No. F079240

IN THE CALIFORNIA COURT OF APPEAL
FIFTH APPELLATE DISTRICT

JERRY COX,
Plaintiff and Appellant,
v.
ASHLEY HARRIS,
Defendant and Respondent.

Superior Court Case No. 11149
On Appeal From Mariposa County Superior Court
Honorable Michael A. Fagalde, Judge

RESPONDENT'S BRIEF

Erica L. Reilley (State Bar #211615)
*Erna Mamikonyan (State Bar #302000)
Melissa Adams (State Bar #323918)
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071.2452
Telephone: +1.213.489.3939
Facsimile: +1.213.243.2539
emamikonyan@jonesday.com

Shuray Ghorishi (State Bar #268323)
Arati Vasan (State Bar #255098)
Jennafer Dorfman Wagner (State Bar #191453)
Erin C. Smith (State Bar #234852)
FAMILY VIOLENCE APPELLATE PROJECT
449 15th Street, Ste. 104
Oakland, CA 94612
shuray@fvaplaw.org

Attorneys for Defendant and Respondent
ASHLEY HARRIS

CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rules of Court, rule 8.208, there are no entities or persons who have a financial or other interest in this case.

Dated: July 13, 2020

Respectfully submitted,

JONES DAY

By: */s/ Erna Mamikonyan*
Erna Mamikonyan

Attorneys for Defendant and Respondent
ASHLEY HARRIS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

"Abuse often continues long after the relationship has ended and commonly extends to civil courts, where many abusers will use any available means to exert power and reestablish control over survivors long after the relationship has ended."[1]

It is well documented that domestic abusers often use the judicial system as a tool to intimidate and control their victims. One common tactic is suing or threatening to sue victims for defamation, libel, or malicious prosecution if the victim has reported abuse to law enforcement. This technique is generally referred to as a strategic lawsuit against public participation or "SLAPP." SLAPP cases are "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).) In the domestic abuse context, these lawsuits are brought against victims as a common form of harassment, retaliation, and coercion, further exacerbating and contributing to the cycle of abuse. As a result, domestic abuse victims, especially those with limited resources, may decide against reporting the abuse out of fear of having to deal with a lawsuit or to suffer monetary damages.

---

[1] Brown, *De-Weaponizing the Courts: Attorney's Fees may Help Deter Litigation Abuse against Domestic Violence Survivors* (Oct. 29, 2019) https://www.americanbar.org/groups/family_law/committees/domestic-violence/litigation-abuse/ (as of July 10, 2020), citing Klein, *How Domestic Abusers Weaponize the Courts,* The Atlantic (July 18, 2019).

Fortunately, California's anti-SLAPP laws help to prevent meritless SLAPPs by ending them early and without great cost to the SLAPP target. In deciding anti-SLAPP motions, courts are to determine whether the challenge is related to the defendant's rights, such as free speech, and whether the plaintiff's claim has legal substance and a probability of success. In the domestic abuse context, anti-SLAPP laws are significant in addressing intimidation techniques by abusers, particularly where, as here, the abuser brings a claim for malicious prosecution. Malicious prosecution claims are disfavored in California, and courts have even barred such claims when the protected activity arises from civil harassment, family law, or Domestic Violence Prevention Act proceedings.

The trial court here was faced with a disfavored malicious prosecution claim against a victim of domestic abuse after her report to police resulted in charges that were subject to a two-year criminal investigation but later dismissed by the district attorney. In considering respondent Ashley Harris's ("Ashley") anti-SLAPP motion to strike, the trial court rightly ruled Ashley's police report was covered by the anti-SLAPP statute, and also correctly ruled that appellant Jerry Cox's ("Cox") malicious prosecution claim had no probability of success, both as a technical matter and a substantive one. Those rulings were proper and should remain intact. Not only do they comport with the letter of the law, but they are bolstered by long-standing policy that recognizes that domestic

abuse often extends past the relationship and into the civil courts through precisely the types of claims Cox tried to pursue here. Indeed, after the trial court's dismissal order issued, Cox filed another action in federal court asserting very similar claims, albeit now including the local county and the local Sheriff's department as defendants. If ever there was a context in which malicious prosecution claims should be outright prohibited given the potential chilling effects on victims and the highly charged and emotional nature of the circumstances, domestic abuse is it. But that broader issue need not be decided through this appeal. The trial court's order stands on its own, was proper, and should be affirmed.

FACTUAL BACKGROUND[2]

1. Ashley and Cox Commence a Dating Relationship That Quickly Devolves into Domestic Abuse on November 11, 2015.

Ashley met Cox on an online dating site in approximately October 2015, where he falsely identified himself as Bronson.[3] (CT 9, 43; CTO 136, 146.) Cox initially invited Ashley to meet at his ranch, but she informed him that she felt more comfortable if they met in person first,

---

[2] Citations to "CT ___" are to the page number(s) of the Clerk's Transcript; citations to "CTO ___" are to the page number(s) of the Clerk's Transcript Omission; citations to "RT ___" are to the page number(s) of the Reporter's Transcript along with the Master Index; citations to "EAR ___" are to the page number(s) of the Exhibits to Augmented Record. Cox's opening brief is referred to as "Opening Brief" and cited to as "AOB ___."

[3] Cox continued to lie to Ashley about his real name until Ashley confronted him on November 11, 2015. (CTO 136.)

which they did on October 24, 2015, for dinner at a restaurant. (CTO 164.) After Cox presented himself as being "innocent" and "normal," Ashley agreed to visit his ranch the following day on October 25, 2015. (CTO 8, 164.) It took her approximately three and a half hours to drive from her mother's residence in San Luis Obispo to Cox's remote ranch in Mariposa County. (CTO 20, 164.) Ashley would stay at the ranch for several days. (CTO 164.) While Ashley was there, Cox would leave for long periods of time and not come back until after dark, so Ashley spent most of her time with Aaron Rivera, who worked at the ranch, and his girlfriend, Darlene Windham ("Darlene"). (CTO 164-165.) Cox eventually put Ashley to work on the property assisting Darlene with odd jobs around the ranch. (CTO 165.) On or about November 7, 2015, Ashley agreed to attend a wedding with Cox. (CTO 165, 196.) Sometime thereafter, Ashley left the ranch to go to a doctor's appointment. (CTO 165.)

Ashley returned on November 11, 2015 at approximately 7:30 p.m. (CT 9; CTO 142, 165.) This is when the abuse commenced and lasted until the morning of November 13, 2015, during which time Cox brutally raped and assaulted Ashley and threatened her life. (CT 9-10; CTO 136-137, 142-143, 168.) As a result of this traumatic experience, Ashley exhibits symptoms of the Rape Trauma Syndrome ("RTS") to this day.[4] (CTO

[4] As the California Supreme Court has noted, Rape Trauma Syndrome consists of three phases: disorientation (agitation),

137.) These symptoms are compounded by a traumatic brain injury Ashley suffered as a result of a fall at a CVS Pharmacy in 2014.[5] (CTO 137, 168.)

To give more detail: On the evening of November 11, 2015, Ashley was greeted by Cox who was holding a bottle of whiskey with only a small amount left in the bottle. (CTO 165.) Later that night, Ashley asked Cox if his name was "Jerry" and not "Bronson," as he led her to believe through their conversations online. (CTO 136, 165.) Enraged at being called "Jerry," Cox grabbed Ashley by her throat with one hand and told her to "shut the fuck up." (CTO 136.) Cox then ripped off her clothes, pinned her down, and began to strangle her. (CTO 136, 165-166.) Ashley tried to

---

reorganization (denial), and integration (depression). (*People v. Bledsoe* (1984) 36 Cal.3d 236, 242-243.) Behavioral science literature has also addressed the symptoms of RTS and noted that rape victims often display counterintuitive behaviors—"behaviors that are opposite of how one would expect a rape victim to act." (Hogan, *The False Dichotomy of Rape Trauma Syndrome* (2006) 12 Cardozo J.L. & Gender 529, 530.) For instance, "studies demonstrate that rape victims may have trouble remembering and may even give inconsistent statements about the rape, which may be counterintuitive behavioral responses to some who believe that one would never forget such a traumatic experience." (*Id.* at p. 533.) "Since the behaviors are inapposite to common intuition, it often leads factfinders to disbelieve the victim." (*Id.* at p. 530.) Fortunately, however, "testimony about RTS has improved the treatment of rape cases in the justice system by providing the factfinder with better information when deliberating on the victim's behavior during and after the rape." (*Ibid.*)

[5] Ashley sustained multiple fractures and injuries to her head and face. (CTO 168.) As a result of her injuries, Ashley cannot smell or taste and has partial hearing loss in her right ear. (CTO 168.) The abuse Ashley suffered is all the more concerning considering that the neurosurgeon who treated her advised her that she could die if she suffered another serious injury. (CTO 168.)

fight Cox off, but she could not breathe. (CTO 136, 166.) Cox forcibly penetrated her vagina until he ejaculated inside of her. (CTO 136, 166.) Cox also forced his penis into Ashley's mouth so violently it caused her severe pain and continuous retching. (CTO 136, 166.) Cox threatened to chop Ashley into pieces with a knife or meat saw, scatter her body around the property, and let the animals get to her, so that nobody would ever find her. (CT 10; CTO 136.) He told her she could scream as loud as she wanted because nobody would hear her. (CT 10.) Cox then warned Ashley that if she said anything about the assault, no one would believe her. (CT 10; CTO 136.) He further stated that this is what she got for questioning a drunk man and if next time she was a good girl, he would give her food. (CTO 166.) Ashley took this to mean he viewed her as his slave. (CTO 166.) Ashley was in shock. (CTO 166.)

