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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

VARIAN MEDICAL SYSTEMS, INC., et al., Plaintiffs and Respondents, v. MICHELANGELO DELFINO et al., Defendants and Appellants.	H024214 (Santa Clara County Super. Ct. No. CV780187)

Defendants Michelangelo Delfino and Mary Day used Internet bulletin boards to post numerous derogatory messages about their former employer, Varian Associates, Inc. (Varian) and two Varian executives. Varian and the two executives sued. Defendants treated the lawsuit as a challenge to their constitutional right to free speech and responded with a flood of spiteful messages posted on hundreds of Internet bulletin boards. By the time of trial defendants had posted over 13,000 messages and vowed to continue posting until they died.

Defendants' position at trial was that their postings contained only truth, opinion, or hyperbole. They stressed their belief that they were constitutionally entitled to publish the offending messages and that large corporate plaintiffs ought not be permitted to stifle free speech by filing suit against them. The jury was not persuaded. Defendants were found liable for defamation, invasion of privacy, breach of contract, and conspiracy. The trial court determined that in view of defendants' promise to post until they died an injunction was necessary to prevent future injury. The judgment gives plaintiffs $775,000 in damages and a broad injunction.

On appeal we are asked to consider whether the fact that defendants' messages appeared on Internet bulletin boards affects the character of the offending messages for purposes of defamation law. Specifically, defendants argue that typical Internet hyperbole cannot be considered defamatory. Defendants also argue that to the extent speech on the Internet may be defamatory it must be designated as slander, which requires proof of special damages, rather than libel, for which damages are presumed. We reject these and defendants' other challenges to the damages portion of the judgment. We do find merit in defendants' argument that the portion of the injunction prohibiting future speech is an impermissible prior restraint under both the state and federal constitutions. Accordingly, we shall modify the judgment striking the invalid portions of the injunction and as modified, affirm.

I. FACTUAL BACKGROUND

Plaintiffs Varian Medical Systems, Inc. (VMS) and Varian Semiconductor Equipment Associates, Inc. (VSEA)[1] are publicly traded companies that manufacture technological equipment for medical and other markets. Plaintiff George Zdasiuk is a vice president of VMS and plaintiff Susan B. Felch is the director of a VSEA research center. Defendant Delfino was employed by Varian as a senior engineer. Zdasiuk fired him in October 1998 for complaints that he was disruptive and harassing to Felch and other co-workers. Defendant Day resigned in sympathy two months later.

Immediately after Delfino lost his job he began a campaign of posting derogatory messages about plaintiffs on Internet bulletin boards.[2] He posted some of his first

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[1] Varian Associates, Inc. was the original corporate plaintiff. Varian Associates, Inc. split into three companies in April 1999 and was replaced as plaintiff by VMS and VSEA. Unless the context of our discussion requires greater specificity, we shall refer to the corporate plaintiffs as "Varian" or "the Varian plaintiffs."

[2] An Internet bulletin board is simply "a computerized version of a cork and pin board on which users can post, read, and respond to messages." (Jeremy Stone Weber, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising* (continued)

messages on the Yahoo! finance board for Varian. With rare exceptions, the messages on the Yahoo! board that were posted by persons other than defendants concerned the price of the stock and related issues such as, "My broker sees Varian dropping to 35 before the breakup . . . ," and "Does anybody know how much the profit sharing is this year."

Some of Delfino's messages were similar to those posted by others. Some were much more caustic. He maligned Varian products. He accused Felch of being "a manipulative liar" or "a neurotic hallucinator." He charged Zdasiuk with being mentally ill. He claimed both executives were incompetent and accused them of being chronic liars. Many of his messages contained sexual implications. One early message implied that Felch had attained her position by having sex with a supervisor: "building 7, looks like a ghost town, with the IIS manager Sue Felch doing as much as she has ever done . . . . I'll bet you big money that Dick had nothing to say about her and her so-called operation in Palo Alto. The only thing that makes any sense, and I'm gropping, [*sic*] is there is a dress with a stain on it somewhere. . . . find the dress and you might make money!!!"

After plaintiffs filed this lawsuit the torrent of messages began in earnest. Defendants accused plaintiffs of trying to chill their right to free speech and responded to the perceived infringement by accelerating the publication of their remarks and intensifying their viciousness. They even published their own website dedicated to an ongoing narrative of the case.

Many of the messages in the new flood of postings were variations on Delfino's original themes. There were messages denigrating Varian products and Varian

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from Computer Bulletin Board Speech (1995) 46 Case Western Reserve L.Rev. 235, 238.) Once a person is logged in to an Internet bulletin board, the person may post messages, respond to messages already posted, or simply read the discussions without posting any of his or her own messages. (*Id*. at p. 239.) Most such systems allow users to participate using pseudonyms if they choose to do so. (*Id*. at p. 241.)

executives, messages implying sexual improprieties, messages referring to Felch and Zdasiuk as incompetent, and messages accusing them of harassment and discrimination. One message accused Felch of stalking Day.

The progress of the lawsuit itself provided a rich source of material. Defendants typically distorted actual facts or statements or simply took statements out of context to make their meaning derogatory. For example, Megan Gray, an attorney for a third party, filed a motion in this action during the discovery phase. In her papers Gray referred to the portion of the complaint that quoted defendants' message about the "dress with a stain." She wrote: "For example, Defendants often posted messages implying, if not outright stating, that Plaintiff Felch is a female executive who acquired semen stains on her clothes from oral sex with a supervisor, which was supposedly the reason she still had a job, etc." Defendants took a portion of that quote and posted numerous messages like these: " 'Felch is a female executive who acquired semen stains on her clothes from oral sex with a supervisor . . .' was stated by Megan Gray the famous LA lawyer." "And Megan E. Gray, the famous lawyer, seems to think the bitch even has a semen stained dress from having oral sex with a supervisor."

"Bathroom" postings were another recurring theme. Before Delfino lost his job Felch had complained that on hundreds of occasions he passed the window to her office and made hand gestures, mimicking her telephone conversations. Varian's director of human resources installed a video camera in Felch's office to try to capture Delfino's gestures on tape. The camera remained in place for a few weeks. Defendants first learned of the video camera during discovery in this case. It happens that Felch's office had windows on its hallway side. Employee restrooms were located across the hall from her office. It also happens that "Take Your Child to Work Day" may have taken place during the few weeks the video camera was operating. Putting these facts together, defendants began posting messages such as these: "Wow! [¶] Unbelievable testimony about children who used a Varian bathroom videotaped with a hidden camera" and "Bill,

you may have said it best when you suggested prison time and stiff fines for those despicable individuals responsible for secretly videotaping unsuspecting employees and visitors going to the bathroom at Varian." Defendants admitted posting more than 300 messages on this topic alone.

Plaintiffs denied the truth of all the derogatory messages. Felch and Zdasiuk also testified that they were disturbed by the messages and felt threatened by them. Zdasiuk was particularly frightened by Delfino's statement that Delfino was the "worst nightmare" of anyone who would be so foolish as to go out of their way to annoy him.

II. PROCEDURAL SUMMARY

Plaintiffs filed this lawsuit in February 1999.[3] Defendants mounted a vigorous defense. The matter moved from superior court to federal court, then back to superior court. Upon remand to superior court defendants filed special motions to strike the complaint as a strategic lawsuit against public participation (the anti-SLAPP motions) (Code Civ. Proc., § 425.16). The trial court denied those motions and defendants appealed. Defendants were unsuccessful in having the matter stayed while their appeal was pending and the case went to trial in the late fall of 2001.

The jury found defendants liable for defamation (libel), invasion of privacy (appropriation of name), breach of contract,[4] and conspiracy and determined as to each

[3] Plaintiffs included several business-related causes of action in the original complaint based upon the fact that defendants had formed MoBeta, Inc., a technology start-up, which defendants regularly touted in their messages disparaging Varian. MoBeta, Inc. was never named as a defendant and the business-related causes of action were eventually dismissed or abandoned.

[4] The contract claim was tried on the theory that plaintiffs were third party beneficiaries of the contract between Yahoo! and defendants. The jury decided that defendants had breached the contract but that plaintiffs had not suffered any damages. Defendants now argue that the damages portion of the judgment may not rest upon the contract cause of action. Because we find no error with respect to the tort causes of action we do not reach this issue.

tort that defendants had acted with malice, fraud or oppression. The jury awarded plaintiffs $425,000 in presumed or general damages and $350,000 in punitive damages. No special damages were awarded on any cause of action.

Basing its ruling on the evidence adduced at trial, the trial court ordered a permanent injunction, which we shall discuss in more detail below.

