COURT OF APPEAL FOURTH APPELELATE DISTRICT

DIVISION ONE

OF THE STATE OF CALIFORNIA

SHARON KRAMER,	) Court of Appeal No: D054496
	) Denial, September 14, 2010
Defendant and Appellant	)
	) Superior Court No.: GIN044539
v.	) Date of Entry: October 16, 2008
	)
BRUCE KELMAN	) Court of Appeal No: D047758
	) (2006 anti-SLAPP Opinion)
Plaintiff and Respondent	) November 16, 2006
	)

AFTER AN OPINION BY THE COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE NO. D045596 & D047758
SUPERIOR COURT OF CALIFORNIA
HONORABLE JUDGE LISA SCHALL
CASE NO. GIN044536

PETITION FOR REHEARING AND MODIFICATION OF OPINION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Treatises

Rules

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FOURTH DISTRICT COURT OF APPEALS FOR THE STATE OF CALIFORNIA, DIVISION ONE

SHARON KRAMER,	**Appellate Court No. D054496**
Defendant and Appellant	**Superior Court No. GIN044539**
v.	**Appellate Court No. D047758 (2006 anti-SLAPP Opinion)**
BRUCE J. KELMAN,	
Plaintiff and Respondent	

PETITION FOR REHEARING

Defendant and Appellant, Sharon ("Kramer"), petitions this court for rehearing under California Rules of Court, rule 8.536 and in accordance with 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 733, pp. 762-763*;* Kramer petitions to modify its ("Opinion") under California Rules of Court, rule 8.532(c)(2). Judgments stated are not in the record.

As stated in the unpublished Opinion [http://freepdfhosting.com/a07c7bf25c.pdf] "...in Kelman v. Kramer I [this court's unpublished anti-SLAPP 2006 Opinion http://freepdfhosting.com/baf482cac4.pdf] we expressly rejected Kramer's argument that such independent review entitled her to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." (Typd.Opn.pp.13) "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)* (Typd.Opn.pp.12)

"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.)*" (Typd.Opn.pp.13)

This case is (*"Kelman v. Kramer"*) D047758 (anti-SLAPP 2006 Opinion), GIN044539, D054496. As evidenced for this court, every day that this court ignores Defendant and Appellant, Sharon ("Kramer's") uncontroverted evidence that the following sentence is perjury, *"I testified the types and amounts of mold in the Kramer house could not have caused the life threatening illnesses she claimed"* as found in Plaintiff and Respondent, Bruce ("Kelman"s) declarations used to establish a fictitious reason for Kramer's malice in this libel case while strategically litigating to silence Kramer of a deceit in science and policy – just like this court ignored the same evidence in it's unpublished anti-SLAPP 2006 Opinion (App.Opn.Brf.Erta, pp.7-12,15,16) [[http://freepdfhosting.com/c74e07c42f.pdf]; and
every day that this court ignores that there is no evidence of Kramer even once been impeached as to her subjective belief that the words *"lay translation"* going to *"two different paper, two different activities"*, and flipping back to "*translation*" as spoken by Kelman on February 18, 2005, as evidenced by Kramer that she considers to be "*altered [his] under oath statements on the witness stand"* used by Kelman to obfuscate and to hide from a jury, who all was involved and how it became the false concept in public policy that

science holds mold does not harm – just like this court ignored the same evidence in its 2006 Opinion; (App.Opn.Brf.Erta,pp.17-23,29); is

one more day that someone, somewhere, in the United States of America is having their life devastated by the false concept that it is scientifically proven mold and their toxins do not harm, being allowed to remain in public policy, medical practices, claims handling practices and the courts;(App.Req.To.Notice.Arizona.NAA.Amicus,pp.11) [http://freepdfhosting.com/7d201e1198.pdf]; because

this court chose not do independent examination of the evidence on appeal in 2010, or of the errors of its 2006 Opinion that all courts relied upon while ignoring the evidence found in Kramer's briefs and exhibits substantiating this litigation is Strategic Litigation Against Public Participation to silence one who has been willing to speak out of the deceit in public policy and in the courts. As such, the finding of this Opinion of libel with actual malice is not supported by evidence on appeal. (App.Repy.To.Court.Query) [http://freepdfhosting.com/5b2c34d0b6.pdf]

Directly stated, this Opinion is aiding interstate insurer unfair advantage over the mold sick and injured in medical treatment denials, claims handling practices and litigation to continue; by its stated choice to not independently examine the evidence of errors in this court's 2006 Opinion.(App.Opn.Brf.Erta,pp.32,33) While stating no errors of trial were found, this court acknowledges the scope of the trial was predicated on the 2006 Opinion which ignored the same facts in evidence this Opinion now does; primarily on the issues of plaintiff perjury, malice, defendant subjective belief in her words and the impact of this litigation on public health. (App.Opn.Brf.Erta,pp.29,30) (App.RpyToCtQuery,pp.19)

Given that circumstance and the fact that the value of promoting stability in decision making in public health policy far outweighs the value of non-reevaluation of this court's prior erred disposition; and litigation has cost the Kramer family well over

one half of one million dollars in litigation expenses alone to defend Kramer's truthful words for the public good (App.Rply.Brf,pp.21) [http://freepdfhosting.com/7bb2a4b4ae.pdf]; this court needs to do an independent examination of this case – not reiterate prior errors it made in 2006 as fact in 2010 to conclude that libel with actual malice has been proven by a standard of clear and convincing evidence. (Typd.Opn,pp.2-4,7-15)

This Opinion is predicated on a flawed viewpoint bias that Kramer's well evidenced and sincere views on the science and public health are not relevant to this litigation; are not relevant to Kramer's logic and defense for using phrase *"altered his under oath statements on the witness stand"*; and are not relevant to why ("US Chamber") of Commerce & American College of Occupational and Environmental Medicine ("ACOEM") mold policy author, Kelman, sued Kramer in 2005 in an effort to keep her valid, evidenced views of a deception in health marketing, science and policy from coming to greater public light; thereby causing change in policy to the detriment of the affiliates of the US Chamber. (Typd.Opn.pp.,13,14) (App.Opn.Brf.Erta,pp.35) This flawed viewpoint bias of the motivations and credibility of the parties in this case has pervaded this litigation. It has caused the courts to violate Kramer's first amendment rights by wrongfully attributing her truthful and evidenced statements of a deception, of which Kelman is only one of many involved; as "fulsome" evidence of Kramer having malice for Kelman, personally. (Typd.Opn.pp.9,13)(App.Repy.ToCt.Query,pp.3) (App.Opn.Brf.Erta.pp.46)

Not mentioned in the Opinion, Kramer has evidenced for this court that the US Chamber's policy statement on mold cites false University of California physician authorship and was in realty, only authored by two PhDs, Kelman and undisclosed party to this litigation, Bryan ("Hardin"), who is a retired high level CDC NIOSH employee. (App.RpyToCtQuery,pp.20,21)(App.RspToCt.DenialToNoticeFraudArizonaNAAAmicus) [http://freepdfhosting.com/9b90407e75.pdf]

It is not evidence of malice for Kelman, for Kramer to state and evidence the false concept adversely impacting many lives that was mass marketed into US health policy by ACOEM, the ("Manhattan Institute") think-tank, and the US Chamber for the purpose of biasing the courts against the mold sick and injured; their medical, legal and scientific proponents; and their "crusading whistleblower" advocates. (Typd.Opn.pp.14) This Opinion is aiding this to continue, just like this court's 2006 Opinion did. The evidence is, Kramer's purportedly libelous ("March 2005 writing") was the first to publicly expose how these entities were involved and connected, not just Kelman, in mass marketing the deception in science and policy over the mold issue. (App.Rpy.Brf,pp.1)

This Opinion ignores evidence that entered the case and events that have occurred since the 2006 Opinion was rendered which further evidences why Kelman was strategically litigating to silence Kramer and with much of this evidence not permitted to be discussed in trial. (App.Opn.Brf.Erta,pp.19).(Typd.Opn.pp.14) The evidence is, Kramer is responsible for *"taking the bull by the horns"* and causing a Federal Government Accountability Office audit of the health effects of mold ("**Federal GAO** Report**"**). Published shortly after the 2008 trial, it concludes that science finds it is **biologically plausible** that mycotoxins found in water damaged buildings can harm human health. The GAO Report has played a valuable role in aiding to slowly change policies and deeply seeded biases over the mold issue intentionally instilled by the US Chamber et.al, to stave off financial responsibility. (App.Opn.Brf.Erta,pp.43,44)

The GAO Report, that Kramer caused, negates the validity of **professional defense witnesses** testimony**,** such as Kelman's, on behalf of the insurance industry that serious illnesses "**Could not be**" from mycotoxins indoors; based on a flawed modeling theory by Hardin and Kelman.(App.Opn.Brf.Erta,pp.18) This flawed theory was legitimized and interjected into health policy by ACOEM, then spun further and mass marketed to the courts by the US Chamber and Manhattan Institute (toxic mold claims are because of "trial

lawyers, media and junk science") to lend false credence to defense experts' opinions to be able to sell doubt of liability for mold and mold toxins being the cause of illness. Had Kramer been intimidated into silence by this litigation in 2005, this GAO Report that negates the US Chamber's science never would have come to be in 2008. (App.Rply.Brf.pp.2,3)

The Opinion, while stating the sincerity of Kramer's views of the science and marketing of false science are not of relevance to this case, ignores the evidence that Kelman attempted to coerce Kramer to endorse his science before he would stop litigating and after defeating Kramer's anti-SLAPP motion by the use of perjury on the issue of malice; with Kramer's evidence for this court of Kelman's perjury going ignored in the 2006 Opinion, just like this Opinion. (App.Opn.Brf.Erta.pp.12-17)(Typd.Opn.14).

