

Supreme Court Case No. S 134873
Court of Appeal, First Appellate District, Division Two – No. A 106618

IN THE SUPREME COURT OF CALIFORNIA

HEBREW ACADEMY OF SAN FRANCISCO, ET AL.

Plaintiffs/Appellants,

vs.

RICHARD N. GOLDMAN, ET AL.,

Defendants/Respondents.

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After A Decision by the Court of Appeal,
First Appellate District
[Case No. No. A106618]
San Francisco County Superior Court
Trial Court No. 414796 Honorable Ronald E. Quidachay

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SAN FRANCISCO JEWISH COMMUNITY ENDOWMENT FUND

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I. INTRODUCTION

The plain language of the California's Uniform Single Publication Act ("USPA") does not limit its application to "mass media" publications. To the contrary, the statutory language, by its very terms, broadly applies to any "single" publication, exhibition, or utterance and to any "one" presentation, broadcast or exhibition. Under the statute's plain language, therefore, any publications generally made available to the public, such as the ROHO volumes here, fall within its scope.

Given that the USPA does not create a "mass media" limitation, there is no reason to digress to an inherently fact-bound inquiry as to what constitutes "mass media," as Appellants proffer. That determination would necessarily vary from case to case and create the very uncertainty that the single publication rule was intended to eliminate. Appellants' proposed alternative approach is also flawed for its attempt to revisit the application of the discovery rule to publications governed by the USPA. Such a proposal would only serve to resurrect uncertainty as to the application of the limitation period under the USPA and create further litigation as to the application of the discovery rule "exception."

In contrast to the unworkable approach offered by Appellants, if this Court were to clarify that the single publication rule applies to defamatory publications once they become equally accessible to the claimant as they are to the general public, then a meaningful standard would be achieved. That does not mean, as Appellants misstate repeatedly in their Answer, that the USPA would apply to all publications because it would not. It would only apply to those in which the publisher makes the publication equally accessible to the plaintiff as it is to the general public.

Similarly, the discovery rule cannot be invoked to delay the accrual of a cause of action for libel once the factual basis becomes equally accessible to plaintiff as it is to the general public. As discussed more fully below, this Court should follow the trend in other jurisdictions to limit the discovery rule in defamation cases to such inherently covert defamations, such as entries in personnel records.¹

II. ARGUMENT

A. **The Uniform Single Publication Act on Its Face Applies to Publications of Limited Distribution**

Appellants' criticism of Respondents for "focusing" on the language of the USPA (Answer at 40) underscores Appellants' attempt to minimize the import of the statutory language in interpreting the meaning of the USPA. Such attempt, however, is contrary to California law on statutory construction. One of the most fundamental rules of statutory construction is first to examine the actual language of the statute. *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238. In examining the specific language of a statute, "courts should give to the words of the statute their ordinary, everyday meaning." *Id.* Moreover, if that meaning is without ambiguity, doubt or uncertainty, then the language controls. *Id.* at 1239. Legislative history is only a necessary interpretive tool if the words of the statute are not clear. *Id.*

¹ Respondents do not "candidly admit" that Rabbi Lipner "had no means of discovering" the ROHO Goldman volume, as Appellants state in the introduction to their Answer. (Answer at 1.) Rabbi Lipner, in fact, did discover the volume when Ms. Real, while researching his background, came upon it through the very method intended, a card catalog in a prominent library. (AA 199.)

