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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PETER DICE, Plaintiff and Appellant, v. X17, INC., et al., Defendants and Appellants.	B243910 (Los Angeles County Super. Ct. No. SC116581)

APPEAL from an order of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Affirmed in part and reversed in part with directions.

Law Offices of James R. Balesh and James R. Balesh for Plaintiff and Appellant.

One, Christopher W. Arledge and John Tehranian for Defendants and Appellants.

X17, Inc. (X17), published on the Internet a video recording and photographs showing Peter Dice standing near and interacting with a man who was sitting beside Lindsay Lohan, a celebrity, outside a restaurant. The words "cocaina" and "droga" are heard on the recording as the seated man studies a small plastic bag and hands it to Dice. The caption of the video recording and an article published with it suggest that it depicts an illicit drug purchase involving Dice and Lohan.

Dice filed a complaint against X17 and its owner, Francois Navarre, alleging that the publication contained false and defamatory statements and violated his privacy and publicity rights. X17 and Navarre filed a special motion to strike the complaint under Code of Civil Procedure section 425.16, the anti-SLAPP statute.[1] The trial court granted the motion in part and denied it in part. Both sides appealed the order. X17 and Navarre contend the motion should have been granted in its entirety and the court erred by denying the motion in part. Dice contends the motion should have been denied in its entirety and the court erred by granting the motion in part.

We conclude that the trial court properly denied the special motion to strike as to Dice's defamation counts and other counts. We reject the defendants' contention that Dice is a limited purpose public figure who must prove actual malice and their contention that there was no provably false statement of fact. We also conclude that the court erred by granting the special motion to strike as to Dice's count for commercial appropriation of likeness and violation of Civil Code section 3344 and that Dice

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[1] All statutory references are to the Code of Civil Procedure unless otherwise specified. SLAPP is an acronym for Strategic Lawsuit Against Public Participation.

presented evidence sufficient to overcome the "news exception" to liability based on violation of his publicity rights. We therefore will affirm the order in part and reverse it in part.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*

X17 is a celebrity news reporting and photography agency. Navarre is its owner. Dice is a "sobriety coach" who helps others to get sober and instructs on sober living. Lohan is a well-known actress and celebrity whose substance abuse problems have been widely reported in the media.

Photographers affiliated with X17 recorded video of Lohan sitting on a bench between two men outside a restaurant on a public street in the Venice Beach neighborhood of the City of Los Angeles. All three are holding cigarettes. After a cut in the video recording, Dice is seen standing with a dog on a leash leaning toward the man seated to Lohan's left who is holding up and inspecting a small plastic bag.[2] Lohan also looks at the bag. A voice is heard, apparently the photographer's or his associate's, stating "cocaina." The man seated to Lohan's left then hands the bag to Dice. Then two voices are heard, apparently the photographer's and his associate's, conversing in a foreign language. The word "droga" is whispered twice in the conversation and then

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[2] Dice declared that he purchased the bag from a vendor on the boardwalk and handed it to his friend sitting beside Lohan, although the video recording initially shows the seated man in possession of the bag.

spoken in a normal conversational volume a third time. In fact, the bag contained "healing crystals" used in alternative medicine, and not illicit drugs.

The man seated to Lohan's right, wearing a baseball cap, stands up and enters the restaurant. There is another cut in the video recording, and the same man is seen standing outside the restaurant next to Lohan who is also standing. At this point, Dice has disappeared from the video and does not reappear. The man in the cap who was seated to Lohan's right appears to hand something to the man who was seated to Lohan's left, who is now standing in the doorway and enters the restaurant. Lohan hands something to the man in the cap who puts it in his pocket. The man in the cap then hands Lohan a lighter and sits down. She lights a cigarette and returns the lighter to the man in the cap. Lohan and the two men later walk across the street to a parked car and drive away together.

