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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

RYAN O'NEAL, Plaintiff and Respondent, v. CRAIG NEVIUS, Defendant and Appellant.	B238640 (Los Angeles County Super. Ct. No. SC113381)

APPEAL from a judgment of the Superior Court of Los Angeles County. Linda K. Lefkowitz, Judge. Affirmed.

Lathrop & Gage, Lincoln D. Bandlow; Inglis Ledbetter, Gower & Warriner, Richard S. Gower and Gregory J. Bramlage for Defendant and Appellant.

Laveley & Singer, Martin D. Singer and Todd S. Eagan for Plaintiff and Respondent.

In the underlying action, plaintiff Ryan O'Neal filed a complaint against defendant Craig Nevius alleging he made defamatory statements falsely accusing O'Neal of stealing and concealing an Andy Warhol portrait of the late iconic actress Farrah Fawcett. Nevius filed a special motion to strike O'Neal's complaint under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)[1] The trial court denied the motion and Nevius contends the trial court erred. We disagree and affirm.

FACTS

Andy Warhol painted two portraits of Farrah Fawcett. No one disputes that Fawcett owned one of the paintings, and bequeathed it to the University of Texas when she left her entire art collection to the university. There is, however, an ongoing dispute regarding whether Fawcett owned the second Warhol portrait and also left it to the University of Texas. Ryan O'Neal, Fawcett's on-and-off boyfriend of 30 years, contends Warhol gave him the second portrait. That dispute is the subject of separate litigation between the University of Texas and O'Neal.

In the operative defamation complaint, O'Neal makes the following allegations. Craig Nevius was an obsessive and delusional fan of Fawcett who was "deeply jealous" of O'Neal's relationship with Fawcett. Nevius worked for Fawcett as her personal assistant without pay and assisted with the NBC documentary "Farrah's Story," until Fawcett asked that O'Neal take over the creative process, putting an end to Nevius' work. In response, Nevius became more obsessed with Fawcett and her relationship with O'Neal. Even after Fawcett's tragic death from cancer, Nevius continued to harass O'Neal and made defamatory accusations about him stealing the second Warhol painting.

Good Morning America and *Star Magazine* reported that the second Warhol portrait – valued at $30 million – was stolen and concealed by O'Neal and then found in his home after his daughter, Tatum O'Neal, included the allegation in her a tell-all autobiography titled "Found." Craig Nevius was the source of this information. Nevius also stated that police and private investigators were investigating O'Neal's theft,

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[1] All further references are to the Code of Civil Procedure, unless otherwise indicated.

possession and concealment of the portrait. Nevius provided other similar comments to the media.

In the case before us, Nevius filed an anti-SLAPP motion to strike O'Neal's complaint, supported by evidence showing that he believed Fawcett owned the second Warhol portrait. His evidence, in the form of his declaration, showed the following. Nevius knew Fawcett stored the portrait in a storage facility prior to hanging it in her home; Fawcett considered auctioning the portrait; Fawcett told him that she owned the portrait; and O'Neal asked Fawcett to bequeath the portrait to him. Nevius averred that he had no information indicating that the second Warhol portrait of Fawcett belonged to anyone other than Fawcett.

In a declaration in support of his anti-SLAPP motion, Nevius further averred: " . . . I never said that Mr. O'Neal 'stole' or 'concealed' the [second] Warhol portrait of Ms. Fawcett. In fact, I do not to this day know if Mr. O'Neal 'stole' or 'concealed' anything." According to Nevius, he told *Good Morning America* and *Star Magazine* that he understood the University of Texas was investigating the whereabouts of the second Warhol portrait of Fawcett. Nevius claimed he was surprised when he heard the *Good Morning America* story air, and heard that the police were investigating O'Neal.

