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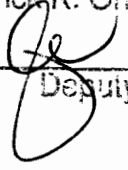
SUPREME COURT
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March 10, 2010

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Honorable Ronald M. George, Chief Justice
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Frederick K. Ohlrich Clerk


Deputy

Re: *Simpson Strong-Tie Company, Inc. v. Gore*, No. S164174

Dear Chief Justice George and Associate Justices:

This letter brief by Simpson Strong-Tie Company, Inc., addresses the inquiry this court posed in its order of February 24, 2010: “Does the anti-SLAPP exemption under Code of Civil Procedure section 425.17, subdivision (c), for a ‘statement or conduct . . . made in the course of delivering the . . . goods or services’ of a person primarily engaged in the business of selling or leasing goods or services apply to *any* statement or conduct made in the course of delivering the person’s goods or services or only to a statement or conduct made in the course of delivering the person’s goods or services that ‘consists of representations of fact about that person’s or a business competitor’s business operations, goods or services’?”

Mode of analysis

We begin with the familiar three-part framework for statutory construction. First, the court looks to the statutory text itself. If the text is clear and unambiguous, its plain meaning governs, and there is no need for judicial construction. (*Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 902; *Citizens for Civic Accountability v. Town of Danville* (2008) 167 Cal.App.4th 1158, 1161-1162; *Absher v. AutoZone, Inc.* (2008) 164 Cal.App.4th 332, 339 (*Absher*)). Next, if the statutory text is inconclusive, the court looks to intrinsic aids in the form of various rules of statutory construction. (*Absher, supra*, at p. 340; *Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 202-203 (*Oden*)) Finally, if the statutory text and intrinsic aids do not yield a clear and certain resolution, the court looks to legislative history as an extrinsic aid. (*Absher, supra*, at p. 340; *Oden, supra*, at p. 204.)

Plain meaning

In our view, the text of Code of Civil Procedure section 425.17, subdivision (c), is clear and unambiguous with regard to the court’s inquiry, because of the way the phrase “the statement or conduct” appears twice in subdivision (c)(1) of the statute. Subdivision (c)(1) states:

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

(Code Civ. Proc., § 425.17, subd. (c)(1), italics added.)

This subdivision prescribes two commercial speech exemptions: a “content and purpose” exemption (or, as Gore calls it, a “content” exemption), and a “course of delivery” exemption (or, as Gore calls it, a “delivery” exemption). By introducing each of these exemptions with the phrase “the statement or conduct,” the statute makes the two exemptions substantively independent of each other, in that, after prescribing the “content and purpose” exemption with the introductory phrase “the statement or conduct,” the statute continues anew by prescribing the “course of delivery” exemption with that same introductory phrase. Because this structural aspect of subdivision (c)(1) makes the two exemptions substantively independent of each other, the statutory text makes clear that the “consists of representations of fact about” element of the “content and purpose” exemption is specifically *not* an element included in the “course of delivery” exemption.

That is why page 14 of Simpson's Opening Brief On The Merits presents the language of subdivision (c)(1) as follows:

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

or

- the statement or conduct was made in the course of delivering the person's goods or services.

With subdivision (c)(1) presented in this manner, we plainly see how the two exemptions are substantively independent. The “content and purpose” exemption requires

“representations of fact about that person’s or a business competitor’s business operations, goods, or services.” The “course of delivery” exemption does not include any such requirement. Thus, the statute’s plain meaning is that the “consists of representations of fact about” element is within the “content and purpose” exemption but is *not* within the “course of delivery” exemption.

Until recently, Gore attributed this same plain meaning to subdivision (c)(1). In his Respondent’s Brief in the Court of Appeal (at pages 15-22), he also treated the “consists of representations of fact about” element as being exclusive to the “content and purpose” exemption. Not until his Answer Brief on the Merits in this court, nearly three years into this litigation, did he suggest that the matter “is an open question.” (Answer Brief on the Merits p. 42, fn. 15.) That Gore and Simpson long shared the same view of subdivision (c)(1)’s plain meaning says much about the statute’s clarity.

Rules of statutory construction

In addition to pure textual analysis, the rules of statutory construction support a construction of subdivision (c)(1) that excludes the “consists of representations of fact about” element from the “course of delivery” exemption.

“[C]ourts should avoid a construction that makes any word surplusage.” (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135.) “Significance, if possible, should be attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose” (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744, internal quotation marks omitted.)

Construction of the “course of delivery” exemption as including the “consists of representations of fact about” element would make surplusage of the four words in subdivision (c)(1) that commence the “course of delivery” exemption – the words “the statement or conduct,” where they appear for the second time. (Indeed, those four words would have to be deleted entirely for the prescription of the “course of delivery” exemption to include the “consists of representations of fact about” element and still be structurally comprehensible.) Such construction is disfavored. This court can and should give significance to those words – the significance being that the statute makes the two commercial speech exemptions substantively independent of each other, with the “consists of representations of fact about” element being exclusive to the “content and purpose” exemption and not an element of the “course of delivery” exemption.

Had the Legislature intended to make the “consists of representations of fact about” element a part of the “course of delivery” exemption, the Legislature could easily have done so by omitting from subdivision (c)(1) the second reference to “the statement or conduct.” If subdivision (c)(1) had been drafted in that manner, it would have read: “The statement or conduct consists of representations of fact about that person’s or a business competitor’s business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person’s goods or services, or [] was made in the course of delivering the person’s goods or services.” Instead, the words “the statement or conduct” are repeated at the outset of the “course of delivery” exemption – this time without including the “consists of representations of fact about” element previously set forth in the “content and purpose” exemption – thus signaling the Legislature’s clear intent to exclude that element from the “course of delivery” exemption. This court should not nullify the Legislature’s careful choice of language in this context by reading the second reference to “the statement or conduct” out of subdivision (c)(1).

