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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROBIN ROSEN, Plaintiff and Appellant, v. JAI SINGH et al., Defendants and Respondents.	B230067 (Los Angeles County Super. Ct. No. BC441076)

APPEAL from a judgment of the Superior Court of Los Angeles County, Luis A. Lavin, Judge. Affirmed.

Law Offices of Glenn M. Rosen and Glenn M. Rosen for Plaintiff and Appellant.

W. Ruel Walker for Defendant and Respondent Jai Singh.

Reback, McAndrews, Kjar, Warford & Stockalper, Robert C. Reback, Cindy A. Shapiro and Thien T. Nguyen for Defendant and Respondent Franklin Moser.

In a prior litigation, plaintiff and appellant Robin Rosen filed a personal injury action against the Los Angeles Metropolitan Transit Authority (MTA) and its bus driver, claiming she suffered a debilitating stroke a month after the MTA bus rear-ended the school bus in which she was traveling.[1] Plaintiff retained expert biomechanical and medical witnesses—defendants and respondents in the instant action, Jai Singh and Franklin Moser, M.D.—to help prove liability and damages. The MTA and bus driver, however, prevailed when the jury specially found they were not negligent in the underlying accident. In the instant action, plaintiff sued experts Singh and Dr. Moser, alleging they conspired with the MTA's counsel in the personal injury action to sabotage her case by giving detrimental testimony, thereby violating their fiduciary and contractual obligations to plaintiff.

Singh and Dr. Moser brought anti-SLAPP[2] motions under Code of Civil Procedure section 425.16 to dismiss the action on the ground that all the claims against them were premised on their testimony in the personal injury action, which was an exercise of constitutional rights of petition and free speech. The trial court granted the motions, finding plaintiff's causes of action arose out of protected speech and plaintiff failed to carry her burden of showing a probability of prevailing on the merits of her claims.[3] In her timely appeal, plaintiff contends the trial court erred in granting the anti-SLAPP motion. We affirm.

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[1] We will generally refer to Ms. Rosen as plaintiff in order to avoid confusing her with her counsel at trial and on appeal, Glenn Rosen.

[2] "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.) An order granting or denying a special motion to strike under Code of Civil Procedure section 425.16 is appealable. (Code Civ. Proc., § 904.1, subd. (a)(13).) All further statutory references are to the Code of Civil Procedure unless otherwise stated.

[3] The complaint also named David Cossman, M.D., and Vascular Surgery Associates of Southern California, neither of whom are parties to this appeal.

FACTS AND PROCEDURAL BACKGROUND

The Complaint

Plaintiff's instant lawsuit named Singh and Dr. Moser as defendants in the complaint's 10 causes of action, all of which were predicated on their promises "to use their good faith to testify in favor of [plaintiff] and to act as her experts" in her personal injury action against the MTA and its bus driver, entitled *Robin Rosen v. Los Angeles County Metropolitan Transportation Authority and Wendel Rush*, No. BC360683 (the "personal injury action"). That action arose out of an accident in October 2004, when an MTA bus driven by Wendel Rush allegedly rear-ended the school bus in which plaintiff was seated as a passenger. The school bus had no head restraints and the accident caused a dissection of plaintiff's left internal carotid artery, resulting in a stroke, impaired speech and balance, and partial paralysis. Her medical bills amounted to $400,000, and her care and treatment would amount to $7 million over the course of her life.

Plaintiff hired experts Singh and Dr. Moser, based on their representations that there was no conflict of interest between either one and the MTA. According to plaintiff, defendants agreed her injuries were caused by the accident with the MTA bus. However, at some point, they secretly entered into a conspiracy with legal counsel for the MTA, Katherine Pene, to "act against [plaintiff] to make sure that [she] would lose her case." Defendants were motivated by "their own pecuniary benefit to obtain more cases" from the MTA and Attorney Pene.

Every cause of action incorporated those allegations by reference as the factual basis for each claim. The first cause of action for breach of fiduciary duty alleged that defendants promised and assured plaintiff "they would testify in her behalf, work on her behalf and make sure that her case was presented properly by them in a professional manner," but they breached their fiduciary duty by knowingly, willfully, and maliciously failing to do so. The second cause of action for breach of contract alleged defendants had a contract with plaintiff to "act on her behalf, testify on her behalf and do everything to

improve her case and not to act in their own best interests" against plaintiff's interests. They breached those contracts by working in favor of the MTA.

