4 Civil No. D063801

IN THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

STUTZ ARTIANO SHINOFF & HOLTZ, APC., *Plaintiff/Respondent,* v. MAURA LARKINS, *Defendant/Appellant*	Ct. of App. No. D063801 Superior Court Case No. 37-2007-00076218-CU-DF-CTL

Appeal from an Order of the Superior Court of California
In and For the County of San Diego
Honorable Judge Judith F. Hayes

RESPONDENT'S BRIEF

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TO BE FILED IN THE COURT OF APPEAL APP-008

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE	Court of Appeal Case Number: D063801
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APPELLANT/PETITIONER: Maura Larkins RESPONDENT/REAL PARTY IN INTEREST: Stutz Artiano Shinoff & Holtz, APC	

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(3) Daniel Shinoff	Shareholder
(4)	
(5)	

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James F. Holtz
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I. INTRODUCTION

The law firm of Stutz Artiano Shinoff & Holtz, APC ("Stutz") sued Appellant Maura Larkins for libel based upon statements that Larkins made on her internet website. In 2009, the trial court filed a stipulated injunction prohibiting Larkins from maintaining the defamatory statements on her website, and barring future publication of statements accusing Stutz and its lawyers of illegal conduct, violations of law, unethical conduct, lack of professional competence, or intimidation.

After Larkins failed to comply with the terms of the stipulated injunction, Stutz moved to sanction Larkins by striking her answer to Stutz's complaint. In the meantime, Larkins sought to modify the stipulated injunction, but the trial court denied Larkins' motion. Larkins has appealed from that order in a separate concurrent appeal.

Pertinent to this appeal, the trial court granted Stutz's motion to strike her answer, and then entered a default judgment against Larkins. Now, four years after Larkins made repeated internet publications violating the stipulated injunction, Larkins claims that the Superior Court's order entering default judgment was improper.

The trial court, however, did not err. The trial court's order striking the answer was a viable sanction against Larkins for her willful and deliberate refusal to comply with the trial court's orders. Larkins' failure to abide by the terms of the injunction has wasted the trial court's resources, and caused Stutz to incur unnecessary expenses. The sanction was absolutely warranted under the circumstances, and this Court should affirm the default judgment.

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II. FACTS AND PROCEDURAL HISTORY

A. Prior Proceedings

Maura Larkins has a pattern of willful failure to comply with the law, resulting in terminating sanctions. (6 AA 1286, 1380-1382, 1384, 1386-1388, 1390; 9 AA 2034-2040.) In fact, terminating sanctions have now been issued four times, and she has voluntarily dismissed one other case. (*Id.*)

Larkins was a teacher in the Chula Vista Elementary School District. (6 AA 1336-1337.) She was terminated in 2001. (6 AA 1340; 6 AA 1376) Larkins sued the school district's assistant principal, and fellow teachers in *Larkins v. Werlin*, et al. (Case No. GIC 781970). (6 AA 1336-1378.) She alleged libel and slander showing she knew what these terms mean. (6 AA 1336-1378.) On December 3, 2004, Judge Nevitt granted terminating sanctions for failure to comply with litigation requirements. (6 AA 1380-1382.)

In January 2004, Larkins sued the lawyer who represented her in the employment dismissal hearing for alleged malpractice in *Larkins v. Schulman*, Case No. GIC 823858. (6 AA 1287, 1384.) Larkins subpoenaed many district employees for deposition, and the court granted a motion to quash those subpoenas and a protective order in August 2004. (6 AA 1287.) Later, the legal malpractice case was dismissed by the Court as a "terminating sanction". (6 AA 1384.)

In April 2004, Larkins filed another case in San Diego Superior Court related to her employment with the District called *Larkins v. California Teachers Association, et al.*, Case No. GIC 825879. (6 AA 1287.) The Court consolidated the *Larkins v. Werlin* and *Larkins v. CTA* cases. (6 AA 1287.) In January 2005, judgment was entered against Larkins in favor of the District

and all of the individual district employee defendants and costs were awarded. (6 AA 1386-1388.) She dismissed the remaining claims. (6 AA 1390.)

From the foregoing, it is apparent that because Larkins could not accept personal responsibility for her acts which led to her termination, she repeatedly attempted to sue the school district, her superiors and co-employees, and repeatedly lost. (6 AA 1287.) By 2005, she had turned her attention to the Stutz firm because they represented the school district. (6 AA 1287.) Because Daniel Shinoff was the firm member in charge of the school team, she began directing her ire towards him personally and other firm attorneys with whom she had contact. (6 AA 1287.)

