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I.
STATEMENT OF FACTS

A. Introduction

Respondent DIANA FINERAN founded the Traditional Cat Association, and stewarded it through its initial years (AA265). She wrote the breed standards for respondent the Traditional Cat Association (TCA), by herself. She sat at a typewriter at home, without assistance, and wrote them (AA270-AA271). She then took the initiative to register the breed standard, and obtained a copyright (AA274-AA275). She then, on her own, proceeded to create the Godparent program for traditional cats, as well as the stud book (AA276).

Appellants have made remarkable attempts to deny the independent work she has done, make claims that others did the good work she accomplished for the TCA, and destroy her reputation within the TCA (AA40-AA42)and thereby her standing in her profession. Fair resolution of these disputes is therefore critically important to DIANE FINERAN, founder of the TCA.

B. Litigation Thus Far

There has as yet been no resolution of DIANE FINERAN's claims**.** There have been two small claims actions (the "San Diego Small Claims Action" and the "Nevada Small Claims Action") and one Federal action during which only one issue was determined.

(1) The San Diego Small Claims Action Was Not Decided On Its

Merits, but Was Dismissed For Lack of Jurisdiction.

Appellants misrepresent the result of the San Diego small claims action. They assert that plaintiffs "did not prevail", but neglect to inform the Court the ruling was actually based on lack of jurisdiction. As the San Diego Small Claims Court pointed out in its Notice of Ruling:

> Plaintiffs claims are based on actions taken under the laws of a Washington State Corporation. The majority of the prayer of plaintiff is for judicial orders beyond the jurisdiction of small claims court.
>
> The court finds the matter to be in the wrong situs and venue. Claim of plaintiff is dismissed with prejudice claim of Defendant is dismissed with prejudice. (AA75)

Thus, there was no "final determination" of any issue against plaintiffs. Plaintiff did not "lose" this small claims case.

(2) In the Nevada County Small Claims Action, Plaintiff Was Awarded A Substantial Part of the Relief She Sought.

Appellants also misrepresent the result of the Nevada Small Claims action. In its initial decision, the Honorable John Darlington, Judge of the Nevada County Superior Court, enjoined Appellant Briggs:

> ...not to use INC. In her newsletter unless her association is lawfully incorporated and to publish in her next newsletter that her association is not TCA, Inc., of Washington and that anyone who has paid dues to her association after September 1, 1998 ...shall be entitled to a refund or to have their dues forwarded to TCA, Inc of Washington [plaintiff's organization]. (AA94)

The court awarded no damages except $26.00 in costs, because

"Plaintiff prevailed in her equitable claim only" (emphasis added) (AA94).

Appellant Briggs made a motion for reconsideration. The decision was affirmed with the exception of the award of $26.00 in costs. Upon reconsideration, Judge Darlington chose to affirm the judgment against Appellant Briggs, but made the curious decision to rule there was "no prevailing party" because no damages were awarded (AA81). Despite this curious wording, which Appellants have quoted out of context, plaintiff clearly did prevail on her equitable claim.

In short, in the Nevada Small Claims Action, Respondent was awarded a judgment for injunction against defendant Briggs, but no money damages. Respondent thus obtained a substantial judgment against Appellant Briggs in the Nevada Small Claims Action. Respondent did not "lose" this small claims action.

(3) Only Twp Issues Were Determined In the Federal Action.

The jury in the Federal action could not reach a unanimous verdict on most of the special questions posed. As a result, the only issues decided were judgment for Appellants on the single issue of copyright infringement, and judgment for Respondents on Appellants' counter claim of conversion. (AA111).

II.
STATEMENT OF THE CASE

Appellant Herold's decision to publish false and defamatory statements about plaintiff on his private website is not protected by CCP §425.16(e), as the website and its publications does not meet the statutory requirements to

qualify for conditional protection under the anti-SLAPP statute. Appellant Herold's private website is not a "public forum". And, the remarks on the website were not made in a judicial proceeding, but on the website.

The statute of limitations argument Appellants now make was not made in the anti-SLAPP motion to strike, but in a demurrer and is thus improperly offered on appeal. In any case, Respondent's cause of action for defamation is not barred by the statute of limitations because the defamatory publications continue to the present day, and because the allegations of defamation go beyond those reported on the website which is the subject of the ant-SLAPP motion.

