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Jabs and SLAPPs

THE VIABILITY OF DEFAMATION ACTIONS IN CALIFORNIA TODAY

Defamation is having a moment. Maybe it always has, but it seems to be dominating the news with much more frequency. In recent memory, Johnny Depp, Alex Jones, Rudy Guiliani, George Stephanopoulos, Donald Trump, and their fame have served to put a spotlight on the law of defamation and perhaps remind the public that their words can have consequences.

As attorneys, we see that our clients may encounter defamation in the workplace or business and in their personal lives. Individuals with a public platform in government or who champion controversial causes, where tempers run hot, may be more likely to encounter attacks on their character. This is also true for public figures whose celebrity makes them an easy target.

Whole treatises have been written on the topic of defamation. This article will serve as a basic primer to springboard into the legal research based on the facts of your case. This article will also provide an overview of the "special motion to strike" under Civil Code section 425.16, colloquially referred to as an "anti-SLAPP" motion, which is often filed in response to defamation lawsuits. Failing to successfully oppose this motion may expose your client to the fees and costs of the moving party. This article is intended to provide the plaintiff practitioner with some helpful tips and authority focusing on the favorable standard of review in order to wrest leverage away from the filer of a special motion to strike and regain control of the litigation.

Defamation, generally

"Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage." (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486.) "Publication need not be to the 'public' at large; communication to a single individual is sufficient." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) Statements that carry a defamatory *implication* may be actionable. (*Issa v. Applegate* (2019) 31 Cal.App.5th 689, 707.) "A 'totality of the circumstances' test [is used] to determine whether a statement is fact or opinion, and whether a statement declares or implies a provably false factual assertion; that is, courts look to the words of the statement itself and the context in which the statement was made." (*Id.* at 703.)

Defamation is categorized into either libel or slander. (Civ. Code, § 44.) In their most basic forms, libel is in writing or other "fixed representation," while slander is as an oral utterance. (See Civ. Code, §§ 45, 46.) It has been observed that modern technology with electronic communications and publications makes the distinction between libel and slander increasingly obsolete. (*Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 551, fn. 9.) Consider that the controlling jury instructions do not make a distinction between libel and slander, but instead focus on defamatory "statements." (CACI 1700-1706 ["[t]he word 'statement' in these instructions refers to any form of communication or representation, including spoken or written words or pictures or [other] audible or visual representations"].)

Defamation per se vs. per quod

A statement is defamatory "*per se*" or on "on its face" when the statement pertains to certain subject matter concerning the plaintiff. (See Civ. Code, § 44 [charging plaintiff with a crime, an infectious disease, injuring them in their profession or business, or imputes to them want of chastity].) In such situations of obviously defamatory statements, plaintiff is under no obligation to prove damages, which are assumed. (*Jarman v. Rea* (1902) 137 Cal. 339, 345; *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 384-385.)

A statement is defamatory "*per quod*" when it does not fall within the categories of Civil Code, section 46, and generally some additional extrinsic evidence is needed to provide context to the statement in order to convey its defamatory meaning. (*Bartholomew v. YouTube, LLC* (2017) 17 Cal.App.5th 1217, 1231.) Plaintiff must also plead and prove special damages. (*The Nethercutt Collection v. Regalia* (2009) 172 Cal.App.4th 361, 367.)

Defamation damages

For statements that are defamatory *per se*, the jury must award damages for harm to reputation or shame, mortification, or hurt feelings, even in the absence of any substantive evidence supporting their existence.

In addition to assumed or nominal damages for statements that are defamatory *per se*, a plaintiff may also plead and prove actual damages, which may include:

Harm to property, business, trade, profession, or occupation;
Expenses had to pay as a result of the defamatory statements;
Harm to reputation; or
Shame, mortification, or hurt feelings.

Punitive damages are available to the plaintiff that can prove malice, which, depending on the subject and content of the statement, requires some combination of increased fault ("*New York Times* malice," discussed *infra*) and/or malice, oppression, or fraud as those concepts have been defined under California law.

Burden of proof

Even if explicitly defamatory, plaintiff is obligated to prove some level of fault on the part of the speaker. Plaintiff's burden here can shift depending on (1) the subject matter uttered by the alleged defamer and whether the matter was of public concern; or (2) the identity of the defamed party and whether they are a public official or public figure.

If the topic is a matter of private concern, concerning a private figure,

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plaintiff need only prove negligence. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016.) Negligence is a simple showing of the failure to use reasonable care to determine truth or falsity. (CACI 1704.)

