

No.

IN THE
Supreme Court of the United States

MICHAEL R. SOLOMON,

Petitioner,

v.

DESERT HEALTHCARE DISTRICT, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

Introductory Statement:

SOLOMON sued the Desert Healthcare District, its CEO KATHY GRECO, and one of its Board members, KAY HAZEN, for obtaining and publishing his confidential medical records, including, but not limited to, a cat scan of his brain without authorization. The lower courts have held obtaining and publishing Petitioner's confidential medical records is protected activity under the Free Speech and Freedom of the Press rights of the First Amendment to the United States Constitution. The Lower Courts summarily dismissed his case under a SLAPP Motion.

1. Does the "newsworthy" privilege permit the publication of stolen private and confidential medical records?

2. Is the publication of stolen private and confidential medical records protected speech under the First Amendment of the United States Constitution?

3. Can the allegations in Petitioner's Complaint and the evidence established in Petitioner's Declarations establishing intrusion into Petitioner's privacy be ignored in granting Defendant's SLAPP Motion when Petitioner is denied his constitutional right to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution by being denied a trial by jury

under Article 1, Section 16 of the California Constitution?

4. Can a SLAPP Motion be granted when the facts pled in the Complaint state sufficient facts and the Declarations provide sufficient admissible evidence to establish a cause of action under numerous causes of action not pled in the Complaint without denying Petitioner his constitutional right to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution by Petitioner his constitutional right to a trial by jury under Article 1, Section 16 of the California Constitution?

PARTIES TO PROCEEDING

Petitioner:

Michael Robert Solomon, M.D.

Respondents:

Desert Healthcare District

Kay Hazen

Kathy Greco

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Petitioner Michael Robert Solomon respectfully petitions for a Writ of Certiorari to review the Order Denying Review issued by the Supreme Court of California.

OPINIONS BELOW

The Supreme Court of California entered an order denying review on February 28, 2018 (Pet. Appendix A-1). The California Court of Appeal for the Fourth District, Division Two issued an unpublished opinion on December 8, 2017 (Pet. Appendix A-2 – A-23). The Trial Judge David Chapman of the Superior Court of California, County of Riverside, Desert District issued an unpublished opinion on November 30, 2015 (Pet. Appendix A-24 – A-39).

JURISDICTION

The Supreme Court of California entered an order denying review on February 28, 2018. (Pet. Appendix A-1). This Court has jurisdiction to grant Certiorari under 28 U.S.C. §1257 to Review the final judgment of the highest court in the State of California denying Petitioner a title, right, privilege or immunity specially set up or claimed under the United States Constitution and because the validity of the state SLAPP statute is drawn in question on the ground of being repugnant to the United States Constitution and laws of the United States.

PROCEEDINGS BELOW

Petitioner Solomon sued Respondents Desert Healthcare District, its CEO, Kathy Greco, and one of its Board Members, Kay Hazen, for the unauthorized theft and publication of his personal medical records, including, but not limited to, a cat scan of his brain.

Respondents filed a SLAPP motion contending their activities of stealing and publishing Petitioner's confidential and private medical records was protected activity under the newsworthy privilege of the First Amendment to the United States Constitution. The Trial Court Judge agreed and granted the SLAPP motion. Petitioner timely appealed. The California Court of Appeal for the Fourth District, Division Two, affirmed the decision of the Trial Court. Petitioner timely appealed to the California Supreme Court, which denied Petitioner's Petition for Review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, First Amendment.
2. United States Constitution, Fifth Amendment.
3. United States Constitution, Fourteenth Amendment.
4. California Constitution, Article 1, Section 1.

5. California Constitution, Article 1, Section 16.
6. California Code of Civil Procedure, 425.16.
7. California Code of Civil Procedure, 425.16 (b)(1).

REASONS FOR REVIEW

Under current law, the publication of stolen and private medical records is afforded protection under the Free Speech provisions of the First Amendment of the United States Constitution.

Since the First Amendment was ratified on December 15, 1791, the advent of electronic medical records and the ability of anybody to steal and publish confidential and private medical records has changed the First Amendment from a shield protecting a persons right to free speech into a sword for blackmail, extortion, and public humiliation of sick people. The special confidential status of private medical records requires this Court to revisit this issue and exclude the **publication** of private and confidential medical records from First Amendment protection.

