S122953

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

STEPHEN J. BARRETT, M.D., et al.,

Plaintiffs and Appellants

vs.

ILENA ROSENTHAL, et al.,

Defendants and Respondents

OPENING REPLY BRIEF OF RESPONDENT /APPELLANT

After a Decision by the Court of Appeal
First Appellate District, Division Two
[No. A096451]

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I.

PRELIMINARY STATEMENT

Respondent/Appellants would be hard pressed to try and write a reply brief when the Appeals Court in this case and the Appeals Court in Grace v. Ebay (2004) 4 C.D.O.S. 6539 already went to great lengths to provide this Court with the required basis and analysis that more than justifies the statutory interpretation of 47 USC §230 of the Communication Decency Act ("§230") as to who §230 immunity applies to, who §230 immunity does not apply to, and how §230 immunity can be lost. Moreover, the Appeals Court goes to great lengths to explain why federal cases reaching a different result are not necessarily binding (Appellate decision, p. 18). Indeed, the Appellate Court went to great length to explain why Zeran v. America Online Inc. (4th Cir. 1997) 129 F.3 327 Cert. Den. (1998) S24 U.S. 937 ("Zeran") and the analysis provided by the Zeran Court is flawed and should not be followed. (Appellate decision, p. 17.) Indeed, many of the cases Petitioner cites, rely on the holding in Zeran. However, as noted by this in Golden Gateway Center v. Golden Gateway Tenants (2001) 26 Cal. 4th 1013, "we must view with caution seeming categorical directives not essential to earlier decisions and be guided by directives only to the extent it remains analytically persuasive".

Here, none of the cases Petitioner relies on are analytically persuasive on the §230 questions at issue in this case since none of the cases Petitioner relies on made any serious effort to analyze §230 under the principles of law applicable to the interpretation of case and statutory law as was done in this case and in Grace v. Ebay. Indeed, the Zeran opinion granting §230 immunity to publishers and distributors consists of less than 8 pages.

In short, in light of the Appellate Court's extensive analysis of why §230 does not provide immunity to Petitioner and distributors who know that libelous statements are posted on their website and do nothing to remove it, Respondents respectfully request that the Court's analysis of §230 be incorporated as set forth herein so that this court need not waste its time re-reading Respondents' repetition of the Court's responsive arguments that negate many if not all of Petitioner's interpretation of §230. Instead, Respondent brief will provide additional grounds why this Court should affirm the Appellate Court's interpretation of §230 immunity. For example, constitutionary

consideration for statutory interpretation, ignored in Petitioner's brief adds further support for affirming the Appellate Court.

Additionally, Respondent brief will address the so-called facts that Petitioner misstates in her brief and the facts no court ever seriously analyzed in regard to Petitioner's libelous republishing which support Respondent Polevoy and Respondent Barrett's position that the statement at issue, i.e., Petitioner's reposting of Bolen's Publication contain actionable statements involving both Respondents Polevoy and Barrett, not just Dr. Polevoy, as the Appeals Court ruled.

Indeed, because of the trial court's ruling that Petitioner's republication of the Bolen Publication was protected under §230, the trial court viewed as irrelevant any of the statements made against Respondent Barrett by Petitioner in this document. Similarly, because of the trial court's rulings, the Appellate Court also gave little, if any, consideration to the other republished statements by Petitioner that relate to Respondent Barrett and why Petitioner's statements were actionable as to Respondent Barrett. (See Appelate decision, p. 10) (See also Appendix 7, pp. 525-527) (See Appendix 2, Trial Court's ruling, pp. 002-116)

In short, in addition to the Appellate Court's findings and analysis, there are seeral additional grounds for affirming the Appellate Court's decision regarding §230 immunity. Moreover, there is ample justification, based on the republications at issue, to reverse the two lower courts' determination that Rosenthal made no libelous and actionable statements against Respondent Dr. Barret.

II.

INTRODUCTION AND STATEMENT OF CASE

Plaintiffs/Appellants and now Respondents Dr. Steven Barrett and Dr. Terry Polevoy (hereafter "Respondents") filed a verified complaint for libel, libel per se and conspiracy against Defendants Ilena Rosenthal and others on November 3, 2000. (Appendix 1. pp. 002-116)

The complaint against Ilena Rosenthal was based on her admitted Internet reposting of Tim Bolen statements, which Petitioner republished on numerous occasion including republication after

Petitioner was told that the statements were false. (Appendix 3, Rosenthal's Answer, pp. 145, Appendix 10, pp. 879-880, 1139 and Appendix 1, pp. 077.)

Because of the publicity involved in this case, the background leading up to the complaint is important to reemphasize. First, this case is not anywhere close to the paradigm case that CCP §425.16 was originally designed to protect. In fact, this is a case that has taken CCP §425.16 to the extreme. As noted by the Trial Court 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) Note: Congress reigned in the scope of SLAPP coverage with the enactment of CCP 425.17. See Brenton v. Metabolife (2004) 116 Cal. App. 4th 679, taking commercial speech out of the reach of CCP §425.16.

Respondents 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. Respondent Barrett's efforts have culminated in the editing or co-authoring of 48 books, 10 textbook chapters, and hundreds of 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, Respondents' writings have criticized products, services, and theories that are marketed with claims that are false, unsubstantiated, and/or illegal. Respondents' work has aroused great concern and hostility among the promoters and profiteers of such practices and products, many of whom believe that destroying Respondents' reputations will increase their success and profits in the marketplace. (Appendix 5, Barrett declarations, pp. 437-475)[1]

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 wherein Petitioner reposted and republished 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

[1] Rosenthal did not object to any of Respondent's declaration or documentary evidence in support of their opposition to Rosenthal's motion.

register and agree to be bound by the restrictions and limitations imposed by the service provider. (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", which the Court in Golden Gateway supra at 1030 held was the rule for determining what a public place or forum is. The Appellate Court however, rejected this claim, holding that the Internet is a public forum. Consequently, another question that should be addressed is whether Golden Gateway's definition of a public place or forum carries over to CCP §425.16's reference to a public forum or place? If it does, did Rosenthal's speech occur in a place that meets the definition of a public place or forum, a condition required for CCP§525.16 to apply?

In addition, Respondent's lawsuit suit is also not about alternative medicine or any other public issue involving Petitioner. It is no more than Respondents' response to Rosenthal's false and libelous portrayal of Respondents as criminals, liars, dishonest, and professionally incompetent. Indeed, the public issue argued by Petitioner was cleverly created by Petitioner, her lawyers and by Tim Bolen out of thin air without any significance to any legitimate issues on this subject.

