

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.

SUPREME COURT
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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

OPENING BRIEF ON THE MERITS

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FEDERATION OF SAN FRANCISCO, THE PENINSULA, MARIN AND
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SAN FRANCISCO JEWISH COMMUNITY ENDOWMENT FUND

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I. ISSUES PRESENTED FOR REVIEW

1. Whether the Court, in reserving judgment in *Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1253 (“*Shively*”) as to “the applicability of the single-publication rule to written publications that receive an extremely limited distribution,” intended to limit the application of the single publication rule solely to “communications in the mass media,” as the Court of Appeal below held; and

2. Whether, in light of *Shively*, the discovery rule can be invoked in a libel case to delay the accrual of a cause of action even after the factual basis for the alleged defamation becomes equally accessible to plaintiff as it is to every other member of the general public.

INTRODUCTION

In a decision reversing the trial court’s grant of summary judgment to Respondents Richard N. Goldman and The Jewish Community Federation of San Francisco, The Peninsula, Marin and Sonoma Counties (“Respondents”), Division Two of the First Appellate District held that the single publication rule applies only to communications in the mass media. *Hebrew Academy of San Francisco v. Goldman* (2003) 129 Cal.App.4th 391 (review granted). In so ruling, the Court of Appeal essentially ignored footnote 6 in *Shively*, in which this Court reserved for another day the issue of whether the single publication rule applied to publications receiving “extremely limited distribution.” (31 Cal.4th at p. 1245.) As Justice Haerle’s dissenting opinion below notes, that day has come. This Court’s footnote 6 in *Shively* is “remarkably applicable to the case before us.” *Hebrew Academy v. Goldman, supra*, 129 Cal. App. 4th at 406. The broad brush holding by the majority below that the single publication rule applies only to mass media publications dodges several issues regarding limited

publications that were reserved by the footnote in *Shively* for later determination: (1) what publications fall within the Court’s definition of “extremely limited distribution,” (2) whether the single publication rule applies to such publications, and (3) whether the single publication rule applies to non-mass media publications that have more than “extremely limited distribution.” All of these issues are raised here, but none was directly addressed by the Court of Appeal below.

Whether the single publication rule applies to library reference material, such as the volumes of the Regional Oral History Office (“ROHO”) division of the Bancroft Library involved here, raises a concern that will impact libraries across the state. Although the majority opinion below seemingly seeks to soften the impact of its ruling by stating that “the parties agree there was but one publication of the alleged defamation” (*Hebrew Academy, supra*, 129 Cal.App.4th at 400), its statement of the law is inaccurate absent the application of the single publication rule, as Appellants noted in their opening brief to the Court of Appeal.¹

Here, without the protection afforded by the single publication rule, each time a member of the public accesses a ROHO volume or indeed any similar reference material, whether today, tomorrow or a decade from now, there is another “publication” and another potential cause of action for libel. *Shively, supra*, 31 Cal.4th at 1243-1244 (wherein this Court explained that the 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

¹ In their opening brief below, Appellants asserted that absent the application of the single publication rule, “the common law recognized a new cause of action whenever the defamatory book or newspaper fell into the hands of a new reader, no matter how long ago the defamation had been distributed,” citing *Shively, supra*, 31 Cal. 4th at 1244. (Appellants’ Opening Brief in the Court of Appeal (“AOB”), p. 23.)

separate publication of the defamation to an audience, giving rise to a separate cause of action for defamation . . . This conclusion also had the potential to disturb the repose that the statute of limitations ordinarily would afford, because 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.”) Thus, unless the Court of Appeal’s decision is reversed, reference library publications, such as the ROHO volumes here, will be subject to repetitive lawsuits and unlimited limitations periods every time they come within the hands of a new reader.

The Court of Appeal also extended the narrow exception to the limitation period for libel law, called the “discovery rule” exception, which applies to “covert,” “hidden,” or “concealed” publications of libelous materials, to a publication that is in no respect secret or intended to be so, but instead has been accessible to the general public for nearly a decade. In so ruling, the Court of Appeal held that Appellants, who filed this lawsuit in November 2002, should be permitted, after more than nine years, to challenge the allegedly libelous content of 1992 interviews that were published in 1993 and available to the general public both locally and nationally since that time through public libraries.

Countless publications are similar to the subject volume of the oral histories here, and the rule espoused by the Court of Appeal effectively exposes them to potentially indeterminate libel exposure. Furthermore, the decision does so in apparent disregard of this Court’s recent pronouncement in *Shively* that “[w]e see no justification for applying the discovery rule to delay the accrual of plaintiff’s causes of action beyond the point at which their factual basis became accessible to plaintiff to the same degree as it

was accessible to every other member of the public.” *Shively, supra*, 31 Cal.4th at 1252-1253.

