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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALICE HILL, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B277842 (Los Angeles County Super. Ct. No. BC605475)

APPEAL from an order of the Superior Court of Los Angeles County, Holly J. Fujie, Judge. Affirmed.

Terran T. Steinhart for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Matthew A. Scherb, Deputy City Attorney, for Defendants and Respondents.

In 2014, Los Angeles Police Department (LAPD) officers shot and killed Ezell Ford. Leroy Hill witnessed that shooting and gave the press his account blaming the police. A year later, an unknown assailant shot and killed Leroy. Based on allegations that the City of Los Angeles and city officials promised to protect Leroy, his widow Alice[1] sued the City of Los Angeles and officials for breach of contract and for wrongful death. They responded with a special motion to strike the complaint under the anti-SLAPP statute (Code Civ. Proc., § 425.16),[2] which the trial court granted. Alice appeals. We affirm the court's order because Alice failed to establish a probability of prevailing on her claims.

BACKGROUND

I. Leroy witnesses the shooting of Ford

Police officers shot and killed Ford, a Black man, on August 11, 2014.[3] Leroy witnessed the shooting. A few days after the shooting, The Huffington Post published an article, dated August 14, 2014, entitled, *LAPD Shouted 'Shoot Him' Before Killing Unarmed, Mentally Ill Black Man: Witness*. The article identified Leroy as an eyewitness to the Ford shooting and quoted Leroy as saying that the police beat and shot Ford while Ford was on the ground. The article had a photograph of Leroy.

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[1] We refer to the Hills by their first names to avoid confusion. We intend no disrespect.

[2] All further statutory references are to the Code of Civil Procedure.

[3] The killing of Ford occurred just days after a police officer shot Michael Brown, a young Black man, in Ferguson, Missouri.

Leroy gave another statement to The Final Call. In an article dated September 23, 2014, Leroy was quoted as telling The Final Call that he did not hear the police say anything before shooting Ford.

In connection with the Ford shooting, Los Angeles city and county officials held press conferences on August 19, 2014 and on November 13, 2014. The record does not contain a transcript of the first press conference. But the record shows that District Attorney Jackie Lacey, Mayor Eric Garcetti, LAPD Police Chief Charlie Beck, LAPD Inspector General Alexander Bustamente, and Councilman Curren Price attended the second press conference. Mayor Garcetti asked the public for help and reiterated "our call for witnesses to come forward, to help the community, to help the family, to help our officers, and to help this department get to the bottom of what happened that day." District Attorney Lacey said, "I am interested in facilitating any reluctant witness at the request of the LAPD" and asked witnesses to contact an investigator. Inspector General Bustamante similarly implored anyone with information "to please come forward." As to witnesses who had come forward to the Ford family but not to law enforcement, Chief Beck said "we would like them to come forward" and that there were "multiple avenues" by which they could do so. However, to District Attorney Lacey's knowledge, Leroy did not present himself as a witness to her or to the District Attorney's office. The District Attorney's office also had no written agreement with Leroy regarding witness protection.

Meanwhile, the Ford family had filed a federal civil rights action against the City of Los Angeles and the LAPD. Leroy gave the Fords' attorneys a videotaped and written statement and agreed to testify for the Ford family. The Fords shared Leroy's statement with the City of Los Angeles, and, in March 2015, Leroy received a deposition subpoena from the city.

Tragically, however, before Leroy could be deposed, an unknown assailant shot and killed him on March 13, 2015.

II. Alice sues the City[4]

After her husband's murder, Alice sued the City of Los Angeles, Mayor Garcetti, Chief of Police Beck, Deputy Chief Earl Paysinger, Inspector General Bustamante, and Councilman Price (collectively, the City). Her operative pleading, the second amended complaint (SAC), alleged causes of action for breach of contract and for wrongful death based on allegations that City spokespersons at the press conferences told witnesses to be unafraid for their safety because the City would provide protection—the "protection promise." Further, the SAC alleged that the City's negligent failure to fulfill its obligations under the "protection promise" resulted in Leroy's wrongful death.