Judgment was entered and we dismissed as moot defendants' appeal from the denial of their anti-SLAPP motions. Defendants timely filed notice of appeal from the judgment and from the trial court's denial of their motion for judgment notwithstanding the verdict. We have stayed enforcement of both the damages and the injunctive portions of the judgment and granted plaintiffs' request for calendar preference. We deferred ruling upon defendants' post-judgment motion for adjudication of contempt as to plaintiffs, ordering it to be considered with the appeal.

III. ISSUES ON APPEAL

1. Is there sufficient evidence to support a finding that plaintiffs were defamed?

2. Are defamatory communications posted on the Internet libel or slander?

3. Was a finding of actual malice within the meaning of *New York Times Co. v. United States* (1971) 403 U.S. 713 (*New York Times*) required to hold defendants liable for defamation?

4. Is the injunction lawful?

5. Did the superior court lack jurisdiction to proceed with the trial while defendants' first appeal was pending?

IV. DISCUSSION

A. Is There Sufficient Evidence to Support a Finding That Plaintiffs Were Defamed?

Defendants contend that there is insufficient evidence to support the jury's determination that defendants defamed each of the plaintiffs "by a statement or statements" that were libelous on their face. Our review of the issue is more stringent

than the traditional substantial evidence standard of review. We must " 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499 quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 284-286; and see *Franklin v. Leland Stanford Junior University* (1985) 172 Cal.App.3d 322, 330.)

We begin with a brief overview of that which constitutes defamation. Defamation is an invasion of the interest in reputation. (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) Libel, one of the two forms of defamation, is defined as a false and unprivileged publication "which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.)

Publication of a defamatory statement requires communication of the statement to some third person who understands both the defamatory meaning of the statement and its application to the person to whom reference is made. (*Ringler Associates Inc. v. Maryland Casualty Co*. (2000) 80 Cal.App.4th 1165, 1179.) In deciding whether a statement is defamatory, one must consider that which is explicitly stated as well as that which is insinuated or implied. (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 803.) The result is driven by the " 'totality of circumstances' " in the case at hand, beginning with the language of the statement itself and then considering the context in which the statement was made. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260-261.)

It is an essential element of defamation that the publication consists of a false statement of *fact* rather than opinion. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340 (*Gertz*).) But a statement of opinion may be actionable " 'if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.' " (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 451-452.) "Even if the speaker states the facts

upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18-19.)

On the other hand, "where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." (*Gregory v. McDonnell Douglas Corp*. (1976) 17 Cal.3d 596, 601.) The dispositive question is whether a reasonable factfinder could conclude that the published statements *imply* an assertion of defamatory *fact*. (*Milkovich v. Lorain Journal Co.*, *supra*, 497 U.S. at p. 21.)

Defendants argue generally that Internet message boards are so filled with outrageous anonymous postings that no reasonable person would take a typical anonymous and outrageous posting as a true statement of fact. We reject the argument for a number of reasons. First, we assume that one reason people use financial bulletin boards, such as the Yahoo! finance board that defendants used, is to seek information to evaluate a particular company. (Lidsky, "Silencing John Doe: Defamation & Discourse in Cyberspace," 49 Duke Law Journal 855, 886 (2000) (*Lidsky*).) Even if the exchange that takes place on these message boards is typically freewheeling and irreverent, we do not agree that it is exempt from established legal and social norms. The Internet may be the "new marketplace of ideas," (*id.* at pp. 893-894) but it can never achieve its potential as such unless it is subject to the civilizing influence of the law like all other social discourse. Some curb on abusive speech is necessary for meaningful discussion. We would be doing a great disservice to the Internet audience if we were to conclude that all speech on Internet bulletin boards was so suspect that it could not be defamatory as a matter of law. In effect, such a conclusion could extinguish any potential the forum might have for the meaningful exchange of ideas.

Second, the mere fact that the audience might not have believed defendants' postings does not change their defamatory character. " 'In order that the defendant's words may be defamatory, they must be understood in a defamatory sense. It is not necessary that anyone believe them to be true, since the fact that such words are in circulation at all concerning the plaintiff must be to some extent injurious to his reputation-although obviously the absence of belief will bear upon the amount of the damages. There must be, however, a defamatory meaning conveyed.' " (*Arno v. Stewart* (1966) 245 Cal.App.2d 955, 962-963 quoting Prosser, The Law of Torts (3d ed. 1964) § 106, pp. 763-764.)

Finally, defendants' postings were not, as defendants contend, typical anonymous and outrageous postings. Defendants' messages stood out from the messages authored by other people. Compared to the other postings, defendants' postings were especially vituperative personal attacks. If there were other postings on the boards that were more like defendants' postings, they were not part of the record.

Defendants further argue that certain categories of statements such as those alleging sexual impropriety, incompetence, or lying are not defamatory because they are similar to statements in other cases that found such statements to be rhetorical hyperbole or something like it. These comparisons are not helpful. The unique circumstances of each case must be considered when evaluating a statement for its defamatory content. Therefore, the result in one case cannot drive the result in an entirely different factual situation.

Defendants finally direct us to a consideration of specific postings, arguing that if even some of them could not be considered defamatory as a matter of law we must reverse the judgment. Since over 500 different messages were introduced into evidence, we begin by reviewing the procedure the trial court utilized in handling them all.

We first focus on the jury instructions defining statements that would be libelous on their face, or libel per se. The reason we do so involves the issue of damages. A libel

that is defamatory "without the necessity of explanatory matter" is a libel per se. (Civ. Code, § 45a.) Only a libel per se is actionable without proof of special damages. (*Ibid*.) Since plaintiffs had no special damages, the only type of libel for which defendants could be held responsible in damages is a libel per se.

The trial court determined as a matter of law that a statement that asserted or implied as a fact any one of 11 different facts, would, if untrue, be libel per se.[5] (See *Smith v. Maldonado*, *supra*, 72 Cal.App.4th at p. 647.) By means of a special verdict form the jury was asked to determine whether defendants had defamed plaintiffs "by a statement or statements which were libelous on their face." The jury was not asked to identify any specific statement as defamatory. Thus, by answering "yes" to the question of whether defendants had defamed plaintiffs by "a statement or statements which were

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[5] The court instructed the jury: "A statement, if untrue, is defamatory on its face if it asserts or implies as a fact any of the following:

"1. that a person committed a crime;

"2. that a person has a personal trait or engaged in conduct that would tend directly to injure the person with respect to his or her profession, trade or business either by impuning [*sic*] to him or her general disqualification in those respects which the profession, trade or business particularly, peculiarly requires or by impuning [*sic*] something with reference to his or her profession, trade or business that has a natural tendency to lessen its profits;

"3. that a person is impotent;

"4. that a person is an adulterer, that is, that he or she engages in sexual affairs outside of marriage;

"5. that a person has attained his or her professional position by having sex with a supervisor;

"6. that a person is a liar or a chronic liar or has committed perjury;

"7. that a supervisor discriminates against other persons on the basis of race, gender, prejudices such as sexual orientation or similar characteristics;

"8. that a person has engaged in sabotage or intentionally caused damage in the workplace,

"9. that a person engaged in sexual harassment;

"10. that a person has created a hostile work environment due to sexual misconduct;

"11. that a person has stalked another person."

libelous on their face," the jury necessarily found that defendants had made untrue statements expressing or implying as a fact one or more of the 11 facts the court listed. Because defendants do not assert here that these statements were true, we focus our review solely on the question of whether there were statements that asserted or implied any such facts as to each of the plaintiffs. We have no trouble identifying many that do.

There are numerous messages that either directly assert or imply that Felch was professionally incompetent, that she engaged in sex outside of marriage, that she was a liar, that she had sabotaged her laboratory at work, and that she held her position by having sex with a supervisor. The "dress with a stain" message that we quoted above is typical. Any recipient of that message in 1998 or 1999 would have reasonably concluded that the "dress with the stain" remark was intended to refer to the Clinton/Lewinsky affair in which the White House intern was supposed to have preserved a dress stained with the President's semen. (See Schmidt, *FBI To Test Lewinsky Dress*, Wash. Post (Jul. 31, 1998) p. A4.) One reasonable interpretation of the statement is that Felch is so incompetent or lazy that she must resort to blackmail or sex with a supervisor to keep her job.

