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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

VERONICA MCCLUSKEY, Plaintiff, Cross-defendant and Appellant, v. WILLIAM HENDRICKS, Defendant, Cross-complainant and Respondent.	B292470 (Los Angeles County Super. Ct. No. BC671735)

APPEAL from an order of the Superior Court of Los Angeles County. Lia R. Martin, Judge. Affirmed.

Law Office of Michael Mogan and Michael Mogan for Plaintiff, Cross-defendant and Appellant.

Miller Wanner, Kathrin A. Wanner and Kirsten E. Miller for Defendant, Cross-complainant and Respondent.

Veronica McCluskey (appellant) appeals the denial of her special motion to strike the cross-complaint of respondent William Hendricks (respondent) under Code of Civil Procedure section 425.16.[1] She contends that the trial court erred because respondent failed to establish a probability of prevailing on his claim for defamation.

We find no error and affirm.

FACTS

Background

Respondent and his wife, who both lived in Iowa, owned an apartment in Los Angeles that they rented out on a short-term basis through Airbnb. In May 2017, appellant agreed to act as their cohost. In that role, she prepared the apartment for new guests. In early June 2017, respondent was addicted to opiate pain pills, and he sometimes had pills delivered to locations where he was traveling. Because respondent planned to be traveling to Los Angeles, he arranged to have pills mailed to the apartment.

In a text exchange, respondent asked appellant about a piece of mail he was hoping to receive. She replied: "The white envelope is hidden in the linen closet. You'll have to get someone to send it for you. I opened it by accident as I thought it was the USB. I don't feel comfortable sending drugs in the mail with my named attached[.] . . . [S]orry. I could get deported for being associated with any [kind] of pain pills if they are not administered for me." He said, "I can understand that! That's not what I was asking about, although I do enjoy pain pills[.]

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

. . . [¶] Was actually looking for my medical marijuana card. . . . [¶] . . . [¶] I'll have my friend . . . meet you one day to grab that." A bit later in the exchange, appellant said, "Not really a comfortable thing to bring up[.] [¶] Haha[] thought maybe you guys were smuggling drugs lol [¶] And using Airbnb as a front." Respondent replied, "Lol [¶] I wish ;) [¶] Just a bad habit [¶] Let me see if my friend . . . can meet you tomorrow while you['re] cleaning if that's OK? He's a super nice guy, but I know you are a private person. He has nothing to do with those, but will get them out of there[.]"

Soon after, appellant's and respondent's relationship deteriorated because appellant was not getting paid through Airbnb. Also, appellant accused respondent of making derogatory comments about her to customers. She ended their business relationship and texted that she would forward everything to Airbnb.

That same day, appellant e-mailed Airbnb stating, "I think this is a drug ring." She added, "[Here] are the pics of all the packages that come through the apartment every few days . . . I leave them in there then someone else picks them up! I have texts saying I want nothing to do with it but was told to do my job!" At the end, she stated, "I think this legit might be a front and/or a drug ring."

Respondent e-mailed appellant early on June 17, 2017, and stated: "I have all of my notes for Airbnb written up, too, if you want to go there. [¶] Glad you enjoyed our view, too bad you violated a house rule that I've had from day one and a touchy subject for [A]irbnb—photo shoots. [¶] I don't want to get nasty but will go there if you want to. I'd just assume save us both the

time and energy."[2] In her responsive e-mail, appellant wrote: "That's a photo I sent you guys for the windows so they could be cleaned after your wife ASKED me to. [¶] I need to say in writing I feel very unsafe, bullied and harassed and now stalked. [¶] Please do not contact me again. The authorities have been now involved and if you reach out again I will be getting a restraining order."

Appellant e-mailed Airbnb, stating, "I feel very unsafe[.] [¶] He[has] started to stalk my online media[.] [¶] How do I get a restraining order[?] [¶] . . . [¶] I wrote this back to him asking him to stop contact." Airbnb advised appellant to contact local authorities. She volleyed: "What are the chances the host . . . I decide to co host for are drug smugglers[?] Craziness! [¶] Probably a 1 [percent] chance. . . . [¶] Yeah I'm going to the police with all the evidence today. . . . [¶] Super upset I've been put in this vulnerable situation. I would highly recommend putting the guests somewhere else. [¶] If I was a guest I wouldn't [want to] be staying in a drug front."

