

**Civil Case Number: D053856**

**In the Court of Appeal of the State of California  
FOURTH APPELLATE DISTRICT  
DIVISION ONE**

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DANIELLE GRIJALVA and CSFES,

Plaintiffs and Appellants

v.

HELGA BRANDT and ASSE INTERNATIONAL, INC.

Defendants and Respondents

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***On Appeal from Grant of Special Motion to Strike  
(Notice of Appeal filed August 8, 2008)***

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO  
The Honorable JACQUELINE M. STERN, Judge Presiding  
Superior Court Case No. 37-2008-00052285-CU-DF-NC

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**RESPONDENTS' BRIEF**

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**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Respondents and Defendants ASSE International, Inc. and Helga Brandt are not aware of any interested entities or persons that must be listed in this certificate pursuant to Rule 8.208 of the California Rules of Court.

Dated: May 1, 2009

Respectfully submitted,

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1. **INTRODUCTION**

Respondents ASSE International, Inc. and Helga Brandt (collectively, “Respondents”) oppose this appeal and support the trial court’s granting Respondents’ special motion to strike the First Amended Complaint pursuant to California Code of Civil Procedure (“CCP”) § 425.16; California’s anti-SLAPP statute. The trial court’s ruling must be upheld because the trial court did not abuse its discretion by refusing to consider Appellants’ untimely-filed opposition absent a showing of excusable neglect and because Respondents met their initial *prima facie* burdens under California’s anti-SLAPP statute.

The record below establishes that Appellants Danielle Grijalva and the Committee for the Safety of Foreign Exchange Students (collectively, “Appellants”) filed an action for defamation and unfair business practices against Respondents in response to and shortly after ASSE International, Inc. intervened in a lawsuit pending in North Carolina between Danielle Grijalva and a third party. Not only is this the archetypal format for a Strategic Lawsuit Against Public Participation, Appellants tried to create two concurrent lawsuits in two far-flung jurisdictions in order to burden Respondents with litigation costs. In response, Respondents filed a special motion to strike pursuant to CCP § 425.16.

Appellants did not file an opposition to the motion by the due date despite having eighty-one (81) days in which to do so. Instead, Appellants filed an *ex parte* application at the eleventh hour to continue the hearing on Respondents’ anti-SLAPP motion. In the same *ex parte* application, Appellants sought leave of court to file a second amended complaint. In an attempt to overcome the untimely nature of the opposition, Appellants’ attorney claimed excusable neglect under California Code of P § 473.

The trial court denied Appellants' *ex parte* application on the ground that absent a stipulation, an amended complaint must be filed by motion. Likewise, the trial court denied Appellants' request to continue the hearing because a special motion to strike must be heard within a limited timeframe unless the court's calendar prevents it.

The trial court then properly exercised its discretion to deny consideration of Appellant's untimely opposition. Further and because the trial court found that Respondents' had met their initial burden for its anti-SLAPP motion, the trial court granted Respondents' special motion to strike and dismissed the case as to Respondents.

## **2. STATEMENT OF CASE**

### **A. Cast of Characters**

Respondent and defendant ASSE International, Inc. ("ASSE") is a California non-profit corporation engaged solely in educational and cultural programs approved and regulated by the United States Department of State. ASSE's principal activity is sponsoring exchange programs for foreign high school age students to spend either a school year or part of a summer with a volunteer host family in the United States. ASSE also provides services to World Heritage International, Inc. in connection with the placement of Programmes Internationaux d'Exchanges' foreign students in the United States.

Respondent and defendant Helga Brandt ("Brandt") and defendant Josef Motycka ("Motycka") are employees or agents of ASSE. Appellants voluntarily dismissed Motycka from the lawsuit without prejudice following the hearing on Respondents' special motion to strike.

Appellant and plaintiff Committee for Safety of Foreign Exchange Students ("CSFES") is a California non-profit whose purported mission is

to protect foreign exchange students residing in the United States. In connection with this activity, CSFES operates the website [www.CSFES.org](http://www.CSFES.org).

Appellant and plaintiff Danielle Grijalva (“Grijalva”) is the founder and sole staff member of CSFES. Grijalva is a California resident.

Although not parties to the case on appeal, the following additional parties were parties to the lawsuit in North Carolina which in turn prompted Appellants to initiate a lawsuit in California:

Programmes Internationaux d’Echanges (“PIE”) is a non-profit association organized under the laws of the Republic of France. PIE organizes student exchange programs in France and in other countries. PIE arranges for French students to attend educational programs and schools in the United States while staying with volunteer host families.

