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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL J. ROOD, Plaintiff and Appellant, v. STEVE YUHAS, Defendant and Respondent.	D056840 (Super. Ct. No. 37-2008-00090621-CU-DF-CTL)

APPEAL from an order of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

Plaintiff and appellant Michael Rood brought this defamation action against defendant and respondent Steve Yuhas, a radio talk show commentator on AM 600 KOGO (KOGO). The matter is before us on Rood's appeal of the trial court's order granting Yuhas's special motion to strike Rood's amended complaint (FAC), under the

anti-SLAPP provisions. (Code Civ. Proc., § 425.16, subd. (i).)[1] In the FAC, Rood sought damages for injury to his professional reputation as a public school official, based on Yuhas's broadcasts that reported and gave his views on a pending school district investigation into alleged misconduct of Rood on school time.

In the motion to strike, Yuhas asserted that the entire action against him, based on his privileged publications and broadcasts, was barred by the absolute privilege of Civil Code section 47, subdivision (d)(1)(C), pertaining to "a fair and true report in, or a communication to, a public journal, of . . . [a] public official proceeding," or subdivision (d)(1)(D), "of anything said in the course thereof . . . . [the proceeding]." (Civ. Code, § 47 [stating exceptions not applicable here in its subd. (2)]; § 425.16, subd. (b)(1).) Yuhas thus argued he sustained his initial burden to show the conduct complained of arose from actions in furtherance of his right to free speech, and reflected information gained from records of official proceedings in which Rood was involved (a child custody dispute). (Civ. Code, § 47, subd. (d)(1)(A); *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 236-238, 240 (*Sipple*).)

In the motion, Yuhas further contended Rood was unable to produce sufficient admissible evidence that he had a substantial probability of prevailing in the action, because Yuhas was asserting meritorious defenses of privilege and truth to the defamation charges, and no constitutional malice, reckless disregard for the truth or

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1 All further statutory references are to the Code of Civil Procedure unless otherwise specified. The acronym SLAPP has been widely adopted to describe lawsuits affecting speech or petition rights (Strategic Lawsuit Against Public Participation). (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.)

knowing falsehoods could be shown. (§ 425.16, subd. (b)(1); *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 746-748 (*Brown*); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89 (*Navellier*).)

On appeal, Rood first contends the trial court erred as a matter of law in finding the anti-SLAPP statute was applicable, because Rood was a private figure against whom no news media privileges could be properly asserted. Rood further argues the trial court did not have an adequate basis in the record to determine that he could not show a probability of prevailing on his claims, because instead, as of the time of the broadcasts, only an informal, inconclusive, private type of public school district investigation, audit or other vehicle was going on, about his allegedly inappropriate business and other activities during school hours. He further contends the trial court erred in denying him an opportunity to conduct further discovery, and made other inappropriate evidentiary rulings. (§ 425.16, subd. (g).)

On de novo review, we agree with Yuhas that the trial court was correct in both parts of its ruling that the motion to strike the FAC must be granted. The record fully supports the decision, including the evidentiary rulings, and we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

A

Background and Complaint; Related Pending Cases

We will outline the background facts in a somewhat abbreviated manner for the purpose of understanding how Yuhas's broadcasts came to be made. In determining whether the anti-SLAPP statutory scheme properly applies to this set of allegations, we

look to the pleadings and the respective showings on the motion. (*Navellier, supra*, 29 Cal.4th 82, 88-89.) We set forth more detailed facts as needed in the discussion portion of this opinion.

From 1997 to 2003, Rood was employed as a teacher by the San Diego Unified School District (the District). In August 2003, he began serving as the principal of a continuation high school within the District, Mark Twain High School, which serves students who have not been able to complete their degrees in standard District high schools and who have other problems (the high school).

From September 2005, Rood and Michael Portantino, who was the publisher of the Gay & Lesbian Times (GLT or the "magazine") and the Rocket (now defunct) magazines, lived together as cohabitants. By late 2006, the two men were in a committed relationship and as joint guardians, they took custody of a baby girl (the child), whom they planned to adopt. However, beginning in the spring of 2007, they began to have arguments about real estate and other things, including the coguardianship. After May 2007, Rood acted as the sole caretaker of the child, until the two men reconciled in August 2007.

In the summer of 2007, Rood had most of the month of August off from his public school principal duties. During that time, he agreed with Portantino that he would sell or barter advertising on behalf of GLT, by communicating with merchants and restaurant owners. Earlier that year, GLT staff made up business cards identifying Rood as an associate publisher of GLT, and Portantino gave him the cards in August to assist him in the advertising efforts.

During the month of August, Rood used the business cards at meetings with merchants, to discuss potential restaurant trade or barter arrangements on behalf of the magazine. Using his magazine connections and several e-mail accounts, including one with his school district address, he obtained event tickets for employees at the high school and relatives.

After Rood returned to school August 23, 2007, he lost interest in pursuing the advertising, but cooperated with a GLT staff member, Todd Klein, on following up his contacts with several restaurateurs. In an August 31, 2007 e-mail, he notified Klein of follow-up work to be done, and asked that his District e-mail address no longer be used. According to Rood's declaration in the motion proceedings, he never served as the magazine's associate publisher, and was never an employee or independent contractor with the magazines, nor did he receive any compensation.

By early September 2007, Rood and Portantino had broken off their personal relationship and were having ongoing serious disputes about custody of the child. Later in September, 2007, Portantino filed a petition to remove Rood's guardianship status, and he and Rood filed opposing declarations in that case about their personal disputes. (*In re Guardianship of S.* (Super. Ct. San Diego County, 2007, No P192727); the "guardianship case.") Portantino filed a declaration in the guardianship case, claiming Rood was at fault for their parenting problems and was behaving erratically, due to Rood's stress that he told Portantino that he was having at work due to an investigation of his professional conduct. A few months later, Portantino brought material from the custody file to Yuhas for his use in investigating allegations against Rood.

