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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

INTEGRATED INVESTIGATIONS, INC., et al., Plaintiffs and Respondents, v. CHRISTY L. O'DONNELL, Defendant and Appellant.	B231035 (Los Angeles County Super. Ct. No. BC439563)

APPEAL from a judgment of the Superior Court for Los Angeles County, Abraham Khan, Judge. Reversed with directions.

Hinshaw & Culbertson, Renee C. Ohlendorf and Wendy Wen Yun Chang for Defendant and Appellant.

The Mathews Law Group, Charles T. Mathews, Arlene Huang Olson and Jeffrey Nakao for Plaintiffs and Respondents.

Defendant and appellant Christy O'Donnell appeals from the denial of her special motion to strike under Code of Civil Procedure[1] section 425.16. She argues that the court abused its discretion in sustaining plaintiffs' objections to evidence she submitted in support of her motion, that the trial court erred in concluding that section 425.16 did not apply to the claims alleged in the complaint, and that plaintiffs failed to demonstrate a probability that they will prevail on their claims. Her arguments are well taken. Accordingly, we reverse the order denying the special motion to strike and remand the matter with directions to enter a new order granting the motion.

BACKGROUND

Plaintiffs Integrated Investigations, Inc. (Integrated), Paul F. Thornton, and Ian Farrell filed a lawsuit against the County of Los Angeles (the County) and Christy L. O'Donnell after Integrated, a private investigation company, learned that the County had sent emails and other communications to various entities, stating that Integrated was not to be hired to conduct investigations for the County and related entities. The operative complaint alleges nine causes of action against O'Donnell, for professional negligence, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, fraud, breach of fiduciary duty, breach of contract, defamation per se, intentional infliction of emotional distress, and negligent infliction of emotional distress.[2] All of the claims are based upon the same set of facts.

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

[2] All but the professional negligence claim were also alleged against the County.

The complaint alleges that in April 2009, Integrated was hired by Frank Tiongson and Mike Kranther[3] to investigate a County employee, Mary Villegas, who had filed a workers' compensation claim and a civil sexual harassment claim against the County. Integrated assigned two investigators (including plaintiff Farrell) to conduct surveillance of Villegas. At one point during the surveillance, Farrell had an encounter with an unidentified man and woman in a Ford Mustang, which ended with a high speed car chase and Farrell commanding the car's occupants to stop following him. Integrated provided its report on the surveillance of Villegas on April 26, 2009; the report did not address the incident involving the car chase. A month later, Tiongson asked Integrated to prepare a supplemental report addressing the incident.

A few days later, on June 1, 2009, Integrated received a telephone call and an email from O'Donnell, who said she represented the County in Villegas' civil lawsuit. Farrell and the other investigator involved in the Villegas surveillance met with O'Donnell at her law office. According to the complaint, O'Donnell was working for the County, but she told Farrell and the other investigator that she was their attorney and that "everything she and they did was privileged and protected." She instructed them to amend their surveillance report, providing "word-for-word" the language to be added or deleted from the original report, and told Farrell to retrieve and destroy all copies of the original report. She told them that the civil case was going to be thrown out based on the statute of limitations, until Villegas asserted that the County had sent the investigators out to harass and scare her into dropping the lawsuit.

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[3] The complaint does not identify Tiongson and Kranther. Tiongson is the third party administrator for the County, and Kranther is the County's Fire Department Chief of Risk Management.

The complaint alleges that O'Donnell "used all of the 'protected' information received from [Integrated and the investigators] against them and in favor of [the County]," although the complaint does not specify what "protected" information she received or how it was used. It alleges that, sometime after the meeting with O'Donnell, Integrated received several calls from various claims adjustors, asking if Integrated was involved in an embezzlement situation in another county, because the County had sent out emails and other communications stating that Integrated was not to be used for any investigations on behalf of the County or other entities. The complaint alleges that the conduct of O'Donnell and the County has caused plaintiffs harm in the amount of at least $10 million.

