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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RODNEY GUILLORY,

Plaintiff and Appellant,

v.

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION,

Defendant and Respondent.

B234302

(Los Angeles County
Super. Ct. No. BC448508)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Mary H. Strobel, Judge. Affirmed.

Lee & Fields, Edward Y. Lee, Christopher P. Fields for Plaintiff and Appellant.

Loeb & Loeb, Michael L. Mallow, Laura A. Wytsma for Defendant and
Respondent.

Rodney Guillory sued the National Collegiate Athletic Association (NCAA) for publishing a report regarding benefits Guillory admittedly provided to a college basketball player. The NCAA asked the trial court to strike Guillory’s complaint, because (1) the report is a matter of public interest protected by the “anti-SLAPP” statute, and (2) Guillory is unlikely to prevail at trial. (Code Civ. Proc., § 425.16.)¹ The court granted the NCAA’s motion. We affirm.

FACTS

The Role of the NCAA

The NCAA is a voluntary association created and governed by educational institutions. The NCAA strives to “retain a clear line of demarcation between college athletics and professional sports.” It dictates that “[s]tudent athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.” Recruiting “is limited to authorized athletics department staff members . . .” from member institutions.

To foster amateurism, the NCAA regulates interactions between prospective or enrolled student-athletes, alumni, and athletics representatives. Students are ineligible to participate in intercollegiate sports if they have ever agreed to be represented by an agent to market their athletic skills, or if they (or their relatives or friends) accept transportation or other benefits from sports agents or athletics representatives from an educational institution. Once a person has been identified as an athletics representative, “it is presumed the person retains that identity.” The NCAA investigates alleged rules violations; conducts hearings to consider investigative findings; and issues public infractions reports.

¹ A SLAPP is a Strategic Lawsuit Against Public Participation. Undesignated statutory references in this opinion are to the Code of Civil Procedure.

NCAA Investigations Involving Guillory

In 2000, the University of Southern California (USC) reported a violation of NCAA rules involving a student basketball player, Jeff Trepagnier. USC found that Guillory purchased airline tickets for Trepagnier and another athlete to meet with sports agents in Las Vegas. As a result of this violation, Trepagnier was briefly suspended from playing for USC.

In 2006, a high school basketball player named O.J. Mayo signed a letter of intent to attend USC. The NCAA reviewed Mayo's amateur status before his enrollment at USC in 2007. The NCAA interviewed Guillory and Mayo, who denied that Mayo received any special benefits. Following the interviews, the NCAA deemed Mayo eligible to play at USC because there was (at that time) no basis for concluding that a rules violation had occurred.

The ESPN Report

In 2008, sports news channel ESPN publicly reported that before the fall 2007 semester began at USC, Guillory and Louis Johnson took Mayo to a shopping mall where they purchased several thousand dollars in clothing for Mayo, paid for by Guillory. ESPN referred to Guillory as a "runner," defining runners as "middlemen who develop relationships with high-profile athletes with the goal of delivering them to a sports agent when the players turn pro." ESPN reported that Guillory "was an L.A. event promoter who also played a role in the suspension of a USC basketball player in 2000." During the shopping spree, the men discussed Mayo's future, in which he was going to create his own "brand" then use "his total package" when he joined a professional basketball team, using a specific sports agent—Bill Duffy Associates Sports Management (BDA)—to polish his image. The ESPN report stated that Guillory gave Mayo cash and other benefits: a flat-screen television, meals, airline tickets for friends and family, and cell phone service. Guillory "was the connection between Mayo and BDA Sports," and BDA "provided Guillory with money to maintain his relationship with Mayo, and to give Mayo some spending money," sums of up to \$200,000. The ESPN report was lengthy and detailed.

NCAA Reaction to the ESPN Report

In response to the ESPN report, the NCAA opened an investigation in May 2008, which continued for nearly two years. The NCAA interviewed 20 witnesses, but Mayo and Guillory refused to cooperate in the investigation. In September 2009, the NCAA gave USC notice of the allegations involving Mayo. In January 2010, USC admitted violating NCAA rules and imposed sanctions on itself: it vacated its wins during the 2007-2008 school year, when Mayo played while ineligible, and returned all money it received during the 2008 basketball championship.

The USC Infractions Report

In February 2010, USC officials appeared before the NCAA Division 1 Committee on Infractions for a three-day hearing involving alleged violations in three sports: football, basketball, and tennis. The committee issued its conclusions in a June 2010 USC Public Infractions Report (the Infractions Report). The Infractions Report did not identify individuals by name, using the terms “student-athlete 2” (Mayo), “representative B” (Guillory), and “representative C” (Johnson).

