S164174

IN THE SUPREME COURT OF CALIFORNIA

SIMPSON STRONG-TIE COMPANY, INC.

Plaintiff, Appellant and Petitioner,

vs.

PIERCE GORE and THE GORE LAW FIRM,

Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT
CASE NO. H030444

REPLY TO ANSWER TO PETITION FOR REVIEW

(Service on Attorney General and District Attorney required by
Bus. & Prof. Code, §§ 17209, 17536.5)

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INTRODUCTION

Gore's answer to Simpson's petition for review drives home the point that Supreme Court review is necessary to resolve multiple decisional conflicts the Court of Appeal's opinion creates and to settle important questions of law. Gore expressly concedes that a "true conflict" (Answer to Petition for Review p. 25 (Answer)) exists in the decisional law regarding who has the burden of showing whether activity falls outside Code of Civil Procedure section 425.17's commercial speech exemptions from the anti-SLAPP statute. The Supreme Court decision he claims resolves that decisional conflict does

nothing of the sort. Gore dwells on an unsettled question that independently merits review: whether the commercial speech exemptions should be broadly construed to effectuate the Legislature's avowed goal of curbing the abuse of anti-SLAPP motions through the enactment of section 425.17. Gore attempts to evade another decisional conflict the Court of Appeal's opinion creates – regarding the scope of the commercial speech exemptions – by relying on inconsequential differences in the facts underlying the two conflicting decisions. And Gore argues an issue of first impression – whether a public opinion survey can ever be admissible to prove defamation – again highlighting an unsettled question that merits review. Gore's answer brief is Simpson's best friend.

LEGAL DISCUSSION

I.

A "TRUE CONFLICT" IN THE LAW REGARDING DEFENDANT'S BURDEN UNDER CODE OF CIVIL PROCEDURE SECTION 425.17 MERITS THIS COURT'S REVIEW.

A. Gore concedes that the Court of Appeal's decision creates a "true conflict" with *Brill*.

Gore's answer brief expressly concedes a compelling reason for Supreme Court review in this case – the Court of Appeal's opinion creates what Gore calls a "true conflict" (Answer p. 25) in the law regarding the first issue presented for review: who has the burden of showing that activity is protected because it falls outside section 425.17's exemptions from the anti-

SLAPP statute. Division Five of the Second Appellate District held in *Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324, 330-331 (*Brill*) that defendant has this burden. The Court of Appeal in the present case expressly disagreed with *Brill* and held that plaintiff has this burden. It is this court's job to resolve such "true" decisional conflicts as "necessary to secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).)

B. The conflict is not resolved by analogy to *Soukup*.

Gore contends this decisional conflict can be resolved by drawing an analogy to *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, which the Court of Appeal here did not even mention. Gore, citing *Soukup* for the first time in his answer brief, construes *Soukup* as holding that a defendant has the burden of establishing the applicability of an exemption from the anti-SLAPP statute. (See Answer pp. 4, 7-9.) Gore is wrong. *Soukup* held nothing of the sort.

The anti-SLAPP exemption statute at issue in *Soukup* was Code of Civil Procedure section 425.18, which concerns the so-called "SLAPPback" – a malicious prosecution or abuse of process lawsuit by the victim of a prior SLAPP. Section 425.18 exempts SLAPPbacks from an anti-SLAPP motion where the SLAPPback defendant's "filing or maintenance of the prior cause of action from which the SLAPPback arises [i.e., the underlying SLAPP] was illegal as a matter of law." (Code Civ. Proc., § 425.18, subd. (h).) *Soukup* held, among other things, that the SLAPPback plaintiff (the original SLAPP defendant) has the burden of establishing that the filing and maintenance of the underlying SLAPP was illegal as a matter of law. (*Id.* at p. 286.) *Soukup* made clear that the SLAPPback plaintiff's burden is something wholly different from a SLAPP defendant's initial burden on any anti-SLAPP motion

– including in a SLAPPback lawsuit – which is to show that the defendant's activity (whether in a SLAPP or a SLAPPback) is protected by the anti-SLAPP statute. *Soukup* explained:

> In the ordinary SLAPP case, the defendant's *initial* burden in invoking the anti-SLAPP statute is to make "'a threshold showing that the challenged cause of action is one arising from *protected activity*.'" [Citation.] There is no further requirement that the defendant initially demonstrate his or her exercise of constitutional rights of speech or petition was valid as a matter of law. [Citation.] Consistent with these principles, a [SLAPPback] defendant who invokes the anti-SLAPP statute should not be required to bear the *additional burden* of demonstrating in the first instance that the filing and maintenance of the underlying action was not *illegal as a matter of law*.

