S164174

IN THE SUPREME COURT OF CALIFORNIA

SIMPSON STRONG-TIE CO., INC.,

Plaintiff and Appellant,

vs.

PIERCE GORE, ET AL.,

Defendants and Respondents.

Appeal From an Order of the Santa Clara County Superior Court
Honorable John Herlihy, Judge

Review After Judgment of the Court of Appeal,
Sixth Appellate District
Justice Conrad L. Rushing, Presiding Justice

DEFENDANTS'/RESPONDENTS' REPLY TO PLAINTIFF'S SUPPLEMENTAL BRIEF

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to Order of this Court entered February 24, 2010, Defendants/Respondents Pierce Gore and the Gore Law Firm ("Gore") respectfully submit this Reply to Plaintiff's Supplemental Brief filed March 10, 2010 ("Simpson S.B.").

1. INTRODUCTION

Simpson Strong-Tie Co., Inc. ("Simpson") makes three attempts to convince the Court that the "representations of fact" requirement in the first clause of Section 425.17(c)(1) is not part of the "course of delivery" exemption in the second clause of that same subsection. Each argument falls of its own weight.

Simpson's "plain language" argument is premised on Simpson's division of subsection (c)(1) into two different paragraphs. Simpson S.B. at 2. Yet, the statute is not divided in this fashion. In choosing to place both clauses of subsection (c)(1) into a single paragraph, the Legislature made clear that those clauses were related. Moreover, in contrast to Gore's interpretation, Simpson's argument fails to harmonize them in any way. (Section 2.A, *infra*.)

Nor do the rules of statutory construction aid Simpson. Simpson's construction, not Gore's, would result in surplusage in the statute. As

Simpson cannot deny, Simpson's broad reading of "course of delivery" would render the first clause completely meaningless. (Section 2.B, *infra*.)

Finally, and tellingly, Simpson's Supplemental Brief makes clear that Simpson is urging this Court to adopt the broad business exemption that the Legislature rejected when it refused to enact SB 1651, the predecessor to SB 515. Simpson urges this Court to construct a new test to temper the absurd results that would flow from interpreting the second clause of subsection 425.17(c)(1) as a stand-alone clause and broadly exempting from the protection of the anti-SLAPP statute *all* statements or conduct that occur in the "course of delivering" a good or service. Simpson's interpretation ignores the plain language of the statute and would instead have this Court judicially enact the earlier version of the exemption that was rejected by the Legislature when it refused to enact SB 1651 because it broadly focused on a class of defendants, and chose instead to enact SB 515, which narrowly focuses on the *content* and *context* of the statement or conduct at issue. (Section 2.C, *infra*.)

2. NONE OF SIMPSON'S ARGUMENTS SUPPORT ITS INTERPRETATION OF SECTION 425.17(c)(1)

A. Simpson's "Plain Language" Interpretation Fails to Harmonize the Two Clauses in Subsection (c)(1).

Section 425.17(c) exempts from the protection of the anti-SLAPP statute speech or conduct that meets two statutory criteria – one dealing with content and context (Section 425.17(c)(1)) and one dealing with

intended audience (Section 425.17(c)(2)). Simpson claims that because subsection (c)(1) repeats the phrase "statement or conduct," it "makes the two exemptions substantively independent of each other." Simpson S.B. at 2. Simpson argues that as a result, the second clause (addressing statements or conduct occurring in the "course of delivering" goods or services) does not contain any of the content elements of the first clause (addressing statements or conduct made to sell or promote goods or services). *Id.*

But to make this argument, Simpson creates a different statute than the one adopted by the Legislature. By insisting that subsection (c)(1) be broken into two different paragraphs, Simpson fails to internally harmonize subsection (c)(1). As the Sixth District Court of Appeal recognized in *McAllister v. California Coastal Comm'n* (2008) 169 Cal.App.4th 912, 929, courts should choose an interpretation that harmonizes the parts of a single subsection. Simpson's interpretation is dependent on its assertion that the two clauses of subsection (c)(1) are completely separate. Only Gore's interpretation treats the subsection as a single paragraph. Only Gore's interpretation appreciates that the reference to "statement or conduct" in the second clause of subsection (c)(1) is "shorthand" to incorporate the content requirement of the first clause, harmonizing the two clauses of this single subsection to create a single, cohesive, test.

B. Simpson's Interpretation Would Result in Surplusage.

Simpson argues, next, that Gore's interpretation would result in surplusage, rendering the four words "the statement or conduct" unnecessary. Simpson S.B. at 3. But this is not true. Rather, as discussed above, these words serve as the indicia that the Legislature intended to incorporate the "representations of fact" requirement from the first clause in the "course of delivery" clause. Section A, *supra*; *see also* Gore S.B. at 4.

Moreover, as Gore explains in his Supplemental Brief, Simpson's argument for a broad interpretation of the "course of delivery" clause would render completely meaningless the first clause of subsection (c)(1), and its careful delineation of the content of the speech that would give rise to the exemption. If, as Simpson contends, "course of delivery" extends to advertisements if they are "part of ... the type of business transaction engaged in by defendants," even including "a grocer's defamatory advertisement" (O.B. at 37, 42 (citation omitted)), everything encompassed by subsection (c)(1)'s first clause would be included in and exempted by the second clause. Such a broad construction would bar the use of the anti-SLAPP statute in most commercial disputes.

