B208936 (CONSOLIDATED)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SEVEN

YANA HENRIKS,
Plaintiff and Appellant,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant and Respondent.

APPEAL FROM LOS ANGELES COUNTY SUPERIOR COURT
RICHARD L. FRUIN, JR., JUDGE • CASE NO. BC378520

RESPONDENT'S BRIEF

[Filed concurrently with Request for Judicial Notice]

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Court of Appeal
State of California
Second Appellate District

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Case Name: Yana Henriks vs State Farm

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INTRODUCTION

Plaintiff Yana Henriks sued defendant State Farm Mutual Automobile Insurance Company for damages allegedly arising out of State Farm's conduct in defending its insureds in a prior personal injury action brought against the insureds by Henriks. The trial court dismissed Henriks' claims against State Farm as a strategic lawsuit against public participation (SLAPP) because they were based on conduct protected by the anti-SLAPP statute and because Henriks failed to demonstrate that she has a probability of prevailing on her claims. Henriks now appeals from that order, raising many supposed errors, none of which have any merit.

Henriks' claims arise from events that occurred after she was involved in an automobile accident with Blake Kobashigawa. Following the accident, Henriks brought a personal injury lawsuit against Blake and his parents. The Kobashigawas' insurer, State Farm, assigned an attorney to defend the Kobashigawas. That attorney hired an investigation firm to conduct surveillance of Henriks to determine the extent and veracity of Henriks' alleged injuries.

Henriks subsequently sued the Kobashigawas' attorney for slander and defamation based on that attorney's communications with Henriks' counsel. Although that lawsuit was eventually dismissed, State Farm hired a different attorney to take over the defense of the Kobashigawas in Henriks' personal injury action. This second attorney, in turn, hired a second investigation firm to conduct additional surveillance.

Following a trial in Henriks' personal injury action, where *Henriks* rather than the Kobashigawas presented surveillance video footage from the *second* investigation, the jury rendered a defense verdict in favor of the Kobashigawas. Having lost that case, Henriks subsequently sued, among others, State Farm, seeking to hold it vicariously liable for hiring the Kobashigawas' second attorney and for that attorney's retention, as part of the Kobashigawas' defense, of the second investigation firm whose employees supposedly engaged in unlawful surveillance. State Farm filed an anti-SLAPP motion, seeking to strike Henriks' claims. The trial court granted the motion and Henriks appealed.

This court should affirm the order granting State Farm's anti-SLAPP motion because (1) State Farm's defense of the Kobashigawas in Henriks' personal injury action comes within the scope of the anti-SLAPP statute and (2) Henriks did not (and cannot) show she has any probability of prevailing on her claims both because they are barred by the litigation privilege and because Henriks has presented no evidence to support her vicarious liability theories. We also demonstrate that Henriks' numerous claims of abuse of discretion by the trial court all fail.

STATEMENT OF THE CASE

A. Following an automobile accident, Yana Henriks sues Blake Kobashigawa and his parents.

In July 2004, Henriks was driving her Mercedes when she was involved in an automobile accident with Blake Kobashigawa. (See 1 Respondent's Appendix (RA) 151; Request for Judicial Notice (RJN) 41-42, 120-121.) She subsequently filed a personal injury lawsuit against Blake, his parents Don and Faye Kobashigawa (the alleged owners of Blake's car), and another individual who was involved in a different automobile accident with Henriks in May 2004. (1 RA 149-158; see 1 Appellant's Appendix (AA) 3.) Henriks contends that she was permanently disabled as a result of the July 2004 accident and was unable to continue working as a financial services executive. (See RJN 35, 46.)

B. State Farm assigns counsel to defend the Kobashigawas. This attorney hires an investigator.

The Kobashigawas were insured by State Farm. (1 AA 54; 2 AA 294.) In compliance with its duty to defend its insureds, State Farm assigned attorney Deborah Peterson from its "in-house" law firm, Barry Bartholomew & Associates, to defend the Kobashigawas against Henriks' lawsuit. (See 1 AA 54; 2 AA 294-295.)[1]

Peterson retained German Lopez of German E. Lopez & Associates (collectively, Lopez) to conduct surveillance of Henriks to determine the extent and veracity of her alleged injuries as part of pretrial discovery. (1 AA 54-55, 59.) Lopez placed Henriks under surveillance between March and April 2006. (1 AA 55, 59-60.)

C. After Henriks sues the Kobashigawas' counsel, State Farm retains a second attorney to defend them.

In September 2006, Henriks sued Peterson for slander and defamation based on Peterson's communications with Henriks' counsel in the Kobashigawa litigation. (1 AA 55-56.) Henriks also moved to disqualify Peterson from defending the Kobashigawas. (See 2 AA 292.)

According to Henriks, the Kobashigawas' counsel, Peterson, was her former neighbor, Henriks and Peterson "used to socialize,"

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[1] Peterson's law firm later changed its name. (2 AA 294-295.) Hereafter, we refer to it as Peterson's law firm.

and Peterson took Henriks' action against the Kobashigawas "as an opportunity to destroy [Henriks'] life" because she "envied" Henriks. (2 RA 471-472, 492.)

Although the trial court eventually dismissed Henriks' claims against Peterson by granting an anti-SLAPP motion (1 AA 62-65),[2] State Farm hired a different counsel—outside counsel Lauren Linde of Sylvester Oppenheim & Linde (Linde's law firm)—to take over the defense of the Kobashigawas (1 AA 57, 67, 69; 2 AA 292, 295). While Peterson did not formally withdraw as the Kobashigawas' counsel, she no longer drafted motions, attended depositions, prepared written discovery, or handled the day-to-day management of the Kobashigawas' defense. (1 AA 57.)

Henriks later asserted that Peterson "resorted to bring[ing] Lauren Linde into the picture" as part of her "vendetta" against Henriks. (2 RA 471-472.) Henriks also claimed that State Farm kept "Peterson on the case because of her 'internal' imput [*sic*] . . . as [Henriks'] former neighbor" and because State Farm supposedly "wanted to benefit from not having to pay on [Henriks'] claim by using their own employee driven by hatred and malice." (2 RA 500.)

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[2] Henriks appealed the order granting Peterson's motion. (See RJN 4-23.) The court dismissed her appeal. (See RJN 21-23.)

D. The Kobashigawas' second attorney retains a new investigation firm.

Once she had been hired as the Kobashigawas' counsel, Linde decided to conduct additional surveillance of Henriks for the purpose of defending the Kobashigawas. (See 1 AA 67; 2 AA 292.) State Farm approved Linde's request for this additional surveillance. (2 AA 292.) Linde then retained Archangel Investigations and Protection (Archangel) to conduct the surveillance to determine the extent of Henriks' alleged injuries. (1 AA 67, 72; 4 RA 886.) Investigators Matthew Cinquanta, Kevin Henry, and Cheyenne Bertoloni performed the actual surveillance between October 21 and November 3, 2006. (1 AA 4, 187-188.)[3]

The State Farm claim representative and her supervisor who handled Henriks' claim against the Kobashigawas "had no communication with anyone from Archangel regarding Yana Henriks." (2 AA 291-292, 294-295.) They "did not dictate Archangel's activities" and "did not participate in any decision regarding Archangel's activities." (2 AA 292, 295; see 1 AA 72 [Archangel's owner explaining that "Archangel never discussed any aspect" of Henriks' personal injury action with State Farm].) After Cinquanta, Henry, and Bertoloni completed their surveillance on

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[3] Henriks and defendants Archangel, Michael Clarke (Archangel's owner), and Linde and her law firm disagree over whether Cinquanta, Henry, and Bertoloni were Archangel's employees or Archangel's independent subcontractors. (Compare, e.g., 1 AA 2 with 1 AA 67-68, 3 RA 635, 672, and 4 RA 939.) Their dispute is irrelevant to this appeal.

November 3, 2006, State Farm received Archangel's Surveillance Investigation Report from Linde's law firm in December 2006. (1 AA 187-194; 2 AA 292, 295.) Aside from the acts described in that report, State Farm was "unaware of any activity Archangel engaged in with respect" to Henriks. (2 AA 292, 295.)[4]

E. Henriks unsuccessfully attempts to amend her personal injury action complaint to assert claims against State Farm alleging that investigators engaged in unlawful surveillance.

On March 12, 2007, Henriks deposed investigator Kevin Henry in her personal injury action. (See 3 RA 550, 590.) During this deposition, Henry "denied engaging in any unreasonable or illegal surveillance activities." (3 RA 550.)

On March 26, 2007, Henriks deposed Henry in an unrelated federal action in which Henriks had sued three individuals for violations of federal racketeering laws. (See 1 AA 69, 234; 3 RA 550, 617; RJN 1.)[5]

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[4] The report indicated that investigators had "conducted discreet inquiries regarding [Henriks'] whereabouts" and occasionally "observed" or "determined" that Henriks' vehicle was parked in a garage but it did not specify the manner in which investigators had "conducted" those inquiries or how they determined whether Henriks' vehicle was in her garage. (1 AA 187-194.)

[5] The district court later dismissed this federal lawsuit; the U.S. Court of Appeals for the Ninth Circuit affirmed. (RJN 1-3, 24-26.)

Subsequently, *only a few days* before she was scheduled to go to trial against the Kobashigawas, Henriks sought leave to amend her complaint to add claims against State Farm, attorney Peterson and her law firm, attorney Linde and her law firm, Lopez, Archangel, Clarke (Archangel's owner), California Surveillance and Investigation, Inc. (Cinquanta's own investigation firm), Cinquanta, Henry, and Bertoloni alleging that the investigators engaged in unlawful surveillance. (3 RA 543-548, 567-586.)

Henriks asserted that she had just discovered the existence of these new claims and new defendants because, during Henry's deposition in the unrelated federal lawsuit, Henry had supposedly admitted "to engaging in [a] number of unreasonable, illegal and highly intrusive surveillance activities" against Henriks in the Kobashigawa matter. (See 3 RA 544-546, 550.)[6]

The court denied Henriks leave to amend her complaint. (See 3 RA 529-530.)

