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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ROADRUNNER JMTC LLC, Plaintiff and Respondent, v. WARNER BROS. TELEVISION et al., Defendants and Appellants.	B344915 (Los Angeles County Super. Ct. No. 24STCV21825)

APPEAL from an order of the Superior Court of Los Angeles County, Wendy Chang, Judge. Affirmed in part, reversed in part.

Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., Ilissa Samplin, Jay P. Srinivasan, Daniel Nowicki and Marissa Mulligan for Defendants and Appellants.

Hueston Hennigan and Robert N. Klieger for Plaintiff and Respondent.

The producers and writers of the hit television series *The Pitt* have been sued by the owners of certain contractual rights in the earlier hit television series *ER*. Both series are dramas featuring medical teams under stress in the emergency room setting.

The relevant rights to *ER* were owned by the famed Michael Crichton. He has passed away, and those rights are now owned by the plaintiff here, Roadrunner JMTC LLC (Roadrunner), controlled by Sherri Crichton, the heir to and widow of Michael Crichton.

In 1994 Michael Crichton entered into an agreement (1994 Agreement) with one of the defendants here (Warner Bros. Television (WBTV)) that it would not make works derivative of *ER* without his agreement (now, without the agreement of Roadrunner). No such subsequent agreement was reached. When defendants went ahead with the production of *The Pitt*, Roadrunner sued WBTV for breach of contract, breach of the implied covenant of good faith and fair dealing, and sued other defendants involved in the making of *The Pitt* for intentionally interfering with the 1994 Agreement.

The complaint was met with a special motion to strike under the anti-SLAPP statute, which was denied. While the complaint repeatedly refers to the "series" of shows constituting *ER* and *The Pitt*, the litigation of the anti-SLAPP motion assumed the claims relate only to the pilots of the two shows.

Defendants now appeal from the denial of the anti-SLAPP motion. We affirm the denial as to WBTV but reverse it as to the other defendants.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Parties*

The plaintiff is Roadrunner, successor to Michael Crichton's rights in *ER*. Defendants are (i) WBTV; (ii) WarnerMedia Direct, LLC (WMD), which assertedly airs *The Pitt*; (iii) John Wells, the executive producer of *The Pitt* and his company John Wells Productions (JWP); (iv) Noah Wyle, who was an actor on *ER* as well as on *The Pitt*; and (v) R. Scott Gemmill who was executive producer for some episodes of *ER* and is the announced showrunner and an executive producer of *The Pitt*.

2. *Background*

The complaint tells the story of Michael Crichton's remarkable career, which for our purposes culminated in his working with Steven Spielberg to develop what was earlier called *Emergency Ward* and later turned into *ER*. The show was sold to WBTV and the copyright was transferred to WBTV. Although the copyright was then owed by WBTV, Crichton and WBTV signed the 1994 Agreement with a "frozen rights" provision, detailed below, which blocked WBTV from making shows, i.e., "sequels, remakes, spinoffs, or other productions," which were derivative of *ER*.

Michael Crichton died in 2008.

The complaint asserts that in early 2020, defendants began development of what Roadrunner calls a "reboot" of *ER*. This development, alone, allegedly violates the "frozen rights" provision. Two years later, Sherri Crichton (who controls Roadrunner) was contacted for her approval, which, after some bargaining, she refused. Defendants then in short order developed *The Pitt*.

Roadrunner claims, "*The Pitt* is *ER*. It's not like *ER*, it's not kind of *ER*, it's not sort of *ER*. It is *ER* complete with the same executive producer, writer, star, production companies, studio, and network as the planned *ER* reboot." Thus the complaint asserts *The Pitt* violates the frozen rights provision.

Defendants perforce have a different take. Their 2022 efforts which culminated in *The Pitt* resulted in a "brand-new medical drama with no ties to *ER*. *The Pitt* had different characters, settings, visuals, styles, music, timing, and more." Defendants assert that the only similarities between the shows are that, as with many other shows, "they are both medical dramas set in emergency departments." They also share an actor, defendant Noah Wyle.

3. *The contract and claims*

Michael Crichton developed *ER* (then known as *Emergency Ward*) and assigned copyright rights to Warner Bros. But in what the complaint terms "an unusual" contractual clause he negotiated in the 1994 Agreement a

> " 'frozen rights' provision, made possible only because of his stature in the industry, that prohibited future productions without Crichton's consent. Specifically, Crichton's 1994 contract with Warner Bros. (the '1994 Agreement') . . . stated that 'any and all sequels, remakes, spin-offs and/or other derivative works . . . shall be frozen, with mutual agreement between Crichton, Amblin and Warner Bros. being

necessary in order to move forward in any of these categories.' "[1]

The 1994 agreement was signed by WBTV, and included this language:

> "2. If Warner Bros. is unsuccessful in obtaining a series order for ER for Fall 1994 or mid-season 1994 as described above, the Series rights to ER shall be frozen, with mutual agreement between Crichton, Amblin and Warner Bros. being necessary in order to move forward.
>
> "3. . . . subject to paragraphs 2 and 10 and the terms of WGA Agreement, Warner Bros. will acquire all rights in and to the property.
>
> [¶] . . . [¶]
>
> "10. Any and all publishing relating to ER, any and all theatrical releases, any and all sequels, remakes, spin-offs and/or other derivative works (including electronic media, interactive and the like) shall be frozen, with mutual agreement between Crichton, Amblin and Warner Bros. being necessary in order to move forward in any of these categories."

