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Being famous is not enough

THE ONSLAUGHT OF ANTI-SLAPP LITIGATION REQUIRES US TO PREEMPTIVELY RESEARCH THE VIABILITY OF A POTENTIAL ANTI-SLAPP RESPONSE BY THE OPPOSING PARTY

What do Michael Jackson, Shia LaBeouf and a naked model have in common? They have all been involved in California anti-SLAPP litigation. Given that we litigate in Los Angeles, the entertainment capital of the world, chances are that you will face anti-SLAPP litigation at some point of your career, especially, if you represent or sue a celebrity or allege a defamation claim against a famous person or a media outlet.

The basics

Considering a section 425.16 motion is a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (Code Civ. Proc., § 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

A defendant satisfies the first step of the two-prong analysis by demonstrating that the conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) of section 425.16, and that the plaintiff's claims in fact arise from that conduct. This article will only focus on categories (3) and (4).

Under section 425.16, subdivisions (e)(3) and (4), the moving party must show that plaintiff's causes of action arose from a conduct "in connection with a public issue or an issue of public interest." But what does that mean exactly? Our Supreme Court in *Rand Res., LLC v. City of Carson*, 6 Cal.5th 610 (2019), set forth a general definition of "public interest" by identifying three qualifying categories of statements. "The first is when the statement or conduct concerns 'a person or entity in the public eye'; the second, when it involves 'conduct that could directly affect a large number of people beyond the direct participants'; and the third, when it involves 'a topic of widespread, public interest.'" (*Id.* at p. 621.)

Most recently, the Court raised the burden even higher, also requiring that a defendant who claims its speech was protected as "conduct in furtherance of the exercise of free speech rights in connection with a public issue or an issue of public interest" must show not only that its speech referred to an issue of public interest, "but also that its speech *contributed to public discussion or resolution of the issue*." (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 150-52.)

Employee termination is not an issue of public concern

In 2019, the California Supreme Court made it crystal clear

that a single employee "termination was not an issue of public interest within meaning of anti-SLAPP statute." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871.) In *Wilson*, a former employee (field producer) sued CNN for defamation after CNN claimed that Wilson plagiarized his content regarding a news story and violated CNN standards and practices. The Supreme Court reversed the trial court's grant of CNN's anti-SLAPP motion against Wilson, concluding that the employment dispute, even at a prominent news organization was not a matter of public significance. (*Id.* at pp. 901-902.) Citing a long list of consistent precedents, the Supreme Court cautioned that "absent unusual circumstances," a garden-variety employment dispute concerning a nonpublic figure will implicate no public issue. (*Id.* at p. 901.)

The Supreme Court rejected CNN's contention that Wilson's professional competence and the reasons for his termination was a public issue or an issue of public interest since they implicated a general subject of journalistic ethics and the retirement of the public figure who was the subject of the story, former Los Angeles County Sheriff Lee Baca. (*Id.* at p. 900.) While the Supreme Court agreed that Sheriff Baca's retirement was a matter of public interest, the Court held that Wilson's defamation claim did not rest on CNN's statement about that subject, but rather, rested on the statements about the reasons for Wilson's termination. (*Id.* at 901.) CNN's statement therefore did not contribute to any public or private discussion on that subject and Wilson's defamation claim did not arise from statements made in connection with any public issue. (*Ibid.*) The *Wilson* decision

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also noted that the former employee (Wilson) was not a figure so prominently in the public eye that any remark about him would qualify as speech on a matter of public concern, stating that "those charged with defamation, cannot, by their own conduct, create their own defense by making a claimant a public figure." (*Id.* at p. 902.)

To be entitled to protection under the anti-SLAPP statute, the statement *itself* must concern a topic of public interest. In determining whether a statement is subject to the anti-SLAPP statute, therefore, courts must examine the "'specific nature of the speech,'" not the "'generalities that might be abstracted from it.'" (*World Fin. Grp. HBW Ins.*, 172 Cal.App.4th at p. 1572.) Only if there is "a degree of closeness between the challenged statements and the asserted public interest" are the statements protected under the statute. (See, e.g., *Albanese v. Menounos* (2013) 218 Cal.App.4th 923, 936 (*Albanese*).)

When the celebrity status is not enough

How about if one sues a celebrity for a defamatory statement given to a media? Could the celebrity status *alone* be sufficient to turn the statement into an issue of public interest? California courts customarily reject such reasoning, holding that matters involving celebrities or public personas do not automatically involve "issues of public interest." Normally, "Defendant's celebrity status, on its own, is not sufficient to render anything the defendant says or does subject to anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) protection." (*Bernstein v. LaBeouf* (2019) 43 Cal.App.5th 15.)

Bernstein involved a bar altercation between Shia LaBeouf, an actor, and a bartender. LaBeouf called the bartender a "racist" after he refused to serve alcohol to LaBeouf and his companion. Video footage of the altercation was later posted on the internet and broadcast on television. Bernstein sued LaBeouf for assault, slander, and intentional infliction of emotional distress. LaBeouf filed a special motion to strike Bernstein's first amended complaint under Code of Civil Procedure section 425.16 (the anti-SLAPP statute), arguing the conduct giving rise to Bernstein's claims was protected speech-related activity concerning a matter of public interest. The trial court denied the motion and the Court of Appeal affirmed, concluding that while racism is undoubtedly an issue of public interest, a defendant cannot convert speech that would otherwise not be entitled to anti-SLAPP protection into protected activity by defining the narrow dispute by its slight reference to the broader public issue.

