2009 WL 1875266
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Second
District, Division 3, California.

Linda RUTTLEN, Plaintiff and Respondent,
v.
COUNTY OF LOS ANGELES, et
al., Defendants and Appellants.

Nos. B208715, B210394.
|
(Los Angeles County Super. Ct. No. BC382897).
|
July 1, 2009.

APPEAL from orders of the Superior Court of Los Angeles County, Reginald A. Dunn (retired) and John Shepard Wiley, Jr., Judges. Reversed.

Attorneys and Law Firms

Law Offices of David J. Weiss, David J. Weiss, Peter Shahriari; Greines, Martin, Stein & Richland, Martin Stein, Alison M. Turner and Jens B. Koepke for Defendants and Appellants.

Rogers & Harris and Michael Harris for Plaintiff and Respondent.

KITCHING, J.

INTRODUCTION

***1** Plaintiff and respondent Linda Ruttlen sued defendants and appellants County of Los Angeles (County), Bruce Chernof, M.D., and John R. Cochran for defamation.[1] Defendants contend that plaintiff's action is a strategic lawsuit against public participation (SLAPP). They filed special motions to strike plaintiff's defamation claim pursuant to Code of Civil Procedure section 425.16,[2] the anti-SLAPP statute. The trial court denied the motions. We reverse. The motions should have been granted because defendants' alleged defamatory statements fell within the scope of the anti-SLAPP statute and were privileged under Civil Code section 47.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Death of Edith Isabel Rodriguez*

In the early hours of May 9, 2007, Edith Isabel Rodriguez died in the emergency room lobby of Martin Luther King Jr.-Harbor Hospital (MLK Hospital). The circumstances surrounding Ms. Rodriguez's death are disputed. What is clear is that Ms. Rodriguez's death was a matter of intense public and media interest as part of a larger controversy over the alleged substandard operation of MLK Hospital.

Plaintiff was a triage nurse working at the MLK Hospital emergency room during the night of Mr. Rodriguez's death. She contends that the emergency room was understaffed and that she did not attend to Ms. Rodriguez because she was serving other patients with urgent medical needs. Plaintiff further claims that at no time was she advised by police officers or anyone else that a patient was lying on the floor of the emergency room lobby in desperate need of medical attention.

2. *Investigations of Ms. Rodriguez's Death*

Both the United States Centers for Medicaid and Medicare Services (CMS) and the Los Angeles County Department of Health Services (Health Department) launched investigations of Ms. Rodriquez's death. The Health Department also formulated a “corrective action plan” in response to the CMS investigation.

CMS issued a report on its investigation, which it made public on Friday, June 15, 2007. On that same day, the health deputies of the Los Angeles County Board of Supervisors (Board) held a special briefing “for the express and exclusive purpose of reviewing the corrective action plan prior to transmission of the County's response to the CMS Investigation.” The special briefing was not open to the general public. Members of the press, however, were invited to be present for the purpose of informing the public.

3. *The Defendants*

"The County is a political subdivision of the State of California and is governed by a five-member elected board of supervisors with legislative and executive authority." (*Auerbach v. Board of Supervisors* (1999) 71 Cal.App.4th 1427, 1431.) The Board is the official governing body of County hospitals, including MLK Hospital.

Chernof was the director of the Health Department.[3] He was responsible for the day to day operations of County hospitals. As part of his official duties, Chernof investigated Ms. Rodriquez's death at the Board's request. After the investigation was completed, Chernof provided his findings to the Board "for the purpose of executive review for the governance of the hospital."

***2** Chernof was also required as director to "implement County policy regarding the protocols of information release to the public." Prior to the events in question the Board adopted a media policy that required the County to make public records readily available to the public.[4]

Cochran was chief network officer of the Health Department. In that capacity, Cochran was required to "plan, direct and coordinate all hospital, administrative and operational activities throughout the Chief Executive Officers of Los Angeles County hospitals." Part of his duties included "executive management of communications by and between the media and Los Angeles County hospitals."

As chief network officer, Cochran was also required "to formally present detailed information regarding hospital policies, events and personnel" to the Board. At the June 15, 2007, special briefing, Cochran provided statements to the Board's health deputies regarding the Health Department's corrective action plan and the circumstances surrounding Ms. Rodriguez's death.