In Rood's declaration in the guardianship case, he sought sole custody of the child and denied that there was any such official District investigation going on, regarding auditing his time at work, nor were there any complaints known to him regarding any alleged inappropriate sexual behavior between him and a staff member of the District. Rather, he understood the District was implementing a payroll time and labor audit in August 2007 at the high school, which was routine in nature. Those declarations were matters of public record in the guardianship case. Litigation there continued through 2008.

On December 27, 2007, Yuhas sent an e-mail to Rood at his District work e-mail address, inquiring about an investigation taking place at the high school, and asking for details. Rood referred the matter to his attorney in the guardianship case, H. Paul Kondrick, because he was going out of town and because he understood that the parties in the proceeding were under a gag order not to discuss the issues. Attorney Kondrick e-mailed Yuhas to advise him that he did not represent Rood in employment matters, nor was there any official investigation going on, but any further questions could be sent to him.

In two radio talk show broadcasts on KOGO, December 28 and December 30, 2007, Yuhas talked about Rood and a District investigation at the high school. These remarks or podcasts were repeated on the Yuhas website. The gist of the commentary was that Yuhas did not believe it was appropriate for Rood, as a public school principal at a school for troubled youth, to be selling advertisements on school time for GLT, which Yuhas considered to be a pornographic publication based on its advertising content,

among other things. Yuhas also reported that Rood was being investigated for inappropriate conduct with staff members at the school.

Rood's original complaint was filed December 29, 2008, and amended May 11, 2009. In the FAC, he summarizes the nature of the comments made by Yuhas in the two broadcasts and claims they are defamatory, as follows: (1) Yuhas said there was an official District investigation going on, when in fact there was only a payroll time and labor audit of staff hours, such that there was no fair report of any official proceedings, particularly because his main informant, Portantino, was obviously a biased witness; (2) Yuhas made false accusations of criminal conduct by Rood about bringing pornography into the school, whose students were troubled and instead needed special guidance; or false accusations that Rood had engaged in inappropriate sexual conduct with another school staff member, or did not treat staff fairly; (3) Yuhas made his comments with reckless disregard for the truth or as knowing falsehoods, and Rood was not a public or limited public figure; (4) Yuhas's statements injured plaintiff's personal and professional reputation.[2]

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2 Originally, Rood named the radio station entities, KOGO, Clear Channel Radio and Clear Channel Communications, as defendants, but he dismissed them from the FAC. Rood also brought two other related lawsuits that were eventually consolidated in the trial court. One was filed against the Reader newspaper (*Rood v. San Diego Reader* (Super. Ct., San Diego County, 2009, No. 37-2009-00082111-CU-DF-CTL)),which carried an article about the District investigative activity, but Rood dismissed it after a correction was issued. The other, *Rood v. Garcia* (Super. Ct., San Diego County, 2008, No. 37-2008-00090621-CU-DF-CTL), was brought against a private investigator associated with Portantino in connection with the custody matter. That defendant, Garcia, unsuccessfully brought an anti-SLAPP motion in that case. Judicial notice was requested of pleadings in

B

Special Motion to Strike

In response to the filing of the FAC, Yuhas filed his special motion to strike, arguing that all aspects of his commentaries were privileged under Civil Code section 47, subdivision (d), based upon fair and true reports of official proceedings. He further argued that only true statements were made, or alternatively, statements of opinion or hyperbole. He denied any malice and claimed journalists' privileges for neutral reportage. (See, e.g., *Ward v. News Group Int'l Ltd.* (C.D. Cal 1990) 733 F.Supp. 83, 84.) Yuhas also filed a related motion to strike specified damages allegations as unsupported (issues later determined to be mooted by the subject ruling on the anti-SLAPP motion).

In support of his anti-SLAPP motion, Yuhas provided his own declaration and those of his attorneys, describing and authenticating material about the sources that he used to compile his broadcasts, including excerpts from the GLT and its more flamboyant advertisements and headlines. Yuhas began by telling the court that because he had been critical of Rood potentially playing the "gay card" (i.e., arguably claiming special privileges), he wanted the court to know that he is gay as well.

In his declaration, Yuhas stated he began his investigation when the radio station received an anonymous phone call December 23, 2007, allegedly from a female teacher who worked for the District, giving a news tip that there was a District investigation into

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that separate case in connection with this motion. An appeal is pending. (*Rood v. Garcia* (D057464).)

misconduct by Rood at his job as principal of a District high school, based on his association with an adult publication for which he worked during school time. Once Yuhas received the tip, he returned the telephone call and spoke to a woman who represented she was the caller, and who said the District was investigating possible ethics code violations by Rood and had questioned her about it. She said the investigator also asked about complaints about a school employee who had received preferential treatment due to his relationship with Rood.

Yuhas then contacted the GLT office and spoke to Portantino, who reported that a District investigator had asked Portantino for correspondence concerning Rood's work for GLT, and Portantino provided him such e-mails. Portantino stated that Rood had the title of "associate publisher" of GLT and its related publication (Rocket), and Portantino gave Yuhas copies of letters from two restaurateurs stating that Rood had contacted them for business during the summer of 2007. Portantino told Yuhas that Rood had worked at the GLT headquarters, utilized an e-mail address there, and received an income tax reporting form. Rood had requested and obtained event tickets for school employees and family through his magazine contacts and title.

Yuhas stopped by GLT offices and picked up copies of the magazines,[3] and a business card for Rood that identified him as "associate publisher." One of Rood's e-mails to Portantino in August 2007 had suggested creating such a title for him.

