

Calif. High Court Ruling: Good News for Defamation Plaintiffs

By Anthony Glassman and Rebecca Kaufman

Defamation plaintiffs rejoice! The California Supreme Court recently issued a ruling in a speech case, *FilmOn.com v. DoubleVerify*, 2019 Cal. LEXIS 3042, 2019 WL 1984290, that curtails the until now seemingly ever-expanding notion of whether speech “is in connection with” a matter of public interest and therefore falls within the ambit of the widely abused anti-SLAPP statute. Never before had a California court articulated a formula for determining whether something “is in connection with” a matter of public interest. Courts must now determine whether a statement, even if the content touches on a general area of public interest, contributes to or furthers the public conversation on that issue of public interest.

California’s anti-SLAPP statute provides an early special motion to strike meritless claims arising from acts in furtherance of a person’s “exercise of a constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest,” see Cal. Civ. Proc. Section 425.16(e)(4). The anti-SLAPP law was enacted “to protect nonprofit corporations and common citizens ‘from



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large corporate entities and trade associations’ in petitioning government,” as in *USA Waste of California v. City of Irwindale*, 184 Cal.App.4th 53, 66 (2010). In other words, the law was meant to protect against defamation claims by well-funded organizations against ordinary citizens who exercised their rights to petition and free speech. For example, the anti-SLAPP statute was intended to deter wealthy developers from dragging homeowners who oppose their proposed projects into court with bogus defamation lawsuits for the purpose of chilling their free speech and breaking them financially.

Unfortunately, the purpose of the anti-SLAPP statute has been turned on its head as wealthy media defendants have utilized the law to fend off legitimate speech claims from ordinary citizens. The deck has been stacked against would-be speech plaintiffs, who rarely overcome the first prong on anti-SLAPP motions—whether the offending speech is “a matter of public interest”—because the courts of appeal have expanded the standard to include almost every conceivable speech act. Plaintiffs are not imagining the imbalance; the California Supreme Court recognized the “travails of the lower courts demonstrate

that virtually always, defendants succeed in drawing a line—however tenuous—connecting their speech to an abstract issue of public interest.” Accordingly, the “public interest” determination has become so broad as to render it meaningless. Until now.

FilmOn.com holds that the context of a defendant’s speech (including the identity of the speaker, the audience, and the purpose of the speech) has to be considered by a court in analyzing whether the statement was made in furtherance of free speech in connection with a public issue. *FilmOn.com*’s defendant DoubleVerify reports to prospective online advertisers about the sites on which they are considering placing ads. DoubleVerify made disparaging remarks about *FilmOn.com* in confidential reports to DoubleVerify’s paying clients regarding *FilmOn.com*’s businesses practices, specifically that *FilmOn.com* contained adult content and violated copyright law.

DoubleVerify successfully argued in the court of appeal that its speech was of “public interest” and therefore qualified for anti-SLAPP protection. The court of appeal agreed that issues of adult content and copyright infringement are a matter of public interest because, apart from DoubleVerify’s report, they have been “the subject of numerous press reports, regulatory actions, and federal lawsuits,” see *FilmOn.com v. DoubleVerify*, 13 Cal.App.5th 707, 720 (2017). Focusing solely on the content of the report, the

court of appeal held that context is irrelevant to anti-SLAPP analysis of whether speech is made in connection with a “public interest.” By this logic, any defamatory statement, so long as it references a matter of public interest, is protected by the anti-SLAPP statute, regardless of how tenuous the statement is from the public issue at hand.

The California Supreme Court reversed, holding “a court must consider the context as well as the content of a statement in determining whether the statement furthers the exercise of constitutional speech rights in connection with a matter of public interest.” While courts have explored the characteristics of public issues and matters of public interest, they have failed to “articulate the requisite nexus between the challenged statements and the asserted issue of public interest—to give meaning, in other words, to the ‘in connection with’ requirement.”

Although courts have increasingly looked solely to content to determine whether speech was made in furtherance of a matter of public interest, they now must look to context as well. The two-part analysis articulated by the court asks what public issue or issue of public interest the speech in question implicates (i.e., the content), and what functional relationship exists between the speech and the public conversation about some matter of public interest (i.e., context).

Under the Supreme Court’s analysis, for a speaker to avail

herself of the anti-SLAPP statute, it is not enough for her speech to touch on a general matter of public interest; rather, the speaker must have “participated in, or furthered, the discourse that makes an issue of public interest.”

The court found that DoubleVerify’s conduct did not further public conversation on the issues of adult content and copyright infringement because DoubleVerify issued the offending report not to the wider public, but privately to a small group of paying clients to use for their own business purposes. Fairness has prevailed. No longer will defamation defendants be all but assured of fulfilling their burden on anti-SLAPP motions, thereby switching the burden to plaintiffs to establish a “probability” of prevailing on the claims challenged by the anti-SLAPP motion. Plaintiffs seeking damages for defamatory speech that, regardless of content, does not further public conversation now have a meaningful chance to move forward with their cases.

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