

PROFESSIONAL LIABILITY UPDATE

ANTI-SLAPP
LITIGATION PRIVILEGE
FAIR AND TRUE REPORTING PRIVILEGE

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Argentieri v. Zuckerberg 2017 WL 605313

The First District holds a press release about a malicious prosecution action is privileged under C.C. §47(d), a fair and true report of an official proceeding, but not under C.C. § 47(b), the litigation privilege.

While a student at Harvard Mark Zuckerberg answered an ad posted by Paul Ceglia to provide website development services. He signed a “Work for Hire” contract, received only partial payment, and later found Facebook. Years later Ceglia sued Facebook claiming the contract Zuckerberg signed entitled Ceglia to 84% of Facebook’s shares.

Ceglia’s attorney Paul Argentieri recruited DLA Piper LLP (DLA Piper), Lippes Mathias Wexler Friedman LLP (Lippes), and Kasowitz Benson Torres & Friedman LLP (Kasowitz), to co-counsel with him in a lawsuit against Zuckerberg and Facebook. Kasowitz hired an expert who determined the Work For Hire contract had been altered, informed Argentieri, and withdrew from the case. Argentieri and the other law firms filed an amended pleading. After Kasowitz notified DLA Piper and Lippes of its findings, they too abandoned the case, although Argentieri remained. Eventually Ceglia’s fraud was uncovered and his case was dismissed.

Facebook and Zuckerberg sued Ceglia’s attorneys in New York state court for malicious prosecution and other state law deceit claims. Facebook and Zuckerberg alleged the attorneys knew or should have known Ceglia’s claims were false. Facebook’s general counsel Colin Stretch issued a press release pledging to hold accountable all responsible for Ceglia’s claims. The press release claimed the law firms knew the claims were based on forged documents, but they pursued it anyway.

Eventually this lawsuit too was dismissed, because the lack of probable cause allegations were conclusory and inadequate to state a claim. Authentication of the Work for Hire contract was vigorously contested throughout the Ceglia litigation, and Lippes and DLA Piper thoroughly investigated after learning of Kasowitz’s findings.

Argentieri then sued Facebook, Zuckerberg, and Stretch for Defamation and Libel in

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California State Court. He alleged Stretch's press release was defamatory. Facebook, Zuckerberg and Stretch successfully moved to strike under C.C.P. § 425.16, California's anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute. The Court of Appeal observed the two pronged anti-SLAPP analysis first requires defendant make a threshold showing the plaintiff's cause of action arises from the defendant's free speech or petition activity. If so, the burden shifts to the plaintiff to show, by admissible evidence, a probability of prevailing on the claim. Argentieri conceded the Facebook defendants met the first prong of the analysis; the issue on appeal was whether Argentieri had demonstrated a reasonable probability of prevailing.

The trial court had concluded the statements were protected by the litigation privilege, codified at Civil Code § 47(b). It applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) with some connection or logical relation to the action. It encompasses statements made during trial and to out of court statements made to achieve the objects of the litigation, even if no function of the court or its officers is invoked.

The Court of Appeal disagreed that the statements were protected by the litigation privilege. Facebook argued that Stretch's statements were analogous to delivering a pleading to the press, which precedent holds is a protected activity. However, the litigation privilege does not encompass publication to the general public through the press. The Court held protection for delivering a copy of a pleading to the press is a specific and limited exception to the general rule that statements to the press, as

republications to nonparticipants in the litigation, are generally not privileged under § 47(b). The press did not have a "substantial interest" in Facebook's New York malicious prosecution case; its only interest was in reporting developments to the public.

The litigation privilege requires a nexus between the statement and the objects of the litigation. It must be connected with, or have some logical relation to the action, and function as a necessary or useful step in the process and serve its purposes. This is a higher standard than content merely related to the subject matter of the litigation.

To further the litigation a communication must function intrinsically, regardless of any consideration of the speaker's intent, to advance a litigant's case. Examples include actual pleadings, a lis pendens, demand letters, communications directed towards settlement, communications between a law firm and persons with potential claims, and investigatory interviews. The litigation privilege does not insulate statements to the press that do not further the objects of the litigation.

The press release may have furthered Facebook's ultimate goal, its desire to set the public record straight about Ceglia's fraud and his attorneys' role. However, Facebook wanting the world to know its views does not further the litigation itself. The "objects of the litigation" do not include a party's desire to be vindicated in the eyes of the world, even if the litigation may achieve this result.

