Filed 8/11/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BALBOA ISLAND VILLAGE INN, INC.,	
Plaintiff and Respondent,	G031636
v.	(Super. Ct. No. 01CC13243)
ANNE LEMEN,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Gerald G. Johnston, Judge. Affirmed in part and reversed in part.

D. Michael Bush for Defendant and Appellant.

Dubia, Erickson, Tenerelli & Russo and J. Scott Russo for Plaintiff and Respondent.

* * *

INTRODUCTION

We hold an injunction absolutely enjoining defendant Anne Lemen from making certain statements adjudicated to be defamatory under common law causes of action for libel and slander constitutes a content-based prior restraint on speech in violation of the First Amendment to the United States Constitution and article I, section 2, subdivision (a) of the California Constitution. A content-based injunction restraining speech is constitutionally permissible if the speech has been adjudicated to violate a specific statutory scheme expressing a compelling state interest justifying a prior restraint on speech, or is necessary to protect a right equal in stature to the constitutional right of free speech, and is no broader than necessary. Two of the three parts of the injunction issued in this case do not meet these criteria.

Lemen lives on Balboa Island, across an alley from the Village Inn, a restaurant and bar owned and operated by plaintiff Balboa Island Village Inn, Inc. (BIVI). For many years, Lemen has been at odds with the owners of the Village Inn over allegations of noise and public disturbances. Lemen made disparaging statements about the Village Inn to Balboa Island residents, sometimes while circulating a petition regarding the Village Inn. She videotaped patrons and employees entering and leaving the Village Inn, sometimes following them, video camera in her hand, to their cars. Lemen took flash photographs of customers through the windows and doors of the Village Inn every Thursday and Saturday night for a year, and, on three occasions, photographed an employee changing his clothes. Lemen confronted customers and employees entering or leaving the Village Inn and called them off-color names.

Lemen's actions were turning away customers from the Village Inn. BIVI sued Lemen for nuisance, defamation, and interference with business, seeking only injunctive relief. After a bench trial, the trial court found in BIVI's favor on all three causes of action and issued a permanent injunction prohibiting Lemen from (1) initiating contact with persons known by Lemen to be BIVI employees, (2) making certain

identified defamatory statements about BIVI to third persons, and (3) filming (whether by video camera or still photography) within 25 feet of the Village Inn premises, unless on her own property, and except to document an immediate disturbance or damage to her property.

Lemen challenges the injunction primarily on the ground it is an unconstitutional prior restraint on speech. We conclude the portions of the injunction prohibiting Lemen from making the identified defamatory statements and from initiating contact with Village Inn employees constitute impermissible prior restraints on speech and are overly broad. We uphold the portion of the injunction prohibiting Lemen from filming within 25 feet of the Village Inn premises. Finally, we deny Lemen's request for attorney fees under Code of Civil Procedure section 1021.5.

FACTS

Since 1989, Lemen has owned property on Park Avenue on Balboa Island (the Lemen property). Lemen resides much of the year at this property and also operates it as a vacation rental.

The Lemen property is located across the alley from the back of the Village Inn, a restaurant and bar that opened in the 1930's. The Village Inn stays open until 2:00 a.m. on weekends and live music is performed in the bar area on most evenings. Departing patrons often are inebriated and boisterous. Noise, disturbances, and public urination are not uncommon.

Lemen purchased the Lemen property from the Packards. When Lemen purchased the property, the Packards were involved in a dispute with the Village Inn over noise issues. The noise issues were disclosed in a real estate disclosure statement given to Lemen before she purchased the Lemen property.

BIVI, owned by the Toll family, purchased the Village Inn from Lance Wagner in November 2000. Partly in response to Lemen's complaints about noise,

Wagner reconfigured the interior of the Village Inn to place the bar and entertainment to the areas farthest from the Lemen property, had the walls insulated, and installed soundproof windows.

Lemen remained dissatisfied with conditions at the Village Inn. She became so exasperated that she tried to sell her property. She filed several complaints against Village Inn and BIVI with law enforcement and regulatory agencies and "attempted to spread her message as a harbinger for change through a door to door petition campaign within the community." Lemen obtained about 400 signatures on her petition.

Purportedly to document wrongdoing at the Village Inn, Lemen regularly stood outside the Village Inn's entrance, or sat in her parked van across the street, and videotaped Village Inn customers and employees entering and leaving the premises. Lemen's videotaping upset many customers. With video camera in hand, Lemen sometimes followed departing customers until they reached their cars and followed arriving employees up to the Village Inn's front door.

Lemen also took flash photographs of customers through the windows and doors of the Village Inn every Thursday and Saturday night for a year, upsetting the customers. On three occasions, she photographed an employee changing his clothes.

