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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL H. FERRARO,

Plaintiff and Respondent,

v.

MARTIN A. FERRARO, et al.,

Defendants and Appellants.

G044937

(Super. Ct. No. 30-2010-00382036)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, David Hood, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Macrae & Edrington and Eric C. Chase; Law Offices of Lawrence A. Strid and Lawrence A. Strid for Defendants and Appellants.

Jeffrey S. Benice for Plaintiff and Respondent.

Michael and Martin Ferraro are twin brothers. After Michael choked Martin's son at a family gathering, Martin called the police and Michael was arrested and prosecuted for child abuse and battery. Following his acquittal, he sued Martin for, inter alia, malicious prosecution. Martin contends the trial court erred in denying his "anti-SLAPP" motion to dismiss Michael's lawsuit (Code Civ. Proc., § 425.16), and we agree. Because Michael failed to demonstrate a reasonable probability of prevailing on his claims, we reverse the trial court's ruling.

### FACTS

One evening, Martin invited Michael and his family over to his house for dinner. Martin's 13-year-old son Eric and his girlfriend Karen Fovos were also in attendance, as were Eric's grandparents. Following supper, everyone was sitting around the dinner table, talking and enjoying dessert. The mood was light until something happened between Michael and Eric. While they were talking to each other, Michael suddenly stood up and started choking Eric. Eric tapped Michael's arm, signaling for him to stop, but Michael persisted for several more seconds before finally letting go. When he did, Martin asked him what he was doing, and they argued briefly. Then Michael left with his family, and Martin called the police.

Sheriff's Deputy Christine Chang responded to the scene. As reflected in her report, Martin told her Eric made a statement to Michael jokingly, which upset Michael. Michael then got up and choked Eric for about 15-20 seconds, causing him to pass out briefly. In addition to telling Chang about the choking incident, Martin told her Michael owned guns, and he wanted to obtain a restraining order against him. Martin also said he wanted Michael to be prosecuted for what he did to Eric.

Eric told Chang that he and Michael were joking about each other's hair after dinner when Michael said to him, "You think you're tough, punk? Let's go." Thinking Michael was only joking, Eric replied, "Yeah, I can take you." Then Michael got up and started choking him until he passed out. Eric felt nauseated afterward, and

when Chang interviewed him, she noticed two red marks, about two inches long, on his neck. Later that night, Martin took Eric to the hospital to be examined. There is no evidence Eric sustained any other injuries.

Eric's grandfather reported to Chang that he heard both Eric and Michael say "let's go" while they were bantering back and forth at the dinner table. Then Michael stood up, wrapped his hands around Eric's neck, and told him, "Shut up or I'll break your jaw."

Fovos reported she heard Eric tell Michael, "I can take you," but she thought he was only joking around. She was surprised when Michael started choking Eric.

After finishing up her interviews at Martin's residence, Chang went to Michael's home to continue her investigation. Michael's wife said she did not actually see the incident involving Michael and Eric, but she did hear Eric provoking Michael and challenging him to fight.

Michael told Chang that after dinner, Eric started getting "mouthy" with him by calling him a "fag" and making fun of his hairdo, which Eric referred to as a "comb over." Michael said that prompted him to grab Eric's "upper torso," but he denied choking him. He claimed he was only trying to "straighten [Eric] out," not hurt him, although he admitted he did not have permission to discipline Eric. At that point in the interview, Chang arrested Michael for assault, battery and child abuse and placed him in the back of her squad car. Inside the car, Michael told Chang, "Eric threatened to kick my ass so I grabbed him. I didn't intentionally try to hurt him."

Chang took Michael to the Orange County jail, where he was booked into custody before eventually being released on bail. Chang also filed a report with the child abuse registry and contacted a judge, who issued an emergency protective order requiring Michael to stay away from Eric and Martin.

Michael was subsequently charged in a misdemeanor complaint with one count of child abuse and one count of battery with serious bodily injury. (Pen. Code, §§ 273a, subd. (a), 243, subd. (d).) However, a jury acquitted him of the charges, and on Michael's motion, the trial court subsequently found he was factually innocent. (Pen. Code, § 851.8.)<sup>1</sup>

In the wake of that ruling, Michael sued Martin and Fovos (defendants) for malicious prosecution, false arrest, intentional infliction of emotional distress and negligent supervision. In the complaint, Michael alleged defendants acted maliciously and without probable cause in reporting him to the police. He also alleged Eric had a history of violent behavior and had tried to provoke him on previous occasions. It was Michael's position that he acted in lawful self-defense during the incident that led to his arrest and prosecution.

