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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

RICHARD S. HIRSCHFIELD, as Trustee, etc., Plaintiff and Appellant, v. TANYA COHEN, Defendant and Appellant.	B267706 (Los Angeles County Super. Ct. No. SC124349)

APPEALS from orders of the Superior Court of Los Angeles County, Lawrence Cho, Judge. Appeal from order denying special motion to strike affirmed; appeal from order denying request for attorneys' fees dismissed.

Rosario Perry and Steven Coard for Plaintiff and Appellant.

Schwimer Weinstein and Michael E. Schwimer for Defendant and Appellant.

Tanya Cohen appeals from an order denying her special motion to strike (Code Civ. Proc., § 425.16; anti-SLAPP statute)[1] a complaint for declaratory relief filed by her landlord, Richard S. Hirschfield, as trustee of The Richard S. Hirschfield Trust. Cohen contends the trial court erred in denying her motion because Hirschfield's complaint arises from Cohen's prior filing of a complaint with the local rent control board, which was protected activity under the anti-SLAPP statute. Hirschfield cross-appeals from the trial court's denial of his request for attorneys' fees in connection with the denial of Cohen's special motion to strike.

We find that Hirschfield's complaint for declaratory relief arises from the underlying rent control dispute, not from Cohen's filing of a complaint with the rent control board. Accordingly, the trial court properly denied the special motion to strike. We also find that the trial court's order denying Hirschfield's request for attorneys' fees is not an appealable interlocutory order.

We affirm the denial of the special motion to strike and dismiss Hirschfield's appeal from the denial of his request for attorneys' fees.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Construction of Homes and Lease to Cohen*

In 1994 Hirschfield purchased four contiguous lots on Marine Street in the City of Santa Monica. There were two

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[1] All statutory references are to the Code of Civil Procedure unless otherwise indicated. SLAPP is an acronym for "strategic lawsuit against public participation." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 (*Park*).)

single-family dwellings and one three-unit multifamily dwelling on the four lots. All of the prior units were subject to rent control. In 2004 Hirschfield decided to demolish the existing structures and build four houses, each one on a separate lot. Hirschfield terminated the tenancies of the occupants pursuant to the Ellis Act (Gov. Code, § 7060 et seq.). In connection with the permitting process for the new construction, the city's zoning administrator issued findings and determinations for each lot stating that the new homes were exempt from rent control because they were single-family dwellings.

Hirschfield completed the construction in 2009. On September 18, 2009 Hirschfield entered into a written lease agreement with Cohen to lease the house at 746 Marine Street for a one-year term at $4,900 per month. The parties later renewed the lease, with the last lease expiring at the end of 2012. In January 2013 Cohen's tenancy continued as a month-to-month tenancy.

B. *The Rent Increases and Rent Control Dispute*

In early 2013 Hirschfield notified Cohen of a rent increase to $5,300 a month. Cohen did not dispute this rent increase. In June 2013 Hirschfield notified Cohen of another rent increase, raising her rent to $5,800 per month. In July 2013 Cohen phoned Hirschfield to complain about the second increase. She stated that the house was subject to rent control and the increase was illegal. Hirschfield responded that the house was exempt from rent control because it was a single-family dwelling.

On July 23, 2013 a staff attorney with the Santa Monica Rent Control Board (Board) sent a letter to Hirschfield stating that the four newly constructed homes were subject to rent

control and must be registered with the Board. The letter stated, "The Board has received a copy of a lease that shows that you rented one of those units, 746 Marine Street, on September 19, 2009. Because you rented one of the new units less than five years after the withdrawal of the demolished units, all four parcels are again subject to the rent control law." (Fn. omitted.) Hirschfield's attorney responded with a letter stating that the new units were exempt from rent control because they were single-family homes.

C. *Cohen's Rent Control Board Complaint and the Parties' Settlement Agreement*

On October 17, 2013 Cohen filed a complaint with the Board. Cohen alleged that her residence was subject to rent control, and that Hirschfield failed to register her tenancy and increased her rent illegally.

