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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BRUCE KELMAN et al., Plaintiffs and Respondents. v. SHARON KRAMER, Defendant and Appellant.	D054496 (Super. Ct. No. GIN044539)

APPEAL from a judgment of the Superior Court of San Diego County, Lisa C. Schall, Judge. Affirmed.

In this defamation case, Sharon Kramer appeals from a judgment entered on a jury verdict finding she libeled Bruce Kelman. The jury awarded Kelman nominal damages of one dollar and the trial court awarded Kelman $7,252.65 in costs. The jury found that Kramer did not libel GlobalTox and judgment against GlobalTox was entered. The trial court awarded Kramer $2,545.28 in costs against GlobalTox.

In a prior opinion, a previous panel of this court affirmed an order denying Kramer's motion to strike under the anti-SLAPP statute. In doing so, we largely resolved the issues Kramer now raises on appeal. In our prior opinion, we found sufficient evidence Kramer's Internet post was false and defamatory as well as sufficient evidence the post was published with constitutional malice. We also found there was sufficient evidence to defeat Kramer's claim she was protected by the fair reporting privilege provided to journalists by Civil Code section 47, subdivision (d)(1). Under the doctrine of the law case, these determinations are binding on us and compel us to find there is sufficient evidence to support the jury's determination Kramer libeled Kelman and was not entitled to the fair reporting privilege.

We find no error in the trial court's award of costs. Accordingly, we affirm the judgment.

I

FACTUAL BACKGROUND

Our prior unpublished opinion, *Kelman v. Kramer* (Nov. 16, 2006, D047758) (*Kelman v. Kramer I*), fully set forth the factual background of the plaintiff's claims:

"Kelman is a scientist with a Ph.D. in toxicology who has written, consulted, and testified on various topics, including about the toxicology of indoor mold. He is also the president of GlobalTox, which provides research and consulting services, including on toxicology, industrial hygiene, medical toxicology, and risk assessment. Kramer is 'active in mold support and the pressing issue of mold causation of physical injury' after having experienced indoor mold in her own home.

"In June 2004, Kelman gave a deposition in an Arizona case, *Kilian v. Equity Residential Trust* (U.S.Dist.Ct., D.Ariz., No. CIV 02-1272-PHX-FJM). During the deposition, Kelman testified about his involvement with a paper on the health risks of mold that he co-authored with two others for the American College of Occupational and Environmental Medicine (ACOEM). This paper was reviewed by his peers in the scientific community. Later he wrote a nontechnical version of the paper for the Manhattan Institute. During the deposition, Kelman, inter alia, denied including in the Manhattan Institute version argumentative language that had been rejected during the peer review process at ACOEM and testified that if there were any sentences that had been removed from the ACOEM version that appeared in the Manhattan Institute version, they 'certainly weren't very many.' The following exchange then occurred:

" 'Q. And that new version that you did for the Manhattan Institute, your company, GlobalTox, got paid $40,000, correct?

" 'A. Yes. The company was paid $40,000 for it.'

"In February 2005, Kelman testified during a hearing in an Oregon State court case, *Haynes v. Adair Homes, Inc.*, (No. CCV0211573) (*Haynes*). The Haynes family sued a builder alleging construction defects in their home resulted in mold growing in the house and causing physical injury to Renee Haynes and the Haynes's two young children. During the hearing, Kelman testified on cross-examination about his work on the ACOEM and Manhattan Institute papers. The libel claim in the present case concerns whether Kelman testified consistently with his *Kilian* testimony about being paid by the Manhattan Institute during his testimony at the *Haynes* hearing:

" 'MR. VANCE: Okay. Now, this revision of the [ACOEM paper] state-

" 'BRUCE J. KELMAN: What revision?

" 'MR. VANCE: The revision -- you said that you were instrumental in writing the statement, and then later on you said you and a couple other colleagues wrote a revision of that statement, isn't that true?

" 'BRUCE J. KELMAN: No, I didn't say that.

" 'MR. VANCE: Well --

" 'BRUCE J. KELMAN: To help you out I said there were revisions of the position statement that went on after we had turned in the first draft.