This Opinion also ignores the evidence that Kramer has been written of in a 2006 news article for her willingness to publicly speak out over the deception in science, while others do not because of fear of retribution. (App.Rply.Brf.pp.14) This Opinion is illustrating why that fear would be valid, thus chilling speech and aiding the environmental science of the US Chamber that mold does not harm to continue to influence policy and the courts, by ignoring the evidence of Kelman's perjury to make up a strategically needed reason for malice to silence Kramer while intimidating others. (AppReqNoticeArizona.NAA.Amicus)

This Opinion is predicated on assumptions not found or supported by the evidence including but not limited to the judgments on record. (Typd.Opn.pp.1,2,10,14)**.** It is predicated on numerous omissions of Kramer's evidence that clearly substantiate the required burden of proof of libel with actual malice was never met. The Opinion relies on Kelman's proven perjury on malice and never corroborated hearsay used in this case and in trial to inflame the courts and the jury with a false portrait of Kramer. .(App.Opn.Brf.Erta,pp.29) "Defendants, in their zeal to present a portrait of plaintiff

Roston...that would enhance their position, made reference to a multitude of cases which were inappropriate for consideration by the trial court... The presentation of such matter, if designedly done, is certainly to be discouraged. One might mistake it for an attempt to inflame the court against a party to the action." *Roston v. Edwards* (1982) 127 Cal.App.3d 842 [179 Cal.Rptr. 830, The inflaming attorney in Roston was Keith ("Scheuer").

This Opinion demeans, discredits and misapplies "crusading whistleblower" Kramer's directly stated and evidenced views of a deception in policy as spiteful words, evidence of malice for Kelman, while gutting Kramer's legitimate defense of why she wrote *"altered his under oath statements"*. Kramer could stop "crusading" if this court would stop ignoring her uncontroverted evidence of Kelman's perjury on the issue of malice; and stop ignoring the fact that Kramer has never been impeached as to her subject belief of the truthfulness of her words. Directly stating the truth for the public good is not malicious. It is called freedom of speech that the gatekeeping courts are to protect from being chilled in the name of public health and safety, and for the sake of democracy.
(App.Rply.To.Ct.Query,pp.1-3)

There is a demonstrated manifest misapplication in the Opinion of not acknowledging the legitimacy of Kramer's views; and the relevance of science, politics, policy and public health to this litigation in Kramer's needed defense for her thought process behind writing *"altered his under oath statements on the witness stand"*; while ignoring the evidence of what is at stake for the American public when this court does not acknowledge perjury to make up a libel law required reason for malice by ACOEM/US Chamber author, Kelman, as he litigates to silence Kramer. (App.Res.To.Ct.Query,pp.43-45) This court, via this Opinion, has indicated they concur with their 2006 Opinion and lower courts were correct to follow, while expressly stating this court did not do an independent examination of the case, evidence of malice, personal and actual, Kramer's and Kelman's. (Typd.Opn.pp.13)

"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.)"(Typed Opn, pp. 11)

As such, Defendant and Appellant, Sharon Kramer, petitions this court for rehearing to reverse its Appellate Opinions under California Rules of Court, rule 8.532(c)(2) to adhere to the relevant evidence in record in 2010 and according to the constitution, the law, and legal precedent that govern proof of libel with actual malice; and what the courts are obligated to do when provided irrefutable evidence of criminal perjury & attempted coercion used to strategically litigate while harming the accused and the American public; and to set aside an erroneous judgment on appeal obtained by improper means (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 733, pp. 762-763.); additionally, to modify its erred findings of judgments not currently in the record. Kramer petitions for rehearing under California Rules of Court, rule 8.536 based the following five points:

1. **A). Upon independent examination of evidence, this court would find that there is no evidence of Kramer ever being impeached as to her subjective belief that Kelman's words of "*lay translation*" to *"two different papers, two different activities"* and flipping back to *"translation"* were obfuscating and altering under oath statements to attempt to hide how it became US policy that mold does not harm. No refuting evidence in: (Respondent's.Reply.Brief)[http://freepdfhosting.com/f0207f8a45.pdf] The Opinion ignores the evidence that Kramer has stated and evidenced why this is what she meant by *"altered his under oath statements"* since July of 2005. (App.Rply.To.CourtQuery,pp.10,11)**

B.) Falsely stated in the Opinion, upon independent examination, this court would find that there is no evidence of Kramer making *"hostile statements"* of Kelman before March 2005 when she wrote of his February 2005 testimony in *Haynes v. Adair Homes, Inc.*, (No. CCV0211573) (*Haynes*) in the state of Oregon. (App.Opn.Brf.Erta,pp.48) (Resp.Reply.Brf)

C.) This Opinion ignores the evidence that Plaintiff Special Jury Instructions Proof Of Actual Malice, instructed the jury that it was determined Kramer had failed to investigate; and had hostility and personal malice for Kelman when she wrote *"altered his under oath statements"* in March 2005.(App.Opn.Brf.Erta,pp.31)

D.) This Opinion ignores the evidence that the trial judge, when denying Kramer's JNOV Motion, while finding libel with actual malice had been proven by clear and convincing evidence, based this conclusion on a source who submitted affidavits stating Kramer's writing was correct. (App.Opn.Brf.Erta,pp. 27)(App.Rply.Brf,pp.13)

E.) Upon independent examination this court would find libel with actual malice was never proven.

A. No Evidence Of Nonbelief Of Truth

Page 8 and 2 of the Opinion states, "The court [2006 Opinion] 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.″(Typd. Opn,pp.8) "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."(Typd.Opn,pp.2)

Not mentioned in this Opinion, nor the 2006 Opinion when determining Kramer's writing was false and malicious is that since July of 2005, Kramer has been stating and evidencing for all courts repeatedly in declarations and briefs that she finds Kelman's statements made on February 18, 2005, of "*lay translation*" going to "*two different papers, two different activities*" and flipping back again to "*translation*" to be obfuscating and *"altered [his] under oath statements"* because of her sincere views on the science; and of the deception in science and marketing that Kelman was trying to hide from the *Haynes* jury.(App.Opn.Brf.Erta,pp.29,30) There is no evidence Kramer has ever been impeached as to her *"subjective belief as the truthfulness of these alleged false statements"*. (Res.Rply.Brf) This fact alone – never impeached by Kelman as to Kramer's belief of the truthfulness of her words, negates the Opinion of proof of writing a known falsehood or having reckless disregard for the truth, published with actual malice. Kramer's "Response To This Court's Query", Jaunary 28, 2010 described what she has told and evidenced for the courts since July 2005 of why she wrote "altered":

> *"Declaration of Kramer submitted to the courts, July 2005: 'Within the prior sentences, Kelman testified 'We were not paid for that…', not clarifying which version he was discussing. There was no question asked of him at that time. He went on to say GlobalTox was paid for the 'lay translation' of the ACOEM Statement. He then altered to say 'They're two different papers, two different activities.' He then flipped back again by saying, '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.' By this statement he verified they were not two different papers, merely two versions of the same paper. And that is what this lawsuit is really all about.*
>
> *The rambling attempted explanation of the two papers' relationship coupled with the filing of this lawsuit intended to silence me, have merely spotlighted Kelman's strong desire to have the ACOEM Statement and the Manhattan Institute Version portrayed as two separate works by esteemed scientists.*
>
> *In reality, they are authored by Kelman and Hardin, the principals of a corporation called GlobalTox, Inc. – a corporation that generates much income denouncing the illnesses of families, office workers, teachers and children with the*

purpose of limiting the financial liability of others. One paper is an edit of the other and both are used together to propagate biased thought based on a scant scientific foundation.

Together, these papers are the core of an elaborate sham that has been perpetrated on our courts, our medical community and the American public. Together, they are the vehicle used to give financial interests of some indecent precedence over the lives of others.'(Appelant Appendix Vol.1 Ex.8:157-158) (Response to Court's Query, pp.10-11)"

Pages 4 -6 of the Opinion cite Kelman's testimony in Haynes. There are fourteen lines of the transcript omitted from the middle. (Typd.Opn.pp4)(App.Opn.Brf.Erta,pp.26) These were also omitted from the 2006 Opinion. They corroborate Kramer's contention that the line of questioning of the US Chamber/Manhattan Institute's relationship to ACOEM over the mold issue would have been stopped if the plaintiff attorney Calvin ("Vance") had not had the Arizona *Kilian v. Equity Residential Trust* (U.S.Dist.Ct., D.Ariz., No. CIV 02-1272-PHX-FJM, (*Kilian*) transcript in its entirety.

