S164174

ORIGINAL

SUPREME COURT
FILED

SEP 26 2008

Frederick K. Ohlrich Clerk

Deputy

IN THE SUPREME COURT OF CALIFORNIA

SIMPSON STRONG-TIE COMPANY, INC.

Plaintiff and Appellant,

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

OPENING BRIEF ON THE MERITS

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ISSUES PRESENTED 1

INTRODUCTION 2

BACKGROUND 5

A. Simpson Strong-Tie Company 5

B. The corrosive effect of pressure-treated wood on metal fasteners 6

C. Simpson's efforts to educate the public and ensure proper selection of metal fasteners for wood decks 7

D. The defamatory advertisement 9

E. Attorney Pierce Gore 9

F. Simpson's confirmation of the advertisement's defamatory nature 11

G. Simpson's lawsuit and the anti-SLAPP dismissal 12

H. The Court of Appeal's decision 13

LEGAL DISCUSSION 13

I. SECTION 425.17, SUBDIVISION (c)(1) PRESCRIBES TWO COMMERCIAL SPEECH EXEMPTIONS FROM ANTI-SLAPP PROTECTION 13

II. DEFENDANT SHOULD HAVE THE BURDEN OF SHOWING THAT ACTIVITY FALLS OUTSIDE SECTION 425.17'S EXEMPTIONS 16

A. On an anti-SLAPP motion, defendant has the burden of showing that a claim arises from protected activity. 16

B. Defendant's burden on an anti-SLAPP motion applies in all anti-SLAPP litigation as a matter of stare decisis. 17

C. Defendant's burden on an anti-SLAPP motion necessarily encompasses the question whether activity is statutorily exempt from anti-SLAPP protection. 19

D. Evidence Code section 500 imposes on an anti-SLAPP defendant the burden of persuasion as to the nonexistence of facts that invoke the commercial speech exemptions. 20

E. The issue is not resolved by analogy to *Soukup*. 23

F. It makes sense for Gore to have the burden of persuasion 25

III. THE COMMERCIAL SPEECH EXEMPTIONS ARE PROPERLY CONSTRUED TO INCLUDE ADVERTISING BY A LAWYER SOLICITING CLIENTS FOR A CONTEMPLATED LAWSUIT 26

A. The commercial speech exemptions should be construed to help curb abuse of the anti-SLAPP statute. 26

B. Section 425.17's legislative history demonstrates that the commercial speech exemptions are intended to apply to advertising of professional services. 28

C. The "content and purpose" exemption includes advertising that touts a lawyer's services in an effort to solicit clients for a contemplated lawsuit. 31

D. The "course of delivery" exemption includes services incidental to a defendant's typical business transactions. 37

CONCLUSION 45

CERTIFICATE OF WORD COUNT 47

TABLE OF AUTHORITIES

Page

CASES

Advanced Micro Devices, Inc. v. Intel Corp.
(1994) 9 Cal.4th 362 36

Aguilar v. Atlantic Richfield Co.
(2001) 25 Cal.4th 826 22

Aguilar v. Avis Rent A Car System, Inc.
(1999) 21 Cal.4th 121 27

Bigsby v. Johnson
(1941) 18 Cal.2d 860 40

Brill Media Co., LLC v. TCW Group, Inc.
(2005) 132 Cal.App.4th 324 . . . . . 1, 3, 4, 13, 17, 37, 38, 39

California Assn. of Psychology Providers v. Rank
(1990) 51 Cal.3d 1 . . . . . 27, 28

Cassady v. Morgan, Lewis & Bockius LLP
(2006) 145 Cal.App.4th 220 23

Cole v. Fair Oaks Fire Protection Dist.
(1987) 43 Cal.3d 148 40

Colonial Ins. Co. v. Ind. Acc. Com.
(1945) 27 Cal.2d 437 21

Conservatorship of Hume
(2006) 140 Cal.App.4th 1385 22

Equilon Enterprises v. Consumer Cause, Inc.
(2002) 29 Cal.4th 53 . . . . . 16, 18, 19

Forsher v. Bugliosi
(1980) 26 Cal.3d 792 34

Ghirado v. Antonioli
(1994) 8 Cal.4th 791 26

HMS Capital, Inc. v. Lawyers Title Co.
(2004) 118 Cal.App.4th 202 34

Houge v. Ford
(1955) 44 Cal.2d 706 15

In re Lorenzo C.
(1997) 54 Cal.App.4th 1330 21

Jackson v. County of Los Angeles
(1997) 60 Cal.App.4th 171 44

Jewett v. Capital One Bank
(2003) 113 Cal.App.4th 805 32

Kasky v. Nike, Inc.
(2002) 27 Cal.4th 939 . . . . . 35, 36

Kray Cabling Co. v. County of Contra Costa
(1995) 39 Cal.App.4th 1588 15

M.G. v. Time Warner, Inc.
(2001) 89 Cal.App.4th 623 34

MacLeod v. Tribune Publishing Co.
(1959) 52 Cal.2d 536 . . . . . 34, 35

Martinez v. Metabolife Intern., Inc.
(2003) 113 Cal.App.4th 181 41

Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.
(2007) 41 Cal.4th 954 20

Nally v. Grace Community Church
(1988) 47 Cal.3d 278 34

Navellier v. Sletten
(2002) 29 Cal.4th 82 . . . . . 16, 19, 26

Norwood v. Judd
(1949) 93 Cal.App.2d 276 21

Ontario Community Foundations, Inc. v. State Bd. of Equalization
(1984) 35 Cal.3d 811 41

Paley v. Superior Court
(1955) 137 Cal.App.2d 450 19

Peabody v. City of Vallejo
(1935) 2 Cal.2d 351 . . . . . 21, 22

People v. Davis
(1967) 66 Cal.2d 175 22

People v. Jenkins
(2006) 140 Cal.App.4th 805 39

Regents of the University of California v. Sumner
(1996) 42 Cal.App.4th 1209 39

Ryan v. Garcia
(1994) 27 Cal.App.4th 1006 . . . . . 38, 39

Shoemaker v. Myers
(1990) 52 Cal.3d 1 40

Simmons v. Ghaderi
(2008) 44 Cal.4th 570 39

Slaney v. Ranger Ins. Co.
(2004) 115 Cal.App.4th 306 34

Soukup v. Law Offices of Herbert Hafif
(2006) 39 Cal.4th 260 . . . . . 23, 24

Taheri Law Group v. Evans
(2008) 160 Cal.App.4th 482 43

United Steelworkers of America v. Board of Education
(1984) 162 Cal.App.3d 832 19

Western Landscape Construction v. Bank of America
(1997) 58 Cal.App.4th 57 . . . . . 18, 19

STATUTES AND COURT RULES

Business & Professional Code § 17200 12

Business & Professional Code § 17500 12

California Rules of Court, rule 8.520(c)(1) 47

Civil Code § 47 43

Code of Civil Procedure § 425.16 . . . . . *passim*

Code of Civil Procedure § 425.17 . . . . . *passim*

Code of Civil Procedure § 425.18 . . . . . 23, 24

Code of Civil Procedure § 904.1 27

Code of Civil Procedure former § 1981 22

Evidence Code § 500 . . . . . 20, 22

Evidence Code § 1119 39

Evidence Code former § 1152.5 . . . . . 38, 39

Labor Code § 3600 40

MISCELLANEOUS

Bruce Brusavich, President of Consumer Attorneys of California, letter to
Honorable Sheila Kuehl, May 1, 2003 . . . . . 29, 30

California Law Revision Com. comment, 29B Pt. 1 West's Ann. Evid. Code
(1995 ed.) foll. § 500 22

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Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended May 1, 2003 29

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S164174

IN THE SUPREME COURT OF CALIFORNIA

SIMPSON STRONG-TIE COMPANY, INC.,

Plaintiff and Appellant,

vs.

PIERCE GORE and THE GORE LAW FIRM,

Defendants and Respondents.

OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

1. Which party bears the burden of persuasion with respect to the applicability of the anti-SLAPP exemptions set forth in Code of Civil Procedure section 425.17, subdivision (c)?

2. Does Code of Civil Procedure section 425.17, subdivision (c) exempt from anti-SLAPP protection an advertisement by a lawyer soliciting clients for a contemplated lawsuit?

INTRODUCTION

There can be too much of a good thing. That is what has happened with California's anti-SLAPP statute, which is being vastly overused. The Legislature recently addressed the problem by exempting certain lawsuits – including actions arising from commercial speech – from anti-SLAPP protection. The present case concerns the scope of the commercial speech exemptions.

Defendant Pierce Gore is an attorney who specializes in plaintiffs' class-action lawsuits. Plaintiff Simpson Strong-Tie Company, Inc., is a manufacturer of construction fasteners and connectors. Gore targeted Simpson and two other companies for a class action he hoped to file, even though he had no clients. He published a defamatory advertisement in a major daily newspaper saying that users of Simpson's and the other two companies' galvanized screws in wood deck construction "may have certain legal rights and be entitled to monetary compensation" and should contact him "if you would like an attorney to investigate whether you have a potential claim." (Appellant's Appendix p. 4 (AA).) The advertisement falsely implied that Simpson's galvanized screws are defective. But it produced no clients for Gore, and no lawsuit against Simpson.

Simpson sued Gore for damages and injunctive relief, alleging defamation and other causes of action. Gore filed an anti-SLAPP motion (Code Civ. Proc., § 425.16), which the trial court granted. The Court of Appeal affirmed the anti-SLAPP dismissal.

