2d Civil No. B208715
(consolidated with B210394)

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LINDA RUTTLEN,

Plaintiff and Respondent,

v.

COUNTY OF LOS ANGELES, JOHN R. COCHRAN and BRUCE CHERNOF, M.D.

Defendants and Appellants.

Appeals from Los Angeles County Superior Court
Honorable Reginald Dunn
Los Angeles County Superior Court Case No. BC382897

APPELLANTS' OPENING BRIEF

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INTRODUCTION

A woman died last year on the floor of the emergency room waiting area at Martin Luther King, Jr. – Harbor Hospital ("MLK Hospital"), re-awakening an ongoing public controversy about the quality of medical care at MLK Hospital. Plaintiff Linda Ruttlen was the triage nurse on duty that night. The next day defendant County of Los Angeles, through its Board of Supervisors, initiated an investigation into the death. Two senior County employees, defendants John Cochran and Bruce Chernof, were tasked with spearheading the investigation and keeping the Board and the public informed about the results. They gave official and unofficial briefings to the Board and coordinated all communications to the media about the investigation.

Ruttlen sued the defendants for defamation and wrongful termination based on statements Cochran and Chernof made during and about the investigation. First the County, then Cochran and Chernof, filed special motions to strike Ruttlen's claims pursuant to Code of Civil Procedure section 425.16, the so-called anti-SLAPP statute.[1] At issue are statements attributed to Cochran and Chernof in a *Los Angeles Times* article: (a) statements made by Cochran during a special briefing to the Board's Health Deputies, and (b) statements made by Chernof to the *Los Angeles Times* concerning the investigation. The trial court denied both anti-SLAPP motions. Here's why that was wrong.

The Anti-SLAPP Statute Applies To Ruttlen's Claims. The statements giving rise to Ruttlen's claims satisfy *all* the enumerated

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[1] Code of Civil Procedure section 425.16 sets out the procedure for striking complaints in lawsuits commonly known as SLAPP suits—strategic lawsuits against public participation.

categories in subsection (e) of Civil Procedure Code section 425.16, which define the "act[s] in furtherance of a person's right of petition or free speech . . . in connection with a public issue" that are covered by the statute. (Code Civ. Proc., § 425.16, subd. (b).)

- **Official Investigation.** Cochran and Chernof's statements were made either to the media or to the Board in connection with an official investigation (subsections (e)(1) & (e)(2)).

- **Public Interest.** The statements directly concerned a matter of great public interest, namely the quality of medical care at MLK Hospital as reflected by this incident (subsections (e)(3) & (e)(4)).

- **Public Forum.** The statements were made in the public forum of the *Los Angeles Times* concerning a matter of public interest (subsection (e)(3)).

Once the defendants established that the anti-SLAPP statute applied, the burden shifted to Ruttlen to establish that she would probably prevail in this lawsuit.

Ruttlen Did Not And Cannot Show That She Will Probably Prevail On Her Claims. Even if one assumes the alleged statements by Cochran and Chernof were false and defamatory, Ruttlen cannot prevail against them because the statements are protected by three separate privileges set forth in Civil Code section 47.

- **Official-Duty Privilege.** Since both the statements to the Board and to the media were made as part of Cochran and Chernof's duties regarding the ongoing investigation, they are protected by the absolute privilege in section 47, subsection (a).

- **Official-Proceeding Privilege.** Since the statements were either part of or directly related to an official proceeding—the County's investigation—they are also protected by the absolute privilege in section 47, subsection (b).

- **Common-Interest Privilege.** Since the statements were made to further the common interests of the County and the public in understanding how this shocking incident could occur and how that reflected on the quality of medical care at MLK Hospital, and since Ruttlen did not show the statements were made with the requisite malice, the statements are also protected by the qualified privilege in section 47, subsection (c).

The County cannot be held liable either, because its liability here would be purely derivative. Ruttlen does not claim that the County made any defamatory statements apart from those made by Cochran and Chernof. Under the Government Code, the County can only be liable for a common law tort if a cause of action lies against one of its employees. (Gov. Code, § 815.2, subd. (a).) Since no cause of action can succeed against Cochran and Chernof because their alleged statements are privileged, the County is immune from liability for the common law tort of defamation.

As discussed more fully below, this Court should reverse the orders denying the defendants' anti-SLAPP motions.

STATEMENT OF MATERIAL FACTS

A. Ruttlen Is On Duty When Rodriguez Dies In The MLK Hospital Emergency Waiting Room.

On May 9, 2007, Edith Isabel Rodriguez ("Rodriguez") died of a gastrointestinal perforation while in the emergency room waiting area at MLK Hospital. (CT 6.)[2] Ruttlen was the triage nurse in the emergency department that night. (*Id.*) Given the recent spate of well-publicized problems at MLK Hospital, Rodriguez' death ignited a firestorm of controversy and public and media interest. (AA 67[¶22]; CT 6.)

B. Chernof And Cochran Are Involved In The County's Official Investigation Of Rodriguez' Death.

The Los Angeles County Board of Supervisors ("Board") began an investigation into the circumstances surrounding Rodriguez' death the next day, on May 10, 2007; the investigation ended approximately three weeks later. (AA 66[¶10].) The investigation was based, in part, on eyewitness accounts and police incident reports. (AA 67[¶21].) The County, through the Board, had the obligation to investigate, because MLK Hospital was a public facility whose sole and official governing body was the Board. (CT 35[¶6]; 38-39[¶5].)

