

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

Robin Marien et al.,

Plaintiffs, Cross-Defendants,
and Respondents

v.

Robert M. Kuczewski,

Defendant, Cross-Complainant,
and Appellant.

Court of Appeal No.

D080658

Superior Court No.

37-2015-00015685-CU-DF-CTL

Appeal from a Judgement
Of the Superior Court, County of San Diego
Hon. Kenneth Medel, Judge

APPELLANT’S OPENING BRIEF

Robert Michael Kuczewski

Appellant
Self-Represented

PREFACE

Appellant Kuczewski has been self-represented throughout most of the history of this case due to financial limitations. Ideally, this should not disadvantage a person in a court of law, but we all know that it does. Appellant respectfully requests that any and all possible allowances be made so that justice prevails in spite of Appellant's lack of experience with the court system and its many complexities.

More importantly, the current judgment in this case represents a threat to our first amendment rights to petition our government and also represents a threat to our first amendment freedom of the press to publish the video record of public government meetings. Appellant respectfully requests that these important first amendment issues be given the highest priority in the deliberation of this case.

Certificate of Interested Persons

Pursuant to California Rules of Court, Rule 8.208, the following brief is submitted by Robert Michael Kuczewski.

The undersigned certifies that Robert Michael Kuczewski does not know of an entity or person that must be listed under (d)(1) or (2) of Rule 8.208.

Dated: June 30, 2023

Respectfully submitted,

By:

Robert Michael Kuczewski
in pro per

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None submitted.

Appellant lacks the experience and resources to find appropriate authorities and begs the Appellate Justices to use their own extensive background in the law for any such references. Appellant also asserts that the questions at issue are fundamental rights granted by the First Amendment to the United States Constitution. These include freedom of speech and freedom of the press, and should be interpreted to favor the rights to speak and publish.

Table of Lodged Media on 16GB Flash Drive

Exhibit_300_173_Comparison
 City_Council_Causes_of_Action_dates.mp4
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Hamby_Collision_Video
 Brad's tandem vid SAVE.mov
KUCZEWSKI_Jury_Exhibits
 Exhibit_130_Photo_Metzgar_Smoking
 DSC03399.JPG
 Exhibit_138_Photo_Marien_Finger
 Robin_Finger_1_DSCF1449_00m_07s.png
 Robin_Finger_2_DSCF1449_00m10s.png
 Exhibit_144_PDF_Accidents
 Accidents_through_2015_05.pdf
 Exhibit_154_DVD_Vid_Photo_2014_11_09
 MVI_0605.MOV
 Transcript_of_MVI_0605.pdf
 Exhibit_158_DVD_Vid_Photo_2015_06_14a
 MVI_1986.MOV
 MVI_1988.MOV
 Exhibit_165_Vid_2015_03_08_Arrest
 MVI_1052.MOV
 Exhibit_168_Vid_2015_06_14_Gliderport
 MVI_1968.MOV
 Exhibit_170_Vid_2015_07_12_Battery_Arrest
 MVI_0198.MOV
 Exhibit_300_173_City_Council_Speeches
 City_Council_Causes_of_Action_Redacted.mp4
 Exhibit_301_172_PDF_Lyne_Perry_Email
 Lyne_Perry_Email.txt

INTRODUCTION

This is an appeal of a judgment after trial in a defamation case. The case involves a citizen who tirelessly petitioned the City of San Diego for an Advisory Board to provide safety oversight, technical oversight, and fairness oversight over a business operating under a lease on public land within the Torrey Pines City Park (“Gliderport”) which is owned by the City of San Diego. The citizen in this case (Defendant/Appellant Kuczewski) personally witnessed ongoing incidents of bullying, dangerous practices, and other abuses by Plaintiffs/Respondents Marien, Jebb, and Air California Adventure who were making millions of dollars every year from their free lease of City Land. Appellant Kuczewski was also aware of many accidents and even deaths at the Gliderport under Plaintiffs/Respondents’ management. These were regularly published in the local news and sometimes the national news. Appellant Kuczewski regularly brought and displayed many actual photos and video recordings and press clippings of abuses, bullying, violations, accidents, and deaths and displayed them to the San Diego City Council during official Council Meetings while seeking oversight of the Plaintiff’s/Respondent’s business by the City of San Diego.

Appellant Kuczewski also testified as an Expert Witness under oath in a deposition against Respondents in a separate case (Cal Sup San Diego 37-2013-00052120) where Respondents had injured a woman paragliding pilot named Shannon Hamby during one of her purchased training sessions (see lodged video: *“Hamby_Collision_Video/Brad's tandem vid SAVE.mov”* at 2:22 [2 minutes and 22 seconds]). Shannon was badly injured and Appellant Kuczewski testified in his September 10, 2014 Deposition that Respondents were grossly negligent in training Shannon during conditions that were far too crowded and otherwise inappropriate for her skill level. That case was settled in Shannon Hamby’s favor for an undisclosed amount shortly after Appellant Kuczewski’s deposition testimony. By November of 2014 (2 months after Appellant Kuczewski’s deposition) Respondents began a crusade of physical bullying, false arrests, and fabricated restraining orders against Appellant Kuczewski attempting to intimidate him from continued reporting of their abuses and violations to the San Diego City Council and from any future testimony against them in court. These actions of bullying, false arrests, and fabricated restraining orders were also intended to intimidate any other members of the hang gliding and/or paragliding community from testifying against Respondents in either

a Court of Law or the City Council. All restraining orders and all arrests adverse to Appellant Kuczewski were eventually dismissed as baseless and Appellant Kuczewski continued to observe abuses at the Gliderport and continued to report bullying, violations of ordinances, accidents and deaths to the City of San Diego during their regularly scheduled public comment period per the Brown Act. Plaintiffs/Respondents quickly filed this law suit as yet another attempt to silence Appellant Kuczewski's appearances as an expert witness in Court and as a speaker at San Diego City Council. This lawsuit has dragged through the Court system for over 8 years. Appellant Kuczewski was initially represented by pro bono attorney Chad Morgan who felt strongly that the case should (and would) be decided in Kuczewski's favor. Morgan felt so strongly that he both represented Appellant Kuczewski and filed Kuczewski's Anti-SLAPP motion for no cost. Morgan further filed and prosecuted Appellant Kuczewski's Anti-SLAPP appeal for no cost. But as the case dragged on, Morgan could not afford to continue without pay, and Kuczewski could not afford the cost of Morgan or any other attorney. Eventually the case went to Jury trial and Appellant Kuczewski's self-representation was no match for Respondents' deep pockets and professional counsel. Appellant Kuczewski argued that

the Jury Instructions should describe Plaintiffs/Respondents as limited purpose public figures, but the Court refused and adopted Plaintiffs/Respondents Jury Instructions including CASI instruction 1704 (3RT 739). Appellant Kuczewski lost the case with a debilitating judgment of \$1.8 million against him.