The report stated that “representative B” (Guillory) is affiliated with a professional sports agency. He is a USC “booster” since 2001, when he purchased an airline ticket to Las Vegas for another student athlete. With respect to Mayo, Guillory became a booster in November 2005, when he appeared unannounced at the USC men’s athletic department to say that he could deliver Mayo to the institution, and began assisting in recruitment efforts. USC learned (through an internet search) “that [Guillory] had been identified as a ‘runner’ for a sports agent in a case involving another NCAA member institution.” By acting as a go-between between the prospective student and the college, “a handler becomes a representative of athletics interests for that institution” which, in turn, exposes the institution to sanctions for NCAA rules violations. With respect to Mayo, the report concludes that he and his associates took benefits from professional sports agents or persons acting on behalf of these agents.

NCAA rules were violated when Guillory provided inducements and benefits to Mayo. These included: (1) providing Mayo and his brother with cash, transportation,

meals, basketball instruction and merchandise in 2006; (2) wiring cash to Mayo's girlfriend in 2006 and 2007; (3) providing Mayo and his brother with cell phones and wireless service in 2007-2008; (4) arranging for Mayo to appear on the cover of a magazine in 2007; (5) providing transportation to and lodging in Las Vegas in 2007 for Mayo and his brother; and (6) giving Mayo a \$1,400 television in 2007.

Guillory's Complaint

Guillory's 2010 complaint asserts claims for defamation, invasion of privacy/false light, and negligent misrepresentation. Guillory alleges that he was an event promoter who met Mayo at a basketball camp in 2003, when Mayo was in seventh grade. They forged a strong personal relationship, in which Guillory served as a friend, mentor, and positive African-American male influence in place of Mayo's absent father. Guillory alleges that he had no influence over Mayo's decision to attend USC: rather, Mayo asked Guillory to contact USC after deciding that it had a large media market and he wanted to help the school establish a basketball tradition. During an investigation in 2007, the NCAA determined that Guillory's relationship with Mayo did not make Mayo ineligible under NCAA rules.

After playing for one year at USC, Mayo decided to play professionally. At that point, Louis Johnson made public accusations against Guillory to ESPN, claiming that improper benefits were provided to Mayo and his family. Based on Johnson's claims, the NCAA conducted an investigation and published its findings in the Infractions Report. The report mischaracterizes Guillory's relationship with Mayo, claiming that he represented Mayo in the marketing of his athletic ability. The report also states that Guillory is a "booster" or representative of USC's athletics interests.

With regard to the benefits listed in the Infractions Report, the complaint admits that they are largely true. It is true that Guillory drove Mayo to a basketball camp, provided meals and gave Mayo clothing. It is true that Guillory wired money to Mayo's girlfriend. It is true that Guillory gave Mayo a cell phone and wireless service. It is true that Mayo appeared on a magazine cover, though Guillory did not arrange for it. It is true

that Guillory drove Mayo to Las Vegas to watch his brother play basketball. It is true that Guillory purchased a big-screen television for Mayo in August 2007.

Despite the truth of the statements made in the Infractions Report, Guillory alleges that he “was providing love, comfort, society, support, mentorship, and guidance to Mayo” and is being falsely labeled as a “professional leech” with intentions of profiting from Mayo. When viewed in light of his close relationship with Mayo, none of the benefits Guillory provided to Mayo were improper. They were more like tokens of affection. The statements in the Infractions Report are defamatory and place him in a false light. In addition, the NCAA represented in 2007 that Guillory was not a representative of USC’s athletics interests and his relationship with Mayo was permissible. These statements were false, and the NCAA had no reasonable grounds for believing the representations when they were made. Guillory relied on the NCAA statements by continuing his close relationship with Mayo during his year at USC. Guillory seeks general damages of \$25 million, plus punitive damages.

The NCAA’s Anti-SLAPP Motion to Strike the Lawsuit

The NCAA brought a special motion to strike Guillory’s complaint under the anti-SLAPP statute. It argued that the Infractions Report addresses an issue of public interest. It also argued that Guillory cannot show a probability of prevailing on the merits of his claims because his complaint admits that the factual findings in the Infractions Report are substantially correct, and Guillory is a limited public figure who cannot prove actual malice.

