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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| TAWNI J. ANGEL et al.,<br><br>Plaintiffs and Respondents,<br><br>v.<br><br>MARCY WINOGRAD,<br><br>Defendant and Appellant. | B261707<br><br>(Los Angeles County<br>Super. Ct. No. SC123378) |

APPEAL from an order of the Superior Court of Los Angeles County, Lisa Hart-Cole, Judge. Reversed.

Horvitz & Levy, Jeremy B. Rosen, and Felix Shafir, for Defendant and Appellant.

Talisman Law, and Donald E. Chomiak, for Plaintiffs and Appellants.

Plaintiffs and respondents Tawni Angel, Jason Nestor, and Tawnis Ponies and Petting Farm, Inc. operated a pony ride and petty zoo at the Main Street Farmers' Market in Santa Monica. Defendant and appellant Marcy Winograd opposed "animal attractions" and initiated a campaign to cause the City of Santa Monica to end plaintiffs' participation at the farmers' market. The campaign accused plaintiffs of animal cruelty in violation of the Penal Code and included protests at the farmers' market, emails to City of Santa Monica officials, and articles posted on local media websites. The City of Santa Monica investigated defendant's claims and found no evidence of animal cruelty. Defendant nevertheless continued her campaign. The Santa Monica City Council ultimately voted to explore activities to replace the pony ride and petting zoo at the expiration of the city's contract with Tawnis Ponies and Petting Farm, Inc.

Claiming defendant's statements about animal cruelty and other statements defendant made about them were false, plaintiffs brought an action against defendant asserting causes of action for libel per se, intentional interference with prospective economic advantage, intentional infliction of emotional distress, and injunctive relief.[1] Defendant moved to strike plaintiffs' complaint under the anti-SLAPP (Strategic Lawsuits Against Public Participation) statute—Code of Civil Procedure section 425.16. The trial court granted the motion as to the intentional infliction of emotional distress and injunctive relief causes of action and denied it as to the libel per se and intentional interference with prospective economic advantage causes of action. Defendant appeals. Because defendant's statements were privileged under the legislative privilege in Civil Code section 47, subdivision (b) (section 47(b)), we reverse the order denying defendant's motion to strike the libel per se and intentional interference with prospective economic advantage causes of action.

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**1** Plaintiffs also named Danielle Charney as a defendant. Charney is not a party to this appeal.

## BACKGROUND

Defendant was a long-time community activist who believed "animals are sentient beings, capable of suffering, and deserve to be treated with dignity and compassion." In 2010, defendant moved to Santa Monica, a city she believed had a reputation for adhering to progressive ideals of fairness and compassion.

The Main Street Farmers' Market in Santa Monica was located a few blocks from defendant's home. There was a pony ride and petting zoo at the market's entrance. "Over the years, [defendant] grew increasingly uncomfortable when visiting the Farmers Market because each time [she] entered and exited [she] passed six ponies tethered to a carousel or 'hot walker' with a metal bar and knotted rope across their faces, walking in a tiny circle on concrete in the sun, band music hammering their ears, car exhaust spewing in their faces, and commotion swirling around them from crowds of visitors both to the market and the adjacent restaurant." The conditions in the petting zoo were cramped—the "animals were crammed together in a small pen." She considered the pony ride and petting zoo to constitute animal cruelty and abuse.

In March 2014, defendant decided to take action to protect the animals. She launched an internet petition "call[ing] on the city of Santa Monica, known for its visionary and progressive policies, to shut down pony rides and petting zoos." The petition described pony rides and petting zoos as "cruel and inhumane" animal exhibits.

From April to July 2014, defendant and others protested at the farmers' market. They gathered petition signatures and held signs that read, "Stop Animal Abuse: Free the Pony [*sic*] and Petting Zoo." Defendant also created a Facebook page and the website: wwwfreethepony.org.

On May 4, 2014, defendant called Santa Monica Animal Control and complained about the lack of water and shade for the animals, and lameness of one pony. Animal Control officers went to the farmers' market and observed the pony ride and petting zoo. They found the animals to be "healthy, well watered and in comfortable conditions." The officers reported there was no evidence of lameness or discomfort in any of the ponies. On May 9, 2014, Laura Avery, the farmers' market supervisor sent defendant an email

detailing the officers' findings. She stated, "[W]e find that the care and operations of the animals are conducted in the most sensitive manner, there is no evidence that they are mistreated, harmed or injured and the activities are in compliance with all existing laws and regulations. The animals receive regular veterinary checks and the ponies' hooves are professionally tended to. Tawni is a participant in good standing at the Main Street Farmers Market and there is no reason to suspend operations."

