Filed 2/27/18 Nelson v. Superior Court CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

JEFF NELSON et al.,

Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

JOHN DOES 1 through 50, whose true identities are unknown,

Real Parties in Interest.

B283743

(Los Angeles County Super. Ct. No. BC645561)

ORIGINAL PROCEEDINGS in mandate. John P. Doyle, Judge. Petition granted.

Gerard Fox Law, Gerard P. Fox, Morgan E. Pietz and Thomas P. Burke Jr. for Petitioners.

No appearance for Respondent.

Miller Law Associates, Randall A. Miller and Lisa D. Mallinson for Real Parties in Interest.

INTRODUCTION

After pseudonymous Internet commenters posted on social media that Jeff Nelson practices "bestiality and paedophilia [sic] and incest," has "mouth sores," and sells food that causes "mouth herpes," he and his company VegSource Interactive (collectively, Nelson) sued for defamation. To discover the identity of the commenters, one of whom posted under the pseudonym Chantelle Robin, Nelson served subpoenas on Google, Tumblr, YouTube, and Twitter, requesting potentially identifying information, including the commenters' IP addresses. Before those companies responded to the subpoenas, however, they notified Robin, who filed a motion to quash the subpoenas. The trial court granted the motion to quash.

Nelson filed a petition for writ of mandate seeking to compel the trial court to vacate its order granting the motion to quash and to enter a new order denying the motion. Because Nelson made a prima facie showing of defamation against Robin and another pseudonymous commenter, we grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

In his operative complaint Nelson alleged five causes of action against unknown (Doe) defendants:[1] defamation, false

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[1] Code of Civil Procedure section 474 "allows a plaintiff who is ignorant of a defendant's identity to designate the defendant in a complaint by a fictitious name (typically, as a 'Doe'), and to amend the pleading to state the defendant's true name when the plaintiff subsequently discovers it." (*McClatchy v. Coblentz,*

light, intentional and negligent infliction of emotional distress, intentional and negligent interference with prospective economic advantage, and unfair competition. All of the causes of action were based on the allegation that "[c]ertain unknown John Doe defendants are waging a campaign of sustained online defamation and harassment against . . . Nelson, his family, and their business." Nelson suspected the "person(s) behind this scheme are vegan YouTuber competitors who are doing it not just out of spite, but also for profit."

Nelson described himself as "a frequent speaker and conference leader on issues relating to health and nutrition, with a specific focus on the benefits of a plant-based vegan diet." Since 1996 he has run "a media and publishing company with a focus on health, nutrition, and veganism." The company, VegSource, "creates original content and documentaries for sale, cooking DVDs, and a variety of products in the vegan health sector." "One aspect of the company's business is a YouTube channel . . . which has programming that frequently includes [Nelson] and others speaking about the vegan lifestyle, as well as related educational, marketing, and advertising efforts." Advertisers pay to advertise on VegSource's YouTube channel. VegSource also organizes and sponsors an annual event called the Healthy Lifestyle Expo, which brings together "top, bestselling experts in the vegan niche."

In July 2016 Nelson "invited a vegan YouTube personality named Charles Marlowe a/k/a 'Vegan Cheetah' to attend and

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Patch, Duffy & Bass, LLP (2016) 247 Cal.App.4th 368, 371.) "To serve their complaint, plaintiffs may then seek disclosure of [the unknown defendants'] identities." (*ZL Technologies, Inc. v. Does 1-7* (2017) 13 Cal.App.5th 603, 611-612.)

speak" at the Healthy Lifestyle Expo. Marlowe "speaks frequently about his troubled past, including his drug addiction and criminal record, and credits veganism with helping get his life back on track." After the public announcement that Marlowe would speak at the event, someone using the pseudonym (screen name) Chantelle Robin "began releasing a series of videos on a phony YouTube account" attacking Nelson and his decision to invite Marlowe to speak.

The complaint alleged that Robin and others posted many defamatory statements, including the following comments Robin allegedly posted on YouTube:

1. "'What [Nelson] called his kids are women in their mid twenties, who vilely attack all kinds of others. Not to mention the family gangbang on essena o'neill, a young girl.'"