Here, the clear language of the USPA does not limit its application to “mass media,” a term which is noticeably undefined by Appellants.² First, contrary to the case law cited by Appellants, the actual language of the statute is devoid of any reference to the phrase “mass media.” Second, the language of the statute states that it applies to any “single” publication or exhibition or utterance, or any “one” presentation to an audience, broadcast over radio or television, or exhibition of a motion picture. Cal. Civil Code § 3425.3. The statute’s inclusion of a “single” publication, exhibition or utterance and “one” presentation within its ambit debunks the notion that the statute should be limited solely to “mass media” publications. Third, the statutory examples of a single written publication that would fall within its scope are not limited to communications that would necessarily reach a large number of people. For example, while the statute references the publication of “a newspaper or book or magazine,” it significantly does not limit those examples by size, distribution volume or geographical territory. Appellants acknowledge as much in their concession that the USPA would apply to a “publication in a small newspaper or a not particularly popular book.” (Answer at 40-41.) A “small newspaper,” however, could have a circulation of 1,000 or fewer papers and a very limited geographical distribution, but according to Appellants, it would fall within the USPA. Likewise, a “not particularly popular book” would presumably have a very limited distribution. Yet, again, such a publication of limited distribution, according to Appellants,

² Respondents assume Appellants use the term “mass media” in its popular sense to invoke the notion of communications that reach a large number of people.

would also fall within the act. Neither of these examples, however, comport with the popular notion of “mass media” publications.

The USPA does not create a “mass media” limitation for the simple reason that it would create an unworkable “standard,” as Appellants’ approach exemplifies. That approach would transform the single publication rule’s application into an inherently fact-bound inquiry whose outcome would vary from case to case and generate the very kind of uncertainty about limitation periods that the single publication rule was intended to eliminate. For example, Appellants cite with apparent approval *Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.* (Minn. 1984) 352 N.W.2d 1 as “limited guidance” on the scope of the single publication rule for the proposition that a publication of a book with less than 1,000 distributed volumes would not come within the protection of the rule. In contrast, Appellants also concede that the California USPA protects “small newspapers” (Answer at 41.), which could have a circulation of fewer than 1,000 newspapers. Appellants, however, do not even acknowledge this contradiction, let alone attempt to address it. Moreover, if a publication consisting of 1,000 books is not sufficient to trigger the single publication rule by Appellants’ count, the logical follow-up question becomes whether 2,000, 3,000 or 10,000 volumes becomes the magical number. In *Shively*, less than 7,000 volumes of “A Problem of Evidence” were distributed in California, but not necessarily on sale, during the relevant time frame (there was no numerical breakdown as to the distribution in the region in which she was living at the time). *Shively v. Bozanich* (2003) 31 Cal.App.4th 1230, 1240 (“*Shively*”). Such inquiries into distribution volumes highlight the futility of relying on such an unpredictable and malleable “standard” for applying the USPA.

Appellants' fact-intensive approach also raises the question of whether courts must look at the volume of distribution of the alleged defamatory material in the geographical region in which the plaintiff resides. If that is the case, then simple state-wide distribution numbers, such as those available in *Shively*, would presumably be insufficient if the bulk of the distribution were in a region in which the alleged victim did not travel. Appellants' other example of a publication that would fall within the California USPA, "a not particularly popular book," raises other factual questions under Appellants' approach, such as whether special criteria should apply to unpopular books because they would presumably be read by few readers and not widely displayed in bookstores or offered to the public in libraries. Mere distribution numbers for unpopular books, therefore, could be misleading, which again highlights the fallacy of relying upon such numbers to establish a USPA standard.

Appellants' approach is also flawed for its proposed, but unexplained, extension of the discovery rule to selected publications governed by the USPA. Appellants propose that if the scope of the USPA is not restricted to "mass media" publications, then the discovery rule should apply to those selected publications that fall within the USPA, but not within the notion of "mass media." (Answer at 46-47.) Appellants' proposal is inherently flawed for the same reasons discussed above. Would college textbooks, such as the one at issue in *Johnson v. Harcourt Brace Jovanovich, Inc.* (1974) 43 Cal.App.3d 888, be subject to the discovery rule "exception" to the USPA? Would "scholarly journals," such as law reviews and medical and scientific journals fall within the exception, as Appellants suggest (Answer at 43)? Would a single presentation, a small newspaper, or an unpopular book fall within the exception? Such inquiries

would resurrect the uncertainty as to the application of the limitation period under the USPA that had previously been foreclosed by *Shively*, and spawn a host of litigation as to the application of the discovery rule “exception.”

