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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

JOSIE HARRIS, Plaintiff and Respondent, v. FLOYD MAYWEATHER, JR., Defendant and Appellant.	B276174 (Los Angeles County Super. Ct. No. PC056372)

APPEAL from an order of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Affirmed in part and reversed in part.

Rick Edwards, Inc. and Rick Edwards for Defendant and Appellant.

Law Office of Daniel Friedlander and Daniel A. Friendlander for Plaintiff and Respondent.

Josie Harris (Harris) sued Floyd Mayweather, Jr. (Mayweather) for defamation and intentional and negligent infliction of emotional distress. In response, Mayweather, pursuant to section 425.16 of the Code of Civil Procedure,[1] filed a special motion to strike Harris's lawsuit—a so-called anti-SLAPP motion.[2] The trial court denied Mayweather's motion, finding that while Harris's lawsuit arose out of protected activity by Mayweather, she established a probability of prevailing on each of her claims. We reverse that ruling with respect to Harris's claims for emotional distress.

BACKGROUND

I. Mayweather's statement

On April 14, 2015, Yahoo! Global News (Yahoo) posted a video interview of Mayweather by Yahoo news anchor Katie Couric (Couric). Yahoo posted the interview two weeks before Mayweather, a professional boxer, was scheduled to fight Manny Pacquiao at a casino in Las Vegas. The media dubbed the Mayweather-Pacquiao bout as the "fight of the century" and it was expected to produce the largest pay-per-view television audience to-date.

During the course of the her interview, Couric questioned Mayweather about a number of topics, including his "issues with domestic violence" and his "run-ins with the law." Before showing Mayweather's answer to the domestic violence question,

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

[2] SLAPP is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

the video had a voice-over which stated the following: "[I]n 2011 Mayweather pled guilty to reduced misdemeanor charges after his ex-girlfriend alleged he beat her in front of their children. He was sentenced to 90 days in jail and released after serving 2 months." As part of his response, Mayweather gave the following "explanation for what happened": "Did I kick, stomp, and beat someone? No, that didn't happen. I look in your face and say 'No, that didn't happen.' Did I restrain a woman that was on drugs? Yes, I did. So if they say that's domestic violence, then you know what? . . . I'm guilty of restraining a person." (Italics omitted.)

II. Harris's lawsuit

A. HARRIS'S COMPLAINT

On May 5, 2015, a little over two weeks after Yahoo posted the Couric interview, Harris filed suit against Mayweather. In her complaint, Harris alleged three causes of action—defamation; intentional infliction of emotional distress; and negligent infliction of emotional distress—all of which were premised on Mayweather's explanation to Couric for the domestic violence incident that resulted in his 2011 guilty plea.

Specifically, Harris alleged that in 2010, she was Mayweather's former long-time girlfriend and that she was living in Las Vegas in a home owned by Mayweather with the three children she had with Mayweather, but Mayweather did not live with them. Shortly after midnight on September 9, 2010, Harris returned home to find Mayweather inside the house waiting for her. An argument ensued and Harris, in fear of her and her children's safety called 911. After the police arrived, Mayweather left the house. Several hours later, at approximately 5:00 a.m., Mayweather returned to the house "unannounced and uninvited."

According to the complaint, Mayweather awoke Harris, who had been sleeping on a sofa in the family room, dragged her by the hair across the carpet, hitting her with his fists, and knocking her into furniture. Mayweather, perusing text messages on Harris's cell phone, proceeded to "interrogat[e]" Harris about her love life. During his interrogation of Harris, Mayweather twisted her arm and continued to punch her and pull her hair. The children witnessed Mayweather "continuing to hit Harris, kick her, and stomp on her shoulder." Harris begged her children to "run down to the security gate and get help." Eventually, the oldest child ran to the guard house pursued by Mayweather. Once the security guard called 911, Mayweather left the house's subdivision. Harris was taken to the hospital where she was treated for her injuries. Mayweather turned himself into the police the next morning.

In her complaint, Harris alleged that Mayweather's statement during the Couric interview about the incident was defamatory and injurious to her, because it "falsely cast [her] as a drug-abuser or drug-addict, as a woman that [needed] to be restrained by Mayweather because she was under the influence of drugs at the time of the altercation [and] as the aggressor in the altercation that needed restraining by Mayweather."

