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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THERMOVIEW INDUSTRIES INC. OF  
CALIFORNIA,

Plaintiff and Appellant,

v.

UTILITY CONSUMERS ACTION  
NETWORK etc., et al.

Defendants and Appellants.

D042815

(Super. Ct. No. GIC808576)

APPEALS from orders of the Superior Court of San Diego County, J. Richard Haden, Judge. Reversed in part; affirmed in part.

A consumer interest group's findings about the business practices of a window installation contractor were matters of public concern within the meaning of California's anti-SLAPP statute, Code of Civil Procedure<sup>1</sup> section 425.16. Moreover, in stating that the contractor had been accused of cheating the elderly, the consumer group fairly

characterized an earlier report published by the Better Business Bureau (BBB). Given these circumstances the consumer group's motion to strike the contractor's complaint for defamation, unfair business practice and interference with prospective economic advantage should have been granted.

#### SUMMARY

Defendant and appellant Utility Consumers Action Network (UCAN) is a non-profit corporation whose stated mission is " 'to protect consumers from utility abuse, poor service, and excessive rate hikes.' " Defendant and appellant Michael Shames is the executive director of UCAN.

On August 15, 2002, UCAN sent a written newsletter to its members and posted the contents of the newsletter on its website.

The newsletter contained a fundraising appeal and a four-page article on energy efficient windows. The article described the advantages of replacing aluminum frame, single-pane windows with vinyl frame, double-pane windows. The article also encouraged readers to "Check Out The Contractor *Before* You Sign the Contract!" The article told readers to check the contractor's BBB record, verify the contractor's license status, find out if the contractor had been approved by the League of California Homeowners (LCH) and determine whether the contractor had liability insurance that would protect the consumer in the event of an accident on the consumer's property.

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

The article also rated 10 window contractors who had submitted bids on the same house. Each contractor was asked to provide an estimate for double-pane windows with vinyl frames and an Energy Star rating from the Department of Energy. Seven of the bids were for a price of between \$6,223 and \$8,146. One bid was for \$12,548 and one was for \$19,904. Plaintiff and respondent Thermoview Industries Inc. of California (Thermoview) submitted the tenth bid. Thermoview's bid was for \$31,530. In addition to price, the article rated each bidder on whether the contractor had a window-glazing license, LCH approval and offered energy efficient windows. In light of its high price and the absence of either a glazing license or LCH approval, Thermoview received the article's lowest rating which contained the following comment: "If greed is good, these guys are saints."

In addition to the low rating it gave Thermoview, the article made the following statement about the corporation: "Avoid contractors with 'unsatisfactory' BBB ratings. In March 2002, we found that one of the contractors we rated on page 4, *Thermo View Industries* had complaints about high pressure sales tactics, cheating the elderly, and inability to meet deadlines."

The BBB in fact had a report on Thermoview which stated: "Based on BBB files, this company has an unsatisfactory record with the Bureau due to a pattern of complaints. Complaints are concerning high pressure sales tactics, difficulty by the company in achieving deadlines and overcharging for services, especially for the elderly."

Thermoview filed a complaint against UCAN and Shames. Thermoview alleged that the BBB had never accused Thermoview of cheating anyone. According to

Thermoview, UCAN's false statement gave rise to claims for libel, unfair competition and interference with economic advantage.

UCAN and Shames filed a motion to strike under section 425.16. They argued that statements in the article were matters of public interest within the meaning of section 425.16, subdivision (e)(4), and that Thermoview therefore had the burden of demonstrating that it had a probability of prevailing on its claims. (§ 425.16, subd. (b)(1).)

In opposing the motion Thermoview submitted a declaration from one of its officers which stated that in each of the previous five years Thermoview had performed approximately 3,000 contracting jobs, that 40 percent of the jobs were for window installation and that in the 36-month period considered by the BBB only 10 complaints had been received the agency. The officer further stated: "While I dispute many opinions of the BBB, the number of complaints and their disposition are correct."

The trial court denied the motion to strike. It found that the newsletter's statements about Thermoview were not in the public interest and that in any event Thermoview claims had probable merit. Thermoview moved to recover the attorney fees it incurred in opposing the motion. The trial court denied the attorney fees motion.

UCAN and Shames filed a timely notice of appeal from the order denying its motion to strike and Thermoview filed a notice of cross-appeal from the order denying its motion for attorney fees.