In short, Petitioner statements had nothing to do with any opinions regarding alternative health or medicine, the so-called public interest was cleverly created by Petitioners for one reason: to trigger the applicability of CCP §425.16 in order for Petitioner to collect fees and costs. Indeed, the Bolen article, which Rosenthal republished, when looked at closely, is nothing more than commercial speech created by Tim Bolen to help his client McPhee get her job back. (Note: subsequent to the Trial Court's ruling in this case, the same court held that all Plaintiffs had proven by clear and convincing evidence that Bolen's statements were libelous per se and made with malice.)

In short, a close review of the facts shows that this suit does not arise out of any real public debate or issue of public concern that Rosenthal was either involved in or knew anything about. To the contrary, Rosenthal's statements are nothing more than her clever attempt to injure Respondents by weaving defamatory statements, which personally attack and libel Respondents, by cleverly wrapping the libel around a non-existent public issue created out of nothing more than smoke and mirrors. Query, 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 by creating a non-existent public issue? If this was the legislative intent, Congress has provided a vehicle for any clever libeler to qualify their libelous statements for protection under §425.16(e)(4), the same way an author can get around the "obscenity laws" by claiming, ipse dixit, that his book has "socially redeeming values." As will be discussed, Petitioner's cleverly crafted declaration lacks any evidence to suggest that Petitioner knew or had any interest in alternative medicine, Christe McPhee's Canadian radio show or her opinions, if any, on alternative medicine. Indeed, there is no evidence that Petitioner ever even heard McPhee's show or knows what, if any, ideas or opinions McPhee has on alternative medicine.

In any event, from May 22, 1999 to May 21, 2001, Ilena Rosenthal posted 212 messages that mentioned Respondents, nearly all of which were intended to injure Appellant's reputation, i.e., Petitioner's statements had nothing to do with her interest in or desire to debate any views on alternative medicine that Respondents ever spoke about. As an aside, many of Petitioner's messages were subsequently repeated in part or in full by others who received Rosenthal's reposted message and responded. (Appendix 5, Barrett declaration, p. 438) To this day, Ilena Rosenthal continues to post and republish defamatory and offensive messages on the Internet about Respondents. (Appendix 5, Barrett Decl., p. 444. See Appendix 1 pp. 78-80.) Indeed, Petitioner has now included Grell in her statements by calling him a malicious prosecutor, guilty of malicious prosecution and other statements that are libelous and/or actionable based on false light theory of liability.

Rosenthal's hatred and ill will towards Respondents has also continued to grow. As a result, Ilena Rosenthal has become a significant part of Defendant Bolen and Hulda Clark's mission to attack Respondents through libelous statements made for the benefit of people who hired Tim Bolen. Bolen's tactic is to personally attack anyone who speaks out against any of his clients, like Christie McPhee or Hulda Clark. In fact, in his discovery deposition, Bolen admits that he had no evidence of any wrongdoing or criminal acts by any Respondents. Hulda Clark, who filed a separate RICCO complaint against Respondents and many others, including federal experts, who were involved in a federal investigation of Hulda Clark, made numerous false statements in the complaint about Respondent's so-called criminal acts. During Clark's deposition she also admitted that she had no evidence to support any of the statements made in her complaint. This RICCO complaint was

dismissed prior to hearings on several SLAPP motions brought by Respondents and others named as Defendants in this lawsuit. Typical of how Respondents' opponents operate, the RICCO complaint, with all of its false statements about Respondents criminal activity, has been posted on different websites with streaming banners that "Barrett sued for Racketeering," forgetting to mention that the suit was dismissed.

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 just about all other diseases including AIDS and the common cold. Hulda Clark is an unlicensed naturopath who operated and may still be operating a clinic in Mexico, which at one point had been shut down by the Mexican authorities. 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 short period of time by administering a low-voltage electric current, herbs, and other nonstandard alternative medicines. (Appendix 5, Barrett declaration, pp. 438-439 and Appendix 1, Complaint pp. 002)[2]

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, who do business as JuriMed, an unregistered entity, claims that its purpose is to assist so-called "alternative" health practitioners faced with regulatory action, criminal prosecution, or other matters that these people were charged with and 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.) Discovery has also shown that Bolen has been paid over fifty thousand dollars as Hulda Clark was leader.

In November 1999, the Bolens began their campaign by distributing false and defamatory statements to the effect that Dr. Barrett and Dr. Polevoy are liars, arrogant, emotionally disturbed,

[2] 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.)

"de-licensed," professionally incompetent, intellectually dishonest, dishonest, unethical, quacks, thugs, bullys, a Nazi, a hired gun for vested interests, the leaders of a subversive organization, who have engaged in an assortment of criminal activity, including conspiracy, extortion, filing a false police report, and many other unspecified criminal acts. (Appendix 1, Complaint, pp. 002-116).

The Bolens targeted Dr. Polevoy and Dr. Barrett because Respondents posted information to Respondents' websites 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, a Bolen client. Others, who either sympathized with Clark or McPhee, or who felt critically toward Respondents or had a financial stake in quieting Respondents, have republished Bolen's messages widely. Ilena Rosenthal is one such person.

Respondents first became aware of Ms. Rosenthal activities in mid-August 2000 after she posted and republished a fictitious Bolen article to the Déjà Vu newsgroup. The article, titled "Sleazy Quackbuster' Scam Shuts Down Canada's Number One 'Alternative Medicine Show" (Appendix 1, Complaint, p. 077), included many libelous factual statements having nothing to do with alternative medicine or health care, 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. . .
(h) Polevoy . . . is pure fraud. . .
(i) In Polevoy's attack on McPhee, first he tried to shut her own with scare tactics; stalking, and intimidation techniques.
(j) 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.

As noted previously, neither the trial court nor the Appellate Court, with one exception, ever evaluated these other statements to determine if any of them are actionable. The one exception is the statement about Polevoy's stalking.

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

In fact, almost every statement in the Rosenthal republished statement is false. For example, Respondents did not lie or provide false information nor is Dr. Barrett "de-licensed" any more than a retired attorney would be considered disbarred.

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 and libelous goes on and on. In fact, contrary to Petitioner's claim, the falsity and libelous nature of these statements are outlined in the pleadings, the declaration and in Respondents' opposition to Petitioner's Motion to Strike. (See Appendix 1.) Again, Petitioner filed no evidentiary objections to Respondents' declarations or document which supported Respondent's opposition and burden of proof on the issue of Respondents' libel and malice.

As previously noted, it appears that this evidence was not considered by the trial court or by the Appeals Court because the republished statements referenced to in Respondents' declarations were ruled absolutely protected by §230 and irrelevant by the trial court and never considered by the Appellate Court. (Appellate decision, p. 10)

In addition to republishing Bolen's letter, Ilena Rosenthal also 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 to both Polevoy and Barrett, the same call to action and the same libelous form letters noted above. Again, it appears that this evidence was also ignored by the trial court and the Appellate Court.