O'Donnell filed a special motion to strike the complaint. She argued that all of the claims were subject to section 425.16 because all were based upon statements and writings she made as an attorney representing the County in litigation (i.e., the civil lawsuit Villegas filed against the County), and that plaintiffs could not prevail on their claims against her because, among other things, her conduct was immunized under the litigation privilege, Civil Code section 47, and plaintiffs could not present any evidence to support their claims against her.

In support of her motion, O'Donnell submitted evidence[4] (including her own declaration and a declaration from her co-counsel in the Villegas litigation) that she first learned Integrated had been hired to investigate Villegas in early May 2009. She declared that during a mediation session in Villegas' civil lawsuit on May 8, 2009, which O'Donnell attended as the attorney for the County, the mediator informed O'Donnell about allegations Villegas made concerning the car

[4] Plaintiffs objected to almost all of the evidence O'Donnell submitted in support of her motion, and the trial court sustained almost all of those objections. O'Donnell challenges the court's rulings on appeal. As we discuss in section A, *post*, most of those objections were meritless, and the trial court abused its discretion by sustaining them.

chase incident. Villegas asserted that an investigator hired by the County drove up to a car in which she was a passenger (her son was driving) and yelled, "This is a fucking warning." She said that she believed she was being warned that if she did not dismiss her lawsuit, she and her son would be physically harmed. Villegas reported the threat to the police, and provided to the police a video she took of the incident.

Before the mediation, O'Donnell had filed a motion for summary judgment on behalf of the County in the civil lawsuit. O'Donnell believed the County's chances of prevailing on the motion were very high based upon several procedural arguments. After learning during the mediation session about Villegas' allegations about the investigator, the County's Fire Department Chief of Risk Management Michael Kranther (who, with the County's third party administrator Paul Tiongson, had retained Integrated in connection with Villegas' workers' compensation claim) called Farrell in O'Donnell's presence. She heard Farrell say to Kranther that he did not say to Villegas, "Take this as a fucking warning." Instead, Farrell told Kranther that he said only, "This is your last warning stupid." Based on Farrell's statements to Kranther, O'Donnell recommended to the County that it should not settle the civil lawsuit until it had more information about Villegas' allegations against Farrell and Integrated.

On May 21, 2009, Villegas' attorney emailed to O'Donnell a proposed witness list in the civil lawsuit, which listed as a witness "'Eian', Private Investigator." In describing the subjects about which "Eian" was expected to testify, the document stated: "Defendant's private investigator hired to do surveillance on plaintiff. Followed plaintiff by car over course of at least several days. Threatened plaintiff and her son both physically by driving his car at them, and verbally. Harassment of plaintiff and her family being investigated by LAPD." The following week, O'Donnell received from Agnes Dinh, the County

Fire Department's Risk Management assistant, a copy of Integrated's original report and an amended report of its surveillance of Villegas. The original report, which was addressed to the County's attorney for Villegas' workers' compensation claim (not O'Donnell) and signed by plaintiff Thornton on behalf of Integrated, did not mention the car chase incident. The amended report, which was addressed to the workers' compensation attorney and included a signature block for Thornton (although it was not signed), added certain details, including several incidents in which an unidentified male in a Ford Mustang drove by to look at the investigators. The report stated that the investigators told the man that they were conducting an investigation and that he should contact the Watch Commander at the Los Angeles Police Department Mission Station if he had any concerns. The report also described the car chase incident, stating that the Ford Mustang began following one of the investigators (the two investigators were in separate cars), that the Mustang was tailgating the investigator's car and drove through a red light to continue the chase, and that the investigator drove through a green light, reversed direction, and pulled up next to the Mustang and told the driver "last warning stupid." The report stated that the investigators did not know that the woman in the Mustang was Villegas or that the driver was associated with her; it also stated that the warning was intended "to inform the man that he was creating a dangerous situation and that we would be forced to call the police."

The day after she received the reports, O'Donnell sent an email to County Counsel, expressing her concerns about the effect on the civil case of Farrell's "last warning stupid" statement to Villegas and her son. She informed County Counsel that Villegas' lawyer advised her that he intended to use this statement as evidence that the County threatened Villegas because of her report of sexual harassment. O'Donnell wrote that she was concerned that the statement may raise a triable issue of fact sufficient to defeat the County's motion for summary judgment

because it may allow Villegas to argue a "continuing violation" theory. She expressed her frustration that she had been told at the mediation session that no threat had been made, but that the investigators had admitted it in their amended report.