World Heritage International, Inc. (“World Heritage”) is a New York not-for-profit corporation which exists as an independent student exchange organization. Pursuant to an agreement between World Heritage and PIE, World Heritage arranges and oversees host family and school placements in America for PIE’s French national students.

**B. Nature of the Action and Procedural History**

Appellants filed the underlying action in response to a lawsuit brought by PIE against Grijalva in North Carolina relating to the placement of foreign exchange students.

**(1) The underlying North Carolina action**

On September 21, 2007, PIE filed a complaint in North Carolina state court against Grijalva for defamation, civil conspiracy, interference with business relations and interference with contract. (Appellants’ Appendix (“AA”) 38–49.) PIE’s complaint alleged that Grijalva and



CSFES made false or misleading statements about PIE, its students and affiliates in the U.S., including ASSE and World Heritage. (AA 40–49.) The complaint specifically alleged that Grijalva contacted the parents of a PIE student by email and falsely claimed that “all too often students are placed [by PIE and its affiliates] in the homes of convicted felons and registered sex offenders.” (AA 41.) The complaint further alleged that Grijalva contacted the French Consulate regarding the enrollment of a French PIE student into a North Carolina high school, and that Grijalva contacted a French PIE student in Missouri by email and said “PIE France is not interested in the safety and welfare of its students.” (AA 42.)

On December 20, 2007, the North Carolina trial court issued a preliminary injunction barring Grijalva from contacting PIE’s students, their natural families and host families. (AA 51–54.) The preliminary injunction also barred Grijalva from spreading false or misleading information about PIE. (*Id.*)

On February 8, 2008, ASSE and World Heritage jointly filed a complaint-in-intervention in the North Carolina action alleging that Grijalva defamed ASSE, interfered with ASSE’s business relationships and contracts, and disseminated knowingly false, malicious and misleading information to students in the ASSE program. (AA 56–59.)

Thirty-two (32) days later, Respondents filed the underlying lawsuit against ASSE, Brant and Motycka. (AA 1–5.)

**(2) The California action**

On March 24, 2008, Respondents filed a First Amended Complaint, the operative pleading, containing two causes of actions against Respondents and Motycka: one cause of action for defamation and a second cause of action for unfair business practices. (AA 9–13.) Appellants’ First

Amended Complaint alleged that Respondents and Motycka made nine false or defamatory statements against Appellants. (AA 11.) However, the First Amended Complaint did not specify who made the statements, when the statements were made, where the statements were made, how the statements were made, to whom the statements were made, or whether the statements were made all together or separately. In other words, the First Amended Complaint alleged that certain unspecified defamatory statements were made at an unknown time, unknown place, by unknown methods, and to unknown recipients.

On April 24, 2008, Respondents filed a demurrer and a special motion to strike pursuant to CCP § 425.16. (AA 15-33; 111-125.) Due to congestion in the trial court's calendar, the earliest date on which the demurrer and special motion to strike could be heard was July 25, 2008. Consequently and pursuant to CCP § 1005 and California Rule of Court 3.100, Appellants' opposition to the special motion to strike and demurrer was due to be filed and served no later than July 14, 2008. No opposition of any kind was filed by that date.

On July 16, 2008, Respondents filed and served Appellants with notices of non-opposition. (AA 126-128; 129-131.) On July 21, 2008, Appellants filed an *ex parte* application to allow late filing of an opposition, to continue the CCP § 425.16 motion, and for permission to file a second amended complaint. (AA 132-133.)

As part of the *ex parte* application, Appellants' counsel sought relief pursuant to CCP § 473, claiming excusable neglect. David Allen, Appellants' counsel, submitted a declaration stating two purported grounds for excusable neglect (AA 194-196): (1) he had been forced to relocate his family; and (2) he had been preparing for trial in another matter the week of

July 11, 2008 and subsequently trailing in the department in which the case was to be tried. (AA 195.) Mr. Allen offered no explanation as to why he could not have nonetheless filed his opposition in a timely manner nor why he prioritized working on other matters over filing an opposition to Respondents' special motion to strike and demurrer.

