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Bennett v. **Ackerman**

Cal.App. 4 Dist., 2002.

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Court of Appeal, Fourth District, Division 2, California.

Jeffrey P. BENNETT, Plaintiff and Appellant,

v.

Richard D. ACKERMAN, Defendant and Respondent.

No. E030764.

(Super.Ct.No. 353806).

July 22, 2002.

City council member brought action against candidate to recover for defamation in campaign literature and on Internet. Candidate filed anti-SLAPP motion to block member's alleged strategic lawsuit against public participation. The Superior Court, Riverside County, No. 353806, Joan F. Ettinger, Temporary Judge, granted special motion to strike. Member appealed. The Court of Appeal, [Ramirez](#), P.J., held that: (1) statements that council member was a convicted embezzler and an ex-con were true; (2) campaign flyer's depiction of member behind bars, even though he was never incarcerated, was protected speech; (3) statement that member engaged in "unethical pilfering" of sales tax money to improve streets near his million dollar home was protected speech and an opinion; (4) statement that member destroyed citizen e-mail complaints was true; (5) candidate's use of a term referring to administration of council member, even though he was not mayor, was not actionable defamation; and (6) member was not entitled to depose witnesses.

Affirmed.

West Headnotes

[1] Libel and Slander 237

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k30 k. Falsity. [Most Cited Cases](#)

City council candidate's allegedly defamatory statements that council member was a convicted embezzler and an ex-con were true in light of nolo contendere plea to grand theft of charitable foundation's property while serving as executive director, even though an audit determined that no funds were mis-spent and a former county supervisor gave an opinion that the member did not misappropriate funds, even though the member never served time in jail, and even though the conviction was later dismissed; neither grand theft nor embezzlement required permanent disposal of the misappropriated property, the plea was an admission of guilt, grand theft included embezzlement, and an "ex-con" could be defined as one who had been pronounced guilty of a criminal offense. [West's Ann.Cal.Penal Code §§ 487, 1203.4.](#)

[2] Constitutional Law 92

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(F) Politics and Elections

92k1684 k. Literature and Distribution

Thereof. [Most Cited Cases](#)

(Formerly 92k90.1(5))

Libel and Slander 237

237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k35 Absolute Privilege

237k36 k. In General. [Most Cited Cases](#)

Political campaign flyer's allegedly defamatory depiction of city council member behind bars, even though he was never incarcerated following nolo contendere plea to grand theft, was protected speech by election candidate; as a whole, the picture merely depicted symbolically what it also conveyed in words, i.e., that the member had been convicted of a crime, and, thus, did not convey an impression that was un-

true. [U.S.C.A. Const.Amend. 1.](#)

[3] Constitutional Law 92 ↪2170

[92](#) Constitutional Law

[92XVIII](#) Freedom of Speech, Expression, and Press

[92XVIII\(X\)](#) Defamation

[92k2167](#) Particular Issues and Applications

[92k2170](#) k. Public Employees and Officials. [Most Cited Cases](#)

(Formerly 92k90.1(5))

Libel and Slander 237 ↪36

[237](#) Libel and Slander

[237II](#) Privileged Communications, and Malice Therein

[237k35](#) Absolute Privilege

[237k36](#) k. In General. [Most Cited Cases](#)

City council candidate's allegedly defamatory statement that council member engaged in "unethical pilfering" of sales tax money to improve streets near his million dollar home was protected speech as rhetorical hyperbole to criticize member's objectives and to express belief that member had acted unreasonably. [U.S.C.A. Const.Amend. 1.](#)

[4] Libel and Slander 237 ↪10(3)

[237](#) Libel and Slander

[237I](#) Words and Acts Actionable, and Liability Therefor

[237k10](#) Words Imputing Unfitness for or Misconduct or Criminal Acts in Office or Employment

[237k10\(3\)](#) k. Executive Officers and Employees. [Most Cited Cases](#)

City council candidate's allegedly defamatory statement that council member engaged in "unethical pilfering" of sales tax money to improve streets near his million dollar home was an opinion indicative of the speaker's disapproval of the actions of the member; the candidate's belief that the member's actions were wrongful or unethical was not a provably false statement of fact.

[5] Libel and Slander 237 ↪30

[237](#) Libel and Slander

[237I](#) Words and Acts Actionable, and Liability Therefor

[237k30](#) k. Falsity. [Most Cited Cases](#)

City council candidate's allegedly defamatory statement that council member destroyed citizen e-mail complaints was true, even if he followed city policy developed on advice of counsel; city clerk confirmed that the city's official website directed persons to send e-mail to the member's personal e-mail address, rather than an official city address, and the member admitted deleting e-mails that were sent to his personal e-mail address.

[6] Constitutional Law 92 ↪2170

[92](#) Constitutional Law

[92XVIII](#) Freedom of Speech, Expression, and Press

[92XVIII\(X\)](#) Defamation

[92k2167](#) Particular Issues and Applications

[92k2170](#) k. Public Employees and Officials. [Most Cited Cases](#)

(Formerly 92k90.1(5))

Libel and Slander 237 ↪10(3)

[237](#) Libel and Slander

[237I](#) Words and Acts Actionable, and Liability Therefor

[237k10](#) Words Imputing Unfitness for or Misconduct or Criminal Acts in Office or Employment

[237k10\(3\)](#) k. Executive Officers and Employees. [Most Cited Cases](#)

City council candidate's use of a term referring to administration of council member, even though he was not mayor, was not actionable defamation in light of the constitutional freedom provided to those who speak in the election forum to choose a somewhat exaggerated turn of phrase. [U.S.C.A. Const.Amend. 1.](#)

[7] Pretrial Procedure 307A ↪25

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery

[307AII\(A\)](#) Discovery in General

[307Ak25](#) k. Sequence and Timing; Condition of Cause. [Most Cited Cases](#)

Good cause for departing from stay of discovery until decision on city council candidate's anti-SLAPP mo-

tion to block member's alleged strategic lawsuit against public participation was not provided by member's claims that he needed to depose candidate's witnesses to enable him to determine whether to disqualify the judges, to determine whether to file a claim against county based upon the actions of its employees, and to determine whether to add additional defendants to his defamation lawsuit. [West's Ann.Cal.C.C.P. § 425.16, subd. \(g\)](#).

[8] Appeal and Error 30 ↻1043(6)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)6 Interlocutory and Preliminary Proceedings

30k1043 Interlocutory Proceedings

30k1043(6) k. Discovery and Depositions. [Most Cited Cases](#)

Any error in denying city council member's motion to depose candidate's witnesses prior to decision on candidate's anti-SLAPP motion to block member's alleged strategic lawsuit against public participation was harmless in defamation suit; the member sought the depositions on the issue of actual malice, but the result did not turn on that issue. [West's Ann.Cal.C.C.P. § 425.16](#).

APPEAL from the Superior Court of Riverside County. Joan F. Ettinger, Temporary Judge. (Pursuant to [Cal. Const., art. VI, § 21](#).) Affirmed.

Roberts & Associates and [Clifford W. Roberts, Jr.](#), for Plaintiff and Appellant.

Thompson & Colegate and [Joseph W. Naus](#), for Defendant and Respondent.

OPINION

[RAMIREZ](#), P.J.

*1 Plaintiff Jeffrey P. Bennett (Bennett) appeals from a judgment entered in favor of defendant Richard D. **Ackerman** (**Ackerman**) after the trial court granted **Ackerman's** special motion to strike pursuant to [Code of Civil Procedure section 425.16](#) ([section 425.16](#)), the anti-SLAPP statute (strategic lawsuits against public participation). Bennett sued **Ackerman** for slander and libel based upon statements that

Ackerman published, in his campaign literature and on the Internet, about Bennett while the two were competing for a seat on the city council for the City of **Corona** (the City). In response **Ackerman** invoked [section 425.16](#), which authorizes the filing of a special motion to strike when a defendant faces a cause of action arising from any act in furtherance of the right of petition or free speech under the United States or California Constitution in connection with a public issue. The trial court found that Bennett failed to establish that there was a probability that he would prevail on his claims and therefore granted **Ackerman's** motion. Bennett claims that the trial court's finding was erroneous. Bennett also challenges the trial court's denial of his second request to engage in discovery pursuant to [section 425.16 subdivision \(g\)](#). We affirm.

Facts and Procedural History

Ackerman and Bennett were candidates for a seat on **Corona's** city council in the election held on November 7, 2000. Bennett, who had been on the city council since 1992 and had been mayor twice, was running for a third consecutive term on the council. As part of the race, **Ackerman's** campaign produced a flyer that contained the following statements: "Jeffery P. Bennett [¶] *Convicted Embezzler & Disingenuous Liar* [¶] VOTE FOR ANYONE BUT THE EX-CON!!! NOVEMBER 7, 2000[¶] Mr. Bennett lied about the 91 freeway, avoids his conviction for embezzlement and benefits his own 'mansion district' with Measure A tax money. Mr. Bennett should be resigning. He shouldn't be running for a third term." (Emphasis in original.) A footnote following the term "Convicted Embezzler" read: "Mr. Bennett had his lawyers use a legal loophole to make the fact that he was convicted of this horrible crime be expunged [*sic*] from the public record. The reality is that he was successfully prosecuted for *misappropriating funds from a charity for handicapped children*." (Emphasis in original.) The flyer also depicted a man's profile with transparent vertical bars superimposed over it.

An issue in the 2000 council race was traffic congestion on the 91 freeway. On an Internet page copyrighted by his 2000 campaign, **Ackerman** stated,

“Instead of using bonds and developer fees intended for our freeways, drainage systems and roads, Bennett wrongly used them to improve the streets nearest his million dollar home. He actually took your hard earned Measure A tax dollars and spent them on his mansion ‘district.’ You need to protect your tax and bond money from unethical pilfering...”

*2 Also in connection with the 91 freeway issue, **Ackerman** discovered that citizen complaints to the City were not being retained and kept available for public review. Citizen e-mails were sent to individuals within the city government, including Bennett, and were either deleted intentionally by the recipient or were automatically deleted by the system after 90 days. **Ackerman** brought a lawsuit, which was settled when the City agreed to adopt a new retention policy consistent with the law. In his initial candidate statement, **Ackerman** said, “[w]hen the Bennett Administration was caught destroying traffic complaints, I sued City Hall and won.” In another posting on his website, **Ackerman** stated “the [C]ity was actually disposing of e-mails from citizens with complaints.” Yet another **Ackerman** Internet page contained the following statement: “... it was the Bennett Administration that had to be corrected when it was caught destroying citizen complaints about traffic.”

On January 25, 2001, Bennett filed his complaint alleging causes of action for slander and libel. He alleged that during the campaign **Ackerman** made public statements and published documents accusing him of being an embezzler and an “ex-con,” accusing him of illegally destroying public records, and of using Measure A tax money for his own benefit, none of which was true. He further alleged that **Ackerman** either knew that his statements were false when he made them or recklessly disregarded whether they were true or not, and requested punitive damages. **Ackerman** answered and filed a special motion to strike both causes of action under the provisions of [section 425.16](#). He argued that Bennett could not establish a probability of prevailing on either cause of action both because the statements were true and because even if they were not, actual malice could not be shown.

In response Bennett filed a motion seeking specified

discovery under [section 425.16, subdivision \(g\)](#), including **Ackerman's** deposition, his response to form and special interrogatories and requests for admissions, as well as the depositions of any number of persons that **Ackerman** might identify at his deposition as having heard, helped produce or discussed with him the offending statements. The trial court granted Bennett's motion, in part, requiring **Ackerman** to produce documents relevant to the issue of malice and to submit to a deposition. The hearing on **Ackerman's** motion to strike was continued to May 30, 2001.

On May 16, 2001, Bennett filed an ex parte application to continue the hearing on **Ackerman's** motion to strike in order to enable him to amend his opposition based upon information learned in **Ackerman's** deposition, to challenge a claim of privilege, to seek a change of venue and to further investigate, through additional discovery, both **Ackerman's** malicious intent and the possibility of adding additional defendants to his suit. The court granted Bennett a continuance and rescheduled the hearing on **Ackerman's** motion for July 11, 2001.

*3 On May 31, 2001, Bennett filed another ex parte application, this one seeking an order shortening time for the hearing of a second motion for specified discovery, to wit, 13 additional depositions. Bennett alleged that **Ackerman** identified the proposed deponents as persons with whom he consulted in order to ascertain the truth of the statements at issue, and the effect those statements would have on the public. The depositions were therefore necessary “to ascertain [**Ackerman's**] veracity, intent, bias, state of mind, and other matters...” **Ackerman** opposed the request on the grounds that the discovery sought contravened the purpose of the anti-SLAPP legislation, and that it was not shown to be relevant to defeating the motion to strike. The trial court denied the motion on the grounds raised in the opposition.

On June 29, 2001, Bennett filed his opposition to **Ackerman's** special motion to strike. In substance, Bennett claimed that he had demonstrated that there existed triable issues of material fact on the question of the truth of **Ackerman's** statements and on the question whether **Ackerman** had made those state-

ments maliciously. As such, he claimed to have established a prima facie case of defamation sufficient to overcome **Ackerman's** motion.

The trial court heard argument on the motion to strike on July 11, 2001. It requested additional briefing from the parties on the issue of whether Bennett had spent any time in jail, which was provided, and took the matter under submission. On August 22, 2001, the trial court filed its order and statement of decision granting **Ackerman's** motion on the grounds that the statements made were true, and/or were based upon reliable evidence, eliminating the possibility of actual malice. Judgment was entered for **Ackerman** on September 11, 2001. This appeal followed.

Discussion

A. The Trial Court Did Not Err in Granting Ackerman's Section 425.16 Motion

Section 425.16, subdivision (b)(1), provides: “A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” “To establish such a probability, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. [Citation.] Whether he has done so is a question of law, which we determine de novo.’ [Citations.]” (Rosenaur v. Scherer (2001) 88 Cal.App.4th 260, 274, 105 Cal.Rptr.2d 674 (Rosenaur).) A plaintiff must also show that “the defendant's purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.” (Wilcox v. Superior Court (1994) 27 Cal.App.4th 809, 824, 33 Cal.Rptr.2d 446 (Wilcox).)

*4 Before a plaintiff can be required to make such a showing, the defendant bears the burden of making a

prima facie showing that section 425.16 applies. (Wilcox, supra, 27 Cal.App.4th at pp. 819-820, 33 Cal.Rptr.2d 446.) From the time of his opposition Bennett has conceded that section 425.16 applies to his complaint, thus obviating the need for **Ackerman** to meet his initial burden. “It is well settled that section 425.16 applies to actions arising from statements made in political campaigns by politicians and their supporters, including statements made in campaign literature. [Citations.] ‘The right to speak on political matters is the quintessential subject of our constitutional protections of the right of free speech.’ [Citation.]” (Rosenaur, supra, 88 Cal.App.4th at pp. 273-274, 105 Cal.Rptr.2d 674.) Thus, the question before us is whether Bennett has shown that his evidence, if credited, would sustain a judgment in his favor.

“In order to satisfy due process, the burden placed on the plaintiff must be compatible with the early stage at which the motion is brought and heard (§ 425.16, subds.(f) and (g)) and the limited opportunity to conduct discovery (subd. (g)). In order to preserve the plaintiff's right to a jury trial the court's determination of the motion cannot involve a weighing of the evidence. [Citation.]” (Wilcox, supra, 27 Cal.App.4th at p. 823, 33 Cal.Rptr.2d 446.) Still, in determining whether a plaintiff has provided sufficient evidence to prevail, a court must consider not only the plaintiff's evidence, but also the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (Id. at p. 828, 33 Cal.Rptr.2d 446; § 425.16, subd. (b)(2).)

Bennett pled causes of action for slander and libel, two forms of defamation, the first oral and the second written. (Civ.Code, §§ 44, 45, 46; Joel v. Valley Surgical Center (1998) 68 Cal.App.4th 360, 372, 80 Cal.Rptr.2d 247.) In order to prevail, Bennett must prove that **Ackerman** intentionally communicated to a third person, either orally or in writing, a false, unprivileged statement about him that had a natural tendency to injure him or that caused him special damage. (Smith v. Maldonado (1999) 72 Cal.App.4th 637, 645, 85 Cal.Rptr.2d 397 (Smith).) Further, since Bennett is admittedly a public figure, he bears the burden of demonstrating, by direct, rather than implied, clear and convincing evidence, that **Acker-**

man's statements were made with actual malice. (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 950, 52 Cal.Rptr.2d 357 (*Beilenson*).)

Malice is shown by demonstrating either that the defendant knew his or her statements to be false, or that the statements were made with reckless disregard for their truth or falsity. (*Rosenaur, supra*, 88 Cal.App.4th at pp. 274-275, 105 Cal.Rptr.2d 674.) In other words, a plaintiff must show that a defendant subjectively entertained serious doubt as to the truth of the statement. (*Id.* at p. 275, 105 Cal.Rptr.2d 674.) “ ‘It is clear ... that “reckless conduct is not measured by whether a reasonably prudent [person] would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.” ‘ [Citations.]” (*Id.* at p. 277, 105 Cal.Rptr.2d 674.)

*5 Bennett's complaint focuses on three types of statements published by **Ackerman**: (1) those involving Bennett's prior criminal conviction; (2) those involving the use of Measure A tax monies; and (3) those involving the destruction of citizen e-mail complaints. **Ackerman** does not deny publishing these statements to third parties. Thus, our inquiry is focused on whether the statements are reasonably susceptible of a defamatory interpretation, including whether or not they are true, and, if so, whether or not Bennett has shown evidence from which a reasonable juror might conclude that **Ackerman** acted with actual malice.

1. Bennett's Prior Criminal Conviction

[1] In July 1981, Bennett was charged with felony violation of [Penal Code sections 487](#) and [504](#), grand theft and embezzlement, for appropriating property of the RIDE Foundation to an improper use while he was its executive director. He entered a plea of nolo contendere to a violation of [Penal Code section 487](#), grand theft. At the sentencing hearing on December 4, 1981, the offense was reduced to a misdemeanor and Bennett was sentenced to three years' probation.

Bennett argues that the statements that he is a convicted embezzler and an ex-con are false. He also claims that the average reader of **Ackerman's** flyer would conclude that he served time in prison for stealing money from a charity, which is also false. He denies that he ever took any funds from RIDE and claims that a later audit determined that no program funds had been misspent. He denies ever having been held in any jail or prison and asserts that his criminal record was expunged under [Penal Code section 1203.4](#).^{FN1}

^{FN1}. “In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, ... the defendant shall ... be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; ... and, ... the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted....” ([Pen.Code, § 1203.4, subd. \(a\)](#).)

“ ‘In all cases of alleged defamation, whether libel or slander, the truth of the offensive statements or communication is a complete defense against civil liability, regardless of bad faith or malicious purpose.’ [Citations.]” (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1180, 96 Cal.Rptr.2d 136.) “[T]he defendant need not justify the literal truth of *every word* of the allegedly defamatory matter. It is sufficient if the *substance* of the charge is proven true, irrespective of slight inaccuracy in the details, ‘so long as the imputation is substantially true so as to justify the “gist or sting” of the remark.’ [Citations.]” (*Id.* at pp. 1180-1181, 96 Cal.Rptr.2d 136, italics in original.)

As a result of Bennett's plea of nolo contendere to the accusation that he had abused his position of trust with RIDE to fraudulently appropriate its property for an improper purpose, and the resulting conviction, we conclude that **Ackerman's** statements that Bennett is

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a convicted embezzler and an ex-con are true. Thus, Bennett cannot show a probability of prevailing on either of his causes of action based upon these statements.

Bennett argues that he has shown evidence that, if accepted by the trier of fact, would negate the defense of truth. He further alleges that in order to reach the conclusion that the statements are true, a court must engage in improper weighing of the evidence. We disagree.

*6 First, Bennett claims that he was not guilty and entered a nolo plea only because he could not afford a defense. That fact, even if true, does not alter the truth of the statement that he was previously convicted of a crime. His reasons for accepting such a conviction are not relevant to determining the truth of **Ackerman's** statements. No weighing of evidence is involved. Bennett also argues that **Ackerman** accuses him of being a “convicted embezzler,” which falsely implies that he committed the offense of embezzlement, rather than accusing him of having been convicted of embezzlement. Bennett's plea is the equivalent of a guilty plea, which is a conclusive admission of guilt to every element of the offense, except that his admissions could not be used against him in any civil suit arising out of his criminal act. ([Pen.Code, § 1016](#); [People v. Lopez \(1999\) 74 Cal.App.4th 675, 680, 88 Cal.Rptr.2d 252.](#)) The fact that his plea is an admission of guilt defeats his argument.

Similarly, neither the fact that a later audit determined that no funds were misspent, nor former Riverside County Supervisor Norton Younglove's opinion that Bennett did not misappropriate funds from RIDE, based upon the results of that audit, equates with an absence of embezzlement. In addition to the fact that Bennett's plea admitted that he did in fact take property of a value exceeding \$400 from RIDE ([Pen.Code, § 487](#)), neither grand theft nor embezzlement requires that the misappropriated property be permanently disposed of by the thief/embezzler. ([People v. Hunter \(1957\) 147 Cal.App.2d 472, 475, 305 P.2d 608](#) [grand theft complete when property taken with intent to take it]; [People v. Britz \(1971\) 17 Cal.App.3d 743, 751, 95 Cal.Rptr. 303](#)

[embezzlement complete when property diverted from trust purpose].) The fact that no funds were mispent does not prove that there was no embezzlement.

Bennett also argues that he was convicted of grand theft rather than embezzlement, therefore **Ackerman's** statement is false. This argument elevates form over substance. Grand theft includes crime of embezzlement. ([People v. Britz, supra, 17 Cal.App.3d at p. 751, 95 Cal.Rptr. 303.](#)) According to the information and the complaint, the facts upon which Bennett was charged with grand theft constitute embezzlement. (*Ibid.*; [Pen.Code, § 503.](#)) Further, there is no evidence that **Ackerman's** charge that Bennett was an embezzler, rather than a thief, was made with actual malice.

The fact that Bennett's conviction was dismissed under [Penal Code section 1203.4](#) does not show the untruth of **Ackerman's** statements. “The statute does not purport to render the conviction a legal nullity.” ([People v. Frawley \(2000\) 82 Cal.App.4th 784, 791, 98 Cal.Rptr.2d 555.](#)) Nor does it “purge a defendant of the guilt established thereby.” ([Adams v. County of Sacramento \(1991\) 235 Cal.App.3d 872, 877, 1 Cal.Rptr.2d 138.](#)) It merely releases the defendant from “ ‘all penalties and disabilities resulting from the offense,’ “ subject to “numerous and substantial” limitations. ([People v. Frawley, supra, 82 Cal.App.4th at p. 791, 98 Cal.Rptr.2d 555.](#))

*7 Bennett also urges that he is not an ex-con because he presented significant evidence, by way of expert declarations, that the term implies either that he was convicted of a felony, or that he served time in prison, neither of which is true. Setting aside **Ackerman's** argument that Bennett's booking was the technical equivalent of one day's incarceration (see, e.g., [People v. Levell \(1988\) 201 Cal.App.3d 749, 754, 247 Cal.Rptr. 489.](#)), Bennett's purported definition of the term “ex-con” is overly narrow, because, as his own evidence suggests, it is not so limited. (See [Conroy v. Spitzer \(1999\) 70 Cal.App.4th 1446, 1453, 83 Cal.Rptr.2d 443](#); [Robertson v. Rodriguez \(1995\) 36 Cal.App.4th 347, 359-360, 42 Cal.Rptr.2d 464.](#)) Indeed, a survey conducted by Bennett's expert found that nearly 60 percent of the people surveyed had an alternative definition of ex-con than the one

Bennett now espouses. The term “con” is recognized as slang for “convict.” (Webster’s 3d New Internat. Dict. (1993) p. 468.) “Convict” has, as a definition, “a person pronounced guilty by a competent tribunal of a criminal offense.” (*Id.* at p. 499, 42 Cal.Rptr.2d 464.) Thus, an ex-con may be defined as one who has previously been pronounced guilty of a criminal offense. This is true of Bennett. He cannot meet his burden of demonstrating the untruth of **Ackerman’s** statement merely by offering proof of an alternative interpretation.

[2] Similarly Bennett complains that the flyer’s depiction of him behind bars gives the false impression that he has been incarcerated. We decline to accept his narrow view. Considering the flyer as a whole, the picture merely depicts symbolically what it also conveys in words, i.e., that Bennett was convicted of a crime. Thus, it does not convey an impression that is untrue. The depiction is typical of the campaign rhetoric and hyperbole that are unfortunately commonplace in American politics. As recognized by the court in *Beilenson, supra*, 44 Cal.App.4th at pp. 950-952, 954-956, 52 Cal.Rptr.2d 357, such exaggerations are protected speech, especially in the context of political campaigns, and it is the extremely rare case in which damages may be recovered. **Ackerman’s** depiction of Bennett behind bars is not so far removed from the truth that it should be included among the remarkably limited exceptions to this rule.

2. Use of Measure A Funds

Measure A is a countywide half-cent sales tax that is to be used for the construction of freeways and the maintenance and construction of local streets and roads. Bennett resides in a **Corona** neighborhood near Garretson Avenue and Chase Street, where houses exceed 4,500 square feet in size and typically cost around a million dollars. From 1996 through 2000 the city council, of which Bennett was a member, approved over \$100,000 worth of improvements on streets near his home. **Ackerman** accused Bennett of benefiting his own “mansion district” with Measure A tax money and of using Measure A tax money to improve streets nearest his million dollar home rather than using it on freeways and roads. He labeled these acts “unethical pilfering.”

*8 Bennett argues that **Ackerman** did not prove that his statements were true. This argument misses the mark. To meet his burden under [section 425.16](#), which we have already concluded he did, **Ackerman** did not have to introduce any evidence that his statements were true. Rather, in order to defeat **Ackerman’s** motion, it was up to Bennett to introduce evidence that the statement was false. (*Rosenaur, supra*, 88 Cal.App.4th at p. 274, 105 Cal.Rptr.2d 674; *Smith, supra*, 72 Cal.App.4th at p. 645, 85 Cal.Rptr.2d 397.) This Bennett failed to do. He never averred that he did not vote to improve streets in his neighborhood.

On one hand, **Ackerman** claims that his statements are opinions, and cannot therefore be the subject of a defamation suit. On the other hand, he claims that the statements are true. “First, [w]hether published material is reasonably susceptible of an interpretation which implies a provably false assertion of fact—the dispositive question in a defamation action—is a question of law for the court.” [Citation.] “That which might be a statement of fact under other circumstances may become a statement of opinion [that does not state an actual fact] when uttered in the political context .’ [Citation.]” (*Rosenaur, supra*, 88 Cal.App.4th at p. 264, 105 Cal.Rptr.2d 674.) “ [T]he dispositive question for the court is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion. [Citation.]’ [Citation.]” (*Id.* at p. 280, 105 Cal.Rptr.2d 674.) “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.]” (*Smith, supra*, 72 Cal.App.4th at p. 647, 85 Cal.Rptr.2d 397.) “ ‘Courts must be cautious lest we inhibit vigorous public debate about ... public issues. If we err, it should be on the side of allowing free-flowing discussion of current events. We must allow plenty of “breathing space” for such commentary.’ [Citation.]” (*Rosenaur, supra*, 88 Cal.App.4th at p. 280, 105 Cal.Rptr.2d 674.)

[3] Bennett claims that **Ackerman’s** statements insinuate that he illegally or unethically used Measure A tax money to his own benefit. To show that such an interpretation is not true, Bennett avers that the entire council voted on the expenditures, that he had no

control over other votes, and that he did not violate any laws or regulations governing conflicts of interest for public officials. First, we disagree with Bennett's conclusion that a reasonable person would interpret the statements to imply illegal conduct on Bennett's part. Even if they did, we would again conclude that the statements are the protected kind of rhetorical hyperbole, used to express **Ackerman's** criticism of Bennett's objectives as part of the city council, and his belief that Bennett had acted unreasonably. Much more direct accusations of criminal conduct have been held to have constitutional protection. (See [Rosenaur, supra, 88 Cal.App.4th at pp. 279-280, 105 Cal.Rptr.2d 674](#), and cases cited therein.)

*9 [4] Second, we disagree with Bennett's suggestion that this court should equate **Ackerman's** direct allegation of unethical behavior with a conflict of interest. The two are not necessarily analogous. While a conflict of interest may be a violation of the law, it has been held that a charge of unethical conduct is not an assertion that any law has been violated. ([Beilenson v. Superior Court, supra, 44 Cal.App.4th at p. 952, 52 Cal.Rptr.2d 357](#).) Rather, an accusation of unethical conduct is an opinion indicative of the speaker's disapproval of the actions of the accused. (*Ibid.*) **Ackerman's** belief that Bennett's actions concerning use of Measure A tax funds were wrongful or unethical are not provably false statements of fact. Thus, Bennett cannot show a probability of prevailing on either of his causes of action based upon these statements.

3. The Destruction of Citizen E-mail Complaints

[5] Near the end of Bennett's second term in office as a city council member, **Ackerman** discovered that the City was not retaining citizen e-mail complaints in conformity with laws regarding public records. Instead, they were either deleted directly by the recipient or were automatically deleted from the City's system after 90 days. **Ackerman** later charged the "Bennett Administration" with destroying citizen e-mail complaints about traffic.

Bennett claims that the statements were defamatory because, though referring to the "Bennett Administration," they insinuated that he either personally des-

troyed or was responsible for the destruction of public records, which is a crime. ([Gov.Code, § 6200, subd. \(b\)](#).) Even if we accept his assertion that the term "Bennett Administration" refers to him personally, a dubious proposition, facts that Bennett himself put forward demonstrate that **Ackerman's** assertion is true. In an e-mail letter dated March 6, 2001, the City Clerk confirmed that the City's official website directed persons to send e-mail to Bennett's personal e-mail address rather than an official City address. In a declaration and in his briefs on appeal, Bennett admits deleting e-mails that were sent to his personal e-mail address.

We find it telling that Bennett does not aver either that he did not destroy any citizen e-mail complaints, or that he had no hand in developing, approving or adopting the City policy. Instead he claims that the City's policy of retaining e-mail for only 90 days, over which he had no *specific* control, was implemented on advice of counsel. The fact that he merely followed City policy provides no evidence of the fact that he did not destroy citizen e-mail complaints, nor does the fact that the City policy was developed with the advice of legal counsel. Likewise, neither fact demonstrates that he did not participate in establishing City policy in any way.

[6] Bennett also claims that the statements are false because he was not mayor at the time of **Ackerman's** discovery, and therefore there was no "Bennett Administration." Especially in light of the discussion above, we find this argument ineffective. Certainly the City administration that was not retaining citizen e-mail complaints was one of which Bennett was a part. In light of the constitutional freedom provided those who speak in the election forum to choose a somewhat exaggerated turn of phrase, **Ackerman's** use of the term "Bennett Administration" is not actionable defamation. ([Rosenaur, supra, 88 Cal.App.4th at p. 265, 105 Cal.Rptr.2d 674](#).) Bennett has failed to present any evidence showing that **Ackerman's** statements were false. As such he has failed to show a probability of prevailing on either of his causes of action based upon these statements.

*10 As a consequence of these conclusions, we need not consider the issue of **Ackerman's** actual malice.

It would have no bearing on the outcome of this appeal. Bennett having failed to demonstrate a probability of prevailing on either his libel or slander cause of action with respect to any of the allegedly offending statements/publications, the trial court did not err in granting **Ackerman's** motion under [section 425.16](#).

B. The Trial Court Did Not Abuse Its Discretion in Denying Additional Discovery

[Section 425.16, subdivision \(g\)](#) provides that when an anti-SLAPP motion is filed, “[a]ll discovery proceedings in the action shall be stayed.... The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.” Bennett claims that the trial court erred when it denied his second motion under this subdivision, in which he sought to depose 13 witnesses that **Ackerman** had identified.

Whether a plaintiff has complied with the requirements of [section 425.16 subdivision \(g\)](#), so as to merit discovery prior to a hearing on the motion to strike, is a question within the sound discretion of the trial court. (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 838, 284 Cal.Rptr. 839 [statute's use of “may” denotes trial court discretion]; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 868, 44 Cal.Rptr.2d 46.) We therefore review the trial court's decision for an abuse of that discretion. “Under this standard the reviewing court will not disturb the trial court's decision unless it ‘has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination.’ [Citation.] The Court of Appeal will only interfere with the trial court's exercise of discretion when it finds under all the circumstances, viewed most favorably in support of the trial court's action, no judge could have reasonably reached the same result. [Citation.]” (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 301, 96 Cal.Rptr.2d 605.)

[7] The burden upon the plaintiff is to demonstrate good cause in light of the requirements of due process and the purposes behind [section 425.16](#). Ini-

tially, we will dispose of three grounds that Bennett gave for taking the depositions: (1) to enable him to determine whether to disqualify the judges of the trial court; (2) to determine whether to file a claim against the County of Riverside based upon the actions of its employees; and (3) to determine whether to add additional defendants to his lawsuit. None of these reasons have anything to do with enabling Bennett to gain information that would assist him in making a prima facie case of defamation against **Ackerman**. Thus, they do not constitute good cause for departing from the rule staying discovery and form no basis for the granting of the motion.

*11 Bennett also stated that his due process rights required that he be authorized to take the depositions of 13 individuals that **Ackerman** identified in his deposition as having consulted regarding the allegedly defamatory statements. He explained that **Ackerman** used his reliance on information obtained from these proposed deponents to support his claim to have acted without malice. Specifically, Bennett asserted, “Plaintiff needs to take the depositions of these persons **Ackerman** allegedly relied on, to ascertain his veracity, intent, bias, state of mind, and other matters, so that he can present admissible evidence to defend the pending anti-SLAPP motion.” The pages of **Ackerman's** deposition wherein the proposed deponents were identified were provided to the trial court. At the hearing, Bennett argued that he was entitled to ask the proposed deponents whether they indeed discussed the subject statements with **Ackerman** because if they answered negatively, it would aid him in proving malice.

From the information provided in **Ackerman's** deposition, it is conceivable that the majority of the persons that Bennett sought to depose could potentially have provided him with evidence that he might have used to oppose **Ackerman's** motion on the issue of malice. This fact raises a difficult question regarding where a trial court must draw the line in attempting to achieve a balance between a plaintiff's right to due process and a defendant's right to enforce the purposes of the anti-SLAPP statute, which is to enable the defendant to end the lawsuit as quickly and inexpensively as possible. (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073, 112 Cal.Rptr.2d

[397.](#)) However, in this case we need not grapple with that question.

[\[8\]](#) Even were we to conclude that the trial court erred in refusing some or all of the depositions, we hold that such error would be harmless. ([Cal. Const., art. VI, § 13.](#)) “When the error is one of state law only, it generally does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. [Citation.]” ([Soule v. General Motors Corp. \(1994\) 8 Cal.4th 548, 574, 34 Cal.Rptr.2d 607, 882 P.2d 298.](#)) The result in this appeal does not turn on the issue of actual malice. Therefore, any information that Bennett may have obtained from the witnesses that he proposed to depose would not have made any difference in the ultimate outcome of this matter. No miscarriage of justice having occurred, no reversal is merited.

C. Ackerman's Request For Attorney Fees on Appeal

Ackerman argues that he is entitled to an award of attorney fees on appeal based upon provisions in [section 425.16, subdivision \(c\)](#). He cites [Rosenaur, supra, 88 Cal.App.4th 260, 105 Cal.Rptr.2d 674](#), for the proposition that a provision for attorney fees need not specify that it applies to fees on appeal in order that the prevailing party should be entitled to them. ([Id. at p. 287, 105 Cal.Rptr.2d 674.](#)) While that is true, the court in [Security Pacific National Bank v. Adamo \(1983\) 142 Cal.App.3d 492, 191 Cal.Rptr. 134](#) recognized that though the appellate court may fix attorney fees on appeal, it is the better practice to have the trial court determine the right to attorney fees at the time it determines costs on appeal. ([Id. at p. 498, 191 Cal.Rptr. 134.](#)) We will adhere to that wisdom and allow the trial court to exercise its discretion with respect to an award for attorney fees on appeal, upon proper application by **Ackerman**.

Disposition

***12** The judgment is affirmed. Defendant to recover his costs on appeal.

We concur: [McKINSTER](#) and [RICHLI](#), JJ.

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Not Reported in Cal.Rptr.2d, 2002 WL 1609050
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