Lemen confronted customers and employees entering or leaving the Village Inn, calling them "whores," "drunk[s]," "satan," or "satan's spawn." Lemen called the wife of one of BIVI's owners the "madam whore." On one occasion, Lemen confronted a Village Inn employee and asked him if he was a Mexican. On another occasion, Lemen confronted one of the musicians (Arturo Perez) as he approached the Village Inn, asked him if he had a green card, and asked if he knew whether any illegal aliens worked in the restaurant.

Lemen told various Balboa Island residents the Village Inn sold liquor to minors, had child pornography, sold drugs, filmed sex videos inside, attracted "bikers,"

stayed open until 6:00 a.m., had prostitutes, had lesbian sex taking place, and was owned or influenced by organized crime. Lemen made many of these statements while circulating her petition. All of these statements about the Village Inn were false.

Lemen's conduct drove away customers from the Village Inn, causing it to lose an unquantified amount of business. Since filing this lawsuit, BIVI has created a "no loiter zone" around the Village Inn to prevent loitering late at night.

PROCEEDINGS IN THE TRIAL COURT

BIVI sued Lemen for nuisance, defamation, interference with business, and preliminary and permanent injunction. The first amended complaint, the operative pleading, sought only injunctive relief.[1]

A bench trial was conducted over five days. Some 20 witnesses testified, either personally or through deposition transcripts and videotapes. After the conclusion of trial, the court prepared and issued a statement of decision. The trial court found: "The case before the court involves statements and conduct by Defendant which Plaintiff alleges have caused damage to Plaintiff's business. At trial, testimony and other evidence was presented to the court that Defendant has made statements to customers of Plaintiff, as well as residents of Balboa Island which include the following: Plaintiff sells alcohol to minors; stays open until 6:00 AM; makes sex videos; is involved in child pornography; distributes illegal drugs; has mafia connections; encourages lesbian activities; participates in prostitution and acts as a whorehouse; and serves tainted food. Some of these statements were made while Defendant was presenting a petition for signature regarding Plaintiff's business activities to island residents. On other occasions, the statements occurred while Defendant engaged in conversation with actual or

[1] Lemen moved to strike the original complaint pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP (strategic lawsuit against public participation) statute. In response to the motion, BIVI filed a first amended complaint. The record does not reflect what became of Lemen's motion to strike.

prospective customers of Plaintiff who were entering or departing Plaintiff's premises. Evidence was also presented to show that Defendant has confronted employees of Plaintiff, questioned their legal status and demanded to see a 'green card', accused employees of being 'whores', called one of Plaintiff's owners the 'madam of a whorehouse', and stated that 'Satan' owns and operates Plaintiff. [¶] Evidence was also presented that Defendant has engaged in a regular course of video taping and still photography of Plaintiff's patrons and the activities in and around Plaintiff's premises. This has included a practice of following departing customers with video camera in hand and asking questions. In addition, there was evidence produced to show that Defendant has, at times, made a regular practice of parking her van across the street from Plaintiff's business and video taping the business and its patrons. Defendant was also shown to have taken still flash photos at night through the windows of Plaintiff's building."

As the trial court found, Lemen "denied most of the activity and statements attributed to her." The trial court resolved the credibility issue in BIVI's favor: "However, the Court is convinced by a preponderance of the evidence based on the many witnesses called to testify, that, in fact, Defendant did make the statements attributed to her and engaged in the other conduct previously described."

Relying on *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121 (*Aguilar*), the trial court concluded injunctive relief limiting free speech may be permissible to prevent wrongful conduct, and believed "such a situation exists here." The court concluded, "it is crucial that such limitations be no more restrictive than what is necessary to protect Plaintiff's legitimate interests in conducting a lawful business, and the restrictions must be clear and specific enough that Defendant can understand what is prohibited and what is not."

The trial court issued the following relief: "4. On the fourth cause of action for Preliminary and Permanent Injunction against Defendant, judgment is entered in favor of Plaintiff and against Defendant, and the Court orders that Lemen, her agents,

