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S239686

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
FEB 14 2018
Jorge Navarrete Clerk
Deputy

STANLEY WILSON,
Plaintiff and Appellant,

v.

CABLE NEWS NETWORK, INC., et al.,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B264944

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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IN THE SUPREME COURT OF CALIFORNIA

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CABLE NEWS NETWORK, INC. et al.,
Defendants and Respondents.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND RESPONDENTS

Pursuant to California Rules of Court, rule 8.520(f)(1), California Hospital Association (CHA) requests permission to file the attached amicus curiae brief in support of defendants and respondents Cable News Network, Inc. (CNN), CNN America, Inc., Turner Services, Inc., Turner Broadcasting System, Inc., and Peter Janos.[1]

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[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than CHA, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

CHA is a trade association representing over 400 hospitals and health care systems in California, comprising over 90 percent of the hospitals in the state. CHA is committed to establishing and maintaining a financial and regulatory environment within which hospitals, health care systems, and other health care providers can offer high quality patient care. CHA promotes its objectives, in part, by participating as amicus curiae in important cases like this one.

CHA's members are active participants in the state-law-mandated peer review process, and frequently invoke the anti-SLAPP statute to defend against meritless challenges predicated on that process. CHA's members therefore have an important interest in seeing that the anti-SLAPP statute remains a valid tool in ensuring that the peer review process continues to serve the salutary and protective purposes that California law has entrusted to it. The proposed amicus curiae brief supplements the parties' briefs by providing a broader perspective on the deficiencies in the lower court's opinion and how the issues raised in this case will affect the peer review process, as well as existing case law in general.

Accordingly, CHA requests that this Court accept and file the attached amicus curiae brief.

February 6, 2018

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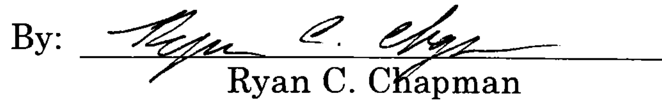
By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

Code of Civil Procedure section 425.16 (section 425.16), California's "anti-SLAPP" statute, "allows a court to strike any cause of action that arises from the defendant's exercise of his or her constitutionally protected rights of free speech or petition for redress of grievances." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 311-312 (*Flatley*).) The question presented by this appeal is whether the anti-SLAPP statute is inapplicable to an employee's claims against his or her employer whenever the employee alleges the defendant's purportedly wrongful activities were undertaken with a discriminatory or retaliatory motive. (See PFR 7.) The answer to that question is no.

An anti-SLAPP motion "under section 425.16 involves a two-step process." (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 420 (*Vasquez*).) "First, the moving defendant must make a prima facie showing 'that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in [section 425.16].' " (*Ibid.*) "If the defendant makes this initial showing of protected activity, the burden shifts to the plaintiff at the second step to establish a probability it will prevail on the claim." (*Ibid.*) The Legislature specified the acts protected by the

anti-SLAPP statute in section 425.16, subdivision (e). (*Id.* at p. 422.)

In *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057 (*Park*), this Court reaffirmed this longstanding test for determining whether a plaintiff's claims are within the anti-SLAPP statute's scope under prong one of the anti-SLAPP analysis, holding that a defendant can satisfy its threshold burden by " 'demonstrat[ing] that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e).' " (*Id.* at p. 1063.) In making such a determination "courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Ibid.*) Where a protected activity "supplie[s] an essential element" of a plaintiff's claims, the anti-SLAPP statute applies to that claim. (*Id.* at p. 1064.)

Under the plain text of the anti-SLAPP statute and this Court's long-standing precedent, whether the defendant undertook those protected activities with a discriminatory or retaliatory motive has no bearing on this first prong analysis. By contrast, the Court of Appeal here held that, when a plaintiff alleges that a defendant acted with a discriminatory or retaliatory motive, "[d]iscrimination and retaliation are not simply motivations for defendants' conduct, they *are* defendants' conduct." (*Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 835 (*Wilson*), review granted Mar. 1, 2017, S239686.) The Court of Appeal is wrong. Justice Rothschild's dissenting opinion identifies the fatal flaw in

the majority's analysis: This approach "conflate[s] the first prong analysis, in which the court determines whether the alleged injury-producing act was in furtherance of the defendant's right of petition or free speech, and the second prong analysis, which considers the merits of the cause of action." (*Id.* at p. 843 (dis. opn. of Rothschild, P.J.).) Were the Court of Appeal correct here, malicious prosecution and many defamation claims—quintessential SLAPPs—would inappropriately be excluded from the anti-SLAPP statute's scope merely because the protected activities underlying these claims were alleged to have been undertaken with an improper motive.

