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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ALLISON MORENO,
Plaintiff and Appellant,

v.

THOMAS A. OSTLY et al.,
Defendants and Respondents.

A130445

(Alameda County
Super. Ct. No. RG07339821)

I.

INTRODUCTION

Allison Moreno (Moreno) filed a lawsuit claiming that she was wrongfully terminated and subjected to sexual harassment at the law firm where she worked for approximately six months as a paralegal. Moreno’s lawsuit also included allegations of rape and sexual assault against her immediate supervisor, attorney Thomas A. Ostly (Ostly). Ostly cross-complained against Moreno for defamation, intentional infliction of emotional distress, and intentional interference with prospective economic relations.

The case went to trial before a jury. By special verdict, the jury found that Moreno was not sexually harassed or wrongfully terminated. The jury found in favor of Ostly on all of the causes of action alleged in his cross-complaint, and further found that Moreno was “acting with hatred or ill will toward Thomas Ostly” when she falsely accused him of sexually assaulting her. The jury awarded Ostly a total of \$1.25 million in damages, including a \$100,000 punitive damage award after finding that Moreno acted with malice. On appeal, Moreno defines the critical issue as “whether there is substantial

evidence that [she] engaged in wrongful conduct, i.e., defamation, and whether such conduct caused Mr. Ostly any of his damages.” We find there is substantial evidence to support the jury’s verdict and affirm.

II.

PRELIMINARY OVERVIEW

California Rules of Court, rule 8.204(a)(2)(C), provides that an appellant’s opening brief shall “[p]rovide a summary of the significant facts” And a leading California appellate practice guide instructs: “Before addressing the legal issues, your brief should accurately and fairly state the critical facts (including the evidence), free of bias; and likewise as to the applicable law. [Citation.] [¶] Misstatements, misrepresentations and/or material omissions of the relevant facts or law can instantly ‘undo’ an otherwise effective brief, waiving issues and arguments; it will certainly cast doubt on your credibility, may draw sanctions [citation], and may well cause you to lose the case! [Citations.]” (Eisenberg et al., *Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2011) ¶ 9:27, p. 9–8 (rev. # 1 2011), italics omitted.)

Moreno ignores this sage advice and the corollary precept that all evidence must be viewed in support of the judgment. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) What Moreno attempts here is merely to argue the facts as she would have them, an argumentative presentation that not only violates the rules noted above, but also disregards the admonition that appellants are not to merely “re-argue on appeal those factual issues decided adversely to [them] at the trial level, contrary to established precepts of appellate review.” (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398-399 (*Hasson*)). Consequently, we briefly summarize the facts to provide the general context of this appeal, reserving certain details for the discussion of specific issues raised by Moreno on appeal.

III.

FACTS AND PROCEDURAL HISTORY

Ostly was the law partner of Stephen Murphy (Murphy) and Monalisa Vu (Vu) in the law firm of Ostly, Murphy, & Vu LLP (OMV). Ostly specialized in landlord-tenant matters, primarily representing tenants. He worked in a relatively intimate community of local lawyers where he was well known. Moreno began working for OMV around January 2006. She worked primarily for Ostly as his legal assistant. Moreno's employment with OMV ended on July 13, 2006. She filed the underlying lawsuit against Ostly and OMV on August 8, 2007, alleging sexual harassment, failure to prevent sexual harassment, retaliation, and failure to pay back wages. Among other allegations, Moreno's complaint alleged that on or about May 10, 2006, Ostly "forced himself sexually" on her after she was "very intoxicated and hardly conscious." Thereafter, Moreno claimed Ostly made "almost daily sexual advances towards her."

Ostly cross-complained against Moreno, alleging, among other things, causes of action for defamation, intentional infliction of emotional distress, and intentional interference with prospective economic relations. His cross-complaint stated that Moreno had publicly accused him of "committing crimes including rape and sexual assault." He claimed these allegations by Moreno were "completely false and Moreno knew they were false when she made them." Furthermore, Ostly claimed Moreno was "fully aware of the effect of making false accusations and did so knowing the hardship and damage it would cause Ostly."

The matter went to a jury trial. It was undisputed that while Moreno was employed at OMV, she and Ostly had a sexual relationship; and she admitted having sex with Ostly approximately 10 times after their first sexual encounter on May 10, 2006. However, the nature of their relationship was a matter of considerable dispute in these proceedings. At trial, Moreno testified that she believed their first sexual encounter, which took place after they had several drinks after work, was "rape" and that she "was powerless to stop it." She claimed the other times they were sexually intimate "were a result of a very, very coercive and manipulative and abusive circumstance." During her

employment with OMV, she didn't tell anyone what was going on because she was "paralyzed by shame." She claimed that Ostly fired her when she sought to terminate their sexual relationship.

