Case No. S239686

SUPREME COURT
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IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

STANLEY WILSON,
Plaintiff and Appellant,

v.

CABLE NEWS NETWORK, INC. et al.,
Defendants and Respondents.

After a Decision By the Court of Appeal
Second Appellate District, Division 1, Case No. B264944
Los Angeles Superior Court Case No. BC559720 (Hon. Mel Red Recana)

RESPONDENTS' REPLY BRIEF ON THE MERITS

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I

INTRODUCTION

Wilson cannot rewrite the anti-SLAPP statute to save his claims.

In interpreting a statute, the Court's primary goal is to give effect to the Legislature's intent in enacting the law. "To determine intent, 'The court turns first to the words themselves for the answer.'" (*In re Littlefield* (1993) 5 Cal.4th 122, 130.) "If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*People v. Knowles* (1950) 35 Cal.2d 175, 183.)

Here, the anti-SLAPP statute provides first that it "shall be construed broadly." (Code Civ. Proc. §425.16(a);[1] *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.) The statute next states that a cause of action "arising from any act in furtherance of the person's right of...free speech...in connection with a public issue" is subject to being stricken. (§425.16(b).) The statute defines protected "acts" as including "any other conduct in furtherance of the exercise of ... the constitutional right of free speech in connection with ... an issue of public interest." (§425.16(e)(4).)

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

Despite these clear and unambiguous terms, Wilson attempts to graft new requirements on the statute, and apply them in a way that excludes his claims.

First, Wilson argues that the anti-SLAPP statute applies only to claims where protected activity was "alleged to constitute an element of the tort" (AB p.7), which he wrongly denies is the case here. Wilson ignores that he alleged his termination as a necessary element (adverse action) of his employment claims, and further that CNN's exercise of its editorial judgment in terminating him as a producer writing news stories for publication on CNN.com for plagiarizing is protected as conduct in furtherance of CNN's free speech rights. Indeed, a news organization acting to ensure the accuracy and integrity of its reporting lies at the very core of free speech-furthering conduct.

Wilson attempts to obfuscate this conclusion by focusing on the alleged motivation for his termination, which he asserts is also an alleged element of his claims. He argues that "discrimination" and "retaliation" are the relevant "act[s]" for purposes of application of the anti-SLAPP statute, but can never be in furtherance of free speech as the statute requires.

But, "discrimination" and "retaliation" are neither motives, nor acts. They are legal claims that require proof of elements including an adverse

action (e.g., termination, denial of a promotion) and unlawful motive (e.g., because of race). And further, no matter what Wilson says, the *motivation* underlying an *act* is not itself an *act*. The two should not be conflated.

Instead, under the anti-SLAPP statute, the proper focus is on the alleged adverse action as the "act" or "conduct" from which claims arise. Here, that "act" is CNN exercising its editorial discretion to terminate Wilson from his role producing and writing stories for CNN.com following his admission of plagiarism. Because that act advanced CNN's First Amendment rights and was in connection with an issue of public interest, CNN satisfied the first prong of the anti-SLAPP statute.

Second, Wilson argues that the statute's requirement that conduct be "in connection with…an issue of public interest" requires that a communication be "public" and contribute to a "public debate." To get there, Wilson offers alternative constructions of the statute's plain language designed to limit its reach to plaintiffs who are "in the public eye" or whose behavior was known to the public. But, again, the statute must be "construed broadly" and pursuant to its plain language; it cannot be limited by artificial distinctions found nowhere in the statute.

Whatever degree of "connection" is required by the statute, it is satisfied here. The conduct underlying Wilson's employment claims – that

he, an award winning producer and writer for CNN.com, was terminated for plagiarism – is connected to the public's interest in the news itself; the compilation, production, and reporting of the news; journalistic integrity and ethics, and news organizations' reputations and trustworthiness. The conduct underlying Wilsons's defamation claim – that a human resources representative told Wilson's supervisor that he had "plagiarized" in connection with implementing his termination – is connected to the same public interests.

In short, the Court of Appeal, in error, narrowly construed the anti-SLAPP statute in a manner that undermines its intent and is inconsistent with its plain terms, decisions of this Court, legislative intent and public policy. Accordingly, the Court of Appeal's decision should be reversed.

I

ISSUE NO. 1: Under the first prong of the anti-SLAPP statute, is the employer's alleged discriminatory motive for terminating the plaintiff employee irrelevant (as held by the Second Appellate District, Division 7 and Fourth Appellate District, Division 2)?

CNN's Motion demonstrated that the gravamen of Wilson's employment claims – his termination for plagiarizing news stories – was an "act" in furtherance of CNN's exercise of free speech in connection with an

issue of public interest – namely, the public's interest in the news itself; the curation, production, and reporting of news; journalistic integrity, ethics, and credibility; and the underlying story itself, the retirement of Sherriff Baca. (Volume 1 of Appellant's Appendix pp.48:13-50:19.)[2]

Though it is obvious that Wilson's claims arise from his termination, Wilson attempts to shift the Court's focus to his allegation of discriminatory motive, which he argues is a requisite element of his claims and not protected activity. But the anti-SLAPP statute is directed at a protected "act" (§425.16(b)) and "conduct" (§425.16(e)(4)), not motive. And, while discriminatory motive is an element of Wilson's claims, so too is the adverse action of termination. With the proper focus it is apparent that Wilson's claims challenge CNN's protected activity, and, as a result, are subject to the anti-SLAPP statute.

A. The plain terms of the anti-SLAPP statute do not support the Court of Appeal's construction of the statute.

Though the plain terms of the anti-SLAPP statute are determinative, Wilson completely ignores them. Instead, without any textual support, he argues that the focus of the anti-SLAPP statute is on the label affixed to a

[2] Hereafter, citations to Appellant's Appendix will be cited as (Vol. Number AA/pg/line).

claim by the plaintiff (i.e., "discrimination" and "retaliation") (Answering Brief (hereafter "AB") p.31), as opposed to the underlying conduct itself (i.e., termination). Quoting from the decision below, Wilson argues "'Discrimination and retaliation are not simply motivations for defendants' conduct, they *are* defendants' conduct.'" (*Id.* (emphasis original).)

As an initial matter, "discrimination" and "retaliation" are neither motivations nor conduct; they are legal causes of action that encompass distinct elements, including: (1) adverse action, (2) unlawful discriminatory or retaliatory motivation (e.g., "because of ... race"), (3) causation, and (4) damages. (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713; CACI No. 2500 (elements include an "adverse employment action" and that plaintiff's protected status was a "substantial motivating reason" for that action). Only the first of these – the adverse action – is an "act" or "conduct" from which a cause of action for discrimination or retaliation arises. While such a claim also requires proof of an alleged wrongful motive, causation, and damages, none of these requisite elements are an "act" within the meaning of the anti-SLAPP statute.

Furthermore, the illogic of arguing that a motive is an "act" is evidenced by the language of the anti-SLAPP statute itself, which requires that the "act" from which a claim arises be in "furtherance of the exercise of...free speech." While alleged adverse actions, such as termination from

employment, can logically be in furtherance of free speech rights, a motive cannot. [3]

For that reason, Wilson's argument that "a cause of action can only arise from protected conduct if it alleges at least one ***wrongful*** act that falls within the definition of protected conduct" is misguided. (AB p.32.) For the purposes of the statute's "first prong," the cause of action must arise from a protected act, but whether or not the plaintiff alleges that it is wrongful, retaliatory or discriminatory is irrelevant.[4]

Once the focus of the inquiry is properly on the alleged adverse action from which Wilson's claims arise – his termination – it is clear that the statute's remaining "first prong" requirements are satisfied. CNN's termination of Wilson as a producer and writer of stories for CNN.com following his admission of plagiarism was in furtherance of its free speech right to make editorial decisions as to who writes the news it publishes daily to the public. And further, as discussed in Section II, *infra*,

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[3] Wilson's argument also defies common sense. A person's motivation for taking an act is not itself an act; e.g., whether a person hits another angrily or playfully, the act is still hitting the person, not its motivation.

[4] Otherwise, a plaintiff could plead around the anti-SLAPP statute by alleging that an act was "unlawful" or "wrongful." That is an inquiry left for the "second prong" of the anti-SLAPP analysis in which a court tests the adequacy of a claim, including determining whether the plaintiff is likely to prove an unlawful motive.

termination of an award winning producer for plagiarism is in connection with an issue of public interest.

Though Wilson argues that his "employment claims do not arise from CNN's actions in furtherance of free speech..." (AB p.31) and "[n]o protected activity was alleged as the basis of Wilson's claims" (AB p.34), it is well established that news organizations have a constitutional right to determine who reports the news on their behalf. (Opening Brief (hereafter "OB") pp.52-53 (collecting cases).) These cases hold that news organizations' staffing decisions – both hiring and termination – are exercises of free speech. But here, CNN need only show that its actions were "in furtherance" of its exercise of free speech, a lesser standard it has clearly satisfied.

This conclusion finds additional support in the evidence submitted by CNN concerning the details of Wilson's job as a news producer, the nature and substance of his plagiarism and his subsequent admission that he "exercise[ed] poor judgment, "violated good journalistic principles" and was solely at "fault." (V1AA/115-117.) Though Wilson did not plead these facts, the anti-SLAPP statute plainly states that such facts are properly considered. (§425.16(b)(2) ["In making its determination, the court shall consider the ... supporting and opposing affidavits stating the facts upon which the ... defense is based."].)

B. This Court's Prior Decisions do not support the Court of Appeal's construction of the statute.

In his effort to re-write Section 425.16, Wilson either ignores or misstates this Court's prior precedent. This Court has never held that certain claims – e.g., employment discrimination and retaliation – are exempt from the purview of the anti-SLAPP statute. Instead, in *Navellier v. Sletten* (2002) 29 Cal.4th 82, this Court stated that "[n]othing in the statute itself categorically excludes any particular type of action from its operation, and no court has the power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Id.* at 92.)

Nor has this Court ever held that the anti-SLAPP statute focuses on the *motive* alleged, as opposed to the *act* or *conduct* that is the gravamen of a claim. In *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, this Court did not hold, as Wilson suggests, that a trial court should consider alleged motive in determining the first prong of the statute. Rather, *Park* simply distinguished between conduct that forms the basis of a plaintiff's claim and "speech leading to an action or evidencing an illicit motive." (*Id.* at 1067.) This holding does not support the decision below because, here, Wilson's termination – a speech furthering act – is the basis for his claim, not incidental to it.

Wilson makes much of *Park*'s statement that "courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." *Id.* at 1063. Wilson claims that the "elements" of his claim are CNN's "decision to terminate him for discriminatory reasons" (because a "termination without more [is] not actionable" (AB p.14.)) and that discrimination is not protected activity. Wilson's argument, however, ignores the corollary: discriminatory intent without an adverse employment action is *also* not actionable. Absent his termination –whatever the reason – Wilson could not state a claim. And discriminatory intent is not even an act; it is just that – intent. Thus, the proper element to focus on is the alleged adverse action, which is necessarily the "act" on which a claim is based. (*See Park*, 2 Cal.5th at 1068 ["Communications disparaging Park, without any adverse employment action, would not support a claim for employment discrimination, but an adverse employment action, even without the prior communications, surely could."].)

Furthermore, consideration of the elements of an asserted claim may help identify the act from which the claim arises but it does not dictate whether that act is protected under the anti-SLAPP statute. Indeed, in *Park*, this Court made clear that the employment action itself, not just the motive, should be considered: "The elements of Park's claim…depend…only on

the denial of tenure itself ***and*** whether the motive for that action was impermissible." (*Id.* at 1068.) This Court then concluded that the denial of tenure did not constitute protected activity, because the *act* of denying tenure itself did not fit the definition of protected activity under the statute. In contrast, here, the *act* at issue is CNN's editorial decision to terminate Wilson, an act which furthered CNN's constitutional right to determine who produces and writes the stories that it publishes on its website. *Supra*, p.11.

Finally, while this Court expressed concern about applying the anti-SLAPP statute in ways that create obstacles to enforcement of the State's "antidiscrimination public policy," that concern is implicated only when the "arising from" inquiry is focused on "speech leading to an action or evidencing an illicit motive." (*Id.* at 1067.) However, this concern is not implicated in the present case where the protected act – termination of Wilson – is the act upon which his claims rely. Moreover, this Court should be equally concerned with avoiding limiting the anti-SLAPP statute in ways that would undermine its purpose and chill free speech. Though such circumstances may be uncommon, where an adverse employment action

like a termination or denied assignment is in furtherance of free speech it is entitled to protection under the anti-SLAPP statute.[5]

C. While the Courts of Appeal are split, Wilson provides no logical rationale for following *Nam* and *Martin*.

Wilson's attacks on *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257 and *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510 fail. He also provides no logical rationale for following cases such as *Nam v. Regents of University of California* (2016) 1 Cal.App.5th 1176 and *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611.

Wilson tries to discredit *Tuszynska* by overstating the extent to which it was disapproved by this Court in *Park*. Far from weighing in on the issue at hand here, this Court disapproved *Tuszynska* only "[t]o the extent *Tuszynska* ... presupposes courts deciding anti-SLAPP motions cannot separate an entity's decisions from the communications that give rise to them, or that they give rise to ... ." (*Park*, 2 Cal.5th at 1071.) As previously discussed, that is not an issue here. Importantly, this Court did

[5] Wilson also cites *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, but *City of Cotati* is inapposite as there was no dispute over what act gave rise to plaintiff's claim and no analysis of whether to look at the claimed motivation for an act versus the act itself.

not disapprove the salient portion of *Tuszynska*; namely that a court should distinguish "a defendant's alleged injury-producing conduct with the unlawful motive the plaintiff is ascribing to that conduct." (*Tuszynska*, 199 Cal.App.4th at 271.) The Court should endorse this particular holding of *Tuszynska*.

Similarly misleading is Wilson's discussion of *Hunter*. Though Wilson suggests that this Court, in *Park*, was critical of *Hunter*, this Court expressly declined to overrule *Hunter*. Indeed, *Park* and *Hunter* are consistent with each other: in *Park*, the defendant could not rely on speech *surrounding* an adverse employment action to avail itself of the anti-SLAPP statute. In *Hunter*, the act in furtherance of free speech *was* the adverse employment action. As explained in *Park*, the *Hunter* analysis applies where, as here, "the choice of [employees] involved conduct in furtherance of [defendant's] speech on an identifiable matter of public interest." (*Park*, 2 Cal.5th at 1072.) In *Hunter,* it was the television station's choice to employ particular people (young females) to report the weather; here, it is a global media outlet's choice not to employ Wilson (a producer who plagiarized) to report the news.

Wilson also incorrectly criticizes *Hunter* for purportedly not analyzing the elements of the pleaded cause of action. In fact, the *Hunter* court correctly focused on the adverse employment action giving rise to

plaintiff's claims – "CBS's decisions about whom to hire as the on-air weather anchors for its ... newscasts." (*Hunter*, 221 Cal.App.4th at 1521.) Wilson argues that *Hunter* "should have considered the specific hiring decision alleged to have been discriminatorily motivated" but it is unclear why Wilson believes that decision was not considered in *Hunter*.

When Wilson turns to those decisions that he contends support his position, he again misstates this Court's prior decisions. Wilson makes much ado about this Court's approval, in *Park*, of *Nam*. But *Park*'s approval of *Nam* was limited to the distinction the Third District drew between liability-causing conduct and the communications surrounding it. *Park* did not opine on, much less endorse, *Nam*'s reliance on allegations of motive and its apparent conclusion that employment claims cannot be subject to an anti-SLAPP motion.

To the contrary, this Court articulated the "basis for liability" in *Nam* as "the Regents' alleged retaliatory conduct, including 'subjecting [plaintiff] to increased and disparate scrutiny, soliciting complaints about her from others, removing [her] from the workplace, refusing to permit her to return, refusing to give her credit towards completion of her residency, failing to honor promises made regarding her treatment, and ultimately terminating her... .'" (*Park*, 2 Cal.5th at 1067.) Having focused on these alleged adverse actions, this Court concluded that, in *Nam*, "[w]hat gives

rise to liability is not that the defendant spoke, but that the defendant *denied the plaintiff a benefit, or subjected the plaintiff to a burden*, on account of discriminatory or retaliatory consideration." (*Ibid.* (emphasis added).)

Equally unavailing is *Martin*. In *Martin*, the plaintiff alleged that his public agency employer discriminated and retaliated against him, resulting in his constructive discharge. The agency, in turn, sought to invoke the anti-SLAPP statute by arguing that the suit arose from negative evaluations of the plaintiff made during an official proceeding encompassed by Section 425.16(e)(2). The Fourth District disagreed with the agency, holding that plaintiff's claims were not subject to Section 425.16 because they arose from an adverse employment action, not statements made during an official proceeding. (*Martin*, 198 Cal.App.4th at 625.) Critically, the Fourth District did *not* endorse reliance on allegations of a discriminatory motive. To the contrary, the court expressly noted that "we make no credibility determination regarding plaintiff's allegations, or weigh the merits of his claims." (*Id.* at 625.)

In its Opening Brief, CNN cited to *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1089, for the proposition that "a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary." The Court of Appeal's

decision takes the opposite approach: it presumes the validity of the motive alleged by Wilson, and ignores CNN's constitutional right. Wilson argues that this is appropriate because there purportedly is no "per se protected activity" alleged in the Complaint.[6] Wilson provides no authority for the proposition that some protected activity is entitled to the presumption and some is not. Instead, Wilson cites to *Castelman v. Sagaser* (2013) 216 Cal.App.4th 481, where the Fifth District rejected the argument that the trial court should have presumed that the defendant's conduct was protected. However, in *Castelman*, there was extensive authority for the proposition that the particular defendant's conduct (violation of his fiduciary duties as an attorney) was not protected under Section 425.16. That is not the case here: Wilson can point to no authority holding that a media organization engaging in protected First Amendment speech does not have a First Amendment right to terminate employees for violation of its editorial standards.[7]

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[6] Wilson does not explain what he means by "per se protected activity." There is ample authority supporting CNN's constitutional right to terminate employees to maintain its editorial standards. (See OB pp.53-54.)

[7] *San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, review of which is currently pending while the related issues in this case are decided, also recognized that "[r]eporting news is protected speech" and "[i]n determining whether the anti-SLAPP statute applies, the appropriate focus is on the alleged injury-producing conduct..., and not defendants' alleged wrongful motive for engaging in that conduct...." (*Id.* at 83-84.) *San*

(continued...)

D. Legislative history does not support the Court of Appeal's construction of the statute.

Wilson ignores CNN's arguments concerning the legislative history behind Section 425.16; the legislative history supports CNN's position.

E. Public Policy Concerns Support the Anti-SLAPP Statute's Application to The Claims Asserted By Wilson.

Wilson denies that affirming the decision below would have any chilling effect. But his contention that CNN is in the same position as other employers (AB pp.23-29) fails to recognize that certain types of employment claims directly challenge an employer's exercise of free speech, and the protections afforded under the anti-SLAPP statute should be available in those circumstances. Without those protections, the ills the statute was intended to protect against – attacks against, and attendant chilling of, free speech – will, for that employer, be left unchecked.

Furthermore, CNN agrees that media "has no special immunity from generally applicable laws" (AB pp.23-24), but one such generally

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(...continued)
Diegans is citable for persuasive value while review is pending. (Cal.R.Ct. 8.1115(e)(1).)

applicable law is the anti-SLAPP statute, which undeniably applies to claims arising from CNN's editorial decisions.[8]

Application of the anti-SLAPP statute to employment claims like Wilson's claims does not insulate CNN from liability under civil rights claims. Though Wilson is correct that in *Lyle v. Warner Bros. Television Prods.* (2006) 38 Cal.4th 264, 297 and *Shulman v. Group W Prods., Inc.* (1998) 18 Cal.4th 200, 208, the plaintiffs had an opportunity to litigate their claims through summary judgment, Wilson was likewise afforded an "opportunity to prove his case." (AB p.25.) In response to CNN's motion, Wilson was required only to present evidence sufficient to show a "probability" of prevailing on the claim. (§425.16(b)(1).) He failed to do so and his claims were stricken. This outcome is exactly the balance that the Legislature intended in enacting the anti-SLAPP statute.

Wilson argues that "legitimate allegations of employee plagiarism and ethical breaches" will not be penalized under the Court of Appeal's analysis. (AB p.28.) Not so. Deprived of the protections of the anti-SLAPP statute, an employer would be required to engage in expensive and burdensome litigation to prove its defense – even where the plaintiff lacks even minimal evidence supporting alleged claims.

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[8] Likewise, Wilson cannot immunize himself from the consequences that any journalist might face when they engage in, and admit to, plagiarism.

* * *

In short, Wilson's arguments do not support the Court of Appeal's erroneous holding. Wilson's employment claims arise from acts in furtherance of the exercise of free speech in connection with issues of public interest.

II

ISSUE NO. 2: Under the first prong of the anti-SLAPP statute, must the defendant demonstrate that the plaintiff had "name recognition" or was "otherwise in the public eye?'"

CNN's Motion demonstrated that the gravamen of Wilson's defamation claim – that, in Wilson's presence, Human Resources representative Dina Zaki stated to Wilson's supervisor Peter Janos that Wilson had plagiarized stories for CNN.com in violation of its editorial policies– was free speech in connection with several matters of public interest, any one of which supported dismissal of the claim. V1AA/50:2-19; VIIIAA/753:8-755:14 [issues of public interest include Baca's retirement,

Wilson's plagiarism and "journalistic ethics of those who report the news"].)[9]

Wilson does not dispute that plagiarism and journalistic ethics are issues of public interest. (E.g., AB p.11.) Instead, he argues that the communication at issue is unconnected to any public interest because: the communication itself was made in a private setting limited to Zaki, Janos and Wilson; the words used by Zaki did not call out any "public" issue, but focused on Wilson's "private" act of plagiarism; Zaki's statement did not involve conduct affecting a large number of people; Wilson was not a person in the public eye; and Wilson's plagiarism and termination were not known to the public and did not contribute to public debate. (*Id.*, pp.43-51.)

These arguments are premised on an overly-restrictive construction of the anti-SLAPP statute in which the communication underlying the defamation claim must itself be of "public interest." Wilson's interpretation cannot be reconciled with the statute's use of the terms "in connection" to modify the phrase "a public issue or an issue of public interest." A proper

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[9] CNN's motion did not list every conceivable public interest connected to the communication. To the extent that CNN in its briefing to this Court has identified additional connected issues of public interest, these may properly be considered by the Court because they do not present a change in theory. And, in any event, "it is settled that a change in theory is permitted on appeal when[, as here,] a question of law only is presented on the facts appearing in the record." (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 24.)

reading of these terms requires only that the speech or conduct be reasonably connected to an issue relating to the welfare or well-being of the general public or of appeal or relevance to the general populace. (*See* "Public Interest," *Random House Dictionary*, <http://www.dictionary.com/browse/public-interest> [as of Jan. 4, 2018].)

A. The Statement Underlying Wilson's Defamation Claim Is An Act In Furtherance Of CNN's Exercise Of Free Speech.

Initially, the Court of Appeal assumed that Zaki's statement about Wilson's plagiarism was an act in furtherance of the exercise of free speech and focused its attention solely on whether that act was also "in connection" with an "issue of public interest." (*Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 837-840.) Wilson challenges that assumption, arguing that CNN failed to prove that the statement at issue was an act in furtherance of the exercise of free speech. (AB p.44.) According to Wilson, a "non-public communication, which in no way contributed to a public debate" cannot constitute a "free speech furthering act." (*Id.*)

This argument fails. Wilson's claim arises from the *exercise of free speech itself* – statements orally communicated by one CNN employee to another (which he claims were defamatory). Otherwise, Wilson would have

no claim for defamation, which requires "publication" by one person of an (alleged) false and defamatory statement to another. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) The contention that a claim for defamation can somehow arise from something other than the exercise of free speech is without support in case law. It is no coincidence that defamation claims are consistently the proper subject of anti-SLAPP motions. (*See* OB 59, 64-66 (collecting cases).)

Nor is Wilson correct that only "[]public communication[s]" that "contributes to the public debate" (AB p.44) qualify as acts in furtherance of the exercise of free speech. Section 425.16, subdivision (e)(4) encompasses "any other conduct" in furtherance of the exercise of free speech. (§425.16(e)(4).) "Any other conduct" is not modified by the word "public," nor is there a reference to speech needing to be broadcast to a certain sized audience to be protected.

That subdivision (e)(4)'s use of "any other conduct" encompasses "public" *and* "private" speech is also made clear by the immediately preceding subdivision, Section 425.16(e)(3), which protects "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." (§425.16(e)(3) (emphasis added).) If "any other conduct" was limited to public discourse, it would be superfluous of subsection (e)(3). (*Smith v. Superior Court*

(2006) 39 Cal.4th 77, 83 ["[Statutory] language must be construed in the context of the statute as a whole and the overall statutory scheme, and we give significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." (quote marks omitted)].)

This was the conclusion reached in *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883. *Wilbanks* involved defamation claims over statements accusing plaintiffs of being under investigation, incompetent, and unethical. (*Id.* at 889-890.) The trial court granted defendant's anti-SLAPP motion and, on appeal, plaintiffs argued that the speech at issue was not protected by the statute because it was private. The First District disagreed:

> Section 425.16, subdivision (e)(4) includes *conduct* in furtherance of free speech rights, regardless whether that conduct occurs in a place where ideas are freely exchanged. Section 425.16, therefore, governs even private communications, so long as they concern a public issue."

(*Id.* at 897-898 ["It follows that even if Wolk's communications were not made in a public forum ... they fall under subdivision (e)(4)"]; *see also* OB pp.64-67 (collecting additional cases).)

In light of the plain terms of the statute, including that it must be "construed broadly," any requirement that "any other conduct" (Section 425.16(e)(4)) be "public" would be arbitrary and unwarranted.

B. The Plain Terms of the anti-SLAPP Statute Require Only A "Connection" With an Issue of Public Interest

Wilson attempts to limit the factual circumstances under which protected communications are connected to an issue of public interest to just "three categories" of speech – "1. Subject of the statement was a person/entity in the public eye; 2. The precipitating statement/activity involved conduct that could affect large numbers of people beyond the direct participants; or 3. The precipitating statement/activity involved a topic of widespread public interest." (AB p.45.) Wilson then concludes that Zaki's communication about his plagiarism did not fall into these categories.

But the anti-SLAPP statute requires only that a protected act be "in connection" with an issue of public interest, nothing more. It does not limit the kind of communication that will satisfy this requirement, or the factual circumstances surrounding the communication. And, though the statute does not explicitly define what is meant by a "public issue" or an "issue of public interest," in light of the statute's mandate that it be construed broadly and its preamble that the Legislature was enacting it "to encourage continued participation in matters of public significance," it is plain that those terms mean any issue relating to the welfare or well-being of the general public or of appeal or relevance to the general populace. *Supra*

p.23. Similarly, though the statute does not define the degree of connection that is necessary, in light of the broad construction required, the necessary connection should be no more than what is "reasonable" or "logical."

Thus, where a claim is based on a communication between two or more persons concerning an issue of public interest, the requirement is satisfied. In contrast, where a communication concerns a private matter – one that has no impact on the public and is unrelated to any issue of relevance to the general public – the requisite connection would not be shown.

So, for example, in an employment context, a defamation claim based on a discussion between two managers at a public restaurant about the plaintiff worker's unsafe handling of chicken would satisfy the requirement. However, if the discussion concerned the plaintiff's theft of the employer's property, the claim likely would fall outside of the statute. In both scenarios, the fact that the discussion was limited to two people and concerned a private, non-celebrity figure and conduct not known to the public are irrelevant. What differentiates the two is the fact that the former involved an issue implicating potential harm to the public, the public reputation of the restaurant, and was connected to general public concerns about food safety, whereas the latter involved only internal concerns.

Here, CNN has demonstrated a connection with issues of public interest. This was not a communication about theft from an employer, insubordination, or other such issues that impact primarily on an employer's own private business interests. Instead, Zaki reported to Janos that Wilson, an award winning producer, had engaged in plagiarism, a wrong that consists of misrepresentation *to the public* about authorship of text in a story. Unlike property theft and insubordination, plagiarism causes harm *to the misled public.* It further damages the employer news organization's *public reputation* and the *public's trust in it.* And unlike property theft and insubordination, the public's interest in how the news is curated, produced, and reported, as well as the integrity, ethics, and credibility of those reporting the news and related concerns is robust.

Accordingly, Wilson's argument that there is an "insufficient degree of closeness" between Wilson's plagiarism and a public interest is unavailing. The communication about Wilson's plagiarism was connected to the public's interest. The Court of Appeal erred in holding otherwise.

C. This Court Has Not Required That The Subject of the Communication Be of Interest to the Public or Contribute To A Public Debate.

This Court has not directly addressed the issue of the connection required between a protected communication and an issue of public interest. But it has rejected Wilson's argument that the subject of a protected communication must itself be debated and known by the public. *Park, supra*, arose from the University defendant's decision to deny tenure to a professor and the professor's claim that the denial was discriminatory. The primary focus of *Park* was on what nexus a defendant must show between plaintiff's claim and the defendant's protected activity for the claim to be struck. This Court ultimately decided that the claim at issue was not subject to an anti-SLAPP motion because the underlying *act* or *conduct* was the denial of tenure, not constitutionally protected speech used in arriving at that decision. (*Park*, 2 Cal.5th at 1068.)

Relevant here, the University defendant in *Park*, among other arguments, sought to rely on the Second District's decision in *Hunter* to argue that its tenure decision was protected. As summarized by this Court, in *Hunter*, the plaintiff "sued over the defendant's allegedly discriminatory refusal to hire him as a weather news anchor." (*Park*, 2 Cal.5th at 1071.) The Second District ultimately held that the anti-SLAPP statute protected

"[t]he reporting of news, whether in print or on air," and that "a news media organization's decision as to who shall report the news [is] an act in furtherance of that protected speech (*Hunter*, at p. 1521)." (*Park*, 2 Cal.5th at 1071.)

In analogizing to *Hunter*, the University defendant argued that tenure decisions for professors "implicate the public interest as much as decisions concerning who should appear in a news broadcast and thus are equally entitled to protection." (*Park*, 2 Cal.5th at 1071.) This Court rejected this argument, reasoning that:

> [T]his argument fails to appreciate the underlying structure of the position accepted in Hunter and thus offers a mismatched analogy. The defendant television station argued that (1) the station itself engaged in speech on matters of public interest through the broadcast of news and weather reports, and (2) the decision as to who should present that message was thus conduct in furtherance of the station's protected speech on matters of public interest, to wit, its news broadcasts. [citations]. **Whether the hiring decision itself was a matter of any particular public importance was immaterial**. (*See Hunter*, at p. 1527 ["the proper inquiry is not whether CBS's selection of a weather anchor was itself a matter of public interest; the question is whether such conduct was '**in connection with**' a matter of public interest. As Hunter concedes, weather reporting is [**speech in connection with**] a matter of public interest."]; *id.* at p. 1527, fn. 3 [declining to consider the significance of the hiring decision itself].)

(*Park*, 2 Cal.5th at 1072-73.)

Thus, in *Park*, this Court approved the Second District's reasoning that the relevant inquiry is not whether the subject matter of the protected speech is itself a matter of public interest but whether it is "in connection with" a matter of public interest. Decisions by other Courts of Appeal are in accord. (See OB, pp.64-67 (collecting cases).)

No different than in *Hunter*, here, the statements that Wilson plagiarized and had violated CNN policies, and as a result was being terminated, are undoubtedly "in connection" with matters of public interest.

D. The Court of Appeal's Narrow Construction of "Issues of Public Interest" Is Not Supported By Other Appellate Decisions.

Wilson takes a variety of statements from Courts of Appeal decisions out of context and weaves them together to purportedly create rules limiting what speech is connected with an issue of public interest. But, no such rules can be derived from the decisions.[10]

[10] Moreover, any narrowing of the statute is appropriately left to the Legislature.

1. There is No Support for Limiting Protected Speech to Just Three Categories

No court has held that only certain categories of speech are connected to an issue of public interest. Wilson's "three categories" trace back to *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, where the First District made clear that, while it was assessing prior decisions and the kinds of protected conduct at issue, "[n]one of these cases defines the precise boundaries of a public issue." (*Id.* at 924.)

Indeed, as "some courts have observed," "there is no need to expressly define 'public interest' under the anti-SLAPP statute, because courts applying their common sense and experience 'will, or should, know a public concern when they see it.'" (*FilmOn.com v. DoubleVerify, Inc.* (2017) 13 Cal.App.5th 707, 720 (review granted) (*quoting Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1122, n.9).) Put another way, courts are capable of distinguishing between matters of public concern versus those of private concern and the fact that there may not be a bright line test or concrete categories does not hinder the analysis.

This is not the first time that this Court has had to draw such distinctions. Guidance can be taken from this Court's decisions analyzing

what constitutes a "public policy" in connection with claims for common law wrongful termination in violation of public policy. In that context, this Court has explained that "despite its broad acceptance, the principle underlying the public policy exception is more easily stated than applied. The difficulty, of course, lies in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee." (*Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1090.) As a "guideline[]," this Court has noted that "the policy in question must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer." (*Id.* (citing *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654).) (Compare *Gantt*, 1 Cal.4th at 1097 (public policy against coercing employee to lie to DFEH investigator) *with Foley*, 47 Cal.3d at 670-71 (public policy not implicated "[w]hen the duty of an employee to disclose information to his employer serves only the private interest of the employer").

Applying common sense and experience, it is apparent that Zaki's statement that Wilson plagiarized was in connection with issues of public interest, if not a matter of public interest itself. The public has an interest in plagiarism at a mainstream news organization. And the effects of

plagiarism are felt well beyond the employment relationship. (*See supra*, p. 32.)

2. Private Communications Can Be Connected With An Issue of Public Interest

Wilson argues that private communications are never connected to an issue of public interest. However, it is well established that subdivision (e)(4) "governs even private communications, so long as they concern a public issue." (*Terry v. Davis Comm. Church* (2005) 131 Cal.App.4th 1534, 1546 [statement made in an internal investigation report disseminated in closed meetings with parents was statement in connection with an issue of public interest]; see also *FilmOn.com*, 13 Cal.App.5th at 723 [concluding "it is irrelevant that DoubleVerify made its reports confidentially to its subscribers, because the contents of those reports concerned issues of widespread interest to the public"]; *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 465, 468 [statements made privately parents to coordinator of a youth basketball program about a volunteer coach concerned issues of public interest].)

FilmOn.com is instructive. [11] Similar to Wilson's complaint that Zaki falsely stated to Janos that Wilson had plagiarized, in *FilmOn.com*, the plaintiff, FilmOn, claimed that defendant DoubleVerify's "confidential reports" to certain corporate clients defamed plaintiff by falsely classifying FilmOn websites as "Copyright Infringement – File Sharing" and "Adult Content." (*FilmOn.com*, 13 Cal.App.5th at 712.)

FilmOn made the same argument that Wilson makes here – that "DoubleVerify's reports could not have concerned an issue of public interest because they 'were made entirely in private, to individual companies that subscribe[d] to its services.'" (*Id.* at 720; *id.* at 722 [reciting FilmOn's "implicit contention that the challenged activity must occur in public view, and thus advance a public debate"].) The Second District rejected the argument, reasoning that:

> [The] argument rests on the flawed premise that to qualify as speech in connection with an issue of public interest, the statement must itself contribute to the public debate. Though the public interest requirement "means that *in many* cases the statement or conduct will be a part of a public debate" [citation], an ongoing public debate is not a sine qua non for protection under

[11] *FilmOn* is citable for persuasive value while review is pending. (Cal. R. Ct. 8.1115(e)(1)). Moreover, the central issue identified by this Court for review –under the first prong of the anti-SLAPP statute, "should a court take into consideration the commercial nature of that speech…" – does not bear on the issues presented here.

> the anti-SLAPP statute where the statement concerns an issue of widespread public interest. [citation] To judicially impose such a requirement would impermissibly "narrow[] the meaning of 'public interest' despite the Legislature's mandate to interpret the anti-SLAPP statute broadly." [citation]

(*Id.* at 721.) Put another way, "[w]hether a statement concerns an issue of public interest depends on the **content** of the statement, **not** the statement's speaker or audience." (*Id.* at 722.) No different here, whether there is an issue of public interest connected with the conversation about Wilson's plagiarizing depends not on who was present for the conversation but on the content of the conversation. And the content of the conversation at issue here undoubtedly was connected to multiple issues of public interest, as well as being a matter of public interest itself. (OB pp.69-72; *supra*, pp. 25-26, 32, *infra*, pp. 42-45.)

Wilson tries, but fails, to attack the reasoning of *FilmOn.com*. He argues that the audience has to matter because otherwise "a person speaking alone in a room to herself could qualify under Section 425.16(e)(4)." (AB p.48.) This makes no sense. Wilson does not explain how speaking to oneself could give rise to a claim by another person such that the anti-SLAPP statute would ever be implicated. Again, defamation necessarily requires a speaker and an audience (even if it is an audience of one). In any event, here, there was a speaker and an audience.

Wilson also misstates the facts of *FilmOn* by arguing that by sending the confidential reports to multiple clients, the reports "constitute dissemination of the message beyond a private conversation." (AB p.49.) FilmOn explicitly argued that the communications were "private" and the Second District assumed as much and held that the communications were still in connection with a matter of public interest.[12] *Supra*, p.36-37.

Equally misplaced is Wilson's reliance on cases that he contends stand for the proposition that a communication cannot be connected to an issue of public interest unless it occurs in public view, and thus advances a public debate. None of the cases support Wilson:

***Wilbanks, supra*, 121 Cal.App.4th 883.** *Wilbanks* did not hold that speech must be part of a public debate in order to be in connection with a matter of public interest. Instead, *Wilbanks* merely stated that the requirement that speech be in connection with an issue of public interest means that "in **many** cases," not **all**, the statement will be a part of a public debate. (*Id.* at 898 [identifying the "**most commonly articulated** definitions" of statements made in connection with a public issue].) Wilson

[12] Wilson's argument that the size of the audience is relevant because the conduct must not only be in connection with an issue of public interest but must "also be in furtherance of the exercise free speech rights [*sic*]" (AB p.49) conflates the separate requirements of the first prong. As discussed above, here, defamation is speech and, thus, undoubtedly is an act in furtherance of free speech.

cannot convert *Wilbank*'s recitation of general categories of speech in connection with matters of public interest into an exclusive list.

Indeed, in *Wilbanks*, the First District recited the general categories of speech, concluded that the speech at issue did not fall into those categories, but nevertheless held the speech at issue conveyed "information concerning a matter of public interest," namely, "consumer information." (*Id.* at 898; *id.* at 900 [statements were "information ostensibly provided to aid consumers choosing among brokers," and "therefore, were directly connected to an issue of public concern"].)

Similarly, here, it remains undisputed that the public has an interest in how the news is gathered, produced, and reported, journalistic integrity, ethics, and credibility, as well as whether a journalist is plagiarizing stories, particularly stories for CNN.com, which has a global reach and is viewed daily by millions. Zaki's statement about Wilson plagiarizing was a statement about Wilson's journalistic ethics, integrity and credibility and whether he did, in fact, plagiarize stories that he prepared for CNN.com, which is clearly connected with these larger public concerns. Thus, the statement is connected to an issue of public concern, if not itself a matter of public concern.

***City of Industry v. Fillmore* (2011) 198 Cal.App.4th 191.** Plaintiff repeats the reasoning of the decision below that *City of Industry* stands for the proposition that only free speech that "directly contribute[s] in some manner to the discussion of an issue of public interest" is "in connection with" a matter of public interest as a means to argue that the anti-SLAPP statute cannot apply to private conversations. (AB p.47.) To the extent that *City of Industry* could be read to support such a broad proposition, it should not be followed for the reasons set forth above. (*Supra*, pp. 27-29.) The argument, however, overstates the holding of *City of Industry* and misunderstands the specific facts of that case.

In *City of Industry*, the Second District did not rule that a statement need be part of a **public** debate to be protected. Instead, the court was focused on whether the act at issue – "the routine submission of sales tax returns" – was speech in connection with a matter of public interest. (198 Cal.App.4th at 218.) In this regard, the Second District opined that "[t]he fact that conduct, when considered in the abstract, may have particular public policy implications" does not bring it within the scope of the anti-SLAPP statute and that, instead, "[t]he inquiry must focus on **the content of the speech** or other conduct on which the cause of action is based, rather than generalities or abstractions." (*Id.* at 217 (emphasis added).)

The court concluded that the act underlying the claim was not speech in connection with a matter of public interest but simply "the routine submission of sales tax returns," which themselves were "not part of any discussion of [the allocation of local sales taxes]," i.e., a matter of public interest. (*Id.* at 218.) Put another way, while the tax returns were alleged to contain misrepresentations that gave rise to fraud claims, the tax returns themselves were not speech in connection with topics of public interest, such as government fraud, the allocation of sales tax, or whether the defendant had committed wrongdoing in submitting the tax returns.

In contrast, here, again, the content of the allegedly defamatory statement was in connection with topics of public interest.

***Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122**; ***World Fin. Grp., Inc. v. HBW Ins. & Fin. Serv., Inc.* (2009) 172 Cal.App.4th 1561**; and ***Albanese v. Menounos* (2013) 218 Cal.App.4th 923**. These cases are inapposite. None of these cases held that to be in connection with a matter of public interest, the speech at issue must be part of a larger public debate.[13] In each, the result did not hinge on whether the speech at issue was "private" or "public." Rather, the courts in those cases concluded that,

[13] If any of these cases can be read as *requiring* that the statement itself be an issue of public interest, then they are wrongly decided for the reasons already discussed.

based on the specific facts of each case, the statements at issue were in connection with a *private* dispute. Thus, in *Weinberg*, the Third District concluded that an accusation of theft was in connection with a "private campaign" "to discredit plaintiff in the eyes of a relatively small group of fellow collectors." (110 Cal.App.4th at 1127.) Similarly, in *Albanese*, the Second District concluded that an allegation of theft was made in connection with a "private dispute" and was not in connection with some other public controversy or issue. (218 Cal.App.4th at 936-37.) Finally, in *World Fin. Grp.*, the Second District concluded that the alleged wrongful conduct and speech was committed in a "business capacity" and was "directed at competitor's associates and customers for the sole purpose of promoting the competing business." (172 Cal.App.4th at 1569.)

Here, the statement at issue here did not concern a "private" matter such as a theft of personal property, but instead involved plagiarism which, by its very nature, causes direct injury to the public, the public's trust in the news, and the public reputation of a news organization, and, thus, is connected with multiple issues of public interest.

III CONCLUSION

The decision of the Court of Appeal should be reversed.

DATED: January 7, 2018

MITCHELL SILBERBERG & KNUPP LLP

By_____
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Attorneys for Defendants and Respondents

WORD COUNT CERTIFICATION

Pursuant to CRC 28.1(d)(1), counsel for Defendants hereby certifies that this **RESPONDENTS' REPLY BRIEF ON THE MERITS** was produced using 13-point Times New Roman type and contains approximately **8,399** words, excluding the Tables of Contents and Authorities. In doing so, counsel relies on the word count of the computer program used to prepare this Petition.

DATED: January 8, 2018

MITCHELL SILBERBERG & KNUPP LLP

By_____
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles , State of California, I am over the age of eighteen years and am not a party to this action; my business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, CA 90064-1683, and my business email address is egd@msk.com.

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Executed on January 8, 2018, at Los Angeles, California.

Eirlys McKenzie