X17 published the video and still photographs on its website with the caption in bold text, "Lindsay Lohan Makes Purchase in Venice." Under the caption in smaller text was the sentence "Lindsay makes purchase on the street in Venice." This was followed by an article with the headline, "*EXCLUSIVE VIDEO*—LINDSAY LOHAN MAKES A PURCHASE ON VENICE STREET." The article stated:

"UPDATE—Lindsay's rep Steve Honig has called and expressed his disapproval of this story. He has given us the following statement, 'The bag contained crystals that had been purchased for Lindsay at a local shop.'

"Lindsay Lohan hung out with her new friends outside of Hal's Bar & Grill in Venice Beach—not far from her home.

"The 25–year –old actress kept busy writing in a notebook and smoking cigarettes . . . while those around her kept watch.

"At one point, Lindsay can be seen taking a bag from a friend. Her friend checks out the contents of the bag and eventually, Lindsay takes a different bag from another guy and hands over the cash to pay for it. She then took time to chat with some young fans passing by."[3]

2. *Trial Court Proceedings*

Dice filed a complaint against X17 and Navarre in April 2012 alleging that the defendants disseminated information falsely asserting that he handed Lohan and her friend a bag containing cocaine. He alleges counts for (1) slander, (2) libel, (3) violation of his publicity rights under Civil Code section 3344 and common law, (4) invasion of privacy, and (5) intentional infliction of emotional distress, all arising from the publication of the video recording and article.

X17 filed an answer and later, jointly with Navarre, filed a special a special motion to strike the complaint. The defendants argued that the publication was news reporting on an issue of public interest and therefore was protected activity under the anti-SLAPP statute. They also argued that Dice was a limited purpose public figure who must prove actual malice in order to prevail on the merits, which he could not prove. The defendants argued further that the right of publicity did not protect against

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[3] The evidence in the record does not disclose whether the article was published initially without the "UPDATE" or when the "UPDATE" was added.

news reporting. They filed a declaration, exhibits and a request for judicial notice in support of their motion.

Dice argued in opposition to the motion that the publication was not news reporting, that it was false, and that it did not concern an issue of public interest and therefore was not protected activity under the anti-SLAPP statute. He also argued that he was not a limited purpose public figure and that the defendants were negligent in publishing the video recording and article. He argued that the evidence established a prima facie case of liability on each count. He also argued in his opposition that he should be granted leave to conduct discovery to substantiate his claims, "including the depositions of the Defendants and to request documents and information regarding the falsity of the subject statements." Dice filed his own declaration and other declarations and exhibits in support of his opposition. The defendants filed objections to some of the evidence filed by Dice.

The trial court heard the motion and filed a minute order ruling on the motion on September 4, 2012. The order stated that the subject of the publication, possible drug use by a celebrity, was an issue of public interest and that each count alleged in the complaint arose from protected activity under the anti-SLAPP statute. The court concluded that Dice was not a limited purpose public figure, stating, "this Court cannot properly conclude that Plaintiff voluntarily injected himself into the debate on drug availability/use in Los Angeles and/or by celebrities. Approaching Lindsay Lohan on a busy public street, in front of paparazzi, with a bag containing a crystalline substance can be fairly characterized as a regrettable decision—but not one which transformed

Plaintiff into a limited purpose public figure (or the rare 'involuntary' limited purpose public figure)." The court also concluded that Dice had presented evidence that the defendants were negligent in publishing the video recording and article and evidence supporting each element of the counts other than the third court.

The order stated with respect to the third count for violation of publicity rights that the defendants could not be liable for reporting news and a matter of public interest either under Civil Code section 3344 or the common law. The court sustained several of the defendants' evidentiary objections, granted their request for judicial notice, and denied Dice's request for leave to conduct discovery, stating that he had failed to explain what additional facts he expected to discover. The court therefore granted the special motion to strike on the third count only and denied it on the other counts. The order also stated that "[a]ny request for attorney's fees pursuant to [Code of Civil Procedure] Section 425.16(c) incurred in bringing the motion as to the third cause of action for violation of right of publicity only may be made by separate motion supported by admissible evidence showing in detail the amount of reasonable time spent thereon."