The third claim alleged defendants breached the covenant of good faith and fair dealing by entering into a conspiracy with Attorney Pene to ensure plaintiff would lose her personal injury lawsuit. Defendants "knew they were violating this covenant" and were acting against plaintiff's interests in "making sure there would be no offer of settlement . . . and that the case would have to go to [t]rial wherein they would testify against" plaintiff to prevent her from prevailing. The fourth claim alleged "deceit" under Civil Code sections 1709 and 1710, based on the same conduct set forth in the prior allegations.

The fourth claim, civil conspiracy, alleged that in approximately August or September 2008, defendants "conspired and agreed to implement a scheme to victimize" plaintiff by "testifying against her for the benefit of" Attorney Pene and the MTA. In the fifth claim, plaintiff alleged defendants committed fraud by "intentionally misrepresenting that they were acting in good faith for" plaintiff's interests "when they were in fact acting against her to her detriment." The seventh claim, denominated "fraud by concealment," generally alleged defendants concealed material facts by acting in concert with Attorney Pene to prevent plaintiff from prevailing at trial or from receiving a fair settlement offer. The eighth claim alleged negligent misrepresentation on the ground that defendants "knowingly and willfully induced [plaintiff] to believe they were acting in good faith and representing her interests when in fact they were acting against her."

In the ninth cause of action, plaintiff alleged defendants should be estopped from relying on any statutes of limitations to bar her claims. In the tenth cause of action, plaintiff alleged the conduct in the prior causes of action amounted to negligence by defendants.

The Anti-SLAPP Motions

Dr. Moser's anti-SLAPP motion was supported by declarations from Attorney Pene and Dr. Moser himself. Dr. Moser is a board certified radiologist. Prior to October 2008, vascular surgeon Dr. David Cossman asked Dr. Moser to review "some films" of plaintiff to "determine whether she had suffered a carotid dissection as a result of a bus accident." Plaintiff's attorney, Glenn Rosen, visited Dr. Moser's office and told him plaintiff "had suffered a cerebral incident some time after being involved in a motor vehicle accident involving" the MTA, and he had filed a lawsuit on her behalf. Attorney Rosen provided Dr. Moser with MRI and MRA images taken of plaintiff after she suffered a cerebral infarction (stroke) some weeks after the bus accident. Dr. Moser discussed his interpretation of the scans with plaintiff's attorney.

According to Dr. Moser, the scans confirmed plaintiff's infarction. Additionally, "the scans were suspicious, but not diagnostic[,] of a dissection of the left carotid artery." Dr. Moser opined that he could not make a determination that the infarction was caused by a carotid dissection without additional studies, such as an angiogram. Attorney Rosen said no such studies had been done and never provided Dr. Moser with any additional medical test results or records concerning plaintiff, nor did he provide Dr. Moser with any documents concerning the bus accident or any deposition transcripts from the litigation. Dr. Moser did not tell Attorney Rosen he would testify that plaintiff's injuries resulted from the bus accident, based on his review of the scans he had reviewed. Rather, he told the attorney that he would testify truthfully based on his review of those scans.

At his deposition on October 20, 2004, Dr. Moser testified truthfully, consistent with his prior representations to plaintiff's attorney, that the scans showed evidence of a cerebral infarction, "but that the scans . . . were not diagnostic for a dissection leading to infarct[ion]." The expert further testified that he was told no angiogram had been done on plaintiff. When questioned by Attorney Rosen, Dr. Moser testified that trauma could cause an artery dissection, but he would defer to plaintiff's "treating physicians as to whether the bus accident caused her subsequent infarction." He was not called to testify

at plaintiff's trial. Dr. Moser never discussed plaintiff's case with Attorney Pene, except to the extent he answered Attorney Pene's deposition questions in her capacity as counsel for the MTA. Dr. Moser never agreed to "testify in any way other than truthfully."

Attorney Pene declared that she and her law firm represented the MTA and Rush in plaintiff's personal injury action. Rush and the MTA denied that the MTA bus struck the school bus in which plaintiff was a passenger at the time of the October 22, 2004 accident. The investigating officer from the California Highway Patrol supported that conclusion and he testified to that effect at trial. Medical records showed plaintiff first received medical treatment on November 3, 2004, but "only for neck and back soft tissue injuries." Sixteen days later, plaintiff suffered a stroke and was hospitalized. "A carotid duplex ultrasound . . . was reported to reveal a distal left internal carotid artery clot as the cause of her stroke."

