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Appellate Reports

HOW *BERK V. CHOY* VALIDATES 25 YEARS OF NINTH CIRCUIT DISSENTS

When the Supreme Court decided *Berk v. Choy* (2026) ___ U.S. ___ [2026 WL 135974] in January 2026, it resolved a narrow question: Whether Delaware’s affidavit-of-merit requirement for medical-malpractice suits applies in federal court. The Court held that it does not, because Federal Rule of Civil Procedure 8 “answers the disputed question” of what information a plaintiff must provide about the merits of a claim at the outset of litigation.

On reading the opinion, it struck me that the Court’s analysis would seem to apply with equal force to California’s anti-SLAPP statute. If federal courts cannot apply Delaware’s requirement that, to avoid dismissal, a medical-malpractice plaintiff must submit an expert affidavit alongside the complaint, how can they apply California’s anti-SLAPP statute, which requires plaintiffs to show a probability of success on the merits to avoid dismissal?

My thesis is straightforward: The reasoning in *Berk* applies with equal force to California’s anti-SLAPP statute, and when the issue next arises, courts should hold that the statute does not apply in federal court. Indeed, Judge Daniel Bress’s concurrence in *Gopher Media LLC v. Melone* (9th Cir. 2025) 154 F.4th 696, filed just three months before *Berk* was decided, already made precisely this case – applying the same analytical framework the Supreme Court would adopt in *Berk*.

***Berk v. Choy*: The correct analytical framework**

Berk arose from a medical-malpractice suit filed in federal court. Delaware requires that a medical-malpractice complaint be “accompanied by” an affidavit from a medical professional attesting to the suit’s merit. The plaintiff failed to

provide such an affidavit. The district court dismissed his lawsuit, and the Third Circuit affirmed, applying *Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64, to conclude that Delaware’s affidavit requirement applied in federal court.

The Supreme Court reversed. Justice Barrett’s opinion makes clear that when a Federal Rule of Civil Procedure is “on point,” the *Erie* analysis is bypassed altogether. A valid Federal Rule “displaces contrary state law even if the state law would qualify as substantive under *Erie*’s test.” (*Berk*, *supra*, 2026 WL 135974, at *3, citing *Hanna v. Plumer* (1965) 380 U.S. 460, 469–474.)

The analysis is “straightforward.” (*Berk*, at *3.) First, the court asks whether the Federal Rule “answers the question in dispute.” (*Ibid.*, citing *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* (2010) 559 U.S. 393, 398.) If it does, the Rule governs – unless it “exceeds statutory authorization or Congress’s rulemaking power.” (*Ibid.*) That’s it. No balancing of state and federal interests. No inquiry into whether failing to apply the state law would encourage forum shopping.

Nor would it be a promising avenue to challenge a federal rule as invalid. The test for whether a rule is valid is “modest.” (*Berk*, at *6.) In essence, the test is simply whether the rule “really regulates procedure.” (*Id.*, citing *Sibbach v. Wilson & Co.* (1941) 312 U.S. 1, 14.) “Or put differently, what matters is what the Rule itself regulates: If it governs only ‘the manner and the means’ by which the litigants’ rights are ‘enforced,’ it is valid.” (*Berk*, at *6, citing *Shady Grove*, 559 U.S. at 407, emphasis in original.) The Court has thus far “rejected every statutory challenge to a Federal Rule that has come before us.” (*Ibid.*)

Justice Barrett identified “the disputed question” as “whether *Berk*’s lawsuit

may be dismissed because his complaint was not accompanied by an expert affidavit.” (*Id.* at *3.) Rule 8 “gives the answer”: a plaintiff must provide “a short and plain statement of the claim.” (*Ibid.*) By requiring no more than a statement, Rule 8 establishes “implicitly, but with unmisstakable clarity” that evidence of the claim is *not* required. (*Ibid.*)

Critically, *Berk* forecloses the argument that state laws serving “substantive” purposes warrant deference. Justice Barrett is emphatic: “the substantive nature of [a state] law, or its substantive purpose, makes no difference.” (*Id.* at *6, emphasis added.)

The Court also rejected the defendants’ attempt to “rewrite” Delaware’s law to avoid conflict with the Federal Rules. The defendants argued the affidavit requirement could be enforced as a “free-floating evidentiary requirement” separate from the pleading rules. The Court rejected this as unworkable: “That defendants cannot fit the affidavit requirement into the Federal Rules illustrates that it has no place there.” (*Berk*, at *5.)

California’s anti-SLAPP statute and its four pillars

California enacted its anti-SLAPP statute in 1992 to combat what the Legislature believed was “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” (Code Civ. Proc., § 425.16, subd. (a).) The statute’s purpose is to provide a mechanism for the early termination of meritless claims targeting protected speech and petition activity.