The causes of action for defamation against Appellant Kuczewski all stemmed from Kuczewski's speeches to the San Diego City Council and/or the publication of those City Council speeches on the internet by Defendants/Appellants Kuczewski and/or Holland. Respondents have admitted that Appellant Kuczewski's speeches to the City Council were protected speech, but they then claimed that publication of City Council videos on a web site can become defamation ... even though the City of San Diego had already published those exact same City Council videos on the City's own web site. Indeed, all that Kuczewski and Holland did was republish portions of the videos already present on the City of San Diego web site. This theory of "republishing" of open City Council meetings becoming defamation is incompatible with the freedom of the press as guaranteed by the First Amendment to the Constitution of the United States. If Respondent's theory were to hold, then governments could not publish

the proceedings of their own public meetings. Similarly, journalists could not publish video clips of citizens speaking to their own government. Indeed, it's not clear if journalists could publish anything at all without taking the risk that what they are publishing may result in a lawsuit.

The Critical Error in a Nutshell

As stated, this case involves a first amendment freedom of speech issue. It involves Appellant Kuczewski's right to petition his government for redress of grievances. It involves Kuczewski's right to freedom of the press and to re-publish the proceedings of San Diego City Council meetings on the Internet. It involves public land worth millions of dollars and a business that has leased that land - for free - for decades while bringing in millions of dollars every year off of that free lease with no money going to the City (people) of San Diego. This case involves a business that has operated recklessly and injured and killed many citizens who went there to learn the fun sport of paragliding. It involves a citizen who was brave enough to speak up at City Council and brave enough to testify in Court. It involves retaliation against that citizen for reporting abuses to the San Diego City Council and retaliation for testifying in Court against a business

operating in a City Park with no oversight. The single most egregious error (of many) by the Superior Court was issuing improper Jury Instructions which cast the matter as a private dispute between private citizens in a private matter. Nothing could be further from the truth.

Plaintiffs/Respondents were operating on a free lease on public land worth millions of dollars. Plaintiffs/Respondents had advertised themselves on the Internet luring unsuspecting citizens into their dangerous training programs and tandem “rides”. But most importantly, Plaintiffs/Respondents were acting as defacto public officials while operating the City-Owned Torrey Pines Gliderport within the officially designated Torrey Pines City Park. That last point is the clincher. While Respondents will argue that they are private individuals, the truth is that they were acting in the capacity of government officials when operating a City Park which is owned by the Citizens of San Diego. The frequent press coverage of Gliderport activities which was presented during trial highlights the fact that the Gliderport business was also a matter of continued public interest. See the press clippings lodged along with this opening brief. The press clippings are in the file named “Accidents_through_2015_05.pdf” in the folder named:

KUCZEWSKI_Jury_Exhibits/Exhibit_144_PDF_Accidents

That file contains nine different press clippings from 9 different accidents at the Gliderport published by four different local news agencies (Channel 8 San Diego, Channel 10 San Diego, Union Tribune San Diego, and La Jolla Light). Furthermore, Plaintiffs/Respondents themselves sought a position of public prominence through their purchasing and operating of a business on public land. Even further, Plaintiffs/Respondents often put themselves in the public eye by promoting their business on the Internet and elsewhere. The Jury instructions issued in this case did not match the reality of the situation. The standard for defamation is significantly different in private figure cases than in limited purpose public figure cases. Indeed, that one seemingly subtle difference shifts the entire burden of proof in a defamation case from Plaintiff to Defendant. On that fact alone, the Jury verdict must be overturned and the case must either be decided in Appellant's favor or returned to Superior Court for another trial.

Other Important Errors in a Nutshell

During the testimony of Plaintiff/Respondent Robin Marien (2 RT 484 through 2 RT 490), it was discovered that his company "Air California Adventure, INC" actually had no standing at all in the "Public Flat Rate

Lease of the Torrey Pines Gliderport” (1 CT 81). The lease that Robin Marien, Gabriel Jebb, and Air California Adventure, INC claimed to use as authority to operate their business and to falsely arrest Appellant Kuczewski was actually a lease between the City of San Diego and Air California Adventure LLC., which is NOT the same corporation as Marien’s Air California Adventure INC. Air California Adventure LLC was owned by former San Diego Police Officer David Jebb. David Jebb had obtained that lease back in 1998. But some time around 2009, Plaintiff/Respondent Robin Marien claims to have “taken over” the lease under his own company’s deceptively similar name of “Air California Adventure, INC”. But California State records clearly show that Air California Adventure LLC and Air California Adventure INC were (and are) two separate corporations. It’s not clear why Jebb didn’t just turn the LLC over to Marien when Marien “took over”. It is likely because the lease actually specifies that the corporation “Air California Adventure LLC” must remain 51% owned by David Jebb (1 CT 93 [4.6 Control by Specified Individuals or Entities]) and they didn’t want to “rock the boat” with the City since the 10 year lease had already expired in 2008 and was continuing on a month to month basis in 2009. So rather than declare a change in