An angiogram was conducted on November 23, 2004, at plaintiff's request on behalf of her treating health care providers. The hospital and physician were selected by plaintiff—not by Attorney Pene, her firm, or her clients. The report by radiologist Kurt Openshaw, M.D., "did not identify a carotid artery dissection, and his subsequent deposition and trial testimony . . . confirmed that the angiogram ruled out a carotid artery dissection." When deposed on September 23, 2008, more than six weeks before trial, Dr. Openshaw testified that "the angiogram did not reveal any basis for the claim that the subsequent stroke was caused by the bus accident." Dr. Openshaw's deposition was two weeks before the deposition of plaintiff's medical expert, Dr. David Cossman, and four weeks before Dr. Moser's deposition.

Attorney Pene does not know why plaintiff's counsel did not provide the angiogram films to Drs. Moser and Cossman. Her firm had obtained them as part of the medical records subpoenaed during the course of the lawsuit; plaintiff's counsel was provided with timely notice of the subpoenas. Plaintiff's counsel did not request the medical records from Attorney Pene, and she did nothing to prevent counsel from obtaining them. Nor does Attorney Pene know why plaintiff's counsel did not provide the medical experts with the videotape of Dr. Openshaw's deposition. Neither Attorney

Pene nor any member of her firm took any steps to prevent plaintiff or her counsel from obtaining the medical records or deposition videotape.

The personal injury action began in November 2008. On December 9, 2008, the jury rendered a special verdict in favor of the defense, finding neither defendant was negligent. As a result of that verdict, judgment was entered for the defense with the jury not having to reach the questions of causation and damages.

Singh's anti-SLAPP motion was supported by his declaration, in which he stated that he is a biomechanical engineer. Plaintiff's attorney retained him as an expert witness in the personal injury litigation. In that capacity, Singh inspected the MTA bus, reviewed documents, prepared reports, and testified in a deposition and at trial. He "gave testimony favorable to plaintiff in an effort to establish that plaintiff indeed sustained serious injuries as a result of the collision." All of his efforts were intended to benefit plaintiff. He never conspired with anyone to act against plaintiff's interests.

Plaintiff's Opposition

In opposition to Dr. Moser's motion, plaintiff argued the actionable conduct on which the complaint was based was not the expert's testimony, but rather his conflict of interest, which existed at the time he was retained and first examined plaintiff's scans. As part of the conspiracy against plaintiff, Attorney Pene convinced Dr. Openshaw to "take the films so that they could not be used and [she talked] Dr. Openshaw into lying about what the films said and how they were used. . . . The conspiracy was expanded with [Attorney] Pene convincing Singh to testify against plaintiff without informing plaintiff of the conflict of interest with the MTA and [Attorney] Pene. Singh did this after his inspection of the school bus and before inspecting the MTA bus." No evidence, however, was presented to support those assertions.

In essence, plaintiff argued Dr. Moser's testimony was incidental to the wrongful conduct alleged in the complaint. The wrongful conduct as to each cause of action, plaintiff asserted, was Dr. Moser's false representation that he had no conflict of interest

with Attorney Pene or the MTA at the time he agreed to become plaintiff's expert. "We are not saying that he breached his duty by testifying and by what he said."

The anti-SLAPP opposition was supported by the declaration of Hope Ashley Rosen, Attorney Rosen's daughter.[4] She was present when Attorney Rosen retained Dr. Moser as an expert in the personal injury action. Attorney Rosen told the doctor who defendants were and identified Attorney Pene and her firm as defense counsel. Dr. Moser said he had no conflict of interest and could serve as plaintiff's expert. The doctor examined the MRA scan presented to him by Attorney Rosen. Dr. Moser said, "There it is, there is the dissection of the carotid artery." When told about the reports of the bus accident, the doctor said that "it was not unusual for a dissection of the left internal carotid artery to take place as a result of the trauma and that is evidently what happened to Robin Rosen."[5]

With regard to Singh's motion, plaintiff argued Singh's misconduct consisted of: (1) failing to have a PowerPoint presentation as an aid to testifying, despite Singh's representation that he had prepared one; (2) not permitting Attorney Rosen to participate in the inspection of the MTA bus; (3) failing to properly inspect the MTA bus with its bike rack in the lowered position; and (4) granting Attorney Pene the authority to "sell off" the MTA bus after the inspection was completed.[6] Again, however, plaintiff provided no evidentiary support for those assertions. Plaintiff argued that Singh's

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[4] Attorney Rosen also submitted his own declaration, but it was limited to providing support for plaintiff's claim for attorney fees.

