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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

KYLE MADISON et al., Plaintiffs and Respondents, v. SANLI PASTORE & HILL, INC. et al., Defendants and Appellants.	B283872 (Los Angeles County Super. Ct. No. BC626872)

APPEAL from an order of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, Stephen M. Levine, for Defendants and Appellants.

Lyle R. Mink for Plaintiffs and Respondents.

Plaintiffs and respondents Kyle Madison and Marjan Madison (the Madisons) believed two professional advisers—an attorney, Daniel Spielfogel (Spielfogel), and consultants retained to provide expert witness services, defendants and appellants Sanli Pastore & Hill, Inc. (SPH) and Thomas E. Pastore (collectively, Pastore)—took money that was rightfully theirs. The Madisons sued the advisers for conversion, alleging they accepted payment from a person and entity Kyle Madison had sued for fraudulently taking their money. Spielfogel and Pastore brought Code of Civil Procedure section 425.16[1] special motions to strike the conversion claims against them, which the trial court denied. We recently affirmed the trial court's decision with respect to Spielfogel (*Madison v. Spielfogel* (July 20, 2018, B280588) [nonpub. opn.] (*Madison I*)), and we now consider whether there is any basis for reaching a different conclusion with respect to Pastore.

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[1] As we describe in further detail *post*, this statute permits the trial court to strike "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . 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, subd. (b)(1).) Undesignated statutory references in the remainder of this opinion are to the Code of Civil Procedure.

I. BACKGROUND[2]

The Madisons created a limited liability company (the LLC) with Michael Theodore (Theodore) to purchase, renovate, and market a rental property in Cabo San Lucas, Mexico. The rental property project proved to be more costly and less profitable than the parties expected, and disputes arose over funds and access to the property. In 2011, Kyle Madison sued Theodore and the LLC for breach of contract, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, fraud, dissolution of the LLC, appointment of a receiver, accounting, and injunctive relief. The complaint alleged Theodore misappropriated and converted LLC funds and commingled those funds with his personal accounts.

To defend against the lawsuit, Theodore retained Spielfogel, as his (and the LLC's) attorney, and Pastore, to provide expert witness services. In 2015, the trial court held a 15-day bench trial on Kyle Madison's equitable causes of action against Theodore and the LLC. The court found Theodore breached a fiduciary duty to the Madisons by transferring "not insignificant sums of money" from the LLC into his personal bank accounts. The court made no determinations, however, as to how much money Theodore owed the Madisons. Several months later, the court ordered an accounting and tracing analysis so that it could "make determinations regarding the imposition of a constructive trust."

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[2] In reciting the facts, we draw heavily from our opinion in *Madison I*.

Not long after the court ordered an accounting, the Madisons sued Spielfogel and Pastore for conversion.[3] Although the tracing analysis had yet to be completed, the court had not made any determinations of amounts owed, and the parties' legal claims and defenses had not yet been tried, the Madisons' complaint alleged Theodore owed them "at least $1.7 million" and Theodore had paid Spielfogel and Pastore approximately $309,295 and $68,820, respectively, from Theodore's bank accounts that contained funds belonging to the Madisons.

Spielfogel and Pastore each filed a special motion to strike the Madisons' complaint pursuant to section 425.16, the anti-SLAPP statute. Pastore contended the Madisons' conversion claim arose from activity protected by that statute because the claim was based on his provision of expert witness services during litigation—which was conduct "in furtherance of the exercise of the constitutional right of petition" (§ 425.16, subd. (e)(4)). Pastore maintained that even though the Madisons' complaint was specifically directed at "conversion" and not the provision of expert services, the two were "inextricably intertwined" because the expert witness services were a necessary antecedent to his receiving payment. Pastore pointed to case law holding that funding litigation is protected activity under section 425.16, and he contended the Madisons' complaint was based on the funding of litigation.

Pastore further contended the Madisons could not show a probability of prevailing on the merits of the conversion claim for

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[3] The Madisons initially did not sue SPH, which is the entity that received payment for expert services. The Madisons filed an amended complaint adding SPH as a defendant in January 2017.

the following reasons: they could not establish the elements of conversion—having not established ownership in the amounts allegedly converted; Pastore innocently received payment from Theodore without knowledge of the source of funds; and the challenged conduct was in any event protected by the litigation privilege (Civ. Code, § 47, subd. (b)).

The Madisons opposed Pastore's motion to strike. They argued their conversion claim was not about targeting Theodore's "lawyers and experts" or "funding litigation" but rather about possession of the Madisons' property—their money.