These omitted 14 lines illustrate the defense attempting to invoke the rule of completeness, after Kelman shouted "*..ridiculous..*" when asked of paid edits, the ACOEM paper and the Manhattan Institute. (Typd Opn, pp.4) Below italicized words as in the Opinion falsely infer Kramer accused Kelman of lying about being paid by the Manhattan Institute to author the ACOEM Mold Statement:

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?"*
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.* (Typd.Opn.pp.4)

(Omitted From Opinion):

MR. VANCE: Your Honor, may I approach. Would you read into the record, please, the highlighted parts of pages 905 and 906 of the trial transcript in that case.
MR. KECLE: Your Honor, I would ask that Dr. Kelman be provided the rest of the transcript under the rule of completeness. He's only been given two pages.
JUDGE VANDYKE: Do you have a copy of the transcript?
MR. KECLE: I do not.
MR. VANCE: Your Honor, I learned about Dr. Kelman just a –
JUDGE VANDYKE: How many pages do you have?
MR. VANCE: I have the entire transcript from pages –
JUDGE VANDYKE: All right. Hand him the transcript.
MR. VANCE: I'd be happy to give it to him, Your Honor.
JUDGE VANDYKE: All right. (App.Opn.Brf.Erta,pp.26)

(Back In The Opinion)

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

Kramer never accused Kelman of lying about being paid by the Manhattan Institute to author the ACOEM paper. Kramer did not even mention ACOEM's until the last sentence. She was writing of the Manhattan Institute paper. The irrefutable evidence is, Kramer's writing accurately states there were two papers and payment was for the Manhattan Institute version itself, not ACOEM's. Her March 2005 writing states, *"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.....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."* (App.Opn.Brf.Erta,pp 32)

The 2006 Opinion this Opinion is relying upon when deeming Kramer's writing false with reckless disregard for the truth, wrote the same thing Kramer did in its 2006 Opinion. This court found while determining Kramer's writing false: *"This testimony supports a conclusion Kelman did not deny he had been paid by the Manhattan Institute to write a paper, but only denied being paid by the Manhattan Institute to make revisions in the paper issued by ACOEM. He admitted being paid by the Manhattan Institute to write a lay translation."* (App.Opn.Brf.Erta,pp.32)

Given that this Opinion falsely infers Kramer accused Kelman of lying about being paid to author a paper that Kramer was not even writing of just like the 2006 Opinion; this Opinion is greatly flawed in its finding of a false accusation of perjury with actual malice. And given that Kramer has a degree in marketing and is published in peer reviewed medical journals regarding the conflicts of interest in health marketing by ACOEM et al, over the mold issue; and in light of the fact that there is no impeaching evidence otherwise; it is not unreasonable to conclude that Kramer's subjective belief is that Kelman's altering under oath statements of *"lay translation"* to *"two different papers, two different activities"* and back to *"translation"* could reasonably be deemed *"altered his under oath statements"* to obfuscate, after having to admit there was a second paper that was paid for by a think-tank and then having to discuss the two papers together by his *Kilian* testimony coming into the *Haynes* trial over objections and a shouting of *"ridiculous";* that could well have stopped the line of questioning if Vance had not had the *Kilian* transcript in its entirety.

Given that Kramer understands the adverse impact on health policy because of these two papers being closely connected to mass market misinformation; it is not unreasonable that she would consider Kelman shouting *"ridiculous"* instead of taking the opportunity to clarify there were two papers when asked about paid edits; could reasonably be perceived

as Kelman attempting to obfuscate to shut down the line of questioning so as not to let the jury know the purportedly unbiased ACOEM paper was closely connected to a paid for hire think-tank version on behalf of the US Chamber of Commerce.

The evidence is, Kramer is responsible for Vance having the *Kilian* transcript via a mutual acquaintance that forced Kelman to have to discuss the two papers together in front of the *Haynes* jury.(App.Opn.Brf.Erta,pp.19,20)**.** The evidence is**,** Kramer was told by a source who was in the courtroom that Kelman was attempting to say the two papers were not connected, but had to admit they were (after the *Kilian* transcript was permitted into the *Haynes* because Vance had *Kilian* it in entirety). (App.Opn.Brf.Erta,pp.23) One of Kramer's four sources submitted affidavits after the 2006 Opinion, corroborating altered was an accurate description of Kelman's testimony after *Kilian* entered *Haynes*. (App.Opn.Brf.Erta,pp.25,26)**.**

"This conclusion is supported by a variety of other evidence in the record, and Synanon again appears to be merely quibbling with the author's choice of words. Given the importance of permitting a reasonable degree of literary license, the statement in question seems easily supportable and by no means an act in reckless disregard of the truth." *Reader's Digest Assn v. Superior Court* (1984) 37 Cal.244, 264-265

B. No Evidence Of Hostile Statements Before Kramer Wrote

On page 9, the Opinion states, *"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."*

There is no evidence in the court record of Kramer ever uttering a word of displeasure regarding Kelman's minor involvement in her own lawsuit. The evidence is that Kramer

felt Kelman's testimony in her own lawsuit of stating her home was an increased risk after a botched remediation helped Kramer to receive the sizeable settlement of nearly one half of one million dollars, hardly a malice causing amount based on a supportive testimony. (App.Opn.Brf.Erta,pp.12-14) It is simply untrue that Kramer harbored malice for Kelman and is a key false statement in the Opinion indicative of an inflaming fallacy that has pervaded this case on the issue of extenuating circumstances misused to infer actual malice.

Falsely stated in the Opinion, there is no evidence of Kramer making any *"hostile statements...about Kelman"* before she wrote of his February 2005 Oregon testimony, in March of 2005. The evidence is that Kramer once referred to the corporation of ("GlobalTox") Inc. as an "ilks" in a third party email to a 'contact us" button regarding a webinar. Kelman is not mentioned in the email. There is no evidence of *"hostile statements Kramer made thereafter about Kelman"* before she wrote in March of 2005.(App.Opn.Brf.Erta,pp.48) GlobalTox lost their defamation claim. A statement of them cannot be used as evidence of malice for Kelman. This is indicative of a key inflammatory concept used to establish false extenuating circumstances to infer actual malice.

Upon independent examination, this court would find that the false concept of Kramer's purported personal malice for Kelman is based on three flawed points in the 2006 Opinion. 1.) It ignored evidence Kelman was committing perjury to establish Kramer's lawsuit of long ago as a reason for purported malice. 2.) It attributed that Kramer had once written the word "ilks" when referring to GlobalTox as evidence of malice for Kelman. 3.) It applied Kramer's detailed explanation of why she felt Kelman would have reason to alter and obfuscate, and Kramer's views on "positions" to be bad tone and thus evidence of malice for Kelman, personally.

As evidenced from the 2006 Opinion that this Opinion is relying upon to misattribute Kramer's direct words and views of a mass marketed deceit in science as "fulsome" evidence of personal malice for Kelman: *"Further, in determining whether there was a prima facie showing of malice, the trial court also relied on the general tone of Kramer's declarations...Kramer's declarations are full of language deriding the positions of Kelman, GlobalTox, ACOEM and the Manhattan Institute... (Appellant Appendix Vol.1 Ex.12:256, 257)"*(App. Reply To Court Queary, pp.3) This is false evidence of personal malice for Kelman, but serves as convincing evidence of judicial viewpoint bias gutting and twisting Kramer's needed defense into evidence of malice for Kelman.

On page 12 the Opinion states, *"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.)* (Typd.Opn.pp12)

As accurately stated, the trial *was* based on the above erred 2006 Opinion with the theme of the case and the framing of the scope of the trial becoming Kramer had malice for Kelman because he was a great expert in her own litigation; everything she said and evidenced of a deception in health policy was to be perceived as evidence of personal malice for Kelman; and that Kramer's word "altered" falsely accused Kelman of having to admit he lied about being paid by the Manhattan Institute for the ACOEM paper because she was out to get him - even though Kramer's writing states there are two papers, with payment being for the Manhattan Institute version, not ACOEM's. (App.Opn.Brf,pp.12-16)

C. Jury Instructions Stated Kramer's Writing Was Wrong And She Had Malice

On page 10, the Opinion states, "..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."(Typd.Opn.pp.10) This Opinion ignores the evidence that the jury was instructed by the Plaintiffs' Special Jury Instructions Proof of Actual Malice, it had been predetermined that Kramer's writing was incorrect because she failed to investigate; and instructed that Kramer had "anger, hostility" for Kelman when she wrote in March 2005. The jury foreman submitted an affidavit stating the jury asked the trial judge, that if they followed these special instructions that they were directed they must, did they have to find libel with actual malice. The trial judge responded, "Yes". Plaintiff Special Jury Instructions Proof of Actual Malice: *"...a combination of Kramer's anger, hostility toward Plaintiffs, failure to investigate or subsequent conduct may all constitute circumstantial evidence that actual malice existed. Evidence alone of Kramer's animosity, hatred, spite or ill will toward Kelman or GlobalTox does not establish actual malice."*(App.Opn.Brf.Erta,pp.36)

D. Trial Judge Deemed A Corroborating Source As Proof Kramer's Writing Was Incorrect and Actual Malice

Page 12 the Opinion states, "...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..." (Typd.Opn.pp 12) This Opinion ignores the evidence, briefs and record of oral argument December 12, 2008, that the trial judge found source witness, Vance, who submitted affidavits stating he was of the opinion "altered" was a correct description of Kelman's testimony, was the smoking gun clear and convincing proof that Kramer had written a known falsehood. A witness who says a writing is correct, is not

evidence of a known falsehood, maliciously published with reckless disregard for the truth. Kramer's JNOV should have been granted. (App.Rpy.Brf.13)

E. No Proof of Libel with Actual Malice

The evidence of the case is that Kramer has never been impeached as to the subject belief in her words. There is no evidence of her making hostile statements of Kelman before she wrote in March of 2005. She did not accuse Kelman of lying about being paid by a think-tank for the ACOEM's paper as this Opinion and the 2006 Opinions infer. Her writing accurately states there were two papers with payment being for the Manhattan Institute one, not ACOEM's. To critricize positions affecting health policy is not evidence of malice. It is speech to be protected under the first amendment. Kramer sincerely believes based upon her view of the science and health policy that Kelman was altering and obfuscating to hide how it became policy that mold does not harm by a prior testimony coming into a trial over objections. A witness who says a writing is true is not evidence a writing is false. Kramer was the first person to publicly write of the deception in science over the mold issue in this same purportedly libelous writing. It is criminal to use perjury to prove you were accused of perjury. Libel with actual malice has not been proven by clear and convincing evidence. This court should reverse its Opinion accordingly.

