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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

TERESA JACOBO, et al., Plaintiffs and Respondents, v. BEST BEST & KRIEGER, et al., Defendants and Appellants.	B259521 (Los Angeles County Super. Ct. No. BC538644)

APPEAL from an order of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Affirmed.

Leo J. Moriarty, for Plaintiffs and Respondents Teresa Jacobo, George Cole, George Mirabal and Victor Bello.

Stanley L. Friedman for Plaintiff and Respondent Oscar Hernandez.

Lester & Cantrell, Mark S. Lester, David Cantrell and Colin A. Northcutt for Defendants and Appellants.

In 2010, plaintiffs, then members of the City of Bell city council, were charged with misappropriation of public funds (see Pen. Code, § 424) based on payments they received for serving on various city boards and commissions. Following their convictions, plaintiffs filed a malpractice action alleging the city attorneys for Bell had improperly advised them that the payments were legal.

Defendants filed a motion to strike the complaint pursuant to Code of Civil Procedure section 425.16 arguing that plaintiffs' claims sought to impose liability based on communications made in connection with an issue under consideration by the Bell city council. The trial court denied the motion, concluding that plaintiffs' claim did not arise from any protected communications, but rather from the breach of professional duties defendants allegedly owed to plaintiffs. We affirm.

FACTUAL BACKGROUND

A. Summary of Events Preceding Plaintiffs' Malpractice Action

In June of 2008, the city council for the City of Bell adopted a series of resolutions that appropriated funds to compensate council members for their positions on various local boards and commissions, including the Community Housing Authority Commission, the Public Finance Authority Board, the Surplus Property Authority Board, the Solid Waste Recycling Authority Board and the Planning Commission. Under the resolutions, each council member was to receive approximately $1,575 a month for their service on each entity, totaling approximately $95,000 in annual compensation. This compensation was in addition to payments the council members received for their service on the city council ($140 a month) and the Community Redevelopment Agency ($60 a month).

In 2010, the Los Angeles County District Attorney's Office sent the City of Bell a letter expressing concern that its council members' compensation exceeded the statutory limits set forth in Government Code section 36516. The law firm of Best Best & Krieger (BBK), acting in its capacity as city attorney for Bell, sent a letter in response asserting that each council member received only $150 a month for his or her service on the city

council, which fell within the applicable statutory limits. The letter further asserted that the council members' additional compensation for "service on [Bell's] other boards, commissions and authorities ha[d] been approved over the years by adoption of several resolutions, which were discussed and approved in open session before the public."

The district attorney subsequently filed an information charging city council members Teresa Jacobo, George Cole, George Mirabal, Victor Bello and Oscar Hernandez (collectively plaintiffs) with several counts of misappropriation of public funds in violation of Penal Code section 424, subdivision (a). The Attorney General filed a separate civil action against plaintiffs for waste of public funds (see Code Civ. Proc., § 526a) and fraud. The state authorities alleged that several of the boards and commissions plaintiffs served on were "sham agencies established [solely] to award [themselves] additional compensation. . . . " Between 2013 and 2014, each plaintiff pleaded guilty to, or was otherwise convicted of, violating Penal Code section 424.

On January 4, 2013, the City of Bell filed a legal malpractice complaint against BBK and Lee Edwards, an attorney at BBK. The complaint alleged Edwards and BBK had failed to exercise reasonable care when they neglected to advise Bell officials that various boards and commission had been devised for the sole purpose of providing additional compensation to council members. Bell also asserted claims for breach of contract, express indemnity and implied indemnity, each of which were predicated on terms set forth in the legal services agreement Lee and BBK had entered into with the city. In November of 2013, the court approved a settlement of Bell's claims.

B. Plaintiffs' Complaint

On March 7, 2014, plaintiffs, acting in their individual capacities, filed a similar suit against Lee and BBK (collectively defendants) alleging claims for legal malpractice, breach of fiduciary duty, breach of contract, and indemnity "arising from defendants' liability to plaintiffs in their capacities as City Attorney for the City for Bell and counsel for the plaintiffs."

