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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THOMAS J. HARRON, Plaintiff and Respondent, v. JAIME BONILLA et al., Defendants and Appellants.	D042903 (Super. Ct. No. GIC773848)

APPEAL from an order of the Superior Court of San Diego County, Sheridan Reed, Judge. Affirmed.

Foley & Lardner, Kenneth S. Klein, Wendy L. Tucker and Sahyeh S. Fattahi for Defendant and Appellant Jaime Bonilla.

Haight, Brown & Bonesteel, Jules S. Zeman, Kevin M. Osterberg, Maureen Haight Gee, Kelly D. Wood and J. Alan Warfield for Defendant and Appellant Antonio Inocentes.

Wood & Wood, John W. Wood and Shirley J. Wood for Plaintiff and Respondent.

Jaime Bonilla and Antonio Inocentes appeal an order denying their special motions to strike Thomas J. Harron's defamation action against them under the anti-

SLAPP (strategic lawsuit against public participation) statute. (Code Civ. Proc.,[1] § 425.16.) We conclude neither defendant met his threshold burden of showing the complaint arises from protected speech within the meaning of the anti-SLAPP statute, and thus the burden did not shift to Harron to show a probability of success on the merits. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In 1991 the Otay Water District (the District) hired Harron as its general counsel. In November 2000 the District's voters elected three new members, including Bonilla and Alfredo Cardenas, to the District's Board of Directors (Board) for the term beginning January 2001. In a December 2000 meeting, the outgoing Board approved an employment contract for Harron that included a 15-month severance period. In a memorandum, the outgoing Board rated Harron's performance "as 'Outstanding,' " and recommended that the incoming Board consider "a favorable merit increase . . . in recognition of [his] outstanding performance."

In a January 10, 2001 special meeting Bonilla and Cardenas assumed office and the Board elected Bonilla as its president. The Board adjourned to closed session to discuss personnel matters, and on its return to open session Bonilla moved to terminate Harron's employment. Inocentes, a long time member of the Board, seconded the motion, and he, Bonilla and Cardenas, a majority of the Board, voted to fire Harron. The

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1 Statutory references are to the Code of Civil Procedure unless otherwise specified.

Board held no discussion in open session regarding Harron's job performance or its reason for firing him.

Immediately after the special meeting adjourned, Bonilla and Inocentes spoke to a newspaper reporter for *The San Diego Union-Tribune* (*Union-Tribune*) about Harron's termination. The following day, the newspaper published an article that quoted Bonilla as saying: " 'It's not necessarily for cause[.] . . . It's a matter of trust. The board just didn't trust [Harron]. That's the basic bottom line.' " The article quoted Inocentes as saying, " 'I felt [Harron] had a conflict of interest.' " Director Watten was quoted as saying, "the action against [Harron] was 'a vendetta well known to be coming.' " The article was also published on the *Union-Tribune*'s Internet Web site.

Harron sued Bonilla and Inocentes for slander.[2] The fourth amended complaint alleges the true reason Harron was fired was because of his race, and the defendants' statements were false and spoken "with the intent to injure plaintiff personally and professionally." The complaint also alleges "Bonilla had personal animosity and hatred toward plaintiff because of his prior business dealings with plaintiff, and because of plaintiff's race," and "Inocentes had personal animosity and hatred toward plaintiff because plaintiff cooperated with the District Attorney's office in its investigation of . . . Inocentes, because plaintiff refused to approve certain financial matters that would have benefitted . . . Inocentes, and because of plaintiff's race."

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2 Harron also sued the District for wrongful termination, discrimination and related causes of action, but it is not involved in this appeal.

Bonilla and Inocentes brought separate special motions to strike under section 425.16. They argued their comments to the *Union-Tribune* reporter were in the exercise of their constitutional right of free speech in connection with a public issue, and Harron cannot establish a probability of prevailing on the merits. Particularly, the defendants claimed their statements were matters of opinion and not false, and the statements were absolutely privileged under Civil Code section 47.

In opposition to the motions, Harron argued the defendants' speech was not protected within the meaning of the anti-SLAPP statute, and it was probable he would prevail on the merits at trial. Harron submitted evidence showing that during the 2001 campaign for seats on the Board, Bonilla, Inocentes, Cardenas and other persons met numerous times to discuss campaign strategy and issues. During the meetings, Bonilla professed his intent to replace Caucasian employees of the District with Latino employees. Bonilla made statements such as, " 'We got to get rid of all the gringos' "; he needed " 'his people,' " meaning Latinos, at the District; he intended to have the District hire his Latino lawyers, and he wanted Harron fired because he is " 'Anglo.' " Harron also submitted evidence that Inocentes frequently made comments to the District's general manager that he found derogatory, such as " 'Anglo,' " to differentiate between persons based on their race. Harron submitted a variety of additional evidence to support his theory the defendants' stated reasons for his termination were subterfuge.

In a tentative telephonic ruling, the court denied the anti-SLAPP motions on the ground the defendants failed to make prima facie showings their comments to the *Union-Tribune* reporter were protected within the meaning of subdivision (e)(2), (3) or (4) of

section 425.16. At oral argument, the court explained that because the Board chose to consider Harron's employment in closed session, and personnel matters discussed in closed session are confidential, the defendants' comments do not meet the "public issue" or "public interest" requirements of section 425.16, subdivision (e)(3) and (4). The court determined that to show the anti-SLAPP statute applies, the defendants were required to make a "threshold showing" their comments regarding the reason for Harron's termination did not divulge matters discussed in closed session.

The court granted the defendants' request to submit supplemental declarations. After considering them, the court confirmed its tentative ruling as to Bonilla. The court found Inocentes made a prima facie showing his comment to the reporter was protected under the anti-SLAPP statute because it did not divulge information discussed in closed session, but the court denied his motion on the alternative ground Harron showed a probability of prevailing on the merits at trial.

DISCUSSION

I

The Anti-SLAPP Statute

In 1992 the Legislature enacted section 425.16, known as the anti-SLAPP statute, to allow a court to dismiss certain types of unmeritorious claims at an early stage in the

litigation.[3] (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1159.) "The anti-SLAPP statute is designed to nip SLAPP litigation in the bud by striking offending causes of action [that] 'chill the valid exercise of the constitutional rights of freedom of speech and petition . . . .' " (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1035, 1042.) Section 425.16 provides: "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 shall be subject to a 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).)

In deciding an anti-SLAPP motion, the trial court must "engage 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. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

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[3] The special motion "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (§ 425.16, subd. (f).) Here, the court granted the defendants permission to bring their motions long after Harron filed his fourth amended complaint and the case was originally scheduled for trial.

A defendant meets his or her burden by showing the act underlying the plaintiff's cause of action fits one of the categories enumerated in section 425.16, subdivision (e). (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) As used in that provision, a protected act 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 . . . free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).) Subdivision (e)(1) and (2) have no public interest requirement. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 (*Briggs*).)

"Whether section 425.16 applies, and whether the plaintiff has shown a probability of prevailing, are both questions we review independently on appeal." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906.) An "appellate court, whenever possible, should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not its curtailment.' " (*Briggs, supra,* 19 Cal.4th at p. 1119.)

II

Bonilla's Disclosure of Closed Session Discussions
Was Not a Legitimate Exercise of His First Amendment Rights

The anti-SLAPP statute is intended to "protect[] a defendant 'from retaliatory action for his or her exercise of *legitimate* . . . rights.' " (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1366, disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 68, fn. 5.) If the defendant concedes or the evidence conclusively establishes the conduct complained of was not a valid exercise of his or her constitutional rights of free speech, the defendant cannot make a prima facie showing the conduct arises from protected activity within the meaning of the anti-SLAPP statute and the plaintiff has no obligation to show a probability of prevailing on the merits. (*Paul for Council v. Hanyecz, supra,* at pp. 1366-1367; *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 459.)

Bonilla admitted in deposition that in speaking with the *Union-Tribune* reporter he revealed matters discussed in closed session.[4] The evidence conclusively establishes Bonilla's comments violated the Ralph M. Brown Act (the Brown Act) (Gov. Code, § 54950 et seq.), and thus they are not protected by the anti-SLAPP statute.

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4 Bonilla submitted a supplemental declaration that stated, "I did not say anything to [the reporter] . . . which revealed what had occurred in closed session." In his earlier deposition, however, he admitted his comments revealed the closed session discussion. The court has discretion to give great weight to an admission made in deposition and disregard a contradictory and self-serving declaration. (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 861.)

The Brown Act " 'was adopted to ensure the public's right to attend the meetings of public agencies. [Citation.]' [Citation.] Accordingly, the Brown Act requires that the legislative bodies of local agencies . . . hold their meetings open to the public except as expressly authorized by the [Brown] Act." (*Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 331, fn. omitted.) The Brown Act expressly authorizes a public agency to meet in closed session regarding a variety of topics, including the consideration of "the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee. . . ." (Gov. Code, § 54957, subd. (b)(1).)

The "underlying purposes of the 'personnel exception' are to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body." (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955.) The "Legislature has drawn a reasonable compromise, leaving the majority of personnel matters to be discussed freely and candidly in closed session, but permitting an employee to request an open session to defend against specific complaints or charges brought against him or her by another individual and thus to clear his or her

name." (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 682.)[5]

At the relevant time, the Brown Act did not expressly provide that information discussed in closed sessions is confidential.[6] In *Kleitman v. Superior Court, supra,* 74 Cal.App.4th 324, however, which was decided in 1999, the court held confidentiality could be "strongly inferred" since the Brown Act requires that any minute book of closed sessions is confidential. The court further explained: "The Attorney General has concluded that 'If the recording of a closed session discussion must be kept in confidence, it follows that oral communications of such information *may not be made to the public*.' [Citation.] Therefore, the Attorney General has 'routinely observed that it would be *improper for information received during a closed session to be publicly disclosed without authorization of the governing body as a whole*.' [Citation.] [¶] In so concluding, the Attorney General explained that, 'The basis for our prior conclusions was

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5 Harron asserts that public policy *requires* a local agency to meet in closed session to consider personnel issues. We are not required to reach the issue, but we note that Government Code section 54957 states the Brown Act does not "prevent" closed session consideration of personnel issues. (Gov. Code, § 54957, subd. (b)(2).) The statute does not expressly mandate a closed session; it does mandate an open session at the employee's request when the issue under consideration concerns "complaints or charges brought against an employee by another person or employee." (*Ibid.*) In *Leventhal v. Vista Unified School Dist.* (S.D.Cal. 1997) 973 F.Supp. 951, 958, the court held that "[a]lthough [Government Code section] 54957 allows public employees to demand that a governing body air complaints about the employee in public, it does not grant the employees the right to force the conflict behind closed doors."

6 In 2002 the Brown Act was amended to expressly prohibit the disclosure of information acquired by being present in a public agency's closed session "unless the legislative body authorizes disclosure of that confidential information." (Gov. Code, § 54963, subd. (a).)

that the statutes authorizing closed sessions and making records thereof "confidential" would be rendered meaningless if an individual member could publicly disclose the information he or she received in confidence.' [Citations.] We agree with the Attorney General. Disclosure of closed session proceedings by the members of a legislative body necessarily destroys the closed session confidentiality which is inherent in the Brown Act." (*Id.* at p. 334, citing 76 Ops.Cal.Atty.Gen. 289, 290, 291 (1993), 80 Ops.Cal.Atty.Gen. 231, 239 (1997), italics in original and italics added.)

Contrary to Bonilla's assertion, he had no duty to apprise the public of the reasons for Harron's termination; rather, Bonilla was forbidden from divulging the nature of closed session discussions. The Legislature's intent to maintain the confidentiality of employment issues discussed in closed session—to protect the employee from embarrassment and promote candid discussion—is incompatible with an intent to protect the revelation of confidential closed session discussions under the anti-SLAPP statute. Closed sessions, when authorized by the Brown Act, are not subject to public scrutiny. (See Gov. Code, § 54957.1, subd. (a)(5).)

Bonilla contends the trial court erred by requiring him to prove his comments to the reporter did not violate the Brown Act, "before even getting to the threshold burden under the anti-SLAPP statute." "Indeed, requiring Bonilla to prove that his alleged statements did not violate Harron's privacy rights, would make 'superfluous' the secondary inquiry as to whether respondent had established a probability of success." Bonilla relies on *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94-95, in which the court explained: " 'The Legislature did not intend that . . . to invoke the special motion to strike

the defendant must first establish her [or his] actions are constitutionally protected under the First Amendment *as a matter of law*. If this were the case then the [secondary] inquiry as to whether the plaintiff has established a probability of success would be superfluous.' " (Italics added, citing *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305.) This language is inapplicable, however, when, as here, the undisputed evidence shows the defendants' conduct is not a legitimate exercise of free speech rights. In that circumstance, the burden never shifts to the plaintiff to show a probability of success.

Bonilla's speech is not protected under the anti-SLAPP statute as a matter of law. Although the trial court relied on an analysis of section 425.16, subdivision (e)(2), (3) and (4) in concluding Bonilla's speech was not protected, we may affirm its order on any theory supported by the record. (*Blue Chip Enterprises, Inc.* v. *Brentwood Sav. & Loan Assn.* (1977) 71 Cal.App.3d 706, 712.)

III

Subdivision (e)(3) and (4) of Section 425.16
Are Inapplicable to Inocentes's Speech

Inocentes submitted a declaration that stated his comment to the *Union-Tribune* reporter regarding Harron's supposed conflict of interest "was not related to the closed session of the . . . Board," and rather was based on opinions he formed on his own before entering the closed session. Based thereon, the trial court found that Inocentes "now meets the initial threshold showing [under subdivision (e)(3) and (4) of section 425.16] and the court must turn to the issue of whether [Harron] will probably prevail on the

claim."[7] After reviewing the evidence, the court answered the question affirmatively. We disagree with the court's finding that Inocentes met his initial burden, and hold that his speech does not come within subdivision (e)(3) and (4) of section 425.16. Again, we affirm the court's order if it is correct on any theory supported by the record.

Subdivision (e)(3) of section 425.16 protects speech made in a public forum "in connection with an *issue of public interest*," and subdivision (e)(4) of the statute protects "any other conduct in furtherance of the exercise of the constitutional right of . . . free speech in connection with a *public issue* or an *issue of public interest*." (Italics added.) We conclude that under the reasoning of *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107 (*Du Charme*), subdivision (e)(3) and (4) of section 425.16 are inapplicable to Inocentes's allegedly defamatory statements.[8]

In *Du Charme,* the plaintiff, a former managerial employee of the union (Local 45), sued Local 45 and other parties for defamation after a Local 45 employee posted an article on its Internet Web site stating the plaintiff was removed " 'for financial mismanagement.' " (*Du Charme, supra,* 110 Cal.App.4th at p. 112.) The court held that although the publication was presumably of interest to Local 45's membership, it did not meet the public issue or public interest criteria of the anti-SLAPP statute (§ 425.16, subd. (e)(3) & (4)) because when made the publication was "unconnected to any discussion,

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[7] Inocentes also relied on subdivision (e)(2) of section 425.16 at the trial court, but on appeal he has abandoned that issue.

[8] Our analysis also pertains to Bonilla's speech as an alternative ground for affirming the order as to him.

debate or controversy." (*Du Charme, supra,* at p. 118.) Rather, the plaintiff's "termination was a fait accompli; its propriety was no longer at issue. Members of the local were not being urged to take any position on the matter. In fact, *no* action on their part was called for or contemplated. To grant protection to mere informational statements, in this context, would in no way further the statute's purpose of encouraging *participation* in matters of public significance (§ 425.16, subd. (a))." (*Ibid.*)

In *Du Charme, supra,* 110 Cal.App.4th at pages 115-116, the court noted that cases applying subdivision (e)(3) and (4) of section 425.16 concern an ongoing public debate, and in contrast, when the Local 45 employee posted the comment about the plaintiff on Local 45's Web site "[he] was not participating in any . . . Local 45-wide discussion of Du Charme's qualifications to continue as assistant business manager. He was simply informing the local's members of Du Charme's termination." (*Du Charme,* at p. 116.)

The *Du Charme* court held: "[T]o satisfy the public issue/issue of public interest requirement of section 425.16, subdivision (e)(3) and (4) of the anti-SLAPP statute, in cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance." (*Du Charme, supra,* 110 Cal.App.4th at p. 119.) Inocentes makes no attempt to distinguish *Du Charme.* Rather, he ignores its holding.

Although this case involves a public agency, while *Du Charme* did not, we find the case applicable. The "anti-SLAPP suit statute is designed to protect the speech interests of private citizens, the public, and governmental speakers," and the "*identity of the speaker is not a decisive factor in determining whether the speech activity is protected under the First Amendment*." (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1117, italics added.)

Inocentes's comments to the reporter were unconnected to any ongoing debate; as in *Du Charme,* the employment action was a fait accompli and the stated reasons for Harron's firing were informational only. By opting to hold a closed session to consider Harron's employment, but then airing grievances about him after adjournment of the board meeting, the defendants denied Harron a public forum in which to defend against their claims of conflict of interest and untrustworthiness. As the Supreme Court has declared, "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the *free flow of ideas and opinions* on matters of public interest and concern." (*Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 50, italics added.)

Under *Du Charme*'s analysis, with which we agree, subdivision (e)(3) and (4) of section 425.16 are inapplicable. Inocentes did not meet his threshold burden of showing his speech is protected under the anti-SLAPP statute. Accordingly, we are not required to reach the issue of whether Harron showed he has a probability of prevailing on the merits.

IV

Harron's Request for Attorney Fees

"If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (§ 425.16, subd. (c).) Harron requests attorney fees, contending that "[s]ince Bonilla's and Inocentes'[s] special motions to strike simply relitigate issues unsuccessfully raised in their earlier motions, it is submitted their special motions to strike were brought solely to cause unnecessary delay."

Harron, however, has not cited the appellate record to show he even raised the issue of attorney fees at the trial court. "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.) Accordingly, where a party provides a brief "without argument, citation of authority or record reference establishing that the points were made below," we may "treat the points as waived, or meritless, and pass them without further consideration." (*Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)

DISPOSITION

The order is affirmed. Harron is entitled to costs on appeal.

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McCONNELL, P. J.

WE CONCUR:

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HUFFMAN, J.

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McDONALD, J.