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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

VICTOR ROOSEN, Plaintiff and Appellant, v. DOUGLAS J. FARRELL, Defendant and Respondent.	B209873 (Los Angeles County Super. Ct. No. BC386547)

APPEAL from orders of the Superior Court of Los Angeles County. Luis A. Lavin, Judge. Affirmed.

Lisitsa Law Corporation and Yevgeniya Lisitsa for Plaintiff and Appellant.

Richard D. Marks; Greines, Martin, Stein & Richland, Robin Meadow and Lara M. Krieger for Defendant and Respondent.

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Plaintiff Victor Roosen appeals from an order striking his complaint for malicious prosecution against Attorney Douglas J. Farrell pursuant to Farrell's special motion to strike under Code of Civil Procedure section 425.16.[1] We affirm the order because Farrell's alleged conduct is within the ambit of section 425.16 and Roosen failed to provide evidence to establish a probability of prevailing on the merits of his malicious prosecution claim.

BACKGROUND

Victor Roosen, a real estate broker, worked with Sammy Ray Williams (Sammy), as administrator of the estate of decedent Willie Mae Williams, to sell a parcel of real property to Trustee Properties, LLC. Sammy claimed that he was related to Willie Mae. After Willie Mae's grandson, Keith Williams, discovered that Sammy had sold the property and a property belonging to the estate of his grandfather, Ardis Williams, Keith filed petitions in the probate court charging Roosen, Sammy, Trustee Properties, and others with fraud. Farrell, hired by Trustee Properties' title insurance company to defend Trustee Properties, filed cross-petitions against Roosen, Sammy, and others for declaratory relief and indemnity. Several months later, Trustee Properties obtained a new lawyer who filed a pleading striking Roosen as a respondent in Trustee Properties' cross-petitions. Roosen then brought this suit against Farrell for malicious prosecution.

Farrell filed a special motion to strike the malicious prosecution complaint under section 425.16, arguing among other things that Farrell had probable cause to file and maintain the cross-petitions for declaratory relief and indemnity against Roosen. The motion was based on numerous documents filed in the probate matters as well as Farrell's declaration.

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

Section 425.16 is referred to as the anti-SLAPP statute. "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 16, fn. 1.)

A. Sammy Ray Williams's Sales of the Real Properties to Trustee Properties

Ardis and Willie Mae Williams, husband and wife, as joint tenants, owned a parcel of real property on 35th Place in Los Angeles. Willie Mae also was sole owner of another parcel of real property in Los Angeles on Manhattan Place (the Manhattan property). Willie Mae died in 2002. Ardis died in July 2005. In February 2006, Sammy, claiming to be the son of Willie Mae, filed in propria persona a petition for probate of the estate of Willie Mae (*Estate of Willie Mae Williams* (Super. Ct. Los Angeles County, No. BP096765)). On June 1, 2006, a court order appointed Sammy as the administrator of Willie Mae's estate, and on June 28, 2006, letters of administration were issued to Sammy.

On June 29, 2006, Sammy, as administrator of Willie Mae's estate, sold the 35th Place and Manhattan properties to Trustee Properties. In connection with the sale of the 35th Place property, Sammy recorded an affidavit of death of joint tenant, claiming that Ardis had died in 1999. In August 2006, Trustee Properties, by its "Member/Manager" David J. Behrend, conveyed the two properties to Marc A. Petrie. Petrie is Roosen's registered domestic partner.

B. Probate Petitions of Keith Williams

Meanwhile, on June 21, 2006, Keith Williams (Keith), the grandson of Willie Mae and Ardis Williams, filed two other proceedings to probate the estates of Willie Mae and Ardis Williams. (*Estate of Willie Mae Williams* (Super. Ct. Los Angeles County, No. BP098204) and *Estate of Ardis Williams* (Super. Ct. Los Angeles County, No. BP098203).) Keith was appointed the administrator of his grandparents' estates. On July 18, 2006, letters of administration were issued to Keith in the two probate matters.