**C. Ruling of Superior Court**

The trial court denied Appellants' *ex parte* application, stating "we all know that the second amended complaint has to be filed by a motion, not on an *ex parte* basis absent a stipulation." (*See* Reporter's Transcript on Appeal ("RT") Volume 1 at 1:26-28) The trial court also denied Appellants' application to continue the hearing on the special motion to strike because CCP § 425.16(f) imposes time limits for hearing an anti-SLAPP motion, and the court's calendar did not mandate an exception. (*Id.* at 1:28 to 2:12.)

At the hearing on the special motion to strike, the trial court declined to consider Appellants' late-filed opposition. (*See* RT Volume 2 at 3:11-20; AA 205-206.) Second, the trial court found that Respondents had met their initial burden for the anti-SLAPP motion, shifting the burden back to plaintiffs. (*Id.*) The court then found that: "As plaintiffs have not filed a timely opposition brief, their have not met their statutory burden." (AA 206.) Once the special motion to strike was granted, Respondents' demurrer was taken off-calendar as moot. (*Id.*)

**3. SUMMARY OF MATERIAL FACTS**

PIE filed an action against Grijalva in North Carolina. The core nucleus of facts in the North Carolina action involve statements by Grijalva alleging that PIE and its affiliates were negligent in the supervision of French foreign exchange students under their care in North Carolina. The

North Carolina trial court issued a preliminary injunction which barred Grijalva from initiating direct communication with PIE-sponsored students, their natural families and their host families in America. (AA 52-54.) The preliminary injunction also barred Grijalva from spreading false or misleading information about PIE. (*Id.*)

As an affiliate of PIE, ASSE intervened into the North Carolina action on February 8, 2008 and sought an identical preliminary injunction against Grijalva. (AA 56-59; 75-80.) Thirty-two days after ASSE intervened in the North Carolina lawsuit, Grijalva filed the underlying California action against ASSE, Brandt and Motycka alleging defamation and unfair business practices.

In response, Respondents filed an anti-SLAPP motion pursuant to CCP § 425.16. Appellants failed to file a timely opposition to the anti-SLAPP motion. Instead, Appellants filed an *ex parte* application to file a second amended complaint and to continue the anti-SLAPP motion—giving Appellants extra time to file an opposition. In an attempt to overcome the untimeliness of the opposition, Appellants' attorney filed a declaration claiming excusable neglect under CCP § 473. The trial court denied Appellants' *ex parte* application.

The trial court found that Respondents met their initial *prima facie* burden for the anti-SLAPP motion. The trial court also exercised its discretion and did not consider Appellants' late-filed opposition. The trial court then granted Respondents' motion to strike. Appellants filed this appeal.

#### 4. ISSUES ON APPEAL

- a. Whether the trial court acted within its discretion in refusing to find excusable neglect where counsel failed to explain why he was unable

to timely file the opposition and where counsel admitted he had been busy working on other matters.

- b. Whether the trial court acted within its discretion in refusing to consider Appellants' late-filed opposition.
- c. Whether the trial court was correct in finding that Appellants had met the initial *prima facie* burden for their special motion to strike.

## 5. STANDARD OF REVIEW

In Appellants' Opening Brief, Appellants claim that the standard of review is *de novo*. (See AOB at 2). This is not entirely correct. The Court of Appeal reviews the trial court's finding of *prima facie* burdens *de novo*. *Tuchscher Development Enters. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1232 (2003).

However, the trial court's procedural rulings on whether to consider a late-filed opposition and whether excusable neglect exists are reviewed for abuse of discretion. *State Farm Fire & Casualty Co. v. Pietak*, 90 Cal. App. 4th 600, 608 (2001) (noting that relief under Cal CP 473(b) "is a matter of trial court discretion"); California Rule of Court 3.1300(d) (granting the court discretion to refuse to consider a untimely filed motion as long as the court reflects this act in the minute order).

## 6. DISCUSSION

### A. The Trial Court Acted Within its Discretion When Refusing to Find Excusable Neglect When the Delay Occurred Because Counsel was "Too Busy" on Matters for Another Client

"A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse." *State Farm Fire & Casualty Co. v. Pietak*, 90 Cal. App. 4th 600, 610 (2001).

“Excusable neglect” is generally defined as an error “a reasonably prudent person under the same or similar circumstances might have made.” *Zamora v. Clayborn Contracting Group, Inc.*, 28 Cal. 4th 249, 258 (2002).

“Conduct falling below the professional standard of care, *such as failure to timely object to or properly advance an argument*, is not therefore excusable.” *Ambrose v. Michelin North America, Inc.*, 134 Cal. App. 4th 1350, 1354 (2005) (emphasis added).