all persons acting on her behalf or purporting to act on her behalf and all other persons in active concert and participation with her, be and hereby are, permanently enjoined from engaging in or performing directly or indirectly, any of the following acts: [¶] A. Defendant is prohibited from initiating contact with individuals known to Defendant to be employees of Plaintiff. Any complaints Defendant has regarding Plaintiff or Plaintiff's business must be communicated to a member or members of Plaintiff's management, who will be identified by Plaintiff for Defendant and for which Plaintiff will provide Defendant a phone number by which Defendant can timely and easily communicate any problems related to Plaintiff's operation. [¶] B. Defendant is prohibited from making the following defamatory statements about Plaintiff to third persons: Plaintiff sells alcohol to minors; Plaintiff stays open until 6:00 a.m.; Plaintiff makes sex videos; Plaintiff is involved in child pornography; Plaintiff distributes illegal drugs; Plaintiff has mafia connections; Plaintiff encourages lesbian activities; Plaintiff participates in prostitution and acts as a whorehouse; Plaintiff serves tainted food. [¶] C. Defendant is prohibited from filming (whether by video camera or still photography) within 25 feet of the premises of the Balboa Island Village Inn *unless* Defendant engages in such filming while on Defendant's own property. An exception to this prohibition occurs when Defendant is documenting the circumstances surrounding an immediate disturbance or damage to her property. An example of this exception might involve Defendant's attempts to gather evidence regarding the mechanism and identity of any person who breaks the window of Defendant's house."

A judgment issuing a permanent injunction was entered on October 11, 2002. Lemen timely appealed.

STANDARD OF REVIEW

"The trial court's decision to grant a permanent injunction rests within its sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion." (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912.)

In assessing whether the trial court abused its discretion in granting a permanent injunction, we review the trial court's factual findings for substantial evidence. "[T]o the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, an appellate court will review such factual findings under a substantial evidence standard." (*Shapiro v. San Diego City Council, supra,* 96 Cal.App.4th at p. 912.) "'When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.'" (*Ibid*.) When the ultimate facts are undisputed, whether a permanent injunction should issue becomes a question of law, which the appellate court reviews de novo without regard to the trial court's conclusions. (*Cabrini Villas Homeowners Assn. v. Haghverdian* (2003) 111 Cal.App.4th 683, 688-689.)

Lemen filed no objections or proposed additions to the statement of decision. We therefore infer the trial court made implied findings necessary to support the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 140.)

ANALYSIS

I.

Whether Substantial Evidence Supports the Permanent Injunction

A permanent injunction may be granted "to prevent the breach of an obligation existing in favor of the applicant: [¶] 1. Where pecuniary compensation

would not afford adequate relief; [¶] 2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; [¶] 3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or, [¶] 4. Where the obligation arises from a trust." (Civ. Code, § 3422.)

In the statement of decision, the trial court found that Lemen (1) made false statements to Balboa Island residents and to Village Inn customers and potential customers, (2) confronted Village Inn employees and the wife of one of the owners and made disparaging statements to them, (3) engaged in a regular course of videotaping Village Inn patrons (including the practice of following them to their cars), and (4) engaged in a practice of taking flash photographs at night through the Village Inn's windows. Based on these findings, the trial court found in BIVI's favor on its causes of action for nuisance, defamation, and interference with business.

The facts, as expressly or impliedly found by the trial court, satisfied the elements of BIVI's claims for nuisance (see *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937-939), defamation (see Civ. Code, §§ 45, 46), and interference with business (see *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 389-390; BAJI No. 7.82). Lemen does not contend otherwise. Lemen challenges the sufficiency of the evidence to support the factual findings, contending (1) she denied making any false statements; (2) "[t]he court did not make any findings of fact concerning what was deemed to be the truth, relative to the Village Inn"; (3) "a vast majority of the plaintiff's witnesses had either an ownership interest in the bar at some point, or were employees or customers" and "it was simply Anne Lemen's word against the witnesses who were in favor of the bar"; and (4) no evidence was presented establishing the Village Inn was damaged by her alleged false statements.

Substantial evidence supported the trial court's findings. As to points one and three above, the trial court, as the trier of fact, had the power to weigh witness credibility and resolve conflicts in the testimony. Lemen denied engaging in this

conduct, but the trial court disbelieved her, stating, "the Court is convinced by a preponderance of the evidence based on the many witnesses called to testify, that, in fact, Defendant did make the statements attributed to her and engaged in the other conduct previously described."

As to point two, to the extent the trial court did not make express findings as to the truth of Lemen's statements, we infer the trial court impliedly made all necessary findings. (*In re Marriage of Arceneaux, supra,* 51 Cal.3d at p. 1133; *Tusher v. Gabrielsen, supra,* 68 Cal.App.4th at p. 140.) Aric Toll, one of the owners, testified Lemen's statements were false. His testimony alone is sufficient to support the implied findings. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

As to point four, we similarly infer the trial court impliedly found "pecuniary compensation would not afford adequate relief" or "it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief." (Civ. Code, § 3422.) Aric Toll testified Lemen's activities turned away potential customers and annoyed existing ones. He testified "[i]t would be difficult to estimate exactly how much business I've lost from her speaking with potential customers around my restaurant."

II.

