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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SCOTT MEYER,

Plaintiff and Appellant,

v.

EMILY PEDERSON,

Defendant and Respondent.

D059720

(Super. Ct. No. 37-2010-00097717-
CU-NP-CTL)

APPEAL from an order of the Superior Court of San Diego County, Richard E. L. Strauss, Judge. Affirmed.

Plaintiff and appellant Scott Meyer brought an action for damages against defendant and respondent Emily Pederson to allege negligent infliction of emotional distress, intentional infliction of emotional distress, and abuse of process. The complaint arose out of a series of interactions between them beginning in April 2009, when Pederson called police after a late night argument with Meyer, her then live-in partner and father of her child. Police arrested Meyer for acting belligerently and making a death

threat against Pederson. Subsequently, Pederson obtained a temporary domestic violence restraining order, which was made permanent after a hearing.

Pederson then moved to Iowa and filed a paternity and custody action there. According to Meyer, Pederson mentioned the restraining order before the court and custody evaluators in Iowa, and as a result Meyer had to settle the custody case on unfavorable terms. The restraining order was later reversed by this court on appeal.¹

Meyer then filed this action in August 2010, alleging that the statements made to police and to others arising out of the domestic violence action caused him emotional distress. Meyer also alleged that Pederson committed an abuse of process by calling the police because she did so with the malicious intent of putting him in an unfavorable position in the custody and paternity actions.

The matter is before us on Meyer's appeal of the trial court's order granting Pederson's special motion to strike Meyer's complaint under the anti-SLAPP provisions. (Code Civ. Proc.,² § 425.16, subd. (i).) In her motion to strike, Pederson asserted that the entire action against her, based on the police report and subsequent statements related to and in furtherance of judicial proceedings, arose out of free speech activity and was barred by the absolute privilege of Civil Code section 47, subdivision (b), which protects citizen communications made in initiation or furtherance of any judicial proceedings,

¹ Meyer filed an unopposed motion for us to take judicial notice of the record from his prior case, which we granted. (*S.M. v. E.P.* (2010) 184 Cal.App.4th 1249 [our prior opinion].)

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

including communication with authorities regarding suspected criminal activity.

Pederson argued that she sustained her initial burden under the anti-SLAPP statutory scheme to show that the conduct complained of arose in furtherance of her right to free speech, and the trial court agreed. In his opposition filings Meyer conceded that the conduct fell within the purview of sections 425.16 and Civil Code section 47, subdivision (b), but argued that he could provide enough admissible evidence to demonstrate his likelihood of prevailing on the merits.

The court granted Pederson's motion to strike based on the conclusion that not only did the conduct fall within the provisions of section 425.16, Meyer had failed to supply sufficient admissible evidence to show his substantial probability of prevailing in the action, as provided in the form of Meyer's declaration about Pederson's actions. The court found that the declaration was conclusory, lacked foundation, was based on inadmissible hearsay, and failed to allege specifics. The court also found that Meyer's allegations supported Pederson's claim that the statements were privileged.

On appeal, Meyer asks us to correct his statement that Pederson's conduct fell within the purview of section 425.16, allowing the case to proceed to trial on the merits, or, in the alternative, to allow discovery to proceed. Meyer alleges that he could not provide sufficient evidence because discovery was stayed at the time the anti-SLAPP motion was filed. (§ 425.16, subd. (g).)

On de novo review, we agree with the trial court that the communicative conduct complained of fell within the ambit of absolute privilege or protected speech. We also

agree with the trial court that Meyer failed to provide sufficient admissible evidence, and we disagree that he was unable to do so due to the discovery stay. We affirm.

FACTUAL BACKGROUND

*A. Meyer and Pederson's Relationship*³

Meyer and Pederson began a romantic relationship in 2003. Meyer worked as a neurosurgeon, and Pederson held an unspecified job in the same hospital. They had an on-again, off-again relationship over a five-year period. In December 2007, toward the end of their relationship, Pederson informed Meyer that she was pregnant. The pregnancy was unplanned, but both parties were pleased.

Prior to the child's birth, Meyer filed an action in California to establish paternity, and sought an ex parte order preventing Pederson from moving to Iowa before giving birth. The court denied Meyer's request for a restraining order, stating that in the absence of an emergency, it had no jurisdiction to prevent her from traveling.