B. The Complaint And Summary Adjudication

On October 5, 2007, Stutz filed its complaint with the Superior Court of San Diego County alleging damages for defamation by Larkins and seeking punitive damages. (1 AA 1-9.) On October 24, 2008, Stutz filed a motion for summary adjudication. (1 AA 155 - 2 AA 268.) On March 26, 2009, the trial court granted Stutz's motion finding that certain statements on Larkins' website were defamatory. (2 AA 401.)

C. The April 6, 2009 Stipulated Permanent Injunction

Larkins, in order to avoid a jury trial that day on the issue of damages engaged in negotiations with Stutz. (1 RT 89-91.) The parties stipulated to the Court issuing a permanent injunction with agreed upon terms. (1 RT 91-93.) On April 6, 2009, the trial court issued an Order on a Stipulated Permanent Injunction (the "Stipulated Injunction") which enjoined and restrained Larkins from:

> ...continuing to publish or republishing by any method or media, including but not limited to all electronic data, websites and web pages, the defamatory statements alleged in Plaintiff's First Amended Complaint pertaining to Plaintiff and any of its

lawyers past or present, and future publication of statements with regard to Plaintiff and its lawyers accusing illegal conduct or violations of law, unethical conduct, lack of professional competence or intimidation.

(2 AA 467-468.)

During the April 6, 2009 hearing on the stipulated injunction, Larkins was admonished by the Court as to rights she was giving up. (1 RT 91-94.) The following exchange occurred:

THE COURT:	I HAVE BEFORE ME A DOCUMENT ENTITLED, "ORDER ON PERMANENT INJUNCTION." IT HAS BEEN SUBMITTED TO THE COURT FOR MY SIGNATURE. IT IS MY UNDERSTANDING THAT THE PARTIES AGREE ON THIS. IS THAT CORRECT, COUNSEL?
MR. HOLTZ:	YES, YOUR HONOR. THIS IS A STIPULATED PERMANENT INJUNCTION.
THE COURT:	DID YOU READ IT?
MS. LARKINS:	YES I DID.
THE COURT:	DID YOU UNDERSTAND IT?
MS. LARKINS:	YES, I DID.
THE COURT:	DO YOU HAVE ANY QUESTIONS ABOUT ANYTHING?
MS. LARKINS:	NO, I DON'T.
THE COURT:	HAVE YOU HAD ENOUGH TIME TO LOOK AT THIS?
MS. LARKINS:	OH, YES.
THE COURT:	YOU UNDERSTAND IF YOU WANTED YOU COULD GO TAKE IT TO A LAWYER, BUT YOU'VE CHOSEN TO REPRESENT YOURSELF. IS THAT WHAT YOU WANT TO CONTINUE TO DO?
MS. LARKINS:	YES.

THE COURT: OKAY. IS THIS AGREEABLE TO YOU?
MS. LARKINS: IT MOST CERTAINLY IS.
THE COURT: IS THIS WHAT YOU WANT TO DO?
MS. LARKINS: THIS IS WHAT I WANT TO DO.

(1 RT 91-92.) The Court then went on to explain:

> **THE COURT:** I'M GOING TO GO AHEAD AND SIGN THIS. ANYTHING BEFORE I SIGN IT? ANYBODY WANT TO SAY ANYTHING? I DIDN'T ASK THOSE QUESTIONS BECAUSE I SAW ANYTHING IN HERE THAT IS QUESTIONABLE. THE REASON I ASK YOU THOSE QUESTIONS IS THAT IN EVERY AGREEMENT THAT'S GIVEN TO THE COURT I ASK THE SAME QUESTIONS. THAT IS TO PREVENT SOMEBODY FROM COMING BACK LATER AND SAYING, NO, I DIDN'T REALLY MEAN TO SAY WHAT I SAID OR DO WHAT I DID. THAT REMEDY IS NOT GOING TO BE AVAILABLE, BECAUSE WE GO THROUGH THIS EXERCISE IN MAKING SURE THAT EVERYBODY UNDERSTANDS WHAT THEY'RE DOING, ESPECIALLY IF YOU DON'T HAVE A LAWYER HERE. I WANT TO MAKE SURE YOU READ IT, UNDERSTAND IT, AND DON'T HAVE ANY QUESTIONS.

(1 RT 92-93.) Pursuant to standard settlement procedure the Court questioned Larkins regarding the terms of the stipulation. (1 RT 91-93.) Larkins stated that she understood the stipulated injunction's terms and agreed to be bound thereby. (1 RT 91-92, 94.) Then Larkins made a knowing waiver of the right to seek counsel and stated she wished to continue in pro per on the record, before the Court signed the stipulated permanent injunction. (1 RT 91-92.)