In rebuttal, Ostly claimed he had a consensual sexual relationship with Moreno, and that she voluntarily resigned from OMV when the relationship ended. In support of this claim, Ostly introduced volumes of transcripts of text messages and e-mails exchanged between the parties which he claimed demonstrated the consensual nature of their relationship. A number of the text messages declared Moreno's love for Ostly. In another text message, Moreno offered to perform oral sex on Ostly when he arrived at work. In a text message sent by Moreno to Ostly on July 1, 2006, shortly before her employment with OMV ended, Moreno stated: "You are so, so, so sweet to me and such a good guy. You deserve so many good things. I want to be one of those good things. I hope I can behave myself better. Want to hang out later tonight? Movie? Hello?" Moreno explained that when she sent these text messages, she "was coping with my really difficult circumstances of having been sexually violated by my boss and feeling like I needed to keep my job"¹

There was evidence that after her employment with OMV ended, Moreno told multiple people that Ostly sexually assaulted her. However, the evidence on the

¹ Prior to trial, and after considerable legal wrangling, the Alameda County Superior Court granted Ostly's discovery request and ordered Moreno to produce the personal computer and cell phone that she used during the relevant time period. Upon inspection by Ostly's forensic specialist, it was discovered that the devices produced in response to the court's order were *not* the devices used by Moreno during the period in question but instead were devices currently in use. Based on the failure of Moreno and her counsel to disclose the fact that the requested devices were no longer in Moreno's possession and were unavailable for inspection, Ostly sought discovery sanctions under Code of Civil Procedure section 2033.030, subdivision (a). The court imposed \$13,500 in sanctions against Moreno and her trial counsel, which this court affirmed in a nonpublished opinion. (*Moreno v. Ostly* (Feb. 22, 2011, A127780.) In our opinion, we called Moreno's production of her *current* cell phone and computer for inspection by Ostly's expert, when she knew these were not the devices subject to the discovery order, a "charade." (Opn. p. 12.) As a result of this conduct, the jury in this case was given an instruction on the willful suppression of evidence.

substance and timing of these statements was in conflict. During Moreno's testimony, she was repeatedly called upon to explain the discrepancies between what she said in her videotaped deposition and what she said during her testimony at trial. She explained that when she was deposed, her "mental state was compromised" because she was intimidated by Ostly, who conducted the deposition himself. Nevertheless, it is well established that this court must presume that the jury evaluated the conflicting evidence and resolved that conflict in favor of Ostly. (See *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 (*Crawford*) [evidentiary conflicts must be resolved to uphold the verdict].)

Viewing the evidence most favorably to Ostly, Moreno admitted in her deposition testimony that shortly after her employment with OMV ended, she told "[f]riends and people who I trust" that she was sexually assaulted by Ostly; although Moreno could not recall exactly which friends she was referring to, other than Sasha Ritter, her best friend. Moreno also admitted telling her sister "[a]round August 2006" that she had been sexually assaulted by Ostly and making similar statements to her brother "sometime in . . . 2007 or maybe sometime in 2008."

However, most damaging to Ostly's professional reputation was evidence that Moreno told one of Ostly's professional colleagues, Anne Omura (Omura), that Ostly had raped and sexually assaulted her. Omura was the executive director of the Eviction Defense Center (EDC) and had worked there for 14 years. Omura knew Ostly because EDC referred cases to him and they sometimes collaborated on cases. She also knew Moreno because she had been Moreno's supervisor when Moreno previously worked for EDC. Omura had a friendship with Moreno outside of their professional relationship; and they went out together to eat, shop, go to the movies, and attend other social functions.

There was evidence that Omura disclosed Moreno's accusation to others in the legal community. Laura Lane is an attorney at the East Bay Community Law Center. She went to law school with Omura and practices in the same field as Omura and Ostly, but at a different agency. In April 2007, before Moreno filed her lawsuit against Ostly, Omura told Lane in a crowded department of the Alameda County Superior Court that a

former employee of EDC “has a lawsuit against Tom Ostly for rape.” Lane testified that she was “just shocked.” Lane contacted Ostly and told him that she heard he was “being accused of rape” and that he was “a violent sexual predator.” When asked, Lane said that these claims were coming from Moreno through Omura.

Ostly presented evidence that once these allegations were disclosed to others in the professional community, he had extreme difficulty maintaining his professional relationships and eventually was unable to continue practicing law. By October 2006, Ostly and EDC stopped collaborating on cases because, their “relationship had gotten very contentious given what happened with Ms. Moreno.”

Murphy and Vu, Ostly’s law partners, testified that they were unaware of Ostly’s and Moreno’s romantic relationship during the time OMV employed Moreno. After Moreno made accusations of rape and sexual assault against Ostly, Murphy and Vu became concerned about the potential impact these accusations were having on their business. Murphy ultimately expelled Ostly from the partnership because of concerns Omura was repeating Moreno’s rape allegations, including that Ostly had engaged in similar conduct in the past. Murphy was particularly concerned about Moreno’s rape accusations, because the partnership was new, Murphy was receiving at least 90 percent of his clients from the legal aid community, and many of his clients were victims of domestic violence.