On August 18, 2006, Keith, as administrator, filed verified petitions in his two probate matters to determine title and require transfer of the 35th Place and Manhattan properties to the estates of Ardis and Willie Mae respectively, and for damages for fraud. The petitions alleged that Trustee Properties, Victor Roosen, David Behrend, and Marc A. Petrie were "acting in concert and are in some manner responsible for the filing of the Petition for Probate used by Sammy Ray Williams to obtain authority to transfer the

properties to Trustee Properties, and are not bona fide purchasers for value." Keith also alleged that Trustee Properties, Roosen, Behrend, Petrie, and Sammy "intentionally acted to deceive by perpetrating a fraud or causing a fraud to be perpetrated on this Court to deprive the lawful estates of their property by using Sammy Ray Williams to pose as an heir when in fact he was not, to obtain authority for these wrongful and unlawful transfers of property."

On December 15, 2006, the probate court consolidated Sammy's petition with Keith's petition involving Willie Mae's estate. Sammy resigned as administrator of Willie Mae's estate on December 18, 2006, and on December 19, 2006, the court confirmed Keith as the sole administrator of Willie Mae's estate.

In December 2006 and January 2007, Keith filed first amended petitions (verified by Keith's attorney on Keith's behalf) alleging that Roosen induced Sammy to pose as the rightful heir of Willie Mae and prepared the petition that Sammy filed in the probate court. Further, Sammy, Trustee Properties, Roosen, Behrend, and Petrie conspired to damage the estates of Willie Mae and Ardis; they knew that Sammy was not related to Willie Mae Williams and Willie Mae had predeceased Ardis; and that the 35th Place property, sold by Sammy as the administrator of Willie Mae's estate, was not an asset of Willie Mae's estate, but an asset of Ardis's estate, as Ardis was the surviving joint tenant. With respect to the Manhattan property, Keith alleged that Sammy, Trustee Properties, Roosen, Petrie, and Behrend conspired to convert the property to themselves.

C. Sammy's Final Account and Report

Pursuant to court order, Sammy, through an attorney, filed a verified first and final account and report as administrator of Willie Mae's estate in February 2007. Sammy's report contained his version of the circumstances of the sale of the two properties to Trustee Properties.

According to Sammy's report, his father was Ardis L. Williams, who owned several parcels of real property in Los Angeles and Louisiana at the time of his death in 1999. Roosen, a licensed realtor who specializes in tracing missing heirs and buying abandoned properties from them, contacted Sammy in January 2006 and asked if he was

the son of "Ardis Williams." Sammy answered that he was. Roosen informed Sammy that he was heir to the 35th Place property. Roosen offered to purchase it from Sammy's father's estate for $100,000, and also to arrange for, and pay the costs of, administering the probate estate for Sammy's father. Believing that the property had been owned by his father, Sammy agreed to sell the property. Sammy is legally blind and relied on Roosen's description of the sale document. Roosen guided Sammy's hand in signing the document.

Sammy further declared that, a while later, Roosen informed him that Roosen had found another property belonging to his father and father's wife, Willie Mae, and a parcel of separate property belonging to Willie Mae, the Manhattan property. Sammy realized that Roosen thought that Willie Mae was the name of Sammy's mother. Sammy told Roosen that his mother's name was "'Lottie.'" Roosen suggested that Willie Mae had to be related to Sammy and had to be Sammy's stepmother. According to Sammy, his father had been married several times, "once bigamously," and had had several mistresses, so Sammy thought it plausible that Willie Mae was one of those women, as Sammy also had a half sister named "'Mae.'" Knowing that his father had died in 1999, Sammy believed that Willie Mae had survived his father and that her estate had to be probated first as the surviving joint tenant. Roosen offered to buy the Manhattan property from Willie Mae's estate for $125,000, and Sammy agreed to sell it.

In February 2006, Roosen requested that Sammy sign some documents, which Sammy believed were two probate purchase agreements for the sale of the 35th Place and Manhattan properties. Roosen again guided Sammy's hand in signing the agreements. In May 2006, Roosen arranged for Sammy to be represented by an attorney, Richard Grain, in connection with the sales of the properties.

