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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

URBAN LOGIC CONSULTANTS, INC.
et al.,

Plaintiffs and Appellants,

v.

BEAUMONT CITIZENS FOR
RESPONSIBLE GROWTH et al.,

Defendants and Respondents.

E053189

(Super.Ct.No. RIC10019763)

OPINION

APPEAL from the Superior Court of Riverside County. Paulette Durand Barkley, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Briggs & Alexander and Peter D. Sunukjian for Plaintiffs and Appellants.

Law Offices of Andrew I. Roth, Andrew I. Roth; and Helios J. Hernandez, for Defendants and Respondents.

Plaintiffs Urban Logic Consultants, Inc., and its principals, Deepak Moorjani, Ernest Egger, and David Dillon (collectively, Urban Logic), appeal the granting of a

special motion to strike their complaint (SLAPP¹ motion) brought by defendants Beaumont Citizens for Responsible Growth, Judith Bingham, Mary Daniel, and Nancy Hall (collectively, BCRG) pursuant to Code of Civil Procedure section 425.16.² Urban Logic filed a complaint alleging that statements placed on BCRG's website amounted to trade libel and defamation, and they sought an injunction. The superior court rejected these claims, finding that Urban Logic had failed to show clear and convincing evidence of actual malice on behalf of BCRG, and dismissed the complaint.

I

FACTUAL AND PROCEDURAL BACKGROUND

The facts are taken from the declarations submitted in support of the complaint filed by Urban Logic, the SLAPP motion filed by BCRG, and the opposition filed by Urban Logic. When necessary, we also refer to the complaint and exhibits included with the complaint.

A. *The Complaint*

On October 7, 2010, Urban Logic filed its complaint for equitable relief and damages (the complaint) against BCRG alleging causes of action for defamation and trade libel and seeking an injunction. It alleged that Urban Logic was a California corporation whose main focus was providing urban planning and engineering support for

¹ SLAPP is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

² All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

small municipalities. Pursuant to a contract executed in 1994, Urban Logic provided urban planning and engineering support to the City of Beaumont (the City). The complaint described BCRG as a “dissident group of citizens who are unhappy with the nature and pace of development in the City of Beaumont.” BCRG had made Urban Logic a target of malicious and untrue public statements and publications to discredit Urban Logic in order to slow the rate of development in the City.

The complaint alleged that BCRG set up an Internet website, <http://www.bcr.org>, and then later <http://www.beaumontgate.org>, to post untrue comments about Urban Logic. Those comments included (1) the City paid Urban Logic’s principals \$15,000 per month to serve as planning director, public works director and economic development director, which was untrue because they did not serve as employees; (2) Urban Logic was making 4.5 percent commission on private development projects and 9 percent on public projects, which was untrue because Urban Logic was paid on an hourly basis; (3) the Urban Logic contract had been in place since 1994 and had never been reviewed or put out to bid since that time, which was untrue because there had been numerous reviews since 1994; (4) the City was being run by a private corporation that was making millions of dollars by taking a cut of all development, which was untrue because Urban Logic did not make commission; (5) Urban Logic, through the city manager, Alan Kapanicas, had consistently demonstrated favoritism and cronyism in awarding public contracts, which was untrue because the City was in charge of choosing bids; (6) all mail must go through Urban Logic and Kapanicas, restricting public access to city government, which was

untrue as Urban Logic had no control over the mail; and (7) Urban Logic maintained a stronghold over the City by restricting public access, intimidating detractors, and threatening those who speak out against Urban Logic, which was untrue since Urban Logic had no control over public meetings and hearings.

Urban Logic alleged that the shareholders had been attempting to sell the business, but due to the statements by BCRG on their website, they could not get fair market value for the company. The statements on the website were libelous on their face. As the only exhibits, Urban Logic attached what appeared to be print outs of statements appearing on the BCRG websites.

B. *SLAPP Motion*

On or about January 10, 2011, BCRG filed a SLAPP motion to dismiss the complaint against them (the motion). They argued that their actions in the underlying lawsuit were protected by the anti-SLAPP statute (§ 425.16, subd. (e)(3)) because their acts were in furtherance of their right to free speech under the state and federal Constitutions.