Finally, even if this Court is inclined to agree with the plaintiff in this case concerning employment claims against news organizations, CHA respectfully requests that the Court not engage in any discussion in its opinion regarding how the opinion, and *Park,* should be applied in the different factual situation of lawsuits involving hospital peer review proceedings. As explained in the petitions for review and related amici curiae briefs for the peer review cases being held pending the decision in this case, *Park*'s discussion of peer review cases, without the benefit of an actual record in a peer review case, has created confusion in lower courts and among litigants about how prong one applies in that unique factual context. Regardless of the outcome of this case, the Court should order briefing in one of the pending peer review cases and decide the peer review issue on the merits in a case squarely presenting that question.

LEGAL ARGUMENT

I. THIS COURT SHOULD REAFFIRM THAT THE ANTI-SLAPP STATUTE APPLIES TO *ANY* CLAIMS, INCLUDING EMPLOYMENT CLAIMS, AS LONG AS A PROTECTED ACTIVITY SUPPLIES ONE OF THE ELEMENTS OF THOSE CLAIMS.

A. The anti-SLAPP statute is not categorically inapplicable to claims for discrimination, harassment, and retaliation.

The Court of Appeal indicated that a particular category of claims—specifically, claims for discrimination, harassment, and retaliation—generally fall outside the anti-SLAPP statute's scope of safeguarding the exercise of constitutionally-protected free speech and petitioning rights. (See *Wilson*, *supra*, 6 Cal.App.5th at p. 835.) This was error. As we explain, the anti-SLAPP statute is not categorically inapplicable to *any* claims and the statute's applicability does not hinge on whether the activities in question are protected by the First Amendment.

The anti-SLAPP statute "unambiguously makes subject to a special motion to strike *any* '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' as to which the plaintiff has not 'established that there is a probability that [he or

she] will prevail on the claim.' " (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 58 (*Equilon*), emphasis added.) "Nothing in the statute itself categorically excludes any particular type of action from its operation, and no court has the ' "power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." ' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 91 (*Navellier*).)

Moreover, the "Legislature did not limit the scope of the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition." (*Vasquez, supra,* 1 Cal.5th at p. 421.) Rather, the anti-SLAPP law extends its "statutory protection [to] acts 'in furtherance' of the constitutional rights incorporated by section 425.16 . . . beyond the contours of the constitutional rights themselves." (*Ibid.*) Since the Legislature "spelled out the kinds of activity it meant to protect [under the anti-SLAPP statute] in section 425.16, subdivision (e)," courts do not examine First Amendment law in deciding whether the statute applies to a particular claim. (*Id.* at p. 422.) Instead, courts "determin[e] whether a cause of action arises from protected activity" under prong one of the anti-SLAPP analysis by looking to "the statutory definitions in section 425.16, subdivision (e)." (*Ibid.*) Thus, defendants satisfy their threshold burden to show a challenged claim falls within the anti-SLAPP statute's scope simply by " 'demonstrat[ing] that the defendant's conduct . . . falls within one of the four categories described in subdivision (e).' " (*Ibid.*, quoting *Equilon, supra,* 29 Cal.4th at p. 66.)

B. A claim arises from a protected activity when that activity supplies at least one element of the claim.

Whether the anti-SLAPP statute applies does not depend on the "form" of the challenged claim. (*Navellier, supra,* 29 Cal.4th at pp. 91-92.) Instead, the "critical" question in deciding whether a claim falls within the statute's scope is whether the "cause of action [itself] is *based on*" an act that fits within the categories of protected activities expressly enumerated in the statute. (*Id.* at p. 89; accord, *Vasquez, supra,* 1 Cal.5th at pp. 421-422.)

This Court's decision in *Navellier* is illustrative. "The *Navellier* plaintiffs sued for breach of contract and fraud, alleging the defendant had signed a release of claims without any intent to be bound by it and then violated the release by filing counterclaims in a pending action in contravention of the release's terms." (*Park, supra,* 2 Cal.5th at p. 1063.) The trial court denied the defendant's anti-SLAPP motion and the Court of Appeal affirmed, but this Court reversed. (*Navellier, supra,* 29 Cal.4th at pp. 87, 96.) The Court rejected plaintiffs' contention that breach of contract and fraud claims are categorically excluded from the anti-SLAPP statute's purview. (*Id.* at pp. 90-93.) The Court further held that the anti-SLAPP statute applied to plaintiffs' particular claims there because "specific elements of the *Navellier* plaintiffs' claims depended upon the defendant's protected activity." (*Park,* at p. 1064.) "The defendant's filing of counterclaims" in *Navellier*—a protected activity—"constituted the alleged breach of contract." (*Ibid.*) And the misrepresentation element of the fraud claim in

Navellier consisted of a statement made in connection with a pending judicial matter, which was likewise a protected activity. (*Ibid.*) In analyzing the anti-SLAPP motion under prong one, this Court did not look to the alleged motive of the moving party.