The argument to strike the cause of action for unfair competition also was not made in the anti-SLAPP motion to strike, but in a demurrer and is thus improperly offered on appeal. In any case, the unfair competition cause of action is not based on the defamatory statements made on the private website, and is thus outside the purview of the anti-SLAPP motion.

Even if the publications qualify for the conditional protection of the anti-SLAPP statute, Respondents have a prima facie showing of facts which would, if proved at trial, support a judgment in their favor.

III.
CALIFORNIA'S ANTI-SLAPP STATUTE, CCP §425.16

The purpose of California's anti-SLAPP Statute is to provide protection against lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances...in matters of public significance" CCP§425.16(a). The converse

of this is that, where a lawsuit is not brought primarily to chill the valid exercise of free speech, the statute should not be applied.

The statute also makes clear the respondent in an anti-SLAPP motion has no obligation to meet the evidentiary burden under CCP §425.16 unless the lawsuit is within the statute's scope. It is the moving party (Appellant) who has the burden to demonstrate that the statute applies Wilcox v. Superior Court (1994) 27 Cal.App.4th 809, 819.

IV.
DEFENDANT HEROLD'S PUBLICATIONS ON HIS PRIVATE WEBSITE DO NOT QUALIFY FOR THE CONDITIONAL PROTECTION OF CCP §425.16

A. Appellant Herold's Private Website is not a "Public Forum"

Respondent's must establish as a threshold fact that appellant Herold's private website is a public forum CCP §425.16(3). If respondents cannot establish this fact, their motion to strike ends here.

Cases construing the term "public forum" have noted that the term is traditionally defined as a place that is open to the public where information is freely exchanged ComputerXpress,Inc. V. Jackson (2001) 93 Cal.App.4th 993, 1006. The ComputerXpress court, in its 2001 decision, analyzed when an internet web site could be considered a public forum, relying also upon Damon v. OceanHills Journalism Club (2000) 85 Cal.App.4th 468.

In ComputerXpress, defendants had posted defamatory messages on two websites on the internet, known as "Raging Bull" and "Ogravity 99" ComputerXpress, p. 1006. According to the facts before the court, the Ogravity99web site is accessible free of charge to any member of the public,

and provides a forum where members of the public may read the views and information posted, and post on the site their own opinions ComputerXpress, p. 1007. The Raging Bull web site provided chat rooms which were open and free to anyone who wants to read the messages. Membership was free and entitled the members to post messages Global Telemedia Intern., Inc. v. Doe 1 (2001) 132 F.Supp.2d 1261,1264.

Based on these facts, the court concluded,

> both the Raging Bull and Ogravity99 sites satisfy the criteria for a public forum set forth in Damon v. Ocean Hills Journalism Club (2000) 85 Cal.App.4th 468: 'a place that is open to the public where information is freely exchanged'. Ibid, p. 1007.

Defendant Herold's defamatory remarks do not qualify for protection under CCP §425.16(e), section (3) because, unlike the websites "Raging Bull", and "Ogravity 99" cited in Computer Xpress,Inc. v. Jackson (2001) 93 Cal. App.4th at 1007, Defendant Herold's website does not allow members of the public to post to the site their own opinions (AA33). Defendant Herold's private website is "not open to the public where information is freely exchanged" ComputerXpress op. cit., p. 1007. It is entirely a private website.

It would be a remarkable and unwarranted extension of the definition of "public forum" to hold that every one of the tens of millions of private websites were public forums. The single distinguishing feature of a website is that it can be reached by dialing the owner's electronic address. A policy holding that this single feature qualified all private websites as "public forums", in addition to being an unwarranted extension of the term, would

have inevitable illogical consequences when applied to other similar ways in which defamatory communications can be published.

For example, all that is needed to call any private person over their private phone line is their telephone number, in principle exactly the same as dialing a private person's internet address. Thus, under the overbroad definition of public forum which Appellants propose, a private person's voice mail phone message, containing defamatory remarks, would become a public forum, protected by CCP §425.16.

Indeed, it becomes difficult to think of any type of defamatory communication which would not, at least arguably, be subsumed by such a definition of public forum. Appellant has identified no case holding private websites such as defendants are public forums, and has provided no acceptable rationale for such a sweeping ruling in the present case.

