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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DIANE HARKEY,

Plaintiff and Appellant,

v.

MARK WYLAND,

Defendant and Respondent.

G050197

(Super. Ct. No. 30-2013-00671343)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregory H. Lewis, Judge. Reversed and remanded with directions.

Law Offices of Jeffrey S. Benice and Jeffrey S. Benice for Plaintiff and Appellant.

Bowie & Schaffer, David J. Bowie and Eric C. Schaffer for Defendant and Respondent.

* * *

I. INTRODUCTION

Mark Wyland was running against Diane Harkey for a seat on the State Board of Equalization. Wyland told a political gathering that Harkey had been sued by investors for “defrauding them” and that there “was [a] decision that those investors were defrauded and there is a judgment.” Which was all literally true. Harkey *and* her husband Dan and his company Point Center Financial had indeed been sued for fraud, and there was indeed a decision that the investors had been “defrauded.”

But note the artful use of the passive voice defrauded. There had been a decision against Harkey’s husband Dan and his company. But not against Diane Harkey, who, as far as this record is concerned, was exonerated by the jury.

California uses the “gist or sting” test when it comes to allegedly defamatory statements. A statement can be literally true, but if its gist or sting is false, it may be still actionable defamation. Wyland’s statement implied the court had made a decision that Diane Harkey had defrauded investors, when it point of fact no such decision had been made. So under the gist or sting test, Wyland defamed Harkey by making a false statement to the effect *she* had committed fraud against a group of investors.

But of course since Harkey is a public figure, the bigger issue in this case is whether Harkey could show that Wyland harbored the requisite malice to pass the *New York Times v. Sullivan* test: To be actionable against a public figure, a defamatory statement must not only be false, the statement itself must be made with malice.¹ On that point, Harkey presented evidence, in opposition to an anti-SLAPP motion filed by Wyland, that a political consultant working for Wyland attended her trial and was present when the jury returned a decision exonerating her, all of which happened about a month

¹ See *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280 [“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”].

prior to Wyland’s statement. It is a reasonable inference that the consultant told his employer about the decision, meaning that Wyland *knew* about the exoneration when he made the statement.

Harkey’s defamation suit never went to trial. She voluntarily withdrew it. This appeal is only before us now on the issue of whether Wyland’s anti-SLAPP motion against Harkey’s suit was meritorious, thus making Wyland eligible for attorney fees.² Because, in anti-SLAPP motions, any reasonable inferences to be drawn from the evidence must be drawn in the plaintiff’s favor,³ we conclude that Wyland’s anti-SLAPP motion was not meritorious. Accordingly, we reverse the award of the attorney fees (about \$12,000) made by the trial court against Harkey in favor of Wyland.

II. FACTS

In the summer of 2013, Harkey and Wyland were each running for a seat on the State Board of Equalization. At the time, there was a lawsuit pending by a group of investors against Harkey’s husband Dan, his company, Point Center Financial, and Harkey herself. We will call this suit the “Charton action.” Wyland employed a political consultant, Robert Schuman, to monitor the case.

² Anti-SLAPP motions are so common now that explaining the acronym at this late date feels like almost zombie-like. On the off-chance there are any readers who don’t already know, though, SLAPP stands for “strategic lawsuit against public participation,” the idea being that a defendant has been sued for an exercise of free speech. A SLAPP suit is a bad thing. The archetypical SLAPP suit arises from a citizen speaking out against a particular development project and then getting sued by the developer for interference with prospective economic advantage. (Cf. *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8.) Anti-SLAPP motions are designed to quickly dispose of such lawsuits. (See Code Civ. Proc., § 425.16, subd. (f) [allowing early consideration of anti-SLAPP motions].) (All undesignated statutory references in this opinion are to the Code of Civil Procedure.) Thus the statute provides that unless the plaintiff can establish a “probability” of prevailing (see § 425.16, subd. (b)(3)) the defendant wins with fees.

³ The “probability” element of section 425.16, subdivision (b)(3) isn’t as formidable as it sounds: Because of the Constitutional right to jury trial, probability does not really mean probability. Courts do *not*, for example, attempt a prognostication, preliminary hearing-style, of the ultimate result. The standard of review is actually quite favorable to the plaintiff. As one court recently recapped it: “[W]e *accept as true all evidence favorable to the plaintiff and assess the defendant’s evidence only to determine if it defeats the plaintiff’s submission as a matter of law.*” . . . [¶] That is the setting in which we determine whether plaintiff has met the required showing, a showing that is ‘not high.’ . . .” (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 347-348 (*Barker*), quoting *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700.)

