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February 25, 2005

A Rabbi sues the University of California for defamation over ugly comments about him in an oral history at the Bancroft Library. He loses - statute of limitations ran out. Who should pay the university's attorneys' fees?

A California Appellate court's answer: The Rabbi.

Rabbi Pinchas Lipner and the Hebrew Academy of San Francisco sued the University of California for "recording, printing and maintaining, as part of its Regional Oral History Office [at the Bancroft Library], an interview with co-defendant Richard Goldman in which the latter made a number of allegedly false and defamatory statements about both appellants."

The University successfully claimed that the lawsuit was filed well past the one year statute of limitations for a California libel claim (Cal. Civ. Proc. Sec. 340(c)) . Further, since the Rabbi had not shown a probability of success on the merits, the University was awarded over $76,000 by the trial court to cover about 3/4 of its reported attorneys' fees and costs. Under California law, an anti-SLAPP motion can be made when a lawsuit is filed against you that chills your constitutional right to free speech - curtailing written or oral expression on an issue of public interest in a place open to the public.

Rabbi Lipner appealed the attorneys' fees award. To reverse the trial court award, the state appellate court would have needed to find the trial court abused its discretion (this level of review gives a thumb on the scale to the University, the winner in the trial court). The appellate court evaluated the time the University needed to respond to the lawsuit. It looked at, among other things, the gathering of "considerable historical information" including 350 pages of documentation by the assistant director of the Bancroft Library. The appellate court ruled for the University on February 18th. I don't know if Rabbi Lipner will appeal the decision further.

Hebrew Academy of San Francisco v. Regents of the University of California, Court of Appeal of California, First Appellate District, Division Two, 2005 Cal. App. Unpub. LEXIS 1417 (February 18, 2005, Filed)

To read more about the defamation claims and to read this case:

From the Jewish Bulletin of Northern California, (Nov. 22, 2002):

> Forty pages into the roughly 100-page interview, Glaser asked Goldman, the federation's president from 1981-82, about Hebrew Academy. His page-and-a-half of discourse on the matter includes the following statements:
>
> *"I think [Rabbi] Lipner is a person who doesn't deserve respect for the way he conducts his affairs...I don't think he is an honorable man."

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*"Anyone who would take children away from a school and use them to protest by sitting in at the Federation offices is someone who doesn't appeal to me."

*"I remember a couple of occasions visiting the Hebrew Academy. When he would walk into the room, the children would stand at attention as if it were the Fuhrer walking in."

*"I think he is self-serving and an embarrassment. He was run out of other communities before he got here. We are too tolerant of him."

*"I'm not sure, but I think he had been in Cleveland before he came here. Somebody checked the record and found that community did not tolerate him."

Very few copies of the Goldman interview exist; the S.F.-based JCF owns one, as does the Bancroft Library. Goldman has several, and Glaser and former JCF Executive Director Rabbi Brian Lurie each own one.

HEBREW ACADEMY OF SAN FRANCISCO, et al., Plaintiffs and Appellants, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent. A106905 COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO 2005 Cal. App. Unpub. LEXIS 1417 February 18, 2005, Filed NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977. PRIOR HISTORY: San Francisco County Super. Ct. No. 414796.

DISPOSITION: The order appealed from is affirmed. JUDGES: Haerle, J.; Kline, P. J., Lambden, J. concurred.

OPINIONBY: Haerle

OPINION: I. INTRODUCTION

Appellants Hebrew Academy of San Francisco and Rabbi Pinchas Lipner (appellants) appeal from an order of the San Francisco Superior Court awarding respondent Regents of the University of California (Regents or the Regents) slightly over $ 76,000 in attorney fees under Code of Civil Procedure section 425.16, subdivision (c), (section 425.16(c)) for successfully prosecuting a SLAPP motion in a defamation action brought by appellants against the Regents and other defendants. We affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