In his opposition to the anti-SLAPP motion, O'Neal presented evidence showing that he owned the second Warhol portrait of Fawcett. O'Neal submitted a declaration from his business manager, Russell Francis, who stated that he frequently saw the portrait hanging in O'Neal's home, and that O'Neal had told Francis that he (O'Neal) owned the portrait. Jeffrey Eisen, an attorney who represented the trustee of Fawcett's living trust, stated that the trustee for Fawcett's trust had concluded that O'Neal owned the second portrait of Fawcett. An insurance agent, Rick Rogers, stated that in 1984 O'Neal insured the portrait, which had been appraised in his residence. Rogers expressed his understanding from his communications with Fawcett and O'Neal that she owned one of the Warhol portraits of Fawcett, and O'Neal owned the second. O'Neal's evidence further showed that Nevius's statement in his declaration in support of his anti-SLAPP

motion that he had never said O'Neal stole the second Warhol portrait of Fawcett was demonstrably false; Nevius, in fact, had made such statements.

In a supplemental declaration in support of his anti-SLAPP motion, Nevius stated:

> "In my original Declaration, I acknowledged that *if* I had stated that plaintiff Ryan O'Neal ('O'Neal') had stolen the Andy Warhol portrait of Farrah Fawcett (the 'Warhol Portrait') that is the subject of this lawsuit, such a statement would have been extremely reasonable based on the overwhelming evidence supporting such a conclusion. That evidence was, for the most part, set forth in my original declaration and in the declaration I provided in connection with O'Neal's motion for leave to conduct discovery. I still stand behind that conclusion and believe it to be the correct conclusion to this day. *What I feel is important to correct from my prior declaration, however, is my statement that I had never stated that O'Neal had stolen the Warhol Portrait. At the time I made my original declaration and until only about a week ago, I believed that I had not ever made such a statement to anyone. I have now been made aware of information that indicates I made such a statement to the University of Texas ('UT') in connection with the investigation being undertaken by UT regarding UT's efforts to recover the Warhol Portrait*." (Italics added.)[2]

The parties argued the anti-SLAPP motion to the trial court, and the court took the matter under submission before issuing an order denying the motion. The court found the anti-SLAPP statute applied because O'Neal's complaint arose from Nevius's protected statements as defined in the statute; the court denied the motion upon finding that O'Neal had shown a probability of prevailing.

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[2] Nevius attached copies of emails to his declaration including emails sent to the University of Texas. The emails included language to the effect that O'Neal had stolen the Warhol portrait.

Nevius filed a timely notice of appeal.

DISCUSSION

Nevius contends the trial court's order denying his anti-SLAPP motion must be reversed because the court erred in finding there is a probability that O'Neal will prevail on his claims for damages against Nevius. We disagree.

The Anti-SLAPP Statute

The Legislature enacted the anti-SLAPP statute to address the societal ills caused by meritless lawsuits filed to "chill" the exercise of the "constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) To this end, the statute authorizes a special procedure for striking certain causes of action in the early stages of litigation, when they are determined to fall within the reach of the protections of the anti-SLAPP statute.

The anti-SLAPP statute's special striking procedure entails two steps. In the first step, the court's task is to determine whether the moving defendant has made a threshold showing that a challenged cause of action is one arising from so-called protected activity, that is, "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 . . . ." (§ 425.16, subd. (b)(1).) The anti-SLAPP statute defines an act in furtherance of a person's right of petition or free speech under the federal or state constitution, "in connection with a public issue," to include "any . . . 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), italics added; see also *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042.)

When a court determines a moving defendant has made the required first step showing that a challenged cause of action "arises from protected activity," the court then moves to the second step of the anti-SLAPP statute's procedure. In this second step, the "plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence

submitted by the plaintiff is credited." (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.) The plaintiff's prima facie showing need only establish that the claim has "'minimal merit.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) The question is whether the plaintiff has presented evidence in opposition to the defendant's motion that, if believed by the trier of fact, is sufficient to support a judgment in the plaintiff's favor. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) The court should grant the motion "if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempts to establish evidentiary support for the claim." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; *Zamos v. Stroud, supra*, 32 Cal.4th at p. 965.)

An appellate court reviews an order denying an anti-SLAPP motion under the de novo standard of review. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819.)

