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California Wrongful Death Statute: Correcting an "Unintended Mistake"

Kimberly Jean Wedding

Code Sections Affected

Code of Civil Procedure § 377.060(d), § 377.060(e) (new).

SB 449 (Sher); 1997 STAT. Ch. 13

(Effective May 23, 1997)

I. INTRODUCTION

On December 14, 1994, a Learjet crashed in Fresno, California, resulting in the death of pilots Brad Sexton and Richard E. Anderson.¹ Sexton left behind a wife, mother, father, two brothers, and one sister.² The following year, Sexton's parents, Jacque and Isabel, sued Learjet for the wrongful death of their son, arguing that Learjet's negligence caused an on-board fire, resulting in the crash.³ However, the Sextons' suit was dismissed after Learjet argued that the Sextons had no standing to sue according to California Code of Civil Procedure section 377.60.⁴ This section did not allow parents to sue for the wrongful death of their married child if the parents' cause of action arose between 1993 and 1997.⁵

In the midst of their appeal, the Sextons contacted Senator Byron Sher requesting urgency legislation to rectify this problem.⁶ Consequently, Chapter 13 was enacted to restore the ability of parents, like the Sextons, to sue for the wrong-

1. See Felicia Cousart, *Pilot's Family Coping With Loss*, FRESNO BEE, Dec. 28, 1994, at A1 (reporting the crash of a Learjet in Fresno, California).

2. See Russell Clemings, *The Learjet Tragedy: A Father's Quest*, FRESNO BEE, Dec. 8, 1996, at A1 (identifying the family members that Brad Sexton left behind following his death on December 14, 1994).

3. Cyndee Fontana & Tom Kertscher, *Two More Suits Filed in Learjet Crash; Pilot's Family, Apartment Residents and Employees Seek Damages*, FRESNO BEE, Dec. 13, 1995, at B3 (stating that the Sextons had filed suit for unspecified damages in Los Angeles Superior Court on December 8, 1995).

4. See Clemings, *supra* note 2, at A1 (describing that the Sexton's suit against Learjet had been "thrown out of court in August because of a technical problem over their standing, or eligibility to sue"); see also Letter from Jacque Sexton to Senator Byron Sher (Jan. 21, 1997) (copy on file with the *McGeorge Law Review*) [hereinafter Letter from Jacque Sexton] (explaining that Learjet had persuaded the court to find that the Sextons had no standing to sue them for the wrongful death of their son).

5. See CAL. CIV. PROC. CODE § 377.60 (amended by Chapter 13) (allowing parents to sue for the wrongful death of their child, who had left no surviving issue at the time of death, if the cause of action arose after January 1997); see also Clemings, *supra* note 2, at A1 (reporting that the Sextons' suit was dismissed because California law did not permit parents to sue for the wrongful death of their married child).

6. See *Davis v. County of Los Angeles*, 12 Cal. 2d 412, 418, 84 P.2d 1034, 1038 (1938) (defining an "urgency statute" as one which is "necessary for immediate preservation of the public peace, health or safety"); see also Letter from Jacque Sexton, *supra* note 4, at 1 (requesting Senator Sher's assistance in getting urgency legislation passed to correct the four year time period in which parents, such as himself, had no standing to sue).

ful death of their married child when the decedent has no surviving issue.⁷ Most importantly, it enables parents to sue when the cause of action arose between January 1, 1993 and January 1, 1997.⁸

II. LEGAL BACKGROUND

A. Prior to Chapter 13

In 1992, Chapter 178 repealed section 377 of the Code of Civil Procedure, which allowed parents to sue for the wrongful death of their child.⁹ Specifically, Chapter 178 prohibited parents from suing for the wrongful death of their child, except when that child had left behind no surviving spouse, child, or issue.¹⁰

Realizing that Chapter 178 denied many parents the right to sue, the Legislature passed Chapter 563.¹¹ That legislation specifically restored the ability of parents to sue for the wrongful death of a child who had left a surviving spouse but no surviving issue.¹² However, Chapter 563 applied prospectively to causes of action which arose after January 1, 1997.¹³ Thus, parents whose cause of action arose between the passage of Chapters 178 and 563 lost standing to sue.¹⁴

B. Chapter 13

Chapter 13 corrects this “unintended gap” in existing law by declaring that California Code of Civil Procedure section 377.60 applies to any cause of action

7. CAL. CIV. PROC. CODE § 377.060 (amended by Chapter 13); *see* SENATE FLOOR, ANALYSIS OF SB 449, at 1 (Apr. 7, 1997) (stating that SB 449 intends to restore “the ability of parents to seek damages for the wrongful death of a son or daughter for any cause of action arising on or after January 1, 1993, to the same extent that the right existed prior to this date”).

8. CAL. CIV. PROC. CODE § 377.060(d) (enacted by Chapter 14); *see* Letter from Senator Byron Sher to Governor Pete Wilson (May 21, 1997) (copy on file with *McGeorge Law Review*) [hereinafter Letter from Senator] (explaining that SB 449 would correct the four-year gap in which certain parents were denied to ability to sue those responsible for the wrongful death of their adult children).

9. 1992 Cal. Stat. Ch. 178, sec. 19, at 725 (West) (repealing CAL. CIV. PROC. CODE § 377).

10. 1992 Cal. Stat. Ch. 178, sec. 20, at 725 (West) (enacting CAL. CIV. PROC. CODE § 377.60); *see* SENATE FLOOR, ANALYSIS OF SB 449, at 2 (Apr. 7, 1997) (stating that Chapter 178 limited a parent’s ability to sue for wrongful death).

11. 1996 Stat. Ch. 563, sec. 1, at 2603 (amending CAL. CIV. PROC. CODE § 377.60); *see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 449, at 2 (Apr. 1, 1997) (noting that the passage of Chapter 563 was intended to restore the ability of certain parents to sue for wrongful death).