B. MAYWEATHER'S ANTI-SLAPP MOTION

On August 4, 2015, Mayweather filed his anti-SLAPP motion. In support of his motion, Mayweather advanced a number of arguments, including that domestic violence is a public issue and that Harris, as well as himself, are public figures and, as a result, his statement was subject to the protections of the anti-SLAPP statute. In addition, he maintained that the two core factual assertions in his statement were true. First, at the

time of the incident, as established by the emergency room report of the doctor who examined her at the hospital, Harris was literally "on drugs"—the toxicology screen revealed that Harris tested "positive for marijuana, benzodiazepines and opiates." Second, his statement that he did "not 'kick, beat, *and* stomp' " Harris was true, because he only "twisted" her arm and for that action "he was convicted." In addition, Mayweather argued that his assertion during the interview that he restrained Harris (and by implication that Harris needed restraint) was not an actionable statement of fact, but a permissible opinion.

Mayweather supported his motion with several declarations, besides his own. Mayweather's Nevada criminal counsel submitted one such declaration. The lawyer attached to his declaration copies of Harris's hospital records from the incident and excerpts from the transcript of Mayweather's 2011 plea hearing. According to the plea hearing transcript, the court asked Mayweather the following question: "On September 9, 2010, . . . did you willfully and unlawfully use force or violence against Josie Harris by grabbing her by the hair and throwing her to the floor, or striking her with your fist, or striking her arm, or twisting her arm?" Mayweather replied by stating only "[y]es."[3] In his declaration, Mayweather's counsel stressed that Mayweather's plea could only be properly understood in light of the court's disjunctive question and opined, based on all of his "training and experience," that "when one admits only twisting an arm and by such pleading can avoid further prosecution on felony . . . charges . . . that should be taken very seriously."

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[3] The transcript indicates that Mayweather pleaded guilty to "battery constituting domestic violence" and pled "no contest" to another charge, "misdemeanor harassment."

A mutual friend of both Mayweather and Harris also submitted a declaration in support of Mayweather's motion. The friend attached to his declaration an email from Harris to the friend, dated September 26, 2010, in which Harris described the incident as follows: "Floyd pulled my hair, dragged me, twisted my arm and kicked me." Mayweather argued that, because Harris never said he kicked, beat and stomped her in the email, his statement to Couric that he did not "kick, beat, and stomp" Harris was true.

C. HARRIS'S OPPOSITION

On May 4, 2016, Harris filed her opposition papers and her objections to Mayweather's evidence. In her supporting declaration, Harris flatly denied being "high" or "on drugs" when Mayweather physically attacked her. Instead, she noted that she was on prescription medications: medical marijuana (taken two days earlier on September 7); Wellbutrin (taken on the morning of September 8); and Xanax and Vicodin (taken after the initial confrontation with Mayweather on September 9).

Harris attempted to bolster her assertion with two expert declarations. First, an English professor opined that in current common usage the phrase "on drugs" means "taking illegal[ ] dangerous drugs," not prescription medications, and that a person on drugs implies that the person is a "maniac whose brain has been 'fried' " by illegal substances. Second, a board-certified physician and psychiatrist with a specialty in drug dependencies and addiction medicine, opined that the toxicology screening performed by the hospital following the incident was consistent with Harris's description of the prescription medications she took before the incident. Harris's medical expert further opined that all of the substances Harris consumed prior to the incident are

"notable for having sedative and central nervous system depressant properties." In other words, "when an individual is awakened from sleep with these substances in her system, they would not be expected to cause excitement, irritability, agitation, violence, combativeness, or a need for physical restraint."

Harris also submitted a number of documents in support of her opposition. Many of those documents were news reports published in the wake of the Couric interview, which, among other things, noted the difference between Mayweather's plea and how he described the incident to Couric. For example, an article from the New York Daily News, dated April 14, 2015—the same day that Yahoo posted the interview—stated as follows: "In an interview with Katie Couric promoting his May 2 'Fight of the Century' . . . , the boxing champion painted himself as the victim of a lying, drugged-up ex-girlfriend . . . . [¶] . . . [¶] Mayweather's current version of the events in question are far different than the one he gave in December 2011, when he pled guilty to battery and admitted to hitting Harris [and] twisting her arm."