On May 11, 2014, defendant hired Ralph Oden to take photographs of the pony ride and petting zoo. Oden lived on a ranch and cared for horses for five years while he was a teenager. Oden spent two and one-half hours at the pony ride and petting zoo. One of the ponies appeared to have cracked hooves. He stated a pony with cracked hooves should not be ridden, even by small children. Oden photographed the cracked hooves and told defendant about them.

During the time Oden was at the farmers' market, the ponies were not provided water, even though there were buckets of water at the petting zoo. He observed the water at the petting zoo was full of food pellets. A chicken was perched on top of a water bucket. According to Oden, chickens defecate anywhere and anytime.

That same day, defendant sent an email to City of Santa Monica officials requesting the city revoke the business license of Tawnis Ponies and Petting Zoo, Inc. She stated, despite Avery's claim to the contrary, some of the ponies had cracked hooves. Defendant also complained animals in the petting zoo were given "filthy water, filled with green guck and pellets." She attached photographs—apparently Oden's photographs—allegedly showing cracked hooves and filthy water.

Salvador Valles, who oversaw the City of Santa Monica's business license unit, responded to defendant's email. He said Animal Control, a division of the Santa Monica Police Department, had inspected plaintiffs' pony ride and petting zoo on May 4, 2014, May 11, 2014, and May 18, 2014, and had found no violations. Thus, there was no basis for law enforcement to refer Tawnis Ponies and Petting Farm, Inc.'s business license to the finance department for possible revocation.

Also on May 11, 2014, defendant posted an article on the *Santa Monica Patch* website entitled, "Ponies Suffer with Cracked Hooves at SM Farmers Market." Plaintiffs contend the article was the first of four libelous statements defendant made. In the article, defendant stated, "[P]hotos taken today (5/11/14) show ponies suffering from cracked hooves . . . as they are forced to plod round and round on hard cement for hours, their faces and necks tethered to a metal turnstile, heads and torsos sometimes sagging beneath the weight of the metal bar. Cracked hooves can be the result of overwork or neglect, leading to serious infections and lameness in ponies and horses. California [P]enal [C]ode (section 597) 'prohibits any animal to be so overdriven, overloaded, . . . overworked.'" Defendant concluded her article, "On behalf of almost three hundred petition signers, on behalf of the suffering ponies, on behalf of taxpayers reeling from city government branding Santa Monica as unkind to animals, I ask the city to immediately and without delay shut down the pony ride at the Main Street farmers[']market."

Plaintiffs contend defendant made a second libelous statement on May 11, 2014, posting on Facebook essentially the same article she posted on the *Santa Monica Patch* website. As in the *Santa Monica Patch* article, defendant called on the City to shut down the pony ride at the farmers' market.

Defendant made her third libelous statement, plaintiffs contend, in a May 12, 2014, article she posted on the *Santa Monica Patch* website entitled, "Filthy Water for Goats and Chickens at Main Street Market in Santa Monica."[2] In the article, defendant stated, "Photos taken of the petting zoo at the Santa Monica Main Street Farmers[']Market on Sunday (5/11/14) show pails of filthy water filled with green muck and pellets—this despite the hastily-issued Santa Monica Animal Control permit and farmers market contract that say . . . 'animals shall be provided with sustainable food' and 'water

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[2] Plaintiffs did not allege in their complaint this article was a basis for their libel per se cause of action, but included a copy of the article as an exhibit to Angel's declaration in support of their opposition to defendant's motion to strike under the anti-SLAPP statute. They claim in their respondents' brief on appeal the article was libelous.

must be made available for the animals for the duration of their stay.'" Defendant further stated in the article, "The immune systems of goats and chickens may be compromised from petting zoo commotion and handling. Consequently, when these animals must resort to drinking filthy water they become more susceptible to infections and parasites, which can be life-threatening."

