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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

EVE HALL et al.,

Plaintiffs and Appellants,

v.

KENDALL WEST, LLC et al.,

Defendants and Respondents.

D060402

(Super. Ct. No.  
37-2010-00056289-CU-FR-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Appeal dismissed in part, judgment reversed and remanded with directions.

Plaintiffs and appellants Eve Hall and other residents of the Mira Mar Mobile Community (at times collectively Hall)<sup>1</sup> sued defendants and respondents Kendall West,

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<sup>1</sup> We will refer to plaintiffs and appellants collectively as Hall. The other named plaintiffs are Myrna Ames, David Baker, George Baker, Julie Bash, William Bash, Lois Berning, Margaret Bradnum, James Buck, Janet Buck, Salvador Contreras, Don Davis, Daniel Day, Rita Day, Genevieve Freeman, Micheal Giles, Filbert Guerrero, Richard Haines, Sharon Haines, Arlene Hooks, Alice Jolly, Shirley Loring, Barbara Ann Mellor,

LLC, Tower Communities, LLC, Boggs Steele Mobilehome Park, LLC, Clarence E. Fleming, Alice Dewhirst and Harold Pettee, III, and defendants filed demurrers and a special motion to strike the complaint under Code of Civil Procedure section 425.16, commonly known as the anti-SLAPP statute.<sup>2</sup> While defendants' section 425.16 motion to strike was pending, and after the court had granted Hall leave to file a second amended complaint, Hall dismissed the action without prejudice. The trial court nevertheless proceeded to consider the anti-SLAPP motion for purposes of awarding attorney fees under the anti-SLAPP statute. It awarded defendants their attorney fees for the motion, and later entered orders awarding defendants attorney fees and costs in the entire action, vacating Hall's dismissal of the action, and entering a new order dismissing the action with prejudice.

Hall appeals from the order of dismissal with prejudice,<sup>3</sup> as well as the other orders in defendants' favor. She contends the trial court erred in each of these rulings because (1) it could not consider defendants' anti-SLAPP motion on a complaint that had been superseded by amendment; (2) her causes of action did not arise from protected

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Pam Mortimer, Barry Mylar, Edward Parish, Leslie Pecaut, Donald Rodgers, Mack Salesky, Gary Siens, Sharon Siens, Jill Sullivan, Jim Sullivan, Carol Tong, Francis Victor, Galen Vinson, John Webster, Sandra Webster, Gordy Witz, Gail Neill, Judy O'Keefe, T.M. O'Keefe, Mary Rodgers, Frank Mace, Barry Nevin, Pete Hanna and Peggy Ernst.

<sup>2</sup> See *Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811, 815, fn. 1. All statutory references are to the Code of Civil Procedure unless otherwise indicated.

<sup>3</sup> A signed order of dismissal is an appealable judgment. (§ 581d; *Dowling v. Farmers Ins. Exchange* (2012) 208 Cal.App.4th 685, 692, fn. 5.)

activity, she had demonstrated a probability of prevailing on the merits, and her claims were exempt from the anti-SLAPP statute as based on commercial speech; (3) defendants did not demonstrate a right to contractual attorney fees with admissible evidence; and (4) the trial court lacked jurisdiction to convert her voluntary dismissal into a dismissal with prejudice and violated her constitutional due process right to a hearing on the merits of defendants' anti-SLAPP motion.

Defendants have moved to dismiss the appeal on grounds this court lacks jurisdiction. As we explain, we agree as to the trial court's order awarding attorney fees under section 425.16, and dismiss that portion of Hall's appeal. As for Hall's other contentions, we conclude Hall's voluntary dismissal of her action without prejudice was timely, and that the trial court erred by vacating it and entering a dismissal with prejudice. Specifically, we hold that as a result of the court's order permitting Hall leave to file a second amended complaint and Hall's timely filing of that amended pleading, the court's tentative ruling on defendants' anti-SLAPP motion attacking Hall's original complaint could not constitute the commencement of trial within the meaning of section 581. We further hold defendants are entitled to recover their attorney fees and costs in defending the action under the Mobilehome Residency Law (MRL; Civ. Code, § 798 et seq.).

#### FACTUAL AND PROCEDURAL BACKGROUND

In June 2010, Hall filed the present complaint against defendants (the *Hall* action), setting out causes of action for negligent and intentional infliction of emotional distress (first and second causes of action), fraud (third cause of action) and negligent

misrepresentation (fourth cause of action).<sup>4</sup> In July 2010, defendants demurred to the second, third and fourth causes of action and also moved to strike portions of Hall's complaint under section 430.10. In August 2010, defendants filed a special motion to strike the complaint under section 425.16 on grounds the complaint was based on "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).) In the same motion, defendants sought an order awarding them attorney fees under subdivision (c) of the statute.

In October 2010, Hall filed a first amended complaint. Defendants asked the court to vacate their demurrer hearing, and filed another demurrer and section 430.10 motion to strike.

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<sup>4</sup> Hall asserts her complaint "mirror[s]" the allegations made in a first amended complaint, first amended supplement, and amended cross-complaint filed in another superior court action (*Mira Mar Mobile Community Homeowners Association, Inc. v. Kendall West, LLC, et al.* (Super. Ct. San Diego County, 2011, No. 37-2009-00050733-CU-BT-NC) that was the subject of a prior appeal in this court. (*Mira Mar Mobile Community Homeowners Assn., Inc. v. Kendall West, LLC* (Dec. 14, 2011, D058342) [nonpub. opn.].) We take judicial notice of our prior unpublished appellate opinion and the appellate records in that matter. (Evid. Code, §§ 452, subd. (d) [judicial notice may be taken of court records], 459; Cal. Rules of Court, rule 8.1115(b)(1); *Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1171-1173 [court may take judicial notice of prior unpublished opinions in related appeals on its own motion].) Hall asks that we take judicial notice of these items and other pleadings and matters filed in the *Mira Mar Mobile Community* action, as well as pleadings and other documents filed in a later filed action (*Bradum, et al. v. Kendall West, LLC, et al.* (Super. Ct. San Diego County, No. 37-2011-00051714-CU-PO-NC). We grant Hall's unopposed request for judicial notice, though these documents do not alter our conclusions in this opinion.

In the meantime, Hall opposed the anti-SLAPP motion. Thereafter, the parties stipulated to continue the hearing on defendants' anti-SLAPP motion to the afternoon of February 4, 2011.

On January 21, 2011, the court ruled on defendants' demurrer and section 430.10 motion to strike, granting and denying both in part and permitting Hall leave to amend as to certain causes of action and claims.<sup>5</sup> Days later, defendants replied to Hall's opposition to the anti-SLAPP motion, arguing their anti-SLAPP motion was not moot and urging the court to hear it despite Hall's amendments. They maintained the court was empowered to rule on the motion despite its demurrer ruling granting Hall leave to amend.