1. General allegations

In their general allegations, plaintiffs asserted that defendants, in their capacity as the attorneys for the City of Bell, were "responsible for providing comprehensive legal representation to plaintiffs, including providing labor and employment advice," and "owed duties of care and professionalism to the plaintiffs to advise and guide them with respect to their actions while serving as council members and members of the agencies." Plaintiffs contended these professional duties were the result of a legal services agreement defendants had entered into with Bell. Under this agreement, defendants were responsible for (among other things): "prepar[ing] and review[ing] . . . [city] ordinances [and] resolutions"; "[r]endering legal service and opinions concerning legal matters that affect the City, including new legislation and court decisions"; and "[a]ttending . . . each regularly scheduled City Council Meeting."

Plaintiffs further alleged that, pursuant to their duties as city attorney, defendants had drafted provisions in the City Charter authorizing the city council "to create by ordinance or resolution advisory boards or commissions as in [the council's] judgment are required," and to "appropriat[e] . . . funds as in [the council's] opinion are sufficient for the efficient and proper functioning of such boards and commissions." Acting in reliance on these provisions, plaintiffs adopted various ordinances and resolutions that "created . . . such entities." Plaintiffs alleged that although defendants had "prepar[ed] and reviewed[]" these "resolutions" and "other legal documents pertaining to the . . . compensation . . . Plaintiffs [received] for their . . . services . . . . on the various authorities," they failed to "advise Plaintiffs that the creation of, participation in, . . . and the compensation paid to the Plaintiffs of such services were illegal."

Plaintiffs further alleged they had "reasonably relied upon the defendants, as their attorneys, to properly guide them with respect to what was legal or illegal." According to plaintiffs, defendants had caused them "to believe that [their] services on the various authorities, agencies, and boards was separate and distinct from their services as Council Members and thus that they could be properly compensated for said additional services in amounts which exceeded [limitations set forth in the Government Code]." As a result of

defendants' "fail[ure] to exercise reasonable care and skill in performing [their] legal services," plaintiffs were "prosecuted by the Los Angeles District Attorney's Office with charges of felony misappropriation of public funds. . . ."

2. Allegations regarding each cause of action

Plaintiffs' first cause of action, captioned "Legal Malpractice," alleged that "as a consequence of the attorney-client relationship which existed between [defendants] and plaintiffs, . . . [defendants] owed a legal duty to plaintiffs to exercise reasonable care and skill in performing legal services. . . ." Defendants allegedly breached such duties by "failing to properly advise plaintiffs, by assisting in drafting various resolutions that provided for the salaries paid to the [plaintiffs], . . . and by failing to advise the plaintiffs of what the applicable state laws were, and if said laws were violated to inform them immediately . . . so that corrective action could be taken."

Plaintiffs' second cause of action, captioned "breach of fiduciary duty," similarly alleged that "by virtue of the attorney-client relationship that existed between [defendants] and plaintiffs, . . . defendants . . . owed a fiduciary duty to plaintiffs to act at all times in the best interests of plaintiffs." Defendants had allegedly breached these fiduciary duties "by the [same] acts of misconduct" alleged in relation to the malpractice claim.

Plaintiffs' third claim, captioned breach of contract, alleged the legal services agreements defendants had entered into with Bell required them to "render to plaintiffs legal advice and opinion on how to conduct themselves as council members and authority members in full compliance of the City Charter and any applicable state laws." The breach of contract claim further alleged the agreements required defendants to "furnish such skill, prudence, and diligence as members of their profession . . . when [providing] . . . legal advice, opinions and guidance as to the activities and compensation of the officers of the City, including plaintiffs." Defendants were alleged to have breached these contractual duties by failing to "properly draft and review . . . resolutions [and] ordinances" regarding the council members' compensation, and failing "to properly

inform [plaintiffs] of whether their conduct and compensation was legal per the City Charter, Resolutions and applicable state laws."

Plaintiffs fourth and fifth claims, captioned "express indemnity" and "equitable and implied indemnity," asserted that defendants had "previously accepted employment from the City of Bell and plaintiffs to give legal advice or to render other legal services." The indemnity claims further alleged that defendants' employment agreements "created an obligation to defend and indemnify plaintiffs" from "any and all claims . . . arising out of or in any way connected with [defendants'] performance of the [legal services agreement]." The claims asserted these indemnity provisions obligated defendants to reimburse plaintiffs for the "attorney's fees and costs [incurred] in defending themselves against the criminal and civil actions" that were "brought . . . against them" after defendants had failed "to properly advise them as to their legal duties and responsibilities regarding their activities and compensation."