Park recently reaffirmed *Navellier*'s longstanding rule, holding that when courts decide whether to grant or deny an anti-SLAPP motion directed at claims for discrimination, harassment, or retaliation, they "should consider the elements of the challenged claim and what *actions* by defendant supply those elements and consequently form the basis for liability." (*Park*, *supra*, 2 Cal.5th at p. 1063, emphasis added.) *Park* held that when an activity protected by the anti-SLAPP statute "supplie[s] *an* essential element" of the challenged claim, the statute applies to that claim. (*Id.* at p. 1064, emphasis added.) *Park* did not qualify that standard or place limitations on whether the protected activity must satisfy a *specific* element of the claim. *Park* simply held that the particular claim there did not qualify for protection under the anti-SLAPP statute because *none* of its elements depended on the defendant's protected activities. (*Id.* at pp. 1067-1068.) Thus, the well-settled test discussed in *Navellier* and *Park* is straightforward: If the defendant's protected activity is necessary to satisfy *any* element of the plaintiff's claim, then the defendant has met its first prong burden and the anti-SLAPP statute applies.

Courts have repeatedly applied that test, both before and after *Park*. For example, in *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1513 (*Hunter*), a job applicant sued CBS Broadcasting for discrimination after unsuccessfully seeking a

weather anchor position with local CBS television stations. He alleged that CBS's employment decision was driven by " 'a policy of filling vacant prime time . . . positions with attractive females, and of refusing to hire males to permanently fill those positions.' " (*Id.* at p. 1515.) Faced with an allegation of widespread discriminatory conduct, the Court of Appeal correctly identified its prong one anti-SLAPP responsibility to first identify "the injury-producing conduct underlying [plaintiff's] employment discrimination claims" and then determine if that conduct "qualifies as an act in furtherance of the exercise of free speech." (*Id.* at p. 1521.)

Hunter held that " '[r]eporting the news' " and creating a television show were activities exercising free speech, the selection of anchors to report the news " 'helped advance or assist' both [of these] forms of First Amendment expression," and therefore the selection of a particular individual as a weather anchor constituted a statutorily-defined protected activity " 'in furtherance' " of CBS's right of free speech. (*Hunter*, *supra*, 221 Cal.App.4th at p. 1521.) Since "the injury-producing" activity complained of by the challenged claims was "CBS's decisions about whom to hire as the on-air weather anchors for its KCBS and KCAL prime time newscasts" and the Court of Appeal had decided this activity was protected by the anti-SLAPP statute, *Hunter* held that the statute applied to the plaintiff's claims under prong one. (*Ibid.*) *Hunter* rejected the plaintiff's argument that the "conduct" at issue there was the "decision to utilize discriminatory criteria" because the court understood that when a plaintiff complains about not being *hired*, the *hiring decision* is the act that injured the plaintiff. (*Id.* at

pp. 1521-1522.) The decision being based on an alleged illegitimate motive speaks only to whether that injury is legally cognizable as part of the prong-two merits analysis and does not alter the act that actually occurred.

Similarly, in *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 581-582 (*Okorie*), a teacher alleged a pattern of discriminatory and harassing activity directed against him from the school's principal consisting of reprimands, comments on his disciplinary style, and statements to other teachers that he made parents uncomfortable—all of which were allegedly based on race or national origin. After the teacher was accused of abusing a student, the school notified parents of the accusation, sent a letter to the state credentialing agency, and reassigned the teacher outside of the classroom. (*Id.* at pp. 582, 593.)

The Court of Appeal held that the bulk of the adverse employment actions on which the plaintiff based his claims were communicative activities protected by the anti-SLAPP statute. (*Okorie, supra,* 14 Cal.App.5th at pp. 592-594.) Thus, "in contrast to *Park*, the protected activity [in *Okorie*] '*itself* [was] the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.' " (*Id.* at p. 592, quoting *Park, supra,* 2 Cal.5th at p. 1060.) Since this protected activity was integral rather than incidental to the challenged claims, *Okorie* held that the anti-SLAPP statute applied to the claims. (*Okorie*, at pp. 595-596.)

In applying the anti-SLAPP statute in *Okorie*, the Court of Appeal did not consider the plaintiff's allegations of discriminatory

animus until the prong two analysis of the merits of the plaintiff's claims, concluding that his failure to provide any admissible evidence of discrimination (a requirement for the merits of his case) indicated a failure to meet his burden of showing a probability of prevailing on the merits. (*Okorie, supra,* 14 Cal.App.5th at pp. 596-599.) Thus, despite an alleged discriminatory motive, the only relevant considerations for the prong one analysis were that the protected statements themselves comprised the adverse employment actions (i.e., the injury-producing conduct) on which plaintiff based his claims. (*Id.* at pp. 592-593.)[2]

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[2] See also, e.g., *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1541-1545 (anti-SLAPP statute applied to retaliation action because the action was based on "statements and writings" made to secure a search warrant in an official judicial proceeding and as part of an internal investigation that was an official proceeding authorized by law); *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 604-607, 610-612 (anti-SLAPP statute applied to a retaliation claim that was based on an investigation by the plaintiffs' supervisor, since the investigation was undertaken at the request of defense counsel to defend against other legal claims initiated by the plaintiff); *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1062-1064 (anti-SLAPP statute applied to an Unruh Act claim asserting age discrimination based on the allegation that a radio station and call-in show host ridiculed the plaintiff on air about his age when the plaintiff called into the show).

