Not Reported in Cal.Rptr.3d, 2011 WL 1478972 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Fourth District, Division 2, California.
James A. BRADLEY, Plaintiff and Respondent,
v.
RACEWAY FORD, INC., Defendant and Appellant.

No. E051075.
(Super.Ct.No.RIC542623).
April 19, 2011.

APPEAL from the Superior Court of Riverside County. Paulette Durand–Barkley, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed with directions.
Geller & Stewart, Michael S. Geller and Richard A. Stewart for Defendant and Appellant.

The Law Office of Andrew F. Linehan and Andrew F. Linehan for Plaintiff and Respondent.

OPINION

RICHLI, J.

***1** In March 2008, Plaintiff James Bradley bought a truck from Respondent Raceway Ford, Inc. (Raceway) and filled out various forms on which he notated his personal information, including his Social Security number, in order to finance the purchase. On December 3, 2009, two persons who identified themselves as law enforcement officials came to Raceway and requested to review Bradley's file pertaining to the purchase of the truck. Raceway showed the information to the officials.

Bradley filed a lawsuit against Raceway alleging, based on the disclosure, that he suffered identify theft, invasion of privacy, and emotional distress. Raceway filed a special motion to strike the complaint (SLAPP [FN1] motion) pursuant to Code of Civil Procedure section 425.16. Raceway appeals from the trial court's order denying its motion.

FN1. SLAPP is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

We conclude that the act of publishing the documents in Bradley's file to law enforcement officials was absolutely privileged under Civil Code section 47, subdivision (b) and is subject to a SLAPP motion. We also conclude that Bradley failed to show a probability that he would prevail on his claims. We remand for the trial court to grant the SLAPP motion and dismiss Bradley's complaint.

I

FACTUAL AND PROCEDURAL BACKGROUND

The facts are taken from the declarations submitted in support of the SLAPP motion filed by Raceway. When necessary, we also refer to the exhibits included with the SLAPP motion. Bradley presented no evidence with his opposition to the SLAPP motion.

On February 29, 2008, Bradley completed a motor vehicle credit application and retail sales agreement for the purchase of a Ford F350 truck. He provided two checks for the down payment.

On December 3, 2009, two people came to Raceway and identified themselves as law enforcement officers. According to the business manager, Tami Northup, they showed identification, and she believed one of them to be a Riverside County Sheriff's deputy and the other from the Franchise Tax Board.

The two law enforcement officials asked to see the file on the purchase of the truck by Bradley. Northup explained it was the policy of Raceway to cooperate with law enforcement. Northup contacted the fleet director, Arnie Price, to show the two law enforcement officials the file.

Price met with the law enforcement officials, who showed him their identification. Price showed them a copy of the credit application, the sales contract, and the down payment checks. The law enforcement officials were given copies of these items. They appeared only interested in the monthly income that Bradley stated on the forms.

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On December 21, 2009, Bradley filed his complaint against Raceway (the complaint). The complaint alleged negligence, invasion of privacy, identity theft, intentional infliction of emotional distress, and negligent infliction of emotional distress. He asked for damages and attorney fees and costs.

Raceway filed a SLAPP motion to dismiss the complaint. Bradley filed opposition to the SLAPP motion; and Raceway filed a reply The trial court denied the SLAPP motion, finding "defendant had failed to establish that the complaint arose out of protective speech and or conduct."

***2** Raceway appeals the denial of its SLAPP motion under section 904.1 subdivision (a)(13).

II

DENIAL OF SLAPP MOTION

Raceway contends the trial court erred by denying its SLAPP motion as disclosing documents to law enforcement officials was protected activity as defined under Code of Civil Procedure section 425.16.

A. *Additional Factual Background*

In its SLAPP motion, Raceway argued that its cooperation with law enforcement officials was protected activity under Code of Civil Procedure section 425.16, subdivision (e)(1) as communication in an official proceeding. It argued that Bradley's lawsuit was seeking to "chill cooperation with law enforcement" in the performance of their official duty. The documents given to the law enforcement officials were not protected under any state or federal law. Raceway argued that their actions were protected activity and that it was Bradley's burden to prove he would prevail on his claims.