C. Defendants' Special Motion to Strike the Complaint

1. Summary of defendants' motion to strike

Defendants filed a motion to strike the complaint pursuant to Code of Civil Procedure section 425.16[1] arguing that plaintiffs' claims were based on "statements and warnings concerning adoption of legislation regarding city council pay rates." According to defendants, their "alleged advice [to city council members] on salary issues [qualified as] protected [petitioning activity] because it was 'made in connection with an issue under review by a . . . legislative body.'" (See § 425, subd. (e)(3).)

Defendants also argued plaintiffs could not prevail on their claims for malpractice or breach of fiduciary duty because they could not establish the existence of an attorney-client relationship. Defendants contended the legal services agreements referenced in the complaint made clear they had only agreed to represent the City of Bell, and did not establish an attorney-client relationship with plaintiffs in their individual capacities.

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1 Unless otherwise noted, all further statutory citations are to the Code of Civil Procedure.

Defendants raised similar arguments regarding plaintiffs' claims for breach of contract and indemnity, asserting that plaintiffs had no standing to enforce the legal services agreement because "they [were] not parties to the [legal services agreements]," nor were they "intended third party beneficiaries." Defendants argued that although the agreements gave "Bell the right to enforce the indemnity provision on behalf of its elected officials," the agreements did "not create a direct right for any other person – including plaintiffs – to enforce the indemnity provision."[2]

2. Summary of plaintiffs' opposition

In opposition to the motion to strike, plaintiffs' primary argument was that they had provided evidence demonstrating they did in fact have an attorney-client relationship with the defendants. In support, plaintiffs relied on language in the legal services agreements stating that they would "provide representation and legal services to the city council members," and indemnify city employees for any harm resulting from their legal services. Plaintiffs also relied on statements from plaintiff Oscar Hernandez, who asserted in a declaration that defendant Edward Lee had specifically advised him the compensation he received from the city was "legal." Plaintiffs contended that "given the advice" defendant Lee had personally provided to Hernandez and the "attorney contracts which . . . made defendants indemnors [sic] of plaintiffs," the defendants had failed to prove they "were not counsel for plaintiffs." Plaintiffs similarly argued that they were permitted to "maintain an action for indemnity" because the legal services agreement contained express language stating that defendants would "indemnify and defend the City, its elected officials, and its employees, in any manner arising out of or incidental to the performance by this agreement."

In support of their opposition, plaintiffs provided a declaration from Oscar Hernandez stating that during his time as a member of Bell's city council, defendant Lee

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[2] Defendants raised several additional arguments regarding plaintiffs' inability to prevail on the merits of their claims that are not directly relevant to the issues addressed in this appeal.

regularly instructed him that he should not be concerned "about the items appearing on the agenda[,] . . . [which] included the issue of payments for sitting on various commissions." Hernandez further asserted that: (1) the "[t]he assurances that . . . Lee gave [him] . . . related to the payments that [Hernandez] personally received from the City of Bell"; and (2) he would "not have accepted the payments" if Lee had "advised [him] that such payments were illegal, rather than advising that they were legal (as he did)." In addition to Hernandez's declaration, plaintiffs provided copies of legal correspondence and memorandums BBK had written addressing the legality of the city council's compensation scheme.

3. Trial court's order denying the special motion to strike

The trial court denied defendants' motion to strike, concluding they failed to make a threshold showing that plaintiffs' claims arose from protected activity within the meaning of section 425.16. In a written order, the court explained that "the arguments made by the parties are answered by the Court of Appeal's decision in *Chodos v. Cole* (2012) 210 Cal.App.4th 692 [*Chodos*][,] . . . [which held that section 425.16] does not apply to claims for attorney malpractice, breach of fiduciary duty, or negligence brought against an attorney by the attorney's client [citation], and further held that [the statute] does not apply to bar an attorney's claim against other attorneys for equitable indemnity in connection with a claim for attorney malpractice." The court concluded that under *Chodos*, plaintiffs' claims were not subject to section 425.16 because they were based on improper legal advice defendants had allegedly provided to them regarding the legality of the city council's compensation scheme.

