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## ISSUES PRESENTED FOR REVIEW

1. Whether the discovery rule can be invoked to delay the accrual of a defamation cause of action when the defamatory statements are published outside of the mass media and receive such an extremely limited distribution that the plaintiff has no reason to suspect the defamation.
2. Whether the single-publication rule should be extended to include written publications that receive an extremely limited distribution and, if so, whether the discovery rule also applies to such publications.

## INTRODUCTION

The rule proposed by defendants and respondents is not only unworkable but would also provide unnecessary protection to those who intentionally defame private individuals. Requiring the defamers' victims to forfeit any right to salvage their reputations before they have any reason to suspect that they have been defamed is contrary to the important public policies underlying the discovery rule. While such a sacrifice may be necessary in the context of mass media publications governed by the single-publication rule, there is no legal or equitable justification for immunizing those who defamed Rabbi Pinchas Lipner in a publication that they have candidly admitted he had no means of discovering.

The defamatory transcript produced by the defendants had an extremely limited distribution that was far different from the mass media type of publication that this Court considered in *Shively v. Bozanich* (2003) 31 Cal.4th 1230. Unlike the plaintiff in that case, Rabbi Lipner had neither actual knowledge nor constructive notice of the defamation until after the statute of limitations had run.

As this Court has repeatedly recognized, the rule of discovery equitably tolls the statute of limitations when the plaintiff is justifiably unaware of the facts constituting a cause of action. Libel victims who have no other means of clearing their names are if anything more deserving of this protection than those who have been injured by other wrongs.

There is no basis for defendants' alleged concern that the Court of Appeal decision despite its specific statement to the contrary heralds a return to the common law multiple publication rule, and defendants do not cite a single California case that has ever applied the old rule. Although apparently no California decision has specifically extended the single-publication rule to non-mass media cases, this Court and the Courts of Appeal have assumed that the cause of action accrues on publication, unless tolled by the rule of discovery.

While courts have uniformly refused to delay accrual in cases involving mass media publications, the rule of discovery and the single-publication rule are entirely compatible in cases where the defamatory publication has received extremely limited distribution. Except for the rare case where the victim can establish that the rule of discovery applies, the statute runs on publication, and even malicious defamers are safe after only one year.

The Opening Brief on the Merits provides no justification for precluding individuals such as Rabbi Lipner from even making an attempt to show that they were justifiably unaware of the attack on their reputation.

This Court should affirm the judgment of the Court of Appeal.

### **STATEMENT OF THE CASE**

Plaintiff and appellant Hebrew Academy of San Francisco ( Hebrew Academy ) and its founder, plaintiff and appellant Rabbi Pinchas Lipner, initially filed a complaint on November 18, 2002 against defendants and respondents Richard N. Goldman, San Francisco Jewish Community Federation ( SFJCF ), and San Francisco Jewish Community Endowment Fund ( JCEF )(collectively the Federation defendants or defendants ). In a First Amended Complaint filed on December 19, 2002, plaintiffs added the Regents of the University of California ( Regents ) as defendants. (Appellants Appendix in Lieu of Clerk s Transcript ( AA ) 1.)

The Federation defendants filed a demurrer to the First Amended Complaint on the grounds that the case was barred by the statute of limitations, which the trial court sustained with leave to amend. (AA 9.) After plaintiffs filed a Second Amended Complaint for Damages for Defamation ( SAC )(AA 15), the Federation defendants and the Regents demurred, once more relying on the statute of limitations. (AA 23.) This time the court overruled the demurrers (AA 35), and the Federation defendants answered the SAC on June 18, 2003. (AA 58.) The Regents instead filed a motion to strike pursuant to Code of Civil Procedure section 425.16, which the court granted on July 29, 2003. (AA 109.)

The Federation defendants filed a motion for summary judgment in November 2003, relying primarily on the evidence that had been filed by the Regents in support of their motion to strike. (AA 112; see especially AA 356-742.) Although the motion raised other potential defenses, the trial court granted summary judgment solely on the basis of the statute of limitations. (AA 340; Reporter s Transcript 13-14.) Judgment pursuant to that order was filed on March 25, 2004, and plaintiffs appealed. (AA 346-51.)

The First District Court of Appeal, Division Two, reversed the judgment, holding that the single-publication rule did not apply to the allegedly defamatory transcript, and that the claim was governed by the doctrine of delayed discovery because the transcript was so hidden from public view that Rabbi Lipner and the Hebrew Academy could not with reasonable diligence have discovered it within the statutory period. (*Hebrew Academy of San Francisco v. Goldman* (2005) 129 Cal.App.4th 391, 400, 403-06.) One justice dissented, arguing that the single publication rule applied and there was no basis for delayed accrual under the rule of discovery, because the defamation was as available to plaintiffs as it was to the general public. (*Id.* at 406-10 (Haerle, J., dis.))

The defendants timely petitioned for review.

## STATEMENT OF FACTS

### A. RABBI LIPNER CAME TO SAN FRANCISCO MORE THAN THIRTY YEARS AGO TO FOUND THE HEBREW ACADEMY

Pinchas Lipner emigrated to this country after growing up under the Nazi occupation of Romania during World War II. (Declaration of Rabbi Pinchas Lipner ( Lipner Dec. ) ¶¶ 1-2; AA 192.) He began his career in education in Washington, D.C., before moving to Chicago; in 1969 the National Association of Hebrew Day Schools asked him to come to San Francisco and start the first traditional Jewish day school in the Bay Area. (Lipner Dec. ¶ 3; AA 193.) The Hebrew Academy was founded that year, and has remained open since that time. (Lipner Dec. ¶ 3; AA 193.)

Rabbi Lipner has been a member of the local community for over thirty years, winning awards for his contributions to education. (SAC ¶ 3; AA 16.) He has never lost a job, has never been requested to leave a community, has never left a community due to any sort of scandal or because the community did not tolerate him, and has never been run out of any community. (Lipner Dec. ¶ 8; AA 194.)

Prior to December 2001, Rabbi Lipner had no reason to suspect that defendant Richard N. Goldman, a former president of defendant SFJCF, had defamed him during a 1992 interview. (Lipner Dec. ¶ 9; AA 194-95.)

**B. RABBI LIPNER HAD NO REASON TO SUSPECT THAT MR. GOLDMAN HAD DEFAMED HIM IN A TRANSCRIPT THAT RECEIVED EXTREMELY LIMITED DISTRIBUTION**

The JCEF division of the SFJCF had agreed in 1989-90 to provide \$60,000 in funding for a series of interviews of former Federation officials to be conducted under the auspices of the Regional Oral History Office ( ROHO ), a part of the University of California s Bancroft Library. (Deposition of Phyllis Cook ( Cook Dep. ) 22:20-23:18, 30:4-9, 32:14-33:16, 99:24-100:14, and Ex. 18 pp. 9, 15-16, 18-23, attached as Exhibit 2 to Declaration of Paul Kleven ( Kleven Dec. ); AA 246, 248-49, 259, 269, 275-76, 278-83.) ROHO agreed to interview the officials and produce transcripts of those interviews in a series to be called the Jewish Community Federation Oral History Project ( Oral History Project ). (Cook Dep. 37:18-38:2, and Ex. 18 pp 1-4, 8, 15-16; AA 250, 261-64, 268, 275-76.)

ROHO employee Eleanor Glaser interviewed former Federation president Goldman on four occasions from April 27 to May 13, 1992. (Transcript of Goldman interviews ( Transcript ) p. xiv, attached as Ex. E to Declaration of Shannon Page ( Page Dec. ), which is attached as Ex. 2 to Declaration of Bradley M. Zamczyk ( Zamczyk Dec. ); AA 456.)

Although the Transcript s cover sheet carries a copyright notice dated 1993, (AA 428), it was not actually produced until a copy was presented to Mr. Goldman at a reception held by the Federation in 1996 to honor a number of its benefactors. (Cook Dep. 46:19-48:9 and Ex. 18 pp. 5-7; AA 252, 265-67.) There was no

discussion at the reception of the contents of the Transcript, and apparently neither Mr. Goldman nor any representative of the Federation read it at that time. (Cook Dep. 49:16-50:5, 51:1-3; AA 252; Goldman Dep. 72:4-9; AA 212.)