Pederson decided she wanted to give birth in Iowa near her family, and the couple's son was born there in August 2008. Later that month, she filed a request for child support through the Iowa Department of Human Services. The following month, both parties signed an Iowa document entitled, "STIPULATION RE: CHILD CUSTODY [] AND VISITATION." The stipulation provided in part, "The parties [] agree that

³ We take most of the background for the next three sections from our prior opinion. (*S.M. v. E.P.*, *supra*, 184 Cal.App.4th 1249, 1253-1260, as this case involves the same facts and arises out of the same underlying incident.

Iowa shall have home state jurisdiction over the child pursuant to the UC-CJEA as the child was born in Iowa."

Pederson returned to California in November 2008 in an attempt to work on the relationship with Meyer and raise their child together. She moved in with him and his three other children from a previous marriage.

B. Pederson's Plans to Travel to Iowa

In early April 2009, Pederson told Meyer that she would be traveling to Iowa to attend a baby shower at the end of the month, and that she planned to take the child with her. Pederson also told Meyer that she wanted to relocate to Iowa at some point after the baby shower. On April 16, about a week before Pederson was due to leave, Meyer filed an action in California to establish paternity and custody. Pederson received the summons on April 21. The back page of the summons included a "STANDARD RESTRAINING ORDER" (standard order) that provided: "You and the other party are restrained from removing from the state the minor child or children for whom this action seeks to establish a parent-child relationship without the prior written consent of the other party or an order of the court."

Despite this, Pederson reiterated her desire to take their child with her to Iowa for the baby shower, and continued to plan her trip. Meyer's attorney drew up a stipulation that Meyer wanted Pederson to sign. It provided that Pederson would agree to bring the

child back to California after her trip to Iowa. Pederson refused to sign it. Meyer then became concerned that she might not return the child to California.⁴

C. Incident with Police

Early in the morning of April 23, the day Pederson was due to leave for Iowa, the baby woke up crying. Both Pederson and Meyer woke up to tend to him. Meyer then began questioning Pederson about her trip back to Iowa. According to Pederson, Meyer "continued to badger me, telling me he was going to call the police when I got to the airport stating that I was kidnapping our son, when I had purchased the ticket on March 10th for a round-trip ticket." The conversation became heated, and Meyer ripped the covers off the bed and said, "I'll kill you." Pederson asked him to stop talking about it and let her go back to sleep because she had an early flight. Meyer said, "No, we are not going to go back to sleep."

Pederson called Meyer's sister at around 3:30 a.m. in an effort to calm him down, because she did not want to call the police directly if she did not have to. Pederson considered calling the police because he had threatened her life, and said she was scared at the moment. After the phone call disconnected, Meyer called Pederson a "cold bitch" and "spoiled brat" and told her to "go ahead and call the police" because he was going to call them anyway in the morning to stop her from taking the child out of state. Pederson

⁴ While Pederson had booked a round trip ticket, she did not buy one for her child, who would be traveling on her lap. Pederson told Meyer that this should give him assurance that she would return. Meyer, however, was concerned that the lack of a separate ticket for the child indicated that she might leave their child behind in Iowa with her family.

then called the police and told the person who answered her call that Meyer had threatened to kill her.

When officers arrived at the home, Pederson's eyes were glassy and bloodshot. She did not complain of any pain and she stated that nothing physical had happened between her and Meyer. Meyer was calm but attempted to take over the investigation and was repeatedly told by the officers to "calm down and let us investigate." According to the police report, Meyer said that Pederson told him that she would call the police and tell them that he hit her so that he would be taken to jail.

When police officers told Pederson that under the terms of the standard restraining order issued with the summons in Meyer's paternity action, she could not take the baby out of the state, she replied, "Well, my lawyer said I could." The police told her that she could leave the house, because nothing in the restraining order prevented her from taking the baby out of the house. Meyer said he did not want Pederson to do so because it was nearly 4:00 a.m. and the baby was asleep. Police told Meyer that there was nothing he could do to prevent Pederson from taking the baby out of the house, and that if he attempted to stop her, they would call detectives, who could take the child away from both parents.

According to the arresting officer, while they were attempting to resolve the restraining order issue, Meyer continually interrupted officers and stated how unfair the laws were against men in custody cases. Meyer became irate, saying Pederson was not going to take the baby, even for the rest of the night. An officer told him to calm down or he would be handcuffed. Meyer immediately threw off his watch and placed his hands

behind his back and said, "Fine! Take me to jail then!" He started to yell for his other three children, stating, "Look! See Dad get arrested and go to jail!" Because his behavior was irrational and very angry, officers handcuffed Meyer and took him to jail. Later on April 23, Pederson and the baby flew to Iowa.