(*Ibid.*, italics added.)

Thus, according to *Soukup*, in SLAPPback lawsuits discrete burdens are allocated to each party when the SLAPPback defendant makes an anti-SLAPP motion to strike the SLAPPback: The SLAPPback defendant retains the initial burden of showing that the challenged activity is protected by the anti-SLAPP statute, but the SLAPPback plaintiff (the original SLAPP defendant) has the burden of establishing that the underlying SLAPP was illegal as a matter of law. That is why Gore's attempt to analogize the present case to *Soukup* fails. There is no similar allocation of multiple burdens under section 425.17, because the invocation of section 425.17 poses no issue similar to section 425.18's question in SLAPPbacks whether the filing and maintenance of the underlying SLAPP was illegal as a matter of law. Where, as here, in the non-SLAPPback setting, a plaintiff invokes section 425.17's commercial speech exemptions from the anti-SLAPP statute, only one of the two burdens addressed in *Soukup* is implicated – the SLAPP defendant's burden of showing that activity is protected – and *Soukup* indicates that this is the SLAPP

defendant's burden in *all* anti-SLAPP motions, including Gore's, even where a plaintiff like Simpson invokes an exemption from the anti-SLAPP statute.

As we explain in the petition for review, the defendant's burden in an anti-SLAPP motion – which *Soukup* reiterates is to show that activity is protected by the anti-SLAPP statute – necessarily encompasses the question whether section 425.17 exempts such activity from anti-SLAPP protection. (See Petition For Review p. 18 (Petition).) If there is any analogy of this case to *Soukup*, it is only to *Soukup's* reiteration of the SLAPP defendant's burden – which indicates the defendant has the burden of showing activity is protected because it falls outside the statutory exemptions from the anti-SLAPP statute.

Gore's failure to grasp the pivotal distinction between the present case and *Soukup* highlights the need for Supreme Court review. If Gore's able counsel did not see the distinction, then it seems plausible that others might make the same mistake. This court should not leave future litigants and courts to puzzle their way through to the reason why Gore's attempted analogy to *Soukup* does not resolve the "true conflict" between the Court of Appeal's opinion and *Brill*.

II.

THE DECISIONAL CONFLICT REGARDING THE SCOPE OF SECTION 425.17'S COMMERCIAL SPEECH EXEMPTIONS MERITS THIS COURT'S REVIEW.

A. Whether section 425.17 should be broadly construed is an important unsettled question.

On the second issue presented for review – whether the commercial speech exemptions from the anti-SLAPP statute include advertising by a lawyer soliciting for clients for a contemplated lawsuit – Gore properly points out that the resolution of that issue turns on a sub-issue: whether the exemptions prescribed by section 425.17 should be broadly or narrowly construed. (See Answer p. 5.) We submit that this sub-issue in and of itself is a matter of statewide importance which merits this court's review as necessary "to settle an important question of law" (Cal. Rules of Court, rule 8.500(b)(1)), given the Legislature's finding and declaration of the need for section 425.17's exemptions because of "a disturbing abuse of Section 425.16, the California anti-SLAPP statute." (Code Civ. Proc., § 425.17, subd. (a).) This court's clarification whether section 425.17 is to be broadly or narrowly construed will help to achieve the Legislature's goal of curbing the abuse of anti-SLAPP motions.

B. Factual differences between this case and *Brill* do not eliminate the decisional conflict regarding section 425.17's application to lawyer advertising.

Gore contends the Court of Appeal's decision is not really in conflict with *Brill* regarding the scope of the commercial speech exemptions – despite the Court of Appeal's plain statement that "we . . . respectfully decline to follow" *Brill* in that regard (typed opn. p. 15) – because *Brill* is, as Gore puts it, "distinguishable on the facts" in that the *Brill* defendants had clients while Gore did not. (Answer p. 10.) The obvious answer, if blunt, is: So what? The conflict between the Court of Appeal's decision and *Brill* is in two diametrically-opposed statements of the applicable *law*. Differences between the facts of the two cases do not eliminate that conflict.