Mr. Goldman in fact did not believe anyone would ever read the Transcript, and is not aware of anyone who ever has. (Goldman Dep. 96:9-23, 163:25-164:3, 187:24-188:9; AA 215, 226, 229.) Phyllis Cook, the SFJCF representative with the most knowledge of the project, had no idea who might read any of the oral histories. (Cook Dep. 83:15-84:3; AA 257.) Oral histories are never intended to be distributed to the general public, but are collected for potential use in the future by historical researchers, often after those mentioned in them are dead. (Baum, *Oral History for the Local Historical Society* (3d ed. 1995) at pp. 1, 52-53, 57; AA 392, 418, 420.)

Mr. Goldman is not aware of any copies of the Transcript except for the one that is in his possession. (Goldman Dep. 72:10-22; AA 212.) The Federation is only aware of the location of the single copy in its possession. (Cook Dep. 27:1-28:3 and Ex. 18 p. 5; AA 247, 265.)

Transcripts of the ROHO interviews, including the Goldman Transcript, are kept at the Bancroft Library on the University of California campus, but the transcripts themselves are not readily available for viewing by the public. The transcripts are kept in the stacks, to which the general public does not have access, and must be specifically requested based on a review of the card catalog. Even

after the transcripts are obtained, a member of the public cannot make copies, but must request copies of pages from the library. (Declaration of Miriam Real ( Real Dec. ) ¶ 3; AA 199.)<sup>1</sup>

Rabbi Lipner had no knowledge of the defamatory statements until December 2001. (Lipner Dec. ¶ 9; AA 194-95.) Miriam Real, a researcher at the Hebrew Academy who had once worked at ROHO, was conducting research for a book about Rabbi Lipner and the Hebrew Academy; she learned that ROHO was conducting a series of interviews with past SFJCF presidents, and thought there might be useful information in the interviews. (Real Dec. ¶ 2; AA 199.)

After searching the card catalog for potentially useful transcripts, she requested that they be retrieved from the stacks, reviewed the indices for references to subjects that might be relevant, and then filled out a form requesting copies of the pertinent pages. (Real Dec. ¶ 3; AA 199.) Rather than waiting several hours for the copies, she asked that they be mailed to her. (Real Dec. ¶ 4; AA 199.) Upon reviewing the materials toward the end of December 2001, she

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<sup>1</sup> There was also evidence, to which objection was made, that the Charles E. Young Research Library at UCLA, the New York Public Library, and a few private institutions had a copy of the Transcript. (AA 182-84, 334, 358-61, 626, 659, 661-65, 667, 669-71.) There was no evidence the public had access to these copies. (*Ibid.*) There was also evidence, to which objection was made, that the Transcript was referred to in some online catalogs and indices. (AA 182-84, 334, 358-61, 626-38, 669-71.) The catalogs and indices made no reference to either Rabbi Lipner or the Hebrew Academy. (*Ibid.*)

discovered Mr. Goldman's statements about Rabbi Lipner, and forwarded the pages containing those statements to the Rabbi. (Real Dec. ¶ 4; AA 199.)

Prior to that time, Rabbi Lipner had no knowledge of the Transcript or of the defamatory statements, and none of the defendants had ever advised him that such defamatory statements had been made. (Lipner Dec. ¶ 9; AA 194-95; Goldman Dep. 164:4-165:25; AA 226-27; Cook Dep. 75:16-19; AA 256.) Neither Mr. Goldman nor Ms. Cook is aware of any means by which Rabbi Lipner could have become aware of the statements made about him. (Goldman Dep. 166:1-6, 167:15-168:13; AA 226-27; Cook Dep. 75:20-24; AA 256.)

### **C. MR. GOLDMAN MADE FALSE AND DEFAMATORY STATEMENTS ABOUT THE PLAINTIFFS IN THE TRANSCRIPT**

As shown in the Transcript, Mr. Goldman made a number of false and defamatory statements about the Hebrew Academy and Rabbi Lipner during the course of the interviews. (Transcript pp. 40-41; AA 501-02.) These statements were republished in the Transcript under Section VII. CAPITAL FUNDS DRIVE, 1974, (Transcript p. 39; AA 500), and include the following:

#### **1. Rabbi Lipner Was Run Out of Other Communities**

**Goldman:** [Rabbi Lipner] was run out of other communities before he got here....  
**Int.:** Oh, I didn't know that.  
**Goldman:** I'm not sure but I think he had been in Cleveland before he came here. Somebody checked the record

**and found that community did not tolerate him.**

(Transcript p. 41; AA 502.)

Mr. Goldman actually had no idea where Rabbi Lipner had come from, had absolutely no basis for believing that he had ever been run out of any community, and had no knowledge of any community not tolerating him. (Goldman Dep. 43:2-44:18, 135:19-139:14; AA 208, 223-24.) The reference to Cleveland was only speculation, because Mr. Goldman had no clue where [Rabbi Lipner] came from, nor do I care. (Goldman Dep. 43:13-44:8; AA 208.) Neither Mr. Goldman, nor anyone else as far as he was aware, had ever investigated or otherwise checked the record regarding Rabbi Lipner. (Goldman Dep. 43:2-8, 44:12-18, 137:18-138:24; AA 208, 224.) The statements were entirely false. (Lipner Dec. ¶¶ 3, 8; AA 193-94.)

## **2. Comparing Rabbi Lipner to Hitler**

**Goldman: I remember a couple of occasions visiting the Hebrew Academy. When [Rabbi Lipner] would walk into the room, the children would stand at attention as if it were the Führer walking in.**

(Transcript p. 40; AA 501.)

Mr. Goldman similarly had no basis for making this false and outrageous statement. At his deposition, Mr. Goldman claimed he was simply using the word Führer as an adjective or a descriptive term that could apply not only to Adolf Hitler, but also to other German leaders and to allies such as Benito

Mussolini. (Goldman Dep. 100:21-105:20; AA 216-18.) Mr. Goldman acknowledged, however, that he had never heard the word *Führer* used to refer to anyone but Hitler, except in a recent joking reference to the governor. (Goldman Dep. 101:17-102:7, 183:9-23, 184:3-185:24, 188:10-189:12, 191:23-192:2; AA 217, 228-30.)

Whether Mr. Goldman was actually referring to a *Führer* or the *Führer* (Goldman Dep. 101:2-25, 102:18-103:1, 183:9-23; AA 217, 228; compare Glaser Dec. ¶ 2 and Ex. A; AA 285-86), he claimed he did not consider whether a reader of the transcript would think of Hitler, or whether the comparison would cause Rabbi Lipner distress. (Goldman Dep. 114:14-115:15, 187:17-188:9; AA 220, 229.) Mr. Goldman did not believe it would offend a Jewish person to be compared to Hitler. (Goldman Dep. 38:7-39:5; AA 207.)

Although students at the Hebrew Academy typically stand as a sign of respect when Rabbi Lipner or any other teacher enters the classroom, they do not stand stiffly at attention as if they were German children under Nazi rule. (Lipner Dec. ¶ 6; AA 193-94.) Photographs from that era show students standing rigidly at attention, sometimes giving the Nazi salute. (Goldman Dep. Exhibits 4, 13-15; AA 233-43.)

To Rabbi Lipner, who lived under Nazi occupation and lost many relatives in the Holocaust, the image of his Jewish students responding as to him as if he were Adolf Hitler is particularly abhorrent. (Lipner Dec. ¶¶ 1, 6; AA 192-94.)