BCRG was a group of residents of the City who questioned the relationship between Urban Logic and the City. Bingham, joined by Hall and other residents, started voicing their concerns at city council meetings and faced threats and retaliation. Thereafter, they started BCRG. The group created a website in August 2004 to “get their message out to the public” BCRG alleged that Urban Logic were public figures, and the statements involved public issues. The complaint targeted the free speech of

concerned residents. They alleged that Urban Logic could not show a probability of prevailing on their claims in the complaint because the statements were not defamatory, were substantively true, and were based on public records. BCRG provided links on their website to the contracts supporting their claims.

BCRG provided declarations and exhibits in support of their motion. Bingham claimed that, in October 2003, the City started grading on her personal property, and eventually she had to succumb to inverse condemnation of her property. As a result, she began investigation of the inner workings of the City. Bingham was only able to find contracts between Urban Logic and the City that were given to her by the City at her request, which were dated 1993 and 1994. Bingham claimed that she was being targeted by code enforcement and attached the violation notices she had received. She stopped speaking out at public meetings due to fear of retaliation. She started the Beaumontgate web site and put the contracts between Urban Logic and the City on the site.

Bingham received documents from the City that led her to believe that a majority of public works projects were going to five entities. Included were invoices and work orders for a few entities. Bingham claimed all of the information on the website was based on her review of public documents and information from the City. The motion included vendor check receipts of payments to Urban Logic through the years and other proof of payment.

BCRG also submitted numerous documents of which it requested the trial court take judicial notice. It included the contracts between Urban Logic and the City, which

detailed the fee structure. Urban Logic entered into a contract to run the sewer system at a lump sum plus hourly rate if needed. There were numerous invoices from Urban Logic to the City for services on numerous projects.

BCRG also presented evidence that in 2004, 2005, and 2009 Egger stated he was the director of planning for the City. Dillon stated that he was the economic development commissioner and at another time was the economic development director including up until 2008. In 2008, Moorjani signed as the public works director. They each had city business cards. Egger also was sent a letter by the State of California Department of Housing and Community Development addressed to him as the director of the planning department.

A declaration was submitted with the SLAPP motion from Suzanne Birchard, who owned an electrical company that submitted bids for work at the City. She declared her business was required to do additional items when bidding on a job for the City that was not required for a competitor, Beaumont Electric. Suzanne hand delivered letters and emailed a letter to city council members complaining about the procedure but never received a response. Suzanne also claimed that information was provided to Beaumont Electric when the City was seeking bids on projects that was not provided to other potential bidders. She provided a list of other potential bidders complaining about the bidding process in the City. Clyde Birchard, Suzanne's husband and co-owner of the electrical company, submitted a similar declaration. Clyde also declared that he was unable to properly bid on City projects because of lack of information and that the bids

oftentimes went to Beaumont Electric. He also stated it had reviewed some of Beaumont Electric's work, and it was inferior.

Devonna Wolfe was a research consultant with the firm of TCB Consulting, LLC, and had been hired by Bingham and Hall to review documents pertaining to the City and Urban Logic. According to her research, the last time there was a contract between Urban Logic and the City was 1994. Wolfe had seen contracts awarded to Moody Construction, Tyner Paving, and Beaumont Electric where they were the only bidder.

Mike Ostermann also submitted a declaration. He was a resident of the City. He attended a city council meeting to complain about the poor landscaping plans for a new shopping center. Ostermann accused Urban Logic of corruption in the design. At the meeting, Ostermann was confronted by a man who identified himself as David Dillon and as the economic development director for the City. Dillon also gave him a card for Ernest Egger, who was identified as the planning director. Dillon told Ostermann that he should not come to council meetings and discuss corruption; he should contact Egger and Dillon after the meeting. Ostermann felt he was being threatened. Adam Wagner was with Ostermann and confirmed he felt threatened by Dillon. Wagner had also looked on the City website that had Dillon, Egger, and Moorjani listed as contacts for various departments.

Nancy Gall was a city council member elected in November 2008. Gall confirmed that there was limited seating for the public at council meetings. During her time on the council, there had never been a time when the contract for Urban Logic was discussed or

approved. Gall had never received the letter from Birchard. Most of her mail had already been opened and taped closed once she received it. Gall's city council email did not work.

Nancy Hall, one of the founding members of BCRG, also submitted a declaration. She had worked for the City on projects and understood that Egger, Dillon, and Moorjani were all heads of city departments. Hall claimed that she had made a record request to the City for some of the Urban Logic contracts. Instead of receiving the documents, she was called by Dillon and Egger to meet with them. When she tried to postpone the meeting, she claimed that they came to her house, "adamantly bang[ing]" on the door, but she was too afraid to open the door. Hall also claimed that city code enforcement had come to her property in 2004. Hall had written a letter to one of the councilman complaining about Urban Logic.