B. Defendant Herold's Defamatory Statements Do Not Qualify Under CCP §425.16(e)(1)

Defendant Herold's defamatory remarks clearly do not qualify for protection under CCP §425.16(e), section (1) because they are not, "written or oral statements made before... a judicial proceeding". They are statements in Defendant Herold's private website. An individual's private website is no different than writing a letter and sending it to other people.

C. Defendant Herold's Defamatory Statements Do Not Qualify for Protection Under CCP §425.16 (e)(2)

Defendant Herold's defamatory remarks do not qualify for protection under CCP §425.16(e)(2), because they are not "any written or oral statement or writing made in connection with an issue under consideration by a

...judicial body". Again, they are statements in defendant Herold's private website.

D. Defendant Herold's Defamatory Remarks Do Not Qualify for Protection Under CCP §425.16(e)(4)

Defendant Herold's defamatory remarks do not qualify under CCP §425.16 (e)(4), as the issue of whether Diana Fineran did or did not defame defendants is not a public issue or an issue of public interest.

V.
RESPONDENT'S DEFAMATION CLAIM SHOULD NOT BE STRICKEN IRREGARDLESS OF THE RULING ON THE ANTI-SLAPP MOTION AS THE DEFAMATION CLAIM INCLUDES ALLEGATIONS OF DEFAMATION OUTSIDE THE WEBSITE

Respondent's defamation claims against all Appellants are not based exclusively on allegations of publication of defamatory statements in Appellant Herold's private web site. Unlike any of the cases cited by Appellant, Respondent herein has made allegations of defamation which are not included in any anti-SLAPP motion.

This has been true from the beginning of the case. In the original complaint, respondent alleged that appellants made other false statements (that is, other than the website) orally and via e-mail to various cat breeders, other members and former members of the Traditional Cat Association (AA 6).

Respondent in its First Amended Complaint alleges that each of the defendants have repeated the contents of the website to third persons (AA 349). These allegations, not yet tested by discovery or trial, claim publication of defamatory statements outside the context of the website. Clearly, these

allegations of plain vanilla defamation are not and cannot be subject to the anti-SLAPP statute.

Respondent further alleges that each of the defendants has sent the website as an attachment via e-mail to third persons (AA 349). Thus, even if the website were a public forum, the decision of individuals to republish the defamatory allegations by mailing them to third parties could not be protected by the anti-SLAPP statute.

Incidentally, this allegation further highlights the policy conundrum which would be created by treating all private websites as public forums. Any party could publish defamatory statements on their private website. They and their co-conspirators could then email or otherwise re-publish the information from their own private website, and then look to CCP §425.16 to protect them. Protecting this type of conspiracy could not have been the intent of the legislature in drafting the statute, as its purpose was to provide protection against lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances...in matters of public significance" CCP§425.16(a).

Because Respondent alleges defamation by all defendants in a context outside publication on defendant Herold's website, these allegations are outside the scope of the anti-SLAPP motion to strike**.**

Therefore, the defamation cause of action must survive the anti-SLAPP motion to strike, irregardless of the decision about the website itself.

VI.
PLAINTIFFS' CAUSE OF ACTION FOR DEFAMATION IS NOT BARRED BY THE STATUTE OF LIMITATIONS

A. Appellant Did Not Raise The Issue of Statute of Limitations in its Anti-SLAPP Motion

Appeals can only be taken from appealable orders and judgments Supple v. City of Los Angeles(1988) 201 Cal.App.3d 1004, 1009. The general rule, with only limited exceptions, is only final judgments are appealable CCP §904.1. The "one final judgment rule" generally provides no right to appeal until the entire case is concluded. Cenosite v. Horio (1986) 186 Cal.App.3d 959, 967.

In the present case, Appellants purport to be appealing from "The Minute Order On Submitted Matter Re: Oral Argument on Motion to Strike and Demurrer (emphasis added), filed November 8, 2002,in Department 72 of the above-entitled court" (AA-355). Appellant then accurately cites CCP §904.1 to the effect they may appeal "an order granting or denying a special motion to strike". However, the demurrer to the complaint is most emphatically not appealable. The ruling on a Special Motion to Strike under CCP §425.16 is appealable. CCP §904.1a(13). There is no appeal from a ruling on a demurrer, unless the ruling results in a final judgment. CCP § 904.1a(1).

Here, Appellants are appealing a ruling on their separate demurrer to the complaint.