Every business engages, to some degree, in statements or conduct "made for the purpose of ... promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services," and those statements or conduct necessarily will be part of the type of activity

engaged in by that business, if that phrase is interpreted as broadly as Simpson advocates. Simpson's interpretation renders the first clause – the one that tracks this Court's test for commercial speech from *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, as demonstrated in Gore's Supplemental Brief (Gore S.B. at 11-15) – complete surplusage. It never would be invoked, no plaintiff ever would be required to satisfy its stringent test, and the anti-SLAPP statute would not be available to protect important free speech activities arising in commercial settings. Simpson is perfect proof of this, claiming that Gore delivered his professional services with a notice that did not service a single client. This Court should reject the broad rewriting of the statute urged by Simpson.

C. The Legislature Rejected the Broad Exemption Advocated by Simpson.

Appropriately, it is the legislative history that resolves any ambiguity. Gore's Supplemental Brief details that legislative history and demonstrates that it fully supports Gore's interpretation of Section 425.17(c)(1). Gore S.B. at 10-15. As Gore's Supplemental Brief explains, numerous legislative reports and analyses demonstrate that the Legislature viewed the "representations of fact" requirement as applying to the "course of delivering" clause in subsection (c)(1). Motion for Judicial Notice filed in Court of Appeal ("MJN") at MJN0102, MJN0107 (Assembly Committee on Judiciary Report); MJN0200 (Assembly Republican Bill Analysis);

MJN0205 (Senate Third Reading); MJN0222 (author's letter to Governor requesting signature).

Simpson is left to twisting the meaning of the Legislature's words in order to find support for its interpretation. Simpson claims that the Legislature intended to exempt "commercial activity" from the protection of the anti-SLAPP statute, not commercial speech *per se*. Simpson S.B. at 5. It argues that the Legislature did not adopt this Court's definition of commercial speech from *Kasky* because it wanted to exempt a subcategory of commercial speech from the anti-SLAPP statute's protection. Instead – and despite the near-universal recognition that Section 425.17(c) is the "commercial speech" exemption from the anti-SLAPP statute[1] – Simpson argues that the *Kasky* test was adopted because this was the only way to identify speech that reflects commercial activity if that speech precedes the sale of a product. Simpson S.B. at 5. Simpson offers the remarkable proposition that "the actual *delivery* of a product or service can *only* be commercial activity, and thus there can be no doubt that a statement or conduct made in the course of such delivery was commercial in character."

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[1] *E.g.*, *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 316 ("[t]his exception statute covers ... 'commercial speech,' under subdivision (c)" (quotations in original)).

Id. at 5-6.[2] Therefore, Simpson concludes, the Legislature must have intended by subsection (c)(1) to exempt all speech that is "commercial in character," and not merely a subset of commercial speech. *Id.* at 5.

Simpson's reason for making this bizarre contention is apparent. It realizes that Section 425.17(c)(1) would lead to absurd results if this Court read the "course of delivery" clause in isolation. Gore S.B. at 6-8. Thus, Simpson *had* to inject some content requirement into the "course of delivery" clause. Dissatisfied with the test specifically crafted by the Legislature, Simpson chose another test – statements or conduct that are "commercial in character." Simpson S.B. at 5. But Simpson's argument is hinged on two demonstrably false premises.

First, the Legislature's goal in enacting SB 515 was to exempt a subset of "commercial speech" – the term of art referring to speech that receives lesser constitutional protection – from the anti-SLAPP statute's protection.[3] This is plain from the legislative history, which limited the

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[2] Simpson claims that under Gore's interpretation, the entire "course of delivery" clause would become surplusage because it would be an aspect of 'securing sales or leases.'" Simpson S.B. at 6. Simpson's reasoning is difficult to discern. To secure a sale or lease is to procure, obtain or ensure that transaction. *See, e.g.*, Dictionary.com, available at http://dictionary.reference.com/browse/secure. It is related to the sale of a product or service, not its delivery.

[3] *Cf. Davenport v. City of Alexandria, Va.* (4th Cir. 1983) 710 F.2d 148, 150 n.6 (rejecting argument that live entertainment performed for pay is commercial speech entitled to lesser protection because "'commercial

"commercial speech" exemption by noting that it applies only to speech that does not receive the full protection of the First Amendment. *E.g.*, MJN at MJN0041 (Senate Judiciary Report explanation that because the exemption applies only to "acts that would be categorized as commercial speech, the proposed exception to the anti-SLAPP law would not be unconstitutional"); *id.* at MJN0058, MJN0129 ("That is why SB 515 distinguishes between commercial activity, which includes statements about their products, from constitutionally protected speech").