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[3] In the exhibit appendix, Yuhas provided color copies of sexually oriented material from the magazines that he obtained, such as advertisements for sex toys, gay-themed

Yuhas contacted another teacher at the high school, Denise Taylor, a friend of Portantino, and she told him that she had been questioned by a District representative about Rood's extracurricular activities working for an adult publication. Earlier, in Taylor's deposition as a witness in the guardianship case, she talked about Rood's problems, and she was repeatedly cautioned by all counsel not to talk about any District whistleblowing activity of which she had knowledge.

Yuhas next telephoned two school board members who asked for confidentiality, but confirmed there was trouble at school involving Rood, such as an investigation going on about Rood's association with adult publications and also his alleged preferential treatment of some staff members. One of the board members told him that an audit and an investigation were about the same thing. Yuhas obtained and studied a copy of the District's ethics policy that requires public servants to strive to earn, promote, and maintain public trust and confidence in the District.

Yuhas spoke to several other District employees who had heard about an investigation of Rood, and he talked to the two restaurateurs who were advertisers with GLT. The restaurateurs said Rood had contacted them during school hours, although one of them later denied that this had occurred.

Yuhas e-mailed Rood December 26, 2007 and asked him to call back about the District investigation. After obtaining Yuhas's phone number, Rood referred the matter to his attorney, H. Paul Kondrick, who responded by e-mail to Yuhas and stated that there

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events, gay escort services, reviews of pornographic or erotic material, and other material that Yuhas considered to be pornographic.

was no known ongoing investigation at the high school, although a routine audit had recently been conducted there. More e-mails were exchanged, and Yuhas made his first broadcast December 28, 2007, describing the high school as a special counseling oriented school for troubled youth, and describing an ongoing District investigation into whether Rood had been selling advertising for an adult gay publication during school hours.

Yuhas met again with Portantino and obtained more e-mails from him, including one dated August 31, 2007, from Rood to the GLT manager, Todd Klein, in which Rood asked Klein not to send any more e-mails to Rood's work e-mail address at the District. The same e-mail requested that Klein follow up on Rood's efforts to make advertising sales or barters with certain merchants. Another former teacher at the high school, Sherry Briccio, told Yuhas she had retired from the high school after disagreements with Rood, and the District investigator had questioned her, and she told him Rood was gone from school a lot.

In a second broadcast on December 30, 2007, Yuhas questioned whether Rood's behavior was being held to a lower standard because he was gay and "playing the gay card," whereas a straight principal would have been disciplined for such conduct, of selling ads for a pornographic magazine.

Rood demanded that Yuhas and the radio station retract the broadcasts, but they refused, stating that the investigation existed and no false statements were made.

In her attorney declaration, counsel for Yuhas submitted transcripts and computer disks recording the broadcasts, exemplars of 2007 copies of GLT, excerpts from the guardianship case file, and other materials, including the related actions brought by Rood

against different defendants, that were ultimately consolidated with this action. In Yuhas's unopposed requests for judicial notice, copies of the broadcasts and the magazines, as well as district newsletters and personnel records were provided, along with copies of filings in the guardianship case and in the related action.[4]

Accordingly, Yuhas argued that all allegations of the FAC fell within the scope of anti-SLAPP protections, in part because much of the same information was publicly available in the court file for the parties' guardianship and custody dispute. Moreover, Rood could not show he would probably prevail.

C

Opposition; Reply; Supplemental Briefs Allowed; Evidentiary Objections Pending

In opposition, Rood contended that his evidence would demonstrate that the broadcasts contained false and defamatory information, in that there had been no District investigation, nor any misconduct as claimed, so that he would probably prevail on his slander claims. (§ 425.16, subd. (b)(1).) In his declaration, Rood stated he was never an employee or associate publisher of GLT, nor did he perform any such duties, but rather he was given business cards by Portantino that had been ordered by a staff member, Klein, without his knowledge. Rood never received a paycheck or W-2 form from GLT.

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4 Selections from the guardianship case file were provided by Portantino to Yuhas in December 2007, and they are included in the exhibit appendix to Yuhas's motion. The declaration of Yuhas's attorney states that she obtained these file excerpts in preparing the motion. They include discovery requests and allegations in Portantino's declaration that Rood told him in late summer-early fall 2007 that Rood was under a lot of stress due to an ongoing investigation of him by the District at his school, and that Rood feared he might be fired for some kind of professional mismanagement of money or inappropriate sexual behavior with a staff member.

In the summer of 2007, he voluntarily promoted some advertising for GLT, in connection with personal social events with his then-partner Portantino. There was an e-mail address that appeared to belong to him at GLT, but it was actually for a different employee named Michael Rosensteel, and Klein had access to it.[5]

According to Rood's declaration, Portantino e-mailed him three times in September 2007 about receiving calls from a District investigator about Rood's activities at school. However, Rood stated that to his knowledge, no official District investigation was ever conducted about his advertising activities for GLT, which were limited to August school vacation in 2007. Around that time, there was an informal audit of hours and timesheets being conducted at the high school. As a principal, Rood was often required to attend meetings off campus.

After the December 2007 broadcasts were made, the radio station's general manager sent an e-mail to the District's communications director, Ursula Kroemer, inquiring about any pending investigation. She responded that she had not been notified of any investigation by the District's human resources department, and she praised Rood's work. Kroemer notified Rood that if he received any calls on this personal matter, she recommended that he direct them to his attorney. As of August 2009, District

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[5] In his deposition in the guardianship proceedings, Portantino said he did not know how to answer whether Rood had been an employee of the magazine. Some magazine-related e-mails supplied to Yuhas by Portantino were addressed to Rood at the District e-mail address, but we think receiving such an e-mail is not the same as sending one from that address.

representatives told Rood that there had been no official investigation or proceeding about his conduct.

Rood's declaration gave details about the 2007-2008 conflict he had with Portantino in the guardianship case, and stated that he obtained sole guardianship in July 2008. In June 2008, Rood was removed as the principal at the high school and transferred to a smaller unit at another school, and he was later demoted to a vice principal position.