On December 9, 2013 Cohen and Hirschfield entered into a settlement agreement resolving Cohen's complaint. Hirschfield agreed to pay Cohen $6,512.09 for excess rent collected, and the parties agreed that the "current lawful rent" beginning in January 2014 was $5,058.54 per month. The settlement agreement stated, "This Agreement constitutes a complete resolution of all claims for excess rent that Tenant has or may have against Owner for the period June 2011 through October 2013 . . . as well as the claim for excess rent in November 2013. Tenant acknowledges that once this Agreement is executed and she accepts payment, she may not pursue any action in Court based on the same claims." The agreement also provided, "Each party releases all claims, causes of action, loss, costs, expenses, or damages which either party claims to have pertaining to

Complaint M–0872 (June 2011 through October 2013) plus November 2013."

D. *Hirschfield's State Court Complaint*

On June 18, 2015 Hirschfield filed a complaint against Cohen alleging a single cause of action for declaratory relief. The complaint alleges that an actual controversy has arisen between the parties concerning whether the 746 Marine Street residence is subject to rent control. The complaint does not reference Cohen's complaint to the Board or the settlement agreement. Hirschfield seeks a judicial declaration that as a separate single-family residence the property is not subject to rent control, and that he may therefore increase the rent in excess of the adjustments prescribed by the rent control ordinance.[2]

E. *Cohen's Special Motion To Strike*

On September 8, 2015 Cohen filed a special motion to strike the complaint. Cohen argued that Hirschfield's complaint arose from her protected activity of filing a complaint with the Board because but for her filing of the complaint there would be no controversy between the parties. Cohen asserted that whether

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[2] On August 17, 2015 Cohen filed a cross-complaint against Hirschfield. Cohen alleges that Hirschfield violated Civil Code section 1940.2 by using or threatening to use force in an effort to cause her to vacate the property, and violated Santa Monica Municipal Code section 4.56.020 by failing to provide required housing services, failing to perform repairs and maintenance, verbally abusing her, threatening her with physical harm, and otherwise interfering with her quiet enjoyment of the property. The cross-complaint is not at issue in this appeal.

the rent control law applied to single-family residences was a matter of public interest. Cohen also argued that Hirschfield could not establish a probability of prevailing on his claim. Cohen filed her own declaration, a declaration by her counsel, and documentary evidence in support of her motion.

Hirschfield argued in his opposition that the underlying dispute as to whether the rent control ordinance applied to the property existed before Cohen filed her complaint with the Board. Hirschfield maintained that his complaint arose from that underlying dispute, not from Cohen's complaint. Hirschfield also argued that he had a probability of prevailing on the merits of his claim. Hirschfield filed his own declaration, a declaration by his property manager, and a request for judicial notice in support of his opposition.

On the day before the hearing Hirschfield filed a declaration by his attorney seeking attorneys' fees under section 425.16, subdivision (c)(1), on the basis that Cohen filed her special motion to strike only to cause unnecessary delay.

F. *The Trial Court's Ruling*

On October 8, 2015 the trial court entered an order denying the special motion to strike. Citing *City of Cotati v. Cashman* (2002) 29 Cal.4th 69 (*Cotati*), the court found that Hirschfield's complaint arose from the controversy regarding whether the property was subject to the rent control ordinance, not from Cohen's complaint. The court concluded that Hirschfield's complaint therefore did not arise from protected activity under the anti-SLAPP statute. The court did not reach whether

Hirschfield had established a probability of prevailing on the merits.[3]

The trial court denied Hirschfield's request for attorneys' fees, finding that Cohen's special motion to strike was neither frivolous nor intended solely to cause unnecessary delay.

G. *The Appeals*

Cohen timely appealed from the order denying her special motion to strike. Hirschfield appealed from the denial of his request for attorneys' fees.

DISCUSSION

A. *The Law Governing Special Motions To Strike*

A cause of action arising from an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue is subject to a special motion to strike unless the plaintiff demonstrates a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321 (*Barry*).)