The record is full of similar statements, some more direct about that which defendants were asserting, such as: "The scandal 'Smokin' is referring to is probably the Susan B. Felch, 'my project is wasting money, my life is lousy, i'm so short, so i'll claim people are sabotaging my work [as an] excuse to coverup [*sic*] any affair with another Varian executive that may be ongoing, etc.' "

There are numerous messages about Zdasiuk stating or implying defamatory facts. A message entitled "Yes, George Zdasiuk is quite sick" contains this statement: "Maybe his drinking clouded his judgment, maybe it's one of the reasons he repeatedly violated company policy, who knows. [¶] I just hope he's not intoxicated when he takes the stand at the trial." Another one says, "I'm sure there will be plenty of time for everyone to get to know each other as I suspect we'll have to wait for Mr. Zdasiuk to sober up before he

takes the stand . . . ." A reasonable factfinder could conclude that these messages assert or imply as a fact that Zdasiuk's judgment was regularly impaired by alcohol. This is defamation.

The jury also found that defendants had defamed the Varian plaintiffs. "While a corporation has no reputation in the personal sense to be defamed by words, such as those imputing unchastity, which would affect the purely personal reputation of an individual, it has a business reputation, and language which casts aspersions upon its business character is actionable. [Citations.] A corporation's reputation as an employer is, of course, an important aspect of its business reputation." (*DiGiorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 571.)

There are postings that imply that Zdasiuk, a VMS supervisor, discriminated against persons on the basis of gender or harbored prejudices based upon sexual orientation. A typical posting from this group is this one: "Is Varian Vice President George Zdasiuk a sexist pig . . . Is there another explanation for this corporate vice president to explain his bemoaning the hiring of a pregnant engineer had he known? Perhaps, if Mr. Zdasiuk weren't looking at her chest, he might have noticed if she were showing!" The natural and logical implication of this message is that this Varian executive would refuse to hire an otherwise qualified person who was pregnant, and that he created a hostile work environment by staring at the breasts of women employees.

The many publications relating to plaintiffs videotaping company bathrooms would naturally have the effect of bringing the business into public contempt and imply that the company had committed a crime. Since most of these messages did not differentiate between VSEA and VMS, they could reasonably be construed as applying to either one or both of them.

In sum, there is sufficient evidence to support the jury's finding that defendants had defamed the plaintiffs.

Defendants point out that we cannot determine from the special verdict form which statements provided the basis for the jury's findings. They argue that because we do not know upon which statements the jury relied we must reverse the judgment. We disagree.

The trial court's limitation on that which would constitute libel per se eliminated from consideration many of the messages that had been admitted into evidence. The facts that the trial court listed for the jury are specific and limited and carefully "confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." (*Bose Corp. v. Consumers Union of U.S., Inc.*, *supra*, 466 U.S. at p. 505.) Indeed, defendants do not object to the trial court's characterization of that which would be libelous per se. The jury received appropriate and detailed instructions on how to identify a defamatory statement and we must presume that the jury understood and followed the instructions given. (*Housley v. Godinez* (1992) 4 Cal.App.4th 737, 747.) And finally, there is an ample evidentiary basis to support the verdict. We have identified a great number of messages that could have been construed as libelous within the limits the court set. Although the better practice might have been to have the jury identify the particular statements it found to be defamatory, our review of the whole record satisfies us that even if there were some messages that were protected opinion or rhetorical hyperbole, the jury did not rest its verdict upon them. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.)

B. Are Internet Postings Libel or Slander?

Defendants next argue that to the extent their Internet messages could be considered defamatory, they must be characterized as slander. Defendants point out that the distinction is crucial because slander requires proof of special damages and libel does not and since plaintiffs did not prove any special damages they cannot recover for defamation.

Plaintiffs respond that defendants waived the issue by failing to raise it at trial. Defendants concede they did not spot the issue until after trial but they urge us to apply an exception to the general rule that permits us to pass upon an issue that was not raised below if the facts are undisputed and no different showing could have been made. Defendants also argue that the matter is of considerable public concern warranting consideration of the merits.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. But there are many situations where we do consider such matters, such as when the issue relates to a question of law only, or where the public interest or public policy is involved. Whether or not the rule shall be applied is largely a question of the appellate court's discretion. (*Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 5; and see *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 908.) The issue presented here involves a question that has arisen only with the advent of Internet communications. Application of the common law to matters involving the Internet is of considerable public interest. Moreover, the distinction between libel and slander involves a practical difference in the requirements for pleading and proof so that the question is one that is likely to recur. Accordingly, we exercise our discretion and proceed to the merits.[6]

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[6] Defendants also contend that plaintiffs wrongly tried their invasion of privacy claim on a theory of appropriation of name rather than false light. Plaintiffs point out that aside from failing to raise the issue, defendants submitted proposed jury instructions on appropriation of name and none on false light and agreed to the special verdict form that required findings on only the issues raised by the claim of appropriation of name. We believe that the question is not so simply a question of law as is the libel/slander question. Nor does it involve a matter of public concern. Therefore, since defendants failed to preserve this issue and effectively invited the error by their own request for jury instructions we shall decline to consider it. (See *Stevens v. Owens-Corning Fiberglas Corp*. (1996) 49 Cal.App.4th 1645, 1653.)

A defamatory communication may be characterized either as libel or slander. (Civ. Code, § 44.) The traditional distinction between libel and slander is that libel is written and slander is spoken. Defendants ignore this distinction and focus instead upon the practical difference, which involves the necessity to prove damages. Both distinctions are of ancient origin. Slander was considered a sin in Medieval England. (Dobbs, The Law of Torts, (2001) Ch. 28, § 400, p. 1117 (Dobbs).) When the action migrated to the civil courts the courts required proof of "temporal" or actual damages to avoid interfering with the church's authority over spiritual matters. (Prosser & Keeton, Torts (5th ed. 1984) ch. 19 Defamation § 112, p. 788 (Prosser).)

Libel arose with the advent of the printing press. Libel was at first a crime and was used to suppress political writings. It was later applied to non-political defamatory writings. Libel has been considered the greater wrong, either because of its criminal origins (Prosser, Torts, *supra*, § 112 at p. 785) or because the permanence of its form endowed it with a greater propensity to breach the peace. (Dobbs, *supra*, § 400 at p. 1117; *Ostrowe v. Lee* (1931) 256 N.Y. 36, 39.) In any event, by the early 19th Century libel was actionable per se, that is, damage was presumed. (Prosser, *supra*, at p. 786.)

Libel today is defined as a defamatory publication communicated "by *writing, printing*, *picture*, *effigy*, *or other fixed representation to the eye* . . . ." (Civ. Code, § 45, italics added.) Slander is "*orally uttered*, *and also communications by radio or any mechanical or other means* . . . ." (Civ. Code, § 46, italics added (hereafter section 46).) Television broadcasts are also treated as slander in this state. (See *White v. Valenta* (1965) 234 Cal.App.2d 243, 254.)

Defendants argue that Internet messages fall into the statutory classification of slander because they are communications by "any mechanical or other means" as specified in the slander statute. (§ 46.) Logic tells us that "mechanical or other means" cannot apply to all mechanical methods for producing a communication. After all, the cause of action for libel arose with the invention of mechanical means for reproducing the

printed word. But the slander statute itself contains no clue to what the Legislature intended by the phrase. Accordingly, we may resort to the legislative history. (*ITT World Communications*, *Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 868.)

Prior to 1945 Civil Code section 46 defined slander as a "false and unprivileged publication other than libel." (Stats. 1945, ch. 1489, § 2.) At the time there was some dispute about whether radio broadcasts should be characterized as slander or libel since even though communications delivered by radio were spoken, in most cases the messages were read from a written script. (Prosser, *supra*, § 112 at p. 787.) Some jurisdictions reasoned that because radio broadcasts had such a great potential for injury they should be treated as the supposedly greater wrong of libel. (*Ibid.*) The California Legislature either rejected or ignored that reasoning and simply designated radio broadcasts as slander, amending the section to read as it does today. (Stats. 1945, ch. 1489, § 2.) Thus, by categorizing radio broadcasts as slander, our Legislature adhered to the traditional distinction between libel and slander, i.e., that libel is written and slander is spoken.

The legislative history of the 1945 amendments contains one illuminating reference to the phrase "mechanical or other means." In a letter urging the governor to sign the bill the bill's supporters explained: "Radio broadcasters are definitely placed under the slander provisions of the code in Section 46, the present law defining slander, by addition of the words, 'orally uttered, and also communications by radio or any mechanical or other means which. . . .' This wording includes radio broadcasts directly spoken, those which are mechanically reproduced by transcriptions and we believe will include broadcasts from sound trucks." (Newspaper Publishers Association and Hearst Publications letter to Governor Warren, Jun. 22, 1945, p. 1.) (Stats. 1945, ch. 1489.) "Transcription" as used here is defined as "a tape, disc, or other recording made for broadcast or rebroadcast of a radio or television program." (Webster's 3d New Internat. Dict. (1993) at p. 2426.) This reference in the legislative history supports our conviction

that the Legislature intended to maintain the traditional distinction between libel and slander and that "mechanical or other means" must have been intended to encompass only means of auditory communication. Accordingly, we reject defendants' contention that the language "communications by radio or any mechanical or other means" was intended to include anything like a computer or other device used to produce written communications.