2. "Nelson used money he 'inherited' from the Armour Meat Company to 'hire a convicted felon named Charles Marlowe to harass vegans and shut down vegan [YouTube] channels.'"

3. "Nelson 'is using the criminal Charles Marlowe to do harm to people that [Nelson] doesn't approve of, and someone is going to get badly hurt. [Nelson] will be responsible. He is promoting this harm.'"

4. "Nelson has been 'harassing people for 20 years (while hiding in a troll capacity). [Nelson] has a vendetta against anyone who dares to be interested in animal rights. He believes they should be censored and eliminated. Now he has a criminal thug mascot to hurt people.'"

5. "Nelson 'has a history of attacking and trying to hurt vegans'" and "'has a criminal on felony probation who is willing to stalk and hurt people and silence them.'"

6. "'[Nelson] found a felon with 20 arrests behind him who was willing to stalk and harass vegans on Youtube. Death threats, rape threats, doxing,[2] smear – all attempts to shut down vegan Youtube channels. [Nelson] wants to be the Big Daddy of Youtube and punish at will.'"

7. "'Sources have suggested there was a disease outbreak of anal fissures after the Vegsource Expo Party $$$ at Jeff Nelson's home but this HAS NOT BEEN SUBSTANTIATED AND IS NOT KNOWN TO BE TRUE.'"

The complaint also alleged Robin posted a video on YouTube, titled "Vegan Cheetah has MOUTH SORES! The Shocking Truth of the Vegsource Diet!! Jeff Nelson Bite Size." The text on the screen of the video stated: "'Due to the RESTRICTIVE Vegsource McDougall Diet . . . And close, *intimate* collaboration . . . The Vegsource Industry Has an outbreak of MOUTH SORES' and 'Vegsource Jeff Nelson & Vegan Cheetah Are selling a MAGICAL DIET And it's causing MOUTH HERPES & uncontrollable lying.'" The video included photographs of Nelson and his wife that were "doctored to make it appear as if they had mouth herpes" and placed "next to stock photographs of persons with mouth herpes."

Nelson further alleged:

1. Someone using the pseudonym "TZM RBE" posted on YouTube: "'Former slaughterhouse owner Jeffs family are scum. satanists practice bestiality and paedophilia and incest.. noticed that time when jeff used one of his daughters bare arse cheeks as a thumb-nail on his video.'"

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2 According to Robin, "doxing" is "an internet-based practice of broadcasting private or identifiable information . . . about an individual or organization."

2. Someone using the pseudonym "RONS DOUBLE Ds" posted on YouTube: "'Nelson is paying them to do his dirty work, total dirt bag'" and "'From my gathering JEFF NELSON is paying off congasm and weezie to troll people for him.'"

3. Someone using the pseudonym "GISFORGARY" posted on YouTube: "'I think Jeff fucks Charlie in the ass till he calls him daddy.'"

B. *The Subpoenas*

Nelson served YouTube, Google, Tumblr, and Twitter with subpoenas for the production of documents. Nelson requested documents that would identify Robin and the other pseudonymous posters, including documents disclosing their names, email addresses, IP addresses, physical addresses, and phone numbers. Nelson also asked for information regarding "AdSense" accounts associated with the posters' YouTube accounts.[3]

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[3] "In addition to its search engine operations, Google generates revenue through a business program called 'AdSense.' Under this program, the owner of a website can register with Google to become an AdSense 'partner.' The website owner then places HTML instructions on its webpages that signal Google's server to place advertising on the webpages that is relevant to the webpages' content. Google's computer program selects the advertising automatically by means of an algorithm. AdSense participants agree to share the revenues that flow from such advertising with Google." (*Perfect 10, Inc. v. Amazon.com, Inc.* (9th Cir. 2007) 508 F.3d 1146, 1156.)