An "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or

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[3] The trial court overruled all of Cohen's evidentiary objections asserted in her reply brief. The court also admonished Hirschfield for failing timely to serve his opposition and for violating rule 2.108 of the California Rules of Court regarding line spacing and alignment of text, but declined to strike the opposition.

judicial proceeding, or any other official proceeding authorized by law, (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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

The analysis of an anti-SLAPP motion involves a two-step process. (*Barry*, *supra*, 2 Cal.5th at p. 321.) ""First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. [Citation.] If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.'" [Citations.] . . . "'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute . . . is a SLAPP, subject to being stricken under the statute.'" [Citation.]" (*Ibid.*)

Here, it is undisputed that Cohen's filing of a complaint with the Board is a protected activity in that it constitutes a "writing made before a legislative, executive, or judicial proceeding." (§ 425.16, subd. (e)(1).) The question before this court is whether Hirschfield's lawsuit is one "arising from" this protected activity.[4]

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[4] On appeal Cohen also argues that her oral complaint to Hirschfield about the rent was a protected activity. However, Cohen failed to make this argument in her special motion to

We review de novo the grant or denial of a special motion to strike. (*Park*, *supra*, 2 Cal.5th at p. 1067.) "We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. [Citations.] In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. [Citations.] We do not, however, weigh the evidence, but accept the plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes [her] entitlement to prevail as a matter of law." (*Ibid*.)

B. *Hirschfield's Complaint for Declaratory Relief Does Not Arise from Protected Activity*

"A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1062; accord, *Cotati*, *supra*, 29 Cal.4th at p. 78.) "'[T]he mere fact that an action was filed after protected activity

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strike before the trial court, and therefore has forfeited it on appeal. (*Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1526 [refusing to consider an argument under the first prong of the anti-SLAPP statute because the plaintiff never asserted the argument in the trial court].) In any event, although we agree that Cohen's oral complaint to Hirschfield was a protected activity (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [protected activity includes "'communications preparatory to or in anticipation of the bringing of an action or other official proceeding'"]), the analysis is the same as for Cohen's complaint filed with the Board. The gravamen of Hirschfield's complaint is not Cohen's phone call objecting to the rent increase, but the actual controversy between the parties regarding whether the property is subject to rent control.

took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' [Citation.]" (*Park*, *supra*, at p. 1063.) "Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.] 'The only means specified in section 425.16 by which a moving defendant can satisfy the ["arising from"] requirement is to demonstrate that the defendant's conduct by which [the] plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) . . . .' [Citation.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Ibid*., italics omitted.)

In *Cotati*, the owners of mobile home parks filed a complaint against the City of Cotati in federal court seeking declaratory relief to invalidate the city's rent control ordinance as an unconstitutional taking. The city then filed a complaint for declaratory relief in state court seeking a judicial determination that the same ordinance was constitutional. The owners filed a special motion to strike the city's complaint, arguing that the state court action arose from the owners' filing of the federal action. (*Cotati*, *supra*, 29 Cal.4th at pp. 72-73.)

Our Supreme Court rejected this argument, holding that an action does not arise from protected activity merely because it "'arguably was filed in retaliation for the exercise of speech or petition rights . . . .' [Citations.]" (*Cotati*, *supra*, 29 Cal.4th at pp. 76-77.) The court held further that the plaintiff's subjective intent in filing an action is irrelevant, and the fact that an action

arguably was triggered by protected conduct does not mean the action necessarily arose from protected conduct. (*Id.* at p. 78.)

The court in *Cotati* noted, "'The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject.' [Citation.]" (*Cotati*, *supra*, 29 Cal.4th at p. 79.) The court concluded that the "fundamental basis" of the city's request for declaratory relief was the validity of the rent control ordinance, not the owners' federal lawsuit. (*Id.* at pp. 79-80.)

In *Park*, our Supreme Court considered whether a former assistant professor's claim against a university for discrimination based on the university's denial of tenure arose from protected activity in the form of the communications leading to the tenure decision. The court held that the assistant professor's claim was based on the denial of tenure, which was not a protected activity, and did not arise from the communications leading up to that decision. (*Park*, *supra*, 2 Cal.5th at pp. 1066-1067.)

The court in *Park* noted that in *Cotati*, the "plaintiff could demonstrate the existence of a bona fide controversy between the parties supporting a claim for declaratory relief without the prior suit, although certainly the prior suit might supply evidence of the parties' disagreement." (*Park*, *supra*, 2 Cal.5th at p. 1064; see also *Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, 41-42 (*Gotterba*) [anti-SLAPP motion properly denied as to complaint for declaratory relief against the plaintiff's former employer regarding validity of employment termination agreements where lawsuit arose from dispute over agreements, not protected prelitigation demand letters, which were "merely evidence that a controversy between the parties exists"].)