Defendant's asserted fourth libelous statement was contained in an article published on the *LA Progressive* website on May 13, 2014, entitled, "Ponies Suffering at Santa Monica Farmers[']s Market." Defendant began her article by informing her readers that she had launched a petition campaign calling on the City of Santa Monica to shut down the "exploitative pony ride and petting zoo at the Sunday Main Street farmers[']s market." She stated the city had refused her request to shut down the "animal entertainment" which it "staunchly defend[ed]." Defendant claimed the chickens and goats at the petting zoo were "given filthy water filled with green guck and pellets. Livestock given unsustainable water can develop serious life-threatening parasitic infections." She said, "[P]hotos taken Sunday (5/11/14) show ponies suffering from cracked hooves. Cracked hooves can result from overwork or neglect, leading to serious infections and lameness in ponies and horses. California [P]enal [C]ode (section 597) 'prohibits any animal to be so overdriven, overloaded, . . . overworked.'" Defendant concluded her article by calling upon her readers to sign her petition asking the city to shut down plaintiffs' pony ride and petting zoo.

On May 29, 2014, defendant sent City of Santa Monica officials an email that attached screen shots purportedly from Nestor's Facebook page. The subject line for the email was, "Look at this—'Guns'—'My Bitches'—'Tawni at Firing Range'—'Alcohol in the Morning'." Defendant stated, "While we value freedom of speech, these screen shots of rifles, Tawni at the firing range, and racially-tainted and sexist references featured on the Main Street farmers[']s market pony and petting zoo operator's Facebook page does make one pause and wonder if it's in the best interest of the city of Santa Monica to embrace and promote this business. Please take a look and consider if the values reflected in these photos and video align with the mission of sustainability."

The next day, defendant sent those same city officials another email that stated, "I missed sending this photo of Tawni Angel, the pony ride and petting zoo operator, boozing it up in the morning." She further stated, "I recognize that people have a right to free speech and to own guns, but are these the images with which we want to brand our market, particularly since Tawni and her husband work directly with small children of all ethnicities? Please close this unsavory animal sideshow—and find something far more uplifting for our children."

At a September 9, 2014, meeting, the Santa Monica City Council considered alternative activities for the entrance to the farmers' market after the city's contract with Tawnis Ponies and Petting Farm, Inc. expired. After hearing public comments in support of and opposed to the pony ride and petting zoo, the City Council voted to direct its staff to put out a request for proposal for non-animal activities or to create a pilot educational program.

On the evening of the City of Santa Monica City Council meeting, a reporter from a local television station interviewed Angel and defendant. Defendant stated she had photographs showing the plaintiffs' ponies at the pony ride had cracked hooves.

## DISCUSSION

### A. The Anti-SLAPP Statute

"A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.)

In applying the anti-SLAPP statute, courts engage in a two-step process. "'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated

a probability of prevailing on the claim.'" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712, quoting *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) "'"The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.]" [Citation.]' [Citations.] '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.' [Citation.]" (Italics omitted.) (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.) We review de novo an order denying a motion to strike under the anti-SLAPP statute. (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 585 (*1-800 Contacts*).)

**B. Protected Activity**

Plaintiffs do not contend defendant failed to satisfy the first prong of the anti-SLAPP statute. Indeed, consistent with their approach in the trial court, plaintiffs requests we assume defendant satisfied that initial burden. We treat plaintiffs' tactic as a concession of that point, and we accept the concession. (See *DuPont Merck Pharmaceutical v. Superior Court* (2000) 78 Cal.App.4th 562, 566 [plaintiff's failure to argue speech fell within the protections of the anti-SLAPP statute amounts to a concession of the point].)

**C. Probability of Prevailing**

Plaintiffs' burden in the second step of the anti-SLAPP analysis is to demonstrate a probability of prevailing on their libel per se and intentional interference with prospective economic advantage causes of action. Defendant contends plaintiffs cannot meet their burden because their causes of action are barred by the legislative privilege in section 47(b).[3] We agree.

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[3] Defendant also contends plaintiffs' libel per se and intentional interference with prospective economic advantage causes of action fail under the *Noerr-Pennington* doctrine (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* (1961)

To meet its burden under the section step of the anti-SLAPP motion analysis, a plaintiff "cannot rely on allegations in the complaint, but must set forth evidence that would be admissible at trial. [Citation.] Precisely because the statute (1) permits early intervention in lawsuits alleging unmeritorious causes of action that implicate free speech concerns, and (2) limits opportunity to conduct discovery, the plaintiff's burden of establishing a probability of prevailing is not high: We do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law. [Citation.] Only a cause of action that lacks 'even minimal merit' constitutes a SLAPP. [Citation.]" (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699.)

