NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PIERRE DANIEL,

Plaintiff and Appellant,

v.

MARLON WAYANS,

Defendant and Respondent.

B261814
Consolidated with B263950

(Los Angeles County
Super. Ct. No. BC555610)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Rafael A. Ongkeko, Judge. Affirmed.

Reisner & King, Adam J. Reisner, Tessa M. King; Benedon & Serlin, Douglas G. Benedon and Melinda W. Ebelhar for Plaintiff and Appellant.

Venable, William J. Briggs II, Celeste M. Brecht and Eric J. Bakewell for Defendant and Respondent.

Pierre Daniel, an actor, sued Marlon Wayans, a comedian and movie producer, asserting claims arising from two incidents: (1) Wayans's comments and expressive conduct directed at Daniel during the production of the movie, A Haunted House 2; and (2) Wayans's use of an Internet website to juxtapose a photograph of Daniel and the image of a cartoon character along with Wayans's comments comparing the two. Wayans filed an anti-SLAPP motion (Code Civ. Proc., § 425.16)[1] to strike the complaint. The trial court granted the motion and awarded Wayans his attorney fees. In February 2017, we affirmed both rulings in *Daniel v. Wayans* (2017) 8 Cal.App.5th 367 (*Daniel*).

Our Supreme Court granted review and subsequently transferred the case to this court for reconsideration in light of *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133 (*FilmOn*) and *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871 (*Wilson*). (See Cal. Rules of Court, rule 8.528(d).) We have reviewed the parties' supplemental briefs, and, after reconsidering our opinion in light of *FilmOn* and *Wilson*, we again affirm the trial court's rulings.

STATEMENT OF FACTS

Our prior opinion in *Daniel*, *supra*, 8 Cal.App.5th 367 sets forth the relevant facts and procedural history, which are incorporated here.

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[1] Unless otherwise specified, subsequent statutory references are to the Code of Civil Procedure.

DISCUSSION

A. *FilmOn.com Inc. v. DoubleVerify Inc.*

In *FilmOn, supra,* 7 Cal.5th 133, FilmOn.com Inc., "a for-profit business entity that distributes web-based entertainment programming," sued DoubleVerify Inc., a "for-profit business entity that offers online tracking, verification and 'brand safety' services to Internet advertisers." (*FilmOn, supra,* 7 Cal.5th at p. 140.) FilmOn alleged that DoubleVerify issued confidential reports to its clients that disparaged FilmOn's business. (*Ibid.*) DoubleVerify filed an anti-SLAPP motion and argued that its reports constituted protected speech under the anti-SLAPP statute's "catchall" category of protected activity, which protects " '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.' " (*Id.* at pp. 139–140, 142, quoting § 425.16, subd. (e)(4).)

In opposing the motion, FilmOn argued that DoubleVerify's reports were not connected with a public issue or an issue of public interest because it provided its reports only to DoubleVerify's paying clients, who must keep them confidential. (*FilmOn, supra,* 7 Cal.5th at p. 142.) The trial court rejected this argument and granted the motion. The Court of Appeal affirmed, explaining that " '[n]either the identity of the speaker nor the identity of the audience affects the content of the communication, or whether that content concerns an issue of public interest.' " (*Ibid.*)

The Supreme Court "granted review to decide if and how the context of a statement—including the identity of the speaker, the audience, and the purpose of the speech—informs a court's determination of whether the statement was made 'in furtherance

of' free speech 'in connection with' a public issue." (*FilmOn*, *supra*, 7 Cal.5th at pp. 142–143.)

The Court held that "within the framework of section 425.16, subdivision (e)(4), a court must consider the context as well [as] the content of a statement in determining whether that statement furthers the exercise of constitutional speech rights in connection with a matter of public interest." (*FilmOn*, *supra*, 7 Cal.5th at p. 149.) That subdivision, the Court explained, "calls for a two-part analysis. . . . First, we ask what 'public issue or . . . issue of public interest' the speech in question implicates—a question we answer by looking to the content of the speech. (§ 425.16, subd. (e)(4).) Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest." (*FilmOn*, *supra*, 7 Cal.5th at pp. 149–150.) That relationship "demands 'some degree of closeness' between the challenged statements and the asserted public interest. . . . '[I]t is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate.' " (*Id.* at p. 150.)

In determining whether statements contribute to the public debate, the Court explained, courts do not undertake "a normative evaluation of the substance of the speech," or consider its "social utility . . . or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest." (*FilmOn*, *supra*, 7 Cal.5th at p. 151.) This inquiry, the Court added, requires consideration of the context of the statements, "including audience, speaker, and purpose." (*Id.* at pp. 151–152.)