We find the gravamen of Hirschfield's complaint is not Cohen's filing of a complaint with the Board, but the actual controversy between Hirschfield and Cohen regarding whether the property is subject to rent control. That controversy is not protected activity. As in *Park*, *Cotati* and *Gotterba*, Cohen's filing of a complaint with the Board is only evidence of the parties' dispute as to whether the rent control ordinance applied.

Had Cohen not challenged the increased rent, a controversy would still exist as to whether Hirschfield could raise the rent above what is allowed under the rent control ordinance. Indeed, as pointed out by Hirschfield, if he were to raise the rent in violation of the rent control ordinance, he could potentially be subject to civil or criminal penalties. (See Santa Monica City Charter, §§ 1809(a), 1810; see also *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 128 [finding apartment owners' association had standing to sue where owners could be subject to civil or criminal penalties for charging rent in excess of city rent stabilization ordinance].)

The declaratory relief cases cited by Cohen in which the courts found the claims arose from protected activity are distinguishable. In *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43 (*Stewart*), a resident of the City of Pasadena filed suit against that city, challenging the city's failure to perform the ministerial duties of authorizing and certifying the results of a voter initiative under Government Code section 34460.[5] (*Id.* at p. 54.) The proponent of the initiative and an advocacy group

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[5] Former section 34460 of the Government Code required city officials "to authenticate, certify and file copies of the Initiative with the Secretary of State, Los Angeles County Recorder, and the city's archives." (*Stewart*, *supra*, 126 Cal.App.4th at p. 54.)

intervened on behalf of the plaintiff, asserting that the city had a mandatory ministerial duty to comply with Government Code section 34460. The city then filed a cross-complaint for declaratory relief against the advocacy group, seeking a declaration that the initiative was unconstitutional, and therefore it had no duty to comply with the Government Code. The Court of Appeal reversed the trial court's denial of the special motion to strike, finding that the city's cross-complaint arose from the protected act of the advocacy group intervening in the litigation. The court found, "The principal thrust of the action, and the only matter then 'at issue' between [the advocacy group and the city], was the dispute over [the city's] duty to perform the ministerial obligations imposed by [Government Code] section 34460." (*Id*. at p. 74.) The court noted that the initiative proponent and the advocacy group "correctly asserted—and the trial court correctly agreed—that the constitutionality of the Initiative was irrelevant to the [city] officials' duty to perform certain ministerial duties under [Government Code] section 34460." (*Ibid*.) Thus, the city sued the advocacy group not because of an actual dispute about the constitutionality of the statute, but because the advocacy group "had the temerity to file a complaint-in-intervention to force [the city] to put the Initiative into effect, and because it sponsored the Initiative and supported its constitutionality, all of which are clearly protected activities." (*Id*. at p. 75.)

In *CKE Restaurants, Inc. v. Moore* (2008) 159 Cal.App.4th 262 (*CKE*), a consumer served a notice of violation under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65; Health & Saf. Code, § 25249.5 et seq.) on a restaurant operator, CKE, stating that CKE was required to warn

consumers that some of its food products contained naphthalene, a cancer-causing chemical. CKE filed a complaint for declaratory relief, seeking a judicial determination that its food products were safe and it was not required to provide a warning. (*CKE*, at pp. 266-267 & fn. 2.) The Court of Appeal found that the restaurant's suit arose from the protected activity of serving the Proposition 65 notice and was properly subject to a special motion to strike, finding that but for the Proposition 65 notice, there would be no present controversy supporting the filing of the lawsuit. (*Id.* at p. 271.) The court distinguished *Cotati* on the basis that CKE's complaint expressly referenced the consumer's notice and challenged its contents, and the restaurant operator had threatened to sue if the consumer did not withdraw the notice. (*Ibid.*) In addition, the court noted that it was "undisputed that naphthalene is cancer causing to humans and is present in CKE's food products."[6] (*Ibid.*) Thus, "CKE's action arose *entirely* from the filing of the Proposition 65 notice." (*Ibid.*; see also *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 473, 475 [finding the complaint by a manufacturer of dietary supplements for declaratory relief against a consumer and her attorneys arose from the protected activity of their serving a notice under the Consumer Legal Remedies Act (Civ. Code,

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[6] The court in *CKE* distinguished the holding in *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, in which the court held that the manufacturer of a prescription medical device properly brought an action seeking declaratory relief against the agency charged with implementing Proposition 65, seeking a determination that a chemical in its medical devices posed no significant risk of causing cancer, and therefore no warning was required. (*Id.* at p. 344.)