Roosen assigned his interests in the properties to Trustee Properties and thereafter escrow was opened and Sammy executed grant deeds conveying the two properties to Trustee Properties. The deeds conveying the properties to Trustee Properties were recorded on June 30, 2006. After escrow closed, the escrow company contacted Grain for instructions for distribution of the sale proceeds, as no estate bank account had been

opened. No estate account had been opened by July 17, 2006, when Keith's attorney contacted Grain and informed him that Sammy was neither Ardis's nor Willie Mae's son, and that Ardis had survived Willie Mae. Sammy told Grain that Sammy had never held himself out as Willie Mae's son, but he believed that he was her stepson. Sammy claimed that he was surprised to learn that his probate petition named him as Willie Mae's son.

According to Sammy, Roosen admitted to Grain that Roosen knew before Sammy's probate petition was filed that Sammy was not Willie Mae's son, but that Roosen thought that there was no difference between a son and a stepson.

Attorneys for both Keith and Sammy requested that Trustee Properties reconvey the 35th Place and Manhattan properties, but Trustee Properties refused, asserting that it had good title. In August, Trustee Properties conveyed the properties to Petrie, the registered domestic partner of Roosen. Petrie also refused to reconvey the properties to Keith as the administrator of the estates of Ardis and Willie Mae. Sammy's report appraised the value of the two properties together at $667,150; the net proceeds from Sammy's sales of the properties being held in the escrow account were approximately $219,000.

D. Trustee Properties' Cross-petitions to Quiet Title

In October 2006, Farrell was retained by Lawyers Title Insurance Company to defend Trustee Properties and Petrie with respect to Keith's claims that Sammy's deeds of the two properties to Trustee Properties were void. On behalf of Trustee Properties and Petrie, Farrell drafted cross-petitions to be filed in the probate matters for the estates of Ardis and Willie Mae. The cross-petitions, filed in April 2007, asserted that, if the facts as claimed by Sammy were true, Trustee Properties would be entitled to indemnification and damages from Roosen if a court ultimately found that Roosen was guilty of fraud or if a court found Trustee Properties liable for damages as a result of the fraud perpetrated by Roosen.

Before Farrell filed the cross-petitions in April 2007, he read Sammy's verified report filed in February 2007. Farrell characterized Sammy's verified report as "a

roadmap for the actions attributed to [Roosen]. In part, I relied upon the Report when I prepared and filed the verified Cross-Petition." Farrell further declared that before he filed the verified cross-petitions on behalf of Petrie (on April 2, 2007) and Trustee Properties (on April 12, 2007), both Petrie and Behrend, the managing member of Trustee Properties, had each signed a verification of his cross-petition.

In addition, Farrell's law office, through Farrell's partner, Robert Cipriano, (referred to as Farrell) had written correspondence with Behrend's personal attorneys, Payman Taheri and Y. Gina Lisitsa before filing the cross-petitions. Farrell wrote to them on March 30, 2007, that "the request by your client, David Behrend, that I eliminate any claims against Victor Roosen in the Cross-Petitions to be filed on behalf of Trustee Properties, LLC, because of 'personality problems' and without further explanation, creates serious impediments to its defense in these probate matters because, as you know, Keith Williams has alleged, in his capacity as the Administrator of the Ardis Williams' and Willie Mae Williams' estates, that Mr. Roosen arranged the sale of the two properties that are the subject of the above probate actions by Sammy Ray Williams, as Administrator of the Estate of Willie Mae Williams, to Trustee Properties, LLC, based on the false representations that Sammy Ray Williams was related to Willie Mae Williams. [¶] As you also know, Sammy Ray Williams has supported those allegations with verified pleadings wherein he has detailed how he was approached by Victor Roosen who handled all the details relating to the filing of the probate matter in which Sammy Ray Williams was wrongfully appointed as the Administrator of the Willie Mae Williams' estate, and he also handled all details relating to sales of the subject properties to Trustee Properties based on the misrepresentations that Sammy Ray Williams was qualified to be appointed as a personal representative of Willie Mae Williams' estate with the power to sell the subject properties. [¶] If the court finds that such evidence is competent, it could [restore title to the properties to Keith] free of the lien of the All-Inclusive Deed of Trust in favor of Trustee Properties, and [order that Trustee Properties pay the estate twice the value of the properties], and a failure to name Victor Roosen as a party who must

indemnify Trustee Properties for the losses it will suffer under those circumstances, could leave it without a remedy and means to recover those losses."

