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REPLY BRIEF (P)

S127904

IN THE SUPREME COURT OF CALIFORNIA

BALBOA ISLAND VILLAGE INN, INC.

Plaintiff/Respondent/Petitioner

vs.

ANNE LEMEN

Defendant/Appellant

**WITH PERM.
SUPREME COURT
FILED**

OCT 15 2004

Frederick K. Ohlrich Clerk

DEPUTY

**After a Decision By The Court of Appeal
Fourth Appellate District, Division Three
Case Number G031636
Orange County Superior Court Case Number 01 CC 13243**

ANSWER TO PETITION TO REVIEW

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PRELIMINARY STATEMENT

This will be a preliminary brief and I intend to augment it in the future if this Court chooses to review this case. Given time may be of the essence, I wanted to bring certain matters to the Court's attention.

Village Inn referred to an unpublished opinion, which has now been accepted by the United States Supreme Court for review. (**Tory v. Cochran** 03-1488) If possible, I respectfully request that this Court seek permission from the United States Supreme Court to review and rule on the **Tory v. Cochran** matter in conjunction with the subject case. The right of free speech under the California Constitution is broader than the same right under the United States Constitution and the **Tory v. Cochran** should be decided here. The **Village Inn v. Lemen** case is a fruit from the **Tory v. Cochran** poisonous tree, which would justify the two being heard together.

ISSUES PRESENTED

As framed by the Court of Appeal, the issues are as follows:

- 1) Is a permanent injunction an appropriate remedy regarding past speech deemed defamatory?
- 2) Can the defendant be prohibited from documenting disturbance and perceived violations of governmental codes within a specified distance of a particular establishment?
- 3) Should attorney fees be awarded in defending a litigant in a case where an unconstitutional remedy was the only remedy requested?

Given the context of the issue as framed by the United States Supreme Court in the **Tory v. Cochran** case, the additional issue not addressed by the Court of Appeal is as follows:

4) Is the remedy of a permanent injunction an appropriate remedy in the context of a case involving a public issue?

**1) IS A PERMANENT INJUNCTION AN APPROPRIATE REMEDY
REGARDING PAST SPEECH DEEMED DEFAMATORY?**

The Court of Appeal was correct in deciding that a permanent injunction is not an appropriate remedy with respect to speech deemed to be defamatory. I would like to make it clear for the record that given Lemen's income limitations, as the trial lawyer, I felt like a David with only a few stones at my disposal facing a financial giant. I made a limited effort to contest the statements attributable to my client, as the only remedy sought was, in my view, an unconstitutional one. I felt that no matter what the trial court found she said in the past, a future injunction was not appropriate.

The Village Inn now seems to think if they lose this case that they would have to resort to "self help." It does not take much creativity and imagination to develop alternatives to throttling Anne Lemen. Such alternatives are:

A) **Reaching out to the community:** When there are mixed neighborhood use issues, communication can be very helpful. This case pitted the only local bar serving hard alcohol to young people against residents on a quiet little island. The Village Inn could have installed an internal and external video surveillance system. Anne Lemen

did film what appeared to be a sex and/or drug transaction involving what appeared to be patrons of the bar. If the Village Inn had been open to receiving Lemen's complaints, it could have cooperated with law enforcement personnel, identified the perpetrators and at the very least made sure the two participants were not granted future access to the bar. By ignoring legitimate complaints, the Village Inn was in fact the host to the proliferation of prostitution and drug use as inarticulately alleged by Lemen.

One key to understanding another's position is to listen. The Village Inn resented Lemen to the point where they saw everything she did in a bad light. The Village Inn reasoned that they spent an enormous amount of money to make the Village Inn quieter. *Instead of being grateful, Lemen continued to complain. She continued on her relentless path of harassment by taking photos of employees dressing through open doors.*

Only during the trial did it come out that an employee misread a sign on the door to keep the door unlocked during business hours. He thought the sign said to keep the door open during business hours. As a result, a sound tunnel went straight from the live bands into Lemen's quiet little vacation cottage. She had previously been branded as a liar and she was simply trying to document what she felt was a violation.

B) A suit for compensatory damages: Even if the award was relatively small, it would get the attention of Ms. Lemen. If she persisted, then she could have been sued for punitive damages. She does have a house.

For the government to instruct a citizen about what he or she can't say in the future is an anathema to our way of life in this country.

**2) CAN THE DEFENDANT BE PROHIBITED FROM DOCUMENTING
DISTURBANCE AND PERCEIVED VIOLATIONS OF GOVERNMENTAL
CODES WITHIN A SPECIFIED DISTANCE OF A PARTICULAR
ESTABLISHMENT?**

It is undisputed that Ms. Lemen made a plethora of complaints to law enforcement personnel and that she was widely ignored. A citizen has an unrestricted right to bring complaints to law enforcement entities and to other governmental authorities. The underlying court order was too broad given there was no provision regarding documentation of perceived violations of law. There was not one video, photograph, or image presented at trial that was deemed objectionable. Plaintiff's witness complained of a wide range of perceived instances of harassment, none of which were documented, which made it impossible for Lemen to defend herself on those charges.