12. *See* CAL. CIV. PROC. CODE § 377.60(a) (West Supp. 1997) (allowing persons entitled to property of the decedent by intestate succession to sue for the wrongful death of the decedent when the decedent leaves no surviving issue).

13. *See* SENATE FLOOR, ANALYSIS OF SB 449, at 2 (Apr. 7, 1997) (stating that Chapter 563 only applied to causes of action arising after January 1, 1997).

14. *See id.* (explaining that the proponent contends that passage of Chapters 178 and 563 has “unfairly deprived him and other parents like him of the ability to file a wrongful death cause of action for the death of a son or daughter”).

arising on or after January 1, 1993.¹⁵ Moreover, Chapter 13 declares that Chapters 178 and 573 were not intended to adversely affect the ability of a person to sue who had a cause of action under prior law.¹⁶ The effect of Chapter 13 is to close this "unintended gap" and allow parents, like the Sextons, to sue those responsible for the wrongful death of their child.¹⁷

III. CONSTITUTIONALITY AND PRACTICABILITY OF CHAPTER 13

A. *Retroactivity and Nunc Pro Tunc Declarations*

Chapter 13 contained a legislative declaration stating that it was not the intent of the legislature to adversely affect the standing of those with causes of action prior to the passage of Chapters 178 and 563.¹⁸ This statement raised questions in the Senate Judiciary Committee regarding its possible interpretation as applying retroactively.¹⁹

According to the California Court of Appeals, an amended statute is not given retroactive effect unless the Legislature has clearly stated its intent that the amendment apply retroactively.²⁰ Moreover, in *Holt v. F.E. Morgan*,²¹ the Court of Appeals held that a statute "must give the previous transaction to which it relates some different legal effect from that which it had under the law when it occurred" for it to apply retroactively.²² Consequently, some courts have found that an effort to clarify existing law does not raise questions of retroactivity.²³ The Legislature

15. CAL. CIV. PROC. CODE § 377.60(d) (enacted by Chapter 13); see Letter from Senator, *supra* note 8, at 1 (stating that SB 449 "is needed to restore the rights of certain parents to seek damages for the wrongful death of their adult children").

16. CAL. CIV. PROC. CODE § 377.60(e) (enacted by Chapter 13).

17. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 449, at 1 (Apr. 1, 1997) (describing the effect of Chapter 13 on the rights of parents to sue for the wrongful death of their child).

18. CAL. CIV. PROC. CODE § 377.60(e) (enacted by Chapter 13).

19. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 449, at 3 (Apr. 1, 1997) (raising the question of whether Chapter 13 applies retroactively).

20. See *G.T.E. Sprint Communication Corp. v. State Bd. of Equalization*, 1 Cal. App. 4th 827, 833, 2 Cal. Rptr. 2d 441, 444 (1991) (discussing the presumption that an amendment to a statute acts prospectively, not retroactively).

21. 128 Cal. App. 2d 113, 274 P.2d 915 (1954).

22. *Id.* at 117, 274 P.2d at 917.

23. See *Rodriguez v. Inglewood Unified Sch. Dist.*, 186 Cal. App. 3d 707, 722, 230 Cal. Rptr. 823, 832 (1986) (explaining that an amendment which created a right to safe schools clarified existing law and did not raise the question of retroactivity since "it merely restates the law as it was all the time"); *Redlands v. Sorensen*, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985) (holding that if the purpose of an amendment is to clarify preexisting law, it is simply stating "the law as it was all the time, and no question of retroactive application is involved").

refers to these types of amendments as those which are declarations of “nunc pro tunc.”²⁴

Chapter 13 specifically states that legislature did not intend Chapter 178 to adversely affect the standing of any person under prior law.²⁵ Interestingly, Chapter 13’s legislative declaration is similar to other declarations which merely clarified existing law and were not found to apply retroactively.²⁶ If also found to be merely explaining the existing law, Chapter 13 would not be considered as applying retroactively, but as a “nunc pro tunc” declaration.²⁷

B. Practicability of Chapter 13

Chapter 13 is practicable because it seeks to repair the unintended consequence of prior legislation which, as argued by Jacque Sexton, “has unfairly deprived him and other parents like him of the ability to file a wrongful death cause of action.”²⁸ By introducing Chapter 13 as an urgency statute, it allows the Sextons to continue their wrongful death suit.²⁹

However, Chapter 13 does not include any provisions which would allow parents, who previously had no standing under section 377.60 because their cause of action arose between 1993 and 1997, to commence litigation. Although Chapter 13 will grant standing in these cases, the one year statute of limitations for the commencement of a wrongful death will effectively bar any such litigation.³⁰

24. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 449, at 3 (Apr. 1, 1997) (observing that “nunc pro tunc” declarations have been recognized by the courts); see also BLACK’S LAW DICTIONARY 1069 (6th ed. 1990) (defining “nunc pro tunc” as Latin for “now for then” and “a thing done now, which shall have the same legal effect and force as if done at the time it ought to have been done”).

25. CAL. CIV. PROC. CODE § 377.60(e) (enacted by Chapter 13).

26. See *Re-Open Rambla, Inc. v. Board of Supervisors*, 39 Cal. App. 4th 1499, 1510, 46 Cal. Rptr. 2d 822, 828 (1995) (finding that the Legislature’s clear statement of intent in amending California Government Code § 57329 and § 57385 and California Streets and Highways Code § 989 in 1991 convinced the court that the statute was not meant to operate retroactively but merely to clarify existing law); see also *G.T.E. Sprint Communications Corp.*, 1 Cal. App. 4th at 836, 2 Cal. Rptr. 2d at 446 (holding that the legislative intent behind the amendments of statutes concerning the collection of surcharges for intrastate telephone communications services was meant to clarify the meaning of those sections and not to operate retroactively).

27. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 449, at 4 (Apr. 1, 1997) (stating that, after giving deference to the legislative declaration contained in Chapter 13, the amendments would not apply retroactively).

28. *Id.*

29. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 449, at 4 (Apr. 1, 1997) (noting that “if enacted while the appeals are still pending, SB 449 could be applied by the courts”).

30. CAL. CIV. PROC. CODE § 340(3) (West 1982) (requiring the commencement of wrongful death actions within one year of the date of death).

IV. CONCLUSION

Chapters 178 and 573 have adversely affected Jacque and Isabel Sexton and others similarly situated in their endeavor to collect damages from those responsible for the wrongful death of their children.³¹ The egregious failure of the Legislature to correct this "unintended consequence" over the years is disturbing,³² especially in light of the heightened emotional aspect of wrongful death claims. In addition, the legislature took over three months to pass this law despite its status as urgency legislation.³³ Perhaps the California Legislature should follow the lead of the United States Congress, an example of a legislative body which seeks to set specific time periods aside for corrections to legislation and administrative regulations.³⁴

Coined "Corrections Day,"³⁵ the United States Congress has set up a bi-monthly review procedure for bills presented by Congressional members for reasons including poor drafting and unintended consequences of previous legislation.³⁶ The procedure allows the House to revise and correct those bills considered to be uncontroversial and which require minimal debate.³⁷ The bills submitted under "Corrections Day" procedures would still need to be referred to and approved by the appropriate House committees, receive approval by three-fifths majority of the House, as well as procure both Senate and Presidential approval before being implemented.³⁸

House leaders claim that this new procedure is a better alternative to suspension rules, which are currently in place to expedite uncontroversial legislation.³⁹ Since

31. See Letter from Jacque Sexton, *supra* note 4, at 1 (describing that the passage of Chapters 178 and 563 have excluded the Sextons and other parents from suing for wrongful death).

32. See SENATE JUDICIARY COMMITTEE, COMMITTEE HEARING ON SB 449, at 1 (Apr. 1, 1997) (stating that an attempt had been made to correct the unintended consequence of Chapter 178 through the passage of Chapter 563 in 1996, but noting that Chapter 563 only acted prospectively due to an oversight); Letter from Senator, *supra* note 8, at 1 (explaining that Chapter 13 was "necessary to eliminate the four-year gap in law unintentionally created").

33. See COMPLETE BILL HISTORY OF SB 449, May 23, 1997 at 1 (copy on file with the *McGeorge Law Review*) (providing data which shows that the bill was introduced on February 19, 1997 and was signed into law on May 23, 1997).

34. See *Fix-it Day OK'd in House*, SACRAMENTO BEE, June 21, 1995, at A14 [hereinafter *Fix-it Day*] (reporting that the House of Representatives had agreed to a procedure which would allow "quick votes on repealing laws and regulations that 60% of lawmakers consider stupid or unnecessary").

35. See H.R. Res. 168, 104th Cong. (1995) (establishing a new House of Representatives procedure entitled "Corrections Day," approved by a 271-146 vote).

36. See *id.* (explaining the new "Corrections Day" procedure passed by the House).

37. See *House's Weekly Fix-it Try*, SACRAMENTO BEE, Feb. 2, 1995, at A12 (reporting the rules outlined by Speaker of the House Newt Gingrich regarding the passage of bills during Corrections Day).

38. See Kevin Merida, 'Corrections Day' To Hit Twice Monthly; Some House Democrats See Red As GOP Sets Tuesdays To Cut Unnecessary Tape, WASH. POST, June 21, 1995, at A19 (explaining the procedure that bills submitted under the Corrections Day calendar must entail before they will go into effect).

39. *Id.* at A19 (stating that the House of Representative has in place already a procedure, known as suspension of rules, that would expedite passage of uncontroversial legislation and normally requires a two-thirds majority to pass).

its creation, the federal "Corrections Day" has addressed and resolved many issues,⁴⁰ including environmental regulations,⁴¹ IRS decisions,⁴² and public housing.⁴³ In fact, representatives have asked their constituents to submit their suggestions for bills which they feel need to be revised or repealed.⁴⁴ Interestingly, the Illinois State Legislature has also implemented a similar corrections procedure, known as "Common Sense Day."⁴⁵ The goal of the Illinois "Common Sense Day" is to "eradicate obsolete or duplicative laws on the state's books."⁴⁶

Perhaps the California State Legislature could create a "California Corrections Day," held in both houses once per month and include a provision for expedited governor approval. Chapter 13, which passed the Senate by a 37-0 vote and the Assembly by a 78-0 vote,⁴⁷ would have been a good candidate for use in a California version of "Corrections Day," because it was an uncontroversial measure. If Chapter 13 had been approved under a "Corrections Day" procedure, it would likely have been enacted in a shorter period of time than under the urgency provisions. It is conceivable that had the law been revised at an earlier time, the trial courts would have been able to consider Chapter 13's impact on the Sextons' suit rather than at the later, and more expensive, appellate level.

40. See Associated Press, *Hunting For Silly Statutes and Loony Laws*, SAN ANTONIO EXPRESS-NEWS, July 20, 1997, at A19 [hereinafter *Silly Statutes*] (reporting that "Corrections Day" procedures have repealed 16 laws since its creation).

41. See *Fix-it Day*, *supra* note 34 at A14 (reporting that one of the first issues to be resolved under the new corrections day procedure in the House is revising the impact of U.S. Environmental Protection Agency rules, specifically in regards to their impact on San Diego and the dumping of raw sewage into the Pacific Ocean).

42. See Associated Press, *Gilchrest Bill Aims To Protect Jobs of Rural School Bus Drivers; IRS Policy Threatens Their Employment*, BALTIMORE SUN, Mar. 27, 1997, at B6 (explaining that U.S. Rep. Wayne T. Gilchrest had placed on the "Corrections Day" calendar a bill that would ensure protection to rural bus drivers from an IRS decision which endanger their jobs).

