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# **APPELLANT'S BRIEF**

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Case Number **G031636**

**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT**

**BALBOA VILLAGE INN, INC., a California corporation  
Plaintiff and Respondent**

**Vs.**

**ANNE LEMEN aka ANNE LEMON  
Defendant and Petitioner**

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**ANNE LEMEN aka ANNE LEMON  
Moving Party and Appellant  
Appeal from the Orange County Superior Court  
Gerald G. Johnson, Judge**

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**APPELLANT'S OPENING BRIEF**

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**Attorneys for Defendant/Petitioner  
ANNE LEMEN**

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**I**

**ISSUES PRESENTED**

**1.** Whether the trial court's ruling that a permanent injunction be issued prohibiting defendant and appellant Anne Lemen from making specific statements about the Village Inn and initiating contact with the Village Inn employees in the future should be overturned.

**2.** Whether the trial courts ruling that Anne Lemen is barred from filming from within 25 feet of the Village Inn, with certain exceptions, should be overturned.

## II

### STATEMENT OF THE CASE

This case involves a prior restraint on free speech. The defendant and appellant, Anne Lemen lives next door to the Village Inn, located on the Balboa Island, which is otherwise a quiet place to live. The Village Inn serves alcohol to its patrons. After closing time the patrons occasionally are loud and act in ways that are disruptive to the neighbors, including urinating indiscriminately on the neighbor's lawns.

Ms. Lemen testified that she made numerous complaints to the Newport Police Department and the police were largely unresponsive. (Trial transcript, 8/26/02 morning session, Anne Lemen, page 50, lines 9-17) This was substantiated by the testimony of a former owner of the Village Inn:

And then a police officer showed up and he was standing over by the dining room where the kitchen doors are. And I go "is there a problem?" He goes "yeah, we got another complaint." And I go "complaint from what?" He said, "well, noise." I said, "yeah, I just hired a new assistant manager. Those windows were not closed on the end. I just closed them." He says "well, I'm not worried about it. She is trying" -- he said, I think exact words was, "she tried to close this place before, but she's not going to do it now."



That's the statement the officer made.

Q It was an officer from the Newport Beach P.D.?

A That's right.

Q The Newport Beach police department?

A Yes.

(Trial transcript, 8/20/02, Lance Wagner, page 137 22-25)

Ms. Lemen began to document her complaints by the use of a video and still camera.

The Village Inn sought permission from the City of Newport Beach to modify its entertainment permit. Anne Lemen was opposed to this expansion given the disruption she had previously experienced. She participated in gathering approximately 400 petitions signed by those opposed to the proposed modifications. The Island has approximately 1,100 residents. A third of the residents united on a particular issue is noteworthy.

Plaintiff initially filed a complaint against Ms. Lemen in which the primary allegation was that Ms. Lemen was filing excessive police reports. A SLAPP motion was filed and a 1<sup>st</sup> amended complaint was filed seeking only injunctive relief.

The trial court ruled that Ms. Lemen could not make knowingly false statements about the Village Inn and listed categories of statements that were prohibited. Further, the trial court ruled that Ms. Lemen could not take video or still images within 25 feet of

the Village Inn, unless she was on her own property or she was filming someone who had damaged her property.

### III

#### PRIOR RESTRAINT ON FREE SPEECH

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S.C.A. Const Amend. 1.

"Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." California Constitution Article I, § 2 (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. California Code of Civil Procedure § 425.16.

The Court, in its Statement of Decision, relied two (2) cases: Magill Bros. Inc. V. Bldg. Services Employee's International Union (1942) 20 Cal. 2nd 506 and Aguilar v.

**Avis Rent A Car Sys. (1999) 21 Cal 4th 121.**

In the case of **Magill** (Supra), the critical issue in this case was picketing, as opposed to statements made in public forum. The court specifically stated, “here is not the utterance of false statements which is sought to be enjoined, but the conduct of picketing in an unlawful manner.” (**Magill** at page 509)

The case of **Aguilar v. Avis** (Supra), related only to comments made in the work place environment, as opposed to comments made in public places. The prohibition was justified only by a compelling public policy against a hostile work environment.

In the subject case, the Court did not find a compelling public policy issue. The Court issued broad prohibitions without regard to time or location. There is not a single case that supports the Court’s finding.