C. *The Motion To Quash*

Some of the Internet services providers (ISPs) contacted Robin. They warned Robin that, if they did not receive a "response" or a copy of a motion to quash the subpoena within a certain number of days, they might produce responsive documents, which could lead Nelson to unmask Robin's true identity. Robin, claiming to make a special appearance, filed a motion to quash under Code of Civil Procedure section 1987.1,[4] arguing the subpoenas "threaten to violate Robin's Constitutionally guaranteed rights to free and anonymous speech and privacy."

At the hearing on the motion to quash, Nelson's attorney characterized the motion as "a dispositive motion in disguise, where the court is being asked to decide whether the plaintiff has sustained . . . its burden of coming forward with [a] prima facie case of defamation." The trial court determined that Nelson had not met his burden of making a prima facie case, and granted Robin's motion to quash. The court reasoned that, although

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[4] Under Code of Civil Procedure section 1987.1, subdivision (b), "[a] person whose personally identifying information . . . is sought in connection with an underlying action involving that person's exercise of free speech rights" may file a motion to quash the subpoena requesting that information. (See *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1164-1165 ["[o]nce notified of a lawsuit by the website host or ISP, a defendant may then assert his or her First Amendment right to speak anonymously through an application for a protective order or, as here, a motion to quash the subpoena"]; see also *Glassdoor, Inc. v. Superior Court* (2017) 9 Cal.App.5th 623, 632 ["California . . . courts allow a speaker . . . to defend the right to anonymity under a fictitious name"].)

Robin made "verifiable" statements regarding "mouth herpes and anal fissures," "the platform for such statements, YouTube, and the diction and tone employed by Defendants [in the posts], convey that the statements comprised essentially what might be characterized as a rant and rave not reasonably to be construed as facts by the intended audience." The court stated: "Robin does not represent herself as 'unbiased' and 'having specialized knowledge,' nor does she characterize her videos or comments as 'Research Reports' or 'bulletins' or 'alerts' [citation], and the social media used was not like Yelp [citation] or RipoffReport.com [citation] in which statements could reasonably be understood as conveying facts." The court explained that the context of Robin's statements was dispositive ("all roads lead to this issue of context") and that "you might get a different result from a different judge." The court ruled, "Here, it is apparent that the context of the statements attributable to Robin—that there is an ongoing battle between Plaintiffs and Robin over the manner in which Plaintiffs have expressed their opinions by which both Robin and Plaintiffs have accused each other of personal attacks and bullying—are in the nature of opinions." As support for its statement regarding the "ongoing battle," the court cited Nelson's declaration "notably conceding that Marlowe has a criminal record" and Robin's declaration "explaining that all of her statements were opinions, satire, or criticism."

Finally, although there was no motion to quash the subpoenas seeking indentifying information regarding the other pseudonymous commenters, the trial court ruled that "simply because the other defendants have not filed a motion to quash does not mean that the Court should not consider whether the subpoenas should be maintained as to the other defendants.

While Robin's motion logically focuses on the statements attributed to her, the Court concludes that her motion sufficiently raises the issue of whether Plaintiffs have set forth a prima facie claim as against other defendants in light of the same First Amendment rights that all defendants share herein." The trial court ruled, "As with the statements attributable to Robin," the statements attributable to the other pseudonymous commenters "are also non-actionable statements of opinion."

Nelson filed a petition for writ of mandate. We issued an order to show cause.

DISCUSSION

A. *Applicable Law*

1. *Defamation*

"'"Defamation is 'a false and unprivileged publication that exposes the plaintiff "to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."'"'" (*Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 685 (*Dickinson*).) "'The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage.'" (*Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 862 (*Sanders*).) There are two categories of defamation: libel and slander. (Civ. Code, § 44.)[5] "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any

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[5] Undesignated statutory references are to the Civil Code.

person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (§ 45.) "'A corporation can be libeled by statements which injure its business reputation.'" (*ZL Technologies, Inc. v. Does 1-7* (2017) 13 Cal.App.5th 603, 623 (*ZL Technologies*).) "Slander is a false and unprivileged publication, orally uttered," that "[c]harges any person with crime," "[i]mputes in him the present existence of an infectious, contagious, or loathsome disease," or "[t]ends directly to injure him in respect to his . . . business." (§ 46.)

