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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SHERRY L. LUND,

Plaintiff and Respondent,

v.

DOMINIQUE MERRICK,

Defendant and Appellant.

G045654

(Super. Ct. No. 30-2011-00464163)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Reversed.

Sheppard, Mullin, Richter & Hampton, Brian M. Daucher and Adrienne W. Lee, for Defendant and Appellant.

Bohm, Matsen, Kegel & Aguilera, James G. Bohm and Ryan Kossler, for Plaintiff and Respondent.

## INTRODUCTION

This is an appeal from an order denying an anti-SLAPP<sup>1</sup> motion made by appellant Dominique Merrick after she was sued for slander and intentional infliction of emotional distress by her friend Michelle Lund's stepmother, Sherry Lund. The trial court found in Merrick's favor on the issue of whether the allegedly slanderous statement was protected activity, but ruled against Merrick on the issue of whether Sherry had passed the probability-of-prevailing test.

We reverse. We agree that the statement was protected activity, but we disagree that Sherry produced enough evidence to support a prima facie case for either slander or emotional distress. The trial court should have granted the anti-SLAPP motion.

## FACTS

Michelle Lund is the daughter of Sharon Disney Lund (now deceased) – Walt Disney's daughter – and William Lund. Michelle has a twin brother, Bradford, who lives in Arizona with William and his present wife, respondent Sherry Lund. Michelle and Bradford are beneficiaries of trusts Sharon set up before her death. The cotrustees of Michelle's trust are Robert Wilson, Andrew Gifford, and First Republic Trustees.

In September 2009, at age 39, Michelle suffered a brain aneurysm and was hospitalized for two months. She spent more months in rehabilitation. In November 2009, her friend Dominique Merrick became her temporary conservator. Merrick's temporary conservatorship was terminated in July 2010, upon Michelle's recovery.<sup>2</sup>

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<sup>1</sup> "SLAPP" is an acronym for "strategic lawsuit against public participation," and refers to a lawsuit which both arises out of defendants' constitutionally protected expressive or petitioning activity, and lacks a probability of success on the merits. (Code Civ. Proc., § 425.16; *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 377.)

<sup>2</sup> The conservatorship case did not close when Merrick's temporary conservatorship ended in July 2010. In December 2010, William and Bradford petitioned the court to appoint them and another person conservators of Michelle's person. In June 2011, Sherry became a party to the conservatorship proceedings.

Merrick hired a bodyguard for Michelle on the day after she was released from the hospital in the fall of 2009.<sup>3</sup>

In February 2011, Michelle was deposed in Phoenix in an Arizona action to remove William as the managing member of a real estate company funded from Michelle's assets. During the deposition, which Sherry attended, Michelle was asked whether she felt threatened by Sherry. Michelle responded that she did. When asked why, Michelle said, "I've learned some things about her that just don't make me feel secure." Asked to explain, Michelle said, "There was a theory that, that she had hired a man. I don't – I can't give you dates, but to – to harm someone else and this man that was hired is now in jail." William's lawyer inquired where she had obtained this information; Michelle turned to her counsel and said, "Do I have to answer that?" Her lawyer cautioned her not to reveal any communications with counsel, but told her to respond if she learned it from a non-privileged source. Michelle then stated she had learned it from Merrick. When Michelle reviewed her deposition transcript approximately a month later, she made the following handwritten entry on the correction sheet supplied by the Arizona deposition officer: "Did not hear it 1st from Dominique." Under the "reason" column, Michelle wrote, "Attorney-client privilege [*sic*]."