43. See *House Unanimous: Evict Addicts*, NEW ORLEANS TIMES-PICAYUNE, Oct. 26, 1995, at A20 (stating that the House unanimously passed a bill under the "Corrections Day" procedures which would allow public housing officials to evict or deny housing to those people who use illegal drugs).

44. See Frank Devlin, *Greenwood Looks For 'Dumbest' Laws*, ALLENTOWN MORNING CALL, Oct. 31, 1995, at B3 (reporting that U.S. Representative James Greenwood had asked his constituents to notify him of laws which could be addressed during a "Corrections Day" hearing); see also *Silly Statutes*, *supra* note 40 at A19 (discussing a meeting called by two Texas Congressional members, where they plan to hear constituent complaints regarding their problems with U.S. laws).

45. See Michael Gillis, *Republican Legislators Looking To Strike Obsolete State Laws*, CHICAGO SUN-TIMES, Sept. 20, 1995, at A19 (reporting that the Illinois Speaker of the House had announced a plan to hold a "Common Sense Day" each month modeled after the federal "Corrections Day").

46. *Id.*

47. Letter from Senator, *supra* note 8, at 2 (May 21, 1997) (stating that Chapter 13 passed both houses unanimously).

Clearing Up Civil Procedure Section 425.16—Delivering The Final Knockout Punch to SLAPP Suits

Dora A. Corby

Code Sections Affected

Code of Civil Procedure § 425.16 (amended).
SB 1296 (Lockyer); 1997 STAT. Ch. 271

I. INTRODUCTION

Mary is worried that the developer planning to build a new subdivision in her neighborhood will destroy a nearby wetland. So, Mary and her neighbors start a petition opposing the new development. The developer hears Mary is planning to present the petition against his development at the next city council meeting. The day after the meeting, a process server shows up at Mary's door handing her papers. The papers say the developer is suing Mary for defamation and for more money than she is worth even though all Mary did was voice her and her neighbors' opinions at a government meeting.

Today groups and individuals are being sued simply because they chose to exercise their right to express their views on public issues.¹ These suits stem from ordinary communications such as writing a letter to the editor, testifying at a public hearing, lobbying, or circulating a petition.² When groups or individuals are sued for speaking out on public issues, it is the corporation, government official, or people against whom they speak out who sue them.³

SLAPP is an acronym for Strategic Lawsuits Against Public Participation, a term coined by Professors George Pring and Penelope Canan in their study of lawsuits filed against people who speak out on issues of public interest.⁴ Professors Pring and Canan established four criteria to determine if a suit should be characterized as a SLAPP suit. There must be: (1) Communication influencing a

1. GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 1 (1996).

2. *Id.*

3. Ed Golder, *Horton, ACLU in Rare Alliance Though Usually Ideological Opposites, They're Both Trying to Stop Lawsuits Intended to Keep Citizens from Petitioning the Government*, GRAND RAPIDS PRESS (Grand Rapids, Mich.), May 5, 1997, at B1; *see id.* (noting that about 66% of the SLAPP suits filed are filed by private companies and about 33% are filed by government officials).

4. *See* PRING & CANAN, *supra* note 1, at 3 (observing that there was no real recognition of suits against those speaking out); *id.* (stating that the Professors created the phrase "strategic lawsuits against public participation" to bring attention to these types of suits).

government action that (2) results in a civil suit being filed (3) against the person or organization speaking out (4) about an issue of public interest.⁵ Moreover, SLAPP suits often involve disputes over communications protected under the petition clause of the First Amendment of the United States Constitution and Article 1, Section 3, of the California Constitution.⁶

However, most SLAPP suits are meritless because the filer⁷ often initiates the action not to redress any real legal wrong, but for the sole purpose of either intimidating the target or using the target as an example to discourage others from speaking out.⁸ The filer usually does not hope to win⁹ the case, but rather intends to tie up the target's funds and energy until the filer's measure or agenda is passed or accepted.¹⁰

II. BACKGROUND BEHIND THE CURRENT VERSION OF CODE OF CIVIL PROCEDURE SECTION 425.16

A. *Getting Anti-SLAPP Legislation Adopted in California*

The current version of the Code of Civil Procedure section 425.16 incited quite a battle between the Legislature and the Governor in initial attempts to get the anti-SLAPP legislation enacted in California.¹¹ Senator Lockyer tried twice prior to 1992 to enact anti-SLAPP legislation¹² in California.¹³ The first time in 1990, the anti-

5. PRING & CANAN, *supra* note 1, at 8-9; *see id.* (emphasizing that the test is objective and does not consider the filer's motive for filing the suit). *But see* CAL. CIV. PROC. CODE § 425.16(e) (West Supp. 1997) (stating that California's anti-SLAPP statute covers any written or oral statement made before or in connection with a "legislative, executive or judicial proceeding or any other official proceeding authorized by law" or covers any written or oral statement "made in a place open to the public or public forum with an issue of public interest").

6. *See* PRING & CANAN, *supra* note 1, at 9 (stating that there had been no studies done focusing on the relation of the petition clause and civil lawsuits up until the time of their study). *But see* CAL. CIV. PROC. CODE § 425.16 (West Supp. 1997) (stating that the section also includes freedom of speech).

7. *See* PRING & CANAN, *supra* note 1, at 9 (clarifying that it is more appropriate to use the terms "filer" and "target" to distinguish the parties instead of the terms "plaintiff" and "defendant" because not all SLAPP suits arise in the context of an original complaint but can arise by cross-complaints also).

8. *See* John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 397-99 (1993) (noting that SLAPP suits are filed to intimidate, silence and discourage people from opposing the filer in his or her plan).

