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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

YVETTE McDOUGALL et al., Plaintiffs and Appellants, v. THRIFTY PAYLESS, INC., et al., Defendants and Respondents.	A141510 (Alameda County Super. Ct. No. HG-13-675456)

Plaintiffs Yvette McDougall and Vanessa McDougall appeal after the trial court granted a special motion to strike their tort claims under Code of Civil Procedure section 425.16,[1] also known as the anti-SLAPP (strategic lawsuit against public participation) statute. We affirm.

I. BACKGROUND

On April 15, 2012, the McDougalls attempted to fill three prescriptions, two for Oxycodone and one for Norco, at a Rite Aid pharmacy in San Leandro.

The pharmacist on duty, Sherwin Samson, found the prescriptions suspicious. The McDougalls live in Modesto, had received the three prescriptions from a physician in Fresno, and were attempting to fill the prescriptions in San Leandro. In Samson's professional experience, traveling such a long distance for the filling of a prescription bespoke fraud. Furthermore, the combined prescriptions amounted to a significant quantity of narcotics for which the McDougalls intended to pay nearly $600 in cash. In

[1] All undesignated statutory references are to the Code of Civil Procedure.

light of all of these factors, Samson believed the McDougalls were fraudsters trying to fill counterfeit prescriptions.

Before acting on his suspicions, Samson looked up the prescribing doctor's information and discovered that he had been linked to a substantial number of fraudulent prescriptions. This information was corroborated by another local Rite Aid pharmacy, which faxed a copy of one of the doctor's fraudulent prescriptions to Samson. Comparing the documents, Samson believed the prescriptions looked "very, very similar."

Samson then instructed his technician to call the police, and the technician explained to the police that Samson believed fraudulent prescriptions had been passed in the pharmacy. When the police arrived, Samson explained the situation, showed the officers the suspect prescriptions and the faxed fraudulent prescription, and told the officers that, because the documents were so similar, he believed the McDougalls' prescriptions were fake.

The officers then arrested the McDougalls in the Rite Aid parking lot and cited them for violation of California Health and Safety Code section 11368, which bans the use of forged or altered prescriptions. When, upon investigation, the prescriptions were determined to be valid, however, the Alameda County District Attorney declined to bring charges.

The McDougalls then brought suit against defendants Thrifty Payless, Inc. dba Rite Aid[2] and Samson (collectively, Rite Aid) asserting causes of action for professional negligence, defamation,[3] invasion of privacy, and intentional infliction of emotional distress, based on harm that resulted from their arrest: they posted bail, had to seek psychiatric medical treatment, and experienced humiliation, anxiety, fear, and mental distress. Additionally, the California Department of Motor Vehicles revoked Yvette

[2] The McDougalls erroneously designated this defendant as "Rite Aid Corporation" in the complaint.

[3] The McDougalls have withdrawn this cause of action on appeal.

McDougall's ambulance driver certificate, causing her to lose her job. Rite Aid responded by filing an anti-SLAPP motion, which the trial court granted, ruling Rite Aid was entitled to recover its costs and attorney fees pursuant to section 425.16, subdivision (c).[4]

II. DISCUSSION

An order granting a special motion to strike under section 425.16 is appealable. (§§ 425.16, subd. (i), 904.1, subd. (a)(13).) Our standard of review is de novo—we conduct the same analysis as the trial court in determining whether to affirm or reverse. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

A. *The Anti-SLAPP Procedure*

The intent of the anti-SLAPP statute is to dispose of frivolous litigation primarily aimed at inhibiting a defendant's free speech rights. (*Flatley v. Mauro*, *supra*, 39 Cal.4th at pp. 311–312.) The statute allows a defendant to file a special motion to strike that is not unlike a motion for summary judgment. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

Disposition of an anti-SLAPP motion involves the application of a two-prong test requiring, first, that the moving defendant show the challenged causes of action arose from protected activity, i.e., an act in furtherance of the right of free speech, as determined in section 425.16, subdivision (e). (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; *Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1387; *Smith v. Adventist Health System/West* (2010) 190 Cal.App.4th 40, 50.)

If the defendant makes this initial showing, the burden then shifts to the plaintiff to establish that her claim is both legally sufficient and supported by a prima facie showing of facts such that it could result in a favorable judgment. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) The plaintiff need only show that her claims have

[4] The McDougalls also named as defendants the City of San Leandro and a San Leandro police officer and asserted a cause of action for false arrest/false imprisonment against those defendants. Those defendants are not parties to this appeal. The McDougalls state in their appellate brief that the trial court proceedings involving the San Leandro defendants have been stayed pending disposition of this appeal.

minimal merit to survive an anti-SLAPP motion: the evidence favorable to the plaintiff is accepted as true, while the defendant can only prevail if its evidence defeats the plaintiff's claims as a matter of law—for example, if the defendant's conduct was privileged. (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490 (*Castleman*).) If the plaintiff fails to meet this low burden, the anti-SLAPP motion should be granted and the suit dismissed, and the defendant is entitled to an award of costs and attorney fees. (§ 425.16, subd. (c)(1).)

B. *Samson's Conduct was Protected*

Rite Aid's initial burden for purposes of the anti-SLAPP statute was to show that the McDougalls' claims arise from activity protected by section 425.16. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) As noted, the McDougalls claim they sustained harm because of their arrest, which resulted from Samson's conduct (i.e., having his technician call the police, and, once the officers arrived, speaking with them and showing them the McDougalls' prescriptions and the known fraudulent prescription that had been faxed from another pharmacy). Rite Aid claims Samson's actions constituted a report of suspected criminal activity to the police. It is unquestionable that such police reports come within the protection of the anti-SLAPP statute. (See *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1569–1570; see also *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941–942.) They are also protected by Civil Code section 47, the litigation privilege, because government authorities seek to encourage private citizens to report suspected crimes to the police. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 364–365.)

While the McDougalls recognize that reports of suspected crimes to police are protected conduct, they argue what Samson did here consisted of two separate, distinct actions. Specifically, they classify the giving of the prescriptions to the police as a separate act that is not included under the umbrella of making a police report. Indeed, the McDougalls believe it was an illegal release of medical records amounting to professional misconduct. This set of arguments does not defeat Rite Aid's showing at the first step of the anti-SLAPP analysis.

First, the McDougalls suggest Samson's act of showing the prescriptions to the police, when considered in isolation, would not constitute protected activity because it was not a written or oral statement (see § 425.16, subd. (e)(1)–(2)). But Samson released the McDougalls' prescriptions in the course of making a police report. Samson did not first make a police report and then disclose the prescriptions—there was no separation between the two acts. Indeed, there was no separation in time to suggest that the two acts were as distinct as the McDougalls claim they are. Samson did not telephone the police himself; his assistant made the call. When the police arrived at the pharmacy, Samson gave the police an account of what had happened and what crime he believed the McDougalls were in the process of committing, and as evidence of his suspicions, he handed the prescriptions to the police. We view the oral report and the release of the prescriptions as nothing more than two parts of the same communicative act.

The complaint and the declarations submitted to the court in connection with the anti-SLAPP motion confirm Samson's act of showing the prescriptions to the police was inextricably intertwined with his oral statements to the police about why he suspected the prescriptions were fraudulent. Samson explained in his declaration that these acts were essentially simultaneous and occurred during the same conversation with the officers: "When the police officers arrived, I showed [the McDougalls'] prescriptions to the officers along with the example of the confirmed fraudulent prescription I had received from the other store. I told the police that I suspected [the McDougalls'] prescriptions were fraudulent, after comparing them to a known fake." The McDougalls' complaint describes the interaction similarly, stating "When defendants disclosed plaintiffs' private and confidential pharmacy records they told [the police officers] that plaintiffs' prescriptions were forged and therefore illegitimate." And the McDougalls' declarations also state that Samson told the officers he believed the prescriptions were forged and false *and* gave the prescriptions to the officers. In these circumstances, we view Samson's act of showing or handing the prescriptions to the police as an integral part of the protected activity of reporting suspected criminal conduct to the police. (See *Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 210 [the

defendant attorneys' alleged act of improperly retaining a computer hard drive belonging to the plaintiff constituted protected activity because it arose out of the defendants' representation of their clients in an underlying litigation matter]; see also *Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 412 [the plaintiff's cause of action against the defendant "would have no basis in the absence of Dowling's protected activities"].)

Second, the McDougalls' argument that Samson violated statutory or other limitations on disclosure of medical records provides no basis for finding Samson's conduct was not protected activity for purposes of the first step of the anti-SLAPP analysis. " '[C]onduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is *alleged* to have been unlawful or unethical.' " (*Contreras v. Dowling, supra,* 5 Cal.App.5th at p. 414.) And we reject the McDougalls' brief suggestion that Rite Aid may not avail itself of the anti-SLAPP statute because Samson's conduct was illegal as a matter of law. *Flatley v. Mauro, supra,* 39 Cal.4th at p. 316, which the McDougalls cite in support of this argument, establishes a very narrow exception, which applies only "where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence." (*Ibid.*) As we will discuss in part II.C below, the McDougalls have not conclusively established Samson's conduct is illegal; to the contrary, we will conclude Samson complied with applicable statutes. This narrow exception therefore does not apply.

Third, the McDougalls contend the anti-SLAPP statute does not apply because the "gravamen" of their claims is "professional misconduct" (consisting of the improper release of medical information) and Samson's "police report was incidental to the release of confidential prescriptions." In support of this argument, they cite *Castleman, supra,* 216 Cal.App.4th at pp. 485, 493, a case involving claims against an attorney by his former clients for breach of fiduciary duty and related torts arising from the attorney's decision "to align himself with [the former clients'] adversaries, in direct opposition to [the former clients'] interests, thereby breaching duties of loyalty and confidentiality owed to them by virtue of a prior attorney/client relationship." In concluding these

claims did not arise from protected activity within the meaning of the anti-SLAPP statute, the *Castleman* court stated: " 'A growing body of case law holds that actions based on *an attorney's* breach of professional and ethical duties owed to a client are not SLAPP suits, even though protected litigation activity features prominently in the factual background." (*Id.* at p. 491 , italics added.)

Again, this argument does not persuade us that the McDougalls' claims arise out of unprotected activity. We note the McDougalls have cited no case extending the principle discussed in *Castleman* to an action involving claims against a non-attorney, or to an action arising from a citizen's report of suspected criminal activity to the police. In any event, for the reasons we have discussed, we cannot agree that the McDougalls' allegations about Samson's police report were "incidental" to a cause of action based primarily on an act of "professional misconduct." To the contrary, Samson's act of showing or handing the McDougalls' prescription to the police (the only act the McDougalls contend was improper) was a part of his report to them.

At oral argument, counsel for the McDougalls suggested the Supreme Court's recent decision in *Baral, supra,* 1 Cal.5th 376, supports their argument that Samson's conduct can or should be parsed into protected and unprotected acts for purposes of determining (at the first step of the anti-SLAPP analysis) whether the McDougalls' claims arise from protected activity. We disagree. In *Baral*, which focused on the second step of the anti-SLAPP analysis, the Supreme Court held that, where a pleaded cause of action in a plaintiff's complaint includes allegations of both protected and unprotected activity (sometimes referred to as a "mixed cause of action"), and where the defendant files an anti-SLAPP motion challenging the claims for relief based on protected activity, a plaintiff must show that "each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral, supra,* 1 Cal.5th at pp. 381, 385, 396.) No issue relating to a "mixed cause of action" is presented here: Rite Aid contended in its motion that all of Samson's conduct was protected, and that all of the McDougalls' claims were based on that protected activity. For the reasons discussed above, we conclude Rite Aid is correct.

C. *The McDougalls Cannot Succeed on the Merits of their Claims*

Rite Aid having borne its initial burden of showing the McDougalls' claims arise from protected activity, the burden shifts to the McDougalls to show they can succeed on the merits of their claims against Rite Aid. We hold that they cannot, because Samson's conduct was protected by the litigation privilege, and thus, as a matter of law, the McDougalls cannot prevail on their claims. We need not address the individual elements of their claims, because the litigation privilege provides a complete defense.

Under Civil Code section 47, subdivision (b), police reports are protected by the litigation privilege—they are considered statements made in, or preparatory to, an official proceeding authorized by law. (*Hagberg v. California Federal Bank*, *supra*, 32 Cal.4th at pp. 364–365; *Williams v. Taylor* (1982) 129 Cal.App.3d 745, 753.) The litigation privilege protects police reports to encourage communication between citizens and public authorities, and to prevent the risk of citizens facing libel actions for communicating with public authorities. (*Ibid.*) The litigation privilege, where it applies, bars all tort claims other than malicious prosecution. (*Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, 1502.)

As we discussed above, Samson's actions amounted to a report of suspected criminal activity to the police. The release of the prescriptions was part of the police report and was protected by the litigation privilege; it was not an independent, noncommunicative, wrongful act. (See *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1065; *Chacon v. Litke* (2010) 181 Cal.App.4th 1234, 1257.) Because Samson's actions are privileged, the McDougalls cannot prevail on their claims arising from Samson's conduct. Thus, the McDougalls cannot meet their burden on the second prong of the anti-SLAPP motion because they cannot show even minimal merit that their claims can result in a favorable judgment.

The McDougalls argue Civil Code section 56 et seq., the California Confidentiality of Medical Information Act (CMIA), prohibited the disclosure of the prescriptions. As we noted in *McNair v. City and County of San Francisco* (2016) 5 Cal.App.5th 1154, 1164 (*McNair*), there is "authority for an exception to the litigation

privilege, under which courts have refused to apply the privilege when its general provisions conflict with a specific statute. Under this line of cases, application of the litigation privilege has been deemed inappropriate where the specific statute 'would be significantly or wholly inoperable if its enforcement were barred when in conflict with the privilege.' " But where the CMIA requires or permits disclosure of confidential information, there is no conflict between the privilege and the CMIA, and in such circumstances "it cannot be argued that application of the litigation privilege would render the CMIA significantly or wholly inoperable." (*McNair, supra,* 5 Cal.App.5th at pp. 1165, 1168.)

Like the federal Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d et seq., the CMIA prohibits health care providers from disclosing medical information except in certain circumstances.[5] One such exception is enumerated in Civil Code section 56.10, subdivision (c)(14), which allows providers to disclose medical information when specifically authorized by law. Civil Code section 56.10, subdivision (c)(14) states that an example of such an authorization is a voluntary report to the Food and Drug Administration (FDA), and we have held that this example is not exclusive of other voluntary reports to government entities. (*Shaddox v. Bertani* (2003) 110 Cal.App.4th 1406, 1414–1415 (*Shaddox*); accord, *McNair, supra,* 5 Cal.App.5th at p. 1167 ["As we read *Shaddox,* a voluntary disclosure of confidential medical information falls within the reach of subdivision (c)(14) [of Civil Code section 56.10] if a public policy exists encouraging such disclosure; the disclosure involves issues of public

[5] The McDougalls have asked this court to admit new documentary evidence, specifically, a 2013 version of Rite Aid's Notice of Privacy Practices. We deny the request. To the extent the policy purports to summarize federal or California law pertaining to disclosure of medical records, it is irrelevant, as this court will rely on the statutory provisions themselves.

The McDougalls also have asked that we take judicial notice of a Decision and Order issued by the Federal Trade Commission in 2010. We decline to do so. Barring exceptional circumstances, we do not take notice of evidence not submitted to the trial court. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) The McDougalls also have not shown the FTC order is relevant to this case or prohibited Rite Aid from releasing medical records to law enforcement when permitted by statute.

safety; and it is a communication which would otherwise be immunized by the litigation privilege."].) Indeed, in *Shaddox* we specifically held there is no basis to distinguish a voluntary report to the FDA from a voluntary report to law enforcement. (*Id.* at p. 1415.)

The McDougalls attempt to distinguish this case from *Shaddox* on the ground it did not involve the release of medical documents. (See *Shaddox*, *supra*, 110 Cal.App.4th at p. 1418.) In *Shaddox*, when a dentist became suspicious of a police officer's demand for a prescription for Vicodin, he reported the officer to the San Francisco Police Department. (*Id.* at p. 1410.) The dentist told the police that the officer had been in his office complaining of severe pain, which he could not verify as true, and that he discovered in the officer's files that the officer had come to his office numerous times requesting prescriptions for pain medication. (*Ibid.*) He also reported that another dentist in the office had made a note in the officer's file that he should not be given any other pain medication. (*Ibid.*) Pointing out that the dentist only made an oral report to the police over the phone, and did not physically turn over medical records, the McDougalls contend that this case is different because Samson showed police the suspicious prescriptions.

We do not agree with this narrow view of Samson's actions. Samson became suspicious of the McDougalls because of the information that he read on the prescriptions, and the close resemblance that the prescriptions bore to a fake prescription by the same physician. The McDougalls contend an oral release of this information is an acceptable voluntary report under Civil Code section 56.10, subdivision (c)(14), while the physical act of handing over the prescriptions is not. That, in our view, is a distinction without a difference. In *Shaddox*, we specifically held that the CMIA permitted a dentist to read or describe portions of a patient's physical records to the police as part of making an oral report. (*Shaddox*, *supra*, 110 Cal.App.4th at pp. 1410–1412, 1418.) Since reading the contents of a physical medical record to police is permissible, we cannot conclude that giving the physical record to police officers to read is impermissible.

A prescription is a brief document. It contains little more than the patient's name, the name of the prescribed drug, the amount of the drug prescribed, and the name and

contact information of the prescribing physician. In order for Samson to give the police an accurate account of his suspicions, he would have had to convey most, if not all, of the information contained on the prescription, regardless of whether he turned over the piece of paper upon which it was written. While the officer's dental records in *Shaddox* were far more complicated, and indeed, the dentist did not read the entire record to the police, the dentist read the portion of the dental records that amounted to the sum and substance of his report to the police. (*Shaddox*, *supra*, 110 Cal.App.4th at p. 1410.) When Samson gave the prescriptions to the police, he similarly gave the police key portions of his report.

We also find meritless the McDougalls' argument that the CMIA does not apply in the present case because of Civil Code section 56.10, subdivision (c)(19). Civil Code section 56.10, subdivision (c)(19), which was added by Statutes 2007, chapter 506 (Assem. Bill No. 1178), allows psychotherapists, acting in good faith, to disclose confidential medical information to prevent or lessen serious and imminent threats to the health or safety of reasonably foreseeable victims if the disclosure is made to a person who is reasonably able to prevent or lessen the threat. The McDougalls claim that Civil Code section 56.10 would not have been amended to include that exception if the CMIA had already been broad enough to allow the disclosure of medical information to law enforcement.

The McDougalls misread Civil Code section 56.10, subdivision (c)(19). That statute does not specifically identify law enforcement as the only entity to which information can be disclosed—it instead permits disclosure to all *persons* who could reasonably prevent or limit the threat. (Civ. Code, § 56.10, subd. (c)(19).) This provision is not inconsistent with the authorization in Civil Code section 56.10, subdivision (c)(14).[6]

[6] Because we find that application of the litigation privilege would not render the CMIA significantly or wholly inoperable, and that the privilege therefore applies to bar the McDougalls' claims at the second step of the anti-SLAPP analysis, we need not address Rite Aid's contentions that (1) the federal HIPAA statute authorized the release

Nor are we persuaded by the McDougalls' brief argument that Samson did not comply with regulations published by the State Board of Pharmacy. Title 16 of the California Code of Regulations section 1761, subdivision (a) reads, "No pharmacist shall compound or dispense any prescription which contains any significant error, omission, irregularity, uncertainty, ambiguity or alteration. Upon receipt of any such prescription, the pharmacist shall contact the prescriber to obtain the information needed to validate the prescription." The McDougalls read this regulation as requiring pharmacists who encounter suspicious prescriptions to contact the prescribing physician rather than the police. Even assuming a regulation (as opposed to a statute) could provide the basis for an exception to the litigation privilege, we cannot agree with the McDougalls' interpretation of the regulation at issue here. The regulation just prohibits pharmacists from filling prescriptions that contain errors or ambiguities without checking with the prescribing physician to obtain clarification. Nothing in the regulation prohibits a pharmacist from reporting suspected criminal activity to the police.

At oral argument, counsel for the McDougalls emphasized that a disclosure of the sort that occurred here can implicate important privacy interests. We acknowledge these concerns, and nothing we say here should be taken as minimizing the harm they allege from the disclosure. But the Legislature, in enacting the anti-SLAPP statute and the other statutes discussed above, has made a determination as to how best to balance such privacy concerns with free speech rights and with other interests, such as public safety. We are not free to disturb that balance.

D. *Attorney Fees and Costs*

The McDougalls request that we vacate the trial court's award of attorney fees and costs. Rite Aid counters by contending it is entitled to recover the attorney fees and costs it incurred in the trial court in connection with the anti-SLAPP motion, as well as the attorney fees and costs it incurred in this appeal. Rite Aid is correct. Section 425.16, subdivision (c)(1) specifies that, with exceptions not applicable here, a defendant who

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of the prescriptions, and (2) Business and Professions Code section 4081, subdivision (a) compelled Samson to release the prescriptions to the responding officers.

prevails on a special motion to strike "shall be entitled to recover his or her attorney's fees and costs." An award of attorney fees to a successful anti-SLAPP movant is "mandatory." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) And a statute authorizing an award of attorney fees includes appellate attorney fees unless the statute specifically provides otherwise. (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927–929.) Because section 425.16, subdivision (c)(1) does not preclude recovery of appellate attorney fees, such fees are recoverable. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1500.) Since we have determined that Rite Aid prevails on its anti-SLAPP motion, Rite Aid is entitled to its attorney fees and costs incurred in connection with the anti-SLAPP motion in the trial court, as well as its appellate attorney fees and costs, with the amount of both awards to be determined by the trial court.

III. DISPOSITION

The order granting Rite Aid's anti-SLAPP motion and awarding attorney fees and costs is affirmed. Rite Aid shall recover its attorney fees and costs on appeal. The matter is remanded to the trial court for a determination of the amount of attorney fees and costs to be awarded to Rite Aid.

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Streeter, J.

We concur:

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Reardon, Acting P.J.

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Rivera, J.