COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

NOV 21 2019

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

LOWELL A. BAISDEN, Plaintiff and Appellant, v. PATTI BOWERS, as Executive Officer, etc. et al., Defendants and Respondents.	F076662 (Super. Ct. No. BCV17100648) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

Lowell A. Baisden, in pro. per., for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Linda K. Schneider, Assistant Attorney General, Shawn Paul Cook and Katherine Messana Beck, Deputy Attorneys General, for Defendant and Respondent Patti Bowers, as Executive Officer, etc.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Ernest Slome, Brittany Bartold Sutton and Cary L. Wood, for Defendants and Respondents Evan J. Geilenkirchen and Jane M. Geilenkirchen.

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Plaintiff Lowell A. Baisden was an accountant practicing in Bakersfield, California, and defendants Evan and Jane Geilenkirchen (the Geilenkirchens) were his clients. In 2006, the Geilenkirchens contacted the state agency responsible for licensing and discipline of accountants, defendant California Board of Accountancy (the Board), and filed a consumer complaint regarding Baisden. The Board reviewed the matter and initiated administrative proceedings against Baisden, after which the Board revoked Baisden's license as a certified public accountant (CPA). Baisden challenged the Board's determination in court by means of petition for writ of mandate but was unsuccessful; the Kern County Superior Court denied his petition because substantial evidence supported the Board's findings, and we affirmed that decision on appeal in 2011.

This brings us to the present action. In 2017, a decade after his CPA license was revoked, and after serving prison time for aiding and abetting federal tax evasion, Baisden commenced this lawsuit against both the Board[1] and the Geilenkirchens for tort damages allegedly resulting from the Geilenkirchens' consumer complaint to the Board and the Board's handling of the matter. In response to the lawsuit, the Board and the Geilenkirchens separately filed general demurrers to Baisden's first amended complaint, and the Geilenkirchens also filed a special motion to strike under the anti-SLAPP statute (Code Civ. Proc., § 425.16, the anti-SLAPP motion).[2] The trial court sustained the demurrers without leave to amend and granted the anti-SLAPP motion, and judgments of dismissal were entered. Baisden now appeals. As more fully explained in our discussion below, we conclude the trial court correctly decided the demurrers and the anti-SLAPP motion. Accordingly, Baisden's appeal fails, and the judgment(s) entered by the trial court in favor of the Board and the Geilenkirchens are hereby affirmed.

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[1] Baisden sued the Board as "Patti Bowers, Executive Officer Board of Accountancy, Department of Consumer Affairs, State of California."

[2] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

FACTS AND PROCEDURAL HISTORY

Proceedings Regarding Revocation of Baisden's Accounting License[3]

On or about February 7, 2007, the Board filed an accusation against Baisden seeking revocation of his license as a CPA based on three alleged causes for discipline in conjunction with accounting services he performed for the Geilenkirchens. Among other things, Baisden was accused of preparing the Geilenkirchens' 2002 corporate and individual tax returns using false, fraudulent and misleading information, including use of a sham Nevada corporation, failure to disclose Baisden's lack of independence on certain matters and giving false and fraudulent advice regarding deductions.

After an administrative hearing was held, the administrative law judge (ALJ) issued a proposed decision setting forth detailed findings of fact and recommending that Baisden's CPA license be revoked. On November 26, 2007, the Board formally adopted the ALJ's proposed decision, effective December 26, 2007. Baisden filed a motion for reconsideration with the Board, which was denied on January 4, 2008.

Judicial Challenge to Administrative Decision Unsuccessful

Baisden pursued his right of judicial review and challenged the Board's administrative determination by filing a petition for writ of mandate to the superior court. On January 21, 2010, the superior court concluded that the weight of the evidence supported the Board's findings on the causes for discipline and, accordingly, the petition was denied.

Baisden appealed the superior court's denial of his writ petition. In an unpublished decision issued by this court in 2011, we affirmed the superior court's

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3 We grant the Board's request for judicial notice of several administrative and court records relating to the revocation of Baisden's accounting license, all of which were filed in the trial court in connection with the demurrer hearings below. The trial court granted judicial notice of these records, but for reasons unknown they were lost by that court and were not made part of the record transmitted in connection with this appeal.

judgment and upheld the Board's decision revoking Baisden's CPA license. (*Baisden v. California Board of Accountancy* (Jan. 6, 2011, F060100).) In so holding, we concluded the lower court correctly found that substantial evidence supported the disciplinary causes or grounds that were determined against Baisden.

Despite the finality of our 2011 ruling, Baisden brought a second civil action in 2015, again seeking to vacate the revocation of his license. In 2016, the Board's demurrer on grounds of statute of limitations, res judicata and collateral estoppel was sustained without leave to amend.

Baisden's Present Lawsuit Filed

On March 23, 2017, Baisden filed the instant complaint against both the Board and the Geilenkirchens seeking the recovery of damages for alleged (1) negligence, (2) gross negligence, (3) defamation per se, (4) negligent interference with prospective economic relations, (5) abuse of process, and (6) negligent infliction of emotional distress.

The complaint alleged that Baisden was a certified public accountant operating an accounting practice in Bakersfield from 1978 through 2007. During that time, the Geilenkirchens were among Baisden's clients. Allegedly, the Geilenkirchens contacted the Board in 2006 and reported to the Board that Baisden had prepared a tax return for them for 2002 that caused them to incur penalties for fraud and forced them to retain a different accountant to prepare their subsequent tax returns. According to the complaint, the Geilenkirchens were negligent by failing to provide evidence to the Board indicating that (i) they did not ultimately incur fraud penalties for the tax return in question and (ii) they had changed accountants voluntarily. Similarly, the Board was allegedly negligent when it failed to obtain common tax documents that showed that the Geilenkirchens did not have any Internal Revenue Service (IRS) tax fraud penalties for the tax return Baisden had prepared, or for other reasons the Board allegedly failed to adequately investigate Baisden's conduct. The complaint included further allegations of

defamation arising from the posting of information by the Board on its official website about Baisden's conduct or the discipline imposed.

Baisden's complaint also acknowledged his criminal conviction. Allegedly, in October 2011, Baisden pled guilty to aiding and abetting federal tax evasion in a case involving the tax returns of his sister, Susan Koning and her husband Michael Koning. Baisden was sentenced to 37 months of incarceration in a minimum security federal prison plus 36 months of supervised release. About three years later, in 2014, Baisden was released from custody from a halfway house in Bakersfield to the United States Probation Office. According to Baisden's complaint, in August 2008, the assistant United States attorney had threatened to arrest him and keep him incarcerated until his criminal case was resolved if he did not leave witnesses alone. The Geilenkirchens were allegedly listed in 2009 among the witnesses in the federal criminal prosecution.

