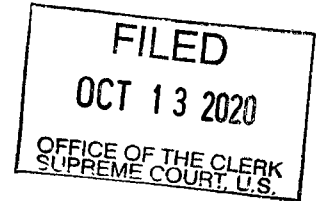


No. 20-541

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

JAMES MACDONALD — PETITIONER

vs.

LOUIS KEMPINSKY, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO  
COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

---

PETITION FOR WRIT OF CERTIORARI

JAMES MACDONALD

(Your Name)

7095 Hollywood Blvd, #327

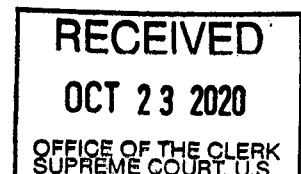
(Address)

Los Angeles, CA, 90028

(City, State, Zip Code)

323-906-7561

(Phone Number)



IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

QUESTION(S) PRESENTED

1) Once again, the California SLAPP LAW has denied due process, denied equal protection, denied access to the Courts, penalized those petitioning for redress and denied even limit rights of discovery to defend against Defendants' SLAPP motions. Plaintiff was denied discovery to prove allegations of material false statements in a verified complaint and to prove Defendants' fraud regarding false statements and other false evidence submitted in the Defendants' SLAPP motions. The SLAPP law has created unequal access to the Courts by allowing the well-connected and wealthy to get away with abuses, while burdening those who petition the Courts for redress with hundreds of thousands of dollars in SLAPP attorney fees. This has created a major public policy perception that you cannot seek justice in California and has been the subject of many articles.

- a. SLAPP law was declared unconstitutional in the States of Washington and Minnesota, as a violation of due process resulting from substantial abuses of the law. This has resulted in unequal protection of due process between the States. The U.S. Supreme Court is asked to intervene and remedy this unequal treatment in California and between the states.
- b. The California law on its face, denies full discovery completely and only allows limited discover if the Court approves it, which is seldom granted,

- c. and denies the Petitioner the right to amend a complaint, even though corrections or other causes of action may make the complaint viable.

MacDonald was twice denied the right to limited discovery in two separate SLAPP hearings to depose the Defendants about their false statements in a verified complaint and their false statements in their declarations in the two SLAPP Motions. Instead, the Court accepted these statements as true and correct and ruled against Plaintiff.

California's SLAPP Law violates the California Constitution and the U.S. Constitution by denying the right to due process. Defendants filed a false verified complaint and filed an unauthorized false petition and then false declarations in the SLAPP to protect those frauds. Plaintiff was denied any rights to defend himself and uncover the fraud in the SLAPP motion hearings.

## LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1) Defendant, Respondent Louis Kempinsky, an Individual

2) Defendant, Respondent Kempinsky Law Office, a Professional Corporation

Counsel for Louis Kempinsky and Kempinsky Law Office, a Professional Corp:  
Kaufman Dolowich & Voluck LLP Phone (310) 755-6511  
Andrew J. Waxler & Courtney Curtis-Ives Fax (310) 525-9720  
11755 Wilshire Boulevard, Suite 2400  
Los Angeles, CA 90025

3) Defendant, Respondent Martin D. Singer, an Individual

4) Defendant, Respondent LVELY & SINGER, a Professional Corporation

5) Defendant, Respondent Andrew Brettler, an Individual

Counsel for Martin D. Singer, LVELY & SINGER, a Professional Corporation,  
and Andrew Brettler:  
Jonathan B. Cole, Esq., Michael McCarthy, Esq., Mark Schaeffer, Esq.  
NEMECEK & COLE  
16255 Ventura Blvd Ste 300  
Encino, CA 91436-2300  
(818) 788 9500, (818) 501 0328 Fax

7) Defendant, Respondent Shereen Arazm, an Individual

8) Defendant, Respondent David Hilty, an Individual

9) Defendant, Respondent OOC Hollywood 1, LLC an Nevada Corporation:

Counsel for Shereen Arazm and David Hilty and OOC Hollywood 1, LLC:  
Gaglione, Dolan & Kaplan Phone (310) 231-1600  
Robert Dolan & Amy Cooper Fax (310) 231-1610  
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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_ ; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_ ; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☒ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is California Appeals Court:

☐ reported at \_\_\_\_\_ ; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

\_\_\_\_\_

## JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_ .

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_ , and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_ .