On February 2, 2011, Hall timely filed her second amended complaint pursuant to the trial court's order granting leave to amend. The next day, the court issued its tentative ruling on defendants' anti-SLAPP motion, ruling on the various evidentiary objections and tentatively granting the motion. Its tentative ruling reads in part: "Defendants'

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<sup>5</sup> Hall has not provided a reporter's transcript of this hearing. The court overruled defendants' demurrer to the second cause of action for intentional infliction of emotional distress, ruling plaintiffs adequately alleged extreme or outrageous conduct on the defendants' part or, by virtue of paragraph 53, that they acted with reckless disregard of the probability of causing emotional distress. The court sustained the demurrers of Kendall West, LLC and Boggs Steele Mobilehome Park, LLC to the third and fourth fraud and negligent misrepresentation causes of action with leave to amend for plaintiffs to allege all fraud elements with greater particularity. It sustained the demurrers of defendants' Fleming, Dewhirst and Pettee to the third and fourth causes of action without leave to amend. The court sustained the demurrers of Tower Communities, LLC to the third and fourth causes of action with leave to amend for plaintiff Bradnum to plead facts demonstrating misrepresentations of fact by the park's resident manager Thelma Thompson, as well as Thompson's knowledge of falsity and intent, plaintiffs' reasonable reliance, and a definite amount of damages.

Special Motion to Strike Complaint pursuant to [section 425.16] is granted. The Court concludes, based on the pleadings and evidence before it that Defendants have met their burden of showing that the allegations in paragraphs 51-56 of Plaintiffs' original complaint constitute protected speech or conduct within the meaning of [section 425.16, subdivisions (e)(2) and (4)]. [¶] The Court initially points out that Plaintiffs' amended complaint and/or the Court's ruling on Defendants' demurrer/motion to strike granting Plaintiffs leave to amend the third and fourth causes of action have no bearing on the Court's power to rule on the merits of the instant motion."

On the morning of February 4, 2011, before the hearing on defendants' anti-SLAPP motion, Hall filed a request to dismiss her action without prejudice. At the hearing, the trial court took note of the dismissal and observed it had no jurisdiction to rule on the motion, but could consider it for the purpose of awarding attorney fees. Hall's counsel acknowledged the court's ability to award fees, but challenged the amount to the extent it included fees for defense counsel's appearance that day. The trial court awarded defendants \$4,260 in attorney fees for the motion's preparation and travel expenses. Defendants served notice of the ruling on February 7, 2011, and again on March 28, 2011.

Following the court's February 2011 attorney fees ruling, plaintiffs filed a new action (*Bradnum, et al. v. Kendall West, LLC, et al.* (Super. Ct. San Diego County, No. 37-2011-00051714-CU-PO-NC)), asserting causes of action for negligent and intentional infliction of emotional distress, negligence per se, negligent misrepresentation and

injunctive relief. A few days later, on February 14, 2011, Hall filed a notice of entry of dismissal of the *Hall* action.

On February 22, 2011, defendants filed a cost memorandum in the *Hall* action seeking an additional \$2,290 in filing and motion fees. Defendants also moved the trial court to deem Hall's February 4, 2011 dismissal a voluntary dismissal with prejudice under section 581, subdivisions (d) and (e), on grounds the court's ruling on the anti-SLAPP motion constituted a public pronouncement of the legal merits of the case. The next day, defendants moved for an award of contractual attorney fees in the *Hall* action as the prevailing party under sections 1021, 1032, 1033.5 and *Santisas v. Goodin* (1998) 17 Cal.4th 599, as well as under the MRL.

Hall opposed defendants' attorney fee motion, making evidentiary objections to the accompanying evidence, and also opposed the motion pertaining to the voluntary dismissal of the *Hall* action. As to the latter motion, she argued there was no authority permitting the trial court to convert her voluntary dismissal without prejudice into a dismissal with prejudice.

In June 2011, the trial court heard arguments on defendants' motion regarding plaintiffs' voluntary dismissal of the *Hall* action, and found its issuance of a tentative ruling on February 3, 2011, constituted " 'a public and formal indication by the trial court of the legal merits of the case' thus cutting off Plaintiffs' ability to enter a dismissal without prejudice." It ruled plaintiffs did not have the right to request dismissal of the *Hall* action without prejudice where the request was submitted to the court the day after its tentative ruling had been published. The court's minute order states: "[T]he voluntary

dismissal of the entire action without prejudice is vacated and the action is dismissed with prejudice as of Feb[ruary] 4, 2011." Defendants served notice of entry of that order that day, June 3, 2011.

On June 24, 2011, the trial court granted defendants' motion for an award of contractual attorney fees in the sum of \$19,133.75, finding defendants to be the prevailing parties in the action entitled to attorney fees under attorney fee clauses in their rental agreements and section 1021. The court entered its order awarding attorney fees on July 7, 2011, and its order dismissing the *Hall* action with prejudice on July 11, 2011. In August 2011, defendants filed a notice of entry of both the July 7, 2011, and July 11, 2011 orders.

On August 16, 2011, Hall filed the present notice of appeal from the July 11, 2011 dismissal order. The notice of appeal states: "Plaintiffs further and additionally appeal from the following orders and/or judgments made: [¶] 1. Hearing Defendants' Special Motion to Strike after the operative pleadings had been amended; [¶] 2. Granting of Defendants' Motion for Attorney's Fees pursuant to Section 425.16 . . . ; [¶] 3. Granting Defendants' Motion for Costs; [¶] 4. Granting Defendants' Motion Deeming Plaintiffs' Voluntary Dismissal without prejudice to be with prejudice; and, [¶] 5. All other errors by the court."

## DISCUSSION

### *I. Motion to Dismiss Appeal*

Defendants have moved to dismiss Hall's appeal (or portions of it) on grounds this court lacks jurisdiction to hear it. Hall asks us to summarily deny the motion as untimely

and filed for purposes of delay. Hall does not cite authority for her propositions.

Accordingly, we elect to address defendants' motion, and will address their arguments seriatim.

*A. The February 4, 2011 Attorney Fee Order was a Directly Appealable Collateral Order, Rendering Hall's Appeal of that Order Untimely*

First, defendants contend Hall's notice of appeal as to the February 4, 2011 order awarding them \$4,260 in attorney fees in connection with their anti-SLAPP motion should be dismissed as untimely. Specifically, defendants argue Hall should have appealed from that order within 60 days after they served notice of its entry on March 28, 2011.