A few days later, appellant e-mailed Airbnb about not getting paid. She stated that her lawyer thought Airbnb endangered her by exposing her to "a drug smuggling ring," and said that it is "[n]ot everyday somebody gets caught up in an Airbnb drug ring like this[.]" Airbnb wrote an e-mail, referred to "the incident reported regarding [respondent] and the listing," and said that she should make a police report and the police officer or detective on the case should speak to Airbnb's "Law Enforcement team." Appellant e-mailed Airbnb to say she felt

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[2] In an e-mail, respondent's wife indicated that appellant "posted a photo of our condo on her Instagram page (without our consent)."

"bullied and victimized." She asked the company to re-list her listings "and stop the bad guys." Then she e-mailed to say Airbnb was "still listing the profile with the drugs after the LAPD lead Narcotics detective has reached out multiple times." She wrote that Airbnb had "been served with criminal charges in helping to traffic drugs," and that "[y]ou guys owe me a lot of back pay[.]"

On June 21, 2017, appellant posted a tweet stating, "@Airbnb please explain why I sent in pictures and a police report of a drug smuggling ring in DTLA and the listing is still up#endangerment." Airbnb replied on Twitter and said appellant's case was being reviewed. She answered with this post: "You guys have closed the case so now I have to call 911 on the daily for them to raid to make sure there's no drugs. Not good for guests." Airbnb said the case was still open. She rejoined: "The listing[is] still online and says there are guests in there right now. How is Airbnb ok with putting guests in danger when cops said not to[?]"

On June 23, 2017, Airbnb deactivated appellant's account due to violations of its "Terms of Service and Community Standards & Expectations." She e-mailed Airbnb and stated: "So the drug host who is involved in drug smuggling gets his listing but the poor innocent person that stands up, me, [loses] 6k? [¶] This doesn't seem fair. Please call me asap."

Appellant's attorney e-mailed Airbnb and averred: respondent told appellant to open a package containing "OxyContin, morphine and Molly." The attorney also averred that "the recipient of the package filled with drugs began harassing my client[.]" He demanded that Airbnb reimburse appellant for the $6,000 in reservations that Airbnb cancelled and reactivate her account. In the final paragraph, the attorney

stated, "I have CC'd Daniel Leighton of Fox11 News on this e-mail as he and the LAPD seem a lot more concerned in the reporting of suspected criminal activity that anyone at AIRBNB[.]"

An officer with the Los Angeles Police Department e-mailed Airbnb because appellant had asked him for a report number as proof that she made a report. He indicated that a Narcotics Officer received information from appellant.[3] He also indicated that an incident number was not assigned because appellant did not call 911. The officer stated, "[Appellant] was very sincere and genuinely concerned with what she observed and felt morally obligated to contact the Police. I admire her decision to come forward[.]"

In a text, appellant thanked the officer for sending the e-mail to Airbnb. Among other things, she stated that respondent made her a part of illegal activity, and that she was "happy to help with anything you need to take this guy down!! Or the company that sends [the pills]. They all need to be stopped." In their ensuing text exchange, the officer asked how often respondent came to the apartment to pick up mail. She wrote: "Maybe once every few months but he wanted me to ship them to his address in Iowa. That was the plan. . . [,] I pick them up then send them to him with my name as the sender. [¶] Which now I obviously realize would be so it wouldn't be suspicious if [it] was coming from me as opposed to a company." The officer replied: "I wanted to put a tracker on his phone to catch him in LA but I'm

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[3] None of respondent's defamation claims are based on statements appellant made to the police. These facts are provided to contextualize the events.

guessing he wouldn't fly back with the pain killers." He asked for respondent's address, and appellant provided one in Iowa. The officer wrote, "I'm going to send this case to the United States postal inspector[']s office in [Iowa]" and, "He's a bad man, he will get what's coming to him." Appellant stated respondent's alleged net worth, and the officer responded thusly: "Well[,] he has a lot to lose then which is good. Sometimes . . . suspects [become] informants [and] give up their source of supply in order to work off their case." Later, the officer texted that the Iowa address did not exist. She replied: "I'm going into a deposition against [respondent] today[.] [¶] He's in here . . . if you guys [want to] take him in for questioning [¶] [o]r arrest him."

