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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

JOEL D. KETTLER, Cross-complainant and Appellant, v. LESLIE GOULD et al., Cross-defendants and Respondents.	B285732 (Los Angeles County Super. Ct. No. LC101909)

APPEAL from an order of the Superior Court of Los Angeles County. Frank J. Johnson, Judge. Affirmed.

Fredman Lieberman Pearl and Howard S Fredman for Cross-complainant and Appellant.

The Ring Law Firm and Bart I. Ring for Cross-defendants and Respondents.

SUMMARY

Cross-complainant Joel D. Kettler contends the trial court abused its discretion when it awarded attorney fees to cross-defendants Leslie and Susan Gould, after cross-defendants partially prevailed on an anti-SLAPP (strategic lawsuit against public participation) motion. We find no abuse of discretion and affirm the trial court's order.

FACTS

This is our third opinion related to the anti-SLAPP motions cross-defendants brought after cross-complainant sued them for defamation and eight other causes of action.[1] We recount first the facts and procedural background of the case, most of which may also be found in our most recent opinion (*Kettler v. Gould* (2018) 22 Cal.App.5th 593, 597-602), and then turn to the ruling on appeal.

1. The Factual and Legal Background

Cross-complainant is a financial planner and advisor who acted in that capacity for Leslie Gould's elderly parents from 1990 until they died, in 2010 and 2011. Cross-complainant had a "close familial relationship" with the Goulds. The elder Goulds gave cross-complainant a power of attorney in 2006, and he managed many aspects of their finances, including payment of their bills and disbursements they authorized to Leslie Gould and his sister. According to the cross-complaint, the parents made

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[1] The other causes of action were libel per se, slander per se, trade libel, intentional interference with prospective economic advantage, intentional interference with contractual relationship, intentional infliction of emotional distress, breach of contract and unfair business practices.

these arrangements, after expressing concerns their children were spendthrifts who lived beyond their means, to control their access to the parents' funds.

After the deaths of the parents, cross-complainant became the trustee of the Gould Living Trust, of which Leslie Gould and his sister were the beneficiaries. The cross-complaint alleged that in February and March 2013, cross-complainant learned that Leslie Gould had intentionally misdirected correspondence and financial statements to his home, to hide the existence of some of the trust's assets from his sister. Cross-complainant exposed this wrongdoing, as well as Leslie's interception of his parents' mail, including payments.

The cross-complaint, filed in February 2015, alleges that, as a result of this exposure: "13. . . . Cross-Defendants have engaged in a malicious, vicious, mean-spirited, scorched earth campaign against Cross-Complainant, falsely accusing Cross-Complainant of misappropriating the [elder] Goulds' funds and intentionally deceiving them to obtain the [power of attorney] and become the successor trustee. In addition to filing this frivolous lawsuit, Cross-Defendants have filed complaints with every person or agency imaginable, including, but not limited to, the Department of Insurance, Certified Financial Planner Board of Standards, Inc. ('CFP Board'), Financial Industry Regulatory Authority ('FINRA'), Cross-Complainant's employer, and any other government agency, company, or person that could possibly interfere with Cross-Complainant's ability to engage in his profession. As a result of Cross-Defendants' wrongful actions, Cross-Complainant's employment relationship with his employer has been terminated." And: "14. Cross-Defendants have also defamed Cross-Complainant's reputation to other Third Parties,

including to existing and potential clients, which has caused one or more clients to cancel their business with Cross-Complainant and no longer use Cross-Complainant as their financial planner/advisor. Cross-Defendants have caused Cross-Complainant to lose clients and hence, commissions, management fees, service fees and performance bonuses."

The allegations just quoted were incorporated into each of the cross-complaint's nine causes of action. In addition to damages, cross-complainant sought injunctive relief in connection with several causes of action, and sought punitive damages in connection with seven of the causes of action.

In April 2015, cross-defendants filed an anti-SLAPP motion (Code Civ. Proc., § 425.16).[2] They sought to strike the entire complaint. Because all of cross-complainant's causes of action were based at least in part on unprotected activity, the court concluded the anti-SLAPP motion could be denied in its entirety, and did so. Cross-defendants appealed.

While the appeal was pending, the Supreme Court decided *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*). *Baral* gives the courts and parties precise directions on how a special motion to strike operates "against a so-called 'mixed cause of action' that combines allegations of activity protected by the statute with allegations of unprotected activity." (*Id.* at p. 381.)