Harris also included among her supporting evidence a copy of the arrest report. The report recounted Harris's description of the incident, which indicated that Mayweather did more than twist her arm: "Mayweather grabbed Harris by the hair and began striking her in the back of the head with a close fist several times." The report further indicated that Mayweather's main concern was not the danger Harris posed to herself and/or others as a result of the drugs in her system, but Harris's love life: "Mayweather began yelling at Harris 'I'm going to kill you and the man you are messing around with.' He also stated 'I'm going have you both disappear.' "

The arrest report also included a summary of the police's interview with the parties' oldest child. According to the report, the son stated that "he saw his dad on his mother and was hitting and kicking her," before he ran to summon the police.

D. MAYWEATHER'S REPLY

On May 9, 2016, Mayweather filed his reply papers in support of the motion. A central focus of those papers was a challenge to the credibility of Harris's medical expert. Mayweather, based on information that his lawyer's paralegal downloaded from the internet regarding Harris's prescription medications, argued that those drugs could have had any number of different effects on Harris not all of which would have been sedative. Mayweather also observed that Harris's medical expert "never interviewed her or examined her." In addition, Mayweather sought to strike portions of the doctor's declaration, as well as portions of other declarations filed in support of Harris's opposition.

E. THE TRIAL COURT'S RULING

On May 16, 2016, the trial court overruled both parties' evidentiary objections and denied the motion in its entirety. Although the trial court found that Mayweather had met his burden of showing that Harris's claims arose out of protected activity by him, Harris also met her burden: she "presented sufficient evidence that [Mayweather] made the statements with actual malice . . . which clearly cast [her] in a negative light and/or made the statements with reckless disregard of whether they were false or not."

DISCUSSION

I. The anti-SLAPP statute

A. SECTION 425.16

The anti-SLAPP statute "provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) The statute applies to "cause[s] 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." (§ 425.16, subd. (b)(1), italics added.) As used in the statutory scheme, an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: . . . (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." (§ 425.16, subd. (e).) The anti-SLAPP statute expressly mandates that it "shall be construed broadly." (§ 425.16, subd. (a).)

B. EVALUATING ANTI-SLAPP MOTIONS

In ruling on a motion under section 425.16, the trial court engages in what is now a familiar two-step process. "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral*, *supra*, 1 Cal.5th at p. 384.)

1. *Step one: arising from protected activity*

The moving party's burden at step one is to show "the challenged cause of action arises from protected activity." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) A defendant's

burden on the first prong is not an onerous one. A defendant need only make a prima facie showing that plaintiff's claims arise from defendant's constitutionally protected free speech or petition rights. (See *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

2. *Step two: probability of prevailing*

If the defendant makes the required showing (*Baral*, *supra*, 1 Cal.5th at p. 384), the plaintiff must demonstrate the merit of his/her claim by establishing a probability of success with admissible evidence. (*Kreeger v. Wanland* (2006) 141 Cal.App.4th 826, 831.) This second step has been described as a " 'summary-judgment-like procedure.' " (*Baral*, at p. 384.) "We decide this step of the analysis 'on consideration of "the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b).) Looking at those affidavits, "[w]e do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff." ' " (*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 378–379, disapproved in part in *Baral*, at p. 396, fn. 11.) We evaluate "the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." (*Baral*, at p. 385.) Thus, in the words of our Supreme Court, a plaintiff opposing an anti–SLAPP motion need only show a "minimum level of legal sufficiency and triability." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438, fn. 5; *Baral*, at pp. 385, 391 [plaintiff need only show his/her claim has " 'minimal merit' "].)

C. STANDARD OF REVIEW

"On appeal, we review the trial court's decision de novo, engaging in the same two-step process to determine, as a matter

of law, whether the defendant met its initial burden of showing the action is a SLAPP, and if so, whether the plaintiff met its evidentiary burden on the second step." (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266–267.)

II. Harris's claims arose out of protected activity

In determining "whether the challenged claims arise from acts in furtherance of the defendants' right of free speech or right of petition under one of the categories set forth in section 425.16, subdivision (e) [Citation.] . . . '[w]e examine the principal thrust or gravamen of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies.' " (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 209, italics omitted.) The "gravamen is defined by the *acts on which liability is based*, not some philosophical thrust or legal essence of the cause of action." (*Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1190.)

Here, the gravamen of Harris's complaint and each of its causes of action is Mayweather's allegedly defamatory statement made during the Couric interview. Although defamation suits are " 'favored causes of action in SLAPP suits,' " (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 890), we cannot simply assume that Mayweather met his burden under the first prong of the anti-SLAPP analysis; rather, we must consider whether his statement was made in a public forum and concerned a matter of public interest.