III. The anti-SLAPP motion

In response to the complaint, the City filed a special motion to strike, which argued that plaintiff could not demonstrate a probability of prevailing on her claims because governmental

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[4] Alice also sued the County of Los Angeles and District Attorney Lacey. After filing an anti-SLAPP motion, they settled with plaintiff and the complaint was dismissed with prejudice as to them. The City joined in the County's motion to strike and relied on the County's argument and evidence.

immunities barred the causes of action; Alice lacked standing to bring the breach of contract cause of action; she failed to meet the requirements of the Government Claims Act; and no enforceable contract was created. The City supported the motion with a transcript of portions of the November 13, 2014 press conference, The Huffington Post and The Final Call articles, and District Attorney Lacey's declaration denying that any "protection promise" was made at the press conference.

In opposition, Alice submitted the declaration of Jaime R. Salanga, the chief executive officer and founder of Draken Security, a private security company.[5] In Salanga's opinion, "any eyewitness to the Ford shooting faced potential danger from one side of the controversy or the other depending upon his eyewitness account. If his account of the shooting supported the police version of justifiable homicide, he faced potential danger from angry members of the black community; and if his account contradicted the police version, he faced potential danger from the police officers involved in the shooting to silence him as a witness." He further opined that Leroy would not have been murdered had the City provided witness protection. Rather, two armed law enforcement officers would have been assigned to protect him 24 hours a day, seven days a week; he and Alice would have been moved to a confidential safe house; and they would have been placed in a permanent witness protection program under the auspices of the United States Marshals.

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[5] The City objected to plaintiff's evidence, but the trial court did not rule on the objections. We need not address the objections because even if all of plaintiff's evidence was admissible, it was insufficient to establish a probability of prevailing on the claims.

In her declaration, Alice claimed that Leroy did not know he gave statements to the press. To the extent Leroy shared what he witnessed, it was "by way of a spontaneous utterance" due to Leroy's "shock, grief and anger." Also, Leroy had assured Alice that they would obtain witness protection "through the promise of the City." But Leroy also told her that the Ford family attorneys said that protection would be given when necessary and that the attorneys "were taking care of that." According to Duane Moody, a consultant to the Ford family who was at the press conferences, at "least one spokesperson at each press [conference] stated that protection would be provided for the safety of each such percipient witness that so presented himself or herself."

At the hearing on the City's anti-SLAPP motion, plaintiff abandoned her breach of contract cause of action. The trial court found that plaintiff could not establish a probability of prevailing on any of her claims, including the breach of contract one. The court found that any statements City officials made at the press conferences were not offers and were too vague as to the parties' obligations. Even if statements at the press conference constituted an offer, there was no evidence Leroy accepted it. As to the wrongful death cause of action, governmental immunities barred it.

This appeal followed.

DISCUSSION

I. Anti-SLAPP motions

"[S]ection 425.16 provides a procedure for the early dismissal of what are commonly known as SLAPP suits (strategic lawsuits against public participation)—litigation of a harassing nature, brought to challenge the exercise of protected free speech rights." (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 665, fn. 3; *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 312, 315.) Section 425.16, subdivision (b)(1) provides: "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 shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Evaluating an anti-SLAPP motion thus involves two steps. First, the court determines whether the moving defendant has made "a threshold showing that the challenged . . . action arises from protected activity," that is, activity in furtherance of the rights of petition or free speech. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; § 425.16, subd. (e).) If the threshold showing is made, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819–820 (*Oasis*).) "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.)

We review an order granting or denying a special motion to strike de novo. (*Oasis*, *supra*, 51 Cal.4th at p. 820.) We consider the "pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) We examine the complaint in a fair and commonsense manner and we broadly construe the anti-SLAPP statute. (*Id.*, subd. (a).) We neither weigh credibility nor compare the weight of the evidence. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

Here, there is no dispute that the first prong of the statute has been satisfied. We therefore proceed to the second prong: whether Alice has satisfied her burden of demonstrating a probability of prevailing on her wrongful death cause of action.