Baral enunciated several principles. First, "when the defendant seeks to strike particular claims supported by allegations of protected activity that appear alongside other claims within a single cause of action, the motion cannot be defeated by showing a likelihood of success on the claims arising

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[2] Further statutory references are to the Code of Civil Procedure unless otherwise specified.

from unprotected activity." (*Baral, supra*, 1 Cal.5th at p. 392.) Second, "an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded." (*Id.* at p. 393.) Third, assertions that are " 'merely incidental' or 'collateral' " are not subject to section 425.16; allegations of protected activity "that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Baral,* at p. 394.) Fourth, "in cases involving allegations of both protected and unprotected activity, the plaintiff is required to establish a probability of prevailing on any claim for relief based on allegations of protected activity. Unless the plaintiff can do so, the claim and its corresponding allegations must be stricken." (*Id.* at p. 395.)

Because the parties and the trial court had not had the benefit of *Baral* when the trial court denied cross-defendants' first anti-SLAPP motion, we reversed the trial court's ruling and remanded with directions to allow cross-defendants to reframe their motion in conformance with the formulation in *Baral* and to determine the issues in accordance with that formulation. (*Gould v. Kettler* (Oct. 31, 2016, B266652) [nonpub. opn.].)

Cross-defendants' second anti-SLAPP motion sought an order striking all allegations of " 'defamatory' communications or 'complaints' filed with" the California Department of Insurance, the CFP Board, FINRA, cross-complainant's employer (AXA Advisors, LLC), and Anthem Blue Cross. The motion also challenged "any and all communications preparatory to or in anticipation of the bringing of an action or other official proceeding . . . ." Cross-defendants argued their statements to FINRA, the Department of Insurance and the CFP Board were

"absolutely privileged with no exceptions" and their statements to AXA "are clearly shielded by the litigation privilege . . . ."

In March 2017, the trial court granted cross-defendants' anti-SLAPP motion as to the FINRA and the Department of Insurance based claims and denied the motion as to claims based on complaints to the CFP Board, Anthem, and AXA. The court also rejected cross-defendants' claim of litigation privilege with respect to AXA. The court found that cross-defendants "are not the prevailing parties, overall," and denied their request for attorney fees, but added that "[i]f counsel wishes to pursue the matter they may file a noticed motion."

We affirmed the trial court's order in *Kettler v. Gould, supra*, 22 Cal.App.5th 593.

2. Cross-defendants' Motion for Attorney Fees and the Trial Court's Ruling

Meanwhile, in May 2017, after the trial court granted the anti-SLAPP motion in part, cross-defendants filed a motion for attorney fees and costs. (§ 425.16, subd. (c)(1) ["a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs"].)

Cross-defendants sought an allocated award of attorney fees in the sum of $91,800 and costs of $1,055, for a total award of $92,855. They contended the court's ruling striking the FINRA and Department of Insurance allegations as protected speech "reduced and eliminated a significant portion of Cross-Complainant's causes of action[] and alleged damages. The elimination of these claims significantly narrows the litigation with respect to discovery and alleged damages as well as the focus of the claimed false statements." Further, they argued, the

lack of success on other claims is relevant to the amount of, but not the right to, attorney fees.

Cross-defendants' motion was accompanied by a declaration from their counsel. Counsel described his experience, his hourly billing rate ($425), the work he performed, and the amount of time he devoted to various categories of work performed. He calculated his total hours, at a minimum, at 355.5 hours. Cross-defendants sought 100 percent of 32.5 hours devoted to unsuccessful ex parte applications by cross-complainant ($13,812.50); 50 percent of the remaining time (323 hours) devoted to the two anti-SLAPP motions and the appeal of the first one ($68,637.50); 100 percent of the 22 hours of time spent on the motion for attorney fees ($9,350); and costs of $1,055.

Cross-complainant's opposition contended the motion should be denied in its entirety. Cross-complainant argued that striking the "incidental references" related to cross-defendants' complaints to FINRA and the Department of Insurance "accomplished nothing." Cross-complainant pointed out no causes of action were stricken, and asserted the references to FINRA and the Department of Insurance "merely provided context, and supported the allegations of malice." Thus, he argued, the " 'fragmentary' " allegations were so minimal and insignificant that cross-defendants "should not be considered the prevailing party" and were not entitled to attorney fees. Cross-complainant further asserted that, at the hearing on the second anti-SLAPP motion (in March 2017), he "abandoned the allegations related to FINRA and the [Department of Insurance] because they merely provided context and are not the basis for any recovery in this action."