Defendants also urge us to categorize communications over the Internet as the supposed lesser wrong of slander because, since Internet communication is the modern-day equivalent of a speech on the "village green," it deserves the greater protection traditionally accorded slander. The argument confuses the analyses. In defamation cases we are always mindful of the balance between the defendant's constitutional right to free speech and the plaintiff's interest in protecting his or her good name. However, that balance is struck by weighing factors such as the plaintiff's status (as a public or private figure) and the subject of speech itself against the defendant's constitutional interests. Whether the speech is classified as libel or slander is an arbitrary and, some would say, archaic distinction. At any rate, in California the distinction has little if anything to do with the constitutional analysis.

We find the plain language of the defamation statutes is dispositive. That is, defendants' messages were publications *by writing*. The messages were composed and transmitted in the form of written words just like newspapers, handbills, or notes tacked to a conventional bulletin board. They are representations "to the eye." True, when sent out over the Internet the messages may be deleted or modified and to that extent they are not "fixed." But in contrast with the spoken word, they are certainly "fixed." Furthermore, the messages are just as easily preserved (as by printing them) as they are deleted or modified. In short, the only difference between the publications defendants made in this case and traditionally libelous publications is defendants' choice to disseminate the writings electronically.

It has been noted that many forms of publication available to us today "cannot realistically be analyzed by reference to the traditional libel-slander dichotomy, which modern technology has rendered increasingly obsolete. [Citations.]" (*Polygram Records*, *Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 552, fn. 9.) In this case, however, the publications are readily analyzed by reference to the existing statutes. We hold that written defamatory communications published by means of the Internet are properly characterized as libel.

C. Did the Trial Court Err in Instructing the Jury That It Could Find Defendants Liable for Defamation on Proof of Mere Negligence?

Defendants next contend that all the plaintiffs are public figures and therefore the trial court erred in instructing the jury that it could find liability on proof of either actual malice or negligence.[7] Defendants also argue that even if the plaintiffs are not public figures they are not entitled to presumed or punitive damages because the defamatory statements involved issues of public concern.

A plaintiff who is a public figure may not recover damages for defamation without clear and convincing proof that the defamatory statement was made with actual malice. (*New York Times Co. v. Sullivan*, *supra*, 376 U.S. at pp. 279-280.) Actual malice in this context means that the defendant published the defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." (*Id.* at p. 280.) If plaintiffs are not public figures, then liability may be established on proof of mere negligence. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747.) If the defamation involves an issue of public concern, proof of actual malice is necessary to

[7] We reject plaintiffs' contention that defendants waived this issue by failing to object to the instruction. Defendants requested two instructions that included the public figure standard and the trial court refused both. Accordingly, the issue was preserved by operation of Code of Civil Procedure section 647, which provides that an objection to any order "giving an instruction, refusing to give an instruction, or modifying an instruction requested" is never waived.

recover presumed or punitive damages even if the plaintiff is not a public figure. (*Gertz*, *supra*, 418 U.S. at pp. 347, 349; *Dun & Bradstreet*, *Inc. v. Greenmoss Builders* (1985) 472 U.S. 749, 756 (*Dun & Bradstreet*).)

There are two types of public figures: all-purpose public figures and limited-purpose public figures. All-purpose public figures are those persons who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." (*Gertz*, *supra*, 418 U.S. at p. 345.) In order for a plaintiff to be deemed an all-purpose public figure, there must be "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society . . . ." (*Id.* at p. 352.)

Limited-purpose public figures are those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." (*Gertz*, *supra*, 418 U.S. at p. 345.) This type of public figure "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." (*Id.* at p. 351.) There are three aspects to the analysis. First the court must find that there was an issue that was being debated publicly that had "foreseeable and substantial ramifications for nonparticipants." (*Waldbaum v. Fairchild Publications*, *Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297.) Second, in connection with such a public debate the plaintiff must have undertaken "some *voluntary* act through which he seeks to influence the resolution of the public issues involved." (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 254.) "Finally, the alleged defamation must have been germane to the plaintiff's participation in the controversy." (*Waldbaum v. Fairchild Publications*, *Inc.*, *supra*, 627 F.2d at p. 1298; see also *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845-846.)

Applying these rules we find first of all that the Varian plaintiffs are not all-purpose public figures. The Varian plaintiffs make equipment for the technology market. They neither advertise nor sell to the general public. In *Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 205 cited by defendants, the plaintiff was an all-purpose public figure

because he owned and operated a radio station that had pervasive influence in the community and which thrust itself into the public eye every day by virtue of its radio broadcasts. Here there are no similar facts. There is nothing in the record to support the conclusion that the Varian plaintiffs have any type of pervasive involvement in the affairs of society.[8]

We also reject the contention that Felch and Zdasiuk are limited-purpose public figures. According to defendants, the "public controversy" into which these plaintiffs injected themselves was the public's interest generally in issues involving corporate mismanagement and specifically in Varian's efforts to silence its on-line critics. Defendants argue that by filing this lawsuit plaintiffs voluntarily thrust themselves into this controversy. But there was no *public* controversy before plaintiffs filed the lawsuit. This entire matter arose as a result of Delfino's termination for harassing Felch, a purely personal issue. And plaintiffs' decision to sue can hardly be characterized as voluntary since they had no recourse but to file the lawsuit if they wanted the offending publications to cease.

Defendants cite *Lee v. Calhoun* (10th Cir. 1991) 948 F.2d 1162, 1165 as support, but *Lee v. Calhoun* is distinguishable. There the plaintiff filed a malpractice lawsuit claiming $38 million in damages. The issue of medical malpractice damage awards was an acknowledged, pre-existing public controversy. In claiming such a high dollar figure in damages, the plaintiff was voluntarily injecting himself into that controversy. In this case, the public's interest was not generated until defendants accelerated their campaign after the lawsuit was filed. As the Supreme Court has said, "those charged with

[8] Defendants' reliance upon *Global Telemedia Intern., Inc. v. Doe 1* (C.D.Cal. 2001) 132 F.Supp.2d 1261 is misplaced. That case concerned whether allegedly libelous statements were made " 'in connection with an issue of public interest' " within the meaning of Code of Civil Procedure section 425.16, subdivision (e). (*Global Telemedia Intern., Inc. v. Doe 1*, *supra*, 132 F.Supp.2d. at p. 1265.) There was no consideration of whether the company was a public figure for purposes of *New York Times* analysis.

defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (*Hutchinson v. Proxmire* (1979) 443 U.S. 111, 135.)

The same analysis applies to the question of whether the Varian plaintiffs are limited purpose public figures, although the question is a closer one. It is not insignificant that the Varian plaintiffs are publicly traded companies. Such companies indisputably have an interest in the dissemination of information about themselves to existing and potential investors. To that extent the companies voluntarily place themselves in a position that increases the risk that they will be defamed in the eyes of those investors. To be sure, defendants' first messages were posted on financial bulletin boards devoted to information about Varian and Varian stock.

On the other hand, while there may be general public *interest* in public companies and their management, there was no "particular public controversy" into which Varian injected itself. (*Gertz*, *supra*, 418 U.S. at p. 351.) The California Supreme Court has rejected the argument that simply by doing business with the public a corporate plaintiff loses its protection as a private person. In *Vegod Corp. v. American Broadcasting Companies*, *Inc.* (1979) 25 Cal.3d 763 (*Vegod*) plaintiffs conducted the going-out-of-business sale for City of Paris, a landmark department store in San Francisco. Defendants published statements charging the plaintiffs with deceiving the public in connection with that sale. The court determined that even though the demise of City of Paris was a matter of public controversy, the plaintiffs had not thrust themselves into that controversy merely by advertising and selling goods to the public. The court held: "Criticism of commercial conduct does not deserve the special protection of the actual malice test. Balancing one individual's limited First Amendment interest against another's reputation interest [citation], we conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur." (*Id.* at p. 770.)

Although *Vegod* did not specifically involve a publicly traded company, it does counsel that criticism of a company's business or employment practices alone cannot create a public controversy. Our Supreme Court has also noted that a " 'fairly high threshold of public activity' is necessary to elevate a person to public figure status. (Tribe, American Constitutional Law (2d ed. 1988) § 12-13, p. 881.)" (*Brown v. Kelly Broadcasting Co*., *supra*, 48 Cal.3d at p. 745.) Because there was no evidence of any particular controversy into which the Varian plaintiffs injected themselves prior to filing the lawsuit, we conclude that the companies' status as public companies is not sufficient to consider them public figures for the purposes of this action.