David Loop was the vice-president of an electrical contracting company and tried to bid on a project in the City in March 2008. However, the information provided by the City was insufficient, and he did not bid on the project. During the prebid process, Loop went to the area and saw that some work was already being done, and it appeared to be by Beaumont Electric. Beaumont Electric was the sole bidder on the project and was awarded the contract. Loop filed a claim against the City for money expended in attempting to bid on the project. Loop alleged that Beaumont Electric was the only company with enough information to bid on the project.

C. *Opposition to SLAPP Motion*

Urban Logic filed opposition to the motion arguing that it had a probability of prevailing on the merits of the lawsuit (the opposition). Urban Logic conceded that the motion involved protected speech activity and that they were public figures and that it must show that BCRG's libelous statements were made with "actual malice."

Urban Logic again broke down the false statements made by BCRG on its website into six categories: (1) Urban Logic was interfering with the federal mail and preventing citizens from communicating with city council members; (2) Urban Logic was intimidating and harassing opponents; (3) Urban Logic was illegally and criminally violating public bidding laws by steering bids to favored contractors; (4) Urban Logic received a "cut" on all public development projects; (5) Urban Logic was operating under a contract that had not been subject to public review; and (6) Urban Logic employees were employed directly by the City. Urban Logic alleged that the statements made by BCRG were libel per se, and it need not show damages.

Urban Logic submitted numerous declarations to support the opposition. We will briefly discuss the declarations here but will provide more detail, *post*. Deputy City Clerk Shelby Hanvey declared that Urban Logic was not involved in opening mail. Mail addressed to city council members was not opened unless there was no addressee on the label.

Dillon, Egger, and Moorjani all submitted declarations. Since 1992, Urban Logic had been working under a contract that could be terminated with 60 days notice. Urban

Logic had no employees in code enforcement. Dillon adamantly denied that Urban Logic received a cut of public works projects and that this had been explained to BCRG on several occasions. Dillon declared that Ostermann and Wagner had been under the influence of alcohol at the meeting and that he had treated them respectfully at the meeting. It was common practice for him to meet with members of the public to address concerns.

In response to the allegations of steering bids in favor of contractors made by Loop and Birchard, Moorjani stated that all developers were held to the same standard. Further, Moorjani declared that the claims by Birchard and Loop had been investigated by the FBI, and Urban Logic and the City were cleared of any wrongdoing.³ Moorjani and Dillon also claimed that 32 different contractors were awarded work on 64 public projects.

The City's finance director declared that Urban Logic had never received a cut or commission on the public works projects. The language of the contract was clear that Urban Logic was paid hourly.

There were also declarations that the contract for Urban Logic was reapproved as part of the 2009-2010 and 2010-2011 budget process and had come up for a vote. Egger and Dillon averred that Gall had voted on the contract.

³ There is a letter from Moorjani to the FBI dated March 2009 but no confirmation as to the outcome of the investigation.

Moorjani, Egger, and Dillon stepped down from their positions as directors in the City on August 27, 2009, so that in-house employees could take over the positions. The City had not changed their website to reflect the change.

Bingham had been tried in 2005 for felony assault for allegedly trying to hit a survey crew. Bingham claimed she was set up by Urban Logic. Moorjani testified at her trial that Urban Logic did not get a cut on public works projects. Further, Egger testified that Urban Logic was only a consultant to the City.

Moorjani and Egger declared they had been present in the past when it was explained to Hall and Bingham that the accusations on their website were false.

Dillon stated that Bingham and other members of BCRG had actual malice and ill will toward Urban Logic. Dillon claimed that in February 2004 Bingham tried to hit him with her car while he was standing on the sidewalk. Further, in September 2004, while he was near Bingham's home, she yelled obscenities at him and accused him of being corrupt. While workers were erecting a wall near the Bingham's property, she continually yelled obscenities at the workers.

Dillon had never threatened Bingham. He had never been involved in code violations given to Bingham. Bingham's documentation that showed the bidding process was "misleading." The contract and amendments between Urban Logic and the City were attached showing it could be terminated with 60 days notice. Also attached was a letter to Hall from another city council member stating that Urban Logic's contract was continually reviewed to ensure it was cost effective.