Several days later, on June 1, Villegas served by personal service her opposition to the County's motion for summary judgment, in which Villegas asserted that the incident with the investigator demonstrated that her harassment by the County was continuing, and that this evidence defeated the County's statute of limitation defense. That same day, O'Donnell emailed Thornton and Farrell. She stated that she was an attorney representing the County in Villegas' civil lawsuit. She told them that Villegas listed Farrell and Paul Ontiveros (the other investigator who conducted surveillance on Villegas) as witnesses she intends to call at trial, and that she (O'Donnell) needed to interview them to prepare her case for trial.

Before O'Donnell interviewed Farrell and Ontiveros, she received from the County and reviewed copies of the police report on Villegas' April 26, 2009 complaint against Farrell regarding the car chase incident, the May 29, 2009 follow-up investigation report by the detective who investigated Villegas' complaint, and the video of the incident that Villegas provided to the police. The follow-up investigation report stated that Farrell told the detective that he did not know that the driver of the car was Villegas' son or that the passenger was Villegas, and that he did tell them to "take this as a 'fucking warning,'" but he said he was not threatening her. The report also stated that Villegas gave the detective the video she took, and that "[o]n the video you can hear Ian Farrell say, 'Take this as a fucking warning.'" O'Donnell reviewed the video several times, concluding that Integrated had falsified its report to the County, because the video showed Farrell driving through a red light, Villegas' car going through a green light, and Farrell saying to Villegas, "Take this as a fucking warning." She believed that

Integrated's original and amended reports might "negatively impact" the County in the civil case.

O'Donnell and her co-counsel, Heather Bean, met with Farrell and Ontiveros on June 4, 2009. According to O'Donnell's and Bean's declarations, O'Donnell explained to Farrell and Ontiveros that she and Bean represented the County in Villegas' civil lawsuit, and that she and Bean did not represent them. Farrell told O'Donnell and Bean that he and Ontiveros had their own attorneys. O'Donnell asked them to tell her what happened on April 26 during their investigation of Villegas. Farrell said that he was followed by a man and woman he did not recognize, that he drove through a green light and the other car drove through a red light, and that he said "last warning stupid" to the driver of the other car. Bean then showed the video to Farrell and Ontiveros. After viewing the video, Farrell said to O'Donnell, "Just tell me what to say, I'll say anything you want me to say." O'Donnell told him to prepare a report that accurately reflects the incident. Farrell told O'Donnell he would have his attorneys look at the newly amended report before he sent it to her.

O'Donnell declared that on June 9, 2009, Integrated faxed the newly amended report to O'Donnell. The new report was similar to the previous amended report, but it now stated that the investigator drove through a red light to gain distance on the Mustang following him, that the light was green when the Mustang drove through, and that the investigator said "last fucking warning stupid" in a "commanding voice" to the driver of the Mustang. Neither O'Donnell nor Bean read the new report immediately. On June 23, O'Donnell received an email from Frank Tiongson (the claims examiner with the third party administrator handling Villegas' workers' compensation claim), asking for a copy of the new report. He wrote that he spoke to Farrell, who said that he had sent the report to her and would feel more comfortable if she gave it to him (Tiongson). O'Donnell

had the report forwarded to Tiongson before she read it. After reading the report, O'Donnell concluded that the report, which she anticipated would be subpoenaed by Villegas for the civil lawsuit, accurately described the car chase incident.

In her special motion to strike, O'Donnell argued that this evidence shows that the acts upon which plaintiffs' claims against her are based -- her request that Farrell amend Integrated's report to accurately describe the car chase incident and her communication with representatives of the County regarding Farrell's and Integrated's conduct -- were communicative acts performed as part of her representation of the County in Villegas' civil lawsuit, and therefore come within the protection of section 425.16. She also argued that plaintiffs could not prevail on their claims because, among other things, her conduct was immunized under the litigation privilege and plaintiffs could not produce any evidence of wrongdoing by her.

