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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

DANIEL B. HAYES et al., Plaintiffs and Respondents, v. PAUL HUTCHINSON et al., Defendants and Appellants.	B237556 (Los Angeles County Super. Ct. No. BC462930)

APPEAL from a judgment of the Superior Court for Los Angeles County, Alice E. Altoon, Judge. Affirmed in part, reversed in part.

Clair G. Burrill; Alison Minet Adams; Law Offices of Robert S. Besser and Robert S. Besser and for Defendants and Appellants.

Kinsella Weitzman Iser Kump & Aldisert, Lawrence Y. Iser and Gregory S. Gabriel for Plaintiffs and Respondents.

Defendants Paul Hutchinson and Paul Hutchinson, Inc. (we will refer to both defendants, collectively, as Hutchinson) appeal from the denial of their special motion to strike and the imposition of attorney fees as sanctions under Code of Civil Procedure section 425.16, the anti-SLAPP statute.[1] We conclude the trial court correctly found that Hutchinson failed to establish that the causes of action alleged by plaintiffs Daniel B. Hayes (Hayes) and Davis Shapiro Lewit & Hayes, LLP (the law firm) arose from conduct protected under section 425.16. Therefore, we affirm the trial court's order denying Hutchinson's special motion to strike. We also conclude, however, that the trial court abused its discretion by imposing sanctions, inasmuch as the court repeatedly stated during argument on the motion that Hutchinson's motion was not "completely frivolous," and it did not provide any findings to support the order. Accordingly, we reverse the order imposing sanctions under section 425.16.

BACKGROUND

Hayes and the law firm represented the musical group Linkin Park (the Band) with respect to its activities in the entertainment industry. In June 2002, Hayes negotiated a new recording agreement between Warner Brothers (WB) and the Band. Under that agreement (the 2002 Agreement), WB was allowed to modify the manner in which royalties would be calculated, so long as the change was "pennies neutral" -- i.e., the change would not have a negative effect on the royalties WB paid to the Band.

In May 2003, WB notified the Band that it was changing the manner in which it would calculate royalties. WB provided example calculations showing that the change would be pennies neutral for royalties from sales of compact discs,

[1] Further undesignated statutory references are to the Code of Civil Procedure.

and that royalties from digital downloads would increase. The in-house auditor at the Band's business management firm confirmed that WB's calculations were correct.

Hayes and the law firm negotiated a new recording agreement between the Band and WB in 2005, to become effective in 2006 (the 2006 Agreement). According to Hayes, royalties were improved under the 2006 Agreement, and the Band received a multi-million dollar advance against those royalties.

In June 2009, the Band hired Hutchinson to conduct a royalty audit of WB. As part of his work on the audit, Hutchinson reviewed the 2002 Agreement and the 2006 Agreement. Based upon his review of the agreements, Hutchinson concluded that changes made to the manner in which royalties were calculated under the 2006 Agreement resulted in substantially less royalties to the Band. Hutchinson met with Hayes in February 2010 to discuss his belief that the Band was receiving lower royalties under the 2006 Agreement than it received under the 2002 Agreement. Hutchinson told Hayes that the changes with regard to royalties for digital downloads in the 2006 Agreement (which changes, according to Hayes, were originally implemented by WB in 2003) were not pennies neutral compared to the 2002 Agreement, but instead resulted in reduced royalties.

Hayes asked Hutchinson not to raise the reduction in royalty issues with WB, because those issues were outside the scope of his audit and because Hayes was at that time involved in sensitive negotiations with WB on the Band's behalf. Eventually, Hutchinson told Hayes that if Hayes did not inform the Band about the royalty issues, Hutchinson would do so. After consulting with the Band's business manager, Hayes terminated Hutchinson on March 29, 2010.

In early April 2010, Hutchinson's attorney, Clair Burrill, arranged a meeting between Hutchinson (accompanied by Burrill) and two members of the Band, who were accompanied by an attorney, Fred Rucker. Hutchinson told those present

about his audit, what he discovered about the changes to the royalties, and how Hayes had responded when Hutchinson told him about his discovery. After the meeting, Rucker told Hutchinson that the Band wanted him to complete the WB royalty audit. Subsequently, in May 2010, Rucker hired Hutchinson "to conduct an examination of certain audit related claims, including a comparison of the effect of changes from the [2002 Agreement] to the [2006 Agreement] on the amount of income generated or to be generated from the [2006 Agreement for a certain period of time] . . . and to prepare and present an evaluation report of those claims for [Rucker's] use on behalf of . . . [the Band]."