The Geilenkirchens' Default Erroneously Taken

Baisden's complaint was served on the Geilenkirchens in Nebraska on April 9, 2017. On April 28, 2017, the Geilenkirchens' defense counsel, Cary Wood, was assigned to defend the Geilenkirchens in the lawsuit. Wood reviewed the file materials and complaint (and attachments) to determine the viability of a potential demurrer and/or an anti-SLAPP motion as his clients' initial responsive pleading. On May 9, 2017, Wood contacted Baisden by telephone and requested an extension of time to file a demurrer to allow an adequate meet and confer to be undertaken at least five days before the due date for the demurrer as required by section 430.41, subdivision (a)(2). Baisden refused to grant the requested extension. That same day, Wood filed a declaration pursuant to section 430.41, subdivision (a)(2), stating that he had been unable to meet and confer with Baisden at least five days prior to the date the demurrer was due and that a good faith attempt to meet and confer had been made.

Under section 430.41, subdivision (a)(2), if the parties are unable to meet and confer at least five days prior to the date the responsive pleading is due, "the demurring

party shall be granted an automatic 30-day extension of time within which to file a responsive pleading, by filing and serving, on or before the date on which a demurrer would be due, a declaration stating under penalty of perjury that a good faith attempt to meet and confer was made and explaining the reasons why the parties could not meet and confer." The automatic 30-day extension "shall commence from the date the responsive pleading was previously due, and the demurring party shall not be subject to default during the period of the extension." (*Ibid.*)

Notwithstanding the statutory prohibition against the entry of a defendant's default during the 30-day extension, Baisden filed a request for entry of default on May 18, 2017, and the clerk entered the Geilenkirchens' default that same day.

First Amended Complaint

On May 30, 2017, Baisden filed and served his first amended complaint. The first amended complaint provided further allegations against the Board, but otherwise contained substantially the same allegations as the original complaint. The first amended complaint was and is the operative pleading for purposes of the dispositive demurrers and anti-SLAPP motion decided by the trial court.

Baisden's Motion for Judgment

Based on the prior entry of default against the Geilenkirchens, Baisden moved for entry of judgment by the court. The trial court denied the motion because the prior default was entered in error since the automatic extension applied and, additionally, the original complaint had been superseded by the service of the first amended complaint. Further, as noted at the hearing, the Geilenkirchens had already responded to the first amended complaint by filing their demurrer. In denying Baisden's motion for judgment, the trial court noted that, technically, the Geilenkirchens should still move to set aside the default even though the complaint was no longer the operative pleading.

The Geilenkirchens' Motion to Set Aside Default

As suggested by the trial court, the Geilenkirchens filed a motion to set aside the default. The motion was made on the ground that the default had been entered by the clerk in error because the Geilenkirchens' attorney had filed a declaration triggering the automatic 30-day extension of time within which to file a responsive pleading under section 430.41, subdivision (a)(2). In light of the automatic extension precluding the taking of default, the Geilenkirchens asserted that entry of default by the clerk was void. Additionally, the Geilenkirchens asserted that, because the order entering their default was void, they were not precluded from appearing in the case by filing their demurrer to the first amended complaint, which they had done.

In opposition, Baisden argued that the Geilenkirchens had not paid their first appearance fee at the time their attorney filed the declaration under section 430.41, and therefore the default was proper. Baisden also argued the declaration had not been filed in good faith.

The Geilenkirchens' Demurrer to the First Amended Complaint

On July 5, 2017, the Geilenkirchens filed their demurrer to Baisden's first amended complaint, arguing the applicable statutes of limitations barred the action. As noted in their demurrer, the acts giving rise to Baisden's claims occurred in 2007 and Baisden suffered injury when the Board revoked his CPA license in 2008, and yet the original complaint was not filed by Baisden until 2017.

In opposition to the demurrer, Baisden argued the demurrer itself was untimely filed because it should be treated as a demurrer to the original complaint, not to the first amended complaint. In any event, Baisden argued the federal government, through the assistant United States attorney, had allegedly threatened his arrest and imprisonment, and therefore equitable estoppel purportedly tolled the running of the statute. In reply, the Geilenkirchens explained why the demurrer was properly made to the first amended complaint and asserted that Baisden's tolling argument was without merit. As noted by

the Geilenkirchens, the statute had run before Baisden's imprisonment, but even if his imprisonment tolled the statute, by law it would be tolled for only two years at most. (See § 352.1, subd. (a).)

The Geilenkirchens' Anti-SLAPP Motion

On August 1, 2017, the Geilenkirchens also filed an anti-SLAPP motion against the first amended complaint. The anti-SLAPP motion was made on the ground that the causes of action asserted against them in the first amended complaint were based on their speech or conduct protected by the provisions of the anti-SLAPP statute (i.e., their consumer complaint filed with the Board) and, moreover, Baisden had no reasonable likelihood of prevailing because the relevant speech or conduct was protected under the litigation privilege of Civil Code section 47, subdivision (b), and the claims were also barred by the statute of limitations.

In opposition, Baisden argued that the anti-SLAPP motion was untimely because it was filed more than 60 days after service of the complaint. He also argued the Geilenkirchens' conduct was "illegal" as a matter of law, and thus not subject to protection of the anti-SLAPP statute. Baisden further argued the Geilenkirchens' communicative acts were not privileged because the basis of his lawsuit was that the Board posted on its website that he was disciplined for certain conduct.

The Geilenkirchens filed a reply arguing the motion was timely but noting that even if it was tardy, the trial court had discretion to hear it. Further, in their reply the Geilenkirchens observed there was no basis for concluding their conduct was illegal, and argued that the privilege of Civil Code section 47, subdivision (b), clearly applied concerning the Geilenkirchens' communications to the Board.

The Trial Court Grants the Geilenkirchens' Motions

The trial court heard the Geilenkirchens' (i) motion to set aside the entry of default, (ii) demurrer, and (iii) anti-SLAPP motion on the same date. At the hearing, the trial court explained why it was inclined to grant all three motions. As to the motion to

set aside the entry of default, the trial court noted it "clearly is a clerical error and, therefore, void from the moment it was filed." Additionally, Baisden had filed a first amended complaint that superseded the original pleading and "reopened the ability of the parties … to respond and plead." Regarding the demurrer, the trial court agreed with the Geilenkirchens' claim that all the causes of action were barred by the applicable statutes of limitation. Finally, as to the anti-SLAPP motion, the trial court observed that "the entire thrust of the action goes to [the Geilenkirchens'] right to petition a government agency." The trial court reasoned that because that conduct was protected under the anti-SLAPP statute, and since Baisden cannot establish a probability of prevailing on the merits because "the litigation privilege" would clearly preclude the Geilenkirchens' liability, the motion must be granted.

Following the hearing, the trial court issued a written order granting the motion to set aside default, sustaining the demurrer to the first amended complaint without leave to amend, and granting the anti-SLAPP motion.