9. *See* Golder, *supra* note 3 (noting that almost 90% of SLAPP suits are dismissed); John J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 105 (1988) (noting that in most SLAPP suits filed, the judgment is not for the plaintiff).

10. *See* Barker, *supra* note 8, at 397 (pointing out that sometimes the suit is filed just to tie up the target's resources so that he or she is too busy defending to oppose the filer publicly).

11. *See* PRING & CANAN, *supra* note 1, at 196 (noting that it took three tries to get anti-SLAPP legislation passed in California).

12. *See* Jeffrey R. Sipe, *SLAPP-Happy Discourse*, INSIGHT MAG., June 27, 1996, at 37 (explaining that legislation providing for a quick hearing on a motion to dismiss is considered anti-SLAPP legislation).

13. *See* PRING & CANAN, *supra* note 1, at 196 (noting that in 1990 and in 1991 there was proposed anti-SLAPP legislation in California that had been vetoed by the Governor); *see generally* Lockyer, SB 2313 (1990) (promulgating anti-SLAPP legislation).

SLAPP bill passed both houses but was vetoed by then Governor George Deukmejian.¹⁴ Opposition to that bill arose because the overall language was too broad.¹⁵ However, Governor Deukmejian rejected the bill claiming there were already enough protections and sanctions in place to deter these particular kind of frivolous lawsuits.¹⁶

With a new governor in office,¹⁷ Senator Lockyer decided to try his luck again.¹⁸ The 1991 bill again overwhelmingly passed both houses but this time most opposition to the bill surrounded the "substantial probability" language used in the proposed statute.¹⁹ The language was thought to place too much of a burden on the filer (plaintiff) to prove his case too early.²⁰ Finally, in 1992, Senator Lockyer, after reworking his bill to incorporate changes suggested by the governor,²¹ saw his years of hard work pay off. Governor Pete Wilson signed California's anti-SLAPP legislation into law, creating Code of Civil Procedure section 425.16.²²

14. See PRING & CANAN, *supra* note 1, at 196 (explaining the history of anti-SLAPP legislation in California).

15. See *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 820, 33 Cal. Rptr. 2d 446, 452 (1994) (observing that the first attempt at anti-SLAPP legislation was vetoed because it would have implemented a pleading bar unless the filer could justify the suit); PRING & CANAN, *supra* note 1, at 196 (explaining that the first bill relating to anti-SLAPP legislation required that there automatically be an advanced court ruling to determine if the filer would have a "substantial probability" to win or the filer would be prohibited from filing a suit affecting a person's First Amendment rights of speech or petition); *id.* (noting that the main opposition to the legislation came from the California Building Industry Association).

16. PRING & CANAN, *supra* note 1, at 196.

17. The new governor was Pete Wilson.

18. See PRING & CANAN, *supra* note 1, at 196 (noting that to get the anti-SLAPP bill passed, Senator Lockyer tacked the bill onto another more popular bill (SB 341 of 1991) that limited liability for officers and directors of nonprofit organizations and changed the pre-filing ruling to a motion to strike).

19. See PRING & CANAN, *supra* note 1, at 196 (explaining that "substantial probability" is the standard by which the SLAPP suit filer has to show that he will win his suit, thus making sure the suit is not frivolous); Barker, *supra* note 8, at 411-12 (noting that the California Building Industry Association saw the "substantial probability" language as too high of a burden to meet before conducting discovery); Mark Goldowitz, *SLAPP Lawsuits and the First Amendment*, SACRAMENTO BEE, Dec. 23, 1991, at B13 (commenting that Governor Pete Wilson vetoed the proposed legislation because he too felt that the "substantial probability" language was too high of a burden to meet).

20. See *supra* note 19 and accompany text (discussing the rejection of the "substantial probability" language); *infra* note 21 (discussing the same).

21. See *Getting SLAPPED: An Answer to Malicious Lawsuits Against Activists*, SAN DIEGO UNION-TRIB., Sept. 3, 1992, at B12 (noting that one of the changes made to the bill was that the word "substantial" was deleted); *Putting an End to Intimidation: Governor Should Sign Bill that Would Curb Unfair Lawsuits Against Homeowners*, L.A. TIMES, Aug. 25, 1992, at B6 (stating that Governor Wilson vetoed the anti-SLAPP legislation because the language did not ensure that legitimate suits could be filed). Cf. *Lafayette Morehouse v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 866, 44 Cal. Rptr. 2d 46, 53 (1995) (pointing out other California code sections that require a specified showing by the plaintiff that their claim has merit); SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1264, at 4 (Feb. 25, 1992) (showing there are other provisions in California law that use pleading hurdles to screen out meritless cases early in the judicial process); Goldowitz, *supra* note 19, at B13 (indicating that under California Code of Civil Procedure § 425.14, which addresses health care, there must be a showing of "substantial probability" that the plaintiff will win the claim in the complaint in order for the plaintiff to pursue punitive damages against health care providers).

22. CAL. CIV. PROC. CODE § 425.16 (West Supp. 1997).

B. California Code of Civil Procedure section 425.16 is Constitutional

After the long battle to adopt anti-SLAPP legislation in California, the next hurdle was waiting to see if the newly created statute would survive constitutional challenges. In *Lafayette Morehouse v. Chronicle Publishing Co.*,²³ the First District Court of Appeals addressed the constitutionality of Code of Civil Procedure section 425.16.²⁴ The plaintiff,²⁵ More University, first argued that the statute infringed on its right to access the courts, thereby violating its right to equal protection.²⁶ However, the Court of Appeals pointed out that if a statute that classifies litigants is a non-suspect class, then the state only has to have a rational basis for the classification for there to be no violation of equal protection.²⁷ Therefore, the court declared the state has a rational basis for enacting the anti-SLAPP statute and that is to "encourage continued participation in matters of public significance and that this participation should not be chilled through the abuse of the judicial process."²⁸

Next, the plaintiff in *Lafayette Morehouse* argued that because Code of Civil Procedure section 425.16 allows the target of a SLAPP suit to file a special motion to strike early in the lawsuit,²⁹ filers of SLAPP suits are denied the right to a jury.³⁰ The plaintiff claimed the right to a jury is denied because the judge is called on to weigh evidence.³¹ The purpose of the special motion to strike is to allow hearings at the beginning of litigation to determine whether or not the suit is meritless.³² The Court pointed out that throughout California law there are numerous code sections

23. 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (1995).

