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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAEL FLATLEY, Plaintiff and Respondent, v. D. DEAN MAURO, Defendant and Appellant.	B171570 (Los Angeles County Super. Ct. No. BC291551)

APPEAL from an order of the Superior Court of Los Angeles County, Richard C. Hubbell, Judge. Affirmed.

Sedgwick, Detert, Moran & Arnold, James J.S. Holmes, Douglas J. Collodel, and Wendy L. Wilcox, for Defendant and Appellant.

Greenberg Glusker Fields Claman Machtinger & Kinsella, Bertram Fields, and Ricardo P. Cestero, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, D. Dean Mauro, who is an attorney, appeals from an order denying his special motion to strike, pursuant to Code of Civil Procedure[1] section 425.16, the second amended complaint for civil extortion, intentional infliction of emotional distress, and wrongful interference with perspective economic advantage brought by plaintiff, Michael Flatley. The complaint was filed two days after Mr. Mauro, on behalf his client co-defendant, Tyna Marie Robertson, commenced litigation in Illinois against plaintiff. Ms. Robertson is not a party to this appeal. Mr. Mauro argues the trial court should have granted the special motion to strike because the second amended complaint alleges harm that results from the protected activity of proposing settlement of a disputed claim on behalf of Ms. Robertson. Further, Mr. Mauro argues his conduct was absolutely privileged as prelitigation communications pursuant to Civil Code section 47, subdivision (b). We disagree and affirm the order denying the special motion to strike. The trial court properly ruled the pre-litigation attempt to extort money in exchange for silence is not the proper subject of a special motion to strike.

II. BACKGROUND

A. Initially Filed Pleading

Plaintiff filed a complaint for civil extortion, defamation, fraud, intentional infliction of emotional distress, and wrongful interference with prospective economic advantage on March 6, 2003. Named as defendants were Mr. Mauro and Ms. Robertson. Mr. Mauro was not named in the defamation and fraud causes of action. On March 27, 2003, plaintiff filed a first amended complaint. On April 18, 2003, defendant Mauro

demurred to and moved to strike the first amended complaint. On May 29, 2003, the trial court overruled the demurrer to the civil extortion and emotional distress claims. The trial court sustained with leave to amend the demurrer to the tortious interference claim.

B. The Second Amended Complaint

Plaintiff filed a second amended complaint on June 5, 2003. The second amended complaint alleges that plaintiff is a resident of Ireland and a well known performer and entertainment entrepreneur. Defendants are Illinois residents, who allegedly intentionally communicated about plaintiff to and from California. Plaintiff alleged he met Ms. Robertson in Las Vegas, Nevada prior to October 2002. The second amended complaint further alleged that at the time they met and unbeknownst to plaintiff: Ms. Robertson was an ex-stripper with a gambling habit that had led to her seeking the protection of the bankruptcy courts; Ms. Robertson had been sued for charging over $460,000 of personal items to a company credit card and passing dishonored checks; and Ms. Robertson had extorted money and other financial benefits from men.

Plaintiff employed a private secretary, Thomas Trautmann.[2] Plaintiff gave Ms. Robertson Mr. Trautmann's telephone number. During October 2002, Ms. Robertson telephoned Mr. Trautmann. Mr. Trautmann arranged for plaintiff to come to Las Vegas on October 19, 2002. Ms. Robertson arrived at plaintiff's two bedroom suite in the Venetian Hotel in Las Vegas. At that time, Ms. Robertson was told that one of the bedrooms was occupied by plaintiff and the other by Mr. Trautmann. Ms. Robertson did not request separate accommodations. Plaintiff and Ms. Robertson had dinner together

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1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

2 Mr. Trautmann's role as plaintiff's private secretary is referred to throughout the second amended complaint. However, Mr. Trautmann's actual name is never mentioned in the second amended complaint; it first arose in plaintiff's special motion to strike opposition. For purposes of clarity, when describing the allegations of the second amended complaint, we will refer to Mr. Trautmann by his name.

and returned to his suite. The two went directly to plaintiff's bedroom. Ms. Robertson allegedly went into plaintiff's bathroom, subsequently reappeared in the nude, and then climbed into bed with him. It was alleged that Ms. Robertson voluntarily spent the night with plaintiff. The next morning Ms. Robertson kissed plaintiff in the presence of Mr. Trautmann. Plaintiff and Ms. Robertson then had breakfast together in the suite. When Ms. Robertson subsequently left for the airport on the morning of October 20, 2002, she kissed plaintiff and said she hoped to see him again soon.