ownership (which would likely have triggered a rebidding of the holdover lease) Marien simply created a similarly named second corporation and began operating the Gliderport as if he owned the lease. There may have been other reasons for this shell game that are yet to be discovered. But we do know that under oath, Respondent Marien had no explanation for how these two corporations were switched without a issuing new lease and without a new bidding process by the City of San Diego (2 RT 484 through 2 RT 490). The Court should have clearly recognized the importance of this issue and its fatality to Plaintiffs/Respondent's case. Yet the Court refused to consider the matter and curtailed Appellant Kuczewski's probing of the matter in court. The issue was simply swept under the carpet. It turns out that the subtle matter of ownership was also critical to the cross complaint for assault and battery in this case. Plaintiffs/Respondents were claiming that they had a right to expel Defendant/Appellant Kuczewski from their leased property, and that their right to expel Kuczewski justified their use of force (assault and battery) against Kuczewski (the claims in Kuczewski's counter suit). Furthermore, the fact that Marien, Jebb, and Air California Adventure INC. were operating on an invalid lease through a sleight-of-hand name swap would have greatly bolstered the validity of Kuczewski's

statements made to the San Diego City Council which Plaintiff's claimed to be "defamation". In other words, this one fact would have seriously damaged Plaintiffs/Respondents claims and simultaneously bolstered Defendant/Appellant Kuczewski's counter-claims. Yet the Court did not resolve the matter for the Jury and refused to allow Appellant Kuczewski to do so himself (2 CT 490).

The Court also refused to allow key video files to be presented to the Jury. The most egregious example is the video showing the collision of Shannon Hamby while under the instruction of Air California Adventure and the callous and dishonest handling of the accident by Air California Adventure's instructors (see lodged media file titled "*Hamby_Collision_Video/Brad's tandem vid SAVE.mov*"). The video shows the Shannon Hamby collision at 2 minutes and 22 seconds (2:22) into the video. The video also shows one of the Plaintiffs/Respondents employees (Brad Geary) and Plaintiffs/Respondents son (Max Marien) engaging in dangerous stunt flying with two child passengers of approximately 10 years of age (16:38 to 19:25). The stunts included intentionally butting gliders against each other in flight, walking on top of the other glider while in flight, partially collapsing the leading edge of the other glider while in

flight, and biting the leading edge of the other glider while in flight. Some of these stunts were performed while Brad Geary removed his helmet with a mounted camera to take “selfies” which meant he was flying the glider at times with no hands with a child passenger. The video also shows Brad Geary phoning Shannon Hamby’s husband at 4:55 while flying without hands with his child passenger. At 5:23 Brad Geary begins speaking to Shannon’s husband Jon and tells him a lie that he saw the accident “from the air” when the video clearly shows he was on the ground at the time of the accident. This video would have supported Appellant Kuczewski’s public statements regarding Plaintiffs/Respondents irresponsible behavior and dangerous conduct. The video would have been highly influential in producing an outcome more favorable to Appellant Kuczewski, but this crucial video was excluded from the trial by the Court’s earlier ruling.

Finally, the Court continually limited the questioning by Appellant Kuczewski throughout the trial. As just one example, Kuczewski was questioning Expert Witness Jack Gary Smith (1 RT 156) who was presented as an expert on airports to establish that the Torrey Pines Gliderport should be treated as an “airport”. Appellant Kuczewski asked: “In your experience with airports - and you said you were an expert - do people normally allow

dogs to wander around the field of an airport?” (sic) (1 RT 173). This was a completely relevant question since Plaintiffs/Respondents were claiming the Gliderport as an “Airport” while regularly allowed dogs and children and others to walk all over the “airfield”. Appellant Kuczewski was prepared to show photos and videos of dogs and children and others walking all over the Gliderport property while Plaintiffs/Respondents were present. However, the Court refused to allow this very reasonable and important question and the Jury was left with the inaccurate impression that the Torrey Pines Gliderport should be treated as an “airport”. The impression that the Gliderport should somehow be considered an “airport” conjures up the extreme security measures (and loss of personal freedoms) that we’ve grown accustomed to at airports since the September 11, 2001 terrorist attacks. Yet nothing could be further from the truth at the Torrey Pines Gliderport. There have been no actual airplanes flying at the Gliderport in nearly 20 years. And even back then, the actual airplanes only flew for a few weeks each year and they didn’t even use the Gliderport property. Instead, they used the old abandoned runway on UCSD property. The Gliderport is more properly compared to a surfing beach than to an

airport, yet the Court curtailed Kuczewski's line of questioning which would have brought those facts to light.

STATEMENT OF THE CASE

On May 11, 2015, Plaintiffs/Respondents filed the Complaint in this action. The Complaint included 61 pages of allegations alleging causes of action for interference, defamation, infliction of emotional distress, and declaratory and injunctive relief. In response to the First Amended Complaint, Defendant/Appellant Kuczewski filed a Cross-Complaint, which alleges causes of action for assault, battery, and false imprisonment. Both sides filed special SLAPP motions to strike the opposing complaints, and both were denied. Both parties appealed and both appeals were denied.

During subsequent Discovery, both sides requested all writings, video recordings, and photographs held by the opposing side related to the case. Appellant Kuczewski produced 2,673 individual items requiring 317 gigabytes of storage. These included items from 2005, 2008, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, and 2018 - all as requested by Respondents. Respondents, in sharp contrast, did not produce one single video or one single photo or one single text message in response to

Appellant's many requests for production. Respondents had either intentionally destroyed this evidence or intentionally withheld it from Appellant Kuczewski. Respondent Marien further refused to even identify his own employees names when presented with clear photographs of those employees during deposition. This imbalance was brought to the attention of the Court in "EX PARTE REQUEST FOR RELIEF UNDER CCP 1987", but again, no relief was granted by the Superior Court.

In 2019, Respondents identified their "Doe-1" as Marjorie Mae Holland. Holland was named in 32 of the 33 causes of action and in all 27 causes for defamation. Holland subsequently filed a special motion to strike under Section 425.16 (SLAPP). Appellant Holland's motion was denied, appealed and denied again by this Court of Appeals.