X17 and Navarre timely appealed the order, as did Dice.

CONTENTIONS

X17 and Navarre challenge the denial of their special motion to strike on the first, second, fourth and fifth counts. They contend in their appeal (1) Dice is a limited purpose public figure who must prove actual malice in order to prevail on the merits, but he presented no evidence of actual malice, so the special motion to strike should

have been granted on all counts; and (2) there was no provably false statement of fact, so Dice cannot prevail on the merits of any count.

Dice challenges the granting of the special motion to strike on his third count for violation of publicity rights. He contends in his appeal (1) the publication was not protected activity under the anti-SLAPP statute; (2) the exceptions to his publicity rights claims for reporting news and matters in the public interest are inapplicable; (3) the denial of his request for leave to conduct discovery was error; and (4) the defendants did not prevail on their special motion to strike because they were successful on only one of five counts and therefore are not entitled to an attorney fee award as defendants prevailing on a special motion to strike (§ 425.16, subd. (c)(1)).

DISCUSSION

1. *Special Motion to Strike*

A cause of action is subject to a special motion to strike if the defendant shows that it arises from an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue and the plaintiff fails to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) On appeal, we independently review both of these determinations. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1345-1346.)

A cause of action is one "arising from" protected activity within the meaning of section 425.16, subdivision (b)(1) only if the defendant's act on which the cause of action is based was an act in furtherance of the defendant's constitutional right of

petition or free speech in connection with a public issue as defined in subdivision (e) of the statute. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) Whether the "arising from" requirement is satisfied depends on the " 'gravamen or principal thrust' " of the claim. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477, quoting *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193.) A cause of action does not arise from protected activity for purposes of the anti-SLAPP statute if the protected activity is merely incidental to the cause of action. (*Martinez*, *supra*, at p. 188.) In deciding whether the "arising from" requirement is satisfied, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

An " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' " is defined by statute to include "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

A plaintiff establishes a probability of prevailing on the claim by showing that the complaint is legally sufficient and supported by a prima facie showing of facts that, if proved at trial, would support a judgment in the plaintiff's favor. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714.) The court cannot weigh the evidence, but must determine as a matter of law whether the evidence is sufficient to support a judgment in the plaintiff's favor. (*Ibid.*) The defendant can defeat the plaintiff's evidentiary showing, however, by presenting evidence that establishes as a matter of law that the plaintiff cannot prevail. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

"Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

The filing of a special motion to strike automatically stays all discovery proceedings, but the trial court for good cause on a noticed motion may allow specified discovery before the hearing on the special motion to strike. (§ 425.16, subd. (g) ["The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision"].) We review the ruling on a request for leave to conduct discovery under the anti-SLAPP statute for abuse of discretion. (*Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 617.)

2. *The Defendants Have Shown No Error in the Partial Denial of Their Special Motion to Strike*

a. *Legal Framework*

The defendants contend Dice is a limited purpose public figure who must prove actual malice in order to prevail on the merits. They argue that he presented no evidence of actual malice, so the special motion to strike should have been granted on all counts.

The First Amendment rights of freedom of speech and of the press, applicable to the states by the Fourteenth Amendment, impose limitations on a state's authority to award damages for defamation. The First Amendment prohibits a public official or a public figure from recovering damages for defamation unless the statement was made with "actual malice," meaning that it was made with knowledge that the statement was false or with reckless disregard of whether it was true or false. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280 [84 S.Ct. 710]; *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 134 [87 S.Ct. 1975]; *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 262-264 (*Khawar*).) A private figure, in contrast, need not prove actual malice. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345-348 [94 S.Ct. 2997] (*Gertz*); *Khawar*, *supra*, 19 Cal.4th at p. 263.)