A. PUBLIC FORUM

"Web sites accessible to the public . . . are 'public forums' for purposes of the anti-SLAPP statute." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4.) As the appellate court in *Wilbanks v. Wolk*, *supra*, 121 Cal.App.4th at page 895, explained,

statements published on a "Web site on the Internet . . . are accessible to anyone who chooses to visit [the] Web site. As a result, [the] statements hardly could be more public."

Here, according to Harris's complaint, Yahoo! Global News posted the Couric interview to its news.yahoo website where it was purportedly seen by "millions of Yahoo!'s website visitors and others." Accordingly, we hold that Mayweather met the public forum requirement under section 425.16, subdivision (e).

B. ISSUE OF PUBLIC INTEREST

The term "issue of public interest" is construed broadly in the anti-SLAPP context. (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 464.) An issue of public interest is "any issue in which the public is interested." (*Nygard, Inc. v. Uusi–Kerttula* (2008) 159 Cal.App.4th 1027, 1042, italics omitted.) The issue does not need to be " 'significant' " to be covered by the anti-SLAPP statute. (*Ibid.*; see, e.g., *Hecimovich*, at pp. 467–468 [4th grade basketball coach's "coaching style" issue of public interest].) Given the concept's elasticity, it is not surprising that the important issue of domestic violence has been recognized in the anti-SLAPP context as one of public interest. (See *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 236–240.)

Although "not every Web site post involves a public issue" (*D.C. v. R.R.* (2010) 182 Cal.App.4th 1190, 1226), the bar for an anti-SLAPP defendant to overcome is not a particularly demanding one. "In general, '[a] public issue is implicated if the subject of the statement or activity underlying the claim . . . was a person or entity in the public eye." (*Id.* at p. 1215.) *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, is illustrative. In that case, the former housekeeper of the actor Marlon Brando

was held to be involved in an issue of public interest by virtue of being named in Brando's will. (*Id.* at p. 1347.) Similarly, *in Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, the Court of Appeal held that a radio station's disparaging remarks about a contestant on the television program *Who Wants to Marry a Multimillionaire* were made in connection with an issue of public interest. (*Id.* at p. 807.) More recently, in *Daniel v. Wayans* (2017) 8 Cal.App.5th 367, 386, we held that internet posts by a popular actor/writer/producer about his forthcoming movie were matters of public interest.

Here, the evidence unequivocally established that both Harris and Mayweather are individuals who have voluntarily put themselves in the public eye. The media reports submitted by both parties observe that (a) Mayweather is a "[w]orld champion," "undefeated" boxer, who also has a "long history of domestic violence," and (b) Harris has actively sought media attention, including appearing in a popular television show (*Starter Wives Confidential*) based on her relationship with Mayweather, and sat for multiple interviews (video and print) regarding Mayweather and domestic violence.

In sum, we hold that Mayweather met his burden by establishing that the gravamen of Harris's complaint and each of its causes of action arose out of a statement made in a public forum regarding a matter of public interest. The burden then shifted to Harris to demonstrate that each of her causes of action was legally sufficient and factually substantiated. (*Baral*, *supra*, 1 Cal.5th at p. 396.)

III. Harris showed a probability of success on her defamation claim

A. DEFAMATION

" 'The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage.' " (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1312.) The defamatory statement must specifically refer to, or be " 'of or concerning,' " the plaintiff. (*Blatty v. New York Times Co*. (1986) 42 Cal.3d 1033, 1042.) "It is not the literal truth or falsity of each word or detail used in a statement which determines whether or not it is defamatory; rather, the determinative question is whether the 'gist or sting' of the statement is true or false, benign or defamatory, in substance." (*Ringler Associates Inc. v. Maryland Casualty Co*. (2000) 80 Cal.App.4th 1165, 1181–1182.)

As recently explained by another division of this court, if the defamation plaintiff " 'is a public figure, he cannot recover unless he proves, by clear and convincing evidence . . . , that the libelous statement was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." ' [Citations.] 'The rationale for such differential treatment is, first, that the public figure has greater access to the media and therefore greater opportunity to rebut defamatory statements, and second, that those who have become public figures have done so voluntarily and therefore "invite attention and comment." ' " (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1260 (*Jackson*).)

"Because a defamatory statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability.