Hutchinson provided the evaluation report to Rucker in late July 2010. The report details the differences between the royalty terms in the 2002 Agreement and the 2006 Agreement, and the financial impact of those changes (i.e., comparing the royalties the Band earned and was expected to earn under the 2006 Agreement with what the Band would have earned if the royalties were calculated under the terms of the 2002 Agreement). The report ended with the following "Summary": "The impact on the royalties paid to [the Band], following the 2006 renegotiation, is a significant decline in all the digital unit royalty rates, when in fact the situation during these renegotiations was very much in favor of [the Band] getting a reasonably good improvement on their unit royalty rates. In my opinion, this was an incredibly unfavorable renegotiation for [the Band] and, in my view, this was due to a lack of care and effort by Danny Hayes and his staff in not properly reading and checking the draft agreements submitted by [WB]. Further, in my view, this goes beyond mistake to incompetence, which incompetence is exacerbated by the following. When I raised these issues regarding the 2006 Agreement to Danny Hayes, he first tried to 'persuade' me to exclude them from my report. When I refused, he had a discussion with [WB] and sent me an e-mail that stated 'I spoke with WB today about the 2 big issues and promised that I

would craft the claim language in advance with them'. When I objected to this ludicrous suggestion, I was fired. Lastly, in my view, Danny Hayes gives lawyers a bad name. I am sure he was handsomely compensated for his efforts in connection with the 2006 renegotiations and that is a shame. In fact, the renegotiations resulted in improvements for [WB] and income to Danny Hayes (and perhaps continuing income on some basis) all at the expense of the artist, [the Band]."

The Band terminated Hayes and the law firm on July 30, 2010, shortly after receiving the report. Hayes and the law firm filed the instant action against Hutchinson less than a year later. The operative first amended complaint alleges claims for defamation, trade libel, and intentional interference with contractual relations based upon statements Hutchinson made in the evaluation report.

Hutchinson filed a special motion to strike under section 425.16, arguing that his statements in the report were protected because the report was prepared in anticipation of litigation. Hutchinson submitted his declaration in support of the motion setting forth the background facts and describing how he came to draft his report. In describing his initial meeting with Rucker and members of the Band, he stated that Rucker told him "he was an attorney that specializes in legal malpractice litigation and had been retained by [the Band] to assist them with the Hayes matter." Hutchinson also stated that he was "hired directly by Fred Rucker to give him my expert opinion as to the potential damages claims arising out of a comparison of the effect of changes from the 2002 Agreement to the renegotiated 2006 Agreement on the amount of income generated from . . . all relevant income sources." Finally, he declared that Rucker "explained that he intended to use my expert opinion report in preparation for litigation against Hayes."

In opposing the motion, Hayes and the law firm contended that the statements at issue were not protected under section 425.16 because no litigation

was contemplated at the time the statements were made. They submitted, among other things, declarations from Rucker, two members of the Band (who served on what the Band referred to as the "legal and finance committee"), the Band's business manager, and two other managers for the Band.[2]

In his declaration, Rucker stated that when he and members of the Band met with Hutchinson, Hutchinson gave him materials that he contended supported his concerns about the 2006 Agreement. According to Rucker, over the course of subsequent meetings, Hutchinson offered to prepare a report explaining his concerns regarding Hayes' negotiations of the Band's recording agreements. Rucker stated that he and the Band agreed to have Hutchinson prepare the report, which would allow the Band to understand and consider Hutchinson's concerns. Rucker denied telling Hutchinson that he (Rucker) had been retained by the Band to assist in potential litigation against Hayes, or that he intended to use the report in preparation for litigation against Hayes. He also declared that no member of the Band ever told Hutchinson (or his attorney) in Rucker's presence that the Band was contemplating litigation against Hayes, nor did he see any written communication from members of the Band indicating that they were contemplating such litigation.