Appellants' Special Motion to Strike [CCP 425.16] (the Anti-Slapp Motion) did not raise the issue of statute of limitations (AA11-30). Therefore, it is improper for Appellants to raise this issue for the first time in its appeal of the ruling denying the Special Motion to Strike.

Appellants did file a separate Demurrer to Complaint (AA 236-AA245). However, a court's ruling on a demurrer to the complaint is not appealable until there is a final judgment.

B. Even if Appellants Had Raised the Issue of Statute of Limitations in the Special Motion to Strike, Respondents Claim of Defamation Is Not Barred By the Statute of Limitations

Plaintiffs allege that, "Since sometime in 1998, Defendants have published a web site...the purpose of the web site is to damage the reputation of plaintiff..." (AA5). The web site was begun in 1998, but continues to the present, as admitted by defendant, John Herold. At Defendant Herold's Declaration, attached to appellants' Motion to Strike, Appellant Herold admits:

> I first posted my website on the Internet in about 1998. It has been continually accessible to anyone with access to the Internet from that point until present. (emphasis added) (AA33).

Because the alleged defamatory remarks continue to the present, the statute of limitations does not preclude Respondents from bringing an action for defamation.

Moreover, Respondent's 1st amended complaint alleges that all defendants have repeated the defamatory contents of the website to third persons, and have e-mailed the defamatory contents to third persons, "within the year before the filing of the complaint" (AA 349).

These allegations, outside the purview of the anti-SLAPP statute, describing the publication of defamatory statements within the year preceding the filing of the complaint, and repetition of the comments orally and in writing after first publication of the website, preclude striking the defamation

claim on the basis of the statute of limitations.

VII.
PLAINTIFFS' CAUSE OF ACTION FOR UNFAIR COMPETITION SHOULD NOT BE STRICKEN

A. Appellants Did Not Raise the Issue of Striking the Cause of Action for Unfair Competition in their Special Motion to Strike [CCP 425.16]

Appellants' Special Motion to Strike [CCP 425.16] (the Anti-Slapp Motion) did not raise the issue of the Unfair Competition Cause of Action (AA11-30). Therefore, it is improper for Appellants to raise this issue for the first time in its appeal of the ruling denying the Special Motion to Strike.

Appellants did file a separate Demurrer to Complaint (AA 236-AA245). However, a court's ruling on a demurrer to the complaint is not appealable.

B. The Cause of Action for Unfair Competition Is Not Based On The Publications On the Website, Which is the Basis for the Anti-Slapp Motion, and Therefore Stands On Its Own

The Cause of Action for Unfair Competition alleges, among other things, that Appellants created their own association and used the identical name in promoting their association as Respondent's Traditional Cat Association (AA3). It further alleges that Appellants used and continue to use the logo, motto, constitution, bylaws, registry, show rules, breed names, breed standards, domain name, home page, list server and related documents that are used by plaintiff, the rightful owner of the name and rights (AA3). It further alleges that Appellants further conspired to use Plaintiffs' trade name THE TRADITIONAL CAT ASSOCIATION, its constitution and bylaws, and makes numerous other claims of unfair competition (AA3-AA5).

These allegations of unfair competition are not remotely related to the

website publication which is the subject of the Special Motion to Strike [CCP §425.16]. They therefore stand on their own, and should not be stricken no matter what the ruling on the anti-SLAPP motion. They simply are not subject to a Motion to Strike under CCP §425.16, even if Appellants had raised this issue in their Motion to Strike in the court below.

VIII.
PLAINTIFFS HAVE STATED AND CAN SUBSTANTIATE A LEGALLY SUFFICIENT CLAIM OF DEFAMATION

The plaintiffs need only demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited Navallier v. Sletten (2002) 29 Cal.4th, 82, 88; see also, Briggs v. Eden Council (1999) 19 Cal.4th 1106, 1123. Plaintiffs need to show a probability that they will prevail on only one of the alleged defamatory statements in order to defeat this motion. A plaintiff meets the burden of demonstrating the merits of its causes of action by showing the defendant's purported constitutional defenses are not applicable in the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses. Wilcox v. Superior Court (1994) 27 Cal.App.4th 809.