[5] Dr. Moser objected to those statements on hearsay grounds, but the trial court overruled the objections, finding that her statements as to what she heard Dr. Moser say were admissible as party admissions.

[6] Singh submitted a declaration in support of his motion to disqualify Attorney Rosen (filed contemporaneously with Singh's anti-SLAPP motion), in which he refuted plaintiff's assertions and stated that he never spoke to Attorney Pene at any time regarding the facts of the personal injury action.

actionable conduct "had nothing to do with any protected activity," but rather consisted in his failure to give truthful testimony and information to plaintiff.

The Trial Court's Ruling

The trial court found that the gravamen of the claims against defendants was their testimony in deposition or at trial. Accordingly, defendants had satisfied their initial burden under section 425.16 of showing the claims arose out of protected speech. "[T]he gravamen of this lawsuit is [that plaintiff is] seeking to punish these [d]efendants for either how they testified at a deposition or what they may or may not have said in court." As to the second aspect of the anti-SLAPP test, the court found plaintiff failed to satisfy her burden of showing a probability of prevailing on her claims because the factual allegations contained in plaintiff's opposition brief were not supported by any evidence. Because plaintiff had failed to present any evidence to show a probability of prevailing on the merits, the court granted the motions as to defendants.

DISCUSSION

The Anti-SLAPP Statute

Plaintiff contends the trial court erred in granting defendants' motions to dismiss under section 426.16. The governing law is well established. "'In evaluating an anti-SLAPP motion, the trial court first determines whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [(*Equilon Enterprises*)].) Under . . . section 425.16 "[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 . . . shall be subject to a special motion to strike. . . ." ([*Id.*,] subd. (b)(1).)' (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 [(*Rusheen*)].) 'If the court finds the defendant has

made the threshold showing, it determines then whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Equilon Enterprises . . . , supra,* 29 Cal.4th at p. 67.) "In order to establish a probability of prevailing on the claim (. . . § 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must '"state[] and substantiate[] a legally sufficient claim."' [Citations.] Put another way, 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.' [Citations.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)' (*Rusheen . . . , supra,* 37 Cal.4th at p. 1056.)" (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1435–1436 (*Morrow*).) We independently review both aspects of this test—whether plaintiff's causes of action arise from protected activity and, if so, whether she has shown a probability of prevailing on the merits. (*Id.* at p. 1436.)

Protected Activity

As we have explained, "[s]ection 425.16 defines an 'act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue,' covered by the anti-SLAPP statute and subject to an anti-SLAPP motion, as including statements or writings made before a judicial proceeding or made in connection with an issue under consideration or review by a judicial body. (§ 425.16, subd. (b)(1), (e).) Thus, statements, writings and pleadings in connection with civil litigation are covered by the anti-SLAPP statute, and that statute does not require any showing that the litigated matter concerns a matter of public interest. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (*Briggs*); *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5 (*Healy*).)" (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35 (*Rohde*).)

The deposition and trial testimony of expert witnesses Dr. Moser and Singh in the personal injury action certainly fall within the statute's definition of protected speech.

"Section 425.16 is 'construed broadly, to protect the right of litigants to "'the utmost freedom of access to the courts without [the] fear of being harassed subsequently by derivative tort actions.'"' (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1194; see § 425.16, subd. (a); *Briggs, supra,* 19 Cal.4th at p. 1119.)' (*Healy, supra,* 137 Cal.App.4th at p. 5; see *Flatley* [*v. Mauro* (2006)] 39 Cal.4th [299,] 321–322 [(*Flatley*)].)" (*Rohde, supra,* 154 Cal.App.4th at p. 35.) Indeed, it would be hard to imagine clearer examples of "classic petitioning activity" than preparing for and testifying in court or at a deposition. (See *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1548 (*Haight Ashbury Free Clinics*) [statements urging a witness to give false deposition testimony were protected activity]; see also *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 673 (*Peregrine Funding*) [attorney's written opposition to Securities Exchange Commission actions was protected activity under anti-SLAPP statute]; *Rohde, supra,* at p. 32 [attorney's litigation-related voicemail messages, threatening to take "appropriate actions" and accusing estate agent of conspiring with the opposing party were protected activity].)