2. This court should expressly recognize that Kramer's word "statements" is plural, <u>not</u> singular. This error in the Opinion along with presenting Kramer's writing regarding Kelman's testimony partially as text and partially as endnote, leaving out 14 lines of transcript, and not italicizing all the words Kramer has evidenced for this court (and never been impeached) that she considers to be altering words; is causing the Opinion to wrongfully project that Kramer accused Kelman of getting

caught lying about being paid by the Manhattan Institute for the ACOEM's mold statement after viewing his prior testimony from Kilian. As evidenced for this court, this error is being encouraged by inflaming statements in Kelman's brief of falsely portraying Vance's questions to be Kramer's writing.(App. Response To Court's Query, pp. 5)(Typd.Opn. pp.7,14)

At pages 3,7, the Opinion states, *"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..." (Typd. Opn, pp.3) "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."*(Typd.Opn,pp.7)

The above are false statements. Kramer's writing did not *"focus on Kelman's testimony about being paid by the Manhattan Institute"* or if his testimony in the two cases were consistent with each other about who paid whom for what paper. This court did in its 2006 Opinion. Misleading in the Opinion by leaving out 14 key lines from the middle of the transcript and by dividing Kramer's two paragraphs about Kelman, it portrays Kramer making a false accusation of Kelman lying about being paid by a think-tank to author the ACOEM paper. (Typd.Opn.6-7) Acknowledging the purportedly libelous "*altered his under oath statements"* means more than one altering is critical to the understanding that Kramer did not maliciously accuse Kelman of perjury or publish with reckless disregard for the truth. Kramer meant, trying to say not connected but having to admit they were - obfuscating - over a matter of great concern to public health. The Federal GAO Report that negates the deception in health marketing, supports why a defense witness would not want

it known how closely tied ACOEM's purportedly unbiased science is to the US Chamber's. (App.Opn.Brf.Erta,pp.19)

3. Judicial Viewpoint Bias. This court should expressly recognize that contrary their statement, *"the sincerity of Kramer's views"* is not of relevance to this libel litigation; proving or disproving the sincerity of her views and logic behind writing *"altered his under oath statements"*, is the entire point of libel litigation. This court should expressly recognize that Kelman attempted to coerce Kramer to endorse his science, against her views which this Opinion deems are not relevant to this litigation.

Opinion states, page 14, **"**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.... Thus the trial court did not abuse its discretion in excluding the evidence Kramer offered" (Typd.Opn.pp.14)

By not being able to discuss the science, Kramer was not able to defend the validity and logic for why she wrote *"altered his under oath statements"*. While the Opinion states Kramer's views of the science are not of relevance to the litigation, it ignores that Kramer was being required to sign the following endorsement of Kelman's science in apology for writing *"altered his under oath statements"* before Kelman would stop litigating or suffer hundreds of thousand of dollars in litigation expense to defend the truth of those words and all others of the deception in health marketing over the mold issue. Kramer refused to sign:

> "....To my knowledge, their [Kelman, and his colleagues at Veritox, Inc. (formerly known as Globaltox, Inc.)] testimony and advice are based on their expertise and objective understanding of the underlying scientific data. I sincerely regret any harm or damage that my statements may have caused." (App. Reply To Court Query, pp. 23) (Appellant Appendix Vol.IV App.942)

If Kramer's views were important enough to Kelman that Kramer be forced to go against her views and endorse his science before he would stop litigating, then it should be obvious that Kramer needed to be able to discuss these views in trial to defend why she wrote what she did that Kelman wanted silenced. This court should modify the Opinion to acknowledge Kramer was not given the opportunity to defend the truth of her words in trial. This Opinion should take appropriate action to address the criminality of Kelman and Scheuer attempting to coerce Kramer into an endorsement adverse to the health and safety of the American public.

4. This court should recognize that one cannot use criminal perjury to inflame the courts by making up a reason for the other party's malice when strategically litigating to silence a whistleblower; even if one is an author of policy papers for the US Chamber of Commerce and the American College of Occupational and Environmental Medicine. (AppRplyToCtQuery,pp.23-25) This Opinion ignores Kramer's uncontroverted evidence provided since September of 2005; Kelman has been committing perjury of his *"role as a defense expert in Kramer's own lawsuit"*. (App.Opn.Brf.Erta,pp.8-22)

Page 9, the Opinion states, "A state of mind, like malice, 'can seldom be proved by direct evidence. It must be inferred from objective or external circumstantial evidence.' [Citation.]..... We found that in light of ...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." (Typd.Opn.pp.9)

Kelman's purported *"role as a defense expert in Kramer's own lawsuit"* was perjury in this lawsuit to inflame the courts. As this court was informed of what will happen when they acknowledge the evidence of Kelman's perjury, "When this Reviewing Court acknowledges what legally cannot be denied: Kramer's overwhelming, uncontroverted and irrefutable evidence that seven judges and justices ignored Kramer's overwhelming, uncontroverted and irrefutable evidence of Kelman's perjury on the issue of malice and ignored Kramer's vast evidence of Scheuer's willful suborning of Kelman's criminal perjury; then seven years worth of scientific fraud perpetrated on US Courts over the mold issue by the US Chamber of Commerce et al, will immediately cease by the acknowledgment that their author of their scientific fraud has no qualms about lying under oath to the courts and strategically litigating; and while their other author (sic, Bryan "Hardin") does not disclose he is a party to the strategic litigation." (App.Reply.To.Court.Query, pp.43-45).

Not mentioned in the Opinion, the following is perjury by Kelman to establish a false reason for malice: Declarations of Kelman submitted to the courts, 2005, 2006 and 2008: *"I first learned of Defendant Sharon Kramer in mid-2003, when I was retained as an expert in a lawsuit between her, her homeowner's insurer [Mercury Casualty] and other parties regarding alleged mold contamination in her house. She apparently felt that the remediation work had been inadequately done, and that she and her daughter had suffered life-threatening diseases as a result. I testified that the type and amount of mold in the Kramer house could not have caused the life-threatening illnesses that she claimed. I never met Ms. Kramer."* (App.Opn.Brf.Erta,pp.7)

Not mentioned in the Opinion, the following is suborning of perjury by Scheuer when establishing needed external circumstances of malice to inflame the courts: *"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. Apparently furious that the science conflicted with her dreams of a remodeled house, Kramer launched an obsessive campaign to destroy the reputation of Dr. Kelman and GlobalTox."
(App.Opn.Brf.Erta,pp.8)

The following are excerpts of Kramer's Opening Brief Errata evidencing for this court how many times, by how many people and in how many ways, judges and justices were informed, but ignored that Kramer was evidencing US Chamber/ACOEM author, Kelman, was repeatedly committing perjury and Scheuer was repeatedly suborning to inflame the courts and present a false portrait of Kramer's writing and motivation for writing:

"As directly evidence by its absence in the transcript of Respondent's actual deposition testimony in Mercury, no such malice causing testimony as claimed of "I testified the types and amounts of mold in the Kramer house could not have caused the life threatening illnesses she claimed" was ever given by Respondent in Appellant's Mercury case...As evidenced by the declaration of William J. Brown III, (Brown)...the courts have been informed complete with documentation of Respondent's actual testimony in Mercury since June 30, 2006, but refused to take notice when denying Appellant's anti-SLAPP motion. As evidenced by the declaration of John Richards, Esq. and submitted to the court ...who took Respondent's deposition in Mercury, no such malice causing testimony was ever given by Respondent in Mercury, nor has there been any evidence in this case that Appellant has "launched into an obsessive campaign to destroy the reputations" of any of the other approximately seven expert defense witnesses ....As is evidence by the declaration of Appellant's expert witness who was not permitted to testify, Dr. Harriet Ammann, Respondent could not have possibly given the testimony he claimed to have given in Mercury...as evidenced by the deposition of Appellant, taken by Scheuer on January 3, 2008, Respondent and Scheuer knew they were providing false declarations and

knew the impact it was having on perception bias within the courts. .....taken from the Appellate Court anti-SLAPP ruling of November 19, 2006...'Kramer asked us to take judicial notice of additional documents, including the complaint and an excerpt from Kelman's deposition in her lawsuit against her insurance company. We decline to do so as it does not appear these items were presented to the trial court."..."Initially, we note this lawsuit is not about a conspiracy. This lawsuit was filed by Kelman and GlobalTox alleging one statement in a press release was libelous. Thus, conspiracy issues are not relevant."..letter that Appellant sent to Scheuer on September 18, 2008...requesting he fulfill his duty as a licensed officer of the court and inform the courts of the improvidently entered orders that were founded on perjury.....On October 31, 2008, Respondent submitted a Motion To Strike Costs Or Award Costs To All Prevailing Parties. This time, Appellant even took the exhibit page regarding the perjury and put a caption in big, bold print on the pages. She provided the court with 23 exhibits regarding Respondent's known perjury on the issue of malice. (Vol.4 App.988-1062)..... Not one piece of evidence was ever submitted in this case that Appellant was even remotely unhappy with Respondent's involvement in Mercury. On December 12, 2008, when in oral argument, Appellant requested Judge Schall ask Scheuer of the matter, to which she replied, "I'm not going to be drawn into that kind of petty behavior asking Mr. Scheuer to explain himself on things..." (Vol.7 RT.568)" (Appellate Opening Brief Errata, pp.8-17)"

This court should reverse its Opinions by acknowledging Kramer's uncontroverted evidence of Kelman's perjury to establish a fictional theme of malice. *"If the remittitur issues by inadvertence or mistake or as a result of fraud or imposition practiced on the appellate court ...its significant function is to permit the court to set aside an erroneous judgment on appeal obtained by improper means. In practical effect, therefore, the motion or petition to recall the remittitur may operate as a belated petition for rehearing on*

special grounds, without any time limitations." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 733, pp. 762-763.)

5. This court should recognize that judgments stated in the Opinion are not in the court record. There is no judgment entered of Kramer being awarded $2,545.28 and prevailing over GlobalTox, even though she did. Kelman did not argue to have Kramer's costs halfed in his motion to tax costs. The court did it of its own accord. There is double standard of the courts halfing Kramer's costs, but not Kelman's. Falsely stated, Kramer did not have an opportunity to dispute costs incurred by GlobalTox being awarded to Kelman.

Pages 1,2,10,14 the Opinion states, *"We find no error in the trial court's award of costs." "...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." "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." "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." "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).)"(Typd.Opn.pp.1,12,10,14)

There is no judgment entered of Kramer prevailing over GlobalTox and awarded costs of $2,545.28, only a ruling of this. (App.Opn.Brf.pp.Erta.pp.4) Kramer asked for costs of over $16,129.00 and attorney fees of $472,125.00 while evidencing Kelman's perjury for the seventh judge. Falsely stated, Kelman did not argue that Kramer's costs of disposition, $3800, should be halfed in his memorandums to tax costs (Attached Ex.C) The court halfed Kramer's costs, while stating nothing could be done of Globaltox's costs being submitted by and awarded to Kelman. (Vol.9, RT)

Kramer did not submit deposition costs of $3800. Kelman did. That is how Kramer knew Kelman had submitted all costs incurred by Globaltox, because Kramer was only deposed once and on video. $3800 was the cost incurred, not half. (App.Opn.Brf.Erta,pp.4) Falsely stated in the Opinion, Kramer did not have an opportunity to request Kelman's costs he was awarded that were incurred by GlobalTox be taxed. Kramer filed a motion to strike Kelman's entire cost memorandom based on evidencing for the fifth judicuary to oversee this litigation of Kelman's perjury on issue of malice. Rule 3.1700(b)(2) states *"Form of motion Unless objection is made to the entire cost memorandum, the motion to strike or tax costs must refer to each item objected to..."* Kramer was not to state individual items that were objectionable in her motion to strike.

In oral argument of December 12, 2008, after the trial judge refused to be *"drawn into that kind of petty behavior"* of asking Kelman's attorney, Scheuer, of the perjury, *"The trial judge specifically stated she would not hear Appellant's oral augments for Motion for New Trial.. (Reporter's Transcript, P.577). Respondent's costs were never even addressed to be able to be denied to be heard."* (App.Rply.Brf,pp.27). Kramer was never given the opportunity to address Kelman's award of costs incurred by GlobalTox – a party she prevailed over in trial. The evidence is, Kramer now has an interest accruing lean on her home for $3,626.33 of costs submitted by and awarded to Kelman that he did not incur. One trial judge refused to hear motions and the next trial judge claimed he could not nothing about prior erred judgments with a presiding judge refusing to hear a motion for reconsideration in between these two judges based on a purported date of entry of judgment of December 18, 2008 – that is not found in the court record with no mailings of this purported judgment. (App.Opn.Brf.Erta,pp.3,4,52)(App.Rply.Brf,pp.27,30,32,33)

The Opinion must be modified and a judgment entered awarding Kramer $2,545.28 as the prevailing party over GlobalTox. Kelman should not be awarded costs of $3,626.33 Kramer had no opportunity to request be taxed and were incurred by a party she prevailed over in trial, GlobalTox. Kramer should be awarded all costs and attorney fees when this court's Opinions modify and reverses to stop aiding insurer unfair advantage by acknowledging the evidence, *"I testified that the amount and types of mold in the Kramer house could not have caused the life threatening illness she claimed"* is perjury by the US Chamber's *"Scientific View of the Health Effects of Mold"* author Kelman, while strategically litigating.

CONCLUSION

Petitioner requests that rehearing be granted and that the court reverse its finding that libel with actual malice has been proven by clear and convincing evidence; that fraud on an appellate court when strategically litigating over a matter of public health and safety is irrelevant; that judgment be reversed accordingly; and judgment modify to accurately reflect rulings.

Submitted September 29, 2010

_____

Sharon Kramer, Appellant Pro Per

CERTIFICATION OF WORD COUNT PER RULE 14(C)

I, Sharon Kramer, Properia Persona, certify that the attached Petition for Rehearing contains 8,400 words, based on the "Word Count" of the computer program that was used to prepare said brief. This brief thus contains fewer than the 8,500 word maximum allowed per Rule 8.204 of the California Rules of the Court for the Appellate Court.

DATED: September 29, 2010 _____

Sharon Kramer

Filed 9/14/10 Kelman v. Kramer CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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.

Filed 11/16/06 Kelman v. Kramer CA4/1

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)

APPEAL from an order of the Superior Court of San Diego County, Michael B. Orfield, Judge. Affirmed.

Sharon Kramer appeals an order denying her anti-SLAPP (strategic lawsuit against public participation) motion (Code Civ. Proc.,[1] § 425.16) to strike a complaint for libel

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

by Bruce J. Kelman and GlobalTox, Inc. (GlobalTox).[2] She contends the trial court erred in finding Kelman and GlobalTox were likely to prevail on their libel claim. She claims she made a true statement, she acted without malice, the court applied the wrong standard, and her statement was privileged. She also contends the court erred by broadening the scope of the complaint and excluding evidence. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

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

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2 GlobalTox recently changed its name to VeriTox, but since GlobalTox was the name used below, we shall continue to refer to the company by that name.

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? (86/57)

"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." (Italics added.)

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. One paragraph of the press release was devoted to Kelman's testimony:

"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." (Italics added.)

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 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.[3]

DISCUSSION

I

Anti-Slapp Law

"Section 425.16, known as the anti-SLAPP statute, permits a court to dismiss certain types of nonmeritorious claims early in the litigation." (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.)

In determining whether a motion to strike should be granted under the anti-SLAPP statute, "[f]irst, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e).' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) Among the categories spelled out in section 425.16, subdivision (e) are: "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest" (§ 425.16, subd. (e)(3)) and an " 'act in furtherance of a person's right of petition or free

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3 Kramer asked us to take judicial notice of additional documents, including the complaint and an excerpt from Kelman's deposition in her lawsuit against her insurance company. We decline to do so as it does not appear these items were presented to the trial court.

speech under the United States or California Constitution in connection with a public issue.' " (§ 425.16, subd. (e).)

If the court finds that the defendant has made a showing that the complaint or cause of action is within the scope of the anti-SLAPP statute, the burden shifts "and the plaintiff must show a probability of prevailing on the claim." (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 45.)

"Only a cause of action that satisfies both prongs of the anti-SLAPP statute — i.e., that arises from protected speech or petitioning and lacks even minimal merit — is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten, supra,* 29 Cal.4th 82, 89, italics omitted.) On appeal we apply a de novo standard of review. (*Padres, L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 509; *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

II

Protected Activity

Here the trial court found and the parties do not dispute that Kelman's complaint fell within the scope of the anti-SLAPP statute. The statement at issue was made in the context of a press release, posted on a public Internet forum and concerned litigation about a public issue, that is, the possible health risks associated with toxic indoor mold. Kramer's statement fell within the scope of section 425.16, subdivision (e)(3) and (4): It was made in a public forum concerning an issue of public interest and was an act in furtherance of her constitutional right to free speech in connection with a public issue. Thus, Kramer met the first prong of the anti-SLAPP statute. The burden of proof then

shifted to Kelman to establish a probability of prevailing on his claim that Kramer's speech was not protected speech because it was libelous.