A public figure can either be a public figure for all purposes or a limited purpose public figure. Limited purpose public figures " 'have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved' " and thereby " 'invite attention and comment.' " (*Khawar*, *supra*, 19 Cal.4th

at p. 263, quoting *Gertz, supra*, 418 U.S. at p. 345.) In other words, a limited purpose public figure is an individual who " 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' " (*Khawar, supra*, 19 Cal.4th at p. 263, quoting *Gertz, supra* , at p. 351.)

Unlike a public figure, a private figure " 'has not accepted public office or assumed an "influential role in ordering society." [Citation.] He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicting by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.' " (*Khawar, supra*, 19 Cal.4th at pp. 263-264, quoting *Gertz, supra*, 418 U.S. at p. 345.) Private figures need not prove actual malice to recover damages for defamation, but need only prove negligence. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 398.) "The rationale for such differential treatment is, first, that the public figure has greater access to the media and therefore greater opportunity to rebut defamatory statements, and second, that those who have become public figures have done so voluntarily and therefore 'invite attention and comment.' " (*Ibid.*, quoting *Gertz, supra*, 418 U.S. at pp. 344-345.)

Three elements must be present to characterize a plaintiff as a limited purpose public figure. "First, there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants. Second, the plaintiff must have undertaken some voluntary act through which he or she

sought to influence resolution of the public issue. In this regard, it is sufficient that the plaintiff attempts to thrust him or herself into the public eye. And finally, the alleged defamation must be germane to the plaintiff's participation in the controversy." (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1577.) "As the United States Supreme Court has stressed, '[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.' [Citation.]" (*Khawar*, *supra*, 19 Cal.4th at p. 267, quoting *Wolston v. Reader's Digest Assn., Inc.* (1979) 443 U.S. 157, 167 [99 S.Ct. 2701].)

Whether a plaintiff in a defamation action is a public figure is a question of law that we review de novo. (*Khawar*, *supra*, 19 Cal.4th at p. 264.) We review the trial court's resolution of any disputed factual question bearing on the public figure determination under the substantial evidence standard. (*Ibid.*)

b. *Dice Is Not a Limited Purpose Public Figure*

Dice's conduct in approaching Lohan in public foreseeably resulted in his being photographed with her. His conduct in approaching her and handing her companion a small plastic bag, however, does not show an attempt to influence the resolution of a public controversy or voluntarily invite attention and comment regarding a public controversy. Instead, Dice wants no part in any public controversy concerning Lohan and drug use and never sought to influence public opinion on the subject. We conclude that Dice did not voluntarily seek to influence the resolution of a public controversy and is not a limited purpose public figure on that basis.

Khawar, *supra*, 19 Cal.4th 254, is instructive. *Khawar* involved a libel suit brought by a journalist who was photographed standing near Robert Kennedy shortly before his assassination at the Ambassador Hotel. A tabloid newspaper published a summary of a book alleging that the man in the photograph, and not Sirhan Sirhan, committed the assassination. The trial court found that the plaintiff was not a public figure. (*Id.* at pp. 259-261.) The California Supreme Court agreed. (*Id.* at pp. 267-268.) *Khawar* stated that the plaintiff's conduct in standing near Kennedy at a political campaign event foreseeably resulted in his being photographed with Kennedy, but by committing such conduct the plaintiff did not voluntarily associate himself with a public controversy regarding the assassination or attempt to influence the resolution of any public issue. (*Id.* at pp. 266-267.)