PROCEDURAL HISTORY

*A. Temporary Restraining Order*⁵

The day after she arrived in Iowa with the baby, Pederson filed a motion in the California action to quash summons. In her motion, Pederson argued that California did not have jurisdiction to determine the paternity and custody of her child, and sought a restraining order against Meyer based on the incident that occurred in the early hours of April 23.

Pederson also filed a request for a temporary restraining order. In her request, she described "the most recent abuse" committed by Meyer as follows: "He woke me up. Tore off the covers and said, 'I'll kill you.' He then called me a 'cold bitch.' When police came he was arrested." The court held an ex parte hearing on April 24. The court entered an order shortening time for hearing Pederson's motions and ordered Pederson to return to California with the child for a hearing on May 4.

⁵ We again take the contents of the next two sections from our prior opinion as the procedural history between the two cases is largely shared. (*S.M. v. E.P.*, *supra*, 184 Cal.App.4th at pp. 1253-1260.)

On April 30, Pederson filed an action in the Iowa District Court for Floyd County to establish custody and child support. (*E.P. v. S.M.*, Iowa District Court for Floyd County, case No. DRCV 029319.)

At the May 4 hearing in California, the court filed a "Restraining Order After Hearing (Order of Protection)" against Meyer. The order expired after six months and named Pederson as the protected person. Meyer was listed as the restrained person and was ordered not to contact or see Pederson.

The court made no finding as to whether Meyer actually made a death threat against Pederson. However, it did make a finding that "there was a very negative comment, that there was an argument, and essentially he wouldn't stop and was badgering her. That seems pretty obvious. And so as a result of this behavior . . . [Pederson] became afraid."

B. Jurisdiction Over Paternity and Custody

When Pederson filed her first request for child support through the Iowa Department of Human Services shortly after the child's birth in 2008, both parties had stipulated that Iowa would have home state jurisdiction over the child.

On May 5, the California court issued a minute order stating that Iowa, not California, had jurisdiction over the paternity and custody matter between Pederson and Meyer because Pederson had filed a paternity case in that state shortly after the child's birth in 2008. The court stated that Pederson would be permitted to return to Iowa at any time.

C. Appeal of Restraining Order to This Court

In May 2010, this court heard Meyer's appeal of the case regarding both the restraining order and jurisdiction over the parties' custody and paternity claims. In our prior opinion, we upheld the trial court's ruling as to jurisdiction, finding that Meyer's 2008 stipulation to jurisdiction in Iowa rendered the issue moot. We also found that the trial court abused its discretion in issuing the restraining order against Meyer because in issuing the order, the court misapplied the statutory requirements and misapprehended the legal effect of the order. We reversed the restraining order against Meyer.

D. Records of Restraining Order Sealed or Destroyed

In July 2010, Meyer filed a petition in superior court for a finding of factual innocence regarding the death threat and to seal and destroy the records of the restraining order. The court granted his petition to seal and destroy the records. The record does not reflect whether the court made a finding as to Meyer's factual innocence, although Meyer's declaration states that he was found factually innocent. Meyer was never criminally charged.

E. Settlement of Iowa Paternity and Custody Case

At some point, Pederson and Meyer settled their paternity and custody case in Iowa. The record before us does not reflect the terms of that settlement.

F. Meyer's Lawsuit Against Pederson

On August 11, 2010, Meyer filed the subject complaint against Pederson in San Diego Superior Court alleging abuse of process, intentional infliction of emotional distress, and negligent infliction of emotional distress.

1. Abuse of Process Claim

The complaint alleges that Pederson requested the restraining order against Meyer without just cause or sufficient evidence, and for improper reasons. The complaint also alleged that Pederson intentionally referred to the restraining order to taint the views of the Iowa court in the custody and paternity action, thus forcing Meyer to settle the case on unfavorable terms. He asserts that this caused him to incur unnamed and unspecified damages.

2. Intentional Infliction of Emotional Distress (IIED) Claim

The complaint alleges that Pederson unconscionably used the restraining order for improper purposes, such as assisting her in willful violation of the standard restraining order, tainting the Iowa record in the paternity and custody action, forcing Meyer into unfavorable custody and settlement terms, and utilizing the restraining order to corroborate other allegations against Meyer. (Meyer did not expand on what he meant by "other allegations.") Meyer alleged that he suffered emotional distress as the result of Pederson's conduct, in the form of humiliation, extreme embarrassment, public ridicule, anger, and severe mental anguish.