Shortly after Ilena Rosenthal posted her first defamatory message, Dr. Barrett, on behalf of himself and Dr. Polevoy, sent Rosenthal an e-mail requesting that she remove these libelous repostings of Bolen's statement. 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, subsequently posted Dr. Barrett's private letter along with the full text of the libelous article Dr. Barrett asked that Rosenthal to remove. Dr Barrett sent another private e-mail formally demanding that Rosenthal remove the messages and pay damages. Rosenthal responded to this private e-mail, by posting Dr. Barrett's message along with another libelous publication stating 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.)

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

As noted, Ms. Rosenthal's affidavit, which was submitted with her special motion to strike, was the result of Petitioner's attorneys spending over 40 hours creating it. (See Appendix 16 pp. 1444-56.) The declaration however, is a work of fiction. For example, Rosenthal declares that her messages were intended to "debate" appellant's views on alternative medicine, etc. (Appendix 4, p. 173.) However, a review of the statements at issue shows that no such attempt at debate was made. In fact, there is no evidence that Rosenthal even knew McPhee or what, if any, views she had on alternative medicine nor is there any evidence that Petitioner knew anything about Respondents' views on alternative medicine. Moreover, there is no evidence that Rosenthal knows anything about alternative medicine. In fact, Rosenthal has never attempted to discuss or rebut the content of any of Respondent's writings or opinions on alternative medicine or any other subject. (Appendix 5, Barrett declaration pp. 437-475.) Moreover, the first six pages of Rosenthal's declaration are devoted to the breast implant issue, an issue not involved in this case. (Appendix 5, pp.174-180.) Indeed, in Rosenthal's declaration she slips and reveals her true intent behind her republications with her statement that "this lawsuit was brought to silence my critical opinions of Plaintiffs Barrett and Polevoy", not to restrict her right to express her opinions on alternative medicine, the public issue

that formed the basis of Petitioner's SLAPP motion, the Trial Court's ruling, as well as the Appellate Court's ruling regarding CCP §425.16's applicability. (See Appendix 4 p. 187, lines 15-17.)

In short, Rosenthal's declaration was a clever and successful attempt to create a fictional "public issue" that would and did protect her under CCP §425.16. If this Court reviews the Bolen article, which Petitioner republished, this Court will see how spurious this claim is.

Another 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, Respondents have never engaged in any debate with Ms. Rosenthal on this or any other topic. To the contrary, any exchange between Rosenthal and Barrett and Polevoy was entirely one-sided, i.e., Rosenthal unilaterally posted one libel after another even after being notified that 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. A review of Petitioner's website: www.humanticsfoundation.com also confirms that Petitioner has not expressed any views about alternative medicine or health care. A review of Rosenthal's publications on her website also fails to reveal a single article on alternative medicine or health care. In short, the statement at issue had nothing to do with alternative medicine other than using the term alternative medicine to create the illusion that this was the issue, instead of both Bolen and Petitioner's attack on Respondents to help McPhee get her job back by her hire consultant.

Another example took place on May 15, 2001 when Rosenthal posted a defamatory letter from Julian Whitaker, M.D., with full knowledge that Dr. Barrett had sued Dr. Whitaker for libel and successfully defended against Whitaker's SLAPP motion. The republished 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 successfully sued, so that Rosenthal could post them also. (Appendix 5, Barrett declaration, pp. 430-475.)

In sum, Rosenthal has and continues to maliciously defame Respondents for the sole purpose of destroying their good names and reputations. (Appendix 5, pp. 437-475) In fact, in one posting, Rosenthal 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 responded to someone's message about being an anti-Semite with the statement 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. 437-475.) Such statements are also what malice is about.

In short, Rosenthal's republished statements were intended to attack Respondents personally, not Respondents' views or opinions on alternative medicine. Like Bolen and Hulda Clark, Petitioner became part of a clandestine campaign whose mission was to try and destroy Respondents' reputation by posting one defamatory message after another that had nothing to do with their views or opinions on any alternative medicine issues.

Indeed, contrary to her declaration, and contrary to the Court's findings, Rosenthal had not entered into any public discussion with Respondents on any public issue involving alternative medicine 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 under CCP §425.16 (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. Also difficult to understand is how the Court could state that a person guilty of a crime is only "potentially libelous".

After Petitioner filed her motion, Respondents filed their opposition on May 21, 2001 (Appendix 5, p. 343.) and a 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 Respondent's opposition, declarations, or documents used in Respondents' opposition.

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 Grell, despite the fact that Grell admitted he never intended to make any claim against Petitioner and immediately filed a dismissal against Rosenthal.[3] (Appendix 2, p. 117.) The Court's fee and cost awarded included Grell. The court also denied Plaintiff/Respondent's motion to conduct discovery.

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.) The awarded costs were about a third of what Petitioner claimed was due.

Appellants filed this appeal. The Court of Appeals reversed is part, the trial courts ruling and sustained other parts of the Court's ruling.

The appeal involved Defendant Ilena Rosenthal only. (Appendix 2. pp. 117-144). The issues raised on appeal involved the following Trial Court's ruling: (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 shown to have been made with malice.
4) Rosenthal made no statements about Grell.
5) Plaintiffs failed to demonstrate any actual damages.

[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. (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. The specific allegations relevant to Dr. Barrett and Dr. Polevoy involving Rosenthal are set forth in Appendix 1, pp. 20-22.

Prior to the Court's ruling, Plaintiffs opposed Defendant Rosenthal's motion to strike 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 since there was no matter of public interest, or significance involved in Rosenthal's libelous speech.
2) Section 47 USC § 230 does not grant immunity from liability to an ordinary Internet user who knowingly 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 probability 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 which was immediately corrected by dismissing any claims that might be construed as a claim by Grell against Rosenthal. Grell did not try to infringe upon Rosenthal's free speech rights. In fact, Rosenthal said nothing about Grell.

The Appellate Court, in a fifty-seven page opinion, affirmed the trial courts ruling granting Rosenthal's SLAPP motion as to Grell and Barrett but vacated the trial courts ruling as to Dr. Polevoy. The Appellate Court also vacated the award of fees and costs as well as the Court's rulings regarding actual damages and discovery for Polevoy. Since the Appellate Court's decision is incorporated as it set forth herein, as noted, Respondents do not want to waste this Court's time going through and summarizing the Court's rulings and basis for them.

After the Appeal, Respondent's Petition for review was denied. Respondents however, still respectfully submit that the trial court and Appellate Court erred in not reviewing all of Rosenthal's statements involving Dr. Barrett and that, in the interest of justice, they should be reviewed since they contain provable factual and libelous statements made by Petitioner against Barrett that support his claim of libel.

Defendant/Respondents also Petitioned for Review, which was granted. In granting review, the primary focus was 47 U.S.C. §230 of the Communication Decency Act, and the extent that the immunity provision of §230 affords protection from liability for Internet users, either as an individual, or as Internet Service Providers or as something similar.