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[6] According to the somewhat disjointed deposition excerpts from the unrelated federal lawsuit that Henriks attached to materials she filed in this case, Henry testified in the federal lawsuit that he: (1) delivered flowers to Henriks; (2) used camera equipment with the "sound track . . . on all the time" during surveillance and subsequently turned over surveillance videotapes to Archangel; (3) was about 40 feet from Henriks when he observed her speaking with her lawyer; (4) saw Henriks drive up to his vehicle while Henry was conducting surveillance; (5) walked onto a driveway between two buildings to "see if [he] could see [Henriks'] vehicle" because he did not think the driveway was private property; and (6) "glanced in the window" of Henriks' garage door and thus saw Henriks' Mercedes. (1 AA 234-239; 3 RA 617-622.)

F. Henriks loses her personal injury action against the Kobashigawas.

Henriks' personal injury action proceeded to trial before a jury on April 9, 2007. (1 AA 73-74.)

During the trial, the jury heard testimony about Henriks' medical history, including her treatment with 52 different health care providers, and her alleged injuries. (See RJN 115, 121A-126, 129-131, 142-145.)

The jury also saw surveillance video footage taken by the first investigator, Lopez, which showed Henriks "bending down into her vehicle to pick up a case containing twenty-four bottles of water, a task unlikely to be performed [by] someone with her alleged injuries." (1 AA 55; see 1 AA 60-61; RJN 93-94, 126, 146.)

The Kobashigawas' counsel, however, did not introduce the surveillance video derived from the second set of investigators, Cinquanta, Henry, and Bertoloni. (See 1 AA 70.) Rather, Henriks presented this video, over Linde's objections and perhaps to Henriks' own detriment. (See *ibid.*; RJN 128 [respondent's brief in Henriks' personal injury action describing how the surveillance video Henriks presented at trial contradicted her own testimony].)

Henriks also called Henry to testify at trial over Linde's objections. (1 AA 70.) Henry testified that: (1) he did *not* call Henriks to pretend to have flowers or packages for her; (2) while conducting surveillance, he walked down a driveway and looked into the window on Henriks' garage door; and (3) he lied during his March 2007 deposition in Henriks' personal injury action but

subsequently corrected his deposition testimony so that it reflected "the truth." (3 RA 626-628.)[7]

Moreover, Henriks testified about the damages she supposedly suffered as a result of surveillance and her counsel argued to the jury that Henriks should be awarded damages for "'unlawful surveillance.'" (1 AA 70.)

The jury reached a defense verdict, finding that Blake Kobashigawa's negligence was not a substantial factor in causing harm to Henriks. (1 AA 73-75.) The court entered judgment in favor of the Kobashigawas. (*Ibid.*)[8]

G. Henriks files this lawsuit against State Farm.

Several months after the adverse jury verdict, Henriks filed this lawsuit against State Farm. (See 1 RA 1.) The first amended complaint at issue in this appeal asserted claims against State Farm, the Kobashigawas, Peterson and her law firm, Linde and her law firm, Archangel, Clarke, California Surveillance and Investigation, Inc., Cinquanta, Henry, and Bertoloni. (1 AA 1-18.) This complaint originally consisted of seven causes of action: (1) invasion of privacy; (2) unlawful eavesdropping in violation of Penal

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[7] On April 12, 2007, Henry had submitted "changes" to his March 12, 2007 deposition testimony in which he said he was an employee of Archangel, not California Surveillance and Investigation, Inc. (Cinquanta's investigation firm), in direct contravention of his prior March 12 testimony. (1 AA 86-90; see 3 RA 684, 688-689.)

[8] Henriks' appeal from the Kobashigawas' judgment is pending. (See RJN 27-204.)

Code section 632; (3) trespass; (4) fraud; (5) intentional infliction of emotional distress; (6) violation of Business and Professions Code section 17200 (UCL); and (7) false imprisonment. (*Ibid.*)

The claims against State Farm in the first amended complaint were based on the premise that State Farm defended the Kobashigawas by hiring counsel to defend them in Henriks' lawsuit, that counsel then hired Archangel to conduct surveillance of Henriks, and Archangel's alleged employees—investigators Cinquanta, Henry, and Bertoloni—supposedly engaged in unlawful surveillance. (See 1 AA 3-17.)[9]

Henriks' first amended complaint faulted Cinquanta, Henry, and Bertoloni for allegedly (1) "shadow[ing]" and "tail[ing]" Henriks, (2) observing her, (3) filming her activities, (4) filming and audio-recording a confidential conversation between Henriks and her attorney,[10] (5) calling Henriks and, during those calls, misrepresenting their identities and pretending to have deliveries for her, (6) entering onto her property and "'peep[ing]' into her window" to confirm whether she was home, (7) entering onto her driveway and placing potted plants in front of her garage in an

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[9] The first amended complaint also alleged that State Farm hired Archangel. (1 AA 4.) As explained below, Henriks has never presented any legal or factual support for her baseless assertion that State Farm, rather than Linde, hired Archangel, and, on appeal, Henriks instead asserts only that State Farm controlled the investigation through Linde. (*Post*, pp. 27, 34.)

[10] This supposedly "confidential" conversation occurred in a public place (the parking lot of a doctor's office) in which the trial court later determined in this case that Henriks "had no protectable privacy interest." (1 AA 192-193; 3 RA 667.)

attempt to observe Henriks removing them, (8) smearing debris on her vehicle's windshield in an attempt to "capture [her] cleaning" the windshield, and (9) confining Henriks to her home by parking their vehicles on a street near her residence to conduct surveillance and to follow her if she left her home. (1 AA 4-17.)

H. State Farm files an anti-SLAPP motion.

State Farm filed an anti-SLAPP motion in response to the first amended complaint, arguing that: (1) the anti-SLAPP statute applied to all of Henriks' claims against State Farm because they were based on acts taken in furtherance of the defense to Henriks' personal injury action; and (2) Henriks could not establish that she had any probability of prevailing on her claims. (1 AA 21, 26-27, 31-38; see 2 AA 286-290.)

On the same day that State Farm filed its anti-SLAPP motion, Henriks dismissed with prejudice her causes of action against State Farm for unlawful eavesdropping, violation of the UCL, and false imprisonment. (2 AA 285-286; 3 RA 726, 760.)

I. Henriks seeks to lift the anti-SLAPP discovery stay and opposes State Farm's anti-SLAPP motion.

Henriks moved to lift the discovery stay imposed by the anti-SLAPP statute. (1 AA 106-115; see Code Civ. Proc., § 425.16, subd. (g) ["[a]ll discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant" to the anti-SLAPP

statute].) Her motion was scheduled to be heard several weeks *after* the hearing on State Farm's anti-SLAPP motion. (1 AA 21, 106.)

Henriks thereafter filed an ex parte application seeking to continue the hearing on State Farm's anti-SLAPP motion and to shorten time for the hearing on her discovery motion. (2 AA 264-265.) The court denied the application without prejudice, and directed Henriks to raise her discovery request in her opposition to State Farm's anti-SLAPP motion so that State Farm could have an opportunity to respond and so that the court could evaluate Henriks' discovery request "in light" of the specific issues raised by State Farm's motion. (1 AA 270; 5/23/08 RT A-7.)[11]

Subsequently, Henriks filed an opposition to State Farm's anti-SLAPP motion, arguing that the motion should be denied because it was not timely filed, the court should disregard State Farm's challenge to the three causes of action Henriks had already dismissed, and Henriks could show she had a probability of prevailing on her remaining claims. (1 AA 148-164.) Henriks' opposition brief did not renew her prior discovery request or address why Henriks should be permitted to conduct discovery. (See *ibid.*) Instead, the opposition brief asserted that Henriks had already submitted sufficient evidence—namely, the Cinquanta, Henriks, and Henry declarations filed with the opposition brief—to show a probability of prevailing. (See 1 AA 156-164.)

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[11] The reporter's transcripts for May 23, 2008 and June 5, 2008 both confusingly contain pages A-1 to A-12; additionally, the caption for the May 23 transcript erroneously states that it covers proceedings from *March* 23, 2008. Citations to these transcripts are preceded by the correct date of the transcript (e.g., 5/23/08 RT A-1).

State Farm filed objections to the Henriks and Cinquanta declarations filed with Henriks' opposition brief, pointing out that many of the statements in them were inadmissible hearsay, incompetent, speculative, legal conclusions, or without foundation. (2 AA 271-275; see also 2 AA 284, 286-289.) State Farm also asked the court to exercise its discretion to accept State Farm's motion since it was filed, at most, only one day late. (See 2 AA 284-285, 297-305.)

J. The court denies Henriks' oral discovery request, grants State Farm's anti-SLAPP motion, and sustains State Farm's objections to Cinquanta's declaration.

At the hearing on State Farm's anti-SLAPP motion, Henriks orally requested permission to conduct discovery based on the Cinquanta declaration that Henriks had filed with her opposition to the anti-SLAPP motion. (6/5/08 RT A-5, A-13 to A-14, A-16.) According to Cinquanta's declaration, Michael Clarke (Archangel's owner) had told Cinquanta that "Archangel Investigation is on the vendor's panel of State Farm Insurance Company." (1 AA 166.) State Farm had previously argued that this was inadmissible hearsay (2 AA 272), and Henriks acknowledged at the hearing that this was hearsay (see 6/5/08 RT A-5, A-17). Henriks nonetheless argued that Cinquanta's hearsay description of Clarke's statement justified discovery into whether State Farm had a "contractual relationship with Archangel." (6/5/08 RT A-5, A-13 to A-14.)

The court denied Henriks' oral discovery request under the anti-SLAPP statute for a number of reasons, including because the court determined that the discovery sought would make no difference; even if Henriks could show the existence of a contractual relationship between State Farm and Archangel, that would be insufficient to hold State Farm vicariously liable for the conduct of an independent contractor. (See 6/5/08 RT A-6 to A-18.) Subsequently, Henriks voluntarily took her pending discovery motion off calendar. (See 6/5/08 RT A-22; 4 RA 917-919.)

The court also granted State Farm's anti-SLAPP motion, dismissing Henriks' four remaining claims against State Farm. (4 RA 883-887, 892.) In doing so, the court expressly exercised its discretion under the anti-SLAPP statute to accept an untimely motion. (4 RA 885.)

In granting the anti-SLAPP motion, the court held that Henriks' claims against State Farm were based on activity protected by the anti-SLAPP statute. (4 RA 886, 892.) Additionally, the court held that Henriks offered no admissible evidence to establish that State Farm could be held liable for the investigators' conduct and thus failed to meet her burden of demonstrating that she had a probability of prevailing on her claims. (*Ibid.*) The court also sustained State Farm's objections to Cinquanta's declaration and the vast majority of the objections to Henriks' declaration. (4 RA 886.)

