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No. 69444-8-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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KIMBERLY ZANKO, a single woman,  
MELISSA MACDONALD, a single woman,

Respondents,

vs.

RONALD BRECK EDWARDS and  
KELLIE EDWARDS, husband and wife,

Appellants.

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BRIEF OF APPELLANTS

Reba Weiss, WSBA #12876  
Teller & Associates  
1139 34<sup>th</sup> Avenue  
Seattle, WA 98122  
Attorneys for Appellants

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## **I. INTRODUCTION**

This case presents an issue of first impression in the State of Washington: whether an employee's complaint of sexual harassment to his manager constitutes an "oral statement. . . or any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern,...." within the meaning of RCW 4.24.525, the Anti-SLAPP statute. If so, is a lawsuit for defamation and intentional infliction of emotional distress subject to dismissal under RCW 4.24.525 where the plaintiffs cannot sustain their burden to establish by clear and convincing evidence that they will prevail at trial?

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred when it denied Edwards' motion to dismiss Zanko and MacDonald's lawsuit pursuant to RCW 4.24.525, the Anti-SLAPP statute.
2. The trial court erred when it refused to impose the statutory remedies, including attorney fees and costs, \$10,000 penalty upon each plaintiff for each defendant, and sanctions upon plaintiffs' attorney to deter repetition of the conduct and comparable conduct by others similarly situated.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Where Edwards complained of sexual harassment to his employer, is his complaint considered a matter of public concern for purposes of RCW 4.24.525, the Anti-SLAPP statute? (Assignment of Error 1).

2. Where Edwards complained to his employer that another employee had engaged in conduct that he considered sexual harassment, is his statement an intra-corporate communication and thus not a publication for purposes of defamation?(Assignment of Error 1).

3. Where Edwards complained to his employer that another employee had engaged in conduct that he considered sexual harassment, is his statement a privileged communication for purposes of a claim of defamation? (Assignment of Error 1).

4. Where Edwards' complaint to his manager was a privileged communication, did Zanko and MacDonald establish malice for purposes of a claim of defamation? (Assignment of Error 1).

5. Where Zanko and MacDonald could not establish the elements of a claim of intentional infliction of emotional distress, should the trial court have found that they had not met their burden of proving by

clear and convincing evidence that they could prevail at trial? (Assignment of Error 1).

6. Where Edwards established by a preponderance of the evidence that Zanko and MacDonald's claims are based on his statement in connection with an issue of public concern pursuant to RCW 4.24.525, and where Zanko and MacDonald could not establish by clear and convincing evidence that they could prevail at trial, should the trial court have granted Edwards' Special Motion to Strike pursuant to RCW 4.24.525? (Assignment of Error 1).

7. Did the trial court err when it did not consider whether Zanko and MacDonald could carry their burden of establishing that they would prevail at trial by clear and convincing evidence (Assignment of Error 1)?

8. Where Edwards complained of sexual harassment to his employer and his employer's human resources representative, are his statements protected under RCW 4.24.525(e), as statements prior to litigation or other official proceeding in the exercise of his constitutional right of petition?

9. Where Edwards' Special Motion to Strike pursuant to RCW 4.24.525 should have been granted, should the Court also have imposed attorney's fees and costs as well as a fine of \$10,000 against Zanko and MacDonald each to Defendants Breck and Kellie Edwards each? (Assignment of Error 2).

10. Where Edwards' Special Motion to Strike pursuant to RCW 4.24.525 should have been granted, should the Court have awarded sanctions against Plaintiffs' attorney, Thomas Resick, of \$10,000? (Assignment of Error 2).

#### **IV. STATEMENT OF THE CASE**

Breck Edwards began working for A&A Contract Customs Brokers, USA Inc., ("A&A") on January 4, 2010 as an Account Executive. He had a good working record with A&A until the actions described below took place. CP 249.

In October 2011, Edwards, Plaintiffs Kimberly Zanko and Melissa MacDonald went to a trade show in Las Vegas, Nevada. At the trade show, Zanko, Edwards' manager, and Macdonald, another employee, were trying to obtain a particular new client. This client had shown an interest in Macdonald throughout the day. Zanko told Macdonald words to the

effect, 'do whatever was necessary to get the client for the company, even if that meant using your room key.' This comment was made in Edwards' presence which he understood to mean that Macdonald should "do whatever it takes", including using sexual means, to get this new client. Edwards was offended at the statement and its implications. CP 249.

Edwards continued to be troubled by his manager's statement after he returned to Washington State. He reasonably believed that if that behavior was expected of a female employee it could be expected of him as well. Edwards reported the incident to A&A's Human Resources representative who did not seem at all concerned about the incident and took no action. CP 250.

Zanko learned about Edwards' complaint and began retaliating against him. Within a few days, he was told to reschedule a training seminar that had been scheduled months in advance. Whereas in the past, Edwards was permitted to work from home, he was told that he could no longer do so. He was not permitted to go on visits to two of his top clients. Instead, Zanko went to see the clients without even advising Edwards that she was doing so. On another occasion, a previously approved trip to Edwards' largest client was cancelled the day before the trip. CP 250.

Due to this retaliation, Edwards filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) on January 8, 2012. When A&A learned of the EEOC charge, they took further retaliatory action against Edwards. First, he was called into the CEO's office and berated for filing the charge. At this meeting, the CEO repeatedly insisted that Edwards withdraw the EEOC charge. Edwards refused to withdraw the charge. CP 250; 245.

Three days after this meeting, Edwards was abruptly terminated. The reasons given for his termination are obvious pretexts for retaliation for filing the charge with the EEOC. CP 250.

Edwards was initially granted unemployment benefits. A&A appealed and the matter was heard by Administrative Law Judge Joshua D. Sundt. Judge Sundt held in Edwards' favor, specifically finding:

Employer discharged claimant not for poor performance, but instead because the claimant repeatedly refused to drop the discrimination charge he had filed with the Equal Employment Opportunity Commission (EEOC). It is more likely than not that, if claimant had agreed to drop the EEOC charge as requested by Employer, he would not have been fired."

Judge Sundt also found that Edwards was a more credible witness than Zanko or Macdonald. CP 250; 235-243.

On or about July 6, 2012, counsel for Edwards made a settlement proposal to A&A. CP 247. When she received no response, counsel for Edwards called Mr. Thomas Resick, counsel for A&A. Mr. Resick advised that his client, A&A, was not interested in settlement with Edwards and that if he proceeded with his case, Zanko and MacDonald would sue him for slander. CP 233.

On July 26, 2012, the EEOC issued its Notice of Right to Sue to Plaintiff. CP 304. The Notice reflects that a copy was sent to A&A, the employer. Id. Four days later, on July 30, 2012, Zanko and MacDonald filed this lawsuit in Whatcom County Superior Court against both Breck Edwards and his wife, Kellie Edwards. CP 218-20. They allege that it was Edwards, and not Zanko, who made the offensive remark that Edwards reported to his manager. Id. Zanko and MacDonald's Complaint alleges causes of action of defamation and intentional infliction of emotional distress. CP 218-20.

On August 28, 2012, Edwards filed Defendants' Special Motion to Strike Claims of Slander and Intentional Infliction of Emotional Distress and Request for Imposition of Fines and Sanctions Pursuant to RCW 4.24.525. CP 221-251. Plaintiffs' Opposition To Defendants' Special Motion to Strike Claims Pursuant to RCW 4.24.525 was filed on

September 28, 2012. CP 254-271. Defendants' Reply was filed on September 26, 2012. CP 310-330.

In Plaintiffs' Opposition, Zanko and MacDonald filed declarations making new allegations against Edwards that were not included or referenced in their Complaint and that were directly contrary to their testimony at the administrative hearing for unemployment benefits. CP 333-393. For example, at the administrative hearing MacDonald testified:

Q. (by Mr. Resick): Okay. Did – first question, did Breck Edwards indicate to you how you should take care of a client? Question (sic). You say yes or no.

A. (by Ms. MacDonald): Well, yes.

Q. Okay. What did Breck Edwards say to you on the subject that night?

**A. We were speaking in the context of gaining sales and it was implied that I should take one for the team. That's all I can tell you. I can't say specifically.**

CP 311; 348-49 (*emphasis supplied*). This testimony directly contradicts the detailed testimony in MacDonald's Declaration In Opposition to Defendants' Special Motion to Strike Claims Pursuant to RCW 4.24.525. CP 272-275. Likewise, Zanko testified at the administrative hearing that nothing at all happened that was offensive:

Q. (by Mr. Resick): Okay. I wanted to ask you now, were you ever at a dinner with Melissa (MacDonald) in which somebody made reference to propositioning somebody else?

A. (by Ms. Zanko): **No.**

Q. Okay. Did you – and I want to be careful with my questioning. **Did you ever hear about such a thing while you were in Las Vegas?**

A. **No.**

Q. Okay. Did you ever see Breck make a reference to that type of activity?

A. **No.**

CP 312; 384 (*emphasis supplied*).

Zanko's Declaration in support of Plaintiffs' Opposition stands in stark contrast to her testimony that she never heard Edwards make the statement. CP 281-282.

The Court, in its colloquy with counsel during argument on Defendants' Motion to Strike, made the following remarks:

My question to you at this point would be when you say he wasn't chilled in his going to the EEOC, does it matter, the timing? I mean, this statute is fairly broad in terms of what constitutes in the language of the statute, itself, a governmental proceeding authorized by law, and the fact that somebody brings such an action before some government agency, and there's a lawsuit, isn't that what the statute is about? To prevent people from suing you while that's going on or as a result of that? You went over there, you went to those folks, so I'm going to sue you?

RP p. 9, ll. 13-23. Further, the Court stated:

This statute is disturbing to me on a couple of levels. One is the level that we discussed that it might just, in an attempt to prevent one person's activity being chilled, to prevent other people from pursuing a lawsuit action that they wish to do, to bring an action that they wish to bring.

But the thing that is more troublesome to me is the fact it is written in such a way that the definition of what includes governmental proceeding authorized by law and under what circumstances these statements might be subject to this statute seems to address things which aren't within the purview of the general intent of the statute, I don't think, or even some of the other provisions of the statute.

RP p.19, ll. 2-15. Later, the Court added the following:

The fact that there's nothing pending before the EEOC, I think, changes things significantly. ...

If it is retaliatory, it is retaliatory against a lawsuit or a threat or a promise of a lawsuit. So I don't think that the statute applies, but even if it did for the sake of argument here today, what the statute says is this Court must determine if there is some evidence, preponderance, that there is some retaliation, and let's assume that I make that determination, I'm not doing it, but let's assume I did, then I have to look and see if there is clear, convincing evidence that they might prevail. I think the wording in the statute is possibility of prevailing in the complaint.

Now, what in the world does that mean? Am I to pull out my crystal ball and say who is going to win this lawsuit? I can't do that. ...

So for this Court to determine what this statute means when it says a probability of prevailing, I think the Court can only do one thing, and say if their evidence was believed by a fact finder, would they prevail, and I believe they could, and they could prevail on a slander lawsuit if their evidence is believed and Mr. Edwards' is not.

And I am not say (sic) it is going to be. I am saying if, and that is all the Court can do is look at it like a summary judgment. Take all of the evidence in favor of the Plaintiffs. If I take their information and their evidence in the light most favorable to them, could a finder of fact say, yes, they've been slandered. I think they could.

And so under those circumstances, even if I felt the anti-SLAPP statute applied, I think the second prong here has been met

by the Plaintiffs, which is if they can convince a jury or a judge that what they say happened happened, then there is a probability of their prevailing, and you know, that is – I can't say whether it is clear and convincing yet, because we don't know what the evidence is, but if they do, yes, they can.

So my ruling is that I don't think that the statute applies in this case, because of the circumstances here. There is no pending matter going on in any sort of government agency or department where we can stretch this to say that there is some sort of interference with Mr. Edward's ability to be heard on an issue of public importance, because that is not happening right now, and so it doesn't apply.

But even if it were to be determined to apply, I think that the Plaintiffs have met the burden to avoid having the matter dismissed and the sanctions imposed.

RP p. 20, ll. 16 - p.23, ll. 3 (*emphasis supplied*).

On October 2, 2012, Edwards filed a lawsuit in the U.S. District Court, Western District of Washington alleging that A&A committed violations of Title VII of the Civil Rights Act of 1964 and RCW 49.60 *et seq.*, the Washington Law Against Discrimination. *See* Case No. 2:12-cv-01689-MJP. In its Answer filed October 23, 2012, A&A alleges, among other affirmative defenses, the following:

Defendant is entitled to the affirmative defenses recognized by the United States Supreme Court in Burlington Industries Inc., v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

*See*, Case No. 2:12-cv-01689-MJP, Defendant's Answer and Affirmative Defenses, Section 'R'.

This appeal timely follows the Court's ruling denying Edwards' Motion to Strike pursuant to RCW 4.24.525.