The Board's Demurrer to the First Amended Complaint

On June 19, 2017, the Board filed its demurrer to the first amended complaint. The Board's demurrer challenged the legal sufficiency of the first amended complaint on multiple grounds, including: (i) Baisden failed to overturn the administrative decision his case is based upon; (ii) statutory immunity; (iii) Baisden failed to timely submit a government claim for damages; (iv) res judicata and collateral estoppel; and (v) there was no mandatory duty on the Board's part to conduct an investigation. On June 29, 2017, Baisden filed opposition attempting to distinguish factually the grounds raised by the Board and also arguing for tolling of the time period for filing a government claim due to alleged threats by the assistant United States attorney. The Board filed its reply on July 13, 2017. The hearing on the demurrer was held on July 21, 2017.

The Trial Court Sustains the Board's Demurrer to First Amended Complaint

At the time of hearing on the Board's demurrer, the trial court observed that Baisden's causes of action accrued in January 2008, or shortly thereafter as to the slander claim, but Baisden had failed to set forth any facts justifying a tolling of the six-month time deadline to submit a government claim against the Board. Further, the trial court observed the Board and its agents were immune under relevant Government Code provisions. Finally, the trial court agreed with the Board's additional grounds raised for demurrer, including Baisden's failure to overturn the administrative determination through judicial review, the finality of his unsuccessful judicial challenge (i.e., res judicata), and lack of mandatory duty.

Following the hearing, the trial court issued its written order sustaining the Board's demurrer to the first amended complaint without leave to amend on all grounds raised, including failure to overturn the underlying administrative decision, failure to timely submit a government claim for damages, governmental immunity, res judicata and/or collateral estoppel, and failure to state facts sufficient to constitute a cause of action.

Judgments of Dismissal Entered

On September 15, 2017, the trial court entered judgment in favor of the Board and dismissed the action against it.

On October 10, 2017, the trial court entered judgment in favor of the Geilenkirchens and dismissed the action against them. Thereafter, the Geilenkirchens moved for attorney fees and costs under section 425.16, subdivision (c). Baisden did not file an opposition to that motion. The trial court awarded the Geilenkirchens $18,453.28 in attorney fees and costs, and the judgment was amended accordingly.

Baisden has timely appealed from the separate judgments of dismissal entered in favor of the Geilenkirchens and the Board.[4]

DISCUSSION

I. Standard of Review

In the instant appeal, Baisden argues the trial court erred in its determinations of each of the following matters: (a) As to his claims against the Board, the trial court's order sustaining the Board's demurrer to the first amended complaint without leave to amend; and (b) as to his claims against the Geilenkirchens, the trial court's orders (i) setting aside of the entry of default as void, (ii) sustaining the Geilenkirchens' demurrer to the first amended complaint without leave to amend, and (iii) granting the Geilenkirchens' anti-SLAPP motion. We will address the various orders at issue in the sequence just stated, beginning with ruling on the Board's demurrer, then proceeding to the rulings on the Geilenkirchens' motions.

On appeal from a judgment dismissing an action after sustaining a demurrer, we review de novo whether the complaint states facts sufficient to constitute a cause of action under any legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) We also consider matters which may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "The judgment

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[4] Although Baisden also appealed from the order awarding attorney fees to the Geilenkirchens, he has made no argument as to that order. Any such argument has therefore been abandoned or forfeited by Baisden. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 611; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 710–711.)

must be affirmed 'if any one of the several grounds of demurrer is well taken.' " (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. (*Ibid.*) And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. (*Ibid.*) "The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

We review de novo whether the conditions for granting an anti-SLAPP motion have been satisfied. (*Marijanovic v. Gray, York & Duffy* (2006) 137 Cal.App.4th 1262, 1270.) Finally, evaluating whether a judgment or order is void is a question of law reviewed de novo. (*Nixon Peabody LLP v. Superior Court* (2014) 230 Cal.App.4th 818, 822.)

II. Demurrer by the Board

Baisden's first amended complaint alleged causes of action against the Board premised on the Board's alleged negligence, claiming among other things the Board failed to adequately investigate or obtain sufficient documentation regarding Baisden's services as accountant on the Geilenkirchens' 2002 tax returns and subsequent IRS audit thereof. Allegedly, the Board's negligence also constituted a breach of a mandatory duty owed to Baisden. Additionally, the Board was sued for posting the results of its disciplinary findings against Baisden on its website, which Baisden alleged constituted defamation.

In its order sustaining the Board's demurrer to the first amended complaint without leave to amend, the trial court concluded that multiple deficiencies existed as to Baisden's pleading, including failure to overturn the underlying administrative decision, res judicata and/or collateral estoppel, statutory immunity, failure to timely submit a

government claim for damages, and failure to state facts sufficient to constitute a cause of action. As explained below, we hold the trial court correctly resolved the demurrer.

Preliminarily, we note that Baisden's opening brief did not expressly challenge several of the discrete grounds for the trial court's ruling on the demurrer, including the grounds of failure to overturn the administrative decision, res judicata and/or collateral estoppel. This, by itself, is fatal to Baisden's attack on the demurrer ruling because it leaves the unchallenged grounds for the trial court's ruling intact. A judgment or order of the trial court is presumed correct, and therefore error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) This presumption of correctness applies to orders sustaining demurrers. (*Leader v. Health Industries of America, Inc.*, *supra*, 89 Cal.App.4th at p. 611.) Even where our review is de novo, it is limited to issues which have been adequately raised and supported in the appellant's opening brief. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 836.) Issues not raised in an appellant's opening brief are deemed forfeited or abandoned. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) Applying the presumption of correctness and the principle of forfeiture of unbriefed issues to the grounds relied upon by the trial court in its order *but which were not argued by Baisden* in his opening brief, we may affirm the trial court's order sustaining the Board's demurrer to the first amended complaint without leave to amend based solely on Baisden's failure to meet his burden as appellant.

Nevertheless, we will proceed to discuss more fully why the trial court's demurrer ruling was legally correct, including the grounds ignored in Baisden's opening brief.

A. Failure to Overturn Administrative Ruling

It is well established that before pursuing a claim for damages based on the quasi-judicial decision of an administrative agency, a plaintiff must first have the administrative decision reviewed and set aside in the courts by means of a writ of mandate proceeding. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 69–71; *Westlake Community Hosp.*

v. Superior Court (1976) 17 Cal.3d 465, 483–484 (*Westlake*); see also *Logan v. Southern Cal. Rapid Transit Dist.* (1982) 136 Cal.App.3d 116, 123 [administrative writ of mandate is "the appropriate remedy for the purpose of inquiring into the validity of any final administrative agency decision made as the result of a proceeding which by law requires a hearing, evidence to be considered, and a discretionary determination of fact vested in an inferior tribunal"].) Just as a plaintiff in a malicious prosecution action must first obtain a favorable termination of the underlying action, so a plaintiff claiming he or she was damaged by an adverse administrative decision must successfully overturn that decision in court before any civil action for damages may be pursued. (*Westlake*, *supra*, 17 Cal.3d at p. 484.) Moreover, the party's failure to set aside the administrative decision by writ of mandate has the effect of establishing the propriety and finality of that decision. (*Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at pp. 69–71; *Westlake*, *supra*, 17 Cal.3d at p. 484.)[5]

Baisden has failed to make a successful judicial challenge by writ of mandate to the Board's administrative decision and adverse disciplinary findings. Accordingly, he is precluded from filing his present lawsuit against the Board relating to said decision and findings. It is clear that this ground for demurrer raised by the Board was correctly sustained by the trial court.