California's anti-SLAPP statute has been a great success but a mixed blessing. The statute's 1992 enactment created something of a monster which clever lawyers increasingly exploited throughout the late 1990s so that, by the beginning of the new century, the California trial and appellate courts were

dealing with an explosion of anti-SLAPP motions. That explosion has not yet abated, as this court well knows.

In 2003, the Legislature recognized this problem and sought to curb the proliferation of anti-SLAPP litigation by enacting Code of Civil Procedure section 425.17,[1/] which creates two classes of exemptions from the scope of the anti-SLAPP statute. The first class of exemptions (§ 425.17, subd. (b)) – which does not apply to the present case – prohibits anti-SLAPP motions in certain public interest litigation. The second class of exemptions (§ 425.17, subd. (c)) is for two types of commercial speech by providers of goods and services – persons like Gore, who provides legal services.

The first commercial speech exemption from anti-SLAPP protection is for a statement or conduct by a seller or lessor of goods or services consisting of "representations of fact about that person's or a business competitor's business operations, goods, or services that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services." (§ 425.17, subd. (c)(1).) The second commercial speech exemption is for a statement or conduct by a seller or lessor of goods or services if "the statement or conduct was made in the course of delivering the person's goods or services." (*Ibid.*)

The initial issue presented for review in this case is which party bears the burden of persuasion to show whether the commercial speech exemptions apply. In *Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324, 330-331 (*Brill*), Division Five of the Second Appellate District held the *defendant* has the burden of showing that activity is *not* within the scope of section 425.17's exemptions. In the present case, however, the Court of Appeal expressly disagreed with *Brill* and held precisely the opposite – that the

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1/ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

plaintiff has the burden of showing the activity *is* within the scope of section 425.17's exemptions. (Typed opn. pp. 7-8.)

The Court of Appeal was wrong on this point, and *Brill* was right. On any anti-SLAPP motion, the defendant has the burden of showing that a claim arises from protected activity, which necessarily encompasses the question whether activity is statutorily exempt from anti-SLAPP protection. Moreover, Evidence Code section 500 imposes on defendant the burden of establishing "each fact the existence or nonexistence of which is essential" to a defense, which means the moving defendant on an anti-SLAPP motion has the burden of persuasion as to the "nonexistence" of facts that would otherwise trigger the commercial speech exemptions.

The other issue presented for review is whether the two discrete commercial speech exemptions apply to advertising by a lawyer soliciting clients for a contemplated lawsuit, thus depriving such advertising of anti-SLAPP protection. The answer is *yes*, as to each of the two exemptions. This court should construe those exemptions to help curb overuse of the anti-SLAPP statute, which is the purpose of section 425.17 as declared in its preamble. (§ 425.17, subd. (a).) Section 425.17's legislative history further demonstrates that the Legislature intended the commercial speech exemptions to apply to advertising of professional services. Consistent with the legislative intent behind section 425.17, the statute is properly construed to exempt an advertisement that touts a lawyer's services in an effort to drum up business.

With regard to the commercial speech exemption for a person's statement or conduct "made in the course of delivering the person's goods or services" (§ 425.17, subd. (c)(1)), *Brill* held that this exemption includes services *incidental to* – and thus in the course of – a defendant's typical business transactions. (*Id.* at p. 341.) In the present case, the Court of Appeal again expressly disagreed with *Brill* and held precisely the opposite – the

exemption does *not* include services incidental to a defendant's typical business transactions. (See typed opn. pp. 15-16). By applying this narrow construction to section 425.17, the Court of Appeal effectively nullified the broad language in this exemption that makes it applicable to statements made "in the course of" delivering goods and services. Again, the Court of Appeal was wrong on this point, and *Brill* was right. The Legislature's perception of the need to rein in overuse of anti-SLAPP motions counsels in favor of *Brill's* approach. This court should not construe section 425.17 so narrowly as to make it toothless.

The Court of Appeal's treatment of the commercial speech exemptions would place defamatory mass lawyer advertising like Gore's under the cloak of anti-SLAPP protection – and thus would effectively leave innocent victims like Simpson without a remedy – in situations where the Legislature plainly intended otherwise in enacting section 425.17.

BACKGROUND

A. Simpson Strong-Tie Company.

Simpson Strong-Tie Company began in 1914 as a family-run window screen business based in Oakland, California. In 1956, the business expanded into construction fasteners and connectors – screws, nails, joist hangers and the like – after a neighbor asked the founder's son, Barclay Simpson, for help in making metal connectors for a roofing project. The company has since grown to be the world's largest manufacturer of construction fasteners and connectors used in wood-frame construction to make structures stronger and safer. (See AA 465.)

B. The corrosive effect of pressure-treated wood on metal fasteners.

Simpson sells two types of fasteners – that is, screws – for use with exterior wood decks: stainless steel and galvanized steel. (AA 467, 662-663.) Stainless steel is an alloy containing chromium, which makes the steel very resistant to corrosion. Galvanized steel, in contrast, does not contain chromium but is coated with a layer of zinc, which also resists corrosion. Stainless steel is more corrosion-resistant than galvanized steel, but is far more expensive. (AA 451, 661-662.) Simpson makes several types of galvanized screws as well as stainless steel screws, giving purchasers a range of economic choices depending on building materials and environmental conditions. (AA 467, 480.)

Wood used for exterior construction (which Simpson does not manufacture or sell) is commonly "pressure-treated," a process which forces chemical preservatives into the wood, helping to protect it from insects and fungal decay. (AA 658.) In the past, the chemical preservative of choice for wood was Chromated Copper Arsenate (CCA-C), an arsenic-based preservative that was compatible with existing types of galvanized screws. In recent years, however, arsenic became disfavored, and the wood products industry phased it out. By 2004, the lumber industry had fully switched to other chemicals believed to be more environmentally friendly. Some of these new chemicals – which vary among wood manufacturers in type and quantity used – are more corrosive to galvanized steel than arsenic. (AA 451, 466-467, 658, 660.)

In 2002, Simpson commenced an on-going program of evaluating the effects of the new wood chemicals on its metal products and found that, depending on environmental conditions, some of the new chemicals were more

harmful to Simpson's galvanized screws than other new chemicals, and under many conditions only stainless steel screws should be used. Simpson also determined that different types of its galvanized screws could be used with some types of chemical treatments. (AA 452, 466-467, 715, 854 .) Ultimately, Simpson concluded, builders and consumers would have to make an informed choice of which products to use for each individual project, depending on whether the circumstances made it safe to use various types of galvanized screws. (AA 453.)

C. Simpson's efforts to educate the public and ensure proper selection of metal fasteners for wood decks.

Simpson undertook a comprehensive program to provide consumers, builders, architects and engineers with information necessary to choose safely among various types of galvanized and stainless steel screws. Simpson provided this information through six separate vehicles: (1) Simpson's Internet website, (2) Simpson's annual catalog, (3) trade publications, (4) bulletins issued to the building industry, (5) point-of-sale display materials, and (6) Simpson's annual report. (AA 453-455.)

For example, Simpson's website explains: "The pressure-treated wood industry has transitioned away from the use of Chromated Copper Aresenate (CCA-C) to alternative preservative systems for residential use, effective 12/31/03. Some of the replacement alternatives are generally more corrosive than CCA-C." This explanation is followed by a link to a "Pressure Treated Wood Technical Bulletin" for assistance in "select[ing] the appropriate connector for use with various pressure treated woods." There is also this "Warning," titled in bold-face: "While galvanized steel provides some protection, testing has shown that it is still likely to corrode if in contact with

treated wood. The service life of galvanized parts depends on many variables including the location, installation, exposure, and the thickness of the galvanized coating." (AA 878.)

The "Pressure-Treated Wood Technical Bulletin" contains detailed guidelines for selecting the proper type of screw for use with various pressure-treated wood products. It includes a chart which enables the builder or consumer to determine the level of corrosion risk presented – low, medium or high – depending on environmental factors and the chemical content of the wood being used, and recommends specified types of galvanized screws for low and medium risk conditions and stainless steel screws for high risk conditions. (AA 730-733, 874-877.)

Point-of-sale consumer warnings and recommendations are also an essential element of Simpson's public education campaign. For example, at Home Depot, Simpson's product displays include copies of a two-page handout, entitled "Critical Information[:] New Pressure-Treated Woods Require Additional Corrosive Resistance," which contains Simpson's guidelines and chart – the same as in the "Pressure Treated Wood Technical Bulletin" – to assist purchasers in selecting the proper type of screw. (AA 9, 820-821.) Other point-of-sale warnings include a notice entitled "Bulletin: Corrosion Risks," which states: "Metal connectors, anchors, and fasteners may corrode. Treated wood products may cause corrosion and recent changes in the chemical treatment of wood increases this risk. . . . Consult the Simpson Strong-Tie catalog or [Simpson's website] for detailed information concerning use, conditions for applications and limitations of metal products in potentially corrosive conditions. . . ." (AA 819.)

No other metal products company has come close to doing the extensive research and public education that Simpson has done on the corrosion issue. (AA 453.)