4. *The Los Angeles Times Article*

On Saturday, June 16, 2007, the day after the special briefing to the Board's health deputies, the Los Angeles Times published an article regarding the death of Edith Isabel Rodriquez. The *only* evidence presented by plaintiff of defendants' allegedly defamatory statements was a copy of that article. The article began by stating the following regarding the circumstances of Ms. Rodriguez's death:

"Six staff members at Martin Luther King Jr.-Harbor Hospital-including a nurse and two nursing assistants-saw or walked past a dying woman writhing on the floor of the emergency room lobby last month but did not help her, according to a report made public Friday.

"Their discipline: a letter outlining how they should behave in the future.

"The six are in addition to two others whose roles have already been made public by The Times: a contract janitor who cleaned the floor around the woman as she vomited blood and a triage nurse who oversaw the whole episode and pointedly refused requests to intervene.

"[¶] ... [¶]

"The report released Friday was written by the U.S. Centers for Medicare and Medicaid Services and included the public hospital's responses. It provides the greatest detail to date on the death of Edith Isabel Rodriguez, 43, in the early hours of May 9, which was captured on a security videotape.

"[¶] ... [¶]

"According to the report, the videotape shows that for about 30 minutes, 'staff members walked past the patient or worked to clean the floor next to her without interacting with her....'

"[¶] ... [¶]

"At 1:30 a.m., when Rodriguez was 'kicking with her feet' on the floor, 'two staff members looked at the patient and then walked back through the door to an area within the ER,' the report said without specifying who the workers were.

"Rodriguez died a short time later of a perforated bowel that probably occurred in her last 24 hours of life, the county coroner ruled. Experts have said her death might have been prevented had she received treatment sooner."

***3** The article then described several statements by Chernof: "In an interview Friday, county health services director Dr. Bruce Chernof said the 'letters of expectation' given to the six staff members-which carried no other penalty-were appropriate forms of discipline given their previous performance history and their role in the event. The county owns the hospital.

"Chernof put most of the blame on the nightshift triage nurse, Linda Ruttlen. She turned away requests for help from police officers who had brought Rodriguez in from benches in front of the hospital, where she was crying for help. Ruttlen has been referred to the state nursing board for investigation. 'The majority of the staff raised their concerns to the triage nurse,' Chernof said. 'My expectation is that if they didn't get the response that they wanted that they would have gone beyond that.' "

In addition, the article reported these statements by Cochran: " 'It's really hard to explain how something this bad could happen,' John R. Cochran, the health department's chief deputy director, told deputies to the Board of Supervisors at a briefing Friday afternoon. 'Nobody faulted the policies in place. Nobody faulted the procedures in place. What they faulted was the person [who] failed to do the work,' he said, referring to Ruttlen."

5. *Procedural History of the Case*

Plaintiff commenced this action in December 2007. In her complaint, plaintiff set forth causes of action for defamation, declaratory relief, and wrongful termination. The gravamen of plaintiff's defamation claim is that the statements in the Los Angeles Times article about her were false. Plaintiff alleges that defendants disseminated false information regarding plaintiff to the press in order "to deflect blame" for Ms. Rodriguez's death, "which was the result of an understaffed and overwhelmed emergency room" at MLK Hospital. [5]

In March 2008, the County concurrently filed a demurrer to plaintiff's complaint and a special motion to strike plaintiff's defamation cause of action pursuant to the anti-SLAPP statute. In opposition to the County's motion, plaintiff presented a hand-written affidavit describing her conduct during her shift at MLK Hospital on May 8 and 9, 2007.

On April 21, 2008, the trial court sustained the demurrer with leave to amend but denied the special motion to strike. Explaining the court's denial of the motion, the Honorable Reginald A. Dunn (Ret.) stated: "The evidence before the Court as presented in the moving papers indicates that plaintiff could prevail on her defamation claim based on her affidavit. Defendants did not provide rebuttal evidence indicating the truth of their representation to the media."

On April 30, 2008, plaintiff filed a first amended complaint for defamation and wrongful termination. Plaintiff's defamation cause of action was based on the same material allegations stated in the original complaint. In her wrongful termination cause of action, plaintiff alleged that she was "constructively discharged" when she "was placed in a hostile work environment, being one in which she was expected to work after being falsely accused of being the employee principally responsible for an egregious death of a patient" at the MLK Hospital.

***4** All of the defendants demurred to plaintiff's wrongful termination cause of action. Chernof and Cochran also filed a special motion to strike both causes of action in the first amended complaint pursuant to the anti-SLAPP statute. A hearing on the demurrer and the motion was scheduled on July 21, 2008.