24. See *Lafayette Morehouse*, 37 Cal. App. 4th at 865-68, 44 Cal. Rptr. 2d at 52-54 (holding that California Code of Civil Procedure § 425.16 is constitutional under both the United States Constitution and the California Constitution); *id.* at 865-66, 44 Cal. Rptr. 2d at 52 (holding that California Code of Civil Procedure § 425.16 does not deprive the plaintiff of equal protection); *id.* at 866-67, 44 Cal. Rptr. 2d at 52-53 (holding that California Code of Civil Procedure § 425.16 does not violate the right to a jury under the California Constitution); *id.* at 867-68, 44 Cal. Rptr. 2d at 53-54 (holding that California Code of Civil Procedure § 425.16 does not deny the plaintiff's due process rights); see also 5 B.E. WITKIN, CALIFORNIA PROCEDURE, Pleading § 964 (4th ed. 1997) (noting that California Code of Civil Procedure § 425.16 has been held constitutional on all three issues).

25. The plaintiffs in the case were More University (*Lafayette Morehouse, Inc.*), Dr. Victor Baranco, founder of the University, and others. The court referred to all the plaintiff's simply as "More." *Lafayette Morehouse*, 37 Cal. App. 4th at 861, 44 Cal. Rptr. 2d at 49.

26. *Lafayette Morehouse*, 37 Cal. App. 4th at 865, 44 Cal. Rptr. 2d at 52.

27. *Id.*

28. *Id.*; see also CAL. CIV. PROC. CODE § 425.16(a) (West Supp. 1997) (stating the intent of the legislature in implementing the special motion to strike for SLAPP suits).

29. See SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1264, at 4 (Feb. 25, 1992) (emphasizing that because of the burden of defending a meritless lawsuit there is a need for pleading protection).

30. See CAL. CONST. art. I, § 16 (providing the right to a jury in California).

31. *Lafayette Morehouse*, 37 Cal. App. 4th at 866, 44 Cal. Rptr. 2d at 52-53; see CAL. CIV. PROC. CODE § 425.16(b) (West Supp. 1997) (stating that the court must determine "if there is a probability that the plaintiff will prevail on the claim" and that in doing so the court will "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based").

32. See *supra* note 29 and accompanying text.

allowing for early determination of whether or not a case has merit.³³ However, to avoid a constitutional violation, the judge must consider the pleadings and affidavits only so far as to determine if there is a prima facie case. Under Code of Civil Procedure section 425.16, the trial judge is not to weigh the opposition's pleadings and affidavits against the plaintiff's pleadings and affidavits.³⁴ Rather, the judge is only to look at the opposing pleadings and affidavits to determine whether as a matter of law, the plaintiff's pleadings do or do not establish a prima facie case.³⁵ Therefore, because the judge is not weighing any evidence, there is no violation of the plaintiff's right to a jury trial.³⁶

The last constitutional challenge made in *Lafayette* was that the statute denied the plaintiff due process.³⁷ The plaintiff made a due process challenge because Code of Civil Procedure section 425.16 states that discovery will be stayed once the motion to strike is filed.³⁸ Because discovery is stayed, the plaintiff claimed a denial of due process because without discovery, the plaintiff could not make the required "probability" showing.³⁹ The Court, however, pointed out that under Code of Civil Procedure section 425.16(g), the lower court has discretion to allow specified discovery if the plaintiff can show good cause for needing the particular discovery.⁴⁰ Therefore, there is no denial of due process because, if the plaintiff has good cause for requiring discovery, the court may allow it.⁴¹

III. EXISTING LAW

Under existing law, a person facing a SLAPP suit can file for a special motion to strike.⁴² The person defending the SLAPP must first show that the suit brought

33. See *Lafayette Morehouse*, 37 Cal. App. 4th at 866, 44 Cal. Rptr. 2d at 53 (pointing out other California code sections that require a specified showing by the plaintiff that their claim has merit). Those code sections are California Code of Civil Procedure § 425.13, requiring a showing of substantial probability; California Code of Civil Procedure § 425.14, requiring a clear and convincing standard; and California Civil Code § 1714.10, requiring a showing of reasonable probability. *Id.*

34. *Id.*

35. *Id.*; see *Wilcox*, 27 Cal. App. 4th at 823, 33 Cal. Rptr. 2d at 454-55 (pointing out that the standard in California Code of Civil Procedure § 425.16(b) is similar to the standard for a motion for nonsuit or directed verdict).

36. *Lafayette Morehouse*, 37 Cal. App. 4th at 867, 44 Cal. Rptr. 2d at 53.

37. *Id.*

38. CAL. CIV. PROC. CODE § 425.16 (g) (West Supp. 1997).

39. *Lafayette Morehouse*, 37 Cal. App. 4th at 867, 44 Cal. Rptr. 2d at 53.

40. *Id.* at 867, 44 Cal. Rptr. 2d at 53-54; see *infra* note 42 (discussing discovery under California Code of Civil Procedure § 425.16).

41. See *Lafayette Morehouse*, 37 Cal. App. 4th at 868, 44 Cal. Rptr. 2d at 53-54 (stating that if the plaintiff can show that he or she needs discovery in order to adequately defend the motion to strike, the judge has the discretion to allow the discovery); *id.* (noting that good cause can be shown where the party moving for the motion to strike has all the evidence needed by the non-moving party to establish a prima facie case).

