

LGC Anti-SLAPP Motion Spurs Dismissal Of Libel Case

LGC attorney [Jordan Nager](#) recently obtained a dismissal of a libel case after filing a motion to strike under California Civil Code section 425.16, commonly referred to as an “anti-SLAPP motion.” Faced with the prospect of having his case dismissed and paying the defense’s attorneys’ fees, Plaintiff elected to dismiss all of his claims, with prejudice.

The case stemmed from a review on Plaintiff’s business’s page on the website Yelp.com. LGC’s client, dissatisfied with the services she received from Plaintiff’s accounting practice, posted a one-star review on Plaintiff’s Yelp page calling Plaintiff a “joke” and a “scammer” and imploring others to “just stay away.” Plaintiff, in turn, filed a defamation lawsuit, alleging these statements were false, posted with malice, and caused Plaintiff unspecified damages. Plaintiff also requested punitive damages and attorneys’ fees. In response, LGC filed an anti-SLAPP motion to dismiss Plaintiff’s claims in their entirety.

With a defamatory statement (and lawsuit) potentially only a few keystrokes away, internet postings have become a breeding ground for California defamation jurisprudence. While the traditional elements of defamation apply to internet posts, courts have recognized that the ease of use and anonymity of the internet often “promotes a looser, more relaxed communication style.”

In evaluating an anti-SLAPP motion, a court will look at whether the actions are in furtherance of a defendant’s “right of petition or free speech.” In the defamation context, this means a court will evaluate (1) whether the statement was made in a public forum and (2) concerns a public interest. If these two criteria are met by the defendant, the burden then shifts to the plaintiff to establish there is a probability that he will prevail on the claim.

In LGC’s client’s case, the posting was made on the internet, which has been

universally held to be a public forum. (*Wong v. Jing*, (2010) 189 Cal.App.4th 1354, 1365). Further, LGC argued the fact that the posting was on the review website Yelp.com and implored potential customers to “just stay away” transformed the posting from a private dispute to one that implicates matters of public concern. (*Chaker v. Mateo*, (2012) 209 Cal.App.4th 1138, 1144).

With both elements the initial anti-SLAPP analysis likely satisfied, Plaintiff would have had to demonstrate a probability that he would prevail on his claims, namely that LGC’s client’s statements were false and not statements of opinion. The crux of the anti-SLAPP motion was simply that, in light of the website where the statements were posted and the posting’s tone and tenor, LGC’s client’s statements were solely her opinion.

(Continued on Page 4)

INSIDE THIS ISSUE:

Expedited Jury Trials: A New Alternative In California

2

LGC Welcomes Katie Brach As Partner

2

Online Trademark Fees Decreased For 2015

3

LGC Welcomes Two New Associates To Its San Diego Office

4

New Decision Limits Equitable Claims

4

Decision Expands Duty Of Property Owners

In the recent case of *Lawrence v. Beach and Tennis Club, Inc.*, the California Court of Appeal held that a hotel owner owed a duty of care to take preventative measures to prevent Plaintiffs’ small child from falling out of a hotel room window.

In *Lawrence*, Plaintiffs checked into a hotel in La Jolla with their three sons. They requested a room on the first floor of the hotel when they made their reservation, but when Plaintiffs checked in, there were no rooms available on the ground floor until the next day, so they accepted a room on the second floor instead. The next morning, they opened a window to

hear the ocean. The three children were playing near the sofa when one of the children fell out of the window, suffering serious head and brain injuries. The evidence obtained during discovery indicated that the child leaned or fell against the window screen, which popped out and caused the child the fall.

Plaintiffs filed a suit against the owner of the hotel, asserting various negligence claims on the theory that the hotel owner should have installed a safety device that would have prevented the fall.

(Continued on Page 3)

Expedited Jury Trials: A New Alternative In California

There is a little-known and infrequently used procedure that allows for expedited jury trials in California state courts. California Code of Civil Procedure Section 630.01, *et. seq.* provides that, upon agreement by the parties, a trial may be limited to one day in which each party is afforded three hours in which to present its case, including opening and closing statements and direct and cross-examination of witnesses.

Expedited trials are held before an eight-member jury, unless the parties agree to a smaller number, and a verdict requires a vote of six jurors. Parties are encouraged, and in some instances required, to stipulate to as many factual and evidentiary matters as possible and agree to procedures designed to facilitate the presentation of the case to the jury.