Raceway noted that nothing in the contract signed by Bradley prevented the documents in Bradley's file from being shared in the event of a fraud investigation. In its notice of privacy policy, included with the sales contract, Raceway assured the customer of the privacy of the personal and financial information, so-called consumer information, given to Raceway by the purchaser of a vehicle. According to the policy, Raceway assured the customer, "We may disclose all five types of Consumer Information as permitted by law. For example, this may include a disclosure in connection with a subpoena or legal proceedings, a fraud investigation, recording motor vehicle registration and other documents in public records, an audit or examination, or the sale of your account to another financial institution. Other examples include sharing Consumer Information with nonaffiliated third parties to effect, administer, or enforce the transactions you requested, or where we have your consent, such as when you've requested to be contacted by other companies we work with. We also may share Consumer Information with credit bureaus and similar organizations."

Bradley filed a four-page response to the motion, with no exhibits or accompanying declarations. He contended that Raceway's own privacy policy showed that it would only turn over consumer information in connection with a subpoena and/or search warrant. Bradley offered that no such subpoena/search warrant was presented to Raceway to "trigger its ability" to turn over the documents. Bradley also noted that although Raceway claimed that the documents were turned over for a fraud investigation, nothing in the records recited showed that there was a pending fraud investigation. Bradley contended that Raceway released his personal information to "two unidentified persons" without a valid search warrant. Further, there was no speech involved, only conduct.

In its reply to the opposition, Raceway noted that Bradley had failed to provide any evidence that he would prevail on his causes of action. Further, Raceway argued that not only speech but also writings were protected under Code of Civil Procedure section 425.16. The law was not such that, in order to cooperate with law enforcement, a search warrant or subpoena was required; Raceway could voluntarily cooperate. Moreover, Raceway argued that Bradley did not have a statutory right to privacy in the documents provided to Raceway; his only privacy was based on Raceway's own privacy policy. Raceway argued that it did not violate its own policy, as it could use the documents in a fraud investigation.

***3** A hearing was conducted at which Bradley did not appear. The trial court noted at the outset that it was concerned that the documents were provided to the sheriff's office without a warrant. The trial court noted, "[U]nder a special motion to strike, I have to look at the two prongs. Was it protected speech[?] And then, if we get past that prong, whether there is a prevailing analysis, but I don't see that this [is] a pro-

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tected speech issue in terms of the special motion to strike.... [¶] ... [¶] You discussed a policy cooperating with law enforcement, but I'm not sure that that's—when you're talking about private information."

Raceway responded that cooperation with law enforcement was protected as communication in an official proceeding. The trial court was concerned that there would be no need for subpoenas or warrants if businesses were able to just turn over documents. The trial court noted, "We have this information that's confidential and it's financial information. It's their personal information. And this a public right type of issue or a public issue in terms of this investigation to turn over that private information without the safeguards of requesting that information in the normal activity." Raceway responded there was no statutory protection for the information, as they were Raceway's business records.

The trial court took the matter under submission, noting that it was concerned whether "this really fit under the SLAPP motion confines of that public speech type of argument." In its written finding, the trial court wrote that Raceway "had failed to establish that the complaint arose out of protected speech and or conduct."

B. *Standard of Review*

"Review of an order granting or denying a motion to strike under section 425.16 is de novo." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; see also *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1396 (*Gallimore*) ["[w]hether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both legal questions which we review independently on appeal"].) "This includes whether the anti-SLAPP statute applies to the challenged claim. [Citation.] Furthermore, we apply our independent judgment to determine whether [plaintiff's] causes of action arose from acts by [defendant] in furtherance of [defendant's] right of petition or free speech in connection with a public issue. [Citation.] Assuming these two conditions are satisfied, we must then independently determine, from our review of the record as a whole, whether [plaintiff] has established a reasonable probability that he would prevail on his claims. [Citation.]" (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645.)

