H034059

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

YVONNE WONG,

Plaintiff and Respondent,

vs.

TAI JING, JIA MA, AND
YELP! INC. (SUED HEREIN AS YELP.COM)

Defendants and Appellants.

AFTER AN ORDER BY THE SANTA CLARA COUNTY SUPERIOR COURT
HON. WILLIAM J. ELFVING
CASE NO. 108CV129971

APPELLANTS' REPLY BRIEF

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INTRODUCTION.

Appellants established in their opening brief that the anti-SLAPP statute, Code of Civil Procedure[1] section 425.16, applies to respondent's claims, which arise from appellant Jing's statements about respondent (the Post) on the Yelp.com consumer information website. (AOB 15-27.) Respondent has not shown the contrary. Appellants also showed that Respondent has not established a probability of prevailing on her claims. (AOB 27-57.) Again, respondent has failed to show the contrary. The trial court erred in denying appellants' anti-SLAPP motion.

I. THE TRIAL COURT ERRED IN DENYING APPELLANTS' SPECIAL MOTION TO STRIKE.

As set forth more fully in appellants' opening brief, anti-SLAPP analysis consists of two prongs. On the first, the court determines whether or not the statute applies to the plaintiff's claims. If the statute applies, the burden shifts to the plaintiff to show a probability of prevailing on her claims (the second prong). (AOB 12-14; see also RB 8.) Appellants have met their burden; respondent has not met hers.

Although respondent appears confused as to the standard of review applicable here (see RB 8, suggesting that the standard may be abuse of

[1] Subsequent statutory section references herein are to this Code.

discretion), it is clear that the standard of review of the denial of a special motion to strike is de novo. (AOB 12.) The only portion of this case to which an abuse of discretion standard applies is the trial court's failure to consider the evidence submitted by appellants with their reply papers below. (AOB 12.)

Respondent has also failed to comply with California Rules of Court, Rule 8.204(a)(1)(C), by not citing to the record to support her arguments. Violation of Rule 8.204(a)(1)(C) may result in offending portions of a brief being disregarded; an appellate court need not search the record for evidence that supports the party's statement. (*Regents of the University of California v. Sheily* (2004) 122 Cal.App.4th 824, 827, fn. 1; see also *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16 [record citations in factual background at the beginning of the brief do not cure failure to include pertinent record citations in argument portion of brief].)

Nonetheless, appellants have made their best efforts here to determine respondent's arguments, attempt to identify the relevant evidence, and respond accordingly.

A. Section 425.16 Applies to Respondent's Complaint.

Appellants established that section 425.16, subdivision (e)(3), applies to respondent's Complaint, because her claims arise from statements made in a public forum about issues of public interest (the quality of dental

care, patients' informed access to it, and the use of amalgam fillings). (AOB 15-27.) Respondent has not effectively rebutted said showing. Just as the trial court correctly found that the statute applies (II CT 403:25-404:1), so should this Court.

Respondent does not deny that Jing's Post[2] was made in a public forum. (AOB 16-17.) Additionally, although respondent states that "it is Plaintiff and Respondent's position that the case at bench does not touch on a matter of public interest," she never explains her position. (RB 14; see AOB 17-24.) By failing to address appellants' argument that respondent's claims are covered under section subdivision (e)(3) as statements made in a public forum about issues of public interest, she has essentially conceded this point. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-85 [failure to support point with reasoned argument and citations to authority deemed waiver].)

Respondent appears to make two arguments regarding the applicability of section 425.16. (RB 21-23.) Neither have merit. First, citing *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 891, respondent

[2] Respondent repeatedly refers to Jing's single Post as a "blog." (RB 3-4, 6-7, 9, 11-12, 14-15, 18, 24.) Referring to a single post on a consumer information website as a "blog" is deceptive because it implies an ongoing discussion by Jing about respondent. In fact, there was no ongoing discussion by Jing. He simply made *one* post, stating, inter alia, his opinion about respondent and her treatment methods, and then later modified the Post, primarily by deleting most of it. (I CT 8, 68; II CT 349:6-7, 351:3-9.)

