Kramer anti-SLAPP Appellate Brief April 6, 2006

Kelman claims he first learned about Defendant Sharon Kramer during litigation in 2003 when he was brought in to testify. However, he was brought in prior to the litigation in 2002. Exhibit 6 to Defendant's reply, Appendix 492-494)

Kelman states in his declaration at page 5, paragraph 8, lines 7-10 (Appendix 358) that Mrs. Kramer and her daughter were claiming life threatening illness from exposure to mold in the underlying litigation, when in fact, in Mrs. Kramer's declaration in reply, she showed that she never claimed a life threatening illness in that suit, and that her daughter, a cystic fibrosis sufferer (a life threatening illness) had also been inflicted with ABPA (an invariably fatal illness to cystic fibrosis sufferers) since 1998, before the improper mold remediation occurred. (Exhibit 5, 6 to Defendant's reply declaration, Appendix 461, 486-491)

Kelman stated at page 5, paragraph 8, line 10 (Appendix 358) that, in the litigation he testified it couldn't cause a life threatening illness when a) Sharon Kramer never claimed a life threatening illness and b) as to her daughter, Erin, **he admitted he was not competent to make such a medical opinion.** (Exhibit 6 to Defendant's reply declaration, Appendix 494)

Kelman anti-SLAPP Appellate Brief May 12, 2006

Dr. Kelman first learned of Kramer when he was retained as an expert in a lawsuit between Kramer, her homeowner's insurance company and other parties that had provided services to Kramer. To summarize briefly, in 2001 a water line to an icemaker in Kramer's home sprung a small leak. Her homeowner's insurer paid to fix the leak and remediate the localized mold contamination. Kramer contended that the remediation had been incompetently performed, that she and her daughter had contracted life-threatening diseases as a result, and that her insurance company consequently should pay to rebuild her home. Mercury Insurance v. Kramer, etc., et al., San Diego Superior Court case no. GIN024147.

Dr. Kelman testified in a deposition that the type and amount of mold in the Kramer house could not have caused the life-threatening illnesses that Kramer claimed. (Appendix, page 358.)

Kramer anti-SLAPP Reply Brief July 5, 2006

Plaintiffs/ Respondents' whole assertion of malice on Mrs. Kramer's part arises out of the "Big Lie" approach which is premised upon two false constructs; 1) that Defendant is a sour-grapes, failed, litigant who is verbally stalking Plaintiff Kelman because she was disappointed in the outcome of a litigation involving her insurer and 2) that Defendant is an unscientific kook who attacks Kelman because she doesn't know any better.

A closer look at all these allegations (no real evidence other than Kelman's self-serving and provably inaccurate declaration supports these assertions) reveals, in fact, that they are as spurious as this malignant lawsuit and equally as invalid.

First lie- Defendant Sharon Kramer is a bitter and unsuccessful litigant because Kelman testified as to both Mrs. Kramer and her daughter Erin that there was an insufficient mold load to cause life threatening injury due to mold exposure. Not only was Kelman's declaration in opposition to the CCP425.16 motion impeached by the reply (for instance, Kelman states under oath that he first became aware of Kramer in mid-2003 when retained as a litigation expert, but the Appendix at Page 493-494 discloses that, in fact, Kelman authored a letter regarding the Kramers in July 2002, before they were sued by their insurers in September 2002. The matters of which judicial notice are requested re: the settlement documents in the Mercury case, show that the trial judge [sic Judge Orfield] in **this case, who was the trial judge in that underlying case, was or should have been aware that the underlying case settled in 10/03 for sums going to the Kramer family and, on the record, in the amount of $450,000.00.**

Kelman, in his opinion as expressed in his July 23, 2002 letter [App. 494] stated that "a physician with detailed knowledge of the clinical condition of the child involved must be consulted for specific determination of the safety of this environment." Also in the Kelman deposition in the underlying matter, of which this court has been requested to take judicial notice, it shows that, under oath, Kelman acknowledged that he couldn't give an opinion regarding the effect of exposures to penicillium/aspergillis where someone such as Mrs. Kramer's daughter, Erin, suffers from an immuno-compromising disease such as Cystic Fibrosis (additionally, Erin has been diagnosed with ABPA, which is often fatal to CF patients and results from exposure to penicillium/aspergillis. **To quote from Kelman's testimony, "But specifically with regard to ABPA, that would not be a consideration I would not give as a Toxicologist" Question, "You wouldn't feel qualified to give that?" Answer, "That is correct."(cite pg 46, 8-12, p 45 20-25, p 102 13-25, p 103 1-7, 12-18, p 107 8-12) Nowhere does Kelman provide documentation that Mrs. Kramer personally claimed to have acquired a fatal illness. She did not.**

So, in summation, Defendant was not an unsuccessful litigant and **Kelman did not testify as to her daughter, Erin, that the mold exposure she suffered wasn't life threatening. Mrs. Kramer never claimed she acquired a life threatening illness, as Kelman claims to have testified.** The trial judge ruling on Mrs. Kramer's 425.16 motion **(Judge Orfield)** knew from personal knowledge that Kelman's declaration was, at the very least, giving all improper credence to his sworn assertion, inaccurate and that the so-called evidence of malice was no evidence at all, but a litigation theme.

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BRUCE J. KELMAN et al., Plaintiffs and Respondents, v. SHARON KRAMER, Defendant and Appellant.	D047758 (Super. Ct. No. GIN044539)

Additionally, there was other evidence presented which could support a finding Kramer had a certain animosity against Kelman. Kelman gave an expert opinion in Kramer's lawsuit against her insurance company seeking damages caused by the presence of mold in her home. Kelman stated there did not appear to be a greatly increased level of risk of mold inside the home compared to the levels in the air outside the home. While the Kramer family eventually settled and recovered damages from the insurance company, a reasonable jury could infer that Kramer harbored some animosity toward Kelman for providing expert services to the insurance company and not supporting her position.