B. Res Judicata and/or Collateral Estoppel

Not only did Baisden not overturn the administrative decision, his litigation seeking to set aside the administrative decision by means of writ of mandate was unsuccessful on the merits. The Board's decision was judicially affirmed by the trial

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[5] If a complainant fails to overturn an adverse administrative decision by writ of mandate, the decision is generally binding in a later civil action brought in superior court. (*Runyon v. Board of Trustees of California State University* (2010) 48 Cal.4th 760, 773–774; *Jamieson v. City Council of the City of Carpinteria* (2012) 204 Cal.App.4th 755, 760.)

court, which in turn was affirmed by us on appeal. We agree with the Board that the resulting final judgment against Baisden was binding and preclusive for purposes of res judicata and/or collateral estoppel. As we proceed to explain, this ground for demurrer was properly sustained by the trial court.

We briefly summarize the nature of the final judgment. As reflected in the documents submitted by the Board in its request for judicial notice, the administrative hearing was presided over by an ALJ with the Office of Administrative Hearings, the parties had the opportunity to submit evidence and testimony, they argued the matter before the ALJ, the ALJ issued a written proposed decision explaining his findings and recommendation, and the proposed decision was adopted by the Board.[6] Thereafter, the propriety of the Board's administrative decision and the sufficiency of the evidence to support its findings were challenged in the superior court by means of Baisden's petition for writ of mandate. Upon conducting an independent review of the factual record, including the hearing transcript and other evidence, the superior court upheld the Board's findings and decision and accordingly denied the petition. Finally, in 2011, in Baisden's appeal from the denial of his petition for writ of mandate, we affirmed the superior court's judgment upholding the Board's decision. (*Baisden v. California Board of Accountancy*, *supra*, F060100.) In so doing, we held the trial court correctly found that substantial evidence supported the disciplinary causes or grounds that were determined against Baisden.

Where, as here, the validity of the administrative decision was litigated by a writ of mandate proceeding and a judgment on the merits of that mandate proceeding is final, the doctrine of res judicata and collateral estoppel are generally applicable to that final judgment. (*Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control* (1961)

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6 As these factors tend to reflect, the administrative proceedings had a sufficiently judicial character to permit a collateral estoppel effect to the Board's decision. (See *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 944.)

55 Cal.2d 728, 733 [judgment denying writ in trial court and affirmed on appeal is final for purposes of res judicata]; *Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 844 (*Wassmann*) [administrative decision and judgment denying petition for writ of mandate conclusive in subsequent civil lawsuit for purposes of res judicata].)

"The doctrine of res judicata or claim preclusion dictates that in ordinary circumstances a final judgment on the merits prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Wassmann, supra*, 24 Cal.App.5th at p. 844, citing *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) For purposes of res judicata, a cause of action is defined under the primary rights theory, meaning that regardless of the various theories of recovery that may be advanced, a harm suffered generally gives rise to only one violation of a primary right or one cause of action. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797–798 ["The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory … advanced."]; *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 575–577.) The doctrine of collateral estoppel is similar but applies to specific issues. "The doctrine of collateral estoppel or issue preclusion prevents 'the relitigation of issues argued and decided in a previous cause, even if the second suit raises different causes of action.' [Citation.] 'Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action.' [Citation.]" (*Wassmann, supra*, 24 Cal.App.5th at p. 844.)

As summarized in *Villacres v. ABM Industries Inc., supra*, 189 Cal.App.4th at p. 575: " ' "The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent.

Public policy and the interest of litigants alike require that there be an end to litigation." ' [Citation.]"

In his former writ of mandate action, Baisden claimed the Board erred in finding the causes for discipline were adequately established by the evidence, and he sought to have the revocation of his CPA license set aside. As noted, a final judgment rejecting his challenge was entered by the trial court and was affirmed by this court in *Baisden v. California Board of Accountancy*, *supra*, F060100. In the present lawsuit, although a different legal theory is raised (e.g., alleged negligence in gathering evidence or investigating), Baisden again challenges the propriety of the Board's findings and decision. The gravamen of both litigations is that the Board got it wrong, and he suffered harm by loss of his CPA license. Moreover, although a different remedy is sought in Baisden's present lawsuit in the form of tort damages, the harm suffered is still ultimately derived from the revocation of his CPA license. On this record, we conclude that Baisden's current lawsuit involves the same cause of action, and therefore it is barred by res judicata. " ' "If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged.... [T]he rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. [Citations.]" [Citation.]' " (*Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 589–590, quoting *Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160.) Accordingly, the trial court correctly sustained the demurrer on this ground.

C. Statutory Immunity

The Board also demurred on the ground that the Board and its employees were immune from liability under Government Code sections 821.6 and 818.4. The trial court sustained the demurrer. We conclude the trial court correctly ruled that statutory immunity barred Baisden's claims against the Board.

Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." The statute has been given an expansive interpretation to further the rationale for the immunity, which is to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits. (*All Angels Preschool/Daycare v. County of Merced* (2011) 197 Cal.App.4th 394, 407 (*All Angels*).) "The policy behind [Government Code] section 821.6 is to encourage fearless performance of official duties. [Citations.] State officers and employees are encouraged to investigate and prosecute matters within their purview without fear of reprisal from the person or entity harmed thereby. Protection is provided even when official action is taken maliciously and without probable cause." (*Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1424.) Although this section refers only to public employees, Government Code section 815.2 extends the protection of the immunity to the employing public entity. (*Kayfetz v. State of California* (1984) 156 Cal.App.3d 491, 496 & fn. 5.)

"Acts by a public employee that are ... in the course of an investigation of alleged wrongdoing, are covered by the statutory immunity." (*All Angels*, *supra*, 197 Cal.App.4th at p. 407.) Because investigation is an essential step toward the institution of formal proceedings, it is shielded by the immunity. (*Id.* at p. 408.) "Weighing and presenting evidence are prosecutorial functions. As such, these acts are within the ambit of 'instituting or prosecuting any judicial or administrative proceeding ....' " (*Jenkins v. County of Orange* (1989) 212 Cal.App.3d 278, 284.) Furthermore, the immunity under Government Code section 821.6 extends to communications made by the employee that have a connection with the investigation or prosecution process. (*All Angels*, *supra*, 197 Cal.App.4th at p. 408.) "Acts undertaken in the course of an investigation, including press releases reporting the progress or results of the investigation, cannot give rise to liability." (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1048.) This

includes publication of disciplinary results that follow from the investigation. (*Kayfetz v. State of California*, *supra*, 156 Cal.App.3d 491, 496–498 [immunity applied to publication of action report]; *Citizens Capital Corp. v. Spohn* (1982) 133 Cal.App.3d 887, 889.)