The two band members, Brad Delson and Rob Bourdon, declared that in their capacity as members of the legal and finance committee, they help oversee the business and legal affairs of the Band. They both stated that they asked Hutchinson to prepare the report "in order to gather facts and understand the basis for Mr. Hutchinson's concern that our royalties under the [2006 Agreement]

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[2] Hayes and the law firm also argued they were likely to prevail on their causes of action, and presented additional evidence to support their claims. In light of our conclusion that Hutchinson failed to establish that the communications at issue are protected under section 425.16, it is not necessary to address that evidence.

decreased." They declared that they were "not imminently planning to make any formal claim against Danny Hayes," they did not know of any members of the Band who had such plans, and they did not tell Hutchinson that the Band was seriously contemplating imminent plans to bring an action against Hayes.

The Band's business manager, Jonathan Schwartz, and two other managers, Michael Green and Jordan Berliant, made similar statements in their declarations. All of them declared that the report was prepared to detail Hutchinson's concerns of alleged decreased royalties under the 2006 Agreement and to enable the Band and its corporate organization to understand and consider those concerns. They also stated that "at no time was there any serious contemplation or consideration within the Linkin Park organization of imminent, or even probable, litigation against Danny Hayes, who was a trusted representative and advisor of the band for more than ten years."

In response to these declarations, Hutchinson submitted an additional declaration with his reply in support of the motion. He reiterated that Rucker told him that he was a legal malpractice attorney and that "he wanted an expert opinion as to the damage claims." Hutchinson also declared that Rucker "insisted that my services be provided directly to him and not to [the Band] so that he could preserve the effect of the work product doctrine." He attached as an exhibit a copy of an e-mail Rucker sent to Hutchinson's attorney confirming this.[3] Finally, Hutchinson declared: "It was always my understanding that the separate damages analysis was to be my expert opinion as to the damage claims and that the same was being

[3] Hayes and the law firm objected to the e-mail on numerous grounds, and objected on hearsay grounds to statements in Hutchinson's reply declaration (although not the final statement quoted above). The trial court sustained all of the objections. Hutchinson challenges the court's ruling as to the e-mail on appeal; we address that challenge in section A, *post*.

provided to Fred Rucker in anticipation of and preparation for litigation and would be protected by the work product doctrine. With that assurance, I provided a straightforward opinion as to the damage claims."

The trial court denied the special motion to strike. It found "that the defendants did not meet the burden of demonstrating that the report was prepared in anticipation of imminent litigation and therefore it is not protected under section 425.16." The court also ordered Hutchinson to pay attorney fees as sanctions in the amount of $19,500. Hutchinson timely filed a notice of appeal from the court's order.

DISCUSSION

On appeal, Hutchinson argues that the trial court erred by denying the special motion to strike because the report falls within the protection of section 425.16 because: (1) it was prepared in anticipation of litigation and therefore is protected by the litigation privilege codified in Civil Code section 47, subdivision (b); (2) it falls within the common interest privilege set forth in Civil Code section 47, subdivision (c); (3) it is protected under the First Amendment because it reflects Hutchinson's opinions; and (4) it is protected by a purported accountants' privilege. In addition, Hutchinson contends that: (1) the trial court erred by sustaining the objections to Rucker's e-mail, which Hutchinson submitted in support of his assertion that he prepared the report in anticipation of litigation; (2) Hayes and the law firm failed to produce evidence to establish a probability of prevailing on their claims; and (3) the attorney fee award must be reversed because the special motion to strike was not frivolous and the trial court failed to make the required factual findings to support the imposition of sanctions.

A. *Evidentiary Ruling*

We begin with Hutchinson's challenge to the trial court's evidentiary ruling, since it affects the evidence to be considered when determining whether Hutchinson satisfied his burden to show that the report is protected under section 425.16 because it was prepared in anticipation of litigation.

Hutchinson attached as an exhibit to his reply declaration filed in support of the special motion to strike an e-mail purportedly sent from Rucker to Hutchinson's attorney, Burrill. Hayes and the law firm filed written objections to the e-mail on several grounds, including that it lacked foundation and was not properly authenticated, that it constituted inadmissible hearsay, and that it was new evidence submitted with a reply brief without providing Hayes and the law firm notice and an opportunity to respond. The trial court sustained the objections.

On appeal, Hutchinson contends the trial court erroneously sustained Hayes' and the law firm's objection to the e-mail on hearsay grounds, and argues that the e-mail was admissible hearsay under Evidence Code section 1224, as an admission against interest, or because it was offered to show the terms of his engagement not contradicted by any writing between the parties. We need not determine whether the e-mail is admissible hearsay, however, because we conclude the e-mail was not properly authenticated. Hutchinson was not an addressee of the e-mail, and his declaration did not include any information indicating that he personally received it; he merely declared that a true copy of the e-mail was attached to the declaration. That is not proper authentication. (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 244.) Therefore, the trial court did not abuse its discretion by sustaining the objection on the ground that it was not properly authenticated. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348 [evidentiary rulings on special motion to strike reviewed for abuse of discretion].)