Larkins subsequently failed to remove the statements listed in Stutz's First Amended Complaint and continued to publish defamatory falsehoods in violation of the injunction. (3 AA 507-543.) Stutz sent multiple "meet-and-confer" letters addressing these violations in detail. (3 AA 545-558.) Stutz

then filed a motion to enforce the stipulated injunction with evidence of the violations and the attempts to meet and confer. (3 AA 480-562.)

On August 7, 2009, the Court confirmed its tentative ruling after briefing by the parties and argument, and granted Stutz's Motion to Enforce Permanent Injunction against Larkins, ordering Larkins to remove the subject statements within 48 hours. (3 AA 655a.) This minute order was followed by a formal order dated September 18, 2009. (3 AA 655b-655c.)

D. The December 11, 2009 "Expanded Injunction"

Larkins, again, did not remove all of the statements held defamatory by the court, and in some cases she only slightly modified her statements in an attempt to skirt the trial court's ruling. (3 AA 656-666.) Accordingly, Stutz filed a motion to strike Larkins' answer. (3 AA 656-666.) On December 11, 2009, the trial court denied the motion, but expanded the original Stipulated Injunction to a blanket prohibition against mentioning Stutz anywhere on Larkins' website (the "Expanded Injunction"). (4 AA 785-787.)

On March 18, 2010, Larkins appealed the Expanded Injunction. (5 AA 1032.) However, Larkins did not appeal the March 10, 2010 contempt and sanctions order. (5 AA 1031.)

E. Larkins' Appeal of the December 11, 2009 "Expanded Injunction"

On August 5, 2011, this Court of Appeal issued an opinion on Larkins' appeal of the Expanded Injunction. (5 AA 1021-1042.) While this Court reversed and remanded the Expanded Injunction due to constitutional concerns, it stated that the trial court may consider other methods to compel Larkins' compliance with the earlier Stipulated Injunction. (5 AA 1041.)

Specifically, this Court stated in its opinion:

> "On Appeal, Larkins does not challenge the trial court's finding that she failed to comply with the April 6th stipulated injunction or the Court's August 7 order enforcing the stipulated

> injunction. On remand, the trial court may consider whether to exercise its statutory and inherent authority to coerce compliance with the April 6 or August 7 orders and/or to punish Larkins for her failure to comply with said orders in a manner consistent with the law and the views expressed in this opinion."

(5 AA 1041.) This Court thus remanded the proceedings to the trial court for further consideration on enforcement of the Stipulated Injunction. (1 RA 1-2.)

F. Stutz's Motion to Strike Larkins' Answer

On October 25, 2011, Stutz filed a motion to strike Larkins' answer based on her continued failure to comply with the April 6, 2009 Stipulated Injunction. (6 AA 1190-1200a, 1201-1252, 1284-1390.) The trial court took the matter under submission, and on March 12, 2012, issued an extended briefing schedule allowing a surreply and response. (6 AA 1412-1413.)

G. Larkins' Motion to Modify or Dissolve the Stipulated Permanent Injunction

While Stutz's motion to strike Larkins' answer was pending in the trial court, Larkins filed a Motion to Dissolve or Modify the April 6, 2009 Stipulated Injunction. (5 AA 1045-1079.) Stutz opposed on both substantive and procedural grounds under Code of Civil Procedure section 533 as invalid and without substantive merit. (5 AA 1080-1130.)

On May 30, 2012, the trial court issued a minute order which included the denial of Larkins' Motion to Modify or Dissolve the Stipulated Permanent Injunction. (7 AA 1467-1468.) Specifically, the trial court stated, "The Motion of Defendant Maura Larkins to Modify the Injunction is DENIED. (Code Civ. Proc. § 533)". (7 AA 1468.)

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H. The Court Defers Striking Larkins' Answer And Allows Further Briefing Regarding Compliance

Also on May 30, 2012, the trial court found, "defendant continues to post statements on her websites that violate the parties' original stipulated injunction." (7 AA 1466-1469.) The trial court identified the offending statements. (7 AA 1466-1467.) The trial court stated that "[a]lthough the statements change on defendant's websites, the results are the same. Defendant continues to willfully violate the stipulated injunction. Defendant does not assert, nor has she ever argued that her publications do not violate the original stipulated injunction. The Court of Appeal noted the same. (Court of Appeal decision, p. 21 ["On appeal, Larkins does not challenge the trial court's finding that she failed to comply with the April 6 stipulated injunction, or the court's August 7 order enforcing the stipulated injunction."])" (7 AA 1467.)

The trial court then indicated that it would sanction Larkins: "On the Court's OSC Re: Sanctions, and as directed by the Court of Appeal, the Court exercises its discretion to punish defendant for her failure to comply with the original April 6, 2009 stipulated injunction and her failure to comply with subsequent Court Orders. (See August 7, 2009, October 30, 2009 and December 11, 2009). This ruling applies to the parties original stipulated injunction, and the Court's ruling herein that [defendant] continues to violate the original stipulated injunction." (7 AA 1468.)