If the topic concerns a matter of public concern, the plaintiff carries a heavier burden if they wish to recover assumed/nominal damages, which do not require evidence of harm. In such instances, the plaintiff must prove "*New York Times* malice" which is "clear and convincing evidence that the defendant realized that [their] statement was false or that [they] subjectively entertained serious doubts as to the truth of [their] statement." (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 275 [based on the holding in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254].)

A statement is a matter of public concern "[i]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy." (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845.) However, "the mere act of publishing material in the mass media creates public interest in its contents . . . ." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 752.)

But public *interest* is not the test. "It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'" Whether the speech involved is of public concern is determined by analyzing its "'content, form, and context … as revealed by the whole record.'" (*Varian Medical Systems, Inc. v. Delfino* (2003) 113 Cal.App.4th 273, 299.)

If the plaintiff is a public official or public figure, they must also prove *New York Times* malice to establish liability. The rationale for a higher burden of proof is that public officials and figures have greater access to the media whereby they can rebut falsehoods. Arguably, this higher burden should not apply if the plaintiff is a public official and the statement does not concern their official duties. "[T]he Constitution [does not] protect[] defamatory statements directed against the private conduct of a public official . . . ." (*New York Times, supra,* 376 U.S. 254, 301 (J. Goldberg, concurring).)

Evidence of defamation

Defamatory words are "operative facts" and their publication can be proved by what would otherwise be hearsay evidence. (*Russell v. Geis* (1967) 251 Cal.App.2d. 560, 571.)

> There is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay but as original evidence.

(*Id.* (*citing* Witkin, Cal. Evid. [2d. ed. 1966] § 463, p. 425).)

Damages for loss of reputation, shame, mortification, and hurt feelings (i.e., general damages) can be established through plaintiff's own testimony (See *Time Inc. v. Firestone* (1976) 424 U.S. 448; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991) and the testimony of friends, fellow workers, relatives, and those providing medical treatment for mental suffering, as along as the evidence is limited to the reputation and emotional harm that the plaintiff suffered directly and personally from the defamation. (Cal. Tort Damages (Cont. Ed. Bar 2d ed. 2021) Defamation, § 8.13.)

What is not defamation

Many people believe that defamation is not actionable if it concerns matters of opinion, but that is only partially true.

"Though mere opinions are generally not actionable, *a statement of opinion that implies a false assertion of fact is* . . . . Thus, the inquiry is not merely whether the statements are fact or opinion, but whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact."(*Issa, supra,* 31 Cal.App.5th 689, 705-706 (original emphasis, citations omitted).)

By statute, there are also several categories of topics that are presumed to encompass privileged statements that are not actionable. (See Civ. Code, § 47.) These privileges apply in certain contexts, like legislative and judicial proceedings, and section 47 should be carefully reviewed to determine whether it applies to the facts of your case.

Enter SLAPP

SLAPP is an acronym that stands for "Strategic Lawsuit Against Public Participation." The anti-SLAPP statute and its motion to strike are intended to address "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16.) Section 425.15 is designed to eliminate "meritless or retaliatory litigation at an early stage of the proceedings." (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 806-807.)

As discussed below, the anti-SLAPP statute essentially shifts the burden to the plaintiff to prove that their claims have merit at the outset of the case. These motions are often filed in response to defamation actions because such claims often encompass the right of protected free speech. Section 425.16 has a one-sided fee-shifting provision that entitles the prevailing *defendant* to recover their attorneys' fees and costs; a plaintiff can only recover fees and costs on a showing that the "special motion to strike is frivolous or is solely intended to cause unnecessary delay."

Basics of the anti-SLAPP statute

The anti-SLAPP analysis is a little bit like a motion for summary judgment in that it involves both a legal and evidentiary component. The statutory language establishes a two-part test. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 5367.) If this threshold showing is made, then opposing parties must demonstrate a probability of

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prevailing on the merits of the complaint. (*Equilon Ent.*, *supra*, 29 Cal.4th at p. 67; *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548; Code of Civ. Proc., § 425.16, subd. (b)(1).)

Anti-SLAPP prong one: Protected activity

Under the first prong, protected activity is defined by subpart (e) to section 425.16, which concerns legislative, judicial, and other government-related functions. However, more typically evaluated in the case law, are statements concerning "public issues" or "issues of public interest." The California cases establish that generally, "[a] public issue is implicated if the subject of the statement or activity underlying the claim (1) was a person or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread, public interest." (*Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 814; see *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.*, *supra*, 172 Cal.App.4th at p. 1573; *Century 21 Chamberlain & Associates v. Haberman* (2009) 173 Cal.App.4th 1, 9.)