In their second amended complaint filed March 13, 2003, appellants alleged that the Regents, along with several earlier-named defendants, had defamed them by recording, printing and maintaining, as part of its Regional Oral History Office, an interview with co-defendant Richard Goldman in which the latter made a number of allegedly false and defamatory statements about both appellants. The Regents originally demurred to the second amended complaint based largely on the statute of limitations, but the court overruled that demurrer, after which the Regents filed their answer. Less than two weeks later, the Regents filed a motion to strike the second amended complaint under section 425.16. A hearing was held on that motion on July 29, 2003, after which the court took the matter under submission. On September 9, 2003, it filed an order granting the Regents' motion; the order stated that the Regents had met their burden of establishing that appellants' defamation claim involved "a statement made 'in connection with a public issue' pursuant to" section 425.16 and, further, that appellants had not met their burden of establishing a probability of success on the merits because the applicable statute of limitations (Code Civ. Proc., § 340, subd. (c)) had run. Accordingly, appellants' second amended complaint was ordered stricken as to the Regents. On or about February 3, 2004, the Regents filed a motion for attorney fees pursuant to section 425.16(c); the motion asked for fees totaling $ 98,706.50 and costs of $ 9,739.79. Appellants opposed this motion and the Regents replied to this opposition. A hearing on the attorney fee motion was held on March 16, 2004 and, on April 7, 2004, the court filed its order awarding the Regents fees in the amount of $ 76,300 and costs in the amount of $ 375, plus post-judgment interest. Appellants filed a timely notice of appeal.

III. DISCUSSION The operative statute, section 425.16(c), provides, insofar as pertinent here: "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (§ 425.16(c).) Recently, our Supreme Court elaborated on the application of this subdivision as follows: "Under Code of Civil Procedure section 425.16, subdivision (c), any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees. The fee-shifting provision was apparently intended to discourage such strategic lawsuits against public

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participation by imposing the litigation costs on the party seeking to 'chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' (Id., subd. (a).) The fee-shifting provision also encourages private representation in SLAPP cases . . . ." (Ketchum v. Moses (2001) 24 Cal.4th 1122, 1131 (Ketchum).) The parties agree, as indeed they must, that our standard of review of trial court orders awarding attorney fees under section 425.16(c) (and, indeed, in almost all other contexts) is abuse of discretion. Quoting an earlier decision of another appellate court, one of our sister courts summarized this point thusly: """The matter of reasonableness of attorney's fees is within the sound discretion of the trial judge. [Citations.] Determining the weight and credibility of the evidence, especially credibility of witnesses, is the special province of the trier of fact. [Citation.]" [Citation.] "In determining what constitutes a reasonable compensation for an attorney who has rendered services in connection with a legal proceeding, the court may and should consider 'the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded . . . the intricacies and importance of the litigation, the labor and necessity for skilled legal training and ability in trying the cause, and the time consumed.' [Citations.]" [Citations.]'" (Church of Scientology v. Wollersheim (1996) 42 Cal.App.4th 628, 659, disapproved on other grounds in Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 68, fn. 5; see also, to the same effect, PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1094-1095; Ketchum, supra, 24 Cal.4th at p. 1140; Dowling v. Zimmerman (2001) 85 Cal.App.4th 1400, 1426; Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist. (2003) 106 Cal.App.4th 1219, 1248.). Appellants contend the trial court abused its discretion here principally because: (1) there was no "substantial evidence" regarding how the 300 plus hours of attorney and paralegal time claimed by the Regents' counsel was spent, i.e., that their claim was "unsubstantiated" and lacked "itemized billings"; (2) in any event, the time claimed was "huge" and "outrageous" under all the circumstances, particularly the circumstance that Regents' counsel relied on statute-of-limitations research substantially already undertaken by counsel for their co-defendants. Subsidiary to their first contention, the lack of itemized billing, appellants object to the Regents' position that attorney and paralegal time sheets regarding the work of their attorneys and paralegals are privileged and also complain that the information provided by the Regents, i.e., "the total amount of time spent by each person on each motion . . . and the total amount billed by each person each month . . . was insufficient for proper opposition . . . ." In sum, appellants complain that the time spent by Regents' counsel--for which they were ultimately assessed over $ 76,000--was "so much time with so little to show for it." We readily acknowledge that the sum assessed is somewhat large, particularly bearing in mind the status and nature of appellants. n1 But, and bearing in mind both our standard of review and various other factors to be noted hereafter, we cannot agree that the trial court abused its discretion in making the attorney fee and cost award it did. Our conclusion in that regard is based upon several separate and distinct considerations.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - n1 However, as the Regents note in their briefs to us, and also observed in oral argument to the superior court, it is not at all unusual for attorney fee claims and awards in SLAPP cases to involve substantial sums, even sums in excess of those claimed and awarded here. (See, e.g., Bernardo v. Planned Parenthood Federation of America (2004) 115 Cal.App.4th 322, 360 [$ 77,835]; Church of Scientology v. Wollersheim, supra, 42 Cal.App.4th at p. 658 [$ 130,507].) - - - - - - - - - - End Footnotes- - - - - - - - -

