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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

STACY MCCRORY, Plaintiff and Respondent, v. COUNTY OF SANTA BARBARA et al., Defendants and Appellants.	2d Civil No. B275372 (Super. Ct. No. 15CV02871) (Santa Barbara County)

The County of Santa Barbara (County) and Patricia Dark appeal an order denying, in part, a special motion to strike pursuant to the anti-SLAPP statute. (Code Civ. Proc., § 425.16[1]; *Baral v. Schnitt* (2016) 1 Cal.5th 376, 392-396 (*Baral*); *Cho v. Chang* (2013) 219 Cal.App.4th 521, 523.) We affirm.

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[1] All statutory references are to the Code of Civil Procedure unless stated otherwise.

We will sometimes refer to County and Dark collectively as County, except where clarity demands that we draw a distinction.

FACTUAL AND PROCEDURAL HISTORY

This appeal concerns voicemail and email messages between three Santa Barbara County employees: Patricia Dark, a Deputy Public Defender; Doctor Takashi Wada, the Interim Director of the Department of Alcohol, Drug and Mental Health Services (ADMHS); and Stacy McCrory, a licensed marriage and family therapist employed by ADMHS. The communications at issue concern the underlying criminal prosecution of J.M., who suffers from Huntington's Chorea and who has been repeatedly determined to be incompetent to stand trial.[2]

Dark represented J.M. in his 2014 prosecution for resisting a police officer during a hospital intake; McCrory was assigned the task of finding suitable placement for J.M., and Wada was McCrory's department head. Dark questioned McCrory's anomalous placement strategy and, in an email message to Wada, assailed McCrory's competence. McCrory later resigned her employment with the County, but photocopies of Dark's email message were mailed anonymously to McCrory's present and prospective employers.

On September 4, 2015, McCrory filed an action against the County and Dark for defamation, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage, among other causes of action. McCrory alleged that Dark falsely stated to Wada that McCrory was "operating beyond her clinical competence" and "knowingly

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[2] "Huntington's Chorea is a genetic disorder characterized by uncontrolled movements, progressive dementia, psychiatric problems, and psychoses caused by the degeneration of nerve cells in the brain. In general, there is loss of cognitive and mental functions." (*Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, 85.)

and directly asked [Dark] to commit an ethical breach" and "clearly stated [a] request to place [Dark's] client at increased criminal risk of prolonged imprisonment for the financial benefit of [ADMHS]," among other related statements. McCrory later complained regarding Dark's allegations to a supervising public defender and a deputy county counsel.

Two months later, McCrory resigned her county employment and accepted a position with the Mental Wellness Center as clinical director. On July 25, 2014, McCrory's final day of employment with the County, the chief executive officer of the center notified McCrory that she received an anonymous letter containing a photocopy of Dark's email to Wada. A second executive officer of the Mental Wellness Center also received a photocopy of the email. McCrory then complained to other supervising attorneys in the public defender's office, who stated that they would conduct an investigation regarding the matter.

Shortly thereafter, another anonymous letter containing a photocopy of Dark's email was mailed to Ventura County Behavioral Health, Juvenile Facilities Department. McCrory's complaint also alleged that she was denied a contract to provide professional services to Ventura County due to the anonymous letter.

Defendants' Anti-SLAPP Motion

On February 16, 2016, the County filed a special motion to strike three causes of action in McCrory's complaint pursuant to the anti-SLAPP statute. (§ 425.16, subd. (e)(2).) In support of, and in opposition to the motion, the parties presented declarations, McCrory's original voicemail to Dark, and photocopies of the parties' email exchanges, among other evidence.

Dark declared that she has represented J.M. in criminal proceedings since 2010. On three occasions, the trial court determined that he was incompetent to stand trial. On January 17, 2014, the court reduced the 2010 charge to a misdemeanor and ordered J.M. released, his competency having never been restored. Within two months, J.M. was arrested for six new criminal offenses, including felony resisting a police officer. The court reduced the felony charge to a misdemeanor and the parties stipulated that J.M. was once again incompetent to stand trial. The court ordered that J.M. be evaluated immediately for a conservatorship and later ordered ADMHS to recommend competency restoration placement for J.M.[3]

Dark declared that she was gravely concerned for J.M.'s mental and physical welfare given the degenerative nature of his disease and his rapidly deteriorating condition. In an email to the Public Guardian, Dark stated: "I fear that this man will die in custody – untreated and suffering. I fear that we are handling this unfortunate human being in the most inhumane and inefficient way possible."

On April 18, 2014, McCrory left a voicemail for Dark regarding J.M.'s placement. McCrory stated that the matter was "going to be a nightmare" and "the fact that it was reduced to a misdemeanor is going to make it a lot messier." McCrory suggested that "to get done what we need to get done" that we "leave it a felony and send him to Metropolitan State Hospital."[4]

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[3] On two previous occasions, the public guardian declined to institute conservatorship proceedings on J.M.'s behalf.

[4] McCrory later declared that Metropolitan State Hospital had the skilled nursing facilities necessary to treat J.M.'s medical condition.

She added that J.M.'s misdemeanor placement would become a County financial responsibility for "like $240,000 a year which [represents] several case managers for our department." She suggested that Dark "work with the DA on putting it back to a felony" although that approach "goes against [Dark's] ethics."

Several days later, Dark responded by email to McCrory's voicemail, and discussed the trial court's order regarding an expedited conservatorship proceeding. Dark also stated: "There is no basis for his current charges being a felony and it would be unethical of me to advocate for such a thing nor is there a legal mechanism to reinstate a felony once it has been reduced to a misdemeanor by a judge."

