

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 04/29/09

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE

T. FREEMAN

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

R. HERNANDEZ, CSR #9572

Reporter

1:00 pm

BC363201

Plaintiff
Counsel

NO APPEARANCES

DEEPAK KALPOE

VS

Defendant
Counsel

PHILLIP C MCGRAW

R/F BC363407 DENIED

NATURE OF PROCEEDINGS:

1. Defendant Kay Skeeters as Executrix of the Estate of Jamie Skeeter's Special Motion to Strike; Request for Attorneys' Fees and Costs

SUPPLEMENTAL TENTATIVE RULING

Defendant Kay Skeeters as Executrix of the Estate of Jamie Skeeter's Special Motion to Strike is granted. C.C.P. § 425.16.

Jamie Skeeters was the former chief of police and reputed polygraph expert who was sent by the Dr. Phil show to Aruba to get interviews of Plaintiffs and other individuals regarding the disappearance of Natalie Holloway. It is alleged that he secretly taped the interview with Plaintiff Deepak Kalpoe that formed a large portion of the Dr. Phil broadcast and the alleged defamation and republications thereof which form the core of this lawsuit. The operative First Amended Complaint ("FAC") contains 18 causes of action for defamation or republication of defamatory material by Defendants against Plaintiffs with the core statement of alleged defamation being that the Kalpoe Plaintiffs had sex with Natalee Holloway on the night of her disappearance and by innuendo, non-consensual sex (see e.g., paragraphs 18-21). All of the remaining causes of action are based on this same primary allegation, i.e., that Plaintiffs did

<p>MINUTES ENTERED 04/29/09 COUNTY CLERK</p>

5/4/09

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not have sex or otherwise rape Natalie Holloway and that Defendants harmed them by manipulating statements and the interview recordings to make it look like they had admitted to doing so. The 19th cause of action for invasion of privacy/false light the 20th cause of action for misappropriation of likeness, the 21st cause of action for intentional infliction of emotional distress and the 22nd cause of action for negligent infliction of emotional distress are all based on the alleged defamation in the broadcast. The 23rd and 24th causes of action for fraud and negligent misrepresentation are based on the allegation that Defendant Skeeters misrepresented to Deepak Kalpoe that the Dr. Phil would in essence "take care of them" and help them exonerate themselves and that's why Kalpoe allegedly agreed to talk with Skeeters, but that Defendants instead created false and misleading statements based on the allegedly secretly recorded interview and defamed Plaintiffs in the broadcast. The 25th cause of action is not a true cause of action as it is for civil conspiracy only.

"The anti-SLAPP statute states that a cause of action shall be subject to a special motion to strike if (1) the cause of action arises from an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue, and (2) the plaintiff is unable to establish a probability of prevailing on the merits of the claim. (§ 425.16, subd. (b)(1).) The purpose

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of the statute is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights. (§ 425.16, subd. (a).) The Legislature has declared that the statute must be 'construed broadly' to that end. (Ibid.) [P] A defendant moving to strike a cause of action under the anti-SLAPP statute must show that the cause of action 'aris[es] from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue' (§ 425.16, subd. (b)(1)). [Citation]. If the defendant makes that showing, the plaintiff must establish a probability of prevailing on the merits of the claim in order to avoid dismissal. (§ 425.16, subd. (b)(1))." Hall v. Time Warner, Inc. (2007) 153 Cal.App.4th 1337, 1345-1346.

The first inquiry for the Court is whether or not Defendant Skeeters has established that the claims stated in Plaintiffs' operative FAC arise from Defendant Skeeters' lawful acts of free speech or the right to petition in connection with a public issue. "Section 425.16, subdivision (e) describes four categories of conduct that constitute an 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 within the meaning of subdivision (b)(1): (1) any written or oral statement or writing made before a

<p align="center">MINUTES ENTERED 04/29/09 COUNTY CLERK</p>
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507475

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legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Hall, supra 153 Cal.App.4th at p. 1347 (internal quotations omitted).