Rood supplied a declaration from his professional association or "union" representative, Jeannie Steeg, stating that to her knowledge, there had been no official investigation or proceeding by the District conducted against Rood, from 2006 through the present. Rood also provided a declaration from his treating psychologist about the emotional distress he had suffered due to Yuhas's statements.

Counsel for Rood supplied a declaration stating that he had conducted discovery in the guardianship case about what type of investigation or official proceeding was going on relative to Rood, and learned there was none, other than the District's implementation of a "new time and labor payroll application with real time," and a related "payroll time and labor audit in August 2007" at the high school. The objective of that audit was to determine that internal controls existed to protect District assets, and to verify that absences were timely and accurately recorded.

Rood additionally provided numerous declarations from witnesses, including several District employees and his brother, to the effect that they did not know of any evidence of any official investigation by the District. Rood argued that there should be

no absolute or qualified privilege attached to Yuhas's statements, because any privilege was lost through the use of an obviously biased informant, Portantino. Rather, the broadcasts put him, a private person, in the public eye, without justification.

In Rood's unopposed request for judicial notice, he presented a City of San Diego proclamation commending the GLT as a respected and widely read community newspaper, and argued that Yuhas had unfairly portrayed it as pornographic.

Rood filed evidentiary objections to Yuhas's declarations, and sought to compel further discovery (later deemed a moot issue). There were also numerous disputes in the two related actions about discovery and whether the actions should be coordinated. The motion to strike was continued several times.

In his reply papers, Yuhas submitted additional evidence that in August 2007 the District had been conducting an audit or investigation of Rood's conduct on school time, relating to his association with GLT. A supplemental declaration was submitted by Stephanie Mendenhall, a teacher at the high school, regarding her knowledge about a District investigation at that time of Rood's financial activities. From those materials, Yuhas continued to argue that he had only reasonable beliefs that such a District investigation was being carried out, also as corroborated by the statements made by other sources.

After a tentative ruling to deny the motion to strike was announced, the trial court allowed supplemental briefs from the parties, solely to address the adequacy of the reply showing made by Yuhas, under a clear and convincing evidence standard. Rood filed a

supplemental brief and also supplemental declarations. Yuhas replied with more supplemental arguments and supplemental declarations.

D. Ruling on Merits

After taking the matter under submission and considering the further briefing it had allowed, the court issued an order on December 11, 2009 granting Yuhas's special motion to strike. The court granted both unopposed requests for judicial notice, taking judicial notice of the existence of the documents but not the truth asserted therein. The court overruled Rood's evidentiary objections to both the Yuhas and Portantino declarations, and sustained in part and overruled in part the evidentiary objections brought by Yuhas to Rood's declaration.[6]

With regard to the further briefing that was submitted, the ruling stated: "The Court disregards plaintiff's supplemental declarations submitted in contravention to the Court's instructions. The Court further disregards the supplemental arguments and evidentiary objections raised by defendant Yuhas as to those declarations." The court noted that although Rood had been given an opportunity to explain and address Yuhas's supplemental declarations, "Plaintiff's supplemental briefs fail to explain or refute this evidence." In further explaining its reasoning, the court stated: "Whether the Gay and Lesbian Times is a pornographic publication is a matter of opinion and of no relevance here."

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6 To the extent Rood continues to argue the same evidentiary objections he made at the trial level, he has waived on appeal any claims of the trial court's abuse of discretion. He has failed to supply meaningful record citations or authorities to assist us in evaluating those claims. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.)

Thus, with regard to the first prong of the statutory analysis, the court ruled, "There is no dispute that defendant Yuhas sustained his initial burden to show the conduct complained of arises from actions in furtherance of Yuhas' right to free speech." Accordingly, since Yuhas was asserting the defenses of privilege and truth as to Rood's defamation charges, the court went on to evaluate the respective showings on the second portion of the anti-SLAPP statutory test.

The court introduced the issues presented on whether Rood had showed a probability of prevailing, as follows: "Defendant Yuhas contends plaintiff cannot meet his burden of showing by competent evidence a probability of prevailing on the merits of his defamation claim for the following reasons: (1) Yuhas' speech concerned the District's investigation into a public school principal's misconduct and is thus privileged, irrespective of truth (Civil Code section 47), (2) the investigation also became part of a child-custody dispute in the Superior Court between plaintiff and the publisher of the Gay & Lesbian Times and Rocket Michael Portantino and Yuhas' speech is privileged for this reason as well (Civil Code section 47), (3) Yuhas' speech is protected by the First Amendment and the California Constitution as fair comment and neutral reportage, (4) the speech is true, (5) the speech was made without 'constitutional malice' (i.e., knowledge of any falsity or serious doubts as to truth) and (6) the speech caused plaintiff no injury."

In reaching the merits, the court ruled that Rood had failed to sustain his burden to establish a probability of prevailing on the merits of his action: "The Court finds, as a matter of law, defendant's evidence supporting the motion defeats plaintiff's attempt to

establish evidentiary support for the claim. [¶] In his reply declaration, defendant Yuhas submitted evidence that the District was in fact conducting an audit or investigation of plaintiff's conduct in connection with his association with the Gay and Lesbian Times. The e-mail inquiry from Clark Simington is sufficient to give defendant Yuhas a reasonable belief that the District was conducting an investigation into Rood's association with the Gay and Lesbian Times. This evidence corroborates the statements made by Portantino as well. Therefore, Yuhas' broadcasts concerning the District investigation, audit or other vehicle to learn of plaintiff's activities during school time are privileged under [Civil Code] section 47. [¶] It is undisputed that this same information was raised in the parties' custody dispute which also makes the information a matter of public record. [¶] In addition, this evidence supports Yuhas' contention that he made the broadcast statements without constitutional malice. Since Yuhas relied on statements from several resources, which are substantiated by the Simington e-mail, plaintiff's allegation of malice is defeated."