Urban Logic also filed objections and declarations in support of striking the declarations submitted by BCRG by David Loop, Chris Mann, Clyde Birchard, Suzanne Birchard, Nancy Hall, and Judith Bingham and portions of Nancy Gall's declaration. Urban Logic also objected to some of the documents that BCRG had submitted for judicial notice.

D. *Reply to Opposition and Sur-Opposition to the Motion*

BCRG alleged in their reply to the opposition that the statements on their website were based on reliable sources and public records and were not made with the requisite malice. BCRG responded that there was no proof of falsity of the statements on the BCRG site or that they were made with actual malice. BCRG also filed opposition to the objections to the declarations and judicial notice.

Urban Logic filed sur-opposition. Urban Logic urged the court to accept as true their evidence and that any evidence to the contrary presented by BCRG was to be considered at trial and not in determining if it had made a prima facie case. Moorjani, Egger, and Dillon submitted supplemental declarations.. }

BCRG filed objections to the sur-opposition arguing that declarations could not be changed.

E. *Ruling on the Motion*

The matter was heard by the superior court on February 15, 2011. At the hearing, BCRG filed evidentiary objections to Urban Logic's declarations. The superior court tentatively ruled that even if some of the statements on the website were potentially false,

there was no showing of actual malice. Urban Logic argued that there had been a showing that BCRG knew their statements were false. Further, they had submitted everything that they could to show actual malice. BCRG argued it had done everything it could to research the claims on the website. The superior court believed that there had to be more than just a false statement; there had to be clear and convincing evidence of malice. The superior court granted the motion and agreed to submit a written decision and ruling on the evidentiary objections in five days.

The superior court submitted a written ruling. It determined that Urban Logic must show actual malice by clear and convincing evidence. It stated, “As the Court analyzes the pleadings and evidence submitted, the Court must determine whether Plaintiff demonstrated that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment. [Citation.] The burden is on Plaintiff to produce evidence that would be admissible at trial. [Citation.] The Court will consider the pleadings and evidentiary submissions of both plaintiff and defendant, but will not weigh credibility or comparative strength of evidence. The court considers Defendant’s evidence only to determine if it defeats Plaintiff’s showing as a matter of law. [Citation.]”

The superior court then ruled, “Turning to the facts presented, even if the Court considered all of the evidence submitted . . . , and even if Plaintiffs presented sufficient evidence of falsity (preponderance standard), Plaintiffs have not shown evidence of actual malice by clear and convincing evidence.” The statements that Bingham was

consumed with rage against Urban Logic did not demonstrate malice in statements on the website. The motion was granted.

The superior court issued its rulings on the evidentiary objections striking parts of the declarations submitted by Urban Logic and overruling some of the objections. It also granted one of Urban Logic's requests to strike testimony. Urban Logic filed a notice of appeal.

II

GRANT OF SLAPP MOTION

Urban Logic's sole contention is that the trial court erred by granting the motion, as they had showed that they had a probability of prevailing on their causes of action for defamation and trade libel.

A. *Standard of Review*

“Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.]” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; see also *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1396 [“[w]hether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both legal questions which we review independently on appeal”].) “This includes whether the anti-SLAPP statute applies to the challenged claim. [Citation.] Furthermore, we apply our independent judgment to determine whether [plaintiff's] causes of action arose from acts by [defendant] in furtherance of [defendant's] right of petition or free speech in connection with a public

issue. [Citation.] Assuming these two conditions are satisfied, we must then independently determine, from our review of the record as a whole, whether [plaintiff] has established a reasonable probability that he would prevail on his claims. [Citation.]” (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 644-645.)

Urban Logic has conceded that the issue involves free speech and that they are public figures. As such, this court need only address the grant of the motion on the step that Urban Logic failed to show a probability of prevailing on their claims in the complaint.

B. *Urban Logic’s Reasonable Probability of Success on Their Claims at Trial*

In order to establish a probability of prevailing on the claim, “the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim. [Citation.]’ [Citations.]” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714.)

A plaintiff “need only establish that his or her claim has ‘minimal merit’ [citation] to avoid being stricken as a SLAPP. [Citation.]” (*Soukup v. Law Offices of Herbert Hafif, supra*, 39 Cal.4th at p. 291, fn. omitted.) In other words, “we accept as true all evidence favorable to the plaintiff and assess the defendant’s evidence only to determine if it defeats the plaintiff’s submission as a matter of law.” (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700.)