The trial court's May 30, 2012 Minute Order requested further briefing from the parties regarding Larkins' post-order compliance with the original Stipulated Injunction. (7 AA 1467-1468.) This forty-five (45) day window of opportunity was presumably given to Larkins by the court to allow time to bring the website into compliance and avoid further penalty for violation of the Stipulated Injunction. (7 AA 1467-1468.)

I. Larkins' Motion For Reconsideration Of The Denial Of Her Motion To Modify Or Dissolve The Injunction

Larkins, instead of bringing her website into compliance, filed an interim motion for reconsideration of the May 30, 2012 order (7 AA 1470-1489), and three unsuccessful ex parte applications. (7 AA 1490-1503 (first ex parte motion to stay); 7 AA 1504 (minute order denying first ex parte motion); 7 AA 1513-1528 (second ex parte motion to stay); 7 AA 1529 (minute order denying to reconsider first ex parte motion and denying second ex parte motion); 7 AA 1531-1569 (third ex parte motion).) Larkins also filed an extraordinary writ for alternative review or prohibition with this Court, which was denied without comment. (8 AA 1827-1878.)

On June 6, 2012 Larkins filed a timely, but procedurally improper motion for reconsideration. (7 AA 1470-1489.) The motion, made under Code Civ. Proc. section 1008, failed to include an affidavit as required by subdivision (a), and lacked information required to be included by statute. (7 AA 1483-1484.) Again, even considering her motion on the merits, it failed to contain reference to any new law or fact upon which the trial court could reconsider the May 30, 2012 order. (See 7 AA 1470-1489.)

J. The Trial Court Strikes Larkins' Answer, And Larkins Appeals the Order Denying Dissolution or Modification of the Injunction.

Despite repeated warnings from the trial court, after May 30, 2012, Larkins failed to take any action to comply with the trial court's order to bring her websites into compliance with the April 6, 2009 Stipulated Injunction. (8 AA 1618-1703.) Accordingly, Stutz filed its brief regarding the status of Larkins' website. (6 AA 1390.)

After considering the further briefing from both parties regarding Larkins' compliance with the Stipulated Injunction, the trial court granted

Stutz's motion, and ordered Larkins' answer struck on August 10, 2012. (9 AA 2034-2040.) To that end, the trial court found "Defendant [Larkins] failed to comply with the Court's Orders of August 7, 2009 and March 10, 2010 as it applies to the parties' original Stipulated Injunction." (9 AA 2037.) The trial court also found "Defendant [Larkins] has continued to publish and republish statements in violation of the April 6, 2009 Stipulated Injunction [...] as late as June 5, 2012 and July 5, 2012." (9 AA 2038.) Stutz waived payment of sanctions. (9 AA 2037-2038.)

On September 4, 2012, Larkins appealed from the Minute Order denying her motion to modify or dissolve the stipulated injunction, which, was entered on May 30, 2012 by the trial court.[1] (10 AA 2367.)

K. Default Prove-Up, and the Instant Appeal the Injunction.

Following the trial court's striking of Larkins' answer, Stutz provided the court with a prove-up brief on damages and requested an entry of judgment on its complaint. (11 AA 2385-2390.) On January 29, 2013, as a result of striking Larkins' answer, the trial court entered final default judgment against Larkins. (12 AA 2562.)

In response, Larkins moved the trial court under Code of Civil Procedure section 473 to set aside the default (which was a judgment at that point) and under Civil Code section 3424, subdivision (a) as well as Code of Civil Procedure section 533, to dissolve the injunction. (12 AA 2672-2673.) After briefing from both sides, on March 6, 2013, the trial court issued an order denying Larkins' motion in full. (*Id.*)

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[1] After the notice of this appeal and the Appellant's Opening Brief were filed, Larkins also filed this appeal from the final judgment in the case. Stutz's motion to consolidate the two appeals was denied by this Court on May 2, 2013.

As to the motion to set aside the default judgment, the trial court explained that Larkins was required to show that judgment had been entered as a result of "her mistake, inadvertence, surprise, or excusable neglect." (12 AA 2672.) Addressing Larkins' failure to meet this burden, the trial court noted that it was "Defendant's willful and deliberate acts, which resulted in the Court striking the Defendant's answer as a sanction." (*Id.*) In finding that the default was not "through [Defendant's] mistake, inadvertence, surprise, or excusable neglect," the trial court referenced Larkins' history of continued willful and deliberate violations of the April 6, 2009 stipulated injunction. (*Id.*) Specifically, the trial court referenced its efforts through the March 10, 2010 monetary sanction and admonishment to place Larkins on notice that "'...the Court will be forced to strike [her] answer and take her default.'" (*Id.*) Lastly, the trial court concluded that "[e]ven if Defendant had demonstrated mistake, inadvertence, surprise, or excusable neglect, [her] motion was not 'accompanied by a copy of the answer or other pleading proposed to be filed.'" (*Id.*)

