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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BRUCE J. KELMAN et al., Plaintiffs and Respondents, v. SHARON KRAMER, Defendant and Appellant.	D047758 (Super. Ct. No. GIN044539)

APPEAL from an order of the Superior Court of San Diego County, Michael B. Orfield, Judge. Affirmed.

Sharon Kramer appeals an order denying her anti-SLAPP (strategic lawsuit against public participation) motion (Code Civ. Proc.,[1] § 425.16) to strike a complaint for libel

1 All statutory references are to the Code of Civil Procedure unless otherwise indicated.

by Bruce J. Kelman and GlobalTox, Inc. (GlobalTox).[2] She contends the trial court erred in finding Kelman and GlobalTox were likely to prevail on their libel claim. She claims she made a true statement, she acted without malice, the court applied the wrong standard, and her statement was privileged. She also contends the court erred by broadening the scope of the complaint and excluding evidence. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Kelman is a scientist with a Ph.D. in toxicology who has written, consulted, and testified on various topics, including about the toxicology of indoor mold. He is also the president of GlobalTox, which provides research and consulting services, including on toxicology, industrial hygiene, medical toxicology, and risk assessment. Kramer is "active in mold support and the pressing issue of mold causation of physical injury" after having experienced indoor mold in her own home.

In June 2004, Kelman gave a deposition in an Arizona case, *Kilian v. Equity Residential Trust* (U.S.Dist.Ct., D.Ariz., No. CIV 02-1272-PHX-FJM). During the deposition, Kelman testified about his involvement with a paper on the health risks of mold that he co-authored with two others for the American College of Occupational and Environmental Medicine (ACOEM). This paper was reviewed by his peers in the scientific community. Later he wrote a nontechnical version of the paper for the Manhattan Institute. During the deposition, Kelman, inter alia, denied including in the

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2 GlobalTox recently changed its name to VeriTox, but since GlobalTox was the name used below, we shall continue to refer to the company by that name.

Manhattan Institute version argumentative language that had been rejected during the peer review process at ACOEM and testified that if there were any sentences that had been removed from the ACOEM version that appeared in the Manhattan Institute version, they "certainly weren't very many." The following exchange then occurred:

> "Q. And that new version that you did for the Manhattan Institute, your company, GlobalTox, got paid $40,000, correct?
>
> "A. Yes. The company was paid $40,000 for it."

In February 2005, Kelman testified during a hearing in an Oregon State court case, *Haynes v. Adair Homes, Inc.*, (No. CCV0211573) (*Haynes*). The Haynes family sued a builder alleging construction defects in their home resulted in mold growing in the house and causing physical injury to Renee Haynes and the Haynes's two young children. During the hearing, Kelman testified on cross-examination about his work on the ACOEM and Manhattan Institute papers. The libel claim in the present case concerns whether Kelman testified consistently with his *Kilian* testimony about being paid by the Manhattan Institute during his testimony at the *Haynes* hearing:

> "MR. VANCE: Okay. Now, this revision of the [ACOEM paper] state --
>
> "BRUCE J. KELMAN: What revision?
>
> "MR. VANCE: The revision -- you said that you were instrumental in writing the statement, and then later on you said you and a couple other colleagues wrote a revision of that statement, isn't that true?
>
> "BRUCE J. KELMAN: No, I didn't say that.
>
> "MR. VANCE: Well --

"BRUCE J. KELMAN: To help you out I said there were revisions of the position statement that went on after we had turned in the first draft.

"MR. VANCE: And, you participated in those revisions?

"BRUCE J. KELMAN: Well, of course, as one of the authors.

"*MR. VANCE: All right. And, isn't it true that the Manhattan Institute paid GlobalTox $40,000 to make revisions in that statement?*

"BRUCE J. KELMAN: That is one of the most ridiculous statements I have ever heard.

"MR. VANCE: Well, you admitted it in the Killian [sic] deposition, sir.

"BRUCE J. KELMAN: No. I did not.

". . . . . .

"MR. VANCE: Would you read into the record the highlighted portions of that transcript, sir?

"BRUCE J. KELMAN: "And, that new version that you did for the Manhattan Institute, your company, GlobalTox got paid $40,000. Correct. Yes, the company was paid $40,000 for it.

"MR. VANCE: Thank you. So, you participated in writing the study, your company was paid very handsomely for it, and then you go out and you testify around a country legitimizing the study that you wrote. Isn't that a conflict of interest, sir?

"BRUCE J. KELMAN: Sir, that is a complete lie.

"MR. VANCE: Well, you['re] vouching for your own self [inaudible]. You write a study and you say, 'And, it's an accurate study.'

"BRUCE J. KELMAN: We were not paid for that. In fact, the sequence was in February of 2002, Dr. Brian Harden, and [inaudible] surgeon general that works with me, was asked by

American College of Occupational and Environmental Medicine to draft a position statement for consideration by the college. He contacted Dr. Andrew Saxton, who is the head of immunology at UC -- clinical immunology at UCLA and myself, because he felt he couldn't do that by himself. The position statement was published on the web in October of 2002. In April of 2003 I was contacted by the Manhattan Institute and asked to write a lay version of what we had said in the ACOEM paper -- I'm sorry, the American College of Occupational and Environmental Medicine position statement. When I was initially contacted I said, 'No.' For the amount of effort it takes to write a paper I can do another scientific publication. They then came back a few weeks later and said, "If we compensate you for your time, will you write the paper?" And, at that point I said, 'Yes, as a group.' The published version, not the web version, but the published version of the ACOEM paper came out in the Journal of Environmental and Occupational Medicine in May. And, then sometime after that, I think it was in July, this lay translation came out. They're two different papers, two different activities. The -- we would have never been contacted to do a translation of a document that had already been prepared, if it hadn't already been prepared.

"MR. VANCE: Well, your testimony just a second ago that you read into the records, you stated in that other case, you said, "Yes. GlobalTox was paid $40,000 by the Manhattan Institute to write a new version of the ACOEM paper." Isn't that true, sir? (86/57)

"BRUCE J. KELMAN: I just said, we were asked to do a lay translation, cuz the ACOEM paper is meant for physicians, and it was not accessible to the general public.

"MR. VANCE: I have no further questions." (Italics added.)

In June 2005, Kramer wrote a press release about the *Haynes* case and posted it on PRWeb, an Internet site. This press release was later also posted on another Internet site, ArriveNet. One paragraph of the press release was devoted to Kelman's testimony:

"Dr. Bruce Kelman of GlobalTox, Inc., a Washington based environmental risk management company, testified as an expert witness for the defense, as he does in mold cases throughout the country. Upon viewing documents presented by the Hayne's attorney of Kelman's prior testimony from a case in Arizona, Dr.

> Kelman *altered his under oath statements on the witness stand.* He admitted the Manhattan Institute, a national political think-tank, paid GlobalTox $40,000 to write a position paper regarding the potential health risks of toxic mold exposure. Although much medical research finds otherwise, the controversial piece claims that it is not plausible the types of illnesses experienced by the Haynes family and reported by thousands from across the U.S. could be caused by 'toxic mold' exposure in homes, schools or office buildings." (Italics added.)

Kramer's claim Kelman had "altered his under oath statements on the witness stand" focuses on Kelman's testimony about being paid by the Manhattan Institute. She claims the portion of Kelman's testimony in the *Haynes* hearing that we italicized supports the statement in her press release.

Kelman and GlobalTox sued Kramer for libel based on the statement in the press release that "Kelman altered his under oath statements on the witness stand."

Kramer brought a section 425.16 motion to strike the complaint. The court denied the motion, concluding that although Kramer had sustained her burden of showing the complaint fell within the scope of section 425.16, subdivision (e)(3) and (4), Kelman and GlobalTox had sustained their burden of showing a probability they would prevail on their libel claim. The court stated the gist of the press release statement was that Kelman committed perjury in the *Haynes* case, lied about a subject related to his profession, or "accepted a bribe from a political organization to falsify a peer-reviewed scientific research position statement." The court stated there was admissible evidence to show

Kramer's statement was false; that Kelman was clarifying his testimony under oath, rather than altering it; and to show Kramer acted with actual malice.[3]

DISCUSSION

I

Anti-Slapp Law

"Section 425.16, known as the anti-SLAPP statute, permits a court to dismiss certain types of nonmeritorious claims early in the litigation." (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.)

In determining whether a motion to strike should be granted under the anti-SLAPP statute, "[f]irst, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e).' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) Among the categories spelled out in section 425.16, subdivision (e) are: "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest" (§ 425.16, subd. (e)(3)) and an " 'act in furtherance of a person's right of petition or free

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3 Kramer asked us to take judicial notice of additional documents, including the complaint and an excerpt from Kelman's deposition in her lawsuit against her insurance company. We decline to do so as it does not appear these items were presented to the trial court.

speech under the United States or California Constitution in connection with a public issue.' " (§ 425.16, subd. (e).)

If the court finds that the defendant has made a showing that the complaint or cause of action is within the scope of the anti-SLAPP statute, the burden shifts "and the plaintiff must show a probability of prevailing on the claim." (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 45.)

"Only a cause of action that satisfies both prongs of the anti-SLAPP statute — i.e., that arises from protected speech or petitioning and lacks even minimal merit — is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten, supra,* 29 Cal.4th 82, 89, italics omitted.) On appeal we apply a de novo standard of review. (*Padres, L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 509; *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

II

Protected Activity

Here the trial court found and the parties do not dispute that Kelman's complaint fell within the scope of the anti-SLAPP statute. The statement at issue was made in the context of a press release, posted on a public Internet forum and concerned litigation about a public issue, that is, the possible health risks associated with toxic indoor mold. Kramer's statement fell within the scope of section 425.16, subdivision (e)(3) and (4): It was made in a public forum concerning an issue of public interest and was an act in furtherance of her constitutional right to free speech in connection with a public issue. Thus, Kramer met the first prong of the anti-SLAPP statute. The burden of proof then

shifted to Kelman to establish a probability of prevailing on his claim that Kramer's speech was not protected speech because it was libelous.

III

Falsity of Statement

Kramer contends "to a lay person (and anyone else who looks at the statement without an agenda) it clearly appears that Plaintiff Bruce Kelman altered his testimony under oath."[4] She asserts the statement was true, as a matter of law. We disagree. Whether the statement was true or false raises a question of fact.

To prove a cause of action for libel, an intentional tort, the plaintiff must show: a publication, in writing, that is false, defamatory and unprivileged and has a natural tendency to injure or that causes special damage to a person. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 529-530, pp. 782-783; Civ. Code, §§ 45, 46.) Truth is a complete defense to liability for defamation. (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 768-769; *Gantry Constr. Co. v. American Pipe & Constr. Co.* (1975) 49 Cal.App.3d 186, 191-192.) The truth defense requires only a showing that the substance, gist or sting of the communication or statements is true. (*Gantry Constr. Co. v. American Pipe & Constr. Co.*, at p. 194.)

The record in the *Haynes* case indicates that prior to being asked whether "the

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4 Kramer also contends GlobalTox has no standing to sue for libel because it was not defamed. We disagree. The statement at issue identified Kelman with GlobalTox and therefore, if false, the statement injured the reputations of both Kelman and GlobalTox.

Manhattan Institute paid GlobalTox $40,000 to make revisions in that statement," Kelman was being cross-examined about revisions to the ACOEM paper and stated he had participated in making revisions after turning in the first draft. In context, the question about being paid to "make revisions in that statement" was ambiguous and a reasonable jury could conclude Kelman interpreted the question as asking whether he had been paid $40,000 by the Manhattan Institute to make revisions in the ACOEM paper itself, a suggestion Kelman found offensive. A short while later, Kelman explained how the Manhattan Institute paper was an entirely separate project — the writing of a lay translation of the ACOEM paper — and he readily admitted he was paid by the Manhattan Institute to write the lay translation.

This testimony supports a conclusion Kelman did not deny he had been paid by the Manhattan Institute to write a paper, but only denied being paid by the Manhattan Institute to make revisions in the paper issued by ACOEM. He admitted being paid by the Manhattan Institute to write a lay translation. The fact that Kelman did not clarify that he received payment from the Manhattan Institute until after being confronted with the *Kilian* deposition testimony could be viewed by a reasonable jury as resulting from the poor phrasing of the question rather than from an attempt to deny payment.

In sum, Kelman and GlobalTox presented sufficient evidence to satisfy a prima facie showing the statement in the press release was false.

IV

Malice

Kramer contends the court erred in finding Kelman made a prima facie showing sufficient to support a finding by clear and convincing evidence that she acted with malice.

As Kelman concedes, he was a limited public figure[5] and therefore it was necessary for him to show not only that the statement was false but also to show by clear and convincing evidence that Kramer acted with malice. (*Colt v. Freedom Communications, Inc., supra,* 109 Cal.App.4th 1551, 1557; *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 279.) Malice exists when an individual publishes a falsehood knowing it was false or with reckless disregard for whether it was true or not. (*Sipple v. Foundation For Nat. Progress* (1999) 71 Cal.App.4th 226, 247.) The existence of actual malice turns on the defendant's subjective belief as to the truthfulness of the allegedly false statement. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 257.) A state of mind, like malice, "can seldom be proved by direct evidence. It must be inferred from objective or external circumstantial evidence." (*Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009, 1021, disapproved on other grounds in *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1065.) Relevant evidence may include the defendant's anger or

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5 "The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues." (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1577.)

hostility toward the plaintiff, a failure to investigate, and subsequent conduct by the plaintiff. (*Reader's Digest Assn. v. Superior Court*, at p. 257; *Tranchina v. Arcinas* (1947) 78 Cal.App.2d 522, 524.)

Here, Kelman's statements were made during a recorded court hearing and thus, Kramer could or did view the statements in context. A reasonable jury could conclude a simple investigation of Kelman's testimony in context would have revealed the gist of Kelman's testimony did not involve any alteration of testimony given under oath or conduct amounting to perjury.

Additionally, there was other evidence presented which could support a finding Kramer had a certain animosity against Kelman. Kelman gave an expert opinion in Kramer's lawsuit against her insurance company seeking damages caused by the presence of mold in her home. Kelman stated there did not appear to be a greatly increased level of risk of mold inside the home compared to the levels in the air outside the home. While the Kramer family eventually settled and recovered damages from the insurance company, a reasonable jury could infer that Kramer harbored some animosity toward Kelman for providing expert services to the insurance company and not supporting her position.

A jury could also infer animosity against Kelman by Kramer's conduct two months before the press release was issued. In January 2005, after learning the American Industrial Hygiene Association (AIHA) had invited GlobalTox to participate in a teleweb conference, Kramer sent two e-mails to AIHA, one asking, "What could possibly be your

justification for affiliating with the ilks [*sic*] of GlobalTox," the other containing the following paragraph:[6]

> "Why is a company that is known to provide expert insurance defense litigation being allowed to hold an online seminar for Industrial Hygienists? Is the goal of the AIHA to promote the safety of mankind as your code of ethics states? Or is the goal of the AIHA to limit financial liability for those who support your organization? Do children of industrial hygenists [*sic*] attend elementary schools? Shame on you for perpetuating this perverse situation. *May your children rot in hell*, along with all the other innocent children you are hurting." (Italics added.)

Further, in determining whether there was a prima facie showing of malice, the trial court also relied on the general tone of Kramer's declarations. These declarations reflect a person who, motivated by personally having suffered from mold problems, is crusading against toxic mold and against those individuals and organizations who, in her opinion, unjustifiably minimize the dangers of indoor mold. Although this case involves only the issue of whether the statement "Kelman altered his under oath statements on the witness stand" was false and made with malice, Kramer's declarations are full of language deriding the positions of Kelman, GlobalTox, ACOEM and the Manhattan Institute. For example, Kramer states people were "physically damaged by the ACOEM Statement itself" that the ACOEM statement "is a document of scant scientific

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6 On appeal, Kramer contends these e-mails constituted "hearsay" and therefore were not admissible evidence. Since she did not object on this basis below, she is precluded from raising this issue on appeal. (Evid. Code, § 353, subd. (a); *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1611.) In any event, the evidence was not offered to prove the truth of the matter stated so it was not subject to exclusion as hearsay.

foundation; authored by expert defense witnesses; legitimized by the inner circle of an influential medical association, whose members often times evaluate mold victims o[n] behalf of insurers and employers; and promoted by stakeholder industries for the purpose of financial gain at the expense of the lives of others."

Kramer also contends the trial court applied the wrong standard in determining whether Kelman had met his burden of making a prima facie showing of malice, pointing out that Kelman was required to make a prima facie showing that there existed *clear and convincing* evidence to support a finding of malice but the court in its tentative decision referred to the defendants having "sustained their burden of proof to establish a '*probability*' that they will prevail on their sole cause of action for Libel (per Se)" and in making its ruling at the hearing stated "there is a reasonable *probability* that the plaintiffs will prevail on their libel cause of action." (Italics added.) We find no error here. The court's application of a "probability" or "reasonable probability" standard properly reflects the standard stated in section 425.16, subdivision (b)(1). Section 425.16, subdivision (b)(1) states, that an anti-SLAPP motion should not be granted if "the court determines that the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim." (Italics added.) Encompassed within this standard in the context of this case is that there was a probability Kelman would prevail in establishing by clear and convincing evidence Kramer acted with malice.

V

Privileges

(A) Civil Code Section 47, Subdivision (c)

Kramer contends her statement was privileged under Civil Code section 47, subdivision (c), which states:

> "A privileged publication or broadcast is one made:
>
> ". . . . . .
>
> "(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law."

To support her argument, Kramer merely quotes from *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 914, which explains this privilege applies when the parties to the communication have " 'a contractual, business or similar relationship, such as "between partners, corporate officers and members of incorporated associations" or between "union members [and] union officers." ' " She states she meets this privilege

"insofar as her protected audience are those injured victims of toxic mold exposure and advocates for those victims." Kramer, however, did not send out the press release to a select few, she broadly published it on the Internet and made it available to the general public. Thus, this privilege does not apply.

(B) Civil Code Section 47, Subdivision (d)(1)

Kramer contends her press release was privileged under Civil Code section 47, subdivision (d)(1), which provides a privilege for "a fair and true report in, or a communication to, a public journal, of . . . a judicial, . . . or . . . of anything said in the course thereof . . . ." As we explained above, Kelman and GlobalTox presented admissible evidence showing Kramer's statement in the press release was neither a fair nor true report of Kelman's testimony during the *Haynes* hearing. Therefore, this privilege does not support granting her anti-SLAPP motion.

VI

Additional Allegation

Kramer contends "[t]he court created an additional aspect of the allegedly libelous statement by holding that it could be read as an allegation of bribery." She contends such a finding is unsupported by the evidence.

The trial court drew an inference that Kramer was intending to imply that the payment for the revisions was a bribe to obtain certain revisions favorable to the defense position in toxic mold litigation. However, the statement in her press release at issue here was limited to stating Kelman had altered his under oath testimony and did not refer to any particular testimony. As published, it was an allegation of perjury, not of bribery.

Nonetheless, this error does not require reversal since the trial court's ruling on the basis of perjury is well supported by the record and justified denial of the anti-SLAPP motion.

VII

Exclusion of Evidence

Kramer contends the trial court erred in sustaining the plaintiffs' objections to her declarations and exhibits on the basis of relevance, hearsay and foundation.

(A) Trial Transcript - Kelman's Testimony in the Haynes Case

Kramer argues the cites to Kelman's testimony in the *Haynes* case "are not hearsay because they constitute admissions against interest and in portions thereof prior inconsistent statements which show alterations of his under oath testimony . . . ." She provides only one example: Kelman's "change in testimony regarding the extent of his involvement in the preparation of the ACOEM statement." She neither provides any citations to the record nor further argument.

As appellant, Kramer has the burden of showing error. (See *Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.) "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.) We may ignore points that are not argued or supported by citations to authorities or the record. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

Kramer has failed to meet her burden of establishing error. She has not provided any description of the testimony she believed was improperly excluded — except for the one example — and no citations to the record or further argument to support her claim of error. We decline to sift through the record for her exhibits to see if any error might have occurred. Indeed, we are uncertain where to find her one example. We note that if the example was intended to refer to Kelman's testimony on pages 53 to 59 of the transcript of the *Haynes* transcript, there was no objection to that testimony; the objection was to Kramer's restatement of the testimony in her declaration.

(B) Prior Inconsistent Statements

Kramer contends the court erroneously excluded Kelman's "prior inconsistent e-mail on that same issue" — presumably, the extent of his involvement in preparing the ACOEM statement — because it was "an admission against interest and directly impeaches his declaration in opposition."

Again, Kramer has failed to meet her burden of showing error. We decline to wade through the record to find this e-mail or the portion of the declaration Kramer claims it somehow impeaches, to see if there was an objection to this e-mail, and to determine if there was error. Moreover, Kramer's cryptic argument fails to explain how the e-mail was material or relevant to the issues at hand, that is, whether Kelman altered his testimony about receiving payment from the Manhattan Institute or whether she acted with malice.

(C) Coconspirator Admissions

Kramer contends the court erred in excluding "[t]he e-mails of various ACOEM board members" because they were "co-conspirator admissions (with regard to the true intention o[r] purpose for its creation, use, and manner of preparation of the ACOEM statement) binding upon Kelman which also act as impeachment of his declaration regarding the true reason for the ACOEM report creation, the limited scope of defense oriented 'peer review,' and the scope of his involvement in the creation of the document." She argues various exceptions to the hearsay rule apply including state of mind (Evid. Code, § 1250), coconspirator statements (*id.*, § 1223), and admissions by a party (*id.*, § 1220).

Initially, we note this lawsuit is not about a conspiracy. This lawsuit was filed by Kelman and GlobalTox alleging one statement in a press release was libelous. Thus, conspiracy issues are not relevant.

Kramer's brief does not clearly refer to any e-mails of various ACOEM board members. Moreover, the "evidence" she details involves collateral matters, such as whether the ACOEM paper was intended to be a defense document for litigation, whether it was "peer-reviewed by 100's of physicians,", whether Kelman's interpretation of the ACOEM findings was correct, whether Kelman first heard of Kramer in 2003 or 2002, whether Kramer's e-mail to AIHA was inflammatory, whether she posted the press release to ArriveNet, and whether she had engaged in a campaign against Kelman. We fail to see how exclusion of this evidence would have changed the result, that is,

established that Kramer's statement in the press release, as a matter of law, was true and made without malice.

DISPOSITION

The order is affirmed. Kelman is awarded costs on appeal.

McCONNELL, P. J.

WE CONCUR:

McDONALD, J.

AARON, J.