Guillory opposed the NCAA’s anti-SLAPP motion. His declaration refers to his close relationship with Mayo who, while still in high school, “was a highly sought recruit for all of the top NCAA” schools. When Mayo expressed interest in USC, “I contacted the former basketball coaches [at USC] in order to relay that information.” Guillory denies that he was an agent or acting on behalf of an agent. He reiterates that he entertained Mayo and his family members; gave him clothing; transported him; made wire transfers to Mayo’s friends; provided cell phones to Mayo and his brother; was contacted by a magazine about a cover article and passed the information to Mayo; and

purchased a television for Mayo as a reward for making it to college. Guillory does not state whether he disclosed any of this information to the NCAA during his 2007 interview, when the NCAA was trying to determine Mayo's eligibility to enroll at USC. Guillory maintains that all of the things he provided to Mayo "were of the type that would be generally available to other students attending USC from their relatives, friends, and loved ones."

In response, the NCAA cited numerous articles from the media, dating from 2006, showing that Guillory has continuously been in the news with respect to his relationship with Mayo, making him a public figure. Guillory's declaration does not refute statements in the Infractions Report that he provided benefits to Mayo.

THE TRIAL COURT'S RULING

The trial court granted the NCAA's anti-SLAPP motion. It found that the Infractions Report is in furtherance of the constitutional right of free speech in connection with an issue of public interest, and Guillory did not meet his burden of demonstrating the probability of prevailing on the merits of his claim. Guillory is unlikely to prevail because he admits that the statements in the Infractions Report are substantially true. The statement that Guillory is a USC "booster" or athlete-representative was not shown to be false, and in any event it is an opinion or legal conclusion that cannot support a defamation claim.

Guillory is a limited public figure who cannot show by clear and convincing evidence that the NCAA published the Infractions Report with actual malice, or acted with reckless disregard for the truth. Though the NCAA certified Mayo's eligibility to play for USC in 2007, the uncontested evidence shows that Guillory did not disclose the benefits he provided to Mayo. Guillory's claim for negligent misrepresentation does not allege justifiable reliance. The court struck Guillory's complaint on June 17, 2011.

DISCUSSION

1. Appeal and Review

Appeal lies from the order granting NCAA's motion to dismiss the complaint under the anti-SLAPP statute. (§ 425.16, subd. (i).) The court's ruling on the motion is

subject to de novo review. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1245.)

2. Overview of the Anti-SLAPP Statute

The anti-SLAPP statute allows the courts to expeditiously dismiss “‘a meritless suit brought primarily to chill the defendant’s exercise of First Amendment rights.’” (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 670; § 425.16, subd. (a); *Simpson Strong-Tie, Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) There are two components to a motion to strike brought under section 425.16. First, there must be a threshold showing that the claim arises from the defendant’s exercise of the constitutional right to free speech. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Second, if the lawsuit affects a protected right, the court determines whether there is a reasonable probability that the plaintiff will prevail on his claims. (§ 425.16, subd. (b)(1); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) To protect First Amendment rights, the anti-SLAPP statute must “be construed broadly.” (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.)

3. Application of the Anti-SLAPP Statute

a. Threshold Showing that the Lawsuit Arises from Protected Activity

The NCAA relies on one of the four categories covered by the anti-SLAPP statute. It claims it engaged in “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)(4).) On appeal, Guillory argues—for the first time—that the Infractions Report is not a matter of public interest.

Guillory’s newly minted claim fails, because he waived the issue in the trial court. Guillory’s opposition to the anti-SLAPP motion states, “Plaintiff Guillory concedes that the statements contained in the Report involve a matter of ‘public interest’ shifting the

burden on Plaintiff to make a prima facie showing that there is a probability that he will succeed at trial.” Guillory made the concession twice in his opposition.²

Waiver is the intentional relinquishment of a known right. (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1320.) Guillory could have argued below that the Infractions Report is not an exercise of free speech. He did not do so. Instead, he conceded that the Infractions Report falls within the first prong of the anti-SLAPP statute. Based on this concession, the trial court found that the NCAA’s publication was in furtherance of the constitutional right of free speech in connection with an issue of public interest. “It is fundamentally unfair to fault a trial court for a reason it never had an opportunity to consider.” (*Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1093.) Guillory expressly waived his right to assert that the Infractions Report is not a matter of public interest.