Applying these principles to the facts before it, the Supreme Court explained that, although the *content* of DoubleVerify's reports involved issues of public interest—such as "the various actions of [FilmOn's] prominent CEO" (*FilmOn*, *supra*, 7 Cal.5th at p. 152) and the issue of children's exposure to sexually explicit media content—the *context* of the report showed that they did not contribute to the public debate on such issues. (*Ibid.*) Most importantly, the defendant's reports were made "privately, to a coterie of paying clients," who used them "for their business purposes alone. The information never entered the public sphere, and the parties never intended it to." (*Id.* at p. 153.) Accordingly, the defendant's report about the plaintiff did not come within the protection of the anti-SLAPP statute. (*Id.* at p. 154.)

B. *Wilson v. Cable News Network, Inc.*

In *Wilson*, *supra*, 7 Cal.5th 871, the plaintiff, Stanley Wilson, was a former writer and producer with Cable News Network (CNN). CNN allegedly made various adverse employment decisions against Wilson and eventually terminated his employment after determining that he committed plagiarism. Wilson sued CNN alleging unlawful discrimination, retaliation, and defamation. CNN filed an anti-SLAPP motion, which the trial court granted. The Court of Appeal reversed, and the Supreme Court granted review.

The Supreme Court addressed a split among the Courts of Appeal "over whether, in an employment discrimination or retaliation case, the employer's alleged motive to discriminate or retaliate eliminates any anti-SLAPP protection that might otherwise attach to the employer's employment practices." (*Wilson*, *supra*, 7 Cal.5th at p. 883.) The Court held that it does not. For "anti-SLAPP purposes discrimination and retaliation claims arise

from the adverse actions allegedly taken, notwithstanding the plaintiff's allegation that the actions were taken for an improper purpose. If conduct that supplies a necessary element of a claim is protected, the defendant's burden at the first step of the anti-SLAPP analysis has been carried, regardless of any alleged motivations that supply other elements of the claim." (*Id.* at p. 892.)[2]

Although the plaintiff's allegations of defendant's improper motive are not dispositive at the first step of the anti-SLAPP analysis, courts may consider the defendant's reason for taking the challenged actions to determine whether the acts were made to further the defendant's exercise of its free speech rights. (*Wilson, supra*, 7 Cal.5th at p. 889.) Thus, although CNN's termination of Wilson's employment was not "itself speech," it may be afforded anti-SLAPP protection if the act was made in furtherance of CNN's free speech rights. (*Id.* at pp. 892–893.) The Court explained that although a news organization's staffing decisions may, in some cases, implicate the organization's constitutional rights and anti-SLAPP protections (see, e.g., *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1527), CNN failed to show that Wilson's role at CNN was such that the adverse actions taken against him "warrant[ed] protection under the anti-SLAPP statute" on that basis. (*Wilson, supra*, 7 Cal.5th at p. 896.)

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[2] Our opinion in *Daniel*, the Court noted, is among the decisions that "correctly recognized that the text of the anti-SLAPP statute and [the Supreme Court's] precedent require a court at the first step to examine the defendant's actions without regard to the plaintiff's allegations about the defendant's motives." (*Wilson, supra*, 7 Cal.5th at p. 889, fn. 7.)

The Court came to a different conclusion as to CNN's explanation that it terminated Wilson because of his plagiarism. Disciplining an employee for violating ethical standards against plagiarism, the Court explained, "furthers a news organization's exercise of editorial control to ensure the organization's reputation, and [preserves] the credibility of what it chooses to publish or broadcast." (*Wilson, supra*, 7 Cal.5th at p. 898.) To that extent, CNN's decision "qualifies as 'conduct in furtherance' of CNN's 'speech in connection with' public matter." (*Ibid.*)

The *Wilson* Court also considered whether CNN met its first step burden with respect to Wilson's defamation claim. That claim was based on allegations that CNN had told prospective employers and others that Wilson had committed plagiarism in violation of CNN's standards and practices. (*Wilson, supra*, 7 Cal.5th at p. 882.) CNN argued that its statements about Wilson were statements made in connection with an issue of public interest—namely, Wilson's professional competence and his plagiarism. The Supreme Court rejected the argument. Although "a statement . . . about a person or entity in the public eye may be sufficient . . . to establish [that] the statement is 'free speech in connection with a public issue or an issue of public interest,' " the Court explained that Wilson "is not a figure so prominently in the public eye that any remark about him would qualify as speech on a matter of public concern." (*Id.* at pp. 901–902.)