Respondents filed their special motion to strike and demurrer on April 24, 2008, ninety-one (91) days prior to the hearing and eighty-one (81) days prior to the date the oppositions were due.

In their Opening Brief, Appellants admit that the opposition papers were not timely filed. (AOB at 6:3, 12). Appellants’ counsel sought to excuse his oversight in failing to timely oppose Respondents’ motions by claiming excusable neglect pursuant to CCP § 473. Appellants’ attorney, David Allen, declared that the failure to file timely was his own fault because of personal difficulties and because:

During the week of July 11, 2008, [he] was preparing for trial in Long Beach and the following week [was] trailing in the department where the case was to be tried. On July 18, 2008, the case was transferred to another department with the next court date set for July 24.

(AA at 195:7-10.) In other words, Appellants’ counsel failed to timely oppose the special motion to strike and demurrer because, in addition to some personal difficulties, he prioritized the work of a different client over Appellants’ interests.

It is well-settled that the press of business is not sufficient cause to support a finding of excusable neglect. The “stress admittedly attending modern legal practice” cannot afford an acceptable excuse for neglect

within the meaning of CCP § 473. *Garcia v. Hejmadi*, 58 Cal. App. 4th 674, 684 (1997). As the *Garcia* court stated:

failure to timely make an argument cannot, therefore, be considered a mistake permitted to an untrained "reasonably prudent person" within the meaning of section 473. Garcia's counsel did not contend a page was lost in his office machinery or that a filing date was miscalculated; nor was it contended by Garcia that an abandonment ended the attorney-client relationship; counsel pointed to the stress admittedly attending modern legal practice as affording an acceptable excuse for neglect within the meaning of the Code of Civil Procedure. We cannot find the Legislature so intended.

*Id.*

Simply put, the decision to further one client's trial matters at the expense of another client's interest is not excusable neglect. Appellants' counsel could have timely filed an opposition to the special motion to strike, but did not because he was too busy on another matter. Appellants' counsel offered no explanation whatsoever regarding why he chose to prioritize his work for a different client over that for Appellants. As Appellants' counsel lacked excusable neglect for failing to file a timely opposition, the trial court did not abuse its discretion in denying Appellants' *ex parte* application.

**B. The Trial Court Acted Within its Discretion in Refusing to Consider an Untimely Opposition**

Appellants' argument that "a bit more of a nod towards hearing the matter on the merits would not have been inappropriate" is also without merit. (*See* AOB at 9.) In cases such as this, the proper question is whether the trial court abused its discretion, not whether the trial court could have made the opposite decision.

Pursuant to California Rule of Court 3.1300(d), the court has discretion to refuse to consider a late-filed paper. If the court exercises this

discretion, “the minutes or order must so indicate.” Here, the minute order demonstrates that the trial judge exercised this discretion. (AA at 205.)

**C. The Trial Court Correctly Found that Respondents Met the Prima Facie Burden to Bring a CCP § 425.16 Special Motion to Strike**

**(1) The Standard for Anti-SLAPP Motions to Strike**

The Supreme Court in *Navellier v. Sletten*, 29 Cal. 4th 82 (2002), explained the burden defendants bear when bringing a special motion to strike:

Section 425.16 posits ... a two-step process for determining whether an action is a SLAPP. First, 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)’ (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043 [61 Cal. Rptr. 2d 58]). If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.

*Navellier*, 29 Cal. 4th at 88 (emphasis added).

To invoke the protection of the anti-SLAPP statute, a defendant must merely make a prima facie showing that the plaintiff’s action (or causes of action) arises from acts done in furtherance of the defendant’s right of petition or free speech. *See* CCP § 425.16(e) (illustrating acts covered by the statute); *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 1042-43 (1997). In determining whether a defendant’s burden is met, the court must consider “the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” CCP §425.16(b)(2). It is noteworthy that there is “nothing in the statute requiring the court to engage in an inquiry as to the plaintiff’s subjective



motivations before it may determine [whether] the anti-SLAPP statute is applicable.” *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 480 (2000).

A defendant also has the burden of making a prima facie showing that the plaintiff’s causes of action are outside of CCP § 425.17’s statutory exceptions to the applicability of CCP § 425.16. *Brill Media Co. v. TCW Group, Inc.*, 132 Cal. App. 4th 324, 331 (2005).