In the meantime, on June 13, 2008, the County filed a timely appeal of Judge Dunn's order denying its special motion strike.

The Honorable John Shepard Wiley, Jr., presided over the hearing on July 21, 2008. At that hearing, the court sustained defendants' demurrer to plaintiff's wrongful termination cause of action without leave to amend. However, the court denied Chernof's and Cochran's special motion to strike. Judge Wiley explained the reason the court denied the motion as follows: "I believe I'm compelled to deny that motion under Judge Dunn's [April 21, 2008] order. I think that whole issue is controlled by the fact that Judge Dunn ruled on virtually identical issues."

On August 27, 2008, Cochran and Chernof filed a timely appeal of Judge Wiley's order denying their special motion to strike. That appeal was consolidated by this court with the appeal by the County.

CONTENTIONS

Defendants contend that the trial court erroneously denied their special motions to strike with respect to plaintiff's defamation cause of action. [6] The alleged defamatory statements of Cochran and Chernof, defendants argue, fall within the ambit of the anti-SLAPP statute. Defendants further contend that plaintiff cannot meet her burden of establishing that she will prevail on the merits of her defamation claim because the statements of Cochran and Chernoff were privileged under Civil Code section 47. Defendants seek a reversal of the orders denying the motions

with respect to plaintiff's defamation cause of action and an award of their attorney's fees and costs in the trial court and on appeal.

DISCUSSION

1. *Standard of Review*

We review the denial of an anti-SLAPP special motion to strike de novo. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 845.) The interpretation of Civil Code section 47 is also a pure question of law which we review independently. (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1138 (*Rothman*).)

2. *The Anti-SLAPP Statute*

"The anti-SLAPP statute is designed to nip SLAPP litigation in the bud by striking offending causes of action which 'chill the valid exercise of the constitutional rights of freedom of speech and petition ....' (§ 425.16., subd. (a).) Finding a 'disturbing increase' in such lawsuits, the Legislature has declared it in the public interest 'to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.' (*Ibid.*) [¶] Thus, where a cause of action arises 'from any act' of a person 'in furtherance of the person's right of petition or free speech ... in connection with a public issue,' that cause is subject to a motion to strike, unless the plaintiff establishes a probability of prevailing on the claim. (§ 425.16, subd. (b).)" (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042 (*Braun I*).) To accomplish its purposes, the anti-SLAPP statute must be "construed broadly." (§ 425.16, subd. (a).)

***5** "In determining whether to grant a special motion to strike an alleged SLAPP, the trial court engages in a two-step process. First, the court determines whether the challenged cause of action arises from a protected activity described in the statute. (§ 425.16, subd. (e).) Second, if the court so finds, it then decides whether the plaintiff has established a probability of prevailing on the merits of the claim." (*Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1075, 1084 (*Maranatha*).)

3. *Plaintiff's Defamation Cause of Action Arises From Activity That Falls Within the Scope of the Anti-SLAPP Statute*

Conduct that falls within the scope of the anti-SLAPP statute includes "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of Petitioner the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e), hereafter § 425.16(e).)

The alleged defamatory statements in question easily fall within one or more of the categories stated in section 425.16(e). The alleged statements were made "in connection with" the death of Ms. Rodrigeuz, an issue of public interest being considered by the Health Department and the Board. Thus, at a minimum, Cochran's and Chernof's statements fall within section 425.16(e)(4). [7]

Plaintiff does not expressly dispute that the alleged defamatory statements in question fall within the scope of section 425.16(e). Instead, plaintiff claims that her defamation cause of action does not " 'offend the principles protected by the statute.' " "A 'constitutional' right of free speech," plaintiff argues, "does not permit the destruction by libel of a private person, any more than it allows the right of a person falsely to cry fire in a crowded theater."

Plaintiff's argument misses the mark. The anti-SLAPP statute does not alter a defendant's substantive right to free speech or a plaintiff's substantive right to damages for defamation. Rather, it simply provides, inter alia, that when the defendant's conduct is in furtherance of his or her free speech rights in connection with a public issue, the plaintiff has the burden of establishing that there is a probability that the plaintiff will prevail on his or her claim. If the plaintiff cannot meet that burden, the plaintiff's claim will be stricken and nipped in the bud. (See § 425.16, subd. (b)(1); *Braun I, supra,* 52 Cal.App.4th at p. 1042.)