CNN also argued that its discussion of the reasons for Wilson's termination—Wilson's plagiarism—implicates the issues of journalistic ethics generally, which is an issue of public concern. (*Wilson, supra*, 7 Cal.5th at p. 902.) The Court rejected this argument, stating: "CNN's alleged statements about an isolated plagiarism incident did not contribute to public debate about when authors may or may not borrow without attribution. 'What a court

scrutinizing the nature of speech in the anti-SLAPP context must focus on is the speech at hand, rather than the prospects that such speech may conceivably have indirect consequences for an issue of public concern.' " (*Id.* at p. 903.)

Citing *FilmOn*, the *Wilson* Court also pointed to "the private context [of] the alleged statements." (*Wilson*, *supra*, 7 Cal.5th at p. 903.) That context, the Court stated, "makes heavier CNN's burden of showing that . . . the alleged statements . . . contributed to discussion or resolution of a public issue for purposes of subdivision (e)(4)." (*Ibid.*) CNN did not satisfy that burden, and the Court concluded that "CNN's privately communicated statements about Wilson's purported violation of journalistic ethics do not constitute 'conduct in furtherance of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest.' " (*Id.* at p. 904.)

C. *The On-Set Comments and Conduct*

Regarding the claims arising from Wayans's on-set conduct, we held in *Daniel* that Wayans had met his burden of making a prima facie showing that his alleged conduct fell within the definition of the catchall provision in subdivision (e)(4) of section 425.16. (*Daniel*, *supra*, 8 Cal.App.5th at p. 387.) As we explained: "Wayans submitted evidence that the making of A Haunted House 2 was an issue of public interest. Wayans is a popular and prolific entertainer—since 1988, Wayans has acted in 21 films; since 1991, he has acted in 13 different television shows, specials, or movies; since 1992, he has written or co-written 16 different films and/or television movies or shows; and since 1996, he has produced or served as an executive producer of 13 different films and/or television movies or shows. The longevity and breadth of Wayans's career demonstrate continuing public interest in his

work. In addition, many of Wayans's projects 'involve making fun of pop culture, racial stereotypes, [and] current events,' adding to the public's interest in his work. In light of Wayans's extensive body of work and the subject matter of that work, A Haunted House 2 falls easily within the anti-SLAPP statute's definition of an 'issue of public interest.' " (*Id.* at p. 386.)

FilmOn requires a two-step analysis in evaluating whether challenged statements were made "in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) First, we identify the issues of public interest implicated by the challenged conduct. (*FilmOn, supra*, 7 Cal.5th at p. 149.) This part of the test was not new, and *FilmOn* "did not announce any change in the approach that courts should take to identifying issues of public interest." (*Serova v. Sony Music Entertainment* (Jan. 8, 2020, B280526) __ Cal.App.5th __ [2020 WL 90627 at p. *8].) As the preceding excerpt from *Daniel* shows, issues of public interest implicated by the challenged conduct include the making of A Haunted House 2, Wayans's popularity and celebrity as an entertainer, Wayans's comedic style of making fun of pop culture, racial stereotypes, and current events, as well as the use of the term "nigga."

Next, *FilmOn* directs courts to "ask what functional relationship exists between the speech and the public conversation about some matter of public interest." (*FilmOn, supra*, 7 Cal.5th at pp. 149–150.) The relationship must be one in which the speech "contributes to—that is, 'participat[es]' in or furthers—some public conversation on the issue." (*Id.* at p. 151.) Determining whether the speech makes such a contribution does not depend upon "the social utility of the speech," but requires consideration of its context, including the speaker, the audience, and the purpose of the speech. (*Id.* at pp. 151–152.)

Here, the speaker is Wayans—himself a person of public interest—and the purpose of the challenged speech was to foster and further the improvisational and creative process Wayans used to write and produce A Haunted House 2. By frequently using the term "nigga" in the off-camera development of the movie and in the movie itself, Wayans directly contributed to the public conversation about that controversial word and how it may be used. Although the audience for the specific conduct that is the focus of Daniel's complaint was initially limited to those working on the set of A Haunted House 2 at the time, that conduct contributed to the development of Daniel's character as "Cleveland," which was ultimately incorporated into the movie. In contrast to the reports challenged in *FilmOn*, there is nothing to suggest that the statements made to Daniel were intended to be private or "confidential." (*FilmOn*, *supra*, 7 Cal.5th at p. 154.) Thus, although our prior decision did not explicitly address the context of the challenged speech as such, our post-*FilmOn* examination of that context shows that Wayans established the requisite functional relationship between the challenged conduct and issues of public interest.