Sherry filed suit against Merrick in April 2011, alleging two causes of

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<sup>3</sup> In her declaration supporting Merrick's motion, Michelle stated that a bodyguard was provided for her in light of William and Sherry's unsuccessful efforts to remove her to Arizona while she was ill.

action: defamation and intentional infliction of emotional distress.<sup>4</sup> The defamation claim alleged that “[o]n or about November 6, 2009, Defendant Merrick spoke the following words of and concerning [Sherry]: [Sherry] ‘had hired a man to harm someone else, and this man that was hired is now in jail.’” The emotional distress cause of action was based on the same oral statement. Sherry further alleged that Merrick made this statement to “cause Michelle to believe that [Sherry] would in fact hurt her,” to “convince [Michelle] that she needed to hire bodyguards for her protection[,] and to cut her off from the family that loved her so that [Merrick] could take financial advantage over Michelle [*sic*].”

Merrick filed an anti-SLAPP motion in May 2011. The motion included a declaration from Michelle, in which she explained that she had not learned of the “theory” about Sherry hiring a man to harm someone from Merrick. Although she and Merrick had discussed the theory, Michelle had actually heard it for the first time in April 2010 during a meeting at her home. The participants at this meeting included Michelle, Merrick, Michelle’s own lawyers, and two other lawyers. The purpose of the meeting was to explore the possibility of Michelle’s joining with her aunt and her half-sisters in the petition for conservatorship over Bradford pending in Arizona. The other two lawyers represented Michelle’s aunt and half-sisters in the conservatorship action.

At this meeting, one of the other lawyers, Brian Murphy, told everyone present that he had learned from Sherry’s former husband, William Blair, that the police

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<sup>4</sup> This case is but one in a galaxy of cases and other proceedings relating to Michelle and Bradford filed between October 2009 and April 2011. In addition to Michelle’s conservatorship petitions and a separate petition by Merrick and Wilson to terminate William’s power of attorney for health care for Michelle, Wilson and Gifford petitioned to remove William as a trustee of Bradford’s trust; Bradford twice petitioned to remove Wilson and Gifford as trustees of his trust; Sharon’s sister (Bradford’s and Michelle’s aunt) and two of William’s daughters from a prior marriage petitioned the probate court in Arizona to appoint a conservator for Bradford, a proceeding that Michelle later joined; Michelle sued William in Arizona for misconduct as a manager of her limited liability company; William and Sherry filed a complaint against William’s son-in-law (a psychiatrist) with the Wyoming Board of Medicine over a declaration supporting the termination of William’s power of attorney for health care; William, Sherry, and Bradford sued another of William’s daughters and her husband in Arizona (in two separate suits); Bradford sued Wilson and Gifford in Arizona; and Bradford and one of Sherry’s daughters sued Wilson’s wife in California for assault and battery alleged to have occurred while they were all visiting Michelle in the hospital.

had arrested and jailed a man who had been hired to harm Blair. Blair also told Murphy that he believed Sherry to be behind the hiring. Murphy passed this information along to the people at the meeting.

Declarations from Merrick and from one of Michelle's lawyers, who were also present at the meeting, confirmed the source of this information. In her declaration, Merrick admitted discussing Murphy's statement with Michelle, but only in the context of whether Michelle should continue employing her bodyguard, which had been in place since November 2009. Merrick also stated that she too first heard the "theory" when Murphy raised it at the meeting.

The admissible evidence Sherry submitted in opposition to the anti-SLAPP motion did not address the source of the statement about her, the date of the meeting in which it was first conveyed to Michelle and Merrick, or the context in which Merrick subsequently uttered the statement to Michelle. In her declaration, Sherry characterized the statement that she had hired someone to harm someone else as false and "horrible lies" made up by Merrick. She provided no evidence to support her contention that Merrick was the source of the statement.

The court denied the anti-SLAPP motion, ruling that although the statement was protected activity, Sherry had "adequately, but barely, established a probability of prevailing on her defamation and IIED [intentional infliction of emotional distress] causes of action." Michelle appealed; Sherry did not cross-appeal.