In addition, the validity of the California SLAPP statute is repugnant to the Constitution and laws of the United States because it deprives citizens of a title, right, privilege or immunity that is specially set up or claimed under the Constitution. The California SLAPP statute deprives citizens of due process and equal

protection under the Fifth and Fourteenth Amendments to the United States Constitution by denying citizens their right to trial by jury granted under Article 1, Section 16 of the California Constitution.

STANDARD OF REVIEW

The case of *Martin v. Inland Empire Utilities Agency*, 198 Cal. App. 4th 611, 624, 130 Cal. Rptr. 3d 410 (2011) held “A ruling on a special motion to strike under *California Code of Civil Procedure Section 425* is reviewed *de novo*.”

SYNOPSIS OF THE CASE

Respondents HAZEN and GRECO formulated a plan to steal over one billion dollars from the taxpayers of the Desert Healthcare District. They devised a scheme to give taxpayer funds of the District to a private foundation so the private foundation could distribute District taxpayer funds to private organizations employing Defendant HAZEN but only providing services to residents living outside the boundaries of the District.

When Petitioner objected to these illegal expenditures, Respondents formed a conspiracy to illegally obtain and illegally disclose the confidential medical information of Petitioner “to create a question in the mind of the public and electorate about the mental competence of Petitioner”. Respondents defend this unlawful intrusion into Petitioner’s confidential

medical information by claiming Petitioner's confidential medical information is "newsworthy" and therefore the Respondents have a right under the First Amendment of the United States Constitution to obtain and *publish* Petitioner's confidential and private medical information that were illegally obtained.

STATEMENT OF THE CASE

Petitioner's Registered Domestic Partner disclosed to an employee of the DISTRICT that Petitioner **appeared to have** suffered a stroke and was being taken to Desert Regional Medical Center. (C.T. 54:27 - 55:4; 91:1 - 91: 92:1). When Petitioner was admitted to Desert Regional Medical Center, Defendant Greco misused her position with the District to obtain the confidential healthcare information of Petitioner from Petitioner's personal physician (Dr. Sidiqui); Desert Regional Medical Center staff; and Desert Regional Medical Center medical records (C.T. 92:19 - 95:19; 99:10 - 103:21) including a Cat Scan of Petitioner's brain (99:25 - 100:6)!

Immediately after her receipt of this confidential information, Defendant GRECO *published* it to Kay Hazen, Mark Mathews, Glenn Grayman, M.D., and William Grimm, M.D., other members of the District staff, and attorneys Best, Best, and Krieger.

Petitioner filed suit for damages against Respondents for obtaining and *publishing* Petitioner's

confidential and private medical records. Respondents responded with a SLAPP motion contending that they had a right to obtain and ***publish*** Petitioner's confidential medical information without his consent because he was a public figure and his personal health information was "newsworthy" (C.T. 43:8 - 44:28).

The Trial Court granted Respondents SLAPP motion, finding that the confidential medical records of Petitioner are not protected because they are "newsworthy" (C.T. 147 - 148; 152 - 153). There are no reported cases which have addressed the specific question of whether the unauthorized publication or communication of confidential medical records is protected by the "newsworthy" exemption.

However, this action was not limited to the unauthorized publication or communication of his confidential medical records. Petitioner also alleged that Respondents intruded into his right to privacy by ***illegally*** obtaining without authorization his confidential medical records (C.T. 92:19 - 95:19; 99:10 - 103:21). In addition, at the SLAPP Motion, Petitioner introduced testimony that Defendant GRECO ***admitted*** to Petitioner that she obtained his confidential medical records without his authorization (C.T. 102:10 - 102:25).

The Trial Court applied the newsworthy privilege and granted Respondents SLAPP motion (C.T. 147 - 148; 152 - 153). The Trial Court ruled the newsworthy privilege took precedence over the Petitioner's right to confidentiality of his medical

records (C.T. 147 - 148; 152 - 153). The Court of Appeal affirmed. The California Supreme Court denied review. All Lower Courts ignored Petitioner's evidence of the theft of his medical records by the Respondents.