Clearly, subsection (1) does not apply. However, subsection (2) concerning writings or statements made "in connection with" an issue under consideration by a judicial body, subsection (3) statements made in a public forum on an issue of "public interest" and subsection (4) concerning conduct in furtherance of the exercise of free speech rights in connection with an issue of "public interest" all seem to apply to the facts here, namely a public broadcast about a criminal investigation concerning the disappearance of an American teenager in Aruba which had received extensive news coverage in all types of media. The FAC does appear to fall within the purview of the statute.

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50/4/09

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In Lieberman, infra, a news station broadcast a report about a doctor (Lieberman) illegally dispensing drugs based in part on secret recordings of such a transaction obtained by station employees posing as patients. The Second District found that the secret tapings, even if illegally obtained, were conduct in furtherance of the exercise of free speech rights by the station in presenting the news story. "We conclude that the broadcast was an act in furtherance of the appellant's exercise of a constitutional right to free speech in connection with a public issue, as defined in section 425.16. [Citation omitted]. Quoting Nicholson v. McClatchy Newspapers (1986) 177 Cal.App.3d 509 [223 Cal. Rptr. 58], Lieberman contends that the secret recording was not an act in furtherance of appellant's right of free speech. He argues that although 'the First Amendment protects the ordinary news-gathering techniques of reporters,' it does not protect illegal conduct, and the press is not 'immune from liability for crimes and torts committed in news gathering activities.' [Citation]. To say that lawful newsgathering is an act in furtherance of one's right to free speech, but unlawful newsgathering is not an act in furtherance of one's right to free speech, begs the question. It is not the defendant's burden in bringing a SLAPP motion to establish that the challenged cause of action is constitutionally protected as a matter of law. [Citations]. Once the defendant shows that the cause

<p align="center">MINUTES ENTERED 04/29/09 COUNTY CLERK</p>
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5049

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of action arose from acts done in furtherance of an exercise of free speech, it becomes the plaintiff's burden to establish that the acts are not protected by the First Amendment. [Citation]." Lieberman v. KCOP Television, Inc. (2003) 110 Cal.App.4th 156, 165. The plaintiff there (Lieberman) had filed a lawsuit against the station alleging violation of Penal Code § 632, i.e., secretly recording a confidential communication.

The Court went on to explain that there did not appear to be authority on point as to whether or not the act of news-gathering is conduct in furtherance of the exercise of First Amendment rights for purposes of a SLAPP motion under Section 425.16. But the Court noted that "Section 425.16, subdivision (a), mandates . . . that the statute be construed broadly, and the statute's reach is not restricted to speech, but expressly applies to conduct. (§ 425.16, subd. (e)(4).) Further, that conduct is not limited to the exercise of its right of free speech, but to all conduct in furtherance of the exercise of the right of free speech in connection with a public issue. (Id.) Furtherance means helping to advance, assisting. [Citation omitted]. Reporting the news is free speech. [Citation]. Reporting the news usually requires the assistance of newsgathering, which therefore can be construed as undertaken in furtherance of the news media's right to free speech. Because the surreptitious recordings here were in aid of and were incorporated into a

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50/5/09

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broadcast in connection of a public issue, we conclude that Lieberman's complaint fell within the scope of section 425.16." Lieberman, supra 110 Cal.App.4th at p. 166.

Furthermore, an issue of "public interest" is given broad application in the case law. "The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. [Citations omitted]. "[M]atters of public interest . . . include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals." " Damon v. Ocean Hills Journalism Club (2000) 85 Cal.App.4th 468, 479. Further, the Second District has explained, upon review of the legislative history and relevant cases interpreting the statute, that "'an issue of public interest' within the meaning of section 425.16, subdivision (e) (3) is any issue in which the public is interested. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute it is enough that it is one in which the public takes an interest." Nygard, Inc. v. Uusi-Kerttula (2008)159 Cal. App.4th 1027, 1042.