Mr. Goldman has admitted that the Hebrew Academy students did not stand at attention or salute like the children shown in the photographs. (Goldman Dep. 107:24-109:17, 110:23-112:10, 196:20-197:3, 197:18-198:4 and Exhibits 4, 13-15; AA 218-19, 231, 233-43.)<sup>2</sup>

## ARGUMENT

### **I. VICTIMS OF DEFAMATION WHO ARE JUSTIFIABLY UNAWARE THAT THEY HAVE BEEN DEFAMED BECAUSE THE DEFAMATORY STATEMENTS HAVE RECEIVED AN EXTREMELY LIMITED DISTRIBUTION SHOULD BE ALLOWED**

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<sup>2</sup> Mr. Goldman also stated, among other things, that he did not think Rabbi Lipner was an honorable man because he had taken schoolchildren to sit in at the Federation offices. (Transcript p. 40; AA 501) He acknowledged that he had no knowledge as to whether Rabbi Lipner was even involved in a sit-in or took any children anywhere; though he claimed to have relied on newspaper articles, the newspaper accurately stated that the protesters were a group of about 40 young men and women, and never mentioned Rabbi Lipner. (Goldman Dep. 50:12-53:7, 89:3-91:10, 91:23-92:13, 95:1-9, 96:4-8, 96:24-98:13; AA 209-10, 214-16; Lipner Dec. ¶ 4 and Ex. 1; AA 193, 198.)

Mr. Goldman also stated that Rabbi Lipner had solicited and manipulated Russian émigrés into enrolling their children at the Hebrew Academy. (Transcript p. 40, AA 501; Glaser Dec. ¶ 2 and Ex. A; AA 285-86.) Mr. Goldman admitted that he had no knowledge of how the Russians made decisions regarding their children's schools, and no knowledge of how the Hebrew Academy came to educate a large number of Russian children. (Goldman Dep. 126:20-132:5, 199:14-201:7; AA 221-22, 232.) In fact, when Jewish émigrés from Russia arrived in San Francisco in the 1980s, the SFJCF requested that the Hebrew Academy accept their children as students at the school, at a great financial sacrifice. Neither Rabbi Lipner nor anyone else at the Hebrew Academy attempted to solicit or manipulate them into coming there. (Lipner Dec. ¶ 7 and Ex. 2; AA 194, 197.)

## THE OPPORTUNITY TO COME WITHIN THE PROTECTION OF THE DISCOVERY RULE

### **A. The Discovery Rule Promotes the Strong Public Policy in Favor of Resolving Cases on Their Merits by Allowing Diligent Plaintiffs, Including Defamation Victims, to Pursue Their Claims Once They Have Reason to Suspect They Have Been Harmed**

While statutes of limitation are designed to serve the dual purposes of protecting defendants from stale claims and encouraging plaintiffs to diligently assert their rights, this Court has recognized that they also operate against the public policy favoring disposition of cases on the merits rather than on procedural grounds. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.)

The two public policies identified above—the one for repose and the other for disposition on the merits—are equally strong, the one being no less important or substantial than the other.

(*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 396.)

Statutes of limitation sometimes bar meritorious causes of action brought by diligent plaintiffs, because they operate[] conclusively across the board, and not flexibly on a case-by-case basis. (*Norgart*, 21 Cal.4th at 395.) To provide the necessary flexibility, courts and legislatures have adopted various exceptions to the general rule that a claim accrues on the date when a defendant performs a wrongful act or a wrongful result occurs. The most important of these exceptions is the discovery rule. (*Id.* at 397.)

Code of Civil Procedure section 338, subdivision (d),<sup>3</sup> for example, has long provided that in cases involving fraud or mistake, the claim is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. (See *Shain v. Sresovich* (1894) 104 Cal. 402, 405.) More recently, the Legislature has explicitly included the discovery rule in statutes of limitation governing professional negligence and various other tort claims.<sup>4</sup> California courts have repeatedly held that in general tort causes of action governed by the one-year statute of limitations provided by section 340, subdivision (c):<sup>5</sup>

the common law rule, that an action accrues on the date of injury ..., applies only as modified by the discovery rule. The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause.... [T]he statute of limitations begins to run when the plaintiff suspects or should suspect ... that someone has done something wrong to her.

(*Jolly v. Eli Lilly and Company* (1988) 44 Cal.3d 1103, 1109-10; see also *Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1248.)

In addition to allowing the rule of discovery to modify the time of accrual in general tort cases such as products liability (*Fox*, 35 Cal.4th at 809 n.3), and

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<sup>3</sup> Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

<sup>4</sup> See, e.g., sections 340.15, 340.2, 340.5, 340.6, 340.8.

<sup>5</sup> Until recently, section 340, subdivision (c) allowed one year within which to bring an action for libel, slander, assault, battery, ... or for injury to or for the death of one caused by the wrongful act or neglect of another.

invasion of privacy (*Cain v. State Farm* (1976) 62 Cal.App.3d 310, 314-15), California courts have also applied it to claims for libel and slander. (*Manguso v. Oceanside Unified School District* (1979) 88 Cal.App.3d 725, 728-31; *McNair v. Worldwide Church of God* (1987) 197 Cal.App.3d 363, 379-80.)

**B. Due to Society s Interest In Protecting the Reputation of Individuals, Defamation Victims Have A Greater Right to the Protection of the Discovery Rule Than Do the Victims of Other Torts**

Although this Court has never specifically applied the discovery rule to decide a defamation case, both the majority and dissenting opinions in *Bernson v. Browning-Ferris Industries of California, Inc.* (1994) 7 Cal.4th 926, assumed that the discovery rule applied in appropriate defamation cases, citing *Manguso v. Oceanside Unified School District* (1979) 88 Cal.App.3d 725, with approval. (*Id.* at 931-32 and 941 (Kennard, J., dis.)) The plaintiff in that case was a member of the Los Angeles City Council who had been the subject of a highly critical dossier [defendants were] circulating among the Los Angeles media, (*id.* at 928), and the decision ultimately turned on the doctrine of equitable estoppel due to the defamers fraudulent concealment of their identities. (*Id.* at 936-38.)

In explaining why equitable estoppel was particularly appropriate in a defamation case, the Court provided a compelling rationale for making the discovery rule available as broadly as possible in defamation actions:

Stolen property may be replaced or recovered, but where does one

go to restore one's reputation? In the immortal words of Shakespeare's Iago: Who steals my purse steals trash; ... [P] 'Twas mine, 'tis his, and has been slave to thousands; [P] But he that filches from me my good name [P] Robs me of that which not enriches him, and makes me poor indeed. (Shakespeare, Othello, act III, scene 3.) However difficult, time-consuming and costly, a libel action may be the only recourse available to one who has been falsely maligned.

(*Bernson*, 7 Cal.4th at 938.)

The Court has long recognized that private individuals are especially worthy of protection:

A reasonable degree of protection for a private individual's reputation is essential to our system of ordered liberty.... We agree with the high court's observation that, the individual's right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.

(*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 743-44, quoting *Gertz v. Robert Welch, Inc.* (1984) 418 U.S. 323, 341.)

This Court recently afforded the equitable protections of the discovery rule to the plaintiff in *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, giving her an opportunity to pursue an additional products liability claim, in addition to the claim she was already pursuing against her health care providers.

Libel plaintiffs who have been falsely maligned are, if anything, entitled to greater protection than the average tort victim. As this Court has observed,

Article I, section 2, subdivision (a) of the California Constitution states, Every person may freely speak, write and publish his or her sentiments on all subjects,

*being responsible for the abuse of this right....* This provision ... reflects a considered determination that the individual's interest in reputation is worthy of constitutional protection. (*Brown*, 48 Cal.3d at 746 (emphasis in opinion).)

Defendants are asking in effect that defamers should be allowed to abuse the right to speech, and to defame private individuals with absolute impunity, as long as their victim does not learn of the defamation within the first year after publication. (OBM 22-23.) In doing so, they ignore the important public policy rationale behind the development of the discovery rule, as well as society's interest in protecting the individual's reputation, arguing repeatedly that the only consideration must be to spare the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. (OBM at 11, 13-14, 16, and 23 n.5, quoting or citing *Gregoire v. G.P. Putnam & Sons* (1948) 298 N.Y. 119, 125 [81 N.E.2d 45, 47].)