The Court then ruled that Holland's case was defaulted because she did not know that she needed to file an answer to the complaint after the SLAPP appeal had been denied. Holland asserted that her answer was the same as Kuczewski's answer in all causes of action, but the Court would not accept that and ruled Holland to be in Default.

Kuczewski's case eventually went to trial in June of 2022 where he was self-represented because he could not afford an attorney.

Much of Appellant Kuczewski's evidence was not allowed by the Court. For example, the video of Shannon Hamby's accident was denied even though the conduct of Air California Adventure (Respondent) employees on that video directly supported Appellant Kuczewski's statements as being truthful (see submitted video file named "Brad's tandem vid SAVE.mov" in the folder named "Hamby_Collision_Video"). The Hamby video showed the careless and reckless behavior of Plaintiffs/Respondents actions which again supported Kuczewski's statements to the San Diego City Council as being true. Similarly the Court ordered that Kuczewski's actual City Council videos must be redacted. See the two lodged video files in the folder titled: "KUCZEWSKI_Jury_Exhibits/Exhibit_300_173_Comparison" for redacted and non-redacted versions. The Court also refused to allow any other evidence from the Hamby accident into evidence.

Many of Appellant Kuczewski's witnesses (including all of the arresting officers) could not be located for trial. The Court also excluded at least one of Appellant Kuczewski's witnesses (Sherella Gatlin) who had seen the bloody aftermath of a beating administered by Plaintiffs/Respondents employees against Bryan Yute who testified. Ms.

Gatlin would have testified to the condition of Mr. Yute after the beating but she was not allowed to testify.

Throughout the trial the Court continually criticized Defendant/Appellate Kuczewski for not having a lawyer. The Court belittled Appellant Kuczewski several times in front of the Jury. At some hearings, the Court would begin by sarcastically stating “I don’t see a lawyer next to you Mr. Kuczewski”.

ACTUAL SPEECHES IN EVIDENCE

During the testimony of Marjorie Holland, all of the videos of Appellant Kuczewski’s speeches to the San Diego City Council were entered into evidence and shown to the Jury in a single 43 minute and 16 second video lodged in folder “Exhibit_300_173_City_Council_Speeches” and file: “City_Council_Causes_of_Action_Redacted.mp4”. All media evidence was copied onto a laptop computer by the court to be available to the Jury during deliberation. The original flash drive containing the videos was returned to Kuczewski and those videos have been lodged along with this opening brief. Those videos of Appellant Kuczewski’s speeches to the San Diego City Council are the most crucial evidence in this defamation case. Almost all of Plaintiffs/Respondents causes of action were taken

directly from those videos of Kuczewski's speeches to the San Diego City Council. Those videos constitute the bulk of Respondents complaint.

The Jury delivered a verdict awarding Plaintiffs/Respondents \$1.8 million dollars. Appellant Kuczewski asserts that no award should have been given since Kuczewski's speeches were (1) true, and (2) protected by the First Amendment of the U.S. Constitution. Appellant Kuczewski also asserts that the \$1.8 million dollar judgment was abusive and that it was unfairly influenced by the widely publicized \$10 million defamation award to actor Johnny Depp against Amber Heard which was headline news just prior to the trial in this case.

On July 22, 2022, Appellant Kuczewski submitted a Motion for Judgment Notwithstanding the Verdict (7 CT 1788) and a Motion for New Trial (7 CT 1765). Both motions were denied by the Court (8 CT 1978).

This Appeal was filed on August 1, 2022.

STATEMENT OF APPEALABILITY

The judgment from which appellant appeals is final (Cal. Rule of Court, rule 8.204(a)(2)(B)).

STANDARD OF REVIEW

This case involves Questions of Law with regard to the classification of Limited Purpose Public Figures, Freedom of Speech, Freedom of the Press and other related matters. In this case, one of the questions is whether business operators of public parks who are acting as defacto public officials within that park and who advertise their services on the Internet and elsewhere should be considered as private figures, public figures, or limited purpose public figures. Similarly, this case involves First Amendment issues with regard to speech at City Council meetings and republication of portions of official City Council meeting videos on the Internet. As stated on the Court's web site (<https://www.courts.ca.gov/12431.htm>):

De novo is a Latin phrase meaning "from the beginning." In de novo review, the appellate court does not defer to the decisions made in the trial court and looks at the issue as if the trial court had never ruled on it. This type of review is generally limited to issues involving questions of law. If the issues involve questions of law — like the interpretation of a contract or a statute — the appellate

court does not assume the trial court's ruling is correct but looks at the issue from the beginning (de novo), exercising its independent judgment. But this kind of review is still not a new trial because the appellate court does not look at new evidence and bases its review on the evidence in the record from the trial court.

Appellant asserts that the present appeal should be reviewed de novo and that it involves the First Amendment's Freedom of Speech and Freedom of the Press issues. Appellant requests that the Court of Appeals review the actual video evidence of Appellant Kuczewski's speeches which were submitted to the Court without redaction (0 RT 9). The unredacted video is in the lodged folder named:

KUCZEWSKI_Jury_Exhibits / Exhibit_300_173_Comparison

with a file name of:

City_Council_Causes_of_Action_dates.mp4

The redacted video is in the same folder and is titled:

City_Council_Causes_of_Action_Redacted.mp4

The Court ordered the redaction against Appellant's objections, and the redacted version was presented to the Jury. That video is also in the folder:

KUCZEWSKI_Jury_Exhibits /

Exhibit_300_173_City_Council_Speeches

The unredacted version shows ALL of Appellant Kuczewski's speeches to the San Diego City Council which form the basis of this law suit. These are the speeches that were published by the City of San Diego on the City of San Diego's own web site. These are the speeches that were downloaded by Defendant Holland from the City's web site and then simply republished as individual speeches. Appellant respectfully requests that the Court of Appeal view these speeches (a 44 minute video) to determine - de novo - whether those speeches to the San Diego City Council are defamation or if those speeches are protected speech seeking redress of grievances from the government of San Diego. Appellant also respectfully requests that the Court of Appeal determine whether simply republishing those speeches (as Defendant Holland had done) can be defamation. If Plaintiffs/Respondents theories of this case are upheld, then all speakers to the City of San Diego and any government could be subject to a defamation lawsuit. Similarly, if Plaintiffs/Respondents theories of this case are upheld, then any republication of speeches to the San Diego City Council or to any other government could also be subject to a defamation lawsuit. The chilling

effect of this decision must not be ignored, and the case deserves to be reviewed de novo.