[Citations.] 'Though mere opinions are generally not actionable [citation], a statement of opinion that implies a false assertion of fact is . . . .' [Citations.] Thus, the 'inquiry is not merely whether the statements are fact or opinion, but " 'whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.' " ' " (*Jackson*, *supra*, 10 Cal.App.5th at p. 1261.)

B. HARRIS MET HER BURDEN

As a preliminary matter, we hold that a reasonable trier of fact would conclude that the entirety of Mayweather's statement declared or implied provably false assertions of fact. The stings of Mayweather's statements—that he did not kick, stomp, and beat Harris and that Harris was under the influence of drugs and acting erratically and needed to be restrained—are more than mere opinions; they are factual assertions whose truth can be determined. As such, they are actionable.

With regard to Harris's evidence, we hold that she presented clear and convincing evidence from which it could reasonably be inferred that Mayweather's statement was not only false and defamatory, but also made with actual malice. First, she produced concrete evidence indicating that Mayweather did more than restrain her by twisting her arm. In addition to her declaration describing the alleged assault in detail, Harris produced the arrest report, which included both her contemporaneous description of the alleged assault, which described more than arm-twisting by Mayweather, and her son's statement that Mayweather was "on" Harris, "hitting *and* kicking her." (Italics added.) Moreover, Harris produced the emergency room report, which, in addition to noting the results of the toxicology screen, contained the attending doctor's physical

findings upon examination of Harris. The doctor, inter alia, found that Harris was in "moderate distress" and suffering from the following: redness, swelling, and "moderate tenderness" in multiple areas of her head; "mild tenderness" around her left jaw; and "mild tenderness" and bruising to her left forearm. The doctor's clinical impression was as follows: "Physical assault. [¶] Multiple contusions to the head and face and left forearm." Since this evidence is unequivocally at odds with the assertion that Mayweather was simply restraining a drug-addled Harris by only twisting her arm, it may reasonably be inferred that Mayweather acted with malice or reckless disregard of the truth during the Couric interview.

Second, Harris also produced unrebutted expert medical testimony that the prescription medications in her system at the time of the incident would not cause her to be the aggressor in the situation (i.e., the person who needed to be restrained).

Finally, Harris produced evidence that Mayweather's statements were immediately interpreted by third parties in the media in a way that was injurious to her—that is, Mayweather's portrayal of himself as the "victim of a lying, drugged-up ex-girlfriend," namely her. Although neither Couric nor Mayweather identified Harris by name in the interview, the interview's reference to Mayweather's 2011 plea left little doubt that Mayweather's statement concerned Harris. For example, both the New York Daily News and the Washington Post, which published articles on the interview the same day that it was posted to the internet, identified Harris by name as the person Mayweather was purportedly restraining.

In light of such evidence, we hold that Harris demonstrated that her defamation claim possessed the requisite "minimum

level of legal sufficiency and triability." (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at p. 438, fn. 5.) Accordingly, the trial court properly denied the motion as to the defamation claim.

IV. Harris failed to show a probability of success on her intentional infliction of emotional distress claim

"A cause of action for intentional infliction of emotional distress exists when there [has been] ' " ' "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff has suffered severe or extreme emotional distress; and (3) [the defendant's outrageous conduct was the] actual and proximate causation of the emotional distress." ' " ' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.) "A defendant's conduct is 'outrageous' when it is so ' " 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' " ' [Citation.] And the defendant's conduct must be ' " 'intended to inflict injury or engaged in with the realization that injury will result.' " ' " (*Id.* at pp. 1050–1051.)

In other words, "[l]iability for intentional infliction of emotional distress ' "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." [Citation.]' [Citations.] . . . [¶] With respect to the requirement that a plaintiff show severe emotional distress, [our Supreme Court] has set a high bar. 'Severe emotional distress means " 'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.' " ' " (*Hughes v. Pair*, *supra*, 46 Cal.4th at p. 1051.) According to the Restatement Second of Torts, section 46, comment d, pages 72–73, "Liability has been found *only* where the conduct has been so outrageous in character, and

so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (Italics added.) In other words, "[t]he rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate or unkind." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496.)