II. Plaintiff has not demonstrated a probability of prevailing on her wrongful death cause of action

Plaintiff premises her wrongful death cause of action on the alleged "protection promise." As we explain, the City owed her no duty of care, and therefore she has not shown a probability of prevailing on her claim.

Except when otherwise provided by law, California public employees are statutorily liable to the same extent as private persons for injuries caused by their acts or omissions, subject to the same defenses available to private persons. (Gov. Code, § 820; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128 (*Zelig*).) Also, public entities are generally liable for injuries caused by the negligence of their employees acting in the scope of their employment. (Gov. Code, § 815.2.) Under those statutes, general principles of tort law, in particular the law of negligence, govern Alice's wrongful death cause of action, which was

premised on allegations that the City negligently failed to fulfill their obligations to Leroy under the "protection promise."

"The elements of a cause of action for wrongful death are a tort, such as negligence, and resulting death. [Citation.] The elements of a negligence cause of action are duty to use due care and breach of duty, which proximately causes injury." (*Lopez v. City of Los Angeles* (2011) 196 Cal.App.4th 675, 685; see also *Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [wrongful death claim resulting from negligence requires all elements of actionable negligence].) Generally, however, one owes no duty to control another's conduct or to warn those endangered by such conduct. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1499 (*Hernandez*).) Absent a special relationship or undertaking, a public entity owes no duty in tort. A special relationship exists "if an injured person demonstrates the public officer 'assumed a duty toward [him] greater than the duty owed to another member of the public.' " (*Walker v. County of Los Angeles* (1987) 192 Cal.App.3d 1393, 1398 (*Walker*).) "Special relationships" thus can be created where public employees create a foreseeable peril not readily discoverable by endangered persons or make an express or implied promise to undertake a special duty toward the plaintiff. (*Id.* at p. 1399; *Zelig*, *supra*, 27 Cal.4th at p. 1129.)

A special relationship was created, for example, when an animal control officer asked the plaintiff Walker to help her catch a dog. (*Walker*, *supra*, 192 Cal.App.3d at p. 1395.) Walker obliged the officer, but the dog bit his thumb off. (*Ibid.*) The court found that where a public employee "expressly" asks a "specific private citizen" for assistance in performing a public function involving a foreseeable risk of injury, a special

relationship is created during the time the citizen works with the officer. (*Id.* at pp. 1399, 1401.) But, even *Walker* acknowledged that its holding was limited to its unique facts and admonished that it was not "creat[ing] a far-ranging duty of care on behalf of any citizen who volunteers to respond to a *general* call for help." (*Id.* at p. 1401.)

Although Alice relies on *Walker* to support her argument that the City owed her a duty of care by asking for help in locating Ford's killer, the general rules of tort law will usually bar recovery when plaintiffs, having suffered injury from third parties engaged in criminal activities, claim that their injuries could have been prevented by timely assistance from a law enforcement officer. (*Zelig*, *supra*, 27 Cal.4th at p. 1129.) Thus, *Hernandez* more closely mirrors the facts here. In *Hernandez*, Torrez, himself a gang member, had information about a gang-related murder. (*Hernandez*, *supra*, 49 Cal.App.4th at p. 1496.) He reluctantly gave a statement to the police. (*Ibid.*) Although police officers assured Torrez no harm would come to him as a result of being questioned, gang members thereafter killed him. (*Id.* at pp. 1496, 1502.) In finding that law enforcement owed Torrez no duty of care, *Hernandez* distinguished *Walker*. In *Walker*, the public officer asked for assistance and the plaintiff acceded to that request. In contrast, the duty on the part of citizens to assist in criminal prosecution does not give rise to a

right to protection on demand. (*Hernandez*, at p. 1504.)[6] Instead, "absent a special undertaking to protect a witness, there is no duty to do so in the course of investigating and prosecuting criminal activity." (*Id.* at pp. 1504–1505.) Because there was no allegation the assurance in *Hernandez* "amounted to a specific or implicit undertaking to provide any protection for Torrez," recovery was barred. (*Id.* at p. 1502.)