C. *Section 425.16's Application to the Activity of Raceway Disclosing Personal Information to Law Enforcement Officials*

"In 1992, the Legislature enacted section 425.16 in an effort to curtail lawsuits brought primarily 'to chill the valid exercise of ... freedom of speech and petition for redress of grievances' and 'to encourage continued participation in matters of public significance.' [Citation.] The section authorizes 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 [Constitution] or [the] California Constitution in connection with a public issue....' [Citation.] The goal is to eliminate meritless or retaliatory litigation at an early stage of the proceedings. [Citations.] The statute directs the trial court to grant the special motion to strike 'unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' [Citation.] (*Gallimore, supra*, 102 Cal.App.4th at pp. 1395–1396, fn. omitted.)

***4** "[T]he statutory phrase 'cause of action ... arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action was *based* on an act in furtherance of the defendant's right of petition or free speech. [Citations.] '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)....' [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) Under section 425.16, subdivision (e), an act in furtherance of a person's right of petition or free speech includes, in pertinent part: "(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...."

This court must first determine if Raceway has made a threshold showing that cause of action arises from protected activity. (*Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal.4th at p. 67.)

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Bradley's causes of action all arise from the disclosure by Raceway of Bradley's personal information, in documents filled out by Bradley, to two law enforcement officials. Hence, we must decide under the first step of the SLAPP analysis if the publishing of Bradley's information to law enforcement officials was protected activity under Code of Civil Procedure section 425.16.

It appears Bradley has assumed below and on appeal that the two persons who came into Raceway were not law enforcement officials. However, the only evidence presented in the trial court were the declarations of Northup and Price that the two persons showed them badges and were believed to be from the Riverside County Sheriff's office and the Franchise Tax Board. We must conclude that they were law enforcement officials.

Bradley has claimed that Raceway's publishing Bradley's personal information to the law enforcement officials was not speech or conduct within the meaning of Code of Civil Procedure section 425.16, subdivision (e)(1). We disagree.

"The word 'publish' ordinarily means to disclose, reveal, proclaim, circulate or make public." (*In re Application of Monrovia Evening Post* (1926) 199 Cal. 263, 266.) By analogy, in *Mendoza v. ADP Screening and Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1653, the court concluded that publishing information from the Megan's Law Website was protected speech. We do not construe Code of Civil Procedure section 425.16 as narrowly as Bradley does that Raceway had to make a "statement" in order to qualify under the statute. The publication of the documents was sufficient to bring it within the protection of a SLAPP motion.

***5** We also reject Bradley's claim that Raceway had a "legal duty" not to disclose the personal information given based on his right to financial privacy. Bradley first relies on federal law. He refers to the Gramm–Leach–Bliley Act (15 U.S.C. § 6802 et seq.) and the Federal Right to Financial Privacy Act (12 U.S.C. section 3401 et seq.). Both prohibit financial institutions from disclosing nonpublic financial information to nonaffiliated third parties without first giving notice and an opportunity to object to the consumer. However, although not discussed by Bradley, it appears the federal law cited by him applies only to financial institutions such as banks, credit unions, and securities firms. (12 U.S.C. § 3401, subd. (1); see *Patenaude v. Equitable Life Assur. Soc'y of the United States* (9th Cir.2002) 290 F.3d 1020, 1029 [Gramm–Leach–Bliley Act restructured relationship between insurance companies, banks, and securities firms].)

Bradley also cites to California law. The California Financial Information Privacy Act (Fin.Code, § 4050 et seq.) limits disclosure of nonpublic personal information by financial institutions. (Fin.Code, § 4052.5.) However, Financial Code section 4052, subdivision (c) excludes as a financial institutions any dealer that enters into contracts for the sale or lease of motor vehicles.

As such, Raceway did not have a legal duty to protect Bradley's financial information. We set forth, *ante*, that Raceway did have its own policy about disclosing financial information. The policy stated, as relevant here, that it would disclose the customer's personal information "in connection with a subpoena or legal proceedings" or "a fraud investigation." However, Raceway also stated as to the policy that "[t]his notice is limited to describing our policy. It is not a contract, contract amendment, or complete list of legal obligations on the subject of privacy." Although the policy may have been misleading to customers as to the obligation on behalf of Raceway to keep personal information disclosed to it confidential, the policy did not create a *contractual obligation* that Raceway was foreclosed from disclosing information without a subpoena or fraud investigation.