OMV’s other named partner, Vu, was heavily involved in women’s rights issues, including helping women who were the victims of domestic violence. Vu was likewise concerned about the affect the rape and sexual assault accusations would have on the law firm given the nature of their practice and their work with community-based organizations. During this timeframe, Vu was an adjunct professor at the University of San Francisco School of Law. She testified that she had students in her class who were working in various local legal organizations asking her about the claims being made against Ostly and her firm because “[t]he rumor was out there. Everybody knew it.”

OMV dissolved in November 2007 after a progression of events beginning with Moreno’s accusations, followed by Omura’s repetition of those accusations, and

culminating with Moreno's lawsuit filed in August 2007, which was the "coup de grace" and "straw that broke the camel's back" for OMV.

Ostly testified that as a result of the accusations being made against him by Moreno, he became depressed and gained significant weight. He eventually consulted a psychiatrist who prescribed antidepressants. He also consulted a psychologist who recommended that he get a service animal for companionship, which Ostly eventually did. By December 2007, Ostly was so paranoid about leaving his home for fear of running into people who might know that he was being accused of rape, that he grew a beard to change his appearance so no one would recognize him, and stayed in his house sleeping 18-20 hours a day. He could not support himself financially and began borrowing money from his mother. To make ends meet, he started working odd jobs that would minimize his contact with people in the community he knew, including working security late at night and attending storage auctions to bid on items he thought he could resell.

After a three-week trial, the jury found against Moreno on her claims of harassment and wrongful termination. By special verdict, the jury found that Ostly had not discharged Moreno from her employment, that Ostly did not make "unwanted sexual advances" to Moreno, and that she was not subjected to a hostile work environment or any harassing conduct while employed at OMV.²

The jury found in favor of Ostly on his cross claims for defamation, intentional infliction of emotional distress, and intentional interference with prospective economic relations. It is apparent from the jury's responses to the special verdict forms that the jury concluded Moreno's sexual relationship with Ostly was consensual, her testimony that she submitted to unwelcome sex in order to stay employed was not credible, and that her allegations of rape and sexual assault were false. By special verdict, the jury also found that when Moreno made defamatory statements to third parties that Ostly raped and/or sexually assaulted her, she was acting with malice or oppression and hatred and ill

² Moreno has not appealed from this portion of the jury's verdict.

will. The jury also found that Moreno's conduct in making these false allegations was "outrageous."

On August 2, 2010, the jury awarded Ostly damages in the total amount \$1.15 million. The jury's damage award was broken down as follows: \$500,000 for harm to Ostly's business, profession or occupation; \$500,000 for harm to Ostly's reputation; \$100,000 for future lost earning, wages, or income; and \$50,000 for shame, mortification and hurt feelings. On August 3, 2010, the jury awarded Ostly an additional \$100,000 in punitive damages.

On August 31, 2010, the trial court entered judgment based on the jury's verdict. On October 28, 2010, the trial court denied Moreno's motions for judgment notwithstanding the verdict and for a new trial. This appeal followed.

IV.

DISCUSSION

A. Substantial Evidence Supporting the Jury's Defamation Verdict Against Moreno

On appeal, Moreno claims this court must reverse the defamation verdict claiming there is no substantial evidence to support it. She questions whether the evidence shows she made any defamatory statements outside of privileged communications. Without the factual underpinning provided by the defamation verdict, Moreno claims that Ostly's verdict for intentional infliction of emotional distress and intentional interference with prospective economic relations must be reversed as well.

1. General Overview of the Law of Defamation and Privileged Communications

To prove a cause of action for defamation per se, which the jury found in this case, the plaintiff must present evidence that the defendant intentionally published a false and unprivileged statement of fact that tends to injure the plaintiff in his or her profession or that causes special damages. (Civ. Code, § 46; *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 (*Smith*).) "[T]o be actionable per se, a defamatory statement must tend "directly" to injure the person defamed in respect to his office, profession, trade or

business’ [Citation.]” (*Regalia v. The Nethercutt Collection* (2009) 172 Cal.App.4th 361, 368, original italics (*Regalia*)). “Perhaps the clearest example of libel per se is an accusation of crime.” (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 385 (*Barnes-Hind*)). When measured by this test, there can be little doubt that an employee’s accusation that her employer sexually assaulted her is defamation per se. If defamation per se is proved, damage “ ‘to plaintiff’s reputation is conclusively presumed and he need not introduce any evidence of actual damages in order to obtain or sustain an award of damages’ including, in an appropriate case, punitive damages. [Citation.]” (*Barnes-Hind, supra*, 181 Cal.App.3d at p. 382; see also *Regalia, supra*, 172 Cal.App.4th at p. 367 [slander per se requires no proof of actual damages].)