§ 1750 et seq.) of an intended lawsuit for misleading advertising, noting the notice was a prerequisite for the consumer to file a lawsuit and the complaint alleged as the actual controversy, "'[t]his action is being filed because [the d]efendants threaten to file a lawsuit claiming that [the p]laintiff's advertising violates'" the Consumer Legal Remedies Act].)

In each of these cases, the Court of Appeal concluded that the complaint for declaratory relief arose from protected activity because but for the protected activity, there would have been no legitimate dispute. Here, by contrast, there is an actual controversy between Hirschfield and Cohen, separate from her complaint to the Board, regarding whether her rental unit is subject to the rent control ordinance. In addition, in each case the complaints for declaratory relief specifically referenced the protected activity as the basis for the complaint. (See *Lunada Biomedical v. Nunez*, *supra*, 230 Cal.App.4th at p. 475; *CKE*, *supra*, 159 Cal.App.4th at p. 271; *Stewart*, *supra*, 126 Cal.App.4th at pp. 55, 74-75.) Here, nowhere in Hirschfield's complaint does he reference Cohen's complaint to the Board; rather, the entire complaint focuses on the underlying rent control dispute.

Cohen's reliance in her reply brief on *Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119 is similarly misplaced. There, a member of a homeowners' association (HOA) filed an application with the HOA to resolve a dispute with a neighbor who refused to trim trees obstructing the applicant's view. Colyear, who owned an adjacent parcel, then filed a complaint against the applicant and neighbor for declaratory and other relief, alleging that two of the trees referenced in the application were on his property, but that

his property was not subject to the HOA's tree-trimming covenant. (*Id.* at pp. 126-127.) The Court of Appeal affirmed the trial court's grant of the applicant's special motion to strike, finding that the gravamen of Colyear's complaint was that by submitting an application to the HOA concerning the neighbor's property, the applicant invoked an invalid process as to Colyear's property. (*Id.* at p. 135.) Thus, it was the act of filing the application that created the alleged injury to Colyear, not the asserted dispute about whether the HOA's tree-trimming covenant applied to Colyear. (*Ibid.*)

We conclude that Hirschfield's complaint does not arise from protected activity under the anti-SLAPP statute. In light of our conclusion, we need not address Cohen's contention that Hirschfield failed to establish a probability of prevailing on the merits of his complaint or that the court erred by overruling Cohen's evidentiary objections. (*Gotterba*, *supra*, 228 Cal.App.4th at pp. 43-44.) The trial court properly denied the special motion to strike.

D. *The Order Denying Attorneys' Fees Is Nonapppealable*

A trial court's order is appealable only when made so by statute. (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696.) Section 425.16, subdivision (i), provides that "[a]n order granting or denying a special motion to strike shall be appealable under Section 904.1." However, neither section 425.16 nor section 904.1 provides that an order denying an attorneys' fee award in connection with the denial of a special motion to strike is appealable.

"As with all questions of statutory interpretation, our fundamental task is to determine and effectuate the intended purpose of the statutory provisions at issue. [Citation.] Our analysis begins with the statutory text, which usually provides the best indicator of the relevant legislation's purpose. We generally assign statutory terms their ordinary meaning, while also considering the context—which includes related provisions and the overall structure of the statutory scheme—to further our understanding of the intended legislative purpose and guide our interpretation." (*Ryan v. Rosenfeld* (2017) 3 Cal.5th 124, 128 [considering whether denial of section 663 motion to vacate final judgment is appealable].) "'"If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." . . .' [Citation.]" (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616-617.)