The defendants also appear to argue in the alternative that Dice is an involuntary public figure because he engaged in conduct that was bound to invite public attention, even if he never sought or desired such attention. *Gertz*, *supra*, 418 U.S. 323, stated in dicta, "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." (*Id.* at p. 345.) As *Khawar* noted, *Gertz* also stated that a person can become a public figure by being " 'drawn into a particular public controversy' [citation]" (*Khawar*, *supra*, 19 Cal.4th at p. 265, quoting *Gertz*, *supra*, 418 U.S. at p. 351.) *Khawar* explained:

"[T]he high court imposed the actual malice requirement on defamation actions by public figures and public officials for two reasons: They have media access enabling

them to effectively defend their reputations in the public arena; and, by injecting themselves into public controversies, they may fairly be said to have voluntarily invited comment and criticism. (*Gertz*, *supra*, 418 U.S. 323, 344-345 [94 S.Ct. 2997, 3009-3010].) By stating that it is theoretically possible to become a public figure without purposeful action inviting criticism (*id.* at p. 345 [94 S.Ct. at pp. 3009-3010]), the high court has indicated that purposeful activity may not be essential for public figure characterization. But the high court has never stated or implied that it would be proper for a court to characterize an individual as a public figure in the face of proof that the individual had neither engaged in purposeful activity inviting criticism nor acquired substantial media access in relation to the controversy at issue. We read the court's decisions as precluding courts from affixing the public figure label when neither of the reasons for applying that label has been demonstrated. Thus, assuming a person may ever be accurately characterized as an *involuntary* public figure, we infer from the logic of *Gertz* that the high court would reserve this characterization for an individual who, despite never having *voluntarily* engaged the public's attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements." (*Khawar*, *supra*, 19 Cal.4th at p. 265.)

Khawar stated that there was "no substantial evidence that Khawar acquired significant media access in relation to the controversy surrounding the Kennedy assassination or the Morrow book to effectively counter the defamatory falsehoods in

the Globe article." (*Khawar, supra,* 19 Cal.4th at p. 265.) The only media access that he achieved was an interview by a Bakersfield television station occurring after and as a result of the published article. *Khawar* stated, "Although this single interview demonstrates that Khawar enjoyed some media access, it is only the media access that would likely be available to any private individual who found himself the subject of sensational and defamatory accusations in a publication with a substantial nationwide circulation. . . . If such access were sufficient to support a public figure characterization, any member of the media—any newspaper, magazine, television or radio network or local station—could confer public figure status simply by publishing sensational defamatory accusations against any private individual. This the United States Supreme Court has consistently declined to permit. As the court has repeatedly said, 'those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.' [Citations.]" (*Khawar, supra,* at p. 266.)

Similarly here, there is no evidence that Dice enjoyed any significant media access apart from the media access that would likely be available to any private individual who was the subject of a sensational story insinuating celebrity drug use. We therefore conclude that Dice is not an involuntary public figure.

Dice is not a public figure, so he need not prove actual malice. We therefore reject the defendants' contention based on the purported absence of evidence of actual malice.

c. *The Publication Included a Statement of Fact*

A defamatory statement must contain or imply a provably false assertion of fact. (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 112-113.) A statement of opinion that does not imply a provably false assertion of fact is not actionable. (*Ibid.*) Whether a statement contains or implies a provably false assertion of fact depends on the totality of the circumstances. (*Id.* at p. 113.)

The defendants contend the word "cocaina" on the recording is stated in an inquisitive manner as a question and therefore should be understood as a statement of opinion rather than one of fact. They also argue that a statement should be considered one of opinion when the facts supporting the statement, here the images, are fully disclosed. The defendants' discussion of the information disseminated in the video recording and the article is incomplete.

The word "cocaina" is heard on the recording followed by the word "droga" spoken three times in different phrases, apparently in Portuguese. Although the parties presented no declaration by an interpreter, we believe that the words "cocaina" and "droga" would commonly be understood by people viewing the recording to mean "cocaine" and "drug."[4] The word "cocaina" is spoken in an inquisitive manner as a question, but the word "droga" is spoken repeatedly without an inquisitive tone and in a manner suggesting a statement of fact.

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[4] The parties appear to assume that "cocaina" and "droga" would commonly be understood by people viewing the video recording to mean, respectively, "cocaine" and "drug." We agree and take judicial notice of this fact as a matter of common knowledge. (Evid. Code, § 452, subd. (g).)