“The First Amendment generally prevents government from proscribing speech ... because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid” **Walker vs. Kiouisis (2001) 93 Cal.App.4th 1432, 114 Cal.Rptr.2d 69; R.A.V. vs. St. Paul 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).**

The court appeared to make its own determination as to what subjects of discussion were true and false for the present and future. The court in the case of **Wilson v. Los Angeles County (1975) 13 Cal.3rd 652**, ruled that “the truth or falsity of a statement on a public issue is irrelevant to the question whether it should be repressed in

advance of publication.” (Wilson at page 658).

Words and comments taken out of context cannot be used to stifle a free debate.

The Wilson court held: “Thus, Appellant was placed in the untenable position of speculating on whether his attempts to comply with the court orders were satisfactory or whether additional versions of the Newsletter would also be repressed. The result was not merely a theoretical chilling of his right to publish, but actual acquiescence by him, under threat of contempt, in refraining from future publication of any of the four versions of the circular. (Crosby v. Bradstreet Company, supra, 312 F.2d at p. 485). By the restraining order the court also devised for itself an intolerable role: it was called upon to determine whether various versions of the Newsletter presented "too narrow a view of the truth" and whether successive publications were "substantially similar" to the original circular. It even went so far as to specify such details of publication as the size of type which would give a "fair" presentation. The court thus aggressively assumed the role of governmental censor, approving its version of a "fair" presentation, and disapproving a "too narrow view of the truth." (Wilson at page 661). It is important to reiterate that the court ruling relied on only two cases that did not support the ruling.

A prior restraint is a measure of last resort to be imposed only under the most extreme circumstances involving a compelling public interest. The less drastic alternative would be for the Village Inn to file a lawsuit and allege defamation if Ms. Lemen made a false statement, that was otherwise unprotected, that in some way damaged the Village

Inn.

In this case there was no compelling public interest identified. The Wilson holding is directly contrary to the trial courts ruling in this case that ruled “limitations on free speech and the right to petition may permissible and appropriate to prevent otherwise inappropriate conduct.” Having individual trial court judges set limitations on future speech based on what s/he deems to be “inappropriate conduct” is frightening. Here the trial court expressly recognized that limitations were being imposed on the “right to petition.”

Clearly the Village Inn was a problem that demanded a solution as can be seen in the videotapes that were introduced into evidence (Exhibit 50). Anne Lemen took the role of an activist by necessity, much like a cat backed into a corner. She could not sleep well at nights because of the noise and she had to work to support herself and didn't want the situation to get any worse. She is not a lawyer, nor a professional politician. She filed police reports. The police wouldn't help her. She complained to regulatory agencies. She unsuccessfully tried to sell her home.

While she may have taken logical leaps, assumed matters, or come across as shrill, she did believe that the Village Inn was tolerating or at least not taking proper preventive measures regarding offensive actions of its patrons. The facts that gave rise to her beliefs are in fact captured on videotape and in photographs that were presented at trial. Free speech does not require that we state our convictions with such precision.

Appellant contends that the true motive for this lawsuit was to stop the petition campaign and the stifle the opposition to the expanded entertainment permit. Mr. Toll felt that the petitions were part of Ms. Lemen's campaign to create a "negative attitude" concerning the proposed modification to the entertainment permit.

Q You're aware of what Ms. Lemen's petition efforts were, correct?

A Yes, I am.

Q Were those petition efforts in opposition to this plan to reduce the noise levels through the house sound system?

A I'm not certain what the petition was in opposition to because I feel that it was false to begin with, but I know that I feel that it was an effort on her part to create negative attitude about the entertainment amendment that I was applying for.

(Trial transcript, 8/20/02, Aric Toll, page 237 12-22)

Mr. Toll indicated that he wanted Ms. Lemen to stop gathering the petitions.

Q You want her to stop the petition campaign?

A Yes, I do.

