

PROFESSIONAL LIABILITY UPDATE

ANTI-SLAPP
FAIR AND TRUE REPORTING PRIVILEGE

By Jennifer Becker

Health Smart Pacific, Inc. v. Kabateck 2016 WL 7667365

The Second District holds statements to the media about the allegations in a complaint are privileged under C.C. §47(d), a fair and true report of an official proceeding.

Michael Drobot owned and operated Healthsmart Pacific Inc. which owned and operated Pacific Hospital, specializing in spinal surgeries. Drobot pled guilty to bribing a state senator for his support of regulations allowing workers to “pass through” the cost of hardware used in the spine surgeries to workers’ compensation insurance carriers. Drobot also admitted to paying kickbacks, which included cash, meals, and services, to doctors, chiropractors, marketers, and others for spinal surgery referrals.

A former patient, Mary Cavalieri, sued Drobot and Healthsmart, alleging they engaged in a bribery scheme, accusing them of using hardware from a “sham” distributor, and of paying kickbacks, including supplying prostitutes, for referrals. The complaint alleged surgeons used counterfeit, non-FDA approved, knock-off medical hardware produced by a local machine shop.

Shortly after the Cavalieri complaint was filed, Cavalieri’s attorney Brian Kabateck was interviewed on a local television station.

The reporter described Cavalieri’s lawsuit as alleging medical devices were implanted in Cavalieri’s body as part of a scam to illegally profit from insurance companies and California taxpayers. On camera Kabateck described the allegations that Drobot-affiliated hospitals and doctors installed counterfeit hardware in patients. His client, Kabateck explained, had to have her surgery redone, and the counterfeit parts were discovered. Kabateck explained that Drobot was at the center of the scheme, and he had pled guilty to insurance fraud. The reporter explained the bribery and kickback charges, which Kabateck described as “lavish trips on private jets, [and] ... prostitutes...” Kabateck described the hardware as made by a local machine shop, unsupervised by the FDA and unclean.

Another Cavalieri attorney, Robert Hutchinson, was interviewed on radio about her complaint. Hutchinson said it was about non-FDA-approved hardware used without knowing whether it could cause infection. He also asserted the hardware was made at a local machine shop, and the price of the hardware was grossly inflated. Hutchinson

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asserted doctors knowingly used counterfeit hardware for kickbacks from hospitals and marketers, which was alleged in the complaint.

Drobot and Healthsmart sued Kabateck and Hutchinson alleging they falsely asserted a scheme to use cheap, counterfeit hardware in spinal surgeries at Pacific Hospital. They alleged the attorneys knew the statements were false, had created hysteria among former patients, and harmed existing and prospective economic relationships. Kabateck and Hutchinson successfully moved to strike under C.C.P. § 425.16, California's anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute, and were awarded fees.

The Court of Appeal noted the anti-SLAPP analysis is two pronged. First, the court determines whether the challenged claim arises from protected activity, acts done to further the defendant's right of petition or free speech under the United States Constitution or the California Constitution about a public issue. If so, the burden shifts to the plaintiff to show a probability of prevailing on the claim. The plaintiff must demonstrate each challenged claim is legally sufficient and factually substantiated. The court must determine if plaintiff's showing, if accepted by the trier of fact, would sustain a favorable judgment.

Although Kabateck and Hutchinson's statements were acts to further their right to free speech, Drobot argued they were not made in the public interest or about an issue of public interest. The anti-SLAPP statute does not define "public interest" or "public issue," which are inherently amorphous terms. Attempted definitions include statements about a person or entity in the public eye; conduct that could directly affect many people beyond the direct participants;

or a topic of widespread, public interest. Another attempted definition explains a matter of public interest does not equate with mere curiosity; it is something of concern to many people, not merely to the speaker and a relatively small, specific audience. There should be closeness between the challenged statements and the asserted public interest; the focus of the speaker's conduct should be the public interest, not an effort to gather ammunition for another round of private controversy; and the speaker cannot defend the conduct by making the claimant a public figure through defamatory statements.

Kabateck's and Hutchinson's statements raised matters of public interest. Many people may have been directly affected by the alleged counterfeit hardware. The public, as consumers of medical services, have an interest in doctors and healthcare facilities. The assertions of a widespread illegal physician kickback scheme raise issues about the integrity of the health care system, a matter of widespread public concern. The statements linked the alleged counterfeit medical hardware conspiracy, the kickback scheme, and the bribery of a state legislator, undeniably a matter of public concern.

A plaintiff cannot show a probability of success, the second prong analysis, when statements are privileged as a matter of law. C.C. § 47 (d), the fair report privilege, confers an absolute privilege on any fair and true report in, or a communication to, a public journal of a judicial proceeding, or anything said during the proceeding. Statements are privileged regardless of the defendants' motive. The court determines if a statement is entitled to the privilege. Whether the statement is "fair and true" can be a matter of law if there is no dispute on what occurred in the underlying judicial proceeding or what was contained in the

report; otherwise, it is determined by the trier of fact.

The privilege protects those who communicate information to the media, a stated goal of the legislation, which was passed to protect an attorney's transmittal of a copy of a pleading to a newspaper. The privilege applies to fair and true reports of anything said in the course of a judicial proceeding, which includes filing a complaint and the allegations in a complaint.

The Court rejected Drobot's argument "judicial action" was necessary for the privilege to apply. It distinguished a case that rejected the fair and true report privilege when a disgruntled party in a custody dispute reported the court appointed psychologist to law enforcement and then publicized it on the radio. There, the Court held the radio interview was not protected by the fair and true report privilege because there was no evidence any official action had been taken on the complaint. That court also relied on the Restatement Second of Torts, section 611 which requires some official action be taken by the officer or body whose proceedings are reported for the privilege to apply. Another basis was the court's inability to determine if the report was "true and fair." Reports to law enforcement are not judicial proceedings, they are possible precursors to a judicial proceeding. Further, the Court concluded the Restatement did not articulate the rule in California, where a complaint or other pleading is part of a judicial proceeding.

Kabateck's and Hutchinson's statements were "fair and true" communications as a matter of law. "Fair and true" does not refer to the truth or accuracy of the matters asserted in the judicial proceedings, but to the accuracy of what occurred in the judicial proceedings. Neither the merits of

Cavalieri's allegations nor the truth of Kabateck's and Hutchinson's statements about Drobot and Healthsmart were material. The inquiry was whether the statements accurately conveyed the substance of the allegations made in Cavalieri's complaint, measured by the natural and probable effect the statements would have on the average person reading, viewing, or listening to the reports.

The matters Drobot admitted in his plea bargain were not the measure of what was "fair and true." The statements Kabateck and Hutchinson made in their television and radio appearances were substantially similar to the statements made in the Cavalieri complaint.

An attorney cannot make defamatory allegations in a complaint and then hide behind the fair report privilege with impunity. The statements are only privileged if they are tied to allegations in the complaint; this does not include communicating the alleged facts without reference to the complaint. The issue was whether the average person would understand the attorneys' statements as communications about the Cavalieri complaint, or as established facts. The Court found both attorneys sufficiently qualified their statements as allegations in the Cavalieri complaint

Since the privilege is absolute, the Court would not consider the attorneys' motives or whether the statements were made with malice.

Comment: The Court acknowledged the power conferred on attorneys through this privilege. The litigation privilege protects allegations in a complaint, and the fair report privilege protects reports to the media about allegations in a complaint. However, this

concern is trumped by the policy reasons for the fair and true reporting privilege: the public's need to be informed about what is occurring in its judicial system. The Legislature tempered its effect by precluding its application to communications that violate rule 5-120(A) of the California State Bar Rules of Professional Conduct, which prohibits extrajudicial statements that could materially prejudice an adjudicative proceeding. Moreover, attorneys remain exposed to malicious prosecution actions.