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[1] Amblin Entertainment was owned by Steven Spielberg, who with Crichton jointly produced *Emergency Ward* and its successor *ER*. As is commonly known, Spielberg made *Jaws*, *Jurassic Park, E.T., Close Encounters of the Third Kind,* and other films. Amblin is not a party here.

The complaint's first cause of action asserts against WBTV breach of the 1994 Agreement, and in the second cause of action a breach of the related implied covenant of good faith and fair dealing. The rest of the defendants—WMD, Wells/JWP, Wyle, and Gemmill—are sued in the last cause of action for intentional interference with contractual relations, that is, knowingly disrupting the 1994 Agreement.

The heart of the complaint is that, after WBTV tried and failed to get Roadrunner's agreement on a reboot of *ER*, defendants went ahead anyway with *The Pitt*, which was in essence "*ER* 2.0." This violated the frozen rights provision of the 1994 Agreement because *The Pitt* was derivative of *ER*.

4. *The anti-SLAPP motion is filed*

In response to the complaint, defendants filed an anti-SLAPP motion seeking dismissal. (Code Civ. Proc., § 425.16.) Anti-SLAPP motions require, as the "first prong," that defendants show the claim to be based on "protected" First-Amendment-related activity. If so, the statute then requires as a second prong a showing of "minimal merit" from the plaintiff. If there is no merit, the claim is stricken. (See generally, *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 276, 278–279.)

The parties agree prong one is satisfied and disagree on the second prong.

Roadrunner claims *The Pitt* is a "derivative" of *ER* in the relevant sense of that term, and so the 1994 Agreement is breached. Defendants say there is no admissible evidence to support Roadrunner's view of the meaning of "derivative" and under any reading, *The Pitt* is not derivative; thus no cause of action has merit. There are additional arguments on the

last cause of action (intentional interference with contractual relations) which we discuss separately.

The trial court resolved admissibility issues both in favor of and against Roadrunner, in the end finding sufficient evidence to support Roadrunner's view of the meaning of the 1994 Agreement. It then found prong two satisfied and denied the anti-SLAPP motion. Defendants now appeal.[2]

DISCUSSION

Defendants say the trial court erred in three respects. First, the court used inadmissible evidence to conclude that the term "derivative works," as used in the 1994 contract, did not have its meaning under copyright law. Second, there was no evidence that *The Pitt* was derivative even under an "ordinary" plain language interpretation of the term, much less the copyright meaning. Third, the trial court never addressed the viability of the claims for breach of the implied covenant and intentional interference with contract.

1. *Standard of Review*

Our review in anti-SLAPP matters is de novo. (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 42.)

The standard of review on contract interpretation is more nuanced. The usual standard is de novo. Whether a term is ambiguous or not is also reviewed de novo. (*Pomona Valley Hospital Medical Center v. Kaiser Foundation Health Plan, Inc.* (2026) 119 Cal.App.5th 43, 63.) If there is an ambiguity and

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[2] Orders deciding anti-SLAPP motions are appealable. (Code Civ. Proc., § 425.16, subd. (i).)

its resolution depends on credibility findings, our review is the highly deferential "substantial evidence" standard. (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 520 [" 'interpretation of a contract is subject to de novo review where the interpretation does not turn on the credibility of extrinsic evidence' "].) This may occur, for example, if the resolution of an ambiguity depends on believing extrinsic evidence about the meaning of a word, such as a witness' testimony or conflicts in testimony.

The extrinsic evidence here comprises various declarations filed by Roadrunner in support of its interpretation of the frozen rights provision. Defendants do not attack the credibility of those witnesses (they do contest admissibility), and the trial court did not purport to resolve credibility issues. It follows that our review is de novo.

2. *Anti-SLAPP*

Anti-SLAPP law is codified at Code of Civil Procedure section 425.16.[3] This allows a special motion to strike claims, brought early in a case and usually decided without the benefit of discovery. The law targets claims made not with an expectation of success, brought only to muzzle an adversary with the threat of burdensome, meritless litigation.

In what is now a familiar pattern, anti-SLAPP analysis has two prongs. First, one determines if the conduct or speech that is the focus of the claims is "protected activity" falling within one or more of the categories in subsections 425.16 (e)(1) through

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[3] Statutory references are to the Code of Civil Procedure.

(4). (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) If it does, then under prong two, one determines if there is " 'minimal merit' " to the claim, that is, evidence sufficient for a prima facie case. (See generally *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 989; *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–385.) If there is minimal merit, the anti-SLAPP motion is denied and the case proceeds. " '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." ' " (*Navellier*, at pp. 88–89.)

The Supreme Court has compared the burden on the second prong to that in a summary judgment motion, but in " 'reverse.' " (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719; *Medley Capital Corp. v. Security National Guaranty, Inc.* (2017) 17 Cal.App.5th 33, 44.) The statutory test is whether there is "a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) Just as a defendant in a summary judgment motion must offer "a prima facie showing of the nonexistence of any triable issue of material fact" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850), so too plaintiffs in an anti-SLAPP motion must produce admissible evidence sufficient to make a prima facie case for each element of each claim subject to the motion. (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1102 [summary judgment requirement to establish "an essential element of the cause of action"].)

The parties agree prong one was met.

The second prong focuses on whether there is minimal merit to Roadrunner's claim that WBTV breached the frozen rights provision. That in turn depends on whether *The Pitt*

is a "derivative" of *ER*. That spawns two issues. First, does "derivative" carry the relatively restricted and technical meaning it has in copyright law, as defendants have it? Or, as Roadrunner claims, does it have the broader, common-usage meaning? Second, each side claims that, no matter which definition is used, it prevails.