Hall responds that the February 4, 2011 order was not appealable, but rather an interlocutory order reviewable from the July 11, 2011 dismissal order, because it was neither ancillary to an order granting or denying an anti-SLAPP motion on the merits, nor was it a postjudgment order. She maintains case law holds that an order concerning attorney fees is "*only* appealable if it is ancillary to an appeal of an order on the merits of any anti-SLAPP motion . . . ." Hall relies on *Doe v. Luster* (2006) 145 Cal.App.4th 139 and *Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265 (*Baharian-Mehr*) for this proposition.

Defendants' challenge to the timeliness of Hall's appeal of the February 4, 2011 attorney fee order has merit. The February 4, 2011 order awarding the prevailing defendants attorney fees under the anti-SLAPP statute was an immediately appealable collateral order in that it "[left] the court no further action to take on "a matter which . . .

is severable from the general subject of the litigation" ' ' and was not important, essential or a " ' "necessary step" ' ' to the correct determination of the main issue in the action. (*City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 781, quoting *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 561.) The order directs Hall to pay money, and "[g]enerally, in order for the collateral order to be appealable, the order ' "must direct the payment of money by appellant or the performance of an act by or against him." ' ' (*Ibid.*; accord, *California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 565, fn. 1 [order awarding private attorney general attorney fees (§ 1021.5) after voluntary dismissal of the action is an order collateral to the main action and separately appealable].)

In *City of Colton v. Singletary, supra*, 206 Cal.App.4th 751, the Fourth Appellate District, Division Two court explained: "The order awarding attorney's fees to a prevailing defendant in an anti-SLAPP case emanates from the anti-SLAPP statute, which provides, '[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs,' except as otherwise set forth in the statute. (§ 425.16, subd. (c)(1).) Since the attorney fee award is associated with the anti-SLAPP statute it has little to do with the main causes of action in the case; rather, it is an ancillary issue growing out of the anti-SLAPP motion. Further, the attorney fee order directs the appellant to pay money to the respondent, which is an important consideration in determining if an order meets the collateral order exception. Thus, since the attorney fee order is (1) independent of the main causes of action, and (2) involves the payment of

money by the appellant, we conclude it qualifies for the collateral order exception, and is directly appealable." (*City of Colton v. Singletary*, 206 Cal.App.4th at pp. 781-782.)

Contrary to Hall's contention, this court may not review the correctness of the collateral February 4, 2011 order from the final judgment. (§ 906; *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1247; *Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 884; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 89, p. 152 ["An appealable order from which no appeal was taken cannot be reviewed on an appeal from the final judgment"].)

Because the February 4, 2011 order was immediately appealable, to perfect her appeal of that order, Hall was required to file a notice of appeal within 60 days after defendants served their notice of entry of the order on March 28, 2011. (Cal. Rules of Court, rule 8.104(a)(1)(B).) Because she did not do so, we lack jurisdiction to consider her challenge to the order awarding defendants \$4,260 in attorney fees on their anti-SLAPP motion. "California follows a 'one shot' rule under which, if an order is appealable, appeal must be taken or the right to appellate review is forfeited." (*In re Baycol Cases I and II* (2011) 51 Cal.4th 751, 761, fn. 8; see *Maughan v. Google Technology, Inc.*, *supra*, 143 Cal.App.4th at p. 1247 [" 'If a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review" '"]; *Sole Energy Co. v. Petrominerals Corp.*, *supra*, 128 Cal.App.4th at p. 239.) We dismiss this portion of Hall's appeal.

The authorities on which Hall relies are unavailing. Neither stands for the proposition that an anti-SLAPP attorney fee order is *only* appealable if it is ancillary to an order granting or denying the anti-SLAPP motion. In *Doe v. Luster, supra*, 145 Cal.App.4th 139, the trial court denied the defendants' anti-SLAPP motion, and the plaintiff then brought a motion for discretionary attorney fees as a prevailing plaintiff under section 128.5. (*Id.* at p. 142; § 425.16, subd. (c)(1).) The court denied plaintiff's motion for attorney fees, and the plaintiff attempted to appeal from that order. (*Doe*, 145 Cal.App.4th at p. 142.) The appellate court dismissed the appeal, finding the order was interlocutory and not directly appealable, reasoning that while an order granting or denying a special motion to strike was appealable under section 425.16, subdivision (i) (see also § 904.2, subd. (a)(13)), neither that statutory provision nor any other authorized an immediate appeal from the award or denial of attorney fees. (*Doe*, at pp. 145-146.) The Court of Appeal construed section 425.16, subdivision (i) as manifesting the Legislature's intent to limit the exception to the one final judgment rule to the court's ruling on the special motion to strike itself, not to make separately appealable related but ancillary rulings for such attorney fee orders. (*Doe*, at p. 146.) In *Doe*, the order denying attorney fees was necessarily interlocutory, because the plaintiff had *prevailed* on defendants' special motions to strike, thus avoiding dismissal of her lawsuit. (See *Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 993.)

To the extent *Doe's* holding was intended to apply to an order *granting* anti-SLAPP fees to a prevailing *defendant*, it is dicta on the question, which was not presented in that case. (Accord, *Baharian-Mehr, supra*, 189 Cal.App.4th at p. 274 [pointing out

part of *Doe's* holding is dicta].) But the *Doe* court itself distinguished the circumstances before it from those—similar to the circumstances here—where a party voluntarily dismisses their pleading before the hearing on the anti-SLAPP motion, creating a postjudgment or "postdismissal" order. (*Doe v. Luster, supra*, 145 Cal.App.4th at p. 149, fn. 8.) And further, *Doe* did not consider the collateral order exception and whether it applied to the attorney fee order. We decline to follow *Doe* on the question before us.

*Baharian-Mehr, supra*, 189 Cal.App.4th 265 involved a defendant's appeal from the trial court's order denying his anti-SLAPP motion and finding it to be frivolous, resulting in an award of attorney fees to the prevailing plaintiff simultaneous with the order. (*Id.* at p. 273.) In the face of the plaintiff's argument that the attorney fee order was not reviewable except from a final judgment, the Court of Appeal disagreed, holding under the circumstances of that case, where the issue of the merits of an anti-SLAPP motion is properly on review, the appellate court had jurisdiction over both that issue and the issue of attorney fees. (*Id.* at pp. 274-275; see also *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 680, fn. 2.) Again, *Baharian-Mehr* does not involve the circumstances present in this case, in which the trial court did not grant or deny the anti-SLAPP motion, but only exercised its limited jurisdiction to consider its merits for the sole purpose of deciding whether to award costs and attorney fees. (See *Gogri v. Jack in the Box, Inc.* (2008) 166 Cal.App.4th 255, 268 (*Gogri*)). *Baharian-Mehr* did not consider whether an anti-SLAPP attorney fee order—absent an order granting or denying the motion—is collateral and thus separately appealable. *Baharian-Mehr* does not convince us to change our conclusion.

