SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 06-06-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV414441 Motion: Quash	Martha Hale vs Belmont Village, L.P. et al	Off Calendar
LINE 2	23CV428101 Motion: Strike	Walter Eugene Neal, Jr. vs Sandra Copas et al	See Tentative Ruling. Court will issue the final order.
LINE 3	20CV367835 Motion: Summary Judgment/Adjudication	Jeff Stevens vs The Board of Trustees of the Leland Stanford Junior University	Off Calendar (Settled)
LINE 4	21CV383578 Motion: Summary Judgment/Adjudication	Dorothy Bolin vs Matthew Levy, MD et al	See Tentative Ruling. Defendant shall submit the final order.

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LINE 5	21CV390116 Motion: Compel	RREF II Bridgepointe, LLC vs Thomas Anthony et al	Defendant Happily Ever After ("Defendant") brings a motion to compel the deposition of Plaintiff's PMQ. While Defendant could have behaved in a more professional manner and the parties should have engaged in meaningful meet and confer efforts to avoid this motion, the facts remain that Plaintiff failed to timely object to the place of the deposition, failed to timely respond to Defendant's request for a mutually agreeable time, and failed to follow the procedural rules of the CCP in terms of making objections to the scope of documents requested. As such, Defendant's motion to compel is GRANTED and Plaintiff is ordered to appear for deposition within 30 days of the hearing date, unless the parties mutually agree to a different date. The deposition shall take place at a location as described in CCP § 2025.250, as there has been no motion under § 2025.260. Plaintiff must pay sanctions to counsel for Defendant in the amount of $1,425 within 10 days of the final order, as its objections are not substantially justified. Defendant shall submit the final order within 10 days.

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Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 6	22CV395492 Motion: Compel	Bayard Chapin vs Linda Arciaga et al	Notice appearing proper and good cause appearing, Plaintiff's unopposed motion to compel Defendant Edricboylynn Residential Care Home to respond to FI, set one, and RFP, set one is GRANTED. Defendant shall provide verified code-compliant responses without objection within 20 days of the final order. Defendant shall pay sanctions of $662.87 to Plaintiff within 20 days of the final order. Plaintiff shall submit the final order within 10 days.
LINE 7	23CV424997 Motion for appointment of counsel		See Tentative Ruling. Court will issue the final order.
LINE 8	24CV429843 Motion to Withdraw as Counsel		The opposed motion to withdraw by Plaintiff's counsel Eric Sakai is GRANTED. Moving counsel shall submit the final order to be effective upon service of the order.
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

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LINE 14			
LINE 15			
LINE 16			
LINE 17			

- oo0oo -

Calendar Line 2
Case Name: *Neal v. Copas, et al.*
Case No.: 23CV428101

Before this Court is a Special Motion to Strike to Walter Eugene Neal, Jr.'s ("Plaintiff") Complaint by Sandra Copas and Bryan Copas. (collectively, "the Copas" or "Defendants.")

I. Background

A. Factual

This is an action for defamation, abuse of process, malicious prosecution, and other related claims.

According to the Complaint, Defendants are husband and wife. (Complaint, ¶ 10.) The wife, Sandra Copas, is Plaintiff's younger sibling. (*Ibid*.) Plaintiff's action stems from Sandra Copas' volatile relationship with both Plaintiff and their mother, Keiko Neil ("Mother,") an 89-year-old widow and a "Hiroshima survivor." (Complaint, ¶ 11.) Plaintiff claims he is a real estate developer "with an excellent business reputation," and Defendants procured money from Plaintiff via "nefarious means," resulting in Plaintiff's financial and emotional injury. (Complaint, ¶¶ 12, 14.) Plaintiff further asserts that Mother was victim to intimidation, elder abuse, and extortion, at the hands of Defendants. (Complaint, ¶¶ 14, 20) Consequently, Plaintiff involved law enforcement to "restore the peace," and ultimately relocated "to a secure New York property" with Mother to avoid further harm, financial or otherwise, by Defendants. (Complaint, ¶¶ 22, 27.) Plaintiff filed a domestic violence lawsuit[1] against his sister, Sandra Copas, on behalf of Mother. (Complaint, ¶ 30.) In turn, Defendants filed a petition[2] for a restraining order against Plaintiff. (Complaint, ¶ 32.)

Plaintiff's Complaint arises from statements that Defendant Sandra Copas made during the course of the domestic violence restraining order ("DVRO") filed by Defendant against Plaintiff. (Complaint, ¶¶ 32, 35, 44.) Sandra Copas prepared various YouTube videos and filed documents (containing YouTube video links) with the court in support of her petition. (Complaint, ¶¶ 45-47.) The videos demonstrated the "nature and extent of the alleged harassment and fear" that Defendant Sandra Copas experienced at the hands of Plaintiff. (Complaint, ¶¶ 45-47.)

B. Procedural

Plaintiff filed the operative Complaint on December 21, 2023, asserting the following causes of action:

(1) malicious prosecution;
(2) defamation;
(3) abuse of process;

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[1] See Case No. 20DV000054, entitled *Keiko Neal v. Sandra Day Copas*

[2] See Case No. 19DV001008, entitled *Sandra Kay Copas v. Walter Eugene Neal, Jr.*

(4) interference with business relationships: negligence and/or intentional;
(5) infliction of emotional distress: negligence and intentional ("IIED" and/or "NIED");
(6) declaratory relief and determination of aider and abettor liability;
(7) declaratory relief and determination of conspiracy liability;
(8) injunctive relief; and
(9) negligence

On February 1, 2024, Defendants filed a cross-complaint against Roes 1-30, inclusive, alleging: (1) comparative negligence; (2) equitable indemnity; (3) contribution; and (4) declaratory relief. On March 6, 2024, Defendants filed an amended special motion to strike Plaintiff's Complaint, in its entirety, or alternatively, motion to strike all nine causes of action (Code Civ. Proc., § 425.16). Plaintiff opposed the motion on May 23, 2024. On May 30, 2024, Defendants filed a reply.