In an April 2, 2007 letter by Taheri to Farrell, Taheri claimed that "the only thing that supports your position in suing Mr. Roosen is the verified complaint of [Keith] Williams. However, in these proceedings, it has become perfectly clear that [Keith] is controlled by his handlers and does not possess an independent mind. [Keith] does not have any idea what occurred here other than the fact that [Sammy] tried to steal his money. . . . [¶] Mr. Petrie is the domestic registered partner of Mr. Roosen. For Mr. Petrie to allege fraud on the part of Mr. Roosen is not unlike me accusing my wife of fraud outside the marital home . . . . [¶] . . . [¶] Mr. Roosen did not commit any fraud here, irrespective of the false allegations made against him. Let me give it to you another way: suppose someone thinks of you as a bad man; and I know you not to be one. Would it be proper of me to verify a pleading based on the earlier of the assertions? I would think not and I would think it also inappropriate. [¶] Now speaking strategically: how is it going to look when Mr. Petrie has sworn out a verified petition against his registered domestic partner, how would it seem to a jury or to the judge. Similarly, how would it seem to a judge or jury for the Trustee Properties to sue someone who they do business with on an ongoing basis and who they have no independent reason in disbelieving."

On April 3, 2007, Farrell wrote back to Taheri and Lisitsa that Farrell was concerned not with Keith's verified complaint, but with *Sammy's declaration* that Roosen approached Sammy and orchestrated the sale of the properties. Farrell believed that it was "very unlikely" that the court would disregard Sammy's testimony. Farrell also stated that the cross-petitions filed on behalf of Trustee Properties did not state that the allegations made by Sammy and Keith were true, but only that if they are found to be true, Trustee properties would be entitled to indemnification and damages. Farrell concluded that there was "nothing 'malicious' about the allegations made in the cross-petitions prepared by this office, they are, to the contrary, asserted for the express

purpose of preserving remedies that may provide Trustee Properties and Marc Petrie with what may be the only means of recouping the losses they may suffer in this matter."

Taheri responded to Farrell by letter of April 9, 2007, stating that "as a strategic move it makes no sense for Trustee Properties to sue Victor Roosen," and that it "presents a picture of a fractured defense." Taheri also wrote that neither Petrie nor Trustee Properties believed that Roosen was "a wrongdoer in this action," and if the client "is telling us that Roosen is not responsible, who are we to second guess that proposition? [¶] In short, I know that you are trying in good faith to protect both Mr. Petrie and Trustee Properties LLC from harm that may result if the petitions are found adverse to them. However, you must also consider what happens if [Keith's assertions turn] out to be false and Mr. Roosen prevails."

On May 15, 2007, Farrell signed a substitution of attorney and on June 1, 2007, Farrell was substituted out of the proceedings as counsel for Trustee Properties. Lisitsa was substituted in as counsel for Trustee Properties.

On June 8, 2007, Trustee Properties, through Lisitsa, filed supplemental cross-petitions striking Roosen as a cross-respondent.

E. Roosen's Malicious Prosecution Action and Farrell's Special Motion to Strike

Roosen, through Lisitsa, filed a complaint for malicious prosecution against Farrell. Roosen alleged that Farrell forced Trustee Properties to sign a verification of the cross-petitions even though Trustee Properties told Farrell that Roosen had done it no wrong, and that the cross-petitions were filed with malice and with the intent to harm Roosen for the benefit of Lawyer's Title Insurance Company, which had hired Farrell. Neither Petrie nor the cross-petition filed by Petrie is mentioned in the malicious prosecution complaint, so Farrrell's actions on behalf of Petrie are not at issue in this case.

Farrell filed a special motion to strike the complaint on the grounds that the complaint fell within the purview of section 425.16 and that Roosen could not establish a probability of prevailing on his complaint because (1) the striking of Roosen's name from the cross-petitions does not constitute a favorable termination for purposes of a malicious

prosecution action, (2) Farrell had probable cause to file and maintain the cross-petitions as a matter of law, and (3) Roosen could not establish that Farrell acted with malice in filing the cross-petitions. The motion was supported by Farrell's declaration and the probate pleadings, including Keith's verified petitions and Sammy's verified final account and report.