"'The "crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. [Citation.]" [Citation.] "Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood. [Citations.]" [Citation.] The question is "'whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact."'" (*Dickinson*, *supra*, 17 Cal.App.5th at p. 686.)

To determine whether a statement is reasonably susceptible of a defamatory interpretation, "'courts use a totality of the circumstances test. [Citation.] "[A] court must put itself in the place of an average reader and determine the natural and probable effect of the statement . . . ."'" (*ZL Technologies*, *supra*, 13 Cal.App.5th at p. 624.) To determine the natural and probable effect of a statement, "'a court considers both the language of the statement and the context in which it is made.'" (*Ibid.*) The language of the statement includes the vocabulary, grammar, syntax, and the level of specificity. "Use of 'hyperbolic, informal'

[citation], "'crude, [or] ungrammatical" language, satirical tone, [or] vituperative, "juvenile name-calling"' provide support for the conclusion that offensive comments were nonactionable opinion. [Citation.] Similarly, overly vague statements [citation], and "'generalized" comments . . . "lack[ing] any specificity as to the time or place of" alleged conduct may be a "further signal to the reader there is no factual basis for the accusations.'" [Citation.] On the other hand, if a statement is 'factually specific,' 'earnest' [citation], or 'serious' in tone [citation], or the speaker 'represents himself as "unbiased,"' "'having specialized"' [citation] or "'first-hand experience,"' or "'hav[ing] personally witnessed . . . abhorrent behavior"' [citation], this may signal the opposite, rendering the statement actionable [citation]." (*Ibid.*) "In considering the *context* of the statement, we look at facts including the audience to whom the statement was directed." (*Dickinson*, *supra*, 17 Cal.App.5th at p. 686.)

2. *Defamation on the Internet*

"As Internet technology has evolved over the past two decades, computer users have encountered a proliferation of chat rooms and websites that allow them to share their views" "anonymously, by using 'screen names' traceable only through the hosts of the sites or their [ISPs]." (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1158 (*Krinsky*).) The Constitution protects anonymous speech, including speech on the Internet, but "[w]hen vigorous criticism descends into defamation . . . constitutional protection is no longer available." (*Id.* at p. 1164; see *Glassdoor, Inc. v. Superior Court* (2017) 9 Cal.App.5th 623, 633 (*Glassdoor*) ["the right to speak anonymously is not an unalloyed good"];

McIntyre v. Ohio Elections Com. (1995) 514 U.S. 334, 357 ["[t]he right to remain anonymous may be abused"].)

When statements are posted on the Internet, the relevant context includes the website on which the messages were posted. (See, e.g., *ZL Technologies*, *supra*, 13 Cal.App.5th at p. 618 [website on which the statements were posted "is intended to 'help job seekers make informed decisions'"]; *Bently Reserve L.P. v. Papaliolios* (2013) 218 Cal.App.4th 418, 433 (*Bently*) [review on a website that publishes crowd-sourced reviews about local businesses can be defamatory]; *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1149 [statements "were made on Internet Web sites which plainly invited the sort of exaggerated and insulting criticisms of businesses and individuals which occurred here"]; *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 699 ["statements must be viewed from the perspective of the average reader of an Internet site such as Craigslist's 'Rants and Raves'"]; *Piping Rock Partners, Inc. v. David Lerner Associates, Inc.* (9th Cir. 2015) 609 Fed.Appx. 497 [even though online message board was "disreputable," an anonymous post "contained sufficient provably false statements of fact to reasonably be considered actionable"].) "While courts have recognized that online posters often '"play fast and loose with facts"' [citation], this should not be taken to mean online commentators are immune from defamation liability." (*Sanders*, *supra*, 219 Cal.App.4th at p. 864.)

3. *Prima Facie Showing*

California courts have held that, to defeat a defendant's motion to quash a subpoena seeking his or her identity, a plaintiff must make a prima facie showing of the elements of

libel. (*Krinsky*, *supra*, 159 Cal.App.4th at p. 1172; see *Yelp Inc. v. Superior Court* (2017) 17 Cal.App.5th 1, 14 (*Yelp*) ["a plaintiff seeking discovery of the anonymous person's identity must first make a prima facie showing the comment at issue is defamatory"]; *Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1305 (*Doe 2*) ["First Amendment protection for anonymous speech requires a libel plaintiff seeking to discover an anonymous libel defendant's identity to make a prima facie showing of all elements of defamation"].) These courts have reasoned that, if "there is a factual and legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment." (*Krinsky*, at p. 1172; see *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 245-246 ["freedom of speech has its limits; it does not embrace certain categories of speech, including defamation"]; *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 485 ["the First Amendment's right to freedom of speech is not absolute"]; *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1131 ["[i]t is well established that defamation of an individual is not protected by the constitutional right of free speech"].)

On the other hand, requiring at least a prima facie showing "ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism." (*Krinsky*, *supra*, 159 Cal.App.4th at p. 1171.) As the court in *ZL Technologies* explained, "To serve their complaint, plaintiffs may then seek disclosure of [the] detractors' identities. When this occurs, the anonymous Internet speakers' First Amendment rights must be balanced against a libel plaintiff's right to prosecute its case. [Citation.] Most of the state and federal courts that had addressed the subject" prior to *Krinsky* "had agreed this balancing necessitated a prima facie showing of the

elements of libel. [Citations.] *Krinsky* concurred with this approach and adopted the same requirement." (*ZL Technologies*, *supra*, 13 Cal.App.5th at pp. 611-612.)[6]

"[A]n appropriate [prima facie] showing requires 'evidence "'that . . . will support a ruling in favor of [the plaintiff] if no controverting evidence is presented. [Citations.] It may be slight evidence which creates a reasonable inference of [the] fact sought to be established but need not eliminate all contrary inferences."'" (*Yelp*, *supra*, 17 Cal.App.5th at p. 14.) "'The dispositive question . . . is whether a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion.'" (*Id.* at p. 16.) This is a question of law for the court. (*Ibid.*; see *Bently*, *supra*, 218 Cal.App.4th at p. 428 [the court determines as a matter of law whether a statement "is reasonably susceptible of a defamatory interpretation" and whether it "is reasonably susceptible of an interpretation which implies a provably false assertion of actual fact"].) "To meet this

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[6] We do not consider in this appeal whether a prima facie showing is the correct standard. Both sides argue it is. And Robin does not make the argument, rejected by the courts in *Yelp* and *ZL Technologies*, that a court ruling on a motion by an anonymous defendant to quash a subpoena seeking his or her identity should "apply a final 'balancing test, weighing "the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case."'" (*Yelp*, *supra*, 17 Cal.App.5th at p. 15; see *ZL Technologies*, *supra*, 13 Cal.App.5th at p. 617 ["[w]e concur with *Krinsky* that a further balancing should not be required '[w]here it is clear to the court that discovery of the defendant's identity is necessary to pursue the plaintiff's claim,' and the plaintiff makes a prima facie showing that a libelous statement has been made"], italics and fn. omitted.)

standard in seeking compulsory disclosure of an anonymous Internet speaker's identity, . . . '[a] plaintiff need produce evidence of only those material facts that are accessible to [it],' for example, evidence of the allegedly libelous statement, its falsity, and its effect on the plaintiff." (*ZL Technologies*, *supra*, 13 Cal.App.5th at p. 612; see *Yelp*, at p. 19 ["a plaintiff seeking to unmask an anonymous Internet commenter cannot be faulted for the inability to provide evidence of facts that can only be known after the anonymous commenter has been identified"].) If the trial court determines the statements at issue are "reasonably susceptible of a defamatory interpretation," "it is for the jury to determine whether a defamatory meaning was in fact conveyed to the listener or reader." (*Bently*, at p. 428.)

4. *Standard of Review*

Because whether Nelson made a prima facie showing of the elements of libel is a question of law, we review the trial court's ruling de novo. (See *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Assn.* (Jan. 8, 2018, A141913) 19 Cal.App.5th 61, 89 [in """instances involving matters of law, the appellate court is not bound by the trial court's decision, but may make its own determination"""]; *Yelp*, *supra*, 17 Cal.App.5th at p. 13 [reviewing whether the trial court's order compelling the production of documents that might reveal an Internet commenter's identity "was correct"].) The standard of review is the same as the standard of review for an order on a special motion to strike under Code of Civil Procedure section 425.16. (See *ZL Technologies*, *supra*, 13 Cal.App.5th at p. 634 [the burden on a plaintiff in a defamation action seeking the identity of pseudonymous speakers is not "unfamiliar" because it

is similar to the burden on the plaintiff under Code of Civil Procedure section 425.16].) In that context, "[t]o show a probability of prevailing for purposes of section 425.16, a plaintiff must ""make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor."" [Citation.] This standard is 'similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment,' in that the court cannot weigh the evidence." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010; accord *Direct Shopping Network, LLC v. James* (2012) 206 Cal.App.4th 1551, 1557, fn. 3.) And whether a litigant has made a prima facie showing in opposition to a special motion to strike is a question of law, which we review de novo. (See *Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Assn.* (2018) 19 Cal.App.5th 399, 412.) We apply that standard here.

Robin argues that, "at its core, the [ruling on the motion to quash] is a discovery order and as such, the applicable standard of review is abuse of discretion." Even if we were to apply the abuse of discretion standard, however, we would still not defer to the trial court's determination on a question of law. Although "'[t]he standard of review generally applicable to review of discovery orders is abuse of discretion'" (*Haniff v. Superior Court* (2017) 9 Cal.App.5th 191, 198), the deference we give to the trial court on a discovery motion ""'always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action. . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion.'"'" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 540). "An order that implicitly or explicitly rests on an erroneous reading of the

law necessarily is an abuse of discretion." (*Ibid.*; see also *ZL Technologies*, *supra*, 13 Cal.App.5th at p. 609 [applying the "'deferential abuse of discretion standard,'" but determining that "the trial court's exercise of its discretion" is "'a question of law in light of the pertinent legal principles'"].)[7]

B. *Nelson Made a Prima Facie Showing of Libel Based on Robin's Statements*

We begin (and end) our analysis with the "'mouth herpes' video," what Nelson calls one of the "worst of Robin's statements," and the statement about "the family gangbang on essena o'neill, a young girl." Although even facially neutral words may be defamatory (*Glassdoor*, *supra*, 9 Cal. App.5th at p. 636; *Doe 2*, *supra*, 1 Cal.App.5th at p. 1313), these statements are not facially neutral. They are libelous per se because "'a listener could understand the defamatory meaning without the necessity of knowing extrinsic explanatory matter.'" (*Yelp*, *supra*, 17 Cal.App.5th at p. 17; see § 45a; see, e.g., *Sanders*, *supra*, 219 Cal.App.4th at p. 860 [anonymous postings on the Internet were defamatory per se because they accused the plaintiff of taking an "'under the table bribe'" in exchange for "'all the construction business in Anaheim'" and lamented that "residents [of Anaheim] are tired of our tax dollars being sunk into . . . the [plaintiff's] friends and family members (sub-contractors)'"].)

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[7] We note the Courts of Appeal are not entirely uniform in stating the standard of review for orders on motions to compel or quash subpoenas seeking the identity of pseudonymous Internet commenters in defamation actions. (See, e.g., *Glassdoor*, *supra*, 9 Cal.App.5th at p. 634 [applying a "tripartite standard of review"].)

Robin argues the video alleging the VegSource diet causes mouth herpes and the doctored photographs of Nelson and his family were "pure satire." Robin stated he or she posted the video "in response" to a video Marlowe had posted "wherein [Marlowe] indicated that the type of vegan diet practiced by the subject of his video . . . is so restrictive as to give her mouth sores." According to Robin, Marlowe's video claims there is a "vegan mouth sore epidemic" and shows the subject of the video "touching her mouth, and depicts altered or photo-shopped pictures of the cracks on her mouth."

The context of Robin's video may include other statements Robin makes *in the same video*; it does not include the statements Marlowe allegedly made in a different video on a different YouTube channel. For example, in *Doe 2*, *supra*, 1 Cal.App.5th 1300 the court explained that "'the entire contents of a personal letter are considered as the context of any part of it because a recipient of the letter ordinarily reads the entire communication at one time.'" (*Id.* at p. 1313; see *San Francisco Bay Guardian, Inc. v. Superior Court* (1993) 17 Cal.App.4th 655, 660 [a letter in a "special parody section" of a newspaper was not defamatory because "[o]nly a viewer that read only the fake letter, accepted it at face value despite its unusual message, and looked at nothing else could miss the joke in this case"].) But there is no reason to believe the viewers of Robin's video had seen Marlowe's video. In fact, Robin directed people searching the Internet for information about Nelson and VegSource to Robin's "mouth herpes" video by including the terms "Jeff Nelson" and "VegSource" in the title of the video and in the meta-tags describing the video. Thus, people searching for "Jeff Nelson" or "VegSource" would not have been

directed first to Marlowe's video, but rather straight to Robin's video.

Moreover, even if the two videos had been posted on the same webpage and viewers of Robin's video had already seen Marlowe's video, Robin's argument that the average viewer would have understood Robin's video was satire is unpersuasive. Robin's declaration states that "no reasonable person" would believe the statements in Robin's video because "there is no evidence to back up the claims by Marlowe." But Robin fails to explain why the lack of evidence to support the claims in someone else's video means no one would believe the claims in Robin's video

Robin's reliance on *Krinsky* is misplaced. Robin argues, "The statements at issue in this case, specifically, the herpes comment and the comments regarding the actions of Nelson and his family, Marlowe's criminal behavior, and Nelson's affiliation with Marlowe are nearly identical to the comments at issue in *Krinsky*, . . . which the *Krinsky* court found (in an identical procedural setting . . .) to be non-defamatory." The statements in *Krinsky*, however, were general statements of opinion ("mega scum bag," "cockroach" and "boobs, losers and crooks") and a supposed "New Year's resolution" of one bank executive that he "'will reciprocate felatoin[sic] with [the plaintiff] even though she has fat thighs, a fake medical degree, "queefs" and has poor feminine hygiene.'" (*Krinsky*, *supra*, 159 Cal.App.4th at pp. 1176-1177.) The court in *Krinsky* held that "[t]he language is unquestionably vulgar and insulting, but nothing in this post suggested that the author was imparting knowledge of actual facts to the reader. The reference to a 'fake medical degree' was only the latest entry in a protracted online debate about whether

plaintiff's medical degree from Spartan Health Sciences University in the West Indies justified her use of the 'M.D.' title in company documents. No reasonable reader would have taken this post seriously; it obviously was intended as a means of ridiculing [the bank executive] and plaintiff." (*Id.* at p. 1177.) Although Robin's video was intended to ridicule Nelson, the average viewer may have believed Robin was ridiculing Nelson because he has "mouth herpes," not because, as Robin suggests, he associates with somebody who posted a different herpes-related video. Thus, "'a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion.'" (*Yelp*, *supra*, 17 Cal.App.5th at p. 16.)

Robin admits he or she posted the "family gangbang on essena o'neill, a young girl" comment.[8] According to Robin, "the word 'gangbang' was not meant in any sexual context, but rather as a 'ganging-up on,' or as the term 'gangbanger' is used for gang members who intimidate their victims in a coordinated group way." According to Robin, Nelson's adult children participated in the "online coordinated abuse and bullying" of 19-year-old Essena O'Neill. Whether Robin meant to use "gangbang" as a sexual term, however, is irrelevant to how a jury might determine the average reader understood that phrase. A reasonable trier of fact could conclude that the average reader of Robin's YouTube comment understood that statement as one alleging sexual assault. (See, e.g., *U.S. v. Rowe* (2d Cir. 2005) 414 F.3d 271, 276 ["typical postings" on child pornography chatroom included the phrase "teen gangbang"]; *K-Beech, Inc. v. John Does 1-85* (E.D.Va. Oct. 13, 2011, No. 3:11CV469-JAG) 2011 WL 10646535,

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[8] Robin claims someone else, "posing as Robin," posted the "anal fissures" comment using Robin's "identity and avatar."

at p. 1 [pornographic film was entitled "Gangbang Virgins"]; *Cervantes v. Small* (C.D.Cal. Nov. 19, 2009, No. CV 09-1539-GW (RNB)) 2009 WL 6639280, at p. 25 [the "common definition" of "a 'gang bang'" is not related to gang activity, but rather when "several men sequentially hav[e] forced sexual contact with one victim"].) Because Nelson made a prima facie showing that Robin defamed him, the trial court erred in granting Robin's motion to quash.

C. *Nelson Made a Prima Facie Showing Regarding the Statements by TZM RBE, but Not the Statements by RONS DOUBLE Ds and GISFORGARY*

The trial court decided, essentially sua sponte, that Nelson failed to make a prima facie showing the statements posted by pseudonymous commenters other than Robin were defamatory. Robin does not defend those statements (which include the statement that Nelson practices bestiality, pedophilia, and incest and that he once posted a pornographic picture of his daughter online). In fact, Robin's opposition to Nelson's writ petition argues that Robin "has no affiliation or connection whatsoever" with the other Doe defendants. The trial court nevertheless quashed those subpoenas, even though there was no motion to quash them.

The trial court may quash a subpoena on its own motion "after giving counsel notice and an opportunity to be heard." (§ 1987.1, subd. (a).) The court's written tentative ruling, which the court distributed before the first of two hearings, gave Nelson notice the court intended to quash the subpoenas related to the

other pseudonymous commenters, and the two hearings gave Nelson an opportunity to be heard.[9]

YouTube viewers could understand the statement by TZM RBE as defamatory. The statements that Nelson practices bestiality, pedophilia, and incest and that he posted a picture of his daughter's "arse cheeks as a thumb-nail on his video" are the kind of statements that expose a plaintiff """"to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided."""""" (*Dickinson*, *supra*, 17 Cal.App.5th at p. 685.) Nelson made a prima facie showing of defamation by introducing (uncontroverted) evidence that the statement was published, false, defamatory, unprivileged, and has a natural tendency to injure. (See *Sanders*, *supra*, 219 Cal.App.4th at p. 862.) On the other hand, the statements posted by RONS DOUBLE Ds (Nelson is paying people "to do his dirty work," is a "total dirt bag," and has people trolling for him) are too vague to be actionable, and the statement by GISFORGARY ("'I think Jeff fucks Charlie in the ass till he calls him daddy'") is akin to the outlandish (and not actionable) "New Year's Resolution" in *Krinsky*. (See *Sanders*, at p. 864; *Krinsky*, *supra*, 159 Cal.App.4th at p. 1177.) Therefore, the trial court did not err in quashing the subpoenas seeking information regarding those two Internet posters.

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[9] Nelson does not argue the court failed to give him the "notice and an opportunity to be heard" that section 1987.1, subdivision (a), requires. He argues only that the decision to quash the subpoenas seeking information regarding the other pseudonymous commenters "is erroneous legally, since the comments are full of false and defamatory statements of fact."

DISPOSITION

Let a peremptory writ of mandate issue directing the respondent court to vacate its order granting the motion to quash and to enter a new order denying the motion. The court should also vacate its order quashing the subpoenas seeking information regarding TZM RBE. Petitioners are to recover their costs in this proceeding.

SEGAL, J.

We concur:

PERLUSS, P. J.

BENSINGER, J. *

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.