Plaintiffs opposed O'Donnell's motion, arguing that all of their claims are based upon attorney misconduct, and therefore neither section 425.16 nor the litigation privilege applies. Plaintiffs submitted declarations from Farrell and Ontiveros (the investigators who met with O'Donnell) and Paul Thornton in support of their opposition, and submitted objections to almost all of O'Donnell's and Bean's declarations and exhibits.

Farrell's declaration included details of his surveillance of Villegas, including the car chase incident, and a paragraph describing his meeting with O'Donnell. In that paragraph, Farrell declared that O'Donnell told him that she represented Integrated, "and everything we discussed was privileged, protected, and she was there to protect us." Farrell stated that he told O'Donnell that his concern was not to lose the County as a client, and that O'Donnell told him that, to protect themselves, he and Integrated would have to make changes to their original report, send her a revised report, and retrieve all copies of the old reports. He also

declared that "O'Donnell provided us with the language, word-for-word, as to what needed to be added and deleted from the original report."

Ontiveros' declaration included a brief description of the surveillance of Villegas, and a description of his meeting with O'Donnell that was almost identical to Farrell's description. The declaration of Paul Thornton, who is the Vice-President of Integrated, stated that he arranged for the meeting between his investigators and O'Donnell. He declared that when he returned O'Donnell's telephone call asking for the meeting, he asked whether they needed to bring Integrated's attorney, and O'Donnell told him it would not be necessary.

In her reply, O'Donnell noted, among other things, that plaintiffs had failed to produce evidence to support their assertion that there was an actual or potential conflict between O'Donnell's representation of the County and her alleged representation of Integrated. She also noted that plaintiffs did not produce evidence showing how O'Donnell's conduct caused plaintiffs harm.

The trial court denied O'Donnell's motion. The court sustained all of plaintiffs' objections except those relating to the two paragraphs in O'Donnell's and Bean's declarations that described their meeting with Farrell and Ontiveros. The court concluded that the gravamen of the complaint was that O'Donnell committed legal malpractice in representing plaintiffs, and therefore section 425.16 did not apply. O'Donnell timely filed a notice of appeal from the order denying her special motion to strike.[5]

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[5] We note that O'Donnell's notice of appeal states that she appeals from both the order denying the motion "and the related . . . tentative ruling thereon." Tentative rulings, however, are not appealable. (See, e.g., *Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1121, fn. 3.)

DISCUSSION

O'Donnell argues on appeal that (1) the trial court erred in finding that plaintiffs' claims did not fall within the scope of section 425.16; (2) plaintiffs did not establish a probability of prevailing on their claims; and (3) the trial court abused its discretion by sustaining plaintiffs' objections to her evidence. Since the propriety of the court's evidentiary rulings affect O'Donnell's first two issues, we begin by addressing those rulings.

A. *Evidentiary Rulings*

Plaintiffs filed written objections to almost every paragraph of O'Donnell's and Bean's declarations, as well as most of the documents attached thereto. The trial court sustained all of the objections except for the two paragraphs in each declaration that described the meeting between O'Donnell, Bean, Farrell and Ontiveros. O'Donnell challenges most of the trial court's rulings on appeal, setting forth each objection and why each ruling was an abuse of discretion. Rather than addressing each objection separately, we will group them based upon the information objected to, and address the rulings as to each group.

The evidence plaintiffs objected to consisted of (1) information O'Donnell and/or Bean received from the County or others about the car chase incident; (2) documents or information O'Donnell and/or Bean received from opposing counsel during the course of representing the County in Villegas' civil lawsuit; (3) O'Donnell's and/or Bean's testimony about their beliefs, analyses, or conclusions regarding the strength of the County's position in the Villegas lawsuit and the effect of the car chase incident on that case; (4) communications between O'Donnell and plaintiffs; and (5) communications between O'Donnell and the County regarding Integrated's final revised report on the Villegas matter.