D. The defamatory advertisement.

Given Simpson's extensive and comprehensive efforts to warn consumers and building professionals of the risks the new pressure-treated wood products have created, as well as to provide information necessary to choose safely among galvanized and stainless steel screws, company officials were surprised and dismayed when, in early January of 2006, they saw the following advertisement in the *San Jose Mercury* News:

> ATTENTION:
>
> **WOOD DECK OWNERS**
>
> If your deck was built after January 1, 2004 with galvanized screws manufactured by Phillips Fastener Products, Simpson Strong Tie or Grip Rite, you may have certain legal rights and be entitled to monetary compensation, and repair or replacement of your deck.
>
> Please call if you would like an attorney to investigate whether you have a potential claim:
>
> Pierce Gore
> **GORE LAW FIRM**
> 900 East Hamilton Ave.
> Suite 100 Campbell, CA 95008
> 408-879-7444

(AA 4.) The advertisement ran five times in the *San Jose Mercury News* and once in the *Los Gatos Weekly Times*. (AA 124-125.)

E. Attorney Pierce Gore.

Pierce Gore is a highly experienced and successful plaintiffs' class-action lawyer. As a former partner with Lieff, Cabraser, Heimann &

Bernstein, LLP, he headed the firm's offices in Nashville, Tennessee. The many class actions in which he has been counsel of record include *In re Bridgestone/Firestone, Inc., ATX, ATXII and Wilderness Tires Products Liability Litigation* (S.D. Ind., No. IP 00-9373-C-B/S, MDL No. 1373), *In re U.S. Robotics* (Del. Ct. Chancery, No. 15,580), *Linn v. Roto-Rooter, Inc.* (Ohio Ct. Com. Pleas, No. CV-467403), *People v. Arcadia Machine & Tool* (Los Angeles Super. Ct., No. BC210894), *Barton v. Weinstein* (D. Ariz., No. CIV96-1643PHX-ROS), and *Wright v. Travelers Property Casualty Insurance Company of Illinois* (Ill. Circuit Ct., No. 03-L-2). Gore is a veteran in the field.

Yet Gore had no potential clients for a lawsuit against Simpson when he published his defamatory advertisement. He had not discovered a single incident of wood deck collapse caused by a Simpson product – and, indeed, Simpson is unaware of any failure of its screws due to corrosion caused by pressure-treated wood chemicals. (AA 451.) Gore had not even located a single user of Simpson products. He had not so much as walked into a hardware store and looked at a Simpson product or point-of-sale consumer notice. His advertisement was nothing more than a fishing expedition for new business – an attempt to drum up litigants for a class action against Simpson. But the advertisement produced no possible plaintiffs. Although it has now been several years since Gore ran the advertisement, neither he nor anyone else has filed such a lawsuit against Simpson. (AA 5, 125.)

Simpson sent Gore two letters in January of 2006 asking him to cease publication of further defamatory advertisements – but only those that were "directed at Simpson." (AA 442-444, 446-447.) Gore did not respond to either letter. (AA 125.)

F. Simpson's confirmation of the advertisement's defamatory nature.

It seemed obvious that if people who saw Gore's advertisement were given a choice between purchasing a Simpson product and a competing manufacturer's product, they would not likely buy the Simpson product. Nevertheless, before finally deciding to commence this litigation, Simpson was careful to confirm independently whether the advertisement was defamatory and had caused Simpson harm. Simpson hired a qualified opinion survey firm to conduct a study of the advertisement's effect on consumers' opinions of Simpson and its products. (AA 373-376.)

Using generally accepted survey techniques (see AA 373-377), the survey firm's interviewers showed the advertisement to 214 randomly-selected shoppers at nine randomly-selected home improvement stores (AA 376) and obtained two sets of responses to each of six questions asked before and after the shoppers saw the advertisement (AA 424-429). The survey, consistent with the obvious, revealed the following:

- Before seeing Gore's advertisement, 6% thought it likely that Simpson's galvanized screws are defective; after seeing the advertisement, 46% thought it likely that Simpson's galvanized screws are defective. (AA 378.)

- Before seeing Gore's advertisement, less than 1% thought Simpson's galvanized screws are of low quality; after seeing the advertisement, 23% thought Simpson's galvanized screws are of low quality. (AA 377.)

- Before seeing Gore's advertisement, 10% said they were unlikely to buy galvanized screws made by Simpson; after seeing the advertisement, 37% said they were unlikely to buy galvanized screws made by Simpson. (AA 379.)

Based on these and other findings, the survey firm concluded that Gore's advertisement "is capable of significantly damaging the reputation of Simpson Strong-Tie and that it results in a lower stated likelihood that customers would purchase products made by the company." (AA 379.)

G. Simpson's lawsuit and the anti-SLAPP dismissal.

After the survey confirmed the defamatory nature of Gore's advertisement, Simpson filed the present action against Gore and his law firm, asserting causes of action for defamation, trade libel, false advertising (Bus. & Prof. Code, § 17500) and unfair competition (Bus. & Prof. Code, § 17200). (AA 10-12.) The complaint seeks damages and a very narrow injunction restricted solely to prohibiting Gore from including Simpson's name in any advertising seeking clients for a lawsuit related to corrosion resulting from wood construction. (AA 13.) Thus, Simpson does not seek to prohibit Gore from advertising for potential clients who are experiencing such corrosion; Simpson asks only that any such advertising not specify Simpson by name.

Gore filed a motion to strike the action as a SLAPP pursuant to section 425.16. (AA 50-52.) In response, Simpson invoked section 425.17's commercial speech exemptions. (AA 325-335, 343-361.) The superior court granted the anti-SLAPP motion and entered a judgment of dismissal. (AA 960, 974.)

H. The Court of Appeal's decision.

On April 30, 2008, the Court of Appeal affirmed the superior court's decision. The Court of Appeal expressly disagreed with *Brill, supra,* 132 Cal.App.4th 324, on two questions pertaining to section 425.17's commercial speech exemptions from anti-SLAPP protection: first, whether the *defendant* has the burden of showing that activity is *not* within the exemptions; and second, whether the exemption for statements made in the course of delivering services *includes* services incidental to defendant's typical business transactions. As to both questions, *Brill* answered *yes* while the Court of Appeal here answered *no*, saying "[w]e respectfully decline to adhere to [*Brill's*] reasoning" on the first question (typed opn. p. 7) and "we must again respectfully decline to follow that case" on the second question (*id.* p. 15).[2/]

LEGAL DISCUSSION

I.

SECTION 425.17, SUBDIVISION (c)(1) PRESCRIBES TWO COMMERCIAL SPEECH EXEMPTIONS FROM ANTI-SLAPP PROTECTION.

The Legislature enacted section 425.17 effective January 1, 2004, to create two classes of exemptions from the scope of section 425.16. The first class of exemptions (§ 425.17, subd. (b)) – which does not apply here – is for public interest litigation. The second class of exemptions (§ 425.17, subd. (c))

2/ The Court of Appeal also said that certain flaws the court perceived in Simpson's public opinion survey – e.g., failure to define the commonly-used word "defective" (typed opn. p. 31) – rendered the entire survey "crippled as evidence of defamatory meaning." (*Id.*, p. 30.)

is for lawsuits involving commercial speech by providers of goods or services – persons like Gore, who provide legal services.

Subdivision (c) of section 425.17 excludes from the scope of section 425.16's anti-SLAPP protection "any cause of action brought [here, by Simpson] against a person [here, Gore] primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person," if both of two factors exist. For the first factor, subdivision (c)(1) prescribes, in the disjunctive, either of two alternatives, as follows:

- "The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services,

  "or

  "the statement or conduct was made in the course of delivering the person's goods or services." (§ 425.17, subd. (c)(1).)

Subdivision (c)(2) prescribes the second factor, in pertinent part, as follows: "The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer . . . , notwithstanding that the conduct or statement concerns an important public issue." (§ 425.17, subd. (c)(2).) This second factor is plainly present here – Gore's intended audience was potential clients.

Subdivision (c)(1) of section 425.17 thus prescribes two discrete commercial speech exemptions from anti-SLAPP protection where, as here, the requirements of subdivision (c)(2) are satisfied. The first subdivision (c)(1) exemption applies to statements or conduct by "a person" like Gore consisting of "representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services." (§ 425.17, subd. (c)(1).) For the sake of simplicity, this brief refers to the first subdivision (c)(1) exemption as the "content and purpose" exemption (the Court of Appeal's opinion called it the "content" exemption (typed opn. p. 10)). The second subdivision (c)(1) exemption applies to statements or conduct "made in the course of delivering the person's goods or services." (§ 425.17, subd. (c)(1).) For the sake of simplicity, this brief refers to the second subdivision (c)(1) exemption as the "course of delivery" exemption (the Court of Appeal's opinion called it the "delivery" exemption (typed opn. p. 10)).

These two exemptions are separated by the disjunctive "or," which "is a delineation of alternatives." (*Kray Cabling Co. v. County of Contra Costa* (1995) 39 Cal.App.4th 1588, 1593; accord, *Houge v. Ford* (1955) 44 Cal.2d 706, 712.) This disjunctive language means that subdivision (c)(1) creates two *different* exemptions, and only one need apply to place a statement outside the scope of anti-SLAPP protection.

Both exemptions apply here – the "content and purpose" exemption because this action arises from representations Gore made about his business operations or services for the purpose of promoting or selling his services, and the "course of delivery" exemption because the action arises from statements Gore made in the course of delivering his services. The Court of Appeal erred in holding otherwise.

II.

DEFENDANT SHOULD HAVE THE BURDEN OF SHOWING THAT ACTIVITY FALLS OUTSIDE SECTION 425.17'S EXEMPTIONS.

A. On an anti-SLAPP motion, defendant has the burden of showing that a claim arises from protected activity.

Because a defendant always has the burden of showing that a claim has anti-SLAPP protection, the defendant necessarily has the burden of showing that the challenged activity is protected because it falls *outside* section 425.17's exemptions – i.e., that the anti-SLAPP statute applies without exemption.