**THE PUBLICATION OF CONFIDENTIAL
MEDICAL RECORDS SHOULD NOT BE
PROTECTED FREE SPEECH AND
THE NEWSWORTHY PRIVILEGE SHOULD
NOT SUPERCEDE OR PRE-EMPT THE
RIGHT TO THE CONFIDENTIALITY OF
MEDICAL RECORDS AND INFORMATION**

In 1998, before the explosion of information available on the Internet and the adoption of electronic medical records, the California Supreme Court issued its opinion in *Schulman v. Group W. Productions, Inc.*, 18 Cal. 4th 200, 74 Cal. Rptr. 2d 843 (1998). In *Schulman*, the California Supreme Court struggled with whether the broadcast of a television show showing emergency medical treatment provided to the patient violated the patient's right to privacy. This Court ultimately held that activity of broadcasting the medical treatment was protected by the newsworthy privilege afforded by the First Amendment, but the act of recording the private emergency medical treatment intruded into the patients right to privacy under the Article 1, Section 1 of the California Constitution and was not protected activity.

This Court should grant this Petition and review the ruling of the California Supreme Court in the *Schulman* case because it is no longer current. The

development of current technology requires confidential medical records to be stored in electronic form, and it is **impossible** to protect electronic medical records from theft. While the records thief may be liable for intrusion, organizations may obtain stolen confidential records and publish them with impunity under the rule of the *Schulman* case. This Court should consider whether the knowing and intentional publication of stolen confidential medical records is still protected free speech under the First Amendment to the United States Constitution.

Petitioner's private health care information should be afforded a much higher level of protection. Publication of records such as the results of a CT Scan of Petitioner's brain are completely unreasonable publicity and unreasonably placed Petitioner in a false light.

In the case of *Heda v. Superior Court*, 225 Cal. App. 3d 525, 275 Cal. Rptr. 136 (1990), the Court of Appeal for the First District explains the highly privileged and confidential nature of medical records. The Petitioner sued the defendant for medical malpractice, but Petitioner was concerned the defendant might die because he was in poor health. Therefore, Petitioner was seeking trial preference, and needed the medical records of the defendant to establish her eligibility for an early trial date. The trial court granted Petitioner's motion to compel production, but the appellate court issued a Writ of Mandate, holding:

A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected..." (*Board of Medical Quality Assurance v. Gherardini, supra*, 93 Cal. App. 3d at 678, 156 Cal. Rptr. 55.) "The information that may be recorded in a doctor's files is broadranging. This chronology of ailments and treatment is potentially sensitive. Patients may disclose highly personal details of lifestyle and information concerning sources of stress and anxiety. These are matters of great sensitivity going to the core of the concerns for the privacy of information about an individual. (*Wood v. Superior Court, supra*, 166 Cal. App. 3d. At p. 1147, 212 Cal. Rptr. 811.) These sensitive matters need not be disclosed to assist a Petitioner in securing trial preference.

Heda v. Superior Court, 225 Cal. App. 3d 525, 529, 275 Cal. Rptr. 136 (1990).

In the *Heda* case, the Court recognized the special nature of confidential medical records. The Court held the right to confidentiality was superior to the right of parties to litigation to obtain relevant and admissible evidence. The Court thus granted the highest level of protection it was able to grant to confidential medical records.

In the case of *Pettus v. Cole*, 49 Cal. App. 4th 402, 57 Cal. Rptr. 46 (1996), the Court analyzed the rights and obligations of an employer obtaining an employee's confidential medical information. In *Pettus*, Petitioner sought paid short-term disability leave from his employer, Du Pont. Petitioner was required to be examined by physicians. The physicians, without the authorization of Petitioner, turned over Petitioner's private medical information to his employer, Du Pont. The Court analyzed the California Medical Information Act:

The basic scheme of the CMIA, as amended in 1981, is that a provider of health care must not disclose medical information without a written authorization from the patient. Section 56.10, subdivision (a) provides that: "No provider of health care shall disclose **medical** information regarding a patient of the provider without first obtaining an authorization, except as provided in subdivision (b) or (c). As our Supreme Court has observed, "Considered together, the statutory provisions require a health care provider to hold confidential a patient's **medical** information unless the information falls under one of several exceptions to the act. (*Heller v. Norcal Mutual Insurance Company*, *supra*, 8 Cal. 4th at p. 38, 32 Cal. Rptr. 200).

