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6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 FOR THE COUNTY OF SAN DIEGO

8 BRUCE KELMAN, GLOBALTOX, INC.,) Case No.: GIN 044539
9 Plaintiffs,)
10 v.) DECLARATION OF WILLIAM J. BROWN
11 SHARON KRAMER, and DOES 1 through 20,) III
12 inclusive,)
13 Defendants.)
14)

15 **DECLARATION OF WILLIAM J. BROWN III**

16
17 I, William J. Brown III, declare:

18 That I am an attorney licensed to practice before all the California courts and am the prior
19 attorney of record for Defendant herein in both this case of Kelman and GlobalTox vs. Kramer, and
20 her mold litigation case of Mercury vs. Kramer. As such, if called as a witness, I could and would
21 competently testify of my own personal knowledge to the following:

22 1. I am aware that in this case, Mr. Kelman's (Plaintiff's) declaration dated
23 September 16, 2005, provided false testimony as to the reason Mrs. Kramer (Defendant) would

1 hold malice for Plaintiff. Plaintiff stated it in his opposition declaration to the anti-SLAPP
2 motion that,

3 “She [Defendant] apparently felt that the remediation work had
4 been inadequately done, and that she and her daughter had suffered
5 life-threatening diseases as a result. I testified that the type and
6 amount of mold in the Kramer house could not have caused the
7 life-threatening illnesses that she claimed.”

8 2. I am aware that Counsel for Plaintiff in this case, Keith Sheurer, (Counsel)
9 provided false reason to the courts as to why Defendant would hold malice for Plaintiff, based on
10 the above noted declaration. In Counsel’s Opposition of Motion to Strike filed September 16,
11 2005, he wrote,

12 “Dr. Kelman testified in a deposition that the type and amount of
13 mold in the Kramer house could not have caused the life-
14 threatening illnesses that Kramer claimed. Apparently furious that
15 the science conflicted with her dreams of a remodeled house,
16 Kramer launched into an obsessive campaign to destroy the
17 reputation of Dr. Kelman and GlobalTox.”

18 3. The above two statements are false. Plaintiff gave no such testimony in the case of
19 Mercury vs. Kramer. Defendant never claimed to have suffered life threatening disease from mold
20 in their home. Her daughter has always had one in the form of cystic fibrosis.

21 4. I did not file a reply brief to the opposition in the trial court. I wrongfully assumed that
22 Judge Orfield would know that the statements made by Plaintiff and his Council (regarding their
23 claim that he was being defamed because Defendant was upset over a negative outcome in that case
24 based on Plaintiff’s expert witness testimony) were false, because Judge Orfield was the presiding
25 judge in that case, and he was aware that the outcome was favorable to Defendant, as the
settlements were put on the record. However, based on Plaintiff’s false testimony and Counsel’s

1 ratification of that testimony, the trial court held that Defendant could have reason to harbor malice
2 for Plaintiff. The anti-SLAPP Motion was denied.

3 5. I did ask that the Appellate Court take judicial notice of the false testimony as to
4 Defendant's supposed reason for malice. The Court declined to take notice, as the information had
5 not been presented to the trial court.

6 6. The Appellate Court proceeded to find that Defendant could have a reason for
7 malice premised on Plaintiff's false declaration testimony that he "*...testified that the type and*
8 *amount of mold in the Kramer house could not have cause the life-threatening illnesses that she*
9 *claimed*" and Council's Reply Brief stating that "*Apparently furious that the science conflicted*
10 *with her dreams of a remodeled house, Kramer launched into an obsessive campaign to destroy*
11 *the reputation of Dr. Kelman and GlobalTox.*"

12 7. Counsel received a copy and was aware no later than June 29, 2006 that Plaintiff's
13 testimony and Counsel's Reply Brief were false with regard to the reason provided to the courts for
14 Defendant's malice through my Appellate Court Request To Take Judicial Notice in which I wrote,
15

16
17 COMES NOW APPELLANT, through her attorney of record, who
18 requests that the Court take judicial notice pursuant to Evidence
Code section 452(d), 455, and 459 of the following documents:

19 1. The deposition transcript of Bruce Kelman from the Mercury v
20 Kramer action, case number GIN024147 at pages 45:20-25, 46: 8-
12, 102, 103 and 107.

21 2. Settlement documents from the Court file of the Mercury v
22 Kramer action dated October, 2003 and indicating court recorded
23 \$450,000 settlement to the Kramers. Honorable Judge Michael P.
Orfield presiding.

1 8. The Appellate Court refused to take judicial notice of the above that proves
2 Plaintiff's declaring of a reason for Defendant's malice was false testimony and Counsel's Reply
3 Brief was false. The Court additionally determined that the "general tone" of Defendant's
4 declarations were a prima facie showing of malice for Plaintiff. They did not claim to verify the
5 validity or lack there of, of her words in the declarations regarding a deceit in science that
6 Plaintiff was attempting to conceal from a jury by altering his under oath statements.
7 Defendant's declarations were used against her as further evidence of malice for Plaintiff
8 because Plaintiff was an expert defense witness that was hired in Defendant's underlying case.