3. *The trial court's order*

The trial court found that the "minimal merit" standard was met on prong two. The court relied on the extrinsic evidence of Steven Katz on the meaning of "derivative." Katz drafted the provision, as counsel for Crichton and his company. Under the broad, common usage meaning of that term that Katz urged, the court ruled:

> "Plaintiffs' evidence establish a timeline of various communications and events to show the negotiations with the Estate over an ER reboot, failure of those negotiations, and the creation of The Pitt. Plaintiffs' evidence challenges Defendants[']' assertion of the applicable definition of derivative works as intended by the parties when drafting the original Agreement. While Defendants challenge Mr. Katz's declaration, that challenge goes to the weight and not the admissibility of his testimony. Mr. Katz['s] testimony, as the original drafter of the clause in question, is sufficient to challenge Defendants' definition of derivative works in the Agreement."

4. *The evidentiary issues*

With a narrow exception not relevant here, courts may only rely on admissible evidence in anti-SLAPP motions. (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940.) The trial court made three significant rulings on the

admissibility of evidence. They addressed declarations of Steven Katz, Todd Leavitt, and Howard Rodman. The court relied on the Katz declaration to the effect that "derivative" had the broad meaning urged by Roadrunner. The court did not rely on Leavitt. The court sustained all objections to the Rodman evidence.

a. *Standard of review*

It is commonplace to note the standard of review for evidentiary rulings is abuse of discretion. (E.g., *People v. Holmes, McClain and Newborn* (2022) 12 Cal.5th 719, 766; *Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 265.) This is clearly so when the ruling requires weighing or involves " 'qualitative' " or " 'equitable determinations.' " (*Doe v. Software One, Inc.* (2022) 85 Cal.App.5th 98, 104.) But because it's an "abuse of discretion" if an error of law is made, the standard of review in those cases is in effect de novo. (*Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1124 (conc. opn. of Turner, P.J.); *Kourounian v. California Dept. of Tax & Fee Administration* (2023) 91 Cal.App.5th 1100, 1111–1112; *People v. Jennings* (2005) 128 Cal.App.4th 42, 49.)[4] The evidentiary issues discussed here presented issues of law, which we review de novo.

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[4] For example, hearsay rulings, based on questions of law, likely are subject to de novo review. (*Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451.) For the same reason—when the legal premises of a ruling are in play—some trial courts' determinations on expert testimony are subject to de novo review. (*Strobel v. Johnson & Johnson* (2021) 70 Cal.App.5th 796, 817.) "In contrast, evidentiary objections based on lack of foundation, qualification of experts, and conclusory and speculative testimony are traditionally left to the sound discretion of the trial court."

b. *Katz*

The trial court wrote that defendants' "challenge goes to the weight and not the admissibility of [Katz's] testimony." That is not so. The objections were to the admissibility of the evidence.[5]

As mentioned, Katz drafted the 1994 Agreement with its frozen rights provision. The testimony he offered, to which defendants objected, was this:

> "1. Paragraph 6 in full: 'Unlike an after-the-fact approval right, paragraph 10 of the 1994 Agreement was drafted as a true freeze, meaning that none of Warner Bros., Amblin, or Mr. Crichton could even start down the road of developing a project based upon or otherwise derived in any way from *ER* without the mutual agreement of the others.'
>
> "2. Paragraph 8—first sentence: 'In negotiating the 1994 Agreement, I understood and intended the words "derivative" and "work" to be used as they are generally understood in the English language, meaning any work or production based upon or derived in any way from *ER*.'

(*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226.)

[5] The trial court was, it appears, in effect ruling that the grounds cited by defendants, in the view of the court, did no more than address the weight of the evidence.

"3. Paragraph 8—last sentence: 'I believe that Warner Bros. is distorting the intention of paragraph 10 by the coincidence that "derivative work" happens to be a defined term under the Copyright Act.'

"4. Paragraph 9—last sentence: 'Had Warner Bros. submitted a long-form contract in which it attempted to limit derivative works to the definition of the Copyright Act, I would have strongly objected.'

"5. Paragraph 10—part of last sentence: 'and informed my understanding of agreement at the time.' "

The objections were overruled. The admitted Katz testimony was the sole basis of the trial court's conclusion that the reference to "derivative" works in the 1994 Agreement did not have the meaning as used in copyright law.

Defendants had objected on the basis that the undisclosed understanding or views of a party to a contract (we assume Katz as such, although he was in fact counsel) are irrelevant to the meaning of a written contract. (*Steller v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 185 [" ' "undisclosed intent or understanding is irrelevant to contract interpretation" . . .' "]; *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 798.)

Roadrunner notes that not all of the Katz declaration was the subject of objection and states—without argument—the rest of the declaration is enough to show the meaning of the disputed term. That is not so. The balance of the Katz declaration, to which defendants did not object, only shows

that the parties did not *discuss* the meaning of the term. As to the crucial material subject to objection, Roadrunner does not disagree with defendants. Roadrunner just asserts that Katz did *more* than assert his personal understanding of the frozen rights provision, which is true but irrelevant here.

Roadrunner does not defend the evidentiary ruling of the trial court. Nor could it: it is clear that, as defendants argued, the objective meaning of words matter, not the undisclosed thoughts or views of a participant. (E.g., *Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1159.)

The trial court should have sustained defendants' objections to the Katz declaration.

c. *Leavitt*

Todd Leavitt was presented as an industry expert. He testified on "custom and practice" in connection with the frozen rights provision. The clause, he suggests, is "distinct" from other deals, due to the "extraordinary credentials" of Crichton and Spielberg.

The court sustained some of defendants' objections, but overruled others, specifically objections to parts of Leavitt's paragraphs 10, 11, and 12. The court should have sustained those objections as well.