Whether the Permanent Injunction Constitutes an Unconstitutional Prior Restraint on Speech

A.

Lemen challenges the permanent injunction as an unlawful prior restraint on her constitutional right to free speech. The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment (*Near v. Minnesota* (1931) 283 U.S. 697, 732), declares that "Congress shall make no law . . . abridging the freedom of speech." (U.S. Const., 1st Amend.) "It is axiomatic that the

government may not regulate speech based on its substantive content or the message it conveys." (*Rosenberger v. Rector & Visitors of the Univ. of Va.* (1995) 515 U.S. 819, 828.)

A prior restraint is an administrative or judicial order that forbids certain speech in advance of it being made. (*Alexander v. United States* (1993) 509 U.S. 544, 550.) "Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." (*Ibid*.)

Prior restraints are not unconstitutional per se. (*Southeastern Promotions, Ltd. v. Conrad* (1975) 420 U.S. 546, 558.) "Any system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.'" (*Ibid.*) "The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (*Id*. at pp. 558-559.)

In *Near v. Minnesota, supra,* 283 U.S. 697, 706, the Supreme Court invalidated as a prior restraint a court order that perpetually enjoined the named party, who had published a newspaper containing articles found to violate a state nuisance statute, from publishing any future "'malicious, scandalous or defamatory'" publication. In *Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, the Supreme Court struck down as a prior restraint an injunction prohibiting the petitioners from distributing anywhere within the town of Westchester, Illinois, leaflets criticizing the respondent's real estate practices. "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." (*Id.* at p. 419.)

A prior restraint on speech may be constitutionally valid if "'it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" (*Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at p. 559.) One such procedural safeguard is an "adequate determination" the speech is unprotected. "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." (*Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations* (1973) 413 U.S. 376, 390 (*Pittsburgh Press*).) Thus, an order based on a continuing course of repetitive conduct, following a final judicial determination the enjoined speech is unprotected by the First Amendment, has been held to not be a prior restraint if it "is clear and sweeps no more broadly than necessary." (*Ibid*.)

In *Pittsburgh Press*, *supra,* 413 U.S. at pages 379, 392, the Supreme Court upheld an order prohibiting a newspaper from publishing "help-wanted" advertisements in sex-based columns such as "'Jobs—Male Interest'" and "'Jobs—Female Interest.'" Organizing help wanted ads in this manner, which defendant newspaper had done repeatedly as a continuing course of conduct, had been judicially determined to violate a city ordinance prohibiting discrimination in employment. (*Id.* at pp. 388-389.) In upholding the order, the Supreme Court commented: "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." (*Id*. at p. 389.) Because it had been judicially determined the challenged order did not endanger protected speech, was "based on a continuing course of repetitive conduct," and was "clear and swe[pt] no more broadly than necessary," the order did not constitute an impermissible prior restraint on speech. (*Id.* at p. 390.)

B.

The trial court's conclusion the injunction in this case did not constitute a prior restraint was based upon *Aguilar, supra,* 21 Cal.4th 121. In *Aguilar*, the California Supreme Court addressed whether an injunction issued under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) enjoining the continuing use of racial epithets in the workplace constituted an invalid prior restraint on speech. A plurality held "a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination." (*Aguilar,* at p. 126 (plur. opn. of George, C. J.).) "Under well-established law, however," the plurality stated, "the injunction at issue is not an invalid prior restraint, because the order was issued only after the jury determined that defendants had engaged in employment discrimination, and the order simply precluded defendants from continuing their unlawful activity." (*Id.* at p. 138 (plur. opn. of George, C. J.).)

The plurality examined United States Supreme Court precedent on prior restraints, particularly *Pittsburgh Press, supra,* 413 U.S. 376, and concluded these "high court decisions recognize that once a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation, or continuation of that practice is not a prohibited 'prior restraint' of speech." (*Aguilar, supra,* 21 Cal.4th at p. 140 (plur. opn. of George, C. J.).) The injunction at issue was based upon a continuing course of conduct that had been judicially determined to violate FEHA. The order therefore did not constitute a prohibited prior restraint on speech, the plurality concluded, because the order was "'clear and sweeps no more broadly than necessary.'" (*Id*. at pp. 140-141 (plur. opn. of George, C. J.).)