The order also addressed defendants' argument that, as a matter of law, the legal services agreement they entered into with the City of Bell did not create an attorney-client relationship with the city's council members. The court rejected this argument for two reasons, explaining: "[F]irst . . ., while the City of Bell as a legal entity, is formally the contracting party, it can only act by and through natural persons – its administrators, mayor, and council member. Only live persons can solicit or receive advice, or act in

response to that advice. [¶] . . . [S]econd[,] . . . it appears defendants contractually undertook to treat the council members and staff as their client for at least certain purposes." In support, the court relied on language in the legal services agreements stating that defendants were required to review all city resolutions and ordinances, and "render to officers and employees of the City legal advice and opinions on all matters affecting the City. . . ." According to the court, "these provisions appear[ed] to specifically contemplate that defendants w[ould] provide legal advice to council members, in their official capacities, relating to matters within the scope of their duties. Under these circumstances, the court is persuaded that council members are to be deemed 'clients' of defendants within the meaning of the distinctions drawn by the Court of Appeal in *Chodos*. It necessarily follows that defendants have not satisfied the threshold criterion that their conduct was in furtherance of the right to petition or free speech under CCP § 425.16."

DISCUSSION

A. Summary of Applicable Law and Standard of Review

"Section 425.16, 'commonly referred to as the anti-SLAPP statute'[**3**][citation] is intended 'to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' [Citation.] The section authorizes the filing of a special motion that requires a court to strike claims brought 'against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' (§ 425.16, subd. (b)(1).)

"Section 425.16 '"requires that a court engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted."' [Citation.] '"First the court decides whether the defendant has made a threshold showing that the

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3 The acronym "SLAPP" stands for "strategic lawsuit against public participation." (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 312.)

challenged cause of action is one arising from protected activity. [Citation.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]." [Citation.]. . . [¶] If the defendant makes this showing, the court proceeds to the second step of the anti-SLAPP analysis. [Citation.] In the second step, the court decides whether the plaintiff has demonstrated a reasonable probability of prevailing at trial on the merits of its challenged causes of action. [¶.] Conversely, if the defendant does not meet its burden on the first step, the court should deny the motion and need not address the second step.' [Citation.]

"'An appellate court reviews an order granting an anti-SLAPP motion under a de novo standard. [Citation.] In other words, we employ the same two-pronged procedure as the trial court in determining whether the anti-SLAPP motion was properly granted.' [Citation.]" (*Hunter v. CBS Broadcasting, Inc*. (2013) 221 Cal.App.4th 1510, 1519 (*Hunter*).)

B. Defendants Failed to Make a Threshold Showing that Plaintiffs' Claims Arise from Protected Activity

"The sole inquiry under the first prong of the anti-SLAPP statute is whether the plaintiff's claims arise from protected speech or petitioning activity. [Citation.] Our focus is on the principal thrust or gravamen of the causes of action, i.e., the allegedly wrongful and injury-producing conduct that provides the foundation for the claims." (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490-491 (*Castleman*).) "A cause of action does not 'arise from' protected activity simply because it is filed after protected activity took place. [Citation.] Nor does the fact '[t]hat a cause of action arguably may have been triggered by protected activity' necessarily entail that it arises from such activity. [Citation.] The trial court must instead focus on the substance of the plaintiff's lawsuit in analyzing the first prong of a special motion to strike." (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669; see also *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727 (*Freeman*) ["'when the

allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute'"].) "We review the parties' pleadings, declarations, and other supporting documents at this stage of the analysis only 'to determine what conduct is actually being challenged, not to determine whether the conduct is actionable.' [Citation.]" (*Castleman, supra,* 216 Cal.App.4th at p. 490.)

Plaintiffs' claims allege defendants breached the professional duty of care attorneys owe to their clients by providing improper advice concerning the legality of the "payments [council members] received for sitting on various [boards] and commissions." Plaintiffs further contend defendants breached their duty of care by "assisting in drafting [the] resolutions" that authorized these illegal payments. Defendants argue these claims are subject to section 425.16 because they seek to impose liability based on communications that were "made in connection with an issue under consideration or review" by Bell's city council: whether to authorize payments to council members for their service on various local boards and commission. (See § 425.16, subd. (e)(2) ["'act in furtherance of a person's right of petition or free speech. . . .' includes: . . . (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"].)