In opposition to the motion, Roosen maintained that (1) Farrell's representation of Trustee Properties without its consent was illegal and unethical under Business and Professions Code sections 6068, subdivision (e)(1) and 6104,[2] taking Farrell's actions in filing the cross-petitions outside the protection of section 425.16; (2) the voluntary dismissal of Roosen from the cross-petition constituted a favorable termination on the merits; (3) Farrell lacked probable cause to file and maintain the cross-petitions; and (4) Farrell acted with malice.

Roosen supported his opposition with his declaration and the declarations of Behrend,[3] Petrie, and Taheri. In reply, Farrell filed objections to portions of the declarations of Roosen, Petrie, and Behrend. The trial court sustained most of Farrell's objections. As Roosen fails on appeal to establish any error or abuse of discretion as to

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[2] Business and Professions Code section 6068 provides: "It is the duty of an attorney to do all of the following: [¶] . . . [¶] (e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

Business and Professions Code section 6104 provides: "Corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension."

[3] Farrell filed a motion to strike the entirety of Behrend's declaration from the appellate record because during the trial on the probate matters involving the estates of Willie Mae and Ardis Williams in July 2009, Behrend testified that it was not his signature on the declaration. Behrend also testified that he did not know whether he authorized anyone to sign his name to the declaration and had no explanation as to how a signature that was not his appeared on the declaration. Roosen filed opposition to the motion and Farrell filed a reply. We denied the motion to strike Behrend's declaration from the record.

the trial court's evidentiary rulings, we consider only those portions of Roosen's evidence admitted by the trial court.[4]

Roosen declared that he was not guilty of the allegations made against him by Keith; Sammy has not filed any claims against Roosen. Being sued by Petrie and by Trustee Properties, "the company whom I have done my best for," was so painful for Roosen that he moved to Pittsburg and discontinued his relationship with Trustee Properties.

Behrend declared that he was not told by Farrell that by signing the verification for Trustee Properties he would be suing Roosen. When he realized what he had signed, he immediately ordered that Roosen not be named in any petition by Trustee Properties. Behrend never authorized Farrell to sue Roosen, and Behrend "never harbored any doubt that Roosen was and is innocent of any wrongdoing."

The trial court granted Farrell's motion to strike, finding that Roosen had not met his burden of showing a probability of prevailing on his malicious prosecution claim because the probate cross-petitions filed against Roosen by Trustee Properties were legally tenable and there was also insufficient evidence that Farrell filed and maintained the cross-petitions with malice.

Roosen appealed from the order granting the special motion to strike and a subsequent award of attorney fees to Farrell.

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[4] Roosen's opening brief challenges the trial court's evidentiary ruling in general but does not identify or discuss each piece of evidence proffered, Farrell's evidentiary objection(s), and why the trial court's ruling as to the specific item of evidence was erroneous. We conclude that Roosen has not met his burden of establishing any error or abuse of discretion with respect to the trial court's evidentiary rulings because his briefs do not contain "argument and citations to authority as to why the trial court's evidentiary rulings were wrong." (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1198.) "We are not required to search the record to ascertain whether it contains support for [Roosen's] contentions." (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.) Accordingly, in reviewing the ruling on the special motion to strike, we do not consider the evidence excluded by the trial court.

DISCUSSION

A ruling on a special motion to strike is reviewed de novo. (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 478 (*Cabral*).) "The anti-SLAPP law [section 425.16] involves a two-step process for determining whether a claim is subject to being stricken. In the first step, the moving defendant is required to make a prima facie showing the plaintiff's action is subject to section 425.16, by showing the defendant's challenged acts were taken in furtherance of constitutional rights of petition or free speech in connection with a public issue, as defined by the statute." (*Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 800.) Once the defendant meets this burden, the burden shifts to the plaintiff to demonstrate the probability that he will prevail on the claim. (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 726.) The plaintiff must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence favorable to plaintiff is credited. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713–714.)

A. Protected Activity Under Section 425.16

Section 425.16, subdivision (b)(1), provides in pertinent part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

A malicious prosecution action qualifies for protection under section 425.16 because filing a lawsuit is an exercise of a party's constitutional right of petition and is thus subject to the anti-SLAPP statute. (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1398; see also *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 [filing and prosecution of a civil action is communicative conduct protected by anti-SLAPP statute].)