Section 425.16 establishes a two-pronged procedure for adjudicating an anti-SLAPP motion. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*); accord, *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon, supra,* at p. 67; accord, *Navellier, supra,* at p. 88.) Thus, the *defendant* has a threshold burden of showing anti-SLAPP protection – i.e., that the anti-SLAPP statute applies to the activity giving rise to the lawsuit. Second, "[i]f the court finds such a showing [of anti-SLAPP protection] has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon, supra,* at p. 67; accord, *Navellier, supra,* at p. 88.)

As we explain below, this two-step process underlies *all* anti-SLAPP analysis: Any defendant claiming anti-SLAPP protection must first sustain this threshold burden of showing that the claim arises from protected activity.

B. Defendant's burden on an anti-SLAPP motion applies in all anti-SLAPP litigation as a matter of stare decisis.

In *Brill, supra*, 132 Cal.App.4th at page 330, Division Five of the Second Appellate District said it is "procedurally unclear" how a court determines the applicability of section 425.17's exemptions from anti-SLAPP protection. *Brill* asked: "Is this ruling made as part of the first prong" of anti-SLAPP analysis "where the defendant has the burden of proof?" (*Brill, supra,* at p. 330.) *Brill* concluded the answer is *yes*. According to *Brill*, "common sense tells us the better analysis is that" the matter "is a first prong determination" on which defendant has the burden (*ibid.*), for three reasons: (1) pertinent language in section 425.17 "closely parallel[s]" language used by the Courts of Appeal to describe the first prong of anti-SLAPP analysis, (2) application of section 425.17 "is not a merits based or second prong issue," and (3) no evidence or legislative history indicates that section 425.17 was intended "to alter the two–prong burden-shifting procedural requirements" for anti-SLAPP analysis "or to impose a separate procedural format for evaluating" section 425.17 exemption issues. (*Brill, supra*, at p. 331.)

In the present case, however, the Sixth Appellate District reached the opposite conclusion, stating that "[w]e respectfully decline to adhere to this reasoning" in *Brill*. (Typed opn. p. 7.) Instead, the Court of Appeal held that "Simpson, as the party claiming such an exemption, has the burden of establishing its applicability." (*Id.* p. 8.) According to the Sixth Appellate District, the *Brill* court went wrong by relying on this court's statement in *Equilon, supra,* 29 Cal.4th at page 67, that section 425.16 establishes "a two-step process" for ruling on an anti-SLAPP motion. The Sixth Appellate District rejected what it called "the supposition" that *every* anti-SLAPP motion

invokes this two–step process, and observed that "[t]he court in *Equilon* said nothing about the treatment of a claim of exemption." (Typed opn. p. 7.) The Court of Appeal concluded that *Equilon's* pronouncement of the two-step process "was not even a *reason*" for *Equilon's* holding and thus "furnishes no authority for imposing upon a moving defendant the burden of negating the possibility that the plaintiff's cause of action falls within an exemption to the anti-SLAPP statute." (*Id.* p. 8, original italics.)

In other words, in rejecting *Brill*, the Court of Appeal determined that this court's prescription of the two-step process in *Equilon* and *Navellier* is not stare decisis but merely a dictum that the California courts are free to disregard outside the precise procedural postures of those cases.

The Court of Appeal wrongly disregarded *Equilon* and *Navellier*, for they indeed establish, as a rule of general application and as a matter of stare decisis, the two-step anti-SLAPP analysis and its burden-shifting process. The test of stare decisis is not strictly, as the Court of Appeal asserted, whether a pronouncement was "a *reason* for the [court's] holding" (typed opn. p. 8, original italics), but, more broadly, whether the pronouncement was "*necessary* to the decision." (*Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61, italics added.) Plainly this court's pronouncement of the two-step process in *Equilon* was necessary to the court's decision in that case, for the court explained that "[w]hen *analyzed in this manner*, the Court of Appeal's ruling is correct." (*Equilon, supra,* 29 Cal.4th at p. 67, italics added.) In other words, for this court to have decided in *Equilon* that "the Court of Appeal's ruling is correct" (*ibid.*), it was necessary for the court to analyze the Court of Appeal's decision "in this manner" (*ibid.*) – that is, according to the two-step burden-shifting process that *Equilon* enunciated.

Equilon's pronouncement of the two-step process also guided this court's contemporaneous decision in *Navellier*: First the *Navellier* opinion summarized the two-step process, citing *Equilon* (see *Navellier, supra,* 29 Cal.4th at p. 88); then the opinion followed that process, ruling for the defendant on the first step (*id.* at pp. 89-95) and remanding for further litigation on the second step (*id.* at p. 95). Thus, *Navellier's* threshold pronouncement of the two-step process was necessary to the court's subsequent analysis, making the pronouncement stare decisis in *Navellier*, too. (*Western Landscape Construction v. Bank of America, supra,* 58 Cal.App.4th at p. 61.) Furthermore, an appellate pronouncement may be stare decisis if intended for guidance in further litigation on remand (see *United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 834; *Paley v. Superior Court* (1955) 137 Cal.App.2d 450, 460), which was the situation in *Navellier*.

C. Defendant's burden on an anti-SLAPP motion necessarily encompasses the question whether activity is statutorily exempt from anti-SLAPP protection.

Once the two-step analysis with its shifting burdens is properly recognized as the rule of general application this court enunciated in *Equilon* and *Navellier*, it becomes apparent that the Court of Appeal's decision in the present case is wrong and *Brill* is right. The defendant's first-prong burden on an anti-SLAPP motion *necessarily* encompasses the question whether activity is statutorily exempt from anti-SLAPP protection. Defendant's first-prong burden is to show "that the challenged cause of action is one arising from *protected activity*." (*Equilon, supra,* 29 Cal.4th at p. 67, italics added.) In enacting subdivision (c) of section 425.17, the Legislature has determined that

certain forms of commercial speech are not *protected activity*. Thus, where a plaintiff asserts a statutory exemption under section 425.17, the defendant, in order to show that a cause of action arises from protected activity, necessarily must show that the activity is not within a statutory exemption from such protection. For this reason, and for those stated in *Brill*, the *Brill* court's resolution of this issue is correct. *Brill* correctly applied the two-step process and its burdens to conclude properly that the defendant has the burden of showing that activity falls outside the statutory exemptions and is therefore entitled to anti-SLAPP protection.

D. Evidence Code section 500 imposes on an anti-SLAPP defendant the burden of persuasion as to the nonexistence of facts that invoke the commercial speech exemptions.

The *Brill* court's conclusion is consistent with Evidence Code section 500, which states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence *or nonexistence* of which is essential to the claim for relief or defense that he is asserting." (Italics added.) Anti-SLAPP protection is a *defense* to a lawsuit. Thus, the moving defendant has the burden of persuasion[3/] as to the existence or nonexistence of every fact that is essential to "asserting" (*ibid.*) anti-SLAPP protection. Section 425.17's "content and purpose" exemption depends on the existence of two facts – the statement was "about that person's or a business competitor's business operations, goods, or services," and the statement was "made for the purpose"

3/ The Evidence Code uses the term "burden of proof" for what is now more commonly called the "burden of persuasion." (See, e.g., *Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 969.)

of obtaining approval for, promoting, or selling or leasing goods or services. Section 425.17's "course of delivery" exemption depends on the existence of the fact that the statement was "made in the course of delivering" goods or services. (§ 425.17, subd.(c)(1).) Thus, application of anti-SLAPP protection to commercial speech – that is, for the commercial speech exemptions to be inapplicable – requires the *nonexistence* of these "content and purpose" and "course of delivery" facts. Consequently, because the nonexistence of these facts is essential to the moving defendant's assertion of anti-SLAPP protection, Evidence Code section 500 imposes on defendant the burden of showing that they do not exist.

The Court of Appeal relied on a so-called "general principle" (typed opn. p. 8) which was rooted in case law that predated Evidence Code section 500, quoting as follows from *Norwood v. Judd* (1949) 93 Cal.App.2d 276, 282: "One claiming an exemption from a general statute has the burden of proving that he comes within the exception." (See typed opn. p. 8.)[4/] The rule of *Norwood v. Judd*, however, is no longer the law in California, having been superseded by Evidence Code section 500. The old *Norwood v. Judd* rule derived from a stale maxim that "[t]he burden of proof rests upon the party holding the affirmative of the issue." (E.g., *Colonial Ins. Co. v. Ind. Acc. Com.* (1945) 27 Cal.2d 437, 441, internal quotation marks omitted [relying on this maxim to conclude that "where the statute has exemptions, exceptions or matters which will avoid the statute the burden is on the claimant to show that he falls within that category"].) The maxim was formerly codified in Code of Civil Procedure section 1981, which stated: "The party holding the affirmative of the issue must produce the evidence to prove it . . . ." (See *Peabody v. City*

4/ The other California state court case mentioned in the Court of Appeal's discussion of this point, *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345 (see typed opn. p. 8), cited *Norwood v. Judd* as analogous authority for a different point.

of Vallejo (1935) 2 Cal.2d 351, 381.) Because of persistent criticism that the maxim frequently lacked "substantial meaning" (e.g., *People v. Davis* (1967) 66 Cal.2d 175, 181) and was easily manipulated to produce any desired result, the Legislature scrapped former Code of Civil Procedure section 1981 in the 1967 Evidence Code, replacing old section 1981 with new Evidence Code section 500. (See Cal. Law Revision Com. com., 29B Pt. 1 West's Ann. Evid. Code (1995 ed.) foll. § 500, pp. 553-554; *Conservatorship of Hume* (2006) 140 Cal.App.4th 1385, 1389, fn. 5.) Under Evidence Code section 500, the focus is no longer on who holds the so-called "affirmative of the issue" but instead is on the existence or nonexistence of facts essential to prove a claim or defense. (*Conservatorship of Hume, supra,* 140 Cal.App.4th at p. 1389, fn. 5.)