Here too there is no evidence the City undertook to protect Leroy. Rather, the only evidence that the City promised to protect Leroy comes from Moody, who was at the press conferences and said that officials represented "protection would be provided for the safety of each such percipient witness that so presented himself or herself." Although the partial transcript from the November 13, 2014 press conference contains no such statement, Moody's testimony is, in any event, insufficient to establish that the City undertook to protect Leroy. No express promise was made specifically to Leroy. Leroy never agreed to work with the City, and there was no evidence that Leroy was even at the press conferences. Also, the alleged "protection

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[6] "In a perfect world, that right would be assured, but law enforcement and government agencies charged with investigating and prosecuting crimes must instead operate in a world of budgetary constraints and limited resources. [¶] . . . If law enforcement agencies were held to owe a duty to protect every witness who is fearful of reprisal, with attendant liability for failure to do so, one can easily suppose that criminal investigations will be inhibited from the outset. Law enforcement officials will hesitate to question potential witnesses without first determining whether the funds exist to protect them. These and other considerations compel the conclusion that absent a specific undertaking to protect a witness, there is no duty to do so in the course of investigating and prosecuting criminal activity." (*Hernandez*, *supra*, 49 Cal.App.4th at pp. 1504–1505.)

promise" was so vague, ambiguous and general we cannot tell what was allegedly promised.[7] (See *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811–812 [in contract context, offer must be sufficiently definite and reasonably certain so that it can be ascertained what the parties agreed to].) What kind of protection was Leroy supposed to have? When was protection to start? How long was it to last? (See, e.g., *Hernandez*, *supra*, 49 Cal.App.4th at p. 1503.) Salanga's opinion about what protection *should have been offered* is no substitute for evidence of what was *in fact* offered. Salanga's opinion does not fill in the blanks. (See, e.g., *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123 [expert's opinion rendered without reasoned explanation of why underlying facts lead to the ultimate conclusion has no evidentiary value].)

Indeed, according to Alice's declaration, the Ford family attorneys were supposed to take care of protection, not the City. She further concedes that Leroy never approached the City for protection: "[R]ather than presenting himself as an eyewitness to the officials of the City or County, Leroy presented himself to" the Fords' attorneys. Notwithstanding these concessions, Alice argues that the City somehow should have known it had to protect Leroy based on Leroy's acceptance of service of the City's deposition subpoena. Stated otherwise, the City was supposed to know that Leroy needed and wanted protection by virtue of being identified in discovery. However, as the City points out, the Fords' responses to discovery and the City's service of a

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[7] Moreover, a witness protection agreement must be in writing and specify the responsibilities of the protected person that establish the conditions for local or state prosecutors providing protection. (Pen. Code, § 14025.)

deposition subpoena cannot legally, or, indeed, reasonably, be construed as creating a special relationship between Leroy and the City.

The "assurance" in this case is therefore even more attenuated than the one in *Hernandez*, because it was made to the public at large during press conferences asking witnesses to come forward. No specific assurance was made to Leroy, Leroy never came forward to the City, he was not actively working with government officials, and he never asked for protection. Alice's loss of her husband is a tragedy. Still, the City owed no duty of care to Leroy or to Alice.[8] The trial court therefore properly granted the City's anti-SLAPP motion.

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[8] Because we conclude that the City did not owe Leroy a duty of care, we need not reach any alternative grounds, such as governmental immunities, that might bar the wrongful death cause of action. (See, e.g., *Hernandez*, *supra*, 49 Cal.App.4th at p. 1505; *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 201–202 [conceptually, applicability of statutory immunities does not arise until it is determined the defendant owed a duty of care to the plaintiff].)

DISPOSITION

The order is affirmed. The City is awarded its costs and attorney fees on appeal.

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KALRA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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