Civil Code section 47 provides in part, "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any (1) legislative proceeding, (2) judicial proceeding, [or] (3) in any other official proceeding authorized by law . . . ." "The privilege set forth in section 47(b) applies to 'any' legislative proceeding. The use of the term 'any' necessarily requires that its application be construed broadly" (*Spitler v. Children's Institute International* (1992) 11 Cal.App.4th 432, 440 (*Spitler*)), and it applies "when it is shown that the statement which is alleged to be defamatory bears some connection to the work of the legislative body" (*Scott v. McDonnell Douglas Corp.* (1974) 37 Cal.App.3d 277, 285). The privilege in section 47(b) applies to local city council proceedings. (*Cayley v. Nunn* (1987) 190 Cal.App.3d 300, 303 (*Cayley*).)

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365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464; *Mine Workers v. Pennington* (1965) 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626). She contends plaintiffs cannot meet their burden as to the libel per se cause of action because the challenged statements were nonactionable opinion and plaintiffs thus cannot show the statements were probably false statements of fact, and because plaintiffs cannot demonstrate the statements were made with actual malice. Finally, defendant contends plaintiffs cannot meet their burden as to the intentional interference with prospective economic advantage cause of action because it fails for the same reasons as the libel per se cause of action, it is duplicative of the libel per se cause of action and thus is superfluous, and plaintiffs cannot prove causation. As we hold the section 47(b) privilege defeats plaintiffs' causes of action as a matter of law, we need not reach these alternative contentions.

Two cases, *Cayley, supra,* 190 Cal.App.3d 300 and *1-800 Contacts, supra,* 107 Cal.App.4th 568, illustrate the applicability of the section 47(b) privilege in this case. In *Cayley, supra,* 190 Cal.App.3d 300, the defendants Nunns applied to a city planning commission for a height variance that would allow them to add a bedroom over their garage. (*Id.* at p. 302.) The plaintiffs Cayleys, the defendants' neighbors, opposed the height variance, claiming the construction would block their scenic view. (*Ibid.*) The planning commission denied the height variance, and the defendants appealed to the city council. (*Ibid.*) In support of their appeal, defendants circulated a petition to try to show neighborhood support for their position. (*Ibid.*) The city council granted the height variance. (*Ibid.*)

In a subsequent lawsuit, the plaintiffs asserted a slander cause of action against the defendants. (*Cayley, supra,* 190 Cal.App.3d at p. 302.) Plaintiffs alleged in their slander cause of action that in the course of obtaining signatures for defendants' petition in support of their requested height variance, "'John Nunn said that the telephone people came to the Cayley house and found his telephone line in the Cayley's house and that the Cayleys had connected illegal wires to a listening device, and that is how they tapped his phone.'" (*Ibid.*) The Court of Appeal noted the defendants' statements about wiretapping "were made to 'encourage the neighbors to sign the [defendant]s' petition' and to 'attempt to influence the outcome of the city council vote.'" (*Id.* at p. 306.) It held, because there was a logical connection or relatedness between the defendants' remarks and the city council proceedings and the defendants made their remarks while marshalling support for their position, the remarks had the benefit of the absolute privilege in section 47, subdivision (2) (subdivision (b)'s precursor). (*Cayley, supra,* 190 Cal.App.3d at p. 306.)

In *1-800 Contacts,* the plaintiff, a company that sold replacement contact lenses, competed against optometrists in the contact lens market. (*Id.* at p. 573.) It alleged it entered into a severance agreement with Jerrald Conder, a former in-house attorney, that barred Conder from: discussing the plaintiff's confidential information; working, for a period of two years, with the plaintiff's competitors; and making public statements to

anyone concerning the plaintiff, its business objectives and management practices, or its propriety information. (*Id.* at pp. 573-574.)

The defendant, an attorney and optometrist who competed against the plaintiff in the sale of contact lenses, met with Conder at a midyear meeting of the America Optometric Association. (*1-800 Contacts, supra,* 107 Cal.App.4th at p. 573.) There, Conder told the defendant about information he learned while representing the plaintiff that he said could help others in taking legislative or legal action adverse to the plaintiff. (*Id.* at p. 574.)

