H034059

COPY

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

YVONNE WONG

Plaintiff and Respondent

vs.

TIA JING, JIA MA
and YELP! INC. (SUED HEREIN AS YELP!.COM)

Defendants and Appellants

After and Order By the Santa Clara County Superior Court
Hon. William J. Elfving
Case No. 108CV12997

RESPONDENT'S OPENING BRIEF

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I. STATEMENT OF FACTS

Beginning in February of 2006, Defendants and Appellants retained the services of Plaintiff and Respondent, a sole petitioner focusing on pediatric dentistry from a single, Foster City Office, to treat their minor child, "L," then age 7. [CT: 251, 257-263]. On February 11, 2006, Plaintiff and Respondent took x-rays of the minor's teeth, discovered one cavity, and obtained Defendants and Appellants' permission for treatment of that cavity with silver amalgam pursuant to a consent form that advised that the silver filling contained mercury [Id.].

On February 27, 2006, Plaintiff and Respondent performed a filling of the cavity, and in doing so administered ADA-approved N20 (commonly referred to as laughing gas) for the 10-minute procedure. [CT: 251-252, 257-258, 279-282]. Plaintiff and Respondent did so because of the minor's resistance to needles, and obtained the verbal consent of the mother, who watched the procedure in its entirety [CT: 251-252].

The filling Plaintiff and Respondent applied included the ADA-approved silver amalgam to which Defendants and Appellants had given their informed consent pursuant to a Material Data Safety Sheet and informational pamphlet concerning that substance [CT: 251, 257-258]. The filling is safe, and there is presently no genuine controversy about its use [CT: 251, 264-275].

Likewise, the use of N20 in minors such as "L" is safe, ADA-approved, and there is presently no genuine controversy about it in such circumstances. [CT: 251-252, 277-282, 315-317].

No untoward effects of this anesthetic or of the filling were seen in the minor child, and Defendants and Appellants never complained of any during the February 27, 2006, treatment of their child or following subsequent treatments of that child during the following two plus years [CT: 252].

During the time Plaintiff and Respondent treated "L," she took x-rays and performed routine teeth cleaning and other simple work on that minor child's teeth and his siblings, all without incident or complaint, and typically in the presence of one of the Defendants and Appellants [CT: 252].

In April 2008, Defendants and Appellants cancelled an appointment they had set without giving Plaintiff and Respondent's office sufficient notice [CT: 252, 257-258]. Plaintiff and Respondent, as was her usual and customary practice (and that of the industry) billed Defendants and Appellants for the missed appointment [Id]. In May 2008, Plaintiff and Respondent took two bitewing x-rays of the minor child, diagnosed dental caries (cavities) and recommended fillings [CT: 254, 257-258]. In response to this information, Defendants and Appellants requested that Plaintiff and Respondent specifically set a Saturday

appointment to perform this work [CT: 252]. Plaintiff and Respondent respectfully declined to make this accommodation on the grounds that she did not have the proper staffing to do so on Saturdays and usually reserved Saturdays for ordinary teeth cleaning and other routine dental tasks that did not require a full staff [Id.].

After being refused this accommodation, Defendants and Appellants became upset and registered their displeasure over being billed for a missed appointment [CT: 253]. Although it is common practice to bill for missed appointments when insufficient notice is given, Plaintiff and Respondent nonetheless told her staff to waive those fees and Defendants and Appellants were put on notice that said fees had been waived [Id.]. Apparently unsatisfied with Plaintiff and Respondent's waiver of those fees, the Defendants and Appellants promptly terminated Plaintiff and Respondent's services as to both their children, demanded the files of both children, and brought them to another dentist [CT: 253]. Thereafter, Defendants and Appellants libeled Plaintiff and Respondent in a blog posted on Yelp. That blog, which began by comparing Plaintiff and Respondent to a "disease" to be avoided, and ended by suggesting that she lacked decency was posted on Yelp's website [CT: 253, 284].