The Malice Standard

For purposes of this appeal from the trial court's anti-SLAPP order, we assume without finding that O'Neal is a "public figure," and that he must satisfy the heightened "malice" standard of proof of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280 (*New York Times*) in order to prevail on his claims for damages. In *New York Times, supra*, 376 U.S. 254, the United States Supreme Court ruled the First Amendment requires a "public figure" plaintiff to prove as an element of his or her cause of action for defamation that the defendant harbored malice in making a false statement. (*Id*. at pp. 279-280.) The malice standard safeguards the First Amendment by limiting a state's power to award damages in a defamation action brought by a public official or public figure. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 257 (*Reader's Digest Assn*.).)

In the context of defamation, malice means a defendant actually knew that his or her publication was false, or that he or she had a "reckless disregard for the truth." Thus, as to a public figure plaintiff, evidence showing the defendant made a false statement about the plaintiff is insufficient. A public figure plaintiff cannot win a

defamation claim in the absence of evidence showing the defendant harbored malice in making a false statement. Under that standard, a public figure plaintiff must present evidence establishing more than "a departure from reasonably prudent conduct." (See *Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 688 (*Harte-Hanks*).) "'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" (*Ibid*.) The standard is a subjective determination — there must be sufficient evidence to permit the conclusion that the defendant actually had in his or her mind a "'high degree of awareness of . . . probable falsity.'" (*Ibid*.)

Analysis

In denying the anti-SLAPP motion, the trial court determined that Nevius satisfied his initial burden to show that O'Neal's causes of action arose from Nevius's protected activity. As noted above, the court then denied the motion upon determining that O'Neal made a sufficient prima facie showing of facts in support of his claims. On appeal, Nevius challenges the trial court's second-step determination. Nevius argues the court did not properly apply the principles of *New York Times* and its progeny. Had the court done so, Nevius contends, it should have ruled O'Neal failed to show sufficient facts to support a judgment in his favor in this current action, specifically on the issue of malice. We find the trial court was correct in its determination that O'Neal presented sufficient evidence of Nevius's malice to demonstrate O'Neal had a probability of prevailing on his complaint under the anti-SLAPP evidentiary standard.[3]

Assuming, as we have, that the *New York Times* standard applies, O'Neal will have to prove Nevius's mental state. Specifically, O'Neal will have to prove that before Nevius spoke he *actually knew* that O'Neal had not stolen the second Warhol portrait of Fawcett; or that he made a *deliberate, conscious decision* not to investigate whether O'Neal in fact had stolen the Warhol portrait. The final and third alternative is to prove

[3] Because we affirm the trial court's order under the second step of the anti-SLAPP procedure, we do not address O'Neal's argument that the anti-SLAPP statute should not apply at all because Nevius's comments did not involve a matter of public interest.

that, before making his comments, Nevius conducted some measure of an investigation, but made a *deliberate, conscious decision* to disregard any information showing that O'Neal had not stolen the painting. (*Harte-Hanks, supra*, 491 U.S. at p. 688 [the actual malice standard is not satisfied by showing a reasonably prudent person would have investigated]; see also *Reader's Digest Assn., supra*, 37 Cal.3d at p. 258 [the actual malice standard is not satisfied by showing the defendant failed to undertake a reasonably competent investigation]; *Jackson v. Paramount Pictures Corp*. (1998) 68 Cal.App.4th 10, 24-26, 35 [evidence showing that a defendant was told a story that sounded like "B.S." does not prove the defendant knew the story was actually false or that the defendant acted recklessly in publicizing the story, where defendant acted on corroborated evidence supporting the story].)

Under the anti-SLAPP statute's evidentiary standard, O'Neal was required to submit sufficient admissible evidence to show his claims have minimal merit, if his evidence is believed. (See *Anschutz Entertainment Group, Inc. v. Snepp* (2009) 171 Cal.App.4th 598, 639.) The anti-SLAPP statute's evidentiary standard does not require a showing by a preponderance of the evidence, and certainly not a showing by clear and convincing evidence as Nevius implies. (*Ibid*.) The Supreme Court has explained that the second prong analysis requires only "a minimum level of legal sufficiency and triability." (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 438, fn. 5.) We find the record discloses facts showing O'Neal had a probability of prevailing on the complaint under this anti-SLAPP evidentiary standard.