On July 21, 2017, appellant e-mailed Airbnb as follows: "I have already contacted the police OVER 2 months ago and they contacted you guys. Thanks to you guys I'm now the lead witness in a drug smuggling case and you won't even answer my e-mails or call me. I've been on Fox News and everything. You guys have IGNORED ME FOR A MONTH. [¶] When should I expect a call?"

On Facebook, appellant posted a receipt regarding a claim submitted against Airbnb. A friend asked what happened, and appellant replied, "Lol so crazy!! Drug smuggling ring—just my luck!" Later, she stated, "Dickhead was sending drugs through the mail" and, "I told [Airbnb] about it and they basically said they would [lose] their cut so the drugs keep going so I told the cops and now my listings are suspended so I'm [suing] for lost revenue." She posted photographs of pills and an envelope addressed to respondent at the apartment listed through Airbnb.[4]

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[4] The photographs in the record are poor quality and the addressee cannot be discerned. Respondent provided better

To other friends, appellant stated that "Airbnb won't do anything. They just deal with money[.] [A]pparently what people do in their apartments is their business and Airbnb doesn't care."

This Action

Appellant filed an action against respondent and Roxanne Hendricks alleging various individual, employment and business related torts.[5] Respondent filed a cross-complaint against appellant for defamation. He set forth statements appellant made in social media and in e-mails to Airbnb calling him a drug dealer who was operating a drug smuggling ring and using his apartment as a front. He also alleged that she accused him of stalking her online media. On information and belief, he alleged that appellant (1) conducted an interview with Fox News and said he was a drug dealer, and (2) made additional but unspecified defamatory statements to others. In response, appellant filed a special motion to strike under section 425.16 to strike the entire cross-complaint as opposed to specific allegations. Respondent opposed and requested an award of attorney fees under section 425.16, subdivision (c)(1), claiming the motion was frivolous.

To prove the falsity of these allegations, respondent submitted a declaration stating that he is a recovering drug

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quality photographs in a letter and contends that the same pictures that appellant e-mailed to Airbnb were posted on Facebook. Appellant does not dispute this, so we accept this representation. Alternatively, we could conclude the record is inadequate for review on this point.

[5] The operative pleading for appellant is the second amended complaint.

addict but is not a drug dealer. Respondent denied stalking appellant.

The motion as well as respondent's request for attorney fees were denied.

This timely appeal followed.

DISCUSSION

I. Anti-SLAPP Overview; Standard of Review.

SLAPPs—strategic lawsuits against public participation—thwart "citizens from exercising their political rights or punishing those who have done so." (*Simpson Strong-Tie, Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) "In 1992, out of concern over 'a disturbing increase' in these types of lawsuits, the Legislature enacted section 425.16, the anti-SLAPP statute." (*Ibid*.; see § 425.16, subd. (a).) Section 425.16, subdivision (b)(1), provides: "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." Section 425.16, subdivision (e) sets out four categories of protected speech.

There is a two-prong analysis when a trial court rules on a special motion. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) First, the moving party must make an initial showing that the anti-SLAPP statute applies to the claims that are the subject of the motion. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 819.) If the moving party does so, the motion will be granted unless the court determines that the plaintiff has established a probability of prevailing on the claim. (*DuPont Merck*

Pharmaceutical Co. v. Superior Court (2000) 78 Cal.App.4th 562, 567–568.) Our Supreme Court has described the second prong as a summary-judgment-like procedure. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 385 (*Baral*).)

To establish a probability of prevailing, a plaintiff (or cross-complainant) must provide admissible, competent evidence to substantiate each element of the causes of action under attack. (*DuPont Merck Pharmaceutical Co. v. Superior Court, supra,* 78 Cal.App.4th at p. 568; see also *Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 88–89 [reiterating that "'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"'"].) "This requirement has been interpreted to mean that (1) when the trial court examines the plaintiff's affidavits filed in support of the plaintiff's *second step* burden, the court must consider whether the plaintiff has presented sufficient evidence to establish a prima facie case on his causes of action, and (2) when the trial court considers the defendant's opposing affidavits, the court cannot weigh them against the plaintiff's affidavits, but must only decide whether the defendant's affidavits, as a matter of law, defeat the plaintiff's supporting evidence." (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 184.)

Our review of the denial of an anti-SLAPP motion is de novo. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067.)