That blog, posted on September 10, 2008, read as follows:

1 star rating 9/10/2008

> Let me first say that I wish there was a zero star in Yelp rating. Avoid her like a disease! My son went there for two years. She treated two cavities plus the usual cleaning. She was fast, I mean really fast. I won't necessarily say that is a bad thing, but my son was light headed for several hours after the filling period. So we decided to try another dentist after half a year. I wish I had gone there earlier. First, the new dentist discovered seven cavities. All right all of those appeared during the last half year period. Second, he would never use laughing gas on kids, which was the cause of my son's dizziness. To apply laughing gas is the easiest to the dentist. There is no waiting, no needles. But it is general anesthetic, not local. And general anesthetic harms a kid's nerve system. Heck, it harms mine too. Third, the filling Yvonne Wong used is metallic silver color. The new dentist would only use the newer, white color filling. Why does the color matter? Here is the part that made me really, really angry. The color tells the material being used. The metallic filling, called silver amalgam, has a small trace of mercury in it. The newer composite filling, while costing the dentist more, does not. In addition, it uses a newer technology to embed fluoride to clean the teeth for you. I regret ever going to her office. P.S. I just want to add one more thing. Dr. Chui, who shares the same office with Yvonne Wong, is actually decent.

By asserting these matters as established fact, Defendants and Appellants' statements created the unmistakable impression to Plaintiff and Respondent (and in her mind to members of the public) that she had (1) broken the law; (2) deviated from the applicable standard of care in treating Defendants and Appellants' son with a filler containing trace amounts of mercury without their knowledge (even though said Plaintiff and Respondent has their signature acknowledging that this filler would be used to fill cavities) and thus exposed their child to an unreasonable risk of harm; (3) that the Plaintiff and Respondent had used a general anesthesia treating their child and thus exposed to an unreasonable

risk of harm; (4) that the Plaintiff and Respondent missed several cavities, and thus deviated from the applicable standard of care in the diagnosis and treatment of Defendants and Appellants' minor child's condition; and (5) that Plaintiff and Respondent was indecent [CT: 254].

Plaintiff and Respondent saw this review in November 2008 and sought to enlist the assistance of Yelp in deleting such statements on the grounds that they were libel rather than legitimate, socially valuable commentary about an issue of public interest [CT: 253, 286-288].

Yelp apparently uses negative reviews posted on its site as a marketing tool to sell its services to business that are subject to reviews on its site, for its first response was to offer to sell Plaintiff and Respondent a "business owner's account" by which she could "claim" (i.e., control the content of) her listing [CT: 252-254, 286-291, 322-332]. Not wanting to buy into what she saw as a species of a "protection" racket ("Let me make you an offer you can't refuse or you'll be sorry"), Plaintiff and Respondent made a second attempt to resolve the matter informally [CT: 253, 286-288]. This time, Yelp responded by simultaneously asserting its immunity under the Communications Decent Act and by advising Plaintiff and Respondent that only a court order could result in the deletion of the offending post [Id].

Finding this to be, in essence, an invitation to litigate the matter, Plaintiff and Respondent filed the instant suit for defamation. Immediately after serving the suit, the defamatory aspects of the post were removed [CT: 253-254]. Plaintiff and Respondent has suffered significant emotional distress over this matter, including sleep loss, stomach upset, and other variants of mental suffering [CT: 254].

Following service on Yelp, Plaintiff and Respondent agreed to dismiss her action against it, and Defendants and Appellants requested an extension of time in which to file a response. Before Plaintiff and Respondent could effectuate the dismissal (her attorneys were forced to relocate their offices on shortened notice in December 2008), Yelp's attorneys brought the instant motion without any effort to follow up on Plaintiff and Respondent's agreement to dismiss it. As promised, Plaintiff and Respondent has since dismissed Yelp. [CT: 312-313]

II. STATEMENT OF THE CASE

Because of the above libelous comments blogged by the Defendants and Appellants on yelp.com, Plaintiff and Respondent filed this lawsuit in December 2008. Defendants and Appellants responded by filing their anti SLAPP special motion to strike in January 2009, in an attempt to get the case dismissed in superior court.

On March 17, 2009, attorneys for all of the parties appeared in Superior Court before the Honorable William J. Elfving to argue the case. [RT: 2] One day later, Judge Elfving caused an order to be filed with the Superior Court denying Defendants and Appellants' special motion to strike the complaint. [CT: 403] Judge Elfving found that the Plaintiff and Respondent had met her burden regarding the second prong to the anti SLAPP statute, specifically that the Plaintiff and Respondent had met her burden of proof that she established a probability that she will prevail on her claims.

Defendants and Appellants timely appealed.