For these reasons, the single publication rule should apply to the ROHO history because such reference library publications are subject to repetitive lawsuits and unlimited tolling of the limitation period unless they are afforded the protection of the rule. The discovery rule should remain as it is, an exception, and should not be expanded to toll the limitation period for publications that were neither made in secret nor held in confidence. At the very least, it should not be applied to publications that are made accessible to the general public. The Court of Appeal’s decision should, therefore, be reversed and the trial court’s judgment in favor of Respondents should be reinstated.

II. STATEMENT OF THE CASE

A. **Statement of Facts**

1. The Goldman Interview

The statements at issue in this case were made during one of four 1992 interviews between Richard Goldman and Eleanor Glaser, an employee of the Regents of the University of California, and the Bancroft Library at the University of California, Berkeley. [AA² 017, Second Amended complaint, paragraph (“¶”) 7; AA 456, Goldman Interview at Exhibit E to Declaration of Shannon Page, (“Page Decl.”), “Interview History.”] The interviews were conducted as part of the voluminous publications of the Regional Oral History Office division of the Bancroft Library. (*Id.*) ROHO’s purpose was (and is) to preserve the history of the Bay Area, California, and the western United States. (AA 359, Page Decl., ¶ 5.) Portions of the ROHO histories are deposited in more than 700

² Appellants’ Appendix In Lieu of Clerk’s Transcript.

manuscript libraries worldwide (Page Decl., ¶ 7, AA 359), and all volumes are catalogued on two nationally accessible library databases: Research Libraries Information Network, and OCLC. (*Id.*) The histories are also catalogued on MELVYL and GLADIS/Pathfinder, the University of California's online catalogues. (*Id.*)

The Goldman interviews were among a series conducted to document Jewish philanthropic activities in California. (Page Decl., ¶ 9, AA 360). During the subject interview, Mr. Goldman discussed Rabbi Lipner and the Hebrew Academy in the context of the operations of the Academy and Rabbi Lipner's activities regarding his stewardship of the Academy. (AA 501-502). Specifically, Mr. Goldman discussed a 1974 capital funds drive for local Jewish organizations, and mentioned the Appellants. (AA 501). Mr. Goldman also referred to Appellants' activities with regard to the Hebrew Academy's recruitment of Jewish Soviet students, as well as the community-based financial support of the Academy. (AA 501-502).

B. Publication of the Goldman Interview

The Goldman interviews were conducted in 1992. (AA 360). The interviews were then prepared for publication in a single volume which included, *inter alia*, an introductory explanation of the Regional Oral History Project, biographical information concerning Mr. Goldman, a detailed table of contents, several laudatory introductions by acquaintances and family members, and the consolidated interview. (AA 428-624). The volume included an extensive word index in which both Rabbi Lipner's name and that of the Hebrew Academy appeared and which directed the reader to the specific pages on which each was mentioned. (AA 622-623). The Goldman volume, consisting of almost 200 pages, including

introductions, appendices, tables of contents, and word indexes, was published in 1993. (AA 360).

From 1993 to the present, the Goldman volume was available to the public as one of a number of ROHO's research volumes. (*Id.*, ¶¶ 10-12). Like the other ROHO volumes, the Goldman volume was catalogued on the two nationally accessible library databases, Research Libraries Information Network, and OCLC, as well as on the University of California's online catalogues, MELVYL and GLADIS/ Pathfinder. The published interview was, likewise, placed in the Bancroft Library at Berkeley and the Charles E. Young Research Library at UCLA, and accessible through other libraries throughout the United States. (AA 360). In addition to being included in the card and online catalogs of the University of California, the published interview was also available to other major libraries in the United States, and specifically acquired by the New York Public Library. (*Id.*, ¶ 12.) The published interview was mentioned in the only weekly Jewish newspaper available in Northern California, the *Jewish Bulletin*. (AA 361). Finally, a copy of the published interview was formally and publicly presented to Mr. Goldman at a Jewish Community Federation banquet in 1996 with over 1,600 members of the Bay Area Jewish community in attendance. (*Id.*)

C. Respondent Lipner's Status in the Community

Rabbi Lipner affirmatively alleges in his complaint (AA 016) and acknowledges in discovery that he has been a well-known member of the San Francisco Jewish Community for over thirty years. (AA 002, ¶ 2.) As founder of the Hebrew Academy, Rabbi Lipner is a frequent and familiar name in press reports, and regularly injects himself into public controversies. (AA 361, 678-730.) Rabbi Lipner's relationship to the Hebrew Academy and his role in the Jewish community were sufficiently

noteworthy that Miriam Real, Director of Admissions for the Hebrew Academy, embarked on research in anticipation of authoring a book about Rabbi Lipner and the Hebrew Academy. (AA 1998). It was allegedly during her research of available public documents commenting on Rabbi Lipner and the Academy that Ms. Real read the Goldman interview and reported its comments to Appellant Lipner. (AA 199).