Twenty-five days later, on November 14, 2002, Ms. Robertson telephoned the Las Vegas police and falsely accused plaintiff of raping her on the night of October 19, 2002. According to the second amended complaint, Ms. Robertson stated that she called the police because she wanted to make "a record." The authorities took no action in response to Ms. Robertson's November 14, 2002, telephone call.

In January 2003, Mr. Mauro, Ms. Robertson's lawyer, sent a letter to a "corporate service" in Carson City, Nevada. A copy of the letter was sent to plaintiff's counsel in Los Angeles. The letter alleged plaintiff had sexually assaulted Ms. Robertson. The letter indicated that Ms. Robertson reported the incident to the police and demanded that plaintiff make a substantial payment. The letter warned that, if payment was not made, the information concerning the alleged rape would be turned over to state, local, and federal authorities for criminal prosecution. The letter also warned that, in the absence of a payment, Ms. Robertson would issue a press release to numerous named media sources throughout the world.

In January 2003, in three separate telephone conversations with plaintiff's lawyers in Los Angeles, Mr. Mauro threatened to "go public" with Ms. Robertson's sexual assault claim if plaintiff did not make a "sufficient" payment to satisfy Ms. Robertson. Defendants are alleged to have made the threats as part of a pattern and practice of Ms. Robertson to extort payments and other economic benefits from men with whom she has had sexual liaisons. The threats are alleged to have not been made in connection with a proceeding contemplated in good faith or to achieve a bona fide purpose in litigation but

in furtherance of a scheme to profit by extorting money. After plaintiff refused to pay anything, Ms. Robertson filed a civil complaint in Illinois and then made false and defamatory statements about him on television and other media outlets that he had raped her. On July 3, 2003, Mr. Mauro answered the second amended complaint.

C. The Special Motion to Strike

1. The Moving Papers

On August 1, 2003, Mr. Mauro filed a special motion to strike pursuant to section 425.16. In support of the motion, Mr. Mauro declared that on January 2, 2003, he mailed a letter to plaintiff which contained a draft of a Cook County unfiled proposed complaint for sexual assault and intentional infliction of emotional distress. The draft copy of the proposed pleading indicated Mr. Mauro expected to file the pleading in Cook County Circuit Court. The letter also included a biographical information sheet and the curriculum vitae of each of the witnesses retained to offer testimony on behalf of Ms. Robertson.

The January 2, 2003, letter provides in part: "Please be advised that we represent a women[sic] with whom you engaged in forcible sexual assault on or about October 19-20, 2003. Please consider this our ***first***, and ***only***, attempt to amicably resolve this claim against all Defendants named in the Complaint at Law enclosed herein. . . . [¶]. . . [A]n in-depth investigation into **MICHAEL FLATLEY'S *personal*** assets, business agreements, royalties, future engagements and financial compensation worldwide shall be undertaken. **ALL OF THIS INFORMATION SHALL BECOME A MATTER OF PUBLIC RECORD, AS IT MUST BE FILED WITH THE COURT,** as it will be part of the bases of several of our expert's testimony. [¶] **Any and all information, including Immigration, Social Security Issuances and Use, and IRS and various State Tax Levies and information will be exposed.** We are positive the media

worldwide will enjoy what they find. . . . [¶] **Once again, please remember all pertinent information and documentation, if in violation of any U.S. Federal, Immigration, I.R.S., S.S. Admin., U.S. State, Local, Commonwealth U.K., or International Laws, shall immediately [be] turned over to any and all appropriate authorities.** . . . [¶] . . . We look forward to a prompt and timely response. **There shall be no continuances nor any delays.** If we do not hear from you, then we shall know you are not interested in amicably resolving this claim and shall immediately file suit. . . . [¶] **P.S. Note**: along with filing suit, there shall be **PRESS RELEASES DISSEMINATED TO, but not limited to, THE FOLLOWING MEDIA SOURCES: Fox News Chicago, Fox News Indiana, Fox News Wisconsin, and the U.S. National Fox News Network, WGN National U.S. Television, All Local Las Vegas Television, radio stations and newspapers; The Chicago Tribune, The Chicago Southern Economist, The News Sun, The Beacon News, The Daily Herald, The New York Times, The Washington Post; ALL National U.S. Television Networks of NBC, ABC and CBS; as well as INTERNET POSTINGS WORLWIDE, including the BRITISH BROADCASTING COMPANY, and the Germany National New Network Stations."** (Original emphasis.) On March 4, 2003, because a settlement could not be reached, Mr. Mauro filed a complaint on behalf of Ms. Robertson in the Nineteenth Judicial Circuit Court of Lake County, Illinois.