" 'MR. VANCE: And, you participated in those revisions?

" 'BRUCE J. KELMAN: Well, of course, as one of the authors.

" *'MR. VANCE: All right. And, isn't it true that the Manhattan Institute paid GlobalTox $40,000 to make revisions in that statement?*

" 'BRUCE J. KELMAN: That is one of the most ridiculous statements I have ever heard.

" 'MR. VANCE: Well, you admitted it in the Killian [sic] deposition, sir.

" 'BRUCE J. KELMAN: No. I did not.

" '. . . . . .

" 'MR. VANCE: Would you read into the record the highlighted portions of that transcript, sir?

" 'BRUCE J. KELMAN: "And, that new version that you did for the Manhattan Institute, your company, GlobalTox got paid $40,000. Correct. Yes, the company was paid $40,000 for it.["]

" 'MR. VANCE: Thank you. So, you participated in writing the study, your company was paid very handsomely for it, and then you go out and you testify around a country legitimizing the study that you wrote. Isn't that a conflict of interest, sir?

" 'BRUCE J. KELMAN: Sir, that is a complete lie.

" 'MR. VANCE: Well, you['re] vouching for your own self [inaudible]. You write a study and you say, "And, it's an accurate study."

" 'BRUCE J. KELMAN: We were not paid for that. In fact, the sequence was in February of 2002, Dr. Brian Harden, and [inaudible] surgeon general that works with me, was asked by American College of Occupational and Environmental Medicine to draft a position statement for consideration by the college. He contacted Dr. Andrew Saxton, who is the head of immunology at UC -- clinical immunology at UCLA and myself, because he felt he couldn't do that by himself. The position statement was published on the web in October of 2002. In April of 2003 I was contacted by the Manhattan Institute and asked to write a lay version of what we had said in the ACOEM paper -- I'm sorry, the American College of Occupational and Environmental Medicine position statement. When I was initially contacted I said, "No." For the amount of effort it takes to write a paper I can do another scientific publication. They then came back a few weeks later and said, "If we compensate you for your time, will you write the paper?" And, at that point I said, "Yes, as a group." The published version, not the web version, but the published

version of the ACOEM paper came out in the Journal of Environmental and Occupational Medicine in May. And, then sometime after that, I think it was in July, this lay translation came out. They're two different papers, two different activities. The -- we would have never been contacted to do a translation of a document that had already been prepared, if it hadn't already been prepared.

" 'MR. VANCE: Well, your testimony just a second ago that you read into the records, you stated in that other case, you said, "Yes. GlobalTox was paid $40,000 by the Manhattan Institute to write a new version of the ACOEM paper." Isn't that true, sir?

. . . .

" 'BRUCE J. KELMAN: I just said, we were asked to do a lay translation, cuz the ACOEM paper is meant for physicians, and it was not accessible to the general public.

" 'MR. VANCE: I have no further questions.' . . . .

" 'In June 2005, Kramer wrote a press release about the Haynes case and posted it on PRWeb, an Internet site. This press release was later also posted on another Internet site, ArriveNet. [The bulk of the press release was devoted to an accurate report of the outcome at trial of the Haynes case. The press release reported that the plaintiffs in the Haynes case had prevailed on their claim that toxic mold had injured them and further that the jury had awarded them damages. The last two paragraphs of the press release were devoted to Kelman's testimony and his work for the ACOEM and the Manhattan Institute. The first paragraph of the press release devoted to Kelman's testimony stated]:

" 'Dr. Bruce Kelman of GlobalTox, Inc., a Washington based environmental risk management company, testified as an expert witness for the defense, as he does in mold

cases throughout the country. Upon viewing documents presented by the Hayne[s'] attorney of Kelman's prior testimony from a case in Arizona, *Dr. Kelman altered his under oath statements on the witness stand.* He admitted the Manhattan Institute, a national political think-tank, paid GlobalTox $40,000 to write a position paper regarding the potential health risks of toxic mold exposure. Although much medical research finds otherwise, the controversial piece claims that it is not plausible the types of illnesses experienced by the Haynes family and reported by thousands from across the U.S. could be caused by 'toxic mold' exposure in homes, schools or office buildings. . . .[1]

"Kramer's claim Kelman had 'altered his under oath statements on the witness stand' focuses on Kelman's testimony about being paid by the Manhattan Institute. She claims the portion of Kelman's testimony in the *Haynes* hearing that we italicized supports the statement in her press release.