## DISCUSSION

### I

#### *Section 425.16*

In 1992 when the Legislature enacted section 425.16, it found 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," and "it is in the public interest to encourage continued participation in matters of public significance, and . . . this participation should not be chilled through abuse of the judicial process." (§ 425.16, subd. (a).)

Under section 425.16, a cause of action asserted "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 or California Constitution in connection with a public issue [is] 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." (§ 425.16, subd. (b)(1).)

The statute defines acts " '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;

(4) or 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." (§ 425.16, subd. (e).)

As the court in *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 892-893 (*Wilbanks*) noted: "The first category essentially echoes Civil Code section 47, subdivision (b)(1), protecting statements made in official proceedings. The second category goes further, referring to statements made outside of official proceedings but in connection with an issue under consideration in official proceedings, whether or not those statements are themselves privileged. Statements in this category are subject to a special motion to strike whether or not the issue under consideration is a 'public issue.' " (Fn. omitted.) On the other hand, "[u]nlike the first and second category of statement or conduct protected by section 425.16, the third and fourth categories protect only statements or conduct connected to an issue of public interest. Beyond that requirement, however, these categories are quite broad, applying by their terms to any statements made in a place open to the public or in a public forum, or any conduct engaged in, in furtherance of the rights of petition or free speech." (*Id.* at p. 893; see also *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117-1118; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 474.)

Although the statute is intended to protect the rights of petition and free speech, there is no requirement that the defendants moving thereunder also prove that the suit was intended to chill their speech. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734; citing *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89-95; *Equilon Enterprises v.*

*Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 58; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75.) In response to case law, the Legislature directed that section 425.16 "be construed broadly." (§ 425.16, subd. (a) as amended by Stats. 1997, ch. 271, § 1.) Thus "[whenever possible, [the courts] should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not to its curtailment'.]" (*Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1119, fn. omitted.)

## II

### *Procedure and Standard of Review*

"The moving party bears the initial burden of establishing a prima facie showing the plaintiff's cause of action *arises* from the defendant's free speech or petition activity. [Citation.] 'The defendant may meet this burden by showing the act which forms the basis for the plaintiff's cause of action was a written or oral statement made before a legislative, executive, or judicial proceeding . . . .' [Citation.] If the defendant establishes a prima facie case, then the burden shifts to the plaintiff to establish ' "a probability that the plaintiff will prevail on the claim," ' i.e., 'make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor.' [Citation.] In making its determination, the trial court is required to consider the pleadings and the supporting and opposing affidavits stating the facts upon which the liability or defense is based. [Citation.] Discovery is stayed upon the filing of the motion. [Citation.] However, upon noticed motion and for good cause shown, the court may allow specified discovery." (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 646-647,

fn. omitted, overruled for other reasons in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5.)

We review the record independently to determine whether the asserted cause of action arises from the defendant's free speech or petition activity, and, if so, whether the plaintiff has shown a probability of prevailing. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 (*Computer Xpress*).

### III

#### *Thermoview's Claims*

Section 425.16, subdivision (e)(4), protects *conduct* in furtherance of free speech rights, regardless whether that conduct occurs in a place where ideas are freely exchanged. (*Wilbanks, supra*, 121 Cal.App.4th at pp. 892-893 (*Wilbanks*)). Section 425.16, therefore, governs even private communications, so long as they concern a public issue. (*Ibid.*; see also *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175-1176.)

"The most commonly articulated definitions of 'statements made in connection with a public issue' focus on whether (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest. [Citations.]" (*Wilbanks, supra*, 121 Cal.App.4th at p. 898.)

The public nature of a statement does not depend upon whether it is true. "Rather, in determining whether there is a legitimate public concern in statements about a private

individual, 'a more appropriate inquiry is whether . . . the form, context and content of the publication as a whole demonstrate that a matter of public concern is implicated.'

[Citation.]" (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1363.)

"Consumer information . . . at least when it affects a large number of persons, . . . generally is viewed as information concerning a matter of public interest. *Paradise Hills Associates v. Procel* (1991) 235 Cal.App.3d 1528, although not itself a section 425.16 case, noted that the First Amendment protected a consumer's statements about the quality of a seller's products and service and her unhappiness with them, finding, in part, that the statements concerned a matter of public interest. 'Courts have recognized the importance of the public's access to consumer information. "The growth of 'consumerism' in the United States is a matter of common knowledge. Members of the public have recognized their roles as consumers and through concerted activities, both private and public, have attempted to improve their . . . positions vis-à-vis the supplies [sic] and manufacturers of consumer goods. They clearly have an interest in matters which affect their roles as consumers, and peaceful activities, such as plaintiffs', which inform them about such matters are protected by the First Amendment." [Citation.]' [Citations.]" (*Wilbanks, supra*, 121 Cal.App.4th at pp. 898-899.)<sup>2</sup>