III. PROCEDURAL HISTORY

On November 18, 2002, Appellants filed their original complaint, alleging causes of action for defamation and false light against Respondents. (AOB 1.) The complaint, which was later amended, alleged that Appellants had suffered damages arising from statements made by Mr. Goldman during an interview with Eleanor Glaser in 1992. (AA 005-6, Appellants' First Amended Complaint, ¶¶ 13-15.)

On December 19, 2002, Appellants filed a First Amended Complaint adding the Regents of the University of California and the Bancroft Library (collectively "Regents") as defendants. (AA 001-007, Appellants' First Amended Complaint.) Respondents demurred to each cause of action asserted against them, and, by order dated March 3, 2003, the trial court sustained the demurrer as to the first cause of action, with leave to amend. (AA 011-012, Order Sustaining Demurrer.) The trial court also sustained the demurrer to the second cause of action, False Light, without leave to amend. (*Id.*, at AA 012.)

Appellants filed their Second Amended Complaint on March 13, 2003. (AA 015-022.) Respondents' subsequent demurrer to the Second Amended Complaint was overruled. (AA 023-034.)

The Regents filed a Code of Civil Procedure § 425.16 motion to strike the Second Amended Complaint, arguing that Appellants could not

bear their burden of establishing, through competent and admissible evidence, a probability that they would prevail because the defamation cause of action was barred by the one year statute of limitations set forth in Code of Civil Procedure § 340(3). (AA 037-057.) By order dated September 4, 2003, the trial court granted the motion (AA 109-110).

Respondents filed the motion for summary judgment which is the subject of this appeal on November 20, 2003, contending, as had the Regents, that the one-year limitation period under C.C.P. § 340(3) had expired long before the action was commenced in November 2002. (AA 113.)

By order dated March 8, 2004, the trial court granted the motion for summary judgment, finding that C.C.P. § 340(3) barred the action (AA 340-341). On March 25, 2004, judgment pursuant to the trial court's order granting summary judgment was filed. (AA 346-347.) Notice of the appeal was thereafter timely filed. (AA 349-350.)

The appeal was briefed by the parties and oral argument presented on April 19, 2005. On May 12, 2005, Division Two of the First Appellate District filed its split decision reversing summary judgment in favor of Respondents.

IV. THE COURT OF APPEAL DECISION

A. The Majority Opinion

In reversing the trial court summary judgment, the Court of Appeal majority found that California's single publication statute, California Civil Code § 3425.3, did not apply to the oral history library reference material, and specifically, the Goldman interview. (129 Cal.App.4th at 400.) Instead, it held that the single publication rule applied exclusively to materials in the "mass media." (129 Cal. App. 4th at 398.) The majority went on to hold

that Appellants' cause of action for defamation should be tolled under the discovery rule exception, because the alleged libel, although not published or maintained in secret, was nonetheless beyond what the ordinary person could be expected to immediately detect or comprehend. (129 Cal. App. 4th at 403.)

B. The Dissent

The dissent took issue with the majority's conclusion that the single-publication rule does not apply to a publication such as the ROHO volumes. It concluded that the publication in fact shared far more with the publication of a "garden variety book" than it did with "purely private communication." The dissent noted that the ROHO volumes were printed by a prestigious university, delivered to prominent American libraries, and made available on request to members of the public. (129 Cal. App. 4th at 406-407.)

The dissent likewise expressed its strenuous objection to applying the discovery rule exception to a publication that shares none of the characteristics of the earlier cases, distinguished by this Court in *Shively*, in which that rule was applied to libel. The dissent noted that the discovery rule exception had been applied only in cases in which the publications were held in secret or confidence. (129 Cal. App. 4th at 408.) Finally, the dissent reiterated this Court's clearest statement in *Shively*, which directly contradicts the majority decision:

We can see no justification for applying the discovery rule to delay the accrual of plaintiff's causes of action beyond the point at which their factual basis *became accessible to plaintiff to the same degree as it was accessible to every other member of the public.* (Emphasis in dissent.)

129 Cal. App. 4th at 409.

V. LEGAL DISCUSSION

A. **The Single Publication Rule Should Apply Here**

1. Application of the Single Publication Rule Should Not Be Limited Solely to Mass Media Publications

The Court of Appeal held that California's Uniform Single Publication Act ("USPA"), which was specifically designed to impose on libel plaintiffs a rigid statute of limitations, applies solely to "mass media publications" and not to generally accessible library publications, such as those at issue here, because no case holds otherwise, and the "statute is confined to communications in the mass media." (129 Cal. App. 4th at 398.) The USPA, however, is not so confined, a fact that is clear from the very language of the statute. The USPA itself makes no mention of the phrase "mass media" nor does the USPA require that the publication be duplicated or distributed in any fashion whatsoever.