Moreover, the caption of the video ("Lindsay Lohan Makes Purchase in Venice"), the text under the caption ("Lindsay makes purchase on the street in Venice"), and the headline ("*EXCLUSIVE VIDEO*—LINDSAY LOHAN MAKES A PURCHASE ON VENICE STREET") and content of the article (". . . Lindsay can be seen taking a bag from a friend. . . . Lindsay takes a different bag from another guy and hands over the cash to pay for it") all state definitively, without reservation or doubt, that the video depicts Lohan purchasing something. In our view, these statements together with the word "droga" stated repeatedly constitute statements of fact rather than opinion. The assertion of fact is that Lohan purchased illicit drugs and Dice was somehow involved in the transaction. We therefore reject the defendants' contention that Dice cannot prevail on the merits because there was no statement of fact.

3. *The Partial Granting of the Special Motion to Strike Was Error*

a. *Dice Has Shown No Error in the Finding that the Third Count Arises from Protected Activity*

Dice contends his third count for violation of publicity rights does not arise from protected activity because false accusations of criminal conduct are not protected activity under the anti-SLAPP statute. He also contends the publication does not concern a matter of public interest because the truth of the matter has nothing to do with celebrity drug use. We reject these contentions.

A cause of action arises from protected activity under the anti-SLAPP statute if the principal thrust or gravamen of the claim is based on conduct described in

section 425.16, subdivision (e), as we have stated.[5] The question is whether the defendant's act underlying the cause of action was an act in furtherance of the right of petition or free speech as defined in the statute, including as relevant here "(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (*Ibid.*) This determination does not depend on the truth or falsity of the underlying statement, a question that typically arises in the second prong. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1549.) A moving defendant need not prove that its conduct was valid or constitutionally protected in order to invoke the anti-SLAPP statute. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 94-95.)

Dice cites *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122 for the proposition that false accusations of criminal conduct are not protected activity under the anti-SLAPP statute. The plaintiff in *Weinberg* alleged that the defendant had falsely accused him of stealing a valuable collector's item and sued the defendant for defamation. (*Id.* at pp. 1128-1129.) The defendant argued that criminal activity is always an issue of public interest and that the complaint therefore satisfied the "public interest" requirement of items (3) and (4) of Code of Civil Procedure section 425.16,

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[5] Dice does not argue that the principal thrust or gravamen of his right of publicity count is not based on protected activity, so we need not address the issue further.

subdivision (e). The Court of Appeal disagreed, stating that the defendant's accusations in the circumstances of that case were a private matter between two private individuals, and the fact that they concerned criminal conduct did not convert a private matter into an issue of public interest. (*Weinberg*, *supra*, at pp. 1134-1135.) *Weinberg* stated, "causes of action arising out of false allegations of criminal conduct, made under circumstances like those alleged in this case, are not subject to the anti-SLAPP statute." (*Id.* at p. 1136.) We construe this to mean not that a cause of action arising from a false accusation of criminal conduct cannot satisfy the "public interest" requirement in any circumstances, but that such a cause of action does not satisfy the "public interest" requirement merely because criminal conduct in general is always a matter of concern to the public. Thus, *Weinberg* is inapposite.

b. *Dice Established a Probability of Prevailing on his Third Count*

The trial court found that Dice had failed to establish a probability of prevailing on either his common law claim for commercial appropriation of likeness or his statutory claim for violation of publicity rights under Civil Code section 3344 because the publication involved the reporting of news and a matter of public interest. Dice contends this was error because he presented evidence that the publication was knowingly or recklessly false. We agree.

"California law has long recognized 'the right to profit from the commercial value of one's identity as an aspect of the right of publicity.' [Citations.] 'What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name . . . . '

[Citation.] There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a [Civil Code] section 3344 claim. [Citation.] To prove the common law cause of action, the plaintiff must establish: ' "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." [Citation.]' [Citation.] To prove the statutory remedy, a plaintiff must present evidence of 'all the elements of the common law cause of action' and must also prove 'a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.' [Citation.]" (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544.)