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_\_ A \_\_\_\_\_ .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from state courts:

☒ The date on which the highest state court decided my case was Jan. 24, 2020, A copy of that decision appears at Appendix A.

☒ No petition for rehearing was timely filed in my case.

☒ A petition for review with the California Supreme Court was thereafter denied on the following date: May 13, 2020 , and a copy of the order denying review appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).



## WHY REVIEW SHOULD BE GRANTED?

The SLAPP law was designed to protect the public from lawsuits, filed to harass and intimidate their opponents. In this case, SLAPP law is being used by the abuser who filed multiple malicious and falsely verified lawsuits only to dismiss the complaints after four long years after the frauds were uncovered in those actions. Having lost in the underlying action, the Defendants have scored big with the SLAPP fees awarded in this suit, while continuing with their filing of false statements, false declarations in the SLAPP motion and false petitions without the client's approval. The Supreme Court of the State of Washington, in 2015 and the Supreme Court of Minnesota in 2017, struck down their SLAPP laws because of abuse by Attorneys and Trial Courts. The US Supreme Court should intervene and strike down the California SLAPP law as a violation of due process and equal protection.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) United States Constitution, First Amendment, the right to petition is guaranteed by the First Amendment to the United States Constitution, which specifically prohibits abridging "the right of the people...to petition the Government for a redress of grievances".

2) United States Constitution, Fourteenth Amendment and Equal Protection. The

14th Amendment affords equal protection. Under the 14th Amendment, 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'.

3) United States Constitution, Seventh Amendment to the United States Constitution. This amendment codifies the right to a jury trial in certain civil cases.

4) United States Supreme Court supervisory powers over State Courts.

5) California SLAPP Law, California Civil Procedure 425.16.

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that

determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) 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, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on

noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, “complaint” includes “cross-complaint” and “petition,” “plaintiff” includes “cross-complainant” and “petitioner,” and “defendant” includes “cross-defendant” and “respondent.”

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j) (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

## **FACTUAL AND PROCEDURAL BACKGROUND:**

MacDonald filed a lawsuit after he was dismissed and was prevailing party from the underling actions. MacDonald sued for malicious prosecution, abuse of process and conspiracy to commit fraud on the court by filing numerous false documents with the court, include false statements in a verified complaint and filing a false petition without the authority of the client. Defendants then used false declarations in the SLAPP motion, resulting in this petition.

## LEGAL DISCUSSION

- 1) SLAPP laws have been declared unconstitutional, as a violation of due process, by the State of Washington and Minnesota. The state Supreme Courts of Washington (*Davis v Cox, NO. 90233-0, May 28 2015*) and Minnesota Supreme Court (*Leiendecker, et al, v. Asian Women United of Minnesota, et al., May 24, 2017*) have declared their SLAPP laws as un-Constitutional, as a violation of due process.
- 2) Plaintiff was denied discovery twice at the trial court and denied any right to prove his claims that Defendants filed false verified complaints and also filed false lawsuits without the permission of the client. The alleged Client has provided declarations stating that they did not authorize the Attorney to file the petition nor send the original letter and draft petition, but the Attorney files a declaration in the SLAPP motion claiming both as “True and Correct” (a felony violation of CPC §132, §134, §115, §118), which is a fraud on the court, is the Attorney’s criminal actions protected under California’s SLAPP Law and is a fee award valid?
- 3) MacDonald’s Expert Witness in a related case, former California Supreme Court Justice, Cruz Reynoso, reviewed the documents in the related case. Justice Reynoso states that Defendants continuing to assert documents as “TRUE and CORRECT” in future hearings is unethical and unlawful. In this case, the Defendants continue to assert false appearance by an attorney as “TRUE AND CORRECT”.