III

Falsity of Statement

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."[4] 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.

To prove a cause of action for libel, an intentional tort, the plaintiff must show: a publication, in writing, that is false, defamatory and unprivileged and has a natural tendency to injure or that causes special damage to a person. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 529-530, pp. 782-783; Civ. Code, §§ 45, 46.) Truth is a complete defense to liability for defamation. (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 768-769; *Gantry Constr. Co. v. American Pipe & Constr. Co.* (1975) 49 Cal.App.3d 186, 191-192.) The truth defense requires only a showing that the substance, gist or sting of the communication or statements is true. (*Gantry Constr. Co. v. American Pipe & Constr. Co.*, at p. 194.)

The record in the *Haynes* case indicates that prior to being asked whether "the

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4 Kramer also contends GlobalTox has no standing to sue for libel because it was not defamed. We disagree. The statement at issue identified Kelman with GlobalTox and therefore, if false, the statement injured the reputations of both Kelman and GlobalTox.

Manhattan Institute paid GlobalTox $40,000 to make revisions in that statement," Kelman was being cross-examined about revisions to the ACOEM paper and stated he had participated in making revisions after turning in the first draft. In context, the question about being paid to "make revisions in that statement" was ambiguous and a reasonable jury could conclude Kelman interpreted the question as asking whether he had been paid $40,000 by the Manhattan Institute to make revisions in the ACOEM paper itself, a suggestion Kelman found offensive. A short while later, Kelman explained how the Manhattan Institute paper was an entirely separate project — the writing of a lay translation of the ACOEM paper — and he readily admitted he was paid by the Manhattan Institute to write the lay translation.

This testimony supports a conclusion Kelman did not deny he had been paid by the Manhattan Institute to write a paper, but only denied being paid by the Manhattan Institute to make revisions in the paper issued by ACOEM. He admitted being paid by the Manhattan Institute to write a lay translation. The fact that Kelman did not clarify that he received payment from the Manhattan Institute until after being confronted with the *Kilian* deposition testimony could be viewed by a reasonable jury as resulting from the poor phrasing of the question rather than from an attempt to deny payment.

In sum, Kelman and GlobalTox presented sufficient evidence to satisfy a prima facie showing the statement in the press release was false.

IV

Malice

Kramer contends the court erred in finding Kelman made a prima facie showing sufficient to support a finding by clear and convincing evidence that she acted with malice.

As Kelman concedes, he was a limited public figure[5] and therefore it was necessary for him to show not only that the statement was false but also to show by clear and convincing evidence that Kramer acted with malice. (*Colt v. Freedom Communications, Inc., supra,* 109 Cal.App.4th 1551, 1557; *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 279.) Malice exists when an individual publishes a falsehood knowing it was false or with reckless disregard for whether it was true or not. (*Sipple v. Foundation For Nat. Progress* (1999) 71 Cal.App.4th 226, 247.) The existence of actual malice turns on the defendant's subjective belief as to the truthfulness of the allegedly false statement. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 257.) A state of mind, like malice, "can seldom be proved by direct evidence. It must be inferred from objective or external circumstantial evidence." (*Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009, 1021, disapproved on other grounds in *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1065.) Relevant evidence may include the defendant's anger or

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5 "The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues." (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1577.)

hostility toward the plaintiff, a failure to investigate, and subsequent conduct by the plaintiff. (*Reader's Digest Assn. v. Superior Court*, at p. 257; *Tranchina v. Arcinas* (1947) 78 Cal.App.2d 522, 524.)

Here, Kelman's statements were made during a recorded court hearing and thus, Kramer could or did view the statements in context. A reasonable jury could conclude a simple investigation of Kelman's testimony in context would have revealed the gist of Kelman's testimony did not involve any alteration of testimony given under oath or conduct amounting to perjury.

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.

A jury could also infer animosity against Kelman by Kramer's conduct two months before the press release was issued. In January 2005, after learning the American Industrial Hygiene Association (AIHA) had invited GlobalTox to participate in a teleweb conference, Kramer sent two e-mails to AIHA, one asking, "What could possibly be your

justification for affiliating with the ilks [*sic*] of GlobalTox," the other containing the following paragraph:[6]

> "Why is a company that is known to provide expert insurance defense litigation being allowed to hold an online seminar for Industrial Hygienists? Is the goal of the AIHA to promote the safety of mankind as your code of ethics states? Or is the goal of the AIHA to limit financial liability for those who support your organization? Do children of industrial hygenists [*sic*] attend elementary schools? Shame on you for perpetuating this perverse situation. *May your children rot in hell*, along with all the other innocent children you are hurting." (Italics added.)

Further, in determining whether there was a prima facie showing of malice, the trial court also relied on the general tone of Kramer's declarations. These declarations reflect a person who, motivated by personally having suffered from mold problems, is crusading against toxic mold and against those individuals and organizations who, in her opinion, unjustifiably minimize the dangers of indoor mold. Although this case involves only the issue of whether the statement "Kelman altered his under oath statements on the witness stand" was false and made with malice, Kramer's declarations are full of language deriding the positions of Kelman, GlobalTox, ACOEM and the Manhattan Institute. For example, Kramer states people were "physically damaged by the ACOEM Statement itself" that the ACOEM statement "is a document of scant scientific

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6 On appeal, Kramer contends these e-mails constituted "hearsay" and therefore were not admissible evidence. Since she did not object on this basis below, she is precluded from raising this issue on appeal. (Evid. Code, § 353, subd. (a); *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1611.) In any event, the evidence was not offered to prove the truth of the matter stated so it was not subject to exclusion as hearsay.

foundation; authored by expert defense witnesses; legitimized by the inner circle of an influential medical association, whose members often times evaluate mold victims o[n] behalf of insurers and employers; and promoted by stakeholder industries for the purpose of financial gain at the expense of the lives of others."

Kramer also contends the trial court applied the wrong standard in determining whether Kelman had met his burden of making a prima facie showing of malice, pointing out that Kelman was required to make a prima facie showing that there existed *clear and convincing* evidence to support a finding of malice but the court in its tentative decision referred to the defendants having "sustained their burden of proof to establish a '*probability*' that they will prevail on their sole cause of action for Libel (per Se)" and in making its ruling at the hearing stated "there is a reasonable *probability* that the plaintiffs will prevail on their libel cause of action." (Italics added.) We find no error here. The court's application of a "probability" or "reasonable probability" standard properly reflects the standard stated in section 425.16, subdivision (b)(1). Section 425.16, subdivision (b)(1) states, that an anti-SLAPP motion should not be granted if "the court determines that the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim." (Italics added.) Encompassed within this standard in the context of this case is that there was a probability Kelman would prevail in establishing by clear and convincing evidence Kramer acted with malice.

V

Privileges

(A) Civil Code Section 47, Subdivision (c)

Kramer contends her statement was privileged under Civil Code section 47, subdivision (c), which states:

> "A privileged publication or broadcast is one made:
>
> ". . . . . .
>
> "(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law."

To support her argument, Kramer merely quotes from *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 914, which explains this privilege applies when the parties to the communication have " 'a contractual, business or similar relationship, such as "between partners, corporate officers and members of incorporated associations" or between "union members [and] union officers." ' " She states she meets this privilege

"insofar as her protected audience are those injured victims of toxic mold exposure and advocates for those victims." Kramer, however, did not send out the press release to a select few, she broadly published it on the Internet and made it available to the general public. Thus, this privilege does not apply.

(B) Civil Code Section 47, Subdivision (d)(1)

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.

VI

Additional Allegation

Kramer contends "[t]he court created an additional aspect of the allegedly libelous statement by holding that it could be read as an allegation of bribery." She contends such a finding is unsupported by the evidence.

The trial court drew an inference that Kramer was intending to imply that the payment for the revisions was a bribe to obtain certain revisions favorable to the defense position in toxic mold litigation. However, the statement in her press release at issue here was limited to stating Kelman had altered his under oath testimony and did not refer to any particular testimony. As published, it was an allegation of perjury, not of bribery.

Nonetheless, this error does not require reversal since the trial court's ruling on the basis of perjury is well supported by the record and justified denial of the anti-SLAPP motion.

VII

Exclusion of Evidence

Kramer contends the trial court erred in sustaining the plaintiffs' objections to her declarations and exhibits on the basis of relevance, hearsay and foundation.

(A) Trial Transcript - Kelman's Testimony in the Haynes Case

Kramer argues the cites to Kelman's testimony in the *Haynes* case "are not hearsay because they constitute admissions against interest and in portions thereof prior inconsistent statements which show alterations of his under oath testimony . . . ." She provides only one example: Kelman's "change in testimony regarding the extent of his involvement in the preparation of the ACOEM statement." She neither provides any citations to the record nor further argument.

As appellant, Kramer has the burden of showing error. (See *Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.) "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.) We may ignore points that are not argued or supported by citations to authorities or the record. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

Kramer has failed to meet her burden of establishing error. She has not provided any description of the testimony she believed was improperly excluded — except for the one example — and no citations to the record or further argument to support her claim of error. We decline to sift through the record for her exhibits to see if any error might have occurred. Indeed, we are uncertain where to find her one example. We note that if the example was intended to refer to Kelman's testimony on pages 53 to 59 of the transcript of the *Haynes* transcript, there was no objection to that testimony; the objection was to Kramer's restatement of the testimony in her declaration.