Roosen maintains that Farrell's filing of the cross-petitions in the underlying probate matters is not protected conduct under section 425.16 because Farrell did not

have the consent and authorization of his client Trustee Properties. Roosen argues that Farrell's actions violated the ethical rules and statutes governing attorneys and were "illegal," so as to come within the illegality exclusion of *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*). As explained below, the alleged or purported breach by Farrell of duties to Trustee Properties is not the sort of illegal conduct that triggers the *Flatley* exclusion. Further, Roosen, a stranger to the attorney-client relationship between Farrell and Trustee Properties, lacks standing to assert the issue of any purported breach of duties by Farrell to Trustee Properties.

In *Flatley*, "the California Supreme Court held that 'a defendant whose assertedly protected speech or petitioning activity was illegal as a matter of law, and therefore unprotected by constitutional guarantees of free speech and petition, cannot use the anti-SLAPP statute to strike the plaintiff's complaint.' The court therefore concluded that 'communications [which] constituted criminal extortion as a matter of law and, as such, were unprotected by constitutional guarantees of free speech or petition,' were not protected by the anti-SLAPP statute. ([*Flatley*, *supra*, 39 Cal.4th at p. 305].) The court made clear, however, that its holding was limited to 'the specific and extreme circumstances of this case,' in which the assertedly protected communications, as a matter of law, fell outside the ambit of protected speech. [Citation.]" (*Cabral*, *supra*, 177 Cal.App.4th at p. 480.)

Flatley's illegality exclusion is limited to the circumstances where "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law." (*Flatley*, *supra*, 39 Cal.4th at p. 320.) "If, however, a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Id*. at p. 316.) Accordingly, the illegality exception applies only if the defendant concedes, or the evidence conclusively establishes, that the conduct was illegal as a matter of law. (*Cabral*, *supra*, 177 Cal.App.4th at p. 482.) The illegality exception does not apply "where the legality of [an attorney's] litigation activities is a matter of considerable

dispute." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 910; *id.* at p. 920 [dispute concerned whether attorney's communications were protected by litigation privilege; court held that communications did not fall outside privilege simply because they were alleged to be fraudulent, perjurious, unethical, or illegal].)

A defendant's protected speech or petitioning activity will be found to be illegal as a matter of law only under narrow circumstances and in "rare cases." (*Flatley*, *supra*, 39 Cal.4th at p. 320.) Thus, courts have applied an illegality exclusion where the conduct at issue involved violence, vandalism, or harassment (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 851, fn. 12 [slashing tires, accosting restaurant patrons, vandalism]; *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc*. (2006) 143 Cal.App.4th 1284, 1289–1291, 1296 [detonating explosive devices, trespass, harassment of employees at biomedical testing laboratory]), or laundering campaign money (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1363, 1365–1367 (*Paul*)).

Division Eight of this district has interpreted the word "'illegal'" in *Flatley* to mean "criminal, and not merely violative of a statute." (*Mendoza v. ADP Screening & Selection Services, Inc*. (2010) 182 Cal.App.4th 1644, 1654 (*Mendoza*).) "[A] reading of *Flatley* to push any statutory violation outside the reach of the anti-SLAPP statute would greatly weaken the constitutional interests which the statute is designed to protect. As [the defendant] correctly observes, a plaintiff's complaint *always* alleges a defendant engaged in illegal conduct in that it violated some common law standard of conduct or statutory prohibition, giving rise to liability, and we decline to give plaintiffs a tool for avoiding the application of the anti-SLAPP statute merely by showing any statutory violation." (*Mendoza*, at p. 1654.)

And Roosen fails to bring to our attention any case where a *non-client* (Roosen was never Farrell's client) has been successful in establishing that an attorney's non-criminal litigation conduct fell outside the scope of the anti-SLAPP statute. On the other hand, several cases have affirmed orders granting attorneys' special motions to strike in that situation.