3. Negligent Infliction of Emotional Distress (NIED) Claim

Meyer's NIED claim reiterates all of the claims in his IIED claim, including the same actions and same damages. The complaint does not allege that Pederson owed him any duty of care.

G. Pederson's Special Motion to Strike Complaint and Meyer's Opposition

On October 18, 2010, over 60 days after service of the complaint on Pederson, Pederson filed a special motion to strike Meyer's complaint pursuant to section 425.16 ("anti-SLAPP motion"). Her motion argued that all allegations of the complaint fell within the scope of anti-SLAPP protections as protected speech and privileged communications with law enforcement and court officers. Pederson also contended that Meyer could not show he would probably prevail on the merits because the complaint targeted only protected speech, and in the absence of any other allegations, he could not provide any admissible evidence to support the complaint.

Pederson also argued that Meyer had failed to provide sufficient admissible evidence to satisfy each required element of all three of his claims. With regard to the IIED claim, she claimed Meyer had failed to allege that Pederson's conduct was outrageous and beyond all bounds of decency, a required element of the offense. With regard to the NIED claim, Pederson contended Meyer had failed to establish that she owed him a duty of care, without which a claim for NIED cannot be sustained. With regard to the abuse of process claim, Pederson argued that all of her statements were privileged, and therefore Meyer could not allege that the use of process was not proper.

Meyer filed an opposition to Pederson's anti-SLAPP motion in which he conceded that Pederson's statements fell within the coverage of section 425.16. In support of his motion, he attached a declaration in which he asserted that Pederson had improperly used the judicial process to obtain a restraining order against him in order to gain an advantage in the custody and paternity case in Iowa. The declaration included such statements as, "I

am informed Ms. Pederson told child custody evaluators in both California and Iowa that the restraining order was issued due to domestic violence," and "I am informed that Ms. Pederson told members of my family, including my ex-wife, that the restraining order was based on domestic violence." He also stated in his declaration, "Ms. Pederson referred to the restraining order to corroborate other allegations, negate her own violation of the automatic restraining order, and assist in forcing me to settle custody and support disputes." Meyer presented no other evidence in support of his opposition.

H. Tentative Ruling and Hearing on the Anti-SLAPP Motion

On March 2, 2011, the trial court issued a tentative ruling on Pederson's motion. The court noted that Meyer had conceded in his opposition that Pederson's statements fell within the purview of section 425.16. As a result, the court evaluated the motion solely on Meyer's ability to demonstrate that he had a probability of prevailing on his claims.

The court ruled that Meyer failed to provide sufficient admissible evidence to demonstrate that the statements comprising the gravamen of his claims were not privileged under Civil Code section 47, subdivision (b). Civil Code section 47, subdivision (b) provides a litigation privilege and is interpreted to create absolute immunity for all torts except malicious prosecution. The court found that statements made during or in connection with a judicial or official proceeding are privileged, whether or not the statements were made with malice.

The court also determined that "[Meyer's] Declaration submitted in support of his opposition is conclusory, lacks foundation, is based on hearsay, and does not provide sufficient factual detail regarding the nature, content, and timing of the statements,

especially as it concerns the alleged statements made to family members and colleagues." The court noted that the declaration actually supported the idea that Pederson's statements were privileged since they were made during or in relationship to the custody and support proceedings. The court tentatively granted Pederson's anti-SLAPP motion, pending a hearing.

At the hearing, held five months after the motion was filed and seven months after the filing of the complaint, Meyer's counsel requested additional time to obtain declarations from other witnesses to substantiate his claims. Pederson's counsel objected, saying that Meyer had had seven months to obtain the evidence but failed to do so. The court did not allow the case to continue nor discovery to proceed, but it did allow the parties to submit supplemental briefs about whether Meyer's declaration was sufficient to show a probability of prevailing on the merits.

After receiving and reviewing the supplemental briefs, the court confirmed its tentative ruling and granted Pederson's anti-SLAPP motion. Meyer appeals in propria persona.

DISCUSSION

I

ANTI-SLAPP STATUTORY PROVISIONS AND STANDARD OF REVIEW

Well-accepted authorities establish a two-step process for applying section 425.16, subdivision (b): " First, the court decides whether the defendant has made a threshold showing that the challenged action is one arising from protected activity [Second,] [i]f the court finds such a showing has been made, it then determines whether the plaintiff

has demonstrated a probability of prevailing on the claim.' [Citation.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712 (*Taus*).)