This change of focus makes all the difference here. Under old section 1981, Simpson might have been said to have had the "affirmative of the issue" whether the commercial speech exemptions apply. Under new Evidence Code section 500, however, the *nonexistence* of the factual predicates for the commercial speech exemptions is essential to Gore's anti-SLAPP defense, which means Gore has the burden of showing those facts do not exist.

The *Brill* court's conclusion is also consistent with "the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Under this principle, a defendant who seeks an anti-SLAPP dismissal of a lawsuit arising from commercial speech should have the burden of establishing that the speech enjoys anti-SLAPP protection because it falls outside the commercial speech exemptions.

Finally, the *Brill* court's conclusion is consistent with the rule that, in deciding whether to shift the normal allocation of the burden of persuasion, courts will consider, among other things, "the knowledge of the parties concerning the particular fact" and "the availability of the evidence to the

parties." (E.g., *Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 234, internal quotation marks omitted.) Gore's subjective purpose for running his advertisement (which is germane to the "content and purpose" exemption; see *post*, pp. 31-32) and whether the advertisement was typical of his business transactions (which is germane to the "course of delivery" exemption; see *post*, pp. 37-41) are both facts that are peculiarly within his knowledge. Consequently, there is no reason to shift the normal allocation of the burden of persuasion as prescribed by Evidence Code section 500, and every reason to impose that burden on Gore.

E. The issue is not resolved by analogy to *Soukup*.

Gore has contended that the first issue presented for this court's review can be resolved by drawing an analogy to *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260 (*Soukup*). Gore construes *Soukup* as holding that a plaintiff has the burden of establishing the applicability of an exemption from the anti-SLAPP statute. (See Answer to Pet. for Review 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 filed 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." (§ 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 (by the original SLAPP plaintiff) was illegal as a matter of law.

(*Soukup, supra,* 39 Cal.4th at p. 286.) *Soukup* made clear that the SLAPPback plaintiff's burden is prescribed as such not because of the status of section 425.18 as an exemption statute, but rather because it would be unfair to impose a greater burden on a SLAPPback defendant (the original SLAPP plaintiff) than the burden imposed on an ordinary SLAPP defendant, which is merely to establish that the claim arises from protected activity. *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*, the SLAPPback plaintiff has the burden of establishing that the original SLAPP was illegal as a matter of law, not because the SLAPPback statute is an exemption from anti-SLAPP protection, but because it would be wrong to impose a greater burden on a SLAPPback defendant than that imposed on an ordinary SLAPP defendant by requiring the SLAPPback defendant to establish that the underlying SLAPP was *not* illegal as a matter of law. That is why Gore's attempt to analogize the present case to *Soukup* fails. *Soukup* turned on the nature of the SLAPP defendant's burden, not the nature of 425.18 as an exemption statute. The lesson of *Soukup* is that, in both SLAPP and SLAPPback cases, the defendant's burden is to establish that the claim arises from protected activity.

The present case is what *Soukup* called "the ordinary SLAPP case" (*Soukup, supra*, 39 Cal.4th at p. 286), where the defendant's burden to show that activity has anti-SLAPP protection necessarily encompasses the question whether section 425.17 exempts such activity from anti-SLAPP protection. (See *ante*, pp. 19-20.) 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 SLAPP defendant has the burden of showing activity is protected because it falls outside the statutory exemptions from the anti-SLAPP statute.

F. It makes sense for Gore to have the burden of persuasion.

The law in all its twists and turns, however obscure, should make sense to nonlawyers if we attorneys and judges are to maintain the public's respect for the legal process. It makes sense for Gore to have the burden of persuasion here: It is self-evident that he ran his advertisement for the purpose of promoting his services (which invokes the "content and purpose" exemption), and he admits that he ran the advertisement as a routine part of his class-action practice and thus in the course of delivering his services (which invokes the "course of delivery" exemption). If the facts could somehow be otherwise – as unlikely as that seems – Gore should have the burden of persuading the superior court that he did *not* run his advertisement to drum up business and as a routine part of delivering his class-action legal services.

We next demonstrate that regardless of who has the burden of persuasion, the record in this case demonstrates that both of the commercial speech exemptions apply here and exclude Gore's advertisement from anti-

SLAPP protection as a matter of law – although either exemption will deprive the advertisement of anti-SLAPP protection.[5/]

III.

THE COMMERCIAL SPEECH EXEMPTIONS ARE PROPERLY CONSTRUED TO INCLUDE ADVERTISING BY A LAWYER SOLICITING CLIENTS FOR A CONTEMPLATED LAWSUIT.

A. The commercial speech exemptions should be construed to help curb abuse of the anti-SLAPP statute.

The anti-SLAPP statute has come to exemplify the notion that there can be too much of a good thing. The statute's laudable protection for the rights of free speech and petition has come at a price – the statute's overuse. As three members of this court observed in 2002: "The cure has become the disease – SLAPP motions are now just the latest form of abusive litigation." (*Navellier, supra,* 29 Cal.4th at p. 96 (dis. opn. of Brown, J.); see also J. Osborn & J. Thaler, *Maine's Anti-SLAPP Law: Special Protection Against*

5/ The Court of Appeal applied the "independent judgment" standard of appellate review in deciding whether the commercial speech exemptions are invoked here. (See typed opn. p. 9.) We agree that this is the appropriate standard of review on this appeal, but only because there are no evidentiary conflicts regarding the facts germane to the exemptions – which means Simpson should prevail on the appeal because the undisputed facts invoke both exemptions. If there had been any such evidentiary conflicts, this appeal would have presented mixed questions of law and fact, calling for deferential review of factual determinations and independent application of the law to the facts as resolved. (See, e.g., *Ghirado v. Antonioli* (1994) 8 Cal.4th 791, 800-801.)

Improper Lawsuits Targeting Free Speech and Petitioning, 23 Maine Bar J. 32, 39 (2008) ["the cure for abusive litigation has morphed into a variant of the disease"].) A Westlaw search as of this writing reveals a staggering 317 published and unpublished California appellate opinions addressing the anti-SLAPP statute, with more than half of those opinions issued since section 425.17's enactment. Some five years into the life of the commercial speech exemptions, the explosion of anti-SLAPP litigation has not yet abated.

This explosion has done more harm than just burdening the courts (and many plaintiffs) with a new form of litigation abuse. Because rulings on anti-SLAPP motions are immediately appealable (see §§ 425.16, subd. (i), 904.1, subd. (a)(13)), the Courts of Appeal have had to contend with dozens of anti-SLAPP appeals every year where, in addressing the second-prong issue of plaintiff's probability of prevailing (see *ante*, p. 16), the appellate courts are commonly addressing the merits of cases before the facts can be fully developed in the trial courts. This can make for troublesome jurisprudence – for the parties, whose cases are being decided in a twilight zone of early adjudication, and for the appellate courts themselves, which in numerous published decisions have been making substantive law on incomplete records. (See *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 149 (dis. opn. of Werdegar, J.) ["for an appellate court to adjudicate an important First Amendment case on such a sketchy record is unfortunate"].)

The legislative intent behind section 425.17 was to send the disease into remission by curbing the widespread abuse of the anti-SLAPP statute. That purpose is plainly declared in the preamble to section 425.17, which states that the exemptions from anti-SLAPP protection are needed because of the "disturbing abuse of Section 425.16, the California Anti-SLAPP Law." (§ 425.17, subd. (a).) Section 425.17 should be construed accordingly, to help achieve the Legislature's goal of reining in anti-SLAPP abuse. (See *California*

Assn. of Psychology Providers v. Rank (1990) 51 Cal.3d 1, 15 [declaration of findings and purpose in statute's preamble is "the most significant source" for ascertaining legislative intent].)

In an amicus curiae brief filed in the Court of Appeal, the Consumer Attorneys of California (CAOC) proposed that section 425.17's exemptions should be narrowly construed in light of the statutory prescription that the anti-SLAPP statute itself – section 425.16 – is to be "construed broadly." (§ 425.16, subd. (a); see Brief of Amicus Curiae CAOC in Court of Appeal p. 10.) This proposition, however, is inconsistent with the Legislature's declaration of intent to curb anti-SLAPP abuse. Narrow construction of the commercial speech exemptions will not curb, but will encourage, continued overuse of the anti-SLAPP statute.

B. Section 425.17's legislative history demonstrates that the commercial speech exemptions are intended to apply to advertising of professional services.

Early versions of the bill that became section 425.17 addressed *corporate* abuse of the anti-SLAPP statute with a categorical commercial speech exemption for a "manufacturer, wholesaler, retailer, or other entity involved in the stream of commerce." (Sen. Bill No. 789 (2001-2002 Reg. Sess.) as amended Aug. 15, 2002; Sen. Bill No. 1651 (2001-2002 Reg. Sess.) as amended May 7, 2002.) A 2002 Senate Judiciary Committee report explained that the proposed exemption would have applied to "product" sellers and service providers, which generally means corporations. (Sen. Com. on Judiciary, Rep. on Sen. Bill No. 1651 (2001-2002 Reg. Sess.) as amended May 7, 2002, pp. 8-9.) Subsequently, however, as a 2003 Senate Judiciary Committee report explained, the proposed language was changed on the

committee's recommendation to focus on "the content and context of the statement or conduct" instead of "a wholesale exclusion of a class of defendants." (Sen. Com. on Judiciary, Rep. on Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended May 1, 2003, p. 7.)