II. Special Motion to Strike the Complaint

Defendants move to strike (Code Civ. Proc., § 425.16) all nine causes of action in the Complaint on the following grounds: 1) each claim arises from protected activity; 2) Plaintiff will be unable to demonstrate a probability of success on the merits; and 3) even if Plaintiff can produce admissible evidence of the essential elements of his claims, they will fail given that Defendants' statements are "protected privileged communications to law enforcement and the Court." (Defendants' Memorandum of Points and Authorities in Support of Anti-SLAPP Special Motion to Strike Portions of Plaintiff's Complaint ("MPA SLAPP,") pp. 2-3.)

A. Plaintiff's Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117, citations and quotation mark omitted.)

In support of his opposition, Plaintiff made a request for judicial notice of "Declaration of Attorney Betty Mac" within the Declaration of Joseph Dworak, Plaintiff's counsel. (See Declaration of Joseph Dworak in Opposition to MPA SLAPP ("Dworak Decl.").) The request is procedurally improper because it was made within a declaration. Requests for judicial notice must be made in a separate document. (Cal. Rules of Ct., rule 3.1113(l) [a request for judicial notice must be made in a separate document listing the specific items for which notice is requested].) In addition, the declaration is not relevant to the issues raised in the motion. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301(*Gbur*) [judicial notice is confined to those matters which are relevant to the issue at hand].)

Accordingly, Plaintiff's request for judicial notice of Betty Mac's declaration is DENIED.

B. Defendants' Request for Judicial Notice

In support of the motion, Defendants request judicial notice of the following:

(1) Sandra Copas' Temporary Restraining Order filed with this Court on December 10, 2019, bearing Case No. 19DV001008;

(2) Plaintiff's Complaint as filed with this Court on December 21, 2023, bearing Case No. 23CV428101 (Exhibit A);

(3) Sandra Copas' pleading titled "Petitioner's Exhibit "N" ISO Declaration of Sandra Copas ISO Petitioner's Objections to Respondent's 3/9/22 Motion," filed with this Court on April 7, 2022, bearing Case No. 19DV001008 (Exhibit B); and

(4) Sandra Copas' pleading titled, "Petitioner's Exhibit E ISO Declaration of Sandra Copas ISO Petitioner's Ex Parte Application to Continue the May 2, 2022 Trial" filed with this Court on April 27, 2022, bearing Case No. 19DV001008 (Exhibit C).

As a preliminary matter, Defendants did not attach a document to their request for judicial notice of item number one. As a result, the request does not comport with the requirements of the Rules of Court. (See Cal. Rules of Ct., rule 3.1306, subd. (c) [A party requesting judicial notice of material under Evidence Code sections 452 or 453 must provide the court and each party with a copy of the material]; see also *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 985, fn. 4.) Consequently, this request is DENIED. However, the Court may take judicial notice of item numbers three and four, as records of the superior court under Evidence Code section 452, subdivision (d). (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) In addition, the items appear relevant to issues raised in the motion. (See *Gbur, supra,* 93 Cal.App.3d at p. 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

This Court takes judicial notice of the fact that the court records were entered by the court and for the date on which they were entered. The Court does not judicial notice of the truth of hearsay statements contained in a trial court order. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.)

Accordingly, Defendants' request for judicial notice of item numbers three and four, are GRANTED.

Finally, Defendants ask this Court to take judicial notice of Plaintiff's operative Complaint for the instant action. As the Complaint is the pleading under review, this request is DENIED as unnecessary. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [denying as unnecessary a request for judicial notice of pleading under review].)

C. Legal Standard

Code of Civil Procedure section 425.16 ("section 425.16") provides a summary procedure by which defendants may dispose of "strategic lawsuits against public participation" or "SLAPP" lawsuits, i.e., lawsuits brought "primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for redress of grievances." (See Code Civ. Proc., § 425.16, subd. (a).) Specifically, section 425.16 provides for a "special motion to strike" when a plaintiff's claims arise from certain acts constituting the exercise of the above-mentioned constitutional rights, "unless the court determines that the plaintiff has established

that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subds. (a) & (b)(1).)

"Consistent with the statutory scheme, ruling on an anti-SLAPP motion involves a two-step procedure. First, the moving defendant must identify 'all allegations of protected activity' and show that the challenged claim arises from that activity. [Citations.] Second, if the defendant makes such a showing, the 'burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.' [Citation.] Without resolving evidentiary conflicts, the court determines 'whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment.' [Citation.]" (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 934.)

Courts are to broadly construe the anti-SLAPP statute to further the legislative intent of "encouraging continued participation in matters of public significance by preventing the chilling of such participation through abuse of the judicial process." (See *Kimbler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199, internal citations omitted.)

D. Analysis

i. First Prong: Protected Activity

"A defendant meets his or her burden on the first step of the anti-SLAPP analysis by demonstrating the acts underlying the plaintiff's cause of action fall within one of the four categories spelled out in section 425.16, subdivision (e)." (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 50-51 (*Collier*).) That section provides that an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) 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, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).) "These categories define the scope of the anti-SLAPP statute by listing acts which constitute an 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.' " (*Collier, supra,* at p. 51, citing § 425.16, subd. (e).)

"A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, 'the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech.' [Citations.] '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' [Citations.] Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.]" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062-1063 (*Park*).)