- 4) Does client and an attorney who files material false statements in a verified complaint have those actions protected under California's SLAPP Law (CCP §425.16)? According to this ruling, yes. There were two SLAPP motions. While the record was incomplete one of the hearings, the record was complete on the second. The Appeals Court errors in its citation of the record. MacDonald's petition stated that the verified complaint was a fraud on the court and specified the false statements made in the complaint. This is not a protected activity under SLAPP and is not a lawful petitioning activity and the Supreme Court should not allow the SLAPP law to deny access to the courts, giving attorneys and their clients immunity from malicious prosecution and abuse of process for their frauds on the court.
- 5) MacDonald had specified the entire court docket in his original designation of record. The clerk misfiled the transcript multiple times and omitted numerous documents and created an incorrect index. In addition, there were seven duplicate volumes as part of the transcript with 20 volume in total. This resulted in confusion by MacDonald as to the completeness of the record. When MacDonald discovered documents were missing, he obtained copies of the missing documents and MacDonald motioned to the Appeals Court to correct the transcript for the omitted documents but the Appeals Court denied the correction of the record. The Supreme Court favors arguments based on the merits of a case, not Trial Court Clerk errors.

6) MacDonald elects to use the AOB rather than the Opinion. Several points in the Second Appellate District's Opinion misstate MacDonald's position and, therefore, set the stage for a flawed conclusion. Because the result is premised on arguments MacDonald did not make or otherwise state that MacDonald forfeited arguments, and this case is contrary to the laws of State of California, a review is required.

### **ERRORS IN THE OPINION**

The OPINION STATEMENT fails to mention that the Appeals Court denied MacDonald's motion to fix the record for the omitted items. MacDonald correctly designated the documents in his original Designation of Record. Because of multiple filing errors by the Trial Court Clerk, the record was incomplete and had an incorrect index resulting in MacDonald mistakenly believing the record was complete. When MacDonald discovered the error, he obtained the missing documents so the Clerk did not have to augment the record for a fifth time and MacDonald motioned to correct the record. MacDonald's motion was denied.

The OPINION STATEMENT regarding the record is incorrect since the missing documents only affected one of the two SLAPP motions. The first SLAPP motion had a complete record.

The OPINION STATEMENT argues that the filing of a verified complaint with false material statements, as alleged in MacDonald's complaints, is a protected activity. This is a fraud on the court and thus is unprotected.

The OPINION STATEMENT does not address Justice Reynoso's expert witness declaration that the Attorney's asserting false appearance as true and correct is a crime. The awarding SLAPP Fees based on fraud is unconstitutional and creates the public perception that only the rich and well connected can have a trial in California.

The OPINION STATEMENT does not address the argument made by MacDonald that one of the impossibly logic arguments is that a verified complaint with material and knowingly false statements made to harass and made to in order to maintain otherwise untenable claims is protected by SLAPP. Instead, the Appeals Courts states that the filing of a false verified petition is protected by SLAPP and after it is discovered and the case is dismissed, MacDonald has no remedy for the malicious prosecution and abuse of process. This effectively give attorneys and rich clients unlimited power to use the Courts in an unlawful way to vex and harass.

There is a GROSS MISCARRIAGE OF JUSTICE in this case. Defendants filed a false VERIFIED complaint and also filed a lawsuit without the permission of the client. The Defendants then offered false evidence as TRUE AND CORRECT in multiple hearings including these SLAPP motions, committing crime after crime against MacDonald and the Court:

Appealability when there is a gross miscarriage of justice. In Article VI, section 13, the California Constitution provides: "*No judgment shall be set aside, or new trial granted*, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or *for any error as to any matter of procedure*, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of



justice.” This provision is derived from former Article VI, section 4½, Constitution. (See *People v. Cahill* (1993) 5 Cal.4th 478, 488.) Under this provision, determining whether a procedural error has resulted in a miscarriage of justice in most instances “will depend upon an appellate court’s evaluation of the effect of the error in light of the evidence at trial . . .” (*Id.* at p. 491.) In some instances, however, an error may result in a miscarriage of justice regardless of the strength of the evidence. (*Ibid.*) In this latter category are certain structural errors that deny the defendant a fundamental constitutional right or otherwise do not lend themselves to ordinary harmless error analysis. (*Id.* at p. 493)

The U.S. Supreme Court should review this case since due process, equal access, discovery, an unabridged right to petition the courts, and a fair trial of the evidence used in a SLAPP motion are being violated by the California SLAPP law.