Under section 425.16, subdivision (b)(1), the trial court, in ruling on such a motion, does not weigh conflicting evidence to determine whether the plaintiff will more likely than not prevail on the claim. Rather, the statute was intended to establish a summary-judgment-like procedure at an early stage of any litigation that creates a potential chilling effect on speech-related activities. (*Taus, supra*, 40 Cal.4th at p. 714.) Accordingly, when a defendant makes a threshold showing that a cause of action arises out of the defendant's speech-related conduct, the provision affords the defendant the opportunity, at the earliest stages of litigation, to have the claim stricken if the plaintiff is unable to demonstrate both that the claim is legally sufficient and that there is sufficient evidence to establish a prima facie case with respect to the claim. (*Ibid.*)

We review an order granting an anti-SLAPP motion under the de novo standard of review. (*PrediWave Corp. v. Simpson Thatcher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1220.) "In other words, we will employ the same two-step procedure as did the trial court in determining whether the anti-SLAPP motion was properly granted." (*Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 703 (*Lefebvre*).)

II

MEYER'S CLAIMS INVOLVE PRIVILEGED STATEMENTS MADE BY PEDERSON

A. Types of Privileged Communications Protected by Section 425.16

When evaluating an anti-SLAPP motion, we first determine whether the defendant's actions arose out of privileged activity. A privileged activity encompasses

two types of statements: statements made in the exercise of free speech, which includes statements made to law enforcement officers or in the furtherance of judicial proceedings (Civ. Code, § 47, subd. (b) [absolute litigation privilege]) and/or protected petitioning activity, section 425.16, subdivision (e)(1)-(3).

Protected petitioning activity is defined as any written or oral statement or writing made before any official proceeding authorized by law, any written or oral statement or writing made in connection with an issue under consideration or review by a judicial body, or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest. (§ 425.16, subd. (e)(1)-(3).) Protected petitioning activity includes reporting a suspected crime to authorities. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103-104.) Speech is also protected if it is made in connection with an issue under consideration or review in an official proceeding, regardless of whether the speech concerns an issue in litigation or an issue of public interest. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.)

The absolute litigation privilege bars a civil action for damages for communications made in any judicial proceeding. (Civ. Code, § 47, subd. (b).) This is an absolute privilege that bars all tort causes of action in California arising out of statements made in any judicial proceeding, except for malicious prosecution. (*Hagberg v. Federal Bank FSB* (2004) 32 Cal.4th 350, 360 (*Hagberg*).)

On the face of the record, we believe that all of Pederson's statements fall within the purview of either protected petitioning activity or the absolute litigation privilege.

B. Meyer Conceded that Pederson's Statements Were Privileged

Meyer claims that Pederson's statements were not privileged and therefore ineligible for anti-SLAPP protection. In his opposition to Pederson's anti-SLAPP motion, he conceded that some of Pederson's statements were privileged: "Dr. Meyer concedes that his complaint for abuse of process falls within the confines of [] § 425.16." He also admitted, "Dr. Meyer's claim is not based solely on the filing of the erroneous restraining order, but on Ms. Pederson's conduct afterward as well. [Her] statements made before the Iowa Court and in settlement negotiations, *while perhaps a limitation on liability*, still can be used to show that she acted with an improper purpose and in an improper manner" (Italics added.) Meyer urges us to use our de novo standard of review to "correct" these concessions because they concern a matter of law. We decline to do so.

De novo review allows an appellate court to apply its independent judgment regarding matters of law. (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 478.) This independent review standard applies only to actions of the trial court, not to those of the litigants. While Meyer correctly states that the effect of his concession regarding the privileged nature of Pederson's statements is a matter of law, it is not a matter of law that was decided by the trial court. While we can correct errors of judgment made by a court, we cannot use this standard to correct errors of strategy made by litigants. While Meyer may regret conceding such a crucial point, it is not an error that we are able to remedy.