"[A] claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park, supra,* 2 Cal.5th at p. 1060.) To determine whether the speech constitutes the wrong itself or is merely evidence of a wrong, "in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (*Id.* at p. 1063.)

"In deciding whether the 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670.) "[I]f the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step." (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 271.)

Here, under the first prong, Defendants maintain that Plaintiff's claims against them arise out of protected statements, as they were made "in connection" with family law proceedings and law enforcement. (See MPA SLAPP, p. 13:7-11.) Specifically, the YouTube videos posted by Defendant Sandra Copas were "created for the Court to review in the Domestic Violence Lawsuit or for the Hollister Police Department to further investigate her claims." (See MPA SLAPP, pp. 13:7-13-14:10-18; 16:9-15.)

1) First and Third Causes of Action: Malicious Prosecution and Abuse of Process

The Complaint alleges nine causes of action, two of which are claims for malicious prosecution and abuse of process. The plain language of the anti-SLAPP statute dictates that every claim of malicious prosecution is a cause of action arising from protected activity because such claims necessarily depend on written and oral statements in a prior judicial proceeding. (*Area 55, LLC v. Nicholas & Tomasevic, LLP* (2021) 61 Cal.App.5th 136, 151 (*Area 55*); see *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735 [malicious prosecution suits arise out of protected activity under the anti-SLAPP statute]; see also *Maleti v. Wickers* (2022) 82 Cal.App.5th 181, 200 (*Maleti*) ["By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit."].)

The first cause of action for malicious prosecution alleges, in pertinent part: "[Sandra Copas] after conspiring with and being aided and abetted by [Bryan Copas] filed [19DV001008] knowing the lawsuit had no merit and was filed malicious [sic] and with ulterior motives…and was, as hereinbefore alleged, terminated in favor of Plaintiff…there was no cause to file a lawsuit against Plaintiff and by doing so knew or should have known…to effectively ruin Plaintiff's personal and business life and to use…as [a] basis to extort money and establish control over KEIKO." (Complaint, ¶¶ 37-40.)

It is apparent that the acts forming the basis of the first cause of action constitute acts in furtherance of moving Defendants' right to petition. This is protected conduct under section 425.16, subdivision (e)(1). (See *Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1012-1017 [in case where the complaint for malicious prosecution was premised on claims in prior suit that "were entirely without basis in law or fact" and where the defendants "had acted without probable cause in bringing the prior suit against him, court stated that "[i]t is beyond question

that the initiation and prosecution of the prior suit here—as involving 'written or oral statement[s] or writing[s] made before a … judicial proceeding' (§ 425.16, subd. (e)(1))—were 'act[s] … in furtherance of the person's right of petition' under the federal and state Constitutions (§ 425.16, subd. (b)(1)) protected under the anti-SLAPP statute"].)

Thus, moving Defendants meet their initial burden on the first step of the anti-SLAPP analysis for the first cause of action for malicious prosecution. (§ 425.16, subd. (e).)

The third cause of action for abuse of process alleges Defendants: "1) Attempt[ed] to intimate [sic] and dissuade a process server from completing the legal tasks the process server was employed to complete by invading the personal comfort space of the process server while [Bryan Copas] was astride his high-powered motorcycle and while stating in an unfriendly manner words to the effect that he, [Bryan Copas] 'knows people,' 2) Dissuading duly served with process witnesses from attending their duly noticed depositions in the case [19DV001008], 3) Working with [Sandra Copas] in the procurement of declarations which were either known to be or should have been known to be patently false and 4) filing malicious an[d] abusive lawsuits." (Complaint, ¶ 55.)

Plaintiff, in opposition, asserts Defendants filed their domestic violence lawsuit for "an improper purpose," namely, "to attack and destroy [Plaintiff] so [Sandra Copas] could reach Keiko's assets unimpeded" and therefore "misused the power of the court for the purpose of perpetuating injustice." (Plaintiff's Opposition to MPA SLAPP ("Opp.,") pp. 11:19-25-12.) Therefore, he contends, Defendants' actions are not protected by the anti-SLAPP statute.

The conduct alleged here includes filing of declarations, service of process, deposition testimony, and the filing of a domestic violence lawsuit. Such actions constitute statements or conduct made in connection with issues under consideration by a judicial body under section 425.16, subdivision (e)(2). (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89 [the filing of a complaint in breach of a general release is a writing made in connection with an issue under review by a judicial body and therefore satisfies the first prong of the analysis]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [the right to petition protected under section 425.16 includes the basic act of filing litigation].) In addition, California cases have determined that claims for abuse of process arise from protected activity. (See *S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 42 [like malicious prosecution, an abuse of process claim involves protected activity]; see also *Booker v. Rountree* (2007) 155 Cal.App.4th 1366, 1370 ["Abuse of process claims are subject to a special motion to strike."]; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1063 ["claims for abuse of process in an earlier lawsuit are subject to an anti-SLAPP motion."].)

Thus, Defendants, as the moving parties, have met their initial burden of establishing that Plaintiff's Complaint as to the first and third causes of action arise from protected activity.

2) Second Cause of Action: Defamation

As to the defamation cause of action, Plaintiff alleges, in pertinent part: "Plaintiff has been harmed by the making, creating, publishing and/or repeating by [Defendants] . . . of statements which are false and defamatory per se." (Complaint, ¶ 44.) Plaintiff's Complaint further alleges Defendants "perpetuated false information" by stating, via YouTube videos, he

engaged in unlawful surveillance of people, committed real estate fraud, and sexually abused women, including Sandra Copas, among other things. (Complaint, ¶ 44.)