To achieve this purpose, the Legislature constructed the statute on four structural pillars that work together as an

integrated structure. *First*, early timing: Anti-SLAPP motions must be filed within 60 days of service of the complaint. (§ 425.16, subd. (f).) *Second*, an automatic stay of discovery, protecting defendants from litigation burdens while the motion is pending. (§ 425.16, subd. (g).) *Third*, a heightened standard requiring the plaintiff to demonstrate a “probability” of prevailing – more demanding than ordinary pleading standards. (§ 425.16, subd. (b)(1).) *Fourth*, immediate appellate review of denials, allowing defendants to obtain appellate correction before being forced to litigate through trial. (§ 425.16, subd. (i).) If the defendant prevails, the statute mandates an award of attorney’s fees. (§ 425.16, subd. (c)(1).)

Newsham and its progeny

In 1999, the Ninth Circuit held in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.* (9th Cir. 1999) 190 F.3d 963, that California’s anti-SLAPP statute could be applied in federal diversity cases. The court began by asking “whether such an application would result in a ‘direct collision’ with the Federal Rules.” (*Id.* at p. 972.) Finding no such collision – reasoning that the anti-SLAPP statute and Federal Rules 12 and 56 could “exist side by side ... each controlling its own intended sphere of coverage without conflict” – the court proceeded to make “the typical, relatively unguided *Erie* choice.” (*Id.* at pp. 972–973.)

Applying the “twin aims” of the *Erie* doctrine – discouraging forum shopping and avoiding inequitable administration of the law – the court concluded that California’s interests favored applying the statute. The court emphasized California’s substantive interest in protecting speech, and warned that “if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum.” (*Id.* at p. 973.)

But almost immediately, the Ninth Circuit began discovering that the stat-

ute’s four pillars conflicted with various federal rules and statutes. As a result, the court started to effectively revise the statute when applied in federal court. In *Metabolife International, Inc. v. Wornick* (9th Cir. 2001) 264 F.3d 832, the court held that the automatic discovery stay conflicted with Rule 56’s requirement that adequate discovery occur before summary judgment. As Chief Judge Kozinski later observed, this “crippled the anti-SLAPP statute” by subjecting defendants to the usual rigors of federal discovery. (*Makaeff v. Trump University, LLC* (9th Cir. 2013) 715 F.3d 254, 274 (Kozinski, C.J., concurring).)

The retreat continued. In *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891, the 60-day timing rule fell. In *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress* (9th Cir. 2018) 890 F.3d 828, the heightened “probability” standard was replaced with ordinary Rule 12(b)(6) and Rule 56 standards – eviscerating the distinctive burden-shifting framework that gave anti-SLAPP motions their teeth. And in *Gopher Media LLC v. Melone* (9th Cir. 2025) 154 F.4th 696, the en banc court eliminated interlocutory appeals by overruling *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, which had allowed them.

After 25 years of judicial surgery, all four pillars had fallen. What remained was, as Judge Paez put it, “a hybrid mess that now resembles neither the Federal Rules nor the original state statute.” (*Makaeff, supra*, 715 F.3d at p. 275 (Paez, J., concurring).)

The Bress concurrence: Berk before Berk

Judge Bress’s concurrence in *Gopher Media*, joined by Judges Collins, Lee, and Bumatay, argued that the Ninth Circuit should have gone beyond its evaluation of whether federal law allowed the type of interlocutory appeal allowed by the anti-SLAPP statute and categorically held that the statute does not apply in federal court at all. His analysis was virtually identical to the framework the Supreme

Court would apply in *Berk* three months later.

Like *Berk*, Judge Bress framed the inquiry as whether the Federal Rules and the state law “answer the same question.” Citing then-Judge Kavanaugh’s opinion in *Abbas v. Foreign Policy Group, LLC* (D.C. Cir. 2015) 783 F.3d 1328, he concluded that “Rules 12 and 56 ‘answer the same question’ about the circumstances under which a court must dismiss a case before trial.” (*Gopher Media, supra*, 154 F.4th at p. 715 (Bress, J., concurring in judgment).) The anti-SLAPP statute, he reasoned, “conflict[s] with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial.” (*Ibid.*)

Like *Berk*, Judge Bress rejected the argument that the anti-SLAPP statute’s substantive purposes warranted special treatment. “It proves nothing to observe that California’s anti-SLAPP statute promotes substantive interests,” he wrote. “All procedural rules can be said to do that in some way or another.” (*Id.* at p. 719.) He noted that the California Supreme Court itself had described the anti-SLAPP statute as “a procedural device.” (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 198.)

And like *Berk*, Judge Bress criticized the effort to “rewrite” the state law to avoid conflicts with federal procedure. The Ninth Circuit had created “a hybrid procedure where neither the Federal Rules nor the state anti-SLAPP statute operate as designed.” (*Id.* at p. 713.) There was, he concluded, “no license” for this approach. (*Id.* at p. 721.)

Judge Bress observed that the Second, Fifth, Tenth, Eleventh, and D.C. Circuits had all concluded that state anti-SLAPP statutes do not apply in federal court. (See *La Liberté v. Reid* (2d Cir. 2020) 966 F.3d 79; *Klocke v. Watson* (5th Cir. 2019) 936 F.3d 240; *Los Lobos Renewable Power, LLC v. Americulture, Inc.* (10th Cir. 2018) 885 F.3d 659; *Carbone v. Cable News Network, Inc.* (11th Cir. 2018) 910 F.3d 1345; *Abbas, supra*, 783 F.3d 1328.) The Ninth Circuit, he noted, stood virtually alone.