Pettus v. Cole, 49 Cal. App. 4th 402, 425-426, 57 Cal. Rptr. 46, (1996)

The Court held that without a written authorization, the physicians had no right to disclose confidential medical information of Petitioner.

The Court then analyzed the liability of the employer, Du Pont, for violating the CMIA by using confidential medical information of Petitioner obtained without the permission of the Petitioner:

We begin with an examination of Pettus's claim that Du Pont violated the CMIA--more specifically, the provisions relating to use and disclosure of **medical** information by employers (§56.20 et. seq.) by misusing information it obtained from Drs. Cole and Unger to terminate his employment. In relevant part, section 56.20, subdivision (c) provides: "No employer shall use, disclose, or knowingly permit its employees to use or disclose medical information which the employer possesses pertaining to its employees without the patient having first signed an authorization under Section 56.11

Pettus v. Cole, 49 Cal. App. 4th 402, 451, 57 Cal. Rptr. 46 (1996)

Under the rationale of these cases, confidential medical records should not be covered by newsworthy privilege.

The Lower Courts in this case held an individual has no right to keep his confidential medical records from being published if they are “newsworthy” (C.T. 152 - 153). This is a major erosion of the right to privacy of medical records enacted by both Federal and California legislation. The right to have medical records remain private is more important than the First Amendment Right to publish information that is “newsworthy”.

Petitioner urges this Court to consider whether the “newsworthy” privilege permits the publication of stolen confidential medical records in the modern age of electronic records and everyone one with a computer and a face book or twitter account being a reporter with the ability to publish it.

This issue that goes far beyond this case. Every day, newspapers are always reporting the theft of the electronic medical records and payment of ransom to the perpetrators of the invasion to prevent publication. Therefore, the only way to protect citizens from this form of attack is to make the person who publishes the stolen information he or she or it knows is confidential medical information that was not authorized for release by the patient as responsible as the thief. Publication of confidential and private medical information should not be protected under the newsworthy exception to the First Amendment even if

the publisher had no role in obtaining the personal and confidential medical information.

Without this protection, there is open season on the confidential medical information of government officials and celebrities as well as average citizens. Patients are entitled to privacy when suffering from serious and life threatening medical conditions, and a blanket newsworthy privilege allows patients to be victimized by a cruel and uncaring press just seeking the sale of newspapers. While the intruder may be liable for the invasion of the privacy of a patient, it is indefensible public policy to allow the person or entity who publishes private and confidential medical information with full knowledge that it was unlawfully obtained to completely escape liability for violating the privacy of medical records just because they may be newsworthy.

While the California Supreme Court granted this precise privilege in the *Schulman* case, the people who published the emergency medical communications between the helicopter emergency nurse and the patient did not steal any information and lacked the same conscious knowledge of wrongdoing that Respondents possessed and the same evil motion that Respondents possessed. Petitioner urges this Court grant this Petition for Review and settle this important question of law by analyzing and considering whether the newsworthy privilege under the First Amendment still authorizes the publication of confidential medical records.

**YOUR PETITIONER HAS BEEN DEPRIVED
OF DUE PROCESS AND EQUAL PROTECTION
BY EXPANDING THE “NEWSWORTHINESS”
PRIVILEGE TO PROTECT THE ACT OF
INTRUSION TO OBTAIN CONFIDENTIAL
MEDICAL RECORDS WITHOUT
AUTHORIZATION AND THEREBY DENIED
Petitioner’S RIGHT TO A JURY TRIAL UNDER
THE CALIFORNIA CONSTITUTION AND HIS
RIGHT TO DUE PROCESS AND EQUAL
PROTECTION UNDER THE FIFTH AND
FOURTEENTH AMENDMENTS TO THE U. S.
CONSTITUTION?**

The decision of the Trial Court stating that Petitioner offered “little evidence of the private information obtained and disclosed” (C.T. E 065066, 153, last paragraph) is in itself a sufficient factual showing to defeat Respondent’s SLAPP motion. All that is required to defeat a SLAPP motion is **some** admissible evidence! The admissible admission of wrongdoing by the primary wrongdoer is more than some evidence!