What Raceway disclosed to law enforcement officials were merely its own business records, and it could disclose the information without requiring that law enforcement officials first provide a warrant or subpoena. It could voluntarily agree to turn over such documents as it had no legal duty or contractual obligation to protect the records. Moreover, we conclude below that such disclosure was protected activity under Civil Code section 47, subdivision (b).

In general, communications in connection with matters related to an official proceeding are privileged under Civil Code section 47, subdivision (b). Statements that are absolutely privileged under that section are entitled to protection under the SLAPP statute.

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(See *Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal .4th at pp. 64–65.) "[I]f the speech is made or the activity is conducted in an official proceeding authorized by law, it need not be connected to a public issue. [Citation.]" (*Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 8211.) Thus, a complaint based on a privileged publication can be the subject of a SLAPP motion.

***6** " '[C]ommunications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b).' " (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; see also *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784.) The Civil Code section 47, subdivision (b) privilege has been extended to protect reports made to the police in order to instigate investigation. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 369–370.) "[T]he absolute privilege established by section 47(b) serves the important public policy of assuring free access to the courts and other official proceedings. It is intended to " 'assure utmost freedom of communication between citizens and *public authorities whose responsibility is to investigate and remedy wrongdoing.*' " [Citation.] We have explained that both the effective administration of justice and the citizen's right of access to government for redress of grievances would be threatened by permitting tort liability for communications connected with judicial or other official proceedings." (*Id.*, at pp. 360–361.) "[A] communication concerning possible wrongdoing, made to an official government agency such as a local police department, and which communication is designed to prompt action by that entity, is as much a part of an 'official proceeding' as a communication made after an official investigation has commenced." (*Williams v.. Taylor* (1982) 129 Cal.App.3d 745, 753 [employer's report to law enforcement concerning suspected theft by former employee privileged under Civ.Code, § 47, subd. (b)].)

The actions of Raceway publishing Bradley's personal information to law enforcement officials who presented themselves at Raceway as conducting official business, as evidenced by them presenting their badges to Northup and Price, were protected by Civil Code section 47, subdivision (b). The relevant authority cited above refers to reports made by citizens to police officers to initiate an investigation of possible wrongdoing. However, there is no logical reason to distinguish the situation here—where the police were investigating wrongdoing—from the situation where the citizen initiates the complaints to law enforcement. Although we are not privy to the type of "official proceeding" that was being conducted by the law enforcement officials, it is reasonable to conclude that they were conducting an investigation of Bradley for some type of wrongdoing. As such, the publication of the documents by Raceway were privileged under Civil Code section 47, subdivision (b) and are properly a subject of the SLAPP motion.

D. *Bradley's Reasonable Probability of Success on His Claims at Trial*

Since we have concluded that Bradley's claims are based on protected petitioning activity, the burden shifts to Bradley to show "a reasonable probability of success on his ... claims at trial ." (*Gallimore, supra*, 102 Cal.App.4th at p. 1396.)

***7** "[T]o avoid dismissal of each claim under [Code of Civil Procedure] section 425.16, plaintiff bore the burden of demonstrating a probability that [he] would prevail on the particular claim.... [W]e [have] explained: 'In order to establish a probability of prevailing on the claim [citation], a plaintiff responding to an anti-SLAPP motion must " 'state[ ] and substantiate[ ] a legally sufficient claim.' " [Citations.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]' [Citation.] [Citations.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713–714.) A plaintiff "need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP. [Citations.]" (*Soukup v. Law Offices of Herbert Hafif, supra*, 39 Cal.4th at p. 291.)

Although the trial court did not reach the issue of probability that Bradley would prevail, we may decide

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it. An appellate court reviews the record independently on appeal from an order deciding a special motion to strike to determine if the trial court ruled correctly. (*Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 695.) Moreover, Bradley presented no supporting evidence with his opposition to the SLAPP motion. We can resolve the bare assertions in his complaint and the evidence presented by Raceway in deciding the probability of his prevailing.

As we have found, the actions of Raceway were absolutely privileged under Civil Code section 47, subdivision (b). Since all of Bradley's tort claims were based on this action, he has not shown how he could prevail without liability based on this action. Moreover, each cause of action is not supported by evidence that would show he was likely to prevail.