Justice Werdegar's concurring opinion suggested more than a judicial finding of unlawfulness was necessary to enjoin speech and recognized the special nature

of the workplace and the compelling state interest in preventing racial discrimination and harassment justified the restraint. The concurring opinion emphasized restrictions on speech in the workplace might be justified as necessary to protect a captive audience from offensive speech and to advance important public policies. (*Aguilar, supra,* 21 Cal.4th at pp. 159-162 (conc. opn. of Werdegar, J.).) "The workplace is different from sidewalks and parks, however; workers are not so free to leave to avoid undesired messages. When employees are forced to endure racially harassing speech on the job, it is arguable that 'substantial privacy interests are being invaded in an essentially intolerable manner.'" (*Id.* at p. 169 (conc. opn. of Werdegar, J.).) In the workplace, the First Amendment rights of employees must sometimes give way to "weighty public policies," such as ridding the workplace of discrimination. (*Id*. at p. 157 (conc. opn. of Werdegar, J.).)

The concurring opinion justified the injunction by analogy to a time, place, and manner regulation necessary to advance the compelling state interest of eliminating racially discriminatory practices in the workplace. (*Aguilar, supra,* 21 Cal.4th at pp. 162-163, 168 (conc. opn. of Werdegar, J.).) Justice Werdegar recognized "the several factors coalescing in this case—speech occurring in the workplace, an unwilling and captive audience, a compelling state interest in eradicating racial discrimination, and ample alternative speech venues for the speaker—support the conclusion that the injunction, if sufficiently narrowed on remand to apply to the workplace only, will pass constitutional muster." (*Id*. at p. 166 (conc. opn. of Werdegar, J.).)

BIVI urges us to read *Aguilar* as upholding any injunction against a prior restraint challenge if there has been a final judicial determination the prohibited speech is unlawful or tortious. There is support for such a broad interpretation. The *Aguilar* plurality opinion suggested its holding is not limited to FEHA claims but is equally applicable to any injunction based upon violation of a statute. The plurality relied heavily on *Pittsburgh Press, supra,* 413 U.S. 376, in which the United States Supreme

Court upheld an order prohibiting a newspaper from publishing advertisements in a manner that would constitute employment discrimination under a city ordinance similar to FEHA. (*Aguilar, supra,* 21 Cal.4th at pp. 139-140 (plur. opn. of George, C. J.).) The plurality also relied on cases upholding injunctions issued under other statutes and noted that "[i]n a variety of contexts, courts have upheld injunctions prohibiting the continuation of a course of expressive conduct that violates a specific statutory prohibition." (*Id*. at p. 141, fn. 8 (plur. opn. of George, C. J.).) Included in footnote 8 in *Aguilar* are two cases supporting issuance of an injunction to prohibit continued publication of defamatory speech. (*Lothschuetz v. Carpenter* (6th Cir. 1990) 898 F.2d 1200, 1208 (conc. & dis. opn. of Wellford, Cir. J.) ["I would grant a narrow and limited injunction to prohibit [the defendant] from continuing and reiterating the same libelous and defamatory charges"]; *O'Brien v. University Community Tenants Union, Inc.* (1975) 42 Ohio St.2d 242, 245 ["Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that *same* speech may be proper"], italics added.)

But the *Aguilar* plurality opinion is just that—a plurality—and as such is not controlling precedent. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 918.) Even if the plurality opinion could be read as broadly as BIVI urges, we believe the *Aguilar* plurality must be considered together with the concurring opinion, which emphasized that restraints on speech in the workplace are justified as necessary to protect a captive audience from offensive speech and to advance a compelling public policy of eliminating workplace harassment and discrimination.

We believe the plurality opinion and concurring opinion in *Aguilar* should be read to support the principle that a content-based injunction restraining speech is constitutionally valid if the speech has been adjudicated to violate a specific statutory scheme expressing a compelling state interest justifying a prior restraint on speech, or when necessary to protect a right equal in stature to the right of free speech secured by

the First Amendment to the United States Constitution. (*Aguilar, supra,* 21 Cal.4th at p. 168 (conc. opn. of Werdegar, J.) ["State law, both statutory and constitutional, thus recognizes a compelling interest in the elimination of racial discrimination in the workplace"].) This interpretation makes *Aguilar* consistent with *Pittsburgh Press*, which concluded the challenged advertising lost any First Amendment protection because it violated a municipal ordinance prohibiting sex-based discrimination.

C.

With these principles in mind, we analyze the constitutionality of the injunction issued against Lemen. We conclude paragraphs 4.A and 4.B of the judgment are invalid as impermissible content-based prior restraints on speech and are overly broad. We conclude paragraph 4.C is no broader than necessary to serve its legitimate purpose of abating a nuisance and preventing interference with BIVI's business and is therefore valid.

1.

There can be no question that paragraph 4.B of the judgment operates as a content-based prior restraint on Lemen's speech. Paragraph 4.B restrains Lemen from making certain statements to persons who are not parties to this lawsuit based upon the content of the statements. The justification for paragraph 4.B offered by the trial court and BIVI is that the statements which Lemen is enjoined from making have been adjudicated in a trial to be defamatory.