The language of section 425.17 as ultimately enacted is much broader, making the exemption applicable not just categorically to enumerated "entities," and not just to "product" sellers and service providers, but to any "person primarily engaged in the business of selling or leasing goods or services," depending on content and context. (§ 425.17, subd. (c)(1); see Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended May 1, 2003.) Along with this change in focus, language was added (as the preamble in subdivision (a) of section 425.17) to state the Legislature's intent to address "abuse" of the anti-SLAPP statute – *all* abuse, not just "corporate" abuse. (See Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended May 1, 2003.)

Thus, section 425.17 as ultimately enacted addresses not only corporate abuse of the anti-SLAPP statute but, more broadly, *any* abuse by a seller or lessor of goods or services. Persons exempted from anti-SLAPP protection include not just corporations, but also sellers of *professional* services, like Gore. Section 425.17's legislative history places Gore's advertisement squarely within the ambit of the statute.

CAOC sponsored the various bills that became section 425.17. (See, e.g., Sen. Com. on Judiciary, Rep. on Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended May 1, 2003, p. 4.) In a letter to Senator Sheila Kuehl, CAOC complained that "California is the *only* state that applies the anti-SLAPP statute to commercial speech," which "has no place in the anti-SLAPP statute." (Bruce Brusavich, President of CAOC, letter to Honorable Sheila Kuehl, May 1, 2003, pp. 1, 4, original italics.) According to CAOC's letter, commercial speech like Gore's does not need anti-SLAPP protection because,

"in defense of a case that involves commercial speech . . . , a defendant has a range of defenses in its arsenal to protect against meritless lawsuits," including the litigation privilege, summary judgment, and demurrer. (*Id.* at p. 9.)[6/]

The 2003 Senate Judiciary Committee report similarly noted that corporate entities – which comprise the typical commercial speaker – "'have far greater resources to defend themselves when sued'" and thus are less in need of anti-SLAPP protection. (Sen. Com. on Judiciary, Rep. on Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended May 1, 2003, p. 5, quoting letter from leading anti-SLAPP authority Professor Penelope Canan.) The same is true of professionals like Gore, who can also obtain liability insurance that pays defense costs.

Attorneys are not prototypical SLAPP victims. Many practice law in well-capitalized medium- to large-sized firms that are corporate-like entities in all but name (and sometimes even in name). (See, e.g., State Bar of California, *Preliminary Report of Results, California Young Lawyers Association Survey* (May 2007) p. 12 [45 percent of surveyed lawyers practice in firms of more than 20 attorneys].) Solo practitioners and small firms can enjoy the cloak of protection provided by personal incorporation or limited liability partnership. All lawyers are (or should be) insured for defense costs. And the payoff can be huge for skilled lawyers like Gore who successfully use advertising to assemble a group of plaintiffs for large-scale class-action litigation. Lawyers who use mass advertising to solicit clients for a potentially lucrative class action – like corporations and other commercial speakers – do not need anti-SLAPP protection.

6/ CAOC's letter to Senator Kuehl can be found in the record before the Court of Appeal as part of the Declaration of Rochelle W. Wilcox In Support Of Defendants-Respondents' Motion For Judicial Notice, exhibit A, pages 49-58.

Imagine an anti-SLAPP motion to protect, say, commercial speech on the Internet website of one of the 50 largest law firms doing business in California, each of which has between 125 and 750 California lawyers – a total number that comprises some 13,600 members of the California bar. (See California Lawyer, *The 2008 California 50 Survey of the State's Largest Law Firms* (Aug. 2008) pp. 32, 34-35.) Surely that is not the sort of victim the Legislature had in mind for continued anti-SLAPP protection when creating the commercial speech exemptions. Yet, under the Court of Appeal's approach, those mega-firms could evade the commercial speech exemptions. A ruling for Gore in this case would invite the mega-firm camel's nose under the tent of anti-SLAPP protection – an invitation that any such defendant would surely exploit in future litigation.

C. The "content and purpose" exemption includes advertising that touts a lawyer's services in an effort to solicit clients for a contemplated lawsuit.

Section 425.17's "content and purpose" exemption from anti-SLAPP protection is for a cause of action "arising from any statement or conduct" by a seller or lessor of goods or services if "[t]he statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services." (§ 425.17, subd (c) & (c)(1).) The "content" element of this exemption is in the phrase "representations of fact about that person's or a business competitor's business operations, goods, or services." (§ 425.17, subd. (c)(1).) The "purpose" element is in the phrase "made for the purpose of obtaining approval for, promoting, or securing sales

or leases of, or commercial transactions in, the person's goods or services." (*Ibid.*)

Advertising that touts a lawyer's services in an effort to solicit clients for a contemplated lawsuit plainly meets the "purpose" element. (Cf. *Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 814-815 & fn. 5 ["It appears that under section 425.17," which was enacted during the pendency of the lawsuit in *Jewett*, the anti-SLAPP statute would not apply to credit card solicitations that were "specifically directed to a target audience of consumers with the sole purpose of inducing them to enter into credit card agreements."].) Indeed, the Court of Appeal here said "[t]here appears to be no dispute, and little room for doubt, that Gore's advertisement satisfies the *purpose* element of the exemption." (Typed opn. p. 11, original italics.)

Simpson argued in the Court of Appeal that Gore's advertisement satisfies the "content" element of the exemption by making underlying factual representations about Gore's business operations and services – specifically, that he had investigated Simpson and had discovered it is selling defective screws, and that he would provide the service of investigating to determine whether a reader has a potential claim. (See Appellant's Opening Brief p. 25.) The Court of Appeal rejected this argument because "Simpson's claims do not 'arise from' Gore's offer to investigate." (Typed opn. p. 12, quoting § 425.17, subd. (c).) According to the Court of Appeal, three statutory elements – (1) a representation of fact, (2) a representation about the person's or a business competitor's business operations or services, and (3) a statement giving rise to a cause of action – "must coincide in a single 'representation[],' or the exemption is inapplicable by its terms." (Typed opn. p. 13, quoting § 425.17, subd. (c)(1).)

The Court of Appeal went astray by construing section 425.17 so narrowly, even though the statute's preamble and legislative history counsel

otherwise. Nowhere does section 425.17 say that all three of these elements "must coincide in a single 'representation[]'" (*ibid.*) (or, as the Court of Appeal apparently would have it, in a single sentence). Nowhere does section 425.17 suggest that the "content and purpose" exemption can be evaded by parsing a short two-sentence advertisement into its component parts, as the Court of Appeal did.

The Court of Appeal's narrow construction depends on a restrictive reading of the words "statement or conduct" and "consists of" in subdivision (c)(1). To be sure, the confluence of these words in the statute means that the "statement or conduct" giving rise to Simpson's causes of action must "consist of" factual representations about Gore's business operations or services. But if "statement or conduct" is construed to include Gore's entire two-sentence advertisement, then the statement giving rise to Simpson's causes of action – the whole advertisement – *does* consist of factual representations about Gore's business operations or services, in two ways:

First, the advertisement expressly states that "an attorney" will "investigate whether you have a potential claim." (AA 4.) That certainly is a factual representation about Gore's services – that he will provide the service of an attorney's investigation to determine whether a reader of the advertisement has a potential claim. The investigation of potential claims plainly relates to the whole advertisement, short as it is.

Second, it can be reasonably inferred from the advertisement that Gore has investigated the named companies and has discovered that they are selling defective screws, so that there is a basis for suing Simpson. There could be no other reason to run the advertisement. Logic dictates that Gore *must* have done such an investigation in order to be able to advertise to the public that purchasers of those three specific companies' screws may "have a potential claim." (AA 4.) Gore's respondent's brief in the Court of Appeal confirms

the soundness of this inference by expressly stating that he conducted an "investigation" and believed it possible Simpson was "selling dangerous and defective products." (Respondent's Brief p. 10 (RB).)

In the procedural posture of the present appeal, this court is required to draw that inference. The standard of appellate review for an anti-SLAPP dismissal is the same as on appeal after a nonsuit, directed verdict or summary judgment. (*Slaney v. Ranger Ins. Co.* (2004) 115 Cal.App.4th 306, 318; *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 629-630.) "The court . . . does not weigh credibility or compare the weight of the evidence. Rather, the court's responsibility is to accept as true the evidence favorable to the plaintiff." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) This means, among other things, that the courts must view the evidence in the light most favorable to the plaintiff, "indulging *every legitimate inference* which may be drawn from the evidence in plaintiff['s] favor." (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291, italics added, original brackets, internal quotation marks omitted.) Even Gore conceded in the Court of Appeal that "[c]ourts 'look to what is explicitly stated as well as what *insinuation and implication* can be reasonably drawn from the communication.'" (RB 25, italics added, quoting *Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 803.) The advertisement's *implied* factual representation about Gore's services (that he had already investigated Simpson and determined it is selling defective screws) is as effective as its *express* representation (that he will investigate potential claims) to invoke the "content and purpose" exemption.

