1961) 192 Cal.App.2d 162, there need not even be a direct accusation of misconduct, since epithets or descriptive words or opinions which carry with them the implication of acts of misconduct are libel per se.

As set forth in the verified complaint and exhibits and in the declarations of Dr. Polevoy and Barrett, and exhibits attached, the statements at issue are replete with statements that are defamatory on their face. Examples of Rosenthal's libelous per se statements contained in the publications at issue include false charges that Appellants' engaged in criminal activity, i.e., Polevoy's stalking of Canadian Christine, conspiracies, and lies. Rosenthal's repeated false statements that Dr. Barrett is de-licensed is particularly libelous on its face since it falsely accuses Dr. Barrett, a retired medical doctor, who license is merely inactive, of misrepresenting his professional status, i.e., inputting unfitness as a doctor by stating or implying that his license had been taken away.

Indeed, when read in their entirety, the publications at issue along with the letters republished by Rosenthal are replete with epithets, descriptive words and accusations of misconduct, which justify a finding of libel per se.

In short, the evidence clearly shows that Rosenthal published to third parties defamatory statements that were libelous per se.

Score 4) Appellants Must Establish That Plaintiffs Suffered Actual Damages

The Court's ruling on this issue is contrary to both case and statutory law, i.e., the law allows a defamed individual, including a public figure, to recover presumed damages in libel per se actions as long as malice is shown. (See Evidence Code §45a.)

In fact, a review of the two cases relied on by the Court, i.e., Averill v. Superior Court (1996) 42 Cal.App.4th 1170, 1176) and Gertz v. Robert Welch supra do not support the Court's holding on this issue. In Gertz, the Court held that presumed damages for a private figure Plaintiffs are not allowed absent a showing of malice.

In sum, the evidence presented by Appellants clearly satisfied the first three issues. The fourth issue, i.e., actual damages is not required in a libel per se action. However, Appellants have suffered damages. The Court, however, refused Appellants request to obtain this evidence when it denied Appellants request for discovery.

Score 5) Appellants Established a Prima Facie Case of Malice.

Appellants respectfully submit that sufficient evidence of malice was presented. To start, malice is defined in several different ways. One definition of malice is a statement made with knowledge that it was false or with reckless disregard of whether it was false or not. (See Civ. Code §§47, 48, and 48a – libel.) Another definition of malice includes ill will. (See CCP 3294 – Punitive Damages.)

In Brindrim v. Mitchell (1979) 92 Cal.App.3d 61, the Court held that on the issue of malice, there is duty to investigate especially after receiving information from plaintiff expressing concerns about the accuracy of the statements. The failure to do so is evidence of malice.

Here, Appellants wrote to Defendant Rosenthal, an admitted researcher, writer and author, explaining to her that the articles she was publishing and republishing were not true. (Appendix 5, Barrett Declaration pp. 437 et al.) Notwithstanding this knowledge, Rosenthal continued to republish the same defamatory statement without any credible effort to investigate to see if the publications were true or false. In short, Rosenthal's failure to investigate after receiving letters that the publications were false was evidence of malice.

Another factor relevant to malice is that Rosenthal, by her own admission, is a writer, author, and researcher. (See Appendix 4, Rosenthal's Decl. Pp.173-189.) As an author, the failure to investigate is more than just negligence. It represents an extreme departure from the standards of investigation and reporting by responsible writers. (See Curtis Publishing Co. v. Butts 388 U.S. 130, 132 (1967) where such conduct was held to demonstrate a reckless disregard as to the truth or falsity of the allegations and thus provided clear and convincing proof of malice.) Here, Rosenthal's failure to investigate by checking reliable sources is additional evidence of malice.

Inaction can also be evidence of malice. For example, in Harte-hanks Communication v. Connaughton 491 U.S. 657 692 (1989) the Court held that while not investigating may not be sufficient, inaction is something different. There, the court held that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the truth or falsity of the statement and that while a failure to investigate standing alone, may not support a finding of malice, the purposeful avoidance of the truth is sufficient.

Here, Defendants Rosenthal admits that she deliberately failed to investigate because of her belief that she did not have to. (Appendix 5, p. 437.) Rosenthal's deliberate decision not to investigate after being told that there writings were false, coupled with the fact that there is no evidence to show that Rosenthal had any reasonable belief in the truth of what she republished and published is another piece of evidence of her malice.