The Supreme Court's decision in *Wilson* further supports the conclusions we reached in *Daniel*. *Wilson* resolved the split among the Courts of Appeal as to how employment discrimination and retaliation cases are analyzed under the anti-SLAPP statute. As *Wilson* acknowledged, our decision in *Daniel* properly "examine[d] the defendant's actions without regard to the plaintiff's allegations about the defendant's motives." (*Wilson*, *supra*, 7 Cal.5th at p. 889, fn. 7.) Beyond this point, *Wilson* appears to provide little guidance for this case.

Daniel draws a comparison to *Wilson* in asserting that Wayans is relying on the fact that the alleged harassment took place on a movie set in the same way that CNN relied on the fact that its unlawful employment decisions were made by a news organization. Just as mere staffing decisions at a news organization do not ordinarily implicate the organization's First Amendment rights, Daniel contends that harassment on a movie set does not constitute protected activity under the anti-SLAPP statute. Wayans's alleged "harassment," however, was not mere staffing decisions, but his statements and expressive conduct, which were, as discussed above, related to issues of public interest.

The *Wilson* Court's treatment of Wilson's defamation claim is also distinguishable from the situation before us. Although Wilson's defamation claim was based on statements CNN made to others, the statements were made in a "private context" about "an isolated plagiarism incident." (*Wilson*, *supra*, 7 Cal.5th at p. 903.) CNN, unlike Wayans in this case, did not show that its statements contributed to discussion of public issues. (*Ibid.*)

D. *Internet Post*

Wayans's Internet post juxtaposing the photograph of Daniel and the Cleveland Brown cartoon figure, we held, was protected under subdivision (e)(3) of section 425.16, which includes "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." (§ 425.16, subd. (e)(3); *Daniel*, *supra*, 8 Cal.App.5th at pp. 387–388.) The statements were made in a "public forum," we explained, because they were posted on Wayans's Twitter account, which "had more than one million followers." (*Id.* at p. 387.)

We further held that Wayans had satisfied his burden of making a prima facie showing that the Internet post was connected with an issue of public interest, explaining "the posting at issue references a Twitter account that had more than one million followers (and, per Wayans's declaration, an Instagram account) for the movie A Haunted House 2, as well as Wayans's Whatthefunny website. . . . Wayans is a popular actor, writer, and producer with many films and television shows to his credit. Moreover, A Haunted House 2 was a sequel to A Haunted House (IM Global Octane 2013), which apparently was sufficiently popular and profitable to lead to financing and production of a sequel. According to Wayans's declaration, when A Haunted House 2 was released, it played in 2,310 theaters and grossed $8.8 million in its first week. [¶] Accordingly, advance information from Wayans about the making of A Haunted House 2, including a photo of someone acting in the film, constitutes a topic of public interest, even though Daniel himself may not have been known to the public. The post both referred to a topic of widespread public interest (the film) and contributed to the public 'debate' or discussion regarding the film by giving fans and those interested a glimpse of someone in the film." (*Daniel, supra*, 8 Cal.App.5th at pp. 387–388.)

In his supplemental brief, Wayans addresses Daniel's Internet posting claim only to point out that our holding in *Daniel* was based on subdivision (e)(3) of section 425.16, and that neither *Wilson* nor *FilmOn* are applicable because they addressed the catchall provision under subdivision (e)(4) of section 425.16. Daniel, in his supplemental brief, does not attempt to apply *Wilson* or *FilmOn* to the Internet posting claim.

Although *FilmOn* and *Wilson* involved subdivision (e)(4) of section 425.16, we disagree with *Wayans* that they would have no bearing on a case involving subdivision (e)(3). *FilmOn*, in

particular, was concerned with the interpretation of the phrase, " 'in connection with an issue of public interest,' " a phrase that appears in both subdivisions. (See *Serova v. Sony Music Entertainment, supra*, __ Cal.App.5th __ [2020 WL 90627 at p. *7, fn. 8] [*FilmOn*'s "analysis of the importance of context in determining whether such a connection exists therefore appears equally applicable to section 425.16, subdivision (e)(3)."].)

As with the claims arising from Wayans's on-set conduct, the context of Wayans's actions established the requisite connection between the challenged speech—Wayans's Twitter posting comparing Daniel and the cartoon character—and the public conversation concerning a public issue—A Haunted House 2. Wayans, the speaker, is a celebrity using the comparison to promote his movie to his audience of more than one million Twitter followers. There is nothing private or confidential about his actions. The analysis of the speech's context, pursuant to *FilmOn*, therefore, further supports our conclusion in *Daniel*, and nothing in *Wilson* raises any doubt as to that conclusion.