C. Even if He Had Not Conceded the Point, Pederson's
Statements Were Still Privileged

Even if Meyer had not conceded the point, Pederson's statements were privileged and fell within the coverage of anti-SLAPP provisions. Abuse of process claims are not exempt from anti-SLAPP motions, although malicious prosecution claims are. (*Hagberg, supra*, 32 Cal.4th at p. 360; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 742.) Meyer's claims all stem from comments made by Pederson either during the course of judicial proceedings, to law enforcement officials in anticipation of or as a result of judicial proceedings, or to family and friends about the judicial proceedings. They all arise out of Pederson seeking a restraining order. Consequently, they are all privileged under Civil Code section 47, subdivision (b), and section 425.16, subdivision (e), and are therefore subject to anti-SLAPP protection. (*Brenton v. Metabolife Intern., Inc.* (2004) 116 Cal.App.4th 679, 685 ["[T]he 'arising from' prong encompasses any action *based on* protected activity or petitioning activity as defined in the statute"]; original italics.)

Meyer nevertheless asserts Pederson's statements were not privileged because the police report she filed was false and she "lied" to police. In arguing this, Meyer relies on *Lefebvre, supra*, 199 Cal.App.4th 696, which held that knowingly making a false police report may destroy the privilege of Civil Code section 47. (*Lefebvre, supra*, at p. 703.) Meyer, however provides no support for his claim that Pederson knowingly filed a false police report. The trial court did not find the report was false, but declined to reach the matter. A later finding of innocence does not necessarily prove a police report was based on information that was given falsely, knowingly and intentionally. The effect of the

report, which Meyer claims was to force him to settle his custody and support cases on unfavorable terms, does not establish that Pederson made it with a malicious or wrongful intent. In the absence of any probative evidence that Pederson intentionally or knowingly made a false police report, we find that her statements fell within the coverage of section 425.16, subdivision (e), and were therefore protected.

Therefore, we consider this first part of this analysis satisfied, and affirm the trial court's determination that Pederson met her burden. In particular, Meyer's abuse of process claim falls under the absolute litigation privilege, and all other claims attack protected petitioning activity. Regarding the latter claims, we next evaluate whether Meyer has met his burden under the second part of the anti-SLAPP analysis: demonstrating his probability of prevailing on the merits.

III

MEYER FAILED TO PRESENT SUFFICIENT ADMISSIBLE EVIDENCE TO SHOW A PROBABILITY OF PREVAILING ON THE MERITS

Once a defendant has successfully demonstrated that his or her statements are privileged under section 425.16, the burden shifts to the plaintiff to provide sufficient admissible evidence to demonstrate a likelihood of prevailing on the merits. (*Taus, supra*, 40 Cal.4th at p. 712.) Only admissible evidence is considered, and we accept as fact all evidence favorable to the plaintiff. (*Lefebvre, supra*, 199 Cal.App.4th at p. 702.) The filing of an anti-SLAPP motion stays all discovery. (§ 425.16, subd. (g).) However, a party may file a motion to allow discovery in order to obtain sufficient admissible evidence, particularly if evidence from which actual malice may be proven is not readily

available. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 93.)

Litigants may also obtain declarations and other evidence from friendly witnesses, since that activity is not contrary to the purposes of the discovery stay (to reduce the costs of discovery while the motion is pending). (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1190 (*Mattel*) ["[N]ot only did the Legislature desire early resolution to minimize the potential costs of protracted litigation, it also sought to protect defendants from the burden of traditional discovery pending resolution of the motion."].)

To meet the requirement imposed by section 425.16, Meyer presented his own declaration signed on February 4, 2011, 30 days before the hearing on the motion and four months after the motion was filed. He presented no other evidence. Under penalty of perjury, Meyer declared that:

"16: . . . I petitioned the Superior Court for factual innocence and to seal and destroy the records of the restraining order. On July 7, 2010, the petition was granted and the records were sealed or destroyed. . . . [¶] . . . [¶] 18. Ms. Pederson referred to the restraining order to corroborate other allegations, negate her own violation of the automatic restraining order, and assist in forcing me to settle custody and support disputes. [¶] 19. I am informed that Ms. Pederson told child custody evaluators in both California and Iowa that the restraining order was issued because of domestic violence. [¶] 20. . . . [A]s a result of Ms. Pederson continuing to refer to the restraining order as a domestic violence restraining order . . . I was forced to settle the custody dispute in Iowa, and drop my appeal regarding California's jurisdiction, out of fear that I would lose all visitation rights of my child. [¶] 21. I am informed that Ms. Pederson told members of my family, including my ex-wife, that the restraining order was based on domestic violence. Further, I am informed that she referred to it after it 'naturally expired' and even after it was rejected by the Court of Appeal. [¶] 22. I am informed that Ms. Pederson told people I work with that the restraining order

was based on domestic violence. Further, I am informed that she referred to it after it 'naturally expired' and even after it was rejected by the Court of Appeal.