"Kelman and GlobalTox sued Kramer for libel based on the statement in the press release that 'Kelman altered his under oath statements on the witness stand.'

"Kramer brought a section 425.16 motion to strike the complaint. The court denied the motion, concluding that although Kramer had sustained her burden of showing the complaint fell within the scope of section 425.16, subdivision (e)(3) and (4), Kelman

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1 The second paragraph devoted to Kelman and the disputed paper stated: "In 2003, with the involvement of the US Chamber of Commerce and ex-developer, US Congressman Gary Miller (R-CA), the GlobalTox paper was disseminated to the real estate, mortgage and building industries' associations. A version of the Manhattan Institute commissioned piece may also be found as a position statement on the website of a United States medical policy-writing body, the American College of [Occupational and Environmental Medicine]."

and GlobalTox had sustained their burden of showing a probability they would prevail on their libel claim. The court stated the gist of the press release statement was that Kelman committed perjury in the *Haynes* case, lied about a subject related to his profession, or 'accepted a bribe from a political organization to falsify a peer-reviewed scientific research position statement.' The court stated there was admissible evidence to show Kramer's statement was false; that Kelman was clarifying his testimony under oath, rather than altering it; and to show Kramer acted with actual malice." (*Kelman v. Kramer I*, *supra*, D047758, fn. omitted.)

In our opinion in *Kelman v. Kramer I*, we affirmed the trial court's order denying Kramer's motion to strike. We agreed with Kramer that her press release fell within the scope of the anti-SLAPP statute, Code of Civil Procedure section 425.16, subdivision (e)(3) and (4), in that it was a statement made in a public forum concerning an issue of public interest and was published in furtherance of Kramer's constitutional right to free speech in connection with a public issue. However, we found that Kelman had established a prima facie case of libel.

Importantly, with respect to whether Kramer's characterization of Kelman's testimony was false, we found that looking at Kelman's testimony as a whole a jury might find Kramer's press release falsely portrayed Kelman's explanation of his prior deposition testimony.

"Kramer contends 'to a lay person (and anyone else who looks at the statement without an agenda) it clearly appears that Plaintiff Bruce Kelman altered his testimony under oath.' She asserts the statement was true, as a matter of law. We disagree.

Whether the statement was true or false raises a question of fact." (*Kelman V. Kramer I, supra,* D047758, fn. omitted, italics added.)

We also found sufficient evidence Kramer either knew the statement about Kelman was false or published it with reckless disregard for whether it was false. We stated: "The existence of actual malice turns on the defendant's subjective belief as to the truthfulness of the allegedly false statement. [Citation.] A state of mind, like malice, 'can seldom be proved by direct evidence. It must be inferred from objective or external circumstantial evidence.' [Citation.] Relevant evidence may include the defendant's anger or hostility toward the plaintiff, a failure to investigate, and subsequent conduct by the plaintiff. [Citations.]" We found that in light of the public record of Kelman's testimony in the Haynes trial, Kelman's role as a defense expert in Kramer's own lawsuit, and hostile statements Kramer made thereafter about Kelman, a jury could conclude Kramer had acted with constitutional malice in publishing the post.

In rejecting Kramer's claim her statement was protected by the privilege set forth in Civil Code section 47, subdivision (d)(1), we stated: "Kramer contends her press release was privileged under Civil Code section 47, subdivision (d)(1), which provides a privilege for 'a fair and true report in, or a communication to, a public journal, of . . . a judicial, . . . or . . . of anything said in the course thereof . . . .' *As we explained above, Kelman and GlobalTox presented admissible evidence showing Kramer's statement in the press release was neither a fair nor true report of Kelman's testimony during the Haynes hearing.* Therefore, this privilege does not support granting her anti-SLAPP motion." (*Kelman v. KramerI, supra,* D047758, italics added.)