Finally, under Appellants’ approach, the scope of the single publication rule would presumably be judicially restricted based on notions of “fairness.” In this regard, Appellants fervently contend that it would be “unfair” not to apply the discovery rule to Rabbi Lipner because it would preclude his ability to seek redress for his perceived harm.³ California courts, however, have applied the single publication rule to situations in which there is an apparently “unfair” result, such as the poor, uneducated janitor, Mr. Johnson, in *Johnson v. Harcourt Brace Jovanovich, Inc., supra*, 43 Cal.App.3d 888. Mr. Johnson’s claim, which arose from the publication of a textbook that was used in college English courses across the country, was barred by the court under the single publication rule, irrespective of his diligence or lack thereof in discovering the publication. Certainly, the harm to him was greater than if the publication were of only limited distribution. Thus, the question is not, as Appellants pose it: “Why shouldn’t those who recklessly defame others be put to the defense?” (Answer at 19), but rather, if “unfairness” is at all germane to the application of the single publication rule, why is it more unfair to apply the rule to Rabbi Lipner, who claims

³ Appellants’ assertions of great harm underscore the inherent contraction in their position. Appellants contend that Rabbi Lipner’s reputation has been gravely injured, on the one hand, but on the other, assert that no one had read the ROHO volume, except for him and Ms. Real, prior to the lawsuit. As to the specific allegations of harm, however, Respondents will not respond to Appellants’ inflammatory and inappropriate mischaracterization of the alleged statements that form the basis of the underlying claim, other than noting their inaccuracies, because those accusations are not germane to the legal issues raised before this Court.

that virtually no one has read the ROHO volume, than to individuals such as Mr. Johnson who was allegedly harmed by a textbook read by thousands of college students across the country? The simple answer is that it is not. As with any pronouncement of the statute of limitations, “its application causes hardship,” but “such occasional hardship is outweighed by the advantage of outlawing stale claims.” *Gregoire v. G.P. Putnam’s Sons* (1948) 298 N.Y. 119, 125.

Courts, under Appellants’ approach, would have to tangle with a morass of factual questions in determining whether the USPA, or its discovery rule “exception,” would apply to a given publication, resulting in a burdensome and virtually unworkable “standard” for courts to apply. In contrast, if this Court were to clarify that the single publication rule applies to all defamatory publications once they become equally accessible to the plaintiff as they are to the general public, then a meaningful bright-line standard would be available as guidance to California courts, as discussed more fully in Respondents’ Opening Brief.

B. Appellants Misconstrue the Import of the Single Publication Rule and its Relationship to the Discovery Rule

Appellants also seemingly misconstrue the very nature of the single publication rule by asserting that “defendants also do not provide any basis for their concern that courts and libel victims will revert to the old [multiple publication] rule unless this Court explicitly makes the single-publication rule universal.” (Answer at 45.) What Appellants ostensibly fail to recognize is that but for the application of the statutory single publication rule, the common law multiple publication rule applies by default. As this

Court explained in *Shively*, the multiple publication, or common law, rule “led to the conclusion that each sale or delivery of a copy of a newspaper or a book containing a defamation also constitute[d] a separate publication of the defamation to an audience, giving rise to a separate cause of action for defamation....” *Shively, supra*, 31 Cal.4th at 1243-1244. The concern with the multiple publication rule was that it “had the potential to disturb the repose that the statute of limitations ordinarily would afford,” because, as the Court explained,

... a new publication of the defamation could occur if a copy of the newspaper or book were preserved for many years and then came into the hands of a new reader who had not discovered it previously. The statute of limitations could be tolled indefinitely, perhaps forever, under the approach.

Id.