II. Impact of *Baral*.

In 2016, our Supreme Court addressed the question of "[w]hat showing is required of a plaintiff with respect to a

pleaded cause of action that includes allegations of both protected an unprotected activity?" (*Baral*, *supra*, 1 Cal.5th at p. 385.) Previously, there were conflicting Court of Appeal decisions. *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90 (*Mann*) indicated that an anti-SLAPP motion should be denied if any of the allegations contained in a targeted cause of action survived anti-SLAPP attack. Others cases indicated that meritless allegations of protected activity should be stricken even if other allegations are not stricken. (*Baral*, *supra*, pp. 385–392.) *Baral* concluded that the first approach could not be squared with the purpose of the anti-SLAPP statute and stated, "It follows, then, that courts may rule on [a] plaintiff['s] specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity." (*Id.* at p. 393.) The court agreed with certain lower courts that "the Legislature's choice of the term 'motion to strike' reflects the understanding that an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded. [Citations.]" (*Ibid.*) The court discarded concerns about "allowing defendants to target fragmentary allegations," holding that "[a]ssertions that are 'merely incidental' or 'collateral' are not subject to section 425.16. [Citations.] Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Id.* at p. 394.) The court proceeded to state, "[W]e disapprove the *Mann* rule." (*Id.* at p. 396.)

Post-*Baral*, the court in *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95 (*Optional Capital*) held that a court should examine the principal

thrust or gravamen of a cause of action when determining whether the anti-SLAPP statute applies. (*Id*. at p. 111.) It cited some pre-*Baral* cases. (*Ibid*.) Based on *Baral*, *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1170 (*Sheley*) rejected the principal thrust/gravamen test. It looked "simply to whether the claims involving the protected activity are merely incidental or collateral to the causes of action as those terms were defined in *Baral*, i.e., whether the allegations are merely background or provide context or whether the allegations support claims for recovery. [Citation.]" (*Ibid*.) A third case, *Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 48, the court noted the split and suggested that if the principal thrust/gravamen test is viable, it only applies to motions seeking to strike an entire cause of action as opposed to specific allegations.

III. First Prong.

Speech is afforded anti-SLAPP protection if it is "any written or oral statement . . . made in . . . a public forum in connection with an issue of public interest" or "any other conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with . . . an issue of public interest." (§ 425.16, subd. (e)(3) & (4).) Appellant contends that the alleged defamatory statements she made on social media and in e-mail, and the statements made by her attorney, fall under the umbrella of these two provisions.

Because appellant's motion sought to strike the entire cross-complaint and not individual allegations, we could limit our analysis to the principal thrust/gravamen of the cross-complaint. But in their appellate briefs, the parties dissect the cross-complaint allegation-by-allegation. Based on *Baral*, we opt to

assess the allegations as they are analyzed by the parties on appeal.

A. Issue of Public Interest: Guiding Principles.

The Legislature intended the public interest requirement "to have a limiting effect on the types of conduct that come within the third and fourth categories of [section 425.16]. [Citations.]" (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132 (*Weinberg*).) Though the statute does not define an issue of public interest, case law sets forth some guiding principles. (*Ibid.*) There should be "some degree of closeness between the challenged statements and the asserted public interest. [Citation.]" (*Ibid.*) Typically, the public interest requirement "means that in many cases [triggering the anti-SLAPP statute], the statement or conduct will be a part of a public debate and the public therefore will be exposed to varying viewpoints on the issue." (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898 (*Wilbanks*).) "The most commonly articulated definitions of 'statements made in connection with a public issue' focus on whether (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest. [Citations.]" (*Ibid.*)

Recently, our Supreme Court examined how to identify an issue of public interest. (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 143–146 (*FilmOn.com*) It cited *Wilbanks* with approval, and then noted other considerations such as whether the activity occurred in the context of an ongoing

controversy, dispute or discussion, or whether it affected a community in a manner similar to that of a governmental entity. (*FilmOn.com*, *supra*, 7 Cal.5th at pp. 145–146.)[6]

"[W]ithin the framework of section 425.16, subdivision (e)(4)," *FilmOn.com* recognized that courts "have struggled . . . to articulate the requisite nexus between the challenged statements and the asserted issue of public interest—to give meaning . . . to the 'in connection with' requirement." (*FilmOn.com*, *supra*, 7 Cal.5th at p. 149.) It instructed that the "inquiry under the [(e)(4)] . . . calls for a two-part analysis rooted in the statute's purpose and internal logic. First, we ask what '. . . issue of public interest' the speech in question implicates—a question we answer by looking to the content of the speech. [Citation.] Second, we ask what functional relationship exists between the speech and public conversation about some matter of public interest. It is [in the second step] that context proves useful." (*FilmOn.com*, *supra*, at p. 149.) In examining context, courts may look at the purpose of the speech, and whether it was "private or widely broadcasted and received." (*Id.* at p. 146.)