In any event, there is no doubt that an investigation and report regarding violations of NCAA rules is a matter of significant public interest. (See *Taus v. Loftus* (2007) 40 Cal.4th 683, 712-713 [a published report regarding suppressed memories of child abuse is unquestionably a matter of public interest implicating the investigators’ right of free speech].) There is an ongoing controversy regarding gifts and financial benefits given to college and high school athletes. The Infractions Report addresses multiple NCAA violations involving three sports and three athletes at USC. The 2008 ESPN report and the news reports appended to the NCAA’s reply—all regarding the relationship between Guillory and Mayo—exemplify the public’s keen interest in these matters, which touch upon a popular athlete’s eligibility to participate in college sporting events. As in *Taus*, the Infractions Report unquestionably falls within the ambit of the anti-SLAPP statute.

This is decidedly not a private dispute (such as a marital dissolution) that attracts public interest. (See *Time, Inc. v. Firestone* (1976) 424 U.S. 448, 454-455.) Rather, it is a newsworthy matter that occasioned investigations, an administrative hearing, and a

² His second admission reads, “Guillory concedes the point that this case, regarding intercollegiate athletics recruitment, involves a matter of public interest.”

report that will serve as a guidepost—and as a warning—to NCAA member institutions, apart from USC.³ As one court wrote, “although there may have been little or no dispute that violation of NCAA rules was improper, there certainly was a dispute as to what the University should *do* about allegations of recruiting violations.” (*Barry v. Time, Inc.* (N.D.Cal. 1984) 584 F.Supp. 1110, 1116.)

b. Probability of Prevailing

Once the first component of an anti-SLAPP motion is satisfied, the burden shifts to the plaintiff to establish a probability of prevailing on his claims. (*Taus v. Loftus, supra*, 40 Cal.4th at p. 713; *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 213.) If the claim stated in the pleading is legally sufficient and is supported by prima facie evidence, it is not subject to being stricken as a SLAPP. (*Ibid.*; *Jarrow Formulas v. LaMarche, supra*, 31 Cal.4th at p. 738; *Major v. Silna* (2005) 134 Cal.App.4th 1485, 1498.) The court does not weigh the evidence; rather, it must accept as true all evidence favoring the challenged pleading. (*Soukup v. Law Offices of Herbert Hafif, supra*, 39 Cal.4th at p. 291; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 45-46.)

i. Defamation Claim

The tort of defamation involves a publication that is false, defamatory, unprivileged, and has a tendency to injure or causes special damage. (*Taus v. Loftus, supra*, 40 Cal.4th at p. 720; Civ. Code, §§ 44, 45.) While a false statement of *fact* can support a defamation action, an expression of *opinion* cannot. (*Ibid.*) The dispositive question is whether the published statements imply a provably false factual assertion. (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1048-1049.) Truth is an absolute defense to a defamation claim. (*Campanelli v. Regents of University of*

³ News reports indicated that Guillory’s relationship with Mayo and USC was concurrently investigated by the FBI, the IRS, the U.S. Attorney, and the NCAA. USC’s basketball coach resigned as a result of the investigations.

California (1996) 44 Cal.App.4th 572, 581; *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 646.)

The Infractions Report lists a number of “inducements and extra benefits” that Guillory provided to Mayo. Guillory’s complaint admits the truth of the facts recited in the Infractions Report relating to benefits provided to Mayo. Providing meals, merchandise, transportation, cell phone service and a big-screen television, money to Mayo’s girlfriend . . . all true, according to Guillory’s complaint. True statements of fact are not actionable.

Guillory complains that the Infractions Report refers to him as a “runner.” This is incorrect. The Infractions Report relates to three USC student-athletes in three sports, Mayo among them. The introduction to the Infractions Report notes, with respect to these athletes, that “Their world included professional sports agents, ‘runners’ and ‘handlers,’ ‘friends’ and family, many of whom were eager to cash in early on expected lucrative professional contracts.” Although Guillory was explicitly called a runner in a 2008 ESPN news report, the Infractions Report refers to runners generically as part of the “world” of top-flight athletes. The Infractions Report briefly mentions an internet search performed by USC staff in 2005, who unearthed a media report indicating that Guillory was a runner “in a case involving another NCAA member institution.” The NCAA’s mention of a media report about another institution is not tantamount to the NCAA calling Guillory a runner in the USC case.