Such an argument could, of course, be made against applying the discovery rule to *any* case, not merely defamation cases, and has effectively been rejected in California, where the discovery rule is firmly established.<sup>6</sup> If anything, the argument has less validity in the context of defamation cases because, unlike the situations in other tort cases, defamatory statements may themselves relate to

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<sup>6</sup> Unlike New York which, apparently, has never considered whether the discovery rule applies in defamation cases. See section II.C, *infra*.

incidents that occurred long before publication, with attendant evidentiary problems even if the victim files suit the day after publication.<sup>7</sup>

The mere abstract possibility that in some cases evidence might be scarce is not a sufficient reason to preclude all defamation plaintiffs from even attempting to come within the protection of the discovery rule. Defendants make no real attempt to argue that there is any such evidentiary problem in this case,<sup>8</sup> and there is none.

Mr. Goldman, for example, fabricated a claim in 1992 that Rabbi Lipner had been run out of other communities before he got to San Francisco, and that [s]omebody checked the record and found that community did not tolerate him. (Transcript p. 41; AA 502.) Rabbi Lipner had come to San Francisco more than 20 years before the interviews, in 1969, and the statements about his background were entirely false. (Lipner Dec. ¶¶ 3, 8; AA 193-94.) At his deposition, Mr. Goldman did not pretend that he had any basis for the statements when he made them, acknowledging that the statements were only speculation, that he had no

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<sup>7</sup> T]he statute of limitations can never guarantee that the facts concerning which a libel is written will not have occurred in the distant past. (Comment, *The Single Publication Rule in Libel: A Fiction Misapplied* (1949) 62 Harv. L.Rev. 1041, 1044.)

<sup>8</sup> Defendants argue that undoubtedly memories have faded, witnesses have died, or evidence has been lost since the Goldman interview (OBM 16), but do not point to a single instance where any of those things occurred.

knowledge that any community did not tolerate Rabbi Lipner, that he had no clue where [Rabbi Lipner] came from, nor do I care, and that no one had ever checked the record. (Goldman Dep. 43:2-44:18, 135:19-139:14; AA 208, 223-24.)

Why shouldn't those who recklessly defame others be put to their defense?

The purpose of a statute of limitations is not to shield a wrongdoer. (*Tom Olesker v. Exciting World of Fashion, Inc.* (1975) 61 Ill.2d 129 [334 N.E.2d 160, 164].) Rabbi Lipner is a private individual<sup>9</sup> who is not merely seeking compensation, like other plaintiffs—he has no other recourse if he wants to protect his reputation and fight the defendants' malicious defamation of him in the Transcript. Unless he can correct the record through this difficult, time-consuming and costly lawsuit, defendants' intentional lies will be unchallenged in the historical record, perhaps to be discovered at some point when he can no longer defend himself. (See Baum, *Oral History for the Local Historical Society* (3d ed. 1995) at pp. 1, 52-53, 57; AA 392, 418, 420.)

Defendants ask this Court to adopt a rule that would deny defamation

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<sup>9</sup> While defendants assert that Rabbi Lipner regularly injects himself into public controversies, (OBM 6), and argued below that he was a limited purpose public figure, (AA 127-29), they have never identified any particular public controversy or otherwise made any real attempt to establish that Rabbi Lipner qualified as any type of public figure under *Gertz*, 418 U.S. at 351, and *Khawar v. Globe International, Inc.* (1998) 19 Cal.4th 254, 262-67.)

victims the equitable protection afforded by the discovery rule to all other tort plaintiffs, without providing any reasoned basis for such a drastic result. As discussed in the next section, it has long been clear that the discovery rule does not apply in cases of mass media defamation, where there is a presumption of constructive notice. But this Court should hold that, except in those cases, all defamation plaintiffs should have an opportunity to defend their reputations by coming within the protection of the discovery rule.

**C. The Discovery Rule Has Never Been Applied to Defamation In Mass Media Publications Governed by the Single-Publication Rule**

While there are certainly cases, as defendants acknowledge (OBM 22-23), where the victim of mass media defamation may have been justifiably ignorant of the libel, the courts have uniformly refused to extend the discovery rule to cases involving the mass media that are governed by the single-publication rule. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1250.) As the Court of Appeal acknowledged in this case (*Hebrew Academy of San Francisco v. Goldman* (2005) 129 Cal.App.4th 391, 402), it is firmly established that defamation in the mass media provides a type of constructive, public notice that precludes application of the discovery rule. (*Shively*, 31 Cal.4th. at 1248.)

In claimed libels involving, for example, magazines, books, newspapers, and radio and television programs, the publication has been for public attention and knowledge and the person commented on, if only in his role as a member of the public, has had access to

such published information.

(*McGuiness v. Motor Trend Magazine* (1982) 129 Cal.App.3d 59, 63 n.2, quoting *Tom Olesker s Exciting World of Fashion, Inc.* (1975) 61 Ill.2d 129 [334 N.E.2d 160, 164].)

But as discussed at length in section II, *infra*, there is no reason to apply the single-publication rule to non-mass media publications that receive extremely limited distribution. If the defamatory statements have not been published in the mass media, and have not otherwise received some other form of publicity sufficient to provide constructive notice of their publication (*Shively*, 31 Cal.4th at 1248), the target of the defamation should at least have a chance to come within the discovery rule.

**D. The Discovery Rule Should Apply to Any Non-Mass Media Defamation Case Where the Victim Is Justifiably Unaware of the Defamation, Not Just to Secret Publications**

Supreme courts in a number of other states have applied the discovery rule to non-mass media defamation cases where, due to the nature of the publication, the victim is unlikely to be aware of the defamation. (See, e.g., *Hoke v. Paul* (1982) 65 Haw. 478 [653 P.2d 1155]; *Tom Olesker s Exciting World of Fashion, Inc.* (1975) 61 Ill.2d 129 [334 N.E.2d 160]; *Burks v. Rushmore* (Ind. 1989) 534 N.E.2d 1101; *Staheli v. Smith* (Miss. 1989) 548 So.2d 1299; *Digital Design Group, Inc. v. Information Builders, Inc.* (2001) 2001 OK 21 [24 P.3d

834](collecting cases);<sup>10</sup> *Kelley v. Rinkle* (Tex. 1976) 532 S.W.2d 947; *Allen v. Ortiz* (Utah 1990) 802 P.2d 1307; and *Padon v. Sears, Roebuck & Co.* (1991) 186 W.Va. 102 [411 S.E.2d 245]

As this Court has observed, the discovery rule has typically been applied to such inherently covert defamations as entries in personnel records, and also to communications by credit reporting agencies to their subscribers. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1252.)<sup>11</sup> Defendants argue vehemently that the discovery rule must be limited to such secret or confidential communications (OBM 3, 17-20), without ever explaining why there must be such a limitation. The rule of discovery typically does not depend on any act of subterfuge by the defendant, but focuses instead on the plaintiff's ability to discover the facts supporting the cause of action:

[T]he discovery rule most frequently applies when it is particularly difficult for the plaintiff to observe or understand the breach of duty, or when the injury itself (or its cause) is hidden or beyond what the ordinary person could be expected to understand....

The cases turn upon the circumstances in which the defamatory statement is made and frequently involve a defamatory writing that

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<sup>10</sup> Cases are also collected at *Limitation of Actions: Time of Discovery of Defamation As Determining Accrual of Action*, 35 A.L.R.4th 1002 (1985).

<sup>11</sup> Citing *Manguso v. Oceanside Unified School District* (1979) 88 Cal.App.3d 725, 730-31; *Schweihs v. Burdick* (7<sup>th</sup> Cir. 1996) 96 F.3d 917, 921; *Tom Olesker's Exciting World of Fashion*, 334 N.E.2d at 164, and *Staheli*, 548 So.2d at 1303.3425.3

has been kept in a place to which the plaintiff has no access or cause to seek access.

(*Shively*, 31 Cal.4th at 1248-49.)