42. CAL. CIV. PROC. CODE § 425.16 (West Supp. 1997).

against him or her falls within Code of Civil Procedure section 425.16.⁴³ In *Wilcox v. Superior Court*,⁴⁴ the court said that the person defending the SLAPP can show that the statute applies by demonstrating that the act on which the suit is brought falls within the definition of an “act in furtherance of right of petition or free speech” under subsection (e) of Code of Civil Procedure section 425.16.⁴⁵ Under existing law, the definition of acts in furtherance of the right of petition or free speech specifically refer to only written or oral acts.⁴⁶

When enacting Code of Civil Procedure section 425.16, the legislature included in the statute their findings and intent that the statute was designed to encourage participation in matters of public interest.⁴⁷ The legislature wanted to stop the chilling effect that lawsuits brought against those who speak out in a government related forum have on the governmental process.⁴⁸

IV. CHANGES MADE BY CHAPTER 271

Chapter 271 expands the prior legislative intent written in the statute. Chapter 271 adds to the intent already stated in subsection (a) of section 425.16 that the statute should be read broadly.⁴⁹ The legislature made this change because of conflicting statements in California Courts of Appeal about how broadly the statute is to be read.⁵⁰

43. See *Wilcox*, 27 Cal. App. 4th at 820, 33 Cal. Rptr. 2d at 452 (finding that the statute, under subsection (b), initially places the burden on the defendant (target) to show that the suit arises from any act in furtherance of the right to petition or free speech under both the United States Constitution and the California Constitution).

44. 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (1994).

45. See *Wilcox*, 27 Cal. App. 4th at 820, 33 Cal. Rptr. 2d at 452 (listing what is required for the defendant to make a prima facie showing that his or her act was in furtherance of his or her right to petition or free speech); see also CAL. CIV. PROC. CODE § 425.16(e) (West Supp. 1997) (defining an “act in furtherance of a person’s right of petition or free speech” as including written or oral statements made in connection with or under consideration by a “legislative, executive, or judicial body or any other official proceeding authorized by law . . .” or “any written or oral statement made in a place open to the public or a public forum”).

46. See CAL. CIV. PROC. CODE § 425.16(e) (West Supp. 1997) (defining “acts in furtherance.” as either written or oral acts).

47. *Id.* § 425.16(a) (West Supp. 1997).

48. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1296, at 2 (May 13, 1997).

49. CAL. CIV. PROC. CODE § 425.16(a) (amended by Chapter 271); see ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1296, at 1 (July 2, 1997) (noting that Chapter 271 clarifies that the intent of the legislature is that the statute should be read broadly).

50. Compare *Zhao v. Wong*, 48 Cal. App. 4th 1114, 1126, 55 Cal. Rptr. 2d 909, 916-17 (1996) (pointing out that the statute should be strictly limited to activities done in furtherance of a person’s right to petition and that any activity protected by the freedom of speech clause is only covered by California Code of Civil Procedure § 425.16 so far as the activity relates to the person’s right to petition), with *Braun v. Chronicle Publ’g Co.*, 52 Cal. App. 4th 1036, 1045-47, 61 Cal. Rptr. 2d 58, 63-64 (1997) (criticizing the Court of Appeals interpretation of California Code of Civil Procedure § 425.16 in *Zhao*), and *Averill v. Superior Court, Eli Home Company*, 42 Cal. App. 4th 1170, 1176, 50 Cal. Rptr. 2d 62, 65 (1996) (holding that the intent of the Legislature is that the statute should be read broadly to protect acts in furtherance of both a person’s right to petition and right to freedom of speech). See *infra* notes 60-66 and accompanying text (discussing the effect of amendments made to stated legislative intent by a later legislature).

In *Zhao v. Wong*,⁵¹ the First District Court of Appeals, in its interpretation of the terms "public significance,"⁵² "public issue"⁵³ and "public forum,"⁵⁴ read the terms narrowly and did not apply the statute in a situation where a newspaper reported on a murder case. However, in *Averill v. Superior Court*,⁵⁵ the Fourth District Court of Appeals applied the statute to a private conversation between an employee and her employer because the Court interpreted the word "public" very broadly.⁵⁶

Based on these differing interpretations the legislature amended the definition of "an act in furtherance of a person's right to petition or right of free speech", in Chapter 271, to include "any conduct."⁵⁷ Therefore, the statute is no longer limited to just acts that are written or oral.⁵⁸

V. COMMENT

A. Adding to the Legislative Intent

As discussed above, the need for Chapter 271 to amend the legislative intent specified under subsection (a) of section 425.16 of the California Code of Civil Procedure arose because of conflicting interpretations of how broadly the existing statute should be read.⁵⁹ A current legislature can amend the legislative intent of a prior legislature.⁶⁰ However, the more pressing question is whether the California Court of Appeals for the First District, who interpreted the statute more narrowly, will have to now change its reading of the statute. When a legislature makes amendments to clarify existing law, the amendment "must be accepted as the legislative

51. 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (1996).

52. See *Zhao*, 48 Cal. App. 4th at 1120-21, 55 Cal. Rptr. 2d at 913 (discussing the courts interpretation of "public significance" and "public issue").

53. *Id.*

54. See *id.* at 1126, 55 Cal. Rptr. 2d at 916 (interpreting "public forum" as narrowly as it has been interpreted in First Amendment jurisprudence).

55. 42 Cal. App. 4th 1170, 50 Cal. Rptr. 2d 62 (1996).

56. See *Averill*, 42 Cal. App. 4th at 1175-76, 50 Cal. Rptr. 2d at 65 (noting the use of the word "includes" in California Code of Civil Procedure § 425.16(e) indicates that the three categories are not all-inclusive).