The Infractions Report refers to Guillory as a “booster” and as a “representative . . . who was also affiliated with a professional sports agency” Guillory complains that this description of him is defamatory. As the NCAA observes, describing someone as a sports enthusiast or representative does not—on its face—tend to expose that person “to hatred, contempt, ridicule, or obloquy” or cause him “to be shunned or avoided” or “injure him in his occupation.” (Civ. Code, § 45 [defining libel].)

Under NCAA rules, an individual becomes a representative of an institution’s athletics interests (commonly known as a booster) if the institution knows (or should have known) that he is assisting in the recruitment of prospective student-athletes or

providing benefits to student-athletes or their families. Guillory admits that he approached USC to recruit Mayo, and admits that he provided benefits to Mayo and Mayo's family and friends, though he denies having any ulterior motives in doing so.⁴ Guillory's motives are not germane. The fact remains that he contacted USC during recruitment and provided benefits to Mayo and Mayo's posse, even if he did so in a loving and mentoring sort of way. This is enough to make Guillory a booster or representative.

The statements in the Infractions Report are not actionable defamation, because they are "substantially true." (*Campanelli v. Regents of University of California, supra*, 44 Cal.App.4th at pp. 581-582.) It is irrelevant that the NCAA deemed Mayo eligible to play for USC in 2007. Possible NCAA rule violations came to light in 2008, when Guillory associate Louis Johnson made allegations of misconduct in an ESPN interview.⁵

ii. Invasion of Privacy/False Light Claim

The right of privacy concerns one's own peace of mind and feelings, in contrast to defamation, which concerns damage to one's reputation and attendant effect on one's business or standing in the community. (*Operating Engineers Local 3 v. Johnson* (2003) 110 Cal.App.4th 180, 187.) Guillory's appellate brief does not address his claim for invasion of privacy, or his claim that the Infractions Report placed him in a false light. As a result, this cause of action is forfeited. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 793, fn. 2; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177.)

⁴ Guillory gives himself away in his brief when he states that he "*has made a living forming relationships with youth basketball players who are prone to losing focus due to non-ideal living conditions.*" (Italics added.) This shows that Guillory is motivated by profit, not by paternal love.

⁵ Because the statements about Guillory are, by his own admission, substantially true and therefore not defamatory, we need not reach the issue of whether Guillory is a limited public figure who must show the statements were made with actual malice.

iii. Misrepresentation Claim

Guillory contends that his claim for negligent misrepresentation is distinct from the publication of the Infractions Report and is therefore not subject to the NCAA's anti-SLAPP motion. A negligent misrepresentation is a false assertion, made by one who has no reasonable ground for believing it to be true, with the intent to induce reliance, causing the recipient to justifiably rely on the untrue fact and suffer damages as a result. (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 834.)

Guillory states that the NCAA represented in 2007 that his relationship with Mayo was permissible. Apparently—and oddly enough—this representation was false, because their relationship was in fact impermissible. Guillory allegedly “relied upon the NCAA’s statements by continuing his close relationship with Mayo throughout his career at USC.” Guillory argues that he suffered damages “as he is now unable to perform his job as a sports promoter and is essentially blacklisted.”

If Guillory’s misrepresentation claim is entirely unrelated to the Infractions Report, it is time-barred. The statute of limitations for negligent misrepresentation is two years. (*Ventura County Nat. Bank v. Macker* (1996) 49 Cal.App.4th 1528, 1529.) The NCAA allegedly made misrepresentations in 2007, so Guillory’s complaint filed in 2010 is untimely.

In reality, Guillory’s misrepresentation claim is based on the publication of the Infractions Report, in which he was found to be a representative or booster. Guillory did not suffer injury until the report was published. Artful pleading cannot avoid application of the anti-SLAPP statute, which applies to any claim arising from protected conduct. The focus is on the defendant’s activity, not the plaintiff’s cause of action. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.)

Guillory’s misrepresentation claim is subject to the anti-SLAPP statute. The evidence shows that Mayo denied receiving benefits from Guillory when he was interviewed by the NCAA in 2007. This does not appear to have been true. If Mayo and/or Guillory lied to the NCAA during the 2007 investigation, Guillory cannot now be heard to complain that he was damaged because the NCAA believed the false or

incomplete information he or Mayo supplied in 2007.⁶ Both Guillory and Mayo subsequently refused to be interviewed or cooperate with the NCAA in its second investigation, making no effort to refute the many national media stories about the benefits Mayo received from Guillory. Guillory has not shown a probability of prevailing on this claim.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.

⁶ In his declaration, Guillory does not disclose what, exactly, he told the NCAA in 2007.