K. Henriks appeals.

After the trial court granted State Farm's anti-SLAPP motion, Henriks appealed. (2 AA 390-391.)

Subsequently, at State Farm's request, the court awarded State Farm $12,500 in attorney's fees and costs. (2 AA 324-341, 372.) Henriks appealed. (4 RA 1053-1054.)

This court consolidated Henriks' two appeals. (2 AA 397-398.)[12]

STANDARD OF REVIEW

This court reviews an order granting an anti-SLAPP motion "'de novo.'" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*).) Such orders are affirmed if they are "correct on any legal ground, whether or not the trial court relied on that ground." (*Walker v. Kiousis* (2001) 93 Cal.App.4th 1432, 1439 (*Walker*).)

The court reviews for abuse of discretion a trial court's (1) acceptance of an untimely anti-SLAPP motion and (2) denial of discovery under the anti-SLAPP statute. (*Platypus Wear, Inc. v.*

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[12] Although Henriks appealed from the order granting State Farm the fees and costs to which it was statutorily entitled for prevailing on its motion (see Code Civ. Proc., § 425.16, subd. (c); 2 AA 372), this court need not consider that appeal. In her opening brief, Henriks never addresses the propriety of that order and has therefore waived any argument challenging that order on appeal. (See *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685; *Katelaris v. County of Orange* (2001) 92 Cal.App.4th 1211, 1216, fn. 4.)

Goldberg (2008) 166 Cal.App.4th 772, 782 (*Platypus*); *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1247 (*Tuchscher*).)

LEGAL ARGUMENT

STATE FARM'S ANTI-SLAPP MOTION WAS PROPERLY GRANTED.

A. California's anti-SLAPP statute.

California's anti-SLAPP statute "requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the [anti-SLAPP] statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*), quoting Code Civ. Proc., § 425.16, subd. (b)(1).)

As pertinent here, the anti-SLAPP statute protects *both* communications *and* conduct related to litigation. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*); *Cabral v. Martins*

(2009) 177 Cal.App.4th 471, 482 (*Cabral*); *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537.)

B. Henriks is barred from challenging whether her claims are subject to the anti-SLAPP statute.

1. Henriks waived any challenge to whether her claims against State Farm fall within the scope of the anti-SLAPP statute by not raising the issue in the trial court.

In the trial court, State Farm explained that the anti-SLAPP statute applied to Henriks' claims because they were based on acts taken in furtherance of the right of petition since they were taken as part of the defense against litigation. (1 AA 31-32; 2 AA 288.) Henriks opposed State Farm's anti-SLAPP motion on multiple grounds but did not argue that her claims fell outside the anti-SLAPP statute's scope. (See 1 AA 151-164.)

Now, Henriks argues for the first time on appeal that her claims against State Farm are outside the anti-SLAPP statute's scope because the acts on which her claims are based fall within the illegality exception to the anti-SLAPP statute and are not protected by the litigation privilege. (AOB 14-20.) While it is clear, for the reasons discussed below (*post*, pp. 21-31), that the anti-SLAPP statute *does* apply to Henriks' claims against State Farm, this court need not consider the issue because Henriks has waived it by failing

to raise the issue below (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11).

Indeed, before State Farm filed its anti-SLAPP motion in the trial court, Henriks responded to *other defendants'* anti-SLAPP motions *in this case* by challenging whether the anti-SLAPP statute applies. (See 2 RA 418-420, 467, 472-477, 487, 493-496.) Thus, Henriks, by choosing not to raise the same arguments in her later opposition to State Farm's motion, knowingly waived them.

2. Henriks is collaterally estopped from relitigating whether the anti-SLAPP statute applies here.

When Henriks sued State Farm, she also sued Peterson and her law firm, seeking to hold them vicariously liable for supposedly unlawful surveillance. (See 1 AA 1-18.) Peterson and her law firm also responded to Henriks' first amended complaint with an anti-SLAPP motion (the Peterson motion). (2 RA 328-336.) Henriks opposed that motion by arguing that the anti-SLAPP statute did not apply to the claims against Peterson and her law firm because those claims were based on illegal acts that were not protected by either the anti-SLAPP statute or the litigation privilege. (2 RA 487, 493-496.) The court rejected Henriks' arguments, holding that the statute applied to her claims, and granted the Peterson motion. (3 RA 663-668.) Henriks could have appealed from that decision (Code Civ. Proc., § 904.1, subd. (a)(13)), but did not. As we now explain, collateral estoppel bars Henriks from relitigating whether the anti-SLAPP statute applies here.

Collateral estoppel "'bar[s] relitigation of an issue decided at a previous proceeding "if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]."'" (*People v. Carter* (2005) 36 Cal.4th 1215, 1240.) Each of those elements is met here:

• **Identity of issues:**

In this appeal, Henriks contends that her claims fall outside the anti-SLAPP statute's scope because they are based on acts that are not covered by the litigation privilege and fall within the illegality exception to the statute. (AOB 14-20.) In the trial court, Henriks opposed the Peterson motion on the same grounds. (2 RA 487, 493-496.) The court necessarily decided those issues against Henriks when it granted the motion. (3 RA 663-668.)

• **Final judgment on the merits:**

The order granting the Peterson motion and dismissing all of Henriks' claims against Peterson and her law firm constituted a dismissal on the merits and an immediately appealable judgment. (See *Lockwood v. Sheppard, Mullin, Richter & Hampton* (2009) 173 Cal.App.4th 675, 680, 682 (*Lockwood*); *Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 994-996 (*Melbostad*); *Russell v. Foglio* (2008) 160 Cal.App.4th 653, 659-660 & fn. 3.) Since Henriks did not appeal, that decision was a final judgment on the merits. (See *Lockwood*, at p. 682 [order granting anti-SLAPP motion is a "dismissal on the merits" with res judicata effect]; *Melbostad*, at pp.

994-996 [anti-SLAPP order dismissing claims is a final judgment and a determination of the parties' rights].)

• **Identity of party:**

State Farm seeks to apply collateral estoppel against Henriks based on the trial court's adjudication of the Peterson motion against Henriks *in this same case.* Henriks was a party to that adjudication: she sued Peterson and her law firm and unsuccessfully opposed their anti-SLAPP motion. (1 AA 1-18; 2 RA 487-502; 3 RA 663-668.)

Having previously and unsuccessfully litigated whether the anti-SLAPP statute applies to her claims in an adjudication that resulted in an adverse final judgment, Henriks is now barred from relitigating that same issue for the first time in this appeal.

Waiver and collateral estoppel aside, we now explain why the anti-SLAPP statute clearly applies here.

C. Henriks' claims against State Farm are subject to the anti-SLAPP statute because they arise from acts in furtherance of the right of petition.

1. The right of petition includes State Farm's right to defend its insureds against litigation.

The anti-SLAPP statute applies if "the plaintiff's cause of action itself was *based on* an act in furtherance of" the right of petition or free speech. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) The right of petition protected by the anti-SLAPP statute

encompasses the right to present a defense to litigation. (*Rusheen, supra*, 37 Cal.4th at p. 1056 [anti-SLAPP statute applies to a "'cause of action "arising from" defendant's litigation activity"']; *Cabral, supra*, 177 Cal.App.4th at pp. 479-480 [defense of clients against litigation constitutes "protected petitioning activity"]; *Beach v. Harco National Ins. Co.* (2003) 110 Cal.App.4th 82, 94 [right to petition encompasses response to a lawsuit].)

The anti-SLAPP statute also protects those who act in furtherance of another's right of petition (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1114-1116; *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1399)—including acts taken to assist another in connection with pending litigation (see, e.g., *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1418-1420 [anti-SLAPP statute applied to claims against attorney based on acts she took to assist clients in connection with pending lawsuit]).

Here, Henriks' claims against State Farm are based on its defense of the Kobashigawas in Henriks' personal injury action—i.e., on State Farm's hiring of Linde to defend the Kobashigawas and Linde's retention of Archangel to conduct surveillance as part of the defense against Henriks' litigation. (See 1 AA 3-17; see also, e.g., 1 AA 67; 2 AA 291-292, 294-295.) Thus, the anti-SLAPP statute applies to Henriks' claims because they are based on acts taken in furtherance of both (1) State Farm's own right of petition (presenting a defense to litigation to comply with its duty to defend) and (2) the Kobashigawas' right of petition in defending against litigation.

Indeed, the anti-SLAPP statute would apply to Henriks' claims even if they were based on the investigators' surveillance rather than on State Farm's hiring of counsel to defend the Kobashigawas and that counsel's hiring of Archangel. The investigators' surveillance was conducted as part of the defense of the Kobashigawas in Henriks' personal injury action. (1 AA 54-55, 59, 67, 77; 2 AA 292, 295; see also 1 AA 10-11 [Henriks alleging investigators were hired "to conduct surveillance as a result of the lawsuit [she] filed against" the Kobashigawas]; 3 RA 544, 546 [Henriks asserting that the "investigation directly stems from the underlying personal injury action" Henriks filed].)

Investigation activities conducted in response to litigation "are acts 'in furtherance of [State Farm's] right of petition or free speech.'" (*Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 604, 610-611 (*Gallanis*); see *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1068-1071 (*Tichinin*) [prelitigation investigation of potential legal claim is protected by the right of petition because penalizing an investigation undertaken to find evidence concerning a claim could "substantially interfere" with that right]; 3 RA 666-667.) Indeed, Henriks has acknowledged that "conducting a [*sic*] surveillance in connection with the litigation of a lawsuit is a legitimate protected activity." (2 RA 495.)

2. State Farm's acts do not fall within the narrowly construed illegality exception.

Henriks argues for the first time on appeal that the anti-SLAPP statute does not apply to State Farm's litigation-based acts because her claims are predicated on acts that fall within the so-called illegality exception to the anti-SLAPP statute. She is wrong.

The anti-SLAPP statute applies unless the "'defendant concedes, or *the evidence conclusively establishes*, that the assertedly protected speech or petition activity was illegal as a matter of law.'" (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 285, emphasis added.) "Mere allegations that [a] defendant[] acted illegally, however, do not render the anti-SLAPP statute inapplicable." (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1245-1246.) Where, as here, defendant State Farm does not concede it acted illegally, the party invoking the illegality exception must demonstrate that petitioning activity was illegal as a matter of law. (See *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367 (*Paul*), disapproved on another ground by *Equilon, supra,* 29 Cal.4th at p. 68, fn. 5.)

