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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHRISTOS CATSOURAS et al.,

Plaintiffs and Respondents,

v.

AARON REICH,

Defendant and Appellant.

G044110

(Super. Ct. No. 07CC07817)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Schlueter & Schlueter and Jon R. Schlueter for Defendant and Appellant.

Bremer, Whyte, Brown & O’Meara, Keith G. Bremer and Tyler D.

Offenhauser; Everett L. Skillman for Plaintiffs and Respondents.

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The underlying case has come before us previously. In a prior published opinion, *Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, we addressed, inter alia, whether the court had properly sustained demurrers filed by peace officers Aaron Reich and Thomas O'Donnell. We held that the court had erred in sustaining the demurrers with respect to the invasion of privacy, intentional infliction of emotional distress and negligence causes of action. (*Id.* at pp. 863-864.) On remand, Reich filed an anti-SLAPP motion pursuant to Code of Civil Procedure section 425.16.<sup>1</sup> The court denied his motion and he appeals. We affirm the order. In addition, we deny the request for sanctions filed by plaintiffs and respondents (the Catsourases).

## I

### FACTS

The facts giving rise to the lawsuit are discussed at length in *Catsouras v. Department of California Highway Patrol*, *supra*, 181 Cal.App.4th 856.

In his motion on remand, Reich claimed that he sent, from his private computer at home, e-mails to friends and family members warning them about the dangers of drunk driving. He acknowledged that the warnings were accompanied by pictures of the decapitated remains of Nicole Catsouras. Reich stated that drunk driving was a matter of public interest. He argued that he was entitled to prevail on an anti-SLAPP motion because, in sending his e-mails, he was engaged in free speech concerning a matter of public interest and the Catsourases could not meet their burden to show they had a probability of prevailing on their invasion of privacy, intentional infliction of emotional distress, or negligence causes of action.

In his declaration in support of the motion, Reich declared that he was a public safety dispatch supervisor with the California Highway Patrol (CHP). Reich

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<sup>1</sup> All subsequent statutory references are to the Code of Civil Procedure unless otherwise specifically indicated.

stated that when he saw the photographs of decedent Nicole Catsouras, he requested copies and thereafter received copies on the CHP computer system. Reich later sent copies of the photographs to himself at his own e-mail account. Thereafter, he e-mailed copies to friends and family members.

Reich further declared: “The email communication with the photographs to my friends and family had a text message. It reiterated the dangers of drinking and driving. . . . Nothing identified the Catsourases or Nicole Catsouras. I told my family and friends in the email that these were the hazards of driving under the influence, and for them please to be safe.” Respondent Christos Catsouras made evidentiary objections to the entire paragraph, which the trial court sustained. As indicated at the outset, the trial court also denied Reich’s anti-SLAPP motion.

## II

### DISCUSSION

#### *A. Code of Civil Procedure Section 425.16—*

““Section 425.16 provides for a special motion to strike ‘[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.’ (§ 425.16, subd. (b)(1).) ‘The Legislature enacted the anti-SLAPP statute to protect defendants, including corporate defendants, from interference with the valid exercise of their constitutional rights, particularly the right of freedom of speech and the right to petition the government for the redress of grievances.’ [Citation.]” [Citation.]’ [Citation.]” (*G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 611.)

““In analyzing a section 425.16 motion, the court engages in a two-step process. ‘First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity.’ [Citation.] The moving defendant meets this burden by showing the act underlying the plaintiff’s

cause of action comes within section 425.16, subdivision (b)(1). [Citation.] If the defendant meets this initial burden, the burden then shifts and the plaintiff must show a probability of prevailing on the claim. [Citation.] The plaintiff must demonstrate the complaint is both legally sufficient and is supported by a prima facie showing of facts sufficient to sustain a favorable judgment if the evidence submitted by the plaintiff is given credit. [Citation.]””” (G.R. v. *Intelligator*, *supra*, 185 Cal.App.4th at p. 611.)

“In reviewing an anti-SLAPP motion, a court must consider the pleadings and the evidence submitted by the parties (§ 425.16, subd. (b)(2)); however, it cannot weigh the evidence, but instead must simply determine whether the respective party’s evidence is sufficient to meet its burden of proof. [Citation.]” (*Padres L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 509.) On appeal, ““[w]e review de novo whether section 425.16 protects the subject speech and whether [the plaintiff] demonstrated a probability he would prevail on his . . . cause of action. [Citation.]” [Citation.]’ [Citation.]” (G.R. v. *Intelligator*, *supra*, 185 Cal.App.4th at p. 611.)

““A defendant can meet his or her burden [of showing that the challenged cause of action arises from protected activity] by demonstrating the acts underlying the plaintiff’s cause of action fit within one of the categories of section 425.16, subdivision (e). [Citation.] Section 425.16, subdivision (e) defines an act in furtherance of the defendant’s right of petition or free speech in connection with a public issue to include: ‘(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right

of free speech in connection with a public issue or an issue of public interest.””  
[Citation.]’ [Citation.]” (*G.R. v. Intelligator, supra*, 185 Cal.App.4th at pp. 611-612.)

In other words, “[t]he only means specified in section 425.16 by which a moving defendant can satisfy the requirement is to demonstrate that the defendant’s conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e), defining subdivision (b)’s phrase, ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.’ [Citation.]” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66.)

*B. Analysis:*

In his motion, Reich argued that when he sent the e-mails, he was engaged in protected speech within the meaning of section 425.16, subdivision (e)(3). Subdivision (e)(3) pertains to “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.” Reich asserted that the e-mails pertained to drunk driving—a matter of public interest.

“To determine whether defendant has met [his] burden we must look at the ‘gravamen of the lawsuit.’ [Citation.]” (*Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 715.) In the second amended complaint, the Catsourases alleged that Reich e-mailed photographs of decedent’s decapitated corpse to members of the public who were not involved in the official CHP investigation of the accident. They further alleged that Reich did not have their consent to so disseminate the photographs and that the dissemination of the photographs caused them harm. The complaint is based on the simple dissemination of the photographs, not on any commentary Reich may have made when he effectuated the dissemination.

In his motion, Reich nonetheless focused on the manner and purpose of dissemination, emphasizing that he included a written message concerning the dangers of drunk driving. He continues this approach on appeal.

However, in his opening brief, Reich omits to mention that the court sustained objections to the portion of his declaration regarding a text message accompanying the e-mails. Furthermore, as the Catsourases point out, Reich does not challenge the ruling in his opening brief. Consequently, any challenge to the evidentiary ruling is deemed waived. (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322.)

In his reply brief, Reich says that any challenge to the evidentiary ruling should not be deemed waived, for two reasons. First, he says that evidentiary rulings related to a section 425.16 motion should be reviewed de novo, so it was reasonable for him to remain silent on the evidentiary ruling. He is in error in asserting that evidentiary rulings are reviewed de novo just because they pertain to a section 425.16 motion. Even in the section 425.16 context a trial court's evidentiary rulings are reviewed for abuse of discretion. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348, fn. 3.) But Reich's error with respect to the standard of review is irrelevant and does not provide good cause to excuse waiver. No matter the standard of review, we only review the points the appellant raises. "The reviewing court is not required to make an independent, unassisted study of the record in search of error . . . . [E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration." [Citation.]" (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523.) If Reich wanted this court to review the trial court's evidentiary ruling, he should have said so in his opening brief.

Second, Reich says a challenge to the evidentiary ruling should not be deemed waived because the Catsourases address the evidentiary ruling in their respondents' brief. We disagree. In their respondents' brief, the Catsourases mention

the evidentiary ruling in the context of saying it is final because Reich did not challenge it. They do not address each of the objections to Reich's declaration that were raised in the trial court, such as: (1) the willful destruction of evidence; (2) the e-mails, if they still exist, speak for themselves; (3) hearsay; (4) vagueness and ambiguity; and (5) conclusory statements. Likewise, the Catsourases, in their respondents' brief, do not provide legal authorities in support of these grounds. In short, the Catsourases do not, as Reich asserts, address or argue the correctness of the court's ruling so as to make it appropriate for Reich to address or argue the same in "reply."

It is true that, as a separate point, the Catsourases state the court may infer that the e-mails, if produced, would have been unfavorable to Reich. (Evid. Code, § 413; *Williamson v. Superior Court* (1978) 21 Cal.3d 829, 835-836, fn. 2.) In retort, Reich contends no negative inference should be drawn from the fact that he destroyed all of his copies of the e-mails, because he says he did what his CHP superiors directed him to do. However, we do not reach the point of drawing inferences, so the issue is moot.

On a somewhat related point, however, we observe that the trial court, at the hearing on Reich's motion, asked whether the recipients of the e-mails still had copies of them. Reich's counsel said that he assumed they did not because they had been served with a cease and desist order. When the court pressed counsel as to whether he had asked the friends and family members if they still had copies, counsel conceded that he had not.

The court expressed doubt that the pictures in isolation gave any indication that it was a drunk driving accident. Reich's counsel maintained that the pictures and the e-mail text had to be taken together to show free speech about drunk driving. This presents a problem because, as we know, Reich did not present copies of the e-mails.

All we have before us is Reich's admission that he e-mailed photographs of the decapitated corpse to friends and family members. As the trial court pointed out, we do not even have copies of the photographs themselves and have no reason to presume that the photographs standing alone somehow communicate that the death was the result

of a drunk driving accident. Any editorial comments that Reich may have made with respect to the photographs are not before us. In short, there is no evidence at this point that the e-mails were sent to communicate on the topic of drunk driving. Whether Reich will subsequently be able to obtain copies of those e-mails remains to be seen.

Because Reich has not met his threshold burden to show that he engaged in protected activity in sending the e-mails, we do not address whether the Catsourases have demonstrated a probability of prevailing on their claims. We end our analysis here.

*(Equilon Enterprises v. Consumer Cause, Inc., supra, 29 Cal.4th at p. 67; Wang v. Wal-Mart Real Estate Business Trust (2007) 153 Cal.App.4th 790, 801.)*

*C. Motion for Sanctions:*

The Catsourases have filed a motion for sanctions. (§ 907; Cal. Rules of Court, rule 8.276(a)(1).) They argue that Reich's appeal is frivolous and was filed solely for the purpose of delay. They maintain that Reich has relied on spoliated evidence, ignored the evidentiary ruling concerning his declaration, and reargued the merits of *Catsouras v. Department of California Highway Patrol, supra*, 181 Cal.App.4th 856, contrary to the doctrine of the law of the case. They contend that, therefore, "any reasonable attorney would agree that the appeal is totally and completely without merit." [Citation.]"

It is true that Reich has relied on evidence that may no longer be available, but he has explained why he destroyed the copies of the evidence previously in his possession. It is also true that Reich failed to mention the court's evidentiary ruling in his opening brief, but we do not choose to award monetary sanctions on account of that one failing.

Finally, we disagree with the assertion that Reich has simply reargued the merits of *Catsouras v. Department of California Highway Patrol, supra*, 181 Cal.App.4th 856, although he did touch upon them in his discussion of the second step of the section

425.16 analysis. As Reich well points out, that case was decided in the context of a demurrer, and free speech was not an issue. (*Catsouras v. Department of California Highway Patrol, supra*, 181 Cal.App.4th at p. 874.) The motion for sanctions is denied.

III

DISPOSITION

The order is affirmed. The Catsourases shall recover their costs on appeal. The motion for sanctions is denied.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.