On July 10, 2013, jury verdicts were read in the courtroom in the Charton case.⁴ While Harkey’s declaration establishing that fact does not specify the precise nature of those verdicts, given that within two days the Charton plaintiffs dismissed three causes of action against Diane Harkey, one for fraudulent conveyance, it is a reasonable inference that the import of the jury verdicts was favorable to Diane Harkey.⁵ Schuman was present when those verdicts were read.⁶

Husband Dan and his company Point Center Financial did not do quite as well. On July 13, 2013, the jury awarded about \$110,000 against him and Point Center, and determined that Point Center was in fact his alter ego. To make matters worse for those two defendants, the jury also found them liable for breach of fiduciary duty and financial elder abuse and awarded the plaintiffs punitive damages based on findings of malice, oppression, or fraud.

Three days later, on July 16, Mark Wyland found himself addressing a gathering of the “Tri-City Tea Party.”⁷ A member of the audience asked him a question about Harkey’s role in the Charton litigation. Wyland’s response was: “Unfortunately, there has been a lawsuit brought by a lot of investors of modest means against her and her husband for defrauding them . . . There was [a] decision that those investors were defrauded and there is a judgment”

We must hasten to add that the ellipses in the quotation are taken from Harkey’s complaint, and there is nothing in the record to indicate what the missing words were, or even whether there were missing words at all, and the ellipses were merely there

⁴ On our own motion we have taken judicial notice of the existence of (several volumes in fact) of special verdicts that were, indeed, reached by jurors in the Charton action on July 10, 2013 (though they were formally filed on July 11, 2013). (See Evid. Code, § 452, subd. (d) [courts may take judicial notice of the “[r]ecords of (1) any court of this state”].)

⁵ The record indicates there was at least one cause of action against Diane Harkey for declaratory relief that remained outstanding. That cause of action was ultimately determined in her favor by the trial judge.

⁶ The record contains photos of Schuman, attending the trial. Harkey would later declare she recognized Schuman as Wyland’s campaign consultant.

⁷ There is evidence in the record that both Wyland and Harkey were vying for the support of the group.

to indicate a pause. But Wyland did not factually dispute the quote for purposes of the anti-SLAPP motion he later brought.

About a month after that, on August 26, 2013, Harkey filed this action based on the statement just quoted, asserting causes of action for defamation, false light, and intentional infliction of emotional distress. However, after Wyland filed an anti-SLAPP motion in November, Harkey voluntarily dismissed her complaint without prejudice, leaving the anti-SLAPP motion still pending. That meant the only issue was Wyland's claim for attorney fees; the merits of Harkey's complaint were only indirectly implicated. The court awarded Wyland all the fees he asked for – \$12,270 – based on the conclusion Wyland would be the prevailing party if the anti-SLAPP motion had been heard on the merits. Harkey timely appealed the fee order.

III. DISCUSSION

A. *Anti-SLAPP Attorney Fees after Voluntary Dismissal*

Normally, Harkey's retreat from the field by voluntarily dismissing her complaint would preclude her from asserting its basic merit. (E.g., *Frank Annino & Sons Construction, Inc. v. McArthur Restaurants, Inc.* (1989) 215 Cal.App.3d 353, 357.) And of course in this appeal, Harkey is doing precisely that – asserting her defamation suit against Wyland had sufficient merit to withstand his anti-SLAPP motion, thus she should not have to pay his fees in bringing it.

But anti-SLAPP motions are a different matter. As Justice Croskey explained in *Liu v. Moore* (1999) 69 Cal.App.4th 745, 749, an attorney fee request based on an anti-SLAPP motion is predicated on the theory that the action targeted by the anti-SLAPP motion, even if already withdrawn, was nevertheless defective in the first place. Thus, as the court held in *Moore*, the withdrawal of a suit does not affect the plaintiff's right to contest attorney fees which are, after all, based on the merits of the complaint. (*Id.* at p. 753.) So we move on to the merits of Wyland's anti-SLAPP motion.

B. *The Merits*

1. *Falsity*

We may also quickly dispense with the problem that, literally speaking, Wyland's exact words were true: Diane Harkey was indeed sued for fraud, and there was indeed a decision of the court finding fraud. What was omitted was that the decision wasn't against her.