Additional evidence of malice can also be inferred from the tenor of the statement Defendants Published. (See Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791.)

Here, the tenor of the articles Rosenthal published and republished, as well as the tenor of the article Rosenthal edited and published on her own (Appendix 5, p. 437) strongly suggests that it was published with malice, hatred and ill will against Appellants and that the sole intent of the publication was to cause Appellants damage, not to promote or further some public interest or issue. Indeed, while Rosenthal and her lawyers spent many hours on her declaration trying to create the impression that her speech was to promote matters of public interest, Rosenthal true intent is revealed by her statement that, "the lawsuit was brought to silence my critical opinions of Plaintiffs Barrett and Polevoy". See Appendix 4 p. 187, lines 15-17. In short, the statement-giving rise to this action arose out of Rosenthal's dislike of Appellants and not out of Rosenthal's concern for alternative medicine.

In additional to the above, case law has also held that the manner of the statement is material upon the question of malice. In other words, if the facts believe to be true are exaggerated overdrawn or colored to the detriment of Plaintiff or are not stated fully and fairly, this can be considered as evidence of malice. (See Snively v. Record Publishing Co. 185 Cal. 565 (1921).)

Here, there can be little, if any, dispute that the statements at issue are overblown, untrue and do not fully and fairly state anything about Appellants. (Appendix 5, Barrett Decl. p. 437.)

Ill will may also be circumstantial evidence of malice in a libel case. See Live Oak Publishing Co. v. Cohagen (1991) 234 Cal. App. 3d 1277. Here, the Court rejected plaintiffs' evidence of ill will as evidence of malice. (See Appendix 5, p. 437.)

In fact, not only did the court err in rejecting this evidence the Court erred by weighing the evidence in his ruling on this issue, when he accepted Rosenthal's declaration and claim that the statement was made because she was upset about being sued with the remark, "This Court surmises….." (Appendix 2, p. 117.) In surmising that her statement was the result of being sued, the Court rejected Appellants' claim and evidence, which that showed that her statement about despising Appellants had nothing to do with being sued since she included other people who never sued her in her "I despise" statement.

In short, the judge erred in 1) weighing this evidence and 2) in holding that evidence of ill will was not relevant to the issue of malice.

Other evidence of ill will was also presented. (Appendix 5, p. 437.) As set forth in the declaration of Steven Barrett, Defendant Rosenthal continued to make her malice obvious. As noted earlier, Rosenthal has stated that she "hated" Dr. Barrett. In another (January 10, 2001), posting Rosenthal states: "I despise bullies like Quacks Barrett & Polevoy." In another (March 16, 2001) posting, Rosenthal stated that: "I am a blatant anti-Barrett and anti-Polevoy and I have a right to express those opinions. So do anti-Semites…that's what free speech is all about." (Appendix 5, Barrett Declaration, pp. 437 et al.)

Finally, little, if any, weight should have been given to Rosenthal's claim that she called Christine McFee at some unknown point in time since information from a source hostile to Plaintiff is not sufficient to negate malice. See Fisher v. Larsen (1982) 138 Cal. App. 3d 627, 640.

(Ms. McFee was the person who claimed that Dr. Polevoy stalked her. Her claim, however, was rejected by the police.) (See Appendix 5, p. 452.)

In short, Appellants presented clear and convincing evidence to show a probability that Rosenthal acted with reckless disregard for the truth, i.e., malice, in publishing and republishing the defamatory statements about Appellants.

XI.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR DISCOVERY[12]

The Court's conclusion that Rosenthal's words did not "contain provable false assertions of fact" was based on the statements specified in the Court's ruling that the words, i.e., quacks, arrogant, bully, etc., were not libelous. These were also the words that formed the basis of the Court's decision that "these words constituted constitutionally protected rhetorical hyperbole." (See Appendix 2)

As noted, these words represented only a fraction of the libelous statements at issue. Consequently, the Court's decision denying discovery was really based on the Court's conclusion "that no plaintiff has asserted a cognizable claim for defamation against Rosenthal" because the words quack, arrogant, etc., were not actionable.