We briefly address defendants' contention that their speech involved matters of public concern. Whether a matter is of public concern is sometimes difficult to determine. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1020.) Merely publishing material in the mass media creates public interest in its contents. (*Brown v. Kelly Broadcasting Co.*, *supra*, 48 Cal.3d at p. 752.) But public *interest* is not the test. "It is speech on ' " matters of public concern" ' that is 'at the heart of the First Amendment's protection.' [Citations.]" (*Dun & Bradstreet*, *supra*, 472 U.S. at pp. 758-759.) Whether the speech involved is of public concern is determined by analyzing its " 'content, form, and context . . . as revealed by the whole record.' " (*Id.* at p. 761, quoting *Connick v. Myers* (1983) 461 U.S. 138, 147-148.)

We have reviewed the whole record. In so doing we conclude that even if some of the defamatory statements could arguably be considered matters of public concern, such as whether a company discriminates against or harasses women in the workplace, viewed as a whole the defamatory speech reflects nothing more than a vicious personal vendetta having nothing to do with issues of legitimate concern to the public.

In sum, the trial court did not err in instructing the jury that defendants could be liable on a showing of either actual malice or negligence.

D. The Injunction

1. Is the Injunction an Unconstitutional Prior Restraint?

The trial judge found that defendants had published very serious defamation and that they were likely to continue to do so since they promised to continue posting until they died. The resulting injunction contains 15 paragraphs. On appeal defendants do not object to any particular paragraph. Defendants generally object that the injunction is a prior restraint on speech. Defendants contend that the injunction prevents them "from speaking on the Internet or anywhere else on a broad range of topics," that it improperly prohibits "future speech," and that it prevents them from posting truthful information. We view these objections as applicable to three paragraphs of the injunction: paragraphs 1, 3, and 6.

The balance of the injunction prohibits defendants from using the names of the individual plaintiffs as aliases or screen names; it requires defendants to take all steps necessary to have any existing messages that the trial court found to be defamatory removed from the Internet; it includes a very broad stay-away order; and it incorporates various orders designed to aid plaintiffs in tracking defendants' online activities. Since defendants do not direct their appeal to these provisions of the injunction, we express no opinion about them;[9] nor are we called upon to review any of the trial court's findings of fact. We restrict our analysis to the question of whether paragraphs 1, 3, and 6 are unconstitutional prior restraints on speech.

Paragraphs 1 and 3

Paragraph 1 prohibits "any written statement that is untrue, expressly or by implication, with regard to any person identified in subparagraphs (a)-(w) below in any of

[9]We do not make an independent inquiry to extract an error defendants fail to specify. (See *California Viking Sprinkler Co. v. Cheney* (1960) 182 Cal.App.2d 564, 571.)

the ways specified therein, which the Court finds are untrue, except that this paragraph 1 does not prohibit [defendants] from making statements about matters that may occur after the date of the trial . . ." Paragraph 1 lists 23 different facts that the trial judge found were untrue.[10] Following the list of 23 facts the order states: "This paragraph 1 shall not

[10] Subparagraphs (a)-(w)of paragraph 1 are as follows:

"a. that [Felch and Zdasiuk] is or was a liar or chronic liar;

"b. that [Felch and Zdasiuk] Richard Aurelio, Richard Levy, or any of their spouses has engaged in adultery or extramarital affairs or is or was sexually promiscuous;

"c. that [Felch and Zdasiuk] or James Fair is or was a danger to children or others;

"d. that [plaintiffs or any of their agents] videotaped children or videotaped any bathroom, restroom, lavatory or similar place, or videotaped any person inside any such place, or videotaped any activity inside any such place, . . . ;

"e. that James Fair is or was homosexual;

"f. that [Felch and Zdasiuk] is or was mentally unstable or mentally ill or suffers from hallucinations;

"g. that Susan Felch sabotaged a PLAD experiment or process or any other experiment or process at her employment;

"h. that Susan Felch had a semen stain on her dress or other clothing or had sex with a supervisor;

"i. that Megan Gray said that Susan Felch had a semen stain on her dress or other clothing or had sex with a supervisor;

"j. that [Felch and Zdasiuk] stalks other persons, . . . ;

"k. that George Zdasiuk is or was homophobic;

"l. that George Zdasiuk discriminates on the basis of gender or pregnancy;

"m. that George Zdasiuk has stared at or regularly stares at female employees' breasts or chest in the court [*sic*] of his employment;

"n. that [the Varian plaintiffs or their agents] produced pornography in the workplace . . . . ;

"o. that any present or former officer, director, or employee of [the Varian plaintiffs] sent pornography to or forced pornography on any of those companies' present or former employees, . . . ;

"p. that Richard Levy or Richard Aurelio has lied under oath or has committed perjury or is being or has been investigated for perjury;

"q. that Megan Gray is or was a liar;

"r. that [the Varian plaintiffs or their agents] violated company policies, except that certain written performance reviews were not timely prepared by some managers; (continued)

be construed as a general prohibition on defamatory statements. Only written statements that defame any person identified in subparagraphs (a)-(w) above in any of the ways specified therein, all of which were shown to be false and defamatory, are prohibited by this paragraph 1." Paragraph 3 prohibits defendants from posting any statement prohibited by paragraph 1 in any part of an Internet message.

Plaintiffs argue that the injunction cannot be considered a *prior* restraint because it prohibits speech that the trial court has already determined to be unlawful. Plaintiffs rely upon *Aguilar v. Avis Rent A Car System*, *Inc*. (1999) 21 Cal.4th 121, 140 (*Aguilar*) for the proposition that such a restraint is permissible. As we shall explain, *Aguilar* is inapplicable in this case.

A prior restraint is an administrative or judicial order that forbids certain speech in advance of the time the communication is to occur. (*Alexander v. United States* (1993) 509 U.S. 544, 550; see also *DVD Copy Control Assn.*, *Inc. v. Bunner* (2003) 31 Cal.4th 864, 886.) "Temporary restraining orders and permanent injunctions-*i.e.*, court orders that actually forbid speech activities-are classic examples of prior restraints." (*Alexander v. United States*, *supra*, 509 U.S. at p. 550.) Prior restraints on pure speech are highly disfavored and presumptively a violation of the First Amendment. (*Hurvitz v. Hoefflin*

"s. that [the Varian plaintiffs or their agents] destroyed evidence in this case or wrongfully reused the tapes used in connection with the cameral [*sic*] that was placed in Susan Felch's office in 1998;

"t. that George Zdasiuk is or was an alcoholic or a drunk, or that he habitually drinks or is intoxicated, or that he was drunk or intoxicated at work or during any deposition or other court proceeding;

"u. that George Zdasiuk was not upset by the death of his sister, or by the death of his father, or by the World Trade Center disaster on September 11, 2001;

"v. that [the Varian plaintiffs or their agents] created, fostered, supported, or permitted the existence of a hostile work environment, or that a hostile work environment existed at Varian; or

"w. that [Felch and Zdasiuk] harassed [defendants], or any other person, either in the workplace or elsewhere."

(2000) 84 Cal.App.4th 1232, 1241.) This is true even when the speech is expected to be of the type that is not constitutionally protected. (See *Near v. Minnesota* (1931) 283 U.S. 697, 704-705 [rejecting restraint on publication of any periodical containing malicious, scandalous and defamatory matter]; and see *New York Times*, *supra*, 403 U.S. at pp. 718-726 [national security interest in suppressing classified information in Pentagon Papers did not outrank First Amendment right of press to publish classified information].)

The plain language of our state Constitution also prohibits prior restraints on speech: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a); and see *Dailey v. Superior Court* (1896) 112 Cal. 94, 100.) This provision is "[a] protective provision more definitive and inclusive than the First Amendment." (*Wilson v. Superior Court* (1975) 13 Cal.3d 652, 658.) Our Supreme Court has stated that the "publication of information about a person, 'without regard to truth, falsity, or defamatory character of that information,' [is] not subject to prior restraint." (*Id.* at p. 659; and see *Rosicrucian Fellow v. Rosicrucian Etc. Ch.* (1952) 39 Cal.2d 121; *Gilbert v. National Enquirer, Inc*. (1996) 43 Cal.App.4th 1135, 1148.)

"The presumption against prior restraints is heavier-and the degree of protection broader-than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (*Southeastern Promotions, Ltd. v. Conrad* (1975) 420 U.S. 546, 558-559.) The government bears a heavy burden to justify a prior restraint. (*New York Times*, *supra*, 403 U.S. at p. 714; *Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 419.)