In *Cabral*, a former wife's action against her former husband's attorney was held to have been properly dismissed under section 425.16 because the attorney's activities in helping the husband evade a child support judgment "were neither inherently criminal nor otherwise outside the scope of normal, routine legal services. Even if the attorney respondents' actions had the effect of defeating or forestalling [the ex-wife's] ability to execute her judgment for child support, thereby (according to [her]) violating the child support evasion statute, this is not the kind of illegality involved in *Flatley* . . . ." (*Cabral*, *supra*, 177 Cal.App.4th at p. 481.)

In *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953 (*Seltzer*), the Court of Appeal reversed an order denying an attorney's special motion to strike a fraud action and held that the motion should have been granted because there was a factual dispute as to whether the attorney, Barnes, engaged in unlawful settlement negotiations, thus precluding application of the *Flatley* exclusion.

Seltzer was involved in a dispute with her homeowners association and tendered a cross-complaint against her to Allstate, her insurer under a homeowners policy. Allstate hired an attorney, Reynolds, to defend Seltzer on the cross-complaint, subject to a reservation of rights, taking the position that some of the claims against Seltzer were not covered by her policy. Barnes represented Allstate in negotiating a settlement of the covered claims by the homeowners association against Seltzer.

Seltzer thereafter brought an action against Barnes for fraud and intentional infliction of emotional distress, alleging that Barnes colluded with counsel for the homeowners association to dismiss the covered claims so as to reconfigure the pleadings to attempt to eliminate coverage and Allstate's financial obligations to her. The trial court denied Barnes's special motion to strike, but the Court of Appeal reversed and directed the trial court on remand to grant the motion. The court stated that Seltzer's "brief on appeal includes several poorly developed arguments that the settlement negotiations were unlawful, but she fails to demonstrate the absence of relevant factual disputes." (*Seltzer*, *supra*, 182 Cal.App.4th at p. 965.) The court also pointed out that Barnes represented Allstate, not Seltzer, and that Barnes's "negotiations with the

Association did constitute petitioning activity on behalf of Allstate, which had ultimate authority over settlement of the covered claims" (*id*. at p. 968), and that Barnes's "role and the basis for his asserted liability was his negotiation of the agreement, which is conduct within the scope of section 425.16" (*id*. at p. 968, fn. 11).

The *Flatley* exclusion was held not to apply to an attorney's violation of California Rules of Court, rule 1.20, in failing to redact certain personal information from an opposing party's credit reports before filing them in court. (*G.R. v. Intelligator* (2010) 185 Cal.App.4th 606 (*G.R.*).) Even though the attorney in *G.R*. admitted the rule violation, the court found the reasoning in *Cabral* persuasive in holding that the rule violation "is not the type of criminal activity addressed in either *Flatley*, *supra*, 39 Cal.4th 299 or *Paul*, *supra*, 85 Cal.App.4th 1356." (*G.R.*, *supra*, 185 Cal.App.4th at p. 616.)

We apply the reasoning of *Flatley*, *Cabral*, *Mendoza*, *Seltzer*, *and G.R*. to conclude that the illegality exclusion does not apply to Farrell's alleged breaches of ethical rules or statutes governing attorneys.

In addition, there is no evidence to support Roosen's accusation that Farrell, by virtue of his having been hired by Lawyer's Title, had an interest adverse to Trustee Properties, and that Farrell violated various ethical rules and statutes. An attorney retained by an insurer to represent an insured owes fiduciary duties to both the insurer and insured. (*Long v. Century Indemnity Co*. (2008) 163 Cal.App.4th 1460, 1468.) "In this 'usual tripartite relationship existing between insurer, insured and counsel, there is a single, common interest shared among them. Dual representation by counsel is beneficial since the shared goal of minimizing or eliminating liability to a third party is the same.' [Citation.]" (*Ibid.*)

There is no evidence that the filing of the cross-petitions against Roosen was not consistent with Trustee Properties's best interest, notwithstanding the unexplained and unsupported belief of its manager, Behrend, that Roosen did nothing wrong. If the trier of fact believed Sammy's version of the events, Trustee Properties may not have had good title to the properties, and it would have been entitled to seek indemnity from

Sammy and Roosen. Behrend's bare expression of opinion that Roosen did nothing wrong is insufficient to establish a conflict of interest between Trustee Properties and Lawyer's Title. In sum, the record does not contain evidence that "conclusively establishes" illegality, as required by *Flatley*. Nor do the unsupported allegations of illegality in Roosen's briefs meet the requirements of *Flatley*.