In *Jackson, supra,* 10 Cal.App.5th 1240, an ex-boyfriend[4] posted to social media that his ex-girlfriend had an abortion and also posted a copy of the sonogram of the twin fetuses and a summary medical report regarding the pregnancy. (*Id*. at p. 1247.) The following day, the ex-boyfriend discussed the abortion during a radio interview and also stated that his ex-girlfriend had undergone extensive cosmetic surgery procedures. (*Ibid*.) The ex-girlfriend sued, alleging, among other things, intentional infliction of emotional distress. Her intentional infliction claim was based upon the pregnancy-related postings and statements and on conduct not protected by the anti-SLAPP statute: "a campaign of harassment, including verbal and physical abuse, that began long before . . . the public disclosures." (*Id*. at p. 1266.) The ex-boyfriend filed an anti-SLAPP motion, which the trial court denied. The Court of Appeal, affirmed in part and reversed in part. With regard to the intentional infliction claim, the Court of Appeal held that "[n]one of the postings or broadcast comments alleged in [the ex-girlfriend's] complaint, whether considered individually or collectively, may

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[4] The defendant in the case at bar (Mayweather) was the ex-boyfriend/defendant in *Jackson, supra,* 10 Cal.App.5th 1240.

fairly be characterized as atrocious conduct intolerable in a civilized society." (*Id*. at p. 1265.) However, because the intentional infliction claim was based on both protected and nonprotected conduct, the Court of Appeal affirmed the trial court's decision with respect to that claim. The Court of Appeal explained its decision as follows: "although [the ex-boyfriend]'s social media postings and comments regarding [the ex-girlfriend] during the radio interview may not, without more, serve as the basis for a claim of intentional or negligent infliction of emotional distress [citations], evidence of those postings and comments may properly be considered by a jury (or in connection with a motion for summary judgment) when evaluating the merits of this claim." (*Id*. at p. 1266.)

Here, assuming Mayweather's allegedly defamatory statement in the Couric interview was false, it cannot reasonably be characterized as atrocious conduct intolerable in a civilized society in light of *Jackson, supra,* 10 Cal.App.5th 1240 and other cases. (See, e.g., *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 954 [allegation of sexual assault not extreme and outrageous]; *McClintock v. West* (2013) 219 Cal.App.4th 540, 556 [stalking allegation not extreme and outrageous]; *Moncada v. West Coast Quartz Corp*. (2013) 221 Cal.App.4th 768, 781 ["callous disregard for plaintiffs' professional and personal well-being" not extreme and outrageous]; cf. *Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486–487 [accusations on website that pastor abused and molested children, misappropriated church funds, and sold and smuggled drugs sufficient to support intentional infliction claim].) Moreover, Harris provided no evidence of the extent of the emotional distress she allegedly suffered as a result of Mayweather's statement. In her declaration, she stated without

amplification that his statement caused her "great suffering." The effect of Harris's silence in this regard is magnified by the absence of any testimony from family, friends or doctors regarding the impact Mayweather's statement had on her emotional well-being. Accordingly, we hold that the trial court erred by denying the motion with respect to Harris's intentional infliction of emotional distress claim. As a result, the order is reversed as to that claim.

V. Harris failed to show a probability of success on her negligent infliction of emotional distress claim

Our Supreme Court has repeatedly affirmed that under California law there is no such thing as the independent tort of negligent infliction of emotional distress. (See, e.g., *Potter v. Firestone Tire & Rubber Co*. (1993) 6 Cal.4th 965, 984 ["there is no independent tort of negligent infliction of emotional distress"]; *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072 ["[w]e have repeatedly recognized '[t]he *negligent* causing of emotional distress is not an independent tort, but the tort of *negligence*' "]; *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 884 ["[n]egligent infliction of emotional distress is not an independent tort"].) As one of the leading treatises on California law explains, a plaintiff seeking to recover for the negligent infliction of emotion distress must allege the tort of negligence; recovery is generally allowed only "where there is physical impact." (6 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 1140, p. 344.)

Here, Harris asserted her negligent infliction cause of action purely as an alternative to her intentional infliction claim. She has not, in other words, alleged a negligence cause of action and has not alleged any physical impact. Accordingly, we hold

that Harris failed to show that her negligent infliction claim has the "minimum level of legal sufficiency and triability" to survive an anti-SLAPP motion. (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at p. 438, fn. 5.) As a result, the order is reversed as to that claim.

DISPOSITION

The order denying Floyd Mayweather, Jr.'s anti-SLAPP motion is reversed with respect to Josie Harris's ostensible causes of action for intentional and negligent emotional distress, respectively. In all other respects, the order is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.