United States Supreme Court decisions that have upheld injunctions based upon past unlawful conduct have done so not only because the past conduct was unlawful, but also because the restrictions did not involve censorship of speech but were merely limits on the time, place and manner. (See *DVD Copy Control Assn.*, *Inc. v. Bunner*, *supra*, 31 Cal.4th at p. 893 (conc. opn. of Moreno, J.).) The high court has declined to apply the strict scrutiny of prior restraint analysis where an injunction prohibiting picketing near an abortion clinic was content neutral and did not prevent the petitioners from expressing their message in other ways. (*Madsen v. Women's Health Center*, *Inc*. (1994) 512 U.S. 753, 764, fn. 2 (*Madsen*).) *Madsen* held that the proper level of scrutiny for a content-neutral injunction is whether the challenged provisions "burden no more speech than necessary to serve a significant government interest." (*Id.* at p. 765.) Only when a restraint is content based does prior restraint analysis apply. (See, *Thomas v. Chicago Park Dist*. (2002) 534 U.S. 316, 322.) A content-based regulation (as opposed to an injunction) is permissible if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. (See *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 45.) The United States Supreme Court has not articulated a test for analyzing a content-based injunction, but such a rule would undoubtedly be stricter than the *Madsen* rule.

The plurality opinion in *Aguilar* held that an injunction prohibiting racial epithets in the workplace was not a prior restraint. The plurality reasoned that since the jury had determined that the speech violated the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), the speech was constitutionally "unprotected" and could be enjoined. (*Aguilar*, *supra*, 21 Cal.4th at pp. 138-139, 144 (plur. opn. of George, C.J.).) In support of that reasoning the lead opinion relied upon *Pittsburgh Press Co. v. Human Rel. Comm'n* (1973) 413 U.S. 376, 390 (*Pittsburgh Press*). *Pittsburgh Press* upheld a regulation prohibiting a newspaper from designating its help-wanted advertisements by gender. (*Ibid.*) In rejecting the newspaper's prior restraint argument, the court remarked:

"The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, *before an adequate determination that it is unprotected by the First Amendment*." (*Ibid.*, italics added.) The court explained that this was "not a case in which the Court is asked to speculate as to the effect of publication" (*ibid*.) and concluded that the commission's order was not a prior restraint because it merely prohibited a continuing course of repetitive conduct. The court's rationale was that to the extent the order prohibited future speech, it was possible to determine the meaning and effect of that speech in advance.

Aguilar's conclusion that an injunction prohibiting racial epithets was permissible was based upon the reasoning of *Pittsburgh Press*, i.e., that the court was not required to speculate about the effect of such speech in the workplace-it would continue to be unlawful. (*Aguilar*, *supra*, 21 Cal.4th at pp. 129, 141 (plur. opn. of George, C.J.).) The three dissenting justices believed that notwithstanding the jury's determination that defendants' prior speech violated the FEHA, the injunction prohibiting future speech was an impermissible prior restraint. (*Id*. at pp. 175-176 (dis. opn. of Mosk, J.); *id*. at pp. 176-177 (dis. opn. of Kennard, J.); *id*. at p. 193 (dis. opn. of Brown, J.).)

Justice Werdegar's concurrence emphasized that more than just a finding of unlawfulness was required to enjoin the speech. Although the injunction was content based (*Aguilar*, *supra*, 21 Cal. 4th at p. 164 (conc. opn. of Werdegar, J.).) the concurring opinion found it was justified by analogy to a permissible time, place, and manner regulation in that it was aimed at relieving a captive audience of unwanted communications and was limited to the workplace, allowing the speakers ample opportunity to express themselves elsewhere. (*Id.* at p. 169 (conc. opn. of Werdegar, J.).) The concurrence also emphasized the balancing of competing constitutional values-freedom of speech, equal protection of the laws, and our state Constitution's additional protection against racial discrimination in the workplace. (*Id.* at p. 167 (conc. opn. of Werdegar, J.) and see U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a), § 8.)

At least in Justice Werdegar's view, the injunction was permissible not only because the jury had determined the speech was a violation of FEHA, but also because the injunction was designed to advance values equal in dignity to the constitutional value of free speech. (*Aguilar*, *supra*, 21 Cal.4th at p. 168 (conc. opn. of Werdegar, J.).)

None of the reasoning used to support the injunction in *Aguilar* applies in this case.[11] We cannot view paragraphs 1 and 3 as content neutral or even as acceptable content-based time, place, and manner restrictions. These paragraphs prohibit publications based upon their content and do not purport to limit that regulation in terms of time, place, or manner. Rather, they prohibit the written communications anytime, anywhere. Defendants are left with no alternative means of communication on those subjects.

It is also important that the instant injunction prohibits defamation rather than racial epithets that create a hostile work environment. Although the state's interest in securing compensation for defamation plaintiffs is strong and legitimate, that interest does not rise to a legislatively declared public policy or a constitutionally embedded right such as that expressed by the FEHA. And the nature of defamation law makes it difficult if not impossible to craft an injunction based upon an adequate determination that any future publications will be constitutionally unprotected. In fact, it is not entirely clear that defamatory speech may be enjoined even after a judicial determination that the speech is defamatory. Our review has disclosed only a handful of cases upholding such injunctions. (*Advanced Training Sys. v. Caswell Equip. Co.* (Minn. 1984) 352 N.W.2d 1 (*Advanced Training*) [injunction prohibiting publication of defamatory books]; *Retail Credit Company v. Russell* (Ga. 1975) 218 S.E.2d 54, 62 (*Retail Credit*) [injunction

[11] We are also mindful that *Aguilar* was a plurality opinion and is not controlling precedent. (*Board of Supervisors v. Local Agency Formation Com*. (1992) 3 Cal.4th 903, 918.)

restraining credit reporting company from publishing *the exact allegations found to have been libelous* by the jury].)[12] The rule is not universally embraced. (See *Metropolitan Opera Ass'n*, *Inc. v. Local 100, supra,* 239 F.3d 172, 178-179 remarking that the Second Circuit has not adopted a rule permitting a libel to be subject to an injunction once its libelous character has been adjudicated; and see *Willing v. Mazzocone* (Pa. 1978) 393 A.2d 1155 reaffirming the common law rule that the remedy for defamation is an action for damages.) Indeed, the United States Supreme Court has never applied the "adequate determination" rubric to a case involving defamatory speech.

One of the reasons for the law's reluctance to enjoin defamation is the difficulty of determining in advance whether or not a particular publication will be defamatory. It has only been in cases where that determination may be made with some reliability that injunctions prohibiting defamation have been upheld. For example, *Advance Training* prohibited certain books; *Retail Credit* prohibited the "exact allegations" the credit reporting agency had previously published. In both cases there was a judicial determination not only that the statement was untrue, but also that the context rendered it defamatory. Such injunctions do not suffer from the problem at hand. That problem is that paragraphs 1 and 3 do not prohibit exact statements under the circumstances in which

[12] *Lothschuetz v. Carpenter* (6th Cir. 1990) 898 F.2d 1200 is frequently cited in support of the proposition that such injunctions are acceptable. That case involved the defendant's letter-writing campaign against the plaintiffs. The trial court refused to issue an injunction in spite of the fact the jury found the letters to be defamatory. In a split decision, the appellate court held that under the circumstances of defendant's "frequent and continuing defamatory statements" an injunction prohibiting the particular speech found to be defamatory was necessary to prevent future injury. (*Id*. at pp. 1208-1209.) Because the court did not have occasion to rule upon a particular injunction, the case may be said to stand only for the general proposition that such orders could be constitutional. It provides no guidance as to the permissible scope of any such order. (See also *O'Brien v. University Community Tenants Union* (1975) 327 N.E.2d 753.)

the court found them to be defamatory. These paragraphs prohibit statements that have not yet been composed.

Here we have a list of facts that the court determined to be defamatory in the context in which they had previously been published. Paragraph 1 then prohibits the use of these facts in new statements "that defame any person . . . in any of the ways specified." By limiting its prohibition to statements that "defame," the trial court intended to limit the restriction to unlawful conduct. But such a restriction does not amount to an advance determination that the prohibited speech will be defamatory because it does not take into account the context in which the future statement will be made. As we explained above, whether a statement is defamatory depends upon the forum, the form of the statement, and the context in which it is published. This is true even if we presume the court intended only to prohibit statements that would be libel per se. In order to be libel per se, a statement must assert or imply the libelous statement as a fact and we cannot assess that point until the statement is published. Were we to approve the restriction incorporated in paragraphs 1 and 3, plaintiffs would still have to obtain a judicial determination of the defamatory nature of each new statement because we cannot determine in advance whether any particular statement will be defamatory. That is the special vice to which *Pittsburgh Press* referred.