The investigation was spearheaded by defendant Bruce Chernof, M.D., who was the Director of the County's Department of Health Services ("DHS") at the time and was responsible for the day-to-day operations of the County's hospitals. (CT 35-36[¶¶1,4,9].) Chernof's duties included

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[2] "CT" refers to the Clerk's Transcript filed in Case No. B208715. "AA" refers to the Appellants' Appendix submitted along with this brief. "RT" refers to the Reporters' Transcripts.

keeping the Board informed of events at MLK Hospital and of the results of the Rodriguez investigation, as well as managing the release of information about the investigation to the public and the media. (CT 35-36[¶¶4-7,9-11].) The County had a policy that to keep the public informed, it must promptly respond to media inquiries, including those concerning County investigations like the one into Rodriguez' death. (See Request for Judicial Notice, Ex. A, filed concurrently [Los Angeles County Code Policy No. 3.140].) In this context, it was Chernof's role to carry out that media policy. (AA 66[¶12].)

Defendant John R. Cochran, III, also had a key role as a liaison between DHS and the Board. As DHS' Chief Network Officer he was responsible for coordinating all administrative and operational activities of the County's hospitals and managing communications between the hospitals and the media. (CT 38[¶3].) In addition, Cochran was also responsible for keeping the Board apprised of any events or investigations concerning County hospitals, including the Rodriguez investigation. (CT 38-39[¶¶4-9].)

C. As Part Of Their Official Duties, Chernof And Cochran Brief The Board And The Media About The Results Of The Rodriguez Investigation, But Only After The Investigation Was Complete.

Both Chernof and Cochran did, in fact, report to the Board about the Rodriguez investigation during formal and informal executive sessions. (CT 36[¶¶9-11], 39[¶¶7-9].) After the investigation was complete, on June 15, 2007, Cochran provided one of those formal briefings to the Health Deputies for the Board of Supervisors. (AA 61-62[¶¶1,6], 70[¶8].) That special briefing, which was closed to the public but attended by the media,

had been triggered by the release of a report by a federal agency concerning its separate investigation of the Rodriguez incident. (AA 61-62[¶6].) In light of the federal report, the Board wanted to reassess the corrective action plan it had developed following the Rodriguez death. (*Id.*)

The County did not authorize the release of any information regarding Ruttlen's involvement in Rodriguez' death prior to the initiation of the investigation. (AA 66[¶15].) The County has policies expressly prohibiting such a disclosure. (AA 66[¶16].) In fact, the County, through Chernof and Cochran, did not release information to the media and public until the Rodriguez death had become a matter of public interest and until *after* the investigation was complete. (AA 66-67[¶¶17-18,22], 70[¶¶10-11].) The statements Cochran and Chernof made were based upon the investigation and were in furtherance of their official duties to inform the Board and the public about the results of the investigation. (AA 67[¶20].) Further, neither Cochran nor Chernof ever used Ruttlen's name when publicly referring to the Rodriguez investigation. (AA 71[¶12].)

D. The *Los Angeles Times* Publishes An Article About The Rodriguez Death That Mentions Ruttlen And Includes Comments Attributed To Chernof And Cochran.

The day after Cochran's special briefing, the *Los Angeles Times* published an article concerning the briefing and the Rodriguez matter. (CT 63.) The only comments in the article attributed to Chernof or Cochran were the following:

> Chernof put most of the blame on the night shift triage nurse, Linda Ruttlen. She turned away requests for help from police officers who had brought Rodriguez in from benches in front of the hospital, where she was crying for help. Ruttlen has been referred to the State Nursing Board for investigation. 'The majority of the

staff raised their concerns to the triage nurse,' Chernof said. 'My expectation is that if they didn't get the response that they wanted that they would have gone beyond that.' (*Ibid*.)

. . . . .

'It's really hard to explain how something this bad could happen,' John R. Cochran, the health department's chief deputy director, told deputies to the Board of Supervisors at a briefing Friday afternoon. 'Nobody faulted the policies in place. Nobody faulted the procedures in place. What they faulted was the person who failed to do the work,' he said, referring to Ruttlen. (*Ibid*.)

PROCEDURAL HISTORY

A. The County Files An Anti-SLAPP Motion To Strike Ruttlen's Defamation Claim, Which The Trial Court Denies; The County Appeals.

On December 26, 2007, Ruttlen filed a complaint against the County and Cochran asserting causes of action for defamation, declaratory relief, and wrongful termination. (CT 5-15.) On March 7, 2008, the County demurred to the wrongful termination and declaratory relief claims and filed a motion under the anti-SLAPP statute to strike the defamation claim.[3] (CT 4, 24-42.) As to the latter, the County argued that the anti-SLAPP statute applied because any alleged defamatory statement arose from the County's official investigation, and because Ruttlen would probably not prevail since the County's comments were privileged, true and not made

[3] Cochran was not a party to the motion or demurrer because of a dispute over service; on May 19, 2008, the parties stipulated to set aside the default that had been entered against him, and he agreed to accept service. (CT 3.)

with actual malice. (*Ibid*.) Ruttlen opposed the motion—relying solely on the *Los Angeles Times* article to establish what the alleged defamatory statements were. (CT 46-65.)

After the County filed a reply, on April 21, 2008, Judge Reginald Dunn (retired), sitting by designation in the department, sustained the demurrer with leave to amend, but denied the motion to strike. (CT 66-68; AA 1-27.) Judge Dunn's minute order read in pertinent part:

> The motion to strike is denied. The evidence before the court as presented in the moving papers indicates that plaintiff could prevail on her defamation claim based on her affidavit. Defendants did not provide rebuttal evidence indicating the truth of their representation to the media. (CT 66-67.)

On June 13, 2008, the County appealed from the order denying its motion to strike. (CT 102-106.)

B. Chernof and Cochran File An Anti-SLAPP Motion To Strike Ruttlen's Amended Complaint, Which The Trial Court Denies; They Appeal.