Additionally, Government Code section 818.4 provides that a public entity is not liable for matters relating to suspension, revocation or issuance of permits, licenses or certificates. This immunity extends to "an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked." (Gov. Code, § 818.4.) The protection also covers the gathering of information and investigation process leading up to such decisions. (*Engel v. McCloskey* (1979) 92 Cal.App.3d 870, 882–883.)

Baisden's appeal argues that the Board acted outside the scope of its statutory immunity when it posted information regarding the disciplinary proceeding on its website. The argument is without merit. First, Business and Professions Code section 27 requires the Board to post information on its licensees on a public website, including "information on suspensions and revocations of licenses issued by the entity and other related enforcement action, including accusations filed … taken by the entity relative to persons, businesses, or facilities subject to licensure or regulation by [the Board]." (Bus. & Prof. Code, § 27, subd. (a); see also *id.* at subd. (c)(8).) Second, immunity under Government Code section 821.6 extends to communications made by the employee that have a connection with the investigation or prosecution process. (*All Angels*, *supra*, 197 Cal.App.4th at p. 408.)

We conclude that Baisden's civil damage claims against the Board relating to the investigation and prosecution of the Board's disciplinary proceeding were barred by

statutory immunity. The trial court correctly sustained the Board's demurrer on this ground.

D. Failure to Timely File Government Claim

Before suing a public entity, a plaintiff must present a timely written claim for damages to the entity as provided by law. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239; Gov. Code, § 911.2.) For alleged injury to person or property, a claim must be presented within six months of accrual of the cause of action. A claim relating to any other causes of action must be presented within one year of accrual. (Gov. Code, § 911.2, subd. (a).) The timely presentation of a claim for damages against the public entity is not merely a procedural requirement; it is a condition precedent to the plaintiff's maintaining an action against the public entity and a necessary element of plaintiff's cause of action. (*State of California v. Superior Court*, *supra*, 32 Cal.4th at pp. 1239–1241.) Thus, failure to comply renders the party's complaint vulnerable to general demurrer.

Here, Baisden concedes his claims accrued in January 2008 when his CPA license was revoked by the Board. However, he argues that the government claim filed by him in July 2016 was nevertheless timely based on principles of estoppel tolling the statutory deadline due to alleged impossibility. We disagree. Baisden relies on *Lewis v. Superior Court* (1985) 175 Cal.App.3d 366, but that case is clearly distinguishable as it involved an attorney who, several days before the statutory deadline expired, was struck by an automobile and rendered mentally and physically disabled (including amnesia) over a period of time that extended beyond expiration of the statutory period. (*Id.* at p. 370.) Under the unique circumstances presented in that case, where timely commencement of the action was rendered impossible or virtually impossible, the *Lewis* court found there was an implied tolling of the statute of limitations. (*Id.* at pp. 377–378.) No comparable circumstances are alleged by Baisden in the present lawsuit. Baisden seeks to bolster his argument by contending he was disabled within the meaning of section 352.1 due to his

criminal prosecution and imprisonment. That argument likewise fails because section 352.1 is expressly inapplicable to causes of action against a public entity for which a government claim is required (§ 352.1, subd. (b)), and in any event the period of disability cannot exceed two years (§ 352.1, subd. (a)).

Baisden's primary contention is that he could not file a government claim on a timely basis because, sometime in 2008, the assistant United States attorney threatened him with arrest and incarceration if Baisden did not leave the witnesses in the criminal prosecution alone. Baisden fails to explain how this could have reasonably prevented him from filing a timely government claim with the Board as a public entity. Indeed, as noted by the Board, in 2009 Baisden had no difficulty filing a petition for writ of mandate in the superior court to challenge the Board's findings. Baisden's arguments on this issue not only lack reasonable factual support and logical coherence, but are not supported in his briefing by any cogent legal argument or authority. For all these reasons, we conclude the trial court properly sustained the Board's demurrer on the ground that Baisden failed to timely file a government claim.

E. Other Grounds for Demurrer

It follows from our discussion above the trial court correctly determined that Baisden failed to allege a valid cause of action against the Board. The trial court properly sustained the Board's demurrer to the first amended complaint. Moreover, Baisden has failed to present any reasonable basis upon which leave to amend could possibly cure the defects discussed above. Therefore, leave to amend was properly denied by the trial court as well.

Accordingly, it is unnecessary to reach the remaining grounds relied upon by the trial court in sustaining the demurrer and we decline to do so. When the trial court's ruling on demurrer was valid on any one ground, it is unnecessary to discuss the remaining grounds relied upon by the trial court. (*Webb v. Youmans* (1967) 248 Cal.App.2d 851, 855.) The judgment of dismissal in favor of the Board is affirmed.

III. The Geilenkirchens' Motion to Set Aside Default

The trial court set aside the clerk's entry of default against the Geilenkirchens, which the trial court noted at the hearing was "void from the moment that it was filed." After the hearing, the trial court issued a written order granting the Geilenkirchens' motion to set aside default. Baisden argues the trial court erred. We disagree and conclude the trial court correctly decided this matter. As we explain hereinbelow, the crucial event was the filing of a declaration by which the Geilenkirchens obtained an automatic extension of time to file a responsive pleading.

Baisden served his complaint on the Geilenkirchens on April 9, 2017. On May 9, 2017, the Geilenkirchens' attorney, Cary Wood, conferred telephonically with Baisden and requested additional time to file a demurrer to allow for the statutory meet and confer process to take place at least five days before a demurrer was due, pursuant to section 430.41, subdivision (a)(1). In that conversation, attorney Wood explained that it had been impossible to meet and confer earlier due to the fact that he had only been recently retained to represent the Geilenkirchens and needed time to analyze the file materials and undertake legal research concerning the grounds for demurrer. Baisden refused to grant an extension. Attorney Wood then informed Baisden of the automatic extension provision of section 430.41, subdivision (a)(2), and told Baisden that he would be filing such a declaration. On May 9, 2017, attorney Wood filed the declaration pursuant to section 430.41, subdivision (a)(2).

By the clear terms of the statute, the effect of filing such a declaration was that the Geilenkirchens, as the parties seeking to interpose a demurrer, were given an automatic 30-day extension of time within which to file a responsive pleading. (§ 430.41, subd. (a)(2).) The 30-day extension "shall commence from the date the responsive pleading was previously due, and the demurring party *shall not be subject to default during the period of the extension*." (*Ibid.*, italics added.) Despite the clear statutory prohibition against the entry of a default during the 30-day extension, Baisden filed a request for

entry of default on May 18, 2017, and the clerk entered the Geilenkirchens' default that same day. As noted, during the hearing of the motion to set aside default the trial court observed that, in light of the automatic statutory extension, default never should have been entered and it "clearly is a clerical error and, therefore, void from the moment it was filed."