Plaintiff advances a variety of arguments to the contrary. As we explain, none is persuasive. Initially, the alleged wrongful conduct does not fall within the illegal conduct exception set forth in *Flatley, supra,* 39 Cal.4th 299. There, the California Supreme Court "held that the anti-SLAPP statute does not protect speech or petitioning activity that is conclusively shown or conceded to be 'illegal as a matter of law' and therefore not a valid exercise of the constitutional right of petition or free speech." (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1168 (*Fremont*), quoting *Flatley, supra,* at pp. 317, 320.) Appellate decisions have consistently interpreted the *Flatley* rule to apply only to criminal conduct. (*Fremont, supra,* at p. 1169.) Plaintiff's complaint does not allege criminal misconduct, but rather a welter of contractual breaches and torts arising out asserted violations of the expert witnesses' duties of loyalty to plaintiff. The holding in *Freemont* is closely analogous. "Conduct in violation of an attorney's duties of confidentiality and loyalty to a former client cannot be 'illegal as a matter of law' [citation] within the meaning of *Flatley*." (*Fremont, supra,* at p. 1169.)

Apart from unsupported and conclusory assertions in her appellate briefing as to "perjury" and "fraud," no attempt has been made to establish that defendants' testimony and related activities were illegal as a matter of law.[7] The recent decision by our colleagues in Division One of this district is instructive: "[W]ithout any supporting factual allegations, the complaint's conclusory references to 'misrepresentations,' 'abusive' conduct, 'frivolous' motions, broken promises to 'cooperate,' and fraudulent statements to provide 'information' and 'documents' are insufficient to state a cause of action regardless of the legal relationship between the parties or, more precisely here, lack thereof." (*Bleavins v. Demarest* (2011) 196 Cal.App.4th 1533, 1543.)

Nor can plaintiff avoid the application of the anti-SLAPP statute by arguing defendants' testimony was false or misleading and therefore not a "valid exercise" of the constitutional right to free speech. That argument was squarely rejected in *Haight Ashbury Free Clinics, supra,* 184 Cal.App.4th 1539: "To make their threshold showing under the first prong of the SLAPP analysis, appellants need not prove that the targeted activity is in fact constitutionally protected. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94–95 (*Navellier*) [‘"The Legislature did not intend that . . . to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law"’]; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305 [lawsuit was not outside scope of SLAPP statute even though defendant had no First Amendment right to disclose privileged and confidential information or refuse to return materials to their rightful owner].)" (*Haight Ashbury Free Clinics, supra,* at pp.1548-1549.)

As our appellate courts have repeatedly recognized: "The problem with [the plaintiff's] argument is that it confuses the threshold question of whether the SLAPP statute applies with the question whether [the plaintiff] has established a probability of success on the merits." (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 964 (*Seltzer*),

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[7] Plaintiff's reply brief is filled with intemperate *ad hominem* attacks on Attorney Pene and defendants, as well as on Dr. Moser's appellate counsel. Plaintiff consistently fails to support these attacks with either citations to the record or legal argument.

quoting *Fox Searchlight Pictures, Inc. v. Paladino, supra,* 89 Cal.App.4th at p. 305.) Requiring a defendant to prove his or her actions were constitutionally protected as a matter of law, would render as superfluous the secondary inquiry as to whether the plaintiff has established a probability of success. (*Seltzer, supra,* at p. 964, citing *Navellier, supra,* 29 Cal.4th at p. 95; see also *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1089 ["a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary"].)

Alternatively, plaintiff argues her complaint falls outside the purview of the anti-SLAPP statute because defendants' constitutionally protected activities were "merely incidental" to misconduct alleged. "A cause of action is one 'arising from' protected activity within the meaning of section 425.16, subdivision (b)(1) only if the defendant's act on which the cause of action is based was an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) Whether the 'arising from' requirement is satisfied depends on the '"gravamen or principal thrust"' of the claim. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477, quoting *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193.) A cause of action does not arise from protected activity for purposes of the anti-SLAPP statute if the protected activity is merely incidental to the cause of action. (*Martinez, supra,* at p. 188.)" (*Fremont, supra,* 198 Cal.App.4th at p. 1166; *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272 ["If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute."].)