57. CAL. CIV. PROC. CODE § 425.16(e) (amended by Chapter 271); see *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 18-20, 43 Cal. Rptr. 2d 350, 357-59 (1995) (emphasizing that the statute applies to conduct in furtherance of the right to petition or freedom of speech); see also ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1296, at 4 (July 2, 1997) (explaining that the need to amend § 425.16 to add "any conduct" was brought to the attention of the legislature by the *Ludwig* case).

58. See *infra* notes 64-73 and accompanying text (discussing the constitutional basis for adding the language).

59. See *supra* notes 50-58 and accompanying text.

60. See *Re-Open Rambla v. Board of Supervisors*, 39 Cal. App. 4th 1499, 1511, 46 Cal. Rptr. 2d 822, 828 (1995) (stating that a legislature can amend a statute to "express the original legislative intent"); see also ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1296, at 4 (July 2, 1997) (noting that *Re-Open Rambla* affirms that a current legislature may express legislative intent of prior legislation).

declaration of the meaning of the original act.”⁶¹ Moreover, under the doctrine of legislative supremacy,⁶² courts are required to defer to the legislature’s determination of public policy.⁶³ Therefore, upon review of Chapter 271, the California Court of Appeals for the first district will have to broaden its interpretation of California’s anti-SLAPP legislation.

B. Conduct is Covered by the Constitution

Chapter 271 provides that the phrase “act in furtherance of a person’s right of petition or right of free speech under the United States or California Constitution in connection with a public issue” will also include “any conduct” in furtherance of a person’s first amendment right of petition or freedom of speech.⁶⁴ With this change, Chapter 271 provides that any conduct done in furtherance of a person’s right of petition or right of free speech is enough to raise a motion to strike under section 425.16 if the conduct is “in connection with a public issue or an issue of public interest.”⁶⁵ Section 425.16 works by first requiring the target of a SLAPP suit to show that the action falls within the statute and to do this it must be determined whether the act done in furtherance, is speech protected by the First Amendment.⁶⁶ Speech does not mean merely those communications that are written or spoken but includes nonverbal communication or conduct.⁶⁷ Some types of conduct have received protection under the First Amendment,⁶⁸ however, much First Amendment litigation surrounds how to determine what type of conduct is protected.

61. See 1A NORMAN L. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 22.31 (5th. ed. 1993) (stating that if the amendment is enacted at the time there is controversy as to interpretations of the original statute, the amendment is reflective of the meaning of the original statute). But see *Western Sec. Bank v. Superior Court*, 15 Cal. 4th 232, 243, 933 P.2d 507, 514, 62 Cal. Rptr. 2d 243, 250 (1997) (clarifying that the above rule of construction is true when the amendment is enacted by a legislative body not separated by a significant amount of time).

62. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989) (stating that the doctrine is one used in statutory interpretation and it means that courts will subordinate to the legislature when exercising the power of judicial review).

63. See *id.* at 293 (noting that courts may not blatantly ignore legislative intent). But see 2A NORMAN L. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 45.03 (5th. ed. 1992) (stating that some courts do not follow amendments interpreting a prior statute because they view the act of amending a statute’s intent as the legislature performing a judicial function—interpreting statutes).

64. CAL. CIV. PROC. CODE § 425.16(e) (amended by Chapter 271).

65. *Id.* § 425.16 (amended by Chapter 271).

66. See *supra* note 45 and accompanying text.

67. See Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of “Speech,”* 1993 WIS. L. REV. 1525, 1531-32 (1993) (noting that the Supreme Court recognizes expressive conduct within the meaning of speech).

68. See Cynthia L. Brennan, Comment, *Mandatory Community Service as a High School Graduation Requirement: Inculcating Values or Unconstitutional?*, 11 T.M. COOLEY L. REV. 253, 263-64 (1994) (listing the burning of the American flag, draft card burning, sit-ins, and picketing by labor groups as types of conduct that the Supreme Court has found to be protected under the First Amendment).

In *Spence v. United States*,⁶⁹ the Supreme Court promulgated a test for determining whether the conduct is protected by the First Amendment.⁷⁰ In making the determination whether the conduct was equivalent to speech, the court considered two factors: first, there must be "intent to convey a particularized message"; second, it must be likely "that the message would be understood by those who viewed it."⁷¹ However, the Court does not consistently apply its own test.⁷² Therefore, courts still have no concrete criteria to determine with precision what conduct falls within the meaning of "speech" under the First Amendment.⁷³ As a result of the amendment made by Chapter 271, there may be increased collateral litigation as to whether the conduct of the target of the SLAPP suit is conduct protected by the free speech and right to petition clauses of the United States and California Constitutions.

VI. CONCLUSION

The amendments to Chapter 271 may help courts to apply the special motion to strike for SLAPP suits more consistently. Chapter 271 now instructs the courts that the statute is to be given a broad interpretation. Hopefully, with this broader intent, more frivolous suits will meet an early end, thereby freeing up limited judicial resources for more meritorious claims.

Now any conduct in furtherance of free speech or the right to petition will give rise to the statute's application. Chapter 271 goes further to make sure that those who do "speak out" will be better protected. The government of the United States is a democracy calling for participation in government by the people. Protecting those who wish to utilize their rights to address their government is the ultimate goal of Chapter 271. The new amendments deliver the knockout punch to filers of SLAPP suits.

69. 418 U.S. 405 (1974).

70. See *Spence*, 418 U.S. at 409-11 (stating that if the conduct was "sufficiently imbued with elements of communication" the conduct should be afforded First Amendment protection).

71. *Id.*

72. See Tiersma, *supra* note 67, at 1538-39 (noting that the two factors for determining whether conduct is equivalent to speech are difficult to apply and further noting that the Supreme Court had only applied the test in two cases).

73. See *id.* at 1539 (noting that when the *Spence* test is not used to determine what conduct is protected, then defining precisely what conduct is protected with the meaning of speech remains elusive).