Defendants argue that the statements complained of by Plaintiff were statements made to law enforcement during the course of a police investigation and to the court during litigation. (MPA SLAPP, pp. 12:19-27; 15:11-16.) Specifically, Defendants contend the statements were made with "the intent to prompt action and investigation of the wrongdoing of Plaintiff and to assist the police." (*Ibid.*)

Here, again, Defendants' statements pertain to Plaintiff's alleged sexual abuse/harassment, which were submitted to this Court during a pending domestic violence lawsuit against Plaintiff, and to law enforcement for further investigation. Therefore, the statements are protected by section 425.16, subdivisions (e)(1) and (e)(2), because they are statements that were made to a judicial body. (See *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941 [stating that "communications to the police are within SLAPP"]; see also *Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1511 [stating that "statements to the police clearly arose from protected activity"]; see also *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 [the constitutional right to petition includes communications preparatory to or in anticipation of bringing an action or other official proceeding are within the protection of the anti-SLAPP statute].)

3) Fourth Through Ninth Causes of Action

Defendants assert the entirety of Plaintiff's Complaint arises from Defendants' protected conduct, namely, Sandra Copas' statements made via YouTube videos, because it was meant *only* for law enforcement and judicial proceedings. (MPA SLAPP, p. 13:7-11.) Defendants claim that "once [Sandra Copas] was put on notice that the privacy setting was not properly applied to her YouTube videos," she "immediately changed the privacy setting so that only the Court could access them." (See Declaration of Sandra Copas in support of MPA SLAPP ("SCopas Decl.,") ¶¶ 3-10.)

In opposition, Plaintiff conclusorily claims that "threats of [Sandra Copas] made to [Plaintiff] destroy any possible protection under [section 425.16]." (Opp., p. 14:15-23.)

In reply, Defendants ultimately argue Plaintiff's *entire* Complaint arises from communications to the police to aid in their investigation of the domestic violence lawsuit, and to apprise the Court for purposes of the DVRO, which fall within the ambit of section 425.16, subdivision (e). (Reply, p. 4:17-24.) This Court agrees that Plaintiff's remaining causes of action against Defendants appear to be predicated on the same general allegations, namely, that Defendants disseminated false, malicious, and misleading information about Plaintiff via YouTube videos, for purposes of the DVRO, which allegedly resulted in his financial ruin and emotional despair. (See Complaint, ¶¶ 59-83.)

As noted above, communications that are preparatory to or in anticipation of commencing official proceedings come within the protection of the anti-SLAPP statute. (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570.) Accordingly, the Court finds that Defendants have sufficiently presented evidence indicating that Sandra Copas' communications to both law enforcement and the court via YouTube videos were in furtherance of her right of petition and, therefore, protected activity. Thus, Defendants, as the moving parties, have met their

initial burden of establishing that Plaintiff's Complaint, in its entirety, arises from protected activity. The Court will examine whether Plaintiff can demonstrate a probability of prevailing on these claims under the second prong. (§ 425.16, subd. (b)(1).)

ii. Second Prong: Probability of Success on the Merits

"In determining whether a plaintiff meets its responsive burden under the second prong, 'the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' [Citations.] In doing so, ' "[t]he court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." ' [Citations.]" (*Area 55, supra,* 61 Cal.App.5th at p. 151.)

"Courts have described this procedure as a 'motion for summary judgment in "reverse." Rather than requiring the *defendant* to defeat the plaintiff's pleading by showing it is legally or factually meritless, the motion requires the *plaintiff* to demonstrate that he possesses a legally sufficient claim which is "substantiated," that is, supported by competent, admissible evidence.' [Citations.] Consistent with this summary-judgment-like procedure, the court 'must draw all reasonable inferences from the evidence in favor of [the party opposing the anti-SLAPP motion].' [Citation.]" (*Area 55, supra,* 61 Cal.App.5th at p. 152.)

Furthermore, " 'evidence may be considered at the anti-SLAPP motion stage if it is *reasonably possible* the evidence set out in supporting affidavits, declarations or their equivalent will be admissible at trial' [citation]. 'Conversely, if the evidence relied upon *cannot* be admitted at trial, because it is categorically barred or undisputed factual circumstances show inadmissibility, the court may not consider it in the face of an objection.' [Citation.]" (*Area 55, supra,* 61 Cal.App.5th at p. 152.)

"When evaluating an affirmative defense in connection with the second prong of the analysis of an anti-SLAPP motion, the court, following the summary-judgment-like rubric, generally should consider whether the defendant's evidence in support of an affirmative defense is sufficient, and if so, whether the plaintiff has introduced contrary evidence, which, if accepted, would negate the defense. [Citations.]" (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 434 (*Bently*).)

1) Malicious Prosecution: First Cause of Action

"To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]." (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 50 (*Bertero*).)

In support of both their motion and reply, Defendants argue that "no malicious prosecution action may arise out of unsuccessful family law motions or orders to show cause." (MPA SLAPP, p. 15:19-26; see also Defendants Reply to Opp. ("Reply,") p. 10:24-27.) Defendants cite both *Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 37 (*Bidna*) and *S.A. v. Maiden*

(2014) 229 Cal.App.4th 27, 36 (*S.A.*) for this proposition. (*Ibid.*) Specifically, Defendants assert Plaintiff's malicious prosecution action is solely predicated on the domestic violence restraining order proceedings between the parties. (*Ibid.*)

