

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

----

ROBERT MILBRODT,

Plaintiff and Appellant,

v.

RACHEL MILBRODT,

Defendant and Respondent.

C068515

(Super. Ct. No.  
CV101423)

Robert Milbrodt filed a verified complaint alleging malicious prosecution and similar causes of action against his former spouse, Rachel Milbrodt. Rachel (we will use the parties' respective first names in this opinion in the interest of clarity and brevity) filed a special motion to strike Robert's complaint under the anti-SLAPP statute (Code Civ. Proc., § 425.16; statutory references that follow are to the Code of Civil Procedure unless specified otherwise). The trial

court granted her motion, and Robert brought this appeal. We affirm the order striking Robert's complaint.

### FACTS AND PROCEEDINGS

In 2007, Rachel reported to a deputy sheriff that she and Robert had argued over child-rearing issues and, during the confrontation, Robert pushed her down and held her on the bed with his hand on her neck, choking her. Robert was arrested and charged with battery and misdemeanor false imprisonment. The criminal trial of those charges resulted in a hung jury and the court declared a mistrial. The matter was recalendared several times, and the district attorney ultimately dismissed the charges in 2009.

Robert then filed a verified complaint initiating the instant action. He denied attacking Rachel, and alleged that her law enforcement report--and her subsequent testimony to the same effect in the criminal proceedings and dissolution of marriage proceedings--were false, fabricated by Rachel to improve her position in the marriage dissolution proceedings and to "destroy" Robert financially, professionally and emotionally. The complaint asserted causes of action against Rachel for malicious criminal prosecution, defamation (both slander and libel) and intentional infliction of emotional distress.

Rachel moved to strike Robert's complaint pursuant to section 425.16, arguing that all Robert's claims are based on her report of an alleged crime to law enforcement, which qualifies as a protected activity under section 425.16. Rachel

also asserts Robert cannot demonstrate a probability of prevailing on his malicious prosecution claim, because Robert did not "prevail" in the criminal action; nor can he prevail on any claim because statements made to police officers regarding criminal activity are absolutely privileged under Civil Code section 47. In support of her motion, Rachel submitted a declaration describing the choking incident and Robert's criminal prosecution.

The only opposition brief in the record on appeal is Robert's "supplemental opposition" to Rachel's motion to strike. There, Robert did not dispute that his claims arose from Rachel's report to law enforcement, but argued a false report to police, maliciously made, is unprivileged. In addition, he argued, he will likely prevail: (1) on his claim for malicious prosecution because he obtained a finding of factual innocence; (2) on his claims for defamation because he was falsely arrested, and Rachel continues to spread "false rumors" about him by which he has been damaged; and (3) on his claim for intentional infliction of emotion distress, because Rachel's false accusation of domestic violence has injured his relationships and his health, and facilitated his "patently false indictment." Robert's opposition did not include any evidence he had obtained a factual finding of innocence of the criminal charges. Nor did the opposition describe the rumors or statements Rachel allegedly made to the couple's children or other individuals.

After a hearing at which both sides argued (no transcript of which appears in the record on appeal), the trial court granted Rachel's motion to strike the complaint. It found Robert's suit arises from Rachel's constitutionally protected activities (reporting an alleged crime to police and testifying about it in court), and Robert failed to provide admissible evidence showing he has a probability of prevailing on the merits of his claims.

## DISCUSSION

### I

#### *Governing Legal Principles and Standard of Review*

The California Legislature passed section 425.16 after finding "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances" and "it is 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." (§ 425.16, subd. (a).)

To address these findings, the statute authorizes the filing of a special motion that requires a court to strike claims brought "against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution . . . unless the court determines that the

plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).)

A court evaluating a defendant’s anti-SLAPP motion engages in a two-step process. First, it decides whether the defendant has made a threshold showing that the challenged cause of action is one “arising from” protected activity. If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.) To show a probability of prevailing for purposes of section 425.16, a plaintiff must make “‘‘a prima facie showing of facts which would, if proved at trial, support a judgment’” in his favor. (See *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010, and cases cited therein.)

We review an order granting an anti-SLAPP motion under a de novo standard, and employ the same two-pronged procedure as the trial court in determining whether the anti-SLAPP motion was properly granted. (*Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 663; *Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1651-1652.)