The common law right of publicity is subject to the exception that there can be no liability for the "[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542; accord, *Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790, 793.) Similarly, Civil Code section 3344, subdivision (d) states an exception for "a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign."

Eastwood v. Superior Court (1984) 149 Cal.App.3d 409, 421, 425, held that both the statutory "news exception" and the similar common law exception are inapplicable to "a knowing or reckless falsehood." *Eastwood* involved a count for commercial appropriation of the right of publicity under Civil Code section 3344 and the common

law arising from the publication of a nondefamatory article about Clint Eastwood that was false but presented as true. (*Eastwood*, *supra*, at pp. 413-415.) *Eastwood* explained that the First Amendment precludes liability for defamation of a public figure, except upon a showing of actual malice, and also precludes liability for violation of the right of privacy based on a deliberate fictionalization presented as truth where the materials published are matters of public interest, unless the plaintiff proves a knowing or reckless falsehood. (*Id.* at p. 424.) *Eastwood* concluded that the "news exception" to the right of publicity is similarly limited and does not preclude liability for a knowing or reckless falsehood under the guise of news. (*Id.* at p. 425.) Other courts have agreed. (*Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 681-682; *Maheu v. CBS, Inc.* (1988) 201 Cal.App.3d 662, 676-677.)

Accordingly, Dice established a probability of prevailing on his third count for common law commercial appropriation of likeness and violation of publicity rights under Civil Code section 3344 if he presented evidence supporting each element of the cause of action and, to overcome the news exception, evidence that the defendants published a statement knowing that it was false or with reckless disregard for its truth or falsity.[6]

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[6] There appears to be no reasonable dispute that Dice presented evidence supporting each element of the cause of action. The defendants effectively concede the point.

Dice argues for the first time in his reply brief that he need only prove that the defendants were negligent as to the truth or falsity of the statements in order to overcome the news exception. We decline to address this argument raised for the first time in his reply brief. (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 362, fn. 18.)

The video recording shows Lohan sitting with two men outside a restaurant. The fact that they are sitting together and the manner of their interaction suggests that they are friends visiting the restaurant together. The man seated to Lohan's left interacts with Dice and inspects a small plastic bag before handing it to Dice. Lohan and the man seated to her right later stand in front of the restaurant door. The man who was seated to her right hands something to the man who was seated to her left, but who is now standing in the doorway and enters the restaurant. Lohan then hands something to the man who was seated to her right, and he hands her a lighter. This apparently is the exchange characterized in the article as Lohan "tak[ing] a different bag from another guy and hand[ing] over the cash to pay for it." Lohan lights a cigarette and returns the lighter to the man who gave it to her, who is now seated. The three later walk across the street and drive away together in a car.

Lohan's interaction with the two men who initially were sitting beside her, as depicted in the video recording, and the fact that they left together in the same vehicle strongly suggest that they were three friends visiting a restaurant and that there was no public drug purchase between them. The video recording, viewed in its entirety, arguably provides no reasonable support for the statement that Lohan made a purchase or, specifically, that she purchased illicit drugs either from the man in the cap or from Dice. We conclude that the video recording itself is evidence that the statements made in the recording and the article were published with reckless disregard for their truth or falsity. We therefore conclude that Dice established a probability of prevailing on his

third count and that the trial court erred by granting the special motion to strike as to the third count.

In light of our conclusion, Dice's contention that the denial of his request for leave to conduct discovery was error is moot, and the defendants are not the prevailing parties on the special motion to strike as to any count and therefore are not entitled to an attorney fee award under section 425.16, subdivision (c)(1).

DISPOSITION

The order is affirmed as to the denial of the special motion to strike the first, second, fourth and fifth counts. The order is reversed as to the granting of the special motion to strike the third count, with directions to deny the motion as to the third count. Dice is entitled to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.