Brill said section 425.17's commercial speech exemptions are triggered by statements that are made "as part of . . . the type of business transaction engaged in by defendants." (*Brill, supra,* 132 Cal.App.4th at p. 341.) The Court of Appeal in the present case disagreed, saying "[t]he Legislature has not chosen to exempt conduct incidental to 'the type of business transaction engaged in by [the] defendant[].'" (Typed opn. p. 16, quoting *Brill, supra,* 132 Cal.App.4th at p. 341.) This is another "true conflict" (Answer p. 25) in decisional law. That the *Brill* defendants had clients while Gore did not is of no more significance to this conflict in the law than the fact that the *Brill* defendants were corporations while Gore is a lawyer.[1/]

1/ Gore similarly attempts to evade the conflict between the Court of Appeal's decision and pointed dictum in *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482 which expressly envisions section 425.17's application to "a 'massive advertising campaign' divorced from individualized legal advice." (*Id.* at p. 492; see Petition pp. 20-21.) To distinguish *Taheri*, Gore relies on the difference between "express representations of fact" (Answer pp. 15-16) and the implied factual representations of the present case (see Petition

III.

WHETHER A PUBLIC OPINION SURVEY CAN EVER BE ADMISSIBLE TO PROVE DEFAMATION IS AN ISSUE OF FIRST IMPRESSION MERITING THIS COURT'S REVIEW.

On the third issue presented for review – whether technical flaws in a public opinion survey go to its weight rather than admissibility – Gore again raises a sub-issue: whether a public opinion survey can *ever* be admissible to prove defamation or is always inadmissible *as a matter of law* for that purpose. This sub-issue is worthy of this court's review as "fairly included in the petition." (Cal. Rules of Court, rule 8.516(b)(1).)

As we point out in the petition for review, in rejecting Gore's public opinion survey evidence because of purported technical flaws, the Court of Appeal suggested that such evidence is *never* admissible to prove defamation. (Petition p. 28; see typed opn. p. 29.) Gore's answer brief seizes on this suggestion and argues that, because a statement's susceptibility to a defamatory interpretation "is a question of law to be determined by the court" (Answer p. 20), as a matter of law survey evidence should be categorically "not admissible" (*id.* p. 21) on grounds of "relevance" (*id.* p. 22) to prove defamatory meaning.

To the best of our knowledge, this issue – whether a public opinion survey is inadmissible as a matter of law to prove defamatory meaning – is one

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p. 22). Again, these are just insignificant differences between the facts described in the two cases. The conflict between the Court of Appeal's decision and the *Taheri* dictim is in opposing statements of the applicable *law* – *Taheri* says mass lawyer advertising can invoke the commercial speech exemptions; the Court of Appeal's decision in the present case puts mass lawyer advertising outside the scope of those exemptions. (See Petition p. 20.)

of first impression in California and possibly nationwide. Our research has produced only one case directly on point – *Celle v. Filipino Reporter Enterprises, Inc.* (2d Cir. 2000) 209 F.3d 163 – which said in a dictum that, contrary to Gore's argument, public opinion surveys "can be useful" to courts in determining whether a statement is defamatory. (*Id.* at p. 178.) Indeed, common sense suggests that a validly-conducted survey may be among the best ways to assess public perception of a statement as defamatory.

Analogous authority supports the *Celle* dictum. The question whether the plaintiff in a defamation action is a public figure is – like susceptibility to defamatory meaning – "a question of law for the trial court." (*Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 264.) Yet cases in other jurisdictions say that in determining whether a plaintiff is a public figure, the trial court "can examine statistical surveys, if presented, that concern the plaintiff's name recognition." (*Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1295; *Riddle v. Golden Isles Broadcasting, LLC* (2005) 275 Ga.App. 701, 704 [621 S.E.2d 822, 825]; *Wilson v. Daily Gazette Co.* (2003) 214 W.Va. 208, 215 [588 S.E.2d 197, 204].) If public opinion survey evidence is admissible on the legal question whether a defamation plaintiff is a public figure, it logically follows that such evidence should be admissible on the legal question whether a statement is susceptible to a defamatory interpretation

Thus, once again, Gore's answer brief highlights a need for Supreme Court review – to resolve the first-impression issue whether public opinion survey evidence can be admissible to prove defamatory meaning.