Consequently, to uphold the Court's ruling on discovery, this Court must uphold the trial court's interpretation of §230. If not, Plaintiffs respectfully submits that the Court's ruling on Plaintiffs discovery motion was an abuse of discretion and must be reversed since the words deemed protected, were actionable. As noted in Metabolife International, Inc. v. Wornick, et al. 72 F.Supp.2d 1160 reversed in part:

> To satisfy due process, the plaintiff's burden must be compatible with the early state of the action and the limited discovery opportunities. See Cal.Civ.Proc.Code § 425.16(f), (g) In federal court, "if a defendant desires to make a special motion to strike based on the plaintiff's lack of evidence, the defendant may not do so until discovery has been developed sufficiently to permit summary judgment under Rule 56". Summary judgment is often considered inappropriate early in the case, for example, when the moving party controls the information required to oppose the motion. See Rogers, 57 F.Supp.2d at 980. In that situation, courts "are lenient in granting further time for discovery." See id. (quoting Wright, et al., Federal Practice & Procedure § 2740 (2d ed.1996). Thus, the Court should not scrutinize Plaintiffs evidence of facts uniquely within the Defendants' control before ordering discovery to enable Plaintiff to meet its burden of opposing Defendants' anti-SLAPP motions. Evidence of "actual malice," which exists when the speaker "entertained serious doubts as to the truth of his statement," (citation omitted) is uniquely within the control of Defendants

California cases have come to similar conclusions. As noted in Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 37 Cal.App.4th 855, the trial court must liberally exercise its discretion by authorizing reasonable and specified discovery when evidence to establish a prima

[12] The same trial court granted cross-complainant's request for discovery in a SLAPP motion filed by Appellants.

facie case is held, or known, by the defendant or its agents. Here, evidence of Rosenthal's malice is uniquely within Rosenthal's control.[13]

Further, if this Court's is going to give CCP § 425.16(e) a broad application, liberality in allowing discovery becomes even more critical to Plaintiffs due process rights. For example, liberality is necessary to avoid the risk that SLAPP motions, will be used by a defendant to SLAPP a plaintiff who has a valid claim by making the plaintiff waste their time and money in filing a response. (See Looney v. Superior Court (1993) 16 Cal.App.4th 521, 537, liberality in allowing discovery must be granted).

In short, Plaintiffs respectfully submit that based on the pleading and declarations submitted by Appellants, that the Court erred in finding that there was no good cause to order that Appellants be allowed to conduct limited discovery relevant to the issue of malice.

A. The Cases Cited By Defendant And Relied On By The Court In Support Of The Claim That Discovery Should Be Denied Are Inapposite

At the hearing, Rosenthal argued that a series of cases support her claim that discovery should be denied. A review of these cases show that they are inapposite to the facts present here. Indeed, the case falls into two general categories: 1) Cases in which the Court found that discovery was unnecessary to a ruling and 2) Cases in which discovery was allowed and further discovery was denied as unnecessary.

1. Category 1 Case: Discovery Deemed Unnecessary
   - A) Global Telemedia International, Inc. v. Do 1 aka Bustedagain 40 132 F.Supp.2d 1261 (Discovery deemed unnecessary).
   - B) Sipple v. Foundation for National Progress 71 Cal.App.4th 226 (Discovery Deemed Unnecessary) supra p. 247 statement was absolutely privileged under the litigation privilege and under the fair and true reporting privilege.
   - C) Dixon v. Superior Court (1994) 30 Cal.App.4th 733 Evidence of malice irrelevant. No need for discovery.
   - D) Lafayette Moorehouse, inc. v. Chronicle Publishing Co. 37 Cal.App.4th 855. Further discovery unnecessary. Statements were true and were absolutely privileged under the fair reporting privilege.
2. Discovery Conducted – No Further Discovery Allowed
   - A) Robertson v. Rodriquez 36 Cal.App.4th 347. Here the Court found that Plaintiff did obtain adequate discovery prior to the motion. No further discovery necessary.

In short, in every case involving the Court's refusal to allow discovery, the decision was based on a finding that that discovery was unnecessary.

[13] In another related matter involving a subsequent cross-complaint, the same Trial Court granted cross-Complainant New Century Press's request for discovery in response to Appellant/Cross-Defendant's SLAPP motion.

Here, the only way discovery becomes unnecessary is if this Court upholds the Court ruling as to §230 and the ruling that Rosenthal's publication of the edited statement was a republication also entitled to protection under §230.

XII.