## **DISCUSSION**

The California Legislature enacted the anti-SLAPP statute to counteract "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." (Code Civ. Proc., § 425.16, subd. (a).) A court may order a cause of action "arising from any act" "in furtherance" of the "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" to be

stricken by means of this special motion. (Code Civ. Proc., § 425.16, subd. (b)(1).)<sup>5</sup>

We use a two-part test to evaluate an anti-SLAPP motion. First, we determine whether the complaint or cause of action is “one arising from protected activity.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) As the Supreme Court has emphasized, “[T]he critical consideration is whether the cause of action is *based on* the defendant’s protected free speech or petitioning activity.” (*Id.* at p. 89.) If the defendant satisfies the first part of the test, the burden shifts to the plaintiff to demonstrate a probability of prevailing. (*Id.* at p. 88.) Although the plaintiff does not have to prove its case at this juncture, it must present a *prima facie* case that could sustain a judgment if its evidence were believed. (*Id.* at pp. 88-89.) We exercise our independent judgment to determine both whether the anti-SLAPP statute applies and whether the plaintiff has established a probability of prevailing on the merits. (*Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1544.)

## **I. Protected Activity**

The trial court ruled that Merrick had shown her statement to be protected activity under Code of Civil Procedure section 425.16, subdivision (e)(2), as a statement made in connection with an issue under consideration by a judicial body. We agree.<sup>6</sup> At the time the allegedly slanderous statement was first published to Michelle, Merrick was the temporary conservator of Michelle’s person. The allegations of the complaint and the evidence submitted by both Michelle and Merrick – the only evidence before the court on

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<sup>5</sup> The statute defines an “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” to include “any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . . .” (Code Civ. Proc., § 425.16, subd. (e).)

<sup>6</sup> Although Sherry did not cross-appeal from the trial court’s ruling on protected activity, the error of which Merrick complains is the court’s ruling that Sherry had satisfied her burden to present evidence supporting her probability of prevailing. But the court could not have arrived at that point in the analysis if it had not already ruled that Merrick engaged in protected activity. If this ruling is wrong, then an incorrect ruling on probability of prevailing could not prejudice Merrick. Accordingly, we may review this aspect of the court’s ruling even though Sherry did not file a cross-appeal. (See *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 22, fn. 5; *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1671; Code Civ. Proc., § 906.)

this subject – established that the discussion between Merrick and Michelle regarding Sherry’s hiring someone to harm her ex-husband took place while Merrick was Michelle’s conservator and that it involved Michelle’s personal security. Michelle had acquired bodyguards in November 2009 because she feared that William and Sherry would try to take her to Arizona against her will.<sup>7</sup> The conversation regarding Sherry occurred in the context of continuing to employ these bodyguards.

Probate Code section 2250 allows a court to appoint a temporary conservator of the person on a showing of good cause. The temporary conservator has the powers of a conservator “that are necessary to provide for the temporary care, maintenance, and support of the . . . conservatee . . . .” (Prob. Code, § 2252, subd. (a).) A person petitioning to become a conservator must execute and file a Judicial Council form acknowledging the receipt of Duties of Conservator and Acknowledgment of Receipt of Handbook. (See Cal. Rule of Court, rule 7.1051.) The form admonishes the proposed conservator of the person that “you are responsible for the conservatee’s care and protection.”

Courts have adopted a “fairly expansive view” of what constitutes statements made in connection with an issue under consideration by a court. (See *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908, and cases cited therein; see also *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1549 [letter to newspaper regarding lawsuit protected activity under Code Civ. Proc., § 425.16, subd. (e)]; *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 962-963 [settlement negotiations]; *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 36 [voice mail messages in connection with disputed asset and threats of litigation].) As Michelle’s

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<sup>7</sup> When Michelle became ill in September 2009, William had her power of attorney for health care. Wilson and Merrick petitioned the court to suspend William’s power of attorney. Pending resolution of this issue, the court ordered that Michelle not be moved out of California.

conservator, Merrick was charged with responsibility for her care and protection, including her personal security. This is not a case of two people gossiping about a third.