After separate hearings, the trial court denied both Spielfogel's and Pastore's motions to strike. Spielfogel and Pastore had made similar arguments, and the court's rationale for its decision against Pastore was consistent with its decision against Spielfogel. The court concluded the thrust of the Madisons' complaint was that Pastore possessed property rightfully belonging to the Madisons and any protected activity by Pastore was "merely incidental to the non-protected activity, which is receipt of property that allegedly belongs to [the Madisons]." Because the Madisons' conversion claim arose from "a property dispute and not constitutionally protected activity," the court reasoned it was immaterial whether assertion of the claim followed, or was triggered by, protected litigation activity. Quoting *Episcopal Church Cases* (2009) 45 Cal.4th 467, 478, the court wrote: "'The additional fact that protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a property dispute into a SLAPP suit.'"

II. DISCUSSION

Pastore's opening brief links his prospect of prevailing in this appeal to the fate of Spielfogel's anti-SLAPP claim. Although we opted to hear both appeals separately, Pastore advocated for his appeal to be heard with Spielfogel's "to avoid possible inconsistent results." On this limited point, the concession of a linkage between our decision in *Madison I* and our disposition of this appeal, Pastore is right—we see no basis for reaching a result here that is different from the result we reached in *Madison I*.

In short, although Pastore repeatedly asserts a "but for" test governs anti-SLAPP protected activity determinations (i.e., "[b]ut for [Pastore] being retained for expert witness services in the [Madison] Action and being paid for such services, the Madisons would not have sued [Pastore]"), controlling precedent holds activity unprotected by the anti-SLAPP statute does not become protected merely because that activity follows or has some relation to protected activity. Rather, an anti-SLAPP remedy will lie only where the assertedly protected activity forms the basis for a challenged claim, meaning, the activity helps establish the elements of that claim. As we shall explain, that is not true for the Madisons' conversion claim challenged here.

A. Review of Anti-SLAPP Motions

The Legislature enacted section 425.16 in response to "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) Such lawsuits are typically called "SLAPPs," short for "'strategic lawsuit against public participation,'" and section 425.16 is often

referred to as the "anti-SLAPP statute." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 381 & fn. 1 (*Baral*).)

Section 425.16 provides a mechanism for weeding out meritless SLAPPs at an early stage in the litigation. (*Baral*, *supra*, 1 Cal.5th at p. 384; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) A defendant moving to strike a claim under the statute bears an initial burden of showing that activity protected by the statute forms the basis of the challenged claim.[4] (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061-1062 (*Park*).) "If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached," in which the burden shifts to the plaintiff to establish a probability of prevailing, i.e., "that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the

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[4] Section 425.16, subdivision (e) defines protected activity for purposes of applying the statute as "(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 or writing 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."

claim is stricken." (*Baral*, *supra*, at p. 396.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*); accord, § 425.16, subd. (b)(1).) We review the denial of an anti-SLAPP motion de novo. (*Park*, *supra*, at p. 1067.)

B. A Causal Relationship Between Protected and Unprotected Activity Is Not Sufficient to Confer Protected Status Upon Otherwise Unprotected Activity

In *Park*, a professor sued his university employer for discrimination after he was denied tenure. (*Park*, *supra*, 2 Cal.5th at p. 1061.) The university filed a special motion to strike Park's complaint on the ground that his discrimination claim was based on protected communications that precipitated (and followed) the denial of tenure. (*Ibid.*) A divided Court of Appeal held Park's claim should be stricken under the anti-SLAPP statute; "although the gravamen of Park's complaint was the University's decision to deny him tenure, that decision necessarily rested on communications the University made in the course of arriving at that decision" and those communications "were protected activity for purposes of the anti-SLAPP statute." (*Id.* at pp. 1061-1062.)

Our Supreme Court reversed after determining that "[t]he elements of Park's claim . . . depend[ed] not on the grievance proceeding, any statements, or any specific evaluations of him in the tenure process, but only on the denial of tenure itself and whether the motive for that action was impermissible." (*Id.* at p. 1068.) The key holding in *Park* is that "a claim may be struck

[under section 425.16] 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; see also *Navellier*, *supra*, 29 Cal.4th at p. 89 ["the 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" and the fact "that a cause of action arguably may have been 'triggered' by protected activity does not entail it is one arising from such"].) The *Park* decision emphasizes courts must "respect the distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Park*, *supra*, at p. 1064.) Accordingly, when reviewing anti-SLAPP motions, "courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Id.* at p. 1063.)