It is beyond dispute that only a subset of speech that occurs in the commercial setting can be characterized as "commercial speech." Indeed, that basic premise underlies this Court's decision in *Kasky*, because the Court's careful analysis of Nike's speech, and its adoption of a three-part test to determine what constitutes commercial speech in the context of state laws barring false and misleading commercial messages, would have been unnecessary if "commercial speech" consisted of all speech in a commercial context. If Simpson's premise were correct, the Court's decision would have been one sentence – "It occurred in the commercial context and therefore it is commercial speech." Instead, this Court held:

> [A]t least in relation to regulations aimed at protecting consumers from false and misleading promotional practices, commercial speech ***must*** consist of factual representations

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speech' is a legal term of art referring to advertising, and Davenport's activity is unrelated to advertising").

> about the business operations, products, or services of the speaker (or the individual or company on whose behalf the speaker is speaking), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services.

Id. at 962 (emphasis added). The Court explained that some of Nike's statements remain protected as non-commercial speech and "Nike's speech loses that full measure of protection only when it concerns facts material to commercial transactions – here, factual statements about how Nike makes its products." *Id.* at 967. Finally, the Court summarized that "[s]peech is commercial in its content if it is likely to influence consumers in their commercial decisions." *Id.* at 969.

The U.S. Supreme Court also has made clear that not all business speech is "commercial speech." Thus, in *First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, that Court held that the banks' speech at issue was fully protected by the First Amendment, notwithstanding the speakers' undeniable economic motivations for that speech. *Id.* at 770-771 & n.4. Any number of cases have held that speech in a business context generally is entitled to the full protection of the First Amendment. *E.g.*, *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 841 (promises made to settle business dispute were not "commercial speech" within the Section 425.17(c) exemption); *see also Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 363 ("If commercial speech is to be distinguished, it 'must be distinguished by its content'").

For example, this Court has rejected the argument that fortune telling is commercial speech because it "provides the mechanism for completing the transaction, and thus relates only to the economic interests of the parties," explaining that "[t]his theory of commercial speech has no basis in precedent and fundamentally misconstrues the commercial-noncommercial distinction." *Spiritual Psychic Sci. Church of Truth, Inc. v. City of Azusa* (1985) 39 Cal.3d 501, 510, *rejected on another ground, Kasky*, 27 Cal.4th at 968; *see also Argello v. City of Lincoln* (8th Cir. 1998) 143 F.3d 1152, 1153 (distinguishing between "the offer to tell a fortune ('I'll tell your fortune for $20') which is commercial speech, and the actual telling of the fortune ('I see in your future ...') which is not"); *Welton v. City of Los Angeles* (1976) 18 Cal.3d 497, 504 (maps to star homes were not commercial speech).

Moreover, the protections of the First Amendment have a particularly important role in business disputes where the speech is not between competitors, but instead is in the nature of consumer protection advocacy. *E.g.*, *Brammer v. KB Home Lone Star*, 114 S.W.3d 101 (Tex. App. 2003) ("[t]his case ... involves dissatisfied customers who are not engaged in any competing commercial activity but rather are attempting to inform the community that a business is profiting from defective products. Regardless of the veracity of such disparagement, the criticism of the business can be reasonably related to social views that are strongly held by

the speakers"). Thus, Simpson is simply wrong in arguing that all speech that occurs in connection with the delivery of a product "*is necessarily commercial speech*" (at least, where "commercial speech" is used as a term of art, as the Legislature intended). Simpson S.B. at 6.

Second, and tellingly, Simpson's Supplemental Brief makes clear that Simpson is openly advocating the Court's adoption of the broad business-based exemption that was rejected by the Legislature. As Gore's Supplemental Brief explains, SB 515 (which was enacted as Section 425.17(c)) differed from prior, rejected, legislation, which "exempted motions brought by product manufacturers, sellers, etc. where the underlying action was based upon representations of that entity regarding its product, service or operations." Gore S.B. at 12, citing MJN at MJN0055, MJN0126; *see also* Gore S.B. at 14-15. The Legislature rejected Simpson's approach, which focused on "a class of defendants," and instead focused on "constitutionally protected conduct." Gore S.B. at 12. To achieve this goal, the Legislature expressly adopted the *Kasky* commercial speech requirements as the "content" necessary to trigger the Section 425.17(c) exemption. *Id.* at MJN0322. Simpson's interpretation – that all commercial activity, and not merely commercial speech, is exempt from the anti-SLAPP statute's protection – would negate the Legislature's careful consideration of this issue and its decision *not* to adopt a broad business-based exemption.

3. CONCLUSION

Simpson's Supplemental Brief highlights the inherent flaws in Simpson's argument. This Court should give Section 425.17(c) the meaning intended by the Legislature and conclude – as did the trial court and court of appeal – that it has no application to Gore's Notice at issue here. For the foregoing reasons and those set forth in Gore's Answer Brief and Supplemental Brief, Gore respectfully requests that the Court affirm the decision of the trial court granting Gore's anti-SLAPP Motion.

Dated: March 10, 2010

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), the text of this brief, including footnotes and excluding the caption, table of contents, tables of authorities and this Certificate, consists of 2,720 words in 13-point Times New Roman type as counted by the Microsoft Word 2003 word-processing program used to generate the text.

Dated: March 18, 2010

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