"As the Supreme Court has explained, '[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' (*Navellier, supra,* 29 Cal.4th at p. 92.) Because conduct that is alleged to be a breach of duty—e.g., in *Navellier,* the breach of contractual

obligations—may also fall within the class of constitutionally protected speech or petitioning activity, a court considering a special motion to strike must examine the allegedly wrongful conduct itself, without particular heed to the form of action within which it has been framed. (*Id.* at pp. 92–93; see also *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734–735 [section 425.16 encompasses any cause of action arising from protected activity, and the statute does not categorically exempt any particular type of action].)" (*Peregrine Funding, supra,* 133 Cal.App.4th at p. 671.) "In deciding whether the 'arising from' requirement is satisfied, 'the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).)" (*Fremont, supra,* 198 Cal.App.4th at p. 1166.)

Plaintiff contends the gravamen of her complaint is one of breach of fiduciary duty, based on the alleged conspiracy by defendants and Attorney Pene to sabotage plaintiff's personal injury action. Indeed, plaintiff asserts the testimony by defendants in that underlying lawsuit was "irrelevant" to her instant causes of action because each one of her claims was factually complete upon the hiring of the expert witnesses, who were already part of the conspiracy with Attorney Pene, and therefore in breach of their fiduciary duties to plaintiff when retained. We cannot agree. As our summary of the actions in the complaint makes clear, whether the claims are alleged to sound in tort, contract, breach of fiduciary duty, or conspiracy, the causes of action are premised on defendants' activities as expert witnesses. That is, the expert witnesses' alleged wrongful conduct in preparing for and testifying to plaintiff's detriment is integral to each claim.

As pleaded, each cause of action incorporated the same core set of factual allegations—that defendants promised "to use their good faith to testify in favor of [plaintiff] and to act as her experts" in the personal injury action. She retained those experts based on their representations that there was no conflict of interest between either one and the MTA, and both experts agreed that her injuries were caused by the accident with the MTA bus. However, at some point, motivated by their desires to profit financially by obtaining more cases from the MTA and Attorney Pene, the two experts

secretly entered into a conspiracy with Attorney Pene, to "act against [plaintiff] to make sure that [she] would lose her case." As such, plaintiff's repeated assertion—unsupported by citation to the record—that defendants' testimony in the underlying action is irrelevant to plaintiff's claims is belied by the complaint's specific allegations, as well as by plaintiff's own arguments on appeal.[8] All of the specific factual allegations of wrongful conduct by defendants refer to, or implicate, the damaging nature of their expert opinions and their deposition and trial testimony.

The *Peregrine Funding* decision is on point. There, the plaintiffs argued "the fundamental basis or gravamen of their claims" rested on the defendant law firm's "breaches of duty and not its petitioning activity." (*Peregrine Funding, supra,* 133 Cal.App.4th at p. 673.) The appellate court rejected the argument, based on the nature of firm's alleged wrongful actions: "[T]he fact is that some of the alleged *actions* constituting these breaches of duty involved petitioning activity the firm undertook on behalf of its client Hillman. Although the overarching thrust of plaintiffs' claims may be that [the law firm's] conduct helped advance the Ponzi scheme—to their detriment—some of the specific conduct complained of involves positions the firm took in court, or in anticipation of litigation with the SEC. We cannot conclude these allegations of classic petitioning activity are merely incidental or collateral to plaintiff's claims against [the law firm]." (*Ibid.*) Indeed, the finding of protected activity is stronger in plaintiff's case, given that a primary objective of the alleged conspiracy with the MTA and Attorney Pene was to offer testimony detrimental to plaintiff.

Finally, plaintiff seeks to rely on a line of authority holding the anti-SLAPP statute inapplicable to actions by clients against their own attorneys, and in particular *Robles v.*

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8 Plaintiff submitted no declaration in support of her opposition to Singh's anti-SLAPP motion. Her opposition to Dr. Moser's motions was supported by Attorney Rosen's declaration and the declaration of Hope Ashley Rosen, neither of which contained factual support for a cause of action independent of Dr. Moser's expert testimony.

Chalilpoyil (2010) 181 Cal.App.4th 566 (*Robles*), which extended that holding to the expert witness who allegedly colluded with retained counsel. In most of those cases, however, the anti-SLAPP statute was deemed "inapplicable in actions by clients against their own attorneys because the gravamen or principal thrust of the particular causes of action did not concern a statement made in connection with litigation, but instead concerned some other conduct allegedly constituting a breach of professional duty. (*PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1226–1227 [simultaneous representation of clients with conflicting interests]; *Hylton v. Frank E. Rogozienski, Inc.*[, *supra*,] 177 Cal.App.4th [at p.] 1274 [inducing the plaintiff to agree to an unconscionable attorney fee]; *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton LLP* (2009) 171 Cal.App.4th 1617 [acceptance of representation adverse to the plaintiff]; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 732 [same]; see also *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1189 [(*Benasra*)] [stating that the action arose from the acceptance of representation adverse to the plaintiff rather than the litigation conduct that followed].) Thus, those courts concluded that any statements made in connection with the litigation were merely incidental to the causes of action." (*Fremont, supra,* 198 Cal.App.4th at p. 1170, fn. omitted.) Here, in contrast, the expert witnesses' testimony was integral to the alleged actionable conduct.