appears to argue that the anti-SLAPP statute does not apply because she contends that she did not file this action to tie up appellants' resources. (RB 21-22; see also RB 7.) However, the statement from *Wilbanks* quoted by respondent is simply part of the Court's general description of SLAPPs and the legislative history and provisions of section 425.16. (*Wilbanks v. Wolk, supra,* 121 Cal.App.4th at pp. 890-93.) Nowhere does *Wilbanks* hold that section 425.16 does not apply if a plaintiff shows that she did not file her lawsuit to tie up the defendant's resources. In fact, in *Wilbanks*, the court held that even though the subject lawsuit was not a "prototypical SLAPP suit" (i.e., the plaintiffs were "not a large private interest"), the anti-SLAPP statute applied to the plaintiffs' claims. (*Id.* at p. 894.) Crucially, the California Supreme Court has clearly stated that whether or not a plaintiff had bad motives for filing the action is irrelevant to the issue of applicability of section 425.16. (See AOB 27, fn 3.)

Second, citing *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 93-94, "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." (RB 22-23.) Respondent has also apparently misinterpreted the Court's holding in *Navellier*. Just after the statement quoted by respondent that essentially says that a defendant need not prove the validity of his purported First Amendment activity to show

applicability of the statute, the Court continues:

> Rather, any "claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case." Plaintiff's argument "confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits."

(*Navellier v. Sletten, supra,* 29 Cal.4th at p. 94 [citations omitted; emphasis in original.) Just as was the plaintiff in *Navellier*, respondent appears to be confused, arguing that because she is attempting "to hold [appellants] accountable for their unprotected defamation of character," the statute does not apply. (RB 23.) As the Court in *Navellier* held, arguments regarding a plaintiff's probability of prevailing are not relevant to the determination regarding applicability of section 425.16.

Respondent's claims are covered by section 425.16, subdivision (e)(3), as they arise from statements made in a public forum about issues of public interest.

B. Respondent Has Not Shown a Probability of Prevailing on Any of Her Claims.

In their opening brief, appellants carefully and meticulously explained why respondent failed to show a probability of prevailing on her claims. (AOB 27-57.) Respondent has failed to effectively rebut appellants' arguments in this regard.

1. Respondent Has Not Shown a Probability of Prevailing Against Jia Ma.

In their opening brief, appellants argued that respondent did not show publication by appellant Ma and the trial court erred in not considering appellants' evidence that Ma had nothing to do with the allegedly defamatory Yelp Post. (AOB 30-32.)

Most importantly, respondent, who has the burden on this issue, did not submit any evidence that Ma wrote or posted the allegedly defamatory statements or was in any way responsible for their publication. Respondent's only apparent argument in this regard is that "since Jia Ma was at most of the dentist appointments,[3] Plaintiff and Respondent could make out a case for conspiracy between the patient's parents (Ma and Jing)," and because

> the filing of an 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.

(RB 24.)[4]

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[3] There is no evidence of this in the record. The closest that the evidence comes to this is respondent's statement that her treatments were "typically in the presence of one of the Defendants." (I CT 252:12-13.)

[4] Respondent does not cite any authority that she should be allowed leave to amend her Complaint to address issues raised in appellants' anti-

Regardless of whether respondent now believes she could show that a conspiracy between Ma and Jing occurred, she did not allege a conspiracy in her Complaint (see I CT 1-7), and did not submit any evidence that supports this theory. In fact, respondent made no attempt below to verify or show who actually wrote and posted the allegedly defamatory material. She simply assumed that it was Jing and Ma jointly. Her assumption does not make it so.

In addition, respondent does not meaningfully respond to appellants' argument that the trial court should have considered appellants' evidence that establishes that Ma had nothing to do with the allegedly defamatory Post. (AOB 30-32.) Respondent does appear to indicate that the trial court was correct in not considering said evidence because she did not do any discovery prior to appellants' motion being decided. (RB 23-24.) Respondent's statement that no discovery has "even [been] permitted on the case at bench" (RB 25) is factually correct only because *respondent never sought any*. Respondent did, in fact, have an opportunity to pursue discovery if she believed she needed to do so. (See AOB 31-32.) Respondent does not explain why she failed to request discovery or what discovery she "needed," much less respond to appellants' argument that a plaintiff's failure to pursue purportedly necessary discovery is not grounds

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SLAPP motion. In fact, she cannot. (See AOB 28.)

for denying a special motion to strike. (See AOB 32.) As appellants established in their opening brief, the trial court erred in not considering the evidence submitted by appellants regarding Ma. (AOB 30-32.)