Bradley filed his first cause of action for negligence. He alleged that due to the nature of the relationship between Bradley and Raceway, Raceway owed a duty to him to keep his personal information safe and secure. He alleged the information only should be released with his consent or in response to a valid subpoena or search warrant. Raceway breached its duty by providing the personal information to unknown persons.

No cause of action for negligence can be maintained absent the existence of a defendant's duty of care toward the plaintiff's protected interest. “The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.] Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court. [Citation.]” (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.)

***8** As stated previously, Raceway did not have a contractual obligation or legal duty to keep Bradley's information private. Moreover, Bradley's allegation assumes that the two persons were not law enforcement personnel. However, the only evidence before this court is that they showed proper identification to Raceway employees. Bradley cannot show negligence for Raceway cooperating with law enforcement.

His second cause of action was for invasion of privacy. Article I, section 1 of the California Constitution provides that all people have certain inalienable rights, and among these are “pursuing and obtaining safety, happiness, and privacy.” A plaintiff alleging a violation of a privacy interest under the California Constitution must establish “(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by the defendant constituting a serious invasion of privacy.” (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39–40.) As we noted, *ante*, Bradley never showed that he had a legally protected privacy interest in Raceway not disclosing the personal information that he provided to them to purchase his truck. Further, despite Bradley's statement that he may have been concerned about identity theft, there is absolutely no evidence that the disclosure of personal information to law enforcement officials resulted in identity theft.

As for the third cause of action, identity theft, Bradley did not allege any facts that there is a civil cause of action for identity theft. Penal Code section 530.5 criminalizes the unauthorized use of personal identifying information for unlawful purposes. However, there is no provision for civil damages.

Bradley's fourth cause of action is based on intentional infliction of emotional distress. Bradley claimed that the disclosure of this personal information caused significant emotional distress.

A cause of action for intentional infliction of emotional distress must be supported by evidence of “ ‘(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.’ [Citations.]” (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1581.) To be deemed “outrageous,” conduct “ ‘must be so extreme as to exceed all bounds of that usually tolerated in a civilized society.’ [Citation.]” (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1259.)

We cannot conclude that Raceway's voluntary publication of Bradley's file containing his Social Security number, address, and income to law enforcement officials was “outrageous conduct.” Although some companies may prefer to release docu-

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ments only when presented with a subpoena, it is not outrageous for a company to choose to voluntarily cooperate with law enforcement.

***9** Bradley's final cause of action is negligent infliction of emotional distress. California law does not recognize an independent tort of negligent infliction of emotional distress. The tort is negligence, a cause of action whose essential elements include a duty to plaintiff. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984–985.) We already concluded, *ante*, that Raceway owed no duty to Bradley not to disclose his personal information to law enforcement officials.

Bradley has not shown a probability of prevailing on his causes of action against Raceway. We will reverse the trial court's order denying Raceway's SLAPP motion and direct the trial court to enter an order granting Raceway's SLAPP motion and dismissing the complaint.

We note that upon remand to the trial court for entry of a new order granting Raceway's SLAPP motion and dismissal of the complaint, the trial court must conduct further proceedings pursuant to section 425.16, subdivision (c). "Under subdivision (c) of section 425.16, 'a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs.' This section authorizes the court to make an award of reasonable attorney fees to a prevailing defendant, which will adequately compensate the defendant for the expense of responding to a baseless lawsuit. [Citation.]" (*Dove Audio, Inc. v. Rosenfeld, Meyer and Susman, supra*, 47 Cal.App.4th at p. 785.) Attorney fees are mandatory to the prevailing defendant and the amount to a defendant on a successful SLAPP motion is within the discretion of the trial court. (See *Paulus v. Bob Lynch Ford, Inc .* (2006) 139 Cal.App.4th 659, 685–686.) Any fee award must also consider appellate attorney fees. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1426.)

IV
DISPOSITION

The order denying Raceway's SLAPP motion is reversed. The trial court is directed to issue an order granting Raceway's SLAPP motion and dismissing the complaint. Raceway shall recover its costs on appeal. The trial court shall award attorney fees and costs incurred by Raceway both in the trial court and on appeal.

We concur: RAMIREZ, P.J., and McKINSTER, J.

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