Therefore, the "public interest" does not have

<p>MINUTES ENTERED 04/29/09 COUNTY CLERK</p>

50475

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to be about an important community matter. In Nygard, it was held that the SLAPP statute did apply to a type of celebrity topic, stating that "the trial court correctly concluded that the statements on which the present suit is based concern an issue of public interest. According to evidence introduced by defendants in support of their motions to strike, there is 'extensive interest' in Nygård 'a prominent businessman and celebrity of Finnish extraction' among the Finnish public. Further, defendants' evidence suggests that there is particular interest among the magazine's readership in 'information having to do with Mr. Nygård's famous Bahamas residence which has been the subject of much publicity in Finland.' The June 2005 article was intended to satisfy that interest." Id. A similar result was reached in Hall, supra. "A statement or other conduct is 'in connection with an issue of public interest' (§ 425.16, subd. (e)(3)) or 'in connection with a public issue or an issue of public interest' (id. (e)(4)) if the statement or conduct concerns a topic of widespread public interest and contributes in some manner to a public discussion of the topic." Hall, supra 153 Cal.App.4th at p. 1347. In Hall, the trial court's determination that the statute was not implicated was reversed with the court explaining as follows: "The public's fascination with [Marlon] Brando and widespread public interest in his personal life made Brando's decisions concerning the distribution of his assets a public issue or an issue of public

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50445

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NATURE OF PROCEEDINGS:

interest. Although Hall was a private person and may not have voluntarily sought publicity or to comment publicly on Brando's will, she nevertheless became involved in an issue of public interest by virtue of being named in Brando's will. Defendants' television broadcast contributed to the public discussion of the issue by identifying Hall as a beneficiary and showing her on camera." Id.

There really does not appear to be any way to dispute that the broadcast concerning the Natalee Holloway disappearance and Plaintiffs' potential involvement in having at least seen her that evening is a matter of public interest. And, the interview gathering and broadcast of a program regarding same is an exercise of the right of Free Speech by media defendants. Accordingly, the court finds that Defendant Skeeters has satisfied his initial burden of showing that the FAC falls within the purview of Section 425.16.

The question then remains whether or not Plaintiffs have shown a probability of prevailing on the merits of the FAC. "In order to establish a probability of prevailing on the claim (§ 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must state and substantiate a legally sufficient claim. [Citations.] Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to

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5/4/09

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sustain a favorable judgment if the evidence submitted by the plaintiff is credited. In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." Nygard, supra 159 Cal.App.4th 1027, 1044(internal quotations and citations omitted).

There is no evidence that Defendant Skeeters participated in the manipulation of his recorded interview. Whether or not the claims in the FAC are viable as to any of the co-defendants is not before the court at present. This motion seeks only to dispose of the claims stated as against Defendant Skeeters. The two main hurdles for Plaintiffs being able to prove probability of success on the merits is that they bear the burden of proof on the alleged falsity of the defamatory statements and that Defendant Skeeters was negligent and/or acted with actual malice.

As for the element of falsity, the United States Supreme Court has held that where a matter of "public concern" is at issue, a defamation plaintiff bears the burden of proof on the question of falsity

<p align="center">MINUTES ENTERED 04/29/09 COUNTY CLERK</p>
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46/4/09

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as against media defendants, even if the plaintiff is a private figure. "Here, as in Gertz, the plaintiff is a private figure and the newspaper articles are of public concern. In Gertz, as in New York Times, the common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity -- that the defendant must bear the burden of proving truth -- must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." Philadelphia Newspapers v. Hepps (1986) 475 U.S. 767, 776, citing Gertz v. Robert Welch (1974) 418 U.S. 323 and New York Times v. Sullivan (1964) 376 U.S. 254. In discussing the ruling in Philadelphia Newspapers, California's First District has indicated that given the constitutional issues involved, the rule concerning the burden of proof should also apply to non-media defendants. See, Nizam-Aldine v. City of Oakland (1996) 47 Cal.App.4th 364, 373-374.