In *Doe v. Luster* (2006) 145 Cal.App.4th 139 (*Doe*), we held that an order denying a motion for attorneys' fees filed by a plaintiff who had successfully opposed a special motion to strike was not immediately appealable. (*Id.* at p. 142.) We found that the plain meaning of section 425.16, subdivision (i), authorizing an appeal from "[a]n order granting or denying a special motion to strike," did not encompass the ruling on "an interlocutory order granting or denying attorney fees following the trial court's ruling on a special motion to strike." (*Id.* at p. 147.) We also reviewed the legislative history, and found, "The Legislature's concern was that the inability to appeal immediately from the denial of a meritorious special motion to strike defeated the protective purpose of section 425.16. No such similar purpose is served by permitting an immediate appeal from an interlocutory order

granting or denying attorney fees following the trial court's ruling on a special motion to strike." (*Ibid.*)

We concluded that the order denying the fees motion was not immediately appealable, despite the fact that the defendant had also appealed from the order denying the special motion to strike. (*Doe*, *supra*, 145 Cal.App.4th at pp. 146-147; see *id.* at p. 142, fn. 2.) While in *Doe* we considered whether a separate motion for attorneys' fees was immediately appealable, we also found that "[t]here similarly is no creditable argument that combining the two motions—one that results in an immediately appealable order; one that does not—somehow transforms the nonappealable order into one that is appealable." (*Id.* at p. 150.) That is the situation now before this court.

Following our decision in *Doe*, the Fourth Appellate District in *Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265 (*Baharian-Mehr*) found in a case involving a single order denying an anti-SLAPP motion and awarding attorneys' fees that allowing an appeal from the denial of an anti-SLAPP motion while deferring the issue of attorneys' fees "would result in absurd consequences the Legislature never contemplated." (*Id.* at p. 275.) The court found that deferring consideration of attorneys' fees "artificially separates two intertwined issues" and potentially wastes judicial resources. (*Id.* at p. 274.)

The court in *Baharian-Mehr* concluded that when the denial of an anti-SLAPP motion is properly appealed, the appellate court has jurisdiction under section 425.16, subdivision (i), to review both the denial of the anti-SLAPP motion and the ruling on attorneys' fees. (*Baharian-Mehr*, *supra*, 189 Cal.App.4th at p. 275; see also *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 680, fn. 2 ["[a]n attorney fee award

in connection with the denial of a special motion to strike is sufficiently interrelated with the denial that the fee award is reviewable on appeal from the order denying the special motion to strike"].)[7]

We reaffirm our holding in *Doe*, and decline to follow *Baharian-Mehr* and *Chitsazzadeh*. We conclude that the order here is neither "[a]n order granting or denying a special motion to strike" (§§ 425.16, subd. (i), 904.1, subd. (a)(13)) nor "an order made after a judgment" (§ 904.1, subd. (a)(2)). While in some cases it may be more efficient for the Court of Appeal to review the denial of a fees motion at the time of review of the denial of the special motion to strike, in many cases there will be no appeal from a later judgment, rendering review of the fees request unnecessary.[8] Further, the fortuity of whether the trial court rules on the plaintiff's request for attorneys' fees in the order denying the anti-SLAPP motion or in a separate order after a motion is filed should not affect whether the ruling on fees is

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[7] In *Moore v. Shaw* (2004) 116 Cal.App.4th 182, the court considered an interlocutory appeal from the denial of both the defendant's special motion to strike and the plaintiff's request for attorneys' fees, but did not expressly address whether the fee ruling was appealable.

[8] Where a party believes it would be inefficient for the Court of Appeal to hear the appeal from the trial court's denial of the special motion to strike without hearing an appeal of the attorneys' fees motion, leading to "absurd consequences," the party has the option to file a petition for a writ of mandate, requesting that the appellate court consider the challenge to both rulings at the same time.

immediately appealable.[9] The decision whether to allow an immediate appeal from the denial of an attorneys' fees request is a policy decision for the Legislature to make. We find that it has.

We conclude, as we did in *Doe*, that an order denying a plaintiff's request for attorneys' fees is not immediately appealable regardless of whether it is made concurrently with the order denying the special motion to strike, as here, or after the filing of a motion for attorneys' fees.

DISPOSITION

The order denying the special motion to strike is affirmed. Hirschfield's appeal from the order denying his request for attorneys' fees is dismissed. Each party is to bear its own costs on appeal.

FEUER, J.*

We concur:

PERLUSS, P. J. SEGAL, J.

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9 The court in *Baharian-Mehr* distinguished our holding in *Doe* as dicta, agreeing that an interlocutory appeal from a separate order on attorneys' fees is not proper, but finding that a ruling on a request for attorneys' fees may be appealed immediately if part of the same order denying the anti-SLAPP motion. (*Baharian-Mehr*, *supra*, 189 Cal.App.4th at p. 274.)

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