Much of the material in paragraphs 10, 11, and 12 is just commentary on the contract (e.g., "[T]he approval rights of the beneficiary of the provision will prevail and there is nothing further that the opposing party can do about it."; observations that terms "could not be plainer"; and conclusions that Warner Bros. failed to get Roadrunner's permission to make *The Pitt* which is "clearly derivative" of *ER*.) None of this is custom and practice testimony on the meaning of the frozen rights clause, which may be why the trial court did not rely on it.

One paragraph states that the frozen rights clause's "philosophical basis and core purpose is not a function of elements such as the copyright law concept of 'substantial similarity' as would be necessary to prove a claim for copyright infringement." This is not custom and practice evidence either; there is no suggestion that there is any custom with regard to the clause which is highly atypical, as the Complaint avers, and Katz testified. There is no suggestion here of a long-standing custom, a general practice, regarding this clause.[6]

Defendants objected that Leavitt was providing impermissible expert testimony on the meaning of a contract. Roadrunner does not defend the trial court's ruling. Roadrunner simply says the other parts of the declaration show custom and practice. But those parts don't address the meaning of the frozen rights clause. Defendants' objections should have been sustained.

d. *Howard Rodman*

Plaintiffs offered Rodman as an expert on the similarities between the two shows. As Roadrunner notes, he is "a Professor (and former chair) of the John Wells Division of Writing for Screen and Television at USC's School of Cinematic Arts, past President of the Writers Guild of America West, and

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[6] Compare, e.g., *Jones v. Robertson* (1947) 79 Cal.App.2d 813, 818–819 [" 'Custom' is defined . . . as 'Something which has by its universality and antiquity acquired the force and effect of law, in a particular place or country, in respect to the subject matter to which it relates; general practice, judicially noticed without proof.' [¶] *In Fuller Brush Co. v. Industrial Commission*, 99 Utah 97 [104 P.2d 201, 203, 129 A.L.R. 511], 'customarily' is defined as meaning 'usually, habitually, according to the customs, general practice or usual order of things, regularly.' "].)

one of three Governors of the Writers Branch of the Academy of Motion Picture Arts and Sciences."

Rodman notes the similarities in the premises of the two shows and distinguishes both of them from other medical shows as addressing specifically action in the emergency room. He discusses the structure of the two shows including the time periods they cover, and opines the pace of the two shows is "decidedly similar." He notes the similar language such as the "rapid-fire deployment of medical jargon," "scores of obscure or profession-coded pieces of language in each episode," and the similar impact these are likely to have on the viewer. He writes that the incidents—detailed in the declaration—are similar. He testifies that similarities in the selection and arrangement of elements were so "striking, substantial, and undeniable" that the pilot scripts read like episodes "of a single continuing series."

Defendants objected that his expertise was irrelevant because the court could view the shows without any need for expertise. The court sustained the objections.

It's true that, as defendants note, Rodman's descriptions of what he saw cannot trump what the court saw when it read the scripts or viewed the shows. But Roadrunner's authorities, and others, are good support for the proposition that expertise in this context—comparison among the works at issue on the extrinsic branch of the substantial similarly test—is indeed relevant and proper. (*Three Boys Music Corp. v. Bolton* (9th Cir. 2000) 212 F.3d 477, 485 ["The extrinsic test often requires analytical dissection of a work and expert testimony."], overruled on a separate ground in *Skidmore v. Zeppelin* (9th Cir. 2020) 952 F.3d 1051 (*Skidmore*); accord, *Sid & Marty Krofft Television v. McDonald's Corp*. (9th Cir. 1977) 562 F.2d 1157, 1164

["analytic dissection and expert testimony are appropriate" for extrinsic part of substantial similarity test], overruled on a separate ground in *Skidmore*; *Ambrosetti v. Oregon Catholic Press* (9th Cir. 2025) 151 F.4th 1211, 1224–1225 (*Ambrosetti*) [use of expert on substantial similarity]; accord, *Swirsky v. Carey* (9th Cir. 2004) 376 F.3d 841, 845; cf. *Yonay v. Paramount Pictures Corp.* (9th Cir. 2026) 163 F.4th 685, 692 (*Yonay*) [contrasting the intrinsic branch of the test, which does not use experts, with the extrinsic branch].)

Defendants suggested at oral argument that this use of experts was limited to music and computer code cases, where a layperson would not have a basis to make the relevant comparison. Circuits may differ, but in the Ninth and Second Circuits there appears to be no such limitation. (*Hanagami v. Epic Games, Inc.* (9th Cir. 2023) 85 F.4th 931, 945 [choreography]; *Walker v. Time Life Films, Inc.* (2d Cir. 1986) 784 F.2d 44, 51 [film]; *Shaw v. Lindheim* (9th Cir. 1990) 919 F.2d 1353, 1357 (*Shaw*) [television show], overruled on a separate ground in *Skidmore*; compare, e.g., *Tanksley v. Daniels* (3d Cir. 2018) 902 F.3d 165, 172 & fn. 3 [no need for expert for television pilot]; *Stromback v. New Line Cinema* (6th Cir. 2004) 384 F.3d 283, 295–296.)[7] The Rodman opinion was admissible.