As Justice Roger J. Traynor observed in *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, in determining whether a publication is defamatory the law of defamation looks to "the sense and meaning *under all the circumstances attending the publication* which such language may fairly

be presumed to have conveyed to those to whom it was published." (*Id.* at pp. 546-547, italics added, internal quotation marks omitted.) The Court of Appeal's parsing of Gore's advertisement to find somehow that no single phrase in it contains all three statutory elements – even though the short advertisement as a whole *does* contain all three elements – violates the *MacLeod* rule that *all the circumstances* of the publication are to be considered. Just about any defamatory utterance can be subdivided into component parts that, standing alone, are not defamatory, even though as a whole they are.

This advertisement was about *Gore*, defaming Simpson in order to tout Gore and his services. It was no public service announcement. The tout and the defamation were of an inseparable whole, with the defamation serving as bait for the tout. The Court of Appeal's approach is as if to parse cheese from a mousetrap.

Moreover, even if the Court of Appeal were right in holding that the specific part of the statement giving rise to this lawsuit must consist of factual representations about Gore's business operations or services, that is precisely the situation here. Gore's factual representations about his business operations and services – that users of Simpson's galvanized screws "may have certain legal rights and be entitled to monetary compensation" and should contact him "if you would like an attorney to investigate whether you have a potential claim" (AA 4) – must be read together for the advertisement to achieve its purpose. Together they contain the defamatory implication that Simpson's screws are so defective that consumers should sue Simpson – which gives rise to this lawsuit.

Gore argued in the Court of Appeal that because legislative history indicates section 425.17 borrows from a discussion of commercial speech in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 961-962 (*Kasky*), the statutory

phrase "representations of fact" (§ 425.17, subd. (c)(1)) must be restricted to representations of the sort listed in the *Kasky* opinion – e.g., statements about price, quality, or availability of goods or services; their manufacture, distribution, or sale; repair or warranty services; or the education, experience and qualifications of persons providing or endorsing services — which Gore says differ from the factual representations in Gore's advertisement. (See RB 15-16, 19.) But *Kasky* made clear that its list of factual representations is merely exemplary, not exclusive. The court said twice that the list was "for example." (*Kasky, supra,* at p. 961; cf. *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 390 [three types of relief set forth in arbitration guide as "examples" were not intended to be exclusive].)

Gore also pointed out in the Court of Appeal that the test for determining whether a representation is one of fact is "whether it easily can be verified by its disseminator." (RB 16.) The factual representations in Gore's advertisement meet this test. Gore can easily verify whether he would have investigated to determine if someone had a potential claim, whether he had investigated the named companies' products, and what defects (if any) he had found.

The "content and purpose" exemption deprives Gore's advertisement of anti-SLAPP protection. For that reason alone, Gore's anti-SLAPP motion should have been denied. We next show how, separate and independently, the "course of delivery" exemption also deprives Gore of an anti-SLAPP motion, so that his advertisement lacks anti-SLAPP protection under either exemption – or both.

D. The "course of delivery" exemption includes services incidental to a defendant's typical business transactions.

Section 425.17's "course of delivery" exemption is for a statement or conduct by a seller or lessor of goods or services if "the statement or conduct was made in the course of delivering that person's goods or services." (§ 425.17, subd. (c)(1).) In *Brill*, the court held that "statements . . . made and conduct engaged in *as part of* . . . the type of business transaction engaged in by defendants" triggered the "course of delivery" exemption. (*Brill, supra,* 132 Cal.App.4th at p. 341, italics added.) In the present case, Gore admitted in the Court of Appeal that he and other plaintiffs' class-action attorneys "routinely" run advertisements like this one in pursuing class-action litigation. (RB 53; see also AA 124.) Simpson replied: "The advertisement being typical of what Gore does as part of 'the type of business transaction engaged in by' him [citing *Brill*], it was published in the course of delivering his services [citation omitted]." (Appellant's Reply Brief and Answer to Amicus Curiae Brief p. 8.)

In rejecting Simpson's argument, the Court of Appeal expressly disagreed with *Brill's* pronouncement (and disregarded Gore's admission) on this point, saying "we must again respectfully decline to follow that case." (Typed opn. p. 15.) According to the Court of Appeal:

- The Legislature has "prescribed a much narrower exemption" than explicated in *Brill*. (*Id.* at p. 16.)

- For the "course of delivery" exemption to apply, the statement "must occur *while* the defendant is providing the goods or

services *he is in the business of selling*." (Typed opn. p. 14, first italics added.)

- "The Legislature has not chosen to exempt conduct *incidental* to 'the type of business transaction engaged in by [the] defendant[].'" (*Id.* at p. 16, italics added, quoting *Brill, supra,* 132 Cal.App.4th at p. 341.)

Again, *Brill* got it right and the Court of Appeal here was wrong, for several reasons.

First, the preamble to section 425.17 counsels against such a narrow construction. (See § 425.17, subd. (a); *ante*, p. 27.) The legislative purpose of reining in overuse of anti-SLAPP motions counsels in favor of *Brill's* approach.

Second, the Court of Appeal's requirement that the statement occur "while" the defendant is delivering goods or services that "he is in the business of selling" (typed opn. p. 14, italics omitted) is contrary to the plain language of section 425.17, which nowhere contains the word "while," but more broadly makes the "course of delivery" exemption applicable to statements "made *in the course of* delivering that person's goods or services." (§ 425.17, subd. (c)(1), italics added.) Analogous case law construes the phrase "in the course of" to have a broader meaning than just "while."

For example, in *Ryan v. Garcia* (1994) 27 Cal.App.4th 1006, 1010-1011 (*Ryan*), the court held that the mediation confidentiality provision of former Evidence Code section 1152.5, which provided for inadmissibility of statements "made *in the course of* the mediation" (former Evid. Code, § 1152.5, subd. (a)(1), italics added), "must be interpreted *broadly to serve its purpose*, that is, to encourage the use of mediation by ensuring

confidentiality." (*Ryan, supra,* at 1011, italics added.) "By using the broad phrase 'in the course of the mediation,' the Legislature manifested its intent to protect a broad range of statements from later use as evidence in litigation." (*Ibid.*) "Narrow interpretation of 'in the course of the mediation' leads to anomalous results not intended by the Legislature." (*Ibid.*) Thus, said *Ryan*, the phrase "in the course of" should be broadly construed as meaning "*part of* the mediation." (*Id.* at p. 1010, italics added; cf. *Brill, supra,* 132 Cal.App.4th at p. 341 ["course of delivery" exemption is triggered by statements made "as part of" defendants' typical business transactions].) Within the context of former Evidence Code section 1152.5, this meant mediation confidentiality applies to an oral recitation of settlement terms made *after* the mediator announces the settlement, because the recitation is, broadly speaking, a *part of* the mediation and thus is made *in the course of* the mediation [7/].

Similarly here, the Legislature's purpose of curbing anti-SLAPP abuse is served by broadly construing section 425.17's phrase "in the course of" to mean *as part of* the defendant's delivery of goods or services. (See *Brill, supra,* 132 Cal.App.4th at p. 341.) Just as the mediation confidentiality provisions of former Evidence Code section 1152.5 were broadly construed to encompass post-compromise statements *as part of* the mediation, the "course of delivery" exemption should be broadly construed to encompass statements at the outset of a contemplated business relationship *as part of* an intended

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7/ Another Court of Appeal decision, *Regents of the University of California v. Sumner* (1996) 42 Cal.App.4th 1209, 1213, disagreed with *Ryan* and concluded that a trial court could admit evidence of statements made after a compromise had been reached. The Legislature subsequently resolved the split of authority in favor of *Ryan* when revising the mediation confidentiality statutes to clarify, in Evidence Code section 1119, that mediation confidentiality extends to statements "made for the purpose of, in the course of, or pursuant to" a mediation. (Evid. Code, § 1119, subd. (a); see *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 580-581.)

delivery of goods or services if the statements could lead to a sale of those goods or services. (Cf. *People v. Jenkins* (2006) 140 Cal.App.4th 805, 811 [Utah robbery statute's phrase "in the course of committing a theft" includes "acts during 'an attempt to commit theft"].) Otherwise, the words "in the course of" in section 425.17 would be meaningless.

Likewise, the exclusive remedy provision of the workers' compensation law, which applies to injury "arising out of and *in the course of* the employment" (Lab. Code, § 3600, subd. (a), italics added), is broadly construed to encompass "the actions of an employer which constitute a '*normal part of* the employment relationship.'" (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 18, italics added, quoting *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160.) The result of this broad construction is to bring "[n]onconsensual termination of an employment relationship" within the scope of workers' compensation exclusivity as "a normal and inherent *part of* employment." (*Ibid.*, italics added.) Just as the phrase "in the course of" in the workers' compensation exclusivity statute is broadly construed to encompass conduct at the end of the employment relationship, section 425.17's phrase "in the course of" should be broadly construed to encompass conduct that is part of a lawyer's initial delivery of litigation services.

This court held long ago that sales "in the course of" business operations include sales that are "incidental and casual" – even though not made in the *ordinary* course of business – because such sales are "a part of" the seller's business operations. (*Bigsby v. Johnson* (1941) 18 Cal.2d 860, 862-863.) Thus, in *Bigsby v. Johnson*, the taxation of retail sales "made in the course of business operations" (*id.* at p. 862) encompassed "*incidental* and casual sales" as well as those made in the *ordinary* course of business (*ibid.*,

italics added).[8/] By parity of reasoning, statements *incidental* to a defendant's delivery of goods or services are likewise a *part of* the seller's business operations and thus are "in the course of" the delivery. (Cf. *Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 188 ["when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute"].)