The Appellate Court's fifty-seven paged decision held that §230 did not grant Petitioner Rosenthal immunity and that §230 did not grant absolute immunity to individuals or Internet Service Providers who act as distributors of libelous statements if they knew or were given notice of the libelous nature of the statement that was published on the Internet Service Provider's site and failed to remove it.

For the reasons discussed in the Appellate Court's opinion, as well as the Appellate Court's decision in Grace v. Ebay (supra) and in Respondent's brief, Respondents respectfully request that this Court affirm the lower court's ruling as to Respondent Polevoy and reverse the lower court's ruling as to Respondent Barrett so that both Respondents are permitted to pursue the libel claims against Petitioner.

III.

PETITIONER'S INTERPRETATION OF §230 IS WRONG

Contrary to Petitioner's claim, the Court's opinion is this case is not an anomaly. To the contrary, the Second Appellate Court in Grace v. Ebay reached a similar result concerning the extent of §230 immunity regarding Internet Service Providers.

Moreover, Petitioner completely ignores the rules applicable to statutory interpretation especially when a statute involves competing constitution rights, i.e., the constitutional right to free speech against the equally important constitution of right to seek redress to protect ones good name against libel. As noted by the U.S. Supreme Court, the right to petition to protect ones good name 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. (See Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 341.) (See Appellate decision, p. 21)

Moreover, Petitioner ignores the absurd results that would follow if an Internet Service Provider and/or a user of interactive computer services is granted the "absolute immunity" Petitioner claims §230 provides.

In addition, if Petitioner's interpretation is found applicable, it would revoke "state laws, the common law, as well as federal case law, including rulings by the United State Supreme Court on the issues involving libel and defamation and the value served by the law of defamation.

Most important is the fact that if Petitioner's interpretation is allowed, it would also destroy the equally important constitutional right to petition and protect one's good name for Internet libel, which the Supreme Court has stated is at the root of any decent system of ordered liberty "(Gertz supra, 418 U.S. at Page 341.)

Petitioner's interpretation would also leave virtually every Internet user or service provider free to repost, republish or have published on their website whatever anyone wants to repost or publish, no matter how libelous and no matter how much notice or proof of the libel is provided.

If Petitioner's interpretation is applied, instead of promoting Decency on the Internet, it would open the Internet to all sorts of clever ways to libel and seriously harm individuals or businesses without the user or service provider ever having to be concerned about liability for the harm it is causing to the individual, who is left helpless to stop it.

In short, the Appellate Court's opinion regarding §230 limited immunity should also be affirmed to prevent these things from happening and to make sure that a user and/or an Internet Service Provider knows (1) that there is no absolute immunity or protection under §230 and (2) that if the person using the Internet or an Internet Service Provider reposts, republishes or publishes libelous statements on the Internet and/or fails to remove libelous statements posted by another knowing or after being given notice of the libelous nature of the publication, that they can be held accountable. As noted by the French lawyer, and philosopher Maximilien Rosespierre (758-1794). "Any law which violates the inalienable rights of man is essentially unjust and tyrannical; it is not a law at all".

Here, Petitioner's interpretation of §230 would violate the inalienable right of a person to petition the Court for redress in order to maintain his or her good name. The Appellate Court's ruling however, protects the rights of both sides, a ruling consistent with the purpose of the statute and consistent with the rules applicable to case and statutory law.

IV.

PETITIONER'S BRIEF IS REPLETE WITH FALSE AND MISLEADING ASSERTIONS

A) General False and Misleading Statement

Respondents respectfully submits that if this Court applied the rules of statutory construction as set forth in the brief, that both §230 as well as CCP §425.16, would, given the actual facts of this case, be deemed inapplicable since no speech involving a public issue was ever involved other than by Petitioner's creative writing which, as will be discussed, is replete with false and misleading statements of fact intended to continue to illusion that Rosenthal's speech is protected so this Court, like the other Courts, will ignore the real facts of the case and believe the image of Petitioner that she created and the contrary image of Respondents which she has also tried to create.

As will be discussed, nothing in Petitioner's speech at issue in this case involved any legitimate matter of public interest or significance involving alternative medicine. The so-called public interest issue was cleverly created by Petitioner's lawyer who spent 40 hours creating the issue out of wholecloth, so that they could collect their fees and costs.

For example, Rosenthal's introduction completely misrepresents what happened in this case. First, Rosenthal did not post her opinion on "issues connected with alternative health care and Barrett and Polevoy's criticisms of it." Nor would it be the truth to say that Rosenthal was involved in discussions of, or promotion of, "alternative health care." These are bare assertions in her declaration and briefs which are contrary to the Petitioner's own website. See www.humanticsfoundation.com. Further, neither Barrett or Polevoy were ever involved in any discussions involving alternative medicine or health care with Rosenthal. Again, review of Petitioner's website shows that the issues that concern Rosenthal have nothing to do with alternative health care. Had discovery been allowed, proof that this claim was made up would have been made clear.

Other examples of Petitioner's misrepresentations are as follows.

In her introduction, Petitioner states that "rather than answering her opinions with their own, Appellants sued Rosenthal, claiming that the statements were defamatory, thereby seeking to chill

Rosenthal from continuing to voice her opinion on these important issues." What opinions? What important issues? The statement is simply false.

What really happened is that Rosenthal decided to repost and republish messages from Tim Bolen, a hired gun and a defendant in this case, which Bolen wrote to help his client McPhee get her job back. The Bolen message was nothing more than an attack piece created by Bolen to help McPhee, since she believed that Respondents were responsible for the cancellation of her radio show. The statement written by Bolen and republished by Petitioner, like Petitioner's declaration, is pure fiction and if read closely, contains no real issues or opinions involving alternative medicine.

In fact, prior to the republication of Bolen's libels, Rosenthal had never challenged or discussed a single statement made by Drs. Barrett or Polevoy on any issue, let alone any issue involving alternative medicine. Since the lawsuit, Rosenthal has posted more than 200 additional messages attacking Respondents' character, not their ideas or opinions on anything remotely connected to matters involving alternative medicine or any other issue of public interest or significance as defined under CCP §425.16. (Appendix 5, p. 437-475, Appendix 1, pp. 77-80)

Indeed, at pages 3-4 of Petitioner brief, she completely misrepresents what Respondents do. She states, "Quackwatch apparently considers to be "quacks" many respected professionals, including … Andrew Weil, M.D. and 2 time Nobel Prize winner Linus Pauling." That statement is not true. While Respondents disagree with many of their ideas, they do not consider them quacks and do not call them quacks. In fact, Linus Pauling has been dead for many years. In addition, his nobel prizes had nothing to do with alternative medicine. Any criticism involving Dr. Pauling stems from the fact that Linus Pauling's name is being used by others to sell numerous types of questionable dietary supplements and health cures.