STATEMENT OF FACTS

The Torrey Pines Gliderport (“Gliderport”) is a world famous 57 acre oceanfront property in La Jolla and is a portion of the larger Torrey Pines City Park which overlooks the Pacific Ocean and Blacks Beach. The Torrey Pines City Park and the enclosed Gliderport are wholly owned by the City of San Diego and fall under the direct jurisdiction of the City of San Diego. This jurisdictional authority includes the San Diego City Council. Within the boundaries of the larger Torrey Pines City Park is a several-acre portion designated as the Torrey Pines Gliderport (1 CT 113 [Leasehold Boundary]). This portion (designated as the “Torrey Pines Gliderport”) has been leased to “Air California Adventure, LLC” through the lease (1 CT 81 [Lease]) titled:

“City of San Diego Flat Rate Lease with Air California Adventure, LLC for Torrey Pines Gliderport located at the Torrey Pines City Park”

The relevant lease of the Torrey Pines Gliderport began on August 1, 1998 (1 CT 88 [2.1 Commencement]), and was set for five (5) years with

the City of San Diego having an option to extend for one additional term of five (5) years (1 CT 88 [Section 2.1 and 2.2]). The rent for this property is described in “SECTION 3: RENT” (1 CT 89 [Consideration]) as:

“The Flight Directory/LESSEE shall not remit any monetary consideration to the City.”

The Gliderport Lease to Air California Adventure, LLC specifies that the controlling share of the corporation must be owned by former San Diego police officer David Jebb (1 CT 93 [4.6 Control by]):

“4.6 Control by Specified Individuals or Entities. The corporation named herein as Flight Director/LESSEE shall remain owned and controlled by David Jebb, at least to the extent of fifty-one percent (51%) of the issued stock of said corporation”

The Gliderport Lease includes at least two provisions for public use (1 CT 86 [1.2 Uses]), and (1 CT 88 [1.10 Public Use]):

“1.2 Uses. It is expressly agreed that the premises are leased to Flight Directory/LESSEE solely and exclusively for the purposes of

the operation and maintenance of the premises and buildings for a gliderport concession, the use of non-powered aircraft and the general public.”

“1.10 Public Use. The general public shall not be wholly or permanently excluded from any portion of the premises.”

Both sections of the lease clearly give rights to the general public which also makes the operation and management of the property a matter of public interest.

At the time the Lease was signed (1998), Air California Adventure LLC was owned by former San Diego Police Officer David Jebb. Plaintiffs/ Respondents Robin Marien and Gabriel Jebb (David Jebb’s son) were both employed by Air California Adventure from at least 2004 and onward. The Gliderport Lease was purportedly in effect during all periods of time involved in this case.

In 2005 Appellant Kuczewski began hang gliding and paragliding at the Gliderport, and continued to do so until 2014. During all of that time, Appellant Kuczewski personally witnessed ongoing incidents of bullying, dangerous practices, and other abuse by Respondents. Appellant was also aware of many accidents and even deaths at the Gliderport under

Respondents' management. In 2007, Appellant Kuczewski researched the Gliderport lease and discovered that it contained explicit provisions protecting the public use of the property (described above in sections 1.2 and 1.10) and that the lease was to expire in August of 2008 (1 CT 88).

On January 8, 2008, Appellant Kuczewski began petitioning the City of San Diego to ensure that the Gliderport operations were properly overseen by the newly formed Torrey Pines City Park Advisory Board (Advisory Board). At that time Kuczewski was president of the Torrey Hawks Hang Gliding Club which was assigned to represent the sport of hang gliding on that newly formed Advisory Board by a unanimous vote of the San Diego City Council. The creation of the Advisory Board had been mandated by a settlement agreement between the Coastal Law Enforcement Action Network v. City of San Diego (San Diego County Superior Court Case No. GIC 861914). Respondent Kuczewski attended and participated in every single meeting of the Advisory Board along with many other Gliderport users. However, the Advisory Board's Chairwoman (appointed by Mayor and former police chief Jerry Sanders) refused to allow any discussion of oversight of the park which was being operated by former police officer David Jebb. Eventually the Advisory Board was disbanded

under Mayor and former police chief Jerry Sanders. Just prior to the disbanding of the Advisory Board, Appellant Kuczewski began speaking again at the San Diego City Council meetings requesting that the City extend or reactivate the Advisory Board to provide meaningful and ongoing oversight of the Torrey Pines City Park. Appellant Kuczewski and others have continued to speak at City Council meetings and to petition the City Council and other government officials to reactivate the Advisory Board since that time. Appellant Kuczewski and members of the Torrey Hawks club have personally met with Mayors Filner and Faulconer as well as Councilmembers Donna Frye, Tony Young, Barbara Bry, David Alvarez, Myrtle Cole, Chris Cate, Vivian Moreno, and Joe LaCava as well as City Attorney Jan Goldsmith. All of those meetings were held with the goal of obtaining fair and objective oversight of the operation of the Gliderport.

Appellant Kuczewski's ongoing requests for meaningful oversight of the Gliderport business were strongly opposed by Respondents for many years leading to ongoing bullying and intimidation. From that time to the present, Appellant Kuczewski has continued to petition the City of San Diego to provide meaningful oversight of the Torrey Pines Gliderport.