2. <u>Cox Assaults Ashley and Ashley Attempts to Escape on November 12, 2015.</u>

Cox eventually left the ranch the following morning on November 12, 2015, without saying anything. (CTO 166.) Ashley attempted to leave but she could not locate her car keys. (CTO 136, 166.) Cox later informed her that he had her keys (which Ashley had last placed in her purse) and instructed her to deep clean the cabin before he returned. (CTO 166.) He threatened that if she did not, she would not even know what pain was. (CTO 166.) When Cox returned, he continued to physically and verbally

assault Ashley and prevented her from leaving the ranch. (CTO 136.) Throughout the day, he would come around her and kick her in the ribs and buttocks. (CTO 166.) On one occasion, Cox caught Ashley attempting to leave at which time he came up from behind, grabbed her by the arms, and threw her back into the cabin and then onto the couch. (CTO 143.) On another occasion, Cox grabbed her by her arm and pushed her to the kitchen table where he attempted to obtain oral copulation from her by pushing her down to his penile area and then dropped his pants revealing just his underwear. (CTO 143.) During the course of the day, Ashley was in shock and she could not get the front door of Cox's cabin open to leave. (CTO 136.) When she did get to the door, she struggled to open it due to the nature of the lock, at which Cox laughed and told her good luck getting out. (CTO 136, 166.) Ultimately, Ashley did not leave because she did not have her keys and (because she was three and a half hours away from home) had no one physically around to help her. (CTO 166.) Other than to run down the mountain, Ashley did not know where to go. (CTO 166.)

That same day, Ashley was able to make two phone calls and have a conversation with her friend Marlon that together lasted a little over 20 minutes. (CTO 205, 209.) Marlon would later tell the Sheriff's Office that Ashley did not tell him she was being held against her will or being abused but that it was possible Cox may have been standing next to Ashley to prevent her from seeking help. (CTO 209.) Later that day, Cox took

Ashley to a Mexican restaurant. (CTO 136, 197.) Cox drove Ashley's car and had her car keys. (CTO 136.) Before they walked in, Cox told her not to raise any suspicion and not to make any eye contact with anyone. (CTO 136.) He also told her that no one could know what he was doing to her, no one would believe her anyway, and if she really wanted to find her way out of there, she would have to find her way by walking. (CTO 197.) Ashley felt like she was captured and did not have any other options but to comply. (CTO 197.)

3. Cox Assaults Ashley Again and Ashley Escapes and Contacts Law Enforcement on November 13, 2015.

On the morning of November 13, 2015, Cox physically and sexually assaulted Ashley again. (CTO 168.) Ashley was finally able to get away from Cox's property, when she sought the assistance of Darlene. Upon seeing Ashley's face, Darlene said to Ashley, "'[h]e (Mr. Cox) hit you didn't he?'" and "'I know, I know.'" (CTO 136-137.) Ashley was eventually able to locate her keys within Cox's residence and retrieve her vehicle. (CTO 143, 167.) Ashley could not have left through the ranch gate herself due to the condition of her arms and the gate being so heavy, so Darlene led Ashley off the property as each drove their own car to the pub at nearby Airport Inn, where Darlene knew the owners and felt Ashley would be safe. (CTO 137, 167.) Ashley and Darlene remained there as Ashley tried to determine whether she was going to report the rape. (CTO

167.) They later decided to drive to a friend Katie's home in Mariposa. (CTO 137, 143.) After hearing from Ashley the events that transpired, Katie told Ashley that she felt Cox had done this before to other local women who were too afraid to report the abuse. (CTO 137, 167.) Ashley "was very scared herself but she did not want anyone else to go through what Cox put her through," so she decided to report Cox's criminal actions and threats to the police. (CTO 167.) And although they were friends of Cox, Darlene and Katie endorsed Ashley's decision. (CTO 137, 167.) Darlene then drove Ashley to the California Highway Patrol Office that dispatched Ashley to the Mariposa County Sheriff's Office ("the Sheriff"), where she filed a report that same day. (CTO 137, 141-145.)

4. <u>Law Enforcement Conducts an Extensive Two-Year Investigation and Files Criminal Charges Against Cox.</u>

After Ashley reported to the Sheriff the abuse she endured, the Sheriff launched a nearly two-year investigation that included searching Cox's ranch, extracting text messages from Ashley and Cox's phones, performing a sexual assault forensic exam, taking DNA evidence from Ashley and Cox, and interviewing a series of witnesses.[6] After her initial

[6] The Sheriff documented the results of Ashley's initial interview in a "Sex Crimes Narrative" report on November 13, 2015. (CTO 141-145.) Thereafter, the Sheriff documented its two-year investigation in a series of thirty-nine "Supplemental Reports" dating from November 13, 2015, through November 8, 2017. (CTO 146-215.) The reports reflect interviews and three DNA swab samples from Cox. (CTO 146, 148, 173-174, 177-178.) The Sheriff's department also prepared a search warrant, an

interview at the Sheriff's Office on November 13, Ashley was transported to Fresno Regional Hospital for a Sexual Assault Response Team ("SART") examination that same day. (CTO 137, 141, 144.) The Sheriff later spoke with the trained medical professional, Hanna Hawari, who conducted Ashley's SART exam and observed "[b]ruising over the entire body including the legs and buttocks conducive to described physical abuse," "petechia [sic] bumps of irritation" inside the vagina, "hardy white secretions coming from the vagina," and "[m]icro injuries[] [which] [a]re signs of trauma to the opening of the vagina" and the location of these micro fractures "are a sign of forceful entry." (CTO 180-181.) The Sheriff asked Hawari whether Ashley was sexually assaulted. (CTO 181.) Hawari responded, "Yes definitely." (CTO 181.)

---

emergency protective order, and a bail increase request (increasing Cox's bail to $500,000). (CTO 150.) The court granted the Sheriff's request for a search warrant and they were able to search Cox's ranch, cell phone, and computer. (CTO 158-159, 163, 189-193.) The Sheriff also asked Ashley to provide her cellphone so they could review her communications with Cox, which she voluntarily agreed to do. (CTO 200, 205-208.) Over the next two years, the Sheriff also interviewed and communicated with several individuals including the waiter at the Mexican restaurant who served Cox and Ashley on November 12, 2015, the Department of Justice Criminalist who determined Cox's DNA matched the semen found in Ashley's vagina and anus, the nurse who performed Ashley's Sexual Assault Response Team examination, Cox's employees, and Cox's ex-girlfriends. (CTO 151, 160-162, 170-172, 175-182, 193, 195, 209.) Tellingly, while Ashley submitted to the trial court the complete set of the reports, Cox submitted only self-serving excerpts. (CTO 102-108, 115-124, 138-229.)

Later that day, the Sherriff's Office completed a search of Cox's ranch pursuant to a search warrant, and noted it needed "more force than normal" to open the doors in the cabin, corroborating Ashley's statements that she had difficulty getting out. (CTO 158.) The Sherriff's Office also questioned Cox who said he never had any sexual encounters of any sort with Ashley (not even a kiss) and denied sexually or physically assaulting her. (CTO 146.) The Sheriff retrieved three DNA samples from Cox. (CTO 146.) The Sheriff later received two reports stating that semen was detected on four swabs taken from Ashley on November 13 and that "the foreign male profile obtained from this mixture is the same as the profile of suspect COX." (CTO 144, 174.) Cox later admitted in his declaration in support of his opposition to the anti-SLAPP motion that he had sex with Ashley on November 8, 2015, but continued denying that he had sex with Ashley any time on November 11 through 13 (notwithstanding the fact that Cox's semen was detected in Ashley's SART exam taken on November 13, 2015). (CTO 21, 174, 178, 181.)

On November 14 and 15, 2015, the Sheriff also interviewed Darlene, who shared that Ashley became very emotional and started to cry when she shared that Cox assaulted and strangled her. (CTO 151.)[7] On or about

[7] The Sherriff also interviewed other witnesses who confirmed Cox's abusive nature. The Sherriff interviewed Renee Grossi who had been on dates with Cox in the past and stated she "felt stuck at the ranch for two or three days [in the past] . . . [because] she did not want to confront

November 16, 2015, the Mariposa District Attorney initiated criminal charges against Cox and issued an amended complaint on February 22, 2016, ultimately alleging several counts including forcible rape, sodomy by use of force, kidnapping, and dissuading a witness by force or threat. (CT 20-35.) In August 2017, the District Attorney prosecuting Cox's case, Thomas K. Cooke, dismissed the case without explanation. (CTO 50.)

PROCEDURAL HISTORY

1. Cox Sues Ashley for Malicious Prosecution.

On August 22, 2018, Cox filed, in pro per, a civil complaint against Ashley for defamation, libel, malicious prosecution, and abuse of process ("Original Complaint") in Mariposa County Superior Court. (CT 4-6.) After his counsel substituted in, Cox filed on December 18, 2018, a voluntary Request for Dismissal of all causes of action except malicious prosecution. (EAR 4.) The Original Complaint did not have a fact section and pled various factual allegations under other causes of action. (CT 4-6.) Accordingly, Cox's voluntary dismissal had the effect of removing all factual allegations from the Original Complaint except for the party names,

---

Jerry about leaving because she felt he would become angry" and described Cox "as liking to have people out at the ranch and not let them leave." (CTO 175.) Grossi also "described Jerry as verbally forceful and aggressive in reference to having sex." (CTO 175.) In a communication with the Sheriff, another ex-girlfriend, Denise Mahoney, confirmed that Cox could be very violent and aggressive and was often verbally abusive and she broke up with him when Cox threatened to kill her. (CTO 195.)

and the new operative complaint ("Operative Complaint") was left with the following statement: "The aforementioned acts constitute malicious prosecution." (CT 4-6; RT 16.)

On December 19, 2018, with assistance of counsel, Ashley filed an anti-SLAPP motion to strike the malicious prosecution cause of action. (CT 42-51.) In support of her motion, Ashley submitted her declaration, a copy of a temporary restraining order that Ashley had obtained against Cox as a result of the November 2015 incident (offered merely for the purpose of showing it was granted), her reply brief, supplemental declaration, and the complete set of Sheriff's Reports documenting the investigation. (CT 9-10, 37-41; CTO 135-137, 141-229, 242-252.) Ashley argued that her report to the police is "protected activity" under the anti-SLAPP statute, as recognized by the courts. (CT 46-47; CTO 247-48.) She further argued that Cox could not establish a probability of prevailing because, among other things, (i) Cox failed to plead the necessary elements for a claim of malicious prosecution, and (ii) Cox could not show Ashley initiated the prior criminal proceeding because law enforcement initiated the extensive independent investigation, which was then followed by the discretionary decision by the district attorney to prosecute. (CT 47, 49; CTO 247-252.)

Two days after Ashley filed her anti-SLAPP motion, Cox uploaded onto YouTube a video titled, "False Accuser lies Exposed," [8] which he later submitted with his opposition to Ashley's motion and claimed it shows District Attorney Cooke stating on video that Ashley had lied. (CTO 23.) Importantly, it is unclear from the YouTube video whether the individual speaking in the video is Cooke, whether the recording takes place in a confidential setting, or whether the individual is even aware that he is being recorded.[9] And not once did the individual specifically mention this case or specifically reference Ashley.[10] Nonetheless, Cox argued, based on pure speculation, that Cooke dismissed the criminal case after receiving a copy of Ashley's deposition transcript taken on June 2, 2017, [11] from her unrelated workers' compensation case. (CTO 23, 32.) Cox also submitted as evidence an incomplete and uncertified excerpt from the alleged deposition transcript reflecting the following:

> **Q:** You mentioned in the deposition that you were the victim of an attack in 2010, and then there was an off-the-record discussion that I can only speculate about. Do you recall that? Your testimony?
> **Ashley**: Yes.

---

[8] The video, which was not admitted into evidence by the trial court, is available at https://www.youtube.com/watch?v=mi6vp3RXe_o.

[9] *Ibid.*

[10] *Ibid*.

[11] Cox incorrectly stated in his declaration in support of his opposition to Ashley's anti-SLAPP motion that the deposition took place on June 2, 2016, when in fact the deposition occurred on June 2, 2017. (CTO 23, 32.)

> **Q:** Then the deposition also mentioned a -----that you were being stalked by somebody in Rohnert Park?
> **Ashley:** Yes. That was a neighbor.
> **Q:** Other than these incidents, have there been any other incidents where you've been the victim of—I'll start with—violent crime?
> **Ashley**: Not that I recall.
> **Q:** No sexual or physical abuse since the Rohnert-Park thing?
> **Ashley:** Not that I recall.

(CTO 32-35.) Ashley stated that she did not recall being sexually or physically abused, likely because of the effects of Ashley's traumatic brain injury and the effects of the RTS Ashley suffered following the sexual assault.

2. <u>Cox Submits Evidence That Grossly Distorts the Parties' Relationship and the Timeline of Relevant Events.</u>

Cox also submitted a declaration that recounts his interactions with Ashley from his perspective and conclusively declares that Ashley lied. (CTO 20-23.) Cox covertly attempts to portray Ashley as a drinker and, though they were together from November 11 through November 13, Cox claims the last time they had sex was on November 8. (CTO 20-23.) He also states that he is not sure why Ashley texted him "I don't like getting slapped in the face" and attempts to justify the message by speculating that Ashley was referring to a time he "accidentally slapped her while sleeping and rolling over." (CTO 21.) And he suggests Ashley concocted this entire story because he asked her to clean the cabin where they had been staying. (CTO 20-23.) Finally, as discussed *infra* at pp. 51-55, Cox continues to

rely on various myths and misconceptions about survivors of abuse to support his position on appeal.

3. Ashley's Anti-SLAPP Motion Is Granted.

On March 11, 2019, the trial court heard Ashley's anti-SLAPP motion.[12] The court first admitted the Sheriff's Reports. (RT 8-9.) The court held that although the Sheriff's Reports were hearsay, it would admit them for purposes of determining the anti-SLAPP motion, noting that if the testimony of witnesses identified in the Sheriff's Report were offered at trial, this would be admissible evidence. (RT 9.) The court excluded the YouTube video for failure to authenticate, lack of foundation, and hearsay (RT 11-12), and for failing to follow California Rules of Court, rule 2.1040(b)(1), which required Cox to provide a transcript of any statement contained in the video (RT 11). The court also sustained Ashley's objection to the incomplete, uncertified deposition transcript for lack of foundation and failure to authenticate. (RT 9.) Given this holding, the court also struck from the record paragraphs 61 and 62 of Cox's declaration, which addressed the deposition and video. (RT 11-12.)

The trial court then addressed the merits of Ashley's anti-SLAPP motion. (RT 12-17.) The court ruled that because Cox's dismissal of all

[12] The court reviewed and considered Cox's Complaint; Cox's voluntary Request for Dismissal; Ashley's anti-SLAPP motion, reply, and supporting declarations; Cox's opposition to the anti-SLAPP motion and supporting declaration, notice of lodgment of exhibits that include excerpts

causes of action except malicious prosecution had the effect of removing all factual allegations from the Original Complaint, the Operative Complaint lacked the factual allegations necessary to support the required elements of malicious prosecution and, for that reason, he could not establish the second prong of the anti-SLAPP analysis—a probability of prevailing on his claim for malicious prosecution. (RT 16.) The trial court also gave weight to the "independent investigation doctrine." (RT 16.) Moreover, the court emphasized the importance of Cox having denied any sexual contact with Ashley to the Sheriff, while a DNA test corroborated that Cox did, in fact, have sexual intercourse with Ashley. (RT 16.) On these bases, the court found that "if [the court] got to the second prong" of the anti-SLAPP analysis, Cox would have not shown a probability of prevailing on the malicious prosecution cause of action. Thus, the trial court granted Ashley's motion. (RT 16.)

4. <u>The Court Granted Ashley's Attorneys' Fees Request.</u>

On May 6, 2019, the trial court granted Ashley's request for attorneys' fees in the amount of $46,031.57 for the work her counsel

---

of the Sheriff's Reports and request for judicial notice of Ashley's unrelated workers' compensation deposition testimony; Cox's evidentiary objections; Ashley's evidentiary objections to evidence; and objections to Cox's request for judicial notice. (RT 5-6.)

performed assisting her with her anti-SLAPP defense and fee motions.[13] (RT 33; EAR 7.) The court concluded the fees were reasonable in light of Ashley's inability to pay counsel, the nature of the special motion to strike and the fact that she could not find any attorney that would take on a pro bono matter in the local area, which caused her to seek counsel out of the area where hourly rates may have been higher. (RT 32-33.)

Cox's appeal followed.[14]

---

[13] Although Ashley appeared in pro per, Ashley had the limited assistance of counsel who helped draft her anti-SLAPP motion, reply brief, supporting declarations, objections to evidence, objection to judicial notice, and the fee petition. (RT 30.) She made various efforts to locate counsel in her area to represent her for all purposes, but she was unsuccessful. (CT 51.)

[14] Following the trial court's dismissal, on August 12, 2019, Cox filed a federal civil rights suit in the Eastern District of California (1:19-cv-01105) against Ashley, Mariposa County, the Mariposa County Sheriff's Office, Sheriff Deputy William Atkinson, Sheriff Deputy Wesley Smith, California Receivership Group, and receiver Mark Adams alleging violations of: (1) 14th Amendment Due Process (42 U.S.C. § 1983); (2) 14th Amendment Equal Protection (42 U.S.C. § 1983); (3) 4th Amendment (42 U.S.C. § 1983); (4) 5th Amendment (Takings); (5) Slander of Title; (6) Breach of Fiduciary Duty; (7) Intentional Interference with Prospective Economic Advantage; (8) Conversion; (9) Unlawful, Unfair, and Fraudulent Business Acts and Practices in Violation of California Business & Professions Code § 17200; (10) R.I.C.O (18 U.S.C. Chapter 96); (11) Conspiracy to Violate Constitutional Rights; (12) Negligence; (13) Negligent Hiring, Training and Supervision; and (14) Monell.

LEGAL STANDARD

An appeal from an order granting a special motion to strike under California's anti-SLAPP law is reviewed de novo. (*Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203, 216.) Rulings on evidentiary objections made in connection with a special motion to strike are reviewed for abuse of discretion. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348, fn. 3.) Similarly, the court reviews the trial court's award for attorneys' fees under the anti-SLAPP statute under the abuse of discretion standard. (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 487.) In fact, "[a] trial court's attorney fee award will not be set aside absent a showing that it is manifestly excessive in the circumstances." (*Ibid.,* internal quotation marks and citation omitted.)

ARGUMENT

I. THE TRIAL COURT PROPERLY CONCLUDED THAT COX'S LAWSUIT IS BARRED BY CALIFORNIA'S ANTI-SLAPP LAW.

A. Cox's Malicious Prosecution Claim Arises from Ashley's Protected Communications with Police.

A special motion to strike under Code of Civil Procedure section 425.16 permits a defendant to obtain an early dismissal of an action that qualifies as a "SLAPP," or "strategic lawsuit against public participation." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.) A motion pursuant to section 425.16 is thus referred to as an "anti-SLAPP" motion. Section 425.16 requires that a court engage in a two-prong inquiry

to determine whether a defendant's anti-SLAPP motion should be granted. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76, citation omitted.) Second, "[i]f the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on that claim." (*Ibid.*)

On appeal, Cox argues that since his Operative Complaint was devoid of any factual allegations of protected activity following Cox's voluntary dismissal of the Original Complaint, anti-SLAPP should not have been triggered. (AOB 12-16.) Cox did not raise this argument in his opposition to Ashley's anti-SLAPP motion before the trial court. (CTO 4-19.) "It is a general rule that contentions not raised in the trial court will not be considered on appeal." (*Rand v. Bd. of Psychology* (2012) 206 Cal.App.4th 565, 587.) The rule "is founded on considerations of fairness to the court and opposing party, and on the practical need for an orderly and efficient administration of law." (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.) Accordingly, this argument has been waived.

In any event, the argument holds no weight. In deciding whether a suit arises from protected activity, the court not only considers the complaint, but also "considers the pleadings, and supporting and opposing affidavits stating the facts [on] which the liability or defense is based."

(*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, internal quotation marks and citation omitted; see also Code Civ. Proc., § 425.16, subd. (b)(2).)
The court's focus is on the substance of the plaintiff's lawsuit in analyzing the first prong of a special motion to strike. "In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier*, *supra*, 29 Cal.4th at p. 89, italics added.) The Supreme Court has recently put it this way: "A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*City of Cotati*, *supra*, 29 Cal.4th at p. 78 ["[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act *underlying* the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech."], italics added.)

Here, notwithstanding Cox's deficient Operative Complaint, his supporting documents and evidence demonstrate his claim for malicious prosecution arises out of Ashley's protected communications with the police. (See *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941 ["The law is that communications to the police are within SLAPP."].) In opposing Ashley's anti-SLAPP motion, Cox argued that "Defendant made a false police report alleging that Plaintiff locked her up from November 11 through 13, 2015 and raped her during that time, and that she tried to escape but he stopped her and continued assaulting her." (CTO 11.) Cox's

supporting declaration stated: "The whole story she told the Sheriff was a lie." (CTO 23.) Cox's Opening Brief in this very appeal asserts that "Cox, initially in pro per, filed a lawsuit against Ashley for defamation, malicious prosecution, and other causes of action *for having made the false police report.*" (AOB 5, italics added.) A review of these documents shows that *but for* Ashley's report to the police, Cox's claim for malicious prosecution would have no basis. Cox fails to state—before the trial court and on appeal—what his claim *is* based on if not Ashley filing the police report. Therefore, the trial court properly concluded that Cox's claim for malicious prosecution is based on Ashley's report to the police.

Navellier, a case referenced by Cox himself (AOB 15), is instructive. In *Navellier*, plaintiffs filed suit in state court, alleging various violations on the part of the defendant for filing counterclaims against the plaintiff in a prior federal action. (*Navellier, supra,* 29 Cal.4th at p. 87.) The California Supreme Court reversed and remanded the appellate court's affirmance of the trial court's denial of the defendant's anti-SLAPP motion and held that the plaintiff's lawsuit arose from protected activity—specifically, the act of filing a lawsuit. (*Id.* at pp. 89-90, 96.) In deciding whether the initial "arising from" requirement was met, the Court looked at declarations submitted by both parties, documents related to the federal action, and "various other documents." (*Id.* at pp. 89-90.) The Court stated that "[e]xamination of the relevant documents reveals that each of [the

defendant's] acts (or omissions) about which plaintiffs complain falls squarely within the plain language of the anti-SLAPP statute." (*Id.* at p. 90.) And "but for the federal lawsuit and [the defendant's] alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis. This action therefore falls squarely within the ambit of the anti-SLAPP statute's 'arising from' prong." (*Ibid.*) In short, *Navellier* illustrates that a court may look at documents beyond the complaint to determine whether a plaintiff's cause of action is based on protected activity.

Cox also relies on *Chambers v. Miller* (2006) 140 Cal.App.4th 821 to support his argument that there was no basis for the anti-SLAPP motion because there was no cause of action containing any factual allegation of protected activity in the Operative Complaint. (AOB 12-13.) In *Chambers*, the court affirmed the trial court's denial of attorneys' fees where the plaintiff dismissed *all* of her claims before the defendants filed their anti-SLAPP motion to strike. (*Chambers*, *supra*, 140 Cal.App.4th at p. 825.) The court noted, "the primary purpose of a special motion to strike is to expeditiously dispose of meritless claims infringing on a party's free speech rights." (*Ibid.*) Thus, the court concluded when *all* claims are dismissed from a plaintiff's complaint, there is nothing left for a defendant to prevail on through a motion to strike. (*Ibid.*) Here, in contrast, Cox's cause of action for malicious prosecution *did* remain, and Ashley *did* successfully

litigate her motion to strike before the trial court. *Chambers*, therefore, is inapposite.

Despite the foregoing, Cox insists that "it does not matter that the malicious prosecution cause of action remained, because the mere label of the cause of action does not assert any factual allegation of protected activity." (AOB 13.) To support this argument, Cox cites to *Baral v. Schnitt* (2016) 1 Cal.5th 376 for the proposition that "the cause of action and the allegations within the cause of action are completely different things for purposes of an anti-SLAPP motion." (AOB 14-15.) This is inaccurate. In *Baral*, the California Supreme Court addressed this question: "How does the special motion to strike operate against a so-called 'mixed cause of action' that combines allegations of activity protected by the statute with allegations of unprotected activity?" (*Baral, supra,* 1 Cal.5th at p. 381.) The court, resolving a district split, held that under anti-SLAPP, when a cause of action is based on allegations of protected activity and unprotected activity, then the court may strike only those allegations of protected activity, thereby preserving the cause of action based on the unprotected activity. (*Id*. at pp. 395-396.) The Court noted that "[*t*]*ypically*, a pleaded cause of action states a legal ground for recovery supported by specific allegations." (*Id.* at p. 381, italics added.) When this is the case, it is true that courts focus on the allegations, rather than the cause of action, to determine whether the claim is based on protected

activity or unprotected activity. (*Id.* at pp. 381-382.) But ultimately, what Cox fails to mention is that the critical point is not what is alleged in the complaint, but rather, whether the claims are based on conduct protected by the anti-SLAPP statute. (*Id.* at p. 382.) Thus, when a complaint is based entirely on protected activity as demonstrated by declarations and other documents outside the complaint, then the entire cause of action is subject to anti-SLAPP. Here, Cox's cause of action for malicious prosecution is based entirely on Ashley's report to the police and is therefore subject to anti-SLAPP. Indeed, Cox does not identify any other activity other than Ashley's report to the police as the basis for his claim. In short, *Baral* does not assist him.

Cox also unsuccessfully relies on *Central Valley*, *supra*, 19 Cal.App.5th at pp. 218-219. (AOB 14.) In *Central Valley*, the defendant brought an anti-SLAPP motion to strike the plaintiff's claims for unfair business practices and interference on the basis that the claims were predicated on what defendant claimed was protected "physician peer review" activities. (*Central Valley*, *supra*, 19 Cal.App.5th at pp. 210, 217-219.) Although the plaintiff's complaint was conclusory and factually inadequate, it expressly alleged that the claims were *not* based on any "wrongs or facts arising from any peer review activities." (*Id.* at pp. 206, 217-218.) Notwithstanding the deficient complaint and the express denial that it was based on peer review activities, the trial court looked at

documents beyond the complaint, including declarations filed in opposition to the anti-SLAPP motion and correspondence between counsel, to verify whether the plaintiff's claim did, in fact, arise out of protected activity. (*Id.* at pp. 210, 217-219.) The appellate court upheld the trial court's ruling denying the anti-SLAPP motion because it was ultimately clear from the evidence that the gravamen of the claims was not based on peer review conduct. (*Ibid.*) Looking at the complaint and evidence, the court concluded, "[i]f there are no acts alleged, there can be no showing that alleged acts arise from protected activity." (*Id.* at p. 218, internal quotation marks and citation omitted.) In other words, the result in *Central Valley* demonstrates that a court "cannot accept the evidence based solely what a defendant 'believes [plaintiff's] claims are based on[,]'" particularly when the complaint expressly excludes that theory. (*Id.* at pp. 217-218.) Not only does Cox misconstrue and take the language from *Central Valley* out of context in the Opening Brief, but Cox also fails to recognize that the ruling in *Central Valley* only undermines his arguments.

Although the court ultimately denied the anti-SLAPP motion, *Central Valley* demonstrates that a plaintiff may not take advantage of strategic pleading to avoid anti-SLAPP. When a plaintiff files a complaint that lacks any factual allegations of protected activity and even expressly denies that the case is based on protected activity, the court will nonetheless look at declarations and other supporting documents to independently review

whether the plaintiff's claims arise out of protected activity. Like the plaintiff in *Central Valley*, Cox's complaint fails to allege any factual allegations of protected activity but, *unlike* that plaintiff, Cox's declaration, supporting documents, and briefing on this very appeal demonstrate that Cox's claim for malicious prosecution *is* based on Ashley's protected activity of reporting to the police.[15]

Ultimately, *Central Valley* is consistent with the purposes of anti-SLAPP laws. Any inclination to limit anti-SLAPP to cases where the complaint pled factual allegations of protected activity would be too restrictive in light of the Legislature's unqualified intention to encourage continued participation in matters of public significance. The legislative history of Code of Civil Procedure section 425.16 "indicate[s] the statute was intended broadly to protect, inter alia, direct petitioning of the government and petition-related statements and writings." (*Briggs v. Eden*

---

[15] Cox also cites, in passing and without any explanation, three additional cases that are similarly inapplicable. In all three cases, the defendant tried to recast the basis for the plaintiff's cause of action like the defendant in *Central Valley*. (*Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 627-628 [rejecting defendant's attempt to recast the basis of plaintiff's cause of action]; *Medical Marijuana, Inc. v. ProjectCBD.com* (2016) 6 Cal.App.5th 602, 621 [same]; *Turnbull v. Lucerne Valley Unified School Dist.* (2018) 24 Cal.App.5th 522, 534 [same].) Here, Ashley does not attempt to alter the basis of Cox's claim for malicious prosecution so she can seek the benefit of anti-SLAPP protection. There is no need to—Cox has made clear that his cause of action is based on Ashley's report to the police. Indeed, Cox has not argued or pled that his claim is based on anything other than this action taken by Ashley.

Council for Hope and Opportunity (1999) 19 Cal.4th 1106, 1120.) By the same token, accepting Cox's proposition would set dangerous precedent permitting plaintiffs to evade anti-SLAPP liability by artfully pleading simply by removing factual allegations of protected activity from their complaints and challenging the defendant's protected activity through other pleadings, affidavits, and declarations in the case: It is a "fundamental concept that a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic . . . ." (See *Comstock*, *supra,* 212 Cal.App.4th at p. 946, internal quotation marks and citation omitted.) This result would compromise the Legislature's intentionally expansive remedial framework and would eviscerate the protections of California's anti-SLAPP law. Accordingly, Cox's claim for malicious prosecution arises out of Ashley's report to the police and, thus, the first prong of the anti-SLAPP analysis is satisfied.

B. The Trial Court's Ruling That Cox Failed to Show a Probability of Prevailing on the Merits Was Correct.

1. The Second Prong of the Anti-SLAPP Inquiry Is Met Because Cox's Operative Complaint Was Not Legally Sufficient.

To meet its burden in showing a probability of prevailing on the merits, a "plaintiff 'must demonstrate that the complaint is *both* legally sufficient *and* supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is

credited.'" (See *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, italics added, citations omitted.) In light of both these requirements, the courts' inquiry here is two-step, with the initial focus on whether the plaintiff properly pled a valid cause of action. (See Burke, Civil Litigation Series: Anti-SLAPP Litigation, Legally sufficient (The Rutter Group 2019) § 5:4.) When a complaint lacks the factual allegations necessary to support the required elements of a cause of action, the plaintiff necessarily fails to show a likelihood of success on the merits. (*Wilson*, *supra*, 28 Cal.4th at p. 821.) It is only when the court determines that the pleading is adequate that "the court then evaluates whether the evidence submitted by the parties and admissible at trial amounts to a sufficient prima facie showing of facts" to support a favorable judgment for the plaintiff. (See *Abir Cohen Treyzon Salo, LLP v. Lahiji* (2019) 40 Cal.App.5th 882, 888, internal quotation marks and citations omitted.)

Since a plaintiff must show that its complaint is *both* legally sufficient *and* supported by sufficient evidence, a failure to sufficiently plead facts in the complaint is fatal to plaintiffs facing anti-SLAPP motions.[16] For example, in *Anschutz Entertainment Group, Inc. v. Snepp*

[16] This requirement does not conflict with the standards courts apply under the first prong of the anti-SLAPP analysis and is consistent with the purpose of the anti-SLAPP statute, that is, to ensure lawsuits are not strategically filed to preclude protected activities, including free speech. For this reason, and as explained *supra* at pp. 29-37, courts look to the complaint *and* other supporting documents to determine whether the suit is

(2009) 171 Cal.App.4th 598, 642-643, the appellate court dismissed under anti-SLAPP plaintiff's slander claims because plaintiff failed to plead special damages and compliance with California's correction statute. Similarly, in *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 31-32, the court reversed and remanded with directions to grant the anti-SLAPP motion where the plaintiff failed to plead a legally sufficient defamation claim, reasoning that plaintiff's pleading of his libel claim "is a paradigm of vagueness, and does not even come close to the specificity required to state an actionable libel claim." (See also *id.* at p. 32 [noting that "[a]lthough we could well stop here, we also note that Sykes's evidentiary showing was also deficient"].)

The trial court here properly concluded that Cox did not show a probability of prevailing on the malicious prosecution claim because his Operative Complaint was not legally sufficient as it failed to plead *any* facts required for a malicious prosecution claim. The elements of a malicious prosecution claim are that the prior action (1) was commenced by or at the

---

challenging a protected activity. Otherwise, plaintiffs can subvert the purpose of the statute by pleading artfully, undercutting the entire purpose of the anti-SLAPP statute. On the other hand, when looking at whether the plaintiff can demonstrate a likelihood of success under the second prong, like in any case, general procedural pleading requirements need to be met first. Therefore, when a plaintiff fails to allege sufficient facts—let alone *any* facts—he cannot succeed on his claim. Courts have found that the inquiry can stop here if the complaint is not legally sufficient.

direction of the defendant; (2) was pursued to a legal termination in plaintiff's favor; (3) was brought without probable cause; and (4) was initiated with malice. (See *Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 897.) Cox's voluntary dismissal of his first, second, and fourth cause of actions for defamation, libel, and abuse of process had the effect of removing all factual allegations from the Original Complaint and only left a claim for malicious prosecution that merely stated, "'The aforementioned acts constitute malicious prosecution[,]'" and nothing else.[17] (CT 5; RT 16.) It is undeniable that Cox's Operative Complaint was devoid of allegations necessary to support a malicious prosecution claim.

Here, Cox's Operative Complaint did not plead any facts to support elements of a malicious proceeding, such as an initiation of a prior proceeding, favorable termination, lack of probable cause, or malice. Therefore, it was proper for the trial court to strike the Operative Complaint. The trial court need not have gone further to evaluate the

[17] As the trial court properly ruled, Code of Civil Procedure section 425.16 does not permit a plaintiff to avoid an anti-SLAPP motion by filing amended pleadings. (RT 26; see *Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 676 ["Although the anti-SLAPP statute does not specifically state it, a plaintiff whose complaint is stricken by a successful anti-SLAPP motion cannot try again with an amended complaint. There is no such thing as granting an anti-SLAPP motion with leave to amend."]; *Simmons v. Allstate Insurance Co.* (2001) 92 Cal.App.4th1068, 1073-1074 [plaintiff is barred from amending the complaint following successful motions to strike].)

evidence submitted, such as Cox's declaration, to determine whether the evidence proffered could sustain a favorable judgment. (See *Abir Cohen*, *supra*, 40 Cal.App.5th at p. 888.)

2. Even If Cox's Operative Complaint Had Been Legally Sufficient, He Failed to Proffer Sufficient Prima Facie Evidence of Facts to Support a Malicious Prosecution Claim.

In addition to pleading a legally sufficient claim—which he has not—Cox must demonstrate the Operative Complaint is "'supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (See *Gilbert*, *supra*, 147 Cal.App.4th at p. 26, quoting *Seelig v. Infinity Broadcasting Corp*. (2002) 97 Cal.App.4th 798, 809.) While Cox's burden is to establish minimal merit, he must demonstrate that his claim is legally sufficient with "competent and admissible evidence." (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist*. (2003) 106 Cal.App.4th 1219, 1236; see also *Navellier*, *supra*, 29 Cal.4th at p. 93.) At the same time, a court "should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (See *Wilson*, *supra*, 28 Cal.4th at p. 821.) On appeal, Cox does not allude to the elements he is required to establish for a malicious prosecution claim, let alone demonstrate how the evidence on the record supports his probability of prevailing.

As a preliminary matter, Cox does not raise the trial court's evidentiary rulings as an error for this court to review and therefore has waived any argument that the trial court abused its discretion in excluding the YouTube video and the deposition transcript: "It is a general rule that contentions not raised in the trial court will not be considered on appeal." (*Rand*, *supra*, 206 Cal.App.4th at p. 587; see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331 [appellate courts will disturb discretionary trial court rulings only upon a showing of "a clear case of abuse" and "a miscarriage of justice"], internal quotation marks and citations omitted.) Even if these evidentiary rulings were properly before this Court, the trial court did not abuse its discretion. First, the trial court properly denied Cox's request for permissive judicial notice and properly excluded the YouTube video because it contained hearsay, lacked foundation, and was not authenticated.[18] (RT 11-12; see also Evid. Code, §§ 250, 1200, 1400, 1401; *McGarry v. Sax* (2008) 158 Cal.App.4th 983, 991 [plaintiff's failure to authenticate the video rendered it inadmissible and useless on appeal because what it depicted could not be ascertained].) The video was allegedly of the District Attorney, Cooke, discussing Cox's criminal case. It is unclear, however—and Cox did not provide any evidence otherwise—

[18] The trial court also ruled that Cox failed to provide a transcript, which is required for any statement contained in a video or any audio record under California Rules of Court, rule 2.1040(b)(1).

whether the individual speaking in the video is, in fact, Cooke. Additionally, it is unclear whether the recording takes place in a confidential setting, whether the individual is even aware that he is being recorded, or whether the discussion actually involved Cox's case.[19] Moreover, there is no indication that the speaker consented to the video-recording, thus barring its admission under Penal Code section 632, subdivision (d).[20]

---

[19] The video, which was not admitted into evidence by the trial court, is available at https://www.youtube.com/watch?v=mi6vp3RXe_o.

[20] In civil matters, no evidence obtained as a result of an illegal act of eavesdropping is admissible in any judicial, administrative, legislative, or other proceeding. (Pen. Code, § 632, subd. (d); *Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1492 [holding that secretly taped telephone conversations and notes based on the tapes could not be introduced as evidence in a civil contract action because they were obtained in violation of Penal Code section 632, subdivision (d)].) Such evidence is typically obtained by recording a communication obtained without consent and when the speaker has a reasonable expectation of confidentiality. (Pen. Code, § 632, subd. (d).) Even assuming the individual being recorded was in a public setting, he still has a reasonable expectation of privacy. (See *Safari Club Internat. v. Rudolph* (9th Cir. 2017) 862 F.3d 1113, 1123-1126 [holding that a plaintiff made out a prima facie case for a violation under Penal Code section 632 where the plaintiff alleged he was secretly recorded and he had a reasonable expectation of privacy where others could not overhear the conversation and the participants stopped talking about anything of substance when anyone came near their table]; *Cuviello v. Feld Entertainment Inc.* (N.D. Cal. 2015) 304 F.R.D. 585, 591 [holding that a plaintiff had a reasonable expectation of privacy while standing on a public sidewalk where he looked around to ensure that no one was within earshot before beginning to speak privately to a fellow animal rights demonstrator].) A violation of the Penal Code's eavesdropping provisions is a criminal offense, punishable by a fine of up to $2500, imprisonment for up to a year, or both. (Pen. Code, § 632, subd. (a).)

Second, the court did not abuse its discretion in denying Cox's request for judicial notice and excluding the unrelated workers' compensation deposition transcript without proper foundation or proper authentication. A court may use its discretion to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (See Evid. Code, § 452, subd. (h).) As such, the deposition transcript could not have been judicially noticed because it was incomplete and uncertified. (See *In re Marriage of Deal* (2020) 45 Cal.App.5th 613, 622, fn.9 [denying appellant's request for judicial notice because the document "appear[ed] [to be] incomplete and [was] therefore not helpful to this court"].)

Therefore, the only evidence properly admitted for the trial court's consideration were portions of Cox's declaration (paragraphs 1 through 60), Ashley's declarations, and the Sheriff's Reports.[21] This evidence

---

[21] Cox asserts the Sheriff's Reports should not have been admitted because they are hearsay. (AOB 18.) This argument lacks merit. As a preliminary matter, Cox himself submitted the Sheriff Reports to the trial court and continues to rely on them; indeed, Cox's malicious prosecution claim is entirely based on Ashley's report to the Sheriff. In any event, the California Supreme Court has unanimously held that, in ruling on an anti-SLAPP motion, California courts should consider documentary evidence even if it would not be admissible at trial in the form offered, so long as it is "reasonably possible the proffered evidence set out in those statements will be admissible at trial." (*Sweetwater Union High School Dist. v. Gilbane Bldg. Co.* (2019) 6 Cal.5th 931, 949.) Here, the trial court properly admitted the Sheriff's Reports for purposes of ruling on the anti-SLAPP

overwhelmingly supports Ashley's presentation of the facts and is not sufficient to satisfy each of the requisite elements of Cox's malicious prosecution claim. Cox's failure to demonstrate any one of the four required elements is fatal to proving a probability of success. (See, e.g., *Williams*, *supra*, 147 Cal.App.3d at p. 897.)

(a) Ashley's Actions Do Not Amount to "Prosecution" Because of the Independent Investigation Doctrine.

For the first element, Cox fails to establish that Ashley's actions amount to "prosecution." A private citizen may be liable for malicious prosecution only if he or she "has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff committed a crime." (*Sullivan v. County of L.A.* (1974) 12 Cal.3d 710, 720.) On the other hand, under the independent investigation doctrine, one "who merely alerts law enforcement to a possible crime . . . is not liable [for malicious prosecution] if, law enforcement, on its own, after an independent investigation, decides to prosecute." (See *Williams*, *supra*, 147 Cal.App.3d at p. 898.)

---

motion after determining that it was reasonably possible that the evidence in the reports could have been admitted at trial through in-court witness testimony. (RT 8-9.) What is more, unlike Cox's proffered incomplete YouTube video and the deposition transcript, the Sheriff's Reports were electronically signed by sergeants and thus are presumptively authentic. (See Evid. Code, § 1453 [a public officer's signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity].)

Under the independent investigation doctrine, the test is whether the defendant was actively instrumental in causing the prosecution, such as taking any active part in directing or aiding the conduct of the case. (See, e.g., *Werner v. Hearst Publications, Inc*. (1944) 65 Cal.App.2d 667, 672-673 [holding that no malicious prosecution action can be maintained against the defendants who made the original complaint to the State Bar when the agency conducted its own independent investigation prior to instigating disbarment proceedings against plaintiff].)

Here, as explained *infra* at pp. 49-55, there is undisputed evidence of Cox's abuse of Ashley, and these were the crimes Ashley reasonably and truthfully reported to the police. (Cf. *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 705 [defendant's communications to the police were conclusively not protected because defendant *admitted* to filing "an illegal, false criminal report"].) Ashley cannot be liable for malicious prosecution for reporting the crimes and seeking protection from further abuse, especially when it is undisputed that the Mariposa County Sheriff's Department conducted an extensive, independent investigation that lasted two years. There is no evidence to suggest that, after she reported Cox's criminal abuse to the Sheriff, Ashley took any affirmative action to further pursue, interfere with, direct, or obstruct the investigation or that the

criminal prosecution was commenced at Ashley's direction.[22] (See *Lucinda Cox v. Griffin* (2019) 34 Cal.App.5th 440, 452 [arrestee's malicious prosecution theory fails because accuser intended that the sheriff's department investigate what she believed to be a crime and the sheriff conducted its own investigation].)

Cox does not argue or cite to any evidence suggesting that the Sheriff or the prosecutor failed to conduct an adequate investigation before filing the charges and prosecuting the case. To the contrary, the record shows that the investigation was thorough and involved various sergeants from the Sheriff's department independently examining cell phone and medical examination records and communicating with and interviewing various individuals familiar with Cox. (CTO 151, 158-159, 160-163, 170-172, 175-182, 189-193, 195, 209.) After the Sheriff launched an extensive investigation, the district attorney then used its discretionary decision making authority to file a criminal complaint against Cox in November 2015, which was then amended in February 2016. (CT 20-35.) Indeed, the Sheriff and the district attorney are empowered to conduct an independent investigation of all complaints from the public prior to prosecuting.

---

[22] Following the initial questioning in November 2015, the Sheriff's department contacted Ashley almost one year later on September 9, 2016, for follow up questions. (CTO 196.) There is nothing in the record to indicate this interview was at Ashley's behest rather than simply a part of the Sheriff's department's ongoing investigation.

(b) Cox Fails to Show That His Criminal Charges Were Terminated Favorably.

For the second element, Cox cannot show the criminal charges against Cox were favorably terminated. To establish that the criminal charges against him resulted in a favorable termination, it is not enough for Cox "merely to show that the proceeding was dismissed." (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 150.) If a dismissal "is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination." (*Ibid*.) Thus, "[w]hen the proceeding terminates other than on the merits, the court *must examine the reasons* for termination to see if the disposition reflects the opinion of the court or the prosecuting party that the action would not succeed." (*Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1411, italics added.) Although there is evidence that the criminal charges against Cox were dismissed, Cox cites to no admissible evidence indicating the reason for the dismissal, without which he cannot establish favorable termination as a matter of law.[23] (See *Lucinda Cox, supra,* 34 Cal.App.5th at p. 451

[23] In an attempt to demonstrate that the criminal case was terminated in his favor, Cox persistently continues to rely on the vague and unverified statements made by an unidentified individual in a YouTube video. (AOB 6, 9, 18-19.) As explained above, this video and related paragraphs in Cox's declaration were excluded by the trial court due to clear evidentiary deficiencies. What is more, even if there were admissible evidence that the charges were dropped due to concerns related to Ashley's credibility—there is not—this alone would not necessarily show that the termination was favorable. (*StaffPro, Inc. v. Elite Show Services, Inc.*

["favorable termination" could not be established where the defendant failed to cite to admissible evidence that explained the district attorney's decision to dismiss the case].)

(c) Cox Cannot Prove Ashley Acted Without Probable Cause or With Malice.

For the third and fourth elements, Cox cannot establish that Ashley lacked probable cause to report Cox's abuse to the Sheriff or that she did so with malice—both are required. The standard for probable cause is whether "it was objectively reasonable for the defendant . . . to suspect the plaintiff . . . had committed a crime." (*Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal.App.4th 1320, 1330.) Generally, "[a] litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164-165.) In other words, Cox would need to demonstrate that Ashley lacked any probable cause to report to the police because she had no reasonable cause to believe that Cox raped, assaulted, threatened, or held her against her will from November 11 through 13, 2015.

(2006) 136 Cal.App.4th 1392, 1399-1400 [If the resolution of the underlying litigation "leaves some doubt as to the defendant's innocence or liability[, it] is not a favorable termination, and bars that party from bringing a malicious prosecution action against the underlying plaintiff"], internal quotation marks and citation omitted.)

Cox also would need to show that Ashley acted with malice. Malice is an essential element of a malicious prosecution claim. (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494.) This element "relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. The plaintiff must plead and prove actual ill will or some improper ulterior motive." (*Ibid.*)

Cox has not met his burden. Cox has not proffered any evidence (1) to dispute the evidence on the record which shows that Ashley objectively had probable cause to file the report or (2) to show that Ashley acted with malice, other than merely declaring that "[t]he whole story she told the Sheriff was a lie." (CTO 23.) When questioned by the Sheriff on November 13, Cox stated that he had never had sex (not even a kiss) with Ashley. (CTO 146.) Later, in his opposition to Ashley's anti-SLAPP, Cox then claimed that the last time he had sex with Ashley was on November 8. (CTO 21.) Despite the inconsistencies in Cox's story, Cox does not—and cannot—dispute the medical evidence in the record of Ashley's November 13, 2015 SART examination results, which *conclusively show signs of abuse and forceful entry*, such as bruising and vaginal injuries, and detected semen matching Cox's profile. (CTO 21, 174, 178, 181.)

Further, to the extent Cox does attempt to undermine Ashley's account of Cox's rape and abuse from November 11 through 13, his efforts fall short. Not only does Cox misstate the record, but he also presents arguments largely based on multiple misconceptions about survivors of domestic and sexual abuse.

First, Cox contends Ashley lied because "[she] did not say anything about being rape or assaulted" to her friend, "Marlo [*sic*]," during a phone call on November 12, 2015, less than 24 hours after the assault occurred. (AOB 18.) The fact that Ashley had a conversation with a friend without mentioning the assault does not disprove Ashley's account of the facts.[24]

[24] Cox erroneously argues that the fact that Ashley failed to immediately report the abuse to her friend demonstrates the abuse never happened. (AOB 8, 18.) This argument is based on an erroneous belief that victims will normally report the offense immediately. In fact, failing to immediately report abuse is the norm for victims. "Because of the effects of the violence on its victims, they have a tendency to react in ways that make the violence invisible. It is rarely reported to officials who might keep records." (Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions* (2005) 25 N. Ill. U. L.Rev. 403, 415.) Moreover, "[f]ear of the abuser becomes a major reason for non-reporting of the violence as the violence increases or intensifies." (*Id.* at pp. 415-416.) As was the case here, "[a]busers often threaten to kill their partners if they leave and research has shown that such threats need to be taken seriously . . . ." (*Id.* at p. 416.) Indeed, studies show that 75% of women continue a relationship with their perpetrator, and women who fail to disclose they were sexually assaulted are even more likely to stay. (Edwards et al., *Predictors of Victim-Perpetrator Relationship Stability Following a Sexual Assault: A Brief Report* (2012) 27 Violence and Victims 25, 28-30.)

Second, Cox contends Ashley lied because the Sheriff's Report shows Cox and Ashley went to a Mexican restaurant on November 12 and the "waiter saw no signs of anything abnormal." (AOB 8, 18.) Without providing any explanation or evidence as to why or how the waiter was able to observe and/or was in a qualified position to assess signs of domestic abuse or "anything abnormal," Cox's reliance on this statement is trivial. (AOB 8, 18.) More importantly, before they walked in, Cox told Ashley not to raise any suspicion and not to make any eye contact with anyone—another tactic he employed to maintain control and perpetuate this abuse.[25] (CTO 136.) Cox also drove Ashley's car to the restaurant and had her car keys. (CTO 136.) The evidence shows that Ashley expressed she felt captured and did not have any other options to leave.[26] That Ashley

---

[25] The modern understanding of domestic abuse is that it derives from an abuser's desire to dominate and control the victim. The widely used "Power and Control Wheel," developed by the Duluth Abuse Intervention Project in the 1980s, illustrates the central role of power and control in domestic violence. (See, e.g., Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law* (2009) 42 U.C. Davis L.Rev. 1107, 1115-1124 ["The 'power and control wheel' is almost required text for service providers who work with women who are subject to abuse."].) There are several ways perpetrators use power and control to subject a victim: making the victim afraid by using looks, actions, or gestures, controlling what the victim does, making light of the abuse, playing mind games, and limiting her outside involvement, among many others. (See Domestic Abuse Intervention Programs: Home of the Duluth Model, *Understanding the Power and Control Wheel* https://www.theduluthmodel.org/wheels/understanding-power-control-wheel/ [as of July 8, 2020].)

[26] Other women stay because they are, rightfully, afraid of retribution: when victims attempt to leave their batterer's control, the risk

seemed normal to a waiter in a restaurant is not a proper basis to discredit her story. Indeed, complying with requests to "act normal" is a safety mechanism sometimes employed by victims who believe it is the best way to ensure their immediate safety.[27]

Finally, Cox also contends Ashley lied by misrepresenting the record as it relates to various text messages exchanged between Cox and Ashley. In his Opening Brief Cox states: "on November 12, 2015, Ashley texted Cox stating things such as: . . . 'Ok doll'; and, 'I loved that.'" (AOB 8, 17.) Cox argues these text messages reveal Ashley was not raped or held against her will. (AOB 17.) But, in truth, these text messages were sent earlier in the day on November 11 and *before* Ashley arrived to the property. (CTO 189-191, 206-207.) As Ashley explained in the Sheriff's Reports, Cox raped Ashley the night of November 11 (after arriving to the property at

---

of being killed escalates significantly. (See, e.g., Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study* (2003) 93 Am. J. Pub. Health 1089, 1092.)

[27] In a strikingly similar story, Epstein and Goodman describe a victim who lost her civil protection suit because she had gone to a Red Lobster restaurant with her perpetrator a few days after a particularly serious violent episode. (Epstein & Goodman, *Discounting Credibility: Doubting the Testimony and Dismissing the Experience of Domestic Violence Survivors and Other Women* (2019) 167 U. Penn. L.Rev. 1, 15-16.) The woman explained she "believed that the best way to ensure her immediate safety was to comply with her boyfriend's requests." (*Ibid.*) Unfortunately, the judge found this made her not credible. (*Id.* at p. 16.) Epstein and Goodman use this as one example to show that victims of abuse are largely discredited, "based on a failure to understand . . . the practical constraints on survivors' lives." (*Id.* at pp. 1-2.)

around 7:30 p.m.) and sexually assaulted her again on November 12 and 13, 2015.[28] (CTO 142-143.) None of the text message threads in the record prove that Ashley acted without probable cause or with malice and they do not prove that Ashley was not raped and assaulted by Cox.

In fact, contrary to Cox's contentions, there are several text messages between him and Ashley in which Ashley directly addressed the abuse. On November 13, 2015, after Ashley was able to escape to safety, she texted Cox saying, "I'm not going to be verbally abused by you[,]" and "I strongly suggest you get your anger under control." (CTO 207.) In another text, which Cox likely deleted, Ashley states: "I've opened myself

---

[28] On November 12, 2015, after being raped the day prior, Ashley attempted to defuse the situation by asking "What's your ETA" and sending a pleasant response "K" (meaning, "okay") followed by "Sweet." (CTO 191, 206-207.) Ashley could not locate her keys and could not get the door open to leave. (CTO 136.) With this context in mind, these text messages illustrate her attempts to get Cox to come back and to appease him so she could get out of the situation. (See Epstein & Goodman, *supra*, at pp. 15-16 [illustrating a similar scenario where a victim complied with her boyfriend's requests to ensure her immediate safety after a violent episode].) Indeed, sexual assault victims rarely take a fight or flight response. (Haskell & Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (2019) Report Submitted to: Justice Canada, p. 15.) Instead, the sexual assault victim must make a split second decision and "selects the response from among the range of other typical, habit-based responses" to an extreme circumstance. (*Ibid*.) Habit-based responses include "making an excuse, or attempting to appease." (*Ibid.*) Moreover, when these habitual responses do not work, "she is not consenting to the escalating sexual intrusiveness." (*Ibid.*) Rather, she is mentally incapable of strategizing or planning an escape because the stress hormones caused by the abuse flood her brain and impair her ability to use her rational prefrontal cortex. (*Ibid.*)

up to you and I got shit on. ***I promised myself I soul [sic] never get in another abusive relationship. It's only been two weeks and you've already hit me in the face by you when you were blacked out drunk***[,]" to which Cox responded, "[w]hatever."[29] (CTO 207, italics and bold emphasis added.)

Importantly, this evidence does not show that it was not objectively reasonable for Ashley to believe Cox had raped her and held her against her will and for her to report that crime to the police. In fact, it shows the contrary. Given the circumstances of the incident and corroborating evidence, there is also no indication that Ashley acted with any ill will or improper ulterior motive.

3. Public Policy Seeking to Prevent Recurring Acts of Domestic Abuse Weighs in Favor of Barring Malicious Prosecution Claims in This Context.

Malicious prosecution is a "disfavored" cause of action and the trend has been for courts to limit its expansion. (See, e.g., *S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 36.) In fact, "[t]he disfavored status of the tort originated in the context of malicious prosecution actions brought by

---

[29] Curiously, the bold portion was missing from the same thread extracted from Cox's phone. (CTO 191.) Fortunately, the Sheriff's Office also extracted text messages from Ashley's phone that reveals the complete set of text messages. (CTO 207.) The Sheriff's Report noted that the Department of Justice criminalist "stated that when a text message has been deleted from a cell phone the Cellabrite recovery program is only able to collect a certain amount of the characters from the actual texts and they may at times not be recovered completely." (CTO 193.)

individuals who had been charged with a criminal offense, and stemmed from the important public policy of encouraging the reporting of suspected crimes by ordinary citizens." (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872, fn. 5.) The California Supreme Court in *Sheldon* explained that courts disfavor malicious prosecution claims particularly because of the great potential of chilling the public's willingness to report criminal activity. (*Sheldon*, *supra,* 47 Cal.3d at p. 872.) The Court reasoned that, consequently, "the elements of the tort have historically been carefully circumscribed so that litigants with potentially valid claims will not be deterred." (*Ibid.*)

Recognizing this tension, California courts have established a "bright-line rule" barring malicious prosecution for claims that arise from various underlying claims, including civil harassment, family law, and domestic abuse proceedings. (See *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1567, 1571 [civil harassment]; *Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 35, 37 [family law]; *Maiden, supra,* 229 Cal.App.4th at p. 36 [domestic abuse].) In *Bidna*, the California Court of Appeal applied the reasoning in *Sheldon* to bar malicious prosecution causes of action arising out of unsuccessful family law motions or orders to show cause. (*Bidna*, *supra*, 19 Cal.App.4th at pp. 37-39.) *Bidna* listed several reasons for adopting the rule, including that family law matters often require a special sensitivity and flexibility in crafting remedies and the threat of malicious

prosecution liability "in the wake of unsuccessful attempts to obtain certain remedies may have a chilling effect on the ability to obtain those remedies by, in effect, increasing the risk of asking for them." (*Id.* at p. 35.) The court in *Bidna* also emphasized that family law cases have a "unique propensity for bitterness" that makes it difficult to distinguish a truly malicious motion from an ordinary one. (*Ibid.*)

The *Bidna* holding was later extended to domestic abuse restraining order matters in *Maiden*. There, a wife requested and obtained a temporary restraining order against her husband under the Domestic Violence Protection Act ("DVPA"). (*Maiden*, *supra*, 229 Cal.App.4th at p. 33.) When the wife subsequently voluntarily withdrew her request for a restraining order, the husband sued her and her attorney for malicious prosecution, as well as for other torts. (*Ibid.*) The Court of Appeal affirmed the trial court's ruling on the attorney's anti-SLAPP motion and held that a request for a restraining order under the DVPA cannot, as a matter of law, be the basis of a claim for malicious prosecution.[30] (*Id.* at p. 36.) Applying the reasoning in *Bidna*, the *Maiden* court concluded:

> The DVPA generally applies where the victim has been abused, threatened, or harassed by a person who is a family member or has

[30] The trial court also granted the wife's anti-SLAPP motion, and the husband appealed. (*Maiden*, *supra*, 229 Cal.App.4th at pp. 33-34.) The husband subsequently dismissed his appeal of that order. (*Id.* at p. 34, fn. 5.) As such, the Court of Appeal only addressed the appeal of the judgment in favor of the attorney. (*Ibid.*)

> or had a close relationship with the victim. It is evident based on our consideration of numerous DVPA appeals that there is often extreme bitterness between the parties, making it difficult to distinguish a malicious DVPA restraining order request from an ordinary one.

(*Id.* at pp. 37-38.) Notably, the court underscored that allowing malicious prosecution claims in this context would have a chilling effect "on the ability of victims of domestic violence and other abuse to obtain protective relief under the DVPA." (*Id.* at p. 38.)

The reasoning from *Bidna* and, particularly, *Maiden* can be applied to the malicious prosecution claim arising from Ashley's statements to the police when she reported acts of domestic abuse.[31] Although the claim here is predicated on filing a police report and not a request for a restraining order, that is a distinction without a difference for the purposes of malicious prosecution. Similar to family law proceedings and claims under the DVPA, determining the validity of malicious prosecution claims predicated on domestic abuse reporting is difficult because of the uniquely tumultuous nature underlying such disputes, as evidenced in this matter. Moreover, the "chilling effect" on the ability of domestic abuse victims to report crimes to authorities would be significant. As such, the trial court here reached the

---

[31] Under the DVPA, abuse is defined to mean, among other things, sexual assault or "[t]o intentionally or recklessly cause or attempt to cause bodily injury." (Fam. Code, § 6203, subd. (a)(1).) Placing a person "in reasonable apprehension of imminent serious bodily injury to that person or to another" also constitutes abuse. (*Id.*, § 6203, subd. (a)(3).) Ultimately, California law is clear that "[a]buse is not limited to the actual infliction of physical injury or assault." (*Id.*, § 6203, subd. (b).)

right result in granting Ashley's anti-SLAPP motion, and public policy further supports protecting, not discouraging, domestic abuse victims' reports to law enforcement.

II. COX WAIVED HIS CHALLENGE TO THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES.

Under California's anti-SLAPP laws, a defendant who prevails on a motion to strike is entitled to recover attorneys' fees. (Code Civ. Proc., § 425.16, subd. (c)(1) ["[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs."].) Accordingly, the trial court awarded Ashley's counsel reasonable attorneys' fees in the amount of $46,031.57 for helping draft her anti-SLAPP motion, reply brief, supporting declarations, objections to evidence, objection to judicial notice, and fee petition. (RT 30, 33; EAR 6-7.)

Cox appeals the trial court's fee award—without any argument or citation to authority—and merely states that the trial court erred by "granting excessive attorney[s'] fees when [Ashley] was in pro per." (AOB 5.) "When a brief does not contain a legal argument with citation to authority, this court may treat an issue as waived and pass it without consideration." (*City of Merced v. American Motorists Insurance Co.* (2005) 126 Cal.App.4th 1316, 1326; see also *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 ["Where a point is merely asserted by appellant's counsel without any argument of or authority for the

proposition, it is deemed to be without foundation and requires no discussion by the reviewing court."].) Making conclusory presentations, "without pertinent argument or an attempt to apply the law to the circumstances of this case" is inadequate to prevail in an appeal. (*Benach v. County of L.A.* (2007) 149 Cal.App.4th 836, 852; *Strutt v. Ontario Savings and Loan Assn.* (1972) 28 Cal.App.3d 866, 873 ["An appellate court is not required to consider alleged errors where the appellant merely complains of them without pertinent argument."].) This is especially true when challenging attorneys' fees: "General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice. Failure to raise specific challenges in the trial court forfeits the claim on appeal." (*Premier Medical Management Systems, Inc. v. Cal. Insurance Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) Because Cox did not point to the specific items challenged in the trial court or on appeal, with sufficient argument and citations to authority, Cox waived any claim on appeal that the trial court abused its discretion by awarding Ashley $46,031.57 in attorneys' fees. (*Ibid*.)

What is more, a quick survey of case law reveals that Cox could not successfully argue that the trial court here abused its discretion in awarding Ashley an "excessive" fee award, as it was only a fraction of what California courts commonly grant for successful anti-SLAPP motions. (See *Lunada, supra,* 230 Cal.App.4th at pp. 487, 489 [affirming attorneys'

fee awards of $104,293.75 and $57,765.63 to defendant's co-counsel firms following successful anti-SLAPP motion]; *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1367 [affirming fee award of $112,353.75 following successful anti-SLAPP motion]; *Premier Medical, supra,* 163 Cal.App.4th at pp. 558, 565 [affirming fee award of $70,750.50 for trial work, $132,739.10 for appellate work, and $16,419.90 for the fee application following successful anti-SLAPP motion].)

Moreover, to the extent Cox argues Ashley is not entitled to attorneys' fees because she appeared in pro per (AOB 5), that argument has been waived. Cox failed to raise this argument before the trial court and failed to support this assertion by citation to any argument or authority on appeal. (See, e.g., *Rand*, *supra*, 206 Cal.App.4th at pp. 587-588; see also *Ochoa v. Pacific Gas and Electric. Co.* (1998) 61 Cal.App.4th 1480, 1488, fn.3 ["It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal."].)

In any event, California courts have made clear that an attorney need not be an attorney of record in order for reasonable fees to be awarded to a prevailing party. (See *Mix v. Tumanjan Development Corp*. (2002) 102 Cal.App.4th 1318, 1324 ["If an attorney is in fact retained by the pro se litigant and renders legal services assisting in the lawsuit, the attorney need not be an attorney of record in order for the reasonable fees of the attorney to be awarded to a prevailing party."].) The courts' focus is whether an

attorney-client relationship exists—not whether the attorney appeared on record. (See, e.g., *Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 524 ["Cases that have allowed the recovery of attorney fees under the anti-SLAPP statute are similarly marked by the existence of an attorney-client relationship."].)

As such, Ashley was entitled to recover attorneys' fees and costs, regardless of whether she appeared in pro per. Ashley filed and substantiated her request for fees of $46,031.57 for her counsel's assistance in drafting numerous pleadings for Ashley's successful anti-SLAPP motion and related request for attorneys' fees. (RT 31-33.) Accordingly, the trial court did not abuse its discretion and its award should be affirmed.

III. AN AWARD OF ATTORNEYS' FEES AND COSTS ON APPEAL IS WARRANTED.

An attorney fee award under the anti-SLAPP statute extends to attorneys' fees and costs incurred on appeal. (*Trapp v. Naiman* (2013) 218 Cal.App.4th 113, 122.) Thus, Ashley requests that the Court award attorneys' fees and costs for prevailing on this appeal.

CONCLUSION

For the foregoing reasons, Cox's malicious prosecution claim fails, as a technical and substantive matter, and was properly dismissed under California's anti-SLAPP law, which is intended to prevent such meritless claims and is particularly appropriate in the context of domestic abuse matters. This Court should therefore affirm the trial court's order granting the anti-SLAPP motion to strike Cox's malicious prosecution claim and attendant attorneys' fees award. This Court should also award Ashley her attorneys' fees on appeal.

Dated: July 13, 2020

Respectfully submitted,

JONES DAY

By: */s/ Erna Mamikonyan*

Erna Mamikonyan
Erica L. Reilley
Melissa Adams
JONES DAY

Shuray Ghorishi
Arati Vasan
Jennafer Dorfman Wagner
Erin C. Smith
FAMILY VIOLENCE
APPELLATE PROJECT

Attorneys for Defendant and Respondent
ASHLEY HARRIS

CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that, pursuant to rule 8.204(c)(1) of the Rules of Court, the text of this brief consists of 13,948 words as counted by the "Word" word processing program used to generate the brief.

Dated: July 13, 2020

By: */s/ Erna Mamikonyan*
Erna Mamikonyan

Attorneys for Defendant and Respondent
ASHLEY HARRIS

NAI-1513780068

PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2452. On July 13, 2020, I served a copy of the within document(s):

RESPONDENT'S BRIEF

☒ by transmitting the document(s) listed above via electronic transmission through the TrueFiling website to the entities set forth below:

Marc E. Angelucci Law Offices of Marc E. Angelucci P.O. Box 6414 Crestline, California 92325 Telephone: (626) 319-3081 Facsimile: (626) 236-4126 Email: Marc.Angelucci@yahoo.com	*Attorneys for Appellant/Plaintiff*

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below:

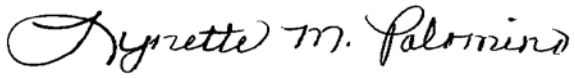
Mariposa County Superior Court Main Courthouse 5088 Bullion Street P.O. Box 28 Mariposa, California 95338 Superior Ct. Case No. 11149 Hon. Michael A. Fagalde Department 3	

Following ordinary business practices, the envelope was sealed

and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 13, 2020, at Los Angeles, California.



Lynette Palomino