Meanwhile, on April 30, 2008, Ruttlen had filed a first amended complaint, having by then added Chernof as a defendant by doe amendment. (AA 28-34; CT 3.) The first amended complaint alleged causes of action for defamation and wrongful termination. (AA 28-34.) On May 27, 2008, all three defendants demurred to Ruttlen's cause of action for wrongful termination. (CT 3.)

Chernof and Cochran also filed an anti-SLAPP motion to strike Ruttlen's defamation and wrongful termination claims.[4] (AA 35-96.) They argued the anti-SLAPP statute applied because Cochran's statements to the Board and Chernof's comments in the *Los Angeles Times* article were connected to the County's official investigation into the Rodriguez matter and concerned a matter of public interest, namely the quality of medical care at MLK Hospital. (*Ibid*.) They further contended Ruttlen would probably not prevail, because their comments were privileged and not uttered with actual malice. (*Ibid*.) Ruttlen opposed their motion, again relying on the statements reported in the newspaper article. (AA 97-107.)

On July 21, 2008, Judge John S. Wiley, Jr., the regular judge in the department, ruled that "the special motion to strike is denied, as more fully reflected in the notes of the official court reporter incorporated herein by reference." (AA 135.) The reporter's transcript reveals Judge Wiley's reasoning:

> I believe I'm compelled to deny that motion [to strike] under Judge Dunn's order. I think that whole issue is controlled by the fact that Judge Dunn ruled on virtually identical issues. (7/21/08 RT 8:5-8.)

Judge Wiley also sustained the demurrer to the cause of action for wrongful termination without leave to amend, leaving only Ruttlen's cause of action for defamation at issue. (AA 135.) On August 27, 2008, Chernof and Cochran appealed the denial of their motion to strike. (AA 138-142.)

On September 26, 2008, this Court ordered their appeal and the County's to be consolidated for all purposes.

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[4] Ruttlen's two causes of action were closely related: her claim of wrongful constructive discharge was based on the "hostile work environment" created by the alleged defamation. (AA 31-32[¶¶15-16].)

STATEMENT OF APPEALABILITY

Orders denying special motions to strike are appealable pursuant to Code of Civil Procedure sections 425.16, subsection (j) and 904.1, subsection (a)(13). Both the County and the individual defendants' appeals are timely because they were filed within the sixty-day limit provided by Rule 8.104 of the California Rules of Court. (CT 102-106; AA 138-142.)

STANDARD OF REVIEW

Appellate courts review denials of anti-SLAPP motions *de novo*. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 845.) "Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 474.)

Whether a statement is privileged under Civil Code section 47, is an issue of law reviewed *de novo*. (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1139-1140.)

ARGUMENT

A SLAPP suit is "'a meritless suit filed primarily to chill the defendant's free exercise of First Amendment rights.'" (*People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 283, citation omitted.) The anti-SLAPP statute, Code of Civil Procedure section 425.16, was enacted to curtail such lawsuits and

"to encourage continued participation in matters of public significance." (Code Civ. Proc., § 425.16, subd. (a); *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 806.) "One of the purposes of the statute is to eliminate meritless litigation at an early stage." (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1113.)

In accordance with these goals, the anti-SLAPP statute authorizes defendants to file a special motion to strike "[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 or California Constitution in connection with a public issue . . . ." (Code Civ. Proc., § 425.16, subd. (b)(1).) The motion must be granted "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Ibid.*)

Thus, courts apply a two-part test to determine if the motion to strike should be granted. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e).'" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88, citation omitted.) Second, if so, the court "then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Ibid.*)

The only statements at issue in this lawsuit are those in the *Los Angeles Times* article attributed to Cochran and Chernof, then employees of the County. (CT 50, 52, 63; AA 101, 105.) Cochran's statements were made during a briefing to the Board's Health Deputies concerning the Rodriguez investigation. (CT 63.) Chernof's comments allegedly came in an

interview with newspaper reporters concerning the County's investigation and a related federal investigatory report. (*Ibid*.)

By every measure the defendants are entitled to prevail on their anti-SLAPP motions, because the statute applies to Cochran and Chernof's purported statements and Ruttlen can't prevail since those statements were privileged.

I. THE ANTI-SLAPP STATUTE APPLIES TO RUTTLEN'S COMPLAINT BECAUSE THE ALLEGED CONDUCT ARISES FROM PROTECTED ACTIVITY.

Defendants satisfy their burden of demonstrating that the challenged conduct arose from constitutionally protected activity by showing that the conduct was any of the following:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (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.

(Code Civ. Proc., § 425.16, subd. (e); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 58.)

To accomplish the purposes of the anti-SLAPP statute, the Legislature has mandated that "this section shall be construed broadly." (Code Civ. Proc., § 425.16, subd. (a); see also *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119.

The statements attributed to Cochran and Chernof fit all of the categories delineated in subdivision (e) and hence are protected by the anti-SLAPP statute. Significantly, neither Judge Dunn nor Judge Wiley ruled otherwise. (See CT 66-68 [Dunn denying County motion because Ruttlen might prevail on merits]; 7/21/08 RT 8:5-8 [Wiley denying the Cochran/Chernof motion because Dunn had denied County's motion].)

A. Cochran and Chernof's Statements Related Directly To The County's Official Rodriguez Investigation (§§ 425.16(e)(1) & (e)(2)).

Subsection (e)(1) of section 425.16 covers statements actually made in the course of certain proceedings and subsection (e)(2) covers statements made "in connection with" those proceedings. The proceedings may be legislative, executive, or judicial, or "any other official proceeding authorized by law." (Code Civ. Pro., § 425.16, subd. (e)(1) & (e)(2).) Courts have broadly defined an "official proceeding" to include a state audit of a medical research center at the University of California (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1048-1049); a private hospital's peer review proceedings (*Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 196); an employee's grievance proceeding (*Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1396-1399); and even the filing of a form with the National Association of Securities Dealers regarding reasons to terminate a broker (*Fontani v. Wells Fargo*

Investments, LLC (2005) 129 Cal.App.4th 719, 728-730, disapproved on another ground in *Kibler v. Northern Inyo County Local Hosp. Dist.*, *supra*, 39 Cal.4th at p. 203, fn. 5).