In 2011, there was yet another student injury at the Gliderport. Shannon Hamby and her husband Jon were taking lessons from Plaintiffs/Respondents. Shannon Hamby did not have the proper ratings to fly at the Torrey Pines Gliderport, but she was allowed to do so under direct instruction of Respondents' business and for a fee. At the time of her injuries, Shannon Hamby was being guided via radio instruction by one of Respondents' instructors when she collided with another under-rated student also allowed to fly at the site. Hamby suffered serious injuries from the collision and from her subsequent fall from the sky. Hamby filed suit against Respondents. Appellant Kuczewski was contacted by Hamby's lawyers to testify as an expert witness in the case. Appellant Kuczewski initially declined because it might interfere with his efforts at reform and oversight. However, Hamby's lawyers approached Kuczewski again citing that all other experts were afraid to testify for fear of retaliation. Kuczewski reluctantly agreed to be an expert witness and was deposed for a full day by Respondents Attorneys on September 10, 2014. Respondents Marien and Jebb were both present during the full day deposition of Kuczewski. Kuczewski's testimony was simple. Shannon Hamby did not have the ratings to fly at that busy site by herself. Yet she was flying there under the

direct supervision of Respondents. Respondents knew that Hamby did not possess the required skills to fly safely, and that made them responsible for ensuring her safety. Her collision with another student (also presumably under Respondents “instruction”) was obvious evidence that they grossly failed in their responsibility toward Shannon Hamby. Kuczewski’s deposition testimony was critical to the case, and the lawsuit was settled in Hamby’s favor shortly afterward.

After Appellant Kuczewski’s deposition testimony, he was again at the Gliderport on November 9th, 2014, and witnessed yet another unsafe practice by Plaintiff/Respondent Gabriel Jebb. Jebb was connected to a paraglider without a helmet while instructing three students. Kuczewski took out his camera and began filming the incident to show to the San Diego City Council as more proof of the need for oversight. See lodged files titled “MVI_0605.MOV” and “Transcript_of_MVI_0605.pdf” in the folder:

KUCZEWSKI_Jury_Exhibits/Exhibit_154_DVD_Vid_Photo_2014_11_09.

Jebb began yelling at Kuczewski to stop filming. Kuczewski asserted his right to film in the public park. Jebb then approached Kuczewski and began slapping at Kuczewski’s camera and chest-butting Kuczewski.

Plaintiff/Respondent Marien and others gathered around Kuczewski and used foul and intimidating language. Kuczewski continued to film the incident. Respondent Marien then began to untie Kuczewski's hang glider while another member of their crew blocked Kuczewski and taunted Kuczewski to fight. Kuczewski did not take the bait but called for the police. When the police arrived, they held private discussions with Marien and Jebb where Jebb likely invoked his father's name as a San Diego police officer. The responding officers then asked Kuczewski to dismantle his glider and leave the property. Kuczewski did dismantle his glider, loaded it on his van and asked a friend to drive it home. Then Kuczewski turned to the officers and asserted his rights as a member of the general public to be on the property according to the lease. Kuczewski was arrested on claims by Respondents that they had a right to remove him from the property. Kuczewski spent 12 hours in jail and was released on bail. However, no charges were ever filed by the City or County, and Kuczewski's bail was returned in full. This pattern of false accusation, false arrest, 12 hours in jail, and no charges filed was repeated twice again in the spring and summer of 2015 until Kuczewski and his attorney met with City Attorney Jan Goldsmith. Respondents also attempted to seek a restraining order

against Appellant Kuczewski from November of 2014 until March of 2015. The trial dragged on for all of those months until Judge Ipema ruled that there had been no justification for the restraining order and Kuczewski was released from the temporary order that had been in place during the trial.

Respondent Kuczewski continued to petition the City of San Diego for oversight and reactivation of the Torrey Pines City Park Advisory Board with regular speeches to the San Diego City Council. Kuczewski's speeches often included current accidents and incidents accompanied by photos and videos. See the lodged media files in the folder named "KUCZEWSKI_Jury_Exhibits" in the subfolders named:

Exhibit_130_Photo_Metzgar_Smoking

Exhibit_138_Photo_Marien_Finger

Exhibit_144_PDF_Accidents

Exhibit_154_DVD_Vid_Photo_2014_11_09

Exhibit_158_DVD_Vid_Photo_2015_06_14a

Exhibit_165_Vid_2015_03_08_Arrest

Exhibit_168_Vid_2015_06_14_Gliderport

Exhibit_170_Vid_2015_07_12_Battery_Arrest

Exhibit_300_173_City_Council_Speeches

Exhibit_301_172_PDF_Lyne_Perry_Email

Some of Kuczewski's speeches also included press clippings from local and national press agencies covering accidents and deaths at the Gliderport. All of Kuczewski's photos and videos depicted actual events at the Gliderport. Kuczewski reported on Respondents smoking in the park in violation of City ordinances. Kuczewski reported on Respondents keeping a pig on the property in violation of their lease. Kuczewski reported on Respondents using their free City leasehold to host private parties for profit in violation of the Gliderport Lease. Kuczewski reported on bullying and abuse. Kuczewski showed photos and videos of Respondent Marien showing Kuczewski his middle finger while Marien shouted "Go show that to the City Council" (which Kuczewski did). Kuczewski showed the City Council numerous newspaper and television reports of the accidents and deaths at the Torrey Pines Gliderport. Kuczewski even read a letter written to him by paragliding pilot Lyne Perry. Lyne Perry wrote to Kuczewski because she knew that Kuczewski had worked for oversight at Torrey Pines Gliderport. On February 9, 2009, Lyne Perry wrote to Kuczewski (2 RT 599) (see submitted email file titled

“KUCZEWSKI_Jury_Exhibits/Exhibit_301_172_PDF_Lyne_Perry_Email/
Lyne_Perry_EMail.txt”):

Bob,

Thanks for thinking of me, but I need to decline at this time. I have been the victim of much bullying by some of the "in" pilots. I am very selective as to who I fly with and I will leave a site if other certain pilots are there. Two years ago I rarely left my home and did not fly for a period of 5 months due to fear from a vicious verbal assault by Josh Gelb during a club event. This was not an isolated event, just the final proverbial straw. The fact that the other pilots just stood by and let it happen led me to believe that they supported such behavior.