In O'Neal's current case, unless Nevius admits he actually knew O'Neal did not steal the second Warhol portrait of Fawcett, or admits that he acted with reckless disregard for the truth when he said that O'Neal stole the portrait, O'Neal is going to have to prove his case by circumstantial evidence. Certainly "actual malice can be proved by circumstantial evidence." (*Reader's Digest Assn., supra,* 37 Cal.3d at p. 257.)

"'[E]vidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity.' [Citations.] A failure to

investigate. . . , anger and hostility toward the plaintiff . . . such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication." (*Reader's Digest Assn., supra*, at pp. 257-258, fn. omitted.) We understand this evidence is only relevant to the subjective attitude of the publisher, and that ill will alone is not sufficient. But it is relevant and present in this record. The inferences reasonably drawn from the evidence here would support a jury's finding that Nevius harbored strong ill-feelings toward O'Neal.

Nevius also admitted that when he made the statements, he did not know if they were true. While this is also insufficient on its own to show malice as the defamation cases describe, it is helpful under the second prong, together with the other malicious behavior, to establish Nevius did not care if the statement was true because he hates O'Neal so much. As the trial court aptly stated: "[Nevius] in June, 2011, asserted that [O'Neal] was a fraud, a thief and a criminal and alluded in a television interview that [O'Neal] had been 'caught[,]' to now admit that he lacks knowledge that [O'Neal] 'stole' or 'concealed anything' constitutes, by his own words, sufficiently clear and convincing evidence as to his own doubt in the truth of the statements and a sufficient basis for the court to find that [O'Neal] has shown 'actual malice' at the time the statements were uttered. . . ."

Further, when presenting his anti-SLAPP motion to the trial court, Nevius stated that he never accused O'Neal of stealing the portrait. He directly contradicted that statement in his later declaration in which he admitted he had in fact accused O'Neal of stealing the painting. These contradictory statements can be used at a trial to demonstrate a consciousness of guilt indicating that Nevius knew he should not have been stating that O'Neal stole the Warhol; and that he did some measure of an investigation, but made a *deliberate, conscious decision* to disregard any information showing that O'Neal had not stolen the painting. It also undermines any testimony Nevius might give, because his contradictory statements will likely be used to impeach his credibility. Nevius's explanation for the contradiction – that he believed he had never made a statement about O'Neal stealing the portrait – would be difficult to sell to a jury. Nevius is deeply

enmeshed in conflicts about O'Neal and whether he rightfully owns the Warhol. Nevius knew the University of Texas was conducting an investigation about the second Warhol portrait of Fawcett, and Nevius was involved in that investigation. In stating this, we are not making impermissible credibility calls about witnesses. Instead, we are simply assessing how the evidence might be used to prove Nevius harbored malice.

The record also shows more than one person in Nevius and O'Neal's circle of acquaintances believed O'Neal owned the second Warhol portrait of Fawcett. This might be used to prove Nevius knew his statements were false, and certainly that they were made with reckless disregard.

In sum, we find there is at least minimal merit to the defamation claim to satisfy the evidentiary standard to defeat an anti-SLAPP motion. Accordingly, we find no error in the trial court's decision to deny Nevius's anti-SLAPP motion.

DISPOSITION

The trial court's order denying the anti-SLAPP motion is affirmed. Appellant to bear costs on appeal.

BIGELOW, P. J.

I concur:

GRIMES, J.

FLIER, J., Dissenting

I respectfully dissent. Because Ryan O'Neal presented no evidence establishing a prima facie case that Craig Nevius acted with actual malice, I would reverse the order denying Nevius's anti-SLAPP motion.

1. Background

On June 15, 2011, Nevius wrote Barry Burgdorf, vice chancellor of and general counsel for the University of Texas System, the following email: "I just got a call from a tabloid asking about the Warhol of Farrah. The guy has been following Ryan's moves since her death and has written a lot about the lawsuits. He's got Tatum's new book. [¶] On page 164, Tatum verifies that Ryan has 'Warhol's portrait of Farrah' hanging in the house in December 2010. [¶] I ran out and picked up the book to see for myself. She says it's there. [¶] Please do not be a gentlemen [*sic*] about this and file a report. This is fraud and theft. . . . [¶] . . . [¶] They are criminals."