## II

### *The Trial Court Properly Applied Section 425.16*

Robert argues the trial court erred in striking his complaint because Rachel made statements (by declaration and/or testimony) about the alleged choking incident in the parties’ subsequent marital dissolution proceeding; those statements are

not covered by the litigation privilege set forth in Civil Code section 47, subdivision (b) and were therefore not a "protected activity." (See *Episcopal Church Cases*, *supra*, 45 Cal.4th at p. 477.)

Civil Code section 47, subdivision (b) provides in relevant part: "A privileged publication or broadcast is one made: [¶] . . . [¶] . . . [i]n any . . . judicial proceeding." The litigation privilege is absolute, which means it applies regardless of the existence of malice or intent to harm. "Although originally enacted with reference to defamation actions alone [citation], the privilege has been extended to any communication, whether or not it is a publication, and to all torts other than malicious prosecution. [Citations.]" (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 29.) "The privilege vindicates several public policies: 'The principal one is ensuring free access to the courts by prohibiting derivative tort actions. [Citation.] The privilege also promotes complete and truthful testimony, encourages zealous advocacy, gives finality to judgments, and avoids unending litigation. [Citation.]' [Citation.]" (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1302, citing *Budwin v. American Psychological Assn.* (1994) 24 Cal.App.4th 875, 880; *Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, 810.)

Because courts making very difficult and critical decisions regarding child visitation should do so with the maximum amount of relevant information, "[c]ase law is clear that [Civil Code]

section 47(b) absolutely protects litigants and other participants from being sued on the basis of communications they make in the context of family law proceedings.' [Citation.]” (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 956, quoting *Wise v. Thrifty Payless, Inc., supra*, 83 Cal.App.4th at p. 1302; *Begier v. Strom* (1996) 46 Cal.App.4th 877, 882; *Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1270.) “Any other rule would surely spawn a second layer of litigation between a former spouse or a spouse currently seeking a dissolution whose goal it is to make his or her former partner’s life miserable.” (*Wise v. Thrifty Payless, Inc., supra*, 83 Cal.App.4th at p. 1302.)

If, as Robert suggests, Rachel attempted in the dissolution proceeding to persuade the court that Robert’s having committed an act of domestic violence against her rendered him undeserving of custody of their children, the court properly considered her declaration or testimony to that effect, and those statements would be absolutely privileged. The litigation 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. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) Moreover, in making a determination of the “best interest of the child,” a court must consider, among other factors, “[a]ny history of abuse by one parent or any other person seeking custody” against “[a]ny child” and/or “[t]he other parent.” (Fam. Code, § 3011, subd. (b)(1), (2).)

Robert's argument to the contrary is premised on Civil Code section 47, subdivision (b)(1). He misreads the statute. The exception described in that subdivision provides: "(1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made *of or concerning a person by or against whom no affirmative relief is prayed in the action* shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action." (§ 47, subd. (b)(1), italics added.) This exception does not apply here, because the alleged statements by Rachel in the dissolution proceedings related to Robert, who was either seeking relief or against whom relief was sought. (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 216 ["the 'without malice' requirement [of section 47, subdivision (b)(1)] applies only to those allegations against correspondents published in the pleadings and affidavits filed in dissolution proceedings"].)

Robert also argues on appeal that Rachel made defamatory statements about him to his employers, and to his friends and colleagues, which would not be protected by the litigation privilege and which therefore provide grounds for tort liability that should have survived Rachel's anti-SLAPP motion. But as

the trial court correctly noted, Robert has presented no evidence Rachel made such statements, and his verified complaint contains no such allegations. Accordingly, he has not made a prima facie showing of ""facts which would, if proved at trial, support a judgment"" in his favor on his claims for defamation and infliction of emotional distress. (Cf. *ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at p. 1010.)

Finally, Robert argues his verified complaint shows a sufficient probability of prevailing on his defamation and emotional distress claims. Having rejected the assertions underpinning this argument--that Rachel's written declarations filed in the marital dissolution proceeding are unprivileged and that the verified complaint contains evidence of other unprivileged statements by Rachel--we likewise reject Robert's contention he has shown the requisite probability of success on the merits of his complaint. The motion to strike was properly granted.

#### DISPOSITION

The order striking the complaint is affirmed. Rachel is awarded her costs and attorney fees on appeal. (Cal. Rules of Court, rule 8.278 (a)(1)(2).)

We concur: \_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ ROBIE \_\_\_\_\_, J.

\_\_\_\_\_ MURRAY \_\_\_\_\_, J.