The order awarding attorney fees necessarily encompasses the trial court's determination of the merits of defendants' anti-SLAPP motion: i.e., that the motion would have been granted absent Hall's voluntary dismissal. (See *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218 [the court "must, upon defendant's motion for a fee award, rule on the merits of the SLAPP motion even if the matter has been dismissed prior to the hearing on that motion"].) Our dismissal of this portion of Hall's appeal bars any challenge to that ruling for purposes of the anti-SLAPP attorney fee award.

*B. The Trial Court's Decision to Consider Defendants' Anti-SLAPP Motion for Purposes of Attorney Fees is Encompassed in Hall's Appeal from the Final Judgment of Dismissal*

Defendants next contend, citing *Century 21 Chamberlain & Associates v. Haberman* (2009) 173 Cal.App.4th 1, that there is no right to appeal from the trial court's tentative ruling on the anti-SLAPP motion; that while an order granting or denying an anti-SLAPP motion is appealable under section 904.1, subdivision (a)(13), there was no such final order in this case.

We reject the contention. Hall's appeal is from the trial court's July 11, 2011 order of dismissal, which constitutes a final judgment. On appeal from a final judgment, "the reviewing court may review . . . any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . ." (§ 906.) Hall's appellate challenge to the trial court's decision to proceed on defendants' anti-SLAPP motion in the face of her superseded pleading is such a decision that is reviewable from the final judgment.

*Century 21* does not assist defendants, as it neither involves an appeal from a final judgment nor a tentative ruling. In that case, the defendant, Haberman, sought to directly appeal from an order in which the trial court continued a hearing on Haberman's motion to compel arbitration but did not rule on the motion or issue an injunction. (*Century 21 Chamberlain & Associates v. Haberman, supra*, 173 Cal.App.4th at pp. 5, 11.) The appellate court dismissed that appeal (leaving the defendant's appeal from the directly appealable order denying her anti-SLAPP motion) because the order was insufficiently final, and that appeal otherwise was not from an appealable order or judgment. (*Id.* at p. 11.) *Century 21* is wholly inapposite.

C. *The Notice of Appeal Adequately References The July 7, 2011 Attorney Fee Order*

Pointing out Hall's notice of appeal only states she appeals from an order "granting defendants' motion for costs," defendants contend the notice of appeal is insufficient to appeal from the July 7, 2011 order awarding attorney fees. Defendants apparently argue the July 7, 2011 order is separately appealable and that the notice of appeal was insufficiently specific as to that order; they maintain it was only sufficient to act as an appeal from the award stemming from their cost memorandum filed in February 2011, not their later attorney fee motion.

A notice of appeal must specifically identify the order and/or judgment from which the appellant seeks appellate review. (Cal. Rules of Court, rule 8.100(a).) The notice of appeal is sufficient "if it identifies the particular judgment or order being appealed." (Cal. Rules of Court, rule 8.100(a)(2).) The rules further require, and the California Supreme Court has instructed, that a notice of appeal " ' shall be liberally

construed in favor of its sufficiency." ' ' " (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 20; Cal. Rules of Court, rule 8.100(a)(2).)

For example, if a notice of appeal specifies an appeal from a nonappealable order, " 'the notice can be interpreted to apply to an existing appealable order or judgment, if no prejudice would accrue to the respondent' " and if it is reasonably clear the appellant intended to appeal from the appealable order or judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority, supra*, 35 Cal.4th at pp. 20, 22.) Here, while Hall's notice of appeal *could* be interpreted as referencing an award of costs, it actually refers to a *motion*, and her appellate brief makes it clear that she was referring to the trial court's July 7, 2011 order granting defendants' motion for an award of attorney fees. We conclude it is reasonably clear Hall intended to appeal from that order, and defendants have addressed the order's substantive merits. Because her notice of appeal filed on August 10, 2011, was timely as to the July 7, 2011 order and no prejudice will result to defendants, we shall construe Hall's notice of appeal as applying to the July 7, 2011 order.

The authority cited by defendants—*DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43—has no application. In *DeZerega*, the appellant filed a notice of appeal from a final judgment allowing "costs of suit," but did not file a separate appeal from a later postjudgment order awarding attorney fees. (*Id.* at p. 43.) The appellate court held it lacked jurisdiction to review the later order awarding attorney fees, which was separately appealable; that the final judgment awarding costs did not adjudicate the entitlement to attorney fees or subsume the later fee award. (*Id.* at pp. 43-44.) Here, as we explain

more fully below (part I(D), *post*), the trial court's June 2011 minute order was ineffective as a dismissal because it was unsigned; the operative dismissal order is the trial court's signed July 11, 2011 order of dismissal with prejudice, which followed the July 7, 2011 attorney fee order. Thus, there is no issue as to our jurisdiction over Hall's appeal from the July 7, 2011 attorney fee order and, as we have explained, that order was sufficiently identified in Hall's notice of appeal.

*D. Hall Has a Right to Appeal from The Trial Court's Order Vacating Her Voluntary Dismissal and Entering a Dismissal With Prejudice*

Defendants finally contend Hall has no right to appeal from a voluntary dismissal; they point out Hall herself argued such an order is not appealable when she filed her writ petition. They further maintain that even if Hall could take an appeal from such an order of dismissal, her notice of appeal from the trial court's June 3, 2011 order was untimely filed.

We reject these contentions. Section 581d provides in part: "All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case." "An order that is not signed by the trial court does not qualify as a judgment of dismissal under section 581d." (*Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1578; *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 229.) The order referenced by defendants—the trial court's June 3, 2011 order vacating Hall's voluntary dismissal

and entering a dismissal with prejudice—is an unsigned minute order that was ineffective as a dismissal of the action under section 581d.

Defendants attempt to distinguish *Daniels v. Robbins, supra*, 182 Cal.App.4th 204 and *Powell v. County of Orange, supra*, 197 Cal.App.4th 1573 as not involving a voluntary request for dismissal filed after trial commenced. They argue, "At that point, it was a mandatory ministerial duty of the court to direct entry of the dismissal with prejudice. It was not the court exercising discretion and granting a dispositive motion requiring a dismissal by court order so as to fall within . . . section 581d." Even accepting defendants' suggestion that section 581d's requirement for a signed written dismissal order requires some dispositive motion in which the trial court exercises discretion, the trial court's characterization of its tentative anti-SLAPP ruling and decision to enter a dismissal with prejudice was the very type of discretionary ruling that would be subject to section 581d.