This decision is in conflict with all the published opinions in California. This result is possible because the statute itself does not state that “little evidence” is a sufficient factual showing to defeat a SLAPP motion. All of the published opinions in California hold the Lower Courts are prohibited from weighing evidence in determining a SLAPP motion because a weighing of evidence violates Petitioner’s constitutional rights. All of the published opinions in California hold that when

Petitioner presents evidence to support a prima facia case, the SLAPP motion must be denied to prevent a violation of the Petitioner's rights under the Fifth and Fourteenth Amendments. However, the statute itself does not so provide.

In this case, the Lower Courts weighed the evidence by classifying it as little evidence. This cannot justify granting a SLAPP motion.

Judge Chapman ruled:

Plaintiff offers little evidence of the private information obtained and disclosed. Plaintiff states that Greco admitted to me that she obtained my personal and confidential medical records from Dr. Siddiqi, (Solomon Dec ¶ 13.). It is unclear who Dr. Siddiqi is and whether the records obtained from him are records of the district. However, even if those records are those of the District, those records are not protected from disclosure because the District is a local agency as defined by Government Code Section 6252(a) and, therefore, not a covered agency under Civil Code section 1798.3.

C.T. E065066 pg. 143, last paragraph.

During oral argument, Dr. Siddiqi was identified as Petitioner's attending physician (R.T. E065066, 1:17 - 1:19).

The statement Petitioner offered "little evidence of the private information obtained and disclosed" (C.T. E065066, 153, last paragraph) is in itself a sufficient factual showing to defeat Respondent's SLAPP motion. All that is required to defeat a SLAPP motion under all published California opinions is **"little"** admissible evidence! The admissible admission of wrongdoing introduced by Petitioner is more than **"little"** evidence!

The Court of Appeal held, on page 14, that:

In an effort to characterize his complaint as based on non-speech conduct, Solomon now contends the gravamen of his complaint is not the *disclosure* of his medical information, but rather Greco's act of *obtaining* the information from his physician. We are not persuaded. The complaint alleges the disclosure of his medical information is what caused him severe emotional distress and was intended to secure his resignation. Additionally, there is no Information Practices Act claim without a disclosure.

Court of Appeal Opinion, pages 14 - 15

In arriving at this conclusion, the Lower Courts disregarded the following allegations contained in Petitioner's Complaint:

20. On August 4, 2014, as soon as your Plaintiff was admitted to Desert Regional Medical Center, Defendant Kathy Greco misused her position as Chief Executive Officer of the Desert Healthcare District, the Lessor and Landlord of Tenant at Desert Regional Medical Center, to obtain confidential and privileged personal healthcare information about Plaintiff MICHAEL R. SOLOMON, M.D. from Defendant Desert Healthcare District Staff and Tenet Healthcare and its employees and physicians. Immediately upon receipt of this confidential and privileged personal healthcare information about Plaintiff MICHAEL R. SOLOMON, M.D., Defendant KATHY GRECO contacted Kay Hazen, Mark Mathews, Glenn Grayman, M.D., and William Grimm, M.D., along with members of the Desert Healthcare staff, and Best, Best, and Krieger and disclosed the confidential and privileged personal healthcare information about Plaintiff MICHAEL R. SOLOMON, M.D. that she had obtained from Defendant Desert Healthcare District staff, Tenet Healthcare and the

Desert Regional Medical Center and its physicians.

C.T. Case #E065066 6:28 - 7:16

In addition, the Lower Courts disregarded the precise language in the Declaration of Michael Solomon submitted as evidence and reading as follows:

13. On October 6, 2014, I had a meeting in my capacity as President of the Desert Healthcare District with Defendant KATHY GRECO to review her performance as C.E.O. During that meeting, we discussed her wrongful act of obtaining and disclosing my personal and confidential medical records. During the meeting, Defendant KATHY GRECO admitted to me that she had obtained my personal and confidential medical records from Dr. Siddiqi. In fact, she said it was Dr. Siddiqi's fault because he provided my personal and confidential medical records in response to her request. During the same meeting, she gave the following additional responses:

"HIPPA doesn't apply to this"

"It was Samantha's fault"

"It was Amiee's fault"

"It was Dr. Siddiqi's fault"

"I had to tell Glen in case there was an emergency because he is second in command"

“You’re not being fair. I only did it out of love”

“I stopped after Amiee asked me to respect your privacy”

“I would do the same thing for anyone who works here”

14. During the meeting, I made handwritten written notes of the responses of Defendant KATHY GRECO to the various subjects of the evaluation. When I arrived home immediately after the meeting, I transcribed the notes into my computer. Attached hereto, marked Exhibit A, and incorporated herein by reference is a copy of my notes about what Defendant KATHY GRECO admitted to me during our meeting about her disclosure of my personal and private medical information. The form is redacted to exclude all other notes because they concern private personnel issues that are not relevant to this case.”

C.T. Case #E065066, 102:5 - 103:8

All published opinions in California prohibit the Lower Courts from weighing the evidence when determining SLAPP motions. All of the published California opinions hold that weighing the evidence deprives Petitioner of his right to a trial by jury in violation of Article 1, Section 16 of the California Constitution and his due process rights and equal

protection rights under the Fifth and Fourteenth Amendments of the United States Constitution. However, the statute itself does not prohibit the Trial Court from weighing the evidence.

This issue was addressed in the case of *Hung v. Wang*, 8 Cal. App. 4th 908 (1992). Although the *Hung* Court analyzed *California Civil Code Section 1714.10*, the legislature adopted the same standard in the SLAPP motion statute. The Court of Appeal held:

As we construe section 1714.10, the trial court may not make findings as to the existence of facts based on a weighing of competing declarations. Whether or not the evidence is in conflict, if the petitioner has presented a sufficient pleading and has presented evidence showing that a prima facie case will be established at trial, the trial court must grant the petition. This test meets the high standard required under Walker to avoid infringement of the right to jury trial.

Hung v. Wang, 8 Cal. App. 4th 908 (1992)

In the case of *McGarry v. University of San Diego*, 154 Cal. App. 4th 97 (2007), the Court of Appeal held:

In considering whether a Plaintiff has met those evidentiary burdens, the court

must consider the pleadings and the evidence submitted by the parties. (§ 425.16, subd. (b)(1), (2).) However, the court cannot weigh the evidence (*Looney v. Superior Court* (1993) 16 Cal. App.4th 521, 537–538 [20 Cal. Rptr. 2d 182]) but instead must simply determine whether the Plaintiff's evidence would, if credited, be sufficient to meet the burden of proof. (*Wilcox v. Superior Court*, supra, 27 Cal.App.4th at pp. 823–825 [standard for assessing evidence is analogous to standard applicable to motions for nonsuit or directed verdict].)

McGarry v. University of San Diego, 154 Cal. App. 4th 97 (2007)

In the case of *Wilcox v. Superior Court*, 27 Cal. App. 4th 809 (1994), the Court held:

we believe the test formulated in *Hung v. Wang*, supra, for determining a "reasonable probability" should apply to motions under section 425.16.

Wilcox v. Superior Court, 27 Cal. App. 4th 809 (1994)

A SLAPP motion is filed before the opportunity for discovery or the opportunity to refine the pleadings or the theories of recovery. At a minimum, Petitioner offered sufficient evidence in the form of statements of admission from Respondent GRECO to sustain

Petitioner's burden of proof to show Respondents intruded into Petitioner's private records, thereby violating Petitioner's right to privacy under Article 1, Section 1 of the California Constitution and his right to due process and equal protection under the Fifth and Fourteenth Amendments to the U. S. Constitution. The California Supreme Court has made it clear that the intrusion into Petitioner's privacy is not a protected activity. Petitioner proved intrusion and violation of his right to privacy under Article 1, Section 1 of the California Constitution and the SLAPP motion should have been denied.