To the first group -- information O'Donnell and/or Bean received from the County or others about the car chase incident, such as Integrated's reports, the police reports on Villegas' complaint regarding the incident, and the statements O'Donnell heard Farrell make to Kranther -- plaintiffs interposed such objections as lack of personal knowledge, improper summary of the contents of what she read, lack of authentication, and hearsay. These objections lack merit. O'Donnell did not offer these documents or her declaration testimony about them for the truth of the matter asserted in them. She offered them to show what information she was given and reviewed in the course of her representation of the County in the Villegas lawsuit, to establish her knowledge and action in accordance with that knowledge. The documents and testimony are, by definition, not hearsay. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316; *Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 947; Evid. Code, § 1200.) Moreover, she authenticated the documents as documents she received, and she clearly had personal knowledge of what she received and reviewed. Because the evidence in this group was offered to show the information O'Donnell received, reviewed, and acted upon, the trial court abused its discretion by sustaining plaintiffs' objections to this evidence.

Plaintiffs objected to the second group -- documents or information O'Donnell and/or Bean received from opposing counsel during the course of representing the County in Villegas' civil lawsuit -- on the grounds of hearsay, lack of authentication, lack of personal knowledge, and incompetent opinion testimony offered to show the state of mind of others. Like the objections to the first group, these objections are meritless. These documents were not offered for the truth of the matters asserted, but for the fact that the assertions were made. Thus, they are not hearsay. (*Jazayeri v. Mao*, *supra*, 174 Cal.App.4th at p. 316; Evid. Code, § 1200.) They were authenticated as documents O'Donnell personally received in

the course of her representation of the County in Villegas' lawsuit. O'Donnell's and Bean's declaration testimony did not purport to offer their expert opinion about the state of mind of others, but instead addressed the effect of these documents on their handling of the Villegas litigation. The sustaining of these meritless objections was an abuse of discretion.

Plaintiffs objected to the third group of evidence -- O'Donnell's and/or Bean's testimony about their beliefs, analyses, or conclusions regarding the strength of the County's position in the Villegas lawsuit and the effect of the car chase incident on that case -- on the grounds that the testimony is irrelevant, self-serving, and incompetent expert opinion testimony. None of these objections has merit. The testimony was not offered as expert opinion testimony, but rather to show O'Donnell's state of mind. The testimony was relevant to show the reason for her conduct, i.e., her meeting with Farrell and Ontiveros, and her communications with the County. Thus, the trial court abused its discretion by sustaining the objections.

Plaintiffs' objections to the fourth group -- communications between O'Donnell and plaintiffs -- are frivolous. For example, plaintiffs objected to paragraph 13 of O'Donnell's declaration on the grounds that it "is based on an unauthenticated email" and hearsay. In that paragraph of her declaration, O'Donnell simply states that she sent plaintiffs an email (attached as exhibit 6) asking to interview them in connection with the Villegas civil case, and she quotes the text of the email she sent. Even if authentication of the actual email were necessary to provide this testimony, it is difficult to imagine what more O'Donnell needed to do to authenticate the email. Moreover, the quoted text of the email is not hearsay because it is not offered for the truth of the matter asserted, but rather to show what she communicated to plaintiffs. (*Jazayeri v. Mao*, *supra*, 174 Cal.App.4th at p. 316; Evid. Code, § 1200.)

The final group included declaration testimony about two emails between Tiongson (the County's third party administrator) and O'Donnell.[6] In the first email, Tiongson wrote that Farrell told him that O'Donnell had a copy of Integrated's final surveillance report and that Farrell would like O'Donnell to provide a copy to Tiongson. The second email was O'Donnell's response, telling Tiongson that she had not yet read the report, which she said was prepared in response to her suggestion that the County should have a report that accurately described the car chase incident, and that she was asking her assistant to send Tiongson a copy of the report. In her declaration, O'Donnell stated that she understood Tiongson's email "to be a consensual request by Plaintiff FARRELL for me to give the Investigative Report #3 to the COUNTY," and that she provided the report to Tiongson "pursuant to the request of Plaintiff FARRELL."

Plaintiffs objected to O'Donnell's testimony about Tiongson's email on the grounds that it is based upon an unauthenticated email that contains hearsay, that she lacks personal knowledge to testify about statements made in the email, and that her testimony is incompetent opinion testimony to the extent it is offered to show the state of mind of others. To the extent O'Donnell offered testimony regarding Tiongson's statement about what Farrell told him to show that Farrell did, in fact, tell Tiongson to have O'Donnell send Tiongson the report, that testimony would be objectionable on hearsay grounds.[7] But O'Donnell actually said in her declaration that she *understood* the email to mean that Farrell consented

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[6] We note that plaintiffs did not object to the emails themselves, which were attached to the declarations as exhibit 7.