In claiming the trial court erred in setting aside default, Baisden argues the declaration filed under section 430.41 was invalid when filed because, at that time, the Geilenkirchens had not yet paid their first appearance fee.[7] We disagree. Even assuming the superior court clerk was obligated to timely collect a filing fee, the failure to do so would not negate or invalidate the actual filing of the declaration by the clerk. (*Duran v. St. Luke's Hospital* (2003) 114 Cal.App.4th 457, 460 [although it is mandatory for the court clerks to demand and receive statutorily required filing fees, if a clerk does file a pleading without receiving the fee, "the filing is nevertheless valid"]; accord, *Foley v. Foley* (1956) 147 Cal.App.2d 76, 77–78; *Bauer v. Merigan* (1962) 206 Cal.App.2d 769, 771.) Here, the record plainly shows the declaration of attorney Wood to obtain the 30-day extension was officially filed by the court clerk on May 9, 2017. Based on the above cited case authority, we conclude the declaration's filing was valid and, thus, fully effective under the statutory provision despite the fact that the filing fee was not paid until sometime later.

In a related argument, Baisden claims the trial court impermissibly allowed the Geilenkirchens to file their demurrer and anti-SLAPP motion, even though the default had not yet been set aside. The rule alluded to by Baisden is that the entry of default cuts off a party's right to participate in the litigation until such time as the default is set aside. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385–386.)

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7 As acknowledged by Baisden's opening brief, the first appearance fee was in fact paid by the Geilenkirchens; it was simply paid late. Baisden's opening brief asserts the fee was paid on July 14, 2017.

However, as the Board correctly points out, the rule differs where the default or other order is void on the face of the record. That is, an order which is void on the face of the record " 'is simply a *nullity*, and can be neither the basis nor evidence of any right whatever....' [Citations.]" (*Nagel v. P&M Distributors, Inc.* (1969) 273 Cal.App.2d 176, 179–180, italics added.) Such an order may be set aside at any time, whether by a direct attack or by a collateral or indirect challenge, including in proceedings that are brought for some purpose other than specifically attacking the order. (*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1326–1327.) "[A] judgment which is void upon its face is a dead limb upon the judicial tree which may be lopped off at any time. Such a judgment may be set aside by the court at any time, and it is immaterial how the invalidity is called to its attention." (*Baird v. Smith* (1932) 216 Cal. 408, 410.)

An order is void on the face of the record if its invalidity is apparent upon the face of the court record or judgment roll. (*OC Interior Services, LLC v. Nationstar Mortgage, LLC*, *supra*, 7 Cal.App.5th at p. 1327; *Hayashi v. Lorenz* (1954) 42 Cal.2d 848, 851.) Where the record shows the clerk entered a default contrary to the statutory powers granted to it, the default is void or a nullity, and may be set aside at any time. (*Westport Oil Co. v. Garrison* (1971) 19 Cal.App.3d 974, 978; *Baird v. Smith*, *supra*, 216 Cal. 408, 410.) That was the case here. At the time Baisden requested and the clerk granted the entry of the Geilenkirchens' defaults under the original complaint, the declaration of the Geilenkirchens' attorney pursuant to section 430.41, subdivision (a)(2), was on file and precluded the entry of default during the period of the automatic extension. For this reason, we agree with the Geilenkirchens that the default was void on the face of the record.

We conclude the Geilenkirchens were entitled to attack the void entry of default collaterally or in any procedural manner, at any time, including the filing of a demurrer and an anti-SLAPP motion against the subsequently filed first amended complaint. In

bringing these motions, the Geilenkirchens implicitly and indirectly challenged the void default with respect to the original complaint by treating it as a nullity and proceeding to raise objections to the first amended complaint. Under the circumstances, we reject Baisden's argument that the trial court erred in allowing the Geilenkirchens to file their ultimately dispositive motions prior to setting aside the void default.

Moreover, even assuming for the sake of argument that the trial court did err in allowing the Geilenkirchens' motions to be filed prior to setting aside the void default, Baisden has failed to demonstrate prejudice. Hence, any such error is not subject to reversal. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; see *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1102, 1116 [judgment affirmed under harmless error standard despite failure to comply with mandatory § 632 requirement that trial court issue statement of decision upon request].) As will be seen in the discussion to follow, the Geilenkirchens' motions showed as a matter of law that Baisden cannot prevail on his causes of action. The timing of the motions relative to the setting aside of the default does not reflect any prejudice to Baisden or the existence of possible grounds for a different outcome in this case. Plainly, no prejudice existed here, even assuming hypothetically that a procedural error may have occurred.

IV. The Geilenkirchens' Anti-SLAPP Motion

Baisden contends the trial court erred in granting the Geilenkirchens' anti-SLAPP motion. We disagree with that contention. We begin our discussion with an overview of the law regarding anti-SLAPP motions, including a more detailed summary of our standard of review and the nature of an anti-SLAPP motion.

A. Summary of our Standard of Review

We review de novo the trial court's ruling to grant or deny an anti-SLAPP motion. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) "Resolving the merits of a section 425.16 motion involves a two-part analysis, concentrating initially on whether the challenged cause of action arises from protected activity within the meaning of the statute and, if it

does, proceeding secondly to whether the plaintiff can establish a probability of prevailing on the merits. [Citation.]" (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699.) In our review, " '[w]e consider "the pleadings, and supporting and opposing affidavits ... upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." ' " (*Flatley v. Mauro*, *supra*, at p. 326.)

B. Overview of Anti-SLAPP Statute

Section 425.16, subdivision (b)(1), provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." An act in furtherance of a person's right of petition or free speech is broadly defined by section 425.16, subdivision (e), to include 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 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, or (4) 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." (§ 425.16, subd. (e).)

"[T]he Legislature enacted section 425.16, the anti-SLAPP statute, to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the

constitutional rights of freedom of speech and petition for the redress of grievances. [Citation.]" (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315.) "The Legislature authorized the filing of a special motion to strike such claims (§ 425.16, subds. (b)(1), (f)), and expressly provided that section 425.16 should 'be construed broadly.' [Citations.]" (*Club Members for an Honest Election v. Sierra Club*, at p. 315; see Code Civ. Proc., § 425.16, subd. (a).) As noted, the resolution of an anti-SLAPP motion follows a two-step process: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity.... [Second], [i]f the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) The defendant has the burden on the first issue; the plaintiff has the burden on the second issue. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928.)

To satisfy the first step or prong, the moving defendant must show the cause of action arises from acts that come within one of the categories of section 425.16, subdivision (e). (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) If the defendant does not meet this threshold burden at the first step, the court denies the motion without addressing the second step. If the defendant makes the required showing, the burden shifts to the plaintiff to satisfy the second step of the anti-SLAPP analysis. (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266–267.) To satisfy the second step or prong, a plaintiff must state and substantiate a legally sufficient claim. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) " '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." [Citations.]' " (*Id.* at p. 1056.) "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); 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." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

C. Anti-SLAPP Motion Properly Granted

As indicated above, the Geilenkirchens' burden under the first prong of the anti-SLAPP statute was to show that the causes of action alleged against them in the first amended complaint were based on or arose out of free speech or petitioning activity protected under the anti-SLAPP statute. (§ 425.16, subd. (b)(1).) We readily conclude that this burden was met. The protection of the anti-SLAPP statute broadly extends to "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(1).) The term "other official proceeding" includes proceedings before governmental agencies. (*Olaes v. Nationwide Mutual Ins. Co.* (2006) 135 Cal.App.4th 1501, 1506–1507; *County of Riverside v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 20, 31.) Protected petitioning activity under this provision includes the basic act of filing litigation or otherwise seeking administrative action from a governmental body. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) Furthermore, the anti-SLAPP protections extend to "any written or oral statement or writing made in connection with an issue under consideration or review by" such governmental body. (§ 425.16, subd. (e)(2).) A statement is deemed to be in connection with an issue under consideration or review by the public entity if it relates to the substantive issues under

consideration in the proceeding and is directed to persons having an interest therein. (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266.)