In this case, crooked county politicians exercised undue influence over the judiciary to ignore precedent and follow only the provisions stated in the statute to silence the Petitioner, thereby depriving him of his right to due process under the Fifth Amendment to the United States Constitution and the right to equal protection under the Fourteenth Amendment to the United States Constitution. This can all be prevented by denying First Amendment protection to the publication of private and confidential medical records. In addition, the denial of due process under the Fifth Amendment and equal protection under the Fourteenth Amendment also renders the statute itself (*California Code of Civil Procedure Section 425.16*) unconstitutional because it violates the Petitioner's constitutional rights to due process and equal protection.

A SLAPP MOTION IS NOT LIMITED SOLELY TO THE THEORIES PLED IN THE COMPLAINT, BUT MUST INCLUDE OTHER THEORIES OF RECOVERY NOT PLED IN THE COMPLAINT WHEN THE OTHER THEORY OF RECOVERY IS SUPPORTED BY THE FACTS ALLEGED IN THE COMPLAINT AND THE EVIDENCE PRESENTED AT THE SLAPP HEARING, PETITIONER'S COMPLAINT AND HIS SUPPORTING EVIDENCE DEMONSTRATED A PROBABILITY THAT HE COULD RECOVER ON HIS CLAIM AND GRANTING THE SLAPP MOTION DENIES PETITIONER'S RIGHT TO A JURY TRIAL UNDER THE CALIFORNIA CONSTITUTION AND HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The facts pled in the Complaint and the admissible evidence provided in the Declarations established a factual basis for the following causes of action:

1. Violation of Petitioner's right to privacy under Article 1, Section 1 of the California State Constitution;

2. Taxpayer suit for recovery of illegally spent Government Funds.

The Complaint and supporting evidence also show that while Respondents actually violated

California Civil Code Section 1798.3(b), (the sole theory of recovery alleged in the Complaint), the cause of action would fail because the statute exempts Respondents from liability for their statutory violations.

The Lower Courts disregarded the actual violation of the statute and the availability of other remedies for the Respondents wrongful and tortious conduct and granted Respondents' SLAPP motion, thereby depriving Petitioner of his right to a trial by jury under Article 1, Section 16 of the California Constitution and his right to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution on these theories solely because they were not pled in the Complaint.

Respondent GRECO as the C.E.O. of Defendant District used her position to obtain Petitioner's confidential medical information (C.T. 92:19 - 95:19; 99:10 - 103:21; 102:10 - 102: 25). Respondent GRECO **admitted** that she acquired and distributed his confidential medical records and medical information. (C.T. 102:10 - 102: 25). Respondent GRECO admitted she distributed Petitioner's confidential medical information to the public! (C.T. 102:10 - 102: 25)

In a *California Code of Civil Procedure* 425.16 proceeding, the Court does not weigh the credibility or comparative probative strength of competing evidence. The prior admission by Respondent GRECO (C.T. 102:10 - 102:25) is alone sufficient evidence to

establish a “prima facie showing of facts to sustain a favorable judgment”.

The Lower Courts interpreted the word, “claim” as used in *California Code of Civil Procedure Section 425.16* to be limited to the precise cause of action pled in the Complaint. The Lower Courts held that since Respondents are not subject to the statute plead in the Complaint, Petitioner is unable to establish a reasonable probability he will prevail on his claim.

Petitioner, along with many other California published opinions, expand the meaning of the word “claim”, as used in *California Code of Civil Procedure Section 425.16* to mean that it is probable that the Petitioner will prevail on the facts plead in the Complaint and established by the affidavits filed in opposition to SLAPP motion, and that this is not limited to the cause of action pled in the Complaint. The published opinions in California are in conflict as to whether *California Code of Civil Procedure Section 425.16* requires the Petitioner to prove he can prevail on the precise legal theory plead in the Complaint or if it requires Petitioner to prove he can prevail on the facts plead in the Complaint and established by the affidavits.

The Lower Courts held Petitioner could not satisfy the second prong of the *California Code of Civil Procedure Section 425.16* motion by showing the probability of prevailing at trial because although the evidence showed the Respondents actually violated *California Civil Code Section 1798*, the statute

exempts these particular Respondents from liability for statutory violations. While Petitioner may not prevail under *California Civil Code Section 1798* because Respondents are exempted by the statute the facts **admitted by Respondents themselves** show a serious and intentional violation of Petitioner's Constitutional Right to Privacy under Article 1, Section 1 of the California Constitution. This is a theory upon which Petitioner can prevail at trial.