Likewise, a very recent unpublished decision by the Court of Appeal for the Second Appellate District, *Heffernan v. Bilzerian*, 2022 WL 14295469, provides helpful analysis. An Instagram celebrity, Dan Bilzerian, who has over 33 million followers, fired an employee and then told a celebrity tabloid, TMZ, that he fired him for "incompetence and negligence." The terminated employee then brought an amended claim against Mr. Bilzerian for defamation. In turn, Mr. Bilzerian filed an anti-SLAPP motion against Mr. Heffernan, claiming that his statement to the TMZ was protected speech under the anti-SLAPP statute, that Mr. Bilzerian is a public persona, and his statement was a matter of public concern. The trial court, however, disagreed and the Court of Appeal affirmed the trial court's denial of Bilzerian's anti-SLAPP motion.

The Court of Appeal first noted that while Mr. Bilzerian submitted evidence that he, personally, had achieved a level of internet celebrity, there was no evidence that his former employee, Mr. Heffernan had. Second, the court determined that the statement by Mr. Bilzerian did not concern conduct that could directly affect a large number of people beyond the direct participants. Third, it concluded that the statement did not concern a topic of widespread public interest, relying on *Wilson*.

Likewise, in *Albanese*, a celebrity stylist alleged that she had worked with a television personality on the Access Hollywood set, who allegedly made a statement that the celebrity stylist was engaged in theft. Albanese sued the TV personality for defamation and related torts but was faced with the anti-SLAPP motion from the TV personality, claiming that the complaint arose from conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest. The trial court denied the motion and the Court of Appeal affirmed.

In explaining its denial of the anti-SLAPP motion, the Court of Appeal acknowledged some public interest in Albanese based on her work as a celebrity stylist and style expert but found there was "no evidence of a public controversy concerning Albanese, Menounos, or Dolce and Gabbana." The court explained: "Even if Albanese is rather well known in some circles for her work as a celebrity stylist and fashion expert, there is no evidence that the public is interested in this private dispute concerning her alleged theft of unknown items from Menounos or Dolce and Gabbana. In short, there is no evidence that any of the disputed remarks were topics of public interest." (*Albanese*, *supra*, 218 Cal.App.4th at p. 936.)

When the celebrity status *is* enough

How about if the statement is made by a non-public figure *about a celebrity* to the media? This may be enough to fall within the protection of the anti-SLAPP statute. In *Nygard v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, the court dealt with statements by a terminated employee to the press regarding activities of the owner of his employer. The comments were a matter of public interest because there was an 'extensive interest' in the owner – 'a prominent businessman and celebrity of Finnish extraction'– among the Finnish public," as well as a "particular interest among the magazine's readership in 'information having to do with Mr. Nygard's famous Bahamas residence which has been the subject of much publicity in Finland.'" (*Id.* at p.

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1042.) Note that in *Nygard*, the facts were exactly the opposite of the *Bilzerian* and *Albanese* cases, where statements were made by a celebrity about a non-public figure who had never been in a public eye before their lawsuits. Note that it matters to the courts who makes the statement and whether the person is in the public eye.

A naked model is a matter of public interest

Is your client an actor in a reality show? Apparently, everything is a matter of public interest in a reality show, even actors' nude bodies. *Belen v. Ryan Seacrest Prods*., LLC (2021) 65 Cal.App.5th 1145 involved a reality show episode that featured a fashion show in which a model was filmed while changing her clothes in a dressing area designated for models, and the film exposed her nearly fully nude body. The model sued the production company for invasion of privacy and related claims and the production company filed an anti-SLAPP motion. The Court of Appeal held that the model's nudity was a matter of public interest giving rise to constitutional protection against liability for model's claims including invasion of privacy and privacy against the show's production and media companies, for purposes of production and media companies' special motion to strike under the anti-SLAPP statute. The Court reasoned that the episode at issue depicted daily lives, experiences, and struggles faced by models, which was a matter of public interest. However, in an interesting twist, the Court then examined the second prong of the statute and found that the model was likely to prevail on her claims, affirming the trial court's denial of defendant's anti-SLAPP motion.

When a non-public figure becomes a public persona

In certain circumstances, even a non-famous person may become a "public figure" and come under anti-SLAPP attack. In *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 801-806, a contestant on the television show, Who Wants to Marry a Multimillionaire, filed defamation claims because a local radio program called her a "chicken butt" and a "local loser" when discussing the television show. The Court of Appeal found that by participating in the television show, the plaintiff "voluntarily subjected herself to inevitable scrutiny and potential ridicule by the public and the media." (*Id.* at p. 808.) Accordingly, she was a public figure. When filing your case, give special consideration to whether your client subjects herself to scrutiny from the media or the public, as those circumstances could lead to her being deemed a public figure. Be extra careful if your client appeared to have generated considerable debate in the media, even if she is not a celebrity.