Courts have circumscribed the anti-SLAPP statute in a way that the inquiry is tethered to the speech rather than imaginative extrapolations. "'The fact that "a broad and amorphous public interest" can be connected to a specific dispute

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[6] Regarding this last referenced category—a public issue affecting a community—*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 118, held "the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance."

is not sufficient to meet the statutory requirements' of the anti-SLAPP statute. [Citation.]" (*World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1570.) "In evaluating the first prong of the anti-SLAPP statute, we must focus on 'the specific nature of the speech rather than the generalities that might be abstracted from it. [Citation.]' [Citation.]" (*Ibid.*)

Accusations of criminal conduct can be issues of public interest. But cases have rejected a per se rule. Context is pivotal. For instance, in *Weinberg*, the defendant was sued for falsely accusing the plaintiff of stealing a token that was a collector's item and filed an anti-SLAPP motion. (*Weinberg*, *supra*, 110 Cal.App.4th at p. 1127.) The motion was properly denied because the activity related to what "in effect was a private matter." (*Id.* at p. 1135.) The court observed that the defendant did not complain to law enforcement or some other entity, and there was no criminal investigation. The defendant simply embarked "on a private campaign of vilification" in order to discredit plaintiff in the eyes "of a relatively small group of fellow collectors." (*Ibid.*) If every wrongful accusation of criminal conduct was automatically an issue of public interest, then such accusations would be "accorded the most stringent protections provided by law, without regard to the circumstances in which they were made—a result that would be inconsistent with the purpose of the anti-SLAPP statute and would unduly undermine the protection accorded by" the libel and slander law set forth in the Civil Code. (*Id.* at p. 1136.)

B. Statements Accusing Respondent of Drug Related Activities.

As alleged in the cross-complaint, appellant posted photographs of pills on her Facebook page and included an envelope that showed that it was addressed to respondent at his apartment in Los Angeles. In addition, she wrote, "Dickhead was sending drugs through the mail" and "Drug smuggling ring . . . just my luck."

On June 17, 2017, appellant e-mailed Airbnb, referred to respondent's apartment and wrote "this is a front" and "I think this legit might be a front and/or drug ring." She also stated, "He's starting to stalk my online media." Further, she wrote, "'What are the chances the host I decide to cohost for are drug smugglers. . . . If I was a guest I wouldn't [want to] be staying in a drug front."

Then, on June 19, 2017, she e-mailed Airbnb and said, "Not every day somebody gets caught up in an Airbnb drug smuggling ring like this." She also stated, "Closing the case in 24[]hours would be allowing the criminal activity to continue." On June 21, 2017, she sent another e-mail to Airbnb, referred to respondent, and said, "Stop the bad guys." The same day, appellant posted on Twitter and asked Airbnb to explain why "the listing is still up" even though she sent in pictures and a police report. She indicated that she had to call 911 every day for the police to raid respondent's apartment to "make sure there[are] no drugs." Next, she asked, "How is Airbnb ok with putting guests in danger when cops said not to[?]"

At some point in June 2017, appellant e-mailed Airbnb and stated that it was still "'listing the profile with the drugs'" and "'you have been served with criminal charges in helping to traffic

drugs.'" On July 2, 2017, in a communication with Airbnb, appellant again referred to a drug smuggling ring and an "Airbnb drug smuggling ring." Almost three weeks later, on July 21, 2017, she wrote, "I'm now the lead witness in a drug smuggling case." In September 2017, she wrote to Airbnb and stated: "[B]ecause of Airbnb I'm now the main witness in a federal drug trial[.]"

Last, based on information and belief, respondent alleged that appellant conducted an interview with Fox News and accused him of being a drug dealer.