A. The Private Website Has Published False Statements

As of March 9, 2001, the website contained the following statement: "jury Finds DF Defamed Officers, Deadlocks on Award, Defamation to be Retried". According to the judgment, however, the jury was deadlocked on the defamation claim. Hence plaintiffs have made a prima facie showing that this statement was false. There is no constitutional protection for false speech. h

the present case the complaint alleges the following statements, and others, are false:

1. "Jury finds DF defamed officers, deadlocks on award; defamation to be retried". This statement is false in that the jury did not find that Diana Fineran defamed the officers, who are the defendants. (AA110-AA112; AA-252).

2. "Diana Fineran did not found the Traditional Cat Association". This statement is false, in that the jury made no such finding, and defendants have admitted that she did found the organization. (AA110-112; AA252; AA265).

3. "Diana Fineran did not write the Breed Standards." This is false in that Diana Fineran did write the Breed Standards (AA268-AA276), and in fact copyrighted them (AA278-AA279).

4. "Diana Fineran sues TCA Secretary; judge denies all claims." This statement is false since the court granted Ms. Fineran an injunction to stop Briggs from using "Inc." in her newsletter and to publish a statement that her association is not TCA, Inc. of Washington (AA94).

B. The False Statements, Published in the Context of Appellant's 'Diane Fineran Web Site' Are Libel Per Se, and Damages Are Presumed Without Proof of Actual Damages

When words are defamatory per se, the law presumes the existence of general damages when a private individual is suing another private individual Contento v. Mitchell 28 Cal.App. 3d 356, 358. Statements which are defamatory per se are statements that are defamatory of the plaintiff without

the necessity of explanatory matter such as inducement, innuendo, or any other extrinsic fact Civ.Code §45(a); Barns-Hind, Inc. v. Superior Court 181 Cal.App.3d 377, 381, 385. The question is whether the statements exposes the person to "hatred, contempt, ridicule or obliquy" Civ. Code §45.

Language may be libelous on its face even though it may be susceptible of an innocent interpretation. The test is whether a defamatory meaning appears from the language itself without the necessity of explanation or the pleading of extrinsic facts Macleod v. Tribune Pub.Co. 52 Cal 2d 536, 549. Therefore, the question becomes, was the statement reasonably susceptible of a defamatory meaning, taking into account all the circumstances of its publication? Selleck v. Globe Intern, Inc 212 Cal Rptr 838.

The statements described above, all false, are published in the context of defendants website labeled by defendants, interestingly, as the "Diane Fineran Website". Even the most casual review of this website shows its specific intent is to bring "hatred, contempt, ridicule or obliquy" on respondent. That is its purpose.

It does not require any interpretation, or extrinsic facts to see that the website, from beginning to end, is meant to, and does, ridicule Respondent. The website is filled only with unfavorable, unflattering, or insulting statements about Diane Fineran. Its intent and effect is to ridicule her. It achieves its purpose. The website does not distinguish between true, half-true, and false statements, but represents all of its statements, including the false defamatory statements of which Respondent complains, as true.

Each of these statements are designed to defame Ms. Fineran,

individually and in her profession and affect her ability to continue to manage the business of the Traditional Cat Association. The subject her to ridicule and contempt. They are thus libel per se. The statements are meant to be, and are, demeaning to her personally and in her professional reputation.

Because Respondent has made and substantiated a legally sufficient claim of defamation, her claim should not be struck even if it appropriately subject to the condition of CCP 425.16.

IX.
CONCLUSION

Defendant Herold's decision to publish false and defamatory comments about plaintiff on his private website is not protected by CCP §425.16, as the website and its publications does not meet the statutory requirements to qualify for conditional protection under the anti-SLAPP statute.

Appellant has improperly appealed the Court's decision on Appellants demurrer to complaint, as regards the Court's decisions about the statute of limitations as it applies to defamation, and to Respondent's cause of action for Unfair Competition. These arguments by Appellant were not part of the special motion to strike (CCP 425.16), and should not be considered on appeal.

Only a portion of Respondent's cause of action for defamation could even potentially be affected by the anti-SLAPP statute. The complaint contains allegations of defamation other than publication in the website, which is the subject of the motion. Therefore, the cause of action for defamation could not be struck on the basis of this motion.

Plaintiffs' cause of action for defamation is not barred by the statute of

limitations because the defamatory publications continue to the present day, and because the complaint alleges defamatory statements by all defendants outside the website within one year of filing of the complaint.

Even if the publications qualify for the conditional protection of the anti-SLAPP statute, plaintiffs have a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiffs' favor.

Respectfully submitted,

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