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Opinion by George, C.J., with Kennard, J., Baxter, J., Werdegar, J., Chin, J., Moreno, J., and Corrigan, J. Concurring Opinion by Moreno, J., with Werdegar, J.

Issues

(1) Whether the protections of a motion-to-strike provided in California's anti-SLAPP ("Strategic Lawsuit Against Public Participation") statute are available to a public entity or its officials.

(2) Whether the Court of Appeal for the Sixth District correctly concluded that the "express advocacy" standard from section 54964 of the California Civil Code, rather than the standard laid out in *Stanson v. Mott*, controlled the distinction between activities which presumptively may and those which presumptively may not be paid for by public funds.

(3) Whether, under the correct standard, the trial court's decision to grant the City of Salinas' anti-SLAPP motion to strike was proper.

Facts

Plaintiffs and Appellants, Angelina Morfin Vargas and Mark Dierolf, were the proponents of a local tax-relief initiative, ultimately termed Measure O, which qualified for the November 2002 ballot in the City of Salinas.[1] Measure O was designed to reduce and finally repeal the City's utility user tax which generated a substantial percentage of the city's general fund budget.[2] Once qualified, the Salinas City Council was required to either adopt the substance of the proposed initiative as an ordinance, submit the initiative to the voters, or direct the municipality's staff to prepare a report on the impact of the proposed initiative should it become law.[3] The city council elected to have a report prepared and, once the report was completed, decided not to adopt the initiative as an ordinance but

1 Vargas v. City of Salinas, 205 P.3d 207, 209 (Cal. 2009).
2 *Id.* at 210–11.
3 *Id.* at 211 (citing CAL. ELEC. CODE §§ 9212, 9215 (West 2003)).

rather to send it to the voters.[4] Thereafter, the city council adopted recommendations from the city staff regarding the city services and programs that would be reduced or eliminated should Measure O pass.[5]

Subsequently, the City of Salinas posted the minutes of each city council meeting on the city's website, according to its regular practice, as well as the city's report on the potential impact of Measure O, slideshows relating to Measure O from different city departments, and a report by the city responding to the alternative reductions suggested by the proponents of Measure O.[6] Further, the city produced a one-page document describing Measure O, the utility user tax, and the services which would be reduced or eliminated.[7] This document was made available to the public in all city libraries, city hall, and the city website. Finally, articles in the city newsletter regularly discussed the utility user tax, Measure O, and its effect on city services.[8]

Plaintiffs filed suit and accused Defendants, the City of Salinas and its manager Dave Mora, of engaging in unlawful campaign activities by using public funds "to prepare and distribute pamphlets, newsletters and Web site materials."[9] Defendants filed a motion to strike pursuant to California's anti-SLAPP statute.[10] The trial court granted this motion and Plaintiffs appealed.[11] The court of appeal found, in accordance with a lengthy heritage of courts of appeal decisions, that the anti-SLAPP statute's protections apply to public entities and, in the instant case, that Defendants had established the first prong of the anti-SLAPP statute—that Defendants' statements and actions concerned a matter of public interest.[12] Further, the court of appeal found that Plaintiffs were unable to satisfy their burden of making a prima facie showing that they would likely succeed on the merits of the action since Defendants' statements and actions were not unlawful under the "express advocacy" standard provided in section 54964 of the California Civil Code.[13] The court of appeal rejected the Plaintiffs' assertion that the

4 *Id.*
5 *Id.* at 211–12.
6 *Id.* at 212.
7 *Id.*
8 *Id.* at 212–13.
9 *Id.* at 213.
10 *Id.* at 213–14.
11 *Id.* at 214.
12 Vargas v. City of Salinas, 37 Cal. Rptr. 3d 506, 514–20 (Cal. Ct. App. 2005) (review granted and opinion superseded), *aff'd*, 205 P.3d 207 (Cal. 2009).
13 *Id.* at 520–526.

standard articulated in *Stanson*, rather than section 54964, should control.[14] Upon further appeal, the California Supreme Court granted Plaintiffs' petition of review.[15]

Analysis

As a preliminary matter, the California Supreme Court found that the protections of California's anti-SLAPP statute extend to public entities.[16] The court noted that it need not decide whether or not "the First Amendment of the federal Constitution or article I, section 2 of the California Constitution directly protects government speech" either in general or of the types involved in the instant case.[17]

The court considered the anti-SLAPP statute, its legislative history, and a related statute.[18] First, subdivision (e) of the anti-SLAPP statute, which defines an "act" deserving of anti-SLAPP protection, is phrased in broad terms and does not distinguish between private entities or individuals and public ones.[19] Further, the California Legislature stated that the anti-SLAPP statute was to be "construed broadly" and the legislative history of the provision revealed legislative concern that abusive lawsuits may discourage statements by public officials regarding public issues.[20] Finally, California's SLAPPback statute, enacted after the numerous courts of appeal decisions which found the anti-SLAPP statute to apply to public entities, expressly permits a public entity to bring an "action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike."[21] This statutory authorization to bring SLAPPback actions would be meaningless and incomprehensible if public entities were not protected by the anti-SLAPP statute.[22] The court also summarily concluded that Defendant's statements constituted "protected activity" within the meaning of the anti-SLAPP statute because they concerned a matter of public interest and, therefore, that prong one of the anti-SLAPP test had been satisfied.[23]