The Board's official investigation of Rodriguez's death easily fits under this broad definition of an "official proceeding."

Cochran's Statements. Cochran's statements were made in a special briefing concerning the Rodriguez investigation before the Board's Health Deputies. (CT 63; AA 61-62[¶¶1,6], 70[¶8].) The briefing, which was attended by the media, was triggered by the release of a report on a separate federal investigation into Rodriguez's death. (AA 61-62[¶6].) In light of the federal report, the Board through its Health Deputies had asked for the briefing to reassess the corrective action plan it had developed following Rodriguez's death. (*Ibid.*) Cochran's statements about the results of the investigation and the corrective actions taken were relayed by the Deputies to the Board. (AA 62[¶8].)

In opposing the County's motion, Ruttlen contended that recounting "what allegedly happened" to the Board's Deputies was not part of an official proceeding and so did not fall within the anti-SLAPP statute. (CT 94.) However, a county's board of supervisors clearly qualifies as a legislative or executive body. (See Cal. Const., art. XI, § 7 [counties may make local ordinances and regulations not in conflict with general law]; *People v. El Dorado County* (1857) 8 Cal. 58, 62 [duties of county supervisors "are various and manifold; sometimes judicial and at others, legislative and executive"].) Thus, a briefing before designated staff of the Board, to supply information for executive review by the Board, is tantamount to a legislative, executive or other official proceeding, and thus is covered by subsection (e)(1).

At the least, Cochran's statements were made "in connection with an issue under consideration" by the Board—the death of Rodriguez and a corrective action plan to prevent future similar events—and as such would be covered by subsection (e)(2). Significantly, Ruttlen's subsequent opposition to Cochran's motion fails to address his conduct and instead focuses on Chernof's reported statements to the *Los Angeles Times*. (AA 101-102.) Thus, Ruttlen effectively conceded that Cochran's conduct fell within the scope of the anti-SLAPP statute.

Chernof's Statements. Chernof's alleged statements to the *Los Angeles Times* were based upon the Rodriguez investigation and were not made until that investigation was complete and not until the incident had become a matter of public interest. (AA 66-67[¶¶17-18,20,22], 70[¶¶10-11].) His statements were thus "made in connection" with the County's investigation and are covered by subsection (e)(2).

Ruttlen argued below that Chernof's "interview" with the *Los Angeles Times*, unlike the official report by the U.S. Centers for Medicare and Medicaid Services, was not part of an official proceeding and so not covered by the anti-SLAPP statute. (CT 94; see also AA 101-102 [interview with press is not what section 425.16 was designed to address].) But the statute, and subsection (e)(2) specifically, is not so narrow; rather it extends protection to "*any*" statements 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." (Code Civ. Proc., § 425.16, subd. (e)(2), emphasis added.)

Thus, in a recent case, the court of appeal held that reporting to the media the results of an investigation falls within subsection (e)(2). (*Maranatha Corrections, LLC v. Department of Corrections and*

Rehabilitation (2008) 158 Cal.App.4th 1075, 1085 ("*Maranatha*").) In *Maranatha*, the director of the Department of Corrections had released to several newspapers a 14-page letter detailing the grounds for terminating plaintiff's contract, including misappropriation of funds. (*Id.* at pp. 1081-1082.) The court held that whether plaintiff had the right to retain the misappropriated funds was an "issue under consideration" by part of the executive branch of government. (*Id.* at p. 1085.)

In this case it cannot be doubted that Rodriguez' death and how it came about was an "issue under consideration" by the County. (AA 66[¶10].) Chernof's reported statements to the *Los Angeles Times* were "in connection with" the investigation in that he was conveying the results of the investigation. **(**Code Civ. Proc. § 425.16, subd. (e)(2); AA 66-67[¶¶17-18,20,22], 70[¶¶10-11].) Thus, Chernof's reported statements are no less protected by section 425.16, subsection (e)(2), than the sharing of information with the media in *Maranatha*.

And, indeed, the case for protection here is even stronger. Los Angeles County has a specific policy mandating that the County respond promptly and fully to media inquiries, including about official investigations such as the Rodriguez investigation. (Request for Judicial Notice, Ex. A.) In fact, it was one of Chernof's official duties as DHS Director to communicate with the media about events and investigations involving MLK Hospital. (AA 66-67[¶¶12,20].)

B. Cochran and Chernof's Statements Concerned An Issue Of Public Interest And Were Made In A Public Forum (§§ 425.16(e)(3) & (e)(4)).

Subsection (e)(3) of the anti-SLAPP statute protects statements made in a public forum in connection with a matter of public interest.[5] Cochran and Chernof's statements satisfy both of these elements.

1. There was intense public interest in the quality of medical care at MLK Hospital, as reflected by the Rodriguez incident.

When Rodriguez died in the emergency waiting room at MLK Hospital, the incident only stoked the already intense public interest in the quality of the medical care the County was offering there. (AA 67[¶22]; CT 6.)

Courts have ruled that similar issues qualified as a public issue under the anti-SLAPP statute. For example, *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424 revolved around a spate of racial brawls at Jefferson High School which ignited a firestorm of public interest.