In summary, paragraphs 1 and 3 do not seek to protect a compelling state interest such as that expressed by the FEHA; they do not incidentally restrict speech with reasonable time, place, and manner regulations, and they cannot rest upon an adequate determination that the prohibited future speech will be "unprotected." Accordingly, we conclude that paragraphs 1 and 3 are unconstitutional prior restraints.

We recognize that part of the difficulty in drafting an appropriate injunction in this case stems from defendants' own egregious conduct. But to paraphrase Justice Brown's remarks in her dissent in *Aguilar,* this is not an all-or-nothing choice between either upholding the injunction or subjecting plaintiffs to a constant stream of libel. (*Aguilar*,

supra, 21 Cal.4th at p. 193 (conc. opn. of Brown, J.).) The jury awarded plaintiffs damages, both compensatory and punitive. It is hard to imagine that after suffering the financial burden of their prior conduct defendants will choose to continue it. If they do, they of course run the risk of paying a second award.[13]

Paragraph 6

Paragraph 6 prohibits the posting of financial information about any Varian executive or employee along with the address of the person's residence or the names or locations of his or her family members. Defendants argue that this restriction is also an impermissible prior restraint. We disagree.

We first consider whether Paragraph 6 is content neutral. In determining whether a restriction that burdens speech is content neutral, the government's purpose in enacting the restriction is the controlling consideration. (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.) "[L]iteral or absolute content neutrality" is not necessary. (*Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 368.) A restriction is content neutral if it is " 'justified without reference to the content of the regulated speech.' " (*Id.* at p. 367, quoting *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293.)

Paragraph 6 is content neutral. It may be justified without reference to the content of the statements. Content-whether the location of a person's home or the place where soccer practice will be held-is immaterial to the restriction. The trial court found that it was the juxtaposition of the information that presented a danger to the subjects of those postings. The court's purpose in issuing this part of the injunction was to prevent defendants from placing plaintiffs in danger and causing them fear in their daily lives.

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[13] Defendants contend, without reference to controlling authority, that the injunction improperly deprives them of the right to a jury determination of that which is defamatory. (See *Kramer v. Thompson* (3rd Cir. 1991) 947 F.2d 666, 672, fn. 15.) Given our conclusion that paragraphs 1 and 3 must be stricken, we need not reach the question.

A content-neutral injunction is permissible if it burdens no more speech than necessary to serve a significant government interest. (*Madsen*, *supra*, 512 U.S. at p. 765.) Paragraph 6 serves the significant government purpose of protecting the safety and well being of plaintiffs and it does not prevent expression in the way paragraphs 1 and 3 do. Defendants may still post the information; they just cannot post it in the same place. Thus, paragraph 6 meets the *Madsen* standard and is permissible for that reason.

2. May the Injunction Grant Relief to Non-Parties?

Defendants also contend that the injunction impermissibly grants relief to persons who were not joined as parties to the lawsuit. Plaintiffs contend that the injunction necessarily must apply to third parties in order to afford complete relief. We agree with defendants.

"For over 50 years California has recognized that a judgment may not be entered either for or against one who is not a party to an action or proceeding. [Citations.]" (*Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 Cal.App.3d 699, 717.) The rule is based upon the fundamental considerations of due process. (*Lambert v. California* (1957) 355 U.S. 225, 228; *Twining v. New Jersey* (1908) 211 U.S. 78, 110-111.) "Without jurisdiction over the parties, an in personam judgment is invalid." (*Bronco Wine Co. v. Frank A. Logoluso Farms*, *supra*, 214 Cal.App.3d at p. 717.) Accordingly, the injunction is invalid to the extent it applies to any persons not joined as parties to the instant lawsuit.[14]

[14] Plaintiffs argue that Civil Code section 3422 generally authorizes the injunction because defendants breached a duty to plaintiffs under the common law and under Business and Professions Code section 17200. It is axiomatic that the provisions of the statutory or common law cannot abrogate defendants' due process and free speech rights under the United States or California Constitutions. Accordingly, we decline to consider the point.

E. Jurisdiction

In October 2000, after litigating for more than a year and a half, defendants filed their anti-SLAPP motions. (Code Civ. Proc., § 425.16.) The superior court denied the motions on the grounds that they were untimely, that defendants' acts did not involve the exercise of a constitutional right in connection with a public issue, and that plaintiffs had demonstrated a probability of prevailing at trial. Defendants appealed that decision but they were unsuccessful in acquiring a stay of the proceedings. Their request for a stay was rejected by the trial court and by this court. The Supreme Court denied defendants' petition for review of our order denying the stay. The matter proceeded to judgment before the appeal was decided. Following entry of judgment we dismissed the first appeal as moot.[15]

On appeal from the judgment defendants now argue that the entire action was automatically stayed by operation of Code of Civil Procedure section 916, subdivision (a) and that as a result the trial court lacked subject matter jurisdiction and the judgment is void. (*Betz v. Pankow* (1993) 16 Cal.App.4th 931, 938.)

The general rule is that "filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal." (*People v. Perez* (1979) 23 Cal.3d 545, 554.) Code of Civil Procedure section 916, subdivision (a) states that perfecting an appeal automatically "stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby" but that "the trial court may proceed upon any other matter embraced in the action and *not affected by the judgment or order*." (Italics added.) The question is whether trial on the merits of the plaintiffs' lawsuit is a matter that is affected by an order denying an anti-SLAPP motion. We do not believe that it is.

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[15] We have taken judicial notice of the record in defendants' first appeal (*Varian Medical Systems, Inc., et al. v. Delfino et al.* (Feb. 29, 2002) H022233 [nonpub. dism.]).

" 'The purpose of the rule depriving the trial court of jurisdiction during the pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it. [Citation.] Accordingly, whether a matter is "embraced" in or "affected" by a judgment within the meaning of [Code of Civil Procedure] section 916 depends upon whether postjudgment trial court proceedings on the particular matter would have any impact on the "effectiveness" of the appeal. If so, the proceedings are stayed; if not, the proceedings are permitted.' (*Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629.)" (*In re Marriage of Varner* (1998) 68 Cal.App.4th 932, 936 (*Varner*).) An exception to this loss of jurisdiction is recognized as to matters that are collateral or supplemental to the questions involved on the appeal. (*People v. Schulz* (1992) 5 Cal.App.4th 563, 570-571.) Where the exception applies, the appellate court has discretion to halt the proceedings below by writ of supersedeas. (*Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 453 (*Reed*).)

Betz v. Pankow, *supra*, 16 Cal.App.4th 931 exemplifies the general rule. *Betz* held that the trial court lacked jurisdiction to vacate a judgment while the appeal from the judgment was pending. (*Id*. at p. 938.) If the trial court had power to vacate the judgment, the appeal would have been futile because subsequent enforcement would have been impossible without a judgment to enforce.

Varner provides another example. *Varner* held that the trial court lacked jurisdiction to terminate its own jurisdiction over spousal support orders while an appeal from its order refusing to vacate the community property division was pending. (*Varner*, *supra*, 68 Cal.App.4th at p. 936.) If the appellant succeeded in reversing the community property division, reallocation of the community property could result in changed circumstances that would justify a change in the spousal support orders. If the trial court

could eliminate its jurisdiction over that issue, it would have no power to modify the support orders on remand. (*Id.* at p. 937.)

In contrast, denial of an anti-SLAPP motion is a separate matter from the merits of the lawsuit itself. Under Code of Civil Procedure section 425.16, if a lawsuit arises out of the exercise of free speech or petition, a defendant may move to strike the complaint. (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 949.) Code of Civil Procedure section 425.16 provides for a two-step process to determine whether an action is a SLAPP. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) First, the court decides whether the defendant has made a threshold prima facie showing that the acts of which the plaintiff complains were taken in furtherance of the defendant's constitutional rights in connection with a public issue. If the court finds that such a showing has been made, then the plaintiff will be required to demonstrate that there is a probability that the plaintiff will prevail on the claim. (Code Civ. Proc., § 425.16, subd. (b)(1).) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute-i.e., that arises from protected speech or petitioning *and* lacks even minimal merit-is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89.)