To invoke this expedited procedure, each party must sign a proposed consent order to be submitted to the Court for approval. The proposed consent order must include a

statement acknowledging the rules and procedures for the expedited trial and an agreement to waive the right to certain motions and appeals. The proposed consent order may also further reduce the size of the jury, relax the rules of evidence, and institute a high/low agreement for an award of damages, if the parties so agree.

Once the parties submit a proposed consent order to the Court, it shall be approved in its entirety, unless the Court finds good cause why the expedited jury trial process should not be used. Upon approval, the process is binding unless all parties agree not to participate or the Court finds good cause not to proceed.

Additionally, parties agree to waive any motion for a directed verdict, to set aside a verdict or judgment, or for a new trial based on inadequate or excessive damages. Finally, the only grounds on which a party may appeal are judicial or juror misconduct and corruption, fraud, or

undue conduct that prevented the appealing party from having a fair trial.

For relatively simple cases, the expedited jury trial process can present a number of advantages. Most obviously, the reduced time helps to reduce costs to all parties involved. The reduced time also increases the likelihood of obtaining an early trial date. Additionally, the rules provide the parties with substantial flexibility in all phases, from selection of the jury to presentation of the case to high-low agreements, all of which allow the parties to shape the process to best meet their needs. Lastly, because few post-trial motions are permitted and the subject of appeals is limited, expedited trials provide the parties with finality.

In light of these advantages, parties should strongly consider an expedited jury trial if appropriate based on the complexity of the case. For more information, please contact Chris Foster in LGC's San Diego office.

LGC Welcomes Katie Brach As Partner

On December 12, 2014, LGC proudly welcomed [Katie Brach](#) as its newest partner.

A San Diego native, Katie obtained her B.A., *magna cum laude*, in criminal justice from George Washington University. She then returned to San Diego to attend law school at University of San Diego School of Law. While in law school, Katie competed nationally on the USD Mock Trial Team.

Katie has spent her entire

legal career with LGC, originally starting as a summer clerk after her second year of law school. She joined LGC as an associate after graduating from USD in 2008.

Katie's practice focuses mostly on defense of developers and general contractors in complex civil litigation, including construction defect, personal injury, premises liability, bad faith, and contract disputes. In addition, she advises contractor and developer clients on preventive

construction practices, including the drafting of contracts, the purchasing of insurance, contract negotiations, and coverage issues.

In her spare time, Katie enjoys running, wine tasting, and watching minor league baseball.

LGC now has 10 partners and 17 associates throughout its offices in California, Arizona, and Nevada.

Congratulations to Katie.



Katie Brach

Decision Expands Duty Of Property Owners

(cont. from page 1)

Defendant filed a motion for summary judgment, arguing that it breached no duty to Plaintiffs because the window complied with all applicable building codes, the screen through which the child fell was not a safety device, Plaintiffs were never guaranteed a ground floor room, and the parents' own carelessness and failure to use precautions caused the child's fall. The trial court granted Defendant's motion, ruling that Defendant did not have a duty to prevent the fall and that the absence of a safety device was not the cause of the fall.

On appeal, the California Court of Appeal reversed. The Court found the hotel owner had a duty to protect children from falling out of windows when the condition or design of the window increased the risk of a small child falling out. The Court noted a hotel owner generally owes a duty of care to its hotel guests to exercise reasonable care to maintain the property in a safe condition. Thus, the issue present in this case was not the existence of a duty, but the scope of the duty under the particular facts of the case.

In determining the scope of the duty, the two primary considerations are the foreseeability of the harm and the burden on the defendant of protecting

against the harm. A greater degree of care is generally owed to children because of their lack of capacity to appreciate risks and danger. After weighing numerous facts in connection with these factors, the Court ultimately concluded that the hotel owner had a duty to take measures to prevent a child from falling from the window.

Specifically, the Court found that it was reasonably foreseeable that a hotel guest would open the window of a room fronting the ocean and that a small child would climb onto the window sill, which was 25 inches above the ground. Furthermore, it was reasonably foreseeable that a small child would fail to understand that the window screen would buckle if the child leaned against it.

The Court held that the window's foreseeable risk of harm to small children outweighed the burden on the hotel owner of taking safety precautions. Other windows in the hotel had protective bars, and Plaintiff's expert engineer testified that protective devices, such as fall-prevention screens and window-opening control devices, were low-cost and readily available. Installing such devices would have imposed a minimal burden and cost on the hotel owner when contrasted with the risk an

unprotected window posed to a small child.

The Court also noted that although both landlords and hotel owners have a duty to maintain their property in a reasonably safe condition, hotel owners have greater control over the rooms on their property because most hotel guests are only temporary. Thus, a hotel owner's duty to maintain reasonably safe rooms is comparable to a landlord's duty to maintain safe common areas of the building.