We conclude that appellant arguably presented an issue of public interest as to accusations indicating that respondent is running a drug ring and using an Airbnb listed apartment as a front. Appellant essentially accused respondent of organized crime involving drugs. There has been widespread interest in this country in organized crime and sophisticated drug operations, as often recounted in the media and entertainment industries. We will presume for purposes of this appeal that the burden shifted to respondent to demonstrate a probability of prevailing on the merits.

This leaves the allegation based on information and belief that appellant did an interview with Fox News and accused respondent of being a drug dealer. Notably, there is no allegation that she did the interview on air and reached a wide audience. Nor is there an allegation that she told Fox News that respondent is a drug smuggler who is running a drug ring and using his Airbnb apartment as a front. The evidence showed that appellant's attorney copied a Fox News reporter on an e-mail to Airbnb stating that on June 6, 2017, appellant opened a package sent to an unnamed Airbnb host and found "a substantial amount

of drugs including OxyContin, morphine and Molly." The e-mail went on to blame Airbnb for doing nothing and demanded that it reimburse appellant for all her cancelled reservations. Appellant provided no evidence of the size of her audience if she did speak to Fox News. Thus, the evidentiary context suggests that what appellant allegedly said was based on a one-time event involving drugs being sent to an Airbnb host, and that the complaint was connected to a dispute over cancellation of her reservations. On this record, the allegation based on information and belief did not involve an issue of public interest for anti-SLAPP purposes. Rather, it implicated a private matter.

C. Statement Accusing Respondent of Stalking Appellant's Online Media.

The cross-complaint alleges that appellant wrote to Airbnb and accused respondent of stalking her online media, and it also alleges that her attorney told a reporter that respondent was harassing appellant.

We conclude that this activity implicates a purely private matter and does not come within the anti-SLAPP statute. Respondent is not a public figure, the statements would not affect large numbers of people, and they did not involve a topic of widespread public interest. They did not occur in the context of an ongoing controversy, dispute or discussion, and they do not involve activity affecting a community in a manner akin to that of a governmental entity.

D. Unspecified Statements.

The cross-complaint contains catchall allegations averring: Appellant made dozens of calls and sent dozens of e-mails to Airbnb in which she defamed respondent. She made additional defamatory statements, both orally and in writing, to Airbnb

representatives, Airbnb guests, her followers on social media, and other third parties.

These allegations do not support a claim for recovery because they do not specify the defamatory matter. They cannot be attacked via section 425.16.

IV. Second Prong.

The question now presented is whether respondent established a probability of prevailing on the merits with respect to allegations that appellant essentially accused him of being involved in organized crime because he was running a drug smuggling ring and using his Airbnb listed apartment as a front for his criminal activity.

A. Defamation Law.

To establish defamation, respondent must show a publication that was false, defamatory, unprivileged, and which has a natural tendency to injure or cause special damages. (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1259.) Defamation occurs either through libel or slander. (Civ. Code, § 44.) Libel is defamation that is based on a publication in writing or other fixed representation that can be seen. (Civ. Code, § 45.) "A libel which is defamatory . . . without the necessity of explanatory matter, such as inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof." (Civ. Code, § 45a.) Slander is oral defamation which, among other things, imputes "any person with crime." (Civ. Code, § 46.) Publication occurs when a defamatory statement is made to at least one third person. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 307.)

"'[I]nducement' and 'innuendo' are terms of art: '[Where] the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," . . .); (2) support that interpretation by alleging *facts* showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' [Citation.]" (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387.)

B. Falsity of Appellant's Publications.

Truth is a defense to a libel action. (*Campanelli v. Regents of the University of California* (1996) 44 Cal.App.4th 572, 581–582 (*Campanelli*).) "[T]he defendant need not prove the literal truth of the allegedly libelous accusation, so long as the imputation is substantially true so as to justify the 'gist or sting' of the remark. [Citation.]" (*Ibid.*)

Appellant argues that all her drug related statements were substantially true under *Campanelli*. She maintains that respondent admitted that he is a drug dealer who smuggles drugs to multiple places because he admitted to shipping drugs through the mail to places he travels.

We find this argument lacking for a multitude of reasons. Respondent claimed to be an addict. He did not say he sold drugs or gave them to other people, and he therefore did not admit to being a drug dealer. Nor did he admit to shipping drugs through the mail, being part of a drug smuggling ring, or using the apartment as a front for drug smuggling. Rather, he said that he was an addict who ordered pain pills over the internet and had them delivered to where he was traveling.