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[7] As we discuss below, the parties disagree whether *ER* comprised a unique collection of features such as pacing, language, and so on, which appear in *The Pitt*. Defendants say the commonalities are shared with many "other hospital drama[s]," and suggest "dozens of other shows" have similar content. The elements identified by Roadrunner as entitled to protection are said to be "generic" and "basic plot tropes";

5. *Breach of contract*

Even without Katz's evidence on the interpretation of the frozen rights provision, we review whether it is likely Roadrunner can show the 1994 agreement was breached, more specifically, that there is a prima facie case that *The Pitt* is a "derivative" of *ER*. We find that, even adopting the more stringent definition of "derivative" urged by defendants, Roadrunner has made out a prima facie case. Accordingly, we need not discuss Roadrunner's alternative argument, which relies on an asserted common, non-legal meaning of the term.

a. *The copyright meaning of "derivative"*

The parties assume, as we do, that a work which is substantially similar to another work is a "derivative" of that work under copyright law.

Roadrunner claims it has provided evidence of the two basic elements of infringement: that defendants had access to *ER* and the two shows "are substantially similar." (*Cavalier v.*

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so too there are familiar " 'stock scenes' " which as such cannot be subject of copyright. For its part, Roadrunner acknowledges there may be "hundreds of possible iterations of medical dramas" but says the features of *ER* stand out, and argues that *ER* and *The Pitt* share an essentially unique set of features. A presumption is buried in both these arguments, which is that the reader—the court for example, or later, perhaps a jury—has the background to recognize whether a plot device, language, pace, setting, and so on, are widespread or not, and concomitantly whether an element shared by both shows is relatively unique. But the reader, or a jury, may or may not watch these sorts of shows; and may have an idiosyncratic understanding of the field. An expert, with a perspective on a wide range of shows, may have worthy insights.

Random House, Inc. (9th Cir. 2002) 297 F.3d 815, 822 (*Cavalier*).) Access is not disputed here, so we turn to the test for "substantial similarity."

We map out two approaches to substantial similarity used in the Ninth Circuit.[8] The first is the common analytical dissection of works, setting aside non-protected material, then

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[8] The parties have briefed Ninth Circuit law, although ordinarily there would be no reason to avoid opinions from other Circuits. It may be that the parties have defaulted to Ninth Circuit cases because we are not, ultimately, interested in copyright but rather in a *contract*, which employs a term assertedly borrowed from copyright law. The contract was apparently made in California among California parties, so the parties may have assumed Ninth Circuit law is relevant. The law in other circuits may differ. (See generally, Asay, *An Empirical Study of Copyright's Substantial Similarity Test* (2022) 13 UC Irvine L.Rev. 35, 40–41 ["significant heterogeneity" in the law of various circuits]; Rogers, *Substantially Unfair: An Empirical Examination of Copyright Substantial Similarity Analysis Among the Federal Circuits* (2013) 2013 Mich. L.Rev. 893, 895 ["[T]he federal circuit courts disagree vehemently about the mechanics of arguably the most important area of copyright law—the process by which courts determine if one work is illegally infringing on another's copyright—the substantial similarity standard. The confusion and disagreement in the doctrine of substantial similarity is not only found in the inter-circuit divergences, but also in the lack of clarity in each circuit's particular test for copyright infringement." (Footnotes omitted.)].) Indeed, the application of the substantial similarity test even within the Ninth Circuit is reportedly uneven. (4 Nimmer on Copyright (2026) Summary Judgment, § 13D.22.) In any event, we follow the parties in generally relying on Ninth Circuit cases.

comparing only protectable elements. The second approach is the "selection-and-arrangement" approach which reviews all elements (whether individually protectable or not), arranged in an original sequence, and determines if that original sequence has been copied in the accused work. Under both tests Roadrunner provides a prima facie case.

i. Analytical dissection

Substantial similarity—at least in the Ninth Circuit—is established if a plaintiff proves both substantial similarity of general ideas under the " 'extrinsic test' " and substantial similarity of the protectable expression of those ideas under the " 'intrinsic test.' " (*Shaw*, *supra*, 919 F.2d at p. 1356, overruled on a separate ground in *Skidmore*, *supra*, 952 F.3d 1051.)

> "The 'extrinsic test' is an objective comparison of specific expressive elements. '[T]he test focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works.' [Citation.] . . . [T]he extrinsic test, now encompass[es] all objective manifestations of *expression* . . . . The 'intrinsic test' is a subjective comparison that focuses on 'whether the ordinary, reasonable audience' would find the works substantially similar in the 'total concept and feel of the works.' [Citation.] [¶] A court 'must take care to inquire only whether "the *protectible elements*, *standing alone*, are substantially similar." ' [Citations.] Therefore, when applying the extrinsic test, a court must filter out and disregard the non-protectible elements in making its substantial similarity determination. [Citations.]" (*Cavalier*,

supra, 297 F.3d at pp. 822–823; see also *Yonay*, *supra*, 163 F.4th at p. 692.)

The parties have not discussed the intrinsic branch of the test, that which results in a subjective evaluation that the two works are (or are not) similar; the shared working assumption here, apparently, is that a trier of fact could conclude that there is sufficient similarity. Because the issue is subjective, it does not lend itself to summary judgment or, in our case, whether a prima face case has been made, and the parties have not addressed this aspect. (*Woodland v. Hill* (9th Cir. 2025) 136 F.4th 1199, 1210 [" 'the intrinsic test is reserved exclusively for the trier of fact' "]; *Ambrosetti*, *supra*, 151 F.4th at p. 1224 ["Courts apply only the extrinsic test at summary judgment."].)

Under the extrinsic test, protectable elements eligible for comparisons between the two works include the " 'plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works.' " (*Yonay, supra,* 163 F.4th at pp. 692–693.) Unprotectable elements, which courts are to disregard in this test, include " 'ideas and concepts, material in the public domain, and *scènes à faire* (stock or standard features that are commonly associated with the treatment of a given subject).' " (*Biani v. Showtime Networks, Inc.* (9th Cir. 2025) 153 F.4th 957, 963.)

A review of the two works[9] reveals that Roadrunner made a prima facie case showing common protectable elements of plot, themes, dialogue, mood, setting, pace, characters, and sequence of events. As Roadrunner noted in its opposition to the

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[9] The parties lodged with the court pilot scripts of the two shows, as well as corresponding media files.

anti-SLAPP motion, both shows provide commentaries on the health care system; they focus specifically on the emergency room and the difficult conditions under which the medical staff operates. Both shows take place, with little exception, in the emergency room, as opposed to other medical shows which track patients as they move out of the emergency room, or indeed never enter it. The pacing of events is also common: very fast pacing, and reactions to multiple overlapping crises. The fast-paced dialogue is (to a layperson) frequently incomprehensible shorthand and jargon, lending an air of immediacy and accuracy to the presentation. Both shows feature a series of patients: they are presented in overlapping sequences, with medical personnel interrupting their work with one to attend to another, layering on crisis after crisis. The shows both display graphic depictions of injuries. The doctors and nurses are exhausted; there are emotional outbursts. Each includes a young doctor, fresh from medical school and incompetent.

This is evidence that " 'the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events' in two works" are the same. (*Kouf v. Walt Disney Pictures & Television* (9th Cir. 1994) 16 F.3d 1042, 1045.)

Defendants do not directly counter this showing. Instead, they argue that all this comprises merely stock scenes and "scenes a faire" which are not protectable. (*Cavalier*, *supra*, 297 F.3d at p. 823.) Defendants argue both shows are just medical dramas "featuring overworked doctors and staff," with "generic similarities" common to "any dramatic story involving emergency room doctors." Any show featuring action in an emergency room would have all these features, defendants argue, and it cannot be that all shows set in an emergency room are derivative of *ER*.

Defendants' position has some strength. But their approach ignores the specific elements noted above by collapsing them under the rubric of high-level abstractions. From that perch, defendants argue, rightly, that copyright does not protect those general ideas. Copyright law is meant to protect expressions, and not the animating ideas; the specific, not the general, they say.

But the critical distinction between "idea" and "expression" is difficult to draw. "As Judge Hand candidly wrote, 'Obviously, no principle can be stated as to when an imitator has gone beyond copying the "idea," and has borrowed its "expression." ' *Peter Pan Fabrics, Inc. v. Martin Weiner Corp*., 274 F.2d 487, 489 (2d Cir. 1960)." (*Herbert Rosenthal Jewelry Corp. v. Kalpakian* (9th Cir. 1971) 446 F.2d 738, 742.)

Parties often can employ higher, or lower, levels of abstraction to describe a work, because "every work can be described at varying levels of abstraction, and the higher the level of abstraction copied, the less likely this taking will be infringement of a copyright. [¶] As Judge Hand noted, the difference between idea and expression is one of degree." (*CDN Inc. v. Kapes* (9th Cir. 1999) 197 F.3d 1256, 1262; see 4 Nimmer on Copyright (2026) Learned Hand's Abstractions Test, § 13D.13.) Defendants allude to the commonalities between the shows as abstracted ideas with generic similarities, but that does not necessarily imply that Roadrunner has failed to make out a prima case on specific protected elements at a lower level of abstraction.

The procedural posture here is important: we have an anti-SLAPP motion brought at the outset of litigation, designed to weed out meritless claims. The issue is whether Roadrunner

made out a prima facie case, and in resolving this we " 'must draw "every legitimate favorable inference" from the [anti-SLAPP] plaintiff's evidence.' [Citations.]" (*Roche v. Hyde* (2020) 51 Cal.App.5th 757, 787.) There are clear and numerous similarities between *The Pitt* and *ER*; where those similarities lie, on a ladder of abstraction protecting only the more specific expressions, is a matter of "degree." Making favorable inferences in Roadrunner's favor, as we must, we find the details here suffice for a prima facie case.[10]

ii. Selection-and-arrangement

The second approach in the Ninth Circuit for substantial similarity is the " 'selection-and-arrangement' " test. (*Yonay, supra,* 163 F.4th at p. 693.) Here, none of the elements need be each protectable; it is the " '*particular* way in which the artistic elements form a coherent pattern, synthesis, or design' " which is protected. (*Ibid*.)

Defendants contend that this approach is limited essentially to one case, *Metcalf v. Bochco* (9th Cir.2002) 294 F.3d 1069 (*Metcalf*), overruled on a separate ground in *Skidmore*, *supra*, 952 F.3d 1051. It is "sui generis," they write. This limitation they say was established by *Yonay, supra,* 163 F.4th at p. 696, which rejected the " 'selection and arrangement' " theory from *Metcalf*.

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[10] This is despite defendants' argument that the shows involve "different characters, in different decades, in different hospitals, treating different emergencies, with no shared iconography or plot." On anti-SLAPP motions, we review only for a prima facie case, not whether that case can be rebutted.

As Defendants' counsel agreed at oral argument, *Yonay* actually endorses the test. Among the cases it cites is *Metcalf*; indeed *Yonay* quotes it. (*Yonay, supra,* 163 F.4th at p. 693.) The opinion recites that "protectable expression can be, and often is, composed of smaller, unprotectable elements." (*Id.* at p. 697.) *Yonay* applied the selection-and-arrangement test, but found that its standards were not met because the plaintiffs there had not *identified*, in the original work, a protectable selection and arrangement. (*Ibid*.)

Metcalf found such a pattern and arrangement; *Yonay* did not. We may frame the issue, then, as which case best fits the showing here.

Metcalf's facts track those in this case, to a remarkable degree. In *Metcalf* both shows were set in an inner city, dealing with similar issues of race, poverty, and urban blight; doctors struggled with choices between the financial allure of private practice and working for the public good in the hospital, among other similarities which go " 'beyond the necessities of the . . . theme . . . .' " (*Metcalf*, *supra*, 294 F.3d at pp. 1073–1074.) While many of these features (such as young professionals choosing between financial and emotional rewards) may have been scènes à faire, they helped satisfy the extrinsic test because the "particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element." (*Id.* at p. 1074). This is enough "to survive summary judgment." (*Ibid*.)

The original work in *Yonay* was one of journalism, generally reciting facts. It described the US Navy's Top Gun school for advanced air-combat tactics. (*Yonay*, *supra*, 163 F.4th at pp. 689–690.) Emphasizing the need for plaintiff to identify

a particular pattern, synthesis, or design in the two works, the court noted the "pattern" offered by the plaintiff was not protected. (*Id*. at p. 697.) Rather, it was essentially an assemblage of facts—by definition unprotectable facts—recited in plaintiff's report. The court also rejected plaintiff's collection of elements because, as described, they were only abstract ideas (such as characters having contradictory traits, or showing them in "aesthetically pleasing places"), which were at too high a level of generality. (*Id.* at pp. 697–698.)

This case tracks the facts of *Metcalf*, not *Yonay*. We follow *Yonay's* instruction that the selection and arrangement must be " 'particular' " and " 'coherent.' " (*Yonay, supra,* 163 F.4th at p. 697.) That particularity and coherence is outlined in the Rodman declaration. It describes *ER* as a then-unique show, not because it was a hospital drama, but by reason of the details we summarize above. It is the combination of elements described by Rodman which makes *ER* stand out, and it is that combination, that "selection and arrangement of . . . elements," which results in the striking similarity to *The Pitt*, so much so that the scripts read like episodes "of a single continuing series." As we make all inferences in favor of Roadrunner, ignoring contrary evidence—the test for anti-SLAPP motions—we find this is enough for a prima facie case.

6. *Remaining Claims*

The trial court did not address those parts of the anti-SLAPP motion which sought dismissal of the claims of (a) breach of the implied covenant of good faith and fair dealing, and (b) intentional interference with contractual rights.

a. *Implied covenant*

Defendants urge the dismissal of the claim because it is duplicative of the contract claim.

Complaints focused on contracts often recite a common set of facts and then rely on that set for various claims, such as breach of the covenant as well as breach of the underlying contract. But this does not lead to the dismissal of the covenant breach claim. That the same facts are alleged in support of the two claims does not automatically show an impermissible duplication.

"The covenant of good faith and fair dealing was developed in the contract arena and is aimed at making effective the agreement's promises." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 [the implied covenant serves "merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*"].) If Roadrunner is right about the contract breach, then it is plausible that a benefit of the agreement, such as having Michael Crichton's name associated with derivative works, would "unfairly frustrate[ ] the agreed common purposes and disappoint[ ] the reasonable expectations of [Crichton] thereby depriving that party of the benefits of the agreement." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.) And there is no question that Roadrunner, and Sherri Crichton, brought this action to preserve Michael Crichton's " 'legacy and authorship.' " Sherri Crichton's declaration supports this, and expressly states that the suit was brought in part to require "Warner Bros. to afford Michael an appropriate credit in connection with the promotion and distribution of *The Pitt*." The complaint, too, identifies Michael Crichton's interest as he signed the 1994 Agreement

"that he would be appropriately credited as a creator" of derivative works.

On the present record the credit of authorship and legacy may not look like a breach of the 1994 Agreement, but it plausibly qualifies as a benefit Michael Crichton reasonably would have expected from that agreement.

b. *Intentional interference with contract*

The trial court did not address the claim for intentional interference with contract rights. This is the sole claim brought against defendants other than WBTV.

The elements are not in dispute: Plaintiff needs evidence of " '(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.' " (*Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1603.)

As to the second element, only Wells and JWP concededly knew of the agreement. The other defendants named here, Wyle, Gemmill, and WMD, did not.

Roadrunner argues that once Wyle, Gemmill, and WMD were served with the lawsuit, they must perforce have become aware of the Agreement and the allegation (at least) that they were disrupting it by continuing to work on *The Pitt*. This is a peculiar argument, in effect proposing that multiple elements of a tort (knowledge of agreement and intent) can be established just by serving a complaint that so alleges. There is no authority for this. The fact that Wyle, Gemmill, and WMD were served is consistent both with their continued good faith belief that they violated no contract and that they had no such belief. Evidence that is equally consistent with two conflicting propositions is

not evidence of either one. (E.g., *Massachusetts Protective Ass'n v. Mouber* (8th Cir. 1940) 110 F.2d 203, 206.) As to Wyle, Roadrunner notes a 2023 communication from Sherri Crichton to Noah Wyle which expresses her gratitude for the promise, as she then understood it, that Warner Bros. would not go forward with a show that was subject to her "approval rights which are clearly spelled out in Michael's contract." This may tell Wyle that there is a contract, but nothing of its terms. This isn't enough for a prima facie case on the second element of defendant's knowledge, nor therefore can it support the third element, defendant's intentional acts designed to induce a breach.

At oral argument Roadrunner pressed the case that any knowledge of contractual rights relating to ER, even if a defendant did not know the terms, or disagreed that a term pertained to his actions, could provide a basis to hold a defendant liable for intentional interference with the 1994 Agreement. Roadrunner referred us to *Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc.* (2019) 36 Cal.App.5th 766 (*Jenni Rivera Enterprises*), and its statement that " 'plaintiff need not establish that the defendant had full knowledge of the contract's terms.' " (*Id.* at p. 783.) This derives from *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 302, which in turn relies on the Restatement Second of Torts, section 766, comment i. This reads, "[I]t is not necessary that the actor appreciate the legal significance of the facts giving rise to the contractual duty, at least in the case of an express contract. If he knows those facts, he is subject to liability even though he is mistaken as to their legal significance and believes that the agreement is not legally binding or has a different legal effect from what it is judicially held to have." (Rest.2d Torts,

§ 766, com. i.) It is not clear what level of specific knowledge of contractual obligations a defendant must have for liability under this formulation, but fortunately we have the next iteration of the Restatement, based on more recent cases. (Rest.3d Liability for Economic Harm, § 17, com. a, reporter's note a.) It's still true that the "defendant's awareness need not extend to the plaintiff's identity or to the specifics of the contract's terms." (*Id.*, com. l.) Nevertheless the defendant must know enough about the specific obligation to know that his actions will likely result in a breach. (See *id.*, com. l, illus. 24.)

Roadrunner also referred us to *Jenni Rivera Enterprises*' citation of an earlier case, *I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 290 (*I-CA Enterprises*), as standing for the proposition that "knowledge of a contractual relationship is sufficient to show knowledge for the tort of inducing breach of contract." (*Jenni Rivera Enterprises, supra*, 36 Cal.App.5th at p. 783.)

There's more to *I-CA Enterprises* than *Jenni Rivera Enterprises* suggests. In *I-CA Enterprises*, defendant's executives not only knew of the contract generally, but specifically of the contractual exclusivity the defendant was accused of interfering with. (*I-CA Enterprises, supra*, 235 Cal.App.4th at p. 290.)

It's clear that a defendant must know enough about the specific terms of a contract to know " ' "that he is interfering with the performance of the contract." ' " (*Jenni Rivera Enterprises, supra*, 36 Cal.App.5th at p. 783.) The defendant must know enough that one may conclude " ' " 'defendant's intentional acts [were] *designed* to induce a breach or disruption of the contractual relationship.' " ' " (*Id.* at p. 788 (italics added); accord, *Hooked Media Group, Inc. v. Apple Inc.* (2020) 55

Cal.App.5th 323, 348.) Even if the defendant doesn't act with the specific intent to interfere with the contract, the defendant must at a minimum know his or her actions are " ' " 'certain or substantially certain' " ' " to cause an interference. (*Jenni Rivera Enterprises,* at p. 782.) All these formulations obviously require knowledge of the specific contractual obligation assertedly interfered with.

We turn to defendants Wells and his related company JWP, as to which there is a prima facie case of knowledge of the frozen rights provision. We turn to the intent element, which asks whether the defendants took actions "designed to induce a breach or disruption of the contractual relationship." (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148.)

Roadrunner does not point us to evidence that Wells and his related company JWP—or indeed any of the non-WBTV defendants—believed they were making a show that violated the 1994 Agreement, or that they knew of specific provisions of the Agreement being violated. In Roadrunner's favor we have (1) (as we have found) a plausible, if legally technical, copyright argument that *The Pitt* is a derivative work of *ER*, and (2) that the defendants worked on *The Pitt*. But the defendants testified they didn't think they were violating known contractual rights, and more pointedly for a prima facie showing, Roadrunner has not directed us to evidence to the contrary.

We review Roadrunner's evidence. It points us first to the declaration of Shane Salerno (literary manager for the Crichtons), but the references only show Wells/JWP were aware in 2023 that Sherri Crichton would not sign off on a new "*ER* reboot." The next reference from Roadrunner is to an email from Sherri Crichton to Wyle (not Wells) which also shows she

hasn't agreed to a new *ER* show. Finally we are referred to a communication from Wells to Sherri Crichton. Roadrunner does not tell us where to look in this long email. The email refers to the idea of making a new *ER* and implicitly acknowledges that Sherri Crichton can—and apparently has—invoked the freeze clause. But it does not suggest that Wells (or JWP) made *The Pitt* knowing, or having a basis to know, that it would violate the freeze clause.[11]

Accordingly there is no prima facie case for the intentional interference with contract claim, and it should be dismissed.

7. *Attorney Fees*

Successful parties in anti-SLAPP motions may be entitled to their attorney fees, including on appeal, although the standard for winning defendants differs markedly from that applicable to victorious plaintiffs. (§ 425.16, subd. (c)(1); see generally, Burk, Anti-SLAPP Litigation (The Rutter Group 2026) ¶ 2:114.) Only if the motion was frivolous could plaintiff obtain fees (§ 425.16, subd. (c)(1)) and we do not think this motion qualifies.

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[11] We understand that in considering an anti-SLAPP motion we are to make inferences in plaintiff's favor, and in that light we can imagine a contract which *very* broadly barred the defendants from making, for example, any show featuring an emergency room; if they knew of those terms and went ahead with *The Pitt,* we'd infer the element of intentional interference. But Roadrunner doesn't contend the freeze clause is so broad.

DISPOSITION

The order of the trial court denying the anti-SLAPP motion as to WBTV is affirmed. As to defendants other than WBTV, the order is reversed and the trial court is instructed to enter an order granting the motion and to dismiss those defendants. The parties will bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KARNOW, J.*

We concur:

ADAMS, P. J.

HANASONO, J.

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* Retired Judge of the San Francisco Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.