Thus, respondent has not met her burden to show publication by Ma; in fact, the only evidence in the record on this point proves that Ma was *not* involved with the writing or posting of the allegedly defamatory statements. (II CT 349:6-9, 357:6-9.) Therefore, respondent has not shown any probability of prevailing against Ma.

2. Respondent Has Not Shown a Probability of Prevailing Against Tai Jing.

In their opening brief, appellants cited authority that a plaintiff opposing an anti-SLAPP motion must rely on the complaint as pled and may not add allegations after the motion is filed. (AOB 28.) In addition, appellants noted that a claim for libel must specifically identify, it not plead verbatim, the allegedly libelous statements and must expressly allege any allegedly defamatory implications. (AOB 34-35.) Respondent has ignored these points, thus conceding them.

As discussed below, respondent has not established a probability of prevailing against appellant Jing, with or without unalleged allegations.

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a. Respondent Did Not Establish a Probability of Prevailing on Her Claim for Libel.

i. The Statement About Amalgam Fillings.

Appellants explained in their opening brief why the statement about amalgam fillings was not actionable. (AOB 37-43.) Respondent asserts that the Post accused her of using amalgam fillings without appellants' informed consent and thereby deviated from the applicable standard of care.[5] (See RB 4, 9, 10-11.) Somehow, respondent believes that because Jing stated that he was "really, really angry," this implies that respondent used amalgam fillings without his consent. (RB 10.) Respondent does not address the argument in appellants' opening brief in this regard (AOB 37-38), except for her repetition of her conclusory statement, with flourishes like "unlawful use" and "secretive use" (neither of which is contained in or implied by the Post). (RB 9, 11.) Jing's point was that there were other materials available and dentists who regularly use them. (AOB 37-38; II CT 351:20-25, 353:3-8.) That Jing was angry to find out that there were other, arguably safer, materials available, does not reasonably imply that the less desirable material was used without informed consent, or was done

[5] Respondent's briefing thus broadens the Complaint's allegation that the Post indicates "that Plaintiff did not warn *defendant Ma* of the fact that her son's filler contained trace amounts of Mercury." (I CT 2:11-14 [emphasis added].)

secretly or unlawfully. Further, respondent does not address appellants' argument that she cannot now allege that the Post implied that she broke the law or violated the applicable standard of care, neither of which is alleged in her Complaint. (AOB 38-40.)

The same is essentially true with regard to appellants' arguments regarding respondent's unalleged theory that the Post was defamatory because it omitted certain facts. (AOB 40-42.) Respondent simply repeats her argument below as if appellants had not filed a brief here. (RB 14-15.) Appellants distinguished *Wilbanks* and explained why there was no defamation by omission of pertinent facts. (AOB 40-42.) Respondent does not meaningfully respond to this.

Respondent does not explain how these omissions would result in a defamatory meaning, except to state that "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." (RB 15.) In fact, the omissions are immaterial and did not result in a defamatory meaning for the Post, unlike the omissions discussed in *Wilbanks*. (See AOB 40-42.)

Respondent cites *Overstock.com v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 703, for the proposition that "couching assertions of

fact as questions, rather than as statements, does not entitle such statements to constitutional protection," and "couching an assertion of defamatory fact in cautionary language does not necessarily defuse the impression that the speaker is communicating an actual fact." (RB 12-13.) It is unclear, however, to what language in the Post respondent is referring, since she does not specify. The Post contained no "cautionary language" such as "in my humble opinion," which respondent puts forth as a hypothetical example of such language. Further, the only question that appeared in the Post is "Why does the color [of the filling material] matter?," which is then immediately answered in a straightforward manner. *Overstock* is simply inapplicable here.

ii. The Statement About Laughing Gas.

Appellants explained in their opening brief why the statement about laughing gas was not actionable. (AOB 43-47.) Respondent argues that the Post was defamatory because it did not state "that [appellants] had permitted their child to be given N2O without objection." (RB 15.) In fact, the Post did not state or imply the contrary. It merely described the bad experience the child had with nitrous oxide, stated that Jing would prefer that his son not be given nitrous oxide because of that, and referred to Dr. Sun as an example of a dentist who does not use it. (I CT 8; II CT 351:26-352:2, 353:3-8.)