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[5] The argument that subsection (e)(3) applies here was not made by the defendants below. "As a general rule issues not raised in the trial court cannot be raised for the first time on appeal. However, appellate courts have made exceptions to this rule . . . where the issue raised a pure question of law . . ." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 998-999, citations omitted, disapproved on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644.) Here, for purposes of this appeal the relevant facts are undisputed; the issue of whether subsection (e)(3) of the anti-SLAPP statute (public forum) applies is a purely legal question. (*ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at pp. 999, 1006-1007.)

(*Id.* at p. 1429.) In covering the story, the *Los Angeles Times* reported comments by school district officials that the high school principal would be replaced in the next month amid the criticism, instead of being allowed to retire in six months as planned. (*Ibid*.) The principal sued, but the court held that the principal's retirement plans and the district's personnel decisions directly related to the public issue of the student violence at Jefferson, and that thus the suit was covered by the anti-SLAPP statute. (*Id*. at pp. 1436-1437.)

Similarly, in *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, the court held the statute covered an e-mail by a medical staff executive to others in his hospital questioning the financial strength of a potential buyer of the hospital. (*Id.* at pp. 519-521.) Noting that the California Senate and Orange County Board of Supervisors had held hearings concerning the purchase of the hospital and three others and concerning the purchasers' financial strength, the court held it had "no difficulty placing the financial survival of four hospitals within the county into the category of 'widespread public interest.'" (*Id.* at pp. 523-524.)

The quality of medical care at MLK Hospital, as reflected in the Rodriguez investigation, was also the subject of government hearings and investigations regarding an institution vital to the community (CT 63, AA 66[¶10]) and is as patently a public issue as those in *Morrow* and *Integrated*. Thus, the statements of both Cochran and Chernof satisfy this element of subsections (e)(3) and (e)(4).

2. The statements were published in the public forum of the *Los Angeles Times*.

Cochran and Chernof's statements also satisfy the second

requirement of subsection (e)(3) because they were reported in a public forum, namely the *Los Angeles Times*. "A local newspaper that is a vehicle for public discussion constitutes a forum for public communication [under the statute]." (*Maranatha,* 158 Cal.App.4th at p. 1086 [contract termination letter published in various daily newspapers]; *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1161 [*Gay and Lesbian Times* qualifies as a public forum].)

Cochran's reported statements were first made in a special briefing to the Board's Health Deputies that was open to the press but not to the public, although the press was invited for the purpose of informing the public. (AA 61-62[¶6].) If those circumstances disqualify Cochran's statements from protection by subsection (e)(3) on the ground that where he originally made them was not a public forum within the meaning of the statute, the statements are nonetheless protected. Cochran's statements, and Chernof's statements for that matter, come under the umbrella of subsection (e)(4), which has no public forum requirement, only a public interest requirement that the statements clearly satisfied. (*See* Code Civ. Proc., § 425.16, subd. (e)(4).)

*** * * * ***

As the foregoing discussion demonstrates, the statements here satisfy one or more, if not all, of the categories of conduct protected by the anti-SLAPP statute. The burden was on Ruttlen to demonstrate a likelihood of prevailing on her claims, a burden she failed to carry.

II. RUTTLEN DID NOT AND CANNOT ESTABLISH A PROBABILITY OF PREVAILING; THE STATEMENTS BY COCHRAN AND CHERNOF ARE PRIVILEGED AND THUS COUNTY LIABILITY CANNOT BE BASED ON THEM.

Once a defendant has shown that the anti-SLAPP statute covers the plaintiff's claims, the trial court must grant the motion to strike unless the plaintiff demonstrates that she will probably prevail on her claims. (Code Civ. Proc., § 425.16, subd. (b)(1).) "Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Navellier v. Sletten, supra,* 29 Cal.4th at pp. 88-89, citation and internal quotations omitted.) This Ruttlen did not and cannot do, because Cochran and Chernof's statements are protected by various privileges in Civil Code section 47; since they cannot be held liable for defamation, neither can the County.

A. Cochran and Chernof's Statements Are Privileged.

Cochran's Statements: The only statements Ruttlen attributes to Cochran are ones he made in a special briefing to the Board's Health Deputies on the Rodriguez investigation: "'Nobody faulted the policies in place. Nobody faulted the procedures in place. What they faulted was the person who failed to do the work,' he said, referring to Ruttlen." (CT 63.)

Chernof's Statements: The only statements by Chernof that Ruttlen points to are the ones attributed to him in the *Los Angeles Times* article:

> Chernof put most of the blame on the night shift triage nurse, Linda Ruttlen. She turned away requests for help from police

> officers who had brought Rodriguez in from benches in front of the hospital, where she was crying for help. Ruttlen has been referred to the State Nursing Board for investigation. 'The majority of the staff raised their concerns to the triage nurse,' Chernof said. 'My expectation is that if they didn't get the response that they wanted that they would have gone beyond that.' (CT 63.)

Ruttlen argued below that these statements were false and caused her damage. (CT 47-48, 50, 52; AA 99, 101-102, 105.) That is beside the point. Even if the statements were false, if they were privileged, Ruttlen cannot prevail.

1. The official-duty privilege protects the statements here, because making them was an explicit part of Cochran and Chernof's official duties (Civ. Code § 47(a)).

"A privileged publication or broadcast is one made: (a) In the proper discharge of an official duty." (Civ. Code, § 47, subd. (a).) The privilege "'protects any statement by a public official, so long as it is made (a) while exercising policy-making functions, and (b) within the scope of his [or her] official duties.'" (*Maranatha*, 158 Cal.App.4th at p. 1087, citation omitted.) In *Royer v. Steinburg* (1979) 90 Cal.App.3d 490, the court held the official-duty privilege protected a motion passed by a school board at a meeting describing its reasons for demoting the superintendent.[6] (*Id*. at p. 501.) In *Copp v. Paxton* (1996) 45 Cal.App.4th 829, a county emergency

[6] Civil Code section 47 was amended in 1991, among other things to renumber the subdivisions. Accordingly, cases cited in Section II of this brief may refer to section 47, subdivisions (1), (2) or (3), rather than section 47, subdivisions (a), (b) or (c).

preparedness official criticized an earthquake expert in a staff memoranda. The court held that the official's distribution of the memorandum was a "discretionary act[] essential to the proper exercise of an executive function" and thus covered by the official-duty privilege. (*Id.* at p. 844.)

a. Cochran's statements.