In *Wilbanks* the defendant was a former insurance agent who had written a number of books on the subject of viatical settlements. Viatical settlements are a means by which dying persons may sell life their insurance policies to brokers and thereby obtain funds

for medical care or other expenses. In addition to the books she wrote on the subject, the defendant, Gloria Wolk, established a website which provided information on viatical settlements. Among other matters the website provided information about viatical brokers, their licensing, complaints about them and investigations of them. With respect to the plaintiff, Wilbanks, the website made the following statement: "*Be very careful when dealing with this broker. Wilbanks and Assoc. is under investigation by the CA dept. of insurance. The complaint originated with a California viator who won a judgment against Wilbanks. How many others have been injured but didn't have the strength to do anything about it?*"

*"The company is under investigation. Stay tuned for details.*

*"Wilbanks and Associates provided incompetent advice.*

*"Wilbanks and Associates is unethical."* (Wilbanks, *supra*, 121 Cal.App.4th at p. 890.)

In finding these statements were made in the public interest within the meaning of section 425.16, subdivision (e)(4), the court in *Wilbanks* stated: "Here, it appears that the viatical industry touches a large number of persons, both those who sell their insurance policies and those who invest in viatical settlements. According to plaintiffs, their own business generated an average monthly income of \$58,333 before Wolk's statements about them appeared on her Web site—and plaintiffs are but one of many brokers. It is undisputed that Wolk has studied the industry, has written books on it, and that her Web

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2 Although it did not involve section 425.16, we reached a similar conclusion about

site provides consumer information about it, including educating consumers about the potential for fraud. As relevant here, Wolk identifies the brokers she believes have engaged in unethical or questionable practices, and provides information for the purpose of aiding viators and investors to choose between brokers. The information provided by Wolk on this topic, including the statements at issue here, was more than a report of some earlier conduct or proceeding; it was consumer protection information.

"That the information provided here is in the nature of consumer protection information distinguishes this case from others recognizing that a publication does not become connected with an issue in the public interest simply because it is widely disseminated, or because it can be used as an example of bad practices or of how to combat bad practices. The statements made by Wolk were not simply a report of one broker's business practices, of interest only to that broker and to those who had been affected by those practices. Wolk's statements were a warning not to use plaintiffs' services. In the context of information ostensibly provided to aid consumers choosing among brokers, the statements, therefore, were directly connected to an issue of public concern." (*Id.* at pp. 899-900, fns. omitted.)

For purposes of applying section 425.16, subdivision (e)(4), the statements which appeared in UCAN's newsletter are indistinguishable from the statements considered in *Wilbanks*. UCAN's statements were made in the context of information UCAN was providing to assist consumers in selecting window contractors. By its own admission

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consumer information in *Melaleuca, Inc. v. Clark, supra*, 66 Cal.App.4th at page 1363.

Thermoview did an annual average of 1,200 window installations each year; if each of the nine competitors discussed in UCAN's newsletter did only half the number of window installations performed by Thermoview, the total number of consumers concerned about the window installation issues and contractors who were the subject of the article would have been in the neighborhood of 5,000 to 6,000. We also note the substantial cost of the windows installations: between \$6,000 and \$30,000. The number of people and substantial cost involved is certainly great enough to make the issue one of public concern within the meaning of section 425.16, subdivision (e)(4). (See *Wilbanks, supra*, 121 Cal.App.4th at pp. 899-901 [plaintiff, only one viatical broker had \$58,000 in monthly income]; *Damon v. Ocean Hills Journalism Club, supra*, 85 Cal.App.4th at p. 479 [election of homeowners board where association had 3,000 members matter of public concern].)