When both parties are celebrities

Extra caution should also be exercised when your client is a celebrity suing another celebrity. *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, is instructive. Following a contentious breakup with his ex-girlfriend Shantel Jackson, former boxing champion Floyd Mayweather, Jr. posted on social media content about Ms. Jackson's abortion and made comments during a radio interview about her plastic surgery. Jackson and Mayweather were a highly publicized celebrity couple for a number of years and were at one point engaged to be married. Their turbulent relationship was extensively covered by the media.

On May 1, 2014, Mayweather posted on his Facebook and Instagram accounts, "the real reason me and Shantel Christine Jackson @MissJackson broke up was because she got an abortion, and I'm totally against killing babies. She killed our twin babies. #ShantelJackson #Floyd Mayweather #TheMoneyTeam #TMT." Mayweather also posted a copy of Ms. Jackson's sonogram of the twin fetuses and a summary medical report of her pregnancy. Media outlets, including TMZ, republished the sonogram and medical report. The following day Mayweather gave a radio interview and stated Ms. Jackson had undergone extensive plastic surgery. (*Id.*, 10 Cal.App.5th at pp. 1240, 1247.) Ms. Jackson sued Mayweather for invasion of privacy, defamation and other claims.

Mayweather argued that Jackson's claims for invasion of privacy and defamation should be dismissed under section 425.16 because "he and Jackson were in the public eye and abortion is a topic of widespread public interest." Mayweather presented evidence that Jackson had promoted her own status as a celebrity and had tens of thousands of Twitter followers, as well as over 250,000 Instagram followers. "According to Jackson the postings and false statements by Mayweather caused a massive negative public reaction, which included death threats and offensive comments describing her as a "baby killer" and a "whore."

The appellate court noted that it was undisputed that the comments by Mayweather on his Facebook page and Instagram account and his comments about Jackson during a radio interview were in a public forum. The Court also noted that both parties conceded that they are high-profile individuals in the public eye. Critically, however, the court found that "Jackson willingly participated in publication of information about her own life and her relationship with Mayweather" and her pregnancy, abortion and plastic surgery were "celebrity gossip" – which the court found to be in the public interest.

Jackson is a cautionary tale demonstrating that anti-SLAPP litigation is particularly robust in cases where both parties have heavy presence in the public eye. There is little room for privacy in such circumstances, even such highly sensitive matters involving a woman's reproductive choices.

When a statement about a celebrity is commercial speech

In certain cases, anti-SLAPP issues arise well after a celebrity's death. In *Serova v. Sony Music Entertainment et al.* (2022) 13 Cal.5th 859, another recent

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California Supreme Court anti-SLAPP case, a consumer sued Michael Jackson's estate and his record company for false advertising. Ms. Serova purchased a posthumous 2010 album titled *Michael* based on representations on the album packaging and the video commercial that Michael Jackson was the lead singer in certain album tracks. Ms. Serova sued, claiming violation of California consumer protection laws, as she believed that some of the tracks featured the singer's imitator. Sony filed a special motion to strike Serova's UCL and CLRA cause of action under anti-SLAPP, claiming that the album packaging and the video commercial was non-commercial speech. The Supreme Court disagreed, concluding that the album packaging statements by Sony and the album video advertisement was meant to sell a product and was commercial speech, not protected by the anti-SLAPP statute.

Statements by attorneys to the media

In the *HealthSmart Pacific v. Kabateck* case, 7 Cal.App.5th at pp. 429-30, the Court of Appeal held that a patient's attorneys' statements in the news interviews that the lawsuit alleged that hospital operations engaged in conspiracy, promoted surgeries with a physician referral kickback scheme involving prostitutes, and that the kickback scheme related to legislative activity by a state senator, were protected statements in connection with a public issue or an issue of public interest, since members of the public had had an interest in particular doctors and healthcare facilities as consumers of medical services, and they also had an interest in a bribery of a senator. (*Ibid.*) When preparing a statement to the media in your case, please note that you will need to show that a substantial number of people will be directly affected by the subject matter of your statement, and you identify a particular issue of concern to the public, similar to the integrity of the health care system or bribery of a state legislator in *HealthSmart Pacific* to avoid an anti-SLAPP motion.

Practice tips

The onslaught of anti-SLAPP litigation requires us to preemptively research the viability of a potential anti-SLAPP response by the opposing party. A carelessly drafted complaint may deal a significant blow to your case, including dismissal of some claims or even the entire lawsuit, and an award of fees and costs against your client.

Before you file a complaint, it might be beneficial to get an opinion from a litigator familiar with anti-SLAPP motions, especially if you are suing a celebrity or a media outlet or your claims involve defamation. Even a non-public figure might be considered a public persona by the courts under certain circumstances. If a statement is being made by your celebrity client to the media, extra caution is advised. Celebrity status alone is not enough to immunize the statement as "protected speech" under section 425.16. The most recent anti-SLAPP decisions teach us that the statement to the media must be on a topic of public concern and should contribute to the public debate on this issue.

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