As Chief Network Officer of DHS, Cochran qualifies as an executive official potentially protected by the official-duty privilege; his duties were to serve as a liaison between DHS and the Board and to keep the Board informed about events or investigations concerning County hospitals, including MLK Hospital. (CT 38-39[¶¶4-9].) Cochran carried out those duties by giving both official and unofficial briefings to the Board. (CT 39[¶¶7-9].) One of those official briefings occurred on June 15, 2007 before the Board's Health Deputies, and its purpose was to help the Board reassess and shape its corrective action plan. (AA 61-62[¶6], 70[¶8].) The quotation attributed to Cochran in the newspaper article—which forms a basis for Ruttlen's suit—was made during that briefing. (CT 63.) In making the statement, Cochran was carrying out his official duties and helping to shape policy regarding the County's healthcare delivery system.

The public policy behind the official-duty privilege is to encourage officials like Cochran "to engage in frank and open communication on important public issues in order to function effectively in the offices entrusted to them." *Copp v. Paxton*, *supra*, 45 Cal.App.4th at p. 843.) It should extend, therefore, to Cochran's statements to the Health Deputies.

b. Chernof's statements.

A number of courts have held that relaying information to the press about official investigations or actions comes under the purview of the official-duty privilege as well. In *Maranatha*, the corrections department director released to the press his 14-page letter concerning his investigation and termination of a public contract due to misappropriation of public funds. The court held this came within the official-duty privilege, because the director "had a 'duty to communicate with the press.'" (*Maranatha*, 158 Cal.App.4th at pp. 1088-89.) Similarly, in *Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, the court held that a city attorney's speech before a local Democratic Club about pending litigation that was posted on the city's website was privileged. (*Id.* at pp. 607, 613, 615.) Finally, in *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, a district attorney's press release detailing the findings of an investigation into the alleged Brown Act violations by a school board was protected by the official-duty privilege. (*Id.* at pp. 1284, 1293-1294.)

Chernof's purported statements to the press are absolutely protected by the privilege as well. As the Director of DHS, part of Chernof's duties was to be a point man with the media to keep the public informed about important events at DHS, including the Rodriguez investigation. (CT 35-36[¶¶4-7,9-11].) Indeed, as mentioned, the County Code has a policy that requires the County to keep the public informed by promptly responding to media inquiries. (Request for Judicial Notice, Ex. A.) Chernof's comments to the media were in furtherance of County policy and were an explicit part of his executive duties. (AA 66[¶12].) If the department director in *Maranatha* was protected by the official-duty privilege, Chernof must be as

well for the interview he gave—he too had a duty to communicate to the press.

*** * * * ***

Ruttlen did not show she would probably prevail and, in fact, has no chance of prevailing against the defendants, because Cochran and Chernof's statements are absolutely protected under the official-duty privilege. On this basis, their anti-SLAPP motion should have been granted.

2. The official-proceeding privilege also protects Cochran and Chernof's statements, because the statements were made as part of or in relaying the results of the official Rodriguez investigation (Civ. Code § 47(b)).

The official-proceeding privilege protects communications made "[i]n any (1) legislative proceeding, (2) judicial proceeding, [or] (3) in any other official proceeding authorized by law." (Civ. Code, § 47, subd. (b).) "[T]he 'official proceeding' privilege has been interpreted broadly to protect communications to or from governmental officials which may precede the initiation of formal proceedings." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 156, emphasis and citations omitted.) Thus, it extends to communications that are part of the investigatory activities of public agencies. (*Garamendi v. Golden Eagle Ins. Co.* (2005) 128 Cal.App.4th 452, 478; see also *Braun v. Bureau of State Audits* (1998) 67 Cal.App.4th 1382, 1389-1390 ["statements made in furtherance" of state investigative audit covered by official-proceeding privilege]; *Block v. Sacramento Clinical Labs, Inc*. (1982) 131 Cal.App.3d 386, 393-394 [coroner's report to district attorney during investigation as to whether to

initiate criminal charges subject to official-proceeding privilege].) Consistent with the broad interpretation of this privilege, "any doubt as to whether the necessary connection between the publication [or communication] and the [proceeding] exists is to be resolved in favor of a finding of privilege." (*Brody v. Montalbano* (1978) 87 Cal.App.3d 725, 733.)

a. Cochran's statements.

Official proceedings include those "within and before county boards of supervisors." (*Young v. County of Marin* (1987) 195 Cal.App.3d 863, 872.) Thus, on its face, section 47, subdivision (b), covers Cochran's statements during a formal briefing to the Board's Health Deputies: Those statements were made in a "legislative proceeding" or an "official proceeding." Cochran was reporting on the County's official investigation and its corrective action plan for MLK Hospital, which was requested by the Board so that it could reassess the plan in light of the release of a report from a parallel federal investigation. (AA 61-62[¶¶6-7].) Cochran's report to the Board, through its Health Deputies, also described the circumstances surrounding Rodriguez's death. (AA 61-62[¶¶6-7], 70[¶8].) Even if this formal briefing is not deemed to be a legislative proceeding in the technical sense because it was not directly before the Board, but before deputies acting for the Board, the briefing was nonetheless an official government proceeding intended to address a matter under consideration by the Board. (AA 61-62[¶¶6-8]; see *Young v. County of Marin, supra,* 195 Cal.App.3d at p. 873 ["the privilege extends to preliminary communications to boards or agencies designed to induce or influence their actions"].)