Assuming Merrick's statement regarding Sherry was defamatory, it falls within the anti-SLAPP statute's protection as an oral statement made in connection with an issue under review or consideration by a judicial body. (*Healy v. Tuscan Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5.) Their conversation easily fits within the boundaries of Code of Civil Procedure section 425.16, subdivision (e). Accordingly we do not need to consider whether it is also protected activity under any other portion of the anti-SLAPP statute.

## **II. Probability of Prevailing**

But, of course, that is only half the inquiry. Once a defendant has established the conduct complained of is protected activity, the burden shifts to the plaintiff to show a probability of prevailing. (*Navellier v. Sletten, supra*, 29 Cal.4th at pp. 88-89.) The plaintiff need only establish a prima facie case, but the case must be based on admissible evidence. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1346.)

### **A. Prima Facie Case – Slander**

The causes of action for defamation – libel and slander – protect an individual's interest in his or her reputation.<sup>8</sup> (See *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 743.) In American jurisprudence, the interest in reputation has coexisted uneasily with guarantees of free speech and freedom of the press. (See *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 325; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 858.) As a result, a defamation action is hedged about with conditions, both constitutional and statutory, limiting the circumstances under which statements can be

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<sup>8</sup> “Who steals my purse steals trash,” Iago tells Othello. “But he that filches from me my good name/ robs me of that which not enriches him/ and makes me poor indeed.” These sentiments would perhaps be more inspiring if Iago had not just opined to Cassio, in the prior act, that “reputation is an idle and most false imposition; oft got without merit, and lost without deserving.”

actionable. (See, e.g., *New York Times v. Sullivan* (1964) 376 U.S. 254 [statements about public figures]; *Gertz v. Robert Welch, Inc., supra*, 418 U.S. 323 [private plaintiff, issue of public concern]; *Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749 [private plaintiff; private issue]; see also Civ. Code, § 47 [absolute and qualified privileges].)

California law defines slander, in pertinent part, as a “false and unprivileged publication, orally uttered, . . . which [¶] 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime. . . .” (Civ. Code, § 46, subd. 1.) “To establish a prima facie case for slander, a plaintiff must demonstrate an oral publication to third persons of specified false matter . . . . [Citation.] Certain statements are deemed to constitute slander per se, including statements . . . charging the commission of crime . . . .” (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106-107.)

When evaluating the plaintiff’s probability of prevailing for purposes of a SLAPP motion, the court can consider the defendant’s evidence in determining whether it defeats a plaintiff’s case as a matter of law. (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.) “[T]he plaintiff ‘must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited.’ [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim. [Citation.]” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

Although Sherry's slander case suffers from several deficiencies, we believe the most obvious one is the lack of evidence to defeat the qualified privilege of Civil Code section 47, which Merrick raised in the trial court. This privilege protects communications, "without malice, to a person interested therein, (1) by one who is also interested . . . ." (Civ. Code, § 47, subd. (c).)

Both Michelle and Merrick were clearly interested in whether Sherry might have hired someone to harm her ex-husband and thus might be capable of harming Michelle. As Michelle's conservator, Merrick was responsible for her "care and protection," which would unquestionably include her personal security. Michelle acquired bodyguards in the first place to thwart any attempt by William and Sherry to take her off to Arizona after her release from the hospital.

To prevail on her slander claim, therefore, Sherry must present prima facie evidence of "actual malice," defined by Civil Code section 48a, subdivision (d), as "that state of mind arising from hatred or ill will toward the plaintiff . . . ." The plaintiff has the burden of presenting evidence of actual malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1210-1211.) Civil Code section 48 warns that where the interested-person privilege is concerned, "malice is not inferred from the communication." "The degree of malice required to vitiate a claim of qualified privilege is 'a feeling of hatred or ill will going beyond that which the occasion for the communication apparently justified . . . .' [Citation.]" (*Katz v. Rosen* (1975) 48 Cal.App.3d 1032, 1037; see also *Taus v. Loftus* (2007) 40 Cal.4th 683, 721 [malice established by hatred or by "a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of plaintiff's rights"].)