(Trial transcript, 8/21/02, Aric Toll, page 279 12-13)

There was no evidence presented that a single person who signed a petition alleged s/he was misled. Mr. Toll didn't even read the petitions that were signed by those opposed to the expansion of the permit. (Trial transcript, 8/26/02 morning session, Aric Toll, page 10 2-9)

Ms. Lemen denies that she made false statements. The court did not identify the specific statements Ms. Lemen made that were false, nor did the court indicate in which way the statements were “knowingly” false. The court did not make any findings of fact concerning what was deemed to be the truth, relative to the Village Inn, for the past, present and future. Further the limitations were to statements “suggesting” the topics of certain categories. One of which was that the Village Inn serves alcohol to minors. Does that mean if there is documentation from then Alcoholic Beverage Control board that an action was taken on the license of the Village Inn for serving alcohol to a minor that Anne Lemen cannot comment on that?

There were other categories referred to by the trial judge. One elderly man testified that he heard the Appellant talk about child porn. However, the man did not ask for clarification or details and no one else in the group that he was with at the time made a similar allegation. (Trial transcript, 8/20/02, Kirby Gault, page 216 6-217 11) Ms. Lemen adamantly denied making such a statement. Maybe Mr. Gault's mind was wandering. We don't know if the trier of fact concluded Ms. Lemen made this particular statement, but the fact it is contained in the final court ruling casts a cloud of doubt over Ms. Lemen that

may undermine her credibility.

Beyond the vagueness of the court ruling, the appellant is not contending that “knowingly false statements” should be constitutionally protected. Ms. Lemen’s statements were made regarding a public issue, relative to Balboa Island. The appellant contends that in the context of public debates, the truth and falsity of statements should not even be an issue, at least with respect to a prior restraint, due to the inherent chilling effect. (See Wilson supra) Otherwise, the strong can intimidate the less fortunate by simply alleging that false statements were uttered. It’s virtually an art in smear politics to take something someone said and repeat it out of context. In addition, comments can be misunderstood during brief conversations and those holding differing opinions don’t always give the other the benefit of the doubt. Add to that the group dynamics when an innocuous comment can take on a life of its own in direct proportion to the amount of alcohol consumed in a bar setting. The courts should not be in a position to scrutinize statements made about public issues and make judgment calls about who may have said what in the context of what they may or may not say in the future.

Further, those without financial resources cannot afford to fully defend themselves in a court of law, especially because homeowners insurance policies will often not afford coverage for free speech related lawsuits. It can quickly get expensive to prove the truth of a statement that one may or may not have said. The safe approach would be for the Davids of the world to not say anything that would upset the Goliaths, who have a vested



financial interest in the outcome of a case and can afford to protect that interest. This would greatly weaken one of the greatest protections and sometimes the only protection that our society can offer to those seeking to challenge a status quo that is unfair, oppressive and powerful.

Ms. Lemen may well have been the catalyst of change, which no doubt made the Village Inn owners angry. There were several defense witnesses that clearly had their own independent negative impressions, based on their own personal observations, about the bar such as the following:

Don Abrams	Real Estate Broker on Balboa Island and also an attorney.	Trial transcript 8/22/02, page 21 22 to page 22 1
Dawn Brickner	Has lived two doors away from the Village Inn for seven years.	Trial transcript 8/22/02, page 11 4-13
Barry Fenn	Former member of US Marine Corp.	Trial transcript 8/22/02, page 73 25- 74 12
Tom Fredricks	An attorney who works for the California Division of Labor Standards Enforcement	Trial transcript 8/22/02, page 1 15 - 2 8
David and Linda Seiberts	Owners of Magnolia Charlie, which is a child's clothing store, in close proximity to the Village Inn	Deposition testimony preserved by videotape for trial

Even co-owner Roberta Toll expressed her displeasure regarding noise in the

streets after patrons left the bar.

Q Assuming it's a legitimate video, do you think it's outrageous for people to be yelling obscenities on Balboa island on a residential neighborhood at one o'clock in the morning?

A I think it's outrageous that somebody is doing it TWO O'CLOCK in the afternoon when children are walking down the sidewalk.

Q So anytime --

A At any time.

Q -- it's outrageous?

A At any time.

(Trial transcript, 8/20/02, Roberta Toll, page 200 18-26)

After Ms. Lemen's campaign, the Village Inn did take steps to reduce the noise.

Q And do you remember the comment being made that A.B.C. does to an extent have the right to regulate entertainment?

A Yes, I do.

Q And do you remember the comment being made that if

the business serving alcohol disturbs the neighbors, something will happen to the license?

A I don't recall that statement.