Although we agree that communications made to city council members regarding pending legislative activity generally qualifies as a form of protected conduct under section 425.16 (see *City of Montebello v. Vasquez* (August 8, 2016, No. S219052) __ Cal.5th __ [2016 D.A.R. 8066, 8070 ["council members' votes, as well as statements made in the course of their deliberations at the city council meeting where the votes were taken, qualify as [protected activity]"]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 ["'communications preparatory to or in anticipation of . . . [an] official proceeding'" are protected by section 425.16]; *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1167 ["[a] statement is 'in connection with' an issue under consideration [in an official proceeding] . . . if it relates to a substantive issue in the proceeding and is directed to a person having some interest in the proceeding"];

Holbrook v. City of Santa Monica (2006) 144 Cal.App.4th 1242, 1247 ["legislative action at City Council meetings" qualifies as form of protected activity]), numerous prior decisions have held the SLAPP statute does not apply to legal malpractice claims brought by a former client "even though protected litigation activity features prominently in the factual background." (*Castleman, supra*, 216 Cal.App.4th at p. 490.)

For example, in *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532 (*Kolar*), plaintiffs hired defendant to represent them in litigation arising from a property dispute with their neighbors and homeowners association. After plaintiffs lost the case, they filed a malpractice claim alleging the defendant had "'failed to exercise reasonable care and skill' while representing them in the . . . litigation." (*Id*. at p. 1536.) Defendant filed a special motion to strike under section 425.16, which the trial court denied.

The Fourth District affirmed, explaining that although malpractice claims are frequently triggered by or associated with protected litigation activity, such claims "do[] not arise from" that activity. (*Kolar, supra,* 145 Cal.App.4th at p. 1535.) Rather, according to the court, such claims arise from "the attorney[']s fail[ure] to competently represent the client's interests. . . . That the malpractice allegedly occurred in the course of petitioning activity does not mean the claim arose from the activity itself." (*Ibid*.) The court further explained that its determination that malpractice claims do not "arise from" protected activity within the meaning of section 425.16 was "consistent with the statute's . . . purpose" (*id*. at p. 1539) to deter lawsuits brought primarily to chill the valid exercise of free speech and petition rights: "A malpractice claim focusing on an attorney's incompetent handling of a previous lawsuit does not have the chilling effect on advocacy found in malicious prosecution, libel, and other claims typically covered by the anti-SLAPP statute. In a malpractice suit, the client is not suing because the attorney petitioned on his or her behalf, but because the attorney did not competently represent the client's interests while doing so. Instead of chilling the petitioning activity, the threat of malpractice encourages the attorney to petition competently and zealously. This is vastly

different from a third party suing an attorney for petitioning activity, which clearly could have a chilling effect." (*Id*. at p. 1540.)

The Sixth District reached a similar conclusion in *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204 (*Prediwave*). The plaintiff, a corporate entity, was sued by an investor who alleged a PrediWave board member had induced the investor to purchase PrediWave through a series of false representations. PrediWave retained Simpson Thacher to defend the company and the board member in the investor suit. After the investor prevailed at trial, PrediWave filed a malpractice claim challenging the competency of the defendant's legal services in the underlying action. Simpson Thacher filed a section 425.16 motion to strike asserting that PrediWave's claims arose from communications and other litigation activities undertaken in the course of the representation.

The court held that section 425.16 was inapplicable, explaining that "clients do not bring [malpractice] lawsuits to deter the speech and petitioning activities done by their own attorneys on their behalf but rather to complain about the quality of their former attorneys' performance." (*Prediwave, supra*, 179 Cal.App.4th 1204 at p. 1227.) The court explained that while section 425.16 might apply to "non-client[]" claims brought "against [an] attorney" for petitioning activity undertaken on behalf of a third party (*id*. at pp. 1220-1221, 1227), it would be "unreasonable to interpret [section 425.16] to include a client's causes of action against the client's own attorney arising from litigation-related activities undertaken for that client. 'The cardinal rule of statutory construction is to ascertain and give effect to the intent of the Legislature. [Citation.]' [Citation.] Although a broad interpretation of the anti-SLAPP statute is statutorily mandated [citation], an overly broad interpretation of section 425.16, subdivision (b), that includes such client lawsuits unreasonably expands the language beyond the clear legislative purpose and leads to absurd results. [Citation.]." (*Id*. at p. 1228.)