The defamatory matter must be “published,” i.e., communicated to some third person who understood its defamatory meaning and its application to plaintiff. (*Ringler Associates, Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1179.) However, the “publication” need not be to any large group—communication to a single person is enough. (*Ibid.*; *Smith, supra*, 72 Cal.App.4th at p. 645.) An original publisher of defamatory material is liable for subsequent republication where “the repetition was authorized or intended by the original defamer, or [¶] . . . the repetition was reasonably to be expected.” (Rest.2d Torts (1977) § 576, p. 200.) This principle was more fully explained by our Supreme Court in *Shivley v. Bozanich* (2003) 31 Cal.4th 1230: “In general, the repetition by a new party of another person’s earlier defamatory remark also gives rise to a separate cause of action for defamation against the *original defamer*, when the repetition was reasonably foreseeable. [Citations.] It is the foreseeable subsequent *repetition* of the remark that constitutes publication and an actionable wrong in this situation, even though it is the original author of the remark who is being held accountable. [Citation.]” (*Id.* at p. 1243, italics omitted.)

We note that at trial, the jury found Ostly had proved his claim for defamation per se based on evidence that Moreno told multiple people that Ostly sexually assaulted her and the repetition of that remark to others within Ostly’s professional community.

Nevertheless, as Moreno points out, even when a plaintiff proves the essential elements of defamation, recovery may be precluded if the defendant shows that the defamatory statements were protected by a privilege, absolute or qualified. (See Civ. Code, § 46 [defamation defined as a false and “unprivileged” statement of fact].) On appeal, Moreno primarily argues that any defamatory statements she made about Ostly to third parties, as a matter of law, fall within the protection of various privileges, including the attorney-client privilege, the litigation privilege, and the common-interest privilege. Consequently, she claims Ostly’s defamation claim must fail as a matter of law.³

Moreno’s appellate briefs fail to mention that the trial court spent a great amount of time dealing with her motions concerning the admissibility of evidence, the applicability of various privileges, and determining which statements by whom could be used by Ostly as proof that Moreno was liable for defamation. Nor do they mention the fact that the jury was given numerous instructions which would have allowed them to make findings in Moreno’s favor, including instructions on the applicability of various privileges to disputed facts. However the jury simply was persuaded by the evidence Ostly’s favor. Thus, Moreno’s efforts are little more than an attempt to retry her case on appeal, asking us to take a de novo look at the evidence and make different rulings than those made by the trial court and to make different findings than those made by the jury, in order to yield a different result. However, “[w]e do not retry cases on appeal and we

³ There is no dispute, of course, that Moreno’s allegations of sexual harassment and sexual assault made in the course of the underlying litigation is protected by Civil Code section 47, subdivision (b), which provides immunity from tort liability for communications made in any legislative or judicial proceeding, or “in any other official proceeding authorized by law.” This provision has been interpreted to provide protection to “communications with ‘some relation’ ” to an official proceeding. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193.) Ostly argued, however, that the communications described as defamatory in his cross-complaint were not similarly protected because they were not statements made in the course of any judicial proceeding, or in connection with an issue under review by any “official proceeding authorized by law.” (Code Civ. Proc., § 425.16, subd. (e)(2).)

1363, 1370, original italics.) “Accordingly, when a conditional privilege applies, as here, malice must be shown. [Citation.]” (*Id.* at p. 1372.)

On every special verdict form, the jury found Moreno acted with hatred or ill will when making false accusations about Ostly. The jury also found that Moreno acted with malice, oppression, or fraud and awarded him punitive damages.

However, on appeal Moreno argues that “no reasonable jury could find hatred or ill will where the undisputed evidence showed that the defendant made an unintentional error and did not doubt the truth of her statement.” To the contrary, based on the evidence at trial, the jury could properly find that Moreno made an improperly motivated attack on Ostly’s reputation by circulating false allegations of sexual misconduct against him, and in doing so, she was motivated by personal animosity against him.

Moreno acknowledged that during her employment with OMV, Ostly told her not to discuss his personal business with anyone from EDC, with whom he had a business relationship; and that if he found out she did so, she would be terminated. Given Ostly’s admonition, it is a reasonable inference that Moreno understood the seriousness of telling Omura, the executive director of EDC, that Ostly had sexually assaulted her. Moreno’s false allegations were inevitably damaging to Ostly in the small legal community in which he practiced. Ostly also presented evidence from which a jury could find that Moreno’s allegations were made with the deliberate intent and purpose of disgracing him and harming his reputation and stature in the legal community. Moreover, the jury could infer that at the time Moreno made this allegation to multiple people, she knew this allegation was false. Therefore, the jury’s finding of malice is supported by the evidence. Consequently, the qualified privilege provided by Civil Code section 47, subdivision (c) is not available to Moreno to shield her statements to her siblings and best friend because the qualified privilege does not even arise if the communication is motivated by malice. (*Brown, supra*, 48 Cal.3d at p. 723, fn. 7.)

3. Defamatory Statements to Omura

We next address Moreno’s claim that the attorney-client privilege applied to virtually all of her communications with Omura. Moreno argues that any statements

made to Omura about Ostly's sexually inappropriate behavior were strictly privileged attorney-client communications which could not support Ostly's claim for defamation. However, what is never even mentioned in Moreno's briefing is that this identical argument was made repeatedly during trial and in posttrial proceedings, and was repeatedly rejected by the trial court.