**3) SHOULD ATTORNEY FEES BE AWARDED IN DEFENDING A
LITIGANT IN A CASE WHERE AN UNCONSTITUTIONAL REMEDY WAS
REQUESTED?**

The Court of Appeal ruled that attorney fees were justified given that Lemen made the statements for her own purposes, not for the benefit of the community. I respectfully disagree. Signed petitions were obtained from approximately 400 of 1,100 residents of Balboa Island. Even as late as the time of trial, Aric Toll, the owner of the Village Inn, hadn't even read the handwritten comments on the petitions, much less argued that any

comments were attributable to false and misleading information disseminated by Anne Lemen.

Regardless of what comments Lemen made and why she made them, legal fees and costs were incurred to protect Anne Lemen from a well-financed commercial establishment that sought an unconstitutional order. The fact that her case resulted in a published opinion on the Court of Appeal level should per se entitle her to attorney fees.

With all due respect to this Court and the Court of Appeal, 2nd District, it is troubling that the Tory v. Cochran case slipped by, albeit in an unpublished state. If this Court would like my analysis of the Tory v. Cochran case, I'd be happy to provide it.

Anne Lemen has stood up to an assault on her free speech rights. Had she not, the poisonous weeds would have proliferated. This is not just about a poor woman who couldn't sleep at night, couldn't sell her house and was branded as a liar and ignored and ridiculed. She has taken a stand that is important to others who lived on Balboa Island. Ultimately her position that the government can't tell someone what not to say in the future will benefit many citizens of this State.

4) IS THE REMEDY OF A PERMANENT INJUNCTION AN APPROPRIATE REMEDY IN THE CONTEXT OF A CASE INVOLVING A PUBLIC ISSUE?

I don't believe there is any dispute that the operations of the Village Inn were a public issue within the context of the Balboa Island Community. There were news articles introduced by the Village Inn at the time of trial. There were news articles in the

largest local papers after the trial and the appeal about the dispute. Approximately 1/3 of the Island residents had signed petitions against the expansion of the entertainment permit for the Village Inn before the underlying case went to trial. There were public forums that were well attended. I have contended that the drop off in business that did occur took place only after two important public sessions in which the Village Inn ownership demonstrated them as not being fully responsive to the neighbor's concerns.

One of the beautiful aspects about our way of government is that if a group of people is not happy with the status quo, they can take action through the political process. The impact felt by the Village Inn due to the legitimate concerns of the company cannot be separately identified by any comments made by Anne Lemen, even if she was deemed to have made the comments. As indicated in the briefs submitted to the Court of Appeal, Lemen denies making the defamatory comments. As to most of the statements attributable to her, they were wrongly distilled from the legitimate and complicated complaints she had about the bar's operation and the comments were taken out of context.

If this Court elects to hear this case, I will respond in more detail.

Dated: October 13 , 2004

Respectfully submitted,

By: 

D. Michael Bush
Attorneys for Defendant/Appellant
ANNE LEMEN

VERIFICATION

I, D. Michael Bush, declare as follows:

I am the attorney for the plaintiff/petitioner/respondent herein. I have read the foregoing **REPLY TO PETITION TO REVIEW** and know its contents. The facts alleged in the petition are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than plaintiff/petitioner/respondent, verify this reply.

I did verify the Word Count using Microsoft word and there were 2,209 words in this document.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on October 13, 2004, at Costa Mesa, California.

BY: 

D. Michael Bush
Attorneys for Defendant/Appellant
ANNE LEMEN

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE

I, D. Michael Bush , 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 2973 Harbor Boulevard, Suite 480, Costa Mesa, Ca. 92626. On October 14 , 2004, I served the following document(s):

REPLY TO PETITION TO REVIEW

in the case entitled: Balboa Island Village Inn vs. Lemen, et al., Court of Appeals Case Number G031636; Orange County Superior Court case number 01 CC 13243, 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:

(X) 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 Anaheim, 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.

J. Scott Russo, Esq.
DUBIA, ERICKSON, TENERELLI & RUSSO

Clerk of the Court
California Court of Appeals

The Hon. Judge Gerald G. Johnson
Judge of the Superior Court

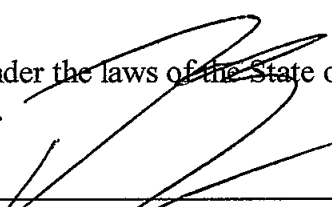
(X) BY HAND DELIVERY/PERSONAL SERVICE (C.C.P. § 1011, et seq.)

I caused said documents(s) to be delivered to:

Clerk's Office
California Supreme Court

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:October 14, 2004

BY: 
D. Michael Bush

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

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