As for Gore's insistence that the Court of Appeal did not reject Simpson's public opinion survey because of purported technical flaws (see Answer pp. 20, 22), this court need only read the Court of Appeal's opinion to know otherwise. The Court of Appeal was not merely technical, but

hypertechnical, in picking apart a single one of the survey's six questions – "How likely would it be that galvanized screws manufactured by Simpson Strong-Tie would be defective?" – by attacking its treatment and use of the everyday words "likely," "would be," and even "defective." (See Petition pp. 25-26.)

In truth, the Court of Appeal, whether knowingly or not, employed a philosophical device called "deconstruction" in which academicians question the meaning of language itself by using the internal elements of a text to undo assertions made in the text. (See, e.g., R. Moynihan, Recent Imagining: Interviews with Harold Bloom, Geoffrey Hartman, Paul DeMan, J. Hillis Miller (1986) p. 156 [DeMan's definition of deconstruction: "It's possible, within text, to frame a question or undo assertions made in the text, by means of elements which are in the text, which frequently would be precisely structures that play off the rhetorical against grammatical elements."].) In the Court of Appeal's deconstructionist view, commonly-used words like "likely," "would be," and "defective" have no concrete meaning but are, as the Court of Appeal put it, "nebulous." (Typed opn. p. 29.) The common folk, however, understand what those words mean, and the business of judges is to resolve disputes between common folk, not philosophers. (See *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 547 [whether publication is defamatory "'is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader'"].) Intellectual deconstruction has its place in theoretical philosophy, but not in the real world of judging, where everyday language *must* have meaning for judges to do their work and for the

people to understand and be guided by the law in their business and personal affairs.[2/]

IV.

THE DECISIONAL CONFLICT REGARDING A DEFAMATORY PREDICTION OF FUTURE EVENTS IS NOT RESOLVED BY THE COURT OF APPEAL'S COMMENT REGARDING STATEMENTS OF OPINION.

On the fourth question presented for review – whether a statement couched as a prediction of future events can be defamatory – Gore contends the Court of Appeal's opinion correctly answered this question when stating that "[a] *statement of opinion* may sustain liability where it implies that the speaker knows additional, undisclosed defamatory facts." (Typed opn. p. 28, italics added; see Answer p. 24.) But there the Court of Appeal was speaking of a *statement of opinion*, not a *prediction of future events*. The court never acknowledged that the latter, like the former, can be actionable if it implies

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2/ Gore says the admissibility issue "is a red herring" because Simpson purportedly does not challenge the Court of Appeal's conclusion that Gore's advertisement is incapable of a defamatory meaning. (Answer p. 23.) Nonsense. Simpson challenges that conclusion by challenging the Court of Appeal's rejection of the survey evidence as proof of defamatory meaning. And Simpson's petition for review asserts the survey's conclusion that Gore's advertisement was defamatory in that it was "capable of significantly damaging the reputation of Simpson Strong-Tie and . . . result[ed] in a lower stated likelihood that customers would purchase products made by the company." (AA 379; see Petition p. 11.) As for Gore's complaint that Simpson has not yet offered proof of "actual harm" from Gore's advertisement (Answer p. 3), other than the public opinion survey, the fact is that Simpson has not yet had an opportunity to do so, because Gore filed his anti-SLAPP motion before Simpson had a chance to analyze its 2006 sales to assess the negative impact of Gore's advertisement.

knowledge of undisclosed defamatory facts. Regarding the latter, the court simply stated: "In general . . . a prediction of future events is intrinsically incapable of conveying a provable (or disprovable) assertion of fact." (Typed opn. p. 26.)

A prediction of future events is not necessarily the same as a statement of opinion, and it is not at all clear that the Court of Appeal meant to refer to the two interchangeably. The opinion leaves the reader hanging with the unqualified notion that a prediction of future events (here, that readers of Gore's advertisement may have a tort claim against Simpson for selling defective products) can never be actionable, which is in conflict with the analogous law of fraud stating that a prediction of future events can be actionable if it implies knowledge of facts that make the prediction probable. (See Petition p. 29.)

CONCLUSION

We close by addressing Gore's pleas that this court should not "perpetuate [Simpson's] punishment of Gore[] by accepting review of this case" (Answer p. 3) because "this lawsuit was initiated to stop Gore from pursuing the class action lawsuit he was developing" (*ibid.*) and he "already has been forced to spend far too much money to protect his rights of speech and petition" (*id.* at p. 13).