Accordingly, "[b]ecause the Court finds the statements were privileged, whether they were true is immaterial. [¶] Consequently, Plaintiff does not have a viable claim for defamation and Defendant's motion is granted and the action dismissed." It was not deemed necessary to discuss the other pending motions, as they became moot. No attorney fees were awarded, although Yuhas had requested them earlier.

Rood appeals the order denying the motion to strike the complaint. (§ 425.16, subd. (i).)[7]

DISCUSSION

I

ANTI-SLAPP STATUTORY PROVISIONS

Well accepted authorities establish a two-step process for applying section 425.16, subdivision (b)(1). " 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . 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.' [Citation.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712 (*Taus*); *Navellier, supra*, 29 Cal.4th 82, 88.)

Under section 425.16, subdivision (b)(1), the trial court, in ruling on such a motion, does not weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim. Rather, the statute was "intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities. [Citations.] Accordingly, when a defendant makes the threshold showing that a cause of action that has been filed against him or her arises out of the defendant's speech-related conduct, the provision affords the defendant the opportunity, at the earliest stages of litigation, to have the claim

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[7] In his respondent's brief, Yuhas seeks an award of attorney fees, or an order for further proceedings on the motion. We will decline the requests and return any renewed fees issues to the trial court.

stricken if the plaintiff is unable to demonstrate both that the claim is legally sufficient and that there is sufficient evidence to establish a prima facie case with respect to the claim." (*Taus, supra*, 40 Cal.4th 683, 714.)

To assess the trial court's rulings on appeal, we review the record de novo, including the determinations made about the sufficiency of a litigant's showing on liability or defenses in its pleadings and affidavits. Those sufficiency rulings present legal questions and issues of law, decided de novo. (*Martinez v. Metabolife International, Inc.* (2003) 113 Cal.App.4th 181, 186; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 474 (*Damon*).)

II

SECTION 425.16, SUBDIVISION (E): CLAIMS ARISING FROM PROTECTED ACTIVITY

We first address the trial court's ruling on the applicability of the anti-SLAPP statutory scheme, which states as follows: "There is no dispute that defendant Yuhas sustained his initial burden to show the conduct complained of arises from actions in furtherance of Yuhas' right to free speech." Our review of the record and the briefs discloses that both in the trial court and on appeal, Rood actually did challenge the notion that Yuhas's broadcasts properly invoked any free speech concerns. In Rood's initial argument, he views himself as a private figure to whom no news gathering privileges should have any application, such that his personal (child custody) and job-related issues addressed in the broadcasts remained wholly private in nature.

In any case, on de novo review, we need not be overly concerned with the precise reasoning of the trial court. Instead, the proper inquiry is whether the trial court correctly interpreted and applied the statutory criteria. In determining whether a challenged lawsuit is a SLAPP: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause of action fits one of the categories spelled out in section 425.16, subdivision (e).' [Citation.]" (*Navellier, supra,* 29 Cal.4th 82, 88.) Section 425.16, subdivision (a) instructs the courts that in making such determinations about the scope of subdivision (e), a broad statutory construction is required.

§ 425.16, subdivision (e) provides as relevant here: "[An] 'act in furtherance of a person's right of petition or free speech under the . . . Constitution in connection with a public issue' includes: (1) any written or oral statement . . . before a . . . judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement . . . made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

Rood's claims of slander that damaged his personal and professional reputation are based on Civil Code section 46. Slander claims require proof of "a false and unprivileged

publication, orally uttered, and also communications by radio or any mechanical or other means which: [¶] 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; [¶] . . . [¶] 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires . . . [¶] . . . [¶] 5. Which, by natural consequence, causes actual damage." (Civ. Code, § 46.)

To argue this action should not properly fall within the scope of anti-SLAPP statutory coverage, Rood initially characterizes the underlying facts as a garden variety workplace matter or dispute that involved an "audit" at a District school that was being conducted confidentially, regarding Rood's or others' performance there as employees. In support, he relies on cases holding that private workplace related disputes do not qualify as raising issues of public concern. (See, e.g., *Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924-926 (*Rivero*) [not within scope of statutory scheme as a matter of public interest, when an individual supervisor of a staff of eight custodians (not previously a subject of media coverage), sues for defamation].)

Although it may be true that internal employee disciplinary matters do not invoke free speech concerns, this case does not present such a scenario. Rather, Rood was a publicly employed official, whose performance of professional activities could give rise to issues of legitimate public interest, within the meaning of section 425.16, subdivision (e)(3) (referring to statements "made in a . . . public forum in connection with an issue of

public interest"). (See *Damon, supra*, 85 Cal.App.4th 468, 476 [characterizing a news publication as a "public forum" within the meaning of the anti-SLAPP statute, where it serves as a vehicle for discussion of public issues, that is distributed to a large and interested community]; *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1160 (*Annette F.*).)

Not every discussion of every workplace dispute will qualify as a matter of public interest, within the provisions of section 425.16, subdivisions (e)(3) and (4). (*Rivero, supra,* 105 Cal.App.4th at p. 924.) Instead, "unlawful workplace activity below some threshold level of significance is not an issue of public interest, even though it implicates a public policy." (*Ibid.*) Further, it is not dispositive that public employment is concerned; only a significant level of "waste or abuse of funds" will rise to the level of a public issue. "For example, in *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, Division Four of this district noted that the financial well-being and integrity of a recognized branch of a large, publicly-funded university medical school were legitimate matters of public concern. [Citation.]" (*Rivero, supra,* 105 Cal.App.4th at p. 925.)[8]

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8 Rood does not clearly explain or deny whether he may qualify as a " ' "limited purpose" or "vortex" ' public figure." (*Sipple, supra,* 71 Cal.App.4th at p. 226.) As explained in that case, such a figure is one who " ' "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." ' " (*Ibid.*, citing *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 254-255.) That figure may lose certain protections for his reputation " 'only to the extent that the allegedly defamatory communication relates to his role in a public controversy.' [Citation.]" (*Sipple, supra,* at p. 247.) These communications relate to public controversies about the District.