## II. *Hall's Second Amended Complaint Filed Pursuant to Leave of Court Superseded All Other Pleadings*

Emphasizing that she had already been granted leave to file, and had filed, a second amended complaint, Hall contends the trial court erred by considering the merits of defendants' anti-SLAPP motion for purposes other than awarding attorney fees. She relies upon the rule that "the filing of an amended complaint moots a motion directed to a prior complaint" (*State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1131) to argue defendants' anti-SLAPP motion became "moot except as to attorney fees" because the pleading against which it was filed was superseded by the

second amended complaint, and the trial court should have found there was no commencement of trial for purposes of assessing the timeliness of her voluntary dismissal without prejudice. Hall seeks to distinguish the authority on which the trial court relied, *Salma v. Capon* (2008) 161 Cal.App.4th 1275, as not involving a filing of an amended pleading pursuant to leave of court.

In *State Compensation Ins. Fund v. Superior Court*, the Court of Appeal addressed the effect of the filing of an amended pleading on a pending motion for summary judgment. It explained, citing California Supreme Court authority, " "It is well established that an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading." ' [Citations.] Thus, an amended complaint supercedes all prior complaints. [Citation.] The amended complaint furnishes the sole basis for the cause of action, and the original complaint ceases to have any effect either as a pleading or as a basis for judgment. [Citation.] [¶] Because there is but one complaint in a civil action [citation], the filing of an amended complaint moots a motion directed to a prior complaint. [Citation.] Thus, once an amended complaint is filed, it is error to grant summary adjudication on a cause of action contained in a previous complaint." (*State Compensation Ins. Fund v. Superior Court, supra*, 184 Cal.App.4th at p. 1131.) The court concluded that the authorities on which it relied "compel the conclusion that the [plaintiff's] filing of an amended complaint rendered [the defendant's] motion for summary judgment moot." (*Ibid.*; see also *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884 [an amended pleading supplants all prior complaints].)

Hall properly concedes that her filing of the second amended complaint and subsequent dismissal did not *entirely* moot the anti-SLAPP motion. In the face of her voluntary dismissal, the trial court was authorized to consider defendants' motion for the limited purpose of determining entitlement to prevailing party attorney fees and costs in making the motion. (§ 425.16, subd. (c).) There is abundant authority entitling a party in defendants' situation, after a plaintiff's voluntary dismissal, to have a pending anti-SLAPP motion heard for the purpose of awarding attorney fees and costs on the motion. (See *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 381, fn. 2 [citing cases]; *Law Offices of Andrew Ellis v. Yang* (2009) 178 Cal.App.4th 869, 879.) And we agree that once the trial court expressly granted Hall leave to amend, Hall's second amended complaint, authorized by that order without qualification, became the operative pleading in the case. As we explain more fully below, because defendants' anti-SLAPP motion was an attack on Hall's original complaint, not on the operative second amended pleading, this procedural circumstance as a matter of law prevents any conclusion that the trial court's tentative ruling on the anti-SLAPP motion put the case at the point of "actual commencement of trial" under section 581, subdivision (b)(1).

The foregoing facts take this case outside of the circumstances in *Salma v. Capon*, *supra*, 161 Cal.App.4th 1275 and other authorities prohibiting amendment so as to "defeat the legislative purpose of section 425.16[.]" (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055 (*Sylmar*); *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307, 1323; *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 773 [plaintiff cannot use "eleventh-hour

amendment" to plead around an anti-SLAPP motion]; accord, *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1209-1210 [citing cases].) In *Salma*, the cross-defendant filed an anti-SLAPP motion to strike certain causes of action from a cross-complaint, and before the hearing on the motion, the cross-complainant filed a first amended cross-complaint revising those causes of action. (*Id.* at pp. 1281-1282.) The trial court ruled the anti-SLAPP motion was not mooted by the filing of the amended cross-complaint, and the appellate court affirmed in reliance on *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068 (*Simmons*). Though *Simmons* involved the propriety of amendment by an anti-SLAPP plaintiff after a court finds a prima facie showing has been made under section 425.16, the *Salma* court held its reasoning applied and supported "automatic dismissal" of the amended claims in that case. (*Salma*, 161 Cal.App.4th at p. 1294.)

*Salma* applied the *Simmons* court's rationale. In *Simmons*, after observing that the anti-SLAPP statute made no provision for amendments, the Court of Appeal explained: "In enacting the anti-SLAPP statute, the Legislature set up a mechanism through which complaints that arise from the exercise of free speech rights 'can be evaluated at an early stage of the litigation process' and resolved expeditiously. [Citation.] Section 425.16 is just one of several California statutes that provide 'a procedure for exposing and dismissing certain causes of action lacking merit.' [Citation.] [¶] Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy. Instead of having to show a

probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend. [¶] By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent. [Citation.] Such a plaintiff would accomplish indirectly what could not be accomplished directly, i.e., depleting the defendant's energy and draining his or her resources. [Citation.] This would totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits." (*Simmons, supra*, 92 Cal.App.4th at pp. 1073-1074; see also *Sylmar, supra*, 122 Cal.App.4th at pp. 1055-1056.) The court in *Salma* reasoned, "Requiring the trial court to analyze the amended claims under section 425.16 simply because the claims were amended before the court ruled on the first motion to strike would cause all of the evils identified in *Simmons* and would undermine the legislative policy of early evaluation and expeditious resolution of claims arising from protected activity." (*Salma v. Capon, supra*, 161 Cal.App.4th at p. 1294.)

In *Sylmar, supra*, 122 Cal.App.4th 1049, Sylmar filed a cross-complaint alleging several causes of action, including fraud. The defendant, Pueblo, filed a demurrer to the cross-complaint as well as an anti-SLAPP motion against the fraud claim, but three days before the anti-SLAPP motion hearing, Sylmar amended its cross-complaint to provide more detail regarding the fraud cause of action. (*Sylmar*, at p. 1053.) The trial court

granted the anti-SLAPP motion and struck the fraud cause of action in the original cross-complaint, awarded attorney fees and costs, and found the demurrers moot. (*Ibid.*) On appeal, Sylmar argued the filing of its amended cross-complaint was a matter of right under section 472, and therefore the trial court should not have ruled on the motion to strike to award attorney fees and costs. (*Sylmar*, at p. 1054.) The Court of Appeal rejected the argument under the *Simmons* rationale, holding Sylmar could not avoid liability for attorney fees by filing an amended cross-complaint. (*Id.* at pp. 1055-1056.)

Under the present circumstances, Hall cannot be said to have frustrated the purposes of the anti-SLAPP statute by timely filing a second amended pleading pursuant to the trial court's order granting leave to amend after a hearing on defendants' demurrer. At the time the trial court granted leave to amend, no tentative or actual ruling had been made on defendants' anti-SLAPP motion, and thus the record does not indicate Hall's amendment was for the purpose of subverting or avoiding a ruling on the motion. Nor are concerns regarding increased costs to defendants implicated, since, as Hall properly concedes, defendants were entitled to have their anti-SLAPP motion heard for purposes of recovering attorney fees and costs on the motion.