This email demonstrates Nevius accused O'Neal of being a criminal. Assuming O'Neal owned the portrait (as required at this procedural stage), the email shows Nevius made a defamatory statement. The critical next question is whether Nevius's subsequent denial of that statement demonstrates a prima facie case of actual malice, i.e., that Nevius acted with *reckless disregard for the truth* when he accused O'Neal of criminal conduct in taking the portrait.[1] Reckless disregard for the truth is the minimal standard necessary

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[1] Claiming to be unaware of the foregoing email, in his special motion to strike, filed on August 22, 2011, Nevius argued "[he] simply did not make a defamatory statement. Contrary to O'Neal's unfounded allegations, Nevius never said that O'Neal 'stole' the Warhol painting . . . ." In his declaration, filed in support of his special motion to strike, Nevius averred, "In none of my interactions with Mr. Burgdorf did I ever state that Mr. O'Neal 'stole' the second Warhol portrait of Ms. Fawcett (or that he 'stole' anything for that matter). Furthermore, I never stated to Mr. Burgdorf that I had any knowledge that this second portrait was in the possession of Mr. O'Neal for a very simple reason: I had no such knowledge. Let me state that again so it is clear: at all times when I spoke to Mr. Burgdorf, I did not know the location of any of the artwork that was not listed on the inventory."

to support an actual malice finding. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280.)

2. Legal Principles

"Code of Civil Procedure section 425.16 (the anti-SLAPP law) allows a court to strike a complaint it determines is an attempt to stifle a defendant's exercise of free speech rights. A court may strike such a complaint where it concludes (1) the cause of action arises from the defendant's exercise of free speech regarding a public issue and (2) there is no probability the plaintiff will prevail on the merits. ([*Id*.], subd. (b)(1).)" (*Young v. CBS Broadcasting, Inc.* (2012) 212 Cal.App.4th 551, 558-559.) In the context of an anti-SLAPP motion, the test for determining whether a plaintiff has met his burden of demonstrating a probability of prevailing, is similar to the standards of evaluating a motion for summary judgment. "The court may not weigh the evidence or make credibility determinations; doing either would violate plaintiff's right to a jury trial. [Citations.] Further, the court may only consider the opposing evidence 'to determine if it defeats the plaintiff's showing as a matter of law. [Citation.]'" (*Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551, 1557.)

Later in his declaration Nevius reiterated, "I never said that O'Neal 'stole' or 'concealed' the Warhol portrait of Ms. Fawcett. In fact, I do not to this day know if Mr. O'Neal 'stole' or 'concealed' anything. What I know is that Ms. Fawcett always had both Warhol portraits in her possession at all times when I knew her and that she had stated to me and others on multiple occasions that she owned both of these portraits (and she certainly never said that one was the property of Mr. O'Neal). One of these two portraits is now hanging in Mr. O'Neal's home. Does that mean he 'stole' it from Ms. Fawcett? The University of Texas appears to think so and has filed a federal lawsuit against Mr. O'Neal claiming exactly that. I personally do not know the answer to that question, but I can say without reservation the following: if I said that Mr. O'Neal stole that portrait . . . based on all of the information I acquired over the years . . . I have absolutely no information, nor have I ever had any information, that would lead me to believe that such a statement is false."

After receiving a copy of his June 15, 2011 email, Nevius filed a supplemental declaration on December 1, 2011, in which he acknowledged he stated O'Neal stole the portrait.

"In opposing an anti-SLAPP motion, a defamation plaintiff need not establish malice by clear and convincing evidence, the standard applicable at trial. Rather, the plaintiff must meet [his] minimal burden by introducing sufficient facts to establish a prima facie case of actual malice; in other words, [he] must establish a reasonable probability that [he] can produce clear and convincing evidence showing that the statements were made with actual malice." (*Young v. CBS Broadcasting, Inc.*, *supra*, 212 Cal.App.4th at p. 563.)