Cross-complainant also asserted the fees sought were "grossly disproportionate to what [cross-defendants] accomplished," and objected that cross-defendants did not produce any redacted bills and made "no showing whatsoever" as to the amount of time devoted to the FINRA and Department of Insurance portions of their motion.

The court heard argument from counsel on July 27, 2017, first tentatively deciding on an award of attorney fees and costs totaling $19,648.75 (rather than the $92,855 sought). The trial court explained:

> "[T]he motion was only partially successful. [¶] It did result in the excising, I guess we could call it, from the complaint, of certain allegations, which did not result in the dismissal of any particular cause of action but did serve . . . to limit the scope of the discovery and the future course of litigation. So it was partially successful.
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> "The question to the court becomes determining what – how much of the case did this affect, did this successful motion affect? What is the percentage of the case? And that's really a difficult process.
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> "The court's impression is that this was far from a dispositive motion. And I'd be inclined to feel that this was worth about 10 percent of the case. It may be, in a rough sense, that 10 percent of the litigation is affected by the successful motion. [¶] And the court would be inclined to reduce some, but not all, of the expenses associated with that – by that percentage.
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> "So, starting from that proposition, the attorneys' fees on the anti-SLAPP motion would be reduced to the amount of $12,962.50. The attorneys' fees for the ex parte

> application would be reduced to $1,381.25. [¶] The – for the current motion, the 10 percent doesn't really have any relevance. However, it looks like moving party's asking to be awarded $425 an hour for 22 hours of work for this motion.
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> "I'd be inclined to reduce that to 10 hours, which would be 10 times $425 an hour, for $4,250. And then, for costs, the court would award them in full, which, the court's reckoning is the costs come out to $1,055."

The court then heard argument from the parties.

Cross-defendants emphasized that cross-complainant "never abandoned" the claims that were excised: "They were all in on this, all the way through. I never received any communication through this entire sojourn . . . otherwise." And, counsel contended, "it [(the FINRA/Department of Insurance allegations)] wasn't provided just for context," but rather as cross-complainant stated in his opposition, " 'for the purpose of showing malice.' "

The court interjected that, "Just to support what you're saying, at any point in this litigation, opposing parties could have voluntarily excised these portions of the complaint that were at issue, and chose not to. [¶] And so it's a little odd to hear now how relatively unimportant they are, and why they ought not to be regarded as important for the sake of setting attorneys' fees."

Counsel for cross-complainant stated that "the primary problem . . . with your proposed ruling, is that . . . there has not been a production of sufficient records to show what matters [*sic*] were actually devoted to FINRA and the Department of Insurance." Counsel conceded that "[y]es, there could be potential impact," but cross-defendants "should be required to

show what fees were devoted to that subject matter." Counsel argued that "applying a percentage, whether it's 50 percent or 10 percent, is error" when "you're dealing with the excising of ten words."

The court responded, "I don't know any attorney who keeps billing records based on individual words in a complaint. I'm sorry. I don't see any feasible way of doing what you just suggested."

Argument continued. Ultimately, the court adopted its tentative ruling as the final decision.

On September 5, 2017, the court entered an order awarding attorney fees and costs totaling $19,648.75. Cross-complainant filed a timely notice of appeal.

DISCUSSION

Cross-complainant contends the trial court abused its discretion in awarding attorney fees for several reasons. He contends cross-defendants were not the prevailing party because the relief granted was minimal and "accomplished nothing." He contends the award was "grossly disproportionate" to what cross-defendants accomplished (again, "[n]othing"). He asserts the trial court "misunder[stood] . . . applicable law" when it said the stricken allegations "serve[d] . . . to limit the scope of the discovery," because (according to cross-complainant) those allegations "are admissible to prove malice." And he complains that cross-defendants "failed to produce any records to show the fees and costs incurred in connection with the successful portion of their anti-SLAPP motion."

None of these contentions has merit. Cross-complainant has not demonstrated an abuse of discretion.

1. The Claim of "No Practical Effect"

"A defendant prevailing on a special motion to strike is entitled to recover his or her attorney fees and costs for the motion. [Citation.] Where the motion is partially successful, the question is whether the results obtained are insignificant and of no practical benefit to the moving party. [Citation.] A court awarding fees and costs for a partially successful anti-SLAPP motion must exercise its discretion in determining their amount in light of the moving party's relative success in achieving his or her litigation objectives." (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1123.)

Cross-complainant contends the partial grant of the anti-SLAPP motion "had no practical effect," and asserts the factual allegations and work involved in trying the case did not change. Cross-complainant relies on *Malin v. Singer* (2013) 217 Cal.App.4th 1283 (*Malin*) and *Moran v. Endres* (2006) 135 Cal.App.4th 952 (*Moran*). Cross-complainant is mistaken on both the facts and the law.

First, the assertion that " '[t]he factual allegations which defendants had to defend did not change' " is clearly wrong. The cross-complaint alleged cross-defendants "filed complaints with every person or agency imaginable, including, . . . the Department of Insurance, Financial Industry Regulatory Authority ('FINRA') . . . and any other government agency . . . that could possibly interfere with Cross-Complainant's ability to engage in his profession." Those are factual allegations, incorporated in every cause of action, that cross-defendants no longer have to defend.

Second, as the trial court found, the excision of those allegations would "limit the scope of the discovery and the future

course of litigation." Those allegations cannot be used to support claims for damages.[3]

Third, neither *Moran* nor *Malin* supports cross-complainant's position.

In *Moran*, the defendants succeeded in eliminating " 'only one of the eleven causes of action,' " and that was the cause of action for civil conspiracy. (*Moran, supra,* 135 Cal.App.4th at p. 954.) The trial court declined to award the defendants attorney fees, and the Court of Appeal affirmed. (*Ibid.*) The Court of Appeal pointed out the defendants sought to dismiss the entire complaint "and instead obtained only the most illusory victory." (*Ibid.*) "The factual allegations defendants faced were not changed when the cause of action for conspiracy was stricken, because that cause of action included no specific factual allegations, but instead incorporated the factual allegations made in the other causes of action. Further, as a legal matter, the cause of action for conspiracy added little or nothing to plaintiffs' case," because " '[s]tanding alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort.' " (*Id.* at pp. 954-955.) The court concluded the results of the motion "were minimal and insignificant, fully justifying the [trial] court's finding that defendants should not recover fees." (*Id.* at p. 955; see *ibid.* ["The

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[3] Cross-complainant states in his brief that he "abandoned claims for recovery based on the allegations related to FINRA and the [Department of Insurance]" at the March 2017 hearing on the second anti-SLAPP motion. But cross-complainant points to nothing in the record except counsel's own claim to that effect at the July 2017 hearing on attorney fees in this case. The court rejected that notion, and so do we.

factual allegations which defendants had to defend did not change. The work involved in trying the case did not change. . . . The case was essentially the same after the ruling . . . as it was before."].) This case – where factual allegations *were* changed and the work involved was changed, and where the trial court was "inclined to feel that this was worth about 10 percent of the case" – is not analogous to *Moran*.

Nor does *Malin* assist cross-complainant. *Malin* stands for the now-established proposition that " 'a defendant should not be entitled to obtain *as a matter of right* his or her **entire attorney fees incurred on successful and unsuccessful claims** merely because the attorney work on those claims was overlapping.' " (*Malin, supra,* 217 Cal.App.4th at p. 1305, boldface added, quoting *Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 344-345 (*Mann*).) Instead, the trial court should determine the lodestar amount, " 'and, if the work on the successful and unsuccessful causes of action was overlapping, the court should then consider the defendant's relative success on the motion in achieving his or her objective, and reduce the amount if appropriate.' " (*Malin,* at p. 1305, quoting *Mann,* at p. 345.) The *Mann* court identified various factors in the analysis, and concluded that " 'fees awarded to a defendant who was only partially successful on an anti-SLAPP motion should be commensurate with the extent to which the motion changed the nature and character of the lawsuit in a practical way.' " (*Malin,* at p. 1305, quoting *Mann,* at p. 345.)

That is what the trial court did here, albeit in the different circumstance that particular claims, rather than entire causes of action, were excised from the complaint. Indeed, in *Mann*, the trial court erred in failing to reduce the attorney fee award for

fees attributable to the causes of action that remained in the litigation. Notably, *Mann* observed that "[a]lthough the amount to be awarded could not be calculated through a purely mechanical approach by allocating particular hours to particular claims, the court should have considered the significance of the overall relief obtained by defendants in relation to the hours reasonably expended on the litigation and whether the expenditure of counsel's time was reasonable in relation to the success achieved." (*Mann, supra,* 139 Cal.App.4th at p. 345.) Here, the trial court did just that, concluding that cross-defendants' success was "worth about 10 percent of the case."

Cross-complainant's assertion there was "no practical effect" is further belied by the *Mann* court's description of the history of that case. Describing an earlier opinion in the same case, the court said: "[W]e recognized defendants' reports to government agencies were absolutely privileged (Civ. Code, § 47, subd. (b)), thus eliminating any actionable theory arising from the alleged false statements to these agencies. By establishing this legal principle, defendants effectively restricted the factual allegations, reduced viable theories of recovery, limited discovery, lessened the work involved, and permitted both sides to more realistically evaluate liability, damages and future legal expenses." (*Mann, supra,* 139 Cal.App.4th at p. 346.) The trial court here similarly concluded that the elimination of the allegations in question "did serve . . . to limit the scope of the discovery and the future course of litigation." Cross-complainant's assertion there was "no practical effect" is mistaken and does not establish an abuse of discretion.

2. The Claim of a "False Understanding of the Law"

In his opening brief, cross-complainant posits the proposition that "the communications to government agencies *remain to be litigated,* since they may still be used to establish the [cross-defendants'] malicious intent," citing *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*), and *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157 (*Oren Royal Oaks*). In his reply brief, cross-complainant expands on this notion, contending the trial court's rationale – that the anti-SLAPP motion limited the scope of discovery and the future course of litigation – was "not consistent with the substantive law," because the stricken allegations "were still a proper subject for discovery" and were "admissible for evidentiary purposes."

Cross-complainant is mistaken. Neither *Flatley* nor *Oren Royal Oaks* stands for the proposition that complaints to a government agency – which are absolutely privileged under Civil Code section 47, subdivision (b) (litigation privilege or section 47(b)) – may nonetheless be used, as cross-complainant asserts, to establish "the requisite intent required to secure an award of punitive damages."

In *Oren Royal Oaks*, the court considered "what role the statutory 'privilege' for statements made in the course of a judicial proceeding . . . plays in an abuse of process action." (*Oren Royal Oaks, supra,* 42 Cal.3d at p. 1159.) The court concluded that the statutory litigation privilege "does not bar the evidentiary use of . . . statements [made during settlement negotiations] to establish the motive with which a defendant in an abuse of process action acted." (*Ibid.*)

Needless to say, this is not an abuse of process action. And nothing in *Oren Royal Oaks* suggests that a complaint made to a

government agency may be used to establish a defendant's liability for punitive damages in connection with defamation and other tort claims. It would be ironic indeed if a complaint to a government agency that cannot be used to establish liability for damages on a defamation claim could nonetheless be used to establish liability for punitive damages on the same claim.

Nor does *Flatley*, which merely repeated the principle stated in *Oren Royal Oaks* in a discussion of the relationship between the litigation privilege and the anti-SLAPP statute, support the proposition. (*Flatley, supra,* 39 Cal.4th at pp. 324-325 [rejecting the defendant's contention "that, because some forms of illegal litigation-related activity may be privileged under the litigation privilege, that activity is necessarily protected under the anti-SLAPP statute"]; *id.* at p. 333 [the anti-SLAPP statute does not apply to communications that constitute criminal extortion as a matter of law].)

In short, cross-complainant offers no reasoned explanation for applying the *Oren Royal Oaks* principle – that statements made in a settlement negotiation may be used as evidence to establish the element of motive in an abuse of process claim – to permit a litigant to use a privileged complaint to establish liability for punitive damages.

3. The Billing Records Claim

Finally, cross-complainant contends the trial court abused its discretion because cross-defendants did not produce billing records showing the amount of fees incurred on the FINRA and Department of Insurance claims. This assertion too has no merit.

As already described, the motion for attorney fees included a declaration from counsel, describing his experience, his billing rate, the work he performed, and the amount of time he devoted

to various categories of work. Billing records are not required in every case. (See *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1398 [" 'The trial court could make its own evaluation of the reasonable worth of the work done in light of the nature of the case, and of the credibility of counsel's declaration unsubstantiated by time records and billing statements.' "].)

The same is true here. The trial court found that counsel's work "was worth about 10 percent of the case." We detect no error in the trial court's analysis, and we will not (and may not) reweigh the evidence. No abuse of discretion is shown.

DISPOSITION

The order is affirmed. Cross-defendants shall recover their costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

GOODMAN, J.*

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* Retired judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.