The discovery rule does not preclude the application of the common law multiple publication rule because it only operates after publication by tolling the limitation period. The multiple publication rule, in contrast, creates a new cause of action, and therefore a new accrual date for defamation, each time the published material comes into the hands of a new reader. The discovery rule does not prevent the new causes of action from accruing. Thus, without the protection afforded by the single publication rule, reference library publications, such as the ROHO volumes here, will be subject to repetitive lawsuits and unlimited limitation periods every time that reference volume comes into the hands of a new reader, whether that be today, tomorrow or a decade from now.

Appellants also dismiss the New York line of cases cited by Respondents on the faulty premise that they do not address the discovery rule. (Answer at 40.) Although there is an interplay between the single

publication rule and the discovery rule (*Shively, supra* at 1251), that interplay does not impact whether the single publication rule applies, but rather the application of the discovery rule. If the single publication rule applies, then, as the Court held in *Shively*, the discovery rule would not. *Id.* (“Inquiry into whether delay in discovering the publication was reasonable has not been permitted for publications governed by the single-publication rule.”) Since the application of the single publication rule limits the applicability of the discovery rule, and not vice versa, courts can properly determine the scope of the single publication rule without analyzing the impact of the discovery rule, as the New York courts have done.

Moreover, New York, as the seminal state in addressing the application of the single publication rule and having the most published decisions on the scope of its application, should certainly be looked to for guidance on the issue before this Court, as this Court previously did in *Shively*. The New York decisions, contrary to Appellants’ assertions, uniformly uphold the broad scope of the single publication rule and explain their rationale for doing so. That rationale comports with California law on the USPA. For example, in *Stockley v. AT&T Information Systems, Inc.* (E.D.N.Y. 1988) 687 F.Supp. 764, 768, the district court explained that “[t]he [single publication] rule is designed to restrict the subject of an alleged defamatory writing to a single cause of action when the writing is released to its intended audience,” and “[i]t protects publishers from facing a new cause of action each time a copy of a book is sold from a given printing, (citation omitted), and a fortiori each time a purchaser lends the book to someone else to read.” Similarly, the New York State court held in *Gelbard v. Bodary* (2000) 270 A.D.2d 866, 866-867, that “under the ‘single publication rule’, a reading of libelous material by additional individuals

after the original publication date does not change the accrual date for a defamation cause of action, but, rather, the accrual date remains the time of the original publication.” The court further explained that “to hold otherwise,” would allow a defamation claim to surface “months or even years later” after its initial publication. *Id.* Given this concern of repetitive lawsuits upon each republication and the endless tolling of the statute of limitations, New York courts have reasoned that the scope of the single publication rule should include even such publications of extremely limited distribution. These concerns raised by New York courts for broadly interpreting the scope the single publication rule equally apply to the California USPA, as discussed in *Shively*.

C. No Justification Exists to Delay the Accrual of a Cause of Action for Libel Once the Factual Basis Becomes Equally Accessible to Plaintiff as It Is to the General Public

In *Shively*, this Court concluded that no justification exists for applying the discovery rule to published works that are not secret or covert, but equally available to plaintiff as they are to the general public. *Shively, supra*, 31 Cal.4th at 1253. As the Court acknowledged, the discovery rule in defamation cases has been limited in application “to such inherently covert defamations as entries in personnel records, and also to confidential communications by credit agencies to their subscribers.” *Id.* at 1252. The *Shively* holding is consistent with other Supreme Court decisions, such as *Bernson v. Browning-Ferris Industries of California, Inc.* (1994) 7 Cal.4th 926. In *Bernson*, the Court acknowledged that “[a] close cousin of the discovery rule is the ‘well accepted principal ... of fraudulent concealment,’” and, “[l]ike the discovery rule, the rule of fraudulent

concealment is an equitable principle designed to effect substantial justice between parties; its rationale 'is that the culpable defendant should be estopped from profiting by his own wrong to the extent that it hindered an "otherwise diligent" plaintiff in discovering his cause of action.'" *Id.* at 931. The Court further explained "[c]onsistent with these principles, a cause of action for libel generally accrues when the defamatory matter is published," but under the discovery rule exception, "the date of accrual may be delayed where the defendant's actions hinder plaintiff's discovery of the defamatory matter." *Id.* at 931-932, emphasis added.