III. ISSUES

1. Whether or not the Plaintiff and Respondent is likely to prevail on the merits at trial.

2. Whether or not the Plaintiff and Respondent's intentions were to deprive the Defendants and Appellants of all of their resources at the time of filing this suit so that they would not have the resources to carry on their discussion of the issues recited in the blog.

3. Whether or not Defendants and Appellants Jia Ma should be dismissed from the case at this early stage.

IV. ARGUMENT

A. Respondent has established a probability that she will prevail on her claims under either a de novo review or an abuse of discretion review.

i. Respondent is likely to prevail on the court for libel (defamation)

The anti SLAPP Statute posits a two-step process for determining whether an action is subject to a special motion to strike. In the case at bench, Judge Elfving in the Superior Court found that the Defendants and Appellants made a threshold showing that the challenged cause of action arose from a protected activity, which a defendant meets by demonstrating that the act underlying Plaintiff and Respondent's cause fits one of the categories covered by a statute.

If such a showing has been made, the court must then proceed to the second step as Judge Elfving did and in the Superior Court it was determined that the Plaintiff and Respondent has demonstrated a probability of prevailing on the claim as required in the cases of Navellier v. Sletton 29 Cal. 4th 82, 88 (2002) and City of Cotati v. Cashman 29 Cal. 4th 69, 76 (2002). The judge in the lower court ruled against granting the anti SLAPP motion because only by meeting both prongs can an anti SLAPP movant prevail.

California Civil Code §45 defines libel as a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him or her in their occupation (emphasis added). Every person has the right

of protection from defamation. (See California Civil Code §§43 and 45). Under California law, a court's inquiry in a defamation by implication lawsuit is not to determine if the communication may have an innocent meaning but rather to determine whether the communication reasonably carries with it a defamatory implication. Thomas v. Los Angeles Times Communication, 189 F. Supp. 2d 1005 (2002). When interpreting defamatory statements, plain English, as used by the average reader, is used to interpret the statements in question. Bates v. Campbell 213 Cal. 438, 442.

In the case at bench, the blog posted on yelp.com (Yelp) was libelous on its face as it asserted as established fact and by necessary implication that Plaintiff and Respondent was an indecent "disease" who had engaged in the following misconduct:

- the unlawful use of a mercury containing silver amalgam, without the knowledge or consent of Defendants and Appellants, to the detriment of the health and safety of their minor child,
- the unlawful use of general anesthesia that could, and did, impair the health and wellbeing of the minor child and which, if true, could result in the loss of Plaintiff and Respondent's license to practice dentistry; and,
- the failure to properly render a diagnosis about the minor child's condition

Together, these assertions, all false, had the cumulative effect of creating the impression to the public at large that Plaintiff and

Respondent: 1) broke the law; 2) deviated from the applicable standard of care by failing to fully disclose all matters germane to the minor child's treatment; 3) exposed the minor child to an unreasonable risk of harm that could result in severe physical and mental impairment; and, 4) was incompetent as to the most basic aspects of the practice of dentistry.

Defendants and Appellants' assertion on YELP that they were "really, really angry" that Plaintiff and Respondent gave their minor child a filler containing small, trace amounts of mercury necessarily conveys the implied assertion that this was done without their knowledge or consent, and was dangerous. However, Defendants and Appellants were actively/constructively present during this procedure, the material data safety sheet attached to the Declaration of Yvonne Wong evidences that Defendants and Appellants not only knew about it but consented to it, and the material is not dangerous. To accuse any doctor or dentist of not disclosing all material risks thereby depriving them of true, informed consent, would tend to injure a doctor or dentist's practice, especially when coupled with the implied assertion that the technique at issue was hazardous. Thus, it is a defamatory statement that Defendants and Appellants posed on Yelp.com. In the Defendants and Appellants' opening brief, they have argued that their reference to the silver amalgam filling was simply a

discussion which questioned the safety of sliver amalgam and posed it as a general discussion regarding silver amalgam. However, a review of the entire blog shows that all of the statements, including the one regarding the silver amalgam filling, when viewed together were definitely more of a discussion on the Plaintiff and Respondent competency and her use of the silver amalgam in particular as secretive and implied that the Plaintiff and Respondent used it without their knowledge or consent.