In response to this identical argument below, there is no doubt that the trial court found some of Moreno's communications with Omura to be covered by the attorney-client privilege. The court pointed out that there was evidence that Moreno met with Omura at Omura's home sometime around July 23, 2006, specifically for the purpose of seeking legal advice with regard to any claim she might have against Ostly. Accordingly, the court held that any statements made by Moreno to Omura during that conversation in which she accused Ostly of coerced sexual relations, sexual assault or rape, were privileged attorney-client communications.

However, the trial court's rulings underscored the point that an absolute privilege for attorney-client communications can be lost if the holder of the privilege repeats the statements outside the protected context within which the statements were originally made. As explained by the court in *Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 Cal.App.3d 818 (*Bradley*), disapproved of on another point by *Silberg v. Anderson* (1990) 50 Cal.3d 205 (*Silberg*): "[W]e observe that the fact that a defamatory statement was initially protected by an absolute privilege because it was uttered on a privileged occasion by persons who are covered by the privilege does not include a full scale, blanket authorization to republish the same on a nonprivileged occasion to persons to whom the privilege is not applicable." (*Bradley*, at p. 827; accord, *Susan A. v. County of Sonoma* (1991) 2 Cal.App.4th 88, 95.)

As the trial court pointed out, "[a]pparently there is evidence of statements made to Ms. Omura *prior* to her being consulted on the 23rd of July . . . that can form the basis of a claim of defamation." (Italics added.) This ruling was based on evidence that Omura and Moreno were in close communication from Moreno's last working day for Ostly on July 13, 2006, and that Moreno went to Omura, as a friend, immediately after

her employment with OMV ended. As Moreno admitted, around the same timeframe, she told her best friend Ritter, her siblings and other trusted and close friends whose identities she claimed not to remember that Ostly had forced unwanted sex upon her. The fact that Moreno admitted discussing the sexual assault with other friends supports a strong inference that Moreno discussed this topic with Omura as well.

There was also evidence that *after* the July 23, 2006 meeting, any attorney-client relationship between Omura and Moreno ceased. For example, it was undisputed that Omura referred Moreno to other lawyers to handle any litigation against Ostly. There also was documentary evidence introduced at trial, in the form of an e-mail dated July 26, 2006, whereby Omura explicitly assured Ostly that she was *not* representing Moreno in her employment case. Ostly also testified that Omura “repeatedly told me that she was not giving [Moreno] legal advice” regarding her employment claims against Ostly. Obviously perceiving no conflict of interest based on any attorney-client relationship with Moreno, Omura continued working on cases with Ostly after her July 23, 2006 attorney-client meeting with Moreno.

The evidence also established that after July 2006, when Moreno sought legal advice from Omura, Moreno and Omura remained close friends and continued to socialize outside of this litigation. A reasonable inference could be drawn that there were times they had discussions about the alleged rape and sexual assault which were outside of any attorney-client relationship. In this regard, Laura Lane, a lawyer working in the landlord-tenant legal community, testified that in April 2007, before any lawsuit was filed, Omura told her that Ostly was being accused of rape. It can reasonably be inferred that Omura, an experienced attorney, would not disregard her professional obligation to Moreno and breach a confidential attorney-client communication by disclosing this information to Lane if she believed it was privileged.

Based on this evidentiary record, the trial court concluded that there was substantial evidence, both direct and circumstantial, that Moreno made unprivileged, defamatory statements to Omura. However, the trial court acknowledged that the evidence was in conflict and subject to different inferences, given both Moreno and

Omura's testimony that they *did not* have any conversations regarding Ostly's sexual misconduct outside of their attorney-client communications. Consequently, the court decided to submit the matter to the jury.

Accordingly, the jury was specifically instructed regarding the attorney-client privilege asserted by Moreno and the special verdict forms given to the jury incorporated the jury's consideration of this defenses. The jury also received instructions that Moreno could not be found liable for defamatory statements made in the course of an attorney-client communication. Specifically, the jury was told that in order to find defamation, per se, Ostly had to prove that Moreno made a statement that he "raped and/or sexually assaulted her "to persons *other than her attorneys during a privileged attorney-client communication.*" (Italics added.) The jury was also instructed that an attorney may not waive that privilege on behalf of his or her client. Additionally, based on evidence that Moreno had willfully suppressed evidence by failing to produce the cell phone that she used during the relevant timeframe, the jury was told that they could draw inferences favorable to Ostly and adverse to Moreno from the evidence. After receiving these instructions, the jury filled out a 27-page special verdict form for defamation per se, as well as the other causes of action, in which it repeatedly found that Moreno made false statements that Ostly raped and sexually assaulted her to persons other than her attorneys and that these false statements were not covered by the attorney-client privilege.⁴

Within the context of this record, Moreno's assertion on appeal that any and all statements she made to Omura about Ostly's sexually inappropriate behavior were exclusively within their attorney-client communications are merely her conclusions