Similarly, the state supreme court decisions cited by Appellants (Answer at 22) support a limited application of the discovery rule. These courts narrowly applied the discovery rule to situations in which the alleged defamatory publication was concealed from the plaintiff. *See, Hoke v. Paul* (1992) 65 Hawaii 478 [653 P.2d 1155] (alleged defamation was contained within a memorandum to a police chief leveling charges of misconduct as a police officer and in a misconduct report); *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.* (1975) 61 Ill.2d 129 [334 N.E.2d 160] (alleged defamation contained in credit report); *Brooks v. Rushmore* (Ind. 1989) 534 N.E.2d 1101 (alleged defamation contained in employment evaluation memorandum); *Staheli v. Smith* (Miss. 1989) 548 So.2d 1299 (alleged defamation contained in tenure recommendation); *Allen v. Ortiz* (Utah 1990) 802 P.2d 1307 (alleged defamation contained in a social worker's letter to the mayor, an attorney, and a domestic relations commissioner regarding child sexual abuse); *Kelley v. Rinkle* (Tex. 1976) 532 S.W.2d 947 (alleged defamation contained in a credit report); and *Digital Design Group, Inc. v. Information Builders, Inc.* (2001) 2001 Okla. 21 [24 P.3d 834] (alleged defamation contained in confidential performance

review). In *Digital Design Group*, the court acknowledged that “[t]he trend among those courts [which have addressed the discovery rule question] is to apply the rule in limited situations, for example – when the publication is likely to be concealed from the plaintiff or published in a secretive manner which would make it unlikely to come to the attention of the injured party.” *Id.* at 24 P.3d at 839. See also, the Tennessee Supreme Court decision, *Quality Auto Parts v. Bluff City Buick Co., Inc.* (Tenn. 1994) 876 S.W.2d 818, 821 n. 3, a state supreme court decision not cited by Appellants (“We also note that the discovery rule has been applied in a limited type of defamation case—cases in which the alleged defamatory statements are published under circumstances in which they are likely to be kept secret, i.e., reports to credit bureaus and letters placed in employment personnel files.”)

Notwithstanding the aforementioned decisions limiting the application of the discovery rule to publications made covertly or in secret, Appellants rely on the general notion that the discovery rule, as an exception to the statute of limitation in tort claims, delays the accrual date of a cause of action until a plaintiff becomes aware of his or her injury and its negligent cause. (Answer at 15.) Appellants, however, also acknowledge that no California Supreme Court decision has ever specifically applied the discovery rule to a defamation case to bar a claim (Answer at 15), and only cite to one appellate decision that discusses the application of the discovery rule in the context of a defamation claim.⁴ *Manguso v. Oceanside Unified School Dist.* (1979) 88 Cal.App.3d 725.

⁴ Plaintiffs also cite to *McNair v. Worldwide Church of God* (1987) 197 Cal.App.3d 363, 379-380, but the question in *McNair* was not whether the discovery rule applied, but rather whether the plaintiff properly invoked

In *Manguso*, the court addressed the question of whether the discovery rule applied to alleged defamatory statements in a confidential personnel file to which the plaintiff had no access. The confidential nature of the publication was apparently an important fact to the *Manguso* court, as exemplified by its distinguishing *Brown v. Chicago, Rock Island & Pacific Ry. Co.* (W.D. Mo. 1963) 212 F.Supp. 832, a federal district court opinion applying Missouri law. In *Brown*, the federal court refused to apply the discovery rule to alleged defamatory material in a letter. The *Manguso* court distinguished *Brown* on the ground "that the letter involved [in *Brown*] was not confidential." *Manguso, supra*, 88 Cal.App.3d at 730. The application of the discovery rule to such confidential publication at issue in *Manguso* is consistent with the trend of limiting the discovery rule's application in defamation cases to situations in which the publication is concealed from the plaintiff or published in a secretive manner, as discussed above.