Whether a statement is defamatory is ascertained by what is often called the gist or sting test. The test goes both ways in defamation law. It is often invoked to show that a statement is essentially true even though the defendant cannot justify the literal meaning of every word. (E.g., *Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1180-1181.) But it can also show that a literally true statement can be defamatory if the gist or sting of the statement is false. *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883 presents an example of such sting, in a context remarkably similar to the case at hand, namely a distortion of what happened in another piece of litigation. There, the defendant said that a small claims judgment had been obtained against the plaintiffs, and there had been a complaint about them to the state insurance regulators. All that was true. But the import of the statement was that the regulators had actually found plaintiffs to have provided incompetent advice and engaged in unethical business practices, and that wasn't true. So the court held the insinuations were indeed defamatory. (See *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 33 [“We have long recognized that false inferences or implications raised by the arrangement and phrasing of apparently non-libelous statements can be as injurious as explicit epithets; we have upheld libel actions founded on such implications.”].)

2. *First Prong of Anti-SLAPP*

Anti-SLAPP motions are evaluated under a standard two-prong test, the first one being whether the targeted action was aimed against the defendant's assertion of free speech or right of petition, i.e., whether the defendant is being sued for “protective

activity.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) And of course there is no question of that here. Wyland was engaged in the assertion of quintessentially protected activity, namely speaking to a political gathering about a candidate for public office. Our main concern is thus the second prong of an anti-SLAPP motion, i.e., whether Harkey could show a sufficient probability of prevailing in her defamation action against Wyland.

3. *Second Prong of Anti-Slapp*

And as we have also previously alluded to (in fn. 3, *ante*), probability in anti-SLAPP law does not mean literal probability. A court *weighing* the evidence, for example, might very well conclude that the defendant would have a probability of prevailing if the case went to trial, but that conclusion, by itself, would be irrelevant. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212 [“The court considers the pleadings and evidence submitted by both sides, but does not weigh credibility or compare the weight of the evidence. Rather, the court’s responsibility is to accept as true the evidence favorable to the plaintiff”].) As mentioned, on an anti-SLAPP motion the court must accept as true the evidence favorable to the plaintiff. (*Barker, supra*, 240 Cal.App.4th at p. 348.) Moreover, reasonable inferences from the evidence are drawn in favor of the plaintiff. (See *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 52 [“The evidence offered by Nagel was sufficient to establish a probability he would prevail on the merits of his claims. Accepting all admissible evidence as true and indulging in every reasonable inference to be drawn from that evidence, the trial court properly found Twin Labs’ statements were either false or likely to be misleading to a reasonable consumer.”].)

The trial court did not do that. Diane Harkey submitted evidence (and Wyland made no objection to it) to the effect that Wyland’s hired campaign consultant was present in the courtroom when the jury came back with a decision favorable to Diane

Harkey on at least one fraud claim (apparently a fraudulent conveyance claim⁸). Wyland made no attempt to narrow this evidence, or, more importantly, make any attempt to show that somewhere along the line prior to July 16 fraud claims against Diane Harkey remained outstanding in the Charton action. Indeed, Wyland's reply papers on the anti-SLAPP motion were silent on the problem of what his consultant knew and when he knew it.⁹ Of course it is a highly reasonable inference that Wyland's consultant, sometime in the six days or so prior to Wyland's speech, conveyed what he had seen at the Charton trial to his employer Wyland. Wyland was, after all, paying that consultant to monitor the Charton case in hopes of having information to use against Diane Harkey.¹⁰

The inference that Wyland *knew* of Harkey's exoneration on or before July 16, 2013, is enough to have given Harkey's complaint sufficient probability of succeeding to withstand Wyland's anti-SLAPP motion. Knowledge or even just reckless disregard of falsity is enough to show actual malice. (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1167 (*Annette F.*.)

To be sure, there must be clear and convincing evidence to show actual malice. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84 (*Christian Research*.) But even as against such a higher standard, Harkey still showed enough to establish a prima facie case of merit. (See *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 390 (*Burrill*) ["Stated differently, we must determine whether Dr. Burrill has made a sufficient prima facie showing of facts to sustain her burden of demonstrating a high

⁸ While the details of the Charton action are largely left unexplained by the parties, it is logical that if a husband has been sued for fraud and there's been some sort of conveyance of his property, the wife will be sued too. In that regard, the records of which we have taken judicial notice include proposed jury instructions from the Charton plaintiffs embodying the plaintiffs' theory that Dan Harkey's company Point Center fraudulently transferred funds to Dan or Diane Harkey to avoid paying debts to plaintiffs.

⁹ For example, if the import of the jury's verdicts of July 10 *was not* to exonerate Diane Harkey, it would have been a simple matter for Wyland to say that his subjective belief, based on what the consultant who had monitored the trial on his behalf had told him, was that Diane Harkey had been found liable for fraud.

¹⁰ Much of the bulk of the record is taken up with Harkey's inclusion of Wyland's campaign committee statements showing Schuman was paid over \$28,000 for his services on behalf of Wyland.

probability that Nair published the defamatory statements with knowledge of their falsity or while entertaining serious doubts as to their truth.”].)

In this regard, the *Burrill* decision is instructive. There, a complaint was filed by a court-appointed counselor charging an ex-husband in a family law proceeding with posting internet statements to the effect that the counselor, though not a medical doctor, had prescribed Benzodiazepine for the husband’s son. (See *Burrill, supra*, 217 Cal.App.4th at p. 365.) The trial court held the husband’s anti-SLAPP motion was properly denied by the trial court, even given the fact that the counselor was a limited purpose public figure, and thus would have to show actual malice. (See *ibid.*) Specifically addressing the allegation the counselor had prescribed Benzodiazepine for his son, the *Burrill* court noted that the husband obtained confusing medical records which mentioned the counselor, and in which some sort of medication was recommended. (See *id.* at p. 395.) The court held that the husband’s leap from (1) the confusing records to (2) the accusation of illegally prescribing Benzodiazepine was a leap “so far from the truth as to permit an inference of actual malice by clear and convincing evidence.” (*Ibid.*, quoting *Annette F., supra*, 119 Cal.App.4th at p. 1170.) We need merely note that while the records in *Burrill* were hard to read and confusing (so the distraught husband had more excuse to jump to the conclusion that the counselor was implicated in an illegal drug prescription), jury verdicts are usually up-or-down affairs: A defendant has done something, or hasn’t, is liable, or is not – so Wyland’s consultant would have less excuse to mix up his facts than the husband in *Burrill*.

This court’s non-unanimous decision in *Christian Research, supra*, 148 Cal.App.4th 71, which is the focal point of Wyland’s briefing, is distinguishable. There, a former employee of a religious organization published the allegation that the organization was the “focus of a federal criminal mail fraud investigation.” (*Id.* at p. 77.) When the employee was sued for defamation on the theory there had been no such federal investigation at all, the former employee submitted a declaration saying he had

spoken with a post office employee named “Debra,” who told him that the organization was being investigated for fraud. Even though the organization submitted evidence to the effect that the post office had never begun any such investigation, a majority of a panel of this court, in adjudicating an anti-SLAPP motion, said the organization had not provided sufficient evidence of malice on the part of the employee. (*Id.* at p. 87.)

The difference between *Christian Research* and the case at hand is that in *Christian Research* the defendant could identify a specific item of evidence that, by itself if credited by the trier of fact, affirmatively established a ground on the defendant’s part for his belief in the *truthfulness* of the allegation.¹¹ By contrast, Wyland has not pointed to any specific sources which would affirmatively establish some support for saying a court decision had decided that Diane Harkey had defrauded any investors. (If Wyland had done this, *then* this panel would have the problem of deciding whether to follow the majority or dissent from *Christian Research*, as there would be, as in *Christian Research*, conflicting evidence giving rise to competing inferences as to whether the defendant actually knew his statement was false. As it is, though, we are spared the need to decide that matter.)¹²

IV. DISPOSITION

We emphasize the narrowness of today’s decision. We are not deciding that Wyland defamed Harkey with actual malice. We are not deciding Harkey was innocent of any fraud in the Charton action. What we do decide is that Harkey proffered sufficient evidence against Wyland’s anti-SLAPP motion to defeat that motion and hence

¹¹ The difference between the majority and dissenting opinions in *Christian Research* boiled down to whether the inferences in the case should be drawn in favor of the plaintiff or the defendant. (See *Christian Research, supra*, 148 Cal.App.4th at p. 95 (dis. opn. of Rylaarsdam, J.) [“we need not draw all inferences favorable to defendant and ignore reasonable inferences favoring plaintiff”].)

¹² Wyland’s own declaration merely said: “Any comments I made at the time were unrehearsed and were reflective of my understandings of the proceedings gleaned from a variety of press reports and personal anecdotes” and “. . . my comments were . . . based upon my reasonable understanding as to their accuracy at the time.” What he didn’t say, in contrast to *Christian Research*, was that he had a specific source who had informed him that Diane Harkey had in fact been adjudicated to have defrauded the investors in the Charton action.

should not be liable for Wyland's fees. We therefore reverse the fee order and direct the trial court to enter another order to the effect that the anti-SLAPP motion should have been denied and Diane Harkey is not responsible for Wyland's fees in bringing his anti-SLAPP motion. Appellant Harkey shall recover her costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.