## V. ARGUMENT

### A. Standard of Review

This case involves the interpretation of RCW 4.24.525, the Anti-SLAPP statute. Statutory interpretation is a question of law that the Court reviews *de novo*. Morgan v. Kingen, 141 Wn. App. 143, 161, 169 P.3d 487 (2007), *aff'd* 166 Wn. 2d 526, 210 P. 3d 995 (2009). The Court interprets a statute to ascertain and give effect to the legislature's intent. Id. at 160. If the statute's meaning is plain on its face, the Court gives effect to that plain meaning. Id. An unambiguous statute is not open to judicial interpretation. Id. at 161.

The Anti-SLAPP statute was patterned after the California anti-SLAPP statute and Washington courts have relied upon California law in construing our statute. Aronson v. Dog Eat Dog Films, Inc., 738 F. Supp. 2d 1104 (W.D. Wash. 2010). California cases have held that review is *de novo* and the appellate court engages in the same two step analysis as the trial court:

On appeal, we review the trial court's decision *de novo*, engaging in the same two-step process to determine, as a matter of law, whether the defendant met its initial burden of showing the action

is a SLAPP, and if so, whether the plaintiff met its evidentiary burden on the second step.

People ex rel. Fire Insurance Exchange v. Anapol, (2012) 211 Cal.App.4th 809 (*quoting* Tuszynska v. Cunningham (2011) 199 Cal.App.4<sup>th</sup> 257, 266-67, 131 Cal.Rptr.3d 63.)

**B. Edwards' Speech Was Protected Under The Anti-SLAPP Act, RCW 4.24.525**

1. The 2010 Enactment of the Anti-SLAPP Statute, RCW 4.24.525, Was Intended to be Broadly Construed to Protect Private Individuals Who Speak on a Topic of Public Interest.

In 2010, the Washington Legislature enacted a new Anti-SLAPP statute embodied in RCW 4.24.525. In its preamble, the Legislature set out the goals and purposes of the new statute:

(1) The legislature finds and declares that: (a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances; (b) Such lawsuits, called “Strategic Lawsuits Against Public Participation” or “SLAPPs,” are typically dismissed as groundless or unconstitutional but often not before the defendants are put to great expense, harassment, and interruption of their productive activities; (c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues; (d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and (e) An expedited judicial review would avoid the potential for abuse in these cases.

2010 Wash. Legis. Serv. Ch. 118 (S.S.B. 6395) (emphasis supplied). The Act “shall be applied and construed liberally to effectuate its general

purpose of protecting participants in public controversies from an abusive use of the courts.” Id. @ Sec. 3(*emphasis supplied*). The new law was enacted to protect statements on matters of public concern, which is the “sine qua non of democracy.” *See*, Bruce E. H. Johnson & Sarah K. Duran, A View From The First Amendment Trenches: Washington State’s New Protections For Public Discourse and Democracy, 87 Wash. Law Rev. 495, 499, 509 (2012) *citing* Robert C. Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State 15 (2012).

The first case to interpret the new statute, Aronson v. Dog Eat Dog Films, Inc., *supra*, held that the statute was to be liberally construed to protect participants involved in discussions on matters of public concern from the abusive use of the courts:

Any conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern is subject to the protections of the statute. That Defendant may be considered a powerful business entity as compared with the private party Plaintiff is of no import under the modern framework of the statute. Nor is it critical that Plaintiff is not a public figure. Whereas a public figure, standing alone, may satisfy the public interest element of the Act, a private individual satisfies this requirement so long as there is a direct connection with the individual to a discussion of a topic of widespread public interest.

Id. at 1111 (*emphasis supplied*).

The Court in Aronson noted that the 2010 Anti-SLAPP statute “vastly expanded the type of conduct protected by the Act” and that the statute was patterned after California’s Anti-SLAPP Act. Id. at 1109. The Court relied heavily on California law as Aronson was a case of first impression in this state. Id. at 1110.

2. The Burdens of Proof in an Anti-SLAPP Case Require Edwards to First Establish That Plaintiffs’ Complaint Is Based Upon His Speech in Connection With A Matter of Public Concern Whereupon Plaintiffs Are Required to Prove By Clear and Convincing Evidence That They Will Prevail at Trial.

Pursuant to the Anti-SLAPP Act, a party may bring a special motion to strike any claim that is based on an oral statement or “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.” RCW 4.24.525(2)(e).

The party bringing a special motion to strike a claim under the Act has the initial burden of showing by a preponderance of the evidence that the claim is based on a statement in connection with an issue of public concern. RCW 4.24.525(4)(b). If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence that she will prevail at trial. Id. If the responding party meets

this burden, the court should deny the motion to strike. In making this determination, the court should consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. RCW 4.24.525(4)(c).

Edwards had the burden of establishing that he spoke on a matter of public concern and that Zanko and MacDonald's allegations are based upon this protected speech. The burden then shifted to Zanko and MacDonald to prove by clear and convincing evidence that they would prevail on their claims at trial. Because they could not do so, the lower Court should have granted the special motion to strike.

3. Zanko and MacDonald's Complaint Alleging Defamation and Intentional Infliction of Emotional Distress is Based on Edwards' Speech In Connection with an Issue of Public Concern.

The focus of an Anti-SLAPP case is on "whether the plaintiff's cause of action itself is based on an act in furtherance of the defendant's right of free speech. . . . The focus is not on the form of plaintiff's cause of action but, rather, the defendant's activity that gives rise to defendant's asserted liability and whether that activity constitutes protected speech." Id. at 1110-11.

Zanko and MacDonald have brought causes of action for defamation and intentional infliction of emotional distress. Their causes

of action are directly related to Edwards' report to his manager that, *in his opinion*, Zanko had engaged in sexually harassing conduct when she told MacDonald to "do whatever it takes" to get a particular customer. The following are particularly pertinent excerpts from the Complaint:

3.4 In the stating of the story the Defendant, Breck Edwards, portrayed Kimberly Zanko as a procurer.

3.5 The Plaintiff, Melissa Macdonald, was described in such a way that she would behave like a prostitute.

3.6 Breck Edwards made known his allegations to the employer of the Plaintiffs. Breck Edwards did know that this would be the case. Breck Edwards had his own reasons for changing the story which involved his own employment situation.

3.7 Breck Edwards' account of the story was altered in a way that would serve his own purposes.

3.8 The Defendant, Breck Edwards, in stating that occurrence happened slandered the Plaintiffs, Kimberly Zanko and Melissa Macdonald.

CP 218-220 (*emphasis supplied*). Zanko and MacDonald's complaint is based upon Edwards' report to his manager of their conduct at the convention. The phrases "in the stating of the story", "was described", "made known his allegations to the employer", "account of the story", and "in stating that occurrence happened" all refer to speech and speaking. The subject matter upon which Edwards spoke was a matter of public concern, i.e., sexual harassment in the workplace. Furthermore, a defendant in an Anti-SLAPP case "need not prove that the challenged

conduct is protected by the First Amendment as a matter of law; only a prima facie showing is required.” Coretronic Corp. v. Cozen O’Connor, (2011) 192 Cal.App.4<sup>th</sup> 1381, 1388.

4. Sexual Harassment in the Workplace is a Matter of Public Concern Within the Meaning of the Anti-SLAPP Act.

A sexual harassment complaint is a statement on an issue of public concern protected by the Anti-SLAPP statute:

One of the acts of expression for which Plaintiff was disciplined was his distribution of the sexual harassment Complaint lodged against him. Regarding the content of the Complaint, it is well-settled that allegations of sexual harassment, like allegations of racial harassment, are matters of public concern. See Connick v. Myers, 461 U.S. at 138, 146, 103 S.Ct. 1684 (noting that “it is clear that ... statements concerning the school district's allegedly racially discriminatory policies involved a matter of public concern”).

Bonnell v. Lorenzo, 241 F.3d 800, 812-13 (6<sup>th</sup> Cir. 2001)(*emphasis supplied*). RCW 49.60.010 provides the purpose of the statute prohibiting sexual discrimination and harassment in the workplace:

It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of ... sex, ... are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free democratic state.

(*emphasis supplied*).

Before an employee can bring an action against an employer for sexual harassment, he must first establish that the employer was on notice of the harassment and failed to take appropriate remedial measures to end the harassment. In *Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 407, 693 P.2d 708, 712 (1985), our Supreme Court held:

To hold an employer responsible for the discriminatory work environment created by a plaintiff's supervisor(s) or co-worker(s), the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action. This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of sexual harassment at the work place as to create an inference of the employer's knowledge or constructive knowledge of it and (b) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment.

*(emphasis supplied)*. In order for Edwards to exercise his statutory right to be free of sexual harassment in the workplace, he first had to notify his employer that the harassment had taken place. *Davis v. West One Automotive Group*, 140 Wash.App. 449, 166 P.3d 807, *review denied* 163 Wash.2d 1040, 187 P.3d 269 (2007) (reporting a racially hostile work environment is a statutorily protected activity, as element of prima facie case of retaliatory discharge in violation of Washington's Law Against Discrimination (WLAD)). This is conduct protected by the Anti-SLAPP statute as an issue of public concern.

It is not necessary that the conduct complained of in fact constitute illegal activity so long as the complaint was made in good faith. “An employee who opposes employment practices reasonably believed to be discriminatory is protected by the ‘opposition clause’ whether or not the practice is actually discriminatory.” Renz v. Spokane Eye Clinic, P.S., 114 Wash.App. 611, 60 P.3d 106 (2002). Nor does the discriminatory conduct have to be directed at the complainant in order for it to constitute protected activity. Ray v. Henderson, 217 F.3d 1234, 1240 (9<sup>th</sup> Cir. 2000) (employee’s complaints about treatment of others is considered protected activity, even if the employee is not member of the class that he claims suffered from discrimination, and even if discrimination about which he complained was not legally cognizable.)

As a matter of public policy, permitting alleged harassers to sue the offended employee for slander would chill every complaint of harassment in the workplace. In fact, reporting harassment in the workplace is a protected activity under RCW 49.60 *et seq.* Our legislature and Supreme Court have made it clear that unlawful discrimination and harassment in the workplace is “a matter of state concern” and an “exercise of police power of the state for the protection of the public welfare”. Such a chilling effect on a matter of public concern should not be permitted.

5. The Court Erred When It Found that the Anti-SLAPP Statute Did Not Apply Because There was No EEOC Charge Pending at the Time Zanko and MacDonald Filed Their Suit.

The lower court held, in part:

The fact that there's nothing pending before the EEOC, I think, changes things significantly. ...

There is (*sic*) pending matter going on in any sort of government agency or department where we can stretch this to say that there is some sort of interference with Mr. Edward's ability to be heard on an issue of public importance, because that is not happening right now, and so it doesn't apply.

RP p. 20, ll.16-17; p. 22, ll. 18-25. Several provisions of the statute define an "action involving public participation and petition" as including a statement made in "legislative, executive, or judicial proceeding or other governmental proceeding authorized by law". See, RCW 4.24.525(2)(a)(b)(c). However, the section of the statute upon which Edwards relies does not contain language requiring the speech to be connected with a public agency: "[a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2)(e). As set forth earlier,

Any conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern is subject to the protections of the statute. ... Whereas a public figure, standing alone, may satisfy the public interest element of

the Act, a private individual satisfies this requirement so long as there is a direct connection with the individual to a discussion of a topic of widespread public interest.

Aronson, 738 F. Supp. 2d. at 1111 (*emphasis supplied*).

In Hecimovich v. Encinal School Parent Teacher Organization, (2012) 203 Cal.App.4th 450, 467, 137 Cal.Rptr.3d 455, the Court held that safety in youth sports, including problem coaches and problem parents in youth sports, was an issue of public interest within the SLAPP law:

Like the SLAPP statute itself, the question whether something is an issue of public interest must be “ ‘construed broadly.’ ” An “ ‘issue of public interest’ ” is “*any issue in which the public is interested.*” A matter of “ ‘public interest should be something of concern to a substantial number of people. ... [T]here should be some degree of closeness between the challenged statements and the asserted public interest .... [T]he focus of the speaker's conduct should be the public interest....’ ” Nevertheless, it may encompass activity between private people.<sup>1</sup>

Id. at 464-67 (*citations omitted*)(*emphasis in the original*).

If, as in Hecimovich, the subject of youth sports is protected as an issue of public interest within the meaning of the Anti-SLAPP statute, then surely the subject of sexual harassment is protected as well.<sup>1</sup>

For protection under RCW 4.24.525(2)(e) it is not necessary that a matter be pending before the EEOC or any other government agency.

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<sup>1</sup> In Hecimovich, the Court cited the number of hits a Google search for the term “youth sports” got as evidence that it was a matter of public interest. A Google search for the term “sexual harassment” showed 17,800,000 hits, also a “subject(s) of tremendous interest.” Id. at 454.

There are separate provisions of the statute, RCW 4.24.525(2)(a)-(d), that provide protection for speech connected to a government agency. The last section of the statute, however, is a “catch-all” provision that protects individuals’ speech regardless of whether it is related to a government agency. The court erred in deciding that the statute did not apply since Edwards did not have a matter pending before the EEOC at the time that plaintiffs filed their complaint.