The anti-SLAPP statute applies where, as here, the petitioning acts at issue are normal, routine activities that are not inherently criminal. (See *Cabral, supra,* 177 Cal.App.4th at pp. 480-481 [illegality exception did not apply where acts at issue "were neither inherently criminal nor otherwise outside the scope of normal, routine" services].) Although courts have carved out an

exception to the anti-SLAPP statute in "rare cases" where the acts at issue were conclusively shown to be "illegal as a matter of law," this exception applies to a defendant's petitioning activity only under "narrow circumstance[s]." (*Flatley, supra,* 39 Cal.4th at pp. 313-317, 320.) Indeed, courts have applied this narrow exception only to egregious circumstances. (See, e.g., *id.* at pp. 325-333 [criminal extortion]; *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1289-1291, 1296 [violent acts, extreme vandalism, and extreme harassment]; *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 851 (*Lam*) [violent acts]; *Paul, supra,* 85 Cal.App.4th at pp. 1363, 1365-1367 [illegal money laundering]; *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 820, disapproved on another ground by *Equilon, supra,* 29 Cal.4th at p. 68, fn. 5 [arson].)

State Farm's defense of its insureds against litigation—including its retention of an attorney who, as part of the insureds' defense, hired an investigation firm to conduct surveillance—is nothing like the egregious and rare circumstances in which courts have applied the illegality exception. (Cf. *Tichinin, supra,* 177 Cal.App.4th at p. 1069 [investigation of a legal claim "is normally and reasonably part of effective litigation, if not an essential part of it"]; *Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 196-197 ["Since insurers don't have law degrees, in practical effect the[ir] 'duty to defend' means a duty to hire competent counsel to conduct the defense of a lawsuit against the policyholder"]; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d

858, 880-881 (*Merritt*) [insurers must rely on attorneys to conduct litigation].)

Henriks argues that her claims fall within the illegality exception because the "investigators admitted committing tortuous [*sic*] and illegal acts," causing the trial court to deny a separate anti-SLAPP motion filed by co-defendants Archangel and Clarke. (AOB 20.) Henriks' argument is based on a false premise. The court did not deny Archangel's and Clarke's motion on the ground that the anti-SLAPP statute did not apply because their conduct was conclusively illegal as a matter of law. (See 4 RA 880-882.) Rather, under the first step of the anti-SLAPP analysis, the court found that the anti-SLAPP statute *applied* to the claims against Archangel and Clarke. (4 RA 881.) The court then determined, under the *second* step of the analysis, that Henriks had shown a probability of prevailing against Archangel and Clarke. (4 RA 881-882.) Thus, contrary to Henriks' argument, the court's denial of Archangel's and Clarke's motion does not show that Henriks has satisfied her burden of demonstrating that State Farm's acts were conclusively illegal as a matter of law for purposes of the first step of the anti-SLAPP analysis.

Indeed, Henriks' claims against Archangel and Clarke are significantly different than her claims against *State Farm*. Cinquanta, Henry, and Bertoloni were the investigators who conducted surveillance of Henriks, and Henriks asserts they were directly employed by Archangel and Clarke. (1 AA 2, 187-188.) The trial court determined Henriks had shown a probability of prevailing on her claims against Archangel and Clarke because

Henry was their employee and had admitted to trespassing and delivering flowers to catch Henriks on video. (4 RA 881-882.)

In sharp contrast, Henriks does not argue on appeal, much less cite any legal or factual support to show, that Cinquanta, Henry, and Bertoloni were hired by State Farm. In fact, the evidence demonstrates that Linde, not State Farm, hired Archangel (1 AA 67; 2 AA 292, 295; see AOB 7) and Henriks contends on appeal that State Farm is vicariously liable because it could supposedly control the investigation through Linde (see AOB 23-30). Thus, State Farm had a far more remote connection, if any, than Archangel and Clarke to Archangel's and Clarke's employees. Moreover, as explained below, Henriks cannot show a probability of prevailing on claims against *State Farm* based on her vicarious liability theories. (*Post*, pp. 34-40.) All of this further confirms that State Farm's activities were not conclusively illegal as a matter of law.

In any event, even if this court were to conclude that the allegations in the first amended complaint concerning surveillance activities are not subject to the anti-SLAPP statute, the statute would still apply to *all* of Henriks' claims against State Farm since they are *also* based on State Farm's hiring of counsel to defend the Kobashigawas against litigation and that counsel's retention of an investigation firm as part of the Kobashigawas' defense, all of which is protected petitioning activity. (See *ante*, pp. 21-22.) "[W]here 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."'" (*Gallanis, supra,* 152 Cal.App.4th at p. 614.) Here, the allegations concerning protected activity in the first amended complaint are not incidental to any allegedly unprotected surveillance activities. To the contrary, the two are intimately intertwined since the surveillance occurred solely because the attorney retained by State Farm, Linde, hired Archangel to conduct surveillance as part of the Kobashigawas' defense. (See 1 AA 3-4, 11; 4 RA 886; see also 1 AA 67; 2 AA 291-292, 294-295.)

3. Surveillance activities are also protected by the litigation privilege.

Henriks also argues for the first time on appeal that the anti-SLAPP statute does not apply to her litigation-based claims against State Farm because they are supposedly based instead on surveillance activities that are not protected by the litigation privilege. (AOB 14-19.) Henriks is wrong.

Even if Henriks were correct that the privilege does not apply to her claims (and she is not, as we will demonstrate), that would be of no consequence because the anti-SLAPP statute protects a broader range of activities than the litigation privilege. (*Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1474; cf. *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199 ["[t]he Legislature has decreed that courts 'broadly' construe the anti-SLAPP statute"].) The investigators' surveillance was undertaken as part of the Kobashigawas' defense in Henriks' personal injury action and claims based on such an investigation

are protected by the anti-SLAPP statute separate and apart from whether they are also protected by the privilege. (*Ante*, p. 23.)

In any event, Henriks' assertion that the litigation privilege does not apply to her claims is wrong for several reasons.

First, Henriks' claims against *State Farm* are based on its hiring of counsel to defend the Kobashigawas in litigation and that counsel's retention of an investigation firm to conduct surveillance as part of the defense of the Kobashigawas. (*Ante*, p. 22.) Since these acts were undertaken as part of the defense against litigation, they are protected by the litigation privilege. (See *Cabral*, *supra*, 177 Cal.App.4th at p. 485 [actions undertaken for "litigation defense . . . are all absolutely protected by the litigation privilege"].)

Second, even if Henriks' claims against State Farm were based on the investigators' actions, her assertion that their actions were unlawful (AOB 15) does not render the litigation privilege inapplicable. The litigation privilege applies regardless of whether an act is "fraudulent, perjurious, unethical, or even illegal." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 920 (*Kashian*); see *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 957-958 [privilege bars claims based on conduct that violates confidentiality statutes and criminal conduct like perjury]; *Gallanis*, *supra*, 152 Cal.App.4th at pp. 604-605, 616-617 [privilege applied to claim based on investigation that allegedly violated civil rights laws].)

Third, Henriks' assertion that the investigators' actions were "non communicative" conduct (AOB 15) is also incorrect. An investigation conducted in connection with litigation is a "quintessentially communicative act[]" and the litigation privilege

applies to claims based on such an investigation. (*Gallanis, supra,* 152 Cal.App.4th at pp. 604, 616-617.)

Indeed, even if the investigators' activities were noncommunicative, the litigation privilege applies "to noncommunicative acts that are necessarily related to the communicative conduct" where the "gravamen" of a claim "is communicative." (*Rusheen, supra,* 37 Cal.4th at p. 1065.) Litigation conduct is a communicative act. (*Id.* at pp. 1058, 1062-1065.) Here, the gravamen of Henriks' claims *against State Farm* is communicative since she seeks to hold State Farm liable for litigation conduct—i.e., for actions taken to defend the Kobashigawas in Henriks' personal injury action (see 1 AA 54-55, 59, 67, 77; 2 AA 292, 295; 4 RA 886; see also, e.g., 1 AA 10-11)—so any noncommunicative surveillance activities undertaken as part of that defense were necessarily related to communicative conduct.

Henriks relies on four cases that she contends show the litigation privilege does not apply to noncommunicative conduct. (AOB 16.) Two of those cases, however, confirm that the privilege *does apply* to noncommunicative acts that are necessarily related to litigation conduct, while the other two are inapposite. (See *Rusheen, supra,* 37 Cal.4th at pp. 1052-1054, 1057-1058, 1061-1065 [privilege *applied* to noncommunicative post-judgment collection practices *necessarily related* to litigation conduct]; *Ribas v. Clark* (1985) 38 Cal.3d 355, 364-365 (*Ribas*) [privilege *applied* to claim based on litigation conduct (testimony given during arbitration) even though this conduct was intertwined with noncommunicative act]; see also *Kimmel v. Goland* (1990) 51 Cal.3d 202, 205-207, 209-

212 (*Kimmel*) [privilege did not apply to cross-claim based on plaintiffs' tape-recording of conversations *where no lawsuit had been filed*]; *Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1470, 1480 (*Mero*) [privilege did not to apply to claim based on physician's *medical examination* of plaintiff]; accord, *Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 65 [privilege did not apply in *Kimmel* and *Mero* because the conduct there occurred "outside and apart" from litigation].)[13]

In sum, Henriks' contention that the anti-SLAPP statute is inapplicable here because the litigation privilege does not apply to her claims is without merit. We now explain that the litigation privilege is also one of the many reasons why Henriks cannot show a probability of prevailing on her claims against State Farm.

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[13] Moreover, whereas *Kimmel* and *Ribas* indicated that the litigation privilege would not apply to *unlawful eavesdropping* claims based on alleged violations of Penal Code sections 631 or 632 because Penal Code section 637.2 expressly authorized a statutory remedy for this unlawful eavesdropping (see *Kimmel*, *supra*, 51 Cal.3d at pp. 207, 210-212; *Ribas*, *supra*, 38 Cal.3d at pp. 358-359, 364-365), this case does not involve such a claim (3 RA 662-668, 755-761 [Henriks dismissing her unlawful eavesdropping claim, which alleged a violation of Penal Code section 632, against State Farm, Archangel, Clarke, Cinquanta, Henry, Bertoloni, and California Surveillance and Investigation, Inc., with prejudice and trial court dismissing that claim against Linde, Peterson, and their respective law firms]).

D. Henriks cannot establish a probability of prevailing on her claims against State Farm.

1. Henriks bears the burden of showing that there is a probability she would prevail on her claims.

Where, as here, the anti-SLAPP statute applies to a plaintiff's claims, the plaintiff bears the burden of establishing "a 'probability' of prevailing on" the merits of her claims. (*Kashian*; *supra*, 98 Cal.App.4th at p. 906.) To do so, a plaintiff ""must provide the court with sufficient *evidence* to permit the court to determine whether 'there is a probability that the plaintiff will prevail on the claim.'"" (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.) Thus, *Henriks* is required to show how admissible evidence substantiates her claims. (See *Tuchscher*, *supra*, 106 Cal.App.4th at pp. 1236-1239.)

2. Henriks cannot prevail because her claims are barred by the litigation privilege.

A plaintiff cannot show that she has a probability of prevailing where an affirmative defense bars her claims. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 477-479; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676 & fn. 11.) Here, Henriks' claims against State Farm are barred because they are subject to the litigation privilege.

The privilege provides litigants with absolute immunity from claims (other than malicious prosecution claims) arising from communications or communicative conduct with some relation to judicial proceedings. (*Rusheen, supra,* 37 Cal.4th at pp. 1057-1058; *Gallanis, supra,* 152 Cal.App.4th at pp. 615-617; *Kashian, supra,* 98 Cal.App.4th at pp. 912-913, 915-916.) The privilege applies where an alleged injury "resulted from an act that was communicative in its essential nature" and also "extends to noncommunicative acts that are necessarily related" to the communicative act. (*Rusheen,* at pp. 1058, 1065.) "Any doubt about whether the privilege applies is resolved in favor of applying it." (*Kashian,* at p. 913.)

As explained above, Henriks' claims against State Farm are based on communicative acts protected by the litigation privilege. (*Ante,* pp. 29-30.) Indeed, the privilege would apply to Henriks' claims even if, as Henriks contends, they involve investigators' noncommunicative acts since such acts would be necessarily related to communicative litigation conduct. (*Ante,* pp. 29-31.) Thus, the privilege bars Henriks' claims.[14]

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[14] State Farm did not raise the litigation privilege below. However, Henriks has invited this court to consider whether the litigation privilege applies by raising the issue on appeal. (AOB 15-18.) Moreover, whether the litigation privilege applies is a question of law (AOB 13; *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 22-26 (*Home*), and this court may therefore consider that issue for the first time on appeal (*Home,* at pp. 22-26). Additionally, this court may affirm an order granting an anti-SLAPP motion on a ground that a trial court has not relied on. (*Walker, supra,* 93 Cal.App.4th at p. 1439.)

3. Henriks cannot demonstrate a probability of prevailing on her claims against State Farm based on her vicarious liability theories.

Henriks argues that she can show a probability of prevailing because State Farm is vicariously liable where its attorney, Linde, hired Archangel and State Farm supposedly controlled Archangel's investigation through Linde. (See AOB 7, 23, 27.)[15] This contention is without merit. As the trial court correctly determined, Henriks "offers no admissible evidence to establish State Farm's responsibility for the Archangel investigation" and has thus failed to meet her burden under the anti-SLAPP statute. (2 AA 320.)

Generally, one who hires an independent contractor is only liable for the independent contractor's tortious conduct if it "retain[s] control" over the contractor's work and "negligently exercises that control in a manner that affirmatively contributes" to an injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 213-214 (*Hooker*); see *Lynn v. Superior Court* (1986) 180 Cal.App.3d 346, 348-349 (*Lynn*).)

An attorney acting in her role as trial counsel and conducting the defense of a lawsuit "is an independent contractor." (*Merritt, supra*, 34 Cal.App.3d at pp. 880-881; see *Channel Lumber Co. v. Porter Simon* (2000) 78 Cal.App.4th 1222, 1228-1232 (*Channel Lumber*); *Lynn, supra*, 180 Cal.App.3d at pp. 348-349; *Palmer v. Ted*

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[15] Henriks does not contend on appeal that State Farm can be held vicariously liable based on any actions taken by Peterson and her law firm. (See generally AOB.)

Stevens Honda, Inc. (1987) 193 Cal.App.3d 530, 539 (*Palmer*).) Thus, an insurer (like State Farm) is generally not vicariously liable for the allegedly tortious litigation conduct of the outside counsel it retains (like Linde) to defend its insureds. (See *Merritt*, at pp. 861-862, 879-882; *Ghiglione v. Discovery Property and Casualty Co.* (N.D.Cal. Mar. 29, 2007) 2007 WL 963250, at pp. *1, *4 (*Ghiglione*); see also *Lynn*, at pp. 348-349; *Palmer*, at p. 539.)[16]

Accordingly, since State Farm hired outside counsel Linde as the Kobashigawas' trial counsel and, as part of the defense of the Kobashigawas, Linde retained Archangel to conduct surveillance (see 1 AA 67, 69-70; 2 AA 292, 295), Linde was an independent contractor when she dealt with Archangel and its investigators. State Farm cannot be held vicariously liable based on independent contractor Linde's involvement with investigators unless State Farm retained control over Linde's work and negligently exercised that control in a manner that affirmatively contributed to Henriks' alleged injury. (See *Hooker*, *supra*, 27 Cal.4th at pp. 213-214; see also *Lynn*, *supra*, 180 Cal.App.3d at pp. 348-349.)

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[16] Henriks contends that State Farm is vicariously liable based on Linde's involvement with the investigation because Linde, as an attorney, was State Farm's agent and thus State Farm supposedly had imputed knowledge of any wrongdoing committed. (See AOB 27.) But the rule limiting a client's liability for the conduct of its independent contractor attorney applies even though the attorney is the client's agent for purposes of imputed knowledge. (See *Channel Lumber*, *supra*, 78 Cal.App.4th at pp. 1228-1232; *Lynn*, *supra*, 180 Cal.App.3d at pp. 348-349; *Merritt*, *supra*, 34 Cal.App.3d at pp. 880-881.) Henriks cites no authority to the contrary. (See AOB 27.)

Here, Henriks has not shown that State Farm controlled the investigation through Linde, much less that it negligently did so. Indeed, she cites *no* factual support for her unfounded assertion that State Farm controlled the investigation. (See AOB 23-30.) Thus, Henriks has failed to satisfy *her* burden under the anti-SLAPP statute of showing that admissible evidence substantiates her claims against State Farm. (See *Tuchscher*, *supra*, 106 Cal.App.4th at pp. 1236-1239).

The evidence in this case shows no more than that State Farm approved Linde's request to conduct surveillance of Henriks and received a copy of Archangel's Surveillance Investigation Report from Linde's law firm after Cinquanta, Henry, and Bertoloni had already completed their surveillance. (See 1 AA 187-188; 2 AA 292, 295.) This report explained that investigators had observed Henriks traveling to and departing from various locations and occasionally meeting with people. (1 AA 187-194.) It did not indicate that Linde or any investigators communicated with State Farm about the investigation, much less suggest that State Farm controlled the investigation. (See *ibid.*) Moreover, the report did not indicate that the investigators had engaged in any unlawful acts (see *ibid.*; see also 2 AA 292, 295), and, even if it had, Henriks cites no evidence to suggest that State Farm ratified the investigators' prior surveillance activities upon receiving the report in December 2006.

Notably, the State Farm claim representative who handled Henriks' claim against the Kobashigawas, as well her supervisor, "had no communication with anyone from Archangel regarding

Yana Henriks." (2 AA 291-292, 294-295.) They "did not dictate Archangel's activities" and "did not participate in any decision regarding Archangel's activities." (2 AA 292, 295.)[17] And aside from the activities described in the Surveillance Investigation Report that State Farm received *after* the investigators had already completed their surveillance (see 1 AA 187-188; 2 AA 292, 295), these State Farm personnel were "unaware of any activity Archangel engaged in with respect" to Henriks (2 AA 292, 295).

All of this further confirms that State Farm did not control the investigation through Linde.

Henriks also contends that, even if State Farm did not actually control the investigation, it had the "right to control" the investigation through Linde and that this alone is sufficient to hold it vicariously liable. (AOB 25-27.) Henriks is essentially arguing that Linde was State Farm's employee and not an independent contractor. (See AOB 25-26.) But, as we demonstrated above, Linde *was* an independent contractor when, as the Kobashigawas' trial counsel, she hired and dealt with Archangel for the purpose of defending the Kobashigawas. (*Ante*, pp. 34-35.) Indeed, when an insurer hires outside counsel to defend insureds, the outside counsel is an independent contractor precisely because the attorney is "not

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[17] Moreover, Archangel's owner, Clarke, has confirmed that "Archangel never discussed any aspect of" Henriks' personal injury action with State Farm. (1 AA 72.) Similarly, in their own declarations, Cinquanta and Henry never said that they spoke with State Farm. (See 1 AA 166-170; 2 AA 243-246.) In fact, Henry's declaration says that Archangel instructed him "to follow Lauren Linde's instructions" and to report to Linde. (2 AA 243-246.)

subject to the control and direction of the[] employer over the details and manner of [her] performance." (*Merritt, supra,* 34 Cal.App.3d at pp. 861-862, 879-882; *Ghiglione, supra,* 2007 WL 963250, at p. *4; see *Channel Lumber, supra,* 78 Cal.App.4th at pp. 1228-1230; *Palmer, supra,* 193 Cal.App.3d at p. 539; *Lynn, supra,* 180 Cal.App.3d at pp. 348-349; cf. *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1347 (*Ali*) [under """"right to control""" test, "the right to exercise complete or authoritative control must be shown" since a "worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved"].)

In any event, Henriks cites *no* factual support for her groundless assertion that State Farm had the right to control the investigation through Linde. (See AOB 23-30.) Thus, Henriks has again failed to satisfy *her* burden under the anti-SLAPP statute of showing that admissible evidence substantiates her claims against State Farm. (See *Tuchscher, supra,* 106 Cal.App.4th at pp. 1236-1239).

Raising yet another vicarious liability argument—this one for the first time on appeal—Henriks also contends that State Farm is liable because it supposedly benefitted from Cinquanta's, Henry's, and Bertoloni's conduct since "Linde used the[ir] surveillance tape at the trial." (AOB 23-25.) She is wrong.

Henriks, *not* Linde, presented surveillance video derived from the Cinquanta, Henry, and Bertoloni investigation at the trial in her personal injury action and *did so over Linde's objections* and perhaps to Henriks' own detriment. (See 1 AA 70; RJN 128.)