FilmOn and *Wilson* addressed only the first step in the anti-SLAPP analysis—evaluating the defendant's showing that the challenged claims arise from protected activity—and provide no basis for reconsidering our analysis of the second step—evaluating the plaintiff's showing of the requisite probability of prevailing. Accordingly, we do not revisit that second step. (See *Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 709, fn. 12 [Court of Appeal's opinion remains determinative as to matters not addressed by Supreme Court's review].)

E. *Recent Amendment to the California Fair Employment and Housing Act*

In his supplemental brief following the Supreme Court's transfer of this case to this court, Daniel asserts that our analysis of the second step in the anti-SLAPP analysis should be reexamined based upon the recent addition of Government Code section 12923 to the California Fair Employment and Housing Act. That statute, which became effective January 1, 2019, declares that the plaintiff in an employment harassment case " 'need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to make it more difficult to do the job.' " (Gov. Code, § 12923, subd. (a); Stats. 2018, ch. 955, § 1, p. 6268.)

The statute further provides that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." (Gov. Code, § 12923, subd. (b).)

Although Daniel contends that the new statute "negates two of the holdings in this [c]ourt's original opinion," he does not explain why the statute should apply retroactively. Indeed, to the extent that the statute effects a substantive change in the law, our application of it would violate the well-settled principle that "retroactive application [of a statute] is impermissible unless there is an express intent of the Legislature to do so." (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840.) The Legislature expressed no such intent in the act that added the new statute. Moreover, as Wayans points out, consideration of

the new statute would exceed the scope of the Supreme Court's transfer order. (See *People v. Lewis* (2004) 33 Cal.4th 214, 228 [lower court may act only in accordance with the order from the Supreme Court].) Accordingly, we decline to consider it.

F. *Daniel's Request for Further Discovery*

Daniel requests that, if he is not successful in reversing the trial court's order, he be permitted to undertake discovery, including depositions of Wayans and two other witnesses. As Wayans argues, Daniel did not raise this issue in his briefs on appeal and the request is beyond the scope of the Supreme Court's transfer order. We decline the request.

DISPOSITION

The judgment and order granting the anti-SLAPP motion and dismissing the complaint are affirmed. The order granting Wayans's attorney fees is also affirmed. Wayans is awarded his costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

I concur.

JOHNSON, J.

LUI, J., Concurring.

I concur with the majority opinion based upon our Supreme Court's opinions in *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871 (*Wilson*) and *FilmOn.com Inc. v. DoubleVerify, Inc.* (2019) 7 Cal.5th 133 (*FilmOn*), and in light of the limited scope of the remand in this case. In *Wilson,* the court held that a court reviewing an anti-SLAPP motion should not defer to a plaintiff's allegations in the first step of the anti-SLAPP analysis. (*Wilson*, at p. 887.) At that stage, "the question is only whether a defendant has made out a prima facie case that activity underlying a plaintiff's claims is statutorily protected." (*Id.* at p. 888.) Although the court did not specifically address how to weigh conflicting *evidence* at this stage of the analysis, the court's focus on whether a defendant has made out a prima facie case suggests that, in considering whether the defendant's conduct is protected under Code of Civil Procedure section 425.16, subdivision (e) in the first step of the anti-SLAPP procedure, a reviewing court should not give the same credence to a plaintiff's evidence as it must in considering the merits of the plaintiff's claims in the second step.

As I explained in my concurrence and dissent to the original opinion in this case, the evidence that the parties presented concerning Marlon Wayans's on-set conduct was sharply conflicting. If one credits Wayans's version of events pursuant to *Wilson*, and in light of the court's opinion in *FilmOn*, I now agree with the majority concerning step one of the anti-SLAPP analysis. Wayans has made out a prima facie case that his on-set behavior was a part of the creative process that was sufficiently related to a matter of public interest—the film he was

creating—to warrant protection under Code of Civil Procedure section 425.16, subdivision (e)(4).

As the majority points out, the scope of the remand in this case does not provide any reason to reconsider the second step of the anti-SLAPP procedure. I continue to hold the views I expressed in my prior opinion about the strength of Daniel's showing with respect to the second step of the anti-SLAPP analysis. Additionally, for the second stage of the anti-SLAPP analysis we must of course credit *Daniel's* version of the on-set events. (*Wilson, supra,* 7 Cal.5th at p. 887.) It may be that, under that standard, Daniel has provided sufficient evidence to make out a prima facie case on the merits of his claims concerning Wayans's on-set conduct. There was no need to address that issue in my prior opinion, and the scope of the remand provides no ground to consider it here.

I therefore concur.

LUI, J.*

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* Presiding Justice of the Court of Appeal, Second Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.