Q Since that meeting at the beek center with the A.B.C. have you taken any steps to make the restaurant less noisier, disturbing to the neighbors?

A Yes, I have.

Q What steps have you taken since that meeting with the A.B.C.?

A We've begun what's been called a no loiter zone which is an extra effort to assure that after 10:00 p.m. there is no person loitering around the business, being customers or otherwise. Also I've signed my staff up for an A.B.C. lead program, training program to take place at the restaurant as an extra effort to take a proactive stance to be in good standing with the A.B.C.

(Trial transcript, 8/21/02, Aric Toll, page 267 23- 268 17)

With respect to the plaintiff's case, a vast majority of the plaintiff's witnesses had either an ownership interest in the bar at some point, or were employees or customers. None of the conversations were recorded and it was simply Anne Lemen's word against

the witnesses who were in favor of the bar.

One interesting plaintiff's witness was Gale Bensussen. Bensussen testified that Lemen made several derogatory comments about the Village Inn. Ms. Lemen offered to allow Bensussen the opportunity to view the videotapes that supported Ms. Lemen's belief, but Bensussen did not accept the offer.

14 Q. DID MS. LEMEN TELL YOU ANYTHING ABOUT THERE  
15 BEING SEX VIDEOS BEING MADE INSIDE THE VILLAGE INN?

16 A. SHE DID INDICATE SHE HAD A VIDEO OF THE  
17 THINGS I MENTIONED EARLIER, SEX FOR DRUGS AND  
PROSTITUTION,  
18 WHAT HAVE YOU, SHE HAD A VIDEO THAT SHE HAD TAKEN, AND  
19 I COULD BUY A COPY FOR FIVE DOLLARS AND DID I WANT TO SEE  
IT AND I SAID NOT REALLY.

(Trial transcript, 8/26/02 afternoon session, Gale Bensussen, page 15 14-20)

This exchange demonstrates Ms. Lemen's good faith belief regarding the truth of the statements she did make. She offered Mr. Bensussen an opportunity to view the videotapes that supported her contentions. Plaintiff's counsel interpreted the comments made by Ms. Lemen that she had made videotape regarding a sex for drugs and prostitution deal", as her saying sex videos were being made inside the Village Inn.

Mr. Toll did testify that his business dipped in June 2002, and believed it was due

to Ms. Lemen's activity in gathering the petitions.

A We had an absolute immediate effect on our bottom line where our revenues, our revenue generated decreased in the month of June by 21 and a half percent, which is a terribly troubling trend for us as we were barely a break even business through the first part of the year. The majority of our clients, 90 to 95 percent of our clients are island residents, retired individuals that have re-occupied their long-owned homes. Anne's -- after immediately following Anne's intense campaign of going door to door, our sales dropped 21 and a half percent.

(Trial transcript, 8/21/02, Aric Toll, page 261 3-12)

One June 4, 2002, residents of Balboa Island attended a meeting hosted by Alcoholic Beverage Control personnel. Ms. Lemen was asked, in court, if she helped coordinate that meeting. (Trial transcript, 8/20/02, Anne Lemen, page 74 21-75 3) On June 20, 2002, a "full house" attended a Planning Commission meeting. Mr. Toll's attorney spoke at the meeting and Ms. Lemen did not. (Trial transcript morning session, 8/26/02, Aric Toll, page 4 20 - 5 16)

Plaintiff failed to offer any evidence to show that the drop off in business was due to the allegedly "knowingly false statements," as opposed to Ms. Lemen's participation in the political process and the community making its own decision.

The public nature of the debate in June 2002 may very well have lead to a large drop off in customers, given the Village Inn catered to the Island's residents. There was no evidence introduced that during the meeting with the Alcoholic Beverage Control Board and the Planning Commission meeting in June 2002, that Ms. Lemen said anything, much less anything that was knowingly false. The Village Inn had every opportunity to present its case to the residents of Balboa Island. The residents could decide for themselves if the owners of the Village Inn were arrogant and insensitive. David Seeber testified that he complained that his wife was scared and that Aric Toll "kind of blew it off like he didn't know what were talking about." (Deposition of David Seeber, page 6 25 - 7 14)

Contrary to the trial courts finding, there was no evidence that the Village Inn was damaged in any way due to "knowingly false statements" made by the defendant. At trial, there was not one person identified who spent a penny less at the Village Inn because of Anne Lemen. (Trial transcript, 8/21/02, Aric Toll, page 266 18-22) There are other possibilities concerning the fall off in business in June, such as the summer break for college students.