There is very little competent evidence offered by Plaintiffs to support falsity of the allegedly defamatory statements that Plaintiffs had sex with Holloway, and/or potentially drugged her and had non-consensual sex with her, on the night of her disappearance. There is the purported order from the court in Aruba (Pltfs' Ex. 11) affirming the trial judge's decision to reject a request by the prosecutor to detain Plaintiffs. Even assuming this

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50449

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translation is admissible, it is not proof that Plaintiffs did not have sex with Holloway. And there is the somewhat ambiguous recorded interview of Deepak Kalpoe that appears to indicate that he did not have sex with her that night (Pltfs' Ex. 2-- translation, plus DVD copies).

There is also no evidence of the alleged fault of Defendant Skeeters that resulted in the alleged defamation. If Plaintiffs are properly deemed private plaintiffs then they only have to prove negligence. If they are properly deemed limited purpose public figures, then they have to prove actual malice on the part of Skeeters by clear and convincing evidence. "The cases decided since New York Times and Gertz make it clear that a person or group should not be considered a 'public figure' solely because that person or group is a criminal defendant [citation omitted]; has sought certain relief through the courts [citation]; or merely happens to be involved in a controversy that is newsworthy [citation]. Rather . . . , a 'public figure' plaintiff must have undertaken some voluntary act through which he seeks to influence the resolution of the public issues involved. [Footnote omitted]. As such, the mere involvement of a person in a matter which the media deems to be of interest to the public does not, in and of itself, require that such a person become a public figure for the purpose of a subsequent libel action." Reader's Digest Ass'n v. Superior Court (1984) 37

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Cal.3d 244, 254 (original emphasis). Where such voluntary acts are taken, the defamation plaintiff can be deemed a "limited purpose public figure". In determining whether or not a defamation plaintiff is properly deemed a limited purpose public figure, "courts should look for evidence of affirmative actions by which purported 'public figures' have thrust themselves into the forefront of particular public controversies" as judged by the totality of circumstances. Id. at pp. 254-255; see also, 5 Witkin, Cal.Law (10th ed. 2005) Torts §§ 601-605, pp. 884-896.

There clearly is no evidence offered showing actual malice by Defendant Skeeter. Arguably though, there is a debatable question as to whether or not Plaintiffs voluntarily obtained limited purpose public figure status simply because their lawyers spoke to the media or that Plaintiff Deepak Kalpoe had agreed to talk to Skeeter in anticipation of giving an interview for the Dr. Phil Show. But, even assuming that Plaintiffs are not properly qualified as limited purpose public figures, they still have to show that the defamatory statements were made with no reasonable basis for believing them to be true. The record before the court shows only that Defendant Skeeters simply was involved in taking the interviews in Aruba, including the interview of Deepak Kalpoe, which interviews were edited and used by the Dr. Phil Show Defendants in preparing their broadcast. There are also some

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50495

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comments by Skeeters on the record during that broadcast but nothing that is identified as defamatory (see Def's Ex. A-3). To the extent that the Dr. Phil Show Defendants can be shown to have been negligent or reckless in the way they edited the show and thus potentially liable, there is no competent showing that Defendant Skeeter was so involved.

The invasion of privacy/false light and misappropriation claims also are not supported against Defendant Skeeter. And, where the matter at issue is "newsworthy", consent to use likeness is not at issue, therefore the fact that the interview was recorded and used without Plaintiffs' permission would not be actionable since the criminal investigation was newsworthy. See, *Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542. There is no competent evidence offered as to Defendant Skeeter's liability for the emotional distress or fraud claims either. As such, the motion is properly granted in favor of Defendant Skeeter given Plaintiffs' failure to offer sufficient competent evidence on essential elements of all causes of action in the FAC to show a probability of success on the merits of their claims as against Defendant Skeeters.

CLERK'S CERTIFICATE OF MAILING/

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NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 04-30-09 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 4-30-09

John A. Clarke, Executive Officer/Clerk

By: _____
T. Freeman

William Cremer
CRÉMER SPINA SHAUGHNESSY JANSEN SIEGERT, LLC
180 North LaSalle Street, Suite 3300
Chicago, Illinois 60601

William Haggerty
FORD WALKER HAGGERTY & BEHAR LLP
One World Trade Center

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