BIVI has cited no California case, and we have found none, upholding an injunction enjoining defamatory statements based solely on a common law cause of action for libel or slander. In *Pittsburgh Press, supra,* 413 U.S. 376, the United States Supreme Court upheld an order issued pursuant to a municipal ordinance prohibiting sex-based discrimination. The Supreme Court concluded any First Amendment interest was lost because the publication violated an ordinance expressing an important state interest.

(*Id.* at p. 389.) The United States Supreme Court has never applied the adequate determination standard of *Pittsburgh Press, supra,* 413 U.S. at page 390 to uphold an injunction against defamatory speech under a cause of action for common law defamation.

Libel and slander are not part of a statutory scheme—such as FEHA—expressing a compelling state interest justifying a content-based prior restraint on First Amendment rights. Libel and slander are based upon common law tort causes of action. The definitions of libel and slander were enacted in 1872 as sections 45 and 46, respectively, of the Civil Code when the Legislature adopted the Field draft code to systemize and codify the common law. (See 6 West's Ann. Civ. Code (1982 ed.) §§ 45, 46; *Roemer v. C.I.R.* (9th Cir. 1983) 716 F.2d 693, 698-699; see also *Schomberg v. Walker* (1901) 132 Cal. 224, 226; *Slater v. Conti* (1959) 171 Cal.App.2d 582, 585.) Civil Code sections 45 and 46, enacted as codification of common law tort causes of action, do not reflect a state interest justifying a prior restraint on First Amendment rights.

Neither *Pittsburgh Press* nor *Aguilar*, therefore, protects paragraph 4.B of the judgment from constitutional challenge. Thus, we conclude paragraph 4.B constitutes an impermissible content-based prior restraint on speech under the First Amendment to the United States Constitution.

Our conclusion is also grounded on article I, section 2, subdivision (a) of the California Constitution, which provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." The California Constitution provides greater protection for speech than is afforded by the First Amendment. (*Aguilar, supra,* 21 Cal.4th at p. 166 (conc. opn. of Werdegar, J.).) The California Supreme Court held in *Dailey v. Superior Court* (1896) 112 Cal. 94 (*Dailey*), an injunction against future speech violated the California Constitution. The California Supreme Court in *Dailey* stated: "[T]he order made by the trial court was an attempted

restraint upon the right of free speech, as guarantied by the constitution of this state, and that petitioner's mouth could not be closed in advance for the purpose of preventing an utterance of his sentiments, however mischievous the prospective results of such utterance." (*Id*. at p. 100.)

The *Aguilar* plurality opinion distinguished *Dailey*, stating that case "cannot be interpreted as broadly as defendants suggest, to prohibit a court, under all circumstances, from enjoining 'speech.' The circumstances in *Dailey* involved a true prior restraint in which the superior court had prohibited the production of a play prior to its first performance simply because the play was based upon the circumstances of a pending criminal case. The court in *Dailey* was not faced with the question whether an injunction prohibiting the continuation of conduct that has been judicially determined to be unlawful constitutes a prior restraint." (*Aguilar, supra,* 21 Cal.4th at p. 143 (plur. opn. of George, C. J.).) Both the plurality opinion and the concurring opinion in *Aguilar* concluded the injunction against racial epithets in the workplace did not violate the California Constitution. (*Id.* at pp.142-144 (plur. opn. of George, C. J.); *id.* at pp. 166-168 (conc. opn. of Werdegar, J.).) However, in light of what we believe to be *Aguilar*'s meaning, the California Constitution, as interpreted by the California Supreme Court, continues to prohibit injunctions enjoining defamatory speech under a common law claim for libel or slander, whether made before or after a judicial determination the publication is defamatory.

Two other California cases warrant discussion. In *Magill Bros. v. Bldg. Service etc. Union* (1942) 20 Cal.2d 506, which the trial court here also relied upon in issuing the injunction, the plaintiff sought an injunction against a labor union and its members prohibiting them from maintaining pickets in front of the plaintiff's place of business. The trial court found the picketers carried banners and signs conveying false information about the plaintiff, but denied the injunction. (*Id*. at p. 508.) The California Supreme Court reversed because picketing, as a form of collective labor activity, may be

enjoined if conducted unlawfully. (*Id*. at p. 510.) The Supreme Court did not hold defamatory speech may be enjoined; in fact, the court stated, "despite the fact that the *publication of false statements alone will not justify equitable relief*, it is the nearly unanimous rule throughout the country that equity will intervene where false or fraudulent statements are combined with picketing and where, under local policy, this renders the picketing illegal." (*Id*. at p. 509, italics added.)