The same day, the defendant and Conder met with representatives of various state optometric associations and, at the defendant's request, Conder spoke about information he had gained while representing the plaintiff that could be used against the plaintiff. (*1-800 Contacts, supra,* 107 Cal.App.4th at p. 574.) The defendant and Conder announced further meetings with other optometrists, and, the plaintiff alleged, its confidential information was discussed at those meetings. (*Ibid.*)

The plaintiff brought an action against the defendant for inducing breach of fiduciary and statutory duties and inducing breach of contract. (*1-800 Contacts, supra,* 107 Cal.App.4th at pp. 574-575.) The defendant filed an anti-SLAPP motion. (*Id.* at p. 576.) The trial court granted the motion. (*Id.* at p. 581.) The Court of Appeal affirmed, holding, as to the inducing breach of contract cause of action, the plaintiff could not show a probability of prevailing because "[t]he tortious charge against [the defendant] was precluded by Civil Code section 47, subdivision (b)(1), the 'litigation privilege' as statutorily applicable to legislative proceedings. . . . Here, the entire thrust of [the defendant's] activity was to enable the enactment of legislation, by soliciting other interested parties to pursue it, and assisting them with information and expertise." (*Id.* at pp. 586-587.) The court further held a communication does not have to be "'directly relevant' to proposed legislation" to fall within the section 47, subdivision (b) privilege. (*1-800 Contacts, supra,* 107 Cal.App.4th at p. 588.) Rather, the proper criterion—reasonable relevance to the subject matter—"is not that narrow, particularly where the subject matter involves legislation." (*Ibid.*)

In their opening brief on appeal, plaintiffs identify four allegedly libelous statements or publications made by defendant: the May 11, 2014, *Santa Monica Patch* website article; the May 11, 2014, Facebook post; the May 12, 2014, *Santa Monica Patch* website article that was not alleged in their complaint (see footnote 2, above); and the May 13, 2014, *LA Progressive* website article. She also contends defendant's September 9, 2014, statements to the television reporter were defamatory. The statements in these articles, post, and television interview relate to the supposed poor treatment the pony ride and petting zoo animals received, and either directly or inferentially solicited public support for defendant's petition to cause the City of Santa Monica to take action to end the pony ride and petting zoo. Accordingly, they fell within the broad construction of the legislative privilege. (*Spitler, supra,* 11 Cal.App.4th at p. 440; *Cayley, supra,* 190 Cal.App.3d at p. 306; *1-800 Contacts, supra,* 107 Cal.App.4th at pp. 586-588.)

Plaintiffs contend defendant's May 29, 2014, and May 30, 2014, emails to City of Santa Monica officials attaching screen shots from Nestor's Facebook page also were libelous and not privileged under section 47(b) because they had no "reasonable relevancy" to defendant's complaints the City of Santa Monica should end the pony ride and petting zoo due to the manner in which plaintiffs treated their ponies and petting zoo animals and, instead, were personal attacks on Angel's and Nestor's character. Plaintiffs did not allege in their complaint these emails were the bases for their libel per se cause of action, but appear to have alleged them as bases for a malice finding in support of their libel cause of action. Even assuming, however, the contested emails were alleged as bases for plaintiffs' libel cause of action, defendant's objective in sending the emails was the same as the objective for her petition, protests, and other emails to City of Santa Monica officials—i.e., to end the pony ride and petting zoo at the Main Street Farmers' Market. As such, there was a logical connection between the May 29, 2014, and May 30, 2014, emails and defendant's objective of ending the pony ride and petting zoo and the emails, thus were privileged under section 47(b). (*Cayley, supra,* 190 Cal.App.3d at p. 306.)

## DISPOSITION

The order denying defendant's motion to strike plaintiffs' libel per se and intentional interference with prospective economic advantage is reversed.[4] Defendant is awarded her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KUMAR, J.*

We concur:

TURNER, P. J. BAKER, J.

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[4] We recognize the legislative privilege does not have unbridled application to any publication or broadcast tenuously connected to a legislative proceeding. Some of those hypothetical circumstances were addressed at oral argument. But, whether the privilege applies depends on the unique facts of each publication or broadcast. Thus, we emphasize our holding is, as it should be, limited to the particular substance and circumstances of the publications or broadcasts at issue before us. (See *McGee v. Superior Court* (1985) 176 Cal.App.3d 221, 226 ["The holding of a decision is limited by the facts of the case being decided"].)

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