- - - - - First of all, Regents' counsel's time was not devoted to just one motion, but actually four. The first was the demurrer they filed to the second amended complaint. That demurrer was based on the contention that the applicable statute of limitations, Code of Civil Procedure section 340, subdivision (c), had run and thus appellants' action was barred. Although unsuccessful on this round of pleadings, that issue became crucial later, at the SLAPP motion stage, and hence the Regents were entitled to rely on the legal research involved in it.

n2 - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - n2 The facts that the Regents' co-defendants had also raised and relied upon the statute of limitations issue at the demurrer stage, and that all defense counsel relied largely on the same cases, do not minimize the relevance of the legal research undertaken on this issue. In the first place, no case has ever held that one defendant's counsel is required to defer to the legal research of another defendant's counsel in circumstances of this sort. Secondly, appellants admit that the Regents' counsel came up with additional authorities on the statute of limitations issue to those cited by co-defense counsel at the demurrer stage. - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The second pleading phase involved the SLAPP motion itself. Of necessity, the research concerning, and preparation of, this motion involved, as the statute mandates, attention to two separate and distinct issues, first of all whether the complaint as to which the motion is directed involves "any act . . . in furtherance of the person's right of petition or free speech under the United States of California Constitution in connection with a public issue" and,

second, whether there is a "probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) The latter issue involved, as just noted, the same statute of limitations issue raised at the demurrer stage. But the preliminary issue required demonstrating to the trial court that the statement being attacked as defamatory implicated both the exercise of free speech and a "public issue." As this court pointed out twice very recently, at least the latter issue is often not free from doubt. (See DuCharme v. International Brotherhood of Electrical Workers (2003) 110 Cal.App.4th 107, 115-119, Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO (2003) 105 Cal.App.4th 913, 919-929, and cases cited in both.) More importantly, the issue often involves the gathering together of considerable historical information concerning the nature of the statement or statements which are the subject of the litigation. Such, indeed, was apparently the case here, as the Regents' SLAPP motion was supported by a declaration from an assistant director of the Bancroft Library which, in turn, attached more than 350 pages of documentation. The third pleading stage involved a motion filed by appellants themselves, in which they sought discovery in order, allegedly, to defend against the SLAPP motion. The Regents successfully opposed this motion, a process which involved both further legal research and drafting and then argument in the superior court. The fourth and final pleading stage involved the motion for attorney fees itself, as the law is clear that a successful SLAPP movant is entitled to recover "fees on fees" under the statute. (Ketchum, supra, 24 Cal.4th at p. 1141.) As a result, all of the time spent by the Regents' counsel in putting together the motion the result of which was the order being appealed from was and is includable, also. Next, the Regents' attorney fee motion included the declarations of three counsel, plus a breakdown of the hours spent by the various attorneys and staff involved in this four-motion effort. The breakdown was both by month and by individual attorney and staff member. Appellants argue that this is insufficient, because it did not include the timesheets or "itemized accountings" for these attorneys and paralegals, nor breakout precisely what issues they were researching or otherwise working on at any specific time. We reject this argument, because the law is clear that neither attorney/paralegal timesheets or "itemized billings" rendered to clients (assuming for purposes of discussion that law firms such as the one representing the Regents supply "itemized billings" to their clients) are required to support a motion such as the one involved here. (See, e.g., Martino v. Denevi (1986) 182 Cal. App. 3d 553, 558-559, 227 Cal. Rptr. 354; Steiny & Co. v. California Electric Supply Co. (2000) 79 Cal.App.4th 285, 293; Padilla v. McClellan (2001) 93 Cal.App.4th 1100, 1106-1107.) Contrary to appellants' suggestions, nothing in our Supreme Court's recent opinion in Ketchum hints to the contrary. n3 (See Ketchum, supra, 24 Cal.4th at pp. 1140-1142.)