At page 4 of Petition's brief, she falsely asserts that Dr. Barrett threatened to sue the host of a radio program if they allowed Rosenthal to speak on the air as previously scheduled. Petitioner makes this assertion, not because it true, but in order to create the picture that Dr. Barrett is someone who threatens people in order to stop expressions of opinion. The truth is that Dr. Barrett did not make any such threat. What happened is that he notified the radio show hosts that Petitioner had been libeling him and that it appeared likely from the program description that Rosenthal would do so

again. He informed the hosts that he had filed suit against her and that if they permitted her to libel him further, they might place themselves at legal risk as well. (Appendix 1, Barrett decl.)

In short, Barrett did not ask them to cancel Rosenthal's appearance. Dr. Barrett simple asked them not to permit her libel him. The decision to cancel the show was the Radio Stations.

At page 5 of Petitioner brief, she states that, "Polevoy … does not believe that those with whom he disagrees have a right to speak or be heard. For example, according to Christine McPhee and defendant Tim Bolen, Polevoy used harassment tactics to get McPhee's radio program (broadcast in Canada) taken off the air." Again, this is not true. If anything, Petitioner's presentation reflects Rosenthal's malicious action since Rosenthal reposted the Bolen article without ever even hearing McPhee's Canadian Broadcasts or contacting her. (Appellant Brief, p. 9)

At page 6, Petitioner claims that she posted statements on the Internet newsgroups dealing with alternative health and medicine issues. A Google – Groups search on September 13, 2002 found that while Petitioner has posted approximately 25,300 messages, including about 11,400 before Dr. Barrett contacted her asking her to remove the libelous republication she was posting, Petitioner's messages, particularly those posted prior to the lawsuit had nothing to do with "alternative medicine." Indeed, as previously noted, a review of Rosenthal's website: www.humanticsfoundation.com contains nothing about alternative medicine. Had discovery been allowed, Respondents would have proven that Petitioner's interest in alternative medicine was a ruse.

At page 6, Petitioner completely mischaracterizes Respondent's requests and warnings to Rosenthal. For example, Barrett did not threaten to sue Rosenthal for calling him "arrogant" or a "quack." He threatened to sue her for posting and failing to retract the false Bolen statement that she reposted. On 8/23/00, Barrett privately wrote to Rosenthal:

> About a week or two ago, I sent you a warning and requested that you remove your posting of Tim Bolen's libelous message falsely accusing Dr. Polevoy of stalking and various other things. You responded that you didn't think that posting someone else's message to a news group could make you liable for damages. I strongly suggest that you ask an attorney about this.
>
> We have in our possession a copy of the police report concluding that Dr. Polevoy did nothing wrong. Do you think that a judge or jury will

> excuse you for posting Bolen's lie that the police judged him guilty? I do not. (Appendix 1, Barrett decl. and Appendix 5, pp. 437-475 Barrett decl.)

Instead of investigating this simple factual statement by calling the police, Rosenthal's response was to publicly call Barrett a bully for threatening her and republishing the libelous statement.

At page 6-7 of Petitioner's brief, she claims that the trial judge concluded that none of the statements made in Bolen's statement that Rosenthal republished were actionable except for the stalking issue. What Petitioner fails to mention is that the basis for the Court's conclusion was §230's immunity, not any analysis of the many other statements Rosenthal republished about Polevoy and Barrett. The words and statements that neither the trial court or Appellate Court ever considered are as follows:

(a) Quackbusters provided false information.

(b) The "Quackbuster" organization, headed by de-licensed MD Stephen Barrett.

(c) Rumors say that 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 Council and the radio stations, with bombacity, lies and misrepresentations.

(g) All the Quackbusters have are those "deep pockets" behind them.

(h) Health Freedom fighters believe that the attack comes from bonded subversive groups, conspiratorially formed into attack unites, 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 "quackbutster" organization, are engaged in a civil and criminal conspiracy to eliminate "Alternative medicine" from Canadian broadcasting.

While parts of these statements might be considered hyperbole, many clearly allege "facts" that are defamatory, to both Respondents Polevoy and Barnett. For example, "de – licensed" means having one's license taken away, and "stalking" is a criminal act. Dr. Barrett is not de-licensed, and Dr. Polevoy never stalked anybody. De-licensed is the medical equivalent of "disbarred", a factual statement repeated over and over by Rosenthal. Indeed, another Court in another jurisdiction found that calling someone de-licensed was libel per se and actionable. In short, Respondent respectfully submits that the court ruling granting Petitioner's motion as to Respondent Barrett should be reversed since Respondents provided Court with admissible evidence that, in the statement Petitioner reposted, there were actionable claims of libel involving Dr. Barrett. Again, Petitioner made no objection to this purchase.

At page 8 in paragraph 2, Petitioner states "Rosenthal contended that her statements were made in response to Barrett's and Polevoy's attacks on alternative medicine…" Again, this statement is not true for the reasons previously discussed, i.e., there is no evidence that Respondents made any statements attacking alternative medicine other than in the libelous publication created by Bolen to help his client get her job back. Had discovery been allowed, Respondents could have proven that this statement was also false.

At page 14, according to Petitioner, the trial court ruled that "all of Rosenthal's statements were made on the Internet… and they addressed matters related to the validity or invalidity of alternative medicine." The judge's conclusion is incorrect and can only have been based on a cleverly crafted declaration created for Petitioner since the same Court held that Bolen's publications were libelous per se and made with malice when it denied Bolen's CCP §425.16 motion to strike.

At page 15, Petitioner tries to excuse her defamatory statements related to her reposting of the Bolen message by claiming that her reposts and republications were petition-related activity that is exempt from liability! This claim was rejected by both the trial and Appellate Court. Indeed, what Petitioner fails to mention is the fact that while privately filed complaints maybe exempt, publicly posting a defamatory statement on the Internet urging people to complain are not.

At page 15, Petitioner makes the statement that Dr. Barrett and Quackwatch were being sued by many doctors and health organizations. Even if this were true, which it is not, the statement had

nothing to do with petition – related activity. It is, however, additional proof that the Bolen statement was a lie which Petitioner repeated.

At page 21, Petitioner maintains that the trial court found that none of Rosenthal's statements "with the possible exception of her re – posting" of Tim Bolen's article were actionable. As noted, Respondent's claim of libel was not based on these other statement and were mentioned because they were relevant to Petitioner's intent and to issue of malice.

At page 31-32 Petitioner uses a definition of malice that would appear to fit Rosenthal precisely. Although the trial court ruled that any feeling of hatred etc., was irrelevant, the Appellate Court concluded that this was relevant to the issue of actual malice and that discovery would flesh this out.

