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Calif. Attys' Press Statements Protected By Anti-SLAPP

By **Andrew Strickler**

Law360, New York (December 20, 2016, 6:45 PM EST) -- A California appeals court Monday agreed that a trio of law firms targeted in a \$60 million defamation suit did not defame a former hospital executive in media interviews when they raised allegations of counterfeit medical devices and a kickback scheme involving prostitution.

A three-judge panel affirmed a lower court ruling for defendants Kabateck Brown Kellner LLP, Cotchett Pitre & McCarthy LLP and Knox Ricksen LLP, saying lawyers' statements to reporters about Michael Drobot and Healthsmart Pacific Inc. were closely tied to a filed complaint and were protected under the so-called fair report privilege and the state's anti-SLAPP statute.

The panel noted a "critical difference" between telling the press what is alleged in a complaint and asserting alleged facts without reference to a complaint.

The attorney defendants "are protected from liability under the fair report privilege in informing the news media that they have alleged that plaintiffs used counterfeit screws in spinal surgeries and supplied prostitutes to Senator [Ronald] Calderon, but they are not protected if they informed the media that such facts were true," the appeals court said.

Healthsmart and Drobot had sued the law firms and attorneys Brian S. Kabateck and Robert Hutchinson in late 2015, alleging they spread falsehoods when they raised accusations that the hospital used fake medical screws that were not approved by the U.S. Food and Drug Administration on the spine of the firms' client.

Also at issue were assertions that Drobot, who admitted to being involved in a massive billing and kickback scheme, supplied prostitutes to legislators and doctors as bribes.

Among a number of others caught in the scam were former California state Sen. Ron Calderon, who pled guilty in the federal corruption case and admitted to taking tens of thousands of dollars in bribes from Drobot in exchange for favorable legislation.

Following Drobot's plea, Kabateck and the three law firms sued Healthsmart and Drobot on behalf of Mary Cavalieri, alleging the hospital had used cheap, nonsterile screws in her surgeries and tying her injuries to the kickback scam.

After the complaint was filed in July 24, Kabateck and Hutchinson each gave press interviews in which they discussed the allegations of the Cavalieri suit. Kabateck mentioned evidence pointing to prostitution, according to the Monday decision, while Hutchinson repeatedly said the scheme involved counterfeit screws.

Drobot argued that the statements "needlessly created incredible hysteria for hundreds of former patients" of Pacific Hospital, and that the charges to which he pled did not include using counterfeit or unsafe hardware.

That suit hit a wall last year, when a Los Angeles judge granted the firms' motion to strike under California's anti-SLAPP statute, saying the firms had a "**slam dunk**" defense against the

defamation claims.

On appeal, Drobot's lawyer argued that the assertions the lawyers made to the press were **not entitled** to the same protections afforded to allegations raised in litigation, and that Drobot should not be considered a public figure.

A message left Tuesday for Drobot's lawyer was not immediately returned.

Justices Frances Rothschild, Jeffrey W. Johnson and Elwood Lui sat on the panel for the Second Appellate District.

Healthsmart Pacific Inc. and Michael D. Drobot are represented by Keith A. Fink of Fink & Steinberg and Jeremy Brooks Rosen of Horvitz & Levy.

The Kabateck Brown Kellner LLP defendants are represented by Harry W.R. Chamberlain II of Buchalter Nemer PC.

The case is Healthsmart Pacific Inc. et al. v. Kabateck Brown Kellner LLP et al., case number B264300, in the Court of Appeal of the State of California, Second Appellate District.

--Additional reporting by Bonnie Eslinger and Kat Greene. Editing by Edrienne Su.

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