Limited application of the discovery rule in the defamation context finds further support in the underlying rationale for the statute of limitations for defamation. As with any statute of limitations, there is always the balancing of allowing a claim to go forward on its merits with the need to bar stale claims. "The underlying purpose of the statute of limitations is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution." *Manguso, supra*, 88 Cal.App.3d at 730. The staleness of

the procedure for naming Doe defendants under Code of Civil Procedure section 474. As such, the court makes only a passing reference to the *Manguso* decision in establishing when a cause of action for slander accrued.

claims is of particular concern in the defamation context because defendants would be put to their defense only after memories have faded, witnesses died or disappeared, and evidence is lost. *Gregoire, supra*, 298 N.Y. at 125; see also, *Quality Auto Parts, supra*, 876 S.W.2d at 820. (“In contrast to the rationale for the discovery rule are the policy reasons for the development of statutes of limitations to ensure fairness to the defendant by preventing undue delay in bringing suits on claims, and by preserving evidence so that facts are not obscured by the lapse of time or the defective memory or death of a witness.”)⁵ As Appellants themselves acknowledge, the very nature of a defamation claim creates an even greater risk of stale claims because “defamatory statements may themselves relate to incidents that occurred long before publication, with attendant evidentiary problems, even if the victim files on the day after publication.” (Answer at 18.)

Counter-balanced against these staleness concerns is the inequity of allowing a defendant to make defamatory statements secretly to others, such as in personnel files. That does not necessarily require, as Appellants argue, an intent on the part of the alleged defamer to hide the publication, but only that it be published under circumstances in which it is likely to be kept secret. In those situations, as discussed above, the trend is to apply the discovery rule to such covert or secret publications. That equitable concern, however, does not apply here, as discussed in Respondents’ Opening Brief, because upon publication, the ROHO volume was equally

⁵ Appellants, in criticizing Respondents for failing to put forth evidence of specific instances of memories having faded or witnesses being lost, ignore the procedural status of this matter. As evident by the record, this case comes before the Court on Respondents’ motion for summary judgment, and therefore, the record, by the very nature of that summary proceeding, is limited.

available to plaintiff as it was to the general public, as Respondents made no attempt to conceal or hide its publication.

Neither Mr. Goldman nor the Federation intended that the interview be kept secret from Rabbi Lipner, the Hebrew Academy, or anyone else, nor was it published in such a fashion. To the contrary, it was made available for review in prominent libraries, catalogued through two nationally accessible library databases on the Internet, was made available through other libraries in the country, and was both mentioned in the only Jewish newspaper available in Northern California and presented to Mr. Goldman at a Jewish Community Federation banquet with over 1,600 members of the Bay Area Jewish community in attendance. In fact, Ms. Real, in the course of doing preliminary research on a biography on Rabbi Lipner, was able to locate the subject ROHO volume by simply looking through the library card catalog at the Bancroft Library. (AA 199.) In short, there was no attempt to secrete the interview nor hide it from Appellants.

Finally, the fiction of constructive notice in mass media publications, which is relied upon heavily by Appellants, equally applies to library reference materials such as the ROHO volume here. For example, although Appellants concede that information regarding the ROHO volume is available on the Internet "in online catalogs and databases," they complain that had Rabbi Lipner consulted those online catalogs and databases, he would not have been put on notice of the alleged defamatory statements because neither those statements nor his name is mentioned in the online catalogs.⁶ (Answer at 32-33.) What Appellants do not acknowledge,

⁶ What Rabbi Lipner would have read, however, is that the ROHO Goldman volume discusses the Jewish Community Federation, "the single

however, is that is true of virtually every other mass media produced book. It would be a very rare occasion for a book to list all of the persons mentioned or statements concerning those persons on the outside cover of the book. Moreover, it would take more than a "sufficiently paranoid" person, to use Appellants' phrase, to suspect that he or she has been defamed in the thousands and thousands of "mass media" books published every year and then to review every one of those books to determine if a defamatory statement had been made. Thus, even in the context of books produced for mass distribution, the most diligent and paranoid reader could not reasonably determine whether or not he or she was defamed in every single book published in a year.