At page 32 Petitioner asserts, without any supporting evidence, that "Rosenthal did not post her statements because of any malice, hatred, or ill will towards any plaintiff." Nothing could be further from the truth given the statements by Petitioner that she hates and despises Respondents and is anti-Barrett and Polevoy.

Petitioner's argument that her actions are privileged is also meritless and was rejected by both the trial court and the Appeals Court.

At page 33, last paragraph, Petitioner tries to make some point about Respondents reliance on their complaint to prove falsity. Again, Petitioner did not rely exclusively on the complaint to prove falsity. To the contrary, the various declarations and exhibits attached to and incorporated into the complaint as well as the additional declarations and exhibits attached to Respondents/Plaintiff's opposition to Rosenthal's SLAPP motion, which were all unopposed, also established the necessary proof of the falsity of the statements as well as why the statements were libelous. (See Appendix 1 and Appendix 5)

At page 34 Petitioner claims that she investigated by speaking with Christine McPhee and was satisfied that the Bolen statements about Polevoy were accurate. What Petitioner fails to mention is that on Page 9 of her own opening brief, Rosenthal admits that she called McPhee after reposting Bolen's message and knew that McPhee was hostile to Respondents. Petitioner also states that the

only thing McPhee said was that she felt like she was being stalked, not that she was stalked by Bolen.

Indeed, the Appellate Court raised concern about Rosenthal's claim of investigation since it only involved contacting McPhee, a person hostile towards Respondents. Further, the fact that Rosenthal never bothered to contact the Canadian police was also relevant.

At page 34, Petitioner points out that the trial court found that many of Rosenthal's statements were part of an on-going and cacophonous debate and use of ad hominem arguments by both sides. Again, no evidence of such debate between Petitioner and Respondents was ever presented to the Court, nor did any such evidence exist. In fact, Respondents' affidavits denied any such debate. (Appendix 1 and 5) What really happened is Rosenthal unilaterally posted over 200 messages attacking Respondents personally.

B) Misstatements About Petitioner

In addition to Petitioner's misstatement of fact about Respondents and the factual issues that are involved, at page 5 of Petitioner brief starting with "Rosenthal's background", Petitioner makes many undocumented and false assertions about herself, undoubtedly in an attempt to place her in a favorable light. For example, the evidence does not show that Rosenthal researched any relevant issue thoroughly or that Petitioner has "become a recognized expert in the field" of alternative health care or anything else.

What Petitioner really does is writes and self-publishes numerous Internet messages and articles, some dealing with breast implants. According to Petitioner's website, www.humanticsfoundation.com, there is no evidence that she has ever self-published anything about alternative medicine or even mentions the term on her website. Indeed, even the links section of Petitioner's website contains nothing that would direct anyone to an alternative health care site. Finally, there are no articles about alternative health care on Petitioner's website in the articles section.

At page 6, Petitioner states that she is listed as a consumer group resource on the FDA Web site. Not true. Moreover, even if it was once true, the actual web page does not endorse Petitioner.

To the contrary, it states: This section provides companies and organizations involved in breast implant issues (note: not alternative health care issues). This section is provided for information purposes only and does not constitute an endorsement by the FDA of the information or recommendations they may provide." See http://www.fda.gov/cdrh/breastimplants/handbook2004/ resourcegroups.html.

At page 8, Petitioner provides a description of her activities. For example, Rosenthal states that like her newsgroup, "Rosenthal herself functions as an online information clearinghouse, receiving and forwarding pertinent works, studies, and opinions of others to the alt.support.breast-implant newsgroup…" Again, a review of her website fails to show any involvement with alternative medicine. Petitioner also states that "Appellant acknowledges that Rosenthal reviews and disseminates an enormous volume of information." What Petitioner fails to disclose is how much, if anything, of what Petitioner disseminates involves pertinent works, studies and opinions involving alternative medicine or health care. Indeed, most what Rosenthal disseminates is an enormous volume of messages, much of it consisting of libelous statements, insults, name – calling, and childish remarks about people she regards as her enemies. The other material she disseminates involves breast implant issues, not information about alternative medicine or health care.

In short, the alternative medicine public interest claim was the by-product of Petitioner's creative writing necessary to file a SLAPP motion, nothing more.

At Page 8, near the bottom, Rosenthal make a statement about how she received Bolen's defamatory message. Petitioner conveniently omit to mention that Bolen's so-called "opinion piece" contained numerous factual statements including the statement that the police had concluded that Polevoy stalked women. As noted, after Rosenthal filed her SLAPP motion, Bolen and the other defendants in this case filed their own SLAPP motions. After discovery, the same trial judge denied each Defendant's motion after finding that all Plaintiffs had presented clear and convincing evidence of malice by all Defendants as to all Plaintiffs. The Court also found that Defendant's statements were libelous per se as to all Plaintiffs.

At Page 9, the first full paragraph, Petitioner attempts to argue that she made a good faith effort to check what Barrett had complained about and was persuaded by McPhee's statement that

McPhee felt that she was stalked. Again, the statements Rosenthal republished was that Respondent Polevoy did stalk McPhee and was engaged in criminal activity, not that McPhee felt like she was stalked.

In short, Petitioner's attempt to convince this Court that Petitioner did not act with malice is not an issue upon which review was granted. To the extent it is, there is enough evidence of malice to meet Respondent's burden of proof. Additional evidence will also be fleshed out through discovery.

In fact, discovery will show that Rosenthal has attempted, and continues to try and post every scrap of information she can find that is false and libelous against Respondents for one purpose, to destroy Respondents' good names.

In short, Rosenthal republished libelous statements knowing they were libelous and then hired a SLAPP lawyer to create a public issue out of thin air. Petitioner succeeded at the trial level and appellate level. Hopefully, this Court will see through Petitioner's deception and conclude that the statements Petitioner republished had nothing to do with alternative medicine and that the statements contain actionable libel as to both Respondents Polevoy and Barrett, not just Dr. Polevoy.

V.

PETITIONER AND THE CASES SHE RELIES ON IGNORES THE GENERAL RULES OF STATUTORY AND CASE LAW INTERPRETATION

As noted, Petitioner's brief and the cases she relies on ignore the rules applicable to case law and statutory interpretation, especially the rules of statutory interpretation when the statute involves competing constitutional rights. Consequently, an overview of these general rules is both necessary and appropriate in assessing Respondent interpretation of §230 and to the extent this Court will consider it, whether CCP §425.16 should have been found applicable since neither the trial court nor the Appeals Court spent any real time using these rules in reaching the decision that the section did apply.

A) Case Law – General Rules of Interpretation

In addition to the lower court's statement about federal case law not being binding (Appellate decision, p 18) in Golden Gateway Center v. Golden Gateway Tenants (2001) 26 Cal. 4th 1013, this Court set forth another 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.