Nor do we agree that the judicially recognized attorney-malpractice exception to the anti-SLAPP statute must generally be extended to actions against the client's expert witness. The rationale for attorney malpractice exception was set forth in *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532 (*Kolar*). The *Kolar* court reasoned that a "'garden variety'" malpractice cause of action does not have a chilling effect on advocacy or any other petitioning activity (see § 425.16, subd. (a)), but instead encourages competent and zealous representation. (*Kolar, supra,* at pp. 1539-1540.) That is, the client in a malpractice suit "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." (*Ibid.*; see also, e.g., *Benasra, supra,* 123 Cal.App.4th

at p. 1187 [claims did not arise out of attorney's statements in arbitration, but out of violations of State Bar rules against representation of conflicting interests].)

Those same policy concerns do not apply here because neither Dr. Moser nor Singh was alleged to have colluded with plaintiff's counsel. Plaintiff in this matter is not suing her own attorney for malpractice in the personal injury action, but rather alleging a conspiracy between opposing counsel and his own experts. The wrongful conduct alleged in the instant matter is not subsumed within an overarching claim of attorney malpractice. Accordingly, plaintiff's action is distinguishable from the scenario in *Robles, supra,* 181 Cal.App.4th 566. There, the plaintiffs were "family members of John Robles, who burned to death when his wheelchair ignited while he was occupying it." (*Id.* at p. 570.) The family members brought a wrongful death action against the company that provided the wheelchair and others. After the wrongful death action was settled, they sued their former attorneys and one of their experts hired by their attorneys, alleging the expert had testified falsely in his deposition in the underlying case, and their attorneys and expert conspired to commit fraud by entering into a business relationship to market a wheelchair safety device the expert developed while retained to prepare testimony on the plaintiffs' behalf. (*Id.* at p. 571.)

In holding the anti-SLAPP statute did not apply, *Robles* found "to the extent that appellant [expert] and the Wills attorneys *were* exercising free speech or petition rights, it was on respondents' behalf, not on behalf of another client, as in *Peregrine Funding.* To turn respondents' own constitutional right against them when they claim negligence and fraud in the exercise of that right would be manifestly unfair and surely beyond the contemplation of the Legislature even in its mandate to construe the statute broadly." (*Robles, supra,* 181 Cal.App.4th at p. 580.) Noting that the line of authority holding that the anti-SLAPP statute "does not shield statements made on behalf of a client who alleges negligence in the defendant's representation of the client or breach of the duty of loyalty," the *Robles* court saw "no reason to create an exception for an expert witness retained by the plaintiffs to testify on their behalf." (*Id.* at p. 579.)

It was a short and reasonable step in *Robles* to extend the judicially-created attorney malpractice exception to an expert hired by the plaintiffs' own attorney when that expert was alleged to have conspired with that same attorney. Indeed, it would have been anomalous to apply a different anti-SLAPP standard to the attorney and expert in those circumstances. However, there is no precedent for creating a general expert witness exception to the anti-SLAPP statute. We agree with *Fremont* that the attorney malpractice exception should not be applied to claims other than "those regarding an attorney's representation of a client in litigation." (*Fremont, supra,* 198 Cal.App.4th at p. 1172 [declining to extend the exception to claims based on an alleged breach of an attorney's professional duties to a former client].)

Such an unprecedented extension of the malpractice exception would be particularly questionable in this case, where the actionable conduct directly implicates core free speech activity in the form of an expert witness's testimony. Testifying experts and attorneys are not similarly situated with respect to professional duties of loyalty to their clients. Rather, as expert witnesses, their obligations went beyond those of client loyalty because those obligations were subject to, and limited by, their oath to testify truthfully. Nor is plaintiff correct in asserting that application of the anti-SLAPP statute to defendants will effectively insulate them against any action arising out of their retention in the personal injury action.[9] Rather, the anti-SLAPP statute merely shifts the

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[9] Plaintiff's reliance on *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392 is misplaced. *Mattco* held that the litigation privilege under section 47 does not protect a negligent expert witness from a malpractice suit sounding in contract and tort by the party who hired the witness. Application of the litigation privilege in the anti-SLAPP context is proper only after the burden has shifted to plaintiffs on the *second* stage of the analysis. "A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim. (*Flatley, supra,* 39 Cal.4th at p. 323; *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 972.)" (*Fremont, supra*, 198 Cal.App.4th at p. 1172.)

burden of proof to plaintiff to make a minimal showing of probability of succeeding on the merits.