The analytical framework *Park* requires us to employ reveals why Pastore's anti-SLAPP argument fails. """"The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages."" [Citation.]" (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.) The "wrongful act" element of a conversion claim does not require proof the defendant knew or intended to receive property belonging to another, or otherwise received the subject property in bad faith.[5] (*Moore v. Regents of University of California* (1990)

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[5] While strict liability is the "general rule" for conversion claims, there is an exception in which the defendant's knowledge

51 Cal.3d 120, 144 ["conversion is a strict liability tort"]; *Oakdale*, *supra*, 43 Cal.App.4th at p. 544 ["questions of good faith, lack of knowledge and motive are ordinarily immaterial"]; *Henderson v. Security Nat. Bank* (1977) 72 Cal.App.3d 764, 770-771.)

When we "consider the elements of the [Madisons' conversion] claim and what actions by [Pastore] supply those elements and consequently form the basis for liability" (*Park*, *supra*, 2 Cal.5th at p. 1063), it is obvious that Pastore's alleged "conversion by a wrongful act or disposition of property rights" is based on his receipt of "not less than $68,820" belonging to the Madisons. Facts concerning the reason *why* Pastore received these funds, or allegations concerning Pastore's knowledge of Theodore's conduct with respect to the Madisons' funds, are unnecessary to state a conversion claim against Pastore.[6] (*Id*. at

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is relevant: when property is converted through fraudulent misrepresentation and the converter transfers that property to an innocent third party that lacks knowledge of the fraud, the third party may rely on lack of knowledge as a defense against liability. (*Regent Alliance Ltd. v. Rabizadeh* (2014) 231 Cal.App.4th 1177, 1183; *Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 546 (*Oakdale*); *CRS Recovery, Inc. v. Laxton* (9th Cir. 2010) 600 F.3d 1138, 1145; 14A Cal. Jur. (3d ed. 2016) Conversion, § 33, pp. 580-582.)

[6] Paragraph 25 of the Madisons' operative complaint alleges Pastore "received wrongfully converted funds in which the Madisons had an ownership interest, wrongfully assumed ownership and control over them, and wrongfully applied them to their own use and benefit without the knowledge or consent of the Madisons." In paragraph 26, the Madisons allege Pastore "participated in the tort of conversion by authorizing, directing or actively participated [*sic*] in the wrongful conduct described

p. 1068 ["Plaintiff could have omitted allegations regarding [alleged protected activity] and still state the same claims"].)

We acknowledge, contrary to the Madisons' contentions, that conversion claims are not categorically exempt from the anti-SLAPP statute. (See, e.g., *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95 (*Optional*); *Finton Construction, Inc. v. Bidna & Keys, APLC*

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herein," which they assert "included but is not limited to: Examining all financial records in issue in the action; receiving information and knowledge that Theodore commingled LLC funds with his personal funds; causing bills to be sent to Theodore for the forensic accounting services described herein; and agreeing to allow SPH to receive payment for forensic accounting services from those commingled funds."

Pastore filed his anti-SLAPP motion after our Supreme Court decided *Baral*, *supra*, 1 Cal.5th 376. The *Baral* court held lower courts may strike from a complaint individual allegations of protected activity on which a challenged claim is based, while leaving in place allegations of unprotected activity as well as "[a]llegations of protected activity that merely provide context, without supporting a claim for recovery . . . ." (*Id*. at pp. 393-394.) Before a court will strike individual allegations under section 425.16, however, the "moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." (*Id*. at p. 396.) No such identification was undertaken in this case, and we therefore do not engage in a targeted analysis as to whether the allegations in paragraph 26 of the complaint refer to protected activity. Nor do we address, because it has not been raised, the seemingly novel question of whether the protections of the anti-SLAPP statute should be determined not just by analyzing the elements of a challenged claim but also by analyzing the elements of a complete affirmative defense.