Additionally, the Court held that the owner's compliance with applicable safety regulations or codes was relevant to show "due care" but was not dispositive on these issues when the circumstances required a duty of care higher than just the safety standards.

This case is significant because it illustrates how broad a property owner's duty may be in certain cases. Here, despite compliance with all applicable codes and an alleged lack of supervision by the child's parents, the Court found a duty existed to prevent the accident.

Please contact [Chris Schmitthenner](#) in LGC's San Diego office with any questions about the case.

Online Trademark Fees Decreased For 2015

The U.S. Patent & Trademark Office surprisingly announced that it is decreasing trademark fees for online application and renewal filings. The reason for the decrease is to attempt to encourage the electronic filing of applications instead of traditional paper filings.

For 2015, there will be a \$50 decrease for all applications submitted through Trademark

Electronic Application System and a \$100 reduction for renewals. This reduction is great news for small businesses interested in seeking trademark protections.

For more information about trademark applications or renewals, please contact [Teresa Beck](#) or [Darcie Colihan](#) in LGC's San Diego office.

Click [here](#) for more information about LGC's intellectual property practice on LGC's website.

LGC Welcomes Two New Associates To Its San Diego Office

LGC is proud to announce two new associates joining its San Diego office: Christopher Foster and Christine Polito.

Chris Foster was born and raised in San Diego before attending Skidmore College, where he earned his B.S., *cum laude*, in Business and Spanish Literature. Chris then returned to San Diego and earned both an M.B.A. and a J.D., *cum laude*, from the University of San Diego.

While in law school, Chris was the Vice Chair of the Appellate Moot Court Board and was on the Editorial Board of the *San Diego International Law Journal*.

Chris originally joined LGC as a summer clerk after his second year of law school and became an associate after being admitted to the Bar last December.

Christine Polito, meanwhile, earned her B.A., *summa cum laude*, from UCSD and

her J.D. from Southwestern Law School.

While in law school, Christine co-authored an opening and reply brief before the Ninth Circuit Court of Appeals, earning a favorable reversal and remand for her clients. She also chaired Southwestern's Moot Court Honors Program.

Welcome to Chris and Christine.

New Decision Limits Equitable Claims

In the recent case of *State Ready Mix, Inc. v. Moffatt & Nichol*, the California Court of Appeal declined to extend liability under a concrete supplier's equitable indemnity claim to a civil engineer hired by the general contractor. The case arose from a general contractor's breach of contract action against a concrete supplier to recoup the cost of replacing defective concrete used to construct a harbor pier. The concrete supplier filed a cross-complaint against the civil engineer hired by the general contractor, asserting claims for equitable indemnity and contribution.

The Court declined to extend liability to the civil engineer under an equitable indemnity theory because the general contractor's claim against the concrete supplier was purely contractual and did not involve claims of personal injury or property damage. With only contractual damages for economic loss at issue, the Court held the concrete supplier's equitable indemnity claim against the engineer was barred under the long-standing economic loss rule.

More importantly, even if property damage claims were at issue, the Court found that the civil engineer did not owe a legal duty to the concrete supplier on public policy grounds. Under limited circumstances, design professionals may owe a duty of care to a third party with whom there is no contractual privity based on a "special relationship" to the third party. This duty is based on multiple common-law factors, including the extent to which contractual duty to others was intended to affect the third party and the foreseeability of harm to the third party.

Here, the civil engineer's review of the concrete supplier's concrete mix design was gratuitous and for the sole benefit of the project manager. Furthermore, the Court found that the concrete supplier's misapplication of the design was the primary cause of damage. Accordingly, the Court ruled that the civil engineer's actions did not support a finding that a duty of care was owed to the concrete supplier on public policy grounds.

For more information about the case, contact [Paul James](#).

LGC Anti-SLAPP Motion

(cont. from page 1)

To that end, courts have held that the "general tenor, setting, and format" of internet postings often suggest they are nothing more than opinion, especially when "full of hyperbole, invective, short-hand phrases, and language not generally found in fact-based documents." (*Computer Xpress, Inc. v. Lee Jackson* (2001) 93 Cal.App.4th 993, 1011-12).

In light of this argument, and the prospective for having to pay LGC's attorneys' fees if the motion was granted, Plaintiff elected to dismiss his complaint with prejudice.

If you have any questions or would like more information on defamation cases and anti-SLAPP motions, please contact [Jordan Nager](#) in LGC's San Diego office.

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