As the Court of Appeal explained in this case, the plaintiffs in cases involving confidential personnel files, such as *Manguso* and *Staheli*, actually had more reason to suspect an injury than Rabbi Lipner did. (*Hebrew Academy of San Francisco v. Goldman* (2005) 129 Cal.App.4th 391, 404 05.) In the personnel cases, the allegedly defamatory statement was intended to be immediately read by others, and was, and this had consequences that soon became known to the plaintiffs. (*Id.* at 405.) Ms. Manguso, for example, alleged that she did not get a job for 16 years due to the defamatory statements that were read by prospective employers. (*Manguso*, 88 Cal.App.3d at 727.) By contrast, in this case the defendants did not expect anyone to read the Transcript, apparently no one did, and so Rabbi Lipner and the Hebrew Academy did not suffer consequences that might have put them on notice. (*Hebrew Academy*, 129 Cal.App.4th at 405.)

Similarly, a person defamed in a credit report such as the plaintiff in *Tom Olesker s Exciting World of Fashion* should have known of the risk of false credit reports, and had a right to obtain a copy of the report and correct it at any time. (*Hebrew Academy*, 129 Cal.App.4th at 405-06.) Rabbi Lipner and the Hebrew Academy had neither a reason to suspect they may have been injuriously defamed by Goldman nor the ability to compel Goldman to disclose whether he had

defamed them. (*Ibid.*)

The focus should be, as in any other case, on whether the plaintiff had reason at least to suspect a factual basis for the claim. (*Norgart v. The Upjohn company* (1999) 21 Cal.3d 383, 397-97; see section I.E *infra.*) The Court of Appeal stated that the discovery rule applies in this case if the factual basis for appellants' libel claims was so hidden from public view that reasonable diligence would not have led to its discovery within the statutory period. (*Hebrew Academy*, 129 Cal.App.4th at 403.)

Appellants suggest that the standard should be whether the factual basis was so hidden from the plaintiff that reasonable diligence would not have led to its discovery within the statutory period. The defamatory publication would not have to be secret or covert, as long as it did not give the victim reason to at least suspect a factual basis for a defamation claim.

As discussed in section I.E, *infra*, Rabbi Lipner and the Hebrew Academy satisfy either standard.

*Manguso*, the first California case to apply the discovery rule to a libel claim, did not limit its holding to confidential documents. Without deciding whether Ms. Manguso could establish the necessary facts to come within the discovery rule, the court followed the same reasoning that previous courts had used in deciding to apply the rule to other types of claims within section 340, subdivision (c):

The principal purpose of the rule permitting postponed accrual of certain causes of action is to protect aggrieved parties who, with justification, are ignorant of their right to sue....

This ... exception is based on the notion that statutes of limitation are intended to run against those who fail to exercise reasonable care in the protection and enforcement of their rights; therefore those statutes should not be interpreted so as to bar a victim of wrongful conduct from asserting a cause of action before he could reasonably be expected to discover its existence.

(*Manguso*, 88 Cal.App.3d at 730-31, quoting *Seelenfreund v. Terminix* (1978) 84 Cal.App.3d 133, 138, and *Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 297.)

Relying on *Manguso*, *McNair v. Worldwide Church of God* (1987) 197 Cal.App.3d 363, held that slander and libel claims did not accrue until plaintiff heard a tape of the slanderous remarks made during a ministers meeting and learned of a defamatory article published in a weekly newsletter distributed by the defendant church to its ministers and a few others. (*McNair*, 197 Cal.App.3d at 369-72 and n.5, 379-80.) Neither of the statements had been published secretly or covertly.

In *Shively*, 31 Cal.4th 1230, this Court was dealing with a slanderous statement to a deputy district attorney, who repeated the statement to an author, who repeated it again in a book published by William Morrow and Company. (*Id.* at 1238, 1247.) The plaintiff argued that the discovery rule tolled the statute of limitations as to all of her claims until she actually purchased the book three months after it was published. (*Shively*, 31 Cal.4th at 1239-40, 1247.)

After noting, as discussed above, that prior cases had equitably applied the

discovery rule to covert defamations, the Court explained that the discovery rule might have applied in *Shively* if plaintiff had learned of the defamatory statements for the first time through, for example, an entry in a police report, an employment record, or an unexpected disclosure by someone to whom the essentially private defamations had been repeated. (*Shively*, 31 Cal.4th at 1253.)

Ms. Shively, however, had learned of the statements after they had been republished in a book that had been widely distributed to the public more than a year before she filed suit. The defendant established that 33,000 copies of the book had been shipped for distribution, and thousands of copies were on sale in her home state of California. (*Id.* at 1239-40, 1253.) Any equitable basis for delayed accrual:

no longer exists once the original defamatory statement is published in a book that was distributed to the general public. In such circumstance, not only is the basis for the claim not hidden, but it has been trumpeted....

We can see no justification for applying the discovery rule to delay the accrual of plaintiff's causes of action beyond the point at which their factual basis became accessible to plaintiff to the same degree as it was accessible to every other member of the public.

(*Id.* at 1253.)

Seizing on the last phrase of the above passage, defendants contend that, for purposes of deciding whether to apply the discovery rule in defamation actions, there is no legal or equitable difference between 33,000 copies of a book about the Trial of the Century that were distributed throughout the country, and 1-3 copies

of the Transcript that were placed somewhere in the non-public stacks of a few libraries. Even in non-mass media cases, defendants argue, the single-publication rule applies and the victims lose the protection of the discovery rule as soon as the defamatory publications become equally accessible to the plaintiff as they are to the general public. (OBM 23.)

In *Shively*, the passage made sense, because the statements at issue there were accessible to everyone once they were published in a mass market book governed by the single-publication rule; the discovery rule no longer applied. (*Shively*, 31 Cal.4th at 1250, 1253.) But it makes no sense in cases involving non-mass media publications, and defendants make no attempt to explain how it would apply in cases involving, for example, extremely limited distribution, the issue that this Court specifically left open in *Shively*, 31 Cal.4th at 1245 n. 6.

In fact, if the Court adopted defendants' proposed bright-line standard (OBM 24), no defamation plaintiff could use the discovery rule even those who defendants grudgingly admit are equitably entitled to its protection. (OBM 18.)

Defendants acknowledge that the discovery rule is arguably necessary:

because there are apparent inequities in allowing a person to publish defamatory statements secretly to others, such as in personnel files, and at the same time, intentionally hide the existence of those publications from the defamed victim.<sup>12</sup>

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<sup>12</sup> There is no indication in *Manguso*, 88 Cal.App.3d at 730-31, that the defendants intentionally hid anything. If the defamer does take additional steps to ensure that the victim will be unaware of the facts

(OBM 18.)

But the defamatory publications in the personnel and credit report cases are, if anything, *more* accessible to the plaintiff than they are to the general public. Presumably, the general public would have no access to the documents, but that lack of access would have no bearing on whether the plaintiff had reason to suspect the defamation.

Defendants' standard completely ignores the public policy that prompted development of the discovery rule, as well as all the policies underlying the adoption of the single-publication rule. (See section II, *infra*.) As the Court of Appeal explained, the defendants' standard also assumes that a defamed person is on notice of the defamation if the basis for the claim is in existence and so could *possibly* have been discovered, effectively adopting the radical view, for which there is no legal support, that the doctrine of delayed discovery cannot be applied in a defamation action. (*Hebrew Academy*, 129 Cal.App.4th at 403.)

Even if defendants were positing some equitable rationale that the defamer, in addition to intentionally or negligently damaging the victim's reputation, also had to be aware that the victim would be unable to discover the damage until the statute had run, the rationale would not help them—they have admitted that Rabbi

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surrounding the defamation, the doctrine of fraudulent concealment will come into play under *Bernson v. Browning-Ferris Industries of California, Inc.* (1994) 7 Cal.4th 926, 937-38, and the victim will not have to rely on the discovery rule.

Lipner had no means of discovering the defamatory statements in the Transcript. (Goldman Dep. 164:4-165:25, 166:1-6, 167:15-168:13, AA 226-27; Cook Dep. 75:16-19, 75:20-24, AA 256.)<sup>13</sup>

Unless a defamatory statement has become accessible to the general public and the plaintiff by being reprinted in the mass media, or has in some other way put the plaintiff on inquiry, the victim of a defamatory writing should be given the chance to come within the rule of discovery, thereby ensuring that diligent, deserving plaintiffs will not be deprived of their only remedy against those who defamed them.