(B) Prior Inconsistent Statements

Kramer contends the court erroneously excluded Kelman's "prior inconsistent e-mail on that same issue" — presumably, the extent of his involvement in preparing the ACOEM statement — because it was "an admission against interest and directly impeaches his declaration in opposition."

Again, Kramer has failed to meet her burden of showing error. We decline to wade through the record to find this e-mail or the portion of the declaration Kramer claims it somehow impeaches, to see if there was an objection to this e-mail, and to determine if there was error. Moreover, Kramer's cryptic argument fails to explain how the e-mail was material or relevant to the issues at hand, that is, whether Kelman altered his testimony about receiving payment from the Manhattan Institute or whether she acted with malice.

(C) Coconspirator Admissions

Kramer contends the court erred in excluding "[t]he e-mails of various ACOEM board members" because they were "co-conspirator admissions (with regard to the true intention o[r] purpose for its creation, use, and manner of preparation of the ACOEM statement) binding upon Kelman which also act as impeachment of his declaration regarding the true reason for the ACOEM report creation, the limited scope of defense oriented 'peer review,' and the scope of his involvement in the creation of the document." She argues various exceptions to the hearsay rule apply including state of mind (Evid. Code, § 1250), coconspirator statements (*id.*, § 1223), and admissions by a party (*id.*, § 1220).

Initially, we note this lawsuit is not about a conspiracy. This lawsuit was filed by Kelman and GlobalTox alleging one statement in a press release was libelous. Thus, conspiracy issues are not relevant.

Kramer's brief does not clearly refer to any e-mails of various ACOEM board members. Moreover, the "evidence" she details involves collateral matters, such as whether the ACOEM paper was intended to be a defense document for litigation, whether it was "peer-reviewed by 100's of physicians,", whether Kelman's interpretation of the ACOEM findings was correct, whether Kelman first heard of Kramer in 2003 or 2002, whether Kramer's e-mail to AIHA was inflammatory, whether she posted the press release to ArriveNet, and whether she had engaged in a campaign against Kelman. We fail to see how exclusion of this evidence would have changed the result, that is,

established that Kramer's statement in the press release, as a matter of law, was true and made without malice.

DISPOSITION

The order is affirmed. Kelman is awarded costs on appeal.

McCONNELL, P. J.

WE CONCUR:

McDONALD, J.

AARON, J.

SCHEUER & GILLETT, a professional corporation
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Attorney for Plaintiffs
BRUCE J. KELMAN and GLOBALTOX, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, NORTH DISTRICT

BRUCE J. KELMAN, GLOBALTOX, INC., Plaintiffs, v. SHARON KRAMER, and DOES 1 through 20, inclusive, Defendants.	**CASE NO. GIN044539** **Assigned for All Purposes to: HON. WILLIAM S. DATO** **DEPARTMENT 31** UNLIMITED CIVIL CASE **Case filed: May 16, 2005** **PLAINTIFF GLOBALTOX, INC.'S OPPOSITION TO DEFENDANT'S AMENDED MOTION FOR COSTS AND ATTORNEY'S FEES** **Trial Date: August 18, 2008** **Hearing Date: March 9, 2009** **Time: 9:00 a.m.** **Department: 31**

Defendant Sharon Kramer's "Amended Motion for Costs and Attorney's Fees" is untimely, procedurally improper, and unsupported by either law or admissible evidence.

In fact, Kramer's instant motion is merely another version of her deficient Memorandum of Costs. In response to that Memorandum, GlobalTox filed its Motion to Tax Costs

Requested by Defendant Sharon Kramer, which is scheduled for hearing on March 9, 2009.

To save space, GlobalTox incorporates herein by reference as though set forth at length the factual and procedural background described in its Motion to Tax Costs. GlobalTox requests that the Court take judicial notice of its files regarding that Motion.

I. KRAMER'S ATTEMPT TO CIRCUMVENT THE PROCEDURAL REQUIREMENTS REGARDING RECOVERY OF COSTS MUST BE REJECTED

California Rule of Court 3.1700(a) provides the exclusive means for requesting pre-trial costs. The claiming party must file a verified memorandum of costs within 15 days after the date of mailing the notice of entry of judgment. There is no alternative to that procedure. Accordingly, Kramer's current motion for costs, filed more than 15 days after notice of entry of judgment was mailed, has no legal basis and is a procedural nullity that must be disregarded.

"[T]he procedures for obtaining costs are technical and mandatory." Boonyarit v. Payless Shoesource, Inc. (2006) 145 Cal.App.4th 1188.

Furthermore, even if the mandatory requirements of Rule of Court 3.1700(a) are ignored, Kramer has not substantiated

her costs. C.C.P. § 1033.5(c) states that to be allowed, costs must be reasonable in amount, and also "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (C.C.P. § 1033.5(c)(2)(3).)

Kramer rides roughshod over this statutory requirement.

GlobalTox objects to all of her "exhibits" on the grounds that none of them is authenticated, that all lack foundation and that all are inadmissible hearsay. Nevertheless, they starkly illustrate the absurdity of the amounts she seeks. For instance, in Exhibit 21, **Kramer claims over $7,000 in attorney service charges incurred for filing documents with this Court.**

This is but one example of the surreal assertions in her Motion. Once again, GlobalTox incorporates by reference its objections to her costs as set forth in its Motion to Tax Costs, and requests that the Court take judicial notice of its files regarding that Motion.

Where the costs sought by a litigant appear unreasonable or unnecessary, the burden of proving otherwise shifts to the party claiming the costs. Stenzor v. Leon (1955) 130 Cal.App.2d 729, 735.

Kramer had provided NO admissible evidence to substantiate any of her costs.

II. KRAMER'S MOTION FOR ATTORNEY'S FEES IS UNTIMELY

California Rules of Court 3.1700(b)(1) and 8.108 mandate that Kramer's motion for attorney's fees had to be filed no later than 30 days after the Court mailed notice of the denial of her motions for new trial and/or judgment notwithstanding the verdict. That notice was mailed by the Court on December 16, 2008.

Accordingly, her motion for attorney's fees had to be filed no later than January 16, 2009. However, the instant motion was served on February 2, more than two weeks late, and for that reason alone must be denied.

III. THERE IS NO LEGAL AUTHORITY FOR AWARDING KRAMER ATTORNEY'S FEES

C.C.P. § 1033.5(a)(10) allows attorney's fees when authorized by contract, statute or law. There is no such authority here. Kramer does not contend that there was a contract with an attorney's fee provision, or a statute that grants attorney's fees in a defamation action.

In a nutshell, she demands that GlobalTox pay her fees because Judge Orfield, the Court of Appeal, Judge Schall and the jury were all misled into ruling against her.

In promoting that theory, she relies on three statutes, none of which apply.

First, she cites C.C.P. § 128.6, but that statute never became effective. It is inoperative. By its terms, § 128.6 was to become effective on January 1, 2003, "unless a statute that becomes effective on or before this date extends or deletes the repeal date of Section 128.7." C.C.P. § 128.6(f). "The repeal date of § 128.7 was extended, effective January 1, 2003, by Stats. 2002, c. 491 (S.B. 2009), § 1, and subsequently deleted by Stats. 2005, c. 706, § 9." (Thompson West, 2009 California Code of Civil Procedure, § 128.6 Notes.)

Second, she relies on the anti-SLAPP statute, C.C.P. § 425.16. But she already tried that route, and lost and lost and lost.

Kramer brought an anti-SLAPP motion to strike the Complaint shortly after this action was filed. She lost in the trial court before Judge Orfield, appealed to the Court of Appeal, lost again, sought a writ before the California Supreme Court, and lost yet again.

Her current motion is merely a thinly disguised subterfuge to re-litigate her failed anti-SLAPP motion. The law of the case, and common sense, prevent her from doing so.

Similarly, Kramer repeatedly invoked in pre-trial and post-trial briefing the third statute she cites, Business and Professions Code § 6068. She raised the same arguments she raises now, and they were rejected at every step -- pre-trial, during trial and post-trial. Apparently unable to accept the reality that the jury found that she maliciously defamed Dr. Kelman, she blames opposing counsel and asserts that he suborned perjury. She ignores the voluminous evidence at trial that showed that she acted maliciously.

In sum, there is no contract, statutory or other basis to award Kramer attorney's fees in any amount.

IV. THERE IS NO EVIDENCE TO SUPPORT THE AMOUNT OF ATTORNEY'S FEES SHE SEEKS, OR ANY AMOUNT

Kramer provides absolutely no admissible evidence to support her claim for $472,125 in attorney's fees. There is no declaration under penalty of perjury or detail of fees from either of the law firms that represented her.

Instead, she only submits (i) a one-sentence letter from William J. Brown, her first attorney in this matter, which merely states without any backup or detail that his office

spent exactly 300 hours, at the agreed rate of $400 per hour, for a total of $120,000, and (ii) a one-sentence letter from Lincoln Bandlow, her second attorney, in which he states without any backup or detail that in the 14½ months that his firm represented Kramer, "his office" spent 939 hours at the agreed billing rate of $375 per hour, for a total of $352,125.