In *Chodos*, *supra*, 240 Cal.App.4th 692, which the trial court discussed at length in the order appealed here, Division Five of this District followed *Kolar* and *Prediwave* in concluding that section 425.16 did not apply to "an indemnity claim [that was] . . .

grounded in allegations of malpractice." (*Id*. at p. 705.) The court explained: "The authorities have established that the anti-SLAPP statute does not apply to claims of attorney malpractice. . . . '[W]hen a claim [by a client against a lawyer] is based on a breach of the fiduciary duty of loyalty or negligence, it does not concern a right of petition or free speech, though those activities arose from the filing, prosecution of and statements made in the course of the client's lawsuit. The reason is that the lawsuit concerns a breach of duty that does not depend on the exercise of a constitutional right.' [Citation.] Even though the 'petitioning activity is part of the evidentiary landscape within which [claimant's] claims arose, the gravamen of [claimant's] claims is that [the former attorney] engaged in nonpetitioning activity inconsistent with his fiduciary obligations owed to [claimant].' [Citation.]" (*Id*. at p. 702.)

Several other cases have adopted the reasoning of *Kolar*, *PrediWave* and *Chodos*, concluding that section 425.16 does not apply to "malpractice claims that challenge the competency of an attorney's legal services." (*Sprengel v. Zbylut* (2015) 241 Cal.App.4th 140, 154-155 (*Sprengel*); see also *Hylton v. Frank E. Rogozienski, Inc*. (2009) 177 Cal.App.4th 1264, 1273 ["the anti-SLAPP statute does not apply to a client's claim against his or her former attorney for . . . malpractice"]; *Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 578-579 ["section 425.16 does not shield statements made on behalf of a client who alleges negligence in the defendant's representation of the client"]; *Jespersen v. Zubiate–Beauchamp* (2003) 114 Cal.App.4th 624, 630 [section 425.16 inapplicable to a "garden-variety attorney malpractice claim"].) Other decisions, including one recently decided by this court (see *Sprengel, supra,* 241 Cal.App.4th 140), have similarly concluded that claims "seeking to impose liability based on an attorney's violation of the conflict of interest rules set forth in the Rules of Professional Conduct" are not subject to section 425.16 because, in such cases, the client is not suing "based on" the provision of legal services, "but rather [on the defendant's] fail[ure] to maintain loyalty to . . . [the] client.'" (*Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1189; see also *Loanvest I, LLC v. Utrecht* (2015) 235 Cal.App.4th 496; 504 [section 425.16 inapplicable "[w]here . . . a legal malpractice action is brought

by an attorney's former client, claiming that the attorney breached fiduciary obligations to the client as the result of a conflict of interest"]; *Castleman, supra,* 216 Cal.App.4th at p. 488 [section 425.16 inapplicable to claims alleging an attorney had committed "ethical violations, including breaches of the duties of loyalty and confidentiality owed to [plaintiffs] as former clients under the State Bar Rules of Professional Conduct"]; *Freeman, supra,* 154 Cal.App.4th 719, 732-733 [section 425.16 did not apply to claims alleging attorney had breached professional obligations set forth in rule 3-310]; *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton LLP* (2009) 171 Cal.App.4th 1617, 1627-1628.)

As in *Kolar* and *Prediwave*, the "principal thrust" of plaintiffs' claims in this matter is that the legal services defendants provided to them fell below the professional standard of care that attorneys owes to their clients. Every cause of action asserts, either expressly or through the incorporation of prior allegations, that defendants served as counsel for plaintiffs, and that they acted below the professional standard of care by "fail[ing] to properly advise [plaintiffs] as to their legal duties and responsibilities regarding their activities and compensation."[4] Plaintiffs' claims therefore fall squarely within well-established case law holding that "the anti-SLAPP statute does not apply to a