[7] In fact, one of the arguments O'Donnell made in her special motion to strike was that plaintiffs consented to her disclosure to the County of the final revised surveillance report. She supported that argument by citing to the statement in Tiongson's email, to which plaintiffs did not object, rather than her declaration in which she quoted that email.

to her giving a copy of the report to Tiongson. Thus, the testimony appears to be offered to show her state of mind and to that extent it is not hearsay. (*Jazayeri v. Mao*, *supra*, 174 Cal.App.4th at p. 316; Evid. Code, § 1200.) Plaintiffs' other objections -- lack of authentication or personal knowledge, and incompetent opinion testimony as to others' state of mind -- are meritless, since O'Donnell stated that she received the email, and did not offer any opinion regarding others' state of mind but rather her understanding.

Finally, plaintiffs objected to O'Donnell's testimony regarding her email to Tiongson on the grounds of hearsay and improper opinion testimony about the state of mind of others. Neither objection has merit. To the extent the testimony quotes her email, it was not offered for the truth of the matter asserted, but to show that the email was sent, and thus was not hearsay. (*Jazayeri v. Mao*, *supra*, 174 Cal.App.4th at p. 316; Evid. Code, § 1200.) O'Donnell's testimony also did not purport to provide an opinion as to others' state of mind. In short, the trial court abused its discretion by sustaining plaintiffs' objections to this final group of evidence.

B. *Special Motion to Strike*

Having concluded that most of O'Donnell's evidence in support of her motion was improperly excluded, we turn to the motion itself.

"A special motion to strike is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party's constitutional right of petition or free speech. [Citation.] The purpose of [section 425.16] is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights. [Citation.] The Legislature has declared that the statute must be 'construed broadly' to that end." (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1165.)

Section 425.16 "establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early state of the litigation." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 312 (*Flatley*).) The statute posits a two-step process for determining whether a cause of action is subject to a special motion to strike. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) We review de novo the trial court's ruling denying a special motion to strike. (*Flatley, supra*, 39 Cal.4th at p. 325.)

1. *Section 425.16 applies to plaintiffs' claims*

The trial court denied O'Donnell's motion on the ground that section 425.16 did not apply because the gravamen of plaintiffs' complaint was that O'Donnell committed legal malpractice in representing plaintiffs. O'Donnell contends the court erred because plaintiffs' claims are based upon statements she made or acts she took in the context of her representation of the County in the Villegas litigation. She is correct.

In determining whether a claim arises from protected activity, as defined in section 425.16, subdivision (b)(1), the "focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability -- and whether that activity constitutes protected speech or petitioning" as defined in section 425.16, subdivision (e). (*Navellier, supra*, 29

Cal.4th at p. 92.) "[W]e disregard the labeling of the claim [citation] and instead 'examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether [section 425.16] applies' and whether the trial court correctly ruled on the . . . motion." (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.)

In this case, all of plaintiffs' claims are based upon O'Donnell's instructions to Farrell and Ontiveros to amend the surveillance report and, apparently, her providing the amended report to the County.[8] O'Donnell presented evidence in support of her motion that all her communications with or about plaintiffs were in the context of representing the County in the Villegas lawsuit. Since, "[u]nder the plain language of section 425.16, subdivision (e)(1) and (2), as well as the case law interpreting those provisions, all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petition activity" (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 479-480), O'Donnell satisfied the requirement to "make a prima facie showing that the underlying activity falls within the ambit of the statute" (*Flatley*, *supra*, 39 Cal.4th at p. 317).

Plaintiffs argue, however, that the gravamen of the complaint is O'Donnell's alleged legal malpractice and attorney misconduct, and therefore the complaint is not based upon protected activity under section 425.16. Plaintiffs also contend that section 425.16 does not apply because O'Donnell's assertedly protected activity was illegal as a matter of law because it violated the Rules of Professional Conduct. Neither argument is persuasive.

