Civil No. S239686

SUPREME COURT OF CALIFORNIA

STANLEY WILSON,

Plaintiff and Appellant,

vs.

CABLE NEWS NETWORK, INC., et al.

Defendants and Respondents.

SUPREME COURT
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APPLICATION TO SUBMIT AMICUS BRIEF AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFF/APPELLANT STANLEY WILSON

After a Decision of the Second District Court of Appeal,
Case No. B264944
Los Angeles County Superior Court, Case No. BC 559720

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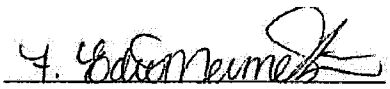
CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization which has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: February 8, 2018



F. EDIE MERMELSTEIN

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF PLAINTIFF AND APPELLANT STANLEY WILSON

Consumer Attorneys of California hereby requests that its attached amicus brief submitted in support of plaintiff and appellant Stanley Wilson be accepted for filing in this action.

Counsel is familiar with all of the briefing filed in this action to date. The concurrently-filed amicus brief is narrowly targeted to address two very precise, but critically-important, points regarding applicable legislative history not otherwise considered or argued by the parties and amicus believes the brief will assist this Court in its consideration of the issues presented.

No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

STATEMENT OF INTEREST OF THE *AMICUS*

The Consumer Attorneys of California ("CAOC") is a voluntary membership organization representing approximately 6,000 associated Plaintiffs' attorneys practicing throughout California. The organization was founded in 1962. CAOC's attorney members primarily represent individuals who have sustained injury and damage in a variety of ways including employment discrimination, retaliation, personal injury and a variety of civil torts. CAOC protects and furthers the rights of the of victimized and injured California consumers, employees and citizens through the legislative process, legal education and support of its attorney members. CAOC's member base represents the most vulnerable Californians in the courts.

As an organization with many attorney members practicing in California protecting civil rights while representing victims of employment discrimination, retaliation and harassment, CAOC is interested in the significant issues presented in this case, especially with maintaining speedy, fair and efficient access to the courts for victimized plaintiffs.

Dated: February 8, 2018

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STATEMENT OF INTEREST OF THE *AMICUS*

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As an organization with many attorney members, practicing in California protecting civil rights while representing victims of employment discrimination, retaliation and harassment, CAOC is interested in the significant issues presented in this case, especially with maintaining speedy, fair and efficient access to the courts for victimized plaintiffs.

INTRODUCTION

The parties in this action have comprehensively briefed many of the legal issues, therefore this brief will be narrowly focused to first address the first prong of the anti-SLAPP statute as to whether the underlying acts committed by Defendant/Respondent CNN ("CNN") complained of by Plaintiff/Appellant Stanley Wilson ("Wilson") are protected acts under the anti-SLAPP statute ("statute"). This brief discusses the meaning of the phrase "an act in furtherance" as used in section 425.16 and the motives behind the "act", which demonstrates that, contrary to the Second District's analysis in *Hunter v. CBS Broadcasting, Inc.*, 221 Cal.App.4th 1510 (2013), the motive of the SLAPPer's subjective intent (to chill the Defendant's rights of freedom to petition and freedom of speech) is not inconsequential where the Defendant couches the underlying acts alleged in the complaint as part of a chain of communication afforded absolute First Amendment protection under the anti-SLAPP statute no matter how attenuated.

Further, a plain reading of the statute's language compels the adoption of an expanded test under prong one of the analysis. The sublevels under prong one are implicit due to the Legislature's intended breadth of the statute and compelled conclusion that the statute's reach was never intended to turn a shield for citizens who engage in public

debate or petition for redress of grievances into a sword for those who violate a citizen's Civil Rights.

In the instant case, Wilson the Plaintiff, a former employee of Defendant media giant CNN, did not file his lawsuit to squelch CNN's First Amendment rights, instead CNN filed an anti-SLAPP motion to chill Wilson's Civil Rights. Contorting the application of the anti-SLAPP statute to allow media conglomerates a ready tool to dissuade individual citizens from filing Civil Rights lawsuits will cause a "chilling effect" not on First Amendment rights of media defendants but on the vindication of an individual's Civil liberties, which include legal and constitutional protections from entities more powerful than any individual.

Thus, the relevance of an allegation that a defendant employer acted with a discriminatory or retaliatory motive has relevance as to whether the specific conduct of discrimination and retaliation form the basis for plaintiff's cause of action and not "acts in furtherance" of a media defendant's right of petition or free speech.

Secondly, this brief discusses the statutory construction related to the burden placed on a moving defendant as it relates to "any written or oral statement or writing" requiring additional proof of protected venue, which CNN failed to carry.

LEGAL DISCUSSION

1. THE PLAIN LANGUAGE OF SECTION 425.16 MANDATES AN ADOPTION OF AN EXPANDED TEST UNDER PRONG ONE OF THE ANALYSIS

A. Under Prong One of the anti-SLAPP Analysis, the "Act in Furtherance" Must Be Proven *By Defendant* to Be More Than Merely Tangential to a Protected Right

Although no requirement exists for a defendant to prove a suit was initiated "to chill the valid exercise of a Constitutional right, the Defendant must establish the underlying conduct of Plaintiff's action is not merely incidental to the Defendant's speech. It is well established that the first prong of the anti-SLAPP statute requires a court to decide "whether the defendant has made a threshold showing that the challenged cause of action is one *arising from protected activity*." (emphasis added) *Hunter v. CBS Broadcasting Inc.* ("*Hunter*"), 221 Cal.App.4th 1510, 1519 (2013). *Hunter* explained, for a court to assess whether a cause of action arises from protected activity, the court must "examine the principal thrust or gravamen of a plaintiff's cause of action." *Id* at 1520. The principal thrust of a cause of action is determined by "identifying '[t]he allegedly wrongful and injury producing conduct'". *Id.* In other words, the court must identify what conduct or acts are actually being challenged. *Id.*

In *Hunter*, the court determined the injury-producing conduct underlying the plaintiff's claims was defendant CBS's casting decision on who to hire as an on-air weather anchor. *Id* at 1521. The court opined that a casting decision of who was to report the news advanced and assisted the protected activity. *Id.* Yet, the *Hunter* Court also stressed, "collateral or incidental" conduct alluding to protected activity is insufficient to trigger application of the anti-SLAPP statute. *Id* at 1520. Thus, the first analytical step is Defendant's burden to identify whether a plaintiff's cause of action is based in furtherance of the defendant's right of free speech. "An act is in furtherance of the right to free speech if the act helps advance that right or assists in the exercise of that right." *Id* at 1521.

It follows, that in determining whether Wilson's cause of action arises from protected activity, the burden is on the Defendant to identify from the complaint the conduct or acts that are actually being challenged are protected under the statute. Wilson complaint premises causes of action one through seven on CNN's sustained employment discrimination including: (1) CNN ignoring his employee complaints to human resources reporting a poor work environment and lack of advancement opportunities based on race; (2) failure to promote Wilson prior to taking paternity leave; (3) being passed over for assignments given to a younger Caucasian man; and culminating in (4) the

pretextual termination; and for Wilson's eighth cause of action the underlying act is defamatory written or oral statements. None of the underlying acts of Wilson's claim advance or exercise CNN's free speech. Rather, the protected activity alleged by CNN is merely incidental to the conduct underlying the complaint.

Hunter referred to *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments* ("*Alta Loma*"), (2007) 154 Cal.App.4th 1273, where the court determined the plaintiff's challenged conduct in her discrimination complaint against her landlord following the landlord's institution of an unlawful detainer action was not predicated on a protected activity. *Hunter* at 1522. Rather, the *Alta Loma* court determined, Plaintiff's action was based on the Defendant's failure to accommodate her disability by not providing her extended notice of termination, even though the plaintiff's suit was "'triggered by'" the landlord's unlawful detainer action. *Id* at 1523. The *Hunter* court found the anti-SLAPP appropriately inapplicable to *Alta Loma* because the plaintiff's "references to protected activity were merely incidental to the unprotected acts [(failure to provide disability accommodations)] upon which [the plaintiff's] claims were based." *Id* at 1525.

Similarly, Wilson has asserted and identified numerous instances where CNN exerted discriminatory

employment practices against Wilson, and failed to take preventative measures to protect Wilson from retaliatory actions by CNN. CNN has asserted the anti-SLAPP statute against Wilson under the contention that a firing decision is an act in furtherance of a protected activity because it advances or assists in the exercise of free speech. However, the Defendant's burden of establishing an act in furtherance of free speech cannot end there. Hunter made clear, the act cannot be incidental to the furtherance of speech.

The firing decision alleged by CNN is incidental to the furtherance of CNN's dissemination of the news. Moreover, as in *Alta Loma*, the termination merely triggered Wilson's action against CNN for its sustained employment discrimination against Wilson over the period of his 14 year employment. Wilson's action is not based on an attempt to prevent CNN from depicting or disseminating the news in a manner of its choosing, rather, Wilson has asserted a long-term chain of unlawful and discriminatory actions taken by CNN against Wilson in violation of employment laws and infringement of his civil liberties throughout the course of his employment with CNN.

Therefore, included in the showing of an act in furtherance of freedom of speech requires the defendant to also establish that the underlying act(s) complained of a plaintiff advances or assists in the exercise of free speech with greater than incidental or collateral effect.

B. If the "Act in Furtherance" is Determined to be a Protected Right under the Statute, then the Plain Reading of the Statute Requires a Balance the Equities to Ensure the Purpose of the Statute is Not Altered for a Wrongful Purpose

The anti-SLAPP statute was enacted to prevent the filing of frivolous lawsuits for the primary purpose or effect of chilling one's Constitutional right to free speech and/or the right to redress grievances. Cal. C.C.P. §425.16. The Legislature's intent is evidenced by a straight reading of subsection (a) of the statute.

The anti-SLAPP statute is to extend broadly for the specific purpose of protecting public participation in matters of public significance from abuse through the judicial process. The Legislature's intended breadth of the anti-SLAPP statute compels the conclusion that the statute's reach was never intended to turn a shield for citizens who engage in public debate or petition for redress of grievances into a sword for those who violate a citizen's Civil rights or used to unnecessarily delay a case or for an employer to intimidate an employee from bringing suit.

Section 425.16(a) states:

> (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the

> redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. *To this end, this section shall be construed broadly.* [Emphasis Added.]

The phrase "[t]o this end" refers specifically to the purpose of the statute, "to encourage continued participation in matters of public significance." CNN attempts to create a broad exemption from suit under the guise of First Amendment protection. CNN argues, "[a]llowing a plaintiff to circumvent the anti-SLAPP statute simply by pleading that conduct was discriminatory is inconsistent with policy favoring broad protection of free speech rights." (Respondent's Opening Brief on the Merits, p. 53) Here, CNN misuses the intended purpose of the statute and turns it into a shield from liability for discrimination and retaliation against an employee, thereby attempting to transform the underlying acts into speech related activity in the stream of its First Amendment rights to carry out the news.

Recently, in *Park v. Board of Trustees of California State University* ("*Park*"), (2017) 2 Cal.5th 1057, 1066, this Court analyzed *Un Hui Nam v. Regents of the University of California*("*Nam*"), (2016) 1 Cal.App.5th 1176, 1187:

> "*Nam* illustrates that while discrimination may be carried out by means of speech, such as a written notice of termination, and an illicit animus may be evidenced by speech, neither circumstance transforms a discrimination suit to one arising from speech. What 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 a discriminatory or retaliatory consideration." *Park v. Board of Trustees of California State University* (*supra*), at 1066

Here, CNN denied Wilson the benefit of promotion prior to taking paternity leave and the benefit of employment after a pretextual termination. CNN also subjected Wilson to a poor work environment and lack of advancement opportunities based on race and being passed over for assignments given to a younger Caucasian man. Wilson did not file suit to chill CNN's First Amendment right to free speech. The discriminatory and retaliatory consideration denied Wilson benefits and subjected him to undue burdens in contravention of Wilson's Civil rights.

This Court has previously found there is no intent-to-chill proof requirement on Defendant under the first prong of the analysis. (See *Equilon Enterprises v. Consumer Cause, Inc.*, (2002) 29 Cal.4th 53, 60). However, where the Defendant must resort to extrinsic evidence and analysis to force an underlying act into a First Amendment rubric, a

balancing of the equities is the implicit next analytical subpart under prong one of the analysis. The statute was not enacted to overreach even with the addition of language extending the breadth.

Here, CNN couches all underlying acts of the complaint as occurring in the stream of CNN's First Amendment communication rights. CNN also singles out the culminating act of termination as an "editorial decision." (Respondent's Opening Brief on the Merits p. 11) CNN attempts to utilize the Legislative amendment to have the statute "construed broadly" for the breadth of the statute to encompass any and all acts where there is a tangential relationship to speech. This interpretation flies in the face of the plain reading of the preamble of the statute which contains the concise intent of the Legislature, "to encourage continued participation in matters of public significance." Wilson's action in no way attempted to quell CNN's delivery of the news.

Where the Legislature intended anti-SLAPP to prevent the chilling of freedom of speech, consideration must also be afforded to the need to ensure that other individual Civil liberties are not overshadowed and obstructed by the broad veil of anti-SLAPP to allow broadcasting agencies evade scrutiny or liability for discriminatory practices.

C. If the Court Finds the Balance of the Equities In Favor of the Plaintiff, the Plain Reading of the Statute Requires *the Court* to Make Determinations as to the Defendant's Motive For Bringing the Motion

A successful anti-SLAPP motion operates as a harsh terminating sanction, awarding the Defendant mandatory reasonable attorney fees and costs. Cal. C.C.P. §425.16. However, the statute also mandates that a court *shall* award a Plaintiff defending the SLAPP reasonable attorney fees and costs only if the anti-SLAPP motion is considered "frivolous or is solely intended to cause unnecessary delay." (Section 425.16 (c)(1)).

Here, the plain reading of the statute evidences that the Legislature placed a stop gap on the potential for abuse of the statute by including a mandatory fee award to Plaintiff when specific findings of frivolity or a sole intent by the Defendant to delay the case. Therefore, under prong one of the analysis, where the Defendant has not met its burden, the Court should then make a determination as to whether the motion was brought in bad faith, that was frivolous or solely intended to cause unnecessary delay. The statute references Cal. C.C.P. §128.5 however, if the Court finds that the motion was frivolous or solely intended to cause unnecessary delay, an award of attorney fees are mandatory rather than discretionary under Cal. C.C.P. §425.16(c)(1).

2. THE STATUTORY CONSTRUCTION RENDERS SECTION 425.16(e)(4) OF THE STATUTE INAPPLICABLE FOR "ANY WRITTEN OR ORAL STATEMENT OR WRITING"

Section 425.16 subdivision (e) states:

> As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) *any written or oral statement or writing* made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) *any written or oral statement or writing* made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) *any written or oral statement or writing* made in a place open to the public or a public forum in connection with an issue of public interest, or (4) 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. [Emphasis Added.]

More simply put, under the first prong analysis a Defendant has the burden to prove the act complained of is based on one of four protected activities under subsection (e) of the code:

- Subsection (e) - *any written or oral statement or writing* (1) made before a proceeding; (2) made in connection with an issue under consideration or review by a proceeding; (3) made in a place open to the public or a public forum in connection with an issue of public interest;

or

- (4) 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.

CNN attempts to apply the catchall section (e)(4) to Plaintiff's defamation claim. However, (e)(4) is inapplicable where the underlying act in the defamation claim is the *written statement* permanently recorded in Wilson's employee file. CNN attempts to sidestep the statutory requirement that *any written or oral statement or writing* must be made "in a place open to the public or a public forum" as required under (e)(3). By moving under the inapplicable subsection (e)(4) of the statute, CNN has not met its burden on its motion.

Whether the statements are in connection with a public issue or an issue of public interest is superfluous where CNN failed to meet its burden under the first prong of the analysis. Not only did CNN failed to allege that the

written or oral statements complained of were made in the proper venue to make the anti-SLAPP statue applicable for this specific type of act, CNN attempts to argue that even private communications can be protected under the statute. (Reply Brief p.38-39) Here, CNN attempts to deem the writing and oral statements as "other conduct" to circumvent the requirements of the statute by applying subsection (e)(4). This is fatal to CNN's analysis under the first prong where the statutory language is clear on the requirements.

> "[W]hen a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. [Citations.] In accordance with this principle of construction, a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list." *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 169

The language of the anti-SLAPP statute is clear, subsection (e) lists three ways that *any written or oral statement or writing* is protected under the statute, then has a fourth catchall section for any conduct that does not arise from *any written or oral statement or writing.* To include *any written or oral statement or writing* under subsection

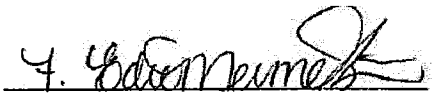
(e)(4) would make subsections (e)(1) to (e)(3) unnecessary or redundant. CNN cannot cure this fatal defect in carrying its burden as it applies to the defamation claim.

CONCLUSION

In addition to the compelling statutory interpretation principles discussed in respondent's briefs, these additional considerations further support the conclusion that the appellate court was correct in finding that the anti-SLAPP motion not applicable.

Dated: February 8, 2018

FEM LAW GROUP

By: 

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CERTIFICATE OF LENGTH OF BRIEF

I, F. Edie Mermelstein, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is less than 4,694 words as calculated utilizing the word count feature of Microsoft Word software used to create this document.

Dated: February 8, 2018

F. EDIE MERMELSTEIN

PROOF OF SERVICE

Stanley Wilson v. Cable News Network Inc., et al. Supreme Court No. S239686; Court of Appeal No. B264944; LASC Case No. BC 559720

STATE OF CALIFORNIA
COUNTY OF ORANGE COUNTY

I am employed in the County of Orange, State of California, I am over the age of eighteen years and am not a party to this action; my business address is FEM LAW GROUP, 18811 Huntington St, Ste 240, Huntington Beach, CA 92648

On February 08, 2018, I served a copy of the foregoing document(s) described as **APPLICATION TO SUBMIT AMICUS BRIEF AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFF/APPELLANT STANLEY WILSON; AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFF STANLEY WILSON** and on the interested parties in this action at their last known address as set forth below by taking the action described below:

☒ BY OVERNIGHT DELIVERY: I placed the above-mentioned document(s) in sealed envelope(s) designated by the carrier, with delivery fees provided for, and addressed as set forth above, and deposited the above- described document(s) with Golden State Overnight in the ordinary course of business, by depositing the document(s) in a facility regularly maintained by the carrier or delivering the document(s) to an authorized driver for the carrier.

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Clerk of the Court
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San Francisco, CA 94102

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☒ BY REGULAR MAIL: I deposited such envelope in the mail in Huntington Beach, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit

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☒ **STATE**: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 8, 2018 at Huntington Beach, California.

M Stubbs

Molly Stubbs