9
10 The Appellate Court found:

11 A state of mine, like malice, "can seldom be proved by
12 direct evidence. It must be inferred from objective or external
13 circumstantial evidence."

14
15 As Kelman concedes, he was a limited public figure and
16 therefore it was necessary for him to show not only that the
17 statement was false but also to show by clear and convincing
18 evidence that Kramer acted with malice.

19
20 Additionally, there was other evidence presented which
21 could support a finding Kramer had a certain animosity against
22 Kelman. Kelman gave an expert opinion in Kramer's lawsuit
23 against her insurance company seeking damages caused by the
24 presence of mold in her home

25
 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.

 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

1 The court's application of a "probability" or "reasonable
2 probability" standard properly reflects the standard stated in
3 section 425.16, subdivision (b)(1). Section 425.16, subdivision
4 (b)(1) states, that an anti-SLAPP motion should not be granted if
5 "the court determines that the plaintiff has established that there is
6 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.

7
8 Further, in determining whether there was a prima facie
9 showing of malice, the trial court also relied on the general tone of
10 Kramer's declarations.

11
12 Initially, we note this lawsuit is not about a conspiracy. This
13 lawsuit was filed by Kelman and GlobalTox alleging one statement
14 in a press release was libelous. Thus, conspiracy issues are not
15 relevant.

16
17 We decline to sift through the record for her exhibits to see if any error
18 might have occurred.

19
20 The court stated there was admissible evidence to show
21 Kramer's statement was false; that Kelman was clarifying his
22 testimony under oath, rather than altering it; and to show Kramer
23 acted with actual malice.

24 9. As further evidence that Defendant held malice for Plaintiff because Plaintiff
25 testified as an expert in Defendant's underlying case, the Appellate Court relied on an angry e-
mail sent to a third party "info@aiha.com" button (AIHA), in which Defendant was complaining
of the false science of ACOEM being taught by Plaintiff to industrial hygienists.

10 10. As an attorney who has had numerous mold related cases, I am aware that
11 Defendant has since been found to be correct regarding her concerns of ACOEM's and Plaintiff's
12 science, and that the AIHA no longer cites ACOEM or Plaintiff among the scientific source

1 references as illustrated in the 2008 AIHA mold guidelines, “Recognition, Evaluation, and Control
2 of Indoor Mold”.

3 11. When defeating the anti-SLAPP motion, Plaintiff and Counsel benefited from the
4 improvidently entered orders of the trial court and the Appellate Court that relied on Plaintiff’s
5 false declaration and Council’s false Reply Brief to the trial court as to the sole reason provided
6 of why Defendant would harbor malice for Plaintiff. Council failed to exercise his affirmative
7 duty after becoming aware of the misrepresentation and to immediately inform the courts and to
8 request that it set aside any orders based upon the misrepresentation. (*73 Cal.App.4th 964,*
9 *B108013, Datig v. Dove Books, Inc.*)¹

10
11 12. I am aware that the August 2008 trial in the case of Kelman and GlobalTox vs.
12 Kramer was premised on the Appellate Court ruling to consider Defendant harbored malice
13 because the Defendant and Plaintiff “had a history” from the case of Mercury vs. Kramer. The
14 false reason for malice that colored the entire case and detracted from Defendant’s legitimate
15 concerns of false science, originated with Plaintiff’s false declaration that he had prior testified

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19 ¹ We therefore find it is necessary to state, explicitly, that although a misrepresentation to the court
20 may have been made negligently, not intentionally, it is still a misrepresentation, and once the
21 attorney realizes that he or she has misled the court, even innocently, he or she has an affirmative
22 duty to immediately inform the court and to request that it set aside any orders based upon such
23 misrepresentation; also counsel should not attempt to benefit from such improvidently entered
24 orders. As the court stated in *Furlong v. White, supra*, an attorney has a duty not only tell the truth
25 in the first place, but a duty to “*aid the court in avoiding error and in determining the cause in
accordance with justice and the established rules of practice.*” (51 Cal.App. at p. 271 (italics
added).) Observance of this duty, we might add, prevents the waste of judicial resources, and the
opposing party’s time and money.

1 “ the type and amount of mold in the Kramer house could not have cause the life-threatening
2 illnesses that she claimed.” and Counsel’s claim of “Apparently furious that the science
3 conflicted with her dreams of a remodeled house, Kramer launched into an obsessive campaign
4 to destroy the reputation of Dr. Kelman and GlobalTox.”

5 13. This false testimony provided to the courts was the catalyst to framing the evidence
6 allowed and not allowed into the trial that Defendant could present in her defense of writing the
7 phrase “altered his under oath statements.”

8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct, and that this declaration is executed this 9th day of September, 2008
10 in Encinitas, California.
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13 William J. Brown III
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