B. *Hutchinson Did Not Meet His Burden To Establish The Report Was Protected Under Section 425.16*

"Section 425.16 . . . was enacted 'to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights.' [Citation.] The statute provides that '[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.' (§ 425.16, subd. (b)(1).) It defines '"act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue"' to include '(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.' (§ 425.16, subd. (e).)" (*Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1158-1159.)

"'"[S]ection 425.16 requires that a court engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. [Citation.] If the court finds such a showing has been made, it then must consider whether the

plaintiff has demonstrated a probability of prevailing on the claim."' [Citation.] '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.] Thus, if the defendant fails to satisfy the first step, the court need not address the second step, and must deny the special motion to strike. We review the denial of a special motion to strike de novo. [Citation.]" (*Aguilar v. Goldstein*, *supra*, 207 Cal.App.4th at p. 1159.)

"In our evaluation of the trial court's order, we consider the pleadings and the supporting and opposing affidavits filed by the parties on the anti-SLAPP motion. In doing so, we do not weigh credibility or determine the weight of the evidence. Rather, we accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." (*Bailey v. Brewer* (2011) 197 Cal.App.4th 781, 788.)

As noted, Hutchinson argues that the statements in the report, upon which all the causes of action are based, are protected by the litigation privilege, the common interest privilege, the First Amendment, and the accountants' privilege, and therefore section 425.16 applies. We conclude he did not meet his burden to establish that section 425.16 applies to the statements.[4]

1. *The Litigation Privilege*

Hutchinson argues that section 425.16 applies because the report was prepared in anticipation of litigation and therefore is subject to the litigation

[4] Because we find that Hutchinson failed to satisfy the first prong of the anti-SLAPP statute, we need not address his contention that Hayes and the law firm failed to satisfy the second prong. (*Aguilar v. Goldstein*, *supra*, 207 Cal.App.4th at p. 1159.)

privilege under Civil Code section 47, subdivision (b). Although the protections of the litigation privilege and section 425.16 are not identical, the California Supreme Court has recognized there is a relationship between them. As the Supreme Court has explained, courts "have looked to the litigation privilege as an aid in construing the scope of section 425.16, subdivision (e)(1) and (2) with respect to the first step of the two-step anti-SLAPP inquiry -- that is, by examining the scope of the litigation privilege to determine whether a given communication falls within the ambit of subdivision (e)(1) and (2)." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322-323.)

"The litigation privilege, codified at Civil Code section 47, subdivision (b), provides that a 'publication or broadcast' made as part of a 'judicial proceeding' is privileged." (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.) "Although the express language of [Civil Code] section 47[, subdivision] (b) applies only to communications made *in* a judicial or other official proceeding, courts have applied the privilege to some communications made *in advance* of anticipated litigation." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1378 (*Eisenberg*); see also *Rubin v. Green* (1993) 4 Cal.4th 1187, 1194; *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 30-37 (*Edwards*).) The privilege applies in the pre-litigation context "'only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.'" (*Eisenberg*, *supra*, 74 Cal.App.4th at p. 1378.)

As the court in *Edwards* noted when addressing when on the continuum between the mere possibility of a lawsuit and the reality of a filed lawsuit the privilege would attach, "[i]n the present litigious society, there is always at least

the *potential* for a lawsuit any time a dispute arises between individuals or entities." (*Edwards*, *supra,* 53 Cal.App.4th at p. 33.) Thus, "[m]ore than a mere possibility or vague 'anticipation' of litigation must be required for the privilege to attach, or else the privilege may be misused in ways for which there is no public policy justification or purpose." (*Ibid.*) The court concluded that, to avoid such misuse, "the parameters of the privilege must be defined by the reasons providing justification for its existence." (*Ibid.*) Pointing to the Supreme Court's explanation that "the privilege is based on a policy of encouraging *free access to the courts* for assistance in the resolution of disputes and the ascertainment of truth, without fear of incurring a derivative tort action" (*ibid.*, citing *Silberg v. Anderson* (1990) 50 Cal.3d 205), the *Edwards* court concluded that "[t]his rationale for the privilege cannot logically be extended to communications made *prior* to or *in anticipation* of litigation until the prospect of litigation has gone from being a mere possibility to becoming a contemplated *reality*" (*Edwards*, *supra,* 53 Cal.App.4th at p. 34). Thus, the court held that the litigation privilege for pre-litigation communications "only arises at the point in time when litigation is no longer a mere possibility, but has instead ripened into a *proposed proceeding* that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute." (*Id.* at p. 39.)