Second, Defendants and Appellants' claim that Plaintiff and Respondent used a general anesthesia "which harms a kid's nervous system" is libel. This false assertion could launch an investigation into her practice which, if believed to be true could cost Plaintiff and Respondent her dental license. As such, it is libel per se. At the March 17 hearing, the Defendants and Appellants' attorney seemed to argue that because nitrous oxide was once a general anesthetic agent (it was many, many years ago). When one thinks of a general anesthetic, the image that appears in most people's minds is that a patient is completely unconscious. However, the patient in the case at bench was conscious and alert throughout the treatment. The Defendants and Appellants' argument is similar to saying that doctors giving a flu shot are spreading the flu virus just because the shot contained dead or weakened virus. Dr. Eisenga, who graduated first in his class from

medical school, would argue that the laughing gas is hardly a general anesthesia because of the child's consciousness throughout the procedure. Therefore, the appeals court should view Defendants and Appellants' blog in its entirety and it will see that the blog is defamatory toward Plaintiff and Respondent.

Finally, the Defendants and Appellants' implied assertion that Plaintiff and Respondent failed to discover several cavities in their minor child's mouth prior to her discharge, when, in fact, Defendants and Appellants requested that Plaintiff and Respondent specially set a Saturday appointment to treat that very condition is libel. For a dentist, discovery of cavities is as basic as discovery of worn tires by a mechanic. To suggest that Plaintiff and Respondent failed to discover cavities is to accuse her of failing the most basic, fundamental standards of professional competence. It is, in essence, to call Plaintiff and Respondent utterly incompetent of basic dentistry.

Although the law protects opinions, it does not protect assertions of fact disguised as opinions. An impartial mind would look at Defendants and Appellants' blog as assertions of fact. See Overstock.Com Inc. v. Gradient Analytics, Inc. 151 Cal. App 4th 688, 703 (2007) wherein it was held that couching assertions of fact as questions rather than as statements does not entitle such statements to constitutional protection; couching an assertion of

defamatory fact in cautionary language does not necessarily diffuse the impression that the speaker is communicating an actual fact. For Defendants and Appellants to attempt to couch their libelous statements as simple "opinion" is disingenuous; they were, in fact, false statements pure and simple. Moreover, for Defendants and Appellants to couch their libelous statements to attempt to make out a "public concern" is wholly without merit. Similarly, Defendants and Appellants' ostensible disclaimer regarding the discovery of cavities that "all right all of those cavities appeared during the last half year" does not mask the true intent of their statements that, by necessarily implication, mean that "the first dentist, Plaintiff and Respondent, missed those cavities" nor is there a need, as Defendants and Appellants seem to suggest, for evidence which assigns an actual dollar value to the injury, or that malice may be proven by direct evidence. See Gertz v. Robert Welch, Inc. 418 U.S. 323, 350; 94 S. Ct. 2997; 41 L. Ed. 2d 789 (1974). In those cases where defamatory statements do not involve matters of public concern, presumed and punitive damages may be awarded to a private person without a showing of actual constitutional malice. Dun and Bradstreet, Inc., v. Green Moss Builders, Inc. 472 U.S. 749, 758-759; 105 S. Ct. 2939; 86 L. Ed. 2d 593 (1985). Also, for defamation cases, actual malice may be proved by actual or circumstantial evidence. Wilbanks v. Wolk

121 Cal. App. 4th 883 (2004), while distinguishable on the basis that it is Plaintiff and Respondent's position that the case at bench does not touch on a matter of public interest is despositive on whether the content of the blog at issue here is defamatory. The Wilbanks court found that the blog at issue was defamatory precisely because the necessary implications made by the statements contained therein as well as by information that was omitted.

Similarly, in the case at bench, the Defendants and Appellants' blog is defamatory for precisely the same reason as the blog in Wilbanks was found defamatory. Defendants and Appellants made an expressly defamatory statement that Plaintiff and Respondent had used a "general" anesthesia on their minor child that "harms" the nervous system. Defendants and Appellants' statements were also, by necessary implication, defamatory in that a reasonable person viewing these statements could conclude that Defendants and Appellants' minor child suffered actual harm to his nervous system by his brief exposure to N20, and by his exposure to the mercury in the filling.