Where a defendant appeals the denial of an anti-SLAPP motion, trial of the plaintiffs' action is not automatically stayed because it would have no direct impact on an appeal from the order. If the appeal is decided in defendants' favor prior to judgment the matter will be dismissed. If the appeal is decided in plaintiff's favor before judgment, the trial will proceed. If the matter proceeds to trial before the appeal is decided and defendant prevails at trial, the appeal may proceed and the only effect the outcome could have on the judgment would involve defendants' right to certain fees. (Code Civ. Proc., § 425.16, subd. (c).) On the other hand, if plaintiffs prevail at trial they have proven their probability of success and an appeal becomes moot because the dispositive issue has been conclusively decided. That is not to say that in some cases trial *should* be stayed. But we believe the question rests in the discretion of the trial and appellate courts.

The most compelling support for our conclusion was articulated in *Reed*, *supra*, 92 Cal.App.4th 448 where the court held that an appeal from the denial of a motion to disqualify counsel did not trigger the automatic stay of Code of Civil Procedure section 916. *Reed* pointed out that "a reasonably persuasive showing that the claim of disqualification likely has merit will probably persuade the appellate court to stay the underlying proceedings pending resolution of the disqualification issue. [Citation.] Courts of Appeal understand that prejudice occurs if the trial is not stayed pending an appeal of an arguably meritorious claim of disqualification. [Citation.] [¶] In some cases, however, the claim of disqualification will be insubstantial or even frivolous. To hold that an appeal from an order denying disqualification automatically stays the trial proceedings would encourage the use of such motions and appeals merely to delay the trial." (*Reed*, *supra*, 92 Cal.App.4th at pp. 455-456.)

The same rationale applies in the case where the trial court denies an anti-SLAPP motion. Although the procedure was designed to help defendants promptly rid themselves of meritless lawsuits, where the underlying lawsuit has even minimal merit the anti-SLAPP motion must be denied and the matter must be tried. If the entire matter is automatically stayed upon appeal from the denial of such a motion, defendants could misuse the motions to delay meritorious litigation or for other purely strategic purposes.

We recognize, as *Reed* did, that error is possible. The appellate court might deny a writ of supersedeas, believing the defendants' claim wholly lacked merit only to discover later in deciding the appeal that the trial court was wrong and the matter should have been dismissed. We believe that the benefit of preventing such rare mistakes by automatically staying all trials pending an appeal from an order denying an anti-SLAPP motion is outweighed by the danger of encouraging meritless anti-SLAPP motions and appeals as trial strategy to simply delay the trial of meritorious cases. (See *Reed*, *supra*, 92 Cal.App.4th at p. 456.) In conclusion, we hold that Code of Civil Procedure section 916

did not automatically stay trial of the lawsuit in this case and that therefore the trial court did not lack jurisdiction to conduct the trial.[16]

V. DEFENDANTS' MOTION FOR ADJUDICATION OF CONTEMPT

A. Background

After judgment was entered in February 2002, defendants continued posting messages similar in tone and content to those that formed the basis for the lawsuit. In response, plaintiffs commenced contempt proceedings against defendants charging that they were violating the injunction. The superior court issued an order to show cause why the defendants should not be held in contempt and defendants sought relief from this court. On June 25, 2002 we issued a writ of supersedeas. In pertinent part, we ordered: "Let a writ of supersedeas issue, staying, pending this appeal, enforcement of the trial court judgment, including all contempt proceedings and related discovery enforcing the injunctive portion of the trial court judgment as well as all proceedings to enforce the damages portion of the trial court judgment."

Defendants have now written and self-published a book, *Be Careful Who You SLAPP*. Plaintiffs became aware that the Barnes & Noble website, bn.com, was taking orders for the book and that local newspapers had begun advertising it. On November 11, 2002 plaintiffs' counsel wrote to Barnes & Noble alerting the bookseller to plaintiffs'

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[16] Until recently no published case had considered the question of whether Code of Civil Procedure section 916 automatically stayed an action when the defense appealed an order denying an anti-SLAPP motion. After we denied defendants' petition for writ of supersedeas in this case, *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179 (*Mattel*) held that the automatic stay applied in such a case. The alleged SLAPP in *Mattel* was a lawsuit consisting of a single cause of action for malicious prosecution. Since the anti-SLAPP motion involved the merits of the single cause of action and the appeal involved the same issue, *Mattel* held that the appeal "embraces the entirety of the action" and therefore trial on the merits was automatically stayed. (*Id.* at p. 1190.) To the extent that *Mattel* may be read as holding that trial is automatically stayed in all cases where defendants have appealed the denial of an anti-SLAPP motion, we respectfully disagree.

concern that the book contained defamatory matter. Specifically, plaintiffs' counsel stated: "We write to notify you that Barnes & Noble is offering for sale a book that may be defamatory." Counsel enclosed a copy of the judgment, noting: "The Judgment has not caused [defendants] to cease their defamatory and harassing conduct. Indeed, the Superior Court has initiated contempt proceedings against [defendants] for repeatedly violating the injunction, but those proceedings have been stayed pending resolution of the defendants' appeal of the judgment." Counsel explained that she believed the book repeated some of the statements the trial court had enjoined and that it may include new libels, as well. The letter was to serve as notice to Barnes & Noble that the book contained defamation.

Plaintiffs' counsel also contacted local newspapers that had run defendants' advertisements. In correspondence to the *Palo Alto Weekly* counsel stated: "I would appreciate hearing from you as soon as possible to learn whether your newspaper intends to pull the ad voluntarily in light of its defamatory content as found in the attached judgment."

On January 8, 2003 defendants filed a motion in this court asking us to find plaintiffs in contempt of our order staying enforcement of the judgment. Defendants argued that plaintiffs' efforts were an "end run" around the stay and constituted contempt of this court's order on three theories: falsely pretending to act under authority of the court (Code Civ. Proc., § 1209, subd. (a)4), abuse of process (*ibid*.), and disobedience of a lawful judgment, order or process of the court. (*Id*., subd. (a)5.) We ordered the motion considered with the appeal.

B. Discussion

A court may exercise its contempt power when the person against whom the judgment or order is rendered has notice of the court's order and has the ability to comply, but willfully refuses to do so. (See *Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, 1736.) Punishment for contempt may rest only upon a

clear, intentional violation of a specific, narrowly drawn order. The precise court orders as written are what may be enforced. (*Id.* at p. 1737; and see *Wilson v. Superior Court* (1987) 194 Cal.App.3d 1259, 1273.)

Where the alleged contempt is not committed in the immediate presence of the court, "an affidavit shall be presented to the court or judge of the facts constituting the contempt." (Code Civ. Proc., § 1211, subd. (a).) "It is well established in this state that the affidavit by which a contempt proceeding is instituted, in order to sufficiently support an adjudication of contempt, must state facts constituting the offense. Otherwise, the court is without jurisdiction." (*In re Ny* (1962) 201 Cal.App.2d 728, 731.)

Reviewing defendants' affidavit according to these standards we find that we have no jurisdiction to rule upon the motion. Our order specifically stayed "enforcement of the judgment." By staying enforcement of the judgment we did not deprive plaintiffs of the right to act in the event they are further defamed. Nor did we grant defendants a license to continue publishing defamatory falsehoods or insulate them from liability for so doing. The order merely prevented plaintiffs from attempting to collect the damages awarded in this case and from pursuing contempt proceedings based upon the injunction. It does not appear from defendants' affidavit that plaintiffs have done that.

The fact that plaintiffs have attempted to halt that which they believe to be further defamation does not constitute an "end run" around the stay of enforcement. One who plays a secondary role in disseminating information published by someone else (such as a bookseller) is not liable for defamation unless the person has reason to believe the information is libelous. (*Osmond v. EWAP*, *Inc*. (1984) 153 Cal.App.3d 842, 852-853.) By informing the booksellers and newspapers of their belief that the information defendants were publishing was defamatory, plaintiffs were merely taking steps to protect their reputations and to ensure that further publication of the material would be actionable if indeed it proved to be defamatory.

In conclusion, defendants' affidavit in support of their motion does not allege facts constituting noncompliance with our order staying enforcement of the judgment. Accordingly, we have no jurisdiction to adjudicate the issue and the motion must be dismissed.

VI. DISPOSITION

The judgment of the superior court is modified to strike the prohibition of future statements set forth in paragraphs 1 and 3 of the injunctive portion of the judgment and to strike all relief granted to persons who were not parties to this lawsuit. These modifications do not affect the trial court's factual finding that defendants' prior statements about the persons and matters listed in paragraph 1, subdivisions (a) through (w), were defamatory. As so modified the judgment is affirmed. The writ of supersedeas issued June 25, 2002 is vacated.

Defendants' motion for adjudication of contempt is dismissed.

The parties shall bear their own costs on appeal.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Wunderlich, J.

Trial Court:	Santa Clara County Superior Court Superior Court No. CV780187
Trial Judge:	Hon. Jack Komar
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