As we indicated at the outset, on remand following our judgment affirming the order denying the motion to strike, the jury found Kramer libeled Kelman. In particular, the jury found the statements in the press release were false and clear and convincing evidence Kramer either knew her statements were untrue or had serious doubts about the truth of the statements. The jury awarded Kelman the one dollar in nominal damages he had requested. However, the jury found Kramer's defamatory statement was not made to anyone who understood it as referring to GlobalTox. The court entered judgment in favor of Kelman and awarded him $7,252.65 in costs. The trial court's judgment awarded GlobalTox no damages and by way of a postjudgment proceeding the trial court awarded Kramer $2,545.28 in costs.

DISCUSSION

I

Law of the Case

Because, as we stated, for the most part Kramer's appeal raises issues which we considered in *Kelman v. Kramer I*, we must first address the impact that opinion has on the issues she raises here. "[T]he decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309; see also *Bergman v. Drum* (2005) 129 Cal.App.4th 11, 18-19.)

There are of course exceptions to the law of the case doctrine. "The doctrine of the law of the case is recognized as a harsh one (2 Cal. Jur. 947) and the modern view is

that it should not be adhered to when the application of it results in a manifestly unjust decision. [Citation.] However, it is generally followed in this state. But a court is not absolutely precluded by the law of the case from reconsidering questions decided upon a former appeal. Procedure and not jurisdiction is involved. Where there are exceptional circumstances, a court which is looking to a just determination of the rights of the parties to the litigation and not merely to rules of practice, may and should decide the case without regard to what has gone before." (*England v. Hospital of the Good Samaritan* (1939) 14 Cal.2d 791, 795.)

"The principal ground for making an exception to the doctrine of law of the case is an intervening or contemporaneous change in the law." (*Clemente v. State of California* (1985) 40 Cal.3d 202, 212.) The doctrine can also be disregarded to avoid an unjust decision. However, "[I]f the rule is to be other than an empty formalism more must be shown than that a court on a subsequent appeal disagrees with a prior appellate determination. Otherwise the doctrine would lose all vitality . . . since an unsuccessful petitioner for pretrial writ review could always maintain on subsequent appeal that the prior adjudication resulted in an 'unjust decision.' [¶]We do not propose to catalogue or to attempt to conjure up all possible circumstances under which the 'unjust decision' exception might validly operate, but judicial order demands there must at least be demonstrated a manifest misapplication of existing principles resulting in substantial injustice before an appellate court is free to disregard the legal determination made in a prior appellate proceeding." (*People v. Shuey* (1975) 13 Cal.3d 835, 846; see also *Yu v. Signet Bank/Virginia, supra,* 103 Cal.App.4th at p. 309.)

The record here will not support an exception to application of the law of the case doctrine. There has been no intervening change in the law of defamation in general or with respect to the fair reporting privilege in particular. Our review of our prior opinion does not show our analysis of the evidence of falsity and malice or our application of the fair reporting privilege were in any sense manifestly incorrect or radically deviated from any well-established principle of law. Thus any disagreement we might entertain with respect to our prior disposition would be no more than that: a disagreement. Given that circumstance and the fact that only nomimal damages were awarded against Kramer, the value of promoting stability in decision making far outweighs the value of any reevaluation of the merits of our prior disposition. (See *People v. Shuey, supra* 13 Cal.3d at p. 846.) Accordingly, on appeal Kramer is bound by our prior determinations of law.

Application of the law of the case doctrine disposes of Kramer's initial argument on appeal that the trial court erred in relying on our prior opinion in framing the issues tried on remand. The trial court was bound by our determinations of law and thus did not err in relying on those determinations in framing the issues for trial. (*People v. Shuey, supra,* 13 Cal.3d at p. 846.)

The law of the case doctrine also precludes Kramer's arguments that the trial court erred in determining, by way of its order denying Kramer's motion for judgment notwithstanding the verdict, that there was sufficient evidence her statement about Kelman was false and that she knew or acted with reckless disregard as to whether the statement was false. In *Kelman v. Kramer I* we determined the record presented at that point was sufficient to sustain findings of falsity and actual malice. Because there was no

material difference in the evidence presented at trial, under law of the case the trial court was bound, as are we, by our prior determination that there was sufficient evidence of falsity and malice.