As Jing testified, and the Post itself indicated, his concern about respondent's use of nitrous oxide arose only *after* it was administered and when his son was facing multiple procedures to repair cavities, due to "the way [his son] reacted," including that the child "was light headed for several hours after[ward]." (I CT 8; II CT 349:13-19, 349:23-25.)

Respondent now claims that the Post implied that she "unlawfully" used nitrous oxide. (RB 9.) That clearly is not the case and respondent has not offered any explanation of how the Post implied this. Respondent also adds a claim that is not alleged in her Complaint, that the Post implied that her use of laughing gas could and did harm the health and well-being of the child. (RB 9.) However, even if respondent could add new allegations, respondent does not respond to Jing's point that any such implication was his lay opinion and was not actionable, thus effectively conceding this point. (AOB 45-47.)

Respondent also states that her "expert," Dr. Eisenga, "would argue that the laughing gas is hardly a general anesthesia because of the child's consciousness throughout the procedure."[6] (RB 11-12.) However, Dr. Eisenga did not so testify.[7] In fact, he indicated that nitrous oxide *is* a

[6] This supposition relies on facts that are not in evidence – that the boy "was conscious and alert throughout the treatment." (RB 11.)

[7] Similarly, he never stated that he "graduated first in his class from medical school." (Compare RB 11-12 with II CT 315-317.)

general anesthetic. (See AOB 44-45, analyzing II CT 316:17-18.) Respondent also asserts, without any reference to the record or any other authority, that "nitrous oxide was once a general anesthetic agent (it was many, many years ago)," and suggests what a lay person thinks of when he thinks of a "general anesthetic." (RB 11.) However, respondent's supposition in this regard is neither admissible evidence nor persuasive. Further, appellants submitted evidence that nitrous oxide is still considered a general anesthetic by the authors of an abstract in the Journal of the American Dental Association, the World Health Organization, and Medicinenet.com. (II CT 355, 363, 376.)

iii. The Statement About Cavities.

Appellants have explained why the statement about cavities was not defamatory. (AOB 48-51.) Respondent does not substantively respond to appellants' discussion on these points, relying on conclusory assertions to the contrary, thereby effectively conceding appellants' points. Respondent does assert that the omission from the Post that she declined to make a Saturday appointment implied that respondent was incompetent and breached the standard of care by not diagnosing cavities in Jing's son's teeth. (RB 12, 14-15.) However, respondent does not show how said omission led to that implication. In fact, the Post did not state or imply that respondent failed to diagnose anything. It acknowledged that children can

develop a lot of cavities in a short period of time. (I CT 8.) The fact that his son was facing so many procedures is part of what influenced Jing's relief to find a dentist who did not use nitrous oxide and who used alternate filling materials. (II CT 352:7-15.)

iv. Other Unalleged Statements.

Respondent does not offer any explanation why appellants' argument that she must rely only upon what is alleged in her Complaint, and not upon unalleged statements, is incorrect. (See AOB 28.) It is not clear whether respondent is still claiming to be actionable the alleged statements that she was "like a disease" or "lacked decency" (see RB 3, 5, 9), but if so, she has waived this point by not responding to appellants' argument that this was non-actionable opinion or hyperbole. (AOB 51-52.) (*Badie v. Bank of America, supra*, 67 Cal.App.4th at pp. 784-85.)

b. Respondent Did Not Show A Probability of Prevailing On Her Claims For Emotional Distress or Injunctive Relief.

With regard to her intentional infliction of emotional distress claim, respondent makes no attempt to explain how she has shown each of the necessary elements and simply asserts that "all three statements when taken in their totality, were outrageous. . . ." (RB 17.)

Assuming that those three statements referred to by respondent in this regard are the three alleged in the Complaint (that respondent failed to

warn Ma that her son's fillings contained mercury, that respondent used a general anesthetic outside the scope of her practice, and that respondent misdiagnosed Jing and Ma's son's condition), if indeed they were made, such statements are not "outrageous" as required to maintain an action for intentional infliction of emotional distress. "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Cervantez v. J.C. Penney Company, Inc*. (1979) 24 Cal.3d 579, 593.)