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[4] Paragraph 13 of the complaint alleges that all of plaintiffs' claims "aris[e] from defendant's liability to plaintiffs in their capacities as . . . counsel for the plaintiffs." This paragraph is "incorporated by reference" into the allegations pertaining to each individual cause of action. The first and second causes of action for malpractice and breach of fiduciary duty both expressly allege that "an attorney-client relationship . . . existed between [defendants] and plaintiffs," and that defendants "owed a legal duty to plaintiffs to exercise reasonable care and skill in performing legal services. . . ." The third cause of action for breach of contract alleges defendants agreed to "render to the plaintiffs legal advice and opinions on how to conduct themselves as council members," and "contracted to furnish such skill, prudence, and diligence as members of their profession . . . commonly possess." The fourth cause of action for express indemnity alleges "[defendants] had previously accepted employment from . . . plaintiffs to give legal advice," and were required to indemnify them for failing to "properly advise them as to their legal dues. . . regarding their activities and compensation." The fifth cause of action for implied indemnity incorporates the allegations set forth in the prior four causes of action, and additionally asserts defendants were required to indemnify plaintiff for failing to "advise[] [them] properly . . . with respect to their compensation."

client's claim against his or her former attorney for breach of fiduciary duty . . . or for malpractice . . . merely because the client's claim against the former attorney followed or was associated with petitioning activity by the attorney on the client's behalf." (*Hylton, supra,* 177 Cal.App.4th at p. 1273.)

Defendants do not dispute that the "gravamen" of plaintiffs' claims is that they breached professional duties arising from an alleged attorney-client relationship, nor do they dispute that such claims are generally not subject to section 425.16. They contend, however, that section 425.16 does apply to the particular claims at issue in this case because, despite the allegations in the complaint, "an attorney-client relationship was not formed between [themselves] and plaintiffs." According to defendants, the plaintiffs' complaint and the attached exhibits make clear that defendants only agreed to represent the City of Bell. They further contend that our "courts have previously determined that the attorney for a municipality does not form a personal attorney-client relationship with the municipality's elected officials. . . ." In support, they rely primarily on *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, which held that county counsel for the County of Los Angeles was not disqualified from defending the County in a civil rights action the County's assessor had brought in his individual capacity. The court concluded the county counsel had no conflict in the matter because, under the terms of the county charter, he "ha[d] only one client, namely, the County of Los Angeles. [Citation.] . . . . [The] County Charter [mandates] . . . the county counsel . . . represent county officers in civil actions, but only as to matters wherein such officers acted in their representative capacity and within the scope of their official duties. Thus the county counsel's representation of county officers is analogous to the representation afforded officers of a corporation by corporate counsel." (*Id.* at p. 32.) Defendants argue that under *Ward,* neither the legal services agreement they entered into with Bell, nor the legal advice defendant Lee is alleged to have personally provided to then-councilmember Hernandez, was sufficient to create an attorney-client relationship. Defendants assert that in the absence of an attorney-client relationship, plaintiffs' claims do not sound in malpractice and are therefore subject to section 425.16.

This court recently considered and rejected a virtually identical argument in *Sprengel, supra,* 241 Cal.App.4th 140. The plaintiff, Jean Sprengel, and her business partner, Lynette Mohr, created "Purposeful Press LLC" to market and distribute a guidebook Sprengel had written. After Sprengel and Mohr became involved in a dispute about the management of the company, Sprengel filed an action to dissolve Purposeful Press, and a separate action alleging Mohr had infringed her copyrights to the guidebook. Mohr, purportedly acting as the manager of Purposeful Press, retained attorneys to represent the company in the actions. After the suits were resolved, Sprengel filed a malpractice action alleging that Purposeful Press's attorneys had violated the duty of loyalty they owed to her by pursuing Mohr's interests in the underlying actions. Sprengel alleged that although she did not enter into an express attorney-client agreement with any of the attorneys, she nonetheless shared an implied attorney-client relationship with them "based on her status as a 50 percent shareholder of Purposeful Press." (*Id*. at p. 151.) Defendants filed a special motion to strike pursuant to Code of Civil Procedure section 425.16, which the trial court denied.