Further, Defendants and Appellants' statements were also, by necessary implication, defamatory in that a reasonable person viewing these statements could conclude that Plaintiff and Respondent had not obtained Defendants and Appellants'

statements were also, by necessary implication, defamatory in that a reasonable person viewing these statements could conclude that Plaintiff and Respondent was incompetent and had breached the applicable standard of care by failing to diagnose cavities that had, in fact, been discovered as a result of bite wing x-rays that Plaintiff and Respondent had taken on May 10, 2008, and for which Defendants and Appellants requested treatment. Defendants and Appellants notably admitted from their blog that they were informed about the mercury in the filling, that is ADA-approved, and that they had permitted their child to be given N20 without objection, and at least one of them was present during the procedure and finally that Plaintiff and Respondent declined their request to make a Saturday appointment to treat the cavities that the dentist had later discovered. These omissions appear to be a purposeful effort to mislead the reader of the blog about Plaintiff and Respondent's ethics and professional competence since any honest appraisal of the treatment at issue would have included this information.

To ascertain whether the statements in question are provably false, factual assertions, courts consider the totality of circumstances. First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense. The Plaintiff and Respondent has already

shown the defamatory sense in the statements that have been used and such statements are defamatory to the average person. Next, the context in which the statement was made must be considered. This contextual analysis requires that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. The context in which the statements were made and the audience to which they were directed is perfectly clear since Yelp.com is for people to review a particular service. The crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. Selig v. Infinity Broadcasting Corporation, 97 Cal. App. 4th 798, 119 Cal. Rptr. 2nd 108 (2002).

The objective falsity of the defamatory matter, and not whether the one who published it believed it to be true is the determining factor. Emde v. San Joaquin County Central Labor Council, 23 Cal. 2d 146, 143 P. 2d 20 (1943). For a statement to be actionable as a defamation, it need not be untrue in every detail. It is sufficient if the imputation therein is substantially untrue in so far as the gist or sting of the defamatory matter is concerned. Emde, supra.

Finally, it should be noted that the burden to show likelihood to prevail is similar to the standard used in summary judgment. See

Slauson Partnership v. Ochoa (2003) 112 Cal. App. 4th 1005, 1020.

ii. Respondent has also made out a case for intentional infliction of emotional distress.

Liability for intentional infliction of emotional distress is based upon conduct exceeding all bounds usually tolerated by a decent society, of a nature which is especially calculated to cause, and does cause mental distress of a serious kind. The elements of a prima facie case for the tort of intentional infliction of emotional distress are outrageous conduct by the defense, his or her intention of causing or in reckless disregard of the probability of causing emotional distress, and the plaintiff's suffering severe emotional distress as well as the proximate causation of the emotional distress by the defendant's conduct. Cervantez v. J.C. Penney Co., 24 Cal 3d 579, 156 Cal. Rptr. 198 (1979). See also Davidson v. City of Westminister, 32 Cal. 3d 197, 185 Cal. Rptr. 252 (1982). In the case at bench, the language used was most certainly intended to cause emotional distress within the Plaintiff and Respondent's mind and, in fact, did so. As discussed above, all three statements when taken in their totality, were outrageous and did, in fact, cause the Plaintiff and Respondent severe emotional distress. The outrageousness

of the Defendant/Appellant's comments is especially egregious when it was very clear that Dr. Wong would be using laughing gas as well as silver amalgam to fill the Defendant/Appellant's child's teeth . Thus, the lower court, through Judge Elfving, correctly determined that the Plaintiff and Respondent had made out a prima facie case for intentional infliction of emotional distress.

iii. Respondent has also made out a case for negligent infliction of emotional distress.

Similar to the above argument, the Plaintiff and Respondent could also make a case out for negligent infliction of emotional distress. The Plaintiff and Respondent can make out a claim that because of the defamation law in California, that a duty was owed to her to at least tell the truth about whatever complaints they had about the doctor's service. The series of libel statutes claim that everybody has the right to be free from libel. This imposes the duty. The Defendants and Appellants breached this duty by blogging untrue accusations against the Plaintiff and Respondent on Yelp.com. The Defendants and Appellants' conduct was the actual and proximate cause of Plaintiff and Respondent's damages. The Plaintiff and Respondent's damages were a lessened regard for her competency in the community as well as severe mental anguish. Thus, the Plaintiff and Respondent

has made out a case for negligent infliction of emotional distress as well as intentional infliction of emotional distress.