### III. *Timeliness of Hall's Voluntary Dismissal Without Prejudice*

We turn to the question of whether, following the court's tentative ruling on defendants' anti-SLAPP motion, Hall could properly voluntarily dismiss her action without prejudice, or whether the trial court correctly determined that its tentative ruling effectively disposed of the case, entitling it to vacate Hall's voluntary dismissal and enter a dismissal with prejudice. Hall attacks several aspects of the court's order. She argues

the court lacked jurisdiction to convert her dismissal without prejudice to a dismissal with prejudice, and her voluntary dismissal was proper because there was no actual decision on the anti-SLAPP motion. Hall further argues that if her voluntary dismissal was improper, the trial court's only option was to declare the filing void and proceed to resolve the substance of defendants' anti-SLAPP motion, rather than dismiss her action with prejudice.

*A. Legal Principles Regarding Section 581 Voluntary Dismissals*

This court set out the applicable legal principles in depth in *Gogri, supra*, 166 Cal.App.4th 255. Under section 581, a plaintiff may voluntarily dismiss, with or without prejudice, all or any part of an action before the " 'actual commencement of trial.' " (*Gogri*, at p. 261, quoting § 581, subds. (b)(1), (c).) Upon the "*proper exercise*" (*Gogri*, at p. 261, italics added) of that right, a trial court would thereafter lack both subject matter and personal jurisdiction to enter further orders in the dismissed action, except for the limited purpose of awarding costs and statutory attorney fees. (*Id.* at p. 261, quoting *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 782, 784.) Section 581 provides a statutory definition of the commencement of trial,<sup>6</sup> but the California Supreme Court nevertheless has construed the phrase "commencement of trial" to include " '*determinations on matters of law which dispose of the entire case*, such as some demurrers and pretrial motions. . . .' [Citation.] Therefore, 'commencement of trial'

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<sup>6</sup> "A trial shall be deemed to actually commence at the beginning of the opening statement or argument of any party or his or her counsel, or if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence." (§ 581, subd. (a)(6).)

under section 581 is not restricted to only jury or court trials on the merits, but also includes *pretrial* procedures that *effectively dispose of the case.*" (*Gogri*, 166 Cal.App.4th at pp. 261-262.)

In *Gogri*, we concluded that the plaintiff's voluntary dismissal was timely filed under section 581 because it was filed *before* the court had issued a tentative ruling granting the defendant's summary judgment motion, and thus the trial court had not made a " 'public and formal indication' " regarding the merits of his case. (*Gogri, supra*, 166 Cal.App.4th at p. 264.) "Alternatively stated, at the time *Gogri* filed his section 581 voluntary dismissal, the trial court had not yet made any decision or taken any other action that effectively disposed of the entire case (i.e., any action that was tantamount to, or would inevitably lead to, judgment for [the defendant])." (*Gogri*, at p. 268.) We relied in part on *Zapanta v. Universal Care, Inc.* (2003) 107 Cal.App.4th 1167, 1171, in which the Court of Appeal held a voluntary dismissal was timely filed, reasoning that at the time of its filing, the summary judgment opposition was not past due, no hearing on the motion had been held, and " '*no tentative ruling or other decision tantamount to an adjudication had been made in respondents' favor.* In other words, *the case had not yet reached a stage where a final disposition was a mere formality.*' " (*Gogri*, at p. 265.) Though we declined to adopt the "mere formality" test as the exclusive test for judging the timeliness of a section 581 dismissal, we found it a sufficiently accurate rule of thumb to apply to undisputed facts. (*Gogri*, at p. 267, fn. 9.)

We also pointed to the opposite circumstances: where voluntary dismissals had been held *untimely* filed where they involved a prior tentative ruling or other special

circumstances making judgment for the defendant "inevitable." (*Gogri, supra*, 166 Cal.App.4th at p. 267, citing *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765, 769 (*Mary Morgan*); *Cravens v. State Bd. of Education* (1997) 52 Cal.App.4th 253, 257; and *Sweat v. Hollister* (1995) 37 Cal.App.4th 603, 614-615, disapproved on another ground by *Santisas v. Goodin, supra*, 17 Cal.4th at p. 609.)<sup>7</sup>

Addressing the defendant's various arguments in *Gogri*, we emphasized that based on our review of section 581 case law, "a trial is commenced for section 581 purposes

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<sup>7</sup> In *Mary Morgan*, the First District Court of Appeal broadly stated that a plaintiff is precluded from voluntarily dismissing an action when a general demurrer is sustained without leave to amend; when a general demurrer is sustained with leave to amend but no amendment is made within the allotted time and all issues are deemed admitted in the defendant's favor; and where a summary judgment order has been made. (*Mary Morgan, supra*, 49 Cal.App.4th at p. 769.) The *Mary Morgan* court was not faced with any of those scenarios but held a plaintiff's voluntary dismissal was untimely when it was filed after the trial court had issued an adverse tentative summary judgment ruling and during a continuance of the summary judgment hearing to permit plaintiff an opportunity to produce opposition evidence. (*Id.* at pp. 768-769, 770.) The court highlighted the very limited purpose for the continuance—solely to allow the plaintiff/opponent to gather evidence that could not then be presented—and did not entitle the opponent to defeat the motion by "collateral maneuvers." (*Id.* at p. 771.) Reasoning that permitting the plaintiff to voluntarily dismiss without prejudice under these circumstances would "eviscerate the summary judgment procedure," it affirmed the judgment entered after the trial court granted defendant's summary judgment motion and struck the plaintiff's request for dismissal. (*Id.* at pp. 768, 772.) In *Cravens v. State Bd. of Equalization, supra*, 52 Cal.App.4th 253, the plaintiff failed to timely oppose the defendants' summary judgment motion, and thereafter was precluded from voluntarily dismissing the case without prejudice. "At that point, entry of summary judgment in favor of [the defendants] became a formality which [the plaintiff] could not avoid by the stagem of filing a last minute request for dismissal without prejudice." (*Cravens*, at p. 257; see *Gogri, supra*, 166 Cal.App.4th at p. 267.) In *Sweat v. Hollister, supra*, 37 Cal.App.4th 603, the court held a section 581 voluntary dismissal was untimely when filed after the trial court issued a final telephonic order granting summary judgment even though oral argument had not been heard. (*Gogri*, at p. 267.)

when there is a determination of legal and/or factual issues that effectively disposes of the *entire case*." (*Gogri, supra*, 166 Cal.App.4th at p. 269.) Further, an objective, not a subjective, standard should apply in determining the timeliness of a section 581 voluntary dismissal. (*Gogri*, at p. 265, fn. 8; see also *Lewis C. Nelson & Sons, Inc. v. Lynx Iron Corp.* (2009) 174 Cal.App.4th 67, 78 [plaintiff's subjective lack of good faith in seeking a dismissal does not, by itself, terminate the statutory right to dismiss without prejudice].) Because in *Gogri*, the plaintiff's section 581 voluntary dismissal was timely, it "deprived the trial court of further jurisdiction (except for the limited purpose of awarding costs and statutory attorney fees)," and we declared void the court's order granting the defendant's motion for summary judgment and the subsequent judgment for defendant. (*Gogri*, at p. 268.)

#### B. *Standard of Review*

The trial court's application of section 581 to undisputed facts is a question of law. (*Gogri, supra*, 166 Cal.App.4th at p. 262.) Accordingly, we independently review the trial court's determination as to whether Hall timely exercised her right to voluntarily dismiss under section 581. (*Gogri*, at p. 262; *Lee v. Kwong* (2011) 193 Cal.App.4th 1275, 1281.)

#### C. *Analysis*

Ordinarily, an anti-SLAPP motion is a dispositive motion, but importantly here, defendants' motion was directed to Hall's *original complaint*, not the operative, second amended complaint, and it was tentatively ruled on and considered *after* the court had granted Hall leave to amend and Hall timely filed her second amended complaint. The

question for our independent review is whether, in these circumstances, the trial court's tentative ruling on the anti-SLAPP motion as to defendants' original complaint—a ruling solely for the purpose of determining defendants' entitlement to attorney fees on the motion—constituted the commencement of trial within the meaning of section 581, cutting off Hall's absolute right to voluntarily dismiss her action under section 581. We conclude defendants' anti-SLAPP motion ceased to function as a dispositive motion after the court permitted Hall to amend her complaint.

The authorities involving voluntary dismissals and anti-SLAPP motions are not on point, because they involve anti-SLAPP motions directed to the operative pleading. *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, involved a voluntary dismissal of a first amended complaint that was filed after the trial court heard argument on the defendant's anti-SLAPP motion and took it under submission, but before the trial court ruled on the motion. (*Id.* at p. 906.) The Court of Appeal looked to the nature of the motion and observed, "Here, a section 425.16 motion, if successful, effectively disposes of the entire case, because the court orders the plaintiff's complaint stricken." (*Kyle v. Carmon*, at pp. 907, 910.) *Law Offices of Andrew Ellis v. Yang, supra*, 178 Cal.App.4th 869, in which a plaintiff law firm filed a dismissal without prejudice one day before the hearing on the defendant's anti-SLAPP motion, likewise involved the operative pleading. (*Id.* at p. 874.) In that case, the Court of Appeal held trial had not commenced for purposes of assessing the timeliness of the plaintiff's dismissal even though the plaintiff had not opposed the anti-SLAPP motion. (*Id.* at pp. 877-878.) *Ellis* synthesized the cases and held "[w]hen some events demonstrate it is inevitable that the plaintiff will not be successful, a plaintiff

loses the right to voluntarily dismiss his or her case." (*Id.* at p. 878.) Because the trial court had not made a tentative or definitive ruling on defendant's anti-SLAPP motion, and it was not inevitable that the motion would be granted even absent plaintiff's formal opposition, plaintiff's voluntary dismissal was effective upon filing. (*Id.* at pp. 880, 881.)

Under the particular circumstances of this case, the court's tentative ruling granting defendants' anti-SLAPP motion to the original complaint could not constitute a "public and formal indication" of the legal merits of Hall's case, nor was it a decision that was tantamount to, or would *inevitably* lead to, judgment for the defendants. A favorable ruling on defendant's anti-SLAPP motion permitted the court to strike the original complaint, leaving Hall's operative, second amended complaint, standing.

We are not convinced by defendants' argument that *Groth Bros. Oldsmobile, Inc. v. Gallagher* (2002) 97 Cal.App.4th 60, is factually analogous. *Groth* involved demurrers to a first amended complaint that the plaintiff failed to oppose. (*Id.* at p. 63.) The plaintiff thereafter unsuccessfully attempted to file a second amended complaint. (*Ibid.*) After the trial court issued a tentative ruling sustained the demurrers without leave to amend and ordered the defendant be dismissed, the plaintiff appeared at the hearing and advised the court he had dismissed the case against that defendant without prejudice under section 581. (*Groth*, at p. 64.) The Court of Appeal held allowing such a dismissal in that case, where the defendant would be entitled to mandatory statutory indemnity if the action were dismissed with prejudice (Corp. Code, § 317, subd. (d)), would frustrate the statutory indemnity scheme and undermine the superior court's tentative ruling system. (*Groth*, at pp. 70, 73.) Thus, in those particular circumstances, the trial court

erred by concluding it lacked jurisdiction to vacate the dismissal, and the appellate court ordered it to vacate the voluntary dismissal, enter judgment dismissing the action on the amended complaint, and order the defendant to be indemnified. (*Id.* at pp. 73-74.)

Defendants argue that Hall, like the plaintiff in *Groth*, "used the window of opportunity presented by the tentative decision procedure not to contest the tentative ruling, but to 'buy time' to voluntarily dismiss [her] action after learning of the court's ruling, but before it could become final." (*Groth, supra*, 97 Cal.App.4th at p. 71.)

However, as we have repeatedly stated, this case differs from *Groth* and other cases in that the trial court's order granting Hall leave to amend, and Hall's timely amendment, superseded her original complaint to which defendants' anti-SLAPP motion was directed.

Nor does public policy justify the trial court's order vacating Hall's dismissal, as defendants' urge. Citing *Simmons, supra*, 92 Cal.App.4th at pp. 1073-1074, defendants argue Hall sought to dismiss her case "in an effort to avoid the adverse anti-SLAPP motion ruling which would have precluded leave to amend." The argument ignores the circumstance that the trial court had *already* granted Hall leave to amend without qualification.

Because trial had not "commenced" within the meaning of section 581, Hall's voluntary dismissal was effective upon filing. The trial court erred by vacating her dismissal and entering a dismissal with prejudice.

#### IV. *Postdismissal Award of Attorney Fees and Costs*

Following Hall's entry of her section 581 voluntary dismissal without prejudice, the trial court was without jurisdiction to act further in the action except for the limited

purpose of awarding costs and statutory attorney's fees. (*Gogri, supra*, 166 Cal.App.4th at p. 261; *Harris v. Billings* (1993) 16 Cal.App.4th 1396, 1405.)

The voluntary dismissal without prejudice did, however, deprive the trial court of jurisdiction to award Civil Code section 1717 attorney's fees incurred in litigation of contract claims. That is because Civil Code section 1717, subdivision (b)(2) states that after a plaintiff voluntarily dismisses the action, there shall be no prevailing party for purposes of Civil Code section 1717. (*Gogri, supra*, 166 Cal.App.4th at p. 274.) But "th[is] limitation of Civil Code section 1717, subdivision (b)(2)—precluding attorney's fees when a complaint is voluntarily dismissed—applies only to contract claims.