The trial court did not find this declaration probative because it "is conclusory, lacks foundation, is based on hearsay, and does not provide sufficient factual detail regarding the nature, content, and timing of the statements especially as it concerns the alleged statements made to family members and colleagues." The court ruled that Meyer had failed to provide a sufficient amount of evidence, and the small amount of evidence that he did provide was not admissible. Meyer challenges these findings.

A. Meyer Failed to Provide Sufficient Evidence to Establish a Probability of Prevailing on the Merits

Meyer submitted only his own declaration, drafted one month before the hearing and nearly four months after the discovery stay, to meet the demands of section 425.16. He claims that, due to the discovery stay, he was unable to obtain further declarations from friends and family, and that his declaration, taken as true, is more than sufficient to meet the demands of section 425.16. We cannot agree.

To demonstrate a probability of prevailing at trial, a plaintiff need only provide a prima facie showing of facts supporting his or her claims, and on appeal, we consider the issue under a standard similar to that employed in determining nonsuit, directed verdict, and summary judgment motions. (*M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 629-630.) In doing so, we neither weigh credibility nor compare the weight of the evidence; rather, we accept as true the evidence favorable to the plaintiff and evaluate the

defendant's evidence only to determine if it defeats that submitted by plaintiff, as a matter of law. (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1478.)

The evidence submitted by Meyer was insufficient to establish his probability of prevailing at trial. He provided only his own declaration about statements made to other people that he did not hear firsthand.⁶ Even accepting the statements as true, they alone do not establish a probability of prevailing on the merits. Meyer provides no specifics in his declaration: no names, dates, locations, or specific statements made.

Moreover, Meyer has failed to provide even minimal evidence to address the elements of each of his causes of action. In his NIED claim, he cannot allege any duty of care owed to him by Pederson, which is an absolute prerequisite for such a claim. In his IIED claim, he alleges no outrageous behavior that shocks the conscience; as disheartening as it is to witness an ex-lover making disparaging comments to the other's family and friends, such behavior is common and not necessarily outrageous.

Even if we need to address the abuse of process claim here, despite absolute privilege, Meyer provides nothing other than his own assertion that the police report was made for the purpose of giving Pederson a more favorable position in a future custody hearing. Even if this were the effect of the restraining order, that factor does not itself prove that Pederson had malicious intent in filing the police report in the first place. Without evidence other than Meyer's assertion, we cannot find that he has met his burden.

⁶ We discuss the admissibility of the evidence in part IIIB, *post*.

We also do not accept Meyer's claim that he was unfairly constrained by the discovery stay. The discovery stay is intended to spare the defendant the cost of formal discovery while the anti-SLAPP motion is pending. (See *Mattel, supra*, 99 Cal.App.4th at p. 1190.) It does not prevent a litigant from obtaining favorable declarations, and Meyer potentially could have done so from family members and friends who heard Pederson make her statements. Even if he had been constrained by the discovery stay in that respect, there is no reason he could not have included in his declaration the names of such declarants or of specific witnesses who would testify. His failure to do so required the trial court to evaluate his statements based on his own assertions, but not on any facts, and that was insufficient to show a probability of prevailing.

B. Meyer's Declaration Contained Inadmissible Evidence

The trial court ruled that Meyer's declaration was "conclusory, lacks foundation, is based on hearsay, and does not provide sufficient factual detail regarding the nature, content, and timing of the statements." The court found major portions of his declaration were inadmissible, and since a plaintiff must show sufficient admissible evidence to overcome the burden of section 425.16, it concluded that Meyer failed to meet this burden. We agree.

As previously discussed, Meyer's statements failed to allege any specifics. He alleges that third parties heard statements made by Pederson about him, but fails to specify the exact nature or content of the statements, when Pederson made the statements, or even name the people who heard the statements. Without this information, the statements lack foundation and are based on hearsay, which is inadmissible. (Evid. Code,

§§ 702, subd. (a); 1200.) When all inadmissible statements are removed from consideration, Meyer's declaration leaves us with nothing to consider. The trial court correctly determined that Meyer failed to meet his burden, and it appropriately granted Pederson's motion.

DISPOSITION

The order is affirmed. Costs on appeal are awarded to Respondent.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

AARON, J.