The Court of Appeal's requirement that the statement occur "while" the defendant is delivering goods or services takes an arbitrary snapshot at the moment of actual delivery and would withhold the "course of delivery" exemption not only *before* but also *after* the moment of actual delivery. Thus, the same commercial speech would be exempt from anti-SLAPP protection *at the moment* of actual delivery but not before or after, despite its occurrence *in the course of* delivery. That would be irrational and cannot have been what the Legislature intended.

Third, even if the Court of Appeal were right that the "course of delivery" exemption requires the statement to occur *while* the defendant is delivering "the goods or services *he is in the business of selling*" (typed opn. p. 14, original italics), that requirement is satisfied here. Gore asserted below that he "routinely" uses advertisements like this one in connection with "class action litigation." (RB 53; see also AA 124 [declaration that Gore has "run this same type of notice in advance of filing class action lawsuits for at least three years, for litigation involving alleged product defects and consumer fraud"].) What this means is that Gore uses advertisements to *assemble a*

8/ The *Bigsby* decision was later superseded by legislation prescribing tax-exempt treatment for certain "occasional sales." (See *Ontario Community Foundations, Inc. v. State Bd. of Equalization* (1984) 35 Cal.3d 811, 817-818.)

group of litigants, which is essential to make the litigation of claims economically viable through the procedural device of a class action. In taking steps to assemble a class, as he did here, he delivers one of the essential services of plaintiffs' class-action lawyers, using mass advertising to make a class action possible for the individuals he represents. A plaintiffs' class-action lawyer *creates* litigation by assembling a class, which is what Gore was trying to do here, as an integral part of the services he provides.

By way of analogy, the Court of Appeal opined that the "course of delivery" exemption would not apply to a grocer's advertisements in advance of intended sales because, although such advertisements "may be 'part and parcel' of his retail business," they are not "part of the goods or services sold." (Typed opn. p. 15.) This analogy is flawed, for two reasons.

First, because the "course of delivery" exemption applies broadly to statements made *in the course of delivering* goods or services, it applies where a statement is made as a *part of the delivery* – not a part of the goods or services themselves. That is certainly the case with advertising, to the extent the advertising informs the public about the availability of the product for delivery. Moreover, in this age of "branding," where products and services have become defined by the advertising that accompanies their delivery, advertising becomes a part of the product's value to the extent the advertising keeps the product in the public eye and bolsters its prestige. Nothing in section 425.17 requires, as the Court of Appeal's analogy would have it, that the statement be a part of the goods or services themselves. Again, the Court of Appeal misconstrued the statute. A grocer's defamatory advertisement *would* fall within the "course of delivery" exemption.

Second, even if the Court of Appeal's statutory construction were correct, Gore's advertisement, unlike a grocer's, *was* a part of his services to

the extent it was part of an effort to assemble a viable class of litigants. That is one of the services Gore claims to provide as a class-action lawyer.

The Court of Appeal also offered another flawed analogy – to "gang bosses" who control turf "by ordering a killing for that purpose." (Typed opn. p. 16.) According to the Court of Appeal, by ordering the killing, the gang boss is not "delivering any service he is in the business of selling." (*Ibid.*) Be that as it may, the killing also is not *incidental* to any service the gang boss is selling, for his control of turf is not a service to anybody but himself – indeed, it is a *disservice* to others. Gore's advertisement, in contrast, was incidental to his services as a class-action lawyer, and as such was part of his delivery of those services.

The Court of Appeal's crabbed reading of section 425.17 makes a nullity of section 425.17's phrase "in the course of." It would perpetuate the overuse of anti-SLAPP motions, contrary to the purpose of the commercial speech exemptions, by putting advertising like Gore's outside the scope of the "course of delivery" exemption. Contrast this reading with *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 492, where the court said in a dictum that "we can envisage circumstances – such as a 'massive advertising campaign' divorced from individualized legal advice – under which the commercial speech exemption to the anti-SLAPP statute conceivably might apply to a lawyer's conduct." *Taheri*, like *Brill*, better reflects the legislative intent behind the commercial speech exemptions.

Gore not only asserted below that his advertisement was a part of his typical business transactions (see RB p. 53; AA 124), he invoked the Civil Code section 47 litigation privilege as purportedly protecting his defamation (see RB pp. 46-54) – an issue the Court of Appeal did not reach in its second-prong analysis. By invoking the litigation privilege, Gore necessarily conceded that the advertisement was a *part of* the litigation services he

delivers, as something he does "routinely" in pursuing class-action litigation. (RB p. 53.). Gore is now judicially estopped to claim otherwise in an effort to evade application of the commercial speech exemptions. (See *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) The advertisement being typical of what Gore does "*as part of*. . . the type of business transaction engaged in" by him (*Brill, supra,* 132 Cal.App.4th at p. 341, italics added), it was published in "the course of" delivering his services (see *ibid.*).

In the Court of Appeal, Gore attempted to distinguish *Brill* on the ground the defendants in that case "had existing clients." (RB 22.) That is a distinction without a difference for purposes of the "course of delivery" exemption. Gore was delivering his normal services by routinely soliciting a class of litigants in the course of his class-action law practice. Whether or not any clients ever materialized does not change that fact. Section 425.17's commercial speech exemptions expressly apply where the intended audience is "potential" customers; an "actual" customer is not necessary. (§ 425.17, subd. (c)(2).) Thus, application of the "course of delivery" exemption does not turn on whether Gore's solicitation successfully produced an actual client.

Gore also argued in the Court of Appeal that application of the "course of delivery" exemption here would make surplusage of the "content and purpose" exemption. (See RB 20-21.) Not so. Just because Gore's statements fit both exemptions does not mean that *all other* statements or conduct would fit both exemptions. There are innumerable situations where one can make a representation of fact about one's own or a business competitor's goods or services entirely outside the course of delivering one's goods or services (e.g., where a manufacturer simply disparages a competitor's products) – which necessitates the "content and purpose" exemption even though both commercial speech exemptions apply here.

CONCLUSION

The Court of Appeal's treatment of the commercial speech exemptions sends the wrong message to attorneys – that they can publish defamatory mass advertising with impunity under the protective cloak of California's anti-SLAPP statute.

Looking ahead to the potential consequences of the Court of Appeal's approach, imagine a lawyer's advertisement that states: "If you are a patient of Dr. John Jones, and he has performed surgery on you, you may have certain legal rights and be entitled to monetary compensation. Please call if you would like an attorney to investigate whether you have a potential claim." Assume the lawyer (like Gore) knows of no patient who has ever been harmed by Dr. Jones. Can there be any doubt that the advertisement is defamatory in that it wrongly implies that Dr. Jones has committed malpractice? Dr. Jones's medical practice could be devastated by the advertisement. Yet the Court of Appeal's approach would give the advertisement carte blanche anti-SLAPP protection. The lawyer could publish the advertisement in newspapers, on the radio, on television, and over the Internet, and Dr. Jones would be powerless to ever stop the damage, other than by paying the lawyer to stop. The potential for abuse is palpable.

It is not too much to require that attorneys carefully adhere to the truth when using mass advertising to solicit clients for an as-yet-nonexistent lawsuit contemplated against a targeted and specified individual or business entity. The Court of Appeal's approach would weaken that requirement and expose businesses and individuals to shakedown scenarios where, because of the cloak of anti-SLAPP protection, the only practical approach for dealing with harmful defamatory advertising may be to buy off the offending lawyer in order to put a quick end to the harm.

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, which are not defective. (See *ante*, pp. 7-8.) Yet Gore, seizing on Simpson's efforts to help consumers, 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 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 answer should be *no*. Gore is and should be free to advertise for clients, but he could easily have done so without defaming Simpson.

For the foregoing reasons, this court should reverse the Court of Appeal's judgment and direct the Court of Appeal to reverse the superior court's judgment and deny the anti-SLAPP motion.

Dated: September 26, 2008

Respectfully submitted,

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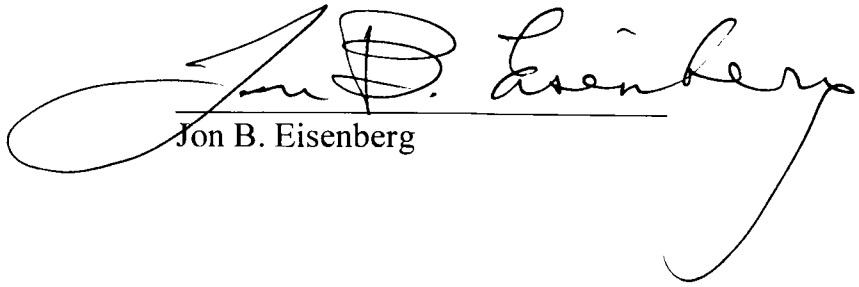
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1))

The text of this brief consists of 13,233 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: September 26, 2008



Jon B. Eisenberg

PROOF OF SERVICE
[C.C.P. § 1013a]

Re: **Simpson Strong-Tie Company v. Gore**
S164174

I, Jessica Dean, declare as follows: I am employed in the County of San Francisco, State of California and am over the age of eighteen years. I am not a party to the within action. My business address is 180 Montgomery Street, Suite 2200, San Francisco, California, 94104. I am readily familiar with the practice of Eisenberg and Hancock, LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On *September 26, 2008*, I served the within document entitled:

- **OPENING BRIEF ON THE MERITS**

on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

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and, following ordinary business practices of Eisenberg and Hancock, LLP by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 180 Montgomery Street, San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 26, 2008, at San Francisco, California.

Jessica Dean