(2015) 238 Cal.App.4th 200 (*Finton*).) But in order to meet its burden under step one of the anti-SLAPP statute, the moving party must show its protected activity was "the wrong complained of"—i.e., as applied here, that Pastore's provision of expert witness services was the act supplying "the elements of the challenged [conversion] claim . . . ." (*Park*, *supra*, 2 Cal.5th at pp. 1060, 1063.) In *Optional*, the anti-SLAPP movant satisfied that burden by demonstrating the conversion claim arose from (in the *Park* sense) the defendant law firm's settlement negotiation of existing litigation—which happened to entail the transfer of funds. (*Optional*, *supra*, at pp. 104, 106, 114.) In *Finton*, the anti-SLAPP movant satisfied its burden by showing the conversion claim arose from (again, in the *Park* sense) the defendant law firm's refusal to divest itself of potential evidence relevant to the underlying lawsuit. (*Finton*, *supra*, at p. 210.)

The Madisons' case against Pastore is unlike both of these cases where the conversion claims were based on acts that actually constituted client representation. The defendant law firms in *Optional* and *Finton* were not sued for receiving compensation for their services; they were sued for performing those services. While Pastore's receipt of funds was compensation for services he performed for Theodore and the LLC, the Madisons' claim to those funds does not directly challenge Pastore's services in the manner seen in *Optional* and *Finton*.

In other words, the tasks Pastore performed in providing expert witness services cannot be said to be "the wrong complained of" (*Park*, *supra*, 2 Cal.5th at p. 1060). Pastore's insistence that his receipt of funds was "inextricably intertwined" with protected litigation activity is little different than the

argument rejected by our Supreme Court in *Park*—that the plaintiff's claim was "necessarily" based on protected communications underlying the tenure decision. The fact that Pastore's protected activity may have led to, or may serve as "evidentiary support" for, the Madisons' conversion claim does not establish the claim arose from protected activity. (*Park*, *supra*, at p. 1064.)

Pastore also has not demonstrated that receiving payment for the provision of litigation-related services is the same as funding litigation for purposes of the anti-SLAPP statute. The case law interpreting section 425.16 fails to establish the proposition advanced by Pastore—that because protected activity of funding litigation necessarily results in someone being paid, the act of receiving payment must also be protected. Accordingly, Pastore's contentions find no support in *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147 (*Sheley*)—a case decided before our Supreme Court's decision in *Park*. In *Sheley*, a decedent's wife brought a conversion claim against the decedent's daughters for wrongfully obtaining money that the daughters used to fund litigation against the wife. (*Id.* at p. 1155.) The *Sheley* court held the daughters' act in obtaining the money was quite literally an act in furtherance of their free speech and petitioning rights because the money acquired enabled their filing of litigation. (*Id.* at pp. 1167-1168.) The *Sheley* decision is therefore dissimilar in an important respect to the factual scenario in this case. Here, the alleged conversion was not undertaken by a party to fund litigation but by those who received payment as compensation for litigation activity. The alleged conversion is thus not "in furtherance of" litigation activity in the same way that it was in *Sheley*, and regardless, under *Park*, the question is ultimately

whether the litigation activity supplies the necessary elements for the Madisons' conversion claim—which, as we have explained, it does not.

Pastore contends that the absence of an anti-SLAPP remedy against claims like the Madisons', which he supposes could impair the ability of sued parties to defend themselves, "would have a chilling effect on the representation of the defendant in almost every civil case." But the cases are legion in holding a plaintiff's intent is not an element of an anti-SLAPP motion. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 74 [plaintiff's "subjective intent" in bringing a claim "is not relevant" because "the anti-SLAPP statute, construed in accordance with its plain language, incorporates no intent-to-chill pleading or proof requirement"] (*Cotati*); see also *id.* at p. 78 ["a claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic"]; *Optional Capital, Inc. v. DAS Corp.* (2014) 222 Cal.App.4th 1388, 1399 ["whether the plaintiff's lawsuit intended to chill or actually chilled the defendant's conduct is not relevant"].)

Complaints of a possible chilling effect are susceptible to hyperbole, but taking the concern seriously at the margins, the inapplicability of the anti-SLAPP statute does not render defendants facing abusive, meritless claims without recourse—as the *Cotati* court observed. (*Cotati*, *supra*, 27 Cal.4th at p. 78, fn. 4.) The requirements for stating a conversion claim for money, the availability of an innocent recipient defense, the frivolousness pleading standard (§ 128.7), the ready availability of a demurrer remedy, and the risks attendant in suing those who litigate as a profession all help explain why we have seen few conversion

claims against a litigation adversary's lawyers and experts in the past; these same considerations provide some assurance such cases will not proliferate in the future.

We have no occasion to express a view on the merits of the Madisons' conversion claim because Pastore has failed to carry his burden in step one. That resolves our task in this appeal.

DISPOSITION

The order is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J.

SEIGLE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.