

Daily Journal

MAY 18, 2010 | LAW PRACTICE

Ads Soliciting Plaintiffs Are Protected, Court Says

By Laura Ernde, Daily Journal Staff Writer

Plaintiffs' attorneys advertising for potential clients don't need to worry about being sued for defamation by the businesses they target for litigation, thanks to a ruling Monday by the California Supreme Court.

Such ads are protected by a state law against SLAPP suits, or strategic lawsuits against public participation, a unanimous court held. *Simpson Strong-Tie v. Gore*, 2010 DJDAR 7087.

The ruling vindicated Los Gatos attorney Pierce Gore, who spent five years fending off a libel lawsuit brought by Simpson Strong-Tie, a wood screw manufacturer whose name was mentioned in Gore's ad encouraging potential plaintiffs to contact him. No class action ever materialized against the company.

Gore's lawyer, Tom Burke of Davis Wright Tremaine in San Francisco, said the ruling ensures the state's anti-SLAPP law remains strong in protecting free speech.

Oakland attorney Jon B. Eisenberg, who represented Simpson, said it leaves no recourse for victims of defamatory advertising by attorneys.

"The effect of the Supreme Court's decision is to make lawyer advertising pretty much a wide open game," Eisenberg said. "You can say what you wish, not only with the protection of the Constitution but also the anti-SLAPP statute. There will be no consequences."

Businesses have even less incentive to sue lawyers over ads because if they lose, they're liable for the defendant's attorney fees, he said.

Burke said Monday's ruling won't protect all attorney advertising, but will certainly shield ads that are similar to Gore's.

His December 2005 newspaper ad said: "Attention: Wood Deck Owners. If your deck was built after January 1, 2004 with galvanized screws manufactured by Phillips Fastener Products, Simpson Strong Tie or Grip-Rite, you may have certain legal rights and be entitled to monetary compensation, and repair or replacement of your deck. Please call if you would like an attorney to investigate whether you have a potential claim." The ad gave Gore's contact information.

"In the hall of fame of lawyer advertising, this would get the award for most benign," Burke said. "This is a model way in which to not only locate appropriate class members but at the same time to have the public know the nature of what it is you're looking for."

Eisenberg argued the ad fell under a commercial speech exemption to the anti-SLAPP law approved by the Legislature in 2003.

But Justice Marvin R. Baxter wrote that the narrow exemption would only apply if Gore had made statements about his own business or a competing lawyer's business.

"Whether the Simpson products are in fact defective is beyond the scope of this proceeding, but the inference that they are defective is not a representation of fact about *Gore's* business operations, goods or services," he said.

Baxter pointed out that under Simpson's broad interpretation, anything that merely mentions products sold by a business - for example, a political ad - would be subject to a lawsuit.

Burke said he was glad the Supreme Court interpreted the commercial speech exemption narrowly, the same way the court handled the public interest exemption in another case he argued. In *Club Members for an Honest Election v. Sierra Club* 45 Cal.4th 309 (2008), the court held the exemption applies only when the entire action is brought in the public interest.

Burke said he thinks Gore might have a SLAPP-back claim against Simpson for pursuing the lawsuit after it was thrown out by Santa Clara County Superior Court Judge John Herlihy and the 6th District Court of Appeal.

Gore, who did not immediately return a call for comment Monday, has said the suit devastated him personally. Mounting legal bills forced his home into foreclosure. Gore's 47-year-old brother, a class-action lawyer in Nashville, Tenn., committed suicide after Simpson sued him over a similar ad.

Burke said Gore doesn't blame Simpson for the death of his brother, who had battled depression and alcoholism for 30 years, but said the lawsuit was a factor.

Eisenberg said the Supreme Court acknowledged that Simpson raised valid legal arguments in its appeal, which resolved an issue of statewide importance, so pursuing a SLAPP-back would be unwise.

"Sometimes litigation should just end," he said.

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