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING ROSENTHAL'S MOTION AS AGAINST APPELLANT GRELL

As noted in the Court's ruling, and as admitted by Grell at the hearing, Grell made no specific allegations against Rosenthal in the complaint. As the hearing, when the issue arose, Grell acknowledged that he had no claim against Rosenthal and that the mistake was a pleading mistake. (Appendix 7, Transcript, p. 513.) On, June 4, 2001, before that Court issued its ruling, Grell filed a dismissal of all claims that might possibly be construed as claims by Grell against Rosenthal. (See Appendix 10, p.1107.)

Notwithstanding the filing of the dismissal, the Court granted Rosenthal's motion as to Grell even though the Court lacked jurisdiction to do so. See Kyle v. Carmon (1999) 71 Cal. App. 4th 901. Consequently, the grant of Rosenthal's motion against Grell must be reversed since the trial court lacked jurisdiction.

More importantly, Appellant respectfully submits that the Court abused its discretion when it granted Rosenthal her fees and costs against Grell.

As noted in Coltrain v. Shewalter (1998) 66 Cal.App.4th 94,

> "Where the Plaintiff voluntarily dismisses an alleged SLAPP suit while a special motion to strike is pending, the Trial Court has discretion to determine whether the Defendant is the prevailing party for purposes of attorneys fees under Code of Civil Procedure §425.16(c). In making that determination, the critical issue is which party realized its objectives in the litigation. Since the Defendants' goal is to make the Plaintiff go away with its tail between its legs, ordinarily the prevailing party would be the Defendant. The Plaintiff, however, may try to show it actually dismissed because it had substantially achieved its goals through a settlement or other means, because the Defendant was insolvent, or for other reasons unrelated to the probability of success on the merits."

Here, Grell dismissed any perceived claims against Rosenthal because Grell never intended to bring any against her, i.e., the dismissal was totally unrelated to the probability of success on the merit.

Further, at no time prior to filing the motion, did Rosenthal contact Grell and make any attempt to bring this issue to Grell attentions so that Grell could correct it.

Indeed, had the motion to dismiss been brought under §128.27, a statute modeled on Rule 11 of the Federal Rules of Civil Procedure, which is what CCP §425.16 is also designed to do, i.e., award attorney fees and costs for filing a frivolous suit, Rosenthal would have, as a condition precedent, to an award of fees and costs, been required to afford Appellant Grell a "safe harbor" time period to correct this mistake before bringing the motion. As noted in Cromwell v. Cummings (1998) 65 Cal.App.4th Supp. 10, the central purpose of the safe harbor provision is to provide an adequate opportunity for withdrawal (voluntary dismissal) without penalty once the impropriety of the pleading and the consequence of non-withdrawal have been made clear." Id. at Supp. p. 14-15.

As noted in Hart v. Hart (2 CDOS 527), the "purpose of section 128.7 is to deter frivolous filing, not to punish parties (citation). This purpose is forwarded by allowing the offending party to avoid sanctions altogether by appropriately correcting the sanctionable conduct after being alerted to the violation."

As noted in Barnes v. Department of Corrections (1999) 74 Cal.App.4th 126, 133 "sanctions under section 128.7 are not designed to be punitive in nature but rather to promote compliance with the statutory standards of conduct."

Like CCP §128.7, the purpose behind section 425.16 is not to punish, (if it was, the legislative could have included a punitive damage provision). Like CCP §128.17, section 425.16, it is to prevent claims brought to "chill" though the "abuse of the judicial process" lawsuits brought "primarily to chill the valid exercise of the constitutional rights of speech and petition for grievances".

Here, there are no facts whatsoever to suggest that Grell intended to bring a claim against Rosenthal, let alone a claim brought to "chill" her free speech rights.

Further, there are no facts that show that the alleged action Grell filed against Rosenthal arose from any speech she made. In short, there is no evidence that CCP §425.16 applies to this issue since no speech was involved.

Consequently, Appellant respectfully submits that given the stated objective of CCP §425.16 coupled with the public policy regarding sanctions, that the same considerations should be used in determining the appropriateness of the Court's award of sanctions against Grell. Should the Court do so, Appellant respectfully submits that there is no reasonable basis to conclude that the sanctions were justified. Appellant Grell respectfully submits that the Court reverse the ruling of the trial court granting Rosenthal's motion as to Grell and in sanctioning Grell by granting Rosenthal's motions for over $30,000.00 in fees and costs. (Appendix 16, p. 1444.)

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XIII.

CONCLUSION

Appellants respectfully submit that based on the foregoing, that the trial court's order be reversed.

DATED: March 14, 2002.

Respectfully submitted,

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By_____
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