Contrary to what appellant argues, her statements were not close enough to the truth to meet the *Campanelli* test. The gist and sting of appellant's statements was that respondent is a sophisticated, for profit criminal who has dangerous and violent coconspirators who use the apartment as part of a criminal enterprise. There is a material difference between this type of criminal and an addict. A drug dealer/drug smuggler running a drug ring is a public scourge who poses an existential threat to society and earns high levels of opprobrium. An addict, on the other hand, has a personal problem. The level of opprobrium reserved for an addict, if any, certainly varies, but it never approaches the level reserved for the operator of a drug smuggling ring. Moreover, in at least some circles, a person addicted to pain pills is worthy of compassion and second chances because he has a medical condition and/or is a victim of the pharmaceutical industry.

Next, appellant states that due to the number of pills respondent ordered, there is evidence respondent attempted possession of them with intent to distribute. She misapprehends our task on appeal. It is not to find inferences supporting her position. Instead, it is to determine whether respondent made a prima facie case of falsity. He did.

C. Defamatory Nature of the Twitter Posts, Facebook Posts and E-mails to Airbnb.

The Twitter posts, Facebook posts and e-mails to Airbnb identified respondent as a drug dealer, drug smuggler and operator of a drug ring. "False statements that accuse [a person] of criminal conduct are defamatory on their face. [Citation.]" (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486.) Thus, the publications qualified as libel per se.

Appellant suggests that to the degree respondent was not named in the publications, they did not involve libel per se and his claim fails because he did not prove special damages. We cannot accept this suggestion because "[t]here is no requirement that the person defamed be mentioned by name." (*DiGiorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 569–570, 573 [finding libel per se as to a corporation not named in the offending publication].) To establish that the defamatory statement attaches to a person, "[i]t is sufficient if the publication points to the plaintiff by description or circumstance tending to identify him." (*Id.* at p. 569.)

While some of appellant's Twitter followers may not have known that she was referring to respondent, it cannot be disputed that Airbnb did. It was communicating with appellant through multiple methods about her contentions. Writings from both parties referenced appellant by name or male pronoun. In its Twitter responses to appellant, Airbnb referred to "the case," which could only be a reference to the accusations she made to Airbnb through e-mail.

The Facebook posts referred to respondent because appellant attached pictures of pills and an envelope addressed to respondent in relation to statements about a person sending drugs through the mail.

As for the e-mails, we conclude that the circumstances as well as the parties identified respondent as the person being accused of criminal conduct.

D. Other Issues.

Appellant argues that respondent failed to establish that at least one person understood that the publications pertained to respondent and perceived them to be defamatory. We are not

aware of any law requiring the victim of libel per se to present such evidence. It is enough to demonstrate the publication of libel per se to a third party.

On appeal, for the first time, appellant argues the statutory common interest privilege in Civil Code section 47, subdivision (c) as a defense. Points not raised in the trial court will not be considered on appeal. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.)

V. Motion for Sanctions; Request for Attorney Fees.

Respondent filed a motion asking us to award sanctions against appellant for filing an appeal that is frivolous or intended solely to cause delay. (Code of Civ. Proc., § 907; Cal. Rules of Court, rule 8.278.) Though we conclude that this appeal lacks merit, it is not frivolous and we find no evidence that delay was appellant's only goal.

Next, respondent requests an award of attorney fees on appeal pursuant to section 425.16, subdivision (c)(1). It authorizes an award of attorney fees to an opposing party if a court finds that a special motion to strike is frivolous or solely intended to cause unnecessary delay. (*Imperial Bank v. Pim Elec.* (1995) 33 Cal.App.4th 540, 557 [a statutory authorization for the recovery of attorney fees incurred in trial court proceedings necessarily includes attorney fees incurred on appeal unless the statute provides otherwise].) We deem this request forfeited because respondent has not cited any law permitting an appellate court to make such an award after the trial court denied the request and implicitly concluded that the special motion to strike was not frivolous or a delay tactic, and when that denial has not been appealed.

The motion for sanctions and the request for attorney fees are denied.

DISPOSITION

The order denying appellant's anti-SLAPP motion is affirmed. Respondent shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT