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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SUSAN ADCOCK, et al., Plaintiffs, Cross-Defendants and Appellants, v. JONATHAN A. GOLDSTEIN, et al., Defendants, Cross-Complainants and Respondents.	B233480 (Los Angeles County Super. Ct. No. SC109643)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Reversed in part and Affirmed in part.

Mitchell Gilleon Law Firm and James C. Mitchell for Plaintiffs, Cross-Defendants and Appellants.

The Goldstein Law Firm, Jonathan A. Goldstein, Joseph A. Goldstein and Charles A. Goldstein for Defendants, Cross-Complainants and Respondents.

INTRODUCTION

Appellants and cross-defendants Susan Adcock, Daniel Gilleon, Nicole Geske, and the Mitchell | Gilleon Law Firm (collectively, cross-defendants) appeal

from: (1) the trial court's order denying their special motion to strike (Code Civ. Proc., § 425.16, the SLAPP statute)[1] the cross-complaint filed by respondents and cross-complainants Jonathan, Charles, and Joseph Goldstein and the Goldstein Law Firm (collectively, the Goldsteins) and (2) the trial court's order awarding attorney fees to the Goldsteins. The court determined that the cross-defendants' assertedly protected activity on which the Goldsteins' cross-complaint was based constituted criminal extortion, and thus cross-defendants did not qualify for the protections afforded by the anti-SLAPP statute. The trial court also granted a $10,000 attorney fees award to the Goldsteins, finding the motion to strike was frivolous. (§ 425.16, subd. (c)(1).) We affirm the denial of the SLAPP motion, but reverse the attorney fee award to Goldsteins. We also deny the Goldsteins' request for attorney fees on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Adcock's Complaint Against the Goldsteins

Represented by the Mitchell Gilleon Law Firm, Adcock filed a complaint on September 17, 2010, alleging claims of assault, battery, sexual battery, false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress against Jonathan Goldstein, and alleging legal malpractice and negligence committed by Jonathan, his father Charles, his brother Joseph, as well as the law firm where they all practiced. In her complaint, Adcock alleges that Jonathan attacked her on September 17, 2007, and again on October 27, 2007.[2]

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[1] All subsequent undesignated section references are to the Code of Civil Procedure.

[2] Adcock subsequently dismissed all claims except the claim for sexual battery against Jonathan.

The Goldsteins' Cross-Complaint

On December 10, 2010, the Goldsteins filed a cross-complaint against cross-defendants Adcock and the law firm Mitchell Gilleon Law Firm, as well as two individual lawyers at that firm, Daniel Gilleon and Nicole Geske. The cross-complaint alleged claims for extortion, conspiracy to commit extortion, intentional infliction of emotional distress, negligent infliction of emotional distress, and unfair business practices in violation of Business and Professions Code section 17200.

The cross-complaint alleged the following facts: Jonathan hired Adcock in September 2007 to perform an adult cabaret show at a gathering at his home. Although Adcock arrived at his home late and thus Jonathan wanted to cancel her performance, he agreed to pay her anyway because she said her bosses would abuse her if she came back without any money. He also let her stay at his house until early the next morning because she did not want to return to her abusive bosses.

Several weeks later, a man identifying himself as Adcock's attorney contacted Jonathan and threatened that if he did not pay Adcock $5,000, she would accuse him of rape and tell his family and the California Bar Association that he was a drug user and a "rapist lawyer." Later, the same man threatened to have Charles and Joseph beat up if Jonathan did not pay the $5,000.

Subsequently a second attorney took over where the first left off, demanding a six figure payment from Jonathan to buy Adcock's silence. Adcock thereafter retained the services of a third attorney who continued to make extortionate demands.

On January 24, 2008, the Goldsteins filed a complaint for extortion and other related causes of action against Adcock as well as her second and third

attorneys (they never learned the identity of the first purported lawyer who threatened Jonathan). That case eventually was dismissed without prejudice.

In "mid to late summer of 2010," the Goldsteins were threatened and extorted first by Adcock and then by Adcock's new attorneys Gilleon and Geske at the Mitchell Gilleon Law Firm. Adcock herself contacted the Goldsteins and stated that "if you won't pay to keep me quiet Jonathan is going to go to jail for rape and the rest of you are going to go to jail with him," and further stated, "I am going to get my money one way or another from all of you even if I have to send some people to your office or homes to beat it out of you." Cross-defendants further "attempted to extort a six figure payment from [the Goldsteins] under direct threat that if they didn't pay the money, [cross-defendants] would accuse [Jonathan] of rape and other sexual crimes and seek to have [Jonathan] arrested by the police and charged with rape," and accuse Charles and Joseph of being accomplices to and complicit in the crimes. In addition to threatening criminal prosecution, they warned that "we will go public with this and ruin all of your professional reputations and that would be just the beginning." Finally, they threatened to file ethical complaints with the California State Bar and other state bar associations.

Cross-Defendants' Anti-SLAPP Motion

Cross-defendants filed a motion to strike the Goldsteins' cross-complaint under section 425.16, alleging that the cross-complaint was filed in retaliation for Adcock's filing a complaint for sexual battery and other claims. Their anti-SLAPP motion alleges that the claims in the cross-complaint arose out of constitutionally protected speech and petitioning activity, namely, filing Adcock's complaint for sexual battery and communicating with the Goldsteins regarding potential settlement of that litigation.

In a supporting declaration, Gilleon stated that when he took on Adcock's case, he knew that Jonathan previously had filed a suit alleging extortion and other claims against Adcock and her former attorneys based on alleged pre-litigation demands made to Jonathan. He stated that he "wanted to avoid a repeat of what happened in 2008. I decided not to make any pre-litigation demands, written or oral, to the cross-complainants for settlement of Ms. Adcock's claims, or to communicate with the cross-complaints, before filing the complaint against them. And neither I nor anyone else at Mitchell Gilleon Law Firm did this." Geske declared that she had no contact or communication of any kind with the Goldsteins or their law firm. For her part, Adcock stated in a declaration that she has never communicated with Charles or Joseph and that after late 2007 she had no contact with Jonathan either. Thus, cross-defendants altogether deny engaging in the threatening acts alleged in the Goldsteins' cross-complaint.

Cross-defendants allege that the only communication Adcock or her attorneys had with the Goldsteins after 2007 was an email from Gilleon to Jonathan proposing settlement discussions, which was sent on December 9, 2010, after Adcock filed her complaint. That email, which was attached as an exhibit in support of the motion to strike, states in full: "Let me know if you are interested in having a settlement discussion. I think this especially makes sense in light of your apparent *pro per* status, which I assume stems from the absence of E&O insurance existing at the time of the incident. If you are willing to discuss an early resolution, it would help my ongoing evaluation of this case if you were to provide a better explanation – than Ms. Adcock's explanation – regarding the $4,000 check you wrote to her on your trust account in November 2007. By 'better,' I mean an explanation that puts your conduct in a better light. In light of the fact you have absolutely no duty to answer this question through an informal email like this, I will conclude nothing if you do not provide an explanation. On the other hand, if

you choose to enter into any level of settlement discussions, I will consider the contents of any response to be absolutely privileged under EC 1152. If we were to settle, we are willing to have a comprehensive confidentiality clause in the SAR. I think you should seriously consider this opportunity. I believe we can work something out quickly, and reasonably."

Trial Court's Ruling on anti-SLAPP Motion and Attorney Fees

The trial court denied the anti-SLAPP motion, determining that cross-defendants failed to satisfy their burden of showing that the Goldsteins' cross-complaint was based on protected activity. The court relied exclusively on the fact that the extortion alleged by the Goldsteins constituted illegal activity that was not constitutionally protected, and thus, under *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*), Adcock and her attorneys were precluded from using the anti-SLAPP statute to strike the Goldsteins' cross-complaint.

The trial court further awarded the Goldsteins attorney fees in the amount of $10,000, finding that Adcock's anti-SLAPP motion was frivolous because a proper review of the caselaw, including *Flatley*, would have led a reasonable attorney to conclude that an anti-SLAPP motion would not lie given the illegal nature of the conduct alleged by the Goldsteins in their cross-complaint.

Cross-defendants have timely appealed.

DISCUSSION

I. DENIAL OF ANTI-SLAPP MOTION

Section 425.16 establishes a procedure for striking a pleading primarily brought to "chill" the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. (*Kibler v. Northern Inyo County Local Hospital Dist*. (2006) 39 Cal.4th 192, 197.) Resolution of such an anti-

SLAPP motion "'requires the court to engage in 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. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.)

The trial court found that cross-defendants failed to satisfy the first step of the anti-SLAPP analysis, and thus dismissed their motion to strike without reaching the second step. We review the trial court's order denying an anti-SLAPP motion de novo. (*Flatley, supra,* 39 Cal.4th at pp. 325-326.)

To satisfy their initial burden of demonstrating that the Goldsteins' cross-complaint arises from protected activity, cross-defendants must show that the act or acts underlying the Goldsteins' claims fit one or more of the categories described in section 425.16, subdivision (e). (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) Subdivision (e) of section 425.16 provides that an "'act in furtherance of a person's right of petition or free speech'" includes, among other categories, "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law. . . ." (§ 426.16, subd. (e)(1), (2).)

The trial court held that cross-defendants did not satisfy their initial burden of demonstrating that the challenged cause of action arises from protected activity

because cross-defendants' assertedly protected activity constituted extortion; thus, under *Flatley*, cross-defendants could not use the anti-SLAPP statute to strike the Goldsteins' claims based on such illegal activity. While we agree with the trial court that cross-defendants failed to show that the Goldsteins' causes of actions arose from protected activity, we so conclude for a more fundamental reason: cross-defendants fail to show that the Goldsteins' claims arise from conduct by cross-defendants fitting one of the categories of activity protected by the SLAPP statute.[3]

Cross-defendants contend that the Goldsteins' cross-complaint alleging extortion and other related causes of action arises from cross-defendants' protected activity of filing Adcock's complaint for sexual battery and sending an email to Jonathan on December 9, 2010, proposing settlement discussions. Indeed, both of these acts constitute protected activity for purposes of the anti-SLAPP statute. (*Bailey v. Brewer* (2011) 197 Cal.App.4th 781, 789 ["'statements, writings and pleadings in connection with civil litigation'" fall within section 425.16, subd. (e), as do prelitigation communications if they concern the subject of the dispute and are made in anticipation of litigation contemplated in good faith and under serious consideration]; *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 908 ["An attorney's communication with opposing counsel on behalf of a client regarding pending litigation directly implicates the right to petition and thus is subject to a special motion to strike."].) However, the more difficult question is whether the Goldsteins' causes of action arose from this protected activity. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*Cotati*).)

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[3] We directed the parties to file supplemental briefing on the question whether the Goldsteins' claims are based on conduct by cross-defendants fitting one of the categories in section 425.16, subdivision (e).

We must analyze the pleadings and supporting and opposing affidavits submitted by the parties and make our own independent determination regarding whether the cross-complaint arises from the filing of Adcock's complaint and/or the email Gilleon sent to Jonathan regarding a potential settlement of Adcock's claims. (*Cotati, supra*, 29 Cal.4th at p. 79 ["In deciding whether the 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'"]; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670 ["On appeal, we independently determine whether this material demonstrates that the cause of action arises from protected activity."].) We do not weigh credibility or determine the weight of the evidence; rather, we accept as true the evidence favorable to the Goldsteins and evaluate cross-defendants' evidence only to determine if it has defeated that submitted by the Goldsteins as a matter of law. (*Bailey v. Brewer, supra,* 197 Cal.App.4th at p. 788.)

Cross-defendants contend that we may reasonably infer that the Goldsteins' cross-complaint is based on the filing of Adcock's complaint and the December 9, 2010 email from Gilleon to Jonathan because the cross-complaint lacks specificity as to the alleged extortionate threats, failing to identify how and exactly when they were made or which particular cross-defendants made them. We do not find cross-defendants' arguments persuasive.

The cross-complaint itself neither explicitly nor implicitly refers to Adcock's complaint, her civil claims against the Goldsteins, or the December 9, 2010 email from Gilleon to Jonathan. (*Cotati, supra*, 29 Cal.4th at p. 77 [finding that complaint was not based on earlier action in part because complaint did not reference earlier action].) All the causes of action are rooted exclusively in allegations of direct extortionate threats by cross-defendants unrelated to Adcock's

civil claims. The cross-complaint as well as all the supporting declarations submitted by the Goldsteins in opposition to the anti-SLAPP motion allege that Adcock contacted the Goldsteins and threatened that if they did not pay her, she would accuse Jonathan of rape and have him arrested and imprisoned, accuse his father and brother of being complicit in his crimes, and send people to beat them. The cross-complaint and the Goldsteins' declarations further allege that cross-defendants threatened to go public with the allegations of rape and ruin each of the Goldstein's professional reputations and also threatened to file ethical complaints with the California State Bar and other state bar associations. The fact that both Adcock's lawsuit for sexual battery and the Goldsteins' cross-complaint for extortion ultimately are both based on underlying allegations by Adcock that Jonathan raped her does not mean that the Goldsteins' cross-complaint is based on Adcock's protected activity of filing a civil suit based on that alleged crime. (*Cotati, supra*, 29 Cal.4th at p. 80 [finding causes of action in second lawsuit did not arise from first lawsuit where both suits were simply based on the same underlying dispute].)

Nor does the fact that the Goldsteins filed their cross-complaint after Adcock filed her complaint help establish that their claims arose from the filing of Adcock's complaint. It is well-established that "the mere fact an action was filed after protected activity took place does not mean it arose from that activity. The anti-SLAPP statute cannot be read to mean that 'any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is *based on* conduct in exercise of those rights.' [Citations.]" (*Cotati, supra*, 29 Cal.4th at pp. 76-77.) "[A] claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic. [Citation.] That a cause of action arguably may have

been triggered by protected activity does not entail that it is one arising from such." (*Id.* at p. 78.)

The evidence in the record also contradicts cross-defendants' contention that the cross-complaint must be based in part on Gilleon's December 9, 2010 email to Jonathan. The timing of that email does not match the time period of "mid to late summer of 2010" during which the Goldsteins allege the extortionate threats were made. Moreover, the benign suggestions in Gilleon's letter that the parties discuss settlement of Adcock's claims simply bear no relation to the alleged threats to have the Goldsteins criminally prosecuted, jailed, and beaten. Finally, in their opposition to the anti-SLAPP motion, the Goldsteins specifically state that the December 9, 2010 email was not the basis for the cross-complaint. The fact that the Goldsteins' cross-complaint does not provide the specific dates on which each alleged threat was made, the means of communication of the threat, or the particular cross-defendant who made each extortionate demand does not permit us to ignore all the evidence demonstrating that the December 9, 2010 email is not the basis for the cross-complaint.

Other than serving Adcock's complaint on the Goldsteins and sending the December 9, 2010 email, cross-defendants deny having any other communications with the Goldsteins. Their sworn statements in support of their anti-SLAPP motion leave us without any basis to infer that the allegations of extortion arose out of the otherwise protected activity of engaging in settlement communications or other litigation activity. (Cf. *Flatley, supra*, 39 Cal.4th at pp. 306, 308-309 [attorney *admitted* sending Flatley a draft civil complaint alleging that Flatley had sexually assaulted attorney's client, along with an accompanying letter stating that if Flatley did not agree to settle the civil claims, Mauro would report him to multiple authorities and publicly accuse him of criminal offenses involving immigration and tax law, among other crimes].)

In sum, the evidence before us shows that the causes of action in the Goldsteins' cross-complaint are all based purely on alleged acts of extortion by cross-defendants, and not on the asserted protected activity of Adcock's filing of civil claims against the Goldsteins or on the December 9, 2010 email proposing settlement. Therefore, cross-defendants have failed to meet their initial burden of showing that the Goldstein's cross-complaint arose out of protected activity. Because cross-defendants have not satisfied the first prong of the anti-SLAPP analysis, we need not reach the question whether the Goldsteins can show a probability of prevailing on the merits of their cross-complaint. Thus, we affirm the decision of the trial court denying cross-defendants' motion to strike, albeit on somewhat different grounds.

We now address the trial court's award of attorney fees to the Goldsteins.

II. ATTORNEY FEES AWARD

The trial court found that Adcock's anti-SLAPP motion was frivolous and awarded the Goldsteins $10,000 in attorney fees. We review the award for abuse of discretion (*Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1388 (*Garamendi*)) and find that the trial court erred in awarding attorney fees to the Goldsteins.

"If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (§ 425.16, subd. (c)(1).) Section 128.5 defines "frivolous" to mean "(A) totally and completely without merit or (B) for the sole purpose of harassing an opposing

party." (§ 128.5, subd. (b)(2).)[4] Thus, "[t]he legal test for a frivolous motion is whether . . . "'*any reasonable attorney would agree such motion is totally devoid of merit*.' [Citation.]" [Citation.]' [Citation.]" (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 275.) In granting an attorney fees award, "the trial court must (a) state specific circumstances giving rise to the award of attorney fees and (b) articulate with particularity the basis for finding the sanctioned party's conduct reflected tactics or actions performed in bad faith and that were frivolous or designed to harass or cause unnecessary delay." (*Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 996; see also *Garamendi, supra*, 132 Cal.App.4th at p. 1388.)

A. *Basis for Trial Court's Denial of Motion to Strike*

In order to understand the basis for the attorney fees award levied against cross-defendants, it is necessary first to set forth the trial court's reasoning underlying its decision to deny cross-defendants' motion to strike. The trial court denied cross-defendants' anti-SLAPP motion on the ground that the conduct alleged in the Goldsteins' cross-complaint unequivocally was criminal extortion, and thus cross-defendants could not establish that the cross-complaint was based on conduct that constituted protected activity. The court relied on *Flatley*, which held that where "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law," such activity will not support an anti-SLAPP motion. (*Flatley, supra*, 39

[4] Although section 128.5 applies only to "actions or tactics" arising from a complaint filed before December 31, 1994 (§ 128.5, subd. (b)(1)), the cross-reference to that section in section 425.16, subdivision (c) requires that courts use the "procedures, standards [and] definitions" of section 128.5 in deciding whether to award attorney fees under the anti-SLAPP statute. (*Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 817; *Garamendi, supra*, 132 Cal.App.4th at p. 1388.)

Cal.4th at p. 320.) In *Flatley*, the defendant lawyer admitted writing letters and making calls to the plaintiff and his attorneys that, when taken together, threatened to accuse the plaintiff of a variety of crimes and disgrace him in the public media unless he paid a large sum of money. (*Id.* at pp. 306-307, fn. 4, 328-329.)

In the instant case, the trial court dismissed cross-defendants' argument that *Flatley* only bars the use of the anti-SLAPP statute in the narrow circumstance where it is conceded or conclusively proved that the party engaged in illegal activity. The court found that under *Flatley*, "for purposes of the first prong of analysis under SLAPP, whether Cross-Defendants committed the alleged acts is irrelevant. The relevant inquiry is whether the acts *as alleged* constitute unprotected criminal conduct." (Italics added.)

In applying this interpretation of *Flatley*, the court relied on *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435 (*Gerbosi*), which the court found had "clarified" the holding of *Flatley*. In *Gerbosi*, the law firm Gaims, Weil, West & Epstein, LLP (Gaims) sought to strike invasion of privacy, unlawful eavesdropping, and other related claims brought against it by Erin Finn, the ex-girlfriend of a client of Gaims. Finn argued that because some of her claims rested on alleged criminal wiretapping activity, Gaims could not satisfy its burden of showing that the claims it sought to strike were based on protected activity. Relying on *Flatley*, Gaims responded that it had satisfied the first step of the anti-SLAPP procedure because neither had it conceded its conduct was illegal nor was the evidence conclusive that the firm had engaged in the alleged conduct. (*Gerbosi, supra*, 193 Cal.App.4th at p. 445.)

The *Gerbosi* court disagreed with this interpretation of *Flatley*. (*Gerbosi, supra*, 193 Cal.App.4th at p. 445.) The court held that "[w]e understand *Flatley* to

stand for this proposition: when a defendant's assertedly protected activity *may or may not be* criminal activity, the defendant may invoke the anti-SLAPP statute unless the activity is criminal as a matter of law. In coming to this result, the Supreme Court observed that an activity could be deemed criminal as a matter of law when a defendant concedes criminality, or the evidence conclusively shows criminality. At the same time, the Supreme Court cautioned that a defendant's '*mere assertion* that his [or her] underlying activity was constitutionally protected' will not suffice to shift to the plaintiff the burden of showing that the defendant's underlying activity was criminal, and not constitutionally protected. (*Flatley, supra*, 39 Cal.4th at p. 317, italics added.) As the Supreme Court aptly concluded, such a rule would 'eviscerate the first step of the two-step inquiry set forth in the [anti-SLAPP] statute.' (*Ibid.*) 'While a defendant need only make a prima facie showing that the underlying activity falls within the ambit of the statute, . . . the statute envisions that the courts do more than simply rubberstamp such assertions before moving on to the second step.' (*Ibid.*) [¶] Here, to the extent that Gaims' anti-SLAPP motion sought to strike Finn's privacy-related causes of action, the assertedly protected activity must be said to be wiretapping in the course of representing a client. Under no factual scenario offered by Gaims is such wiretapping activity protected by the constitutional guarantees of free speech and petition. Gaims' argument that its evidence showed it did not do the acts that Finn alleges it did is more suited to the second step of a anti-SLAPP motion. A showing that a defendant did not do an alleged activity is not a showing that the alleged activity is a protected activity." (*Gerbosi, supra*, 193 Cal.App.4th at p. 446.)

Here, in following *Gerbosi* and interpreting *Flatley* to hold that disputed issues of fact as to whether the assertedly illegal conduct took place are not relevant to the first prong of the anti-SLAPP inquiry, the trial court did not consider authority interpreting *Flatley* in the contrary manner urged by cross-

defendants in this case and by Gaims in the *Gerbosi* case. For instance, in *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953 (*Seltzer*), the court viewed *Flatley* as barring anti-SLAPP motions only in the narrow circumstance where there is no factual dispute that the party bringing the motion has engaged in illegal conduct. (*Id.* at p. 964-965.) The court found that "[t]he burden is on the party opposing a section 425.16 motion to strike to show that no factual dispute exists." (*Id.* at p. 965.) Although the party opposing the anti-SLAPP motion in *Seltzer* alleged that its claims were based on unlawful conduct by the opposing party, it did not show the absence of a factual dispute on this question, and thus the court deemed the first prong of the anti-SLAPP analysis satisfied. (*Id.* at pp. 966-969; see also *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1090 ["The [*Flatley*] exception does not apply here because the parties dispute whether Mendoza's claims were supported in the initial action."].)[5] Other cases decided after *Gerbosi* and after the trial court issued its order denying cross-defendants' motion to strike similarly have not construed *Flatley* as barring anti-SLAPP motions merely where the claims sought to be stricken *allege* criminal conduct. Rather, these cases have narrowly interpreted *Flatley* to require the party opposing the anti-SLAPP motion to prove the absence of a factual dispute as to the commission of criminal conduct. (See, e.g., *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 386 (*Cross*) [finding that case involving motion to strike claims implicitly based on extortion was not "one of those rare cases in which there is uncontroverted and uncontested evidence that establishes the crime as a matter of law" and finding first prong of anti-SLAPP statute satisfied].)

[5] To be fair, cross-defendants failed to bring either of these decisions to the court's attention.

B. *Ruling on the Goldsteins' Request for Attorney Fees*

In granting the request for attorney fees against cross-defendants, the trial court found that three factors justified the award. First, the court found it highly significant that in their moving papers, cross-defendants did not dispute the illegality of the conduct alleged in the cross-complaint. While cross-defendants argued and submitted evidence that they did not engage in the alleged criminal activity, the court found that under *Flatley* and *Gerbosi* such denials were not relevant to the first prong of the anti-SLAPP analysis. The trial court found that to satisfy the first prong the only "relevant inquiry is whether the conduct alleged against Cross-Defendants in the complaint was legal, protected conduct," which obviously was not the case for the Goldsteins' cross-complaint alleging extortionate threats. Thus, the court concluded that no reasonable attorney would have brought the motion to strike the cross-complaint. Second, the trial court faulted cross-defendants for failing to cite *Flatley* in their opening brief in support of their anti-SLAPP motion. Although cross-defendants argued in their reply brief that *Flatley* was distinguishable because the rule it announced applies only where the defendant concedes or the evidence conclusively shows that the assertedly protected activity is illegal as a matter of law, as discussed above, the court interpreted *Flatley* differently. Finally, although the trial court acknowledged that the *Gerbosi* decision was not published until after cross-defendants filed their motion to strike, the court took issue with cross-defendants' failure "to address the significance of *Gerbosi* in [their] reply."

We disagree with the trial court's determination that no reasonable attorney would have brought the SLAPP motion. As stated above, there is conflicting authority with respect to the interpretation of *Flatley* and the question whether the first prong of the anti-SLAPP analysis is satisfied if the party bringing the anti-SLAPP motion denies engaging in the alleged criminal conduct. (Compare

Gerbosi, supra, 193 Cal.App.4th at p. 446 with *Seltzer, supra*, 182 Cal.App.4th at pp. 964-969, and *Cross, supra*, 197 Cal.App.4th at p. 386.) We need not enter that debate. For our purposes, it is enough merely to note the significant difference of opinion on this question. Given that divergence of opinion, the trial court's conclusion that any reasonable attorney would find cross-defendants' arguments "totally devoid of any merit" cannot stand. (*Baharian-Mehr v. Smith, supra*, 189 Cal.App.4th at p. 275; see *Weisman v. Bower* (1987) 193 Cal.App.3d 1231, 1240 [attorney fees not warranted where motion was "arguably meritorious"]; *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1003 ["Given the conflicting authority governing the court's ability to consider earning capacity in the computation of child support, we hold that [appellant's] appeal was not frivolous."].)

We also disagree that attorney fees were justified by cross-defendants' failure to cite *Flatley* in their opening brief in support of the motion to strike. """The legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. . . ." [Citations.]' [Citation.] """Instead, under the statutory scheme, a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary. . . ." [Citations.]' [Citation.]" (*No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1027, fn. 3.) "[I]f a plaintiff [here, cross-complainant] claims that the defendant's [here, cross-defendants'] conduct is illegal and thus not protected activity, the [cross-complainant] bears the burden of conclusively proving the illegal conduct." (*Cross, supra*, 197 Cal.App.4th at p. 385.) Thus, while it might well have been advisable to discuss *Flatley* in order to blunt likely arguments in the opposition, it was not cross-defendants' burden to

raise the *Flatley* exception to the general rule requiring that the court should presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis.

Finally, we disagree with the trial court's conclusion that cross-defendants failed "to address the significance of *Gerbosi* in [their] reply." Cross-defendants devoted almost a full page to a discussion of *Gerbosi*. Although their attempt to distinguish that case may not exemplify the most persuasive legal reasoning, it was not frivolous, and thus does not justify the imposition of attorney fees.

In sum, the award of attorney fees must be reversed. For the same reasons, we also deny the Goldsteins' request for attorney fees on appeal. (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 395 ["'[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]'"].)[6]

DISPOSITION

The attorney fees award in favor of the Goldsteins is reversed. In all other respects, the judgment is affirmed. We deny the Goldsteins' motion for attorney fees on appeal and order the parties to bear their own costs on appeal.

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[6] The Goldsteins argue in their supplemental letter brief that the award of attorney fees should be affirmed because cross-defendants' motion to strike was frivolous given that they denied engaging in any act that could be deemed protected activity. However, the Goldsteins did not raise this argument before the trial court and nor did the court base its attorney fees award on this ground. Thus, we decline to affirm the award on this basis.

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.