The "actual malice" standard safeguards the First Amendment by limiting a state's power to award damages in a defamation action brought by a public official or public figure. (*Masson v. New Yorker Magazine, Inc*. (1991) 501 U.S. 496, 510; *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 155; *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256-257 (*Reader's Digest*).) The actual malice standard is rigorous. "A 'reckless disregard' for truth . . . requires more than a departure from reasonably prudent conduct. 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' [Citation.] The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.' [Citation.]" (*Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 688 (*Harte-Hanks*).) Demonstrating ignorance is insufficient to show recklessness. (*St. Amant v. Thompson* (1968) 390 U.S. 727, 731-732 (*Amant*); see also *Young v. CBS Broadcasting, Inc.*, *supra*, 212 Cal.App.4th at p. 563 ["'the defendant must have made the false publication with a "high degree of awareness of . . . probable falsity," [citation], or must have "entertained serious doubts as to the truth of his publication"'"].)

3. Analysis

O'Neal failed to introduce facts establishing a prima facie case showing Nevius accused O'Neal of criminal conduct with a high degree of awareness of the statement's probable falsity. The record contains no evidence suggesting that Nevius was aware of the falsity of the statement O'Neal stole the portrait. There was no evidence Nevius relied on unreliable sources. There was no evidence that the type of evidence Nevius

relied on to conclude Fawcett owned the portrait was unreasonable. To the contrary, the evidence upon which Nevius relied, such as Fawcett's payment of insurance premiums for the portrait, is the same type of evidence O'Neal advanced to support his ownership claim.[2] Importantly, no witness averred that he or she told Nevius that O'Neal owned the portrait. There was no evidence that the "allegations were so inherently improbable that only a reckless man would have put them in circulation." (*Amant, supra*, 390 U.S. at p. 732.) The story was not a product of Nevius's imagination or based on an anonymous phone call. (*Ibid*.) Nor was there evidence Nevius purposefully avoided the truth. (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 114.)

The evidence relied on by the majority is insufficient to demonstrate actual malice. Although there was evidence of Nevius's ill will toward O'Neal, "the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." (*Harte-Hanks, supra,* 491 U.S. at p. 666.) The "test directs attention to the 'defendant's attitude toward the truth or falsity of the material published . . . [not] the defendant's attitude toward the plaintiff.' [Citation.]" (*Reader's Digest*, *supra*, 37 Cal.3d at p. 257.) Here, there was no suggestion that Nevius's ill will toward O'Neal caused him to disregard O'Neal's ownership of the portrait and falsely accuse O'Neal of taking it. This evidence therefore is insufficient to show actual malice. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 92; *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1579.)

Evidence Nevius did not know whether O'Neal stole the portrait is insufficient to show actual malice. The United States Supreme Court explained the need for this counterintuitive principle in its landmark decision *Amant, supra,* 390 U.S. at page 731. The high court recognized that the test for actual malice "puts a premium on ignorance,

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2 Nevius's declarations asserted the basis for his belief that Fawcett owned the portrait. Nevius knew Fawcett stored the portrait in a storage facility prior to hanging it in her home; Fawcett considered auctioning the portrait; Fawcett told him that she owned the portrait; and O'Neal asked Fawcett to bequeath the portrait to him. Nevius averred, that he never received any information indicating the portrait belonged to anyone other than Fawcett.

encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." (*Ibid*.) Nevertheless, the high court concluded the rigorous standard is necessary to protect "the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." (*Id.* at pp. 731-732.)

Nevius's false denial of his defamatory statement does not support the inference that he investigated the truth of the statement and made a "deliberate, conscious decision to disregard any information showing that O'Neal had not stolen the painting." (Maj. opn. *ante*, at p. 8, italics omitted.) The false denial demonstrates Nevius lacks credibility. A lack of credibility is not affirmative evidence that (1) Nevius investigated whether O'Neal owned the portrait, (2) Nevius learned in his investigation that O'Neal owned the portrait, or (3) Nevius disregarded evidence he learned in his investigation that O'Neal owned the portrait. (Cf. *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 512 ["When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion."].)