Defendants answered the complaint with a general denial of any wrongdoing. Then, following discovery, they filed a motion to dismiss Michael's complaint pursuant to Code of Civil Procedure section 425.16. In support of their motion, defendants submitted several exhibits, including Deputy Chang's report and photographs she took of Eric's neck following his run-in with Michael. They also submitted deposition testimony from Eric's grandparents, who said they did not see Eric try to hit or attack Michael before Michael started choking him.

In addition, defendants submitted deposition testimony from Deputy District Attorney Dennis Conway. Conway stated that, based on Chang's report, he and another prosecutor in his office made the decision to file criminal charges against Michael. Conway said defendants never contacted him or had any direct input in that decision, although they did testify for the prosecution at Michael's trial.

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<sup>1</sup> We mention the criminal court's finding of factual innocence only to help explain the procedural posture of this case, recognizing it is not admissible as substantive evidence in Michael's lawsuit. (Pen. Code, § 851.8, subd. (i)(1).)

In opposing the motion, Michael filed a declaration in which he admitted choking Eric. However, he claimed he acted in self-defense. He said although Eric was only 13 years old at the time of the incident, he was five foot nine inches tall and weighed “a muscular” 160 pounds. Michael was 54 years old, five foot ten inches, and weighed 170 pounds. After dinner, Eric took off his cap and shook his head, causing dirt and debris from his hair to fall on Michael. When Michael asked him what he was doing, Eric replied, “At least I don’t have a comb-over like you.” Eric then told Michael he was going to “kick [his] ass” and moved “aggressively” toward him. Michael responded by grabbing Eric’s neck for a few seconds until he settled down, then he let go.

Michael further alleged that, based upon prior conversations with Martin, he knew Eric was a violent and unbalanced person. Michael did not think Martin should have invited Eric to the dinner, knowing of his dangerous propensities.

At the motion hearing, the court found defendants carried their initial burden of showing their actions in calling the police were grounded in First Amendment activity. However, based on Michael’s declaration alleging self-defense, the court also determined that Michael had demonstrated a reasonable probability of prevailing on his claims. Therefore, the court denied defendants’ motion to dismiss.

#### DISCUSSION

Defendants contend the trial court erred in denying their motion, and we agree.

“Code of Civil Procedure section 425.16, the anti-SLAPP statute, provides in relevant part: ‘A cause of action 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 or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.’ [Citation.] Under this statute, the party moving to strike a cause of action has the initial burden to show that the cause

of action ‘aris[es] from [an] act . . . in furtherance of the [moving party’s] right of petition or free speech. [Citations.] Once that burden is met, the burden shifts to the opposing party to demonstrate the ‘probability that the plaintiff will prevail on the claim.’ [Citations.]” (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 964-965.)

At trial and in his appellate brief, Michael did not dispute his lawsuit arose from acts in furtherance of defendants’ right of petition or free speech. However, at oral argument before this court he claimed otherwise, relying on the recent case of *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696. In *Lefebvre*, the court found the defendants’ actions in filing a police report against the plaintiff did not involve an exercise of the right of petition or free speech. But that’s because the record conclusively established the defendants’ statements were false, and thus illegal. Indeed, defendants did not dispute they “submitted an illegal, false criminal report” against the plaintiff. (*Id.* at p. 705.) Therefore, the defendants’ anti-SLAPP motion was properly denied. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320 [actions which are admittedly or conclusively established to be illegal are not protected under Code Civ. Proc., § 425.16].)

Here, in contrast, the falsity of defendants’ statements to Deputy Chang has not been conclusively established, nor do defendants admit they submitted an illegal, false report against Michael. *Lefebvre* is thus of no assistance to Michael in terms of defeating defendants’ motion. Because defendants’ statements were made in response to a perceived wrongdoing for the purpose of garnering police assistance, they are within the scope of the anti-SLAPP statute. (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1286; *Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1512; *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570.) Therefore, we will proceed to the second part the statute.

“The second step of the anti-SLAPP procedure – a ‘probability of prevailing’ on the merits – means a plaintiff must show that he or she has ‘a reasonable probability of prevailing, not prevailing by a preponderance of the evidence. For this reason, a court must apply a “summary-judgment-like” test [citation], accepting as true

the evidence favorable to the plaintiff and evaluating the defendant's evidence only to determine whether the defendant has defeated the plaintiff's evidence as a matter of law.

[Citation.] A court may not weigh credibility or compare the weight of the evidence.

The court's single task is to determine whether the plaintiff has made a prima facie showing of facts supporting his or her cause of action. [Citation.], [Citation.]”

(*Lefebvre v. Lefebvre*, *supra*, 199 Cal.App.4th at p. 702.) On appeal, we review that issue de novo, independently of the trial court's ruling. (*Id.* at p. 703.)