**E. Rabbi Lipner and the Hebrew Academy Can Meet the Stringent Requirements for Successfully Invoking the Discovery Rule in California, Because They Had No Reason Even to Suspect the Defamation**

Simply allowing defamation victims to raise the discovery rule does not, of course, mean that they will be able to meet the strict requirements that plaintiffs must meet in order for the rule to come into play. Defamation victims must act diligently once they have reason at least to suspect a factual basis for their

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<sup>13</sup> Although *Bernson*, 7 Cal.4th at 932, cited *Manguso* and *McNair* for the proposition that in defamation actions the date of accrual may be delayed where the defendant's actions hinder plaintiff's discovery of the defamatory matter, the defendants in *Manguso* simply put the defamatory letter in a file that was confidential, and the *McNair* defendants made statements at a public meeting and in a newsletter.

defamation claim, which occurs as soon as they have sufficient notice to be considered on inquiry. (*Norgart v. The Upjohn Company* (1999) 21 Cal.3d 383, 397-98.) They cannot simply wait for the facts to find them, but must seek to learn the facts necessary to bring the cause of action in the first place as soon as they at least suspect the elements of the claim. (*Id.* at 398.)

In this case, Rabbi Lipner had no reason to suspect that he had been defamed until he learned of the existence of the Transcript in December 2001, as the Court of Appeal found. (*Hebrew Academy of San Francisco v. Goldman* (2005) 129 Cal.App.4th 391, 402-06.) Instead of the 33,000 copies of the book at issue in *Shively*, which were readily available for viewing at local newsstands and bookstores, defendants can only point to 2 libraries, in addition to the Bancroft Library, where the Goldman Transcript may actually have been deposited. (Page Dec. ¶¶ 8, 11-13 and Exhibits C, F, G, I, J; AA 359-61, 380, 626-38, 659, 667, 669-72.)<sup>14</sup> There is absolutely no evidence regarding the degree of accessibility of the Transcript at the other libraries; *i.e.*, how a member of the public could actually find out what Mr. Goldman had said, though UCLA's library states that it primarily serves the research needs of faculty and graduate students. (AA 661.)

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<sup>14</sup> Although Exhibit I purports to be a list of purchasers of the Goldman Transcript, much of the list was directly contradicted by witnesses who actually had personal knowledge. (Cook Dep. 27:1-28:3 and Ex. 18 p. 5, Ex. 2 to Kleven Dec.; AA 247, 265; Goldman Dep. 72:10-22, Ex. 1 to Kleven Dec.; AA 212.)

At the Bancroft Library, a researcher who was aware of the ROHO series had to go to the library, where the transcripts were kept in the non-public stacks. Once there, she had to specifically request the Transcripts based on a review of the card catalog, review the index, and then request copies of pages of interest. (Declaration of Miriam Real ( Real Dec. ) ¶ 3; AA 199.)

Defendants never really explain how the presence of the Transcript in the non-public stacks of the Bancroft Library would actually put Rabbi Lipner and the Hebrew Academy on notice that they had been defamed. The Transcript was not accessible to Rabbi Lipner or to the general public in any normal sense of the word. Defendants argue that the Transcript was more like garden variety books, magazines and newspapers ... than it is to purely private communication, (OBM 16, quoting *Hebrew Academy*, 129 Cal.App.4th at 406-07 (Haerle, J., dis.)). But there is no real similarity between books, newspapers and magazines that are distributed by the thousands to the general public through bookstores, newsstands, and other outlets, and a transcript that can only be requested to be seen by the public at one, or perhaps three, places in the entire country.

Defendants further contention that the Transcript is a hybrid-form of communication, incorporating both the traditional concept of library reference materials and those associated with the ever burgeoning arena of Internet communications, (OBM at 14), is also untenable. As discussed in *Firth v. State* (2002) 98 N.Y.2d 365, 370 [775 N.E.2d 463], the publication of actual defamatory

statements online might well provide better constructive notice of defamation than do traditional mass market publications, but the Transcript has never actually been available online. (*Hebrew Academy of San Francisco v. Goldman* (2005) 129 Cal.App.4th 391, 399-400.)

While there are apparently references to the Transcript in online catalogs and databases (Page Dec. ¶ 7 and Exhibits F, J; AA 359, 361, 626-38, 669-72), the public could not use the entries to actually read any portion of the Transcript. The entries make clear that the Transcript is made available for research purposes only, and that it is Non-circulating; may be used only in The Bancroft Library. (AA 632, 634.) None of the listings give any indication that the Goldman Transcript mentioned Rabbi Lipner or the Hebrew Academy. (AA 626-38.) As the Court of Appeal found:

Had Rabbi Lipner been aware of and consulted the databases and online catalogs just described, he would not have learned the factual basis for his defamation claim, nor anything that might have justified a suspicion of injury warranting further investigation.

(*Hebrew Academy*, 129 Cal.App.4th at 400.)

Defendants argue that Rabbi Lipner and, apparently, every other reasonable member of the San Francisco Jewish Community, was on inquiry that they had been defamed simply because they should have been aware of the Oral History Project. (OBM 14-15, 15 n. 3, 20-21.) Defendants do not explain why Rabbi Lipner, or any other reasonable person, would suspect that the former

leaders of the SFJCF, the SFJCF itself, and the University of California's Regional Oral History were using the Oral History Project as a vehicle for character assassination.

Reasonable people would have a right to assume that, even if a former leader had decided to compare a respected Jewish educator to Adolf Hitler, the Federation and ROHO would not allow their Oral History Project to be used in that fashion. And of course, even if someone were sufficiently paranoid to suspect that these individuals and institutions were allowing the Oral History Project to be used in that fashion, he or she could only investigate by journeying to the Bancroft Library each time a new transcript was printed, reviewing the index, and requesting any pages in the index that looked alarming.

While they now contend that all authors have a common interest in public exposure and dissemination of their works, (OBM 13), defendants in the trial court produced evidence confirming that there was no reason to believe Rabbi Lipner or any other member of the San Francisco Jewish Community would have been on notice of the defamation, as discussed by the Court of Appeal. (*Hebrew Academy*, 129 Cal.App.4th at 403-04.) Defendants, for example, were aware of only five copies of the Transcript, all of them in private hands. (Goldman Dep. 72:10-22; AA 212; Cook Dep. 27:1-28:3 and Ex. 18 p. 5; AA 247, 265.) Mr. Goldman and Ms. Cook were not aware of *anyone* who had actually read the Transcript or who would be likely to read it, nor could they point to any means by

which Rabbi Lipner could have become aware of the statements made about him. (Goldman Dep. 96:9-23, 163:25-166:6, 167:15-168:13; 187:24-188:9; AA 212, 215, 226-27, 229; Cook Dep. 49:16-50:5, 51:1-3, 75: 20-24, 83:15-84:3; AA 252, 256-57.)

According to an authority on oral histories produced by defendants, they had reason to believe Rabbi Lipner would be unaware of the defamation. Oral historians have quite different interests from other authors, and do not intend their work to be read by contemporary audiences. Oral histories are intended for use in the future by a wide variety of researchers;... The primary use, of course, is for historical research, and most of this will be in the future. It will be many years before you know how well your efforts have worked out. (Baum, *Oral History for the Local Historical Society* (3d ed. 1995) at p. 1, 57; AA 392, 420.)

Rabbi Lipner did not have any reason to suspect that he had been defamed, and neither Mr. Goldman nor the SFJCF believed that he had any means of becoming aware of the defamation. The extremely limited distribution of the Goldman Transcript made the defamatory statements it contained inherently undiscoverable (*Shively*, 31 Cal.4th at 1237, 1245 n.6), and the Court of Appeal properly determined that the discovery rule should apply. (*Hebrew Academy v. Goldman* (2005) 129 Cal.App.4th 391, 397-406.)