An examination of a few similar cases drives the point home. In

Scott v. McDonnell Douglas Corp. (1974) 37 Cal.App.3d 277, the court held that the reading and distribution of letters at a Santa Monica City Council meeting relating to the performance and retention of a public employee were privileged under section 47, subdivision (b). (*Id*. at pp. 285-286.) In *Young v. County of Marin, supra*, the county administrator's recommendation at a board of supervisors meeting that the public defender be discharged was a privileged communication in an official proceeding. (195 Cal.App.3d at p. 873; see also *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1439 [statements to civil service commission to support recommendation of discipline of public employee were privileged].)

Cochran's communications to the Board's deputies cannot be distinguished in any meaningful way from the communications at issue in these cases. Further, Cochran's statements were part and parcel of the investigatory activities of the Board surrounding the death of Rodriguez. Sound policy compels the conclusion they be afforded an absolute privilege to assure public authorities receive the information needed to do their jobs. (See *Braun v. Bureau of State Audits, supra*, 67 Cal.App.4th at p. 1390, citation omitted [privilege for statements made in governmental investigations is "to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing"].) Thus, Cochran's statements to the deputies are absolutely privileged under section 47, subdivision (b).

b. Chernof's statements.

Chernof's alleged statements to the *Los Angeles Times* are also protected by the official-proceeding privilege. The Board—the public's elected representatives—undertook to investigate Rodriguez' death, it can

fairly be said, on behalf of the public to better safeguard the public's health and welfare; communicating the results of the investigation to the public through the media is thus as integral to the investigative process as any other part of the investigation. That is why an explicit part of Chernof's job was to relay the results of the Rodriguez investigation to the public and the media, which he carried out with his brief comments at issue here. (CT 35-36[¶¶4-7,9-11]; AA 66-67[¶¶12,20].)

Moreover, County Policy No. 3.140 mandated that the County respond promptly to media inquiries for information about County government, such as about ongoing County investigations. (Request for Judicial Notice, Ex. A.) Chernof's statements to the media were made in furtherance of that policy. (AA 66-67[¶¶12,20].) In *Braun v. Bureau of State Audits, supra,* the court held that the state auditor's release of a 73-page investigatory report to the media was covered by the official-proceeding privilege, because the statute pursuant to which the audit was done at least implicitly allowed public disclosure of the report. (67 Cal.App.4th at pp. 1386, 1392.) Similarly, County policy not only allowed but mandated disclosure of information about County government to the public, including the results of the Rodriguez investigation; so, similarly, Chernof's statements to the media about the Rodriguez investigation as part of his official duties and in furtherance of County policy come under the absolute, official-proceeding privilege.

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In sum, the privilege afforded by Civil Code section 47, subdivision (b), is another reason Ruttlen cannot prevail in her suit against Cochran and Chernof, and an additional reason their motion to strike should have been granted.

3. The common-interest privilege also protects these statements, because they directly served the common interests of the Board, Chernof and Cochran, and the public to understand the results of the Rodriguez investigation (Civ. Code § 47(c)).

"A privileged publication or broadcast is one made: . . . (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." (Civ. Code, § 47, subd. (c).)

"Communications made in a commercial setting relating to the conduct of an employee have been held to fall squarely within the qualified privilege for communications to interested persons." (*Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 995.) The common-interest privilege has been afforded to public employers and agencies as well. (*Toney v. State of California* (1976) 54 Cal.App.3d 779, 793 [public university disciplinary proceeding]; *White v. State of California* (1971) 17 Cal.App.3d 621, 628 [state criminal identification bureau's distribution of erroneous information about plaintiff privileged].) A wide variety of investigations, reports and statements regarding employees have been protected by this privilege:

- A written report submitted by a supervisory committee to the board of directors that included statements that plaintiff was receiving kickbacks, incorrectly reporting his expenses and keeping irregular office hours, which eventually led to his termination. (*Cuenca v.*

Safeway, supra, 180 Cal.App.3d at p. 996.)

- A memorandum written by plaintiff's supervisor regarding an investigation of a sexual harassment complaint against plaintiff. (*Bierbower v. FHP, Inc.* (1999) 70 Cal.App.4th 1, 3-4.)
- An investigatory report authored by a private investigator hired by the employer that concluded that plaintiff had engaged in ticket manipulation in his job as an airport parking lot cashier. (*Ghebreselassie v. Coleman Sec. Service* (9th Cir. 1987) 829 F.2d 892, 894, 898.)
- A written report by an investigative agency employed by defendant employer that inferred that plaintiff might have committed unethical acts, which led to plaintiff not being hired. (*Freeman v. Mills* (1950) 97 Cal.App.2d 161, 165, 169.)
- Allegedly slanderous statements accusing an employee of theft made by defendants to two insurance adjusters who referred business to defendants. (*Williams v. Taylor* (1982) 129 Cal.App.3d 745, 752.)

The hallmark of all these reports and statements is that they "'were of a kind reasonably calculated to protect or further a common interest of both the communicator and the recipient'." (*Ibid*., citation omitted.)

a. Cochran's statements.

Cochran's statements to the Health Deputies regarding the Rodriguez investigation were, of course, reasonably calculated to further their common interest—to gather information regarding how the County should respond to

the allegations of mismanagement and bad medical care at MLK Hospital as reflected in the Rodriguez incident, as well as to respond to the findings put forth in the report on the parallel federal investigation. (AA 61-62[¶¶6-7], 70[¶8].)