The facts here are readily distinguishable from those considered in *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 30-31 (*Commonwealth Energy*), upon which Thermoview relies. In *Commonwealth Energy* a former employee of the plaintiff corporation took a list of its shareholders and subjected them to a telemarketing campaign in which they were offered membership in an investment advice "club," Investor Data Exchange, Inc. When the corporation sued the club and the former employee for misappropriation of trade secrets, unfair business practices and false advertising, the defendants argued that they were engaged in matters of public interest within the meaning of section 425.16, subdivision (e)(4). The court rejected the defendants' contention. Distinguishing consumer evaluation cases, such as

this one, where the defendant has evaluated the plaintiff's product, the court noted that the only information the defendants offered was about themselves. (*Id.* at pp. 34-35.) "The telemarketing statements were about Investor Data, not about Commonwealth *qua* post-deregulation energy company, and Investor Data is not an entity in the public eye. While investment scams *generally* might affect large numbers of people, the specific speech here was a telemarketing pitch for a particular service marketed to a very few number of people. Nor can it be said that the telemarketing statements were about an issue of widespread public interest. The speech was about Investor Data's *services*, not about investment scams in general." (*Id.* at p. 34.)

In contrast to the statements at issue in *Commonwealth Energy*, here UCAN's statements were very much about Thermoview and were made in the context of a comparison of Thermoview's services with the services offered by a number of its competitors. As the holding in *Wilbanks* makes clear, this sort of quality comparison is very much in the public interest.

Thus Thermoview's claims arose from statements made in connection with an issue in the public interest, and UCAN and Shames therefore met the burden imposed on them by section 425.16.

#### IV

##### *Probability of Success on the Merits*

Because UCAN and Shames met their burden, the burden shifted to Thermoview to establish a probability it would prevail on its claims. (§ 425.16, subd. (b)(1); *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 808-809.) "A plaintiff's burden

under section 425.16 "is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment." ' The plaintiff is required to demonstrate that the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the plaintiff's evidence is credited. [Citation.] The court considers the pleadings and the supporting and opposing affidavits stating facts on which the liability or defense is based, and the motion to strike should be granted if, as a matter of law, the properly pleaded facts do not support a claim for relief. [Citation.]" (*Wilbanks, supra*, 121 Cal.App.4th at p. 901.)

Each of Thermoview's claims is based on its contention that UCAN made a provably false statement about the BBB's report on Thermoview. Thermoview argues that UCAN's newsletter is provably false because the BBB did not literally accuse it of cheating the elderly. As we have seen, by its terms the BBB report only accused Thermoview of using high pressure sales tactics and overcharging the elderly. Because of the discrepancy between the newsletter and the BBB's report, Thermoview alleged that the statements in the newsletter were libelous and that the publication of the libel amounted to an unfair trade practice and an interference with Thermoview's economic opportunity.

It is now axiomatic that a claim for libel must be based upon a false statement of fact. (Civ. Code, § 45; *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1140.) The law of libel is fairly clear with respect to whether a statement is false. "The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. [Citations.] It overlooks minor inaccuracies and concentrates upon

substantial truth. As in other jurisdictions, California law permits the defense of substantial truth and would absolve a defendant even if she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' [Citation.]. . . Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' [Citations.] Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' [Citations.]" (*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 516-517 [111 S.Ct. 2419].)

Under this standard UCAN's statement was not false. In discussing the synonyms of "cheat," The Random House Dictionary of the English Language (2d ed. Unabridged) page 351, states: "CHEAT, DECEIVE, TRICK, VICTIMIZE refer to the use of fraud or artifice deliberately to hoodwink or *obtain unfair advantage over someone.*" (Italics added.) Webster's Third New International Dictionary Unabridged, page 381, has a similar description of the synonyms of "cheat:" "SWINDLE, DEFRAUD, COZEN, OVERREACH." If in fact, as the BBB reports states, Thermoview uses high pressure sales tactics and makes a particular practice of overcharging the elderly, it could be fairly said that it cheated the elderly in the sense that it overreached and took advantage of their vulnerability. Accordingly, the gist or sting of what BBB reported was accurately set forth in UCAN's article.

In sum the record shows that Thermoview is not likely to prevail on its underlying libel claim. Its unfair trade and interference claims, which are predicated on the libel

claim, are therefore also defective. Thus, the trial court should have granted UCAN's and Shames's motion to strike.

V

*Cross-Appeal*

Because UCAN and Shames were entitled to an order striking the complaint, Thermoview was not entitled to recover its attorney fees. Hence we must affirm the order denying its motion to recover its attorney fees.

DISPOSITION

The order denying the motion to strike is reversed with instructions that the motion be granted. The order denying Thermoview's motion to recover its attorney fees is affirmed.

Appellants UCAN and Shames to recover their costs of appeal.<sup>3</sup>

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BENKE, Acting P. J.

WE CONCUR:

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O'ROURKE, J.

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IRION, J.

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<sup>3</sup> On remand appellants UCAN and Shames may move to recover their reasonable attorney fees, including the fees they incurred on appeal.