I am still not emotionally healed and need to stay incognito as much as possible. You may have noticed that I do not post on the SDHGPA forum, even though I am the owner. These days I typically fly with the HGs pilots and only a select few PG pilots.

Blossom is my passion and I am not going to let my fear get in the way of losing this site because I didn't do anything. I wish that I were as thick skinned as you and able to keep going in spite of verbal abuse. When David or Gabe Jebb bullied me, I let it go

because I knew that they bullied most everyone, but when it came from pilots whom I thought were my friends, it devastated me.

Thanks again for thinking of me, but maybe at a later date.

*Lyne Perry, PG,
Consulting Geologist
2157 Arnold Way, Suite 724
Alpine, CA 91901
M:619-647-3414*

Lyne Perry ended up taking her own life within two years of writing that letter. The letter speaks for itself, and Appellant Kuczewski read that letter into the record at a San Diego City Council meeting. Kuczewski read the letter word for word just as Lyne Perry had written it. Yet Respondents claimed that Kuczewski's reading of Lyne's letter was somehow "defamation". It wasn't defamation. It was exactly what Lyne Perry had written in her own words. And it was the truth.

In summary, Respondents have pursued nearly a decade of legal action against Appellant Kuczewski to keep him from showing the City Council any more evidence of the ongoing abuses and bullying and accidents and

deaths and misconduct at the Torrey Pines Gliderport. Yet Kuczewski has continued to speak at the City Council on a regular basis from his first arrest in 2014 through the present year of 2023. All of Kuczewski's speeches have been accurate and many contained actual photographic and/or video evidence of his complaints. All of Appellant Kuczewski's speeches were clearly designed for one purpose: to urge the City of San Diego to institute some form of meaningful oversight of the business operating the City-owned property known as the Torrey Pines City Park. All of Kuczewski's speeches clearly fall under the First Amendment of the Constitution of the United States.

ARGUMENT

FULL RECORD ON VIDEO

Fortunately, all of the alleged defamatory statements by Kuczewski to the San Diego City Council are a matter of public record because they were spoken during San Diego City Council meetings which are always recorded and published on the City of San Diego's web site. These video recordings may be reviewed de novo (see submitted media file named "City_Council_Causes_of_Action_dates.mp4" in folder named "KUCZEWSKI_Jury_Exhibits/Exhibit_300_173_Comparison"). Plaintiffs/ Respondents have stated and acknowledged that all of Appellant's speeches to the San Diego City Council fall under the category of protected speech. But Respondents claim that republishing those (already published) speeches somehow becomes defamation. If this ruling were to stand, then all media organizations would have to fear showing any City Council speeches, any State Legislature speeches, any Congressional speeches, any Court proceedings, and nearly any official proceeding held anywhere in the United States. This leads to an absurd result and must be rejected.

Respondents have claimed that the republication of San Diego City Council speeches on the Internet somehow causes those City Council speeches to lose their protected status even though those same exact video recordings have already been published on the Internet by the City of San Diego itself. Appellant Kuczewski asserts that the speeches were made pursuant to his First Amendment right to freedom of speech and his First Amendment right to petition his Government for redress of grievances (see Constitution of the United States). Defendant/Appellant Kuczewski also asserts that his republication of any and all City Council meetings is also protected by his First Amendment right to freedom of the press (see Constitution of the United States).

Respondents claim that Kuczewski's speeches were false and defamatory. Appellant Kuczewski asserts that his speeches were truthful and accurate. Respondents claim that the speeches were about private citizens operating a private business. Appellant asserts that the speeches were about limited purpose public figures operating a publicly owned park under the authority of the City of San Diego.

Appellant Kuczewski asserts that Superior Court issued incorrect Jury Instructions and took other actions during the trial which unfairly biased the Jury and resulted in a \$1.8 million dollar judgment in favor of Respondents. Appellant also asserts that the \$1.8 million dollar judgment is abusive and that it was unfairly influenced by the widely publicized \$10 million defamation award to actor Johnny Depp against Amber Heard which was headline news just prior to the trial in this case. Appellant also asserts that the Court excluded important evidence and failed to rule correctly upon discovery that Plaintiffs were claiming a right to use City property under a lease issued to an entirely different legal entity.

Appellant further asserts that the denial of motions for SLAPP in this case were improperly used by the Court to classify this case as a “private matter” and to issue improper Jury Instructions in the case. The threshold for sustaining a motion for SLAPP must be high because the SLAPP motion truncates the case without any further proceedings. This must be high threshold ... far above 50%. But the threshold for determination of whether parties in a defamation case are public figures or limited purpose public figures should only be a preponderance of evidence standard or 50%.

However, the Court refused to accept Appellant Kuczewski's requested CASI-approved Jury instructions pertaining to defamation of limited purpose public figures. Instead, the Court summoned Appellant Kuczewski and Respondent's lawyer Saldana into chambers on a Saturday for a private meeting with no reporter or gallery present. At that meeting, the Court accepted all of Plaintiffs/Respondents Jury instructions for defamation of private figures in a private matter and denied and removed all of Appellant Kuczewski's requested Jury instructions related to public figures, limited purpose public figures and public matters. There was no record of that meeting.

Respondents have hinged much of their case on the false notion that it is not the speech before any legislative body that underlies their causes of action, but it is the re-publication of those materials for wide distribution in another, new, and unprivileged forum on which the claims are based. But by that faulty reasoning, the City of San Diego's own internet publication of its own City Council meetings would already constitute unprotected re-publication in "another new and unprivileged forum". By that faulty reasoning, even the City of San Diego's public broadcast of live meetings

on the Internet and via cable Television would also constitute re-publication in “another new and unprivileged forum”. Such a ruling would open the City of San Diego and all municipalities to an infinite parade of law suits for publishing purportedly false statements for wide distribution in “another new, and unprivileged forum”. Indeed, by Respondent’s faulty logic, it would be impossible for any government agency or any news agency to publish any video record of any public meetings without first verifying the veracity of all of the statements presented in all of those meetings. This is an absurd line of reasoning, and it defeats the original purpose behind the many open government statutes such as the California Brown Act and it must not become either law of the land or law of this case.