6. The Court Erred When It Decided That Edwards Had To Establish That Zanko and MacDonald’s Motives Were Retaliatory Or That Their Action Was Brought With An Intent to Chill Defendant’s First Amendment Rights.

The lower court held, in part:

If it is retaliatory, it is retaliatory against a lawsuit or a threat or a promise of a lawsuit. So I don’t think that the statute applies, but even if it did for the sake of argument here today, what the statute says is this Court must determine if there is some evidence, preponderance, that there is some retaliation, and let’s assume that I make that determination, I’m not doing it, but let’s assume I did, then I have to look and see if there is clear, convincing evidence that they might prevail. I think the wording in the statute is possibility of prevailing in the complaint.

RP p. 20, ll.23 – p. 21, ll. 8 (*emphasis supplied*).

The plaintiff’s motives in an Anti-SLAPP case have no bearing on whether the statute applies. “If the actionable communication fits within the definition contained in the statute, the motive of the communicator

does not matter.” Dible v. Haight Ashbury Free Clinics, (2009) 170 Cal. App.4<sup>th</sup> 843, 851.

The statute applies to claims based on “or arising from statements or writings made in connection with protected speech or petitioning activities, regardless of any motive the defendant may have had in undertaking its activities, or the motive the plaintiff may be ascribing to the defendant’s activities.

The People ex rel. Fire Insurance Exchange v. Anapol, (2012) 211 Cal.App.4<sup>th</sup> 809, (*quoting* Tuszynska v. Cunningham, (2011) 199 Cal.App.4<sup>th</sup> 257, 269).

Likewise, whether plaintiffs’ motive in bringing their action is to chill defendant’s exercise of his Constitutional right to free speech is irrelevant. The lower court, however, found this issue relevant:

My question to you at this point would be when you say he wasn’t chilled in his going to the EEOC, does it matter, the timing? I mean, this statute is fairly broad in terms of what constitutes in the language of the statute, itself, a governmental proceeding authorized by law, and the fact that somebody brings such an action before some government agency, and there’s a lawsuit, isn’t that what the statute is about? To prevent people from suing you while that’s going on or as a result of that? You went over there, you went to those folks, so I’m going to sue you?

...

[t]he potential problem with the statute is it means you can never bring an action against somebody once they go to the EEOC or whatever. You can never sue them, because it’s always going to be treated as retaliatory.

RP p. 9, ll.13 - p. 10, ll.7.

In Equilon Enterprises v. Consumer Cause, Inc., (2002) 29 Cal.4<sup>th</sup> 53, 57, the Court answered “no” to the following question: “(m)ust a defendant, in order to obtain a dismissal of a strategic lawsuit against public participation (SLAPP) ... , demonstrate that the action was brought with the intent to chill the defendant’s exercise of constitutional speech or petition rights?” California’s Anti-SLAPP statute, upon which our statute is patterned, Aronson at 1110, does not contain any language “requiring the court to engage in an inquiry as to the plaintiff’s subjective motivations before it may determine [whether] the anti-SLAPP statute is applicable.” Id. at 58 (*citation omitted*).

Our legislature designed RCW 4.24.525 to expedite the hearing so that frivolous SLAPPs are ended early and without a great deal of cost to the “SLAPP target”. RCW 4.24.525(5)(a)(b) and (d). “A requirement that courts confronted with anti-SLAPP motions inquire into the plaintiff’s subjective intent would commit scarce judicial resources to an inquiry inimical to the legislative purpose that unjustified SLAPP’s be terminated at an early stage.” Id. at 65 (*citations omitted*).

RCW 4.24.525 does not contain any language that would require Edwards to establish Zanko and MacDonald’s motive before the statute can be applied. The lower court erred when it engaged in an inquiry into

Plaintiffs' motives in bringing their claims and denying Edwards' motion on that basis.

7. Edwards' Report of Harassment to A&A's Management and Human Resources Representative Is Protected by RCW 4.24.525(e) as an Act In Furtherance of His Exercise of the Constitutional Right of Petition.

Edwards' reports of what he perceived to be sexual harassment is protected by the Anti-SLAPP statute as statements made in anticipation of litigation in the exercise of his Constitutional right to petition. In a recent case on point, Aber v. Comstock, A134701 (San Francisco City & County Super. Ct. No. CGC-10-503100 (2013))<sup>2</sup>, the plaintiff filed a lawsuit alleging, among other claims, sexual harassment. One of the individual defendants she alleged sexually harassed her sued her for defamation and intentional infliction of emotional distress. She filed a motion pursuant to California's comparable Anti-SLAPP statute. The motion was granted and then appealed.

The Court of Appeal, First Appellate District, Division Two affirmed the dismissal of the SLAPP suit. Among other reasons for affirming the lower court's grant of the Anti-SLAPP motion, the Court held that the plaintiff's statements to her employer's human resources

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<sup>2</sup> This case was filed on December 18, 2012 and certified for publication on January 11, 2013. A copy of the case is attached for the Court's convenience.

manager were protected as statements prior to litigation. The Court agreed with plaintiff that,

the statements were necessary to address a commonly used affirmative defense by an employer in a sexual harassment case . . . . The defense is that set forth in Faragher v. City of Boca Raton (1998) 524 U.S. 775, which held that in an action by an employee, the employer can assert as an affirmative defense that the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer.

The Court likened the situation to that in Briggs v. Eden Council for Hope & Opportunity, (1999) 19 Cal.4<sup>th</sup> 1106, 1115. There the court held that the alleged defamatory statements were protected by the Anti-SLAPP statute as they “were in connection with a *potential* complaint to HUD and a *potential* small claims case, neither of which had been filed.” (*emphasis in the original*).

As in Aber, the affirmative defense provided by Faragher and Ellerth has been asserted here, i.e., that Edwards unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer. See, W.D. WA Case No. 2:12-cv-01689-MJP, Answer, section ‘R’. A&A, Zanko and MacDonald cannot have it both ways. They cannot on the one hand allege that Edwards’ statements to his employer were defamatory while at the same time asserting the affirmative defense that he failed to take advantage of preventive or corrective opportunities, per

Faragher and Ellerth. As in Aber, and the cases cited therein, Edwards' reports of harassment to his employer are protected as statements in anticipation of litigation pursuant to his Constitutional right to petition and thus come under the rubric of the Anti-SLAPP statute.

8. Zanko and MacDonalds' Claims of Defamation and Outrage Are Classic SLAPP Claims

Plaintiffs' claims against Edwards are classic SLAPP claims with no merit, brought only to punish Edwards for the exercise of his Constitutional right to free speech:

SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so. 'While SLAPP suits masquerade as ordinary lawsuits such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right.'

Martin v. Inland Empire Utilities Agency, (2011) 198 Cal.App.4<sup>th</sup> 611, 621 (*citations omitted*).

The lower court erred in deciding that Zanko and MacDonalds' claims against Edwards were not subject to Washington's Anti-SLAPP statute. Edwards established that their causes of action against him resulted from the exercise of his Constitutional right to free speech in connection with an issue of public interest, i.e. sexual harassment. The

burden then shifted to Plaintiffs to establish by clear and convincing evidence that they have a probability of prevailing on their claims, a burden that they could not carry.

C. **Plaintiffs Cannot Establish That They Have A Probability of Prevailing On Their Claims of Defamation and Outrage**

1. The Court Erred When It Failed to Engage in an Analysis of Plaintiffs' Claims to Determine Whether They Established By Clear and Convincing Evidence That There Was A Probability Of Prevailing on Their Claims.

The lower court made the following ruling from the bench:

If it is retaliatory, it is retaliatory against a lawsuit or a threat or a promise of lawsuit. So I don't think that the statute applies, but even if it did for the sake of argument here today, what the statute says is this Court must determine if there is some evidence, preponderance, that there is some retaliation, and let's assume I make that determination, I'm not doing it, but let's assume I did, then I have to look and see if there is clear, convincing evidence that they might prevail. I think the wording in the statute is possibility of prevailing in the complaint.

Now, what in the world does that mean? Am I to pull out my crystal ball and say who is going to win this lawsuit? I can't do that. In fact, this is a lawsuit that comes down to who said what, and who is going to believe who said what. Is a jury or fact finder going to believe the Plaintiffs in this case, or is a jury or fact finder going to believe Mr. Edwards? And the only way that is going (sic) happen is for those people to testify and be there to be cross-examined and other evidence presented as to what happened, what might have been said at that point in time, and what was going on at this trade show in Las Vegas.

So for this Court to determine what this statute means when it says a probability of prevailing, I think the Court can only do one thing, and say if their evidence was believed by a fact finder, would they prevail, and I believe they could, and they could

prevail on a slander lawsuit if their evidence is believed and Mr. Edwards' is not.

RP p.20, ll. 23 –p. 21, ll. 20 (*emphasis supplied*).

Zanko and MacDonald have alleged two causes of action in their complaint: defamation and intentional infliction of emotional distress. An analysis of the elements and law pertaining to these causes of action prove that Plaintiffs cannot carry their burden of establishing by clear and convincing evidence that they had a probability of prevailing on either of these claims. The lower court, however, failed to engage in this analysis and held that if the fact finder believed the plaintiffs then they would prevail but if they believed Edwards he would prevail. This simplistic analysis was error.

2. Zanko and MacDonald Cannot Establish by Clear and Convincing Evidence That They Would Prevail On Their Claim of Defamation.

A defamation plaintiff must prove: (1) a false statement, (2) an unprivileged communication, (3) fault, and (4) damages. Commodore v. Univ.Mech.Contractors, Inc., 120 Wn.2d 120, 133, 839 P.2d 314 (1992). Plaintiffs cannot carry their burden of proof as to at least three of these elements.

The Anti-SLAPP statute establishes shifting burdens of proof “where the trial court evaluates the merits of the lawsuit using a summary-

judgment-like procedure at an early stage of the litigation.” Hecimovich 203 Cal.App.4<sup>th</sup> at 466. Summary judgment plays “a particularly important role” in resolving defamation cases. Mohr v. Grant, 153 Wn.2d 812, 821, 108 P.3d 768 (2005). This is so because “[s]erious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted [defamation] lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms.” Id. (quoting Mark v. Seattle Times, 96 Wn.2d 473, 485, 635 P.2d 1081 (1981)).

The Anti-SLAPP Act is to be liberally and broadly construed. Aronson, supra. The lack of evidence of defamation taken together with the “particularly important role” summary judgment plays in defamation cases establishes that Plaintiffs cannot show by clear and convincing evidence that they have a probability of prevailing at trial.

(a) Plaintiffs Cannot Prove A False Statement By Clear and Convincing Evidence.

The precise statement that Zanko and MacDonald allege was defamatory is itself in doubt. In Phillips v. World Pub. Co., 822 F. Supp.2d 1114, 1118 (W.D. WA, 2011), the plaintiff sued for defamation and other torts. Defendant moved to dismiss the complaint pursuant to

Fed.R.Civ.P. 12(b)(6) for failure to state a claim. Defendant also moved to strike all claims pursuant to RCW 4.24.525, the Anti-SLAPP law. In examining plaintiff's defamation claim the Court had this to say regarding the lack of specificity in the complaint:

Nowhere in the complaint has plaintiff alleged when and where such statements were made, or what statements were actually made by defendant Tulsa World. ... Nowhere does plaintiff separately identify the statements allegedly made by the Tulsa World from the statements allegedly made by KIRO-TV, the Seattle Times, or other media outlets. His defamation claim against the Tulsa World fails on this deficiency alone, as such scattershot and unsubstantiated allegations cannot withstand a motion to dismiss.

Id. Likewise, Zanko and MacDonald are vague about the precise statement that they claim was defamatory. In their complaint, the closest they come to specifying an alleged false statement is the following:

The Defendant, Breck Edwards, made certain inappropriate comments which included telling Plaintiff, Melissa Macdonald, one of the female employees of A&A, to act as a prostitute in order to obtain business from a client of A&A and that she "should take one for the team."

The only portion of this allegation that is in quotation marks is "should take one for the team." Certainly, there is nothing defamatory about this remark, which is more of an opinion than an accusation. The remainder of the allegation is vague and non-specific: "to act as a prostitute in order to obtain business from a client." Nowhere do Zanko and MacDonald allege the precise words that Edwards allegedly used to portray either of them as

a “prostitute” or a “procurer”. This is merely their interpretation of what they claim he said. As Phillips holds:

Defamatory meaning may not be imputed to true statements, or to opinion-like characterizations of plaintiff’s actions....Courts give words their ‘natural and obvious meaning’ and may not extend the language by ‘innuendo or by the conclusions of the pleader.’ The ‘defamatory character of the language must be apparent from the words themselves.’

Id. at 1119 (*citations omitted*).

The “defamatory character” of Edwards’ speech to his employer is not even close to apparent from Plaintiffs’ Complaint. Plaintiffs have been vague and non-specific with the precise defamatory language that Edwards allegedly used. Plaintiffs’ “prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists.” Alpine Indus. Computers, Inc. v. Cowles Pub. Co., 114 Wash. App. 371, 378, 57 P.3d 1178, 1183 (2002) amended sub nom. Alpine Indus., Computers, Inc. v. Cowles Pub. Co., 64 P.3d 49 (Wash. Ct. App. 2003). A complaint that fails to identify the words constituting the alleged libel is fatally flawed. Dible, 170 Cal.App.4<sup>th</sup> at 852.