This averages to more than $24,000 per month for over a year, a staggering sum considering that this was an extraordinarily simple case involving one cause of action, a total of three days of depositions, no cross-claims and no third-party defendants.

V. CONCLUSION

There is no legal or factual basis for awarding costs or attorney's fees to Kramer, and her motion must be denied.

Dated: February 24, 2009

Respectfully submitted,
SCHEUER & GILLETT
a professional corporation

By _____
Keith Scheuer
Attorney for Plaintiffs
BRUCE J. KELMAN and GLOBALTOX, INC.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4640 Admiralty Way, Suite 402, Marina Del Rey, California 90292. On February 24, 2009, I served the foregoing **PLAINTIFF GLOBALTOX, INC.'S OPPOSITION TO DEFENDANT'S AMENDED MOTION FOR COSTS AND ATTORNEY'S FEES** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Sharon Kramer
2031 Arborwood Place
Escondido, CA 92029

[X] BY MAIL – I caused each such envelope with postage thereon fully prepaid to be placed in the United States mail at Marina Del Rey, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited in the U.S. Postal Service on that same day with postage thereon fully prepaid at Marina Del Rey, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] BY PERSONAL SERVICE – I delivered by hand such envelopes to the offices of the addressees.

[ ] BY FACSIMILE—I sent such document from facsimile machine (310) 301-0035 on February 24, 2009. I certify that said transmission was completed and that all pages were received and that a report was generated by said facsimile machine that confirms the transmission and receipt. I thereafter mailed a copy to the interested party by placing a true copy thereof enclosed in a sealed envelope addressed to the party listed above.

EXECUTED on February 24, 2009 at Marina Del Rey, California.

[X] (STATE) – I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____
Keith Scheuer

PROOF OF SERVICE
1013(a) CCP Revised 7/17/07
State of California, Court of Appeals
Fourth District, Division One
Case No. D054496
Superior Court Case No. GIN044539
Anti-SLAPP Case No. D047758
STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to this action; my business address is 2031 Arborwood Place, Escondido, CA 92029 and my mailing address is the same.

On September 29, 2010, I served the following document (s) described as APPELLANT'S PETITION FOR REHEARING on interested parties in this action by placing the original and a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Keith Scheuer
Scheuer & Gillett Second Floor
4640 Admiralty Way #402 300 South Spring Street
Marina Del Rey, CA 90292 Los Angeles, CA 90013
(310) 577-1170 (310) 301-0035 Fax

San Diego Clerk of the Superior Court, North County
325 S. Melrose Drive
Vista, California 92083

I submitted an electronic copy to the Supreme Court of California.

I deposited such envelopes in the mail in Escondido, California in accordance with the established custom and practice wherein the correspondence is deposited with the US Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing affidavit.

Dated_____ Signed _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT DIVISION ONE

SHARON KRAMER

Defendant and Appellant

v.

BRUCE KELMAN

Plaintiff and Respondent

Court of Appeal No. D054496

Superior Court No: GIN)44539

Errata to amend Petition for Rehearing, Modification of Opinion submitted September 29, 2010

Appellant Properia Persona, upon reviewing her Petition for Rehearing Modification of Opinion submitted on September 29, 2010, found that page 12 was missing from the five copies submitted to the court. She also realized that two words she had hand written into the Petition on page 2 caused her Petition to be over the 8400 word limit. There was a link she meant to note in the Petition that was not.

As such, she made minor adjustments to pages 2 and 3 to accommodate accuracy while not exceeding the 8400 word limit. All parties served have the correct pages. Appellant submits an Errata of pages 2 and 3; and the addition of page 12 missing from copies to the Court.

My apologies to the court for these errors.

September 30, 2010

Sharon Kramer

Sharon Kramer, Appellant Pro Per

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." (Typd.Opn.pp.13) "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)* (Typd.Opn.pp.12)

"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.)*" (Typd.Opn.pp.13)

This case is (*"Kelman v. Kramer"*) D047758 (anti-SLAPP 2006 Opinion), GIN044539, D054496. As evidenced for this court, every day that this court ignores Defendant and Appellant, Sharon ("Kramer's") uncontroverted evidence that the following sentence is perjury, *"I testified the types and amounts of mold in the Kramer house could not have caused the life threatening illnesses she claimed"* as found in Plaintiff and Respondent, Bruce ("Kelman"s) declarations used to establish a fictitious reason for Kramer's malice in this libel case while strategically litigating to silence Kramer of a deceit in science and policy – just like this court ignored the same evidence in it's unpublished anti-SLAPP 2006 Opinion (App.Opn.Brf.Erta, pp.7-12,15,16) [[http://freepdfhosting.com/c74e07c42f.pdf]; and
every day that this court ignores that there is no evidence of Kramer even once been impeached as to her subjective belief that the words *"lay translation"* going to *"two different paper, two different activities"*, and flipping back to "*translation*" as spoken by Kelman on February 18, 2005, as evidenced by Kramer that she considers to be "*altered [his] under oath statements on the witness stand"* used by Kelman to obfuscate and to hide from a jury, who all was involved and how it became the false concept in public policy that

science holds mold does not harm – just like this court ignored the same evidence in its 2006 Opinion; (App.Opn.Brf.Erta,pp.17-23,29); is

one more day that someone, somewhere, in the United States of America is having their life devastated by the false concept that it is scientifically proven mold and their toxins do not harm, being allowed to remain in public policy, medical practices, claims handling practices and the courts;(App.Req.To.Notice.Arizona.NAA.Amicus,pp.11) [http://freepdfhosting.com/7d201e1198.pdf]; because

this court chose not do independent examination of the evidence on appeal in 2010, or of the errors of its 2006 Opinion that all courts relied upon while ignoring the evidence found in Kramer's briefs and exhibits substantiating this litigation is Strategic Litigation Against Public Participation to silence one who has been willing to speak out of the deceit in public policy and in the courts. As such, the finding of this Opinion of libel with actual malice is not supported by evidence on appeal. (App.Repy.To.Court.Query) [http://freepdfhosting.com/5b2c34d0b6.pdf]

Directly stated, this Opinion is aiding interstate insurer unfair advantage over the mold sick and injured in medical treatment denials, claims handling practices and litigation to continue; by its stated choice to not independently examine the evidence of errors in this court's 2006 Opinion.(App.Opn.Brf.Erta,pp.32,33) While stating no errors of trial were found, this court acknowledges the scope of the trial was predicated on the 2006 Opinion which ignored the same facts in evidence this Opinion now does; primarily on the issues of plaintiff perjury, malice, defendant subjective belief in her words and the impact of this litigation on public health. (App.Opn.Brf.Erta,pp.29,30) (App.RpyToCtQuery,pp.19)

Given that circumstance and the fact that the value of promoting stability in decision making in public health policy far outweighs the value of non-reevaluation of this court's prior erred disposition; and litigation has cost the Kramer family well over

MR. VANCE: Your Honor, may I approach. Would you read into the record, please, the highlighted parts of pages 905 and 906 of the trial transcript in that case.
MR. KECLE: Your Honor, I would ask that Dr. Kelman be provided the rest of the transcript under the rule of completeness. He's only been given two pages.
JUDGE VANDYKE: Do you have a copy of the transcript?
MR. KECLE: I do not.
MR. VANCE: Your Honor, I learned about Dr. Kelman just a –
JUDGE VANDYKE: How many pages do you have?
MR. VANCE: I have the entire transcript from pages –
JUDGE VANDYKE: All right. Hand him the transcript.
MR. VANCE: I'd be happy to give it to him, Your Honor.
JUDGE VANDYKE: All right. (App.Opn.Brf.Erta,pp.26)

(Back In The Opinion)

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

Kramer never accused Kelman of lying about being paid by the Manhattan Institute to author the ACOEM paper. Kramer did not even mention ACOEM's until the last sentence. She was writing of the Manhattan Institute paper. The irrefutable evidence is, Kramer's writing accurately states there were two papers and payment was for the Manhattan Institute version itself, not ACOEM's. Her March 2005 writing states, *"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.....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."* (App.Opn.Brf.Erta,pp 32)

PROOF OF SERVICE
1013(a) CCP Revised 7/17/07
State of California, Court of Appeals
Fourth District, Division One
Case No. D054496
Superior Court Case No. GIN044539
Anti-SLAPP Case No. D047758
STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to this action; my business address is 2031 Arborwood Place, Escondido, CA 92029 and my mailing address is the same.

On September 30, 2010, I served the following document (s) described as APPELLANT'S ERRATA PETITION FOR REHEARING Case No. D054409 on interested parties in this action by placing the original and a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Keith Scheuer
Scheuer & Gillett
4640 Admiralty Way #402
Marina Del Rey, CA 90292
(310) 577-1170 (310) 301-0035 Fax

San Diego Clerk of the Superior Court,
North County
325 S. Melrose Drive
Vista, California 92083

I mailed four copies to

Supreme Court of California
300 South Spring Street Second Floor
Los Angeles, CA 90013

I deposited such envelopes in the mail in Escondido, California in accordance with the established custom and practice wherein the correspondence is deposited with the US Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing affidavit.

Dated 9/30/2010 Signed _____