B. Yelp.com's ability to appeal is limited strictly by Respondent's dismissal of them from this immediate lawsuit

Yelp.com has nothing to appeal because they were dismissed as a party to this immediate lawsuit. Voluntary dismissal of an action on Plaintiff and Respondent's request is ordinarily deemed a ministerial (not a "judicial") act from which no appeal will lie. See Gray v. Superior Court (1997) 52 Cal. App. 4th 165, 170, 60 Cal. Rptr. 2nd 428, 431. In Gray, the court stated on page 170: "It has also been held that the defendant cannot appeal the Plaintiff and Respondent's dismissal because the dismissal has an effect of an absolute withdrawal of the Plaintiff and Respondent's claim and leaves the defendant as though he had never been a party."

The court goes on to state on page 171, that the "petition could not appeal from real party's dismissal, but was entitled to file a motion to vacate the dismissal. The denial of a motion to vacate a non appealable order is itself non appealable."

The Defendants and Appellants' appeal does not appeal the dismissal but only the Superior Court's denial of their special motion to dismiss the entire suit.

C. In a de novo review, the court should rule against the Appellants on both prongs of the 425.16 motion

As to Defendants and Appellants Tai Jing and Jia Ma, the court ruled in favor of the two pronged test on the first prong. In an anti SLAPP motion, the court's first duty is to decide whether the defendant has made a threshold showing that the challenged cause of action is one arising from a protected activity, which the defendant meets by demonstrating that the act underlying Plaintiff and Respondent's cause fits one of the categories covered by a statute. If the court uses the de novo threshold of appeal, then it may review the lower court's finding that defendant had met the first step, which Plaintiff and Respondent contends was definitely not met in this instance.

In Wilbanks v. Wolk 121 Cal. App. 4th 883 (2004) at p. 891, the opinion stated that:

> SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the Plaintiff and Respondent. Indeed, one of the common characteristics of a SLAPP suit is its lack of merit. But lack of merit is not of concern to the Plaintiff and Respondent because the Plaintiff and Respondent does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish Plaintiff and Respondent's underlying objective.

In the case at bench, the Plaintiff and Respondent did not file the suit to tie up defendant's resources for an indeterminate amount of time. This can be established by a cursory review of the transcript of the hearing of March 17 on the anti SLAPP motion wherein Plaintiff and Respondent's counsel stated to the court that in his original offer to settle this claim before the anti SLAPP suit was even filed, Plaintiff and Respondent demanded only an apology on yelp.com and the $3,000.00 that at that time represented her attorney's fees. This court can infer by the Defendants and Appellants' attorneys' lack of response to that statement that the statement was true. If the Plaintiff and Respondent had an underlying objective to indefinitely tie up Defendants and Appellants Jing and Ma's resources indefinitely, then a demand to settle the suit for $3,000.00 is certainly a peculiar way to achieve such an objective.

In Navellier v. Sletten, 29 Cal. 4th 82, 89 in the discussion of "arising from," the Supreme Court similarly stated: "In the anti SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity" . . . The anti SLAPP statute thus does not allow a defendant to escape the consequences of wrongful conduct merely by asserting a spurious first amendment defense. Id., at 93.

In the case at bench, the Plaintiff and Respondent's declaration is replete with references of false statements made by the Defendants and Appellants about the Plaintiff and Respondent which were intended to, and ultimately did, hurt her reputation as a dentist. This is after 25 years of a flawless reputation in her community as a dentist. Thus, the Plaintiff and Respondent in the case at bench has filed a legitimate complaint for slander, defamation of character, emotional distress, etc., not to curtail Defendants and Appellants' free exercise of protected speech, but to hold them accountable for their unprotected defamation of character.

The Court further went on to state in 29 Cal. 4th p. 94 that "the fact that the legislature expressed a concern in the statute's preamble with lawsuits that chill the valid exercise of first amendment rights does not mean that a court may read a separate proof-of-validity requirement into the operative sections of the statute." Thus, the Plaintiff and Respondent contends that the first prong of the two prong test has not been met and Defendants and Appellants' anti SLAPP motion should have been summarily denied as a matter of law.