⁴ While it is impossible to know for certain exactly what credibility determinations led to the jury's verdict, it is likely that the jury found that at least some of Moreno's defamatory statements to Omura were made outside of their attorney-client relationship and consequently were not privileged. The jury specifically found that in making these false accusations, Moreno acted with the specific intent to disrupt Ostly's professional relationships that would have been of economic benefit to him. There is no evidence that the other recipients of Moreno's defamatory communications, her siblings and best friend, had any relationship with Ostly's professional colleagues or connection to Ostly's legal practice.

drawn from facts which were clearly in dispute. Because the facts, or reasonable inferences from the facts, concerning the claim of privilege were in conflict, the determination of whether the evidence supported one conclusion or the other was for the trier of fact. (See *Institute of Athletic Motivation v. University of Illinois* (1980) 114 Cal.App.3d 1, 13-14, fn. 5 [“jury may be required to determine disputed facts relating to the existence of the privilege”].) The jury’s determination on this issue is subject to our traditional standard of review on any jury’s finding of fact, that is, whether it is supported by substantial evidence. (*HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 60; *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 730-731.) Under the substantial evidence rule, the appellate court must indulge in all reasonable inferences that may be deduced from the facts in support of the party who prevailed in the proceedings below. (*Crawford, supra*, 3 Cal.2d at p. 429.)

Viewing the evidence in Ostly’s favor, as we must, we hold that there is substantial evidence, summarized above, from which the jury could conclude that Moreno made unprivileged, defamatory statements about Ostly to Omura. Furthermore, when Moreno made these defamatory statements, the jury found that she was motivated by ill will and hatred toward Ostly, and that she was attempting to cause him emotional distress and disrupt his relationships in the legal community. In particular, as a condition of Moreno’s employment, she was told not to share personal information about Ostly with Omura, who he considered to be a “rumor monger” and a “gossip.” Consequently, Omura’s repetition of Moreno’s untrue and malicious allegations to others in Ostly’s professional community was not just reasonably foreseeable by Moreno—it was likely intended. (See generally *Schneider v. United Airlines, Inc.* (1989) 208 Cal.App.3d 71, 75.)

In a subsidiary argument, Moreno claims that a fatal deficiency in Ostly’s claim for defamation was that there was no testimony as to the actual defamatory words uttered by Moreno to Omura outside of their protected attorney-client communication. Moreno argues that if there was no direct proof of the actual defamatory words she allegedly spoke to Omura, she could not be found liable for defamation. However, the substance of

Moreno's statement defaming Ostly was proved by Moreno's deposition testimony during which she admitted that shortly after her employment with OMV ended, she told several "[f]riends and people who I trust" that she was sexually assaulted by Ostly. Omura also told Ostly shortly after Moreno's separation of employment with OMV, that she had been "hearing things that would lead [her] to believe that he was a sexual predator." Because there was no evidence Omura had any other percipient source for her statements other than Moreno, the jury could reasonably conclude that Omura was simply repeating what Moreno told her. Given this evidence, the defamatory words used by Moreno were adequately proven. (See *Russell v. Geis* (1967) 251 Cal.App.2d 560, 571-572.)

Moreno also claims that "[e]ven if the jury could reasonably infer Ms. Moreno made the statement that Mr. Ostly raped her outside of an attorney-client communication, the litigation privilege under Civil Code section 47(b) still applies." Civil Code section 47, subdivision (b) defines what is commonly known as the "litigation privilege." "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" (*Silberg, supra*, 50 Cal.3d at p. 212.) As Moreno acknowledges, the applicability of the litigation privilege was raised below, and "the verdict form" given to the jury in this case "incorporates jury instructions regarding the litigation privilege."

The privilege applies to any publication or other communication required or permitted by law in the course of a judicial or quasi-judicial proceeding to achieve the objects of the litigation, whether or not the publication is made in the courtroom or in court pleadings, and whether or not any function of the court or its officers is involved. (*Moore v. Conliffe* (1994) 7 Cal.4th 634, 641; *Silberg, supra*, 50 Cal.3d at p. 212.) The privilege also applies to statements made in dialogues preliminary to litigation. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1194-1195.)

The litigation privilege is absolute—it applies regardless of whether the communication was made with malice or the intent to harm. (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1302.) Put another way, application of the privilege does not depend on the publisher’s “motives, morals, ethics or intent.” (*Silberg, supra*, 50 Cal.3d at p. 220.) Consequently, the litigation privilege, if applicable, would preclude not only Ostly’s defamation action, but also Ostly’s claim for intentional interference with existing and prospective economic relationships and intentional infliction of emotional distress. (*Id.* at p. 215.)

While the litigation privilege extends to out-of-court statements made to achieve the objects of the litigation, Moreno has offered no authority, nor are we aware of any, that extends the privilege to circumstances such as those presented here. First, Moreno’s communications were not made in connection with judicial proceedings. “[T]he critical question is the *aim* of the communication, not the forum in which it takes place. If the communication is made ‘in anticipation of or [is] designed to prompt official proceedings, the communication is protected.’ [Citation.]” (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 368.) Nothing about Moreno’s defamatory statements, which the jury expressly found were outside of protected attorney-client communications, were connected to the judicial action. Moreno proclaimed Ostly had sexually assaulted in her personal communications with her friends and relatives and the jury found that in doing so, she was acted outrageously, maliciously, and with the intent to disrupt Ostly’s professional relationships.