The fraud uncovered by MacDonald, and despite MacDonald’s expert witness, a former California Supreme Court Justice, Cruz Reynoso, who provided the following expert opinion relevant to both the SLAPP and Extrinsic Fraud Motions, [*CT:Vol.12-p.2828-2831*]:

“With respect to the issue of whether it is unethical and unlawful for counsel to file an action without the client’s consent, I am of the opinion that such a filing is unethical, is a crime and is not a constitutionally protected activity. I note that two declarants, Mike Malin and Lonnie Moore declare that counsel has filed an action without consent of the client. I am also of the opinion that it is unethical and unlawful for an attorney to continue to falsely assert he had authority to file the action in subsequent hearings on the matter, when client did not grant consent. ”

"A judgment which is void may be attacked directly or collaterally either by parties or strangers - Pusey, Estate of, 57 Cal Dec, 467,181 Pac. 648." See New Complete Digest of the Decisions of the Supreme Courts, Volume 1, Page 1028.

"The fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court." *Id.* at 1338 (citing to *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997 (1944)).

"Fraud upon the court" has been defined to "embrace that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Kenner v. C.I.R.*, 387 F.3d 689 (1968); 7 *Moore's Federal Practice*, 2d ed., p. 512, ¶ 60.23. The 7th Circuit further stated "a decision produced by fraud upon the court is not in essence a decision at all, and never becomes final." It is also clear and well-settled law that any attempt to commit "fraud upon the court" vitiates the entire proceeding.

Fraud on the court included material false statements in a verified complaint. There is no statute of limitations for bringing a fraud upon the court claim. *Hazel-Atlas*, 322 U.S. at 244. "A decision produced by fraud on the court is not in essence a decision at all and never becomes final." *Kenner v. Comm'r of Internal Revenue*, 387 F.2d 689, 691 (7th Cir. 1968).

Sixth Circuit, *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993) This standard recognizes that fraud upon the court, unlike perjury, need not be based on affirmative misstatements, but may be based on nondisclosures, and need not be based on proof of subjective knowledge of falsity, but may be founded on a showing of willful blindness or reckless disregard for the truth.

The follow additional penal codes have been violated in this case and the underlying case resulting in Plaintiff's abuse of process and malicious prosecution claims:

CPC § 132 – OFFERING FALSE EVIDENCE Every person who upon any trial, proceeding, inquiry, or investigation whatever, authorized or permitted by law, offers in evidence, as genuine or true, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged or fraudulently altered or ante-dated, is guilty of felony.

CPC § 134 – PREPARING FALSE EVIDENCE Every person guilty of preparing any false or ante-dated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony.

CBPC 6128(a) ATTORNEY DECEIT: California law prohibiting attorneys from deceiving any party, a misdemeanor.

CPC § 115 – FILING A FALSE PETITION (a) Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony.

CBPC § 6104 FALSE APPEARANCE - Malin v. Singer violates California law prohibiting attorneys from falsely appearing for a client. "anyone who [c]orruptly or wilfully and without authority [appears] as [an] attorney for a party to an action or proceeding [may be subject to] disbarment or suspension." "An attorney may not even appear in a cause of action without some form of authority from the party in whose behalf he appears." Loftberg v. Aetna Cas. & Sur. Co., 264 Cal. App. 2d 306, 308, 70 Cal. Rptr. 269, 270 (1968).

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## CONCLUSION

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ James MacDonald

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James MacDonald, Plaintiff, Petitioner  
Date: October 13, 2020