C. Defendants' alleged discriminatory and retaliatory motives for their protected activities cannot render the anti-SLAPP statute inapplicable here.

1. This Court's prior precedent makes clear that whether a protected activity is undertaken with allegedly illegitimate motives does not bar a claim from falling within the anti-SLAPP statute's scope.

The Court of Appeal deemed the anti-SLAPP statute to be inapplicable because plaintiff Stanley Wilson had alleged the purportedly adverse employment actions here were undertaken with discriminatory and retaliatory motives. (See *Wilson*, *supra*, 6 Cal.App.5th at pp. 834-837.) According to the Court of Appeal, "[a]bsent these 'motivations,' Wilsons's employment-related claims would not state a cause of action." (*Id.* at p. 835.) Thus, in the Court of Appeal's view, "[d]iscrimination and retaliation are not simply motivations for defendants' conduct, they *are* defendants' conduct." (*Ibid.*) The Court of Appeal held that, "[v]iewed from this perspective, Wilson alleges causes of actions that neither implicate CNN's First Amendment rights nor are a matter of public interest." (*Id.* at p. 836.) The Court of Appeal was concerned that any conclusion to the contrary " 'would subject most, if not all, harassment, discrimination, and retaliation cases' " to anti-SLAPP motions. (*Id.* at p. 835.)

The Court of Appeal's approach is foreclosed by this Court's prior decisions, like *Navellier, Equilon, Vasquez,* and *Park.* Discrimination and retaliation are simply forms of action under California law. (See, e.g., *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1168 [discrimination and retaliation are types of employment actions].) As this Court explained in *Navellier*, "[n]othing in the [anti-SLAPP] statute itself categorically excludes any particular type of action from its operation," and therefore " 'the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights.' " (*Navellier, supra*, 29 Cal.4th at pp. 92-93.) Thus, the anti-SLAPP statute applies whenever the challenged claims are based on a defendant's protected activities "as defined in the anti-SLAPP statute." (*Id.* at p. 95.)

The Court of Appeal brushed *Navellier* aside because it claimed *Navellier* deemed the plaintiff's "intent" in filing a lawsuit to be "irrelevant," and never "address[ed] the defendant's subjective intent." (*Wilson, supra*, 6 Cal.App.5th at p. 835.) While it is true that *Navellier* did not address a defendant's subjective intent, *Navellier did* decide how courts must analyze whether the anti-SLAPP statute applies. (See *Flatley, supra*, 39 Cal.4th at p. 318 ["The principal issue in *Navellier* was whether the plaintiffs' causes of action for fraud and breach of contract arose from acts in furtherance of the defendant's exercise of protected speech or petition rights"].) In doing so, *Navellier* expressly concluded that the anti-SLAPP statute is not categorically inapplicable to any particular type of claim, the specific form of the plaintiff's claim is

irrelevant, and the anti-SLAPP statute's applicability instead turns on whether the plaintiff's claims are based on activities defined to be protected in the statute itself. (*Navellier*, *supra*, 29 Cal.4th at pp. 89-95.) *Navellier* also made clear that "any 'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case.' " (*Id.* at p. 94.) Thus, whether the defendant has allegedly engaged in illegitimate or otherwise wrongful conduct has no bearing on the first prong of the anti-SLAPP analysis. (*Id.* at pp. 93-94.) The Court of Appeal's legal analysis here wrongly embraces the opposite, foreclosed approach, tying the anti-SLAPP statute's applicability under prong one to the particular form of claims Wilson asserted and whether defendants engaged in allegedly illegitimate, wrongful conduct, in an effort to categorically exclude the claims from the statute's reach.

Moreover, even if this Court could ignore *Navellier*, the Court of Appeal's analysis here contravenes *Equilon, Vasquez,* and *Park.* *Equilon* emphasized that "[t]he moving defendant's burden [under the anti-SLAPP statute] is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' *as defined in the statute*." (*Equilon*, *supra*, 29 Cal.4th at p. 67, emphasis added.) *Vasquez* reiterated this rule, stressing that "[t]he Legislature spelled out the kinds of activity it meant to protect in section 425.16, subdivision (e)," and therefore the anti-SLAPP