**II. THERE IS NO REASON TO EXTEND THE SINGLE-PUBLICATION RULE TO DEFAMATORY WRITINGS THAT RECEIVE EXTREMELY LIMITED DISTRIBUTION, BECAUSE THE RULE WAS ADOPTED TO ADDRESS PROBLEMS ARISING IN MASS MEDIA DEFAMATION CASES**

**A. Advent of the Mass Media, With Resulting Limitless Liability Under the Common Law Rule, Prompted the Adoption of the Single-Publication Rule**

Defendants contend that the above analysis is largely meaningless because this case, like *Shively v. Bozanich* (2003) 31 Cal.4th 1230, is governed by the single-publication rule, which should apply even to publications that receive an extremely limited distribution. (*Id.* at 1245 n.6.) Defendants position ignores not only the compelling need for the discovery rule in non-mass media defamation cases discussed *supra*, but also the history and rationale for the single-publication rule, and this Court should reject it.

As the Court explained in *Shively*, 31 Cal.4th at 1244-45, courts in the mid-twentieth century fashioned what became known as the single-publication rule to address the problems posed by the common law multiple-publication rule, as exemplified in *The Duke of Brunswick v. Harmer* (Q.B. 1849) 117 Eng.Rep. 75. Under the old rule, each sale of a book or newspaper gave rise to a new cause of action, which had the potential to subject the publishers of books and newspapers to lawsuits stating hundreds, thousands, or even millions of causes of action for a single issue of a periodical or edition of a book, and could also conceivably toll the statute of limitations indefinitely. (*Id.* at 1244.) In *Shively*, this Court

specifically left open the question of whether the single-publication rule would apply to written publications that receive an extremely limited distribution....

(*Id.* at 1245 n.6.)

As the Court recognized, the courts that initially adopted the new rule were primarily concerned about the effect of the mass media on defamation cases:

These courts recognized that the advent of books and newspapers that were circulated among a mass readership threatened unending and potentially ruinous liability as well as overwhelming (and endless) litigation, ...

(*Shively*, 31 Cal.4th at 1244.)

One of the earliest cases to reject the old rule explained that it had its origin in an era which long antedated the modern process of mass publication and nationwide distribution of printed information, and that courts had adopted the single-publication rule after recognizing that radical changes have been brought about by modern methods of disseminating printed matter for which there is a widespread demand. (*Gregoire v. G.P. Putnam & Sons* (1948) 298 N.Y. 119 [81 N.E.2d 45, 47].)

The courts were [s]ensitive to the realities of a society in which mass distribution and nationwide communication now are norms, (*Rinaldi v. Viking Penguin, Inc.* (1981) 52 N.Y.2d 422 [420 N.E.2d 377, 381]), adopting the single-publication in recognition that mass communication of a single defamatory communication, for practical purposes, constitutes a single wrong, (2 Harper, et

al., Law of Torts (2d ed. 1986) § 5.16, pp. 126-27), and in an attempt to protect the communication industry from undue harassment and unjust punishment .... (50 Am.Jur.2d (1995) Libel and Slander, § 264-65.) *Hartman v. Time, Inc.* (3d Cir. 1947) 166 F.2d 127, 134, specifically reasoned that the instruments of free and effective expression, newspapers and magazines which are published on a nationwide basis, should not be subjected to the harassment of repeated law suits,<sup>15</sup> and the notes preceding the Uniform Single Publication Act ( USPA ) codifying the new rule raised the specter that a single defamatory utterance could possibly give rise to more causes of action than three times the estimated number of all the reported cases in the English language. (Comment, *Torts: Defamation: Uniform Single Publications Act: Civil Code Sections 3425.3, 3425.4* (1956) 44 Cal. L. Rev. 146 n.1, quoting *Commissioner s Prefatory Note to the Uniform Single Publication Act*, 9A Unif. Laws Ann. 138 (Supp. 1955).)

In 1955, California became the fifth state to adopt the USPA. (Civ. Code §

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<sup>15</sup> The single-publication rule was not without its critics. (See Comment, *Developments in the Law Defamation* (1956) 69 Harv. L.Rev. 875, 947-49 (rule has the advantage of certainty, it has resulted in some injustice, Comment, *The Single Publication Rule in Libel: A Fiction Misapplied* (1949) 62 Harv. L.Rev. 1041, 1044 (complaining of the increasing tendency to employ this single-publication fiction for purposes beyond those for which it was originally devised. )

3425.3;<sup>16</sup> *Kanarek v. Bugliosi* (1980) 108 Cal.App.3d 327, 331.) At the time, it was unclear to the commentators whether adoption of the USPA actually constituted a change in California law,<sup>17</sup> though the First Appellate District had held back in 1938 that a libel, uttered but once, is not a continuous thing. The libel occurred upon publication. (*Campbell v. Jewish Committee for Personal Service* (1954) 125 Cal.App.2d 771, 774.)

**B. No California Court Since The Adoption of the USPA Has Applied It to a Non-Mass Media Case, and In Cases of Limited Distributions, A Defamation Claim Would Never Accrue Under USPA Where There Was No General Distribution to a Meaningful Mass of People**

Given the history discussed above, it is not surprising that, since adoption of the USPA, California courts have only applied the single-publication rule to mass media publications, ruling that the statute begins to run upon the first general

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<sup>16</sup> No person shall have more than one cause of action for libel or slander ... or any other tort founded upon any single publication or exhibition or utterance, such as one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture.

<sup>17</sup> Compare 44 Cal. L. Rev. at 149 (whether there is change is question without answer, because not even a chemical trace of any California law on the subject appears to exist ), with Note, *Conflict of Laws - Choice of Law in Multistate Libel - Single Publication Rule* (1950-1951) 24 So. Cal. L. Rev. 103 n.1 ( California, apparently, is still an adherent to the traditional common law rule. )

distribution of the publication to the public. (*McGuinness v. Motor Trend Magazine* (1982) 129 Cal.App.3d 59, 63; *Belli v. Roberts Brothers Furs* (1966) 240 Cal.App.2d 284, 289.) The courts have explained that the rule protects publishers of mass communications of a single article in a newspaper or book or magazine, where distribution may occur over time, (*Schneider v. United Airlines, Inc.* (1989) 208 Cal.App.3d 71, 76), by providing that publication occurs on the earliest date on which the allegedly defamatory information is substantially and effectively communicated to a meaningful mass of readers. (*Strick v. Superior Court* (1983) 143 Cal.App.3d 916, 922.)

To distribute means to give out or deliver especially to a group (*distributing* magazines to subscribers). (*Webster's Third New International Dictionary, Third Edition, Unabridged.*) In cases involving written publications that receive extremely limited distribution (*Shively*, 31 Cal.4th at 1245 n.6), the defamatory information is *never* distributed to the general public or communicated to a meaningful mass of readers, and so the statute of limitations arguably would never begin to run if the single-publication rule were extended to non-mass media publications.

In contending that the single-publication rule should govern all written publications, defendants cannot point to a single California case that has ever applied it to non-mass media publications. (OBM 10.) They largely ignore the above history and caselaw explaining the relationship between the rise of the mass

media and the recognition of the need for the single-publication rule, focusing instead on the language of the USPA. (OBM 10-12.)

While it is true that the USPA refers to any one presentation to an audience, (Civ. Code § 3425.3), that language does not indicate any intention to make the single-publication rule apply to all written defamation. The only examples of written publications given are to issues of a newspaper or book or magazine, and slanderous presentations to audiences involve the oral publication of defamatory statements to the public, which should provide the same type of constructive notice as would publication in a small newspaper or a not particularly popular book.

**C. New York Courts Have Never Considered Whether Discovery Rule Should Apply to Defamation Case, So Single-Publication Rule Cases Provide No Guidance**

In the absence of any support from California caselaw, defendants argue that this Court should follow decisions from New York that have applied the single-publication rule more broadly. (OBM 11-12.) New York, however, has apparently never considered whether the discovery rule applies in defamation cases,<sup>18</sup> and while lower New York state and federal courts have applied the

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<sup>18</sup> See Limitation of Actions: Time of Discovery of Defamation As Determining Accrual of Action, 35 A.L.R.4th 1002 (1985), and *Digital Design Group, Inc. v. Information Builders, Inc.* (2001) 2001 OK 21,\* 20 n. 7 [24 P.3d 834](collecting cases).

single-publication rule to limited publications, there is no indication in the cases relied on by defendants that the plaintiff in those cases could have taken advantage of the discovery rule. (OBM 11-12.)