2. The opposition

In opposition, John Brandon, a lawyer, declared that he is a member of the Los Angeles firm of Brandon & Morner-Ritt. Plaintiff is a client of the firm. On January 2, 2003, Mr. Brandon received a copy of the letter sent by Mr. Mauro from a "corporate service" in Nevada. Mr. Brandon received a telephone call from Mr. Mauro on January 9, 2003. Mr. Brandon indicated that he was not handling the case but asked if there was a message he could "pass on." Mr. Brandon's declaration states, "Mr. Mauro gave me a

deadline of January 30, 2003 to offer sufficient payment." Mr. Mauro then stated, "I know the tour dates; I am not kidding about this; it will be publicized every place [plaintiff] goes for the rest of his life." Mr. Brandon declared, "He added that dissemination of the story 'would be immediate to any place where [plaintiff] and the troupes are performing everywhere in the world.'" Mr. Brandon said he would forward the message. On January 10, 2003, Mr. Mauro called Mr. Brandon again. Mr. Brandon's secretary took a message that stated, "'Dean Mauro needs a call back in one-half hour otherwise they are going public.'" Mr. Brandon immediately called Mr. Mauro back. Mr. Mauro complained that the matter was being investigated. Mr. Mauro further said that the January 30 deadline was gone and that if he did not receive a telephone call by 8 p.m. central standard time that night, he would "go public." Mr. Brandon's declaration states, "[Mr. Mauro] said, 'I already have the news media lined up' and that he 'would hit [plaintiff] at every single place he tours.'" Mr. Brandon relayed the messages to Bertram Fields.

Mr. Fields, lead counsel for plaintiff, is a partner in the law firm of Greenberg Glusker Fields Claman Machtinger & Kinsella, LLP. In early January 2003, Mr. Fields received the demand letter from Mr. Brandon. Mr. Fields had a telephone conversation with Mr. Mauro on January 10, 2003. In the conversations, Mr. Mauro said he knew how to play "hardball." Mr. Fields' declaration relates: "[Mr. Mauro] told me . . . that if [plaintiff] did not pay an acceptable amount, they would 'go public,' [and] would see that their story would follow [plaintiff] wherever he or his groups performed and would 'ruin' him." Mr. Mauro stated that he was demanding "'seven figures.'" Mr. Fields reported the communications to the Federal Bureau of Investigation as attempted extortion. Plaintiff did not pay Mr. Mauro or Ms. Robertson anything.

Mr. Trautmann, plaintiff's private secretary, filed a declaration. He spoke on the telephone with Ms. Robertson sometime prior to October 19, 2002. Ms. Robertson asked when plaintiff would be in Las Vegas. Mr. Trautmann checked with plaintiff. Thereafter, Mr. Trautmann called Ms. Robertson back and invited her to be with plaintiff

on October 19, 2002. When she arrived at the two bedroom suite, she put her "things" in what Mr. Trautmann told her was plaintiff's bedroom. No other quarters had been arranged for her and she did not request separate rooms.

Plaintiff and Ms. Robertson went to dinner. When they returned, Mr. Trautmann was in his bedroom. He left his bedroom door open in case plaintiff needed anything. He did not hear any shouting, screaming, crying, or a loud voice from plaintiff's bedroom. When Ms. Robertson emerged from plaintiff's bedroom the next morning, she smiled and said good morning. She also kissed plaintiff. Plaintiff and Ms. Robertson had breakfast together in the room. She seemed relaxed and cheerful. She treated plaintiff affectionately and acted in a friendly manner with Mr. Trautmann. At the door to the suite, Ms. Robertson kissed plaintiff and said she hoped they could get together again soon. Mr. Trautmann walked her down the hall to the elevator.

Plaintiff declared that he is unmarried. When he met Ms. Robertson, she was very friendly. Plaintiff gave Ms. Robertson Mr. Trautmann's telephone number. Plaintiff did this in case Ms. Robertson wanted to contact him. Sometime in October 2002, she telephoned Mr. Trautmann and asked when plaintiff would be in Las Vegas. On October 19, 2002, Ms. Robertson arrived at plaintiff's two bedroom suite. One bedroom was used by plaintiff and the other was occupied by Mr. Trautmann. Ms. Robertson was told this and put her belongings in plaintiff's bedroom. She did not protest that she would be staying in plaintiff's bedroom.

When the two returned from dinner, they went directly to plaintiff's bedroom. Plaintiff removed his clothes and got into bed. Ms. Robertson went into the bathroom, disrobed, reappeared nude, and climbed into plaintiff's bed with him. Plaintiff declared that everything that occurred between the two of them was voluntary and consensual. The next morning, plaintiff arose before Ms. Robertson. When she came out the bedroom, she kissed plaintiff in Mr. Trautmann's presence. She was relaxed and happy. After breakfast, Ms. Robertson kissed plaintiff once more and said she hoped to see him again.