(2) **ASSE Met the Initial Prima Facie Showing of “Some Connection” to a Judicial Proceeding Because the Alleged Defamatory Statements in the Current California Action Form the Substantive Basis for the Underlying North Carolina Action**

“It is well established that filing a lawsuit is an exercise of a party’s constitutional right of petition.” *Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1087 (2001). “[I]t has been established for well over a century that a communication is absolutely immune from any tort liability if it has ‘some relation’ to judicial proceedings.” *Contemporary Services Corp. v. Staff Pro Inc.*, 152 Cal. App. 4th 1043, 1055 (2007).

Because Appellants have not sufficiently alleged Respondents’ allegedly “defamatory statements” in the instant action, the exact origin of and circumstances surrounding the alleged statements are currently unknown. However, **the allegedly defamatory statements appear to directly relate to ASSE’s participation in the North Carolina Action.** For example, the First Amended Complaint alleges Respondents’ defamatory publications included statements that Appellants were “making false statements.” (AA 9.) This allegation relates directly to statements in ASSE’s Motion to Intervene and Proposed Complaint filed in the North

Carolina Action. Specifically, the Motion to Intervene and Proposed Complaint allege that Grijalva had disseminated “false and misleading information.” (AA 64–67, 72, 78-80 (praying for relief in the form of an injunction against Grijalva spreading false or misleading information about ASSE).)

When coupled with the fact that Appellants filed the underlying action a mere thirty-two days after ASSE intervened in the North Carolina action, Appellants’ retaliatory lawsuit is precisely the type of action the Legislature intended to prevent by enacting the anti-SLAPP statute.

(3) **The Statutory Exceptions do not Apply to Grijalva and CSFES’ Causes of Action**

In addition to showing ‘some connection’ to a judicial process, Respondents had the initial burden to show that the underlying action falls outside the statutory exceptions in CCP § 425.17. Respondents met this burden. (*See, exhaustively*, AA 27–33.) Nor do Appellants claim that any statutory exception applies. Because Respondents showed some connection between the alleged defamatory statements and a protected activity, and because none of the statutory exceptions in CCP § 425.17 apply, the trial court did not err in finding that Respondents met their *prima facie* burdens of an anti-SLAPP motion.

7. **CONCLUSION**

Electing to work on one client’s matters at the expense of another client does not constitute excusable neglect under Cal CP § 473. The trial court properly exercised its discretion to deny consideration of Appellants’ late-filed opposition.

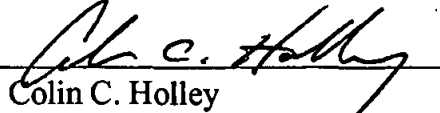
Respondents met their *prima facie* burdens for their anti-SLAPP motion.  
Accordingly, the trial court's ruling should stand.

Dated: May 1, 2009

Respectfully submitted,

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By: \_\_\_\_\_

  
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Attorneys for Defendants and Respondents  
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**CERTIFICATION OF LENGTH OF BRIEF**

I, George L. Hampton IV, am counsel for Defendant and Respondents ASSE INTERNATIONAL, HELGA BRANDT and JOSEF MOTYCKA. I hereby certify that the length of the foregoing Respondents' Brief, excluding the Table of Contents, the Table of Authorities and this Certification, is a total of 3,767 words. In making this Certification, I am relying on the word count of the computer program used in the preparation of the Brief.

Dated: May 1, 2009

  
COLIN C. HOLLEY

**PROOF OF SERVICE**

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to this action. My business address is 2101 East Coast Highway, Suite 260, Corona del Mar, CA 92625.

On May 1, 2009, I served the foregoing document described as

**RESPONDENTS' BRIEF**

on the interested parties in this action, by placing true copies thereof in envelopes addressed as follows:

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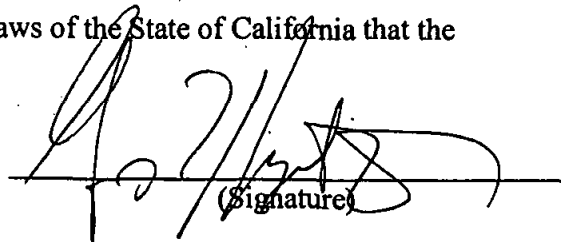
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Hon. Jacqueline Stern, Dept. 27  
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

George L. Hampton IV  
\_\_\_\_\_  
(Type or print name)

  
\_\_\_\_\_  
(Signature)