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - n3 We thus need not reach the issue of whether the billing sheets and time records of the Regents' counsel are "privileged," as briefly claimed by the Regents in their brief to us and strenuously argued against by appellants. - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

Also regarding the time and effort invested by the Regents' counsel, it is instructive that nowhere in their argument to either the superior court or to us do appellants argue that the billing rates claimed for any of those counsel was above and beyond that normally charged in the San Francisco Bay Area by partners, associates and staff of major law firms for litigation of this sort. Finally, it should be especially noted that the superior court did not grant the Regents all they asked for. Their initial motion asked for a total of $ 98,706.50 in attorney and staff fees and $ 9,739.79 in "associated costs." In their reply brief, the former figure had grown to $ 99,051.50, while the latter had shrunk to $ 8,035.94. At the hearing on the motion on March 16, 2004, he Regents' lead counsel made clear that he was not asking for any more than the "lodestar," i.e., the number of hours reasonably spent multiplied by the reasonable hourly rate, notwithstanding the holding in Ketchum that fee enhancements are permitted in SLAPP cases (See Ketchum, supra, 24 Cal.4th at pp. 1135-1136.)

After hearing from both counsel, the court stated that it would grant the motion but would take the matter under submission to further consider the amounts of fees and costs to be awarded. The court directed the Regents to prepare a proposed order including their final amounts requested for fees and costs. Approximately three weeks later, the court entered its order granting fees and costs to the Regents. But in so doing, it reduced the amount requested by almost 25% (from $ 99,051.50 to $ 76,300.00 for fees, and from $ 1,090.20 to $ 375.00 for costs). Under all of these circumstances, the superior court did not abuse its discretion in making the award it did.

IV. DISPOSITION The order appealed from is affirmed. Haerle, J.

We concur: Kline, P. J. Lambden, J.

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Comments

One can only hope that CrazyTerry **Polevoy's** therapist, lawyers, and social workers are explaining this to him while counselling him to keep his piehole shut. CrazyTerry seems to think that just because someone reacted to one of his many vitriolic and hateful attacks by calling CrazyTerry a hate mongering arshole, he has grounds for a libel and defamation action? What CrazyTerry doesn't realize is that evidence over a year old simply serves to defend the view that CrazyTerry is, in fact, a complete arsehole.

Posted by: Dr. Who? | March 3, 2005 07:31 AM

The divergence to CrazyTerry **Polevoy** seems to be everywhere on the internet these days. IThe common theme concerning this man and this dispute, appears to be a number of reactions to his baseless and inaccurate accounts of things he doesn't like or perhaps more accurately doesn't understand. You really can't sue for that? Can you?

Anyway, I really don't understand how a loonie like CrazyTerry would:

1. Have the money to engage such an action.
2. The brains to pull out when it's obvious he doesn't stand a chance in hell of winning.

Posted by: Andrew Higgins | March 3, 2005 01:30 PM

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