In denying the motion to dissolve the injunction, the trial court found that Larkins had "failed to establish changes in material facts or law upon which the injunction was granted." (12 AA 2672.) Moreover, Larkins did not "establish how the ends of justice would be served by the dissolution of the injunction." (*Id.*)

On March 28, 2013, Larkins noticed the instant appeal of the January 29, 2013 final default judgment and the March 6, 2013 denial of her motion to set aside default and dissolve injunction. (12 AA 2674.)

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III. STANDARD OF REVIEW

A. Limited Review On Appeal of Default Judgment

On appeal, review of a default judgment is limited to questions of jurisdiction, sufficiency of the pleadings and excessive damages. (*Corona v. Lundigan* (1984) 158 Cal.App.3d 764, 766-767.) The trial court's ruling on a discretionary motion for relief is not disturbed absent a clear showing of abuse. (*State Farm Fire & Cas. Co. v. Pietak* (2001) 90 Cal. App. 4th 600, 610.)

B. Limited Review On Appeal From Order Denying Motion to Dissolve Injunction

On appeal from an order refusing to dissolve an injunction, appellate review is limited to issues newly arising from the motion to dissolve the injunction and does not extend to issues that could have been raised on appeal from the injunction itself. (*Malatka v. Helm* (2010) 188 Cal.App.4th 1074, 1081-1084; *The Rutter Group*, Cal. Prac. Guide Civ. App. & Writs Ch. 2-B ¶ 2:103.1.)

C. Abuse of Discretion Standard

The abuse of discretion standard applies to whether to grant or deny a permanent injunction. (*Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal.App.4th 359, 390.) And similarly, to a trial court's decision regarding whether to dissolve a permanent injunction. (*North Beverly Park Homeowners Ass'n v. Bisno* (2007) 147 Cal.App.4th 762, 776.) Abuse of discretion standard also applied to a trial court's ruling on a discretionary motion for relief. (*State Farm Fire & Cas. Co. v. Pietak* (2001) 90 Cal. App. 4th 600, 610.)

Under the "abuse of discretion" standard of review, appellate courts will disturb discretionary trial court rulings only upon a showing of "a clear

case of abuse" and "a miscarriage of justice." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331 (*"Blank"*); *Denham v. Super.Ct. (Marsh & Kidder)* (1970) 2 Cal.3d 557, 566 (*"Denham"*).) On appeals challenging discretionary trial court rulings, it is appellant's burden to establish an abuse of discretion. (*Blank v. Kirwan, supra,* 39 Cal.3d at 331; *Denham, supra,* 2 Cal.3d at 566.)

The "abuse of discretion" standard is not met simply by arguing a different ruling would have been "better." Discretion is "abused" only when, in its exercise, the trial court "exceeds the bounds of reason, all of the circumstances before it being considered." (*Denham, supra,* 2 Cal.3d at 566 (internal quotes and citation omitted); *Walker v. Super. Ct. (Residential Construction Enterprises)* (1991) 53 Cal.3d 257, 272, 279.)

D. Constitutional Issues Should Be Considered Only If Absolutely Necessary And There Are No Other Dispositive Grounds

Constitutional issues ordinarily will be resolved on appeal only if "absolutely necessary" and not if the case can be decided on any other ground. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65; *Kollander Const., Inc. v. Super.Ct. (Alvarez)* (2002) 98 Cal.App.4th 304, 314 (disapproved on other grounds in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107, fn. 5 ("We are constrained to avoid constitutional questions where other grounds are available and dispositive").)

IV. ARGUMENTS

A. Larkins Stipulated To An Injunction Against Specific Types Of Defamation To Avoid A Jury Trial On Damages

The Court record shows that Larkins agreed to refrain from publishing certain statements about Plaintiff on April 6, 2009, over four years ago, as the Court was waiting to bring up a jury for trial for damages. (1 RT 85; 6 AA 1287.) A Motion for Summary Adjudication on defamation had already been

granted. (2 AA 401;6 AA 1287; 1 RT 6-14.) Larkins stated on the record, under questioning by the Court, that she understood and agreed with the terms of the injunction. (1 RT 91-92.)

Larkins now claims that the Court's interpretation of the injunction was unconstitutionally broad in violation of her First Amendment right to free speech. As stated in the *People ex rel Bill Lockyer v. RJ Reynolds Tobacco Company* (2004) 116 Cal.App.4th 1253, "Reynolds's contention that the sanction award improperly punished Reynolds's First Amendment communication with adult smokers is also unpersuasive. Reynolds was sanctioned not for its constitutionally protected communication with adult smokers but instead for its violation of MSA [settlement agreement], subsection III(a) by targeting youth in its tobacco advertising." (*Id.* at 1288.) Here, Larkins is subject to sanctions not for protected First Amendment speech, but rather has continued making libelous statements in violation of a court order to which she stipulated.

In this case, the stipulated injunction enjoined and restrained Larkins from "continuing to publish or republishing by any method or media, including but not limited to all electronic data, websites and webpages, the defamatory statements alleged in Plaintiff's First Amended Complaint pertaining to Plaintiff and any of its lawyers past or present and future publication of statements with regard to Plaintiff and its lawyers accusing illegal conduct or violations of law, unethical conduct, lack of professional competence or intimidation." (2 AA 467-468.)

All of the statements set forth above violate the stipulated injunction and are libelous. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to

be shunned or avoided, *or which has a tendency to injure him in his occupation*. (Civil Code, § 45 (emphasis added).)

Charges of unethical conduct against attorney may constitute actionable defamation. (*Katz v. Rosen* (1975) 48 Cal.App.3d 1032, 1036.) A fair construction of Civil Code section 46 requires a holding that calling an attorney a "crook" is equally actionable as slander per se without proof of special damage. (*Albertini v. Schaefer* (1979) 97 Cal.App.3d 822.) Imputing dishonesty or lack of ethics to an attorney is also actionable under Civil Code section 46 because of the probability of damage to professional reputation. (*Albertini, supra,* 97 Cal.App.3d at pp. 829-830; *citing Katz, supra,* 48 Cal.App.3d 1032.) A newspaper publication, involving a cartoon and imputing hypocrisy and habitual alteration of records by plaintiff, an attorney at law, was held to be libelous per se. (*Newby v. Times-Mirror Co.* (1920) 46 Cal.App. 110, 131.) An attorney must not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. (Rules of Professional Conduct, Rule 5-100(A).) The statements made against Plaintiff allege unprofessional conduct and are therefore libelous.

This Court of Appeal previously stated: "On appeal, Larkins does not challenge the trial court's finding that she failed to comply with the April 6th stipulated injunction or the Court's August 7 order enforcing the stipulated injunction. On remand, the trial court may consider whether to exercise its statutory and inherent authority to coerce compliance with the April 6 or August 7 orders and/or to punish Larkins for her failure to comply with said orders in a manner consistent with the law and the views expressed in this opinion." (7 AA 1468.)

The trial court did not abuse its discretion when it refused to modify or dissolve the stipulated injunction. Rather, it evaluated Larkins' lack of

compliance with the injunction, and the lack of new law or facts which would warrant modification or dissolution. Based on Larkins history of refusing to obey court orders, and the status of the website at the time, the trial court was well within its discretion to refuse her request under Code Civ. Proc. section 533.

B. The Trial Court Correctly Denied Setting The Aside the Default Judgment Because Larkins' Continuing Violation of the Stipulation Was Not Mistake, Inadvertence, Surprise or Excusable Neglect.

Courts have affirmed the denial of relief under section 473, subdivision (b), where *intentional* misconduct was found to be responsible, at least in part, for a dismissal or entry of default judgment. For instance, in *Lang v. Hochman* (2000) 77 Cal.App.4th 1225 (*Lang*), the trial court imposed terminating sanction after numerous violations of discovery orders. (*See Id.* at 1239-1240.) Specifically, the trial court found that the attorneys and the client "'willfully, intentionally, violated the discovery laws, the orders of this Court, [and] the recommendations...'" of another judge. (*Id.* at 1241.) On appeal, the appellate court reasoned that "a party can rely on the mandatory provision of section 473 only if the party is totally innocent of any wrongdoing and the attorney was the *sole* cause of the default or dismissal." (*Id.* at 1248.) Finding substantial evidence to support the trial court's determination that shared misconduct caused the default judgment, the court affirmed the denial of mandatory relief under section 473, subdivision (b). (*Id.* at 1252.)

In the instant case, Larkins, who has been acting in pro per throughout these proceedings cannot rely on the mistake, inadvertence surprise, or excusable neglect of her counsel. All of the occasions of misconduct relied on by the trial court in imposing terminating sanctions and entering default judgment were committed by Larkins.

As in *Lang*, the trial court found Larkins' intentional misconduct was responsible for the resulting striking of her answer and entry of default judgment. Therefore, section 473 cannot afford her relief. On more than one occasion Larkins filed lengthy, irrelevant, and procedurally defective pleadings. (12 AA 2672-2673.) Larkins failed to remove— and continues to publish— statements that violate the April 6, 2009 stipulated injunction and the trial court's orders. Accordingly, the trial court appropriately exercised its discretion to strike Larkins' Answer, and enter default judgment in favor of Stutz.

Moreover, section 473 requires that the moving party's proposed answer accompany the application for relief. (Code Civ. Proc., § 473(b).) To this date, Larkins has not filed a proposed answer. On this basis alone, the trial court's denial of Larkins' motion to set aside the default under section 473 was correct. In short, Larkins has not demonstrated any abuse of discretion by the trial court, and therefore the judgment should be affirmed.

C. Larkins Motion To Modify Or Dissolve The Original Stipulated Injunction Presented No New Law Or Facts Under Code Civ. Proc. § 533 And The Time To Appeal The Original Order Has Expired

Larkins is correct that an appeal may be taken from an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction. (Code Civ. Proc., § 904.1 (a)(6).) That said, however, on appeal from an order refusing to dissolve an injunction, appellate review is limited to issues newly arising from the motion to dissolve the injunction and does not extend to issues that could have been raised on appeal from the injunction itself. (*Malatka v. Helm* (2010) 188 Cal.App.4th 1074, 1081-1084 ("*Malatka*").)

In *Malatka*, the plaintiff obtained a restraining order against a neighbor. (*Malatka, supra,* 188 Cal.App.4th at 1079-1081.) The neighbor did not appeal, but later moved to modify the order. (*Ibid.*) The court modified the

order, allowing the neighbor to get within 10 rather than 25 feet of the plaintiff. (*Ibid.*) The neighbor appealed. (*Ibid.*) "[T]o prevent both circumvention of time limits for appealing and duplicative appeals from essentially the same ruling ... on an appeal from an appealable ruling, an appellate court will not review earlier appealable rulings." (*Id.* at 1082.)

Thus, courts have allowed an appeal of a modification of an injunction, but only insofar as it raises issues that could not have been raised in an earlier appeal. (*Id.* at 1083.) For example, in *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230 ("*Chico*"), the appellants sought to challenge not only the modifications of the injunction, but the unmodified parts of the injunction as well. The court concluded, "We perceive no reason why defendants should be able to use the order of April 25, amending the injunction, as an artificial springboard from which to launch an appeal that could have been taken earlier." (*Id.* at 251.)

Similarly, in *Malatka*, the defendant asserted that an order refusing to dissolve an injunction is appealable. The court there rejected the obvious subterfuge, explaining: "Without conflating restrictions on appealability and reviewability, we conclude that, to the extent the current appeal from an order implicitly refusing to dissolve a restraining order presents issues that could have been raised in an appeal from the original restraining order, those issues are not reviewable in this appeal. On the other hand, to the extent the motion to dissolve was dependent on new facts and law, such issues are reviewable." (*Malatka, supra,* 188 Cal.App.4th at 1084.)

Larkins presented absolutely no new facts or new law in her motion. As such, she failed to carry her burden showing that there had been a material change in the facts or law upon which the injunction was granted, or that the ends of justice would be served by the modification or dissolution of the

injunction, as required. (Code Civ. Proc., § 533.) Here, unlike *Malatka*, there is no plausible ground for review because the court did not modify the injunction. It is the very same injunction Larkins could have appealed almost three years earlier, but did not. Larkins, in her motion to the trial court under section 533, failed to identify new facts or law which would support such a modification, nor were any cited in her subsequent motion under Code Civ. Proc. section 1008(a).

This Court has no discretion to relieve an appellant from the consequences of delay in filing a notice of appeal. (*Chico, supra,* 208 Cal.App.3d at p. 254.) Because appellant did not perfect a timely appeal from the order granting the original injunction, the court is left without jurisdiction to review the trial court's original order granting the injunction. (Cal. Rules of Court, rule 8.104(a), (b); *Malatka, supra,* 188 Cal.App.4th at 1085-1087.)

D. The Stipulated Injunction Against Defamation Is Constitutional Because Larkins Knowingly Agreed Not To Defame Stutz And Agreed To Be So Enjoined

As a preliminary matter, Larkins' citations to cases involving preliminary and permanent injunctions without agreement by the parties are unhelpful and inapposite. The California Supreme Court's decision in *Balboa Island Village Inn Inc.* (2007) 40 Cal.4th 1141, and this Court's decision in *Evans v. Evans* (2008) 162 Cal.App4th 1157, both dealt with injunctions which were not stipulated to by the parties. Neither case discussed a stipulated injunction which was agreed upon in front of a judge, in court, with a court reporter present. In fact, Stutz is not aware of any reported case dealing squarely with this issue, specifically, in the context of defamation and a knowing waiver. Generally, however, constitutional rights may be waived.

1. A Knowing Waiver Of Constitutional Rights Is Valid

Nothing in the Stipulated Injunction is a waiver of protected First Amendment speech, as no person has a privilege to defame another. However, "it is possible to waive even First Amendment free speech rights by contract." (*ITT Telecom Products Corp. v. Dooley* (1989) 214 Cal.App.3d 307, 319; *accord, Charter Communications, Inc. v. County of Santa Cruz* (9th Cir. 2002) 304 F.3d 927, 935, fn. 9.)

It is a strained analysis at best to construe the stipulated injunction, the admonishments to Larkins, and her prior lawsuits for defamation, as anything but a knowing waiver. (*See Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516, 528 (the court could see no way to construe the confidentiality provision except as a waiver of whatever rights the County had to disclose the circumstances of Sanchez's resignation).)

2. The Stipulated Permanent Injunction Was Mutually Agreed Upon And Discussed On the Record With Judge Hayes

Larkins states that she does not understand the injunction or its terms, a statement contradicted by the record. (1 RT 91-94.) During the April 6, 2009 hearing on the stipulated injunction, defendant was admonished by the Court as rights she was giving up. (1 RT 91-94.)

Pursuant to standard settlement procedure the trial court clearly questioned Larkins regarding the terms of the stipulation, her understanding, rights, and ability to seek counsel. (1 RT 91-94; 5 AA 1083-1084.) Larkins stated that she understood the stipulated agreements terms and agreed to be bound thereby. (*Id.*) Larkins further clearly waived the right to seek counsel and stated she wished to continue in propria persona on the record, before the Court signed the stipulated permanent injunction. (*Id.*)

Larkins continues to claim extrinsic fraud was committed against her by Plaintiffs and the Court; this claim is patently untrue. The stipulated injunction was reached as a partial settlement, in order for the defendant to avoid a jury trial on the only remaining issue of damages that day, as liability had been determined by summary adjudication. Larkins agreed to the injunction in order to avoid the risks of proceeding on that issue.

3. This Court's Prior Ruling Indicated The Injunction Was Valid, And The Trial Court Could Coerce Defendant's Compliance

The Court of Appeal in its decision on August 5, 2011, did not hold the April 6, 2009 stipulated injunction unconstitutional, and specifically noted it was not subject to appeal. (*See* 5 AA 1041.) Rather, the appellate court struck the language expanding the scope of the stipulated injunction ordered on December 11, 2009. (*Id.*) This Court specifically stated that on remand, the trial court may consider whether to exercise its statutory and inherent authority to coerce compliance with the April 6, 2009 order. (*Id.*)

The April 6, 2009 injunction remains in effect, and was not touched upon by the Court of Appeal in its decision. In fact, contrary to Larkins assertions, the this Court's prior decision in favor did not change, rule upon, or effect the constitutionality of the April 6, 2009 stipulated injunction. (*See id.*) Thus, Larkins made no showing of material change with respect to any circumstance.

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V. CONCLUSION

Respectfully, for the foregoing reasons, this court should affirm the default judgment and order denying Larkins' motion to set aside default and dissolve injunction.

DATED: December 9, 2013

STUTZ ARTIANO SHINOFF & HOLTZ
A Professional Corporation

By: _____

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CERTIFICATE OF WORD COUNT

The text of this Respondent's Brief consists of 5,869 words within its text and footnotes as counted by the Corel Word Perfect version 12.0 word processing program used to generate the brief.

DATED: December 9, 2013

JAMES F. HOLTZ

Stutz Artiano Shinoff & Holtz, APC v. Maura Larkins, et al.
Fourth District Case No. D063801
San Diego Superior Court Case No. 37-2007-00076218-CU-DF-CTL

PROOF OF SERVICE

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of San Diego in the office of a member of the bar of this court at whose direction the service was made. My business address is 2488 Historic Decatur Road, Suite 200, San Diego, California 92106-6113.

On December 9, 2013, I served the following document(s): **RESPONDENT'S BRIEF**

☒ **BY MAIL** by depositing in the United States Postal Service mail box at 2488 Historic Decatur Road, Suite 200, San Diego, California 92106, a true copy thereof in a sealed envelope with postage thereon fully prepaid and addressed as follows:

Maura Larkins 1935 Autocross Court El Cajon, CA 92019 **Defendant In Pro Per**	San Diego County Superior Court Appeals Division 220 W. Broadway, Rm. 3005 San Diego, CA 92101

☒ **BY ELECTRONICALLY** submitting to California Supreme Court through electronic service on the Court of Appeals (which satisfies the requirement for service on the Supreme Court under California Rules of Court, Rule 8.212(c)(2).)

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

Executed on December 9, 2013 at San Diego, California.

JENNIFER WOLBER

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