In *Bidna,* the marriage between plaintiff and defendant was dissolved and physical custody of their daughter was awarded to plaintiff (husband). Defendant's mother told plaintiff that she would use her superior financial resources to keep reopening custody issues until plaintiff finally agreed to give up custody of the child. (*Bidna, supra,* 19 Cal.App.4th at pp. 29-30.) Over a period of less than a year, defendant (allegedly funded by her mother) brought a series of six meritless ex parte applications and orders to show cause to change custody. These proceedings cost plaintiff over $200,000 in attorneys' fees. Plaintiff then instituted a malicious prosecution action. The trial court sustained the demurrer. On appeal, the court established a bright line rule barring malicious prosecution causes of action arising out of family law proceedings due to the unique nature of such proceedings, including the propensity for bitterness and procedural issues. (*Bidna*, *supra*, at pp. 29-30; 35-37.) Thereafter, the court in *S.A., supra,* agreed with and adopted *Bidna*'s general holding and applied it to a request for a domestic violence restraining order under the Domestic Violence Protection Act ("DVPA"). (*S.A.*, *supra*, 229 Cal.App.4th 27 at pp. 36-38.) The court explained that a request for a DVRO under the DVPA is a family law proceeding within the scope of *Bidna*'s bright line rule. (*Id.,* p. 37.) The *S.A.* court therefore concluded that the plaintiff had not, and could not, state a viable malicious prosecution claim based on an unsuccessful petition for a restraining order under the DVPA. (*Id.*, p. 41.)

Similarly, here, Plaintiff's claim of malicious prosecution is based on alleged defamatory YouTube video statements made by Defendants for the Court's examination during a domestic violence lawsuit. (See MPA SLAPP, p. 16:1-8.) Specifically, Defendants made these statements to support their request for a domestic violence restraining order. (*Ibid*.) Pursuant to the holding in both *Bidna* and *S.A.*, Plaintiff is barred from asserting a malicious prosecution claim based on Defendants' DV allegations.

Plaintiff's opposition fails to address Defendants' argument that Plaintiff's claim for malicious prosecution impermissibly originates from a family law proceeding per the *Bidna* and *S.A.* decisions. Rather, Plaintiff makes a blanket statement that the litigation privilege pursuant to Civil Code section 47, subdivision (b) is inapplicable to malicious prosecution claims, and further states, this claim is "not precluded under [the anti-SLAPP statute]." (Opp., p. 13.) Again, Plaintiff neither addresses nor discusses the impact of *Bidna* and *S.A.* when malicious prosecution claims arise directly from family law matters, namely, domestic violence restraining orders. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].) Consequently, the Court rejects Plaintiff's argument in opposition.

Accordingly, the Court finds that Plaintiff has failed to show a probability of prevailing on the merits of his cause of action for malicious prosecution.

2) Remaining Causes of Action & Litigation Privilege

In both their motion and reply, Defendants generally argue Plaintiff cannot establish a probability of success on the merits of *all* his claims because they are barred by the litigation privilege (Civ. Code § 47, subd. (b)). (MPA SLAPP, p. 13:14-27; Reply, p. 11:1-

9; see also *Timothy W. v. Julie W.* (2022) 85 Cal.App.5th 648, 661 ["A plaintiff cannot establish a prima facie case if the litigation privilege precludes a defendant's liability on the claim."].) Specifically, Defendants maintain the alleged statements made by Sandra Copas, were "for litigation in the Domestic Violence Lawsuit," where Sandra Copas was the plaintiff. (MPA SLAPP, p. 14:9-16.) Furthermore, Defendants assert the YouTube videos were "specifically created for the Court to review in the Domestic Violence Lawsuit." Consequently, the Defendants conclude this conduct is privileged. (*Ibid.*)

Defendants also argue their conduct is further protected under Civil Code section 47.1, subdivision (a), which states: "[a] communication made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination is privileged under Section 47." (MPA SLAPP, p. 16:11-27; see also Reply, p. 11:1-2.)

"If the challenged action falls within the litigation privilege, the trial court should grant an anti-SLAPP motion to strike. (See *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1065.) ' "A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim." [Citation.] The litigation privilege is defined in Civil Code section 47, subdivision (b) (section 47(b)), and "precludes liability arising from a publication or broadcast made in a judicial proceeding or other official proceeding." [Citation.]' (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 814, fn. omitted.)" (*Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 769 (*Laker*).)

Although the plaintiff bears the burden in resisting a special motion to strike of establishing the second prong that his claim has merit, the defendant bears the burden of proving any affirmative defenses. (*Laker, supra,* 32 Cal.App.5th at pp. 769-770 [defendants in arguing anti-SLAPP motion should be granted, met their burden of establishing that defamation claim was barred by litigation privilege].) Nonetheless, in addressing the second prong of a special motion to strike, "a plaintiff must show that any asserted defenses are inapplicable as a matter of law or make a prima facie showing of facts that, if accepted, would negate such defenses. [Citation.]" (*Weeden v. Hoffman* (2021) 70 Cal.App.5th 269, 288 (*Weeden*); see also *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1263, fn. 7 [if alleged conduct is subject to litigation privilege, plaintiff cannot establish probability of prevailing to defeat an anti-SLAPP motion].) As noted above, Defendants argue each cause of action is barred by the litigation privilege defense.

"Civil Code section 47, subdivision (b) defines what is commonly known as the 'litigation privilege.' 'The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' [Citation.]" (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 912 (*Kashian*).)

"*The litigation privilege is absolute; it applies, if at all, regardless whether the communication was made with malice or the intent to harm*. [Citation.] Put another way, application of the privilege does not depend on the publisher's 'motives, morals, ethics or intent.' [Citation.] Although originally applied only to defamation actions, the privilege has been extended to *any* communication, not just a publication, having 'some relation' to a judicial proceeding, and to all torts other than malicious prosecution. [Citations.]" (*Kashian, supra,* 98 Cal.App.4th at p. 913, emphasis added.)