It is sometimes said to be a requirement, and it certainly is the common practice, to plead the exact words or the picture or other defamatory matter. The chief reason appears to be that the court must determine, as a question of law, whether the defamatory matter is on its face or capable of the defamatory meaning

attributed to it by the innuendo. Hence, the complaint should set the matter out verbatim, either in the body or as an attached exhibit.

(5 Witkin, Cal.Procedure (5<sup>th</sup> ed. 2008) Pleading, section 739, p. 159).

To “establish the falsity element of defamation, the plaintiff must show the offensive statement was ‘provably false’. ‘Expressions of opinion are protected by the First Amendment and are not actionable.’” Valdez-Zontek v. Eastmont School Dist., 154 Wash.App. 147, 157 (2010) (citations omitted)(quoting Robel v. Rounduip Corp., 148 Wn.2d 35, 55, 59 P.3d 611 (2002)). Without knowing the precise statement that Plaintiffs’ claim was defamatory, it is impossible for them to prove whether it is “provably false” or an “expression of opinion”.

The complaint that Edwards made to his employer, a report that Zanko had engaged in sexual harassment, is a statement of his opinion. He reported that *in his opinion*, Zanko’s behavior was inappropriate and that *in his opinion* it constituted sexual harassment. As a statement of opinion, Plaintiffs’ defamation claim cannot survive.

Without specificity regarding the alleged defamatory statement, Plaintiffs cannot prevail by clear and convincing evidence. Because of the potential chilling effect on the exercise of First Amendment rights of free speech allegations of defamation require a heightened level of

specificity. A pleading of defamation will not be found adequate absent “the precise statements alleged to be defamatory, who made them and when.” Flowers v. Carville, 310 F.3d 1118, 1130 (9<sup>th</sup> Cir. 2002). Courts have dismissed defamation claims for failure to identify the specific statements alleged to be false. *See*, Harris v. City of Seattle, 315 F. Supp.2d 1112, 1123 (W.D. Wash. 2004).

To establish falsity, the plaintiff must show that the challenged statement was “provably false”. The falsity of a statement must be proven from the actual words used in the publication, not by innuendo or a plaintiff’s spin on how it might be construed. Lee v. Columbian, Inc., 64 Wn. App. 534, 538, 826 P.2d 217 (1991). Here, because Plaintiffs’ fail to be specific regarding the alleged words that Edwards allegedly spoke, it is impossible for them to prove falsity. Plaintiffs’ claim of defamation must fail because Plaintiffs have not specified the precise language that Edwards allegedly used and because any such language was a statement of his opinion and therefore not defamatory.

(b) Plaintiffs’ Claim of Defamation Must Fail For Lack of Publication.

In Washington, the law is clear that intra-company communications of business related matters have not been “published” for purposes of defamation – rather, through those statements the company is

merely communicating with itself. Prins v. Holland-North Am. Mortg. Co., 107 Wn. 206, 209, 181 P. 680 (1919); Doe v Gonzaga Univ. 143 Wn.2d 687, 702, 24 P.3d 390 (2001) *rev'd in part on other grounds*, 536 U.S. 273 (statements made within ordinary course of work between employees of common employer are not published).

In a case on point, Woody v. Stapp, 146 Wash.App. 16, 21 (2008), plaintiff's co-workers made a complaint of sexual harassment and the employer conducted an investigation. Plaintiff sued, for among other things, defamation. The Court held that the complaints were intra-corporate communications and applied the qualified privilege for the statements given during the investigation. Like Woody, Edwards' complaint to his manager of what he perceived to be sexual harassment was an intra-corporate communication and therefore not published for purposes of a defamation claim.

(c) Edwards' Report of Sexual Harassment to His Employer is Subject To the Common Interest Privilege.

The common interest privilege applies where the declarant and the recipient have a common interest in the subject matter of the communication. Valdez-Zontek, 154 Wn. App. at 162. The privilege generally applies to companies or organizations "when parties need to speak freely and openly about subjects of common organizational or

pecuniary interest.” Id. Information regarding an employee that is exchanged between managers and other employees on subjects on which they have a need to be informed is conditionally privileged.

In Messerly v. Asamera Minerals, 55 Wn.App. 811, 780 P.2d 1327 (1989), plaintiffs were terminated for smoking marijuana. The employer distributed a memorandum noting the terminations and reminding the employees that drug use was against company policy and would not be tolerated. Plaintiffs sued for defamation.

In affirming the trial court’s dismissal, the court noted that the employer had a legitimate interest in communicating this information to its employees, and thus had a conditional privilege. Because the employer had a duty to maintain a safe workplace, the privilege was not abused. In order to show abuse of the privilege, it was not sufficient to merely establish falsity of the statements, rather plaintiffs needed to show proof of knowledge or reckless disregard as to the falsity of the statement.

In Woody, 146 Wn.App at 21, where plaintiff’s co-workers made a complaint of sexual harassment and the employer conducted an investigation, the Court held that the complaints were intra-corporate communications and applied the qualified privilege for the statements given during the investigation.

When a qualified privilege applies, a plaintiff cannot establish a prima facie case of defamation unless the plaintiff can show by clear and convincing evidence the declarant had knowledge of the statement's falsity and he or she recklessly disregarded this knowledge. Gilman v. MacDonald, 74 Wash.App. 733, 738, 875 P.2d 697 (1994).

Here, the employer had a duty to maintain a workplace free of sexual harassment and Edwards' complaint to him is an essential element in executing that duty. Davis, supra. The employer would not have known about Zanko's inappropriate and offensive comment had Edwards not brought it to its attention. As in Messerly, because the employer had a duty to maintain a workplace free of sexual harassment, the privilege was not abused. Like Woody, Edwards engaged in an intra-corporate communication that is protected by the qualified privilege. As such, Plaintiffs must prove by clear and convincing evidence that Edwards knowingly made a false statement and recklessly disregarded that knowledge. The most that can be determined from Zanko and MacDonald's sparse evidence is that there is conflicting testimony about who made the alleged statement. Nothing can be concluded as to Edwards' alleged state of mind, knowledge of falsity or reckless disregard of falsity. For this reason too, their claim of defamation must fail.

- (d) Plaintiffs Have Not Provided Any Evidence of Special or Actual Damages.

Plaintiffs have only vaguely alleged any damages resulting from Edwards' alleged statement to his employer. They are both still employed with the same employer, and thus they have not suffered any wage loss. They have claimed that they are "embarrassed" but have not alleged any special or actual damages.

Under the common law, a defamation plaintiff could recover presumptive damages if he shows he has been referred to by words which are libelous per se and have been published to a third person. *Arnold v. National Union of Marine Cooks & Stewards*, 44 Wash.2d 183, 187, 265 P.2d 1051 (1954). A publication is libelous per se if it tends to expose a living person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or to injure him in his business or occupation. *Purvis v. Bremer's, Inc.*, 54 Wash.2d 743, 751, 344 P.2d 705 (1959). When the published words are not libelous per se, special or actual damages must be alleged and proved. *Purvis*, at 747, 344 P.2d 705; *Denney v. Northwestern Credit Ass'n*, 55 Wash. 331, 333, 104 P. 769 (1909).

Haueter v. Cowles Pub. Co., 61 Wash. App. 572, 578, 811 P.2d 231, 235 (1991)(*emphasis supplied*).

Plaintiffs have not alleged or proven any "special or actual damages," much less have they proven any "hatred, contempt, ridicule or obloquy", to deprive them of the benefit of public confidence or social intercourse, or to injure them in their business or occupation. *Id.* The fact that they remain employed with A&A proves that they have not suffered

any such damage to their reputations. Therefore, their claims for defamation must fail.

(e) The Court Erred When It Based Its Defamation Ruling Upon the Wrong Set of Facts.

The lower court's ruling is based upon the assumption that Zanko and MacDonald's allegations of defamation pertain to the events that they allege occurred in Las Vegas:

In fact, this is a lawsuit that comes down to who said what, and who is going to believe who said what. Is a jury or fact finder going to believe the Plaintiffs in this case, or is a jury or fact finder going to believe Mr. Edwards? And the only way that is going (sic) happen is for those people to testify and be there to be cross-examined and other evidence presented as to what happened, what might have been said at that point in time, and what was going on at this trade show in Las Vegas.

So for this Court to determine what this statute means when it says a probability of prevailing, I think the Court can only do one thing, and say if their evidence was believed by a fact finder, would they prevail, and I believe they could, and they could prevail on a slander lawsuit if their evidence is believed and Mr. Edwards' is not.

RP p. 21, ll. 11 – p.22, ll. 2 (emphasis supplied).

Plaintiffs' claim of defamation is not based upon events that allegedly occurred in Las Vegas but rather is based solely upon Edwards' report of sexual harassment to his manager. In their opposition brief to Edwards' Motion to Strike, Plaintiffs emphasize this point:

Plaintiffs' claims are actually based on Defendant Edwards (sic) outrageous and offensive conduct at a Las Vegas trade show *and his false slanderous statement made to their supervisor, Mr. Mawer*. Since there is no dispute that Defendant Edwards (sic) outrageous and offensive conduct in Las Vegas is *not* the basis of his alleged sexual harassment claims or EEOC complaint, the anti-SLAPP Act does not apply to these claims.

CP 265 (*emphasis in the original and supplied*). And again,

Here, the Plaintiffs are not suing the Defendants in response to Defendant Edwards' EEOC complaint against his employer. They are suing him for his outrageous and offensive conduct in Las Vegas and his slanderous statements made about them to their supervisor.

CP 266 (*emphasis supplied*).

Zanko and MacDonald had the burden of establishing by clear and convincing evidence that their claims would prevail at trial. They did not correct the Court when it based its defamation ruling upon the events that allegedly occurred in Las Vegas rather than Edwards' report to his manager as they have alleged. The Court erred in ruling that Plaintiffs could prevail on their defamation claim and its decision should be reversed.

3. Zanko and MacDonald Cannot Prove By Clear and Convincing Evidence That They Have a Probability of Prevailing On Their Claim of Outrage.

In the absence of their claim for defamation, Plaintiffs claim for intentional infliction of emotional distress must also fail. Phillips, 822 F.Supp.2d at 1119. The elements of a claim for intentional infliction of

emotional distress are (1) extreme or outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to the plaintiff of severe emotional distress. Id. An emotional distress claim based on the same facts as an unsuccessful defamation claim “cannot survive as an independent cause of action.” Harris, 315 F. Supp. 2d at 1112.

In Phillips, *supra* at 1119-20, the court held:

[P]laintiff has ‘failed to properly allege severe emotional distress. His bare and conclusory allegations ...that he “became emotionally distressed,” that the distress “manifested itself in physical symptoms,” and that he “obtained treatment” for his distress and symptoms are a mere “formulaic recitation of the elements of a cause of action,” and in the absence of factual detail are wholly insufficient to state a claim. Plaintiff’s after-the-fact statement in his recently-filed declaration that the physical manifestation of his distress included a loss of thirty pounds in 2008, stomach pain, and nausea is ineffective to cure the pleading defects in the complaint.

Likewise, Zanko and MacDonald provide a simple formulaic recitation of the elements of a cause of action for outrage without providing any specific evidence of severe emotional distress. Their “after-the-fact” declarations are still deficient but at any rate, cannot cure the defects in their complaint. Id.

Any claims for intentional infliction of emotional distress “must be predicated on behavior ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded

as atrocious, and utterly intolerable in a civilized community.” Kloepfel v. Bokor, 149 Wn.2d 192, 195-96, 66 P.3d 630, 632 (2003). The tort “does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. In this area [,] plaintiffs must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration.” Strong v. Terrell, 147 Wn. App. 376, 385, 195 P.3d 977, 981-82 (2008). Edwards’ report of alleged sexual harassment to his employer does not rise to the level of going “beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” In fact, the opposite is true. His report of what he considered to be sexual harassment was a responsible act that the law supports and requires. Glasgow, *supra*. Likewise, Edwards’ alleged behavior in Las Vegas, including allegedly wearing “some type of drinking device that was half the size of [his] body strapped around [his] neck[s]”, is hardly the type of behavior that goes beyond “all possible bounds of decency”. CP 256.

Plaintiffs’ claims of outrage must fail because they have not alleged or proven any severe emotional distress and because the alleged conduct was not outrageous.

4. Plaintiffs Cannot Avoid Operation of the Anti-SLAPP Statute By Alleging Collateral Acts And Characterizing Their Claims As Garden Variety Torts.

Zanko and MacDonald, in Plaintiffs' Opposition To Defendant's Special Motion to Strike Claims Pursuant to RCW 4.24.525, make the following argument:

Plaintiffs' claims are actually based on Defendant Edwards (sic) outrageous and offensive conduct at a Las Vegas trade show *and* his false slanderous statement made to their supervisor, Mr. Mawer. Since there is no dispute that Defendant Edwards (sic) outrageous and offensive conduct in Las Vegas is *not* the basis of his alleged sexual harassment claims or EEOC complaint, the anti-SLAPP Act does not apply to these claims.