Why *Newsham* cannot survive *Berk*

The parallels between *Berk* and Judge Bress's analysis are not merely striking – they reveal that *Newsham*'s analytical framework is fundamentally incompatible with the Supreme Court's approach in *Berk*.

Newsham asked whether there was a “direct collision” between the anti-SLAPP statute and the Federal Rules; *Berk* doesn't use that framework at all. *Newsham* proceeded to make “the typical, relatively unguided *Erie* choice”; *Berk* holds that when a Federal Rule answers the disputed question, it bypasses *Erie* entirely. *Newsham* emphasized California's substantive interest in protecting speech; *Berk* says the substantive nature or purpose of the state law “makes no difference.” *Newsham* worried about forum shopping; *Berk* (via *Shady Grove*) treats procedural forum shopping as “the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure.” (*Shady Grove*, *supra*, 559 U.S. at p. 416 (plur. opn.).)

It is difficult to identify any load-bearing beam in *Newsham*'s analytical structure that *Berk* does not knock out. The reasoning relied on in *Newsham* is not merely “in tension” with *Berk* – it is fundamentally incompatible with it.

The path forward: Arguing that *Berk* abrogates *Newsham*

This raises a practical question: Must litigants wait for the Ninth Circuit to formally overrule *Newsham*, or can a district court hold that *Berk* has already done so?

The answer lies in *Miller v. Gammie* (9th Cir. 2003) 335 F.3d 889 (en banc). There, the Ninth Circuit held that both district courts and three-judge panels may decline to follow circuit precedent when “the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.” (*Id.* at p. 893.) Importantly, “the issues decided by the higher court need not be identical to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are

clearly irreconcilable.” (*Id.* at p. 900.)

Berk did not involve an anti-SLAPP statute. But under *Miller v. Gammie*, that doesn't matter. What matters is whether *Berk*'s reasoning undercuts *Newsham*'s reasoning “in such a way that the cases are clearly irreconcilable.” They are. *Newsham* employed exactly the kind of analysis that *Berk* says is wrong.

Judge Bress's concurrence in *Gopher Media* did all the analytical work necessary to satisfy the *Miller v. Gammie* standard. It demonstrated, point by point, that the anti-SLAPP statute cannot survive the “answers the same question” framework that *Berk* applies. A district court considering whether *Berk* abrogates *Newsham* need only read the Bress concurrence alongside *Berk* to see that the conclusion is inescapable.

Accordingly, a plaintiff in federal court who draws an anti-SLAPP motion should argue that *Berk* requires that the motion be denied because an anti-SLAPP motion is simply not cognizable in federal court. The defendant remains free, of course, to file appropriate motions under Rule 12 or Rule 56 – but those are motions governed entirely by federal procedure, without the anti-SLAPP label and without fee-shifting.

Forum shopping in perspective

If *Berk* means the anti-SLAPP statute doesn't apply in federal court, the forum-shopping calculus that *Newsham* relied upon inverts: plaintiffs facing potential anti-SLAPP motions will prefer federal court, while defendants wanting the anti-SLAPP weapon will prefer state court.

But this concern should not be overstated. The Ninth Circuit's own decisions had already substantially eroded *Newsham*'s forum-shopping rationale. By the time *Gopher Media* was decided, the federal anti-SLAPP motion was already, as Chief Judge Kozinski put it, “a far different (and tamer) animal than its state-court cousin.” (*Makaeff*, *supra*, 715 F.3d at p. 275 (Kozinski, C.J., concurring).) The main additional effect of holding the statute entirely inapplicable would be to eliminate fee-shifting – which matters, but is not the dramatic shift *Newsham* envisioned when all four pillars were still standing.

More broadly, *Erie* was principally concerned with preventing forum shopping on *substantive* law – ensuring that a plaintiff could not obtain a different rule of decision on the merits simply by choosing federal court. The Supreme Court has never held that federal courts must eliminate all procedural differences that might influence forum selection. Some such differences are inevitable, and forum shopping based on those differences is an inevitable byproduct. As Justice Scalia observed, such forum shopping “is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure.” (*Shady Grove*, *supra*, 559 U.S. at p. 416 (plur. opn.).)

Conclusion

For 25 years, the Ninth Circuit has struggled to reconcile California's anti-SLAPP statute with federal procedure, gradually revising the statute to avoid conflicts with the FRCP and statutes governing appellate jurisdiction. What remains is a fee-shifting remedy attached to a statute that no longer exists in any recognizable form.

Berk v. Choy provides the analytical clarity that has long been missing. The question is straightforward: Do Rules 12 and 56 “answer the same question” as the anti-SLAPP statute? The answer, as Judge Bress explained and every other circuit has recognized, is yes. Under *Berk*, the Federal Rules govern. And under *Miller v. Gammie*, litigants need not wait for the Ninth Circuit to formally overrule *Newsham*. District courts can – and should – recognize that *Berk* has already done so.



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