"The litigation privilege is not limited to the courtroom, but encompasses actions by administrative bodies and quasi-judicial proceedings. [Citation.] The privilege extends beyond statements made in the proceedings, and includes statements made to initiate action. [Citation.]" (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1303.) "The '[p]leadings and process in a case are generally viewed as privileged communications.' [Citation.] The privilege has been applied specifically in the context of abuse of process claims alleging the filing of false or perjurious testimony or declarations." (*Rusheen, supra,* 37 Cal.4th at p. 1058; see *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1431 [declaration "functions as written testimony," is a "communication, not conduct," and "is exactly the sort of communication the privilege is designed to protect"]; *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 489 ["[p]reparing and presenting false documents is equivalent to the preparation and presentation of false testimony"]; see also *Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 913-915 [claim that expert witness had manufactured false evidence for former wife in dissolution action was privileged].)

Here, as explained above, Plaintiff's remaining claims are based on the filing of the domestic violence lawsuit and related pleadings, exhibits, declarations, and petition, which are protected under the litigation privilege. (See *Baker v. Littman* (1956) 138 Cal.App.2d 510, 514, fn. 1 [filing of civil action subject to litigation privilege].) Here, Defendant Sandra Copas' YouTube video links were filed with the Court as a "confidential pleading titled 'Petitioner's Exhibit N'" in support of her petition for a restraining order against Plaintiff. (See Scopas Decl., ¶¶ 3-4.) Defendant Sandra Copas filed another pleading titled, "Petitioner's Exhibit E ISO Declaration of Sandras Copas ISO Petitioner's Ex Parte Application to continue the May 2, 2022 Trial" and attached the same YouTube video links to the filing. (Scopas Decl., ¶ 7.) Plaintiff believed that the YouTube videos were posted privately, and noted "these videos are confidential" in the pleadings. (Scopas Decl., ¶¶ 5-7; see also MPA SLAPP, p. 10:6-11.)

As noted in Defendants' reply, Plaintiff, in opposition, does not submit any substantive argument or supporting authorities to defeat the litigation privilege under Civil Code section 47, subdivision (b) for his remaining causes of action. (See Reply, pp. 3:1-27;11:1-9.) And, even if the litigation privilege is inapplicable, Plaintiff still has the burden of showing the remaining causes of action are legally and factually sufficient to satisfy the second prong.

Plaintiff relies on the declarations of Plaintiff's counsel, Joseph Dworak and Plaintiff's acquaintances, Robert Chapman, Jennifer Woods, and Jageet Kapoor. (See Declarations in Support of MPA SLAPP.) However, Plaintiff's opposition fails to explain or articulate, based on these declarations, how each cause of action is likely to succeed on the merits. Notably, the declarations do not state how the declarants have personal knowledge that the content of Defendants' YouTube videos was false. Nor has Plaintiff addressed the necessary elements of each cause of action in light of the evidence submitted. Instead, Plaintiff explains in great detail about his sister's (Defendant Sandra Copas) "malicious" and "injurious" actions against his mental health, real estate business, and spotless reputation. (See Opp., pp. 10-13.) He concludes Sandra Copas' request for a restraining order should not be entitled to protection. (See Opp., p. 11.) Plaintiff maintains that Defendants' use of the YouTube videos was "a calculated strategy to damage [his] business and reputation" and the videos were never filed with the Court. (Opp., p. 14:23-28.) But, as noted above, Defendant Sandra Copas' declaration and accompanying exhibits demonstrate otherwise. (Scopas Decl., ¶¶ 4-8.)

Next, Plaintiff contends Defendants filed false police reports in support of Sandra Copas' domestic violence lawsuit, and thus, Defendant's conduct is not afforded the protections of section 425.16. This is incorrect. (Opp., p. 12:20-28; see *Flatley v. Mauro* (2006) 39 Cal.4th 299, 316-317 (*Flatley*) ["section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition," but this exception applies to the "narrow circumstance, where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence"]; see also *Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1512 (*Chabak*) [appellate court held that defendant's statements to the police arose from her right to petition the government and thus constitute protected activity under the anti-SLAPP statute]; but see also *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1188 [the mere fact that a defendant's conduct was alleged to be illegal, or that there was some evidence to support a finding of illegality, does not preclude protection under the anti-SLAPP law], overruled on other grounds by *Baral v. Schnitt* (2016) 1 Cal.5th 376.) In reply, Defendants argue their statements to the police were neither false nor illegal, and the alleged illegality is not conclusively shown by evidence. (Reply, p. 7:2-128:4-12.) Here, Plaintiff fails to demonstrate that Defendants concede the reports to the police or the court were false and Plaintiff's evidence does not conclusively establish false reporting. Therefore, Defendants' statements do not fall under the *Flatley* exception.

Accordingly, even if the litigation privilege did not apply, Plaintiff has not demonstrated a probability of success on the merits of his remaining claims to satisfy the second prong.

Finally, Plaintiff attempts to bypass the litigation privilege by asserting "offensive collateral estoppel" and issue preclusion. (Opp., p. 12:1-9.) Plaintiff contends Defendant Sandra Copas "had her day in court" regarding her DVRO, and thus, the resolution of this matter renders Defendants' motion moot. (*Ibid*.) In reply, Defendants argue the defenses of collateral estoppel and issue preclusion do not apply in the instant case. (See Reply, p. 5:13-27.) This Court agrees.