In the present case, Hutchinson filed declarations stating that he believed his report was going to be used in preparation for litigation against Hayes.[5] Rucker,

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[5] Although Hutchinson appeared in his reply declaration to back away from his statement in his original declaration that Rucker *told him* that he intended to use the report in preparation for litigation against Hayes, declaring instead that Rucker referred to the report as "the 'damages analysis'" and wanted to protect it under the work product doctrine, he continued to declare that he understood that the report was being provided to Rucker "in anticipation of and preparation for litigation." Hutchinson also pointed to his

however, declared that he never told Hutchinson that he had been retained by the Band to assist in litigation against Hayes or that he intended to use Hutchinson's report in preparation for litigation against Hayes. Members of the Band's legal and finance committee, as well as the Band's business manager and two other managers, also declared that the Band never was seriously contemplating filing a lawsuit against Hayes, and no one from the Band informed Hutchinson that it was contemplating such a lawsuit. All of them declared that the purpose of Hutchinson's report was to allow the members of the Band and its management team to understand Hutchinson's concerns about the decreased royalties the Band would receive under the 2006 Agreement.

We note that a trier of fact could believe Hutchinson and disbelieve Rucker as to what Rucker told Hutchinson, and conclude that Hutchinson reasonably believed that litigation was seriously contemplated in good faith, even if the Band itself did not actually contemplate litigation. In such an event, the litigation privilege might apply. (See *Edwards, supra*, 53 Cal.App.4th at p. 32, fn. 8 [noting difference in language of comments to sections of the Second Restatement of Torts dealing with litigation privilege as to potential parties to a lawsuit and potential witnesses].) But on a special motion to strike, where it is the *defendant's* burden to establish that the complaint arises from activity that is protected under section 425.16 (*Aguilar v. Goldstein*, *supra*, 207 Cal.App.4th at p. 1159), this conflict in the evidence precludes a finding that the complaint arises from activity protected under the litigation privilege. (See *Bailey v. Brewer*, *supra*, 197 Cal.App.4th at p. 788 [court does not weigh evidence, but must accept plaintiff's evidence as true and determine whether defendant's evidence defeats plaintiff's evidence as a

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engagement letter agreement with Rucker to support his assertion in both declarations that the report was to be used in preparation for litigation. But the agreement – which Hutchinson drafted – does not refer to proposed litigation and instead refers to "audit related claims."

matter of law].) Therefore the trial court correctly found that Hutchinson failed to meet his burden to the extent he relies upon the litigation privilege.

2. *The Common Interest Privilege*

Hutchinson argues for the first time on appeal that his statements are protected under section 425.16 because they fall under the common interest privilege codified in Civil Code section 47, subdivision (c)(3). He contends he may raise this issue, even though he did not raise it in the trial court, because it is a question of law. (Citing *Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294, 1299, fn. 3.) He is mistaken.

Civil Code section 47, subdivision (c) provides that a privileged publication is one made "[i]n a communication, *without malice*, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." (Italics added.) Whether Hutchinson's statements were made without malice is an issue of fact, and is hotly disputed in this case. Therefore, Hutchinson cannot raise this new theory for the first time on appeal. (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1527, fn. 3 ["A party may not raise a new theory for the first time on appeal when that newly raised theory involves facts open to controversy but not placed in issue or resolved at trial"].)