Respondents have also hinged much of their case on the false claim that the Torrey Pines Gliderport is not a matter of public interest. This was easily refuted with the evidence of public interest presented in the case as lodged in file named “Accidents_through_2015_05.pdf” in the folder named “KUCZEWSKI_Jury_Exhibits/Exhibit_144_PDF_Accidents”. That exhibit shows 8 different examples of media coverage of the events at Torrey Pines Gliderport over the years. Those media outlets are clearly the

“experts” with regard to what is of public interest. That’s their business. The plethora of media coverage alone defines the Torrey Pines Gliderport as a matter of public interest.

In addition to the public’s interest being clearly expressed by the many press clippings, the public’s interest is also evident by the public’s ownership of the Gliderport property and the public’s use of the Gliderport facility for recreational purposes. Take note that ALL of the property discussed in this case belongs to the City of San Diego and thus to the people of San Diego. The Gliderport lease specifically designates public use of the land. The management of this public land is - *by any definition* - a matter of public interest by virtue of its value alone. It is also, by definition, a matter of public interest because it is a public park.

The Torrey Pines Gliderport park receives hundreds of visitors nearly every day, and the parade of accidents and deaths at the Gliderport is routinely reported in both the local and national press including television, radio, newspapers, and internet publications.

For all of these reasons, the public property of the Torrey Pines Gliderport and its management or mismanagement is undeniably a matter of public interest.

Furthermore, the Gliderport is a public issue even if it is not an issue in the public “interest” because Plaintiffs/Respondents have put themselves into the public eye and any of the City’s actions (or inactions) with respect to the Gliderport affect a large number of people. Therefore, the Gliderport is a public issue even if the public isn’t interested enough to realize it.

Plaintiffs are in the public eye because they have a contract with the City of San Diego. The contract relates to a very valuable, historic, and important piece of public property. If the City were to charge market rate rent, then the City’s taxpayers would clearly benefit from the appropriate increased funding for other City projects. However, if the City charges less than market rate rent, then taxpayer funds and/or property are subsidizing a private business. Council actions on these subjects must be conducted in open meetings where interested persons can comment on and scrutinize the decision.

Public scrutiny applies not only to the execution of the original contract, but also to management of the existing contract. This includes the

City's oversight of the "competent management" provision in the lease. (1 CT 87 [1.6]) While Plaintiffs (and perhaps the City) do not appreciate Appellant's oversight, the citizens' right to oversee government actions is necessary for the functioning of democracy. Therefore, whether Plaintiffs like, welcome, or want to be in the public eye, they are.

Moreover, whatever happens with the contract will have an effect not only on the Gliderport users, but also on everyone in the City. The City has the power to do virtually anything with the Gliderport property: it could continue using it as a Gliderport, without or with Plaintiffs' as the concessionaire; it could sell the land; turn it into a dog park; or anything else. The possibilities are limited only by one's imagination and the will of the City Council. All possible decisions would have an impact on the City's finances and reputation, affecting everyone. Such decisions, regardless of whether they make wholesale changes or preserve the status quo, also impact large segments of the population, existing Gliderport users included.

JURY INSTRUCTIONS

Appellant Kuczewski specifically requested Jury Instructions CACI 1701, or CACI 1702, or CACI 1703. These are:

CACI No. 1701. Defamation per quod—Essential Factual Elements
(Public Officer/Figure and Limited Public Figure)

CACI No. 1702. Defamation per se—Essential Factual Elements
(Private Figure—Matter of Public Concern)

CACI No. 1703. Defamation per quod—Essential Factual Elements
(Private Figure—Matter of Public Concern)

However, the Court ruled out all of Appellant Kuczewski's requested Jury Instructions and instead used Respondent's requested Jury Instruction CACI No. 1704 (8 CT 1915):

CACI No. 1704 . Defamation per se—Essential Factual Elements
(Private Figure—Matter of Private Concern)

The same is true of the Verdict Forms where Appellant Kuczewski requested verdict forms VF-1701, VF-1702, and VF-1703. However, the Court used CACI No. VF-1704 (8 CT 1886) rather than Appellant Kuczewski's requested alternatives:

CACI No. VF-1704. Defamation per se—Affirmative Defense—Truth
(Private Figure—Matter of Private Concern)

CONCLUSION

All evidence clearly supports the determination that Plaintiffs/Respondents were either public figures or limited purpose public figures for all causes of action. Yet the Court issued Jury Instructions indicating that they were private figures. As stated earlier, this unfairly shifts the burden of proof from Plaintiff/Respondent to Defendant/Appellant. There is no doubt that Kuczewski would NOT have been appealing to the San Diego City Council for oversight of a City Park if it were NOT a City Park. There is no doubt that Kuczewski would not be appealing to the San Diego City Council for oversight of City owned land if it were NOT City owned Land. The very nature of the Gliderport lease is evidence that the Gliderport property is public parkland being managed by Plaintiffs/Respondents for the public's benefit. Again, the final thought experiment to prove this is to ask what would have happened if the City of San Diego was managing the Gliderport the property itself. Would Citizens NOT be able to complain to the City Council about the actions of the City's Management of a City Park? Would Citizens NOT be able to show video

evidence of abuses by City staff? The City of San Diego cannot escape public criticism of their operation of a public park by simply delegating away the City's responsibility to oversee the park. Such an attempted arrangement cannot undermine any Citizen's rights to be critical of how public property is managed. If this were allowed, then governments at all levels could easily skirt public scrutiny by simply delegating any and all responsibility to private businesses. This cannot stand as the precedent set by this case. Appellant respectfully requests that the case be retried with Plaintiffs/Respondents designated as limited purpose public figures for all matters related to the Torrey Pines Gliderport.

Respectfully submitted,

Dated: June 30, 2023

By _____
Robert M. Kuczewski
in pro per

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this proposed brief contains less than 9,000 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: June 30, 2023

By: _____

Robert M. Kuczewski
in pro per