B) Statutory Interpretation – General Rules of Interpretation

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).

In Welton v. Los Angeles (1976) 18 C.3d 497, this 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.)

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 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).

C) General Constitutional Considerations That Petitioner and the Cases She Relies on Failed to Consider

The Constitutional considerations which must also be taken into account when a statute involves competing Constitutional rights are even more important. For example, Petitioner's interpretation of §230 and the cases she cites fail to balance Rosenthal's free speech rights, if any, against Respondents' 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 in Rosenblatt:

> 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. Rosenblatt supra p. 678. (Emphasis added.)

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.)

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.)

Although rejected by the Appellate Court, Respondents still maintain that the Court's interpretation of CCP §425.16 was contrary to these constitutional considerations as well as contrary to Golden Gateway (2001) supra, wherein this Court repudiated the express language in Gerawan Farming Inc. v. Lyons (2000) 24 Cal. 4th 468 which held 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.

Here, Rosenthal's publications involved no state action.

In Hak Fu Hung v. Warren Wang (1992) 8 Cal.App.4th 908, a case that it is frequently cited as analogous authority for the rules governing CCP §425.16 or statutory interpretation (see Wilcox v. Superior Court (1994) 23 Cal. App. 4th 809.), 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.

In this case, both the trial court and the Appellate Court found that §425.16 applied. Respondents believe that the basis for this finding was because the Court accepted Petitioner's declarations and essentially ignored Respondents' evidence to the contrary. (See Hung Rule No. 4). In addition, the trial court made finding of facts based on the weighing of the declarations. (Hung rule 4 and 5) Hopefully, this Court will revisit this issue and eliminate the ability of the clever libeler to frame his or her libelous statements by concocting a public issue when there is none, violates the legislate intent of CCP §425.16.

In sum, based on the rules, to accept Petitioner interpretation of §230 will (1) 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, (2) allow a "clever libeler" to 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, (3) obliterate California's well established laws that, anyone who knowingly republishes another's defamatory statement is liable. See Gilman v. McClatchy (1986) 111 Cal. 606 at 612. See also BAJI (8th Ed., No. 7.02.1), (4) revoke California Civil Code Section 43 which grants every person protection from defamation, and (5) obliterate all individual rights to petition in order protect their reputation, "one of the cornerstones of a decedent society." (See Rosenblatt v. Baer supra p. 678.)

For these reasons alone, Respondents submit that Petitioner's interpretation of §230 must be rejected. However, there are additional other reasons why Petitioner's interpretation of §230 is erroneous.

D) The Legislative History and the Express Language of §230 is Contrary to Petitioner's Assertions.

A review of the Communication Decency Act history suggests that one of the main reasons 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.)

Consequently, 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.

Indeed, the very name of the §230 reinforces the conclusion that Congress' intended that the protections of §230(c)(1) apply to users and providers who tried to prevent the spread of malicious material. 47 USC §230 is entitled **"Protection for private blocking and screening of offensive material."**

In short, the unambiguous language of §230 reveals that the legislative intent behind §230's civil liability immunity was to protect users and Internet Service 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 was constitutionally protected."

Consequently, granting immunity to any individual Internet user or Internet Service Provider who knowingly republishes defamatory material, like Rosenthal, is contrary to (1) the express language of the statute, (2) the legislative intent of §230 and (3) the constitutional protection afforded to individuals and to states charged with protecting its citizens against injury to their reputation.

Further, to accept Petitioner'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.

Further, 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.

Finally, as previously noted, to uphold such an interpretation would lead to absurd results since a user could 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 if §230 were found to provide absolute immunity.

In short, the Appellate Court's interpretation of §230 and its finding that Petitioner is not entitled to absolute immunity is correct and should be affirmed.

VI.

RESPONDENT'S REPLY TO THE COURT'S QUESTION

On or about April 14, 2004, this Court issued its ruling granting Defendant/Respondent/ Petitioner Rosenthal's Petition for Review. After doing so, the Court requested that the parties brief the following two questions: (1) What is the meaning of the term "user" under Section 230 of the Communications Decency Act (47 US §230)? And (2) For purpose of the issue presented by the case, does it matter whether a user engaged in active or passive conduct?

1. What is the meaning of the term "user"?

A search of 47 USC §230 fails to find a definition of the term "user".

Appellant's search included the use of the Legal Information Institute's search engine www.law.cornell.edu, based out of Cornell Law School, which has received numerous awards for the quality of information at this site.

According to the search results, the term "user" as used in 47 USC, §230 is undefined. However, through exclusion, the reference to "user" in §230 appears to mean someone who receives information from the Internet .

For example, 47 USC §230(a)(2) provides that:

> These services offer "users" a great deal of control over information that they receive.

Under §230(b)(3) it states that:

> 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.

Also consistent with the position that the term "user" in §230 was intended to include individuals, families, libraries, schools, and others, who receive information is, §230(f)(2) which again refers to "users" as people who access, receive services and receive information. Section 230(f)(2) states:

> The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple "users" to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

In short, based on the rule of exclusion, the term "user" contained in §230 appears to mean someone who receives Internet Services and information, and not someone who creates or develops information that is "provided through the Internet or any other interactive computer service. (See §230(f)(3) definition of Information Content Provider). This definition is also consistent since §230 title which contains the immunity provision, i.e., "Protection for private blocking and screening which a person receiving information can do". In other words, a user is also someone who receives and removes offensive material from the Internet.

Also consistent with the interpretation of a "user" as a receiver of information is §230(c)(2). Here the term "user" in this provision involves a "users" effort in restricting or deleting information that is received from the Internet.

In fact, if the immunity issue were based on a literal reading of §230, immunity should only apply to "Internet Service Providers or users of an interactive computer service who block and screen offensive material", since this is the unambiguous title of §230 where the immunity provision appears.

In short, based on a reasonable interpretation of the term "users" as set forth in §230, a "user" is one who has nothing to do with information that is posted, reposted or republished on the Internet. A user is a receiver of information who may remove offensive information they receive.

On the other hand, a person using the Internet can wear any number of hats while on-line. For example, a person can be a "user" one moment and lose his or her "user" status once they become involved in the creation or development of information that is "provided through the Internet". In this scenario, the person ceases to be a "user" within the meaning of §230 and becomes an "information content provider" who has no immunity under §230(f)(e). An "information content provider" is someone involved "in whole or in part with the creation and/or development of information provided through the Internet or any other interactive service provider." As set forth in the Meriam-Webster Dictionary, the term "creation" is in part, defined as "the act of making or producing." The word "develop" is defined as "to make visible, promote the growth of, to move from the original position to one providing more opportunity for effective use."

In this case, Petitioner admits that she disseminated information, i.e., she made it more visible, promoted the spread and growth of information, and moved the information from the original position to another.