Ideally, you can cut short the defendant's special motion to strike at the outset by demonstrating that their statements do not encompass matters of public interest. The moving defendant may attempt to characterize what are otherwise matters of private concern by connecting their statements to a larger public interest. But a defendant's reliance on an abstract public interest is not sufficient for anti-SLAPP purposes. (*World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1570 ["In evaluating the first prong of the anti-SLAPP statute, we must focus on 'the specific nature of the speech rather than the generalities that might be abstracted from it.'"]; *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 625 ["At a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance"].) Use these authorities to prevent a defendant from spinning a "parochial" matter into something greater than it is. (See *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34.)

This article assumes that the defendant has satisfied prong one, successfully shifting the burden to the plaintiff to demonstrate a likelihood of success on the merits.

Anti-SLAPP prong two: Standard of review

As to the second prong, to establish a probability of success on their defamation claims, the plaintiff must demonstrate the complaint is legally sufficient and supported by an adequate prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809.) To preserve the plaintiff's constitutional right to a jury trial, the court's determination of the motion cannot involve a weighing of the evidence. (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788.) The court accepts the plaintiff's evidence as true and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. (*Id.* at 795.)

"[C]laims with the requisite minimal merit may proceed." (*Olson v. Doe* (2022) 12 Cal.5th 669, 679.) "[T]he court may not weigh the evidence or determine questions of credibility but must accept all evidence favorable to the plaintiff as true and indulge every legitimate favorable inference that may be drawn from it." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 828 [standard for assessing evidence is analogous to standard applicable to motions for nonsuit or directed verdict] (*citing Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838-839).) "[T]he court does not *weigh* the credibility or comparative probative strength of competing evidence . . . ." (*Taus*, *supra*, 40 Cal.4th 683, 714.) We can synthesize the above to persuade the court with the following standard:

> *Plaintiff's constitutional rights to a jury trial will prevail over defendant's motion upon a showing of minimal merit. In evaluating the existence of merit, plaintiff's evidence shall be accepted as true, is entitled to every legitimate favorable inference, and shall not be weighed against any conflicting evidence.*

The next section provides the case law needed to persuade the court that the plaintiff's evidence exceeds the low threshold needed to establish "minimal merit."

Anti-SLAPP prong two: Existence of defamation

"Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage." (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486.) A "statement" "refers to any form of communication or representation, including spoken or written words or pictures or [other] audible or visual representations." (CACI 1706.) "[T]he court must first determine as a question of law whether the statement is *reasonably susceptible* of a defamatory interpretation; if the statement satisfies this requirement, *it is for the jury to determine* whether a defamatory meaning was in fact conveyed to the listener or reader." (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 428 (emphasis added).) It is sufficient if the interpretation "*implies* a provably false assertion of actual fact." (*Id.* (emphasis added); see *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1370.) It is sufficient if a trier of fact "might" conclude defendants' statements defamatory. (*Bently*, 218 Cal.App.4th at 435.)

Determining whether language is libelous requires examination of expressions used as well as the whole scope and apparent object of writer. (*MacLeod v. Tribune Publ'g Co.* (1959) 52 Cal.2d 536, 546.) Whether language is defamatory requires examination of the effect of language on the mind of an average reader of ordinary intelligence.

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(*Id.* At 547; *Williams v. Daily Review, Inc.* (1965) 236 Cal.App.2d 405, 414-415.) Libel is what a "recipient correctly, or mistakenly but reasonably, understands . . . ." (*Washburn v. Wright* (1968) 261 Cal.App.2d 789, 799.) "[F]alse inferences or implications raised by the arrangement and phrasing of apparently non-libelous statements can be as injurious as explicit epithets . . . ." (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 33.) Defendant is liable for insinuations as well as for explicit statements. (*Ibid.*)

The above can be synthesized into the following:

> *Plaintiff's claim for defamation has minimal merit upon a showing that the totality of the defendant's statements, taken together, might reasonably be interpreted by an ordinary person, even if only mistakenly, to imply or infer a falsity, which causes the plaintiff injury.*

Your opposition should be supported by evidence with proper foundation, which can come from witness or party declarations. If written, authenticate the defamatory statements and remember that they are, while hearsay, still admissible as "operative facts." (*Russell v. Geis* (1967) 251 Cal.App.2d. 560, 571.) Include evidence of any media coverage that was garnered, including online articles or social media posts. The comments section of these forums often exceeds the primary subject matter in terms of overall content. This is fertile grounds for possible evidence of defamatory interpretations by average readers. As long as such interpretations are reasonable, looking at the totality of the defendant's statements, including their apparent object, the plaintiff will have satisfied the "minimal merit" standard to overcome an anti-SLAPP special motion to strike.

Retake control of your case

After recovering from the shock of receiving an anti-SLAPP motion, review the above authorities and which should provide reassurance that you can successfully overcome the defendant's attempts to dismiss your client's defamation claims.

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