4. *Plaintiff Did Not Establish That She Will Prevail on Her Defamation Cause of Action Because Defendants' Statements Were Privileged*

***6** Having determined that defendants' alleged defamatory statements fall within the scope of the anti-SLAPP statute, we turn to the issue of whether plaintiff established a probability that she will prevail on her claim against defendants. "To demonstrate a probability of prevailing on the merits, the plaintiff must show that the complaint is legally sufficient and must present a prima facie showing of facts that, if believed by the trier of fact, would support a judgment in the plaintiff's favor. [Citations.] The plaintiff's showing of facts must consist of evidence that would be admissible at trial." (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1346.)

The *only* evidence plaintiff submitted in support of her claim that Cochran and Chernof made defamatory statements is the Los Angeles Times article dated June 16, 2007. "When offered in this context, the newspaper article is hearsay because it is an out-of-court statement by the reporter offered to prove [defendants] made the remark[s] attributed to [them] in the article." (*Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1266.) There is nothing in the record, however, indicating that defendants made a proper evidentiary objection to the article, or that the trial court sustained such an objection. Accordingly, plaintiff is not precluded from using the statements in the article to establish a prima facie case. (*Id.* at p. 1269; see also *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710-712.)

A. *Elements of Defamation*

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 (*Smith*); see also 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 529, p. 782 (Witkin).) "Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made." (*Smith,* at p. 645.)

B. *Chernof's Statements Were Privileged Because He Made them in the Proper Discharge of His Official Duties (Civ.Code, § 47, Subd .(a))*

Civil Code section 47, subdivision (a) provides that a publication is privileged if it is made in "the proper discharge of an official duty." The purpose of this privilege is to ensure that policymaking officials exercise their best judgment in the performance of their duties without fear of general tort liability. (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413 (*Sanborn); Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 500 (*Royer*).)

The privilege was originally limited to statements made by "high ranking officers" in the executive branch of the government. (*Royer, supra,* 90 Cal.App.3d at p. 500.) It now "protects any statement by a public official, so long as it is made (a) while exercising policy-making functions, and (b) within the scope of his official duties." (*Id.* at p. 501.)

***7** In *Copp v. Paxton* (1996) 45 Cal.App.4th 829 (*Copp*), the court addressed the issue of whether the official-duty privilege extended to statements made by Kent Paxton, a county area coordinator for emergency services. The court held that the privilege "may extend to a county official of Paxton's rank. As the trial court observed, 'Who is higher than Mr. Paxton in his world? In this County? Isn't he the captain of the ship, even though, perhaps it's a destroyer rather than a battleship?' The policy underlying the privilege applies fully to a county executive entrusted with the vital public function of Paxton's office." (*Id.* at p. 843.)

The official-duty privilege protects statements made by policymakers to the press regarding public issues. "Because a public official's duty includes a duty to keep the public informed of his or her management of the public business, press releases, press conferences and other public statements by such officials are covered by the 'official duty' privilege...." (*Rothman, supra,* 49 Cal.App.4th at p. 1149, fn. 6; see also *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1431 [superintendent of schools "had an official duty to communicate with the press about matters of public concern"].)

In *Saroyan v. Burkett* (1962) 57 Cal.2d 706, for example, the superintendent of banks made statements to the press relating to the plaintiff's conduct as an attorney for the banking department. The plaintiff sued the superintendent for defamation. Our Supreme Court, however, held that the superintendent's statements were absolutely privileged, because the defendant "was acting in the exercise of an executive function when he defended the policy of his department, and his statements were related to the defense of that policy." (*Id.* at pp. 710, 711.)

Similarly, in *Kilgore v. Younger* (1982) 30 Cal.3d 770, the California Attorney General held a press conference during which he distributed copies of a report suggesting the plaintiff

was involved in an illegal bookmaking operating. Plaintiff sued the Attorney General on the ground that the statements in the report were libelous. The California Supreme Court, however, held that the Attorney General was absolutely privileged to release the report because he did so in the proper discharge of an official duty. (*Id* . at p. 782.)

More recently, in *Maranatha, supra,* 158 Cal.App.4th 1075, the director of the Department of Corrections provided copies to the press of a letter he wrote to the plaintiffs terminating plaintiffs' contract with the state. In that letter, the director stated that the plaintiffs had "misappropriated" state funds. The plaintiffs sued the director for defamation. The Court of Appeal, however, affirmed an order granting the director's special motion to strike the plaintiffs' defamation claim pursuant to the anti-SLAPP statute. In doing so, the court held that the director's statements to the press were absolutely privileged under Civil Code section 47, subdivision (a). (*Maranatha,* at pp. 1090-1091.)