The Complaint and affidavits filed in opposition to Respondents' SLAPP motion establish Petitioner had a legally protected privacy interest in his personal medical records, including, but not limited to, a Cat Scan of his brain and establish conduct by the Respondents constituted a serious invasion of Petitioner's privacy.

Therefore, at a minimum, the facts stated in Petitioner's Complaint and in the affidavits offered in support of and in opposition to the SLAPP Motion establish that Respondents violated Petitioner's right to privacy under Article 1, Section 1 of the California Constitution. The facts stated in Petitioner's Complaint and the affidavits offered in support and in opposition to the SLAPP Motion establish that Petitioner has a reasonable probability of a recovery on a claim for damages for violation of Petitioner's right to privacy under Article 1, Section 1 of the California Constitution.

Since Petitioner has demonstrated that a probability that he could recover on his claim, the

SLAPP motion should have been denied. This which would have allowed Petitioner to have moved to amend his complaint to state a legal theory upon which he would be entitled to relief under the facts plead in the original complaint and established by the declarations filed in connection with the SLAPP motion. This result is consistent with the opinions issued in the cases of *Nguyen-Lam v. Cao*, 171 Cal. App. 4th 858, 873, 90 Cal. Rptr. 3d 205, 217 (2009) and *Martin v. Inland Empire Utilities Agency*, (2011.), 198 Cal. App. 4th 611, 130 Cal. Rptr. 3d 410 in which the Court disregards pleading defects and relied on the underlying facts in the Complaint and the affidavits to determine the SLAPP motion.

In the case of *Hung v. Wang*, (1992), 8 Cal. App. 4th 908, the Court of Appeal for the Second District engaged in an extensive and detailed analysis of whether *California Civil Code Section 1714.10*, a similar statute to the SLAPP statute, violated the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 7 of the California constitution which guarantee the fundamental right of access to the Courts. The *Hung* opinion noted that the United States Supreme Court case of *Logan v. Zimmerman* (1982), 455 U.S. 422, 428-429 held that a cause of action is a species of property protected by due process, and *Boddie v. Connecticut*, (1971), 401 U.S. 371, 377 which holds that there is a constitutional right of access to the Courts for all persons.

The *Hung* Court, in analyzing *California Civil Code Section* 1714.10, found that the statute did not violate the litigants rights under the 5th or 14th amendments of the United States Constitution guaranteeing due process of law and equal protection or the right under Article 1, Section 16 of the California Constitution guaranteeing a right to trial by jury **because** the California Civil Code Section 1714.10 procedure **does not permit** the Trial Court to weigh the evidence. The *Hung* Court implies that weighing the evidence would violate the 5th and 14th amendments to the United States Constitution as well as Article 1, Section 16 of the California Constitution.

The Court of Appeal in *Nguyen-Lam v. Cao*, 171 Cal. App. 4th 858, 873, 90 Cal. Rptr. 3d 205, 217 (2009) applied the same analysis and holding to the SLAPP motion statute.

By weighing the evidence, the Lower Courts have violated Petitioner's rights under the 5th and 14th amendments to the United States Constitution and Article 1, Section 16 of the California Constitution and thereby rendered the statute itself an unconstitutional violation of Petitioner's right to due process under the Fifth amendment and Petitioner's right to equal protection under the Fourteenth Amendment to the United States Constitution. This Court must grant this Petition for Writ of Certiorari to establish an important legal right that the Lower Courts cannot weigh the evidence in a SLAPP motion.

The SLAPP statute denies all Petitioner's due process of law under the Fifth Amendment and equal protection under the Fourteenth Amendment by preventing Petitioner from filing an amended complaint that states a cause of action based on the facts pled in the Complaint and introduced at the hearing of the motion. Therefore, the SLAPP statute is an unconstitutional violation of the Fifth and Fourteenth Amendments to the United States Constitution and must be invalidated by this Court.

CONCLUSION

This Court must grant this Petition for Certiorari to review this final judgment of the highest court in the State of California because the validity of the state statute is drawn in question on the ground of being repugnant to the Constitution and laws of the United States and because a title, right, privilege or immunity is specially set up or claimed under the Constitution.

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