BCRG contends that we should follow the standard of review it claims was espoused in *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 85, which requires we equally weigh its evidence. This is despite the language in *Taus* regarding the standard of review on actual malice. *Christian Research* stated in its opinion that “[t]he requirement that a public figure plaintiff demonstrate actual malice, however, calls for a different analysis. [¶] . . . ‘The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of “actual malice.”’ [Citation.] Accordingly, a reviewing ‘court is not bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in favor of respondents. To do so would compromise the independence of our inquiry. “[T]he constitutional responsibility of independent review encompasses far more than [an]

exercise in ritualistic inference granting.” [Citation.] Independent review is applied with equal force in considering whether a plaintiff has established a probability of demonstrating malice by clear and convincing evidence in opposing an anti-SLAPP motion. [Citations.]” (*Christian Research Institute v. Alnor, supra*, 148 Cal.App.4th at p. 86, italics omitted.) Even considering that all of Urban Logic’s evidence is true, and only considering BCRG’s evidence if it defeats the evidence as a matter of law, it does not support actual malice.

Here, Urban Logic sued on two grounds: defamation and trade libel. “Trade libel is the publication of matter disparaging the quality of another’s property, which the publisher should recognize is likely to cause pecuniary loss to the owner. [Citation.] The tort encompasses ‘all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so.’ [Citation.] [¶] To constitute trade libel, a statement must be false. [Citation.] Since mere opinions cannot by definition be false statements of fact, opinions will not support a cause of action for trade libel. [Citation.]” (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010-1011 [Fourth Dist., Div. Two].)

“The tort of defamation ‘involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.’ [Citation.]” (*Taus v. Loftus, supra*, 40 Cal.4th at p. 720.)

There is no dispute here that Urban Logic was a public figure. As such, Urban Logic was required to show actual malice on behalf of BCRG to prove its defamation and

trade libel claims. To show actual malice, the plaintiff must show “that the allegedly false statement was made ‘with knowledge that it was false or with reckless disregard of whether it was false or not.’ [Citation.] The reckless disregard standard requires a ‘high degree of awareness of . . . probable falsity’ [Citation.] ‘There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.’ [Citation.]” (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1167 (*Annette F.*)). The defendant “must have made the statement with knowledge that the statement was false or with ‘actual doubt concerning the truth of the publication.’ [Citation.]” (*Ibid.*)

Because “[t]he existence of actual malice turns on the defendant's subjective belief as to the truthfulness of the allegedly false statement,” it may be proved by either direct or circumstantial evidence. (*Annette F., supra*, 119 Cal.App.4th at p. 1167.) “Factors such as failure to investigate, anger and hostility, and reliance on sources known to be unreliable or biased ‘may in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.’ [Citation.] However, any one of these factors, standing alone, may be insufficient to prove actual malice or even raise a triable issue of fact. [Citation.]” (*Ibid.*)

“‘The burden of proof by clear and convincing evidence “requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.”’ [Citation.]” (*Christian Research Institute v. Alnor, supra*, 148 Cal.App.4th at p. 84.) It

must raise more than “a speculative possibility that [defendants] might have known or suspected” that their statements were incorrect. (*Annette F.*, *supra*, 119 Cal.App.4th at p. 1170.)

Prior to addressing each statement and whether it shows actual malice on behalf of BCRG, we note that the trial court excluded some of the evidence submitted by Urban Logic. Since even if the excluded evidence is considered, Urban Logic did still not meet its burden of showing clear and convincing evidence of actual malice, we will not engage in a lengthy discussion regarding the validity of these rulings.⁴

1. *Mail*

The first statements complained of by Urban Logic were regarding the mail. Urban Logic provided that the BCRG website stated, “All correspondence from citizens to the Council must now go through Urban Logic and the City Manager. Sealed envelopes addressed to council members are opened by Urban Logic and/or the City Manager before being given to elected officials.”

Urban Logic relies upon the declaration from Hanvey, the city clerk, who attested that Urban Logic played no role in the processing, routing, and delivering of mail to city council members. Also attached was the internal mail policy apparently adopted by the City.

⁴ At oral argument, counsel for Urban Logic argued that only one claim of actual malice need be shown in order for the ruling of the trial court to be reversed. Since, as we discuss, *post*, that actual malice was not shown on any of the claims, reversal is not warranted.

However, Urban Logic’s evidence does not establish that BCRG should have known the City’s mail procedure. BCRG had presented evidence that Hall, a council member, complained that her mail was opened by Urban Logic employees. Although Urban Logic’s evidence may establish that such declaration was false, it in no way establishes that such falsity was communicated to anyone at BCRG.