Probability of Prevailing

We turn to the second step of the anti-SLAPP inquiry, in which we assess whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Equilon Enterprises, supra,* 29 Cal.4th at p. 67; *Rusheen, supra,* 37 Cal.4th at p. 1056.) "'In order to establish a probability of prevailing on the claim (. . . § 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must "'state [] and substantiate[] a legally sufficient claim.'" [Citations.] Put another way, 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." [Citations.]' (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 [(*Wilson*)].)" (*Rusheen, supra,* at p. 1056.) "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" (*Wilson, supra,* at p. 821; *Morrow, supra,* 149 Cal.App.4th at p. 1439.)

Our assessment of plaintiff's claims against Dr. Moser is straightforward. Dr. Moser presented uncontested evidence that the jury in the personal injury action rendered a defense verdict, finding no negligence as to the MTA and Rush, thereby obviating the issues of injury causation and damages. As Dr. Moser's role in the lawsuit was to opine on the latter issues, plaintiff cannot show a possibility of prevailing on the merits of her claims. Certainly, plaintiff made no evidentiary showing to the contrary.

A similar conclusion was reached in the appeal of plaintiff's action against Dr. Openshaw and others, arising out of allegations that Dr. Openshaw and Attorney Pene

"stole the angiogram Openshaw performed because it showed that the impact of the collision with the MTA bus tore Rosen's left internal carotid artery, which caused her subsequent stroke," thereby preventing plaintiff's experts from rendering a favorable opinion as to causation. (*Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 456 (*Rosen*).) The trial court sustained the defendants' demurrers on the ground that Rosen's causes of action constituted claims for spoliation of evidence, which were barred by the Supreme Court's decisions in *Cedars–Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1 and *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464. (*Rosen, supra,* at pp. 455-456.)

The *Rosen* court affirmed the judgment on the legal ground relied on below and issued an alternative holding: "[E]ven assuming a duty to preserve evidence existed, Rosen cannot allege a cause of action against Openshaw . . . because she cannot allege the breach of that duty caused her any damages. Rosen alleged the conversion of her angiogram prevented her from establishing the causation element on her claim against the MTA. The jury, however, never reached the causation element of Rosen's claim against the MTA because it returned a verdict finding the MTA did not breach any duty it owed Rosen. Consequently, as a matter of law, Rosen cannot allege Openshaw . . . caused her to lose the action against the MTA." (*Rosen, supra,* 193 Cal.App.4th at p. 464.) The same is true in this case with regard to Dr. Moser.[10]

The same analysis applies to Singh, given that he was retained to offer an expert biomechanical opinion on causation—that "plaintiff indeed sustained serious injuries as a result of the collision." As it is possible, however, that Singh's opinion might have had some bearing on the question of negligence, given that he opined that the MTA did collide with the school bus, we note another reason why plaintiff failed to satisfy her

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10 We need not reach the question of whether the determination in *Rosen, supra,* amounts to collateral estoppel. The fact of the prior special defense verdict is not challenged, and the reasoning of the appellate court in *Rosen* applies to the facts before this court.

burden of showing a probability of prevailing on the merits—plaintiff failed to present any evidence in support of her claims against Singh. (See *Summerfield v. Randolph* (2011) 201 Cal.App.4th 127, 137 [plaintiff "made no showing in the trial court as to her probability of prevailing on the merits of her malicious prosecution claim"].) Here, plaintiff's allegations as to Singh's misconduct and complicity in the supposed conspiracy with the MTA and Attorney Pene were supported by nothing other than argument. In contrast, Singh's declaration was admitted in its entirety and refuted plaintiff's allegations of misconduct and damages: Singh's testimony was competent and favorable to plaintiff; he never conspired with anyone to act against plaintiff's interests.

DISPOSITION

The judgment is affirmed. Franklin Moser is to recover his costs on appeal.[11]

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.

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[11] Singh filed a timely notice of election not to file a respondent's brief, but to rely on the appellate record.