Typically, the defendant can raise defenses to the second prong of section 425.16's two-part test to demonstrate that the *plaintiff* cannot prevail on the merits. These defenses, namely, collateral estoppel and issue preclusion, do not establish, or bear any relation to, the probability of success on the merits of Plaintiff's claims. (See *Bently, supra,* 218 Cal.App.4th at p. 434 ["When evaluating an affirmative defense in connection with the second prong of the analysis of an anti-SLAPP motion, the court…generally should consider whether the *defendant's evidence in support of an affirmative defense is sufficient, and if so, whether the plaintiff has introduced contrary evidence, which, if accepted, would negate the defense.* [Citations.]"], italics added.) That said, Defendants address the merits of Plaintiff's defenses in their reply. (Reply, pp. 5-6.) Consequently, this Court will do the same.

Collateral estoppel, i.e., issue preclusion, bars relitigation of the same issues that were argued and decided in the previous action. (*DKN Holdings, LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) Collateral estoppel applies (1) against a party in the earlier suit, (2) of an identical issue, (3) that was actually litigated and necessarily decided in the prior action, (4) after final adjudication. (*Id.*, at p. 825.) As stated in Defendants' reply, the issues presented in their anti-SLAPP motion, namely, Defendants' alleged defamatory statements made against Plaintiff, were not litigated in the prior DVRO action. (Reply, p. 6:4-12.) Therefore, the doctrine of

collateral estoppel does not establish that Plaintiff's causes of action are likely to succeed on the merits.

Instead, the litigation privilege, which is absolute, applies. Accordingly, the special motion to strike the entirety of Plaintiff's Complaint is GRANTED.

III. Conclusion

The special motion to strike the complaint is GRANTED.

The court will prepare the Final Order.

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Calendar line 4
Case Name: *Bolin v. Levy, et al.*
Case No.: 21CV383578

This is a medical malpractice action. On June 16, 2020, plaintiff Dorothy Bolin ("Plaintiff") underwent a pulmonary vein isolation ablation procedure, performed by defendant Matthew Levy, M.D. ("Levy") at El Camino Hospital ("ECH). (See complaint, ¶ 12.) During the procedure, Plaintiff's femoral artery was inadvertently accessed and Plaintiff developed a pseudoaneurysm. (*Id*.) On June 26, 2020, Plaintiff underwent a thrombin injection for the pseudoaneurysm, performed by defendant Fabio Komlos, M.D. ("Komlos"). (See complaint, ¶ 13.) On October 6, 2020, it was discovered that Plaintiff had sustained a ruptured right femoral pseudoaneurysm along with acquired/iatrogenic right femoral AV fistula, for which she required emergent surgery. (See complaint, ¶ 14.) Plaintiff alleges that Levy and Komlos breached their duty of care by failing to perform the underlying ablation procedure using ultrasound, errantly cannulating the femoral artery and failing to provide the appropriate monitoring and follow-up of Plaintiff following both the ablation procedure and thrombin injection procedure. (See complaint, ¶ 16.)

On June 3, 2021, Plaintiff filed a complaint against Levy, Komlos, El Camino Healthcare District ("District") and ECH, asserting a single cause of action for professional negligence. On June 29, 2022, Plaintiff filed a request for dismissal as to District. On March 20, 2024, Plaintiff filed a request for dismissal as to ECH.

Defendants Levy and Komlos move for summary judgment.

DEFENDANTS LEVY AND KOMLOS' MOTION FOR SUMMARY JUDGMENT

Defendants' burden on summary judgment

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted; emphasis added.)

"The 'tried and true' way for defendants to meet their burden of proof on summary judgment motions is to present affirmative evidence (declarations, etc.) negating, as a matter of law, an essential element of plaintiff's claim." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) ¶ 10:241, p.10-91, *citing Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334; emphasis original.) "The moving party's declarations and evidence will be strictly construed in determining whether they negate (disprove) an essential element of plaintiff's claim 'in order to avoid unjustly depriving the plaintiff of a trial.'" (*Id*. at § 10:241.20, p.10-91, *citing Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion.) Such

evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Id*. at ¶ 10:242, p.10-92, *citing Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

Defendants Levy and Komlos meet their initial burden.

"The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Johnson v. Super. Ct. (Rosenthal)* (2006) 143 Cal.App.4th 297, 305, citing *Hanson v. Grode* (1999) 76 Cal.App.4th 601. 606; see also *Budd v. Nixen* (1971) 6 Cal.3d 195, 200; see also *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122.) The requirement regarding expert evidence has been incorporated into the standard for medical malpractice cases:

> When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.

(*Munro v. Regents of the University of California* (1989) 215 Cal.App.3d 977, 984-985, quoting *Hutchison v. United States* (9th Cir. 1988) F.2d 390, 392).)

Defendants Levy and Komlos argue that the cause of action for professional negligence lack merit as to them because Plaintiff cannot demonstrate causation of injuries or the breach of the standard of care. In support of their motion, Defendants present the declaration of Liong-Bing Liem, D.O., who provides his curriculum vitae a review of Plaintiff's deposition and Plaintiff's medical records, and states his opinion that "[c]ardiac ablation is a procedure which would have been chosen by other reasonably careful electro-physiologists to treat plaintiff's condition and performing it met the standard of care… [t]he reasonable patient in the position of DOROTHY BOLIN would have accepted the potential risk of injury to blood vessels which may occur during the access to vessels necessary to perform cardiac ablation as well as the need for further surgical procedures associated with a potential injury to blood vessels, to obtain the benefit of cardiac ablation in treating cardiac arrhythmia… the occurrence of the inadvertent access to either the right or left femoral artery by Dr. LEVY during the cardiac ablation of June 16, 2020, would not be below the standard of care as inadvertent arterial access can and does occur to the reasonably careful electrophysiologist during the same or similar type of procedure… [s]imilarly, it is not below the standard of care to fail to recognize an inadvertent access to a common femoral artery during an attempt to access the femoral vein during cardiac ablation…[w]hen the catheter is removed at the conclusion of the procedure, pressure occluding the small puncture in the femoral artery would be relieved and may lead to bleeding post-operatively… [and] can and does occur to the reasonable careful electrophysiologist and is not below the standard of care… Dr. Levy's method utilized to identify the common femoral vein during the cardiac ablation was within the standard of care…[a]ccess to the common femoral vein may be performed with or without ultrasound guidance…[e]ither technique is an acceptable alternative which is within the standard of care and either could have been chosen by other reasonably careful