The statute's language belies the argument that "mass" distribution is a prerequisite for its application, particularly when one considers that the audience to any single speech or oral performance, which is expressly covered by the statute, can be miniscule in a country of some 300,000,000 people. The USPA provides: "No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon *any single* publication or *exhibition or utterance*, such as any one issue of a newspaper or book or magazine *or any one presentation to an audience* or any one broadcast over radio or television or any one exhibition of a motion picture." (emphasis added) Cal. Civil Code § 3425.3. Under the text's plain language, publications generally made available to the public fall squarely within the scope of the USPA.

New York courts, for example, have broadly applied the single publication rule to situations well beyond those involving mass media. Well before California's codification of the rule, New York applied the single publication rule to newspapers and magazines. *Wolfson v. Syracuse Newspapers, Inc.*, (1938) 4 N.Y.S.2d 640. Ten years later, in *Gregoire v. G.P. Putnam's Sons* (1948) 298 N.Y. 119, cited by this Court in *Shively*, New York's highest court held the rule applied to books, even though the level of publication and dissemination of books had not reached the level of widespread distribution of newspapers and magazines. In doing so, the court confirmed the New York legislature's intent to do away with the precedent that exposed publishers to virtually interminable litigation and potential liability and "to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Id.* at 125.

Since *Gregoire*, New York courts and federal courts, applying New York law, have interpreted the single publication rule broadly, applying it well beyond the traditional concept of mass media publications to communications on the Internet (*Firth v. Date* (2002) 98 N.Y.2d 365, 775 N.E.2d 463); to letters to a disciplinary committee of private club leveling charges against a club member (*Nyitray v. Johnson* (S.D.N.Y. 1998) 1998 U.S. Dist LEXIS 1791); to statements in reports made to credit agencies and bureaus (*Milner v. New York State Higher Education Services Corp.* (2004) 777 N.Y.S.2d 604, 2004 N.Y. Misc. LEXIS 566; *David J. Gold, P.C. v. Berkin* (S.D.N.Y. 2001) 2001 U.S. Dist LEXIS 1206; *Ferber v. Citicorp Mortgage, Inc.* (S.D.N.Y. 1996) 1996 U.S. Dist. LEXIS 1210) and to internal office communications made in reports, letters and memoranda (*Gerentine v. U.S.* (S.D.N.Y. 2001) 2001 U.S. Dist LEXIS 10975; *Gelbard*

v. Bodary (2000) 706 N.Y.2d 801, 2000 N.Y. App. Div. LEXIS 3607; *Stockley v. AT&T Information Systems, Inc.* (E.D.N.Y. 1988) 687 F.Supp. 764; *Mandell v. Terminal Beauty Shops, Inc.* (1960) 201 N.Y.2d 233, 1960 N.Y. Misc. LEXIS 3292.)

New York courts have reasoned that the scope of the single publication rule should include even such publications of extremely limited distribution, such as internal office memoranda and letters, because of stale claims concerns if a suit were permitted to be brought upon a letter or memorandum that is provided to other individuals months or even years later. *See, Gelbard v. Bodary, supra*, 705 N.Y.S.2d at 802, where the court held that the single publication rule applied to an alleged defamatory letter that was used in peer reviewing a physician, reasoning that “[w]ere we to hold otherwise, a defamation claim could accrue when the letter was provided to other individuals involved in a professional review process months or even years later.” One California appellate court has followed the reasoning of New York courts by extending the protection afforded by the single publication rule to Internet publications. *See, Traditional Cat Ass’n v. Gilbreath* (2004) 118 Cal.App.4th 392, 404 (The court noted that no California precedent existed on the issue, but that New York had expressly extended rule to Internet publications, and that “the reasoning of the court in *Firth v. State* [was] persuasive.”)

As the New York courts have recognized, limiting the single publication rule to mass media publications would only defeat the important public policy purposes behind the rule, because a more flexible approach is necessary to address the ever-changing landscape of modern communication. As the dissent below succinctly explains, “the issue of published and distributed books is now far more complex than the majority seems to envision,” so that, for example, “vanity press” books of “very

limited distribution” and their “online” and “self-publishing” counterparts should “be governed by the single publication rule.” *Hebrew Academy, supra*, 129 Cal. App. 4th at 406 n.2 (dissenting opinion).