Moreover, the jury in Henriks' personal injury action may have reached a defense verdict for any number of reasons that had nothing to do with that surveillance video. (See, e.g., RJN 121-147.) In fact, in sharp contrast to the argument she makes in this appeal, Henriks has argued in her personal injury action appeal that a *different* videotape from the initial surveillance conducted by *Lopez*—and not the tape derived from the second surveillance conducted by Cinquanta, Henry, and Bertoloni—is the evidence that was "'very damaging'" to her case. (See RJN 93-94; see also RJN 126.)[18] In any event, none of the inapposite cases on which Henriks bases her argument (AOB 24-25) hold that a party can be held vicariously liable purely because it benefits from another's conduct.

Finally, Henriks contends that State Farm is liable for the investigators' actions based purely on public policy. (AOB 27-30.) Henriks' argument relies on three inapposite cases (*ibid.*) that do not address whether anyone is liable based *purely* on public policy and instead simply articulate the unsurprising principle that a company which hires an investigator may be held responsible for the investigator's actions, especially where the company controls the investigator and approves his wrongful acts. (See *Draper v.*

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[18] Henriks further suggests State Farm benefitted from the investigators' acts because it paid for their investigation. (AOB 25.) Even had State Farm paid for Archangel's work (and Henriks proffered no evidence of State Farm paying), Henriks offers no explanation for how State Farm supposedly benefited from that surveillance when it was Henriks, not Linde, who presented the Archangel surveillance video at trial. (*Ante*, pp. 9, 38.) In any event, even Henriks has acknowledged that an insurer cannot be liable simply for paying for an investigation. (6/5/08 RT A-7.)

Hellman Commercial Trust & Savings Bank (1928) 203 Cal. 26, 33-34, 38-39; *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 740, 768-769; *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 657-658, 660-664.) In *this* case, however, Henriks has presented no evidence that State Farm hired any investigators or controlled their investigation. (*Ante*, pp. 27, 36-38.)

4. The trial court did not abuse its discretion by sustaining objections to Cinquanta's declaration.

Henriks contends the trial court erred by sustaining State Farm's objections to Cinquanta's declaration. (AOB 30.) But she does not explain how that declaration supports her arguments on appeal. (AOB 14-30.) Since Henriks fails to explain how the declaration would affect her arguments even if the court erred by sustaining State Farm's objections, her evidentiary challenge fails. (See *Lockhart v. MVM, Inc.* (2009) 175 Cal.App.4th 1452, 1460-1461.)

Moreover, Henriks' challenge—which this court reviews for abuse of discretion (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348, fn. 3)—is without merit. Cinquanta's declaration recounted hearsay statements supposedly made by Clarke and an alleged Archangel employee. (1 AA 166-169.) Even Henriks admitted that Cinquanta's declaration contained hearsay. (6/5/08 RT A-5, A-17.) Such hearsay is inadmissible. (See *Miller v. Filter* (2007) 150 Cal.App.4th 652, 664.) The declaration also asserted that Cinquanta "followed State Farm's and Archangel's

joint protocol" and that State Farm controlled the investigation and its funding. (1 AA 166-169.) But Cinquanta never explains how he knew any of these supposed "facts," never suggested that he, Henry, or Bertoloni spoke with anyone at State Farm, and the "protocol" Cinquanta attached to his declaration expressly said it was *Archangel*'s protocol and never mentioned State Farm. (1 AA 166-170, 177.)[19] Thus, the court did not abuse its discretion by sustaining State Farm's evidentiary objections. (See, e.g., *People v. Clark* (1996) 45 Cal.App.4th 1147, 1156 [objections to testimony were properly sustained where testimony lacked foundation]; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 656-657, disapproved on another ground by *Equilon*, *supra*, 29 Cal.4th at p. 68, fn. 5 [objections to declarations were properly sustained where declarations contained hearsay].)

On appeal, Henriks does not attempt to show the trial court abused its discretion by sustaining State Farm's objections in June 2008 based on all the circumstances presented to the court at that time. (See AOB 30.) Rather, Henriks contends that, because the court *later* made a different evidentiary ruling concerning the Cinquanta declaration in regard to a *different* anti-SLAPP motion brought by *different* defendants in response to a *different* operative

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[19] Indeed, the State Farm claim representative and her supervisor who handled Henriks' claim against the Kobashigawas have both explained that (1) State Farm did not generate or approve the protocol attached to Cinquanta's declaration, (2) "there is no 'joint protocol' between" State Farm and Archangel, and (3) "at no time did [they] dictate or require" that "this (**or any**) protocol be followed in the retention of any investigators" in Henriks' personal injury action. (2 AA 292-293, 295-296, original emphasis.)

complaint, the previous ruling sustaining State Farm's objections was arbitrary and an abuse of discretion. (See AOB 30; see also 2 AA 375-385; 4 RA 895-916, 922-945, 953-969, 996-1024, 1027-1047.) Henriks' argument is without merit. She cannot demonstrate that the court's June 2008 decision to sustain State Farm's evidentiary objections was an abuse of discretion due to subsequent events that were not before the court when it ruled on State Farm's objections. (See *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1511, fn. 16; *Universal Underwriters Ins. Co. v. Superior Court* (1967) 250 Cal.App.2d 722, 730.) Indeed, the court decided to sustain State Farm's objections under different circumstances than those before the court when it made a different ruling in connection with the later motion filed by different defendants. State Farm objected to statements in Cinquanta's declaration based on several grounds that were never raised by the other defendants in their later motion—for example, on the grounds that certain statements were incompetent, speculative, or ran afoul of insurance and privacy laws. (Compare 2 AA 272-273 with 2 AA 376-385.) Moreover, at the hearing on State Farm's anti-SLAPP motion, Henriks acknowledged the declaration contained hearsay. (6/5/08 RT A-5, A-17.)

E. The trial court did not abuse its discretion by agreeing to consider an untimely anti-SLAPP motion.

Where a complaint is served by mail, a defendant may file an anti-SLAPP motion within 65 days after the complaint is served.

(*Lam, supra,* 91 Cal.App.4th at p. 842; see Code Civ. Proc., §§ 425.16, subd. (f), 1013, subd. (a).) The anti-SLAPP statute's filing deadline, however, "is not jurisdictional." (*Lam*, at p. 840.) An anti-SLAPP motion may be filed within the deadline "or, in the court's discretion, at any later time upon terms it deems proper." (Code Civ. Proc., § 425.16, subd. (f).) Accordingly, "a trial court enjoys considerable discretion regarding whether to allow the late filing of an anti-SLAPP motion . . . ." (*Platypus, supra,* 166 Cal.App.4th at p. 787; see *Lam*, at p. 840.)

Henriks served her first amended complaint by mail on March 3, 2008. (1 AA 19-20.) State Farm's anti-SLAPP motion—filed on May 8, 2008—was filed only *one* day after the statutory deadline. (3 RA 726; 4 RA 885.) Henriks contends that the court abused its discretion by granting State Farm's motion because it was not timely filed. (AOB 30-33.) Henriks is wrong.

While courts may abuse their discretion where they permit a late filing in "extreme" cases (*Platypus, supra,* 166 Cal.App.4th at p. 787)—such as where a defendant waits two years to attack a complaint with an anti-SLAPP motion and files it only after substantial discovery is completed, the discovery cut-off deadline has passed, and trial is scheduled to commence three months later (see *id.* at pp. 775, 784, 787)—this is not an "extreme" case.

State Farm filed its anti-SLAPP motion only *one* day late (4 RA 885), at a time when the parties had conducted little, *if any*, discovery (1 AA 110, 116), the parties were still in the early stages of litigation (see 1 RA 19-242, 254-259; 2 RA 266-413, 417-527; 3 RA 528-754, 765-784; 4 RA 785-894 [parties litigated demurrers and

anti-SLAPP motions between December 2007 and June 2008]), and no trial date had yet been set (4 RA 1058, 1064). Even Henriks acknowledges that State Farm's "delay" in filing its anti-SLAPP motion "was not significant . . . ." (AOB 6.) Given the absence of any extreme circumstances requiring the denial of an untimely anti-SLAPP motion, the court here had broad discretion to accept a late motion when State Farm asked the court (see 2 AA 284-285) to accept its motion since it was only one date late (see *Platypus*, *supra*, 166 Cal.App.4th at p. 787 [court has broad discretion to accept untimely anti-SLAPP motion in absence of extreme circumstances]).[20]

Henriks asserts that the court abused its discretion because State Farm's counsel, which also represented Peterson and her law firm, filed an anti-SLAPP motion on behalf of those co-defendants within the statutory deadline and should have combined State Farm's motion with that motion. (AOB 31-32.) This argument is without merit. The anti-SLAPP statute permits each defendant to file its own anti-SLAPP motion and nothing in the statute required State Farm to combine its motion with the motions of its co-defendants. (See Code Civ. Proc., § 425.16, subd. (b)(1).)

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[20] Henriks relies on three cases to argue that the court abused its discretion by accepting an untimely anti-SLAPP motion. (AOB 32.) But those cases are inapposite since they address discretionary *refusals* to accept untimely motions and, in any event, involve exceptionally different circumstances where motions were filed long after the deadline. (See *Kunysz v. Sandler* (2007) 146 Cal.App.4th 1540, 1542-1543; *Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 280-282; *Morin v. Rosenthal* (2004) 122 Cal.App.4th 673, 678-682.)

F. The trial court did not abuse its discretion by refusing to lift the anti-SLAPP statute's discovery stay.

In enacting the anti-SLAPP statute, the Legislature "sought to protect defendants from the burden of traditional discovery pending resolution of the [anti-SLAPP] motion." (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1189-1190.) Thus, the anti-SLAPP statute provides that, upon the filing of an anti-SLAPP motion, "[a]ll discovery proceedings in the action shall be stayed" unless the trial court, "on *noticed motion* and for *good cause* shown, may order that specified discovery be conducted . . . ." (Code Civ. Proc., § 425.16, subd. (g), emphases added; cf. *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 593 (*1-800 Contacts*) [discovery under the anti-SLAPP statute "may not be obtained merely to 'test' the opponent's declarations"].) In short, the statute "suspends discovery" upon the filing of an anti-SLAPP motion. (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1052 (*Braun*).)