The Las Vegas Police Department did not contact plaintiff. In response to Mr. Mauro's demands, plaintiff refused to pay anything to Ms. Robertson. Plaintiff declared that: he had done nothing wrong; the Illinois lawsuit was "bogus"; and defendants had attempted to extort money from him. Plaintiff declared that he has suffered severe emotional distress from television and media announcements accusing him of raping Ms. Robertson. Plaintiff has been filled with rage and had feelings of anxiety, embarrassment, depression, and fear. Plaintiff had lost sleep and had difficulty concentrating. Plaintiff had hired lawyers and retained a public relations firm to mitigate the potential harm. Plaintiff declared that defendants have interfered with potential economic relationships because his performances and those of his dance troupes are dependent on his reputation.

Richard P. Cestero, an associate of the law firm of Greenberg Glusker Fields Claman Machtinger & Kinsella, viewed a videotape of television statements made after the Illinois lawsuit was filed. Mr. Mauro and Ms. Robertson stated that plaintiff had raped her. They described the alleged rape in "extremely lurid detail."

3. The ruling and appeal

On September 22, 2003, the trial court conducted a hearing on Mr. Mauro's special motion to strike. After taking the matter under submission, the trial court denied the special motion to strike. In denying the motion, the trial court ruled that Mr. Mauro had not satisfied his initial burden of making a prima facie showing that the claims arising from prelitigation communications threatening criminal prosecution and publication of false claims to ruin plaintiff were subject to section 425.16. Mr. Mauro filed a timely notice of appeal.

III. DISCUSSION

A. Standard of Review and Burdens of Proof

A special motion to strike may be filed in response to "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783, quoting *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) Section 425.16, which was enacted in 1992, authorizes a court to summarily dismiss such meritless suits. (Stats.1992, ch. 726, pp. 3523-3524.) There is no requirement though that the suit be brought with the specific intent to chill the defendant's exercise of free speech or petition rights. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at pp. 58-67.) The purpose of the statute was set forth in section 425.16, subdivision (a), as follows: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process . . . ." Under section 425.16, any cause of action against a person "arising from any act . . . in furtherance of the . . . right of petition or free speech . . ." in connection with a public issue must be stricken unless the courts finds a "probability" that the plaintiff will prevail on whatever claim is involved. (§ 425.16, subd. (b)(1); *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App.4th at p. 783.) In order to protect the constitutional rights of petition and free speech, the statute is to be construed broadly. (§ 425.16, subd. (a); *Briggs v. Eden*

Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1119-1121; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1176.)

When a special motion to strike is filed, the trial court must consider two components. First, the moving party has the initial burden of establishing a prima facie case that the plaintiff's cause of action arose out of the defendant's actions in the furtherance of the rights of petition or free speech. (§ 425.16, subd. (b)(1); *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, overruled on another point in *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1123, fn. 10; *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 673; *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042-1043; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App .4th at p. 784; *Wilcox v. Superior Court*, *supra*, 27 Cal.App.4th at pp. 819-821.) Section 425.16 does not apply to every claim which may have some tangential relationship to free expression or petition rights. The Supreme Court has held: "[Section 425.16] cannot be read to mean that 'any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is *based on* conduct in exercise of those rights.' [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77, quoting *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1002, orig. italics.) Quoting from *ComputerXpress, Inc. v. Jackson*, *supra*, 93 Cal.App.4th at page 1002, the Supreme Court in *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at page 77 explained: "California courts rightly have rejected the notion 'that a lawsuit is adequately shown to be one "arising from" an act in furtherance of the rights of petition or free speech as long as suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself.' [Citation.]" A defendant who meets the burden of showing the cause of action arises out of the exercise of the rights of petition or free speech has no additional burden of proving either plaintiff's subjective intent to chill (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at pp. 74-76; *Equilon Enterprises v.*

Consumer Cause, Inc., *supra*, 29 Cal.4th at pp. 58-68) or a chilling effect. (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at pp. 74-76.)

Second, once the defendant establishes the cause of action arises out of the exercise of petition or free expression rights, the burden shifts to plaintiff. The plaintiff must then establish a probability that he or she will prevail on the merits. (§ 425.16, subd. (b)(1); *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1115; *Kyle v. Carmon* (1999) 71 Cal.App .4th 901, 907; *Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1450; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App.4th at pp. 784-785.) The Supreme Court has defined the probability of prevailing burden as follows: "'[T]he 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 plaintiff is credited."' (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821[ ], quoting *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548 [ ].)" (*Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 88-89; *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1123.) The Supreme Court has explained that a plaintiff must only prove the challenged cause of action has "minimal merit." (*Navellier v. Sletton, supra,* 29 Cal.4th at pp. 89, 93-94; *Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 821.)

In reviewing the trial court's order denying the special motion to strike, we use our independent judgment to determine whether the Mr. Mauro engaged in a protected activity. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, *supra*, 65 Cal.App.4th at p. 721; *Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 695, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5.) The trial court can strike one or more causes of action and permit others to remain. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928; *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150.)

B. Defendant's Burden

Mr. Mauro does not deny he made any of the statements attributed to him. Nor does he seriously dispute his conduct was illegal, an issue we will discuss shortly. Rather, Mr. Mauro argues we cannot evaluate the legality of his conduct in deciding whether the causes of action in the second amended complaint arose from his exercise of the rights of free expression and petition. Mr. Mauro argues that the issue of illegality can only be considered as part of the second prong of section 425.16 analysis—the minimal merit issue and not as a threshold matter. Mr. Mauro claims that support for this position may be found in a number of appellate court decisions. (See *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 165 [claims of illegal newsgathering by television station arose from acts in furtherance of right of free speech because it was "not the defendant's burden in bringing a [section 425.16] motion to establish that the challenged cause of action is constitutionally protected as a matter of law"]; *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 583 [meetings cited in complaint to discuss legislative strategies to combat plaintiff's practice of selling lenses to consumers whose prescriptions were not current were all acts in furtherance of defendant's free speech or petition rights such that legality of the conduct must be decided in second prong]; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 910-911 ["conduct that would otherwise come within the scope . . . [section 425.16] does not lose its coverage . . . simply because it is *alleged* to have been unlawful or unethical" (orig. italics)]; *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1089 ["a court must generally presume the validity of the claimed constitutional right in the first step of the [section 425.16] analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary"].) Based on these decisions, defendant argues that in all cases the illegality question must be decided as part of plaintiff's minimal merit showing.

We disagree with Mr. Mauro's contention that the foregoing decisions establish a rule of law that the section 425.16, subdivision (b)(1) "arising from" determination can

never entail a resolution of the legality of the defendant's conduct. We reach this decision for several reasons. To begin with, nothing in the language of the special motion to strike statute imposes such a blanket prohibition against *ever* evaluating the lawfulness of speech or conduct as part of the section 425.16, subdivision (b)(1) "arising from" requirement. Further, Mr. Mauro has not identified any legislative committee reports which suggest the Legislature intended that the section 425.16, subdivision (b)(1) analysis may *never* involve an assessment of the legality of the defendant's conduct.

More critically, the controlling analysis is that in *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1365-1367, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at page 68, footnote 5. In *Paul for Council*, our colleague, Associate Justice Walter M. Croskey described the relevant facts as follows: "Plaintiff's complaint alleged he was elected to the Laguna Niguel City Council in 1989. In 1994, Paul for Council was the official committee acting on plaintiff's behalf in his bid for another term on the council. The thrust of the complaint is that defendants interfered with plaintiff's candidacy by influencing the election with *illegal* campaign contributions for one of his opponents. Plaintiff alleged that defendants' acts violated the Political Reform Act of 1974 (Gov. Code, § 81000 et seq. [])." (*Paul for Council v. Hanyecz*, *supra*, 85 Cal.App.4th at pp. 1360-1361, orig. italics.) The trial court agreed with the defendants' contention that their conduct, raising campaign funds, arose from the exercise of their free speech rights. The Court of Appeal disagreed. Associate Justice Croskey wrote: "We find the trial court erred when it (1) ruled this is a SLAPP suit, and then (2) required plaintiff, upon pain of dismissal, to demonstrate the probability of the suit's success. We reach this conclusion because the record demonstrates defendants were not engaged in a *valid* exercise of their constitutional rights of freedom of speech or petition for redress of grievances." (*Id*. at p. 1360, orig. italics.)

In *Paul for Council*, Associate Justice Croskey wrote that the initial burden requires a prima facie showing that the plaintiff's causes of action arise from the

defendant's exercise of free expression of petition rights. Associate Justice Croskey explained thusly: "To meet its burden, the defendant does not have to '*establish* its actions are constitutionally protected under the First Amendment as a matter of law. If this were so the second clause of subdivision (b) of section 425.16 would be superfluous because by definition the plaintiff could not prevail on its claim.' (*Wilcox*, *supra*, 27 Cal.App.4th at p. 820, italics added.) Rather, the defendant must present a prima facie showing that the plaintiff's causes of action arise from acts of the defendant taken to further the defendant's rights of free speech or petition in connection with a public issue. (*Ibid.*) Only if the defendant makes this prima facie showing does the trial court consider the second step of the section 425.16, subdivision (b)(1) analysis . . . ." (*Paul for Council v. Hanyecz*, *supra*, 85 Cal.App.4th at p. 1365; original italics.) In *Paul for Council*, our colleagues in Division Three held the defendants' conduct at issue, money laundering, as a matter of law, did not arise from the constitutional free expression right and the burden never shifted to the plaintiff to show its claims had minimal merit: "In the instant case, we need not address the second step of section 425.16's two-step motion to strike process because we hold, *as a matter of law*, that defendants cannot meet their burden on the first step. As discussed below, the activity of which plaintiff complains—defendants' campaign money laundering—was not a *valid* activity undertaken by defendants in furtherance of their constitutional right [of] free speech." (*Ibid*.; original italics.) Associate Justice Croskey noted: "In *Wilcox*, *supra*, 27 Cal.App.4th at page 820, the court gave an example of how conduct may touch on an issue of free speech but not be protected under section 425.16. The court stated that if a defendant who brings a section 425.16 motion to strike shows that the act which prompted the suit against him was his own suit against a developer, 'the defendant would have a prima facie First Amendment defense. [Citation.] But, if the defendant's act was burning down the developer's office as a political protest the defendant's motion to strike could be summarily denied without putting the developer to the burden of establishing the probability of success on the merits in a tort suit against defendant.' (27 Cal.App.4th at p. 820.) While laundering

campaign contributions may not be as dramatic or physically dangerous as burning down a building, it is equally outside the scope of section 425.16's protection." (*Paul for Council v. Hanyecz*, *supra*, 85 Cal.App.4th at pp. 1366-1367.) We agree with Associate Justice Croskey's analysis.

In *Kashian*, one of the decisions relied upon by Mr. Mauro, the court held that if there is a question as to whether the defendant's speech or conduct is protected, then the burden shifts to the plaintiff to make the minimal merit showing. But the court in *Kashian* emphasized the case may be different if the defendant's conduct is not entitled to constitutional protection as a matter of law. Our colleague, Associate Justice Timothy S. Buckley, reciting language in Associate Justice Croskey's opinion in *Paul for Council*, explained: '"If the plaintiff contests this point, and unlike the case here, cannot demonstrate as a matter of law that the defendant's acts do not fall under section 425.16's protection, then the claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's burden to provide a prima facie showing of the merits of the plaintiff's case."' (*Kashian v. Harriman*, *supra*, 98 Cal.App.4th at p. 910, quoting *Paul for Council v. Hanyecz*, *supra*, 85 Cal.App.4th at p. 1367; original italics.) As can be noted, Associate Justice Buckley explained that typically issues concerning the legality of a defendant's conduct are resolved as part of the section 425.16, subdivision (b)(3) minimal merits analysis. But if it can be verified "as a matter of law" that the defendant's speech or conduct is not protected, for example it is illegal, then the burden does not shift to the plaintiff to make the minimal merits showing.

Another decision relied upon by Mr. Mauro, *Chavez v. Mendoza*, *supra*, 94 Cal.App.4th at page 1089, merely indicates, as previously noted, that "generally" a court may presume the defendant's conduct is constitutionally protected. But later in the same opinion, Associate Justice Judith Lynette Haller explained that if the plaintiff concedes the conduct at issue is not protected, then the burden never shifts: "A limited exception to the rule precluding a court from determining the validity of the asserted constitutional

right in the first step of the [section 425.16] analysis applies only where the defendant indisputably concedes the claim arose from illegal or constitutionally unprotected activity." (*Id.* at pp. 1089-1090.) This closely parallels the analysis in *Paul for Council* where Associate Justice Croskey limited the scope of the opinion to a case where the issue of the illegality of the defendant was "effectively conceded": "In order to avoid any misunderstanding as to the basis for our conclusions, we should make one further point. This case, as we have emphasized, involves a factual context in which defendants have effectively conceded the illegal nature of their election campaign finance activities for which they claim constitutional protection. Thus, there was no dispute on the point and we have concluded, as a matter of law, that such activities are *not* a valid exercise of constitutional rights as contemplated by section 425.16." (*Paul for Council v. Hanyecz*, *supra*, 85 Cal.App.4th at p. 1367, orig. italics.) Under the narrow circumstances where a defendant "effectively concede[s]," to use Associate Justice Croskey's words or "indisputably concedes," to utilize Associate Justice Haller's language, that the conduct was illegal, then the burden never shifts to the plaintiff show make the minimal merit showing.

Mr. Mauro seizes upon language in *Navellier* and argues that a court can never assess whether the defendant's conduct is illegal and arises from the exercise of free speech or petitioning activity. Mr. Mauro relies on the following language in *Navellier*: "Noting the reference in the statute's preamble to lawsuits that chill the 'valid exercise' of constitutional speech and petition rights (§ 425.16, subd. (a)), plaintiffs further argue, as does the dissent, that the anti-SLAPP statute does not apply to this action because any petitioning activity on which it is based was not 'valid.' We disagree. That the Legislature expressed a concern in the statute's preamble with lawsuits that chill the valid exercise of First Amendment rights does not mean that a court may read a separate proof-of-validity requirement into the operative sections of the statute. (Cf. *Equilon*, *supra*, 29 Cal.4th at p. 59 [chilling intent]; *Cotati*, *supra*, 29 Cal.4th at p. 75 [chilling effect]; *Briggs*, *supra*, 19 Cal.4th at p. 1118 [public interest].) Rather, any 'claimed illegitimacy

of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case.' (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367 [].) Plaintiffs' argument 'confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits.' (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305 [].)" (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 94.)

This language does not support Mr. Mauro's position that, in the section 425.16 context, indisputably illegal conduct can never prevent the burden of proof from shifting. It bears emphasis that the Supreme Court cited *Paul for Council* on the very page where Associate Justice Croskey explained the defendants had "effectively conceded" they had engaged in unprotected conduct—money laundering. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 94; *Paul for Council v. Hanyecz*, *supra*, 85 Cal.App.4th at p. 1367.) The conduct at issue in *Navellier*—filing a cross-claim in federal court—is not, as a matter of law, unprotected conduct. In fact, the Supreme Court held that the filing of the cross-claim at issue was a protected right of petition conduct. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 95.) The Supreme Court was not addressing the issue of what occurs when the defendant has engaged in conduct which as a matter of law indisputably is unprotected conduct. In *Navellier*, the defendant had allegedly committed fraud or a contract breach after entering into a settlement agreement of certain claims pending in federal court. At no time had the defendant agreed or any court found that the conduct in the underlying federal action, as a matter of law, was without a doubt unprotected conduct. Hence, the issue under review in this case—indisputably illegal conduct that is not protected by the federal or state constitutions—was not before the Supreme Court in *Navellier*. The Supreme Court has repeatedly warned that its opinions are not authority for propositions not under consideration in an individual case. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 343; *Hagberg v. California Federal Bank FSB* (2004)

32 Cal.4th 350, 374.) The language in *Navellier* does not stand for the proposition asserted by Mr. Mauro.

Moreover, Mr. Mauro takes the foregoing language in *Navellier* out of its context. Earlier, the Supreme Court had explicitly identified the issue when assessing whether the defendant has shifted the burden of proof: "As is discussed at length in *City of Cotati*[*v. Cashman*], *supra*, 29 Cal.4th 69 . . . , the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. (*Id.* at pp. 76-78.) Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. (*Id.* at p. 78.) 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. (*Id.* at pp. 76- 78; see also *Briggs*[*v. Eden Council for Hope & Opportunity*], *supra*, 19 Cal.4th at p. 1114; *ComputerXpress, Inc. v. Jackson*[, *supra*,] 93 Cal.App.4th [at p.] 1001 [].)" (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89.) In other words, *Navellier* requires, as with any other legal issue, a critical analysis of whether the statutory predicate is met—in this case the existence of protected activity. As *Paul for Council* emphasizes, if the unprotected nature of the activity is effectively conceded, then the burden does not shift. (*Paul for Council v. Hanyecz*, *supra*, 85 Cal.App.4th at p. 1367.) Or as explained in *Kashian*, if the conduct as matter of law is unprotected, the minimal merit burden does not shift to the plaintiff. (*Kashian v. Harriman*, *supra*, 98 Cal.App.4th at p. 910.) Finally, as noted in *Chavez v. Mendoza*, *supra*, 94 Cal.App.4th at pages 1089-1090, if the defendant indisputably concedes the conduct is unprotected, the special motion to strike burden does not shift to the plaintiff. As to the other Court of Appeal authority relied upon by Mr. Mauro, it too does not address the type of situation present in *Paul for Council* or here.

Normally, conduct of the type engaged in by Mr. Mauro falls within the protective provisions of section 425.16. (See *Briggs v. Eden Council for Hope & Opportunity*, supra, 19 Cal.4th at p. 1115 ["communications preparatory to or in anticipation of the

bringing of an action or other official proceeding" are protected under section 425.16]; *Kashian v. Harriman, supra,* 98 Cal.App.4th at p. 908 [filing a lawsuit]; *Shekhter v. Financial Indemnity Co., supra,* 89 Cal.App.4th at p. 153 [attorney's use of the media is entitled to protection under section 425.16].) The problem is that Mr. Mauro went further than threatening to file a lawsuit and then disseminate the information about the complaint to journalists. Rather, in addition to the threatened lawsuit and media exposure, Mr. Mauro threatened criminal prosecution or publication of defamatory matter about the rape as a means of obtaining leverage in the proposed civil action if "seven figures" was not paid. The quid pro quo for the payment of any money was silence. Defendant does not dispute he sent the letter or made demands for payment in exchange for silence. He only disputes whether this is extortion. It is undisputed or effectively conceded Mr. Mauro orally and in writing demanded at least $1 million in exchange for silence.

The threat of criminal prosecution and to publish defamatory matters in order to induce payment of money is extortion under California law. (Pen. Code §§ 518,[3] 519[4]; *People v. Goldstein* (1948) 84 Cal.App.2d 581, 586-587 [threat to have party arrested and publish defamatory matter unless money is paid by a certain date followed by telephone threats is attempted extortion regardless of whether victim actually committed any crime].) Federal courts have consistently held that extortion is not a constitutionally protected form of speech. (See *R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 420 (con.opn. of Stevens, J. quoting Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L.Rev. 265, 270 (1981)) ["Although the First

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[3] Penal Code section 518 defines extortion as "the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear . . . ."

[4] Penal Code section 519 provides: "Fear, such as will constitute extortion, may be induced by a threat, either: [¶] 1. To do an unlawful injury to the person or property of the individual threatened or of a third person; or, [¶] 2. To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or, [¶] 3. To

Amendment broadly protects 'speech,' it does not protect the right to 'fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort.'"]; see also *Giboney v. Empire Storage & Ice Co.* (1949) 336 U.S. 490, 502 ["But it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed"]; *United States v. Hutson* (9th Cir. 1988) 843 F.2d 1232, 1235 [It "is undoubtedly within the government's power to prohibit" extortionate speech]; *United States v. Quinn* (5th Cir.1975) 514 F.2d 1250, 1268 ["It may categorically be stated that extortionate speech has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which is no protection at all"]; *United States v. Marchetti* (4th Cir. 1972) 466 F.2d 1309, 1314, ["Threats and bribes are not protected simply because they are written or spoken; extortion is a crime although it is verbal"].)

Likewise, in California, speech which qualifies as a criminal threats is not constitutionally protected. (Pen. Code §§ 518, 519.) The California Supreme Court has held: "'[T]he state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of the First Amendment protection. [Citations.] In this context, the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is "'communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs . . . .'" [Citations.] As speech strays further from the values of persuasion, dialogue and free exchange of ideas, and moves toward willful threats to perform illegal acts, the state has greater latitude to regulate expression . . . .'" (*People v. Toledo* (2001) 26 Cal.4th 221, 233, quoting *In re M.S.* (1995) 10 Cal.4th 698,

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expose, or to impute to him or them any deformity, disgrace or crime; or, [¶] 4. To expose any secret affecting him or them."

710.) Moreover, lawyers in California[5] and Illinois[6] are also specifically precluded from threatening criminal prosecution as a means of obtaining leverage in a civil action by their respective Rules of Professional Conduct.

Mr. Mauro's written and oral threats to report plaintiff's alleged rape to various state, federal, and international authorities were not protected speech. Rather, his statements were clearly prohibited by the Penal Code, the California Rules of Professional Conduct, and the Illinois Rules of Professional Conduct. A threat to accuse someone of a crime or of injury with the intent to extort money or obtain a pecuniary advantage is not a "protected activity" under federal or state law. (*R.A.V. v. City of St. Paul*, *supra*, 505 U.S. at p. 420 (conc. opn. of Stevens, J.); Pen. Code §§ 518, 519; *People v. Goldstein, supra,* 84 Cal.App.2d at pp. 586-587.)

Mr. Mauro has effectively conceded and it is undisputed his speech and conduct are crimes. No prima facie showing has been made that Mr. Mauro's speech and conduct are anything other than unprotected acts of extortion. As a matter of law, Mr. Mauro's speech and conducted are not protected by our Constitutions. Hence, the burden of proof never shifted to plaintiff to demonstrate his claims have minimal merit. But we do note that plaintiff's unequivocal under oath denial that Ms. Robertson was sexually assaulted is unrebutted in this court. We need not address defendant's other contentions.

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5 California Rules of Professional Conduct, rule 5-100(A) provides: "A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute."

6 Illinois Rules of Professional Conduct, rule 1.2(e) provides: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional disciplinary advantage in a civil matter."

IV. DISPOSITION

The order denying the special motion to strike under Code of Civil Procedure section 425.16 is affirmed. Plaintiff, Michael Flatley, is to recover his costs on appeal from defendant, E. Dean Mauro.

CERTIFIED FOR PUBLICATION

TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.