3. *The First Amendment*

Hutchinson argues his report is protected under section 425.16 because it is privileged under the First Amendment. He makes no attempt, however, to relate his First Amendment claim to the requirements of section 425.16. Section 425.16

does not apply to causes of action arising from *any* act in furtherance of a person's right of free speech. It applies only when that act is "in furtherance of the person's right of petition or free speech . . . *in connection with a public issue*." (§ 425.16, subd. (b)(1), italics added.) Unlike a special motion to strike based upon section 425.16, subdivisions (e)(1) or (e)(2) -- i.e., when the complaint arises from the defendant's conduct in a judicial or official proceeding, which, as we have concluded, the instant complaint does not -- when a special motion to strike is based upon subdivisions (e)(3) or (e)(4), the defendant must establish that the conduct upon which the cause of action arises was conduct in connection with a public issue. (§ 425.16, subds. (e)(3), (4); see *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) Hutchinson does not address this public issue requirement in his briefs on appeal, and we find no evidence that his statements concerned an issue of public interest.

4. *The Accountants' Privilege*

Hutchinson's argument that his special motion to strike should have been granted because his statements are protected under a purported accountant's privilege consists of a single sentence – "Accountants, such as Hutchinson, are afforded protection from damage actions resulting from the accountant's work in the nature of the protection afforded a whistle blower" -- with citations to three cases that not only do not support his assertion, but have no relation to the protection afforded under section 425.16. We deem the argument to have been waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].)

C. *The Attorney Fee Award*

Hutchinson challenges the trial court's award to Hayes and the law firm of $19,500 in attorney fees as sanctions under section 425.16, subdivision (c)(1). We review orders awarding attorney fees under that provision for abuse of discretion. (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450.)

Section 425.16 provides that, "[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (§ 425.16, subd. (c)(1).) "Frivolous in this context means that any reasonable attorney would agree the motion was totally devoid of merit." (*Gerbosi v. Gaims, Weil, West & Epstein, LLP, supra,* 193 Cal.App.4th at p. 450.) In ruling on a party's request for attorney fees under section 425.16, the trial court must follow the procedures of section 128.5. (*Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1392; see also *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 817.) Under section 128.5, the court must file a written order that "recite[s] in detail the conduct or circumstances justifying the order." (§ 128.5, subd. (c).)

In the present case, Hayes and the law firm sought their attorney fees under section 425.16, subdivision (c)(1) on the ground that Hutchinson's special motion to strike was frivolous. At the hearing on the special motion, after the court announced its ruling that Hutchinson did not meet his burden to show that the report was prepared in contemplation of litigation, counsel for Hayes and the law firm asked to address the issue of sanctions. The court responded by saying, "I don't know that it was completely frivolous, counsel." Counsel for Hutchinson agreed, arguing the motion was not at all frivolous. He noted that Hutchinson stated under penalty of perjury that Rucker told him to prepare the report for his use in preparation for litigation, and observed, "Mr. Rucker says one thing. Mr.

Hutchinson says another thing. That's not frivolity." The court agreed, saying: "Yes. That's the problem. It's an issue of fact and I don't have them in front of me." The court then noted there was "an interesting shift in the reply that is very noticeable, counsel, in terms of the grounds," but concluded by saying "[b]ut I don't find it completely frivolous, counsel." Nevertheless, the court immediately began to address the amount of attorney fees Hayes and the law firm incurred. Hutchinson's counsel interjected, saying, "As you say, Your Honor, there's nothing frivolous about this motion." The court responded: "Well, I don't know that it's nothing. But it's not completely frivolous, counsel, is what I said. And it is troublesome that the reply declaration changes tack. In any event, I will be awarding the 19,500 in sanctions." The only reference to the award in the court's minute order on the motion was the following: "Court orders sanctions in the amount of $19,500.00 payable within 20 days of this date."

On appeal, Hutchinson argues that the award of attorney fees was contrary to the trial court's own statements at the hearing on the motion that the motion was not "completely frivolous," and that the trial court's order fails to include the findings required to award sanctions. We conclude the trial court abused its discretion by awarding sanctions. As the court itself noted, there is a disputed issue of fact as to whether Rucker told Hutchinson that he wanted the report for use in preparing for litigation against Hayes – a key issue in determining whether the litigation privilege applies. Moreover, the court's statements that Hutchinson's motion was not completely frivolous necessarily precludes a finding, required to award sanctions under section 425.16, that "the motion is 'totally and completely without merit.'" (*Decker v. U.D. Registry, Inc., supra,* 105 Cal.App.4th p. 1392, quoting § 128.5, subd. (b)(2).) Therefore, we reverse the order awarding sanctions against Hutchinson.

DISPOSITION

The order denying Hutchinson's special motion to strike under section 425.16 is affirmed. The order imposing sanctions is reversed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.