Another problem with Roosen's attempt to apply the *Flatley* illegality exclusion in this case is that Roosen does not have standing to assert the purported illegality. The alleged illegality involves Farrell's purported malpractice or breaches of duties running from Farrell to his client, Trustee Properties. Roosen was never Farrell's client. Causes of action for attorney malpractice or professional negligence are not assignable in California as a matter of public policy. (*Baum v. Duckor, Spradling & Metzger* (1999) 72 Cal.App.4th 54, 65–67.) Such claims are not assignable because of the public policies implicated by the unique quality of legal services, the personal nature of the attorney's duty to the client, and the confidentiality of the attorney-client relationship. (*Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg* (1994) 30 Cal.App.4th 1373, 1379.)

Permitting Roosen to assert claims belonging not to Roosen, but to Trustee Properties, would place Farrell in a conflict of interest with his former client. Farrell would be in the untenable position of having to defend himself from Roosen's charges of breaches of duty to Trustee Properties without revealing privileged client communications. The same public policies which militate against assignment of claims for legal malpractice militate against permitting Roosen to assert his claims of illegality.

For all of the foregoing reasons, we conclude that Farrell's alleged actions constitute protected activity under section 425.16. We turn to the issue of whether Roosen met his burden of showing a probability of prevailing on his claim for malicious prosecution.

B. Probability of Success on Claim for Malicious Prosecution

"To establish a cause of action for malicious prosecution, a plaintiff must demonstrate that the prior action (1) was initiated by or at the direction of the defendant and legally terminated in the plaintiff's favor, (2) was brought without probable cause,

and (3) was initiated with malice." (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740.)

"'A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292.) "If undisputed facts in the record do establish an objectively reasonable basis for bringing the underlying action, the existence of other, allegedly disputed facts is immaterial," and probable cause is established. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 167.)

"The attorney's obligation is to represent his client honorably and ethically, and he may, without being guilty of malicious prosecution, vigorously pursue litigation in which he is unsure of whether his client or the client's adversary is truthful, so long as that issue is genuinely in doubt. Indeed, a lawyer is ethically precluded from asserting his personal belief in the justice of his client's cause. [Citations.] The existence of evidence contrary to the position taken by an attorney in litigation does not of itself support the inference of lack of honest belief in the tenability of the cause prosecuted by him." (*Tool Research & Engineering Corp. v. Henigson* (1975) 46 Cal.App.3d 675, 684, disapproved on another ground in *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 882–883.)

Roosen fails to explain why the facts known to Farrell, including Sammy's and Keith's pleadings, fail to show probable cause to file and prosecute the cross-petitions against him for indemnity and declaratory relief. Sammy's pleading unequivocally implicated Roosen in the fraudulent scheme. Behrend's bare assertions that he did not want Trustee Properties to sue Roosen and that Roosen did nothing wrong are insufficient to show that Farrell's giving of credit to Sammy's version of events was not objectively reasonable. In other words, given the genuine dispute of the facts known to Farrell, Roosen has not shown that it was objectively unreasonable for Farrell to file the cross-petitions against Roosen. Roosen thus fails to make a prima facie showing as to the element of lack of probable cause.

We also conclude that Roosen also fails to provide any evidence to make a prima facie showing with respect to the element of malice. "Malice may not only consist of ill

will or hostility toward the malicious prosecution plaintiff, but may also result where the prior suit was 'instituted primarily for an improper purpose.'" (*Paulus v. Bob Lynch Ford, Inc*. (2006) 139 Cal.App.4th 659, 675.)

Behrend's attorney wrote to Farrell, "I know that you are trying in good faith to protect both Mr. Petrie and Trustee Properties, LLC from harm that may result if [Keith's] petitions are found adverse to them." We agree with Behrend's attorney that the record shows only Farrell's good faith and not any malice.

As Roosen makes no independent argument challenging the award of attorney fees to Farrell, we also affirm that order.

DISPOSITION

The orders granting the special motion to strike and awarding Douglas Farrell attorney fees are affirmed. Farrell is entitled to his costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.