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[8] As we discuss in section B.2., *post*, neither the complaint nor the evidence plaintiffs submitted in opposition to O'Donnell's special motion to strike make clear exactly what O'Donnell did to cause injury to plaintiffs.

Plaintiffs are correct that courts have found, in some cases, that section 425.16 does not apply to lawsuits against the plaintiff's former attorneys for malpractice or breach of the duty of loyalty. For example, in *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, we affirmed the trial court's denial of a special motion to strike a legal malpractice complaint filed by the plaintiffs against their attorneys, where the plaintiffs' claims were based upon the attorneys' failure to timely serve discovery responses and failure to comply with court orders. We found that section 425.16 did not apply because the alleged malpractice "did not consist of any act in furtherance of anyone's right of petition or free speech, but appellants' negligent *failure* to do so on behalf of their clients." (*Id.* at p. 631.) Similarly, in *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, we reversed the trial court's grant of a special motion to strike a complaint filed by former clients against their former attorneys for breach of the attorneys' duty of loyalty. In that case, the former clients alleged that their former attorneys breached their duty of loyalty when the attorneys represented another client in an arbitration against the former clients on a matter in which confidences revealed by the former clients benefitted the new client. We held in that case that section 425.16 did not apply because the complaint was not based upon petitioning activity, but rather on the attorneys' abandonment of their former clients in favor of their new one. (*Id.* at p. 1189 ["The breach [of the duty of loyalty] occurs not when the attorney steps into court to represent the new client, but when he or she abandons the old client. . . . The breach of fiduciary duty lawsuit may follow litigation pursued against the former client, but does not arise from it."].) The Sixth District reached a similar conclusion in *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204 (*PrediWave*), where the plaintiff corporation sued the law firm that represented both the corporation and its former president and chief executive officer, alleging that the attorneys had an

irreconcilable conflict of interest that adversely affected their representation of the corporation. The appellate court found that the "principal thrust" of the plaintiff's causes of action was the simultaneous representation of conflicting interests, resulting in failures to act to protect the corporation's interests, rather than statements or writings made within the meaning of section 425.16, subdivision (e).[9] (*Id.* at pp. 1226-1227.)

The present case is distinguishable from those cases, however, because even accepting as true plaintiffs' assertion that O'Donnell told them she represented them, it is undisputed that O'Donnell's statements and writings were made in the context of her representation of the County in the Villegas litigation. O'Donnell presented evidence, not disputed by plaintiffs, that she told Thornton and Farrell that she represented the County in the Villegas litigation, and that she needed to interview Farrell and Ontiveros to prepare her case for trial because Villegas' attorney listed them as witnesses he intended to call. She stated in her declaration that she met with Farrell and Ontiveros only as percipient witnesses, to prepare for the upcoming trial. Considered in this context, especially in the absence of any evidence regarding the scope or any other purpose of her alleged representation, O'Donnell's alleged statement to Farrell and Ontiveros that she represented them suggests no more than that her "representation" of Farrell and Ontiveros was solely for the purpose of preparing them, as witnesses aligned with (and employed by)

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9 We note that the court in *PrediWave* went further, stating that section 425.16 did not apply because "clients do not bring such lawsuits to deter the speech and petitioning activities done by their own attorneys on their behalf but rather to complain about the quality of their former attorneys' performance." (*PrediWave, supra*, 179 Cal.App.4th at p. 1227.) We disagree with this reasoning. As the Supreme Court observed in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, section 425.16 is to be construed strictly by its terms, and the statute "neither states nor implies an intent-to-chill proof requirement." (*Id.* at p. 59.)

her client, for trial in the Villegas lawsuit. The fact that plaintiffs allege that O'Donnell, in representing the County, *also* violated duties owed to them, does not take their complaint outside the ambit of section 425.16. Their characterization of O'Donnell's actions as professional negligence does not alter the fact that those actions were taken as part of her representation of the County in the Villegas lawsuit. (*Navellier, supra*, 29 Cal.4th at pp. 92-93 [focus is not on the form of plaintiff's claim, but on defendant's activity giving rise to claim]; accord, *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 671 (*Peregrine Funding*); *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103 ["where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct"].) Thus, plaintiffs' argument that their complaint is not subject to section 425.16 because it alleges legal malpractice fails.