We recognize that with respect to malice "courts are required to independently examine the record to determine whether it provides clear and convincing proof thereof." (*McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1664.) However, in *Kelman v. Kramer I* we expressly rejected Kramer's argument that such independent review entitled her to judgment. Rather, we found that such review had taken place in the trial court and, following our own detailed analysis of the evidence of Kramer's hostility towards Kelman, we left the trial court's determination undisturbed. Given that disposition, we can only conclude that panel which decided *Kelman v. Kramer I* conducted the required independent review of the record and agreed with the trial court that, as the record stood at that point, there was clear and convincing evidence of malice. Because, as we have indicated the record of malice presented at trial was just as fulsome as the one considered in *Kelman v. Kramer I*, we cannot depart from our prior decision without also departing from the doctrine of law of the case.

Finally, because we found in *Kelman v. Kramer I* that evidence of the falsity of Kramer's statement was sufficient to defeat the fair reporting privilege, the trial court, confronted with largely the same evidence, was bound by jury's falsity determination to find that the privilege did not apply. We too are bound by that determination.

II

Excluded Evidence

In addition to the issues which were determined in *Kelman v. Kramer I,* on appeal Kramer also argues the trial court erred in excluding evidence which she contends would have shown that Kelman's scientific conclusions have been severely criticized by other, more credible members of the scientific community and that Kramer has been widely recognized as a crusading whistleblower with respect to toxic mold. The trial court correctly excluded this evidence as irrelevant. Kelman's libel claim did not put in issue the validity of his scientific conclusions or the sincerity of Kramer's conflicting views. Kelman's claim was based on his far narrower contention that in reporting his testimony in the Haynes trial, Kramer falsely implied that he had committed perjury and that Kramer knew the implication was false or was reckless in creating it. Neither the validity of Kelman's scientific conclusions nor the sincerity of Kramer's views was relevant to determination of those narrower issues. Thus the trial court did not abuse its discretion in excluding the evidence Kramer offered.

III

Costs

Kelman filed a cost bill of $7,252.65 on October 14, 2008. On October 31, 2008, Kramer filed a motion to strike Kelman's costs and have costs awarded to her as against GlobalTox. In her motion, she argued that as the prevailing party as against GlobalTox she was entitled to an award of costs. With respect to Kelman's cost bill, the only

objection she raised was her contention the verdict in Kelman's favor was defective. In her motion, she did not object to any particular item in Kelman's cost bill.

On December 12, 2008, the trial court awarded Kelman the $7,252.65 in costs he claimed. The trial court also permitted Kramer to file a memorandum of costs as against GlobalTox.

Thereafter, Kramer filed a motion for costs and GlobalTox filed a motion to tax the costs, in which among other matters GlobalTox argued that Kramer only prevailed against one defendant and her deposition costs of $3,800 should be reduced by half. The trial court, with a different trial judge presiding, heard Kramer's cost motion on April 3, 2009, and awarded her a total of $2,545.28. In particular, the trial court agreed with Kelman that Kramer should only be permitted to recover one-half of her deposition costs.

Kramer does not challenge as inadequate the trial court's award to her of costs as against GlobalTox. She does however appear to contend that, just as the deposition costs she claimed were reduced by one-half, Kelman's claimed costs should also be reduced by one-half.

On this record we cannot disturb the trial court's award of costs to Kelman. At the time Kelman's costs were litigated, Kramer made no objection to any particular item of costs and did not argue that any or all items Kelman claimed were attributable to GlobalTox. Thus, as Kelman points out, Kramer did not comply with the requirements of rule 3.1700(b)(2), California Rules of Court, that her objection to costs "*must* refer to each item objected to . . . and *must* state why the item is objectionable." (Italics added.) Because Kramer made no such objection, Kelman never was given the opportunity to

rebut Kramer's contention that half of all the costs Kelman claimed were attributable to GlobalTox and the time for making such an objection has passed. (Rule 3.1700(b)(1), (3).)

Judgment affirmed. Respondents to recover their costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.