> [T]he tort does not extend to "mere insults, indignities, *threats*, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, *and some safety valve must be left through which irascible tempers may blow off relatively harmless steam*. . . ."

(*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496 [citations omitted; emphasis in original].) "Generally, conduct will be found to be actionable where the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" (*Id.* at p. 494 [citation and internal punctuation omitted].)

Here, respondent has sued over a single post on a consumer information website. The Post did not accuse respondent of any immoral or

despicable behavior. It simply contained an honest opinion of respondent and her services, offering alternatives that Jing preferred and providing consumer protection information that he had gathered from his Internet research. This is not so extreme that no civilized society should tolerate it, and the average person who reads such statements is not likely to exclaim that it is "Outrageous!"

In addition, as previously noted (AOB 53), respondent has not established that she suffered *severe* emotional distress as a result of the Post, as required for both negligent and intentional infliction.

Respondent does not make any argument whatsoever with regard to her request for injunctive relief. (See AOB 53-54.) She has therefore waived that claim as a basis for denial of appellants' special motion to strike. (*Badie v. Bank of America, supra*, 67 Cal.App.4th at pp. 784-85.)

3. Respondent Has Not Shown a Probability of Prevailing Against Yelp.

Respondent argues that because she dismissed Yelp, it has nothing to appeal. (RB 19.) Despite correctly stating that appellants are not appealing the dismissal of Yelp, but the denial of its anti-SLAPP motion (RB 19), respondent does not substantively respond to appellants' argument that Yelp has a right to have its anti-SLAPP motion decided, as respondent did not

dismiss it until after Yelp filed its motion. (AOB 54-56.)[8] It appears that the trial court denied Yelp's special motion to strike, as the court did not distinguish among the moving parties when it stated that "Defendants' Motion is DENIED." (II CT 403:22.) In fact, as appellants established in their opening brief, Yelp did, and does, have a right to have its motion decided. As appellants have shown, respondent's claims against Yelp must be dismissed as a meritless SLAPP.

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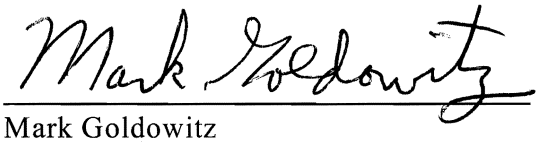
[8] Respondent asserts that Yelp filed its anti-SLAPP motion without any effort to follow up on her purported agreement to dismiss Yelp. (RB 6.) This is not true. After reading a statement to the media by respondent's counsel that indicated that respondent might not dismiss Yelp, Yelp's counsel warned respondent that Yelp would seek dismissal if respondent did not promptly dismiss it. Respondent ignored this warning. (See AOB 54-55 and evidence cited therein.)

CONCLUSION.

Appellants have been sued for a Post that Tai Jing wrote on the Yelp consumer information website. Appellants have shown that the anti-SLAPP statute applies to respondent's claims and that she has not shown a probability of prevailing thereon. In particular, respondent has not shown that Jia Ma had anything to do with the writing or posting of Jing's statements; Yelp is immune from respondent's claim; and respondent has not shown that the Post contains any actionable statements. This Court should reverse the trial court's order denying appellants' anti-SLAPP motion and direct the trial court to grant said motion. It should also rule that appellants are entitled to recover their reasonable attorneys' fees and costs.

Dated: October 2, 2009

Respectfully submitted,



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WORD COUNT CERTIFICATION

I, Mark Goldowitz, hereby certify, 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 3,916 words, including footnotes. Executed this 2nd day of October, 2009.

Mark Goldowitz

PROOF OF SERVICE

The undersigned hereby states under the penalty of perjury under the laws of the State of California:

I am employed in Alameda County; I am over the age of eighteen and not a party to the within cause; and my business address is 2903 Sacramento Street, Berkeley, California, 94702-5209.

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APPELLANTS' REPLY BRIEF

and I deposited said envelopes in the U.S. Mail, postage fully prepaid, all on this day.

Also on this day, I sent a single electronic copy of the above civil appellate brief to the Supreme Court's electronic notification address.

Dated: October 2, 2009

Kim Lehmkuhl