Legislative history

Finally, although it is not necessary for this court to reach beyond pure textual analysis and the rules of statutory construction, the legislative history also supports a construction of subdivision (c)(1) that excludes the “consists of representations of fact about” element from the “course of delivery” exemption.

A committee report on the bill that became Code of Civil Procedure section 425.17 explained that the bill “closely tracks” certain case law on commercial speech set forth in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939 (*Kasky*). (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended June 27, 2003, p. 7; see Gore’s Motion For Judicial Notice filed in the Court of Appeal, exhibit A, p. MJN0107.) *Kasky* prescribed a “limited-purpose test” for determining whether particular speech may be subjected to laws aimed at preventing false or misleading advertising, requiring consideration of “three elements: the speaker, the intended audience, and the content of the message.” (*Kasky, supra*, at p. 960.) The court stated that, with regard to the third element, “the factual content of the message should be *commercial in character*. In the context of regulation of false or misleading advertising, this *typically* means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker’s products or services.” (*Id.* at p. 961, italics added.)

That language is the source of subdivision (c)(1)'s "content and purpose" exemption, which repeats the *Kasky* language almost verbatim, and also adds the phrase "or a business competitor's." (Code Civ. Proc., § 425.17, subd. (c)(1).)

Kasky said nothing about statements or conduct made "in the course of delivering" goods or services, and did not suggest that its description of commercial speech was intended to be exclusive or exhaustive. The language comprising subdivision (c)(1)'s "course of delivery" exemption was conceived by the bill's drafters, wholly independently of *Kasky* – evidently because of *Kasky*'s observation that for speech to be commercial in character "typically" means that the speech consists of certain representations of fact made for a commercial purpose. (*Kasky, supra*, 27 Cal.4th at p. 961.) In this context, "typically" means there are other ways in which speech can be commercial in character. The drafters of section 425.17 responded accordingly by adding another definition of commercial speech to subdivision (c)(1) – the "course of delivery" exemption.

The significance of this legislative history is that subdivision (c)(1)'s "content and purpose" and "course of delivery" exemptions were conceived and crafted independently of each other – the "content and purpose" exemption by *Kasky*, and the "course of delivery" exemption by the statute's drafters, with the latter intended to address situations not encompassed by the former – thus further indicating that the two exemptions are substantively independent of each other.

It makes practical sense for the Legislature to have added the "course of delivery" exemption, exclusive of the "consists of representations of fact about" element, in light of the context in which *Kasky* formulated the language of that element. *Kasky* focused on a "core segment" of commercial speech as "speech *proposing* a commercial transaction" (although commercial speech is not limited to that core segment). (*Kasky, supra*, 27 Cal.4th at p. 956, italics added, internal quotation marks omitted.) Explaining one way in which speech may be "commercial in character," the court said – in language that became the "consists of representations of fact about" element of subdivision (c)(1) – that this "typically" means the speech consists of certain representations of fact "made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." (*Id.* at p. 961.) Because the court was speaking of speech that *precedes* the completion of a commercial transaction – which speech might or might not be commercial in character – it was necessary, in order to ensure that such speech *is* commercial in character, to insert the "content and purpose" exemption's descriptions of types of speech that have a commercial purpose. In contrast, the actual *delivery* of a product or service can *only* be commercial activity, and thus there can be no doubt that a statement or conduct made in the course of

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such delivery was commercial in character. Within the context of subdivision (c)(1), “delivery” *must* mean unambiguous commercial activity, as compared with any number of commercial or noncommercial activities that might precede the delivery of a product or service. Otherwise, subdivision (c)(1)’s last 17 words – that is, the entire “course of delivery” exemption – would be subsumed in the “content and purpose” exemption as an aspect of “securing sales or leases” (Code Civ. Proc., § 425.17, subd.(c)(1)) and thus would itself be surplusage. A statement or conduct made “in the course of” delivering goods or services is *necessarily* commercial speech because it is unambiguously a part of a commercial transaction (see Opening Brief on the Merits, pp. 37-44), and thus there is no need for subdivision (c)(1)’s “course of delivery” exemption to include the “consists of representations of fact about” element in order to ensure that speech or conduct is commercial in character.

Conclusion

For the foregoing reasons, we submit that the answer to the court’s inquiry is that the anti-SLAPP exemption under Code of Civil Procedure section 425.17, subdivision (c), for a “statement or conduct . . . made in the course of delivering the . . . goods or services” of a person primarily engaged in the business of selling or leasing goods or services applies to *any* statement or conduct made in the course of delivering the person’s goods or services.

Respectfully submitted,

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JON B. EISENBERG

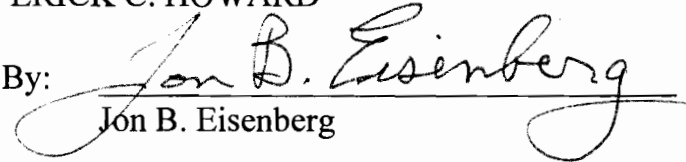
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cc: See attached proof of service

PROOF OF SERVICE
[C.C.P. § 1013a]

RE: Simpson Strong-Tie Company v. Gore
Case No. S164174

I, Jessica Dean, declare as follows: I am a citizen of the United States and employed in the County of San Francisco, State of California. I am over eighteen (18) years of age and not a party to the above-entitled action. My business address is 180 Montgomery Street, Suite 2200, San Francisco, CA, 94104. On the date set forth below, I served the following documents in the manner indicated on the below named parties and/or counsel of record:

• **LETTER TO HONORABLE RONALD M. GEORGE, CHIEF JUSTICE**

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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 10, 2009 at San Francisco, California.



JESSICA DEAN