***8** Under *Saroyan, Kilgore, Maranatha* and *Copp,* Chernof's statements to the Los Angeles Times were absolutely privileged. [8] As director of the Health Department, Chernof was a policymaking public official for purposes of Civil Code section 47, subdivision (a). Chernof was responsible for the general supervision of all County hospitals, including MLK Hospital. (L.A. County Charter, § 22; L.A. County Code, § 2.76.020.) Indeed, Chernof had "sole authority to act in all matters" concerning the Health Department, including but not limited to the hiring and termination of health care professionals working at County hospitals. (L.A. County Code, § 2.76.540(A) & (D); see also L.A. County Code, § 2.76.040.) [9] Chernof therefore held a position of at least the same rank and with at least the same policymaking responsibilities as the county official in *Copp.*

Moreover, at the time Chernof made the allegedly defamatory statements, there was intense public interest and scrutiny of the operation of MLK Hospital and the hospital's care or lack of care for Ms. Rodriguez. Chernof's official duties included keeping the public informed about the Health Department's investigation of MLK Hospital and the Rodriguez incident. Accordingly, like the defendants in *Saroyan, Kilgore,* and *Maranatha,* Chernof was acting within the proper scope of his official duties when he made statements about plaintiff to the Los Angeles Times.

Plaintiff relies heavily on *Sanborn, supra,* 18 Cal.3d 406. There, the issue was whether a city clerk's statements to the press were covered by the official-duty privilege. Unlike Chernof, the city clerk in *Sanborn* did not have executive policymaking functions and did not act within the scope of such functions. (See *id.* at p. 415.) *Sanborn* therefore does not support plaintiff's position.

C. *Cochran's Statements Were Privileged Because They Were Made in an Official Proceeding (Civ.Code, § 47, Subd. (b))*

Civil Code section 47, subdivision (b) provides that a publication is privileged if it is made "[i]n any (1) legislative proceeding, (2) judicial proceeding, [or] (3) in any other official proceeding authorized by law...." The privilege has been interpreted broadly as applying to both statements made by legislators and statements made by members of the public who wish to address themselves to matters pending before a legislative body. (See *Scott v. McDonnell Douglas Corp.* (1974) 37 Cal.App.3d 277, 288.) The privilege applies not only to statements directly related to the proceeding, but also to all that is spoken or done during the course of the proceeding. (*Ibid.*) "The rationale for this extended coverage is that such immunity is essential in that freedom of speech 'is inherent in the idea' of a deliberative assembly." (*Ibid.*)

Here, Cochran made his allegedly defamatory statements in a special proceeding before the health deputies of the Board. The Board is the official governing body of County hospitals, including MLK Hospital. (See Health & Saf.Code, § 1440 et seq.) As we have noted, the Board has both legislative and executive powers. (See *People v. El Dorado County* (1857) 8 Cal. 58, 62 [duties of county supervisors "are various and manifold; sometimes judicial, and at others, legislative and executive"]; *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 47 ["... a board of supervisors actually performs legislative, executive and even quasi-judicial functions"]; L.A. County Charter, §§ 10, 11.) A statement in a proceeding before the Board thus falls squarely within the official-proceedings privilege afforded by Civil Code section 47, subdivision (b). (*Young v. County of Marin* (1987) 195 Cal.App.3d 863, 872.)

***9** Although Cochran's statements were made in a proceeding before the health deputies of the Board rather than in a proceeding of the Board itself, the statements were still privileged. Both the speaker and the audience were exercising official duties in furtherance of the Board's executive and legislative role as the governing body of MLK Hospital. Cochran was charged with investigating Ms. Rodriguez's death at the hospital on behalf of the Health Department

and reporting his findings to the Board. Each of the health deputies likewise were charged with gathering information about Ms. Rodriguez's death and relaying their findings to their respective supervisors on the Board so that the Board could exercise its authority over MLK Hospital. (See L.A. County Code, § 2.04.030 ["... each deputy shall have the powers and may perform the duties attached to the office of his principal ..."]; June 4, 2008 Decl. of Martha Jimenz, ¶ 8 [As Senior Health Deputy to Supervisor Molina, Jimenez relayed information she obtained at the special briefing "to Supervisor Molina for the purpose of executive review related to the operations, administration and governance" of MLK Hospital].) Therefore, the purpose of the official-proceedings privilege-to allow a free and open discussion for government deliberations-is clearly served by extending its coverage to Cochran's statements at the special briefing of June 15, 2007. [10]