Likewise, Yuhas's claims that Rood, a high ranking public education professional, was improperly involved in a particular kind of extracurricular activity (i.e., on-the-job sales of ads for GLT, which could be considered to contain pornography or other material unsuitable for "troubled youth"), arguably address "legitimate matters of public concern," involving the promotion of values in the education context. Because of the nature of Rood's public employment, in the public eye for being charged with educating high school aged children (particularly those who have encountered difficulties in their school careers, leading to their assignment to a continuation school), Rood does not have any adequate basis to claim that only private matters were addressed by the broadcasts. The trial court correctly concluded that his slander action falls within the scope of coverage of section 425.16, within the meaning of some or all of its subdivisions (e)(1), (2), (3), and/or (4).

We next turn to the interplay of the privilege defenses asserted, and anti-SLAPP definitions and principles, with respect to Rood's ability to demonstrate a probability of prevailing on this defamation claim.

III

SECOND PRONG: PLAINTIFF'S PROBABILITY OF PREVAILING

A. Applicable Standards

To make an adequate showing of a reasonable probability of success on the slander claim, Rood must make "a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Navellier*,

supra, 29 Cal.4th 82, 89.) If instead, his action lacked even minimal merit, it is subject to being stricken. (§ 425.16, subd. (b)(1).)

" 'The sine qua non of recovery for defamation . . . is the existence of falsehood.' [Citation.]" (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 112-113 (*McGarry*).) In applying this prong of the anti-SLAPP statute to defamation claims, "courts must take into account whether the plaintiff is a public figure who must prove actual malice by clear and convincing evidence. [Citation.]" (*Annette F., supra*, 119 Cal.App.4th 1146, 1162.) A public or limited purpose public figure must prove actual malice by clear and convincing evidence in order to prevail on a defamation claim. (*Ibid*.)

Where private defamation plaintiffs are involved such that First Amendment considerations are not clearly invoked, the ordinary standard of proof of falsity of statements, preponderance of evidence, will apply. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 600, pp. 883-884, citing *Roemer v. Retail Credit Co*. (1975) 44 Cal.App.3d 926, 932.) However, where a media defendant is sued for defamation by a public or limited purpose public figure plaintiff, that plaintiff must demonstrate the existence of "clear and convincing evidence" of knowledge of falsity or reckless disregard of the truth. (*Reader's Digest Assn. v. Superior Court*, *supra*, 37 Cal.3d 244, 252; see *Anderson v. Liberty Lobby* (1986) 477 U.S. 242; *Khawar v. Globe Int.* (1998) 19 Cal.4th 254, 273; 5 Witkin, Summary of Cal. Law, *supra*, Torts, § 611, p. 905; *Annette F., supra*, 119 Cal.App.4th 1146, 1166-1167.)

In *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 81-82, the court noted CACI No. 1700 requires falsity to be proved by a preponderance of the evidence. (See 5 Witkin, Summary of Cal. Law, *supra,* (2010 supp.) Torts, § 611, pp. 149-150.) However, proof of malice (knowledge of falsity or reckless disregard of the truth) is treated more stringently: "The requirement that a public figure plaintiff prove malice by clear and convincing evidence arises from First Amendment concerns that freedom of expression be provided 'the "breathing space" it needs to survive.' " (*Christian Research, supra,* 148 Cal.App.4th at p. 82, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 272.)

In applying these standards, we first emphasize that we evaluate the defendant's knowledge about the facts reported as of the time that the statements were made. "The existence of actual malice turns on the defendant's subjective belief as to the truthfulness of the allegedly false statement. [Citation.] Actual malice may be proved by direct or circumstantial evidence. Factors such as failure to investigate, anger and hostility, and reliance on sources known to be unreliable or biased 'may in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.' [Citation.] However, any one of these factors, standing alone, may be insufficient to prove actual malice or even raise a triable issue of fact." (*Annette F., supra,* 119 Cal.App.4th 1146, 1167.) Accordingly, it is not necessary or appropriate for us to take into account facts about the later demotions or adverse consequences undergone by Rood, after the District's audit took place, and well after the broadcasts occurred.

Rood's FAC is founded in the allegations about Yuhas's commentary about his activities during his work as a public school principal. As above discussed, we have determined that Rood is not entitled to assert the status of a private figure, but rather, his defamation claims must be evaluated under the standards applicable to a public or at least a limited purpose public figure. To determine if Rood has demonstrated that he will probably prevail on his defamation claims, we next address the extent to which Yuhas's statements made representations of fact or opinion. We then outline the scope of the absolute privilege claimed under Civil Code section 47, subdivision (d), as claimed by Yuhas.[9] We can then analyze whether Rood will be able to show the statements of fact were false or unprivileged, due to an ability to prove actual malice, all within the anti-SLAPP motion framework.

B. Defamation Law: Opinions v. Fact

At the outset in evaluating the appellate arguments, we seek to distinguish between Rood's allegations of factual statements made by Yuhas, and those that could be more fairly characterized as Yuhas's opinions. The issue commonly arises whether a defamation plaintiff has alleged actionable defamatory facts, or instead, whether only nonactionable opinion forms the basis of the lawsuit.

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9 Civil Code section 47 provides in relevant part: "A privileged publication or broadcast is one made: [¶] . . . [¶] (d)(1) By a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof. . . . .[¶] [With exceptions not applicable here set forth in subd. (2)]."