Ironically, during the time that Anne Lemen was carrying the torch, income continued to climb for the Village Inn. (Trial transcript, 8/21/02, Aric Toll, page 260 10-261 1) Aric Toll, testified his regular customers would laugh and ignore Ms. Lemen. (Trial transcript, 8/21/02, Aric Toll, page 256 9-12) However, when she stepped back,

the grass roots took the fire for its own and there was then a sharp fall off in business.

The old adage of “don’t shoot the messenger” comes to mind.

Even if there were fewer neighbors who frequented the Village Inn, free speech is more precious and dear than a business losing money. Plaintiff itself has taken a logical leap by assuming that because the bar’s witnesses, who did not sign the petitions, testified that Ms. Lemen said negative things about the bar, she also told false and negative things to people who did sign the petitions. There were six defense witness presented who were clearly against the modification of the entertainment permit and no allegations were made that Ms. Lemen made false statements to them. There is no evidence that Ms. Lemen misled any of the other 393 signers of the petition.

The prohibition against Ms. Lemen initiating contact with employees is also unreasonable. If she merely says “hi” as one is walking by, or talks to one in a grocery store or in a political meeting, would that be a violation of the court order? If an individual has a problem with Anne Lemen, that individual can file a restraining order.

#### IV

#### **PROHIBITION REGARDING THE USE OF VIDEO AND STILL CAMERAS**

The Courts have held that a report of suspected criminal activity made to an investigative agency is absolutely privileged. **Fremont Compensation Ins. Co. vs. Superior Court** (1996) 44 Cal.App.4th 867, 52 Cal.Rptr.2d 211. This would carry over to reports of violations ordinances, regulations and administrative rules.

Ms. Lemen sought to record the code violations at the Village Inn. None of the images captured on the videotapes or photographs reflected improper behavior by Ms. Lemen. Initially Mr. Toll objected to the video of an open door, but then indicated the filming would be proper if it was to document excessive noise spilling into the streets.

22 Q. BY MR. BUSH: DO YOU BELIEVE ANNE LEMEN WAS  
23 UNREASONABLE IN RECORDING THAT PARTICULAR SEGMENT?

24 A. AS A BUSINESS OWNER, IT MAKES ME VERY  
25 UNCOMFORTABLE TO HAVE HER PARKED RIGHT AT CURB SIDE  
26 DIRECTLY IN FRONT OF THE RESTAURANT WITH THE VIDEOTAPE

101

1 ROLLING. I BELIEVE THAT'S UNREASONABLE.

2 Q. EVEN IF THE DOOR WAS IMPROPERLY PROPPED OPEN  
3 AND SOUND WAS SPILLING INTO THE RESIDENTIAL AREA?

4 A. GIVEN THOSE CIRCUMSTANCES, IF THAT'S WHAT SHE  
5 WAS TRYING TO DOCUMENT.

6 Q. THAT'S REASONABLE, THEN?

7 A. YES.

(Trial transcript, 8/22/02, Aric Toll, page 100 22- to 101 7)

An objection was made to Ms. Lemen taking photographs through an open door of the Village Inn. Ms. Lemen was concerned about the sound of music coming through



then door. An employee testified that he understood the door was to be kept open during business hours. (Trial transcript, 8/20/02, Felipe Anaya, page 206 16- 208 13) Mr. Toll then testified that in fact the requirement was that the doors remain unlocked during business hours. (Trial transcript, 8/20/02, Aric Toll, page 234 1-6) The employee had misunderstood the notice and Ms. Lemen had suffered for years because of the noise. Once again, Ms. Lemen was in the right.

Ms. Lemen recorded a young man crashing through her window, where she had just been sleeping. Mr. Toll thought the whole incident was staged. (Trial transcript, 8/22/02, Aric Toll, page 56 16-24)

Mr. Toll thought the same young man who was filmed crashing through the window may have been the someone filmed negotiating a possible sex deal just outside Ms. Lemen's window.