2. *Intimidating and harassing political opponents*

Next, Urban Logic complains about the following statements regarding them harassing the public: “Urban Logic maintains its stronghold over the City of Beaumont by restricting public access, intimidating detractors and threatening those who dare speak out against them. [¶] Detractors of Urban Logic feel strongly that they have faced threats and retribution through the use of selective code enforcement and the misuse of police powers.”

Urban Logic presented evidence by way of Egger’s declaration that he had never threatened anyone at a meeting but simply “advised” those at a meeting of the consequences of their actions. Moreover, Egger, Moorjani, and Dillon all declared that they had no knowledge of code enforcement actions against Hall and Bingham. Dillon and Moorjani denied harassing Hall by going to her house but admitted that they went to her house to investigate ponding water of which she had complained. Dillon denied that he intimidated or threatened Ostermann or Wagner. Dillon also admitted that a portion of Bingham’s property was condemned but that the condemnation had been properly conducted. Dillon denied ever telling Bingham to “shut up.”

This evidence does not establish that BCRG acted with malice or even that the statements on the website were false. Urban Logic's evidence does not establish that the code enforcement actions did not occur, or that interactions with citizens did not occur. If BCRG *felt* intimidated or harassed by their interactions with the City and Urban Logic, by stating as such on the website does not constitute a reckless disregard for the truth.

3. *Illegally steering bids to select contractors*

Urban Logic next addresses statements regarding bids to contractors. "Urban Logic and City Manager Alan Kapanicas have consistently seen to it that public contracts awarded to a small group of close friends and business associates. This type of blatant cronyism is shameful and illegal and should not be tolerated by the City Council or the residents of Beaumont." It also included that awarding such contracts cost citizens money.

Urban Logic relies on Moorjani's declaration that all developers were held to the same standard. Moreover, Birchard and Loop were "apparently confused" about the nature of the bidding process. Moorjani also claims that the FBI investigated a claim of improper bidding and found no wrongdoing. Moorjani admits that on one project an emergency occurred that required work be started prior to the bidding process but that everything was done in accordance with the law. Dillon also states that out of 64 projects bid from 2000 to 2009, 32 different contractors were awarded the contracts. He provided a listing of contractors who worked on projects. Dillon criticized Bingham for failing to include documents with the motion to show that other contractors were awarded

contracts. Dillon criticized Clyde Birchard's declaration with a different take on their interactions. A company that worked on the project that started before the bidding process averred that an emergency required it to work on a project prior to bidding.

Again, there is no showing in this evidence that Urban Logic statements on its website were made with reckless disregard of the whether they were false or not. Despite a listing of contracts and contractors by Dillon, he does not attest that such information was imputed to BCRG before the statements on their website were posted. Dillon contends that BCRG did not give a full picture of the bidding process but that does not support that BCRG was aware their statements were patently false. Although Dillon generally states that he was present when BCRG was told that all of the issues in their lawsuit were false, that is not enough to show that BCRG was aware its interpretation of the bidding process or who received preferential treatment was false or made with actual malice.

4. *Cut or commission taken by Urban Logic*

Urban Logic adamantly denies they received a commission on projects in the City and complain about the following language: "Under their contract with the City, Urban Logic is paid a commission of up to 4.5% of the construction costs of both public and private development and public improvements. In addition, under a separate contract, Urban Logic is paid another 4.5% to provide construction management services for all public projects. Thus, Urban Logic is making commissions of 4.5% of the cost of all private development projects and 9% of the cost of all public projects."

The contract language of the 1994 amendment included, “. . . [Urban Logic] would assume responsibility of the management of public works projects on a time and material basis not to exceed 4.5% of construction contract amounts.” It also included language in 1993 that “[i]t provides for plan checking and construction inspection services on the basis of time and materials, not exceeding 4.5% of the confirmed construction costs of public improvements.”

The City’s finance director provided a declaration that Urban Logic did not receive a cut or commission or percentage of projects. Dillon explained, “The City merely budgets 4.5% of the estimated cost of capital improvements for payment to Urban Logic for construction management services.” Additionally, Moorjani and Egger testified at Bingham’s criminal trial that Urban Logic did not receive a 4.5 or 9 percent “commission” on all new development.