Henriks argues that the trial court should have permitted her to conduct discovery under the anti-SLAPP statute. (AOB 33.) To demonstrate that the court abused its discretion by denying her request for discovery, Henriks must show the court ""'exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination.'"" (*Tuchscher*, *supra*, 106 Cal.App.4th at p. 1247.) Henriks cannot satisfy that standard because: (1) she failed to present the court with a proper discovery request; and (2) she failed to carry her burden of showing sufficient

good cause to overcome the anti-SLAPP statute's suspension of discovery.

1. The anti-SLAPP statute "requires that requests to conduct limited discovery . . . must be in the form of a noticed motion." (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1061 (*Contemporary Services*).)

Although Henriks filed a noticed motion seeking discovery (1 AA 106), she voluntarily took that motion off calendar before it was decided (6/5/08 RT A-22; 4 RA 917-919). Since the court never ruled on her noticed motion, the court could not have abused its discretion by not granting it and Henriks waived any argument she made in that motion by withdrawing it. (See *Estate of Odian* (2006) 145 Cal.App.4th 152, 167-168 [appellant waived evidentiary argument from motion in limine where she withdrew the motion and never obtained a ruling on it].)

While Henriks also orally asked for discovery at the hearing on the anti-SLAPP motion (6/5/08 RT A-5, A-13 to A-14), an oral request does not comply with the anti-SLAPP statute's noticed motion requirement and a court therefore does not abuse its discretion by denying it (*Tuchscher, supra,* 106 Cal.App.4th at pp. 1247-1248; *Braun, supra,* 52 Cal.App.4th at p. 1052).[21]

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[21] Although Henriks filed an ex parte application seeking to shorten time to hear her discovery motion or to continue the hearing on State Farm's motion, the court did not reject any discovery request on the merits when it denied that application. (*Ante,* p. 13.) Rather, the court denied the application without prejudice to Henriks raising her discovery request in opposition to State Farm's motion (5/23/08 RT A-7 to A-8), a step Henriks never took (see 1 AA

(continued...)

2. Henriks sought discovery because it supposedly would have helped her to show that State Farm could be held vicariously liable. (See 6/5/08 RT A-13.) But, as explained above (*ante*, pp. 29-33), even if State Farm could be held vicariously liable, the litigation privilege independently bars Henriks' claims against State Farm. Accordingly, the discovery Henriks sought was irrelevant and thus the trial court did not abuse its discretion in finding there was insufficient good cause under the anti-SLAPP statute. (See *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 922 [affirming denial of discovery under the anti-SLAPP statute because discovery was irrelevant since the litigation privilege barred plaintiff's claim].)

The discovery Henriks sought also failed to satisfy the anti-SLAPP statute's "good cause" requirement for another reason. Henriks asked for discovery into whether Archangel had a contractual relationship with State Farm. (6/5/08 RT A-5, A-13 to A-14; 1 AA 113.) But, as the trial court correctly determined, even if Henriks could show the existence of a contractual relationship between State Farm and Archangel, the mere existence of that relationship would be insufficient to establish that State Farm is vicariously liable for the acts of the investigators. (See 6/5/08 RT A-7 to A-17.)

(...continued)
148-164). In any event, Henriks' ex parte application could not satisfy the anti-SLAPP statute's "noticed motion" requirement. (See *Contemporary Services*, *supra*, 152 Cal.App.4th at pp. 1061-1062.)

This is so because outside investigators like Archangel and its employees are generally independent contractors and thus the limitations on a party's liability for an independent contractor's conduct apply to Archangel's investigators. (See *Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink & Bell* (1977) 70 Cal.App.3d 331, 335-337, 340 [insurer was not vicariously liable for actions of investigator who was an independent contractor].)[22] Although a defendant can be vicariously liable for an independent contractor's misconduct if it retains control over the independent contractor's work and negligently exercises that control in a manner that affirmatively contributes to a plaintiff's injury (*ante*, p. 34), Henriks has cited no evidence to show State Farm controlled any investigators, much less that it negligently exercised such control. Thus, the court did not abuse its discretion by denying discovery that would not have shown Henriks has a probability of prevailing on her claims against State Farm. (See *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th

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[22] Notably, Henriks cites no evidence to suggest that State Farm had the right to control Archangel and its employees, and evidence instead indicates the investigators took directions from and reported to Linde, not State Farm. (1 AA 68, 72, 77-78; 2 AA 292-293, 295-296.) This further confirms that, even had State Farm hired Archangel (which it did not (*ante*, p. 27)), Archangel's investigators would have been independent contractors. (See *Ali, supra,* 176 Cal.App.4th at p. 1347 [right to control is the "primary test" of whether a worker is an employee or independent contractor; under that test, an employer's "right to exercise complete or authoritative control must be shown" for a worker to be an employee because a "worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved"].)

226, 247; see also *1-800 Contacts, supra*, 107 Cal.App.4th at p. 593 ["good cause" standard for anti-SLAPP discovery requires showing that evidence sought is necessary for plaintiff "'to establish a prima facie case'"].)

CONCLUSION

For the foregoing reasons, this court should affirm the trial court's orders granting State Farm's anti-SLAPP motion and awarding fees and costs.

Dated: December 8, 2009

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 11,623 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: December 8, 2009

Felix Shafir

CASE LAW AVAILABLE SOLEY FROM AN ONLINE SOURCE

(PROVIDED PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.1115(C))

Not Reported in F.Supp.2d, 2007 WL 963250 (N.D.Cal.)
(Cite as: 2007 WL 963250 (N.D.Cal.))

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Only the Westlaw citation is currently available.

United States District Court,
N.D. California.
Frank GHIGLIONE and Rodgers Trucking,
Plaintiffs,
v.
DISCOVER PROPERTY AND CASUALTY COMPANY, Discover Managers, Inc., and Does 1 through 10, inclusive, Defendants.
No. C-06-1276 SC.

March 29, 2007.

George W. Korte, Law Offices of George W. Korte, San Francisco, CA, for Plaintiffs.

Thomas J. Tarkoff, Jack T. Friedman, Carroll, Burdick & McDonough LLP, Walnut Creek, CA, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

SAMUEL CONTI, United States District Judge.

I. *INTRODUCTION*

***1** Plaintiffs Frank Ghiglione and Rodgers Trucking ("Plaintiffs") brought this action against Discover Property and Casualty Company *et al.* ("Discover" or "Defendants") alleging breach of contract and breach of the covenant of good faith and fair dealing based on Discover's conduct during its defense of Rodgers Trucking in a prior lawsuit. *See* Complaint, Ex. A.

Presently before the Court is Defendants' Motion for Summary Judgment. For the reasons stated herein, the Court hereby GRANTS Defendants' Motion for Summary Judgment. The Court also AWARDS Defendants' costs, subject to the Court's approval of Defendants' offer of proof to be submitted within 30 days of this order.

II. *BACKGROUND*

In 2003, Rodgers Trucking was insured by Defendant Discover Property and Casualty Company under a $1 million automobile liability policy. On May 9, 2003, a Rodgers Trucking vehicle struck Mr. Eliseo Soria ("Soria") while he was riding a bicycle. The police report stated that the truck driver caused the collision. *See* Tarkoff Decl., Ex. M. Soria suffered significant injuries and subsequently sued Rodgers Trucking in state court, claiming several million dollars in damages.

After the accident, the insurance broker for Rodgers Trucking reported the accident to Don Bullock at The Murata Group, the third-party administrator ("TPA") for the claim. The TPA hired Arenas Claims Consulting to investigate the accident. Arenas conducted a scene investigation on May 16, 2003 and produced a written report on May 27, 2003. *See* Tarkoff Decl., Ex. C, Bullock Depo., 17-18. The TPA also retained Lenore Defiesta as defense counsel in anticipation of Soria filing a lawsuit. *See id* . at 23-24, 28-29. While investigating the claim, Discover authorized the hiring of multiple experts to analyze the accident and approved over $150,000 in defense costs. *See id.* at 34, 54.

Defendants made several attempts to settle the case. On July 9, 2004, Defendants sent Soria three structured settlement proposals prepared by the Bridge Settlement Corporation. *See* Korte Decl., Ex. 3. Soria rejected the offers. *See* Bullock Decl., ¶ 4. In addition, the parties engaged in multiple mediation sessions before four different mediators. *See* Tarkoff Decl., Ex. A, Korte Depo., 22, 29, 32, 49. During the settlement negotiations Soria never made a demand at or below the policy limits. *See id.* at 58-59. Each of the mediators suggested that

Rodgers Trucking would have to make a monetary contribution to facilitate settlement because the insurance policy was not large enough to constitute a sufficient payment to Soria. *See id.* at 100-101.

Subsequently, when it appeared likely that the case would go to trial, Defendants authorized the hiring of an additional attorney, Kevin Cholakian, to be the lead trial attorney. *See id.* at 111. Mr. Korte, the attorney for Rodgers Trucking, was satisfied that the new attorney provided adequate representation. *See id.*

*2 Immediately prior to trial, the parties settled the Soria case for $1.2 million. Defendants agreed to pay $1 million, the full value of the insurance policy, and Rodgers Trucking agreed to pay the remaining balance of $200,000.00. *See* Tarkoff Decl., Ex. B, Ghiglione Depo., 22; Korte Decl., Ex. 12. At deposition, Frank Ghiglione agreed that when considering the final settlement proposal he was not pressured by Discover or its attorneys. *See* Ghiglione Depo., 32-33. Ghiglione made the decision to settle after discussing the matter with Mr. Korte. *See id.* at 51.

III. *LEGAL STANDARD*

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists when the non-moving party produces evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252-56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is therefore appropriate against a party "who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322-23. The more implausible the claim or defense asserted by the opposing party, the more persuasive its evidence must be to avoid summary judgment, *see Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), but "[t]he evidence of the non-moving party is to be believed, and all justifiable inferences are to be drawn in its favor." *Anderson,* 477 U.S. at 255.

Defendants removed this case to federal court under 28 U.S.C. § 1441(b). Accordingly, this Court must apply California substantive law to Plaintiffs' claims. *See Erie RR v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

IV. *DISCUSSION*

A. *Defendants' Duties as Insurer*

The parties agree that Discover had a general duty to defend Rodgers Trucking against Soria's claims. Upon learning of a potential claim against the policyholder, "the insurer has a duty to defend the insured in any action brought against the insured seeking damages for any covered claim." *Buss v. Superior Court,* 16 Cal.4th 35, 65 Cal.Rptr.2d 366, 939 P.2d 766, 773 (1997). The duty to defend "entails the rendering of service, viz., the mounting and funding of a defense ... in order to avoid or at least minimize liability." *Id.* The general duty to defend includes the obligation to defend the action immediately and in its entirety. *See id.* at 775.