CP 265 (*emphasis in the original*).

The "outrageous and offensive conduct" that Plaintiffs allege Edwards engaged in at the Las Vegas trade show include the following accusations:

- That Mr. Edwards "kept asking Plaintiffs whether they found Todd [Edwards' friend] attractive and were they interested in a relationship." (CP 256);
- "[t]he men had some type of drinking device that was half the size of their body strapped around their necks." (CP 256);
- "After lunch, Defendant Edwards approached Plaintiff Macdonald (sic) and loudly asked whether she or Plaintiff Zanko had sex with one of the contacts they had met the night before." (CP 257);
- "That night when the Plaintiffs arrived at dinner, they found Defendant Edwards to be completely intoxicated. He was also very loud and obnoxious at dinner in front of the client and the other restaurant patrons." (CP 257);
- "Defendant Edwards also kept loudly saying that the client they were dining with really liked Kimberly Zanko and that another

client we were to meet later, wanted a relationship with Melissa Macdonald (sic).” (CP 258);

- “Later, Defendant Edwards loudly stated in front of everyone that Plaintiff Macdonald (sic) should ‘take one for the team,’ suggesting she should engage in sexual relations with a client to obtain new business.” (CP 258).

It should be noted that none of these allegations appear in Plaintiffs’ Complaint. CP 218-20. Significantly, neither Zanko nor MacDonald testified to any of these alleged facts during the administrative hearing before Judge Sundt, where the women testified that “nothing happened” in Las Vegas or that she could not recall specifically what happened. CP 349, 385. Zanko and MacDonald only provided these additional alleged facts in response to Edwards’ Motion to Strike.

In Gallanis-Politis v. Medina, 152 Cal. App. 4th 600, 613-15, 61 Cal. Rptr. 3d 701, 711-12 (2007), a county employee sued the County and County officials asserting discrimination and retaliation claims under state and federal law. The defendants filed a special motion to strike the complaint under California’s Anti-SLAPP statute. They contended that the retaliation claim arose from protected First Amendment activity and that the plaintiff could not prevail on the merits of her retaliation claim. The appellate court agreed with defendants and reversed the order of the trial court denying their special motion to strike.

As Zanko and MacDonald assert here, the plaintiff in Medina also alleged a number of facts that defendant did not claim were protected activity. Plaintiff argued that those acts were unrelated to the protected activity and constituted “the majority of the retaliatory conduct alleged” and that therefore the anti-SLAPP statute did not apply. The Court disagreed:

The published appellate cases conclude that, where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 “ ‘unless the protected conduct is “merely incidental” to the unprotected conduct.’ ” (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672, 35 Cal.Rptr.3d 31 (*Peregrine Funding* ), citations omitted; see also *Scott/v. Metabolife Intern. Inc.*, 115 Cal.App.4th at p. 414, 9 Cal.Rptr.3d 242 [where both constitutionally protected and unprotected conduct is implicated by a cause of action, a plaintiff may not “immunize” a cause of action challenging protected free speech or petitioning activity “by the artifice of including extraneous allegations concerning nonprotected activity”; “[c]onversely, if the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion”]; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308, 106 Cal.Rptr.2d 906 [“a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one ‘cause of action’ ”].)

Id. at 711, 613 (*emphasis supplied*).

Here, Zanko and MacDonald did not even include the “extraneous allegations” that they now make against Edwards in their Complaint. The Complaint alleges only bare bones facts pertaining to Edwards’ report of

sexual harassment to his employer, Doug Mawer. It was only after Edwards brought his Motion to Strike pursuant to RCW 4.24.525 that Plaintiffs alleged non-protected activity. Plaintiffs cannot frustrate the purpose of the Anti-SLAPP statute by this artifice.

**D. Where The Trial Court Should Have Granted Edwards' Special Motion to Strike Pursuant to RCW 4.24.525, The Imposition of Statutory Fines, Attorney's Fees and Costs Upon Plaintiffs and Their Attorney Was Mandatory.**

An award of fines, attorney fees and costs is mandatory if the movant in an Anti-SLAPP motion prevails:

(6) (a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

RCW 4.24.525(6)(a)(*emphasis supplied*).

Each Plaintiff, Zanko and MacDonald, is responsible for paying a fine of \$10,000 to each Defendant, Breck Edwards and Kellie Edwards. Additionally, a fine of \$10,000 upon Mr. Resick, their attorney, is

appropriate. Mr. Resick threatened to file this action if Mr. Edwards persisted in his wrongful termination case against A&A. CP 233. He filed this Complaint only four days after the EEOC issued its Notice of Right to Sue. CP 304; 218-20. Furthermore, Mr. Resick made serious misrepresentations to the Court below. Mr. Resick, in his Opposition brief, represented to the Court that Edwards did not complain to the Human Resources representative, a significant fact. CP 267. Yet, Plaintiff MacDonald testified at the unemployment hearing that Mr. Resick told her that Edwards had complained to Human Resources. CP 359, ll. 6-14.

It is abundantly clear that Mr. Resick has filed this action in order to harass Mr. and Mrs. Edwards and to cause delay and an increase in the cost of litigation. This is a classic tactic in SLAPP cases and the filing and prosecution of such frivolous actions are a drain on the court system. The statute was drafted with the intent to be construed broadly and a broad construction mandates that each Plaintiff be required to pay each Defendant a fine of \$10,000, attorney's fees and costs. The facts and circumstances of this case also mandate that a fine of \$10,000 be imposed upon Mr. Resick for filing this meritless lawsuit.

**E. Request for Attorney's Fees**

Pursuant to the Rules of Appellate Procedure 18.1, the Edwards' request that the Court impose statutory attorney's fees and costs, as provided in RCW 4.24.525(6)(a)(i), for this appeal.

**F. Conclusion**

Defendant Breck Edwards brought a complaint of what he considered to be sexual harassment to his employer's attention. After he filed an EEOC Charge of Discrimination, he was promptly terminated. The EEOC issued its Notice of Right to Sue as a prerequisite to filing suit. Just four days later, Zanko and MacDonald filed this lawsuit.

RCW 4.24.525, the Anti-SLAPP Act, was drafted with the intent that it be construed broadly so as to prevent just these types of lawsuits. Edwards' complaint of sexual harassment to his employer was speech in connection with an issue of public interest and thus falls under the protection of the statute. His statements are also protected as speech in anticipation of litigation and thus protected by his Constitutional right to petition. The burden then shifts to Plaintiffs to establish that they could prevail at trial on their claims of defamation and outrage. For a variety of reasons set forth above, Plaintiffs cannot prevail at trial. The Court erred in its evaluation of the case and in denying Edwards' motion.

Respectfully, this Court should reverse the lower court's ruling with instructions to impose statutory fines, attorney's fees and costs upon Plaintiffs as well as their attorney, Mr. Resick.

Respectfully submitted this 16<sup>th</sup> day of January, 2013.

A handwritten signature in black ink, appearing to read 'Reba Weiss', written in a cursive style.

Reba Weiss, WSBA #12876  
Teller & Associates  
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of January, 2013, I served the foregoing Brief of Appellant on the following parties and persons at the following addresses:

**Counsel for Plaintiffs:**

Thomas J. Resick  
Sarah Hall  
Resick Hansen & Fryer  
412 N. Commercial St.  
Bellingham, WA 98225

By causing a true and correct copy thereof to be delivered by being \_\_\_ mailed; \_\_\_ faxed; x e-mailed; or \_\_\_ hand delivered to the above address.



Reba Weiss

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2013 JAN 17 AM 9:58

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LISA ABER,

Plaintiff and Respondent,

v.

MICHAEL COMSTOCK,

Defendant and Appellant.

A134701

(San Francisco City & County  
Super. Ct. No. CGC-10-503100)

Plaintiff Lisa Aber sued her employer and two of its employees based on an alleged sexual assault by the employees. Defendant Michael Comstock, one of the employees, filed a cross-complaint against Aber, alleging claims for defamation and intentional infliction of emotional distress. Aber filed a special motion to strike the cross-complaint under the anti-SLAPP statute (Code Civ. Proc., § 425.16). The trial court granted the motion and dismissed the cross-complaint. Comstock appeals. We affirm.

**BACKGROUND**

**The Complaint and Cross-Complaint**

The litigation began with a complaint filed by Aber on August 31, 2010. It named three defendants: Wolters Kluwer United States (Kluwer), her employer, and Comstock and James Cioppa, two employees of Kluwer. The complaint alleged four causes of action: (1) sexual harassment; (2) failure to investigate and prevent sexual harassment; (3) sexual battery; and (4) intentional infliction of emotional distress. The first cause of action was against all defendants; the second against Kluwer only; and the third and fourth against Comstock and Cioppa.

The complaint was based on events on the evening of June 5, 2010, at and after a business-related social gathering where, Aber essentially alleged, Cioppa, her supervisor and an officer at Kluwer, and Comstock, a fellow employee, tried to get her drunk and convince her to have sex with them, implying that her job would be secure if she did so. Aber alleged what occurred that evening in vivid detail, in 12 paragraphs to be exact.

On December 21, 2010, Kluwer filed its answer to the complaint, and on April 6, 2011, Cioppa his answer. Meanwhile, Comstock was not served with the complaint until May 7, 2011. On June 3, 2011 Comstock filed his answer and also a cross-complaint, the pleading that is the subject of this appeal.

Comstock's cross-complaint alleged two causes of action: (1) defamation, and (2) intentional infliction of emotional distress. Both causes of action were alleged to arise out of the same "common allegations," which included the following:

Comstock first "denies any wrongdoing and denies all material allegations against him" in Aber's complaint. Then, Comstock went on to allege a version of events on June 5, 2010, that was in stark contrast to that alleged by Aber. It began with Aber emailing Comstock that she would "love to meet" Comstock and Cioppa on June 5; that they met and had one or more drinks at the One Market Restaurant; and then it alleged this:

"7. After leaving One Market Restaurant, COMSTOCK, ABER, and CIOPPA traveled in ABER's car to her apartment in the Marina District of San Francisco. ABER invited COMSTOCK and CIOPPA up to her apartment. ABER made drinks for all three of them.

"8. After spending some time in ABER's apartment, COMSTOCK, ABER and CIOPPA walked to the Topsy Pig Restaurant on Chestnut Street near ABER's apartment.

"9. Toward the end of the evening, COMSTOCK, ABER and CIOPPA left the Topsy Pig Restaurant and walked to a restaurant suggested by ABER to eat. When they had finished eating, COMSTOCK, ABER and CIOPPA got into a cab. The cab stopped first at ABER's apartment to drop her off, and then continued to CIOPPA's apartment to drop off CIOPPA and COMSTOCK. COMSTOCK did not exit the cab when the cab

stopped to drop off ABER at her apartment. COMSTOCK had fallen asleep in the cab before it reached ABER's apartment.

"10. During the evening of June 5, 2010, COMSTOCK and CIOPPA asked ABER if she wanted to have brunch with them the following day. COMSTOCK is informed and believes, and thereon alleges that on June 6, 2010, CIOPPA called ABER. On information and belief, COMSTOCK alleges ABER told CIOPPA she could not meet for brunch that day because she was hung over and sick. On information and belief, COMSTOCK alleges ABER told CIOPPA she had CIOPPA's and COMSTOCK's jackets in her apartment, and that she would bring them to work on Monday.

"11. On the morning of Monday, June 7, 2010, COMSTOCK was in CIOPPA's office in WOLTERS KLUWER San Francisco. ABER stopped by CIOPPA's office with CIOPPA's and COMSTOCK's jackets. ABER stated she was sorry she could not meet them for brunch on Sunday, but that she had been vomiting all day. COMSTOCK and CIOPPA asked ABER if she wanted to get coffee with them that morning. ABER accepted and went to get coffee with them.

"12. Later that morning, as COMSTOCK was returning from a meeting outside the WOLTERS KLUWER office, he saw ABER near the reception desk of the office. ABER approached COMSTOCK and asked if something was wrong. COMSTOCK replied that nothing was wrong. ABER responded that she could tell that something was wrong. ABER responded by reaching out and touching COMSTOCK on the arm and elbow and stating, "Michael, I'm so sorry." COMSTOCK did not speak to ABER again.

"13. COMSTOCK is informed and believes, and thereon alleges that on the afternoon of Wednesday, June 9, 2010, ABER asked CIOPPA if he and COMSTOCK wanted to go out after work. COMSTOCK is informed and believes, and thereon alleges that CIOPPA declined the invitation.

"14. COMSTOCK is informed and believes, and thereon alleges that ABER thereafter orally published false statements about COMSTOCK to third parties, including but not limited to friends, employees of WOLTERS KLUWER, health care practitioners,

and the police. These false statements included the fabricated story that COMSTOCK had sexually assaulted ABER on the night of June 5, 2010.

“15. COMSTOCK is informed and believes, and thereon alleges that ABER made these statements clearly identifying COMSTOCK as the alleged assailant in an effort to damage his reputation.

“16. COMSTOCK is informed and believes, and thereon alleges ABER reported to a nurse at Kaiser Permanente in or around June 2010 that she had been sexually assaulted. On information and belief, COMSTOCK alleges ABER provided the nurse with COMSTOCK’s name and place of employment. On information and belief, COMSTOCK alleges the nurse then told ABER the nurse must report the sexual assault to the police. On information and belief, COMSTOCK alleges the nurse then called the police and asked ABER to repeat her story to the police.

“17. COMSTOCK is informed and believes, and thereon alleges that ABER reported the allegations of sexual assault against COMSTOCK to ERIN BUSH, Human Resources, at WOLTERS KLUWER in or around late June 2010.<sup>[1]</sup>

“18. COMSTOCK is informed and believes, and thereon alleges that ABER knew the falsity of her statements when she made them. ABER acted with malice, fraud, and oppression.”

### **The Motion to Strike**

On July 8, 2011, Aber filed a special motion to strike the cross-complaint under Code of Civil Procedure section 425.16 (SLAPP or anti-SLAPP motion).<sup>2</sup> The SLAPP motion was supported by a lengthy memorandum of points and authorities and a declaration of one of Aber’s attorneys, which attached eight exhibits, most of which were

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<sup>1</sup> Aber had been deposed on March 10, 2011, before Comstock was even served with the complaint, and Comstock had the deposition transcript for use in preparing his cross-complaint.

<sup>2</sup> All subsequent statutory references are to the Code of Civil Procedure unless otherwise stated.

claimed to be excerpts from the website of the United States Equal Opportunity Commission dealing with the subject of sexual harassment in employment.

On July 26, 2011, Comstock filed his opposition to the SLAPP motion. It included a memorandum of points and authorities and three declarations, of Comstock's attorneys Shane Anderies and Annie Leinfelder and of Comstock himself. Comstock's opposition also included a request for judicial notice, seeking notice of a description of a case handled by Comstock's attorney Anderies.

The Anderies declaration attached numerous pages from Aber's deposition and what were claimed to be copies of telephone records and the notes of Kluwer Human Resources manager Erin Bush. The Leinfelder declaration testified essentially only to her hourly billing rate. Comstock's declaration was a total of seven paragraphs, and provided in its entirety as follows:

"1. I am a party Defendant in the above-entitled action. I make this declaration based on personal knowledge. If called to do so, I could and would testify truthfully about the matters stated herein.

"2. I know Plaintiff Lisa Aber from working at Wolters Kluwer.

"3. On or about August 6, 2010, I received an email from Defendant James Cioppa (Cioppa) stating that one of Cioppa's employees told Cioppa that Aber was telling employees at Wolters Kluwer that she got me fired and that there was 'an ongoing investigation going on because of things [I] did.' Cioppa ended his email with, 'Sorry to forward this type of message to you; however I do believe you have a right to know that someone is making negative statements about your character.' A true and correct copy of this August 6, 2010 email is attached hereto as Exhibit A.

"4. On or about May 7, 2011, I was served with Plaintiff and Cross-Defendant Lisa Aber's Complaint for sexual harassment, sexual battery and intentional infliction of emotional distress.

"5. I did not attend Aber's deposition on March 10, 2011 because I had not yet been served in the action. I did not have the opportunity to examine Aber at this deposition.

“6. After I was served with the Complaint, I began to receive discovery previously propounded and responded to in the action, including the deposition transcript of Aber’s testimony, documents produced by Aber, documents produced by Wolters Kluwer, and documents subpoenaed from Aber’s physicians and therapists.

“7. I learned from Aber’s deposition testimony and documents produced by Aber and Wolters Kluwer that Aber had made false statements about me to third parties, including a nurse at Kaiser Hospital, possible [*sic*] the police, Wolters Kluwer’s Senior Human Resources Manager, Erin Bush, and Aber’s friends and other Wolters Kluwer employees.”

On August 1, 2011, Aber filed her reply. It included a memorandum of points and authorities; a declaration of her attorney Bonagofsky; and evidentiary objections to portions of the Comstock and Anderies declarations. Aber also filed opposition to the request for judicial notice.

The motion was scheduled for hearing for August 8. It came on as scheduled, and the trial court granted it that day. However, Comstock’s counsel was not present<sup>3</sup> and, as Comstock’s brief describes it, “Comstock’s counsel objected to the proposed order submitted by Aber’s counsel based on his inability to present oral argument at the August 8 hearing because of the scheduling error. The trial court subsequently ordered a rehearing of the matter on December 6, 2011.”

The motion was heard again on December 6, 2011, and following a hearing<sup>4</sup> the court entered the following order:

**“ORDER GRANTING CROSS-DEFENDANT LISA ABER’S SPECIAL MOTION TO STRIKE THE CROSS-COMPLAINT AS A MERITLESS SLAPP (C.C.P. § 425.16)**

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<sup>3</sup> Comstock represents that his counsel “was not present at the hearing due to a scheduling error by the Court [as] [t]he Court had previously rescheduled the hearing for a later date.”

<sup>4</sup> Comstock has elected to proceed without a reporter’s transcript, so what occurred at the hearing is not before us.

“On August 8, 2011, cross-defendant Lisa Aber’s special motion to strike Michael Comstock’s cross-complaint came before by [sic] this Court. This Court considered the papers submitted by both parties and ordered that: said cross-defendant’s special motion to strike pursuant to C.C.P. § 425.16 be granted, the Cross-Complaint of Michael Comstock be struck in its entirety and dismissed with prejudice, and that Cross-defendant Lisa Aber is entitled to an award of her attorneys’ fees and costs pursuant to C.C.P. § 425.16, subdivision (c).

“This Court subsequently ordered a rehearing of the matter. On December 6, 2011, said rehearing was held. This Court considered the papers submitted by both parties and the arguments presents at said rehearing.

“IT IS HEREBY ORDERED that said cross-defendant’s special motion to strike pursuant to C.C.P. § 425.16 is hereby granted. The Cross-Complaint of Michael Comstock is stricken in its entirety and dismissed with prejudice. Cross-defendant Lisa Aber is entitled to an award of her attorneys’ fees and costs pursuant to C.C.P. § 425.16, subdivision (c).”

Comstock filed a timely notice of appeal.

## DISCUSSION

### SLAPP Law and the Standard of Review

We recently described the SLAPP law and its operation in *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 463-464 (*Hecimovich*):

“Subdivision (b)(1) of section 425.16 provides that ‘[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 Constitution or the 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.’ Subdivision (e) of section 425.16 elaborates the four types of acts within the ambit of a SLAPP, including[‘(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official

proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest,' or] '(4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.'

"A two-step process is used for determining whether an action is a SLAPP. First, the court decides whether the defendant [here, cross-defendant] has made a threshold showing that the challenged cause of action is one arising from protected activity, that is, by demonstrating that the facts underlying the plaintiff's complaint fit one of the categories spelled out in section 425.16, subdivision (e). If the court finds that such a showing has been made, it must then determine the second step, whether the plaintiff [here, cross-complainant] has demonstrated a probability of prevailing on the claim. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).)<sup>[5]</sup>

" 'The Legislature enacted section 425.16 to prevent and deter "lawsuits [referred to as SLAPP's] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) Because these meritless lawsuits seek to deplete "the defendant's energy" and drain "his or her resources" [citation], the Legislature sought " 'to prevent SLAPPs by ending them early and without great cost to the SLAPP target' " [citation]. Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation.' (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

"Finally, and as subdivision (a) of section 425.16 expressly mandates, the section 'shall be construed broadly.'

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<sup>5</sup> Subdivision (h) of section 425.16 provides that "For purposes of this section, 'complaint' includes 'cross-complaint,' . . . 'plaintiff' includes 'cross-complainant' . . . ."

“With these principles in mind, we turn to a review of the issues before us, a review that is de novo. (*Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 988 (*Grewal*).)”

### **Analysis of the Cross-Complaint**

As quoted above, Comstock’s two causes of action are based on the fundamental allegations that Aber published false statements about him to others, specifically as follows: Aber “orally published false statements about COMSTOCK to third parties, including but not limited to, friends, employees of WOLTERS KLUWER, health care practitioners, and the police. These false statements included the fabricated story that COMSTOCK had sexually assaulted ABER on the night of June 5, 2010”; “ABER reported to a nurse at Kaiser Permanente in or around June 2010 that she had been sexually assaulted. . . . Aber provided the nurse with COMSTOCK’s name and place of employment. . . . [T]he nurse then told ABER the nurse must report the sexual assault to the police. . . . [The] nurse then called the police and asked ABER to repeat her story to the police.” Finally, Aber is alleged to have reported the claimed sexual assault to “ERIN BUSH, Human Resources, at WOLTERS KLUWER in or around late June 2010.”

In short, Comstock alleges statements to four persons or groups of persons:

- (1) the police;
- (2) health care practitioners, specifically the nurse at Kaiser Permanente;
- (3) employees of Kluwer, including specifically Erin Bush; and
- (4) “friends.”

### **Comstock’s Cross-Complaint is Within the SLAPP Statute**

Aber contends that Comstock’s cross-complaint is within the SLAPP statute on two separate bases. The first is under section 425.16, subdivision (e)(1) and (e)(2), as statements made in, or in connection with matters under review by, an official proceeding or body. The second is under subdivision (e)(4), as statements made in connection with an issue of public interest. We agree with Aber’s first contention. We need not reach the second.

### **Statements to the Police**

The law is that communications to the police are within SLAPP. (*Walker v. Kiouisis* (2001) 93 Cal.App.4th 1432, 1439 [complaint to police is “made in connection with an official proceeding authorized by law”]; *Chabak v. Monroy* (2007)

154 Cal.App.4th 1502, 1511 [in action by physical therapist against client alleging false report of child abuse, client's "statements to police clearly arose from protected activity"]; see generally *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1009 [filing complaint with a government agency constitutes a "statement before an official proceeding" within section 425.16, subdivision (e)(1)]; *Lee v. Fick* (2005) 135 Cal.App.4th 89, 97 [complaint to the government is itself "part of the official proceedings"].)

Comstock now admits that filing a report with the police is within section 425.16, subdivision (e)(1) and (e)(2).<sup>6</sup> However, he argues that "Aber never complained to the police and provided no evidence that the nurse with whom she spoke filed a report or that the police subsequently investigated the complaint." And, so the argument runs, there was no protected conduct.

An anti-SLAPP motion is brought against a "cause of action" or "claim" alleged to arise from protected activity. (See § 425.16, subds. (b)(1)(3) and (c)(2).) The question is what is pled—not what is proven. The observations by our colleagues in Division Five make the point. As they recently put it in *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1548: "Smith's *purported* oral statements . . . constitute statements made in connection with an issue under consideration by a judicial body [citation]. [Citation.] The *alleged* activity therefore falls within the scope of the SLAPP statute." (Italics added.) Or earlier, in *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 1004: "[B]y demonstrating that . . . *alleged* statements were in connection with an issue under consideration by the district attorney, respondents made a prima facie showing that the acts underlying Schaffer's causes of action are within the ambit of the anti-SLAPP statute." (Italics added.)

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<sup>6</sup> Comstock argued below that false police reports are not protected under the anti-SLAPP statute. He does not raise that argument here, and we deem it waived. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685.)

In short, it is Comstock's allegation that Aber complained to the police that brings his cross-complaint within the SLAPP statute. Comstock cannot defeat that allegation by claiming that Aber did not do what he *alleges* she did.<sup>7</sup>

#### **The Statement to the Kaiser Nurse**

Relying on *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1579 (*Siam*), Aber argued that her statements to the Kaiser nurse were within SLAPP, as statements made to a mandated reporter and thus within section 425.16, subdivision (e)(2).<sup>8</sup> Comstock argued below that the nurse was not a mandated reporter, a position he has abandoned here. He now argues that *Siam* is distinguishable, as (1) it involved a different reporting statute, and (2) official proceedings had already begun at the time the statements were made. We are not persuaded.

While it is true that *Siam* involved a different Penal Code section—11172 rather than 11160 applicable here—we fail to see the significance. Both statutes mandate reports to the government; both provide immunity for reporters. It would thus appear that the Legislature intended that information about potential criminal conduct be provided to

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<sup>7</sup> Comstock's argument may in any event be factually inaccurate. Aber's deposition testimony showed that after she gave the Kaiser nurse the details of the assault, the nurse said that she (the nurse) had to report the assault to the police, and at that point got the police on the line. Aber was on hold for some five to 10 minutes, while the nurse presumably spoke with the police. The officer then asked Aber to go over what she had told the nurse, and Aber asked if she could call the officer back, because she was not feeling well. It would thus appear that Aber did speak with the police, however briefly, and that the officer was apparently conducting an investigation during this conversation.

<sup>8</sup> Penal Code section 11160, subdivision (a) provides as follows: "Any health practitioner . . . who, in his or her professional capacity or within the scope of his or her employment, provides medical services for a physical condition to a patient whom he or she knows or reasonably suspects is a person described as follows, shall immediately make a report in accordance with subdivision (b): [¶] . . . [¶] (2) Any person suffering from any wound or other physical injury inflicted upon the person where the injury is the result of assaultive or abusive conduct."

"Assaultive or abusive conduct" includes battery, sexual battery, rape, or an attempt to commit any of said crimes. (Pen. Code, § 11160, subs. (d)(8), (d)(9), (d)(14), and (d)(24).)

law enforcement, for it to determine what action, if any, to take. Put otherwise, it would appear that the Legislature intended that reporting of information to a mandatory reporter result in a governmental investigation—an “official proceeding”—even when the victim does not directly report to the law enforcement agency.

As the court put it in *Siam*, involving child abuse: the causes of action were “based upon defendant’s reports of child abuse to ‘people who were legally required to report any child abuse allegations . . . in an attempt to manufacture corroboration’ for his own false allegations. That is, the statements were designed to prompt action by law enforcement or child welfare agencies. Communications that are preparatory to or in anticipation of commencing official proceedings come within the protection of the anti-SLAPP statute. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109–1110; *ComputerXpress, Inc. v. Jackson*[, *supra*,] 93 Cal.App.4th [at p.] 1009.) Thus, defendant’s reports of child abuse to persons who are bound by law to investigate the report or to transmit the report to the authorities are protected by the statute. (§ 425.16, subd. (e)(2).)” (*Siam, supra*, 130 Cal.App.4th at pp. 1569-1570.)

As quoted above, section 425.16 must be “construed broadly.” And we construe it to hold that Aber’s statements to the Kaiser nurse—who was required to, and did, report it to law enforcement—is protected activity under section 425.16.

### **The Statements to Bush**

Aber argued that her statements to Bush, the Kluwer HR manager, are protected under section 425.16, subdivision (e)(1) and (e)(2), as statements prior to litigation or other official proceedings. Her theory was that the statements were necessary to address a commonly used affirmative defense by an employer in a sexual harassment case—a defense, not incidentally, that Kluwer has in fact asserted against Aber here.<sup>9</sup> We agree.

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<sup>9</sup> Kluwer’s fifth affirmative defense alleged that “Plaintiff [Aber] unreasonably failed to take advantage of the preventative and corrective opportunities provided by it or otherwise to avoid harm, and that reasonable use of Wolters Kluwer’s internal procedures

The defense is that set forth in *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, which held that in an action by an employee, the employer can assert as an affirmative defense that the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer. (See also *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1038-1039 [analyzing the defense].)

*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115, on which Aber relies, is persuasive. There, the Supreme Court held that “ ‘[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceedings are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], such statements are equally entitled to the benefits of section 425.16.’ ” Thus, the court held that some of the allegedly defamatory statements protected by section 425.16 were in connection with a *potential* complaint to HUD and a *potential* small claims case, neither of which had been filed. (*Briggs v. Eden Council for Hope & Opportunity, supra*, at pp. 1109-1110, 1114-1115.) Other cases are to the same effect, holding that actions based on prelitigation statements or writings may be within the SLAPP statute. (See, for example, *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266 [letter to employer’s customers accusing ex-employee of misappropriation of trade secrets and threatening to file litigation]; *CKE Restaurants, Inc. v. Moore* (2008) 159 Cal.App.4th 262, 271 [statements made in 60-day notice of intent to sue required by Prop. 65]; *Digerati Holdings, LLC v. Young Money Entertainment LLC* (2011) 194 Cal.App.4th 873, 887-888 [letter to film distributors asserting that film was not authorized and threatening to sue].)

Comstock’s response is to say that reliance on *Briggs* is “misplaced,” and that Aber’s argument “completely ignores, or at least disregards, *Olaes v. Nationwide Mutual*

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and remedies would have prevented some, if not all, of Plaintiff’s claimed damages from occurring.”

*Ins. Co.* (2006) 135 Cal.App.4th 1501 [(*Olaes*)], which is precisely on point.” *Olaes* is not on point, let alone precisely.

In *Olaes* a former employee sued his former employer for defamation, alleging that the company falsely accused him of sexual harassment and failed to adequately investigate prior to terminating him. The company filed a SLAPP motion, which the trial court denied. The Court of Appeal affirmed, but not on any basis availing to Comstock. There, the court noted, it was the “clause, ‘any other official proceeding authorized by law,’ that forms the heart of this dispute.” (*Olaes*, 135 Cal.App.4th at p. 1505.) And, the court went on to conclude, the employer’s sexual harassment procedure was not within the ambit of section 425.16. The fact that the company’s personnel department was charged with implementing an anti-harassment policy and established procedures mimicking those of a governmental agency did not transform it into an administrative body. The company possessed neither the powers nor the responsibilities of a government agency and its human resources specialist was not an administrative body possessing quasi-judicial powers. (*Olaes, supra*, at pp. 1508-1509.)

In short, the employer’s argument in *Olaes* was that the investigation of a harassment claim was an official proceeding authorized by law, and therefore the claims against it were subject to section 425.16, subdivision (e)(1) and (e)(2). (*Olaes, supra*, 135 Cal.App.4th at pp. 1505-1508.) That is not Aber’s argument here, which is that her statements to Bush were protected because they were statements prior to litigation, necessary to defeat an affirmative defense that Kluwer could—indeed, did—assert in her lawsuit. That argument was not raised or considered in *Olaes*.

### **The Alleged Statements to Friends**

As quoted above, Comstock’s cross-complaint alleged that Aber made statements to “friends,” a generic allegation unsupported by any specific detail—not as to what was said, not to whom. The issue then becomes what is the significance of that *allegation* vis-à-vis a SLAPP analysis. We conclude it needs to be addressed under the mixed cause of action analysis, which generally holds that the anti-SLAPP law will apply to a cause of

action is based on both activity that is protected by the SLAPP statute and activity that is not.

Our colleagues in Division Three have weighed in on the point: a “ ‘cause of action will be subject to section 425.16 unless the protected conduct is “merely incidental” to the unprotected conduct.’ ” (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.) Likewise, Division Five: “A mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity.”<sup>10</sup> (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287.) These holdings reflect the fundamental concept that a “plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of ‘one cause of action.’ ” (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308.)

Applying that rule here leads to the conclusion that Comstock’s causes of actions are within SLAPP, as the only allegation that is “incidental” is the vague allegation about “friends.” Or, to state it conversely, the essence of the defamation claims are the specific allegations about what Aber said to the Kaiser nurse and to Bush. It is the generic allegations that are “incidental.”

Arguing to the contrary, Comstock cites the recent case of *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 772 where, Comstock asserts, the Court of Appeal dealt with a similar situation. Thus Comstock quotes: “ ‘Given the foregoing analysis, we are confronted with the following situation: What should be the result of an anti-SLAPP motion when a combined, or mixed, cause of action includes one allegation of *unprotected* activity, in which the cross-complainant *has* established a probability of

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<sup>10</sup> Division Five went so far as to hold that two causes of action were subject to SLAPP where protected activity was contained in only two out of 16 allegations of breaches of fiduciary duty, explaining that they were not “ ‘merely incidental’ ” because “they are still acts for which [plaintiff] asserts liability and seeks damages” and those allegations “provide an independent basis for liability.” (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures, supra*, 184 Cal.App.4th at pp. 1552-1553.)

prevailing, and a second allegation of *protected* activity, in which the cross-complainant *has not* established a probability of prevailing. We conclude the lawsuit-related allegations may be parsed from the causes of action and stricken, while the allegations related to non-protected activity may remain as part of the complaint.’ ”

Assuming we would agree with the majority opinion in this 2-1 opinion—a question we do not answer—we find the language on which Comstock relies distinguishable: unlike the plaintiff in *Singletary*, Comstock has not “established” a probability of prevailing on anything.

We thus conclude Aber has met the threshold showing under step one of the SLAPP analysis, demonstrating that the allegations in Comstock’s cross-complaint are within the SLAPP law as within subdivision (e)(1) and (e)(2).<sup>11</sup> That brings us to step two, whether Comstock has shown a probability of prevailing on his claims.

### **Comstock Has Failed to Demonstrate a Likelihood of Prevailing on the Merits**

#### **Introduction to Analysis**

We confirmed the applicable law in *Grewal, supra*, 191 Cal.App.4th at pages 989-990: “We decide the second step of the anti-SLAPP analysis on consideration of ‘the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ (§ 425.16, subd. (b).) Looking at those affidavits, ‘[w]e do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we 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.’ (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699–700.) [¶] That is the setting in which we determine whether plaintiff has met the required showing, a showing that is ‘not high.’ (*Overstock.com, Inc. v. Gradient Analytics, Inc., supra*, 151 Cal.App.4th at p. 699.) In the words of the Supreme Court, plaintiff needs to show only a ‘minimum level of legal sufficiency and triability.’ (*Linder v. Thrifty Oil Co.*

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<sup>11</sup> In light of this conclusion, we need not address whether Comstock’s allegations are within section 425.16, subdivision (e)(4), as speech related to an issue of public interest.

(2000) 23 Cal.4th 429, 438, fn. 5.) In the words of other courts, plaintiff needs to show only a case of ‘minimal merit.’ (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*[, *supra*,] 133 Cal.App.4th [at p.] 675, quoting *Navellier v. Sletten*[, *supra*,] 29 Cal.4th 82, 95, fn. 11.)”

“. . . [T]he anti-SLAPP statute operates like a ‘motion for summary judgment in “reverse.”’ (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719.) Or, as that court would later put it, ‘Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation. [Citation.]’ (*Varian Medical Systems, Inc. v. Delfino*, *supra*, 35 Cal.4th at p. 192; accord, *Taus v. Loftus* (2007) 40 Cal.4th 683, 714.)”

While Comstock’s burden may not be “high,” he must demonstrate that his claim is legally sufficient. (*Navellier, supra*, 29 Cal.4th at p. 93.) And he must show that it is supported by a sufficient prima facie showing, one made with “competent and admissible evidence.” (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1236; see *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497.) Comstock’s demonstration does not measure up.

### **The First Cause of Action for Defamation**

Comstock’s first cause of action, labeled defamation, alleges oral statements by Aber, which means his claim is for slander.<sup>12</sup> To plead such a cause of action, Comstock

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<sup>12</sup> Civil Code section 46 provides: “Slander is a false and unprivileged publication, orally uttered . . . which:

“1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

“2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;

“3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;

“4. Imputes to him impotence or a want of chastity; or

must set forth “either the specific words or the substance of” the allegedly defamatory statements. (*Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 234.) An allegation “of a ‘provably false factual assertion’ . . . is indispensable to any claim for defamation.” (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 32.) As Witkin distills the pleading rule, “It is sometimes said to be a requirement, and it certainly is the common practice, to plead the exact words or the picture or other defamatory matter. The chief reason appears to be that the court must determine, as a question of law, whether the defamatory matter is on its face or capable of the defamatory meaning attributed to it by the innuendo. Hence, the complaint should set the matter out verbatim, either in the body or as an attached exhibit.” (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 739, p. 159.)

Here, as noted, Comstock’s pleading included the following:

“14. COMSTOCK is informed and believes, and thereon alleges that ABER thereafter orally published false statements about COMSTOCK to third parties, including but not limited to friends, employees of WOLTERS KLUWER, health care practitioners, and the police. These false statements included the fabricated story that COMSTOCK had sexually assaulted ABER on the night of June 5, 2010. [¶] . . . [¶]

“16. COMSTOCK is informed and believes, and thereon alleges ABER reported to a nurse at Kaiser Permanente in or around June 2010 that she had been sexually assaulted. On information and belief, COMSTOCK alleges ABER provided the nurse with COMSTOCK’s name and place of employment. On information and belief, COMSTOCK alleges the nurse then told ABER the nurse must report the sexual assault to the police. On information and belief, COMSTOCK alleges the nurse then called the police and asked ABER to repeat her story to the police.

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“5. Which, by natural consequence, causes actual damage.”

“17. COMSTOCK is informed and believes, and thereon alleges that ABER reported the allegations of sexual assault against COMSTOCK to ERIN BUSH, Human Resources, at WOLTERS KLUWER in or around late June 2010.<sup>[13]</sup>

“18. COMSTOCK is informed and believes, and thereon alleges that ABER knew the falsity of her statements when she made them. ABER acted with malice, fraud, and oppression.”

Pleading is one thing. When Aber filed the SLAPP motion, Comstock now had to show a likelihood of success on his claims, a showing he had to make with admissible evidence. This, he has failed to do.

Referring to his burden in his opening brief, for example, Comstock asserts that he met his burden in his declaration where he referred to Aber’s statements as false, citing to paragraph seven of the declaration. In that paragraph Comstock merely asserts, however conclusorily, that he “learned from Aber’s deposition testimony and documents produced by Aber and Wolters Kluwer that Aber had made false statements about me to third parties, including a nurse at Kaiser Hospital, possible [*sic*] the police, Wolters Kluwer’s Senior Human Resources Manager, Bush, and Aber’s friends and other Wolters Kluwer employees.” Such assertion does not identify “either the specific words or the substance of” the allegedly defamatory statements.

But whatever the statements, Comstock does not specifically deny their truth, and certainly does not deny that he sexually assaulted Aber. Such a denial—which would have been easy to make under penalty of perjury, if true—cannot be reasonably inferred from Comstock’s vague statement.

It is true that Comstock’s cross-complaint alleged that Aber’s statements were false. But as we confirmed in *Hecimovich, supra*, 203 Cal.App.4th at p. 474, “plaintiff cannot rely on his pleading at all, even if verified, to demonstrate a probability of success on the merits.”

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<sup>13</sup> Aber had been deposed on March 10, 2011, before Comstock was even served with the complaint, and Comstock had the deposition transcript for use in preparing his cross-complaint.

Comstock's opening brief also cites to evidence from Aber's deposition in which she admits she made calls to certain people; he also cites to an email from a third party. From this evidence Comstock asserts that Aber "must have" made defamatory comments about him. Such an inference cannot be indulged. Not legally. Not factually.

As to the legal, when one is relying on inferences, they must be " 'reasonably deducible from the evidence and not such as are derived from speculation, conjecture, imagination or guesswork.' " (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647; *Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 894.)

As to the factual, asked at deposition about possible communications with third persons, Aber testified either that she did not tell anyone else anything specific about the incident with Comstock (just that something had happened that was work-related) or that she did not remember what was discussed. Comstock does not explain how it can be reasonably inferred that merely because Aber may have had conversation with some people around the time of Comstock's claimed assault on her, they must have included defamatory statements about him.

Comstock's reply brief attempts to get more specific, asserting as follows: "Comstock has identified substantial, additional evidence that Aber likely repeated her defamatory statements to other third parties, which statements are clearly *not* protected. Specifically, Aber spoke with Mark Green, a *trusted* supervisor at Wolters Kluwer, the evening of the alleged assault. [Citation.] Aber also spoke with a friend, Nick Kavayiotidis, 19 times between 10:52 p.m. on June 5 and 7:51 a.m. on June 8, including three times the night of the alleged assault after she returned home (including two after midnight) and subsequently 12 more times on Sunday, June 6, the day after the alleged sexual assault took place. [Citations.] A few weeks after June 5, 2010, Aber told a friend, Katie Schiele, while crying, that she thought her job was in jeopardy, that there had been a merger and that 'something happened,' prompting Schiele to give Aber an attorney's telephone number. [Citations.] Comstock received an email from Jim Cioppa on August 6, 2010 stating that Aber was telling employees at Wolters Kluwer that she got Comstock fired and that there was 'an ongoing investigation going on because of things

[Comstock] did.’ [Citation.] Cioppa ended his email with, ‘Sorry to forward this type of message to you; however I do believe you have a right to know that [Aber] is making negative statements about your character.’ [Citation.]”

We have several reactions to Comstock’s position vis-à-vis Aber’s friends. First, as noted, Aber’s deposition was taken on March 10, 2011; Comstock was not served until April 18; his response was not due until late May, and in fact was not filed until June 3. Comstock could have taken the depositions of any of those claimed witnesses before any pleading was due. He did not. And even after Aber’s anti-SLAPP motion was filed on July 11, Comstock could have sought discovery before the SLAPP motion was heard. (See § 425.16, subdivision (g) [if good cause is shown, court may permit discovery after the motion to strike is filed].). In short, Comstock made no such attempt at discovery. Nor did he provide any declaration from Green (who supposedly worked with him), or from Kavayiotidis, or Schiele.

Second, and perhaps most telling, Comstock provided no declaration from Cioppa, his coworker—and codefendant. After all, it was Cioppa who could testify about the email. But more importantly, Cioppa could support some of Comstock’s specific allegations, including that Comstock had “fallen asleep” in the cab. He could also support the alleged communications between Aber and Cioppa, including the day after the incident and on June 7.

Comstock contends that there is no evidence in the record that Aber in fact followed up with the Kaiser nurse or the police, which shows that she did not believe her statements about the claimed assault to be true. There is nothing in the record indicating whether Aber did or did not follow up with the Kaiser nurse after their phone call. But whether she did or not, it does not support a reasonable inference that Aber believed her statement was false.

Finally, Comstock asserts that because Aber allegedly made similar statements to Bush and then sued Kluwer, a jury could reasonably conclude that her “statements were knowingly false.” We fail to follow the logic.

*Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, relied on by Comstock, is inapplicable. It is true that the Court of Appeal affirmed that defendant failed to show that the reports they filed with the police authorities were not “protected activity” within the SLAPP statute. (*Id.* at p. 701.) But the reason was, as the trial court found, “that the record ‘conclusively’ established that Alice’s and Toothman’s statements to the police were ‘illegal activity’ under Penal Code section 148.5, and, as such, not ‘protected activity’ within the meaning of the anti-SLAPP statute.”<sup>14</sup> (*Ibid.*)

In sum, Comstock has not submitted any admissible evidence that Aber made defamatory statements about him. But even if he had, he would still not prevail, because of the law of privilege set forth in Civil Code section 47, subdivisions (b) and (c).

#### **Defamatory Statements Would Be Privileged**

Civil Code section 47, subdivision (b) provides that a privileged communication is one made “[i]n any . . . (3) . . . official proceeding authorized by law . . . .” Such privilege covers communications to the police or other government authorities reporting a crime or suspected crime. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 363-372.) And it applies “even though the publication is made outside the courtroom and no function of the court or its officers is involved.” (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) This privilege, the Supreme Court has said, is to be given “an

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<sup>14</sup> The record included the unusual, if not unique, fact that at the time the jury returned its verdict acquitting plaintiff Jon Lefebvre of the criminal charges based on Alice’s and Toothman’s statements to the police, the jury, “acting on its own volition, selected the jury foreperson to read the following statement into the record: ‘We, the jury, believe that the absence of any real investigation by law enforcement is shocking and we agree that this appears to follow a rule of guilty until proven innocent. There was no credible evidence supporting the indictment. We believe prosecuting this as a crime was not only a waste of time, money, and energy, for all involved, but is an affront to our justice system. This jury recommends restitution to the defendant for costs and fees of defending himself against these charges. This jury requests that our collective statement be made available in any [future] legal action relating to these parties. . . .’ The judge who presided over Jon’s criminal trial granted Jon’s motion for a finding of factual innocence pursuant to Penal Code section 851.8, subdivision (e).” (*Lefebvre v. Lefebvre, supra*, 199 Cal.App.4th at p. 700.)

expansive reach” (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1194), and “[a]ny doubt as to whether the privilege applies is resolved in favor of applying it.” (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529.) This privilege is absolute, and even covers false and malicious statements. (*Silberg v. Anderson, supra*, 50 Cal.3d at pp. 215-218.)

*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, cited by Comstock in his reply brief, is not to the contrary. Plaintiff there was a token collector who sued another token collector, asserting that defendant had told private citizens that plaintiff had stolen a valuable item from him. The trial court denied a SLAPP motion, and the Court of Appeal affirmed, holding that defendant did not demonstrate that the case was one involving an issue of public interest. The court observed that defendant did not pursue any of the civil or criminal remedies available to him, and thus failed to demonstrate that his dispute with plaintiff was anything other than a private dispute between private parties. The fact that defendant allegedly was able to vilify plaintiff in the eyes of at least some people established only that defendant was partially successful in his campaign of vilification. It did not establish that he was acting on a matter of public interest. (*Id.* at pp. 1132, 1134.)

Civil Code section 47, subdivision (c) provides that a privileged publication is one made “[i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.”

Here, Aber’s report to the Kaiser nurse was to an interested person, not to mention one who was a mandated reporter. Likewise, Comstock’s allegations against Aber show that Aber’s report to Bush, made pursuant to her employer’s policy requiring that sexual harassment be reported to its human resources personnel, was to a person interested in the communication. Thus, the reports to the Kaiser nurse and to Bush are therefore conditionally privileged under Civil Code section 47, subdivision (c), providing Aber a possible affirmative defense, one lost only if Comstock could show malice.

The law is that to defeat a SLAPP motion, Comstock must overcome substantive

defenses. (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 447-448.) And his claim would fail for his inability to show malice, as have the claims of many other plaintiffs who lost SLAPP motions because of such inability. (See *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 275; *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1162; *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 689-690; *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 226-227 [malicious prosecution].)

### **The Second Cause of Action for Intentional Infliction of Emotional Distress**

Comstock's second cause of action for intentional infliction of emotional distress is based on the same allegations as his first cause of action. As Comstock's brief bluntly puts it, "The same false statements establish outrageous conduct by Aber to support Comstock's intentional infliction of emotional distress claim." Comstock is wrong.

A cause of action for intentional infliction of emotional distress requires several things missing here. First, the complained-of conduct must be outrageous, that is, beyond all bounds of reasonable decency. (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593; Rest.2d Torts, § 46, pp. 72-73 ["no occasion for the law to intervene in every case where some one's feelings are hurt"].) Second, the conduct must result in severe emotional distress. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946.) And third, the tort calls for intentional, or at least reckless, conduct. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 453, p. 672.) None of these is evidenced here.

The complained-of conduct here—reporting a sexual assault to the Kaiser nurse and Kluwer's HR department—is hardly "extreme and outrageous." Beyond that, Comstock has provided no evidence that he suffered any emotional distress, let alone severe distress.

*Kinnamon v. Staitman & Snyder* (1977) 66 Cal.App.3d 893, disapproved by *Silberg v. Anderson, supra*, at p. 219 and *Conley v. Roman Catholic Archbishop* (2000) 85 Cal.App.4th 1126, the two cases cited by Comstock, are easily distinguishable. To begin with, both of them involved a demurrer, not a setting, as here, where declarations were involved. Beyond that, the facts are hardly comparable.

Kinnamon sued a lawyer who, in an attempt to collect \$250 owed on a check written on insufficient funds, sent a letter to Kinnamon threatening to file a criminal complaint. The Court of Appeal held it stated a claim: “Here the first amended complaint alleges outrageous conduct on the part of the attorney defendants acting as agents of defendant O’Cana. Rule 7-104 of the California Rules of Professional Conduct states in pertinent part: ‘A member of the State Bar shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil action . . . .’ Thus, the conduct charged in the complaint is of such an extreme nature as to be ‘outrageous.’ (See Anno., Debt Collection—Emotional Distress, 46 A.L.R.3d 772, 780-781; [citations].)” (*Kinnamon v. Staitman & Snyder, supra*, 66 Cal.App.3d at p. 896.)

Conley, a Catholic priest, sued the Archdiocese, claiming it retaliated against him for conduct that was consistent with—if not mandated by—the Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.) The Court of Appeal held that the Archdiocese’s conduct in sanctioning Conley for complying with his mandatory duty was an “outrageous act.” (*Conley v. Roman Catholic Archbishop, supra*, 85 Cal.App.4th at 1132.) Indeed.<sup>15</sup>

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<sup>15</sup> This is how the Court of Appeal described the facts: Conley “witnessed an incident of suspected child abuse involving Father James W. Aylward, the pastor of Saint Catherine of Siena Parish Church, and a minor child. He reported the incident to church and law enforcement officials. Aylward subsequently admitted wrestling with the minor child in contravention of [Archdiocese’s] rules prohibiting certain activities between the clergy and minors. As appellant alleges, respondent retaliated against him for reporting the incident by discrediting his report to law enforcement officials. Respondent relieved appellant of his duties and put him on administrative leave. Respondent falsely reported to other clergy and members of the archdiocese that appellant committed inappropriate conduct during church functions and demanded that appellant submit to a psychological evaluation. Finally, on April 5, 1998, respondent caused a letter to be published in the San Francisco Examiner in which respondent’s director of communications falsely accused appellant of engaging in a witch hunt against Aylward.” (*Conley v. Roman Catholic Archbishop of San Francisco, supra*, 85 Cal.App.4th at p. 1129.)

**DISPOSITION**

The order striking the cross-complaint is affirmed.

\_\_\_\_\_  
Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LISA ABER,  
Plaintiff and Respondent,  
v.  
MICHAEL COMSTOCK,  
Defendant and Appellant.

A134701

(San Francisco City & County  
Super. Ct. No. CGC-10-503100)

**ORDER CERTIFYING OPINION  
FOR PUBLICATION**

**THE COURT:**

The opinion in the above-entitled matter filed on December 18, 2012, was not certified for publication in the Official Reports. For good cause, the request for publication by amicus curiae Association of Southern California Defense Counsel is granted.

Pursuant to California Rules of Court, rules 8.1105 and 8.1120, the opinion in the above-entitled matter is ordered certified for publication in the Official Reports.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Haerle, Acting P.J.

Trial Court: Superior Court of the City and County of San Francisco

Trial Judge: Honorable Ronald E. Quidachay

Attorney for Defendant and Appellant: Andries & Gomes, Shane Keith Anderies, Anne Leinfelder

Attorneys for Plaintiff and Respondent: Bonagofsky & Weiss, John Scott Bonagofsky, Elizabeth Weiss; California Anti-Slapp Project, Mark Allen Goldowitz, Paul Clifford, Ryan Metheny