

## Judge dismisses libel suit against Record-Bee

Contributed by Elizabeth Larson  
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LAKEPORT — A judge on Friday dismissed a libel suit filed by a local doctor against the Lake County Record-Bee though he faulted the newspaper for its "irresponsible" use of language.

In the course of the hearing the newspaper's attorney argued that the law allows the press "literary license" in covering the news.

In May local neurologist Dr. Camille Keene filed suit against the paper, its parent company MediaNews Group of Denver, Publisher Gary Dickson, Managing Editor Rick Kennedy and former reporter Elizabeth Wilson in response to a story published April 15 about local radio personality Eric Patrick.

In the story, Wilson reported that Keene had diagnosed Patrick with Amyotrophic lateral sclerosis — more commonly known as ALS or Lou Gehrig's disease — before further testing concluded that he instead had another disease called Dystonia.

Keene sued after the newspaper refused to retract or correct the article and remove the word "misdiagnose."

The 40-minute hearing on Friday was to determine whether or not to dismiss the case under an Anti-SLAPP (strategic lawsuit against public participation) motion, which the newspaper's San Francisco attorney, Rachel Matteo-Boehm, filed.

An anti-SLAPP motion requires a plaintiff to prove, in brief, that they have been injured and can win the case if it goes forward, as Lake County News has reported.

Appearing in court Friday were Dickson and Kennedy, along with Matteo-Boehm. Wilson, who has since taken a job in Southern California, did not appear, nor did Keene.

In court documents, managing editor Kennedy claimed to have had nothing to do with the article's creation or editing, and stated that he only discovered the newspaper was being sued after he overheard a conversation about it while standing in the line at the local Burger King. Dickson had only recently succeeded Publisher Gregg McConnell when the article was published.

Keene's attorney, John Borba of Santa Rosa, argued that the use of the words "misdiagnosis" and "misdiagnose" in the article and the headline was a "gross mistake" that led to damage to Keene's reputation in the Lake County community.

"At no time did she ever give a diagnosis or a preliminary diagnosis," said Borba.

Keene was not quoted directly in the article, nor was she contacted for it, said Borba. However, Patrick stated in the article that Keene had said to him at one point that his condition "looks like" ALS.

Visiting Judge J. Michael Byrne agreed that there was a "conflict of facts" surrounding that statement.

"This article could have been written in a professional manner," said Borba. Rather, it was written in such a way that made Keene appear incompetent. "That's what the layperson would conclude."

He said they could have called Keene to ask if she had ever rendered a statement such as the one attributed to her. Borba said Keene is a good doctor who was recruited to this area by Sutter Lakeside Hospital.

Borba also questioned the newspaper's use of medical documents to defend itself when Keene wasn't allowed to do so.

"They've already tried this woman," he said of Keene. When typing her name into Google, Borba said the article and the term "misdiagnosis" comes up.

"It has affected her business," he said. "Her business has declined. It's not something she should have to go through."

Borba argued that a person's reputation is just as important as freedom of the press.

The article, he added, "violated every notion of decency."

In her arguments, Matteo-Boehm said Keene had failed to prove her case under the anti-SLAPP statute. She argued the case also failed from another perspective; while it was styled as a defamation case, Matteo-Boehm said it appeared more like a matter of trade libel because Keene was claiming damage to her practice.

The law distinguishes between defamation and trade libel, and the requirements to meet a trade libel case are more stringent, Matteo-Boehm said.

That, Matteo-Boehm argued, meant that Keene needed to make a "prima facie" showing — one that is sufficient to raise a presumption of fact, according to legal definitions — that there was actual malice involved in the article's creation, "and there's none of that here."

In order to survive an anti-SLAPP motion to strike a libel case, the plaintiff must prove reckless disregard and knowledge of untruth, said Matteo-Boehm.

"We looked very hard at the article," she said. "It's our belief it just doesn't convey a defamatory meaning."

An important paragraph in the story — in which a University of San Francisco doctor is quoted as saying he would have thought Patrick had ALS if the tests hadn't come out the way they did — was omitted from the version of the story submitted to the court by Keene, she added. A comparison of the original story and a copy of the story included in Keene's original complaint, which was filed with a different law firm, confirms that paragraph was omitted.

Byrne said that, for him, the word "misdiagnosis" was incorrectly used in the story.

From his reading of the situation, Byrne said Keene didn't offer a diagnosis, but a "preliminary evaluation."  
"She's done the right thing, she's following up the right way," he said of Keene sending Patrick for further evaluation with a specialist. "That's not a misdiagnosis."

Byrne added that the word "misdiagnosis" should not have been used. "I think that's a substantially false statement."

Matteo-Boehm said the article lacked a defamatory meaning. "We do believe that the article is either protected opinion or substantially true."

If it's substantially true, it's not actionable, she added.

Keene hadn't met the burden of proof to show what she did or didn't do in comparison with the article's version of events, said Matteo-Boehm.

It was Patrick's conclusion, based on what Keene told him, that he had been misdiagnosed, Matteo-Boehm said.

The judge maintained his difficulty with the language used. "I don't think 'misdiagnosis' is the reverse of diagnosis," he said.

Matteo-Boehm suggested that another reason to treat the article as opinion is that people can disagree about what a misdiagnosis is.

She argued that the law recognizes the right of the press to exercise "tremendous literary license";

Previous articles the newspaper ran about Patrick's case, which stated he had been diagnosed with ALS, were not cited as a problem by Keene, Matteo-Boehm added. She again suggested it was a trade libel case, and added Keene hadn't pleaded or proved malice on the part of the newspaper.

Byrne said he saw "irresponsible use of the word 'misdiagnosis' in the article, but agreed that he didn't see signs of malice. He added that he was sure it has had dramatic effects on the doctor and her position in the community.

Borba said actual malice can't be determined by the article alone, although the work was clearly irresponsible. But he stated he believed he could prove malice if he was allowed to conduct discovery in the case, and able to depose both Wilson and Patrick. At that point, he said, he would amend his complaint to plead malice.

He maintained it was not a case of trade libel, but a matter of a person's reputation.

Byrne asked him if, by the same token, it's similarly damaging for a person to give a restaurant a bad review. Borba said it's different, because most restaurant owners don't go to school for 10 years for their profession.

"I'm from Napa County, they do down there," Byrne quipped.

Borba said the reporter and editor extrapolated in publishing the story with the word "misdiagnosis" in it. "There was a serious error in judgment made by the Record-Bee on this article." He added that the paper had given "a very poor welcome" to Keene, who was brought here to practice medicine.

Matteo-Boehm said the anti-SLAPP statute addresses the discovery Borba asked for, and allows for it. But Borba was obligated to complete discovery before the Friday hearing.

"The time for that has passed," said Matteo-Boehm.

Borba said all of the county's judges had recused themselves from the case, which made pursuing discovery difficult.

Byrne credited both attorneys with doing a good job in their arguments.

"I had a lot of trouble with the word 'misdiagnose,'" he said. "From a moral perspective, it should not have been in the article."

He said it was important to balance Keene's considerations with freedom of the press.

Byrne concluded that the article, though flawed, had demonstrated that what was said in it was substantially true overall, and that no defamation had been established. Nor were malice or trade libel established, he added.

He ended by granting the newspaper's motion to dismiss.

Matteo-Boehm said a statement of decision is required under the anti-SLAPP and she offered to prepare one. Byrne directed her to create a tentative statement of decision.

While the Record-Bee survived this suit, it's not out of the woods yet.

Next month, the paper must appear in small claims court to defend itself against a second defamation lawsuit filed by former Clear Lake Riviera Community Association board members Sid Donnell, Sandra Orchid and Alan Siegel.

The three allege that the paper's publication of a guest commentary and numerous letters about the association and their leadership — without any fact-checking — resulted in damage to their reputations. At the same time, the paper did not publish an opinion piece Donnell submitted to defend he and his fellow board members.

E-mail Elizabeth Larson at [el Larson@lakeconews.com](mailto:el Larson@lakeconews.com).

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