In addition, the insurer has a number of specific responsibilities:

(1) to make immediate inquiry into the facts of any serious accident as soon as practicable after its occurrence; (2) on the filing of suit against its assured to employ competent counsel to represent the assured and to provide counsel with adequate funds to conduct the defense of the suit; (3) to keep abreast of the progress and status of the litigation in order that it may act intelligently and in good faith on settlement offers.

***3** *Merritt v. Reserve Insurance Co.*, 34 Cal.App.3d 858, 110 Cal.Rptr. 511, 527 (Cal.Ct.App.1973). Defendants agree that they had the duty to inquire immediately into the facts of the case, hire competent counsel, provide counsel with adequate funding, and keep abreast of the progress of the litigation. The Court finds that Defendants fulfilled each of their duties.

Defendants satisfied the duty of immediate inquiry by taking prompt action upon learning of the accident. The Soria accident occurred on Friday, May 9, 2003. *See* Tarkoff Decl., Ex. M. On Monday, May 12, Ron Mathews, the insurance broker for Rodgers Trucking, reported the accident to the TPA who immediately hired Arenas Claims Consulting to investigate the accident. *See id.,* Ex. I. Arenas performed a full investigation of the scene and produced a report on May 27, 2003. *See id.,* Ex. C. By quickly contacting and hiring the investigators, Defendants met their duty to make immediate inquiry into the facts of the Soria accident.

Defendants also satisfied the duty to hire competent counsel. Before Soria filed his personal injury claim, the TPA retained Lenore Defiesta as defense counsel for Rodgers Trucking. *See id.,* Ex. C at 24, 28-29. The TPA had worked with Defiesta on prior insurance defense matters. *See id.,* Ex. C. at 24. In other cases, Defiesta served as defense counsel in five jury trials, four of which involved personal injury claims. *See* Korte Decl., Ex. 13. Based upon this information and the other documents attached to the Korte Declaration, the Court finds that Lenore Defiesta was competent counsel for the Soria case. Moreover, Defendants authorized the hiring of Kevin Cholakian as an additional trial attorney when the case appeared headed to trial. *See* Korte Depo. at 111. Even Plaintiffs' personal counsel, Mr. Korte, agreed that Cholakian was capable of adequately representing Rodgers Trucking. *See id.*

Defendants also provided adequate funding to the investigators and defense attorneys. While defending Rodgers Trucking, Discover authorized expenses for investigation and litigation that exceeded $150,000. *See* Tarkoff Decl., Ex. C at 54. Based on the recommendation of counsel, the TPA and Discover's claim representative authorized the retention of multiple defense experts. *See id.* at 34, 110 Cal.Rptr. 511. Both Plaintiff Ghiglione and Mr. Korte confirmed that every recommendation they made regarding defense activity was approved by Defendants. *See* Korte Depo. at 61-62; Ghiglione Depo. at 76. In light of Discover's approval of all requested and relevant expenses, Defendants satisfied their duty to provide counsel with adequate funds to defend the Soria suit.

Defendants also satisfied their duty to keep sufficiently abreast of the progress of the litigation. The TPA and Defendants' attorneys continued to refine their understanding of the case through additional investigation and participation in numerous mediation sessions. *See* Korte Decl., Ex. 8; Korte Depo. at 22, 29, 32, 49. Indeed, approaching trial, attorney Cholakian produced a comprehensive Pre-Trial Report which summarized the facts of the case and analyzed the potential outcomes. *See* Tarkoff Decl., Ex. E. Thus, Defendants acted in good faith and satisfied their duty to remain informed of the progress of the litigation.

***4** Plaintiffs assert that Defendants failed to meet their duty to employ competent counsel. Plaintiffs' primary complaints center around the timing of defense counsel's decision to reveal the $1 million policy limit to Soria in the hopes of settling the case. Plaintiffs claim that this "placed stars in the eyes of the injured party and fear in the plaintiff" despite the fact that the limits of insurance coverage are discoverable under California law. Opp'n, 6; *see* Cal.Civ.Proc.Code § 2017.210. Though Plaintiffs disagree with some of defense counsel's strategic decisions and the timing of certain disclosures, they have not shown that Defendants should be liable for any alleged mistakes.

California courts have stated that insurance companies are not liable for the potential missteps of retained counsel. "We do not accept the claim that vicarious liability falls on one who retains independ-

ent trial counsel to conduct litigation on behalf of a third party when retained counsel has conducted the litigation negligently." *Merritt,* 110 Cal.Rptr. at 526 . Thus, even assuming that defense counsel was negligent, Discover would not be liable for the conduct of Defiesta or Cholakian.

> In our view independent counsel retained to conduct litigation in the courts act in the capacity of independent contractors, responsible for the results of their conduct and not subject to the control and direction of their employer over the details and manner of their performance.

Id. Moreover, even the retained attorneys are not legally responsible for good faith mistakes.

> In view of the complexity of the law and the circumstances which call for difficult choices among possible courses of action, the attorney cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy or other procedural step.

Banerian v. O'Malley, 42 Cal.App.3d 604, 116 Cal.Rptr. 919, 925 (Cal.Ct.App.1974). In light of the relevant precedent, the Court finds that Defendants are not liable for the alleged mistakes described by Plaintiffs. During the course of the investigation and litigation, defense counsel acted competently and in good faith. Though Plaintiffs' counsel might have tried the case differently, the conduct of defense counsel does not give rise to liability.

B. *Plaintiffs' Cumis Claim*

Plaintiffs assert that their personal counsel, Mr. Korte should have been retained by Defendants as cumis, or independent counsel. Under California law, the duty to appoint independent counsel materializes when a conflict of interest arises between the insurer and insured. *See* Cal. Civ.Code § 2860(a). However, "[n]o conflict of interest shall be deemed to exist ... solely because an insured is sued for an amount in excess of the insurance policy limits." Cal. Civ.Code § 2860(b). Thus, the fact that Rodgers Trucking was sued for an amount greater than the $1 million liability policy does not, in itself, give rise to a duty to appoint independent counsel. "A mere possibility of an unspecified conflict does not require independent counsel. The conflict must be significant, not merely theoretical, actual, not merely potential." *Dynamic Concepts, Inc. v. Truck Insurance Exchange,* 61 Cal.App.4th 999, 71 Cal.Rptr.2d 882, 887 (Cal.Ct.App.1998). During litigation of the Soria case, no conflict of interest arose between Rodgers Trucking and Discover. At all times, Soria's demands exceeded the $1 million limit on Rodgers Trucking's liability policy. As such, "it was to the advantage of both appellant and respondent to minimize appellant's underlying liability." *Blanchard v. State Farm Fire & Casualty Co.,* 2 Cal.App.4th 345, 2 Cal.Rptr.2d 884, 887 (Cal.Ct.App.1991). On the eve of trial, when Soria proposed to settle the case for $1.2 million and Plaintiffs were willing to contribute the $200,000.00 over the policy limits, Discover willingly agreed to pay the full amount of the policy. In the relevant precedent, proper claims for appointment of independent counsel or bad faith involve the insurer's refusal to settle. *See J.B. Aguerre, Inc. v. American Guarantee and Liability Insurance Co.,* 59 Cal.App.4th 6, 68 Cal.Rptr.2d 837, 841 (Cal.Ct.App.1997). Where, as here, the insurer readily agreed to pay the full amount of the liability policy in order to settle the case, a conflict of interest did not arise and Defendants were not obligated to appoint Mr. Korte as independent counsel.

C. *Plaintiffs' Decision to Settle*

***5** Plaintiffs' final contention is that Defendants breached the covenant of good faith and fair dealing by coercing Plaintiffs into settling the case and contributing $200,000.00. To prove this claim, Plaintiffs must show that Defendants were "unreasonably coercing an insured to contribute to a settlement fund." *Id.* at 842. Contrary to Plaintiffs' assertions, the record contains no evidence of coercion. In their depositions, both Mr. Ghiglione and

Mr. Korte stated that they discussed settling the case without any input or pressure from Discover or defense counsel Defiesta and Cholakian. *See* Korte Depo. at 52-53; Ghiglione Depo. at 31-33. The settlement discussions between Ghiglione, Korte, and Soria's attorney occurred on a Sunday, two days after the case was assigned to trial and without input from defense counsel. *See* Korte Depo. at 41; Korte Decl., Ex. 12. Mr. Ghiglione testified that he made the decision to settle in order to eliminate the risk that Rodgers Trucking would be found liable for a higher amount at trial. *See* Ghiglione Depo. at 66. Mr. Ghiglione's decision to contribute $200,000.00 to the settlement came after Defendants made diligent efforts to settle the case within the $1 million policy limit, but found this impossible in light of Soria's demands. *See id.* at 80, 68 Cal.Rptr.2d 837. Mr. Korte testified that Soria never made a settlement demand of less than $1 million and all the neutral mediators opined that a contribution from Rodgers Trucking would be necessary for settlement. *See* Korte Depo. at 58, 100-01. The testimony of Ghiglione and Korte indicates that Defendants never coerced Plaintiffs into settling or making a contribution to the case. As a result, Plaintiffs' claims that Defendants unreasonably coerced a settlement fail as a matter of law.

V. *CONCLUSION*

For the reasons described herein, the Court GRANTS Defendants' Motion for Summary Judgment. The Court also AWARDS Defendants' costs, subject to the Court's review and approval of Defendants' offer of proof to be submitted within 30 days of this order.

IT IS SO ORDERED.

N.D.Cal.,2007.
Ghiglione v. Discover Property and Cas. Co.
Not Reported in F.Supp.2d, 2007 WL 963250 (N.D.Cal.)

END OF DOCUMENT

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

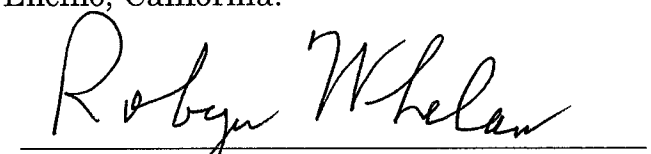
On December 8, 2009, I served true copies of the following document(s) described as **Respondent's Brief** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 8, 2009, at Encino, California.



Robyn Whelan

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Henriks v. State Farm
Court of Appeal No. B208936

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