The truth is that Gore never had any clients for an action against Simpson. Gore's so-called "year of investigation into a potential class action lawsuit" (Answer p. 2) yielded nothing – not a client, not a single defective screw. And even if Gore's advertisement had produced a client, this lawsuit would not have prevented that client from suing Simpson, because even if, as Gore claims, the effect of this lawsuit was to "discourage" Gore from

commencing litigation (*id.* at p. 2), he had an ethical obligation to make arrangements for other counsel to take over the case. (Rules Prof. Conduct, rule 3-700(A)(2) & (B)(3); see Appellant's Reply Brief and Answer to Amicus Curiae Brief pp. 26-27.) That has not happened.

Nobody – not Gore or any other lawyer – has filed any action or claim against Simpson arising from its sales of galvanized screws. That is because of Simpson's exemplary efforts to educate the public on how to choose safely between Simpson's various types of screws for wood deck construction. (See Petition pp. 7-9.) Yet Gore, seizing on those very efforts, attempted to manufacture a class-action lawsuit against Simpson and other industry leaders by using a defamatory newspaper advertisement to troll for clients. All Simpson asked of Gore – in two unanswered letters to Gore (see Appellant's Appendix pp. 442-443, 446-447) and via this lawsuit – was to remove Simpson's name from the advertisement. Gore struck back with an anti-SLAPP motion, which raises the question whether the anti-SLAPP laws can be exploited to shield defamatory lawyer mass advertising that is used in an effort to drum up business. The amicus curiae letters lodged in support of Simpson's petition for review demonstrate the depth of industry concern about this question. It is worthy of this court's review.

Further, nothing in the record supports Gore's claim that he "has been forced to spend far too much money" in defense against this lawsuit. (Answer p. 13.) By the same token, nothing in the record contradicts the reasonable assumption that Gore's general liability insurer, rather than Gore himself, is paying for his defense. And even if Gore *is* paying for his defense out of his own pocket, he ultimately will be made whole if this lawsuit is finally adjudicated a SLAPP and dismissed as such. The specter of Gore's "punishment"(*id.* at p. 3) via this lawsuit is indeed a phantom.

Gore's pleas are an attempt to take this court's eye off the ball – which is the Court of Appeal's creation of multiple conflicts and uncertainties in the decisional law of California. Those conflicts and uncertainties are no phantoms – they are realities which this court should address by granting review.

Dated: July 9, 2008

Respectfully submitted,

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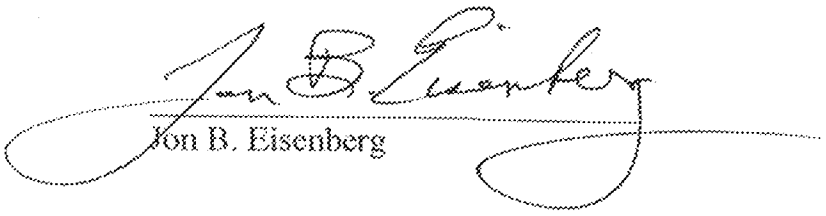
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1))

The text of this brief consists of 3,772 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: July 9, 2008



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PROOF OF SERVICE

I, WENDY CORNELL, declare:

1. I am employed in the City and County of San Francisco, California by Shartsis Friese LLP at One Maritime Plaza, 18th Floor, San Francisco, California 94111.

2. I am over the age of eighteen years and am not a party to the within cause.

3. I am readily familiar with Shartsis Friese LLP's practice for collection and processing of correspondence and documents for mailing with the United States Postal Service, which in the normal course of business provides for the deposit of all correspondence and documents with the United States Postal Service on the same day they are collected and processed for mailing.

4. On July 7, 2008, at Shartsis Friese LLP located at the above-referenced address, I served the attached **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in said cause by

____ Personal delivery by messenger service of the document(s) above to the person(s) at the address(es) set forth below:

_X_ Placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in accordance with the firm's practice of collection and processing correspondence for mailing to the person(s) at the address(es) set forth below:

____ Facsimile transmission pursuant to Rule 2008 of the California Rules of Court on this date before 5:00 p.m. (PST) of the document(s) listed above from sending facsimile machine main telephone number (415) 421-2922, and which transmission was reported as complete and without error (copy of which is attached), to facsimile number(s) set forth below:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 7, 2008 in San Francisco, California.

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