California courts have broadly defined what constitutes a common interest. In *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, the court ruled that a report distributed by defendant church to parents of youth group members at a meeting concerning the church's investigation of allegations that plaintiff engaged in an inappropriate relationship with one of the youth group members was privileged, because it concerned a common interest between church members on church matters, even if a few of the parents present at the meeting were not church members. (*Id.* at pp. 1556-1557.)

And in *Institute of Athletic Motivation v. University of Illinois* (1980) 114 Cal.App.3d 1, a university professor sent a four-page letter to professional athletic organizations and sports magazines that criticized a questionnaire sold by plaintiffs that was administered to coaches and athletes purportedly to identify certain personality traits predictive of athletic success. (*Id.* at p. 5.) The court of appeal held the letter was privileged, because it was communication between parties who were all interested in the reliability of this questionnaire. (*Id.* at pp. 12-13.)

Here, the communication was between parties sharing an interest in investigating and gathering information regarding the allegations of mismanagement and bad medical care at MLK Hospital as reflected in the Rodriguez incident, as well as in responding to the findings put forth in the report on the parallel federal investigation. The fact that the press was present does not defeat the privilege, because the public too shared an

interest in this issue. (See infra, § I.B.1.)

b. Chernof's statements.

Chernof's comments to the media also served the common interests of the public and the County to understand what the County had found and what it intended to do about the Rodriguez incident and about the state of medical care at MLK Hospital. Courts have held that statements to the press about public employees are protected by the common-interest privilege. In *Toney v. State of California, supra*, 54 Cal.App.3d 779, a public university issued a press release concerning a disciplinary action it took against plaintiff professor. (*Id.* at pp. 792-793.) The plaintiff there "concede[d]" that the common-interest privilege applied, underscoring its broad reach and why it applies to Chernof's statements. In *Toney*, however, plaintiff was able to establish that the university acted with malice in issuing the press release. (*Id.* at pp. 793-794.) The same cannot be said here: Ruttlen did not and cannot establish the requisite malice.

c. Lack of malice.

The common-interest privilege is not absolute; it can be overcome by a showing of malice. (Civ. Code, § 47, subd. (c).) But our Supreme Court ruled that "it is the plaintiff who bears the burden of proving that the statement was made with malice." (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1196, italics omitted.) "'The malice necessary to defeat a qualified privilege' is . . . that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth." (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413, original emphasis, citation omitted; accord *Lundquist v.*

Reusser, supra, 7 Cal.4th at p. 1213.) "However, negligence is not malice. 'It is not sufficient to show that the statements . . . were inaccurate, or even unreasonable. Only willful falsity or recklessness will suffice.'" (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 931, citation omitted.)

Ruttlen put forth no evidence that Cochran or Chernof acted with some personal ill will toward her or without reasonable grounds for believing their statements were true, and thus she cannot overcome the common-interest privilege. She charges that the County was trying to scapegoat her for the Rodriguez incident (CT 6, 46-48), but that conclusory assertion is not *evidence* of a malicious state of mind on the part of either Cochran or Chernof. Malice focuses on the speaker's state of mind regarding the target of the statement or concerning the veracity of his statements. Cochran and Chernof's statements were based *entirely* on the County's Rodriguez investigation, an investigation based on eyewitness accounts and police incident reports (AA 67[¶21]); since that is so, it cannot be said, and there is no evidence, that Cochran and Chernof lacked reasonable grounds for believing their statements to be true or that they were motivated by personal spite against Ruttlen to speak out on her conduct.

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Thus, on this additional basis Ruttlen cannot prevail on her claims against Cochran and Chernof, and their anti-SLAPP motion should have been granted.

B. Since Ruttlen Cannot Prevail Against Cochran And Chernof, She Cannot Prevail Against The County.

Government Code section 815, subdivision (a), provides that a public entity is not liable for injury "except as otherwise provided by statute." In other words, it cannot be held directly liable for a common law tort such as defamation. However, a public entity may be held vicariously liable for torts committed by its employees under Government Code, section 815.2, subdivision (a), which provides that a public entity is liable "for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment *if the act or omission would, apart from this section, have given rise to a cause of action against that employee . . . .*" (Gov. Code, § 815.2, subd. (a), emphasis added; see also *Nadel v. Regents of University of California* (1994) 28 Cal.App.4th 1251, 1259, original emphasis ["a public entity may be held vicariously liable for the conduct of its employees acting within the scope of their employment, but *only* to the extent that the employees may be held liable"].)

The only defamatory statements at issue in this case are those allegedly made by Cochran and Chernof. (CT 5-15, 43-65; AA 29-31, 97-107.) Since the County's liability is dependent on that of Cochran and Chernof, and since Civil Code section 47 protection immunizes their conduct, that protection necessarily extends to the County. Ruttlen therefore cannot prevail against any of these defendants, including the County, and both anti-SLAPP motions should have been granted.

CONCLUSION

Ruttlen's cause of action for defamation fits neatly under the anti-SLAPP statute. Ruttlen has no chance of prevailing, because Cochran and Chernof's statements are privileged.

Indeed, a Court of Appeal recently summed up succinctly why the anti-SLAPP statute and privileges do and should apply to Ruttlen's case:

> In order for government to function effectively, state officials must have the freedom to make tough policy decisions and tell the public about the reasons behind those decisions, without fear that their statements will expose them to tort liability. (*Maranatha*, 158 Cal.App.4th at p. 1079.)

This Court should reverse the denial of both the County and the individual defendants' anti-SLAPP motions with directions to dismiss Ruttlen's complaint and award the defendants their costs and attorneys' fees in the trial court and on appeal.

Dated: December 15, 2008

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CERTIFICATION

Pursuant to California Rules of Court, 8.204, subdivision (c), I certify that this **APPELLANTS' OPENING BRIEF** contains 8,523 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: December 15, 2008

_____

Jens B. Koepke