[Citation.] It does not apply to noncontract claims and thus does not preclude attorney's fees on noncontract claims where the contractual attorney's fees clause is broad enough to encompass noncontract claims." (*Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, 1071-1072, citing *Santisas v. Goodin, supra*, 17 Cal.4th at p. 622.)

Here, Hall's action consists only of tort claims for infliction of emotional distress, fraud and negligent misrepresentation, taking it outside of the Civil Code section 1717, subdivision (b)(2) limitation. Hall does not attempt to raise any challenge to the nature of her claims. Rather, she contends the court erred because defendants' counsel did not sufficiently authenticate the leases and because defendants failed to demonstrate they were parties to the leases. Defendants respond that they properly authenticated the lease agreements, that they were sufficiently identified in the lease agreements via allegations in Hall's complaint concerning the park manager, and, alternatively, their attorney fees and costs were properly awarded under Civil Code section 798.85 of the MRL.

### A. *Standard of Review*

" "An order granting or denying an award of attorney fees is generally reviewed under an abuse of discretion standard of review; however, the 'determination of whether the criteria for an award of attorney fees and costs have been met is a question of law.' " " (SC *Manufactured Homes, Inc. v. Canyon View Estates, Inc.* (2007) 148 Cal.App.4th 663, 673 (SC *Manufactured Homes*.) Entitlement to attorney fees under Civil Code section 798.85 is a legal question subject to de novo review. (*MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1397 (*MHC Financing*).

### B. *Defendants are Entitled to Attorney Fees Under the MRL*

Defendants argued below that Hall's causes of action for intentional and negligent infliction of emotional distress, fraud, and negligent misrepresentation "were based on their tenancy in the [park] and assertions that Park Owners violated the MRL." They argue on appeal that plaintiffs' claims implicate the MRL. Hall does not address the MRL on appeal.

The attorney fee provision in the MRL provides: "In any action arising out of the provisions of this chapter the prevailing party shall be entitled to reasonable attorney's fees and costs. A party shall be deemed a prevailing party for the purposes of this section if the judgment is rendered in his or her favor or where the litigation is dismissed in his or her favor prior to or during the trial, unless the parties otherwise agree in the settlement or compromise." (Civ. Code, § 798.85.)

The MRL regulates relations between owners and the residents of mobilehome parks. (*Cacho v. Boudreau* (2007) 40 Cal.4th 341, 345.) It "most significantly regulates the contents of rental agreements and the termination of tenancies." (*Griffith v. County of Santa Cruz* (2000) 79 Cal.App.4th 1318, 1321; see Civ. Code, §§ 798.15-798.19.5 [governing the form of, and mandatory and prohibited terms for, rental agreements between the resident and the mobilehome park]; Civ. Code, §§ 798.55-798.61 [governing termination of tenancies].) It also governs the instances in which the park may be required to permit the sublease of a mobilehome by a park tenant (Civ. Code, § 798.23.5); the procedures that must be followed by the park in amending its rules and regulations (Civ. Code, § 798.25); required procedures for a park's implementation of rent increases (Civ. Code, § 798.30); and ownership transfers of mobilehomes and mobilehome parks (Civ. Code, §§ 798.70-798.83) including requirements for removal of the mobilehome from the park in the event of sale to a third party (Civ. Code, § 798.73). In regulating these activities, the MRL provides "homeowners a measure of stability and predictability in their mobilehome park residency. . . ." (*Griffith v. County of Santa Cruz*, at p. 1323.)

"To be entitled to attorney fees and costs pursuant to [Civil Code s]ection 798.85, the underlying case must arise in the context of those relationships and claims addressed by the MRL. It is not sufficient that the case 'relates to' the MRL." (*SC Manufactured Homes, supra*, 148 Cal.App.4th at p. 675.) "[T]he phrase 'any action arising out of the provisions of [the MRL]' in Civil Code section 798.85 encompasses only those actions directly involving the application of MRL provisions in specific factual contexts

addressed by the MRL . . . ." (*MHC Financing, supra*, 125 Cal.App.4th at p. 1398.) However, "[a] case may 'arise' under the MRL even if a complaint does not allege a specific cause of action under the MRL, as long as the dispute is one within the scope of the MRL. While the defendants' defenses may be considered, the foundation of the case must be grounded in the MRL." (*SC Manufactured Homes*, 148 Cal.App.4th at p. 676.)

Thus, in *SC Manufactured Homes*, the court declined to award fees under the MRL to plaintiffs, a mobilehome retail dealer and its owner, who sued other dealers and park owners for allegedly being involved in a kickback scheme that prevented it from selling its mobilehomes. (*SC Manufactured Homes, supra*, 148 Cal.App.4th at p. 666, 678.) The court held the underlying case did not arise out of the MRL, reasoning, "[T]he case here does not involve a landlord/tenant dispute. It does not involve a lawsuit brought by a park manager to protect its rights as against its homeowners and residents. It does not involve a lawsuit brought by residents arising from their tenancy. It does not involve a case . . . where an entity with standing brings a lawsuit to protect park residents. Rather, plaintiff is a dealer of mobilehomes; joint defendants and Parklane are dealers of mobilehomes and managers and owners of mobilehome parks. Regardless of how plaintiff framed its complaint, regardless of the titles to the three specified causes of action, and even though plaintiff cited sections of the MRL in articulating the alleged conspiratorial and tortious conduct of the defendants, plaintiff sought to protect its own pocketbook—not the rights of tenants. Plaintiff alleged it was foreclosed from competing in the marketplace of mobilehomes. . . . The case before us does not involve the direct

application of MRL provisions in the context for which the MRL was designed." (*SC Manufactured Homes*, at p. 678.)

The *SC Manufactured Homes* court cited to *Del Cerro Mobile Estates v. Proffer* (2001) 87 Cal.App.4th 943, 945-948 (*Del Cerro*), in which this court awarded attorney fees under the MRL to a prevailing mobilehome tenant who had defended against a cause of action alleging that her violations of park rules and regulations were breaches of contract and constituted a public nuisance under the statute. (*Del Cerro*, at pp. 948-949.) Such a claim was "grounded in the [MRL] . . . ." (*Id.* at p. 948.) The court also cited *Palmer v. Agee* (1978) 87 Cal.App.3d 377, in which this court held mobilehome owners who prevailed in an unlawful detainer action by their landlord were entitled to attorney fees under the MRL (then, former Civil Code section 789.12) because their defense to the suit was the landlord's noncompliance with a 60-day written notice of termination imposed by the MRL. (*Palmