

## Registered Sex Offenders: Safe to Say it Out Loud!

By: Mary M. Howell, Esq.

A frequent scenario in a community association law office is that of a board member or manager calling an attorney to say, “We’ve just found out a sex offender lives in the project! Can we warn everyone?” Until the recent decision in *Cross v. Cooper*, the answer was, “Maybe, but there’s no protection if someone misuses the information.” Now, it’s a lot safer to publish that information to community residents.

In the *Cross* case, Ms. Cross owned a house which she rented to the defendants. She wanted to sell that house. A registered sex offender lived across the street. About those 3 things, everyone agrees. After that, the stories diverge wildly. Ms. Cross claimed that the Coopers threatened to disrupt her proposed sale unless she forgave a certain sum of rent; the Coopers claimed they had a moral, if not legal, duty to disclose the information to potential purchasers. Indeed, Mr. Cooper admitted he had told at least one real estate agent about the sex offender. Ms. Cross claimed that she had made the required disclosure about the Megan’s Law website (an official compilation of registered sex offenders) in her sales offer, and further, that she did not consider the particular registrant to be a threat, in that he appeared to be stable, the conviction having occurred a long time ago, without subsequent arrests.

After the sale fell through, allegedly because the Coopers notified the police and disclosed to a buyer the sex offender’s location, Ms. Cross sued the Coopers. The Coopers defended by filing a special motion to strike the complaint, called an “anti-SLAPP” motion.<sup>1</sup> Cross argued that the Coopers’ disclosure was not Constitutionally-protected fee speech, but rather, was made with the intent to extort money from her. The trial court denied the anti-SLAPP motion, but on appeal, the court sided with the defendants.

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<sup>1</sup> “SLAPP” stands for “strategic lawsuit against public participation.” As will be discussed below, the motion allows for early termination of proceedings filed which have the effect of chilling a defendant’s constitutional rights to free speech and petition.

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An “anti-SLAPP” motion requires the moving defendant to demonstrate that the basis of a plaintiff’s complaint is the defendant’s exercise of free speech rights. Constitutionally protected speech is defined by the statute in various ways, including testimony before official bodies, and, as relates to this case, a speech made to the public in connection with a matter of public interest.”

The trial court in denying the motion relied on the fact that the Coopers did not make the statements other than to a small part of the public, and by implication, concluded that it was not a matter of “public” interest.

The district court sharply disagreed: “[Previous cases] demonstrate the obvious: preventing child sexual abuse and protecting children from sexual predators are issues of widespread public interest. Thus, insofar as Cooper’s disclosure served those interests by alerting prospective buyers of the potential risk to children posed by a registered sex offender who lived nearby, his conduct involved a private communication directly related to an issue of considerable interest to the general public and qualify for anti-SLAPP protection.” Moreover, even if the conversation was a private one of limited interest to only those living in or moving into the neighborhood, it would nevertheless qualify for anti-SLAPP protection, because the duty to register and disclose constitutes an ongoing dialogue between the registrant and the public, it is a matter of ongoing public concern.

The court rejected Ms. Cross’s argument that the Coopers’ speech amounted to an illegal act (viz., extortion). The court felt she had not demonstrated the elements of the crime of extortion in her motion papers, because what the Coopers’ threatened to “disclose” was not a secret. The fact that the Coopers may have harbored an intent not to benefit the public, but to achieve personal gain, still did not remove them from the protection of the anti-SLAPP statute.

#### LESSONS LEARNED:

One of the biggest threats to a community association in sharing information regarding sex offenders within the community is the possibility that the California statute does not provide specific immunities for disclosure by private parties. In the aftermath of *Cross*, it will be difficult for a sex offender to successfully prosecute a case for invasion of privacy or similar actions. Nevertheless, be cautious: always check and double-check to make sure the information is both current and correct. Make sure you take precautions to assure that the information is disseminated, so far as reasonably possible, only to members of the association. Finally, check with your insurance providers to make sure that a defense to any claim will be funded by the carrier: *Cross* tells us that a defendant association can successfully petition the court to dismiss a case, but getting to that point still costs money.