In order to establish a claim for the malicious prosecution of a criminal action, the plaintiff must prove the prior action was: 1) commenced by or at the direction of the defendant; 2) terminated in plaintiff's favor; 3) brought without probable cause; and 4) initiated with malice. (*Zamos v. Stroud*, *supra*, 32 Cal.4th at p. 966; *Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871-872.) We agree with defendants that Michael failed to carry his burden of proving a reasonable probability of success on the third element, lack of probable cause, so we need not reach the other elements.<sup>2</sup>

“When, as here, the claim of malicious prosecution is based upon initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant . . . to suspect the plaintiff . . . had committed a crime.

[Citations.]” (*Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal.App.4th 1320, 1330.)

“The resolution of that question of law calls for the application of an objective standard to the facts on which the defendant acted. [Citation.]” (*Ibid.*, italics omitted.)

It is undisputed Michael choked Eric in an aggressive manner after they exchanged words at the dinner table. The content of their conversation is not entirely clear, but none of the people who witnessed the incident reported that Eric did anything physically aggressive toward Michael to justify a possible claim of self-defense. Nor did Michael report any sort of physical aggression on Eric's behalf. Rather, he told Deputy

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<sup>2</sup> We agree with the parties the prior action was terminated in Michael's favor.

Chang he grabbed Eric because he was mouthing off and he wanted to “straighten him out.” In conceding he did not have permission to do so, Michael candidly admitted he was trying to “discipline” Eric, which is inconsistent with the notion of self-defense.

In his declaration in opposition to defendants’ motion, Michael did not specifically dispute the statements attributed to him in Chang’s report. However, he did materially alter his story by alleging he choked Eric only after Eric began to move toward him in an aggressive fashion. In the context of a malicious prosecution action, self-defense is a relevant consideration in determining whether probable cause existed in the underlying criminal case. (See, e.g., *Starkweather v. Eddy* (1930) 210 Cal. 483 [reversing judgment for defendants in malicious prosecution action where plaintiff’s alleged assault was precipitated by an incident in which he was threatened with grievous bodily injury].) However, a party cannot create an issue of fact by a declaration which contradicts his prior statements, absent an explanation for the contradiction. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12; *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 548.)

Michael has never offered any explanation for why he told Deputy Chang his motive for going after Eric was to discipline him and “straighten him out,” while in his later declaration he claimed to have acted in self-defense. The statements are clearly at odds with one another, and there is no evidence other than Michael’s self-serving declaration that raises the specter of self-defense. That being the case, Michael cannot rely on his own declaration to defeat defendants’ motion. Removing the issue of self-defense from the equation, it was entirely reasonable for defendants to believe Michael committed a crime by choking Eric to the point of unconsciousness. Therefore, it cannot be said they lacked probable cause in reporting his conduct to the police. Michael’s failure to demonstrate a reasonable probability of prevailing on the issue of probable cause means his claim for malicious prosecution must be dismissed.

Irrespective of the probable cause issue, Michael's claims for false arrest and intentional infliction of emotional distress must also be dismissed. That's because those claims are based on the statements defendants made to Deputy Chang, and citizen reports to the police regarding alleged criminal activity fall within the litigation privilege contained in Civil Code section 47, subdivision (b). (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350 [the privilege applies to all tort actions, except malicious prosecution, arising from reports made to the police about possible criminal conduct]; accord, *Chabak v. Monroy, supra*, 154 Cal.App.4th at pp. 1513-1514; *Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, 1502-1504; *Cote v. Henderson* (1990) 218 Cal.App.3d 796, 806; *Williams v. Taylor* (1982) 129 Cal.App.3d 745, 753-754.)

That leaves only Michael's claim for negligent supervision. In his complaint, Michael alleged that, given Eric's violent propensities, Martin should have known Eric was likely to cause a physical altercation with him on the night in question. Michael also alleged Eric verbally assaulted him as a consequence of Martin's failure to properly supervise Eric that evening. However, Michael did not allege any particular harm or damages that resulted from the alleged assault. Rather, he merely maintained he was forced to protect himself, which is what led to him being arrested. That brings us back to the issue of self-defense and whether defendants had probable cause to suspect Michael committed a crime by choking Eric. Those are issues that are subsumed within Michael's other claims. Because Michael has not demonstrated a reasonable probability of prevailing on those claims, his cause of action for negligent supervision cannot survive. (See generally *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92 [applicability of anti-SLAPP statute is determined not by the label of plaintiff's cause of action but the defendant's action that allegedly gives rise to his or her asserted liability].)

At bottom, it is abundantly clear all of Michael's claims stem from defendants' actions in reporting him to the police for choking Eric. Because those actions were in furtherance of defendants' First Amendment rights, and because Michael

has failed to make a prima facie showing of facts to support his claims, his lawsuit cannot go forward.

DISPOSITION

The trial court's order denying defendants' motion to dismiss plaintiff's complaint is reversed. Defendants shall recover their costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.