Whether a statement is one of fact or opinion is a question of law that is decided by the court. (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1353-1354.) Frequently, determining whether a statement is one of fact or opinion is difficult. In deciding whether a statement is defamatory, in evaluating the language of the statement in context, the totality of the circumstances is taken into account. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260-261 (*Baker*).) The meaning and effect of the statement is evaluated by measuring its " ' "natural and probable effect upon the mind of the average reader." ' " (*Ibid.*)

Whether the challenged statements communicate or imply provably false statements of fact is evaluated under a "totality of the circumstances" test. "First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense. . . . [¶] Next, the context in which the statement was made must be considered." (*Baker, supra,* 42 Cal.3d at pp. 260-261.)

For example, in *Baker* a media commentator's views that a program about sex education amounted to "titillating innuendo," showing "bare flesh," that "pour[ed] it on," were, when viewed in context, opinions that were protected against defamation claims, because the statements were metaphorical, exaggerated, or "flashy hyperbole." (*Baker, supra,* 42 Cal.3d 254, 267.) Such statements did not impermissibly imply the existence of any undisclosed facts. Reading them in context also required a recognition that sarcasm was being used, and "[t]his conclusion is strengthened finally by examining the statement and its meaning in the societal context in which the article was published, the

audience it intended to address, and the public debate to which it was meant to contribute." (*Ibid*.)

Here, we are concerned with the statutory definitions in Civil Code section 46, subdivision (3), of statements about Rood that allegedly "tend directly to injure him in respect to his office, profession, trade or business, . . . by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires . . . ." Some of Yuhas's broadcasts and website statements clearly announce his own opinions about Rood's professional fitness for work in a public high school for "troubled youth," clearly a matter of public interest. (*Baker*, *supra*, 42 Cal.3d 254, 260-261.) Specifically, Yuhas's statements opined that Rood was "perverted," and Rood was associated with a magazine that amounted to "adult pornography" or "gay pornography," due to its content including advertisements for sex toys, gay escort services, and other nonchildlike pastimes. To deal with this problem, the trial court correctly noted in the ruling that it is a matter of opinion whether the GLT amounts to pornography, and we need not add to that appropriate analysis here.

In making statements about the District's audit or investigation, Yuhas stated "Rood has a problem" and the investigation is a "big deal," and that he thought Rood was "playing the gay card" (e.g., expecting special privileges that a heterosexual public school principal would not be allowed). When such statements are considered in the context of a local current affairs talk show radio broadcast, such statements are much more like opinion or hyperbole of the commentator than statements of fact (e.g., Yuhas said, "I'm going to drum beat it home"). (See *McGarry, supra,* 154 Cal.App.4th 97, 112-113.) We

next consider the remaining, more clearly fact-based statements, for any privilege or other defenses that may apply.

C. Absolute Privilege

"Generally, the defendant bears the initial burden of establishing that the statement was made on a privileged occasion. Once the defendant has met this burden, however, the burden then shifts to the plaintiff to establish that the statement was made with malice.") (5 Witkin, Summary of Cal. Law, *supra,* Torts, § 600, p. 883.) We are concerned here with the privileges provided by Civil Code section 47, as challenged by Rood (shown in italics below): "A privileged publication or broadcast is one made: . . . [¶] . . . [¶] (d)(1) By a *fair and true report* in, or a communication to, a public journal, of (A) of *a judicial,* (B) legislative, or (C) *other public official proceeding, or* (D) *of anything said in the course thereof* . . . . [with some exceptions not applicable here, as set forth in its subd. (2)]." (Civ. Code, § 47, subd. (d)(1).)

First, Rood contends no "*fair and true report*" (Civ. Code, § 47, subd. (d)(1)) was made, but only inflammatory and exaggerated statements. We cannot agree. Although Yuhas stated Rood had been selling ads for "pornography" on school time, that is not the same as Yuhas falsely accusing him of criminal conduct in supplying material "pornography" material to students, as Rood seems to be arguing. (Pen. Code, §§ 186.2, subd. (d), 311.2, 313.)

As stated in *Sipple, supra,* 71 Cal.App.4th 226, 244: " 'It is well settled that a defendant is not required in an action of libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous

charge be justified, and if the gist of the charge be established by the evidence the defendant has made his case.' [Citation.] ' "[A] slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently . . . ." ' " Read as a whole, the broadcasts are based in factual matters.

Next, Rood contends no reports of any "*judicial proceedings*" (Civ. Code, § 47, subd. (d)(1)) existed on which Yuhas could have relied, because the record is somewhat unclear when Yuhas became aware of the guardianship and custody case. However, Yuhas states in his declaration that he interviewed Portantino and Denise Taylor (fellow teacher) who were witnesses in the guardianship proceedings, and Portantino gave Yuhas access to pleadings and discovery matters filed in the guardianship case. Such reports of publications made in the course of a judicial proceeding are generally considered to be absolutely privileged, and these were not sealed records. They could become a legitimate subject of such public discussion.

To the extent the broadcasts addressed alleged misconduct by Rood in treating District employees unfairly, the guardianship case files contained alleged statements by Rood to Portantino that such an investigation was going on, and these files were given to Yuhas by Portantino. We do not seek to determine whether such allegations were ever substantiated, but instead whether Yuhas had a sufficient basis in his investigation to make such statements or repeat such information in the broadcast, and it appears that he did.

Rood further contends none of these reports stemmed from any "*other public official proceedings, or of anything said in the course thereof*" (Civ. Code, § 47, subd. (d)(1)(C), (D)), based on his opposition papers and declarations by various witnesses employed by the District, that they did not know of any official "investigation." Rood continues to argue that only a District "audit," not an investigation, was going on at the time.