Sherry presented no admissible evidence of any hatred or ill will on Merrick's part independent of the statement itself. She has provided no details of experiences involving Merrick, or any statements made by Merrick other than the one forming the basis of this lawsuit, from which it could be concluded Merrick hated her or

harbored any ill will toward her at the time Merrick made the statement to Michelle. Likewise, Sherry has provided no admissible evidence from which it could be concluded Merrick lacked reasonable grounds for believing the truth of the publication. A statement in Sherry's declaration that "brief research" would have revealed the falsity of the accusation not only was not supported by any examples of the brief research but was ruled inadmissible as lacking in foundation. On the other hand, Merrick established that she and Michelle heard the accusation at the same time from the same source – Bryan Murphy, an Arizona lawyer representing Michelle's aunt and half-sisters – who claimed to have received his information from Sherry's ex-husband.<sup>9</sup> Sherry has presented no evidence to establish why Merrick should not have believed what Murphy told her and then discussed it with Michelle in the context of Michelle's personal security.

Because Sherry failed to present a prima facie case of actual malice to defeat the interested-person privilege, she cannot prevail on her cause of action for slander. The anti-SLAPP motion should have been granted on this cause of action. (See *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 472 [plaintiff failed to establish malice; anti-SLAPP motion should have been granted].)

### **B. Prima Facie Case – Intentional Infliction of Emotional Distress**

In addition to her cause of action for slander, Sherry alleged, in a separate cause of action, that Merrick's statement caused her extreme emotional distress. We must, therefore, evaluate that cause of action under the SLAPP action rubrics we discussed above.

"The elements of a prima facie case for the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the

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<sup>9</sup> It should be recalled that the information consisted of two parts. The first part was that a man had been hired to harm Blair and had been arrested and jailed as a result. This was presumably verifiable. The second part was Blair's opinion that Sherry had been behind this incident. According to Michelle and Merrick, when Murphy passed along the information at the April 2010 meeting, he also characterized the accusation against Sherry as Blair's opinion.

intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; (3) and actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593, superseded by Penal Code, § 70, subd. (c)(2) on other grounds.) A cause of action for intentional infliction of emotional distress requires conduct "so extreme and outrageous "as to go beyond all possible bonds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (Coleman v. Republic Indemnity Ins. Co. (2005) 132 Cal.App.4th 403, 416, quoting *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499.) The court determines initially whether the defendant's conduct is so extreme or outrageous as to be actionable. (*Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 173.)

Determination of outrageousness inevitably depends on the facts of the individual case. In *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, a TV reporter with a camera crew videotaped three young children while he informed them that their next-door-neighbor playmates had been murdered by their mother. (*Id.* at p. 1029.) This conduct was held to be sufficiently outrageous to survive summary judgment. (*Id.* at p. 1030.) In *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, evidence of a campaign by animal rights activists that included vandalism and threats of violence against a specific employee supported the denial of an anti-SLAPP motion, even though the protest activity itself was protected. The employee had demonstrated a probability of prevailing on her emotional distress claim. (*Id.* at p. 1260.) Other examples of outrageous conduct have included acts by landlords (see, e.g., *Newby v. Alto Riviera Apartments* (1976) 60 Cal.App.3d 288, 298, superseded by amendments to Civil Code § 1942.5 on other grounds [threats against tenant's life]); insurance companies (see, e.g. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, 476 [insurer waited to rescind health care policy until after insured seriously injured]); debt collectors (see, e.g., *Vargas v. Ruggiero* (1961) 197

Cal.App.2d 709, 718 [yelling and shouting caused miscarriage]); and employers (see, e.g., *Toney v. State of California* (1976) 54 Cal.App.3d 779, 789 [racially motivated campaign against professor resulting in discipline and firing]).

As stated above, the trial court may consider both the plaintiff's and the defendant's evidence when it evaluates this prong of an anti-SLAPP motion. (*Traditional Cat Assn., Inc. v. Gilbreath, supra*, 118 Cal.App.4th at p. 398.) Sherry's admissible evidence to support this cause of action consists of two statements in her declaration: "[Merrick] made up horrible lies about me . . . thereby causing me severe emotional distress" and "I have suffered great anxiety, distress, and insomnia as a result of [Merrick's] conduct."<sup>10</sup> The statement at issue is "[Sherry] 'had hired a man to harm someone else, and this man who was hired is now in jail.'"

Even if believed, Sherry's statements are not sufficient to establish a prima facie case for intentional infliction of emotional distress. When all of the evidence is considered, Sherry has not identified conduct that would be "atrocious and utterly intolerable in a civilized community."

The undisputed and corroborated evidence established that Merrick did not "make up" the statement about Sherry; it was conveyed to both Michelle and Merrick at the same time by Murphy during a discussion about Michelle's joining in an Arizona legal action regarding her brother.<sup>11</sup> The undisputed evidence also established that Murphy did not make the statement in November 2009 – when Michelle was newly released from the hospital – but over 5 months later. Michelle clarified the portion of her deposition regarding the source of her information shortly after the deposition itself and before Sherry filed her complaint. There is no evidence, or allegation, that Merrick made the statement to anyone but Michelle.

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<sup>10</sup> The trial court sustained objections to other portions in the declaration regarding Merrick's intentions in making the statement. The plaintiff's evidence establishing the prima facie case must be admissible evidence. (*Hall v. Time Warner, Inc., supra*, 153 Cal.App.4th at p. 1346.)

<sup>11</sup> Murphy, in turn, represented the statement as originating with Sherry's ex-husband.

According to the admissible evidence before the trial court, Merrick made the statement to Michelle while she was Michelle’s conservator – and therefore responsible for Michelle’s care and protection – in the context of whether Michelle should continue to engage the personal security already hired for her. Merrick did not originate the statement; therefore, any harm done to the relationship between Sherry and Michelle attributable to the statement had already occurred before Merrick said anything. There is no evidence, or allegation, of any other occasion upon which Merrick made the statement or repeated it to someone else. This simply is not enough to satisfy the “outrageous conduct” requirement of a cause of action for intentional infliction of emotional distress. Sherry has not made a prima facie case for this tort.

Sherry cannot prevail on this cause of action for another reason: a plaintiff cannot disguise a defamation claim under some other name, thereby avoiding the protections that limit the reach of libel and slander. (See *Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 56; *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1044-1045; *Reader’s Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 265; *Flynn v. Higham* (1983) 149 Cal.App.3d 677, 682). “[T]o allow an independent cause of action for the intentional infliction of emotional distress, based on the same acts that would not support a defamation claim, would allow plaintiffs to do indirectly what they could not do directly. It would also render meaningless any defense of truth or privilege.” [Citation.]” (*Fellows v. National Enquirer, Inc.* (1986) 42 Cal.3d 234, 245.)

Regardless of the label placed on a cause of action, if it is grounded on false statements that meet the definitions of libel or slander, it stands or falls as a defamation claim. (See *Gilbert v. Sykes, supra*, 147 Cal.App.4th at p. 34 [emotional distress claim dismissed pursuant to anti-SLAPP motion along with libel claim]; *Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394 [demurrer to entire complaint for defamation and emotional distress properly sustained when plaintiff unable to state cause of action for libel.]

Sherry's emotional distress claim is, at best, "redundant." (See *Wong v. Jing, supra*, 189 Cal.App.4th at p. 1379.)

**DISPOSITION**

The order is reversed. The cause is remanded to the trial court with directions to grant Merrick's special motion to strike and to conduct further proceedings under Code of Civil Procedure section 425.16. Appellant to recover her costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.