Here, Baisden's first amended complaint asserted damage claims against the Geilenkirchens based upon their consumer complaint submitted to the Board regarding Baisden's accounting work on their 2002 income tax return. As the trial court correctly found, "the entire thrust" of Baisden's claims against the Geilenkirchens in the first amended complaint "goes to [their] right to petition a government agency[,]" an activity clearly within the protection of the anti-SLAPP statute. Not only did the consumer complaint filed with the Board by the Geilenkirchens come within the statute's protection, but so did their testimony or other statements made to the Board in connection with the Board's investigative and administrative proceedings. (§ 425.16, subd. (e)(1) & (2).) We conclude that the entirety of Baisden's first amended complaint against the Geilenkirchens arose out of free speech or petitioning activity protected under the anti-SLAPP statute, and therefore the first prong of the statute was satisfied.

Because the first prong was met by the Geilenkirchens, the burden shifted to Baisden to establish there is a probability he will prevail on his claims. That is, Baisden had to demonstrate he could state and substantiate a legally sufficient claim. (*Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1056.) " '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." [Citations.]' " (*Ibid.*) In this case, the trial court concluded that Baisden could not meet his burden of demonstrating a probability of prevailing because Baisden's claims against the Geilenkirchens were clearly barred by the litigation privilege of Civil Code section 47, subdivision (b). We agree.

Under the litigation privilege, codified at Civil Code section 47, subdivision (b), a communication made as part of a judicial, quasi-judicial or other official proceeding authorized by law is privileged. (*Action Apartment Assn., Inc. v. City of Santa Monica*

(2007) 41 Cal.4th 1232, 1241 (*Action Apartment*) [noting the usual formulation of privilege as to "any communication" made in "judicial or quasi-judicial proceedings"]; cf. Civ. Code, § 47, subd. (b) [privilege extends to "other official proceeding authorized by law"].) The privilege immunizes a defendant from tort liability based on the subject communication. (*Action Apartment, supra*, 41 Cal.4th at pp. 1241–1242; *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 375.) The purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the courts without the fear of harassment or retaliation by subsequent derivative tort actions. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 213 (*Silberg*).) Similarly, the privilege " ' "exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing." ' " (*Wang v. Heck* (2012) 203 Cal.App.4th 677, 684.) To achieve such important purposes, the privilege is given broad interpretation. (*Action Apartment, supra*, 41 Cal.4th at p. 1241.) "[C]ourts have applied the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings." (*Silberg, supra*, 50 Cal.3d at p. 213; see also *Tiedemann v. Superior Court* (1978) 83 Cal.App.3d 918, 924 [applicability of the privilege to " 'any other official proceeding authorized by law' has been broadly interpreted to include those proceedings which resemble judicial and legislative proceedings such as administrative boards and quasi-judicial and quasi-legislative proceedings"].) The litigation privilege "is applied broadly, and doubts are resolved in favor of the privilege." (*McNair v. City and County of San Francisco* (2016) 5 Cal.App.5th 1154, 1162.)

" 'The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action.' " (*Action Apartment, supra*, 41 Cal.4th at

p. 1241, quoting *Silberg*, *supra*, 50 Cal.3d at p. 212.) Moreover, the litigation privilege is "not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." (*Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1057.) Numerous cases agree that the privilege applies to complaints to government agencies requesting that an agency investigate or remedy wrongdoing. (*Hagberg v. California Federal Bank*, *supra*, 32 Cal.4th at p. 363 [cases cited]; see, e.g., *Tiedemann v. Superior Court*, *supra*, 83 Cal.App.3d at p. 921 [communications to IRS enforcement agency relating to possible tax fraud held privileged]; *Lebbos v. State Bar* (1985) 165 Cal.App.3d 656, 668–669 [communications relating to initiating and pursuing State Bar investigation privileged].)

Based on the above summary of the litigation privilege, we agree with the trial court that the litigation privilege was applicable to the communications made by the Geilenkirchens in connection with the administrative or quasi-judicial proceedings of the Board, including the Geilenkirchens' initial consumer complaint and any subsequent communications made to or before the Board in connection with or relating to the Board's investigation of Baisden and the administrative hearing. The only counter argument raised by Baisden is his assertion that the litigation privilege should not be applied to the Board's action of posting disciplinary information in its website. However, that argument is misplaced and without merit. The sole basis for liability alleged against the Geilenkirchens was their own communications made to the Board, not the separate action of the Board to post certain disciplinary matters. Nor has Baisden presented any viable legal or factual basis for attributing the Board's action to the Geilenkirchens. Therefore, Baisden has failed to present and substantiate any possible ground for overcoming the litigation privilege or to otherwise demonstrate that he can potentially prevail on his claims against the Geilenkirchens. We conclude Baisden's claims against the Geilenkirchens were and are barred by the litigation privilege.

We also reject Baisden's procedural argument relating to the timing of the filing of the anti-SLAPP motion. Section 425.16, subdivision (f), provides: "The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." Baisden made an objection in the trial court that the anti-SLAPP motion was untimely filed. However, the record reflects that the trial court exercised its discretion to hear the motion even though filed beyond the 60-day period. The statute plainly gives the trial court such discretion, and it is recognized that its discretion is "considerable." (*San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 624; see also *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 684 [failure to seek leave not fatal if court elects to entertain late motion]). Moreover, Baisden's appeal presents no cogent argument that the trial court's decision to proceed to hear the motion constituted a prejudicial abuse of its discretion in this case. He has therefore failed to meet his burden as appellant. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556–557; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956–957.)

For the foregoing reasons, we conclude the trial court correctly granted the Geilenkirchens' anti-SLAPP motion as to all causes of action asserted against them in Baisden's first amended complaint. Baisden's claims were based on speech or conduct protected under the anti-SLAPP statute, and such claims cannot prevail due to applicability of the litigation privilege. We note the Geilenkirchens' anti-SLAPP motion *also* argued that Baisden could not prevail due to the expiration of the applicable statutes of limitation. We agree with that argument and conclude the statute of limitations defense provided an additional reason the anti-SLAPP motion was properly granted by the trial court. However, we choose to discuss the statute of limitations question within our consideration below of the merits of the Geilenkirchens' demurrer.