There is some contradictory precedent about whether delivery of pleadings to the press is protected by the litigation privilege. The Legislature's response to this inconsistent precedent was not to expand the existing

litigation privilege, but to expand the fair and true reporting privilege of section 47(d) to include reports of pleadings and other court documents to a public journal.

A fair and true report in, or a communication to, a public journal, of a judicial proceeding, or anything said in its course is, like the litigation privilege, absolutely privileged. It applies regardless of the defendants' motive for making the report, and forecloses a plaintiff from showing a probability of prevailing on the merits. It requires that the report be fair and true, not that it actually further the underlying litigation. It must capture the substance, the gist, or the "sting" of the proceeding measured by the natural and probable effect of the report on the mind of the average reader. The defendant is afforded some flexibility and literary license, and the privilege will apply even if there are slight inaccuracies in the details if they do not mislead the reader.

Facebook's press release was a fair and true communication to a public journal about the malicious prosecution action against Argentieri and others. It asserted Facebook sought to hold Ceglia's attorneys accountable because they knew Ceglia's case was based on the forged Work for Hire contract, which was the gist of the lawsuit.

The Court was unpersuaded qualifiers in Facebook's complaint changed the equation. The press release asserted the lawyers "knew" Ceglia's contract was forged; the allegations in the malicious prosecution complaint that the lawyers "knew or should have known" the contract was false. Many allegations were based on "information and belief," but the press release was unequivocal. There is a legal distinction between "knows" and "should have known" and asserting a fact and asserting a fact based on information and belief. But the

fair and true reporting privilege is not judged by the standard of accuracy of a professional law reporter or a trained lawyer. If the statement conveys the "gist" of the action it is covered by the privilege. Facebook's press release asserted the attorney knew Ceglia's contract was forged; the malicious prosecution alleged this too, and the possibility the attorneys should have known it was false. Neither the alternative "should have known," nor the "information and belief" allegations distort the press release to render it unfair or untrue for protection under § 47(d).

The outcome of the malicious prosecution action, where the court dismissed most of the attorney defendants for failure to state claims against them, did not make the original press release vulnerable as untrue or unfair. The press release accurately reported the allegations. Further, the court in the underlying case did not make any ruling about Argentieri's knowledge of Ceglia's fraud, he was not part of the initial ruling dismissing the case for failure to state a claim.

Although whether a statement is "fair or true" is generally a question of fact for a jury, there was no genuine issue of material fact as to the content of the press release, the content of the malicious prosecution action, or whether an average reader would understand the press release to be a fair and true report of the gist of the malicious prosecution action.

The Court of Appeal confronted the difficult question of a party who makes a specious claim through "official" channels, and then asserts a fair and true reporting privilege after publicizing it. The Restatement Second of Torts, § 611, comment e, explains a report of a judicial proceeding implies official action, and therefore the publication

of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken, is not within the privilege. This prevents a party from making unfounded allegations, claiming protection of the privilege, and then dropping the action.

Argentieri argued the fair and true reporting privilege should not apply to a report of a pleading in a lawsuit by the party who filed the lawsuit. He accused Facebook of concocting the malicious prosecution lawsuit to publicize a report about it to promote its views.

The press release summarized a pleading filed with the court to commence an official judicial proceeding, distinguishing it from precedent Argentieri relied on where a party made a report to law enforcement agencies that did not act on it. The press release, issued by Facebook's attorney, is materially different than a case where an individual publicized her own complaint to law enforcement.

Ultimately, the Court simply rejected application of the Restatement to California's fair and true reporting privilege. Section 47(d) pertains to reports of a "judicial proceeding," which has long been held to include filing a complaint. The Legislative history of 47(d) shows it was intended to protect as privileged an attorney's communication of a complaint to a newspaper on behalf of a client. The press release summarized the complaint; it would be illogical to protect delivery of a complaint, with its extended and detailed allegations, but not the delivery of a succinct press release that fairly reports the contents of the complaint.

The Court rejected Argentieri's argument that Facebook's attorney Stretch violated the

exception to § 47(d), reports that violate State Bar Rules of Professional Conduct, rule 5-120(A) which prohibits extrajudicial statements to generate publicity if the attorneys knows or should know the statements will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Rule 5-120 excludes statements that recount claims, offenses, defenses, the identities of persons involved, and matters of public record. The press release was within the exception to rule 5-120. The press release was issued long before any jury was impaneled, and there was no indication Stretch could have known it would prejudice the malicious prosecution proceeding.

Comment: The fair and true reporting privilege has long lain dormant. In this era of high stakes litigation, it could become a powerful weapon against third party defamation claims based on allegations made in pleadings.