D. *Cochran's Statements Were Protected By the Common-Interest Privilege (Civ.Code, § 47, Subd. (c))*

Civil Code section 47, subdivision (c) provides that a publication is privileged if it is made in "a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." For purposes of this privilege, "malice has been defined as 'a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person.' " (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 (*Brown*).) The plaintiff in a defamation case has the burden of proof with respect to whether or not the defendant acted with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203.)

Here, as discussed, the health deputies requested that Cochran give them information about the Health Department's investigation of Ms. Rodriguez's death. Cochran, the Health Department, the health deputies and the Board had a common interest in determining how and why Ms. Rodriguez died in MLK Hospital. Further, plaintiff has not met her burden of proof with respect to Cochran's alleged malice. Indeed, plaintiff offered no evidence whatsoever regarding Cochran's state of mind. Cochran's statements to the health deputies therefore clearly fall within the scope of the common-interest privilege. [11] (See *White v. State of California* (1971) 17 Cal.App.3d 621, 628-629 [holding that state bureau's allegedly erroneous information sent to a police department fell within scope of common-interest privilege].)

E. *Plaintiff Cannot Prevail Against the County Because She Cannot Prevail Against Chernof and Cochran*

***10** "Under California law, a public entity may be held vicariously liable for the conduct of its employees acting within the scope of their employment, but *only* to the extent that the employees may be held liable." (*Nadel v. Regents of University of California* (1994) 28 Cal.App.4th 1251, 1259; see also Gov.Code, §§ 815, subd. (a), 815.2, subd. (a).) Since plaintiff cannot prevail on her defamation claim against Chernof and Cochran because their statements were privileged under Civil Code section 47, she also cannot prevail against the County.

5. *Attorney's Fees*

Section 425.16, subdivision (c) provides: "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."

Here, we have determined that plaintiff's defamation cause of action was subject to section 425.16, subdivision (b), and that defendants were entitled to prevail with respect to their special motions to strike that cause of action. [12] Defendants therefore are entitled to an award of reasonable attorney's fees and costs.

" 'Although this court has the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees.' " (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1267.) On remand, the trial court is to consider the amount of attorney's fees to be awarded to defendants.

DISPOSITION

The orders denying defendants' special motions to strike are reversed. Defendants are awarded costs on appeal.

We concur: KLEIN, P.J., and ALDRICH, J.

All Citations

Not Reported in Cal.Rptr.3d, 2009 WL 1875266

Footnotes

1 Plaintiff also asserted a wrongful termination cause of action against defendants. However, the trial court sustained defendants' demurrer to that cause of action without leave to amend. Neither plaintiff nor defendants raise any issues regarding plaintiff's wrongful termination cause of action on appeal.

2 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

3 Chernoff stated in two separate declarations that he began serving as director of the Health Department in July 2007. Plaintiff, however, does not dispute that Chernof was the director in June 2007, when he allegedly made the statements that plaintiff contends were defamatory. Indeed, as explained below, the only evidence of Chernof's alleged statements presented by plaintiff was an article in the Los Angeles Times. That article states that Chernof was the director of the Health Department at the time he made the statements.

4 We take judicial notice of County Policy No. 3.140, which states: " 'The Board of Supervisors is committed to openness in County government. The Board fully supports the public's right to know and expects priority to be given to requests for public information-recognizing good government requires an informed citizenry. Public records must be released except in limited exceptions detailed by law or in which it can be demonstrated that the public interest in keeping certain information confidential clearly outweighs the public interest served by disclosure of the record. Even in cases where the County has a specific amount of time legally in which to respond to a request for a public record, the Board does not wish unnecessary delays imposed.' "

5 Plaintiff requests that this court take judicial notice of the Declarations of James D. Leo, M.D. and Russ Kino, M.D., which were apparently filed in another action, Los Angeles Superior Court Case Number TX021140. The declarations, plaintiff claims, show that defendants' statements about her were "false." We decline to take judicial notice of these declarations because the issue of whether or not defendants' statements were false is not before us.

6 An order denying a special motion to strike made pursuant to the anti-SLAPP statute is appealable. (§§ 425.16, subd. (i), 904.1, subd. (a)(13).)

