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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

RICHARD GEHRS, Cross-Defendant and Appellant, v. PLANNED PARENTHOOD GOLDEN GATE et al., Cross-complainants and Respondents.	A092215 (San Mateo County Super. Ct. No. 405649)

I. INTRODUCTION

Rossi Foti filed the underlying action against Planned Parenthood Golden Gate (Planned Parenthood) and others, including Gabriela Gibson, an employee of Planned Parenthood. Planned Parenthood filed a cross-complaint against Foti, Louie Garibaldi, Jeannette Garibaldi and Richard Gehrs (cross-defendants). The cross-complaint was amended several times and the current cross-complaint--the third amended cross-complaint--includes claims by Gibson as well as Planned Parenthood against Gehrs.

Gehrs filed a motion to strike the third amended cross-complaint pursuant to Code of Civil Procedure section 425.16.[1] The motion included a request for attorney fees. The trial court denied the motion as to all causes of action of the third amended cross-

[1] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

complaint, and denied Gehrs' request for attorney fees. This appeal ensued. We affirm the trial court's ruling with respect to Planned Parenthood's claims, but reverse the trial court's ruling with respect to Gibson's claims. We therefore remand with instructions to grant the motion to strike as to Gibson's claims and to reconsider the issue of whether Gehrs is entitled to attorney fees.

II. FACTUAL AND PROCEDURAL BACKGROUND

Given the limited scope of this appeal, we focus only on the third amended cross-complaint and Gehrs' special motion to strike.

Planned Parenthood operates health centers in the City of San Mateo, Daly City, and Redwood City (collectively, Health Centers). The third amended cross-complaint includes two causes of action brought by Planned Parenthood against Foti, the Garibaldis, Gehrs, and unnamed Does, based on their alleged conduct while outside the San Mateo, Redwood City and now-closed Menlo Park health centers. The first cause of action is based on cross-defendants' alleged invasion of the constitutional right to privacy enjoyed by Planned Parenthood's patients. The second cause of action alleges intentional interference with prospective economic advantage, based on cross-defendants' interference with Planned Parenthood's business relations with its patients. Both causes of action seek injunctive relief, an order specifying the amount of civil damages that will be due if a cross-defendant violates the injunction, and attorney fees and costs to the extent authorized by law.

The third amended cross-complaint also includes four causes of action brought by Gibson against Gehrs. While Planned Parenthood's claims are based on cross-defendants' general activities outside the Health Centers, Gibson's claims focus on the specific events of July 18, 1998. On that date, Gibson and Foti came into physical contact with each other while outside the San Mateo health center. Gibson contends that she merely brushed against Foti. Gehrs and Foti reported to the police, however, that Gibson forcefully hit Foti with her shoulder, causing him to nearly fall. Gibson was

arrested for assault, although the District Attorney declined to file charges. Gibson seeks damages for these events under four theories: abuse of process, false arrest, intentional infliction of emotional distress and conspiracy.

Gehrs filed a special motion to strike the third amended cross-complaint pursuant to section 425.16 and requested attorney fees as provided for in that section. Gehrs contended that the claims of Planned Parenthood and Gibson come within the ambit of section 425.16 and that they did not have a probability of succeeding on the merits. As noted above, the trial court denied Gehrs' motion in its entirety.

III. DISCUSSION

A. *Section 425.16*

Section 425.16 authorizes 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).) As used in that section, "'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' includes: (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." (§ 425.16, subd. (e).) Section 425.16 directs the trial court to grant the special motion to strike "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

Thus, the statute creates a two-step process. "First, the court decides whether the defendant has made a threshold prima facie showing that the defendant's acts, of which the plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue. [Citation.] If the court finds that such a showing has been made, then the plaintiff will be required to demonstrate that 'there is a probability that the plaintiff will prevail on the claim.' [Citations.] The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.]" (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1364 (*Paul for Council*).)

On the second issue, the plaintiff meets his or her burden by showing that "the complaint is 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." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823-824 (*Wilcox*).) The plaintiff must also show that "the defendant's purported constitutional defenses are not applicable to the case as a matter of law or [make] a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses." (*Wilcox, supra*, 27 Cal.App.4th at p. 824.) "'Whether he has done so is a question of law, which we determine de novo.' [Citations.]" (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 274.)

"In order to satisfy due process, the burden placed on the plaintiff must be compatible with the early stage at which the motion is brought and heard [citation] and the limited opportunity to conduct discovery [citation]. In order to preserve the plaintiff's right to a jury trial the court's determination of the motion cannot involve a weighing of the evidence. [Citation.]" (*Wilcox, supra*, 27 Cal.App.4th at p. 823.) If the defendant's motion is granted, section 425.16, subdivision (c), provides for an award of attorney fees and costs.

B. *Planned Parenthood's Claims*

We need not consider whether Gehrs met his burden of showing that the causes of action brought by Planned Parenthood come within the ambit of section 425.16 because, even if they do, Planned Parenthood has demonstrated a probability that it will prevail on its claims. Hence, the trial court's denial of Gehrs' motion as to Planned Parenthood's claims was proper on this basis alone.

In the first cause of action, Planned Parenthood alleges that Gehrs' conduct outside the Health Centers inhibits ingress and egress of patients, intimidates and harasses Planned Parenthood patients, staff and volunteers and negatively impacts the physical and emotional health of many patients. Planned Parenthood alleges that, if unrestrained, Gehrs' conduct will severely compromise the ability of the Health Centers to offer, and patients to obtain, quality medical services. Planned Parenthood contends that Gehrs' conduct has thus interfered and continues to interfere with their patients' right to privacy guaranteed by article I, section I, of the California Constitution.

"The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35 (*Hill*).) A woman's decision to continue or terminate a pregnancy implicates constitutionally protected privacy interests. (See *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 332 (*American Academy of Pediatrics)*; *id.* at p. 369 [conc. opn. of Kennard, J.].) The state right of privacy also "protects information about a citizen's participation in a medical procedure, including abortion." (*Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 241.) Thus, there exists a substantial probability that Planned

Parenthood will successfully demonstrate that a legally protected privacy interest is at stake in this litigation.[2]

"The second essential element of a state constitutional cause of action for invasion of privacy is a reasonable expectation of privacy . . . ." (*Hill, supra,* 7 Cal.4th at p. 36.) "[T]his element contemplates an inquiry into whether there is something in the particular circumstances in which an alleged intrusion of privacy arises that demonstrates the plaintiff has no reasonable expectation of privacy in that context, so that the alleged intrusion would not violate the state Constitution even if there were no justification for the allegedly intrusive conduct." (*American Academy of Pediatrics, supra,* 16 Cal.4th at p. 338 [plurality decision].) On this record, we find nothing in the circumstances of entering and exiting the Planned Parenthood facility that should diminish the patients' expectation of privacy. We conclude that Planned Parenthood has established a probability of success on this element, as well.

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2 Although not questioned by Gehrs, it seems clear that Planned Parenthood has standing to argue the privacy interests of its patients. (See *Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1145 ["Where the constitutionally protected privacy interests of absent patients are coincident with the interests of the doctor, the doctor must be permitted to speak for them."]; *People v. Barksdale* (1972) 8 Cal.3d 320, 333 ["A physician has standing to assert his patient's rights where they may not otherwise be established."]; *Chico Feminist Women's Health Center v. Butte Glenn Medical Society* (E.D.Cal. 1983) 557 F.Supp. 1190, 1200 ["California law explicitly holds that physicians have standing to sue on behalf of their patients when the privacy right to choose whether or not to have an abortion is at issue. [Citations.] The related question of whether a women's health clinic has such standing has not been explicitly addressed in California. The decision in [*Committee to Defend Reproductive Rights v.*] *Myers* [1981] 29 Cal.3d 252, however, seems to provide implicit support for the proposition that interested organizations have standing to sue on behalf of women seeking to vindicate privacy rights. And, the Center clearly has sufficient stake in the outcome of this litigation 'to ensure that [it] will vigorously present [its] case.' [Citation.] The court concludes, therefore, that the Center has standing to sue for invasion of Article I, § 1 privacy rights on behalf of the women seeking abortions at the Center."].)

Thirdly, "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Hill, supra,* 7 Cal.4th at p. 37.) On this issue, Planned Parenthood submitted evidence that Gehrs has been observed (1) using his body to block escorts from reaching patients, thus allowing the other cross-defendants to accost patients before an escort can approach, (2) alerting the other cross-defendants when a patient approaches the health center, (3) approaching patients to take close-up pictures of their faces, (4) trying to tape record private conversations between escorts and patients, (5) threatening, cursing at, and verbally harassing patients, and (6) following patients, usually within one foot of their bodies, as they walk to the health center or the health center's parking lot. Gibson recounted the effect of Gehrs' conduct on patients, explaining that she has seen many patients cry after being subject to the cross-defendants' harassment.

Planned Parenthood also offered the declaration of a spouse of one clinic patient. This individual explained that one of the cross-defendants, Foti, followed him and his wife, yelling at them, as they tried to enter the clinic. Meanwhile, Gehrs ran to within a few inches of the couple and shoved a camera in the man's face. The man explained that "[i]nstinctively, [he] raised [his] right hand and pushed the camera away." The couple continued toward the clinic and the man then heard very loud footsteps approaching from behind. Sensing that he was about to be attacked, the man turned around and, as he did, Gehrs sprayed mace in the man's face and eyes. The couple managed to enter the clinic and the man was taken to the police station because Gehrs and Foti had filed a citizen's arrest complaint against him for assault and battery. The charges were later dropped.

This evidence meets Planned Parenthood's burden of demonstrating a probability of successfully establishing the third element of its invasion of privacy claim, that is, that Gehrs' conduct is sufficiently serious in its nature, scope and potential impact to

constitute an egregious breach of the social norms underlying the patients' privacy rights.[3] (See *Hill, supra,* 7 Cal.4th at p. 37.)

Gehrs challenges this conclusion on two grounds. First, Gehrs contends that his conduct and that of the anti-abortion protesters has not physically prevented patients from entering the clinic, as was the case in some of the published decisions in which clinics have successfully obtained injunctions against anti-abortion protesters. However, even if we were to accept Gehrs' proposition that the behavior of the protesters in those cases differ from the behavior of Gehrs and the other cross-defendants, that conclusion would provide us no guidance; the cases that Gehrs cites do not hold that *only* conduct preventing patient access will support an injunction.

Second, Gehrs contends that he is a First Amendment advocate who merely photographs or records a patient if he feels that a negative interaction is about to occur between the patient and an anti-abortion protester. However, Planned Parenthood has offered evidence of Gehrs' conduct, which if true, creates a very different picture from the peaceful activities that Gehrs describes.

We therefore conclude that Planned Parenthood has established a probability of successfully establishing each of the three elements of its invasion of privacy claim. The analysis does not end here, however. Even if these three elements are established, no violation of the state constitutional right to privacy arises if the invasion is justified by a competing interest. (*Hill, supra,* 7 Cal.4th at p. 38.) "Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing

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[3] Gehrs complains that some of the allegations in Planned Parenthood's declarations are conclusory. However, we have solely relied on allegations that are not.

interests. [Citations.]" (*Ibid.*) "Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., . . . freedom to pursue consensual family relationships, a 'compelling interest' must be present to overcome the vital privacy interest." (*Id.* at p. 34.)

Planned Parenthood seeks an injunction preventing cross-defendants from, in part, (1) entering, blocking or obstructing access to the Health Centers, (2) obstructing or impeding the movement of any person between any vehicle and the Health Centers, (3) using or threatening to use pepper spray or any other harmful substance or weapon, (4) shouting, screaming, etc., in a volume that can be heard within the Health Centers, (5) touching or threatening to touch any individual entering or leaving the Health Centers, and (6) damaging the property of the Health Centers. This requested relief does not invade a compelling interest as evidenced in part by decisions upholding injunctions similar to the one that Planned Parenthood seeks here. (See, e.g., *Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1656, 1676, see also *Planned Parenthood Assn. v. Operation Rescue* (1996) 50 Cal.App.4th 290, 298, 305 [affirming injunction creating speech-free buffer zone].) The trial court properly denied Gehrs' motion to strike Planned Parenthood's invasion of privacy claim.

The third amended cross-complaint also includes a second claim by Planned Parenthood that alleges interference with prospective economic advantage. To prevail on such a claim, the plaintiff must show: "'(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.' [Citations.]" (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 520-522.) In addition, the plaintiff must also prove "that the defendant's interference was wrongful 'by some measure beyond the fact of the

interference itself.' [Citation.]" (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393.)

Gehrs does not challenge the sufficiency of Planned Parenthood's evidence on the first two elements: an economic relationship and knowledge of that relationship. Planned Parenthood presented evidence that patients come to Planned Parenthood for prenatal care, disease prevention, birth control and annual check-ups. Planned Parenthood contends that Gehrs must certainly be aware of those types of ongoing relationships between Planned Parenthood and its patients.

Gehrs instead challenges the sufficiency of Planned Parenthood's showing with respect to the remaining elements. As to the third element, which requires intentional acts designed to disrupt the relationship, Gehrs contends that he is a First Amendment advocate, not an anti-abortion protester. Planned Parenthood has, however, presented evidence regarding Gehrs' conduct while outside the Health Centers that, if accepted by the trier of fact, is sufficient to refute Gehrs' contention. Such a showing satisfies Planned Parenthoods' burden in opposing a special motion to strike.

As to the last two elements of actual disruption and economic harm, we note that Planned Parenthood seeks an injunction. As a consequence, measuring the precise amount of economic harm is not as critical as if it were seeking damages. In fact, injunctive relief is considered appropriate in some situations precisely because "it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief." (§ 526, subd. (a)(5); see also Civ. Code, § 3422, subd. (2).)

Gehrs contends that, on the elements of actual disruption and economic harm, the deposition testimony of the Person Most Knowledgdable (PMK) on the issue of harm contradicted Planned Parenthood's declarations. Even if such a contradiction exists, the deposition testimony of the PMK on the issue of harm is itself sufficient to support the elements of actual disruption and economic harm. The PMK testified that she knew of one instance when a patient with an appointment delayed coming to the clinic for a few

hours because of the protesters, that two to five patients a month told her that they changed their appointment dates to avoid protesters, and that patients have reported being fearful that they would not be able to get into the clinic because a protester was walking very closely behind them. This evidence is sufficient to meet Planned Parenthood's burden in opposition to Gehrs' motion to strike.

Gehrs cites *Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188 (*Environmental Planning*), in support of his argument that, if he is an anti-abortion protester as Planned Parenthood contends, his conduct constitutes constitutionally-protected political boycott. In *Environmental Planning*, the plaintiff, a newspaper, alleged that defendants published a newsletter criticizing the plaintiff's editorial policies on environmental matters and calling upon readers of the newsletter not to patronize businesses that advertise in the plaintiff newspaper. (*Id.* at p. 190.) Plaintiff contended that defendants' conduct constituted intentional interference with economic relationships. (*Id.* at p. 192.) Defendants moved for summary judgment and the trial court denied the motion. (*Id.* at p. 192.) Defendants then sought a writ of mandate, which was denied by the Court of Appeal, but granted by the Supreme Court. (*Id.* at pp. 193, 198.) The Supreme Court explained that defendants' activities constituted a politically-motivated boycott designed to force governmental and economic change and hence defendant was entitled to summary judgment. (See *id.* at p. 197.) In reaching this conclusion, the Court cited a United States Supreme Court decision that states that "'[w]hile States have broad power to regulate economic activity, [the Court did] not find a comparable right to prohibit peaceful political activity . . . .'" (*Id.* at p. 196, quoting *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 913.)

Here, in contrast to the "peaceful" political activity of the defendants in *Environmental Planning*, Planned Parenthood represents that Gehrs and the other protesters shout, harass, intimidate and stalk patients and escorts, and on at least one

occasion, even assaulted a patient's spouse. Under the facts as presented on this record, this case is wholly distinguishable from *Environmental Planning.*

In sum, we find that Planned Parenthood has met its burden of establishing a probability of success. Accordingly, the trial court properly denied Gehrs' special motion to strike those causes of action.

C. *Gibson's Claims*

1. *Gibson's claims come within the ambit of Section 425.16*

Gibson contends that her claims against Gehrs do not come within the ambit of section 425.16 because they are based on allegations that Gehrs made a *false* report to the police. She argues that a false report is not conduct in furtherance of the constitutional right of free speech in connection with a public issue.

Division Three of the Fourth District rejected a similar argument in *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562 (*DuPont*). The complaint in that case alleged that defendant made false statements before regulatory bodies, the medical profession and to the public in connection with one of its pharmaceutical products. (*Id.* at p. 564.) The plaintiffs contended that false, deceptive, and misleading statements were not protected by the right of free speech and hence plaintiff's claims did not come within the ambit of section 425.16. (*Id.* at p. 566.) The appellate court responded: "[I]n making this argument, plaintiffs are placing the cart before the horse. The allegation in the unverified complaint that the statements were false may or may not be true. Whether or not they were true should be considered in the second part of the analysis; whether there is a probability plaintiffs will prevail. In determining whether the alleged conduct is constitutionally protected it is sufficient to determine the conduct constituted speech protected by the First Amendment." (*Ibid.*)

Similarly, in *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294 (*Fox Searchlight*), the plaintiff argued that its suit did not fall within the SLAPP statute because the defendant had no First Amendment right to disclose privileged and

confidential documents or to refuse to return those documents to their rightful owner. (*Id.* at p. 305.) The court responded, "The same argument could be made by the plaintiff in a defamation suit--the defendant has no First Amendment right to engage in libel or slander. Yet, defamation suits are a prime target of SLAPP motions. [¶] The problem with [plaintiff's] argument is that it confuses the threshold question of whether the SLAPP statute applies with the question whether [plaintiff] has established a probability of success on the merits. The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the inquiry as to whether the plaintiff has established a probability of success would be superfluous." (*Ibid.*)

We agree with the reasoning of *DuPont* and *Fox Searchlight* and conclude that a mere allegation of falsity will not remove a claim from the ambit of section 425.16. *Paul for Council, supra,* on which Gibson relies, supports rather than undercuts this conclusion. In that case, the defendants admitted that their conduct was illegal but argued that their illegal conduct was in furtherance of their constitutional rights of free speech. (See *Paul for Council, supra,* 85 Cal.App.4th at pp. 1361-1362.) In concluding that the illegality of defendants' conduct removed plaintiff's claim from the scope of section 425.16, the court explained as follows: "This case, as we have emphasized, involves a factual context in which the 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. However, had there been a factual dispute as to the legality of defendants' actions, then we could not so easily have disposed of defendants' motion." (*Paul for Council, supra,* 85 Cal.App.4th at p. 1367.) Here, unlike *Paul for Council,* the truth or

falsity of Gehrs' statements to the police is the subject of debate. The allegation of falsity is insufficient to remove Gibson's claims from the ambit of section 425.16.

2. *Gibson Has Not Established a Probability of Success on the Merits*

The third amended cross-complaint includes four causes of actions by Gibson against Gehrs: abuse of process, false arrest, intentional infliction of emotional distress and conspiracy. Each cause of action is based on Gehrs' allegedly false report to the police.

On appeal, as in the trial court, Gehrs argued that Gibson cannot establish a probability of success on the merits because reports to the police, even if untruthful, are absolutely privileged by Civil Code section 47. Initially, Gibson did not respond to this contention but, on order of this court, she provided a supplemental brief in which she argues that (a) her causes of action are based on the conversations between the cross-defendants, not their statements to the police, and (b) even if her claims are based on statements made to the police, false statements to the police are not protected by Civil Code section 47.

We reject Gibson's belated contention that her claims are not based on Gehrs' statements to the police. In the opposition brief that Planned Parenthood and Gibson filed in this appeal, Gibson stated, with respect to the civil conspiracy claim, that Gehrs and the other cross-defendants "told the police the same false story about what they had seen happen. [¶] Gehrs' report directly contributed to Ms. Gibson's arrest, and to the issuance of a Notice to Appear." With respect to the false arrest claim, Gibson explained that because "[t]he cross-defendants approached the police as a group and gave them their false statements," the police did not try to talk them out of effecting a citizens' arrest. With respect to the intentional infliction of emotional distress claim, Gibson argued that "Gehrs' behavior -- lying to police in order to have Gibson arrested and potentially prosecuted for a crime she did not commit--was outrageous." And with respect to the abuse of process claim, Gibson explained that cross-defendants conspired

to cause her arrest. Thus, prior to her supplemental brief, Gibson clearly recognized that Gehrs' statements to police were central to each of her causes of action against him.

Moreover, even if Gibson's current portrayal of her claims was accurate, we would conclude that she has not demonstrated a probability of success on the merits of those claims. This is so because private conversations between the cross-defendants, without any report to the police, would not be actionable under any of the theories upon which Gibson relies. Gibson cannot simply rely on those private conversations and her subsequent arrest, and exclude consideration of the intervening event, namely, the reports that Gehrs and the other cross-defendants made to the police that caused her arrest.

Furthermore, Gibson describes her claims as alleging a conspiracy "to concoct a vast exaggeration of the events on the sidewalk on July 18, 1998." However, "[a] conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve. [Citation.] As long as the underlying wrongs are subject to privilege, defendants cannot be held liable for a conspiracy to commit those wrongs. Acting in concert with others does not destroy the immunity of defendants. [Citations.]" (*McMartin v. Children's Institute International* (1989) 212 Cal.App.3d 1393, 1406.)

We therefore reject Gibson's contention that her claims do not concern Gehrs' statements to the police. This brings us, then, to whether or not the absolute privilege of Civil Code section 47, subdivision (b), bars claims alleging that Gehrs made a false report to the police. That section provides that "[a] privileged publication or broadcast is one made . . . (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law . . . ." (Civ. Code, § 47, subd. (b).) Courts have almost uniformly held that the absolute privilege of Civil Code section 47, subdivision (b)(3), includes reports made to police officers. (See, e.g., *Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, 112 (*Cabesuela*); *Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, 1502-1504; *Cote v. Henderson* (1990) 218 Cal.App.3d 796, 806; *Williams v. Taylor* (1982) 129 Cal.App.3d 745, 753-754

(*Williams*); *Forro Precision Inc. v. IBM* (9th Cir. 1982) 673 F.2d 1045, 1055; *Johnson v. Symantec Corp.* (N.D.Cal. 1999) 58 F.Supp.2d. 1107, 1109.) Under these authorities, statements made in bad faith to the police, even intentionally false statements, may not form the basis of civil liability.[4] (See, e.g., *Williams, supra,* 129 Cal.App.3d at pp. 749, 753-754 [privilege applied to allegation of slander]; *Cabesuela, supra,* 68 Cal.App.4th at pp. 111-112 [concluding report is privileged even if made in bad faith and applied privilege to defamation cause of action]; *Fremont Comp. Ins. Co. v. Superior Court* (1996) 44 Cal.App.4th 867, 871, 875-877 [applied absolute privilege to allegation that insurance company had accurate knowledge in June 1991 and made false report to district attorney in 1992].)

These decisions reason that reports made to police satisfy the "official proceeding" requirement of Civil Code section 47 because a "communication . . . designed to prompt action by [an official] entity, is as much a part of an 'official proceeding' as a communication made after an official investigation has commenced." (*Williams, supra,* 129 Cal.App.3d at p. 753.) They also find that application of the absolute privilege supports the policy of promoting the reporting of suspected criminal activities without fear of civil liability, a policy that outweighs the occasional harm that might befall a defamed individual. (*Ibid*.)

One decision--*Fenelon v. Superior Court* (1990) 223 Cal.App.3d 1476 (*Fenelon*)--has reached a contrary conclusion and another decision--*Devis v. Bank of America* (1998) 65 Cal.App.4th 1002, 1008--has expressed approval of that decision, albeit in dicta. In *Fenelon, supra,* Division One of the Fourth District concluded that knowingly false reports made to the police are not privileged. The court found support for its conclusion

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4 Courts have expressed an exception for a cause of action for malicious prosecution. (See *Hunsucker, supra,* 23 Cal.App.4th at p. 1502.) However, Gibson has not brought such a claim and does not suggest that any other exceptions exist or apply in this instance.

in the weight of authority from other jurisdictions and the fear that absolute privilege without the safeguards of quasi-judicial proceedings would facilitate malicious use of law enforcement mechanisms. (*Fenelon, supra,* 223 Cal.App.3d at pp. 1482, fn. 8, 1483.)

However, as *Johnson*, a federal district court decision, explains, "eighteen of the nineteen [out-of-state] cases [on which *Fenelon* relies] merely apply the common law privilege for good faith communications between interested parties (codified in California by Civil Code § 47(c)(1)), or similar case law precedent. . . . [T]he nineteenth case, *Hardaway v. Sherman Enterprises, Inc.*, (1974) 133 Ga.App. 181, did involve the application of a statutorily created privilege, [but] the possibility of *absolute* privilege did not arise because the statute at issue explicitly applied only to communication made in 'good faith.' [Citations.]" (*Johnson, supra*, 58 F.Supp.2d at p. 1112.)

As for *Fenelon*'s policy considerations, we again agree with the analysis of *Johnson*: "The relevant forum . . . for determining the truth of a police report is a criminal trial, whose safeguards go beyond those employed in any quasi-judicial proceeding. The absence of a civil remedy for a false report is a significant policy consideration, but one which must be balanced against the need to encourage members of the community to communicate freely with law enforcement agencies without fear of being sued." (*Johnson, supra,* 58 F. Supp.2d at p. 1113.)

Gibson also argues that, because courts have interpreted Penal Code section 11172 as creating an exception to the absolute privilege for false reports of child molestation, we should interpret Penal Code section 148.5 as making a similar exception for reports to the police. We again find the analysis in *Johnson* persuasive: "The conclusion that absolute privilege applies to [reports to police] is further bolstered by an examination of how the Legislature otherwise has chosen to deal with the potential for citizen abuse of law enforcement mechanisms. For instance, Penal Code § 11172 explicitly causes persons filing knowingly false child abuse reports to be '[civilly] liable for any damages caused.' False police reports of child molestation thus are excepted from the absolute

privilege of Civil Code 47 to avoid stripping all meaning from the liability provision of Penal Code § 11172. [Citation]. That the Legislature saw fit explicitly to impose liability for knowingly false publications of child abuse is evidence of its belief that such utterances were otherwise subject to absolute privilege; otherwise, the liability provision of section 11172 would accomplish nothing because the common law of defamation already would impose liability. [¶] In contrast to Penal Code § 11172, Penal Code § 148.5, which makes it a misdemeanor knowingly and falsely to report to a law enforcement official 'that a felony or misdemeanor has been committed,' contains no provision for civil liability. The Legislature's special treatment of false child abuse reports in contrast to its treatment of other police reports indicates an intent to shelter the publisher of the latter against all but a criminal conviction obtained under a reasonable doubt standard." (*Johnson, supra,* 58 F.Supp.2d at pp. 1110-1111.)

We therefore conclude that Gehrs' report to the police is absolutely privileged. As a consequence, Gibson cannot show a probability of success on the merits of her claims. The trial court erred in not striking those claims.

III. DISPOSITION

We affirm the trial court's order to the extent it denied the motion to strike Planned Parenthood's claims and reverse the order to the extent that it denied the motion to strike Gibson's claims. We remand with directions to the trial court to grant the motion to strike Gibson's claims and reconsider the issue of whether Gehrs is entitled to attorney fees. Each party is to bear their own costs on appeal.

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Haerle, J.

We concur:

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Kline, P.J.

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Ruvolo, J.