On appeal, defendants did not dispute Sprengel's claims were based on the breach of professional duties arising from an alleged attorney-client relationship, nor did they dispute such claims are generally not subject to section 425.16. They argued, however, that the claims were nonetheless subject to section 425.16 because the allegations in Sprengel's complaint made clear that "[defendants] only agreed to represent Purposeful Press," and therefore did not represent Sprengel in her individual capacity. (*Sprengel, supra,* 241 Cal.App.4th at p. 155.) In support, defendants relied on case law holding that, generally, "an attorney's representation of a corporate entity does not give rise to an . . . attorney-client relationship with the individual shareholders of the entity." (*Ibid*.) Defendants further contended that because "'an attorney-client relationship was never created between [themselves] and Sprengel . . ., her claims [did] not arise from an attorney-client relationship and d[id] not sound in non-petitioning legal malpractice." (*Id*. at p. 156.)

We rejected the argument, explaining: "Defendants' arguments regarding the absence of an attorney-client relationship with Sprengel improperly conflate the first and second prongs of the Section 425.16 test. 'The sole inquiry' under the first prong of the test is whether the plaintiff's claims arise from protected speech or petitioning activity. [Citation.] In making this determination, '[w]e do not consider the veracity of [plaintiffs'] allegations' [citation] nor do we consider '[m]erits based arguments.' [Citations.] If the defendant demonstrates the plaintiff's claims do arise from protected activity, we then review the potential merits of the plaintiff's claims in the second step of the analysis. [Citation.] However, '[w]here [defendant] cannot meet his threshold showing, the fact he might be able to otherwise prevail on the merits under the 'probability' step is irrelevant.' [Citation.] Whether Sprengel actually shared an attorney-client relationship with defendants relates to the merits of her claims and is therefore not relevant to our first prong analysis. Although the defendants may ultimately defeat Sprengel's claims by proving the absence of an attorney-client relationship, that does not alter the substance of her claims. [Citation.]" (*Sprengel, supra,* 241 Cal.App.4th at pp. 156-157.)

The same analysis applies here. As in *Sprengel*, we conclude that whether defendants' representation of the City of Bell and the other conduct they are alleged to have engaged in gave rise to an attorney-client relationship with plaintiffs relates to the merits of plaintiffs' claims, and is therefore not relevant to our first prong analysis. Although defendants may ultimately defeat plaintiff's claims by proving they did not owe any duty of care to the individual city council members, "that does not alter the substance of [plaintiffs'] claims. [Citation.]" (*Sprengel, supra*, 241 Cal.App.4th at pp. 156-157.)

DISPOSITION

The trial court's order denying appellants' special motions to strike is affirmed. Respondents shall recover their costs on appeal.

ZELON, J.

I concur:

SEGAL, J.

PERLUSS, P. J., Concurring.

In my dissenting opinion in *Sprengel v. Zbylut* (2015) 241 Cal.App.4th 140, 158-163, I explained my disagreement with the numerous appellate decisions that have held an action based on an attorney's breach of professional and ethical duties owed to a client is not subject to a special motion to strike under Code of Civil Procedure section 425.16 even though the conduct that purportedly gives rise to the attorney's liability consists almost entirely of protected litigation-related activity. In brief, I argued the analysis in those cases, creating a blanket exception to section 425.16 for "garden variety malpractice actions," violates the plain language principle of statutory interpretation that has been the hallmark of the Supreme Court's anti-SLAPP jurisprudence (*Sprengel*, at pp. 161-162) and is based on the discredited premise that, because such actions do not chill the exercise of protected rights, they fall outside the ambit of section 425.16 (*Sprengel*, at p. 161).

Communications to city council members concerning pending legislative activity, including advice as to the validity of proposed ordinances and resolutions creating advisory boards and commissions, are protected speech and petitioning activity. (Code Civ. Proc., § 425.16, subd. (e)(2) ["act in furtherance of person's right of petition or free speech" includes "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"].) There is no more warrant for excluding causes of action arising from that protected activity from the reach of section 425.16 than for immunizing litigation-related malpractice actions. Nonetheless, in recognition of the important principles of stability and predictability underlying the doctrine of stare decisis (see *People v. Latimer* (1993) 5 Cal.4th 1203, 1213 [considerations of stare decisis have special force in the area of statutory interpretation because the legislative branch remains free to alter what the courts have done]), I concur in today's opinion.

PERLUSS, P. J.