Additionally, the statements were not in furtherance of the objects of the litigation. (*Silberg, supra*, 50 Cal.3d at pp. 219-220 [“The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action”].) Moreover, communications to nonparticipants in the action, as here, are generally not protected by the litigation privilege. (*Susan A. v. County of Sonoma, supra*, 2 Cal.App.4th at p. 93 [expert witness’s

comments about the case to the press were not covered by the litigation privilege].) The evidence supports the jury's conclusion that the litigation privilege does not apply here.

B. Substantial Evidence Supporting the Intentional Interference with Prospective Economic Relations Verdict Against Moreno

The tort of intentional interference with prospective economic advantage involves five elements: (1) an economic relationship between plaintiff and a third party containing the probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship; (3) defendant's intentional wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 380, fn. 1.)

With regard to the jury's verdict in favor of Ostly for intentional interference with prospective economic relations, Moreno again argues that any alleged defamatory statements were privileged and there is no evidence Moreno acted with hatred or ill will toward Ostly. However, as explained above, Ostly produced substantial evidence supporting the jury's findings that Moreno made unprivileged statements to third parties accusing Ostly of rape and that in doing so, she acted with the intent of damaging his professional reputation and disrupting his economic relationships. As Ostly put it at trial, "She knew exactly the value of the cases I had with EDC. . . . She knew about my ongoing business relationships with them. We talked about everything before she started her employment. . . . [¶] [S]he said she agreed with my perception of the problems that could be started with Anne Omura, and as soon as she left work she went directly across the street to them and started telling them that I had fired her when it wasn't true. . . . [¶] She started telling them I mistreated her when it wasn't true. . . ." Ostly surmised, "I can think of no legitimate reason to go to people I have business relationships with other than to end those business relationships for me."

Moreno additionally claims that "there is no evidence that Ms. Moreno's conduct was a substantial factor in causing the disruption of Mr. Ostly's economic relationship with EDC or Mr. Murphy and Ms. Vu." To the contrary, there was direct evidence that based on the allegations that Ostly was a rapist and sexual predator, his reputation in the

legal community and his collegial relationships with his colleagues deteriorated to the point where he was expelled from his law firm and he stopped working as an attorney. Specifically, by October 2006, Ostly and EDC stopped collaborating on cases because, there “relationship had gotten very contentious *given what happened with Ms. Moreno.*” (Italics added.) Likewise, Murphy and Vu expelled Ostly from the law firm and dissolved the partnership based on their concerns about Ostly being accused of rape and being labeled a sexual predator. There was evidence that Ostly eventually was forced to give up his law career entirely. Given this overwhelming evidence, the jury could draw the reasonable inference that Moreno’s false allegations were a substantial factor in damaging Ostly’s professional reputation and in disrupting his economic relationships within the legal community.

C. Substantial Evidence Supporting the Intentional Infliction of Emotional Distress Verdict Against Moreno

The jury found that all of the elements of the tort of intentional infliction of emotional distress were proven, which are: (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’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct. (See *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.)

Moreno argues that her conduct could not be found to be outrageous because the evidence merely showed “she consulted with an attorney of her choice and disclosed to her close friend and family members that Mr. Ostly sexually assaulted her.” “The standard set for measuring outrageous conduct indicates the qualifying conduct must be 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. [Citation.]” (*Melrich Builders, Inc. v. Superior Court* (1984) 160 Cal.App.3d 931, 936.)

In making her argument, Moreno presents the most benign view of the evidence—a view which the jury obviously rejected. Viewing the evidence in a light most favorable to the jury’s verdict, as we must, the conduct proven in this case was sufficiently egregious to satisfy the extreme and outrageous standard. As described above, there was evidence that Moreno told numerous people that Ostly sexually assaulted her, that Moreno knew her statements were false when she made them, and that Moreno made these statements maliciously for the purpose of damaging Ostly professionally and personally. This is exactly what happened, as Ostly testified these false accusations resulted in “the loss of my career and friends.” Based on this evidence, the jury could reasonably conclude that Moreno acted outrageously when she falsely accused Ostly of sexual assault. (See, e.g., *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1582 [evidence of knowingly false reports of child abuse was sufficient allegation of outrageous conduct].)

Moreno also questions whether the jury could reasonably conclude that her conduct was a substantial factor in causing Ostly severe emotional distress. To the contrary, the evidence was overwhelming that the rumors generated within the legal community that emanated from Moreno’s false and malicious accusations of rape devastated Ostly, both professionally and personally. Once a successful attorney, he testified that he became “very paranoid . . . [because he was] being accused of being a rapist.” He testified he didn’t leave the house “for sometimes weeks at a time.” By May 2008, he had gained over 80 pounds and was sleeping close to 18 to 20 hours a day. At the time of trial, he admitted it was hard to interact with people, because he does not trust anybody.