In *Nyitray v. Johnson* (S.D.N.Y. 1998) 1998 U.S. Dist. Lexis 1791, \*10, 17-33, for example, the plaintiff argued that a letter that resulted in plaintiff's expulsion from a private club had been republished by later readings, but the plaintiff was notified of the charges shortly after the letter was sent. In *David J. Gold, P.C. v. Berkin* (S.D.N.Y. 2001) 2001 U.S. Dist. Lexis 1206, \*6, the plaintiff again argued republication, but he again had actual knowledge of the defamatory credit report within the limitations period. And in *Gelbard v. Bodary* (2000) 706 N.Y.S.2d 801, 802 [270 A.D.2d 866], the court simply found that later re-readings of a letter did not constitute a republication.

The only recent New York Court of Appeals case to actually address whether the single-publication rule should be extended is *Firth v. State* (2002) 98 N.Y.2d 365 [775 N.E.2d 463], which found that [c]ommunications accessible over a public Web site resemble those contained in traditional mass media, only on a far grander scale. Those policies are even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate through the Internet. (*Id.* At 370.)

*Firth* does not help defendants because the Transcript was never published online. There is no similar analysis in the other New York courts regarding the

policies to be addressed in extending the single-publication rule to publications receiving limited distribution, or to cases where a plaintiff was legitimately unaware of the defamation. As this Court has often stated, cases are not authority for propositions not considered. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 374.)

The limited guidance on this issue from other states is actually contrary to defendants position. In *Advanced Training Systems, Inc. v. Caswell Equipment Company, Inc.* (Minn. 1984) 352 N.W.2d 2d 1, \*5, \*7, the Minnesota Supreme Court affirmed the trial court s holding that the single-publication rule did not apply to an action involving a book that was distributed to less than 1,000 individuals and organizations, because the book was neither mass-produced nor mass-distributed. And in a case referred to by this Court in *Shively*, 31 Cal.4th at 1245, the Pennsylvania federal court in *Bradford v. American Media Operations, Inc.* (E.D.Pa. 1995) 882 F.Supp 1508, while refusing to apply the discovery rule to a case where the defamation was widely distributed via traditional mass media, noted that a plaintiff who is not a member of a specialized audience of, say, a scholarly journal might make a stronger claim for a discovery rule. (*Id.* at 1519 n.15.)

**D. Defendants Concerns About a Flood of Litigation, and a Return to the Multiple Publication Rule, Are Unfounded**

In the absence of any persuasive authority to support their request that this

Court extend the single-publication rule beyond its original and justified application to mass media publications, defendants argue repeatedly that unless the rule applies to all written defamation, the courts will face a flood of libel suits against innocent citizens and scholarly institutions. (OBM 2-5, 13-14, 16, 19-20.)

Some of defendants' purported concerns are completely unfounded.

Adoption of a rule that would allow Rabbi Lipner to pursue his claims would not mean that the discovery rule would apply to the thousands of newly published books every year and the enormous volume of other publications, such as newspapers, magazines,... (OBM 2, 19.) As defendants are well aware, all of the precedents and the Court of Appeal decision in this case agree that the discovery rule cannot be applied to mass media publications governed by the single-publication rule. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1250; *Hebrew Academy of San Francisco v. Goldman* (2005) 129 Cal.App.4th 391, 402.)

There is also no basis to anticipate that the courts will be overwhelmed by people allegedly defamed in oral histories, or in any other non-mass media publications, if the Court adopts the standard actually being proposed by Rabbi Lipner. (OBM 2-3, 13-14.) Although *Manguso v. Oceanside Unified School District* (1979) 88 Cal.App.3d 725, did not limit the application of the discovery rule to the facts of that case, there have apparently been only two reported California defamation cases applying the discovery rule from 1979 until the Court of Appeal decision in *Shively*. (*Schneider v. United Airlines, Inc.* (1989) 208

Cal.App.3d 71; *McNair v. Worldwide Church of God* (1987) 197 Cal.App.3d 363.)

Defendants have not cited any cases from any jurisdiction involving oral histories or any of the other innumerable publications (OBM 13) from research institutions that they contend would be adversely affected by allowing people allegedly defamed in them to try to come within the discovery rule.

Other than noting the undisputed history that the common law in 1849 followed the common law multiple publication rule, defendants also do not provide any basis for their concern that courts and libel victims will revert to the old rule unless this Court explicitly makes the single-publication rule universal. (OBM 2-4, 16.) Defendants dismiss as a misstatement of law the Court of Appeals assurance that there was only one publication in this case, (OBM 2, quoting *Hebrew Academy*, 129 Cal.App.4th at 400), but do not point to any California case that has actually applied the multiple publication rule.

Even before adoption of the USPA, California did not permit multiple publication dates based on later readings of a defamatory publication. (*Campbell v. Jewish Committee for Personal Service* (1954) 125 Cal.App.2d 771, 774; see n. 16 *supra*.) Although *Manguso*, 88 Cal.App.3d at 729-30, distinguished mass media cases applying the USPA, the court did not imply that the statute began running every time a prospective employer looked at Ms. Manguso's file, but instead found that the discovery rule could toll the accrual that otherwise occurred

on publication.

In *Bernson v. Browning-Ferris Industries of California, Inc.* (1994) 7 Cal.4th 926, 931-32, this Court stated that a libel claim generally accrues upon publication except when tolled by the discovery rule or by the defendants' fraudulent concealment. In support of the time of accrual, *Bernson* relied on *Strick v. Superior Court* (1983) 143 Cal.App.3d 916, 922, a case involving the single-publication rule.

**E. This Court Should Hold That A Claim Based on Written Defamation that Received Extremely Limited Distribution Accrues On Initial Publication Except as Tolled by the Discovery Rule**

It appears, therefore, that California courts have moved away from the multiple publication rule without specifically extending the single-publication rule beyond cases involving the mass media. In attempting to answer the question that the Court left open in *Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1245 n.6, plaintiffs suggest that, for all the reasons set forth in sections II. A-D, *supra*, the Court should conclude that the single publication rule was never intended to apply to non-mass media publications that receive an extremely limited distribution, and does not apply to them. Under that ruling, the discovery rule would apply as it does in other tort cases, and would depend on whether the defamatory publication gave the victim reason to at least suspect a factual basis for the defamation claim.

Even if the Court decides to hold explicitly that the multiple publication

rule no longer applies to any type of publication, there is no reason why the single-publication rule and the discovery rule cannot both govern cases involving non-mass media publications. As long as the discovery rule does not apply to mass media publications, the policies underlying its initial adoption will be protected. The inherent difficulties of coming within the discovery rule will preclude any possibility that the courts will be flooded with stale defamation cases, particularly given the dire consequences of an adverse ruling under Code of Civil Procedure section 425.16 if a court determines that the defamation victim was not justifiably unaware of the defamation.

**CONCLUSION**

Plaintiffs in defamation cases are at least as entitled to the protections of the discovery rule as the plaintiffs in other tort cases, where it is routinely raised even though its stringent requirements are not easily satisfied. When individuals have been defamed in publications that have received an extremely limited distribution, the policies underlying the adoption of the single-publication do not apply, and there is no reason to deprive them of the opportunity to come within the rule of discovery.

In this case, Rabbi Lipner was justifiably unaware of Mr. Goldman s defamatory statements, and he and the Hebrew Academy should have an opportunity to protect the reputation that they previously enjoyed.

This Court should affirm the decision of the First District Court of Appeal.

DATED: March 22, 2007

LAW OFFICE OF PAUL KLEVEN

by: \_\_\_\_\_  
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**CERTIFICATE OF COUNSEL**

I certify that this Answer Brief on the Merits contains 11, 450 words, as calculated by my WordPerfect 11.0 word processing program.

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