By comparison, Civil Code section 47, subdivision (b), covering statements made in the course of "any . . . official proceeding authorized by law," affords an absolute privilege to "any communication made in such proceedings by a participant that has some connection or logical relation to the proceedings, [citations], . . . including investigatory activities by public agencies." (*Garamendi v. Golden Eagle Ins. Co.* (2005) 128 Cal.App.4th 452, 478, citing *Braun v. Bureau of State Audits* (1998) 67 Cal.App.4th 1382, 1388-1389.) "The privilege is not restricted to statements made once a proceeding has been commenced, but may apply to statements made in advance." (*Garamendi, supra,* at p. 478.) That is also the case here, regarding this investigative "audit," which addressed legitimate District concerns, and was conducted in an official capacity.

Specifically, in the reply declarations filed, Yuhas provided a copy of the District investigator's e-mail sent to Portantino on September 28, 2007, at the GLT e-mail address, asking about Rood's employment status and activities. The District's employee, Simington, gave his title as "Senior Operations Auditor." In the initial motion papers, Simington was mentioned by Portantino as having communicated with the GLT offices about Rood's employment, although the moving papers did not include a copy of this e-

mail. It is not explained why that e-mail and authentication were not provided earlier, but in any case, its content was well within the scope of the issues raised by the original motion filed by Yuhas, which relied on Portantino's numerous contacts with Yuhas before the broadcasts, including Portantino's statements describing his interview with the District investigator, and Portantino's references to a stressful "investigation" of Rood during the custody litigation. Rood was placed on notice that Yuhas was raising such a defense about his reasonable belief of an ongoing investigation of some kind, of a serious nature.

Likewise, other witnesses familiar with Rood and his employment told Yuhas that they had heard that a District investigation was going on that involved him. Yuhas claims that an unnamed school board member, to whom he had promised confidentiality, said that an audit and investigation were approximately the same thing. The record adequately supports Yuhas's claims that he was given facially reliable information, investigated, and learned of an official District proceeding that involved Rood, sufficient to assert these privileges under Civil Code section 47, subdivision (d).

D. Malice: Knowing Falsity of Statements; Reckless Disregard of Truth

Finally, Rood contends on appeal that the showing he made to oppose the motion adequately demonstrates Yuhas made false statements, and the court therefore erred in its order allowing supplemental briefing, when it required Rood to provide clear and convincing evidence of actual malice. (*Sipple, supra,* 71 Cal.App.4th 226, 247.) "The clear and convincing standard requires that the evidence be such as to command the unhesitating assent of every reasonable mind." (*Beilenson v. Superior Court* (1996) 44

Cal.App.4th 944, 950.) On a related note, Rood argues his discovery motion should not have been denied, and he should have been enabled to make a better showing, by further deposing Yuhas, Portantino, and GLT staff persons. Rood also argues that he was incorrectly not allowed to file further declarations to be considered, as surreply to Yuhas's reply declarations, and he again claims that his evidentiary objections were not adequately addressed. (But see fn. 6, *ante*, regarding waiver of objections on appeal.)

In his declaration, Yuhas gave details of the investigation he conducted, after receiving the anonymous phone call "tip" at the radio station about Rood's alleged activities. Yuhas talked to numerous witnesses and researched ethical standards of the District, and he made other efforts to verify the allegations that were being made about Rood. In the reply declarations filed, Yuhas supplied a copy of the e-mail sent by Simington, the District's "Senior Operations Auditor," to Portantino on September 28, 2007, at the GLT e-mail address, asking about Rood's employment status and activities. No new issues were raised in reply, and Rood cannot show any due process denial when the trial court did not allow surreply declarations.

On the record provided, Rood has not shown that Yuhas made these broadcasts and podcasts without making reasonable efforts to verify the allegations that were being made about Rood, nor that Yuhas made them maliciously for some illegitimate purpose. "The actual malice standard [citation] requires a showing that the allegedly false statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.' [Citation.] The reckless disregard standard requires a 'high degree of awareness of . . . probable falsity . . . .' [Citation.] 'There must be sufficient

evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' [Citation.] Gross or even extreme negligence will not suffice to establish actual malice; the defendant must have made the statement with knowledge that the statement was false or with 'actual doubt concerning the truth of the publication.' [Citation.]" (*Annette F., supra,* 119 Cal.App.4th at p. 1167.)

Under those standards, Rood has failed to show by clear and convincing evidence that the broadcast and website statements were made with malice, in that Yuhas had or should have had reasonable doubts about the truth of his statements. Rather, Yuhas apparently conducted a credible level of investigation and talked to more than only obviously biased sources, such as Portantino. Rood's evidence did not sufficiently controvert the showing made by Yuhas, even though he was given an opportunity in supplemental briefing to explain away the District's investigator's e-mail and other statements made in the supplemental declarations about the reasons for a District investigation or audit and its scope. Further, on this record, the trial court could reasonably have determined that more depositions of the same witnesses would not make any difference. The court did not err in finding Rood would probably not prevail on these defamation claims.

IV

REMAINING ISSUES; ATTORNEY FEES

Yuhas brought a separate motion to strike the damages allegations as inadequate. There is an historic distinction between statements that are libelous per se (not requiring additional explanatory matter), as opposed to libel claims based on other types of

statements that require special pleading (libel per quod). (*McGarry*, *supra*, 154 Cal.App.4th 97, 112-113, discussing Civ. Code, § 45a.) The trial court had a reasonable basis to decline to rule on this separate motion, as moot. Likewise, Rood's discovery requests have become moot.

Currently, no award of attorney fees has been made under section 425.16, subdivision (c). On appeal, Yuhas's brief requests such an award. We decline to express any opinion on that matter, and return the action to the trial court for any appropriate further proceedings that may be allowed to consider the renewal of any such request.

DISPOSITION

The order is affirmed. Yuhas to receive the ordinary costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.