The licensed clinical psychologist who evaluated Ostly testified that he was suffering from depression and mild posttraumatic stress. She also noted that as a result of the accusations against him, he had gained a great deal of weight, and had withdrawn from his “work world and social world.” The evidence clearly and convincingly supports the jury’s determination that Moreno’s conduct was a substantial factor in causing Ostly severe emotional distress.

D. Challenge to Jury’s Damage Award

Moreno next claims the trial court abused its discretion when it denied her motion for a new trial because “the jury’s award of \$1.15 million in compensatory damages” and “the jury’s award of \$100,000 in punitive damages is excessive because Ms. Moreno’s conduct consisted of consulting with attorneys and confiding in her close friends and family.” She claims that “[g]iven the limited audience that heard Ms. Moreno’s statements, the jury’s award of over \$1 million can only be explained by passion and prejudice on its part.”

“It is well settled that damages are excessive only where the recovery is so grossly disproportionate to the injury that the award may be presumed to have been the result of passion or prejudice. Then the reviewing court must act. [Citations.] The reviewing court does not act de novo, however. As we have observed, the trial court’s determination of whether damages were excessive ‘is entitled to great weight’ because it is bound by the ‘more demanding test of weighing conflicting evidence than our standard of review under the substantial evidence rule’ [Citation.]” (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259 (*Fortman*); see also *Douglas v. Janis* (1974) 43 Cal.App.3d 931, 940 (*Douglas*) [stating that the determination of the jury on the issue of damages “ ‘is conclusive on appeal unless the amount thereof is so grossly excessive that it can be reasonably imputed solely to passion or prejudice in the jury’ ”].) All presumptions favor the trial court’s determination and we review the record in the light most favorable to the judgment. (*Fortman, supra*, 211 Cal.App.3d at p. 259.)

In this appeal, we have held that substantial evidence supports the jury’s special verdict findings that Moreno made statements about Ostly that were defamatory per se.

As such, damages are presumed as a matter of law. (See *Barnes-Hind, supra*, 181 Cal.App.3d at p. 382 [where plaintiff proves libel per se damage to reputation “ ‘is conclusively presumed and he need not introduce any evidence of actual damages in order to obtain or sustain an award of damages’ ”]; accord, *Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 358; *Douglas v. Janis, supra*, 43 Cal.App.3d at p. 940; see also *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 349 [noting “defamation is an oddity of tort law,” allowing juries to “award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred”].) Consequently, Ostly was not required to prove \$500,000 in damages for harm to Ostly’s reputation, which are presumed damages.

Furthermore, there is no indication that the jury’s award of \$500,000 for harm to Ostly’s business, \$100,000 for Ostly’s future lost earnings, and \$50,000 for shame and mortification was grossly disproportionate to the injury or the result of passion or prejudice. The evidence showed Ostly’s reasonable hourly rate for his services before he stopped practicing law ranged from \$250 in 2005 to \$550 per hour in July 2006, right before Moreno began falsely accusing Ostly of rape and sexual assault. There was also evidence presented that in the previous two years from January 1, 2005, before Ostly hired Moreno, through August 1, 2007, right before Moreno filed her lawsuit against him, Ostly had obtained \$1.713 million in total recoveries and \$636,888 in fees. It was also shown that Ostly had not worked as a lawyer from November 2007, when he was expelled from OMV, through the jury’s verdict on August 2, 2010. At the time of trial, Ostly was working as a security guard for a bar in the Mission District for \$15 an hour, two night a week. He explained that he was “far more in debt than my student loans ever were.”

In the end, Moreno offers no evidentiary basis to sustain her challenge to the jury’s compensatory damage award. In fact, she ultimately concedes in her reply brief that for purposes of this appeal, Ostly has produced substantial evidence of his “emotional distress and actual damages.” Therefore, Moreno’s attacks on the jury’s

damage award is nothing more than challenges to the credibility of the witnesses, the inferences to be drawn from the evidence, and the jury's verdict.

With regard to the jury's award of an additional \$100,000 in punitive damages, Moreno claims her due process rights were violated. She argues, that "[e]ven if Ms. Moreno acted with malice, she simply told her close friend and family members that she believed Mr. Ostly had sexually assaulted her, and sought legal advice from an attorney regarding the issue." Consequently, she claims her "conduct does not rise to the level of reprehensibility that supports punitive damages beyond compensatory damages." However, as we have repeatedly pointed out in this opinion, Moreno's attempt to persuade us "that the jury should have accepted [her] version of the facts" is "misdirected." (*Hasson, supra*, 32 Cal.3d at p. 398.) We cannot reweigh the evidence presented at trial to arrive at a different verdict than that arrived at by the jury.

V.

DISPOSITION

The judgment is affirmed. Ostly is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

RUVOLO, P. J.

We concur:

REARDON, J.

SEPULVEDA, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.