In this regard, there are innumerable “publications” whose means of publication, notoriety, and circulation are much more limited than that of the ROHO volumes. They are found in research institutes, on university and college campuses, and in public libraries. These publications all share one thing in common. While many may be the product of less rigorous protocol from that attending the ROHO publications, the authors, like those who publish through vanity press and its online and self-publishing counterparts, have a common interest in public exposure and dissemination of their works. While all of these publications fall outside the Court of Appeal’s mass media definition, they are within the spectrum of publications envisioned by this Court in *Shively*. Such publications should not be categorically denied the protection of the single publication rule simply because they are not embraced within the traditional notion of “mass media” communications.

Limiting the single publication rule to mass media, moreover, would ignore the principal reasons for the adoption of that rule. As this Court explained in *Shively*, courts fashioned what is known as the single publication rule “to avoid *both* the multiplicity *and* the staleness of claims permitted by the rule applied in the *Duke of Brunswick* case...” *Shively, supra*, 31 Cal.4th at 1245 (emphasis by the Court). The concern with the *Duke of Brunswick* decision may have been due more to the staleness of the claim than the multiplicity of lawsuits, since the Duke had obtained only two copies of the allegedly defamatory newspaper article, and did so seventeen years after the original publication when memories would certainly have faded, witnesses would have died or disappeared, and

evidence would most certainly have been lost. *See, Gregoire v. G.P. Putnam's Sons, supra*, 298 N.Y. at 125.

Similarly, the concern of multiple lawsuits arising out of a single publication is not limited to the mass media context. For example, library reference materials that may not fall within the confines of the mass media definition can, nonetheless, be the basis of a new defamation claim each and every time such a publication falls into the hands of a new reader unless it is afforded the protection of the single publication rule. For these reasons, the concerns that prompted the adoption of the single publication rule apply equally to certain publications of limited access or distribution.

2. The Rationale for Applying the Single Publication Rule to Mass Media Communications Applies to Library Reference Materials, Such As the ROHO Research Volumes

The ROHO volumes, including the Goldman interview, are a hybrid-form of communication, incorporating both the traditional concept of library reference materials and those associated with the ever burgeoning arena of Internet communications. Because of the significant scholarly and public values of the ROHO histories, ROHO's volumes are deposited in more than 700 manuscript libraries worldwide (AA 359, Page Decl., ¶ 7), and are catalogued on two nationally accessible Internet library databases, as well as on the University of California's online catalogues (*Id.*). This national dissemination of the ROHO histories is consistent with its creative purpose of being "intended for the widest possible use." (AA 380; Ex. C to Page Decl.)

As part of the ROHO histories, the Goldman interview, conducted more than a decade ago, has been available to the public in its present published form like the other ROHO histories. (AA 360, Page Decl., ¶¶ 10-12.) As with the other ROHO histories, it is accessible through both

national Internet catalogues and the University of California's online catalogues, and copies are available from the Bancroft Library at Berkeley and the Charles E. Young Research Library at UCLA. Copies were also made available to other libraries throughout the United States, including the New York Public Library. (AA 360, Page Decl., ¶ 11).³ Other copies are accessible through the Magnes Museum in Berkeley, California, a museum that focuses on Jewish life and culture, and Temple Emanu-El in San Francisco. (AA 360-361, Page Decl., ¶ 12 and AA 667). Because the Goldman interview ROHO volume "is (1) printed by an institution such as the University of California, (2) delivered by it to *at least* three prominent

³ The Court of Appeal's summary dismissal of Respondents' argument that the library publications are widely disseminated because they are catalogued on the Internet is based entirely on the fact that neither the allegedly libelous comments nor any direct reference to Hebrew Academy and/or Rabbi Lipner appear on the referenced Internet sites identifying the interviews. That aspect of the Internet catalogue, however, is no different than references to *published* books on Internet websites, or for that matter, how a reader would typically choose a book in a bookstore. The book review on a website or synopsis on the book's binder at the store does not generally categorize potentially defamed persons or the content of the defamation. Significantly, however, the cataloged Internet entries do reference the subject of the Goldman oral history as "Goldman, Richard N." and reveal that it consists of interviews pertaining to, among other entities and subjects, the "Jewish Community Federation of San Francisco," which should have been of interest to both Rabbi Lipner and the Hebrew Academy because it was their source of funding. The catalogues also reveal that Mr. Goldman "discusses the Jewish Welfare Federation; Jewish Community Federation; influencing changes in the United Jewish Appeal and the Jewish Agency; Jewish Endowment Fund; activities on behalf of Israel and other political activities," again matters that would have presumably been of interest to Rabbi Lipner given his involvement in the Jewish community. Indeed, the fact that Ms. Real, in embarking on a biography of Rabbi Lipner, chose to review the ROHO histories, and in particular the Goldman interview, demonstrates at least some apparent nexus between the Academy, Rabbi Lipner, and the Goldman interview that could be gleaned from the catalogues.

American libraries, and (3) available at its Bancroft Library to any member of the public who requests access to it,” the dissenting appellate opinion concluded that it “is more like the garden variety books, magazines and newspapers which are clearly, post-*Shively*, subject to the single publication rule than it is to purely private communication.” *Hebrew Academy v. Goldman, supra* (dissenting opinion), 129 Cal.App.4th at 406-407, emphasis in dissent.

Given the various avenues in which the ROHO volumes can be accessed, both through traditional card catalogues and the more modern Internet databases, the concern of multiple lawsuits arising from a volume’s single publication is apparent. Without the protection of the single publication rule, each access by a member of the public to an ROHO volume triggers another “publication” and thus, another potential cause of action for libel. *Shively, supra*, 31 Cal.4th at 1243-1244 (where this Court explained that the 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” potentially tolling the limitation period indefinitely.”)

Similarly, because of the threat of unending limitation periods, the staleness-of-claims concern prompting the adoption of the single publication rule is as applicable to library reference materials as it is to mass media publications. The present lawsuit exemplifies this concern. Appellants did not file the original complaint until nearly ten years after the ROHO volume containing the Goldman interview was first published in 1993, and undoubtedly in that decade, memories have faded, witnesses have died or disappeared and evidence has been lost. *Gregoire v. G.P. Putnam’s Sons, supra*, 298 N.Y. at 125.

Thus, as with mass media publications, reference library publications, such as the ROHO volume here, are subject to repetitive lawsuits and unlimited tolling of the limitation period every time they come within the hands of a new reader unless the single publication rule applies.

B. 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.

In *Shively*, this Court explained that the discovery rule is an exception to the general rule governing the accrual of a cause of action, and as such, is limited in application “to such inherently covert defamations as entries in personnel records, and also to confidential communications by credit reporting agencies to their subscribers,” citing *Manguso v. Oceanside Unified School Dist.* (1979) 88 Cal. App. 3d 725 (libelous comment in a confidential letter placed in a teacher’s permanent personnel file with her school district), *Schweih’s v. Burdick* (7th Cir. 1996) 96 F.3rd 917, 921 (wherein the court observed that “[t]he courts seem to apply the discovery rule in situations in which the defamatory material is published in a manner likely to be concealed from the plaintiff, such as credit reports or confidential memoranda.”); and *Tom Olesker’s Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.* (1975) 61 Ill. 2d 129 (a credit report which falsely reported the financial state of the plaintiff’s business). 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:

We can see no justification for applying the discovery rule to delay the accrual of plaintiff’s causes of action beyond the point at which their factual basis became accessible to plaintiff to the same degree as it was accessible to every other member of the public.

In contrast to this Court's conclusion in *Shively*, the Court of Appeal below posited that "[t]he view that the discovery rule should be applied with restraint and only rarely is not shared by the courts," (129 Cal. App. 4th at 404), citing non-defamation authorities such as *Cain v. State Farm Mut. Auto. Ins. Co.* (1976) 62 Cal. App. 3rd 310 and *Saltier v. Pierce Brothers Mortuaries* (1978) 81 Cal. App. 3rd 292, both of which are personal injury cases.⁴

In defamation cases, however, other courts, consistent with *Shively*, have concluded "that there is a decided modern trend to apply the discovery rule in a limited type of defamation cases – cases in which the alleged defamatory statements are published under circumstances in which they are likely to be kept secret from the injured party for a considerable time." *Clark v. Aireaserch Manufacturing Company of Arizona, Inc.* (1983 Arz. App.) 138 Arz. 240, 242 [673 P.2d 984, 986], cited with approval in *McCutcheon v. State of Alaska* (Alaska S. Ct. 1987) 747 P.2d 461, 467; see also, the dissenting opinion at 129 Cal. App. 4th 409 and cases cited therein. In such circumstances, the discovery rule is arguably a necessary exception to the general rule (i.e., that the accrual of a cause of action begins upon publication of the alleged defamatory remark) because there are apparent inequities in allowing a person to publish defamatory statements secretly to others, such as in personnel files, and at the same time, intentionally hide the existence of those publications from the defamed victim. That rationale for applying the discovery rule to covert or secret publications, however, does not apply to situations, such as here, in which the alleged libelous publication is equally available to the plaintiff as it is to the general public.

⁴ The Court of Appeal also cited *Manguso, supra* and *Tom Olesker's, supra*, both of which addressed covert and confidential communications, such as personnel files and credit reports, as discussed, *supra*.

The Court of Appeal further strayed from *Shively* by concluding that the discovery rule applies *unless* “the [factual] basis for the claim has been widely distributed in the public record or otherwise the subject of publicity.” (129 Cal. App. 4th at 403.) This conclusion not only ignores the status of the discovery rule as a limited exception (rather than the general rule) to the accrual date of defamation causes of action, but more importantly, ignores the Court’s rejection in *Shively* of the application of the discovery rule once the alleged libelous publication becomes equally available to plaintiff as it is to the general public.

Similarly, Appellants’ position that the discovery rule should apply to every defamation case in which the plaintiff has not been not put on inquiry notice of the alleged defamatory publication or with reasonable diligence could not have discovered the alleged libel during the statutory limitation period would allow the exception to swallow the rule. Under such an approach, the discovery rule would apply to the majority of publications. It is virtually impossible for any person to be on inquiry notice of or with reasonable diligence discover every written publication that could possibly contain a defamatory statement about him or her. This is especially true given the thousands of newly published books every year and the enormous volume of other publications, such as newspapers, magazines, publicly available research materials, and the Internet materials. To expand the application of the discovery rule to each and every incident in which a plaintiff could assert that he or she was never put on inquiry notice of the alleged libel would transform the discovery rule from the exception into the rule.

Moreover, in contrast to the present case, those cases applying the discovery rule invariably involve efforts by the publishing party to maintain the confidentiality of the alleged libel or the publications occurred

within a process which, by its very nature, was calculated to maintain the secrecy of the publication. Here, neither Mr. Goldman nor the Federation intended that the interview be kept secret from Rabbi Lipner, the Hebrew Academy, or anyone else. Quite to the contrary, from 1993 onward, the Goldman volume of the ROHO was (1) available for review at the Bancroft Library at Berkeley and the Charles E. Young Library at UCLA, (2) catalogued through two nationally accessible library databases, as well as the University of California's online library catalogues, and (3) indirectly available to other libraries throughout the country and specifically acquired by the New York Public Library. The published interview was also mentioned in the only weekly Jewish newspaper available in Northern California, the *Jewish Bulletin*, and a copy of the published interview was publicly presented to Mr. Goldman at a Jewish Community Federation banquet in 1996 with over 1,600 members of the Bay Area Jewish community in attendance.

The Court of Appeal also asserted that the discovery rule should apply because Rabbi Lipner was not the intended audience of the ROHO transcripts. (129 Cal. App. 4th at 403-404.) Significantly, *Shively* neither mentions nor even suggests that the intended audience is a factor in determining the application of the discovery rule. Nor would it promulgate sound law or policy to have different limitations periods apply depending on whether the specific plaintiff was within the zone of the intended audience or not. Moreover, as the dissenting opinion points out, a reasonable person within the Bay Area Jewish Community should have been on inquiry notice regarding the ROHO volumes that specifically addresses Jewish history:

The fact (noted by the majority) that the Goldman transcript was one of 15 *oral histories* comprising the "Jewish Community Federation Leadership Oral

History Project arranged between the Bancroft Library and the Jewish Community Federation (with funding by the latter) suggests rather strongly that it was part and parcel of what had to be an extensive and thus well-known project involving the collection and publication of information about prominent people and events within the San Francisco Jewish community. A “reasonable person” within that community should, therefore, have been “on inquiry” regarding it. (129 Cal. App. 4th at 409, emphasis in dissent.)

This is especially true for Rabbi Lipner and the Hebrew Academy, which received funding from the Federation directly. (AA 501.) The Federation is expressly mentioned in the on-line catalogues in reference to the Goldman interview volume of the ROHO.

The library reference materials at issue were neither secreted nor held in confidence; they were disseminated through nationally-renowned libraries and catalogued on nationally-recognized library databases. The discovery rule, therefore, should not apply to extend indefinitely the limitation period to such disseminated material that is equally accessible to Appellants as it is to the general public.

C. Application of Both the Single Publication Rule and the Discovery Rule Should Turn On Whether the Alleged Defamatory Material Becomes Equally Accessible to the Claimant As It Is to the General Public

To accommodate both the single publication rule and the discovery rule exception, this Court should fashion a rule that permits these arguably competing aspects of California law to exist co-extensively. This can be achieved by borrowing from the reasoning in *Shively* in the context of the discovery rule exception discussion and applying it to the single publication rule. The single publication rule should apply once the dissemination of the allegedly defamatory publication becomes equally accessible to the claimant as it does to the general public. *Shively, supra*, 31 Cal.4th at 1252-1253. Applying the single publication rule to publications of limited

distribution or accessibility is entirely consistent with the rationale expressed in *Shively* for limiting the discovery rule's application to secret or confidential communications. *Id.* For example, library reference materials, such as the ROHO volumes here, which were published by a reputable university and are accessible through the Internet, as well as traditional library card catalogues, should fall well within the single publication rule's ambit. At the same time, the discovery rule exception for "inherently covert defamations" of the type noted in *Shively* would not be disturbed by applying the single publication rule to publications not strictly qualifying as "mass media" communications.

Appellants will no doubt assert that application of the single publication rule to publications of limited distribution, like those at issue here, could result in harsh consequences to a potential claimant, who does not receive actual notice of a certain publication containing allegedly defamatory material. (See, AOB at pp. 9-11.) As with any pronouncement of a statute of limitation, however, there is always the interplay between the need to bar stale claims and the occasional harsh result that may occur because of it. See, *Gregoire v. G.P. Putnam's Sons, supra*, 298 N.Y. at 125 (in expanding the single publication rule to books, the New York Court of Appeals acknowledged this interplay: "At times, it may bar the assertion of a claim. Then its application causes hardship. The Legislature has found that such occasional hardship is outweighed by the advantage of outlawing stale claims.")

Indeed, California courts have applied the single publication rule to situations in which there is an apparently "harsh" and "unfair" result. In *Johnson v. Harcourt Brace Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, for example, the plaintiff was a poor, uneducated janitor who brought a cause of action for, *inter alia*, invasion of privacy arising from the publication of

a textbook that was used in college English courses. Although the textbook was apparently used throughout the country, it was dubious to presume that an uneducated janitor would have occasion to read it or, for that matter, even know of its existence. Nonetheless, the appellate court applied the single publication rule to bar the janitor's claim on the grounds that the statute of limitations had begun to run regardless of whether the plaintiff was aware that he had a cause of action. *Id.* at 895.

Moreover, in applying the single publication rule to situations in which the alleged publication is equally accessible to the plaintiff as it is to the general public, any purported harshness is counterbalanced by the claimant's limited exposure to injury. In other words, if an alleged defamatory publication is available to the general public for years and years but rarely accessed, then the claimed damages, if any, would likely be nominal at most.⁵

To accommodate both the existence of the discovery rule exception for confidential communications and the application of the single publication rule beyond mass media communications, this Court should clarify that the single publication rule applies to all allegedly defamatory publications once they become equally accessible to the plaintiff as they are to the general public, and not just to mass media communications. Such a

⁵ The majority below apparently acknowledged that Appellants have not been injured by the Goldman interviews, presumably because Appellants were only aware that Rabbi Lipner and Ms. Real had read the Goldman volume in question at the time this suit was filed. The court speculated, however, that further damage could occur in the future because of the historical, archival nature of the ROHO volume (129 Cal.App.4th at 405, n.7). That speculation as to future injury must be weighed against the obvious problems of allowing claims to be brought on such publications ten, twenty or even thirty years after they are published and made available to the general public, when memories have faded and witnesses and evidence will have most certainly disappeared.

clarification will provide a working bright-line standard to guide California courts in the future when applying the single publication rule to ever-changing modes of modern communication.

VI. CONCLUSION

For the reasons more fully stated above, the single publication rule should apply to the ROHO histories because, as with mass media communications, such reference library publications are subject to repetitive lawsuits and unlimited tolling of the limitations period every time they come into the hands of a new reader unless they are afforded the protection of the rule.

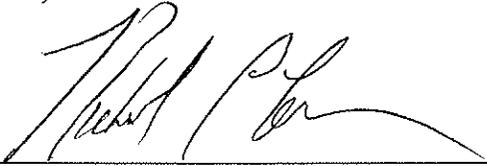
The discovery rule exception should not be expanded to toll the limitation period for publications that were neither made in secret nor held in confidence, and should certainly not be applied to publications created by a well-renowned university and made accessible to the general public.

Finally, a bright-line standard to apply to the scope of the single publication rule without eviscerating the discovery rule exception would be to apply that rule to publications that are equally accessible to the claimant as they are to the general public. Such a bright-line rule would provide guidance to California courts in the future, and at the same time allow for the rule's co-extensive existence with the discovery rule exception.

DATED: October 24, 2005

Respectfully submitted,

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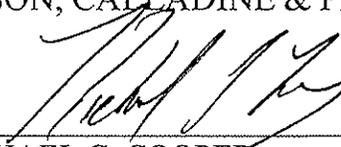
RULE 14(c)(1) CERTIFICATION

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 7,644 words long, including footnotes.

DATED: October 24, 2005.

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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 October 24, 2005, I served the attached:

OPENING BRIEF ON THE MERITS

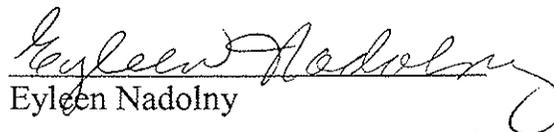
on the persons named below in said cause, by placing a true copy thereof enclosed in an envelope with postage prepaid fully thereon, and depositing it with the United States Mail at San Francisco, California, addressed as follows:

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California Court of Appeal
First Appellate District
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Clerk of the Superior Court
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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 October 24, 2005.


Eyleen Nadolny