Certainly, assuming that Moorjani and Egger testified at Bingham’s hearing (and that is unclear, since no transcripts from the proceedings have been provided) this presents a closer call on the knowledge by Bingham and BCRG of the issue on the commission. However, it is clear from the statements on the website and the links to the contracts that BCRG was relying on the language of the contracts to support its commission claim. The fact that the persons being sued denied such commission does not result in a showing of actual malice. If BCRG believed the contract language supported its claims and disregarded statements of Moorjani and Egger, such statements

do not amount to a reckless disregard of the truth. A difference in interpretation does not necessarily constitute reckless disregard for the truth.

5. *Contract subject to public review*

The next statements involved the review of the Urban Logic contract. The website states that “Urban Logic’s contract to provide planning, economic development and public works services has never been reviewed since it was first adopted in 1994.”

Egger, Dillon, and Aylward all declare that the Urban Logic contract was approved as part of the 2009-2010 and 2010-2011 budget process. They claim that each year the city council voted to keep the Urban Logic contract in place. The document presented was an outline of the budget schedule; it included a list of the expenditures and listed Urban Logic as a vendor. Nothing in the documents addressed whether the Urban Logic contract was up for review. Dillon averred that since 1992 Urban Logic had operated under a contract with a 60-day notice of termination.

BCRG had the contracts that were drafted and approved in 1992 and amended in 1993 and 1994. Urban Logic has not presented any contracts since that date. It merely states that such contract is reviewed each year and approved by the city council. While that may be true, there is no evidence that BCRG was aware of the budgetary process or that it should have investigated such process. It asked the City for the contract between the City and Urban Logic and received contracts dating back to 1994. The statements made on the website do not represent malice on the part of BCRG. It could interpret, since it was only given the 1992 contract and 1993 and 1994 amendments by Urban

Logic, that that contract was the only one in existence, and that it could not be expected to investigate whether each year the contract was reviewed in the budgetary process.

6. *Principals employed by the City*

Finally, Urban Logic objects to statements that “Urban Logic has an exclusive agreement with the City to provide planning, economic development and public works services on a contract basis, which provides Urban Logic principals \$15,000 per month to serve as the City’s Planning Director, Public Works Director and Economic Development Director.”

Egger, Dillon, and Moorjani all declared that they left their positions in August 2009. However, they admitted that the City website still listed them as principals. BCRG did not disregard the truth. It could reasonably consider the City website (at the time the statements were made) to support their statements, and there simply was no evidence of malice.

In a further effort to show actual malice, Dillon declares that Bingham was “consumed with rage” against Urban Logic. He claims that she tried to hit him with her car. Urban Logic also claims, “In addition, over the years Plaintiffs have had numerous conversations with Defendants relating to their allegations against Urban Logic, or been present when others were discussing these issues with them, and Plaintiffs have explained or heard explained everything at issue in this lawsuit.” Further, they rely on their claim that Bingham in 2005 swerved her car toward a crew working near her property and was

tried on felony assault charges. Also, evidence was presented that Bingham yelled obscenities at workers.

However, none of the evidence presented ties this animosity in any way to the statements on the website and proves that they were the result of actual malice. The subjective test focuses on the “‘defendant’s attitude toward the truth or falsity of the material published . . . [not] the defendant’s attitude toward the plaintiff.’ [Citation.]” (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 257.) Since the City has declared that most of the statements on the website are derived from City documents, and Urban Logic has not provided any evidence that this is false, there is no evidence that the statements on the website were made with a reckless disregard for the truth.

III

ATTORNEY FEES

BCRG contend they are entitled to reasonable attorney fees on appeal. “Section 425.16, subdivision (c) provides that a prevailing defendant is entitled to recover attorney fees and costs, and does not preclude recovery on appeal. [Citation.]” (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 659, overruled on other grounds as stated in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5.) BCRG is entitled to its attorney fees and costs as the parties prevailing on the appeal. (Cal. Rules of Court, rule 8.278(a)(2) [“[t]he prevailing party is the respondent if the Court of Appeal affirms the judgment without modification or dismisses the appeal”].)

We remand for the limited purpose of permitting the trial court to exercise its discretion on the amount to award BCRG for their attorney fees and costs for the appeal.

IV

DISPOSITION

The trial court's order granting the special motion to strike pursuant to section 425.16 is affirmed. BCRG is awarded costs on appeal and attorney fees in an amount to be determined by the trial court on remand.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P. J.

We concur:

KING
J.

MILLER
J.