Had Dark ended her criticism of McCrory's proposed strategy with this email response, there would now be no lawsuit. Instead, Dark sent an email message to Wada questioning McCrory's competence and her recommendation to request reinstatement of a felony charge based upon financial, rather than clinical, reasons. She also attached a transcript of McCrory's voicemail message. Dark described McCrory's voicemail message as "disturbing" and urged Wada to "do the right thing for [J.M.]." Dark provided photocopies of her email message several weeks later to another deputy public defender, an ADMHS psychologist, a deputy district attorney, and a deputy county counsel involved with the J.M. matter. Dark declared that she did not forward, however, the anonymously mailed photocopies of the email to McCrory's present or prospective employers.

Following written and oral argument by the parties, the trial court granted the anti-SLAPP motion regarding Dark's initial email publication to Wada. The court determined that the

initial publication represented an exercise of the right of petition in connection with a public issue, and that the litigation privilege of Civil Code section 47, subdivision (b)(2) precluded McCrory's recovery. Regarding republication of the email message to McCrory's present and prospective employers, the court concluded that "[t]he anti-SLAPP 'gatekeeper' analysis only applies to protected activity and the alleged republication of the email is not protected activity." The court then granted McCrory leave to amend her complaint to allege claims regarding only the republication of Dark's email message.

The County appeals and contends that the trial court erred by not granting the anti-SLAPP motion to McCrory's asserted claims of republication.

DISCUSSION

The County relies upon the trial court's statement that the initial email "is central to all three causes of action" to argue that the entire complaint qualifies for anti-SLAPP protection. The County argues that the court erred by not proceeding to the second step of the anti-SLAPP motion analysis regarding McCrory's failure to establish that there is a probability that she will prevail on the merits of her republication claims.

Section 425.16, subdivision (b)(1) provides that a cause of action "arising from" a defendant's act in furtherance of a constitutionally protected right of free speech or petition may be struck unless the plaintiff establishes a probability that he will prevail on his claim. (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321; *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 665, fn. 3.) Section 425.16 "provides a procedure for the early dismissal of what are commonly known as SLAPP suits . . . litigation of a harassing nature, brought to challenge the

exercise of protected free speech rights." (*Fahlen*, at p. 665, fn. 3.) "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability--and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.) The anti-SLAPP statute instructs that its provisions are to be "construed broadly" to implement its legislative objectives. (§ 425.16, subd. (a); *Barry*, at p. 321.)

The analysis of an anti-SLAPP motion filed pursuant to section 425.16 is two-fold. (*Barry v. State Bar of California*, *supra*, 2 Cal.5th 318, 321; *Abuemeira v. Stephens* (2016) 246 Cal.App.4th 1291, 1297.) The trial court first decides whether defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 774.) If the court finds that a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on his claim. (*Barry,* at p. 320; *Abuemeira,* at pp. 1297-1298.) Only a cause of action that satisfies both prongs of the anti-SLAPP statute is subject to a special motion to strike. (*Barry,* at p. 321.) We independently review the trial court's determination of each step of the analysis. (*Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1162; *Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 129-130.)

The litigation privilege of Civil Code section 47, subdivision (b) pertains 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.

(*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 152.) The privilege extends to communications made before or after trial. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 731 [attorney who is a defendant based upon statements made on behalf of clients in a judicial proceeding or who raises an issue under review by a court has standing to bring anti-SLAPP motion].) The privilege also encompasses actions by administrative bodies and includes statements made to initiate official action. (*Wang v. Heck* (2012) 203 Cal.App.4th 677, 684 [judicial and quasi-judicial proceedings are defined broadly to include administrative, legislative, and other truth-seeking proceedings].)

Following the trial court's ruling here, our Supreme Court decided *Baral*, *supra*, 1 Cal.5th 376, 392-396, regarding application of the anti-SLAPP statute to claims involving allegations of both protected activity and unprotected activity, i.e., "mixed" causes of action. "[A]n anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded." (*Id.* at p. 393.) Accordingly, "courts may rule on plaintiffs' specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity." (*Ibid.*) If a defendant is successful in the two-step process of an anti-SLAPP motion to strike, allegations of protected activity are eliminated from the complaint. (*Id.* at p. 396.)

The trial court properly found that the republications to McCrory's successive employers were not protected activity within the anti-SLAPP law. Unlike the initial publication, the republications were not statements "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." (§ 425.16, subd. (e)(2).) McCrory's present and prospective employers have no "connection" to the J.M. criminal prosecution, his competency restoration placement, or his possible guardianship. The employers are uninvolved strangers to the J.M. proceedings. Moreover, having struck the allegations regarding the initial email publication, the court properly allowed McCrory leave to amend to state a claim or claims regarding the republications. (*Baral*, *supra*, 1 Cal.5th 376, 396.) We commend the trial court for a careful and well-reasoned analysis.

We need not discuss the parties' remaining contentions because the County has not established the threshold showing that the republications of Dark's email message to Wada arise from protected activity within the anti-SLAPP statute. (*Baral, supra,* 1 Cal.5th 376, 396 [summary of showings and findings required by anti-SLAPP statute].)

The order is affirmed. Costs are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Colleen K. Sterne, Judge

Superior Court County of Santa Barbara

Michael C. Ghizzoni, County Counsel, Michael M. Youngdahl, Senior Deputy, Julius Abanise, Deputy, for Defendants and Appellants.

James H. Cordes for Plaintiff and Respondent.