V. The Geilenkirchens' Demurrer

The trial court sustained the demurrer by the Geilenkirchens to the first amended complaint on the ground the applicable statutes of limitation had expired. As explained below, we conclude the trial court was correct.

A two-year statute of limitations is applicable to the causes of action premised on injury due to negligence (§ 335.1), and likewise to the cause of action for negligent interference with prospective economic relations (§ 339; *McFaddin v. H.S. Crocker Co.* (1963) 219 Cal.App.2d 585, 591). Abuse of process is considered an injury to the person (see *Cantu v. Resolution Trust Corp.*, *supra*, 4 Cal.App.4th at pp. 886–887), and therefore is subject to the two-year limitations period of section 335.1. (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 555, p. 704.) A one-year statute of limitations is applicable to the tort of defamation (§ 340, subd. (c)). Therefore, none of Baisden's causes of action have a statute of limitations of more than two years.

Statutes of limitations are "acts that prescribe the periods beyond which a plaintiff may not bring a cause of action." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) Important policies underlie such statutes, including to provide reasonable repose and to protect against stale claims. (*Ibid.*) The statutory period begins to run when a cause of action accrues, and it is generally said that an action accrues on the date of injury. (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931, quoting *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109.) Alternatively, the statute of limitations begins to run when the plaintiff suspects or should suspect that his injury was caused by wrongdoing—that someone has done something wrong to him. (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1110.)

Here, the date of Baisden's initial injury appears to have been when his CPA license was revoked by the Board, which, as acknowledged in Baisden's pleading, became effective in January 2008. Baisden also alleged that, in early 2008, he informed his attorney that he was considering filing a civil action against the Geilenkirchens for

negligence. Thus, it appears from the allegations of the first amended complaint that, by early 2008, Baisden had not only sustained injury but suspected wrongdoing on the part of the Geilenkirchens. Indeed, Baisden's opening brief concedes the causes of action "arose" in January 2008. Under the above principles of accrual, the statute of limitation would have commenced at that time. However, Baisden did not file his original complaint against the Geilenkirchens until March 23, 2017, nearly a decade later. Thus, unless an adequate ground for tolling the statutory period existed, Baisden's causes of action were clearly time barred. Baisden argues his complaint was timely because the doctrine of equitable tolling of the statutes of limitation should be applied here. We conclude that doctrine does not assist Baisden.

The Legislature has established various provisions tolling or suspending the statute of limitations where a person entitled to sue is under a material "disability" at the time the cause of action accrues. (*Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1305.) For example, such statutes provide for tolling of the statute of limitations due to a plaintiff's minority or insanity (§ 352), plaintiff's incarceration (§ 352.1), or where the law practice of plaintiff's attorney is taken over by the court because of the attorney's incapacity (§ 353.1). (*Grell v. Laci Le Beau Corp.*, at p. 1305.) The manifest common purpose of the statutory tolling provisions is to avoid unjust application of statutes of limitations where the circumstances render timely commencement of an action impossible or virtually impossible. (*Grell v. Laci Le Beau Corp.*, at p. 1305; accord, *Lewis v. Superior Court*, *supra*, 175 Cal.App.3d 366, 371–372.) In addition to the express tolling provisions, courts have found implicit or equitable grounds for tolling the statute of limitations in extraordinary circumstances. For example, in *Lewis v. Superior Court*, the appellate court found implied tolling existed where a party failed to timely file a complaint within the statute of limitations period because her attorney was struck by an automobile, resulting in life-threatening injuries and unconsciousness or amnesia, including the date of the filing deadline. (*Lewis v. Superior Court*, at pp. 370–371, 380.)

The appellate court concluded: "Language of statutes of limitation must admit to implicit exceptions where compliance is impossible and manifest injustice would otherwise result. We hold that the facts here presented give rise to an impossibility of compliance with the statute of limitation." (*Id.* at p. 380.)

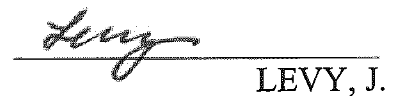
Baisden argues that tolling based on "impossibility" should be applied to his circumstances as alleged in the first amended complaint. In that pleading, he alleged that in 2008, the assistant United States attorney stated Baisden must leave the witnesses in the criminal prosecution alone, or else he would be arrested and incarcerated "until Baisden's criminal case was resolved." He further alleged that in 2009, criminal indictments were returned against Baisden for aiding and abetting tax evasion by Koning. The witness list in the criminal case allegedly included the Geilenkirchens. In 2011, Baisden pled guilty to aiding and abetting tax evasion, and in 2012 he was sentenced to 37 months of incarceration in a Federal prison and 36 months supervised release. Baisden alleged he received a negative response when he spoke to a "counselor" about having permission to file a lawsuit. He further alleged he was released from prison in October 2014, and he remained on probation until June 2016. Additionally, Baisden alleged that when he asked his probation officer about the possibility of Baisden pursuing new litigation against people, approval to do so was not given.

We conclude that no basis has been presented by Baisden to apply equitable tolling based on impossibility. Even if the assistant United States attorney made the purported threat to Baisden in 2008 about what would happen if he did not leave witnesses alone, that did not necessarily prevent Baisden from simply filing a complaint, assuming it was not for the purpose of harassing or bothering witnesses with a frivolous lawsuit. Also, Baisden could have filed a civil complaint for the limited purpose of keeping the statute from expiring (see § 350) without pursuing or serving the action until later, e.g., when criminal proceedings were completed. (See 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 735, p. 958 [mere act of filing a pleading stops statute from

running].) Additionally, we discern no ground of impossibility for filing an action in this case, and certainly nothing on par with what occurred in *Lewis*, during the considerable period of time after Baisden was convicted, or while he was incarcerated or on probation. It is instructive that the statutory disability relating to incarceration only applies to causes of action that accrue while the individual is imprisoned, and even then, the disability cannot exceed two years. (§ 352.1, subd. (a).) Further, it is well established that a parolee may not assert his status as a parolee as a basis for equitable tolling. (*Deutch v. Hoffman* (1985) 165 Cal.App.3d 152, 155.) We think a similar rule would apply to probationers such as Baisden, whether or not his request for a formal approval to sue people was allegedly denied. Nor has Baisden demonstrated that further amendment to include additional background allegations would indicate otherwise. Additionally, in light of the litigation privilege established in the anti-SLAPP motion, leave to amend would serve no purpose. For these reasons, we hold the trial court correctly sustained the demurrer on statute of limitations grounds, without leave to amend.

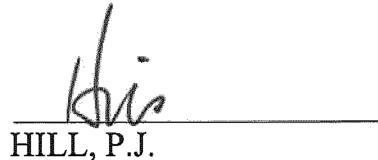
DISPOSITION

The judgments of dismissal and underlying orders appealed from are affirmed. Costs on appeal are awarded to the Board and the Geilenkirchens.

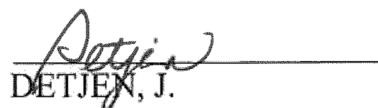


LEVY, J.

WE CONCUR:



HILL, P.J.



DETJEN, J.