electrophysiologists performing cardiac ablation in 2020… [o]n June 26, 2020 FABIO KOMLOS, M.D. complied with the standard of care by injecting thrombin into the pseudoaneurysm… it is my opinion to a reasonable degree of medical probability that the care and treatment provided by MATTHEW LEVY, M.D. to DOROTHY BOLIN met the standard of care applicable to cardiologists and electrophysiologists in all respects… [i]t is further my opinion as an electrophysiologist, that to a reasonable degree of medical probability, there is no objective evidence that the procedure performed by Dr. LEVY on June 16, 2020 was a substantial factor in causing an AV fistula… the occurrence of right common femoral artery pseudoaneurysm in this case was not caused by any breach of the standard of care by Dr. LEVY… [i]t is also my opinion to a reasonable medical probability that the care and treatment provided by FABIO KOMLOS, M.D. to DOROTHY BOLIN on June 26, 2020 met the standard of care in all respects… [f]urther, no act or omission to act by DR. KOMLOS was, to a reasonable degree of medical probability, a substantial factor in causing any injury to Plaintiff, including, but not limited to, an AV fistula or pseudoaneurysm." (Liem decl. in support of Defs.' motion for summary judgment, ¶¶ 2-25.) Levy and Komlos also present the complaint and Plaintiff's medical records. (See Strahan decl. in support of Defs.' motion for summary judgment, ¶¶ 3, 5-7, exhs. B, D-F.)

Defendants Levy and Komlos' evidence is sufficient to meet their initial burden that Levy and Komlos met the standard of care in the subject procedures, and thus did not breach any standard of care, and also that no act or omission on the moving defendants' part was a substantial factor in harm or injury to Plaintiff, to a reasonable degree of medical probability.

Plaintiff fails to demonstrate the existence of a triable issue of material fact.

In opposition to the motion, Plaintiff argues that physicians do not recommend STAT referrals to vascular surgery but "write an order or pick up the phone and arrange." (Opp. para. 7). Plaintiff also states that she "would like to invoke res ipsa loquitor as a defense to the motion. (Opp. para 8). However, as stated by *Munro*, *supra*, 215 Cal.App.3d 977, "[w]hen a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Id*. at p.985; see also *Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310 (stating that "[w]hen a defendant health care practitioner moves for summary judgment and supports his motion with an expert declaration that his conduct met the community standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence"); see also *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123 (stating same; also stating that "[w]henever the plaintiff claims negligence in the medical context, the plaintiff must present evidence from an expert that the defendant breached his or her duty to the plaintiff and that the breach caused the injury to the plaintiff").) Here, Plaintiff has not presented any expert declaration but rather her own layperson opinion as to issues of breach of a duty owed by Defendants and the causation of her injuries. As a matter of law, Plaintiff's evidence is insufficient to demonstrate the existence of a triable issue of material fact.

Accordingly, defendants Levy and Komlos' motion for summary judgment is GRANTED. Defendants shall submit a proposed order consistent with the above tentative ruling as well as a proposed judgment within 15 calendar days.

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Calendar Line 7
Case Name: Tyghe Mullin v. Judith Calado et al.
Case No.: 23CV424957

Plaintiff Tyghe Mullin requests the appointment of counsel. He is indigent and incarcerated. He has brought a complaint against the Defendants for filing a false police report which he claims resulted in his arrest, at which time he allegedly suffered physical injuries, and his imprisonment.

The court has the discretionary authority to appoint counsel for indigent prisoners for civil lawsuits to afford them meaningful access to the courts. *Smith v. Ogbuehi* (2019) 38 Cal.App.5th 453, 465; Penal Code § 2601(d). Measures available to the court to ensure meaningful access include (1) deferral of the action until the prisoner is released; (2) appointment of counsel for the prisoner; (3) transfer of the prisoner to court to attend hearings or the trial; (4) utilization of depositions in lieu of personal appearances; (5) holding of trial in prison; (6) conducting status and settlement conferences and other motions by phone or video; (7) propounding of written discovery; and (8) use of closed circuit television other modern electronic media; or other "innovative, imaginative procedures." *Id*. at 467.

There is a three-step inquiry that the court should consider in determining how to exercise its discretion. The court must consider the applicant's indigency, whether his interests are actually at stake, and what other means can be used to provide meaningful access. *Apollo v. Gyaami* (2008) 167 Cal. App. 4th 1468, 1485-87. Here, it appears that Plaintiff is both incarcerated and indigent. It is not clear that his interests are actually at stake, as his claim is based on a police report made by defendants, a generally protected activity. Finally, the Court may have other means to protect Plaintiff's access to the court, other than appointing counsel. For example, the Court can and will make use of remote technology to allow Plaintiff the ability to attend court while he is incarcerated. Other possible of ways to accommodate Plaintiff include staying the action until his release and/or allowing for the propounding of written discovery. It is not clear at this point that Plaintiff's ability to obtain meaningful access to the courts in being prevented from his incarcerated, indigent status.

As such, the Court denies the appointment of counsel at this time. Should it appear that the Court is unable to provide meaningful access to Plaintiff because of his incarcerated and indigent status, then the Court may reconsider its ruling. The motion is DENIED without prejudice.

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