Even O'Neal argued in the trial court and on appeal that Nevius did *not* investigate, claiming that Nevius failed to "make a reasonable inquiry . . . ." According to O'Neal, "Nevius failed to investigate the accuracy of his defamatory statements before making them . . . ." O'Neal further claimed, "Had Nevius made a reasonable inquiry by asking O'Neal about the Warhol Portrait, he would have learned the truth." Contrary to the majority's speculation, there is no evidence from which to infer Nevius investigated O'Neal's ownership of the portrait. (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 847-848

[speculation that a defendant harbored doubt is insufficient to show actual malice].) Moreover, it is well established that the failure to investigate standing alone does not support actual malice "even when a reasonably prudent person would have done so . . . ." (*Harte-Hanks, supra,* 491 U.S. at p. 688; see also *New York Times Co. v. Sullivan, supra,* 376 U.S. at pp. 261, 287; *Reader's Digest, supra,* 37 Cal.3d at p. 258.)

O'Neal's showing that Nevius was a liar or even a scoundrel does not satisfy the First Amendment's actual malice requirement. Actual malice requires reckless disregard for the truth. (*New York Times Co. v. Sullivan, supra,* 376 U.S. at pp. 279-280.) "'Reckless disregard of the truth . . .' . . . does not mean gross or even extreme negligence, but requires actual doubt concerning the truth of the publication." (*Reader's Digest, supra,* 37 Cal.3d at p. 259, fn. 11.) O'Neal was required to demonstrate a prima facie case of *both* falsity and fault. (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 776.) Proof of falsity is not the same as proving actual malice. (*Bose Corp. v. Consumers Union of U.S., Inc., supra,* 466 U.S. at p. 511.) O'Neal presented evidence only of the former.

Finally, the majority asserts that Nevius's acquaintances believed O'Neal owned the portrait. The record shows that O'Neal's business manager, insurance agent, and an attorney for Fawcett's trust believed in O'Neal's ownership. But no evidence shows Nevius was acquainted with those persons. More significantly, no evidence shows that anyone communicated to Nevius that O'Neal owned the portrait. The relevant inquiry concerns Nevius's state of mind, not that of other persons.

My conclusion that O'Neal failed to sustain his burden of demonstrating actual malice is supported by Division Four's well-reasoned opinion in *Jackson v. Paramount Pictures Corp*. (1998) 68 Cal.App.4th 10 (*Jackson*). In *Jackson,* Michael Jackson alleged that he had been slandered by a broadcast describing a tape of him engaging in sexual conduct with a young boy. (*Id*. at pp. 15, 17.) Prior to the broadcast, the reporter had been told that the story sounded like a "setup" and like "B.S." (*Id*. at p. 24.) Jackson argued that because the reporter learned the story was "B.S.," she recklessly disregarded the truth in reporting it. The trial court instead concluded the information the story was

"B.S." did "not rise to the level of clear and convincing evidence of serious doubt." (*Id.* at p. 26.)

The appellate court affirmed, explaining that the actual malice "standard does not require that the reporter hold a devout belief in the truth of the story being reported, only that he or she refrain from either reporting a story he or she *knows* to be false or acting in reckless disregard to the truth." (*Jackson, supra*, 68 Cal.App.4th at p. 35.) The court reached this conclusion after describing the rigorous standard necessary to protect the First Amendment and explaining that under this standard, "'reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.'" (*Jackson*, at p. 33, quoting *Amant, supra*, 390 U.S. at p. 731.) Whereas in *Jackson*, the reporter received some evidence of the falsity of the story, here Nevius received none, compelling the conclusion that O'Neal failed to establish actual malice.

In short, O'Neal failed to produce any evidence or inferences *from evidence* reflecting Nevius acted with a reckless state of mind as to the truth of his accusation against O'Neal. O'Neal therefore failed to carry his burden of demonstrating a probability of prevailing. (*Young v. CBS Broadcasting Inc.*, *supra*, 212 Cal.App.4th at p. 563 [A plaintiff opposing an anti-SLAPP motion must introduce "sufficient facts to establish a prima facie case of actual malice; in other words, [he] must establish a reasonable probability that [he] can produce clear and convincing evidence showing that the statements were made with actual malice."].) Because all of O'Neal's causes of action—defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress—were based on speech entitled to constitutional protection, the case

should have been dismissed in its entirety.[3] (*Reader's Digest, supra*, 37 Cal.3d at p. 265.)

FLIER, J.

[3] O'Neal's argument that the statements did not concern an issue of public interest ignores the controlling law, which defines public interest in this context as "*any issue in which the public is interested*." (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042.)