The other case is *Wilson v. Superior Court* (1975) 13 Cal.3d 652. In that case, a candidate for county assessor challenged a preliminary injunction enjoining him from distributing leaflets with reprinted newspaper articles reporting his opponent had been indicted for bribery and the opponent's aide had been placed on probation for misuse of campaign funds. (*Id*. at p. 655.) The California Supreme Court held the injunction was an unconstitutional prior restraint. (*Id*. at p. 658.) *Wilson* involved a preliminary injunction, not a final injunction following a trial, and thus the injunction was not based upon a final judicial determination the leaflets were libelous. But the Supreme Court rejected the argument that libelous statements do not enjoy constitutional protection (*id*. at p. 659), thereby demonstrating a judicial determination that statements are defamatory does not in itself mean an injunction prohibiting the defamatory statements would be constitutional.

Long-standing judicial reluctance to enjoin defamatory speech supports our reading of *Aguilar* and the federal and state constitutions. The traditional rule is that equity will not enjoin a libel. (See *Metropolitan Opera Assn. v. Local 100, Hotel Employees & Restaurant Employees Internat. Union* (2d Cir. 2001) 239 F.3d 172, 177 ["Indeed, for almost a century the Second Circuit has subscribed to the majority view that, absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases"]; *Kramer v. Thompson* (3d Cir. 1991) 947 F.2d 666, 677-678 [citing cases]; *Community for Creative Non-Violence v. Pierce* (D.C. Cir. 1987) 814 F.2d 663, 672 ["The usual rule is 'that equity does not enjoin a libel or slander and that the only

remedy for defamation is an action for damages'"], citation omitted; *American Malting Co. v. Keitel* (2d Cir. 1913) 209 F. 351, 354 ["'Equity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may be. This is the universal rule in the United States'"]; *Willing v. Mazzocone* (1978) 482 Pa. 377 [reaffirming common law rule that remedy for defamation is an action for damages].) This rule rests "in large part on the principle that injunctions are limited to rights that are without an adequate remedy at law, and because ordinarily libels may be remedied by damages, equity will not enjoin a libel absent extraordinary circumstances." (*Metropolitan Opera Assn. v. Local 100, Hotel Employees & Restaurant Employees Internat. Union, supra,* 239 F.3d at p. 177.)

Several cases (some cited in the *Aguilar* plurality) have upheld injunctions against continuing defamatory speech after a judicial determination the speech is defamatory. (*Lothschuetz v. Carpenter, supra,* 898 F.2d 1200, 1208 (conc. & dis. opn. of Wellford, Cir. J.) ["I would grant a narrow and limited injunction to prohibit [the defendant] from continuing and reiterating the same libelous and defamatory charges"]; *Advanced Training Sys. v. Caswell Equip. Co.* (Minn. 1984) 352 N.W.2d 1 [injunction prohibiting publication of defamatory books]; *Retail Credit Co. v. Russell* (1975) 234 Ga. 765 [injunction restraining credit reporting company from publishing the exact allegations the jury found to be libelous]; *O'Brien v. University Community Tenants Union, Inc., supra,* 42 Ohio St.2d 242, 245 ["Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper"]; see also *Kramer v. Thompson, supra,* 947 F.2d 666, 677-678 [finding reasoning of cases "quite persuasive" but not reflective of Pennsylvania law].)

We disagree with these cases and find them inconsistent with *Aguilar* and the federal and state constitutions.[2] Although the principle that courts will not enjoin a libel is not constitutional in origin, it is consistent with and promotes constitutionally protected rights of free speech.

Further, one of the reasons for the law's traditional reluctance to enjoin defamation is the difficulty of determining in advance whether or not a particular publication will be defamatory. The same is true when the issue is enjoining a continuing publication. Here, paragraph 4.B lists those statements that the trial court determined to be defamatory in the context in which they had previously been published. While at the time of trial, those statements were false, whether any of those statements would be false and defamatory if published in the future depends on future events as well as the context in which any statement is made. In order to be libel per se, a statement must assert or imply the statement as a fact, and that cannot be assessed until the statement is actually made.