In the Defendants and Appellants' opening brief, as well as their reply to Plaintiff and Respondent's Opposition to the Special Motion to Strike, they assert that since Tai Jing was the one who

wrote the blog, that Jia Ma should be relieved of any liability whatsoever. However, since Jia Ma was at most of the dentist appointments, Plaintiff and Respondent could make out a case for conspiracy between the patient's parents (Ma and Jing). Since the filing of the anti SLAPP motion stops the lawsuit in its tracks, Plaintiff and Respondent had no opportunity to conduct discovery to garner at least sufficient circumstantial evidence that a conspiracy regarding the blog on Yelp.com had occurred. Plaintiff and Respondent should at least have the opportunity to show that and if anything is lacking, should have the opportunity to amend the complaint.

CONCLUSION

In the case at bench, the Plaintiff and Respondent believes that, in a de novo review, neither prong of the test has been satisfied. The record, especially at the March 17th hearing, clearly establishes that the Plaintiff and Respondent did not file the suit for the purpose of causing economic harm to the Defendants and Appellants. If the court reviews the appeal on an abuse of discretion threshold, then the issue of whether or not the first prong has been met is obviously moot.

However, the second prong of the test (i.e., whether or not the Plaintiff and Respondent is likely to prevail on the merits) has clearly been met. The Declaration of Yvonne Wong and the

attachments thereto make it clear that under the totality of circumstances, as well as individually, a defamatory statement has been published by the Defendants and Appellants. The statements blogged on Yelp.com by Tai Jing and Jia Ma included statements that clearly indicated that Dr. Wong had failed to find several cavities, used an amalgam containing trace amounts of mercury without their consent and knowledge, and used general anesthesia on their son, which she is not licensed to use. Unless this court is willing to immunize these statements simply because they are widely disseminated on the internet, then the Plaintiff and Respondent has clearly shown that it is likely to prevail when the time of trial comes. As Judge Elfving pointed out in the superior court order, the issue of whether or not a Plaintiff and Respondent is likely to prevail must be determined from a standard similar to that of a summary judgment, since no discovery has yet been conducted or even permitted on the case at bench.

Therefore, the court should affirm the superior court's decision and allow this case to move on to trial.

Respectfully submitted

Dated: Sept 9

Marc L. Ter Beek
Attorneys for
Plaintiff and Respondent

PROOF OF SERVICE

Re: YVONNE WONG vs. TAI JING, JIA MA, AND YELP.COM
Case No.: H034059

I, Mayra Pineda, certify that I am employed in the City of Oakland, County of Alameda, State of California; I am over the age of eighteen years and am not a party to the within action; my business address is 2648 International Blvd., Suite 115, Oakland, California 94601.

On September 10, 2009, I served by mail the following document(s):

RESPONDENT'S OPENING BRIEF

On the parties to this action, at the following address below:

California Anti-Slapp Project
Mark Goldowitz
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350 McAllister Street
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Superior Court of California County of Santa Clara
191 N. First Street
San Jose, CA 95113

X By First Class Mail: I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence will be deposited with the U.S. Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in Oakland, California, for mailing to the office of the addressee following ordinary business practices.

___ By Personal Service: I caused each such envelope to be given to a courier messenger to personally deliver to the office of the addressee.

___ By Facsimile: I caused each such document to be transmitted, via facsimile machine, to the parties and numbers listed above, pursuant to Rule 2008. The machine reported no error. Pursuant to Rule 2008(e) (4), I caused the machine to print a transmission record, a copy of is attached to the original of this declaration.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Oakland, California.

Mayra Pineda

TO BE FILED IN THE COURT OF APPEAL

COPY

APP-008

COURT OF APPEAL, Sixth APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: H034059
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Marc L. Terbeek SBN 166098 2648 International Blvd Suite 115 Oakland, CA 94601 TELEPHONE NO.: 510-689-0140 FAX NO. (Optional): 510-689-0143 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Yvonne Wong	Superior Court Case Number: 018CV-129971
APPELLANT/PETITIONER: Tia Jing, Jia Ma RESPONDENT/REAL PARTY IN INTEREST: Yvonne Wong	FOR COURT USE ONLY Court of Appeal - Sixth App. Dist. FILED SEP 15 2009 MICHAEL J. YERLY, Clerk By DEPUTY

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Yvonne Wong

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: September 15,2009

Marc L. TerBeek
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2008]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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WORD COUNT CERTIFICATION

I, Marc L. TerBeek, hereby certifies, pursuant to California Rules of Court Rule 8.204(c)(1), that the word count of my computer program for this consolidated brief indicates that it contains 5,685 words, including footnotes. Executed this 15th day of September, 2009.

Marc L. TerBeek