In short, Petitioner does not qualify as a user entitled to immunity since she did much more than just receives information. By repeatedly republishing, reposting, and spreading Bolen's libelous statement Rosenthal helped in part to develop it. As such, she was an "information content provider" who had no immunity.

The Court was also correct in its ruling imposing liability on individuals or computing users using the Internet such as Internet Service Providers based on distributor liability since the Court of Appeals in this case, as well as Grace v. Ebay (CA 2nd 07-22-2004) 04C.D.O.S. 6539) held that §230 was not intended to eliminate distributor liability.

Indeed, although no Internet Service Provider was involved in this case, Petitioner has validated this as an issue by calling herself a distributor. Consequently, distributor liability can and should be considered and affirmed since this is an issue and an important issue that should be resolved sooner rather than later so that a user, thinking they are not liable, and/or a distributor/service provider who may also think they are not liable, know where they stand and what to do if they repost libelous materials or receive notice that a libelous statement has been posted or published on their internet service website.

Moreover, affirming the Court of Appeals' ruling regarding user and distributor liability will go a long way to accomplishing Congress' intent behind §230, i.e., to protect the innocent from libelous republications and publication by returning to these innocent victims the right to seek redress if the user or provider ignores their request to remove the libelous information. Affirming the lower Court's ruling will, at the same time still allow new ideas and information to flourish on the Internet just as long as the information is not used to trample a person's right to his or her good name without leaving that person with any opportunity to stop it.

What can make any more sense?

a) Section 230(c)(1) Reference to Publisher or Speaker Does Not Change Anything.

The statement in §230(c)(1), which, as noted previously, falls under the statutory title "Protection for Good Samaritan blocking and screening of Offensive Material", that no "provider or user" shall be treated as a publisher or speaker of any information, simply means that a user or provider can with complete immunity, remove offensive material that the "provider or user" receives without having to worry about being sued for infringing upon someone's free speech rights.

Assuming arguendo that §230(c)(1)'s immunity provision includes immunity to a publisher or speaker, the immunity only protects an innocent publisher or a speaker/distributor, i.e., one who does

not know that libelous statements are being posted on the provider's website. In short, like traditional libel law, §230 still holds a distributor liable if they know that what is being distributed is libelous.

To the extent §230 refers to "speakers" of information, which under traditional libel law would mean distributors, the result is the same. In short, §230 was intended to protect innocent users, publisher/distributors against strict liability, but not against negligent or intentional wrongdoing.

In short, by eliminating strict liability and protecting Internet user and providers who remove offensive or libelous material from liability, Congress has federalized only one aspect of libel law, i.e., it protects against strict liability, nothing more.

2. Does it Matter Whether a User Engaged in Active or Passive Conduct?

As noted above, this question was not really an issue in this case since Ilena Rosenthal's conduct, i.e., her reposting and republishing of libelous statements, went beyond any concept of a passive Internet user, i.e., a user who simply receives information and/or receives information and decides to remove it.

To the extent this issue is involved, the answer to the question is yes, it does matter whether an Internet users conduct including an Internet Service Provider's conduct, is active or passive, as far as Respondents understand the terms "passive" and "active".

In other words, if passive is meant to include users who only receive or remove offensive information from the Internet and/or Internet Service Providers who receives or removes offensive material that they have no knowledge of because the libelous information has been placed on their Internet Service by another, §230 immunity should attach because the passive user or service provider has done nothing wrong.

However, once the service provider knows or is put on notice that a libelous statement has been placed on their Internet Service, the Internet Service Provider has a duty to protect its users by actually removing the libelous material under distributor liability. If the provider fails to remove libelous material after receiving notice, they lose their immunity and become liable for breach of their duty under common distributor libel law.

In sum, the answer to question Number 2 is that this was not an issue in this case. However, to the extent it is an issue, there is a difference between a passive or active user or Internet Service Provider assuming Respondent's understanding of this phrase is as set forth above.

In this case, there can be no serious dispute that Petitioner was an "active" Internet user, which is better defined as an "information content provider" under §230. As an information content provider, Rosenthal had no immunity. Concomitantly, even if Petitioner was or is considered a distributor, as she claims, Rosenthal lost any immunity by failing to remove that statement and/or reposting libelous statements after being put on notice that the statements were libelous. Either way, Rosenthal has no immunity as a user or as a distributor.

VII.

CONCLUSION

Respondents respectfully submit that based on the foregoing, that this Court affirm the Court of Appeal's ruling that Rosenthal has no immunity as against Respondent Polevoy. Respondents also respectfully request that this Court review those statements that Rosenthal posted which involved Respondent Barrett and reverse the Appellate Court's ruling granting Rosenthal's motion as to Respondent Barrett on the grounds that Petitioner's statements contained actionable libel involving both Respondents Barrett and Polevoy which are not protected under §230 of the Communication Decency Act.

Respectfully submitted,

DATED: September 13, 2004.

Respectfully submitted,

LAW OFFICES OF CHRISTOPHER E. GRELL

By _____
Christopher E. Grell
Attorneys for Respondents/Appellants

CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, rule 14(c)(1))

The text of this brief consists of 13, 189 words as counted by the word count of my computer program used to generate the brief.

Dated: September 13, 2004.

LAW OFFICES OF CHRISTOPHER E. GRELL

By: _____
Christopher E. Grell
Attorney for Plaintiffs and Appellants

PROOF OF SERVICE

I, Olga Rajo, declare that I am employed in the City of Oakland and County of Alameda, with a business address of The Broadlake Plaza, 360 22nd Street, Suite 320, Oakland, California 94612. I am over the age of eighteen years and am not a party to this cause.

On September 13, 2004 I served the attached documents:

OPENING REPLY BRIEF OF RESPONDENT/APPELLANT

on the parties in said cause by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Piper Rudnick, LLP
Roger Myers, Esq.
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Mark Goldowitz, Esq.
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Clerk of the Court
Alameda County Superior Court
201-13th Street
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Clerk of the Court of Appeal
First Appellate District, Div. Two
350 McAllister Street
San Francisco, CA 94102

(X) **By Mail**.*(C.C.P. §1013a, 1015.5)* I placed such sealed envelope(s), with postage thereon fully prepaid, for collection and mailing at Oakland, California, following ordinary business practices. I am readily familiar with the practices of The Law Offices of Christopher E. Grell for processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United State postal Service the same day as it is placed for processing.

(_) **By Personal Service**. I caused each such envelope to be delivered by hand to the addressee(s) noted above.

(_) **By Facsimile**. I caused the contents of said envelope to be served via facsimile electronic equipment transmission to the number indicated after the address (ees) noted above.

I declare under penalties of perjury under the laws of the State of California that this is true and correct. Executed this the 13th day of September, 2004.

Olga Rajo

Olga Rajo