7 Defendants argue that their statements also fall within the ambit of section 425.16(e)(1), (2) and (3). We do not reach those issues because we find that the statements are covered by section 425.16(e)(4).

8 We do not reach the issue of whether Cochran's statements were privileged under Civil Code section 47, subdivision (a), because we hold that Cochran's statements were privileged under Civil Code section 47, subdivisions (b) and (c).

9 Sections of the Los Angeles County Code specifically authorized and required the director of the Health Department to perform a number of functions. These functions included, for example, (1) developing and maintaining a billing and collection system and an automated recordkeeping system (§ 2.76.045); (2) supervising the interment or cremation of indigent dead in the County Cemetery (§ 2.76.080); (3) incurring all necessary expenses for the purpose of transporting an indigent patient to another state, county or country (§ 2.76.230); and, (4) with the consultation and advice of the chief administrative officer and county counsel, preparing and issuing "appropriate instructions, guidelines, forms, protocols, and other documents necessary to carry out the purposes and requirements" of the of policies of the Health Department as established by the Los Angeles County Code (§ 2.76.590(D)).

10 We reject Chernof's argument that his statements to the press were privileged under Civil Code section 47, subdivision (b). Those statements were not made "in" a legislative or judicial proceeding, or "in" any other official proceeding authorized by law. Chernof's reliance on *Braun v. Bureau of State Audits* (1998) 67 Cal.App.4th 1382 (*Braun II*) is misplaced. In *Braun II,* the court held that statements made in an audit report prepared by the state auditor pursuant to the Reporting of Improper Governmental Activities Act (Gov.Code, § 8547 et seq.; hereafter the Reporting Act) were made in an " 'official proceeding authorized by law' " within the meaning of Civil Code section 47, subdivision (b)(3). (*Braun II,* at pp. 1388, 1394.) Under the Reporting Act, the state auditor was required by law to report certain information to " 'official administrative agencies.' " (*Id.* at p. 1390.) Here, by contrast, County Policy No. 3.140 did not require Chernof to make statements regarding plaintiff to the Los Angeles Times. Further, Chernof did not release an official report to the press. Instead, he made statements about plaintiff *in an interview* with reporters. Chernof has not cited any authority supporting his position that such statements are covered by the official-proceedings privilege of Civil Code section 47, subdivision (b).

11 We reject Chernof's claim that his statements to the Los Angeles Times fall within this privilege. The Los Angeles Times did not share a "common interest" with Chernof within the meaning of Civil Code section 47, subdivision (c). (See *Brown,*

supra, 48 Cal.3d at p. 729 [newspaper does not share a common interest within its audience]; 5 Witkin, *supra,* Torts, § 594 at p. 872 [“The ‘interest’ protected must be one of direct and immediate concern....”].)

Chernof's reliance on *Toney v. State of California* (1976) 54 Cal.App.3d 779 (*Toney*) is misplaced. In *Toney,* the plaintiff conceded that a press release fell within the privilege if the defendant did not act with malice. (*Id.* at p. 793.) The court, however, did not address the issue. Instead, the *Toney* court cited *Maidman v. Jewish Publications, Inc.* (1960) 54 Cal.2d 643, 651 (*Maidman*). (*Toney,* at p. 793.)

In *Maidman,* the court addressed the issue of whether statements in a newspaper article were protected by the common law defense of “fair comment.” (*Maidman, supra,* 54 Cal.2d at p. 651.) The court held that the defense fell within the scope of Civil Code section 47, subd. (3), the predecessor of Civil Code section 47, subdivision (c). (*Maidman,* at p. 651.) In *Brown, supra,* 48 Cal.3d at pp. 732-733, fn. 18, however, the court held that the “fair-comment defense arises independently of section 47(3),” and disapproved of language in *Maidman* “indicating that the fair-comment defense is within section 47(3).” The holdings of *Toney* and *Maidman* therefore do not support Chernof's position.

12 Chernof and Cochran made substantive arguments to the trial court that plaintiff's wrongful termination cause of action should be stricken pursuant to the anti-SLAPP statute. The trial court rejected those arguments, but subsequently sustained defendants' demurrer to plaintiff's wrongful termination cause of action without leave to amend. We have not addressed whether Chernof and Cochran were entitled to prevail with respect to their special motion to strike plaintiff's wrongful termination cause of action.

End of Document