Plaintiffs' argument that section 425.16 does not apply because O'Donnell's conduct violated the Rules of Professional Conduct and thus was illegal as a matter of law also fails. This argument is based upon the Supreme Court's holding in *Flatley* that "section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Flatley*, *supra*, 39 Cal.4th at p. 317.) As our colleagues in Division Three of this court recently explained, this rule from *Flatley* "applies only to conduct that is criminally illegal, rather than merely in violation of a statute." (*Fremont Reorganizing Corp. v. Faigin*, *supra*, 198 Cal.App.4th at p. 1169.) Thus, conduct in violation of the Rules of Professional Conduct "cannot be 'illegal as a matter of law' [citation] within the meaning of *Flatley*, so [section 425.16] is not inapplicable on this basis." (*Ibid.*)

2. *Plaintiffs did not establish a probability of prevailing*

Having concluded that O'Donnell established that plaintiffs' complaint arises from protected activity under section 425.16, we turn to the second step of the process for determining if the complaint is subject to a special motion to strike, i.e., whether plaintiffs demonstrated a probability of prevailing on their claims. (*Navellier*, *supra*, 29 Cal.4th at p. 88.)

To establish a probability of prevailing for purposes of section 425.16, "'the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citations.]" (*Navellier*, *supra*, 29 Cal.4th at pp. 88-89.) The plaintiff's burden in this respect "has been likened to that in opposing a motion for nonsuit or a motion for summary judgment." (*Peregrine Funding*, *supra*, 133 Cal.App.4th at p. 675.)

O'Donnell argues that plaintiffs failed to demonstrate a probability of prevailing because plaintiffs' action is barred by the litigation privilege (Civ. Code, § 47), and because plaintiffs did not produce evidence of any wrongdoing by her that caused damages to them. Plaintiffs argue in their respondents' brief that the litigation privilege does not apply to claims, such as their alleged claims, based upon an attorney "forming a conflicting client relationship for the purpose of harming one client for the other's benefit." Plaintiffs also assert that they demonstrated a probability of prevailing because they presented evidence that O'Donnell instructed them to amend their surveillance report and destroy all copies of the original report, and that "[i]t is reasonable to infer that she . . . use[d] the confidential communications from [plaintiffs] for her other client's benefit, to [plaintiffs'] detriment."

We need not determine whether the litigation privilege bars plaintiffs' claims, because we conclude that plaintiffs failed to produce evidence sufficient to

establish any of their claims. The evidence is undisputed that, before O'Donnell ever met with Farrell and Ontiveros -- where, according to plaintiffs, she entered into a conflicting representation with them and purportedly obtained confidential information from them -- the County already had in its possession the police reports from Villegas' complaint about the car chase incident and a video of the incident. The evidence also is undisputed that the information O'Donnell instructed plaintiffs to include in their amended surveillance report simply conformed to the video of the incident. Plaintiffs presented no evidence that they provided O'Donnell with any confidential information, or that she did anything other than pass on plaintiffs' amended surveillance report to Tiongson.[10] Finally, plaintiffs did not submit any evidence to establish a causal link between O'Donnell's conduct and any damages they allegedly suffered.[11] Without evidence of causation, plaintiffs cannot prevail on any of their causes of action. In short, plaintiffs failed to satisfy their burden to demonstrate that their complaint is both legally sufficient and supported by sufficient facts to sustain a judgment in their favor. (*Navellier*, *supra*, 29 Cal.4th at pp. 88-89.) The trial court erred by denying O'Donnell's special motion to strike.

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[10] We note that the report states, on the last page: "Cc: Frank Tiongson."

[11] Although plaintiffs assert in their respondents' brief that they "were compelled to retain legal counsel to address the damage that O'Donnell had caused them," they cite to no evidence to support this statement.

DISPOSITION

The order denying O'Donnell's special motion to strike is reversed. The trial court is directed to vacate its order denying the motion and enter a new order granting O'Donnell's motion. O'Donnell shall recover her attorney fees and costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.