2 Q. GIVEN YOUR FAMILIARITY WITH THE GOINGS ON, DO  
3 YOU HAVE ANY IDEA WHAT THIS TRANSACTION WAS ALL ABOUT?

4 A. I DON'T REALLY KNOW. IT APPEARED -- FROM THEIR  
5 LANGUAGE, IT APPEARED AT THE END MAYBE SHE WAS TRYING TO  
6 SOLICIT SEX FROM THOSE GENTLEMEN.

7 I WOULD LIKE TO POINT OUT THAT THE MALE PARTY  
8 THAT YOU SEE LOOKS VERY MUCH LIKE THE PARTY IDENTIFIED AS  
9 JACOB WITH THE BROKEN WINDOW.

(Trial transcript, 8/22/02, Aric Toll, page 61 2- 62 5)

Ms. Lemen has been right enough of the times to cause concern. The trial court was without authority to bar Ms. Lemen from taking video or still photo images from a public place, such as a street or sidewalk, to preserve evidence of possible violations of law.

Plaintiff contended that Ms. Lemen took far more photographs and video images than she produced. However, the Village Inn had an external and internal video security system. Mr. Toll failed to even review the tapes to see if Ms. Lemen was ever recorded taking inappropriate photographs and failed to introduce any of those tapes into evidence.

Q Do you remember looking at the tapes and seeing any photographs of her?

A I can tell you that my security cameras run 24/7 and that I rarely have the time to review those tapes. So I can assure you that I have tapes of Anne Lemen photographing through the windows. Have I reviewed those tapes? No, I have not.

(Trial transcript, 8/21/02, Aric Toll, page 265 12-18)

Ms. Lemen has to take her own videotapes given that Aric Toll will not share his videotapes, that are running 24/7, with Ms. Lemen. (Trial transcript, 8/21/02, Aric Toll, page 274 14-16)

None of the witness who said they saw Ms. Lemen taking excessive photographs kept or produced any log. The plaintiff did not present the best evidence, or any credible specific evidence, that Ms. Lemen took more videos and still photos than she claimed.

There is no public interest that warrants a prohibition against Ms. Lemen in taking video or still images of perceived violations of state or local ordinances.

## V

### **THE PUBLIC INTEREST AND SUBSTANTIAL BENEFIT DOCTRINE PROVIDES THE APPELLANT IS ENTITLED TO RECOVER ATTORNEY FEES**

There is a doctrine called the Public Interest and Substantial Benefit Doctrine that provides for attorney fees which is codified in California Code of Civil Procedure § 1021.5. This Code provides: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

#### **Family Planning Specialists Medical Group, Inc. vs. Powers (1995) 39**

**Cal.App.4th 1561, 46 Cal.Rptr.2d 667**, states that "... evidence of size of population benefitted by private suit is not always required to determine that benefit conferred on public is substantial, as required to entitle prevailing party to award of attorney fees; substantial benefit may be conceptional or doctrinal, and need not be actual and concrete, so-long as public is primarily benefitted."

**42 U.S.C.A. § 1988(b)**, provides, "In any action or proceeding to enforce a provision of Sections, 1981, 1981(a), 1982, **1983**, 1985 and 1986 ... the Court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ..." While this is a Federal Code, it deals specifically with proceedings in vindication of civil rights, and freedom of speech is a civil right.

Attorney fees ordinarily are awarded to prevailing civil rights plaintiffs unless special circumstances render such award unjust, however, prevailing civil rights defendants can recover attorney fees only where the Court also finds that the civil rights claim was objectively ... unreasonable..." **Choate vs. County of Orange (2001) 86 Cal.App.4th, 103 Cal.Rptr.2d 339.**

"The determination that the public policy vindicated is one of constitutional stature establishes the first of the elements requisite to the award (i.e., the relative societal importance of the public policy vindicated." **Serrano v. Priest (1977) 20 Cal.3d 25, 141 Cal.Rptr. 315, 569 P.2d 1303 ("Serrano III").**

Freedom of speech is "a right which is at the fountainhead of all our liberties ...." (**Diamond v. Bland (1974) 11 Cal.3d 331, 342, 113 Cal.Rptr. 468, 521 P.2d 460 (dis. opn. of Mosk, J.), cert. den., 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125.)**

The court stated in **Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341, affd. (1980) 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741.**, "[t]he right [to petition] in California is ... vital to a basic process in the state's

constitutional scheme--direct initiation of change by the citizenry through initiative, referendum, and recall." "While these rights are by nature individual rights, their enforcement benefits society as a whole. Indeed, only by protecting each individual's free speech and petition rights will society's general interests in these rights be secured."