14 *Id.* at 523–25.
15 *Vargas*, 205 P.3d at 215.
16 *Id.* at 217.
17 *Id.* at 216.
18 *Id.* at 216–17.
19 *Id.* at 216.
20 *Id.* at 217.
21 *Id.* (quoting CAL. CIV. PROC. CODE § 425.18(b)(1) (West 2003)).
22 *Id.*
23 *Id.*

1. The Proper Legal Standard for Determining Whether Actions Relating to Elections and Ballot Measures May be Paid for by Public Funds

The court compared two possible legal standards for whether the statements or actions of a public entity or its officers may or may not be paid for by public funds or utilize public resources.[24] The court of appeal accepted the bright-line "express advocacy" standard adopted by section 54964 of the California Civil Code because the appellate court believed that this statute rendered *Stanson* inapplicable since *Stanson* expressly limited itself to cases not involving clear and unmistakable language authorizing expenditure of public funds for campaign purposes.[25] In *Stanson*, the California? Supreme Court articulated a standard which distinguished between public fund spending for "*campaign purposes*," which was not allowed, and for "*informational purposes*," which was permitted.[26] In that opinion, the court also stated that "no hard and fast rule governs every case" and that, in certain cases, courts would have to make the determination based "upon a careful consideration of such factors as the style, tenor and timing of the publication."[27]

The court concluded that the court of appeal had erred in applying the "express advocacy" standard.[28] Section 54964 does not "affirmatively *authorize*" the use of public funds for communications which do not expressly advocate the approval or rejection of a ballot measure.[29] Rather, the section "simply *prohibits* a municipality's use of public funds for communications that expressly advocate such a position."[30] Further, the court concluded that the legislative history of section 54964 did not support the conclusion that the legislature intended to overturn *Stanson*—the committee report explicitly mentioned *Stanson* but in no way indicated an intent to "depart from or modify" that decision.[31] Finally, utilizing the "express advocacy" standard in cases like the instant one raises troubling constitutional concerns.[32] The court noted that "[i]f a public entity could expend public funds for *any* type of election-related communication so long as the communication avoided 'express words of advocacy'

24 *Id.* at 220–28.
25 *Vargas*, 37 Cal. Rptr. 3d at 523–25.
26 *Vargas*, 205 P.3d at 221 (quoting Stanson v. Mott, 551 P.2d 1, 11 (Cal. 1976)).
27 *Id.* (quoting *Stanson*, 551 P.2d at 12) (emphasis omitted).
28 *Id.* at 228.
29 *Id.* at 224.
30 *Id.*
31 *Id.* at 225–26.
32 *Id.* at 226.

and did not 'unambiguously urge[ ] a particular result'" then "the public entity easily could overwhelm the voters by using the public treasury to finance . . . campaign material containing messages that, while eschewing the use of express advocacy, nonetheless as a realistic matter effectively promote one side of an election."[33] Thus, because no statute clearly and unmistakably authorized Defendants to use public funds for campaign activities, the standard elucidated in *Stanson* applies to the instant case.[34]

2. Whether the Conduct of the City of Salinas and the City Manager Violated the Standard Articulated in *Stanson*

Since no statute clearly and unambiguously authorized Defendants to use public funds for campaign activities, the court turned to the question of "whether the activities fall within the category of informational activities that may be funded through such general appropriations or, instead, constitute campaign activities that may not be paid for by public funds in the absence of such explicit authorization."[35] The court noted that neither the material posted on the website, the one-page document, or the newsletters clearly fell within the categories which *Stanson* recognized as presumptively improper—"bumper stickers, posters, advertising 'floats,' or television and radio 'spots' . . . [or] the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure"—but the court declared this list not to be exhaustive.[36]

The court rejected Plaintiffs' contention that the "style, tenor, and timing" of the challenged communications violated the *Stanson* rule because they impermissibly took sides in the election contest.[37] The court interpreted *Stanson* as banning a public entity from "taking sides" in election contests by using "the public treasury *to mount an election campaign*."[38] In the instant case, Defendants' activities were not impermissible to the extent they merely "evaluate[d] the merits of [the] proposed ballot measure and [made their] views known to the public."[39]

33 *Id.* (alteration in original).

34 *Id.* at 228. The court noted that, since section 54964 does not clearly and unmistakably authorize Defendants to use public funds for campaigning activities, the court did not need to address the serious constitutional question which such an explicit legislative authorization would pose. *Id.*

35 *Id.*

36 *Id.* (alteration in original).

37 *Id.* at 228–29.

38 *Id.* at 229 (quoting Stanson v. Mott, 551 P.2d 1, 9–10 (Cal. 1976)).

39 *Id.* Indeed, the court noted that merely by refusing to adopt the proposed

The court found that merely posting the reports and minutes of council meetings on the website, so as to make them available to the public, constituted permissible informative, rather than campaign, activity.[40] Similarly, the one-page document made available in the city hall and libraries was not impermissible advocacy since the document did not "recommend how the electorate should vote on the ballot measure" and because its "style and tenor is not at all comparable to traditional campaign material."[41] Rather, "from the perspective of an objective observer, the document clearly is an informational statement that merely advises the public of the specific plans that the city council voted to implement, should Measure O be adopted."[42] The court also found relevant the fact that the document was "simply made . . . available at the city clerk's office and in public libraries to members of the public who sought out the document."[43]

Finally, the court concluded that "the City did not engage in impermissible campaign activity by mailing to city residents" the newsletter containing articles about Measure O.[44] The court cautioned that in some cases mass mailings of material relating to ballot measures right before an election could constitute improper campaign activity.[45] However, the court found significant the fact that the newsletter was "a regular edition" rather than a special edition mailed to a larger number of citizens than usual.[46] Additionally, the "the style and tenor of the publication in question was entirely consistent with an ordinary municipal newsletter and readily distinguishable from traditional campaign material."[47] Thus, the articles were "moderate in tone and did not exhort voters with regard to how they should vote" and provided information "in an objective and nonpartisan manner."[48]

The court highlighted certain factors which contributed to its conclusion that Defendants' actions were merely informational and not campaign activities. First, the information

ordinance and instead sending it to the voters, the city council could not help but reveal their view that the measure should fail. *Id.*

40 *Id.* at 230.
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at 231.
47 *Id.*
48 *Id.*

communicated was primarily factual.[49] Second, the statements "avoided argumentative or inflammatory rhetoric."[50] Third, the information was conveyed in a manner "consistent with established practice regarding use of the Web site and regular circulation of the city's official newsletter."[51] Therefore, the court concluded that the court of appeal was correct to decide that Plaintiffs had failed to meet their burden under prong two of the anti-SLAPP statute.[52] Thus, the court affirmed the decision of the court of appeal.[53]

Holding

The court held that "a lawsuit against a public entity that arises from its statements or actions is potentially subject to the anti-SLAPP statute" and that "the campaign activity/informational material dichotomy set forth in *Stanson* remains the appropriate standard for distinguishing the type of activities that presumptively may not be paid for by public funds, from those activities that presumptively may be financed from public funds."[54] However, the court concluded that, in the instant case, "the appellate court reached the correct result in upholding the trial court's order granting defendants' motion to strike."[55]

Concurrence

Justice Moreno agreed that the "express advocacy" standard was insufficient and that Defendants' actions were not unlawful.[56] However, in light of Proposition 13 passed by voters in 1978, he questioned whether the "concept of prohibited 'campaign activity' set forth in *Stanson*, and reaffirmed by the majority meets the current needs of governance."[57] Proposition 13 removed the power to raise local revenues from local legislatures to the electorate.[58] "In this context, local and regional agencies sometimes have been specially charged with the task of sponsoring ballot propositions to raise revenue to fund various infrastructure improvements and services that are

49 *Id.* at 232.
50 *Id.*
51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.* at 217, 228 (citation omitted).
55 *Id.* at 232.
56 *Id.*
57 *Id.* at 234.
58 *Id.*

deemed necessary."[59] Hence, difficulties might arise from attempting to reconcile "the funding of an active informational campaign to promote or defend a lawfully government-sponsored ballot measure" with the majority's "informational/campaign activity dichotomy."[60] Of course, as the majority and *Stanson* recognized, the legislature may expressly authorize "a public entity to expend public funds for campaign activities or materials" by clearly and unmistakably granting this permission.[61]

Legal Significance

In *Vargas*, the California Supreme Court has finally expressly held that California's anti-SLAPP statute applies to public entities and their officers or employees. Further, the court has reaffirmed the rule and standard enunciated in *Stanson* that public entities may not use public resources to support campaign activities but may use such funds to provide the public with impartial information. In rejecting the "express advocacy" standard, the court rejected the position that merely avoiding communications for or against a particular ballot measure would protect a public entity or its officers from lawsuits. Additionally, while *Stanson* provided clear examples of what types of activities constitute "advocacy" and what are "informational," the instant case provides factors to which courts may look for guidance in cases involving activities which do not neatly fit into the campaign/informational dichotomy. These factors suggest that a public entity which avoids communications that are substantively campaign-like and does not involve procedurally irregular expenses or communications is likely to prevail in a subsequent prosecution. However, the *Vargas* court's conclusion that the "government may not take sides" rule, expressed in *Stanson*, only applies where the public funds are used "to mount an election campaign" leaves open the possibility that the court is actually relaxing the standard articulated in *Stanson*. Future decisions may be required for clarity. Finally, whether the California Legislature may constitutionally authorize the use of public funds for campaigning remains unresolved.

59 *Id.*

60 *Id.* at 235.

61 *Id.* at 235–36. "Of course, any such legislation would have to conform to constitutional constraints so as to preserve 'the integrity of the electoral process.'" *Id.* at 236.