Even if paragraph 4.B of the judgment were otherwise constitutionally valid, it is too broad. Paragraph 4.B bears no resemblance to time, place, and manner restrictions, but enjoins Lemen from making the identified statements—based solely on their content—to anyone, anywhere, at any time, in any context. Paragraph 4.B is not limited in scope to protect a captive audience: Paragraph 4.B prohibits Lemen from making the statements to family, to friends, within her own home, or 1,000 miles away. Paragraph 4.B is not limited to statements made by Lemen to Village Inn patrons. By

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[2] Other cases have enjoined defamatory speech to advance a policy evinced by a statutory scheme (e.g., *San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters* (9th Cir. 1997) 125 F.3d 1230 [injunction under Norris-LaGuardia Act]; *Auburn Police Union v. Carpenter* (1st Cir. 1993) 8 F.3d 886 [upholding injunction under Maine statute prohibiting persons from soliciting property for the benefit of a law enforcement officer, agency, or association]), a situation not present in this case. These cases are consistent with our interpretation of *Aguilar*.

prohibiting Lemen from making the identified statements to third persons, paragraph 4.B unlawfully infringes on Lemen's right to contact government officials and to petition for redress of grievances. (See *Smith v. Silvey* (1983) 149 Cal.App.3d 400, 406.)

Although BIVI has an interest in protecting its patrons from being accosted by Lemen while entering or leaving the Village Inn, protection of that interest "'may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 577.) An injunction prohibiting Lemen from accosting customers within a specified area around the Village Inn might be justified under a public or private nuisance theory. But paragraph 4.B, which prohibits Lemen from making the defamatory statements to any third party anywhere, is far broader than necessary to protect Village Inn patrons from being annoyed by Lemen.

Paragraph 4.A suffers from similar constitutional infirmities. Paragraph 4.A is a prior restraint on speech because it prohibits Lemen from initiating any contact with persons she knows to be Village Inn employees. Even if paragraph 4.A were a lawful prior restraint, it is too broad to be upheld. The Village Inn has a legitimate interest in making sure its employees are not accosted by Lemen on their way to and from work. But paragraph 4.A, as is paragraph 4.B, is not "narrowly drawn to achieve that end." (*Perry Ed. Assn. v. Perry Local Ed. Assn.* (1983) 460 U.S. 37, 45.) Paragraph 4.A. includes no time, place, and manner restrictions but prohibits Lemen from initiating any type of contact with a known Village Inn employee anywhere, at any time, regarding any subject. Paragraph 4.A thus sweeps more broadly than necessary and restrains Lemen from exercising her constitutional right of free speech. (*Pittsburgh Press, supra,* 413 U.S. at p. 390.)

2.

We uphold paragraph 4.C of the judgment, which enjoins Lemen from filming within 25 feet of the Village Inn's premises (except when she is documenting an

immediate disturbance or damage to her property). The evidence established, and the trial court found, that Lemen's continuing course of conduct constituted a nuisance and interfered with BIVI's business. Code of Civil Procedure section 731 expressly permits the court to issue an injunction to abate a nuisance. Injunction is a recognized remedy for unlawful interference with business. (*Uptown Enterprises v. Strand* (1961) 195 Cal.App.2d 45, 50-51.)

To the extent paragraph 4.C affects Lemen's free speech rights, it is reasonable in scope, clear, and "sweeps no more broadly than necessary" to abate the nuisance. (*Pittsburgh Press, supra,* 413 U.S. at p. 390.) Paragraph 4.C permits Lemen to take photographs from more than 25 feet from the Village Inn premises, from her own property, or to document disturbances or damage to her property.

III.

Whether Lemen May Recover Attorney Fees Under Code of Civil Procedure Section 1021.5

Lemen requests attorney fees pursuant to Code of Civil Procedure section 1021.5. We deny the request.

Code of Civil Procedure section 1021.5 permits the court to award attorney fees to a successful party in "any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." An award of fees under section 1021.5 is discretionary. (*Family Planning Specialists Medical Group, Inc. v. Powers* (1995) 39 Cal.App.4th 1561, 1567-1568.)

Free speech rights are included among those "recognized as 'important rights[s] affecting the public interest.'" (*Family Planning Specialists Medical Group, Inc. v. Powers, supra,* 39 Cal.App.4th at p. 1568.) Lemen's appeal has produced a partial reversal vindicating her constitutional rights of free speech. However, "[t]he significance of the benefit conferred by a party seeking a [Code of Civil Procedure] section 1021.5 fee award must be determined by the trial court 'from a practical perspective.'" (*Ibid.*) From a practical perspective, Lemen—and not the general public or a class of persons—is the recipient of any benefit our decision confers. Lemen therefore has not met a requirement for recovering attorney fees under Code of Civil Procedure section 1021.5. We do not find it necessary to remand to the trial court to make this determination, and we deny Lemen's request for attorney fees.

DISPOSITION

We reverse as to paragraphs 4.A and 4.B of the judgment. We affirm the remainder of the judgment. We deny Lemen's request for attorney fees under Code of Civil Procedure section 1021.5. Because each party partially prevailed, in the interest of justice, no party shall recover costs incurred on appeal.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.