As such, the notion of constructive notice in the context of mass media publications is fiction. That fiction, however, is based on the notion that once the author makes his work equally accessible to the plaintiff as it is to the general public, he has done all he can and therefore the fiction of constructive notice applies. *Shively, supra* at 31 Cal. 4th at 1253. Because Respondents have made the ROHO interview volume equally accessible to Appellants as it is to the public, the fiction of constructive notice should equally apply here, barring the application of the discovery rule. *Id.*

III. CONCLUSION

California's USPA, on its face, applies to publications, such as the ROHO histories, and is not limited to mass media communications. Moreover, the rationale for applying the single publication rule to mass media communications applies to the ROHO histories because such

largest financial supporter of Hebrew Academy" (AA 741), a matter that presumably would have been of significant interest to Rabbi Lipner. (AA 632, 634 and 636.)

reference library publications are subject to repetitive lawsuits and unlimited tolling of limitations periods every time they come into the hands of a new reader unless they are afforded the protection of the rule.

The discovery rule exception should not be applied to publications made accessible to the general public, and not made in secret nor held in confidence.

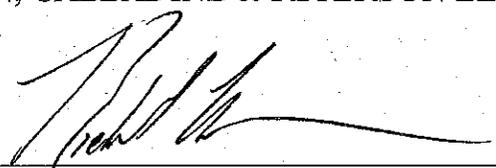
Finally, a bright-line standard to apply the scope of the single publication rule, as more fully discussed in Respondents' Opening Brief, would provide guidance to California courts in the future, in contrast to the fact-intensive approach proffered by Appellants which creates a burdensome and virtually unworkable "standard" for courts to apply.

DATED: February 6, 2006

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RULE 14(c)(1) CERTIFICATION

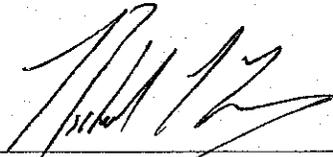
Pursuant to California Rules of Court, Rule 14(C)(1), the undersigned does hereby certify that this brief was prepared in 13-point Times New Roman font and based upon the word count generated by the word processing software the brief is 5,301 words long, including footnotes.

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Attorneys for Respondents

RICHARD N. GOLDMAN and THE JEWISH
COMMUNITY FEDERATION OF SAN
FRANCISCO, THE PENINSULA,
MARIN AND SONOMA COUNTIES, for
itself and for its unincorporated division, THE
SAN FRANCISCO JEWISH COMMUNITY
ENDOWMENT FUND

PROOF OF SERVICE BY MAIL
(Code of Civil Procedure §§ 1013a & 2015.5)

I, the undersigned, declare that I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action; my business address is CARLSON, CALLADINE & PETERSON LLP, 353 Sacramento Street, 16th Floor, San Francisco, California 94111.

On February 6, 2006, I served the attached:

REPLY BRIEF ON THE MERITS

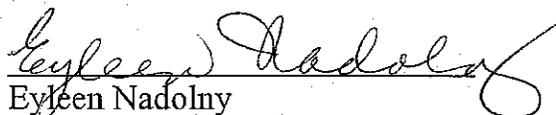
on the persons named below in said cause, by placing a true copy thereof enclosed in an envelope with postage prepaid fully thereon, and depositing it with the United States Mail at San Francisco, California, addressed as follows:

Paul R. Kleven, Esq.
1604 Solano Avenue
Berkeley, CA 94707

California Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102

Clerk of the Superior Court
San Francisco County
400 McAllister Street
San Francisco, CA 94012

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 at San Francisco, California, on February 6, 2006.


Eyleen Nadolny