Here, Ms. Lemen is, in fact, attempting to enforce an important right that effects the public interest, that of free speech and freedom of association. Based upon that alone, she would be entitled to the recovery of her attorney fees and such fees should not be paid out of any recovery Ms. Lemen would, or could, be entitled to.

## VI

### CONCLUSION

The Village Inn was upset about the negative attitude Anne Lemen was spreading about the proposed modification to the entertainment permit by engaging in a petition drive and frequently contacting law enforcement personnel and organizing meetings with regulatory agencies. These actions were bad for business and Ms. Lemen just had to be stopped.

All Ms. Lemen wanted was to peacefully coexist with her neighbors. The Village Inn has become quieter since Ms. Lemen's petition drive, but she has had to pay a terrible price. Anne Lemen is not alone, as others share her concerns about the way the Village Inn operates. Anne Lemen is not alone in wondering what she can and cannot say about an unruly neighbor and what can be done to make the Island be a quieter place to live.

The trial court has weaved a tangled web. It's time to brush off the cobwebs, breath deep and speak freely. The Village Inn will still have their day in court if specific and clear lines are crossed in the future.

Appellant seeks a reversal of the court order with respect to any prohibition on her free speech in the future; a removal of all restrictions of her taking videotapes and still images of the Village Inn and from initiating contact with employees; and for an award of costs and attorneys fees, given that Ms. Lemen has been acting in the public interest.

DATED: 8/26/03

Respectfully submitted,

By: 

D. Michael Bush  
Attorney at Law  
Attorneys for Appellant  
ANNE LEMEN

## **CERTIFICATE OF WORD COUNT**

I, D. Michael Bush, certify that this Brief contains 5,682 words, as contained in the properties section of Microsoft Word 2000 processing program used to count the words of this Brief, except this Certification.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on August 25, 2003 at Fountain Valley, California.

BY: 

\_\_\_\_\_  
D. Michael Bush  
Declarant

**PROOF OF SERVICE**  
STATE OF CALIFORNIA, COUNTY OF ORANGE

I, SCOTT A. ZIMMON, declare:

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within entitled action. My business address is 17330 Brookhurst Street, Suite 330, Fountain Valley, Ca. 92708. On August 28, 2003, I served the following document(s):

**APPELLANT'S OPENING BRIEF**

in the case entitled: **Balboa Island Village Inn vs. Lemen, et al.**, Orange County Superior Court case number 01 CC 13243, Court of Appeals Case Number: G031636 on the interested parties through their attorneys of record by placing a true and correct copy thereof addressed as shown on the attached service list, as designated below:

**(XX) BY FIRST CLASS MAIL (C.C.P. § 1013a, et seq.):**

I caused said documents(s) to be deposited in the United States mail in a sealed envelope with postage fully prepaid at Fountain Valley, California, following the ordinary practice at my place of business of collection and processing of mail on the same day as shown as this declaration.

**( ) BY HAND DELIVERY/PERSONAL SERVICE (C.C.P. § 1011, et seq.)**

I caused said documents(s) to be delivered to each addressee.

**( ) BY EXPRESS MAIL (C.C.P. § 1013(c)(d), et seq.)**

I caused said document(s) to be deposited with an express service carrier in a sealed envelope designated by the carrier as an express mail envelope, with fees and postage pre-paid.

**( ) BY REGISTERED MAIL (C.C.P. § 1020, et seq.)**

I caused said document(s) to be deposited with the United States mail, postage pre-paid, return receipt requested, signed by the addressee that said document(s) were received.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

DATED: 8/27/03

BY: 

SCOTT A. ZIMMON



**BALBOA ISLAND VILLAGE INN, et al. vs. LEMEN, et al.**  
**OCSC Case Number 01 CC 13243**  
**Court of Appeals Case Number G031636**

**“SERVICE LIST”**

The Hon. Judge Gerald G. Johnson  
Judge of the Superior Court  
c/o Clerk of the Court  
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