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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

NICOLE TAUS, Plaintiff and Respondent, v. ELIZABETH LOFTUS et al., Defendants and Appellants.	A104689 (Solano County Super. Ct. No. FCS021557)

I. INTRODUCTION

Plaintiff and respondent Nicole Taus (Taus) was the subject of a published "case study" relating to allegations that she was abused as a young child. The premise of her lawsuit is that defendants invaded her privacy and committed other legal wrongs by piercing a veil of confidentiality that protected her during the case study and using information about her private life to publicly challenge the theories and conclusions advocated by the author of her case study.

Appellants filed special motions to strike Taus's first amended complaint pursuant to section 425.16 of the Code of Civil Procedure,[1] California's anti-SLAPP statute.[2] The trial court granted the motion in part and denied the motion in part. It struck Taus's claim for defamation as to one defendant and her claim for fraud as to another defendant.

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

However the court denied the motion to strike Taus's claims for negligent infliction of emotional distress and invasion of privacy which she alleged against all of the defendants in this action.

Appellants contend the trial court erred by refusing to strike the entire first amended complaint because, they contend, Taus seeks to punish conduct involving speech relating to a matter of public interest and she did not carry her burden of proving a likelihood of success as to any of her claims. We agree in part with appellants but also disagree in part, and remand the case to the trial court so it may enter a new order consistent with this opinion.

II. STATEMENT OF FACTS

A. *Background - Published Articles*

The dispute between these parties relates to the content and publication of three articles published between May 1997 and August 2002.

1. *The 1997 Child Maltreatment Article*

The May 1997 issue of *Child Maltreatment*, a scientific journal published by the American Professional Society on the Abuse of Children, contains an essay entitled "*Videotaped Discovery of a Reportedly Unrecallable Memory of Child Sexual Abuse: Comparison With a Childhood Interview Videotaped 11 Years Before*" (hereafter the *Child Maltreatment* article).

The *Child Maltreatment* article, authored by David Corwin and Ema Olafson, contains the following summary of its contents: "This article presents the history, verbatim transcripts, and behavioral observations of a child's disclosure of sexual abuse to Dr. David Corwin in 1984 and the spontaneous return of that reportedly unrecallable memory during an interview between the same individual, now a young adult, and Dr. Corwin 11 years later. Both interviews were videotape recorded. The significance, limitations, and clinical implications of this unique case study are discussed. Five

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[2] SLAPP is an acronym for "strategic lawsuits against public participation." (*See Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57 (*Equilon*).)

commentaries by researchers from differing empirical perspectives who have reviewed these videotape-recorded interviews follow this article."

The young woman who is the subject of the *Child Maltreatment* article was referred to throughout as Jane Doe (hereafter sometimes just "Jane") and all the names of persons and places relating to her story were changed with the exception of Corwin, who conducted the interviews. According to the article, Corwin became involved in Jane's case in 1984 after Jane's father accused her mother of physically and sexually abusing her. The allegations were made in the context of a custody dispute and Corwin was appointed by the court to conduct an evaluation.

The *Child Maltreatment* article contains excerpts from three interviews that Corwin conducted in 1984 when Jane was six-years-old. During each interview, Jane told Corwin that her mother had rubbed her finger inside Jane's vagina while giving her a bath. The specific excerpts that are repeated in the article include Jane reporting that her mother had first done this to her when she was three, that it hurt, and that her mother had warned that she would do "something" to Jane if Jane told her father what her mother had done. During the third interview, Jane consistently maintained that nobody told her to say these things about her mother and that she was not lying. At one point, Corwin asked if Jane's mother said anything when she put her finger there. Jane reported that her mother asked "That feel good?" and that she said no. Jane also said that this happened more than 20 times and closer to 99 times during the time she lived with her mother.

The excerpts from the 1984 interviews are interspersed with analysis and with Corwin's conclusions, first drawn and testified to in 1984, that: (1) Jane was physically and sexually abused by her mother and (2) Jane's mother falsely accused Jane's father of abusing Jane and attempted to coerce Jane to verify the false accusation. The authors of *Child Maltreatment* reported that they utilized background sources in addition to the 1984 interviews including reports by Child Protective Services and the police, court files and decisions pertaining to the parents' divorce and contentious custody battle, and reports by other evaluators and therapists. According to the article, Jane's statements to Corwin were consistent with statements she previously made to other evaluators. Jane's prior

reports of inappropriate behavior by her mother included "'striking her on several parts of her body, burning her feet on a hot stove, and invading and hurting her genitals and anus with her hands.'"

The *Child Maltreatment* article also contains a transcript of an interview of Jane that Corwin conducted on October 15, 1995, when Jane was 17-years-old. According to the article, the 1995 interview was arranged after Corwin contacted Jane and her father to obtain their consent to continue to use the 1984 videotaped interviews for "professional education," and learned that Jane could not remember the events that were the subject of those earlier interviews.

The transcript of the 1995 interview reflects that Jane was accompanied by her foster mother and that Corwin had agreed to show them the videotapes of the 1984 interviews. Jane stated that she did remember statements and allegations she had made during those interviews but that "[i]t's the memory of if what I said was true that I'm having a problem with." Corwin asked Jane to share what she could recall about that period of time, about the 1984 interviews, and the things she may have said then. Jane described the room where she was interviewed in 1984, a sweatshirt she may have worn, and began to recount some of the allegations she had made. She recalled accusing her mom of abusing her by burning her feet on a stove but stated that she could not remember if that was in fact how her feet were burned. Jane told Corwin that she had recently been in contact with her mother, who denied all the abuse allegations. When Corwin focused the discussion on sexual abuse, the following occurred:

"DC[3] Okay. Do you remember anything about the concerns about possible sexual abuse?

"JD: No. (Eye closure) I mean, I remember that was part of the accusation, but I don't remember anything--(inhales audibly and closes eyes) wait a minute, yeah, I do.

"DC: What do you remember?

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[3] "DC" refers to David Corwin. "JD" refers to Jane Doe. The parenthetical comments were added by the authors of the *Child Maltreatment* article.

“JD: (Pauses) Oh my gosh, that’s really, (. . . Close eyes and holds eyes) really weird. (Looks at foster mother) I accused her of taking pictures (starts to cry and foster mother puts hand on Jane’s shoulder) of me and my brother and selling them and I accused her of--when she was bathing me or whatever, hurting me, and that’s--

“DC: As you’re saying that to me, you remember having said those things or you remember having experienced those things?

“JD: I remember saying about the pictures, I remember it happening, that she hurt me.

“DC: Hurt you, where? How?

“JD: She hurt me. She--

“. . . . .

“JD: You see. I don’t know if it was an intentional hurt--she was bathing me, and I only remember one instance, and she hurt me, she put her fingers too far where she shouldn’t have, and she hurt me. But I don’t know if it was intentional, or if it was just accidental.

“DC: Can you be more specific because I--?

“JD: I know what was said on the tape. On the tape it was said that she put her fingers in my vagina. And she hurt me.

DC: Okay. Is that what you recall or--

“JD: That’s what I recall. I recall saying it, and I recall it happening.

“DC: You recall it happening?

“JD: I recall. I didn’t--that’s the first time I’ve remembered that since saying that when I was 6 years old, but I remember.”

According to the *Child Maltreatment* article, Corwin showed Jane the videotapes of the 1984 interviews, took a two and one-half hour break, and then recommenced the 1995 videotaped interview. During that part of the interview, Corwin asked Jane to describe her feelings about viewing the videotapes. Jane responded that the tapes reinforced her belief that her mom had abused her. In her view, the girl she saw on the tapes would not have made up the accusations. Jane also expressed relief that she no

longer had to entertain the possibility that her father, who had recently died, had lied to her about her mother.

At the end of the 1995 interview, Jane agreed that Corwin could use her interviews for educational purposes. She stated: "Yeah, I think it's--I mean, I'm prepared to give my life, devote my life, to helping other kids who have gone through what I've gone through, well not necessarily what I've gone through, that have gone through traumatic . . . experiences, by becoming a psychologist or psychiatrist, whichever I decide but, and I by no means want to stand in your way."

In the final pages of the *Child Maltreatment* article, the authors reconciled possible inconsistencies between Jane's recalled memory in 1995 and the accusations she made in 1984, and concluded that "[t]he core recollection, then, is true to her earlier disclosures." The authors also suggested that, assuming Jane's memory of abuse had actually been unavailable to her prior to the 1995 interview, Corwin's presence may have helped trigger her recall. Finally, the authors posed questions and issues to explore and address in the future.

2. *The 2002 Skeptical Inquirer Article*

The May/June 2002 and July/August 2002 issues of the *Skeptical Inquirer*, a magazine published by appellant the Committee for the Scientific Investigation of Claims of the Paranormal (CSICOP), included a two-part article entitled "*Who Abused Jane Doe? The Hazards of the Single Case History*" (hereafter, the *Skeptical Inquirer* article.) The *Skeptical Inquirer* article was written by appellants Elizabeth Loftus and Melvin Guyer. The stated premise of this article is that case studies, although useful to scientists, are "bounded by the perceptions and interpretations of the storyteller," and should be used "to generate hypotheses to be tested, not as answers to questions." To illustrate their point, Loftus and Guyer provide "a case study of a case study--a cautionary tale." The case study they scrutinize is Corwin's *Child Maltreatment* article.

According to the *Skeptical Inquirer* article, psychological researchers and clinicians disagree as to whether the human mind represses memories of traumatic experiences in such a way that they can be accurately recovered years later through such

tools as therapy and hypnosis. The article also states that the *Child Maltreatment* article has been offered and accepted as proof that traumatic memories can eventually be reliably recovered.

The *Skeptical Inquirer* article summarizes the content of the *Child Maltreatment* article and offers the following summary of the reactions of professionals who had read about the Jane Doe case: "Corwin's case study was vivid and compelling. Leading scientists were persuaded by it; indeed, emotionally moved by it. Few considered any other possible explanations of Jane's behavior at six or at seventeen. Few were skeptical that Jane really had been abused by her mother before age six, that her retrieved memories were accurate, or that 'repression' accounted for her forgetting what her mother supposedly had done to her. [¶] *But we were*." (Emphasis supplied.)

According to the *Skeptical Inquirer* article, the abuse allegations against Jane's mother grew out of a contentious five-year custody battle and were made at a time when many experts were unaware that interviewers looking for evidence of sexual abuse could easily manipulate children and taint their memories. Further, the article states that Corwin has a "vested interest" in persuading others that his initial finding of sexual abuse was accurate and that "some repression-like process" had prevented Jane from recalling that abuse during the period before Corwin re-interviewed her. Therefore, as Loftus and Guyer explained, "we set out on an odyssey to learn more about the case. Our investigation produced much valuable information that should assist scholars in making their own decisions about whether Jane was abused, and if so, by whom."

The *Skeptical Inquirer* article describes how Loftus and Guyer found "clues" to fuel their investigation notwithstanding the fact that Corwin had disguised the case. For one thing, Corwin showed videotapes of his interviews with Jane Doe at a number of professional meetings and, at some point during the interviews, Corwin used Jane's real first name and a city where she spent some of her childhood. Using this information and other clues from the *Child Maltreatment* article, the authors of the *Skeptical Inquirer* article searched legal databases and found a published appellate court case relating to allegations that Jane's father failed to comply with visitation orders. (See *In re William*

T. (1985) 172 Cal.App.3d 790.) That case provided additional factual details about Jane Doe's family. Further, the disclosure of the father's first name and last initial led to a successful search for the father's identity and, according to the authors, "from there we uncovered the full history of the custody dispute and the abuse allegations."

The *Skeptical Inquirer* article includes its authors' version of an accurate summary of the facts relevant to the Jane Doe abuse allegations. It does not disclose Jane's identity or the real names of people connected to her case. However, it does provide details about Jane's history that were not disclosed in the *Child Maltreatment* article, including unfavorable information about Jane's father and stepmother. Much of the details about Jane's history that are disclosed in this article were obtained through interviews conducted by or on behalf of the authors of the *Skeptical Inquirer* article.

Jane's biological mother was interviewed. She continued to deny the abuse allegations and, according to the article's authors, was "eager for us to visit" and "told us a few things, of course from her perspective, that never appeared in any of Corwin's accounts of this case." The *Skeptical Inquirer* article summarizes the mother's story and also reports that the maternal grandmother's best friend and Jane's older brother concur that mother never abused Jane. The article also discloses that, after Corwin reviewed the abuse allegations with 17-year-old Jane, Jane severed contact with her mother.

Jane's foster mother was also interviewed for this article. The foster mother allegedly described how Jane was "extremely distressed" when she came to live with her. Jane's father had had a heart attack and could not care for her, her stepmother, who had divorced her father long ago, was out of the picture, and Jane wanted to "put the 'puzzle pieces' of her past together." Jane's foster mother helped Jane contact her biological mother but reported that the renewed relationship was destroyed after Corwin "entered the picture." Jane's foster mother opined that viewing the tapes convinced Jane the abuse had occurred, and that the interview with Corwin dramatically changed Jane: "She went into herself. She became depressed. She started behaving in self-destructive ways, and soon left FosterMom's home." According to this article, Jane's foster mother wondered whether Jane rejected her because "of the older woman's strict rules against staying out

late and misbehavior, or because she was trying to run away from her own misery." She also wondered whether viewing the tapes was a mistake.

Jane's stepmother, who was also interviewed for the article, allegedly "volunteered that the way they got Jane away from Mom was 'the sexual angle.'" During the interview, the stepmother displayed continuing and serious animosity toward Jane's mother, accusing her of such things as being a prostitute and a "leech" who always had her hand out. According to the article, Jane's stepmother described how she and Jane's father "documented" their case against mother by, for example, bringing Jane to two hospitals to have her feet examined to support the foot burning allegation. The step-mother also reported that, when Jane was between the ages of four and nine, Jane talked to her about the sexual abuse she endured. The *Skeptical Inquirer* article includes personal information about Jane's stepmother's marital history and legal problems. The authors of the article maintained this information was relevant because Corwin used comparable information about Jane's mother to discredit her credibility.

In this article, Loftus and Guyer offer several reasons why they doubt that Jane Doe was physically or sexually abused by her mother, including: (1) reports of abuse by six-year-old Jane were not consistent; (2) Jane's father's credibility was not superior to mother's in terms of marital stability, criminal records and other behavior; and (3) at least one expert who conducted a thorough contemporaneous investigation doubted any abuse occurred.

The *Skeptical Inquirer* article also questions whether 17-year-old Jane's memory of an alleged prior event was, in fact, a recovered memory. The authors note, for example, that evidence Jane talked about the abuse allegations with her stepmother and others during the years between the 1984 interviews and the 1995 interview "undermin[es] claims of massive repression or dissociation." Further, according to this article, '[t]o the extent that Jane's memory can be regarded as an instance of a recovered, accurate memory, there must be some objective and independent corroboration of the events she purports to remember." The authors suggest the required corroboration does not exist for several reasons: (1) Corwin's original clinical evaluation was neither

objective nor reliable; (2) there is no evidence to support the allegation that mother burned Jane's feet; indeed, the authors' own research supported the conclusion that, if Jane's feet had been burned, the injury would have been documented by the hospitals where Jane was taken or by Child Protective Services and no such documentation existed; (3) there is no evidence, prior allegation or even a reference in the reports or evidence to support Jane's supposed recollection that she previously accused her mother of taking pornographic pictures of her and her brother; and (4) the emotion and personal details captured on the videotapes of the 1984 interviews could persuade not just knowledgeable scientists but Jane herself that the abuse occurred even if it never did.

The *Skeptical Inquirer* article contains a "Postscript" in which Loftus and Guyer describe "unexpected" resistance to their efforts to "critically evaluate" Corwin's claim that Jane Doe recovered a repressed memory. They contend that critics of their inquiry impeded the publication of their work and that even their respective universities warned them not to publish any of the material they had gathered, "even that which is in the public domain and readily found by anyone with access to a modem and Google search engine." The authors stated: "We are alarmed on behalf of all members of the academic community that our universities, institutions that above all others should be championing the right to free speech and academic debate, so implacably opposed it in this instance."

3. *The 2002 Tavris Article*

The July/August 2002 issue of the *Skeptical Inquirer* also contained an article entitled "*The High Cost of Skepticism*" by Carol Tavris (hereafter the Tavris article). In this article, Tavris posits that the power wielded by university Institutional Review Boards (IRB's) stifles scientific inquiry and progress and threatens the very foundation of the "skeptical movement." To illustrate her point, Tavris focuses on the authors of the *Skeptical Inquirer* article summarized above: "The story of what happened to Elizabeth Loftus and Mel Guyer when they set out to investigate the case of Jane Doe is itself," Tavris contends, "a case study of the high cost of skepticism."

According to the Tavris article, the authors of the *Skeptical Inquirer* article decided to examine the Jane Doe case and Corwin's "alleged evidence of a recovered

memory of sexual abuse" because the "stakes were high for their work as scholars, teachers, and expert witnesses, because the case was already being used in court as evidence that recovered memories of sexual abuse in childhood are reliable." According to this article, Loftus and Guyer were encouraged to pursue their story after finding that documents in the public record were not consistent with the *Child Maltreatment* article.

The Tavris article describes how Loftus and Guyer were treated by the IRB's at the universities where they were employed. The IRB at the University of Michigan, where Guyer was employed, allegedly initially took the position that its approval for this project was not necessary because Guyer would not be doing "human subject research" but then reversed its position a month later, "disapproved" the project, and recommended that Guyer be reprimanded. Then, several months later, a new chair of the IRB determined that this project was exempt from IRB consideration because it did not involve human subjects research and found there was no basis for recommending a reprimand.

According to the Tavris article, Loftus and Guyer were encouraged by the "green light given to Guyer at Michigan," and continued their investigation until the University of Washington, where Loftus was employed, received an e-mail from Jane Doe complaining that her privacy was being violated. Tavris offers this explanation as to why the University of Washington should have rejected Jane Doe's complaint out of hand: "Considering that David Corwin had published his account of her life and was traveling around the country showing videotapes of Jane at six and seventeen, and considering that no one was making her story public (and hence violating her 'privacy') except Jane herself and Corwin, this complaint should have been recognized as a cry from a troubled and vulnerable young woman, and set aside."

Instead, Tavris reports, the "investigation" conducted by the University of Washington lasted more than twenty-one months, consisted of a series of shifting charges against Loftus which were often kept secret from her, and was fueled by improper outside influences including a scathing memorandum drafted by a member of the University of Michigan's IRB who was critical of Guyer, and the litigation strategies of opposing

counsel in an out of state court case in which Loftus was a defense expert and Corwin was a plaintiff's expert. Ultimately, Tavris reports, Loftus was exonerated of charges of "scholarly misconduct," and the University of Washington concluded that her investigation of the Jane Doe case did not constitute research involving human subjects. However, even then, her employer instructed her to not contact Jane Doe's mother again, or to interview anyone else in the case without advance approval.

The Tavris article describes Jane Doe as "an unhappy young woman whose life has been filled with conflict and loss." It characterizes Corwin as a man "who has publicly promoted his case study as a personal vindication and a prototype of how recovered memories should be studied." And, it presents Loftus and Guyer as "heroes" whose "courage, persistence, and integrity" made them "willing to 'offend' in the pursuit of truth and justice."

B. *The First Amended Complaint*

On February 13, 2003, Taus filed a complaint against Loftus, Guyer, Tavris, the *Skeptical Inquirer*, the University of Washington (hereafter, the University),[4] and Shapiro Investigations, a company that allegedly performed investigation services for Loftus. In the first paragraph of her complaint, Taus identified herself as "Lieutenant Junior Grade Nicole S. Taus, also known as 'Jane Doe' in publications referred to herein." Taus disclosed other personal information in her complaint including her place and date of birth and the names of her parents. In a first amended complaint, filed March 6, 2003, Taus added CSICOP and the Center for Inquiry West as defendants and alleged four distinct causes of action.

The first cause of action charged all defendants with negligent infliction of emotional distress. Taus alleged that defendants "misused their knowledge and skills as psychologists, researchers and writers" in order to exploit her notwithstanding her known background and personal history of abuse in order to satisfy their own needs.

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[4] The University did not file a section 425.16 motion in the trial court and is not a party to this appeal.

The second cause of action, also alleged against all the defendants, is for invasion of privacy. Taus alleged that she is not a public figure and that she has a constitutional and statutory right to privacy particularly with respect to her medical history and juvenile court records. She further alleged that defendants obtained private information about her both legally and by false representations and published that information, which includes statements about Jane that are not truthful. According to the allegations in the complaint, defendants used fraudulent means to obtain private information from Taus's relatives, including misrepresenting their identities and befriending Taus's biological mother, and then failed to check their sources or verify information by interviewing Taus herself. Taus further alleged that the University ratified the invasive conduct of other defendants by exonerating Loftus from any claims Taus asserted against her.

The third cause of action was for fraud against Loftus and the University. The claim against Loftus is based on allegations that numerous misrepresentations were made to Taus's friends or relatives in order to obtain private information about her. The claim against the University is apparently based on allegations in the complaint relating to an ethics complaint Taus lodged with the University in September 1999 (which is discussed in the Tavris article). Taus alleged that the University falsely represented to her that its complaint process would be confidential and that she was induced by this representation to participate in the complaint process and to refrain from filing a civil action.

The fourth cause of action, alleged against Loftus and Tavris only, is for defamation, slander and libel per se. According to Taus, these defendants have made oral and written statements about her "designed to suggest that she was unhappy, vulnerable, and of questionable fitness for her duty as an officer in the military." The claim against Tavris relates to statements that appeared in the Tavris article. The claim against Loftus is based not just on statements in the *Skeptical Inquirer* article but also on "public and disparaging statements about plaintiff" that Loftus has allegedly continued to make. For example, the complaint contains an allegation that, within a year of the filing of the complaint, Loftus made the following statement at a conference: "Jane Doe engaged in

destructive behavior that I cannot reveal on advice of my attorney. Jane is in the Navy representing our country."

C. ***The Motion to Strike***

On May 13, 2003, Loftus, Guyer, Tavris, CSICO, the *Skeptical Inquirer*, and the Center for Inquiry West (collectively, the Skeptical Inquirer appellants) filed a motion to strike the first amended complaint. Shapiro Investigations (Shapiro) filed a "Concurrence" in the motion to strike pursuant to which it adopted the Skeptical Inquirer appellants' arguments and further alleged that, as a matter of law, Taus did not and could not state a cause of action for invasion of privacy against Shapiro. Opposing the motions, Taus argued section 425.16 did not apply because statements about her are not matters of legitimate public concern. She also argued that all of her claims were meritorious.

On September 18, 2003, the trial court, the Honorable James F. Moelk, filed an "Order after Hearing" (the September 18 order). In its September 18 order, the court ruled on "the defendants' motion to strike plaintiff's first amended complaint pursuant to Code of Civil Procedure § 425.16, to which defendant Shapiro has filed a concurrence." It denied the motion to strike Taus's emotional distress and invasion of privacy claims. It granted the motion to strike the third cause of action for fraud against Loftus but denied the motion as to the University. The court also granted the motion to strike the fourth cause of action for defamation against Tavris but denied the motion as to Loftus. The court did not separately rule on Shapiro's concurring motion.

The Skeptical Inquirer appellants filed their notice of appeal on November 7, 2003. Shapiro filed its notice of appeal on November 12, 2003. As it did in the trial court, Shapiro adopts the arguments asserted by the Skeptical Inquirer appellants but also makes arguments relating to its specific role in the underlying dispute.

III. DISCUSSION

A. ***Standard of Review and Issues Presented***

Section 425.16, subdivision (b)(1), states: "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."

When ruling on a section 425.16 motion to strike, a 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, supra*, 29 Cal.4th at p. 67.)

The "plain language" of section 425.16 "encompasses any action based on protected speech or petitioning activity as defined by the statute, with no requirement that the defendants moving thereunder also prove that the suit was intended to chill their speech. [Citations.]" (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 893 (*Wilbanks*).) "[S]ection 425.16, although enacted in response to SLAPP litigation, is to be broadly interpreted. It can and does apply to suits bearing very little relationship to SLAPP litigation . . . ." (*Id*. at p. 894.)

"We independently determine whether a cause of action is based upon activity protected under the statute, and if so, whether the plaintiff has established a reasonable probability of prevailing. [Citation.] In doing so, we consider '"the pleadings, and supporting and opposing affidavits stating the facts upon which liability or defense is based."' [Citations.]" (*Lieberman v. KCOP Television, Inc*. (2003) 110 Cal.App.4th 156, 163-164.)

B. *Conduct in Furtherance of an Exercise of Free Speech*

As noted above, the first issue we must address is whether conduct giving rise to Taus's claims was in furtherance of the appellants' right of petition or free speech. (*Equilon, supra*, 29 Cal.4th at p. 67.) In applying this prong of the section 425.16 test, the "focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability--and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.) The

"arising from" requirement means that the defendant's act underlying the plaintiff's cause of action "'must *itself* have been an act in furtherance of the right of petition or free speech.'" (*Equilon, supra*, 29 Cal.4th at p. 66.)

Section 452.16 defines acts "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," as including "(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).)

Appellants contend their conduct falls within categories (3) and (4) of section 425.16, subdivision (e). As reflected in the statutory language quoted above, these two categories are limited by the requirement that the defendant's statements or conduct relate to an issue of public interest or a public issue. In *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 919 (*Rivero*), this court identified several defining characteristics of this public issue requirement.

The question presented in *Rivero* was whether a union's allegedly defamatory statements about a former supervisor of janitors at the International House on the campus of the University of California at Berkeley related to a public issue. (*Rivero, supra*, 105 Cal.App.4th 913.) The union had published statements charging the former supervisor with favoritism, soliciting bribes and generally abusing janitors he supervised. After reviewing published decisions interpreting the terms "'public issue'" and "'public interest'" as they are used in section 425.16, this court concluded that, while no case defined the precise boundaries of this public issue requirement, cases finding that statements did implicate public issues fell into one of three categories: "[T]he subject

statements either concerned a person or entity in the public eye [citations], conduct that could directly affect a large number of people beyond the direct participants [citations], or a topic of widespread, public interest [citation]." (*Id*. at p. 924.) We further found that the union's statements did not fall into any of these categories: "Here, the Union's statements concerned the supervision of a staff of eight custodians by Rivero, an individual who had previously received no public attention or media coverage. Moreover, the only individuals directly involved in and affected by the situation were Rivero and the eight custodians. Rivero's supervision of those eight individuals is hardly a matter of public interest." (*Id.* at p. 924.)

Relying on *Rivero*, Taus argues section 425.16 does not apply in this case because appellants failed to establish that Taus or Corwin "were persons in 'the public eye' whose individual conduct 'could directly affect a large number of people beyond the direct participants.'" (Quoting *Rivero, supra*, 105 Cal.App.4th at p. 924.) This argument erroneously conflates two and ignores one of the three distinct characteristics of a public issue that we identified in *Rivero*. As already noted, we found in *Rivero* that relevant authority supported three distinct ways of identifying a public issue. Further, since *Rivero* was decided, courts have formulated a test for identifying a public issue which retains the distinction between these three characteristics. For example, in *Wilbanks, supra,* 121 Cal.App.4th at page 898, the court stated: "The most commonly articulated *definitions* of 'statements made in connection with a public issue' focus on whether (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest. [Citations.]" (Emphasis added.)

Thus, in deciding whether the conduct and statements at issue in this case relate to a public issue, we will consider the three distinct factors set forth above rather than the erroneous test Taus articulates. Taus's substantive contentions all relate to the first factor in the test, whether the defendants' conduct and statements relate to a person or entity in

the public eye. Taus maintains that she is a private figure, that she has never taken any position with respect to the clinical implications of the Jane Doe case study or played any role in an alleged controversy relating to the theory that traumatic experiences can be repressed and subsequently recalled. We agree with these assertions. Taus, whose identity was not publicly revealed until she filed this lawsuit, cannot reasonably be characterized as a person who was in the public eye when appellants allegedly engaged in the conduct which gave rise to Taus's claims.

Appellants' contention, however, is not that Taus is in the public eye, but rather that their statements and conduct relate to a matter which directly affects a large number of people and which is a subject of wide-spread public interest. Taus disagrees, claiming that an insignificant number of people are interested in the subject of the competing articles regarding the Jane Doe case study. In other words, the parties' disagreement relates to whether the breadth of interest in the subject of this litigation is sufficiently wide to satisfy the public issue requirement of section 425.16. We recently addressed this issue in *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107 (*Du Charme*). There, we acknowledged that section 425.16 may apply in some cases in which the challenged activity relates to an issue which may not be of interest to the "public at large" but which nevertheless is of interest to a "limited but definable *portion* of the public." (*Id*. at p. 118.) Ultimately, we held that "in order to satisfy the public issue/issue of public interest requirement . . . 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." (*Id*. at p. 119.)

In this case, the statements and conduct which gave rise to Taus's causes of action relate specifically to the validity of the Jane Doe case study which was the subject of the *Child Maltreatment* article and, more generally, to the question whether childhood memories of traumatic sexual abuse can be repressed and later recovered (the repressed

memory theory). The record before us contains considerable evidence of both (1) an ongoing controversy in academic and clinical circles within the field of psychology as to the validity of the repressed memory theory, and (2) that the publications at the root of this litigation are part of this ongoing debate.

Corwin's article appeared in *Child Maltreatment*, which describes itself as "the official journal of the American Professional Society on the Abuse of Children (APSAC), the nation's largest interdisciplinary child maltreatment professional organization." The *Child Maltreatment* article was published along with five separate commentaries of the Jane Doe case study authored by an array of individuals who practice or teach in the field of psychology. These commentaries are themselves strong evidence that the repressed memory theory is a subject of serious debate in the academic and professional psychology communities and, additionally, that the *Child Maltreatment* article significantly impacted the controversy relating to this theory.

Paul Ekman, a clinical psychologist at the University of California, San Francisco, published a commentary on the *Child Maltreatment* article in which he described the Jane Doe interviews as "an extraordinarily important record" and "a model for how to conduct interviews with children and adolescents about traumatic events." In another commentary, Frank Putnam, a medical doctor at the National Institute of Mental Health, stated that "this videotape of Jane Doe provides concrete evidence that delayed recall of traumatic childhood events does occur." Judith Armstrong, a clinical associate professor at the University of Southern California began her commentary on the article by noting that she saw Corwin's "remarkable set of videotapes" at a 1996 meeting of the International Society of Traumatic Stress Studies, where they stimulated a "spirited discussion" and that she appreciated the opportunity to document some of the ideas and developmental issues that the case study raises. Ulric Neisser, PhD, from Cornell University, described the Jane Doe videotapes as "remarkable" and stated that "[a]ll students of human memory, whatever their views, have reason to be grateful to David Corwin and Ema Olafson . . . for making this valuable material available." Finally, Jonathan Schooler, PhD, from the University of Pittsburg, contributed a commentary in

which he stated: "It is a testament to the progress that we have been making in the field that it is now possible for cognitive and clinical psychologists to discuss the various aspects of a discovered memory case in a civil and noncombative manner. It is my hope that this case may help to further deflate the tensions that have surrounded this controversial issue."

The record also contains a declaration by Maggie Bruck, a psychiatry professor at Johns Hopkins School of Medicine. Bruck attended an annual meeting of the of the International Society for Traumatic Stress Studies in Montreal in November 1997, where Corwin presented his Jane Doe case study and showed the videotaped interviews. According to Bruck, the *Child Maltreatment* article "has received considerable notoriety because of Dr. Corwin's claim that he discovered empirical evidence of a recovered memory by Jane Doe."

Elizabeth Loftus filed declarations in support of the section 425.16 motion, wherein she described her extensive research and publications pertaining to the "study of people involved in false accusations." Loftus stated that she has personally viewed the Jane Doe videotapes and that she read the *Child Maltreatment* article. Like Professor Bruck, Loftus expressed the opinion that Corwin's Jane Doe case study had a significant impact on the repressed memory debate. As she explained, "Dr. Corwin's apparent capture on videotape of the restoration of previously repressed memories was a significant event in the 'repressed' or 'restored' memory debate because it appeared to be empirical evidence to support the claim that traumatic memories can be repressed." Loftus also asserted that "the Jane Doe case history has received national attention in many academic, professional and legal circles," and she identified numerous publications which discussed the Jane Doe case.

There is also evidence that the *Skeptical Inquirer* articles impacted the repressed memory debate. The *Skeptical Inquirer* is the official journal of CSICOP which describes itself as a non-profit scientific and educational organization created to "encourage the critical investigation of paranormal and fringe-science claims from a responsible, scientific point of view." According to Barry Karr, the Executive Director of

CSICOP, the *Skeptical Inquirer* articles at issue in this case were “intended to be a contribution by CSICOP to the scientific communities’ and the general public’s understanding of issues associated with the use of single case studies in the debate over allegedly ‘recovered’ or ‘repressed’ memories of sexual abuse.”

The record contains an excerpt from a book by Richard J. McNally entitled *Remembering Trauma*, which was published by the Harvard University Press in 2003. The excerpted text contains a synopsis of Corwin’s *Child Maltreatment* article followed by this statement: “Although Corwin’s ‘Jane Doe’ case has been widely hailed in the clinical literature and in the courtroom as proof of repressed and recovered memory of sexual abuse, subsequent investigation of the case by Elizabeth Loftus and Mel Guyer . . . has undermined this claim. . . .” Putting aside McNally’s subjective assessment of the articles, his comments are further evidence that both Corwin and Olafson on the one hand and Loftus and Guyer on the other published articles addressing the ongoing and significant debate in academic and professional circles regarding the validity of the repressed memory theory.

By the same token, the Tavris article is evidence that the repressed memory theory is a subject of ongoing controversy. As Tavris explained, Loftus and Guyer challenged the *Child Maltreatment* article because it supported a theory they openly opposed and wanted to discredit. Tavris’s comments about the resistance that Loftus and Guyer encountered not only confirm the significance of the underlying debate regarding the repressed memory theory but also contribute to that ongoing controversy.

The evidence summarized above demonstrates (1) an ongoing controversy centered in academia but spilling over into other related professional communities regarding the validity of the repressed memory theory, (2) that the *Child Maltreatment* article contributed to that controversy; and (3) that appellants’ statements and conduct

which form the basis of Taus's claims all relate to that ongoing controversy as well.[5] Thus, even if the repressed memory debate is not of interest to the public at large, it is extremely important to a limited but definable portion of the public and the challenged conduct and statements "occur[ed] in the context of an ongoing controversy, dispute or discussion, such that [they] warrant[] protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance." (*Du Charme, supra*, 101 Cal.App.4th at p. 119.)

Furthermore, the evidence before us suggests that significant portions of the general public are indeed interested in the matters at issue in this litigation. We note that the record contains evidence of newspaper articles that appeared in the Seattle *Times* regarding Loftus's decision to leave the University of Washington and join the faculty at the University of California at Irvine. One article, written by Susan Kelleher, states that "[t]he topic of so-called 'repressed memory' remains charged with emotion and controversy, mostly because it is impossible to absolutely prove or disprove scientifically." The Kelleher article contains an extensive summary and commentary of the events leading up to Loftus's departure from the University of Washington. The record also includes a copy of an unsigned letter allegedly from Corwin to the managing editor of the Seattle *Times* complaining that he was misquoted in the Kelleher article. The final paragraph of this letter invites the Seattle *Times's* readers to read both the *Child Maltreatment* article and the *Skeptical Inquirer* articles, all of which are posted on the internet, and to form their own opinions about the Jane Doe case study.

This evidence indicates that the controversies regarding the validity of both the repressed memory theory in general and the Jane Doe study in particular are newsworthy matters of interest to substantial segments of the general public. Evidence that

[5] Since the record before us contains sufficient evidence that the public issue requirement of section 425.16 is satisfied, the Skeptical Inquirer appellants' Request for Judicial Notice, which offers additional evidence on this issue, is denied.

participants in these controversies have an internet audience also reinforces that conclusion.

C. *Likelihood of Success*

1. *Scope of Review*

Having found that the defendants' conduct which gave rise to Taus's claims relate to a matter of public interest, we must next consider whether Taus demonstrated a probability of prevailing on her claims. (*Equilon, supra*, 29 Cal.4th at p. 67.) "A plaintiff's burden under section 425.16 '"is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment."' The plaintiff is required to demonstrate that the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the plaintiff's evidence is credited. [Citation.] The court considers the pleadings and the supporting and opposing affidavits stating facts on which the liability or defense is based, and the motion to strike should be granted if, as a matter of law, the properly pleaded facts do not support a claim for relief. [Citation.]" (*Wilbanks, supra,* 121 Cal.App.4th at p. 901.)

However, "[a] motion to strike under section 425.16 is not a substitute for a motion for a demurrer or summary judgment [citation]. In resisting such a motion, the plaintiff need not produce evidence that he or she can recover on every possible point urged. It is enough that the plaintiff demonstrates that the suit is viable, so that the court should deny the special motion to strike and allow the case to go forward." (*Wilbanks, supra*, 121 Cal.App.4th at p. 905.)

Although, as noted above, our standard of review is de novo, the issues on appeal are necessarily dictated by the notice of appeal. Therefore, we do not address (1) any of Taus's claims against the University; (2) Taus's fraud claim against Loftus; or (3) Taus's defamation claim against Tavris. The first of these limitations arises from the fact that the University did not move to strike any claims in the trial court and is not a party on

appeal.[6] The other two limits on the scope of our review are necessitated by the fact that Taus did not appeal the September 18 order pursuant to which the court dismissed her fraud claim against Loftus and her defamation claim against Tavris.

As noted above, appellant Shapiro filed an individual notice of appeal and its own appellate briefs. As it did in the trial court, Shapiro concurs in and adopts the arguments of the other appellants, but also makes arguments relating to its specific role in the matters giving rise to this litigation. As we address the second prong of the section 425.16 test, we will attempt to address Shapiro's individual arguments. However, we reject at the outset Shapiro's contention that the trial court abused its discretion by failing to issue a separate order addressing Shapiro's concurring motion to strike. The express reference to that concurring motion in the September 18 order sufficiently manifests the trial court's intent to dispose of it along with the other appellants' motion to strike. Shapiro does not cite any authority entitling it to a separate ruling on its concurring motion.

2. *Negligent Infliction of Emotional Distress*

As our Supreme Court has "repeatedly recognized," "'[t]he *negligent* causing of emotional distress is not an independent tort, but the tort of *negligence*. [Citations.] The traditional elements of duty, breach of duty, causation, and damages apply. [¶] Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability. [Citation.]' [Citations.]" (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.)

In her appellate brief, Taus does not articulate any theory of negligence that might apply in this case. Indeed, negligence is not even mentioned here or in the opposition to the motion to strike that Taus filed in the trial court. Taus's appellate brief does contain

[6] In light of this fact, we are perplexed by, and will simply ignore, the portion of the September 18 order purporting to deny a motion to strike Taus's claims against the University.

an extremely vague argument that appellants' breached their ethical obligations by violating applicable professional standards. But, Taus does not identify a single ethical obligation or professional standard that was allegedly breached. Instead, she contends that appellants have essentially conceded that publishing the *Skeptical Inquirer* article constituted a violation of the ethical obligations of a psychologist. Not surprisingly, appellants concede no such thing.

Taus has failed to carry her burden of establishing a likelihood that she will prevail on her claim that appellants are liable to her for negligent infliction of emotional distress. Therefore, this claim must be stricken.

3. *Invasion of privacy*

The allegations in the first amended complaint implicate two distinct theories by which Taus might establish an invasion of privacy: (1) public disclosure of private facts, and (2) intrusion into private matters. We will separately address these two theories.

a. *Public disclosure of private facts*

"The claim that a publication has given unwanted publicity to allegedly private aspects of a person's life is one of the more commonly litigated and well-defined areas of privacy law." (*Shulman v. Group W Productions* (1998) 18 Cal.4th 200, 214 (*Shulman*).) The elements of this tort are: "'(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.' [Citations.]" (*Id.* at p. 214.) With respect to this fourth element, our Supreme Court has held that "lack of newsworthiness is an element of the 'private facts' tort, making newsworthiness a complete bar to common law liability."[7] (*Id.* at p. 215.) However, as the *Shulman* court also recognized, a person's involvement in a newsworthy incident does not make everything that person says or does newsworthy. (*Id*. at p. 223.)

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[7] As the court also noted, lack of newsworthiness is not only an element of the private facts tort, it is also "a constitutional defense to, or privilege against, liability for publication of truthful information." [Citations.] (*Shulman, supra*, 18 Cal.4th at p. 216.)

The *Shulman* court set forth the following test for assessing newsworthiness in a context similar[8] to the present case: "[C]ourts have generally protected the privacy of otherwise private individuals involved in events of public interest 'by requiring that a logical nexus exist between the complaining individual and the matter of legitimate public interest.' [Citation.] The contents of the publication or broadcast are protected only if they have 'some substantial relevance to a matter of legitimate public interest.' [Citation.] Thus, recent decisions have generally tested newsworthiness with regard to such individuals by assessing the logical relationship or nexus, or the lack thereof, between the events or activities that brought the person into the public eye and the particular facts disclosed. . . . This approach accords with our own prior decisions, in that it balances the public's right to know against the plaintiff's privacy interest by drawing a protective line at the point the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report [Citation.] This approach also echoes the Restatement commentators' widely quoted and cited view that legitimate public interest does not include 'a morbid and sensational prying into private lives *for its own sake* . . . .' [Citations.]" (*Shulman, supra*, 18 Cal.4th at pp. 223-224.)

In the present case, Taus has identified three allegedly improper disclosures: (1) the *Skeptical Inquirer* article; (2) the Tavris article and (3) statements Loftus made in other contexts. As we will explain, only the third of these disclosures supports an invasion of privacy claim based on an improper disclosure theory.

Taus has not identified any private fact that was revealed in the *Skeptical Inquirer* or Tavris articles which is not newsworthy. To the extent these articles disclosed private information about Taus's past that was not already disclosed in the *Child Maltreatment* article, these facts related to the validity of Corwin's conclusions that Taus was abused

[8] *Shulman* involved a plaintiff who was *involuntarily* involved in a matter of legitimate public interest and, arguably, is distinguishable from the present case because Taus consented to Corwin's use of the Jane Doe case study. Nevertheless, in light of the confidentiality attached to the case study, including particularly the protection of Taus's identity, we find the *Shulman* analysis applies with equal force in this context.

by her mother, repressed the memory of sexual abuse and then recovered that memory 11 years later. As discussed more fully above, the role of the Jane Doe case study in the repressed memory debate made the validity of that case study a matter of legitimate public interest.

The Tavris article also disclosed the fact that Jane Doe had filed an ethics complaint against Loftus and other details about the University's investigation of Loftus. Taus suggests the disclosure of these facts is actionable conduct. However, we find that facts relating to the University investigation were not private to Taus because they also directly relate to Loftus's personal and professional lives. Taus does not articulate any valid theory pursuant to which Tavris should be held liable for publishing private facts about Loftus that Loftus apparently chose to share with her. Beyond that, as we explained more fully above, the University investigation of Loftus also relates, though not as directly, to the repressed memory debate which is a matter of public interest.

But Taus has also alleged that Loftus disclosed private facts about her in other contexts. For example, there is evidence in the record that Loftus made the following statement at a seminar: "Jane Doe engaged in destructive behavior that I cannot reveal on advice of my attorney. Jane is in the Navy representing our country." There is also evidence that Loftus revealed the first and last initial of Taus's real name during a deposition in an unrelated court action. These comments publicly disclose private information about Taus which is not newsworthy. They do not relate in any way to the validity of the Jane Doe study, the repressed memory debate or to any other matter of legitimate public interest. They are clues as to the true identity of Jane Doe and, under the circumstances, a reasonable jury could find that disclosing this information was both offensive and objectionable.

We underscore that Jane Doe's real name is not a matter of public interest; it has no bearing on the validity of the Jane Doe study or on the repressed memory debate. Further, although appellants were able to discover Doe's identity, Corwin did attempt to keep that information confidential. By the same token, though, appellants did not disclose Doe's identity in either the *Skeptical Inquirer* article or the Tavris article. We

reject Taus's contention that these articles provided a road map to her true identity. Indeed, the record rather clearly demonstrates that Corwin himself unwittingly provided that map. Finally, we acknowledge undisputed evidence in this record establishing that many of these appellants did not learn Jane Doe's identity until Taus filed the present lawsuit. We note these facts here to underscore our conclusion that Taus has failed to support her contentions that publishing the *Skeptical Inquirer* and Tavris articles constituted public disclosure of private facts about her.

Thus, the only appellant against whom Taus has made a prima facie case of invasion of privacy based on a public disclosure theory is Loftus. Furthermore, that showing is based not on the *Skeptical Inquirer* article but, rather, on statements Loftus has allegedly made in other contexts. Having said that, we must next consider whether Taus has made a prima facie showing to support her invasion of privacy claim against the remaining appellants based on an intrusion theory.

b. ***Intrusion into private matters***

The elements of an invasion of privacy claim based on an intrusion into private matters are: "(1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." (*Shulman, supra*, 18 Cal.4th at p. 231.)

The first of these elements requires an intentional intrusion, physical or otherwise upon the solitude or seclusion of another. Since the place, conversation or matter must be private to the plaintiff, there is "'no liability for the examination of a public record concerning the plaintiff, . . . [or] for observing him or even taking his photograph while he is walking on the public highway. . . .' [Citations.] To prove actionable intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source. [Citations.]" (*Shulman, supra*, 18 Cal.4th at pp. 231-232.)

Taus has identified three alleged intrusions into her zone of privacy: (1) establishing a friendship with Taus's biological mother in order to obtain personal

information about Taus; (2) securing interviews with friends and family through fraudulent means; and (3) collecting and disseminating confidential information about Taus from various court files.

The friendship between Loftus and Taus's mother is not an intrusion into Taus's private life. The subjects that Taus's mother discussed with Loftus were not private to Taus because they also obviously involved Taus's mother. By her own admission, Taus has had very little contact with her mother and she cannot now reasonably contend that they have a private relationship in which Loftus has somehow intruded. Taus's mother has as much right to share her story with Loftus as Taus has to share the details of her life with Corwin.

Taus's second contention, that appellants conducted interviews by fraudulent means, is supported by the declaration of Taus's foster mother, Margie Cantrell. Cantrell stated that Loftus contacted her in late 1997, told her she was working with Corwin to help Taus, and requested that Cantrell come to an office to answer some questions. Cantrell stated that she accepted the invitation because she knew Corwin and she knew that Taus trusted him and because she wanted to help Taus. Cantrell further stated that, when she met Loftus, Loftus welcomed her, "saying again that she was working with Dr. Corwin and was actually his supervisor in connection with his study of [Taus]." According to her declaration, Cantrell agreed to a recorded interview in reliance on Loftus's representation that she worked with Corwin. However, as the questions that Loftus asked her became "increasingly hostile," Cantrell became concerned and sought assurance that Loftus worked with Corwin. When that assurance was not provided, Cantrell asked for the tape of her interview which Loftus refused to provide.

Cantrell's declaration is undisputed evidence that appellants penetrated a zone of privacy which included Cantrell, who was not only a close friend and confidant of Taus but also a mother figure to her, by misrepresenting their identity and true purpose. Appellants contend that only Cantrell has standing to pursue a claim based on these alleged misrepresentations. We agree that Taus cannot use this evidence to support her fraud claim. On the other hand, this evidence is relevant to show that appellants intruded

into a private area of Taus's life. Indeed, this evidence actually suggests that appellants were aware that the information they sought was private and that it would not have been shared with them had they been truthful about the nature and purpose of their investigation.

Taus's third contention is that appellants obtained private information about her from court files. Although not completely clear, Taus appears to have two distinct arguments. First, she complains that appellants gathered information about her from documents, such as medical and CPS reports, which, although contained in files open to the public, were of a confidential nature. To support this contention, Taus cites Family Code section 3118 which provides that court ordered child custody evaluations, investigations or assessments made in connection with a serious allegation of child abuse are confidential. We must reject this argument because, as noted above, there can be "no liability for the examination of a public record concerning the plaintiff." (*Shulman, supra*, 18 Cal.4th at p. 231.)

However, Taus also contends that appellants obtained private information about her from documents in her juvenile dependency case file. Juvenile court files are not public records, they are confidential. Access to such files and dissemination of information contained therein are expressly limited and governed by Welfare and Institutions Code section 827. Pursuant to that statute, appellants could not have properly accessed Taus's juvenile records without a court order. (*Shulman, supra*, 18 Cal.4th at p. 231.)

Appellants suggest that Taus "incorrectly" assumes that the court records appellants obtained "came from the Solano County file (which was a juvenile proceeding)" when, in point of fact, "any medical or psychological reports they obtained came from the Stanislaus County divorce proceeding."[9] Indeed, appellants maintain that

[9] Notwithstanding this admission that the Solano County court file involving Taus's family was "a juvenile proceeding," at oral argument counsel for the Skeptical Inquirer appellants took the position that the record does not disclose whether the Solano County file pertained to a confidential juvenile proceeding. *In re William T., supra*, 172

"[t]he only evidence before this Court is that Defendants received any psychological or medical reports in their possession legally." That evidence, according to appellants, is a declaration by a private investigator named Gary Ermoian, who is not a named defendant in this case.

In his declaration, Ermoian stated that, at Loftus's request, he went to the Stanislaus County Superior Court in Modesto in July 1997 and reviewed public court files with the name "Taus." Ermoian further stated that he made and sent Loftus copies of letters from a social worker and a doctor which concerned Taus. Ermoian stated that the documents were not sealed or labeled as "confidential." Ermoian's declaration thus supports appellants' contention that they obtained information about Taus from public court files. However, contrary to appellants' contention, this declaration is not the only evidence relevant to this issue.

Apparently appellants would have us ignore the declaration of Harvey Shapiro, the sole owner and proprietor of appellant Shapiro Investigations. Shapiro is a retired police officer and detective who is currently licensed as a private investigator. In his declaration, Shapiro stated that Loftus contacted him in September 1997 and asked him to help her and Guyer investigate statements Corwin made regarding the Jane Doe case. Shapiro assigned to his assistant the task of searching public records at the Solano County court house. The search was guided by a list of names of persons who may have been involved in the Jane Doe case which Loftus had given to Shapiro. Shapiro's assistant told him she copied "voluminous public records" which may have been relevant to the Jane Doe case.

Shapiro's declaration is evidence that appellants did in fact obtain information about Taus from court files in *Solano County*. Although Shapiro characterizes the "voluminous" documents as public records, he did not copy them himself. This evidence

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Cal.App.3d 790, makes clear that Taus's parents litigated their custody battle in Stanislaus County Superior Court but that Taus's juvenile dependency case was, indeed, filed and determined in Solano County. As noted earlier in this opinion, the Skeptical Inquirer appellants identified *In re William T.* as a crucial resource in their investigation.

is cause for concern because (1) appellants have conceded that the court files in Solano County were juvenile files, which are confidential; and (2) appellants now steadfastly refuse to discuss or even acknowledge possession of these "voluminous" documents. In other words, appellants have been less than candid about the fact that they obtained "voluminous" documents from court files in Solano County.

Our concern on this point deepens when we consider other statements in the Shapiro declaration. For example, Shapiro stated that appellants discovered the name of Taus's foster mother, Margie Cantrell, in the voluminous documents obtained from the Solano County court files. Shapiro happened to know Cantrell and he candidly admitted in his declaration that he facilitated a meeting between Cantrell and Loftus by misleading Cantrell as to the reason for his interest in her. Shapiro also stated that appellants learned the name and whereabouts of Taus's stepmother during their interview of Cantrell.

Thus, the Solano County court files proved to be a fruitful source of information for appellants. They provided the link to Cantrell who, during an interview initiated by false pretense, provided the link to Taus's stepmother. In light of these circumstances, the unanswered questions as to whether the Solano County files were confidential and, if so, how they were accessed may have a significant impact on Taus's intrusion claim.

Throughout her appellate brief, Taus improperly attempts to shift her burden of proof to appellants. However, in this instance, Taus's observation that appellants have failed to disclose what documents they have or how those documents were obtained is relevant because, absent evidence as to how the voluminous documents from the Solano County court case were accessed and copied, a jury could reasonably infer that some form of trickery or misconduct was employed to obtain them, particularly because there is evidence of such conduct with respect to other aspects of appellants' investigation.

Appellants contend they are not liable for their investigation into Taus's background because the First Amendment protects the right to gather information. The authority they cite recognizes that "routine reporting techniques" are constitutionally protected and that "[s]uch techniques, of course, include asking persons questions, including those with confidential or restricted information." (*Nicholson v. McClatchy*

Newspapers (1986) 177 Cal.App.3d 509, 519-520.) This authority is not controlling here, however, because Taus has presented evidence that the reporting techniques that appellants employed were not routine.

Taus has presented evidence that appellants used deception and trickery to penetrate a zone of privacy surrounding Taus's close family members in order to obtain private information about Taus that would not have been disclosed in a truthful encounter, and that they may also have improperly accessed and used information from confidential court files. If a jury finds appellants engaged in such conduct, it could also reasonably conclude that such conduct was "highly offensive to a reasonable person." (*Shulman, supra*, 18 Cal.4th at p. 231.) Thus, Taus has made a prima facie case of invasion of privacy based on an intrusion theory.

Taus's intrusion claim is based on the investigation which preceded and precipitated the *Skeptical Inquirer* article. Since the Skeptical Inquirer appellants do not distinguish among themselves, it is very difficult to determine what role any one of them played in the investigation relating to the article. However, we find no evidence that Tavris participated in any aspect of the investigation or in the drafting or publication of the *Skeptical Inquirer* article. Thus, Taus has not made a prima facie case of invasion of privacy against Tavris and her claim against this particular appellant must be stricken.

By contrast, Taus has made a prima facie case against Shapiro, in addition to Loftus, because Shapiro's agent conducted the search of the Solano County court files. Furthermore, Shapiro himself arranged and participated in the interview of Cantrell.

4. *Defamation*

The final cause of action we must consider is Taus's defamation claim against Loftus. Taus bases that claim on three statements contained in the *Skeptical Inquirer* article and two statements made in other contexts.

a. *Guiding principles*

"Defamation is an invasion of the interest in *reputation*." (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 471, p. 557.) "The tort involves a publication which is false, defamatory and unprivileged, and which has a natural tendency to injure or which

causes special damage. [Citations.]" (*Id*. at p. 558.) "Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the 'public' at large; communication to a single individual is sufficient. [Citations.]" (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) Defamation includes both libel and slander. As a general rule, libel is a permanent form of defamation while slander typically takes a transitory form and is restricted to oral statements and gestures. (5 Witkin, Summary of Cal. Law, *supra*, at § 472, p. 558.)

"[T]o state a defamation claim that survives a First Amendment challenge, plaintiff must present evidence of a statement of fact that is provably false. [Citation.] 'Statements do not imply a provably false factual assertion and thus cannot form the basis of a defamation action if they cannot "'reasonably [be] interpreted as stating actual facts' about an individual."'" (*Seelig v. Infinity Broadcasting Corp*. (2002) 97 Cal.App.4th 798, 809 (*Seelig*).) Thus, "satirical, hyperbolic, imaginative, or figurative statements are [constitutionally] protected because 'the context and tenor of the statements negate the impression that the author seriously is maintaining an assertion of actual fact.' [Citation.]" (*Franklin v. Dynamic Details, Inc*. (2004) 116 Cal.App.4th 375, 385.) By the same token, a statement of opinion is actionable only if it implies a false assertion of fact. (*Ibid.*; *Wilbanks, supra*, 121 Cal.App.4th at p. 903; see also *Underwager v. Channel 9 Australia* (1995) 69 F.3d 361, 366.)

"The dispositive question . . . is whether a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion. [Citation.]" (*Seelig, supra,* 97 Cal.App.4th at p. 809.) To determine whether a statement contains a provably false factual assertion, we apply a totality of the circumstances test pursuant to which we consider both the language of the statement itself and the context in which it is made. (*Ibid*.) The words used "'"must be understood in a defamatory sense."'" (*Ibid*.) When considering context, we "'"look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed."' [Citations.]" (*Id*. at pp. 809-810)

"In all cases of alleged defamation, whether libel or slander, the truth of the offensive statements or communication is a complete defense against civil liability, regardless of bad faith or malicious purpose. [Citations.]" (*Smith v. Maldonado, supra*, 72 Cal.App.4th at p. 646.) "The burden of pleading and proving truth is generally on the defendant. [Citation.] However, in an action initiated by a private person on a matter of public concern, the First Amendment requires that the plaintiff bear the burden of proving falsity. [Citations.]" (*Id*. at p. 646, fn. 5; see also *Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 ["The First Amendment trumps the common law presumption of falsity in defamation cases involving private-figure plaintiffs when the allegedly defamatory statements pertain to a matter of public interest. [Citation.]"].)

b. *The Skeptical Inquirer article*

Taus bases her defamation claim on the following three statements from the *Skeptical Inquirer* article:

(1) After Jane met with Corwin and viewed the tapes, "she started behaving in self-destructive ways, and soon left FosterMom's home."

(2) "Jane terminated her newly emerging relationship with her mother after Corwin came back into her life and replayed her childhood tape. Her mother lost her once, long ago in 1984, and lost her again in 1995. At this writing they are not in contact with one another."

(3) "If the abuse never happened in the first place, the adult-child may be mistakenly led to believe that it did because she does not understand that there are reasons why a child might make an abuse report even when no abuse had occurred. She may be led to act on the basis of this 'new information' in ways that she would not have otherwise acted, with results devastating for her and others. In this case, for example, Jane terminated her newly reforming relationship with her mother after seeing her childhood tapes."

Since, as discussed above, these statements relate to a matter of public interest, Taus has the burden of proving falsity. (*Smith v. Maldonado, supra*, 72 Cal.App.4th at p. 646; *Nizam-Aldine v. City of Oakland, supra,* 47 Cal.App.4th at p. 375.) Taus has not

established that any express factual assertion in any of these three statements is false. Indeed, as appellants' contend, the record contains evidence that each statement contains some truth.[10] However, a publication is not insulated from a defamation claim simply because it states some truths. (*Wilbanks, supra,* 121 Cal.App.4th at pp. 901-902.) Here, Taus contends these statements are defamatory because they can be reasonably construed as implying one or more falsehoods about her.

According to Taus, the first statement from the article about which she complains could be reasonably construed as stating that Taus physically injured herself and ran away from home after she viewed the tapes with Corwin. However, when viewed in the context of the article in which it appeared, the statement does not imply either of these factual assertions. Rather, the statement relates to Jane's foster mother's recollection about Jane's change in behavior after she viewed the tapes, which included such things as expressing anger toward the foster mother and refusing to follow "strict rules against staying out late and misbehavior." Taus has not denied engaging in such conduct.

The second statement quoted above, Taus contends, falsely states or implies that Corwin interjected himself into Taus's life and was the cause of the broken relationship between Taus and her mother, that Taus's "decision making was controlled by the impact of the videotapes," and that viewing the tapes caused Taus to acquire a "fixed belief against seeing her biological mother." Similarly, Taus argues the third statement falsely implies that Taus terminated her relationship with her mother because of what she saw on the tapes when, in fact, "Loftus's own interference" caused Taus to terminate her relationship with her mother.

The implied statements that Taus extracts from these express statements are expressions of opinion as to why Taus terminated her renewed relationship with her biological mother. That opinion (that viewing the tapes caused Taus to end the

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[10] For example, Taus conceded in her declaration that her foster mother may have had concerns about her behavior. Further, Taus does not dispute that she left her foster home or that she terminated her relationship with her mother after she viewed the videotapes with Corwin.

relationship) is a subjective one that could be drawn from facts presented in both the *Child Maltreatment* and the *Skeptical Inquirer* articles.

"'A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning.' [Citation.] The rationale for this rule is that '[w]hen the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts.' [Citation.] When the facts supporting an opinion are disclosed, 'readers are free to accept or reject the author's opinion based on their own independent evaluation of the facts.' [Citations.]" (*Franklin v. Dynamic Details, Inc.*, *supra,* 116 Cal.App.4th at p. 387; see also *Underwager v. Channel 9 Australia, supra*, 69 F.3d at pp. 366-367 [expressions of the speakers' professional points of view were opinions not factual assertions].)

The only statements that Taus has implied from the express statements quoted above are expressions of opinion. Those implied opinions could reasonably be drawn from the facts expressly disclosed to the reader of the *Skeptical Inquirer* article. Taus does not question the truth of those underlying facts. Therefore, the challenged statements cannot support a defamation claim against Loftus.

c. *The June 14, 2001, statement*

Taus complains that on June 14, 2001, Loftus made the following statement during a speech she gave in Toronto: "'I continue to be the target of efforts to censor my ideas. I am gagged at the moment and may not give you the details. . . . Who after all benefits from my silence? Who benefits from such investigations in the dark? The only people who operate in the dark are thieves, assassins and cowards.'"

Under the totality of the circumstances, no reasonable person who heard this statement on June 14, 2001, could have interpreted it as a statement of actual fact concerning Taus. Because this statement was made before the *Skeptical Inquirer* article was published, it is unlikely anyone even connected it to Jane Doe.

Taus contends that this statement is now posted on appellants' web site. Considering the totality of the circumstances, viewers of that website are undoubtedly familiar with Loftus's role in the controversy regarding the repressed memory theory and with the professional dispute between Corwin and his followers, on the one hand, and Loftus and her followers, on the other, regarding the validity of the Jane Doe case study. When viewed in this context, as a statement made during the course of a heated professional debate regarding the validity of a highly controversial theory, any reasonable person would understand Loftus's colorful statement as the rhetoric of an agitated advocate whose efforts to promote a professional theory were thwarted by those who disagreed with her. As used in this way, the terms "thieves, assassins and cowards" are nothing more than "'subjective expression[s] of disapproval, devoid of any factual content.'" (*Seelig, supra*, 97 Cal.App.4th at p. 811.)

d. *The October 2002 statement*

Finally, Taus contends that Loftus made the following allegedly slanderous statement at a conference in October 2002: "'Jane Doe engaged in destructive behavior that I cannot reveal on advice of my attorney. Jane is in the Navy representing our country.'"[11]

In contrast to the other statements upon which Taus relies, this statement is not an expression of opinion or a subjective professional judgment drawn from fully disclosed facts. The truth of the factual assertion that Taus is in the military service is undisputed. However, when viewed in its totality this challenged statement could reasonably be interpreted as implying that Taus's ongoing destructive behavior or the effects of past behavior make her unfit for military service.

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[11] Appellants maintain that Loftus "did not combine the statements about 'Jane Doe's' previous 'destructive behavior' and Plaintiff's current services in the military." However, Taus has submitted the declaration of Lynn Crook. Crook stated that she attended the False Memory conference and made careful notes. According to Crook, Loftus made the statement quoted above. Appellants maintain that Crook is not credible. However, it is not appropriate for us to weigh the evidence or make credibility determinations in this context. (*Wilbanks, supra*, 121 Cal.App.4th at p. 905.)

Even if we were to find that fitness for military service is a subjective concept upon which reasonable minds could differ, the challenged statement directly communicates to the listener that the speaker has knowledge of undisclosed facts supporting a conclusion that Taus is unfit. "A statement of opinion may be actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." (*Wilbanks, supra*, 121 Cal.App.4th at pp. 902-903; see also *Franklin, supra*, 116 Cal.App.4th at p. 385.) The statement at issue here clearly does imply facts which may be provably false.

Furthermore, in contrast to the statements made in the *Skeptical Inquirer* article, this statement does not relate to a matter of public interest. It has no bearing on the validity of the Jane Doe case study or on any aspect of the controversy relating to the repressed memory theory. Rather, the statement arguably pertains to Taus's present qualifications to perform her duties as a member of the military. Since the public has no legitimate interest in that matter, the truth of the alleged statement is a defense with respect to which Loftus has the burden of proof. Loftus has not presented any evidence that Taus has engaged in behavior which makes her unfit for military service.

Appellants contend that this and all of the statements about which Taus complains are not actionable because they do not identify Taus by name. According to appellants, "[c]ourts uniformly reject defamation and invasion of privacy claims if the plaintiff is not readily identifiable from the publication." The only California authority appellants cite for this proposition is *Smith v. National Broadcasting Co*. (1956) 138 Cal.App.2d 807, 813-814, which did not pertain to defamation. In any event, appellants' substantive contention that Taus is not sufficiently identifiable might be persuasive with respect to statements in the *Skeptical Inquirer* article. However, as noted during our discussion of Taus's invasion of privacy claim against Loftus, the statement at issue here was made in the aftermath of the publication of the *Skeptical Inquirer* article and the events relating thereto and constitutes a clue to Taus's identity. When viewed under the totality of the circumstances, a reasonable trier of fact could find that the challenged statement sufficiently relates to Taus notwithstanding the express reference to Jane Doe.

D. *Conclusion*

As discussed above, section 425.16 applies to Taus's first amended complaint because the statements and conduct giving rise to her various claims relate to matters of public interest. Furthermore, Taus has not carried her burden of showing a likelihood of succeeding in proving her claims for (1) negligent infliction of emotional distress or (2) invasion of privacy as alleged against appellant Tavris. However, Taus has made a prima facie case to support her claims for (1) invasion of privacy as alleged against all the appellants except Tavris; and (2) defamation as alleged against Loftus.

IV. DISPOSITION

The September 18 order is vacated insofar as it denies the motion to strike (1) the first cause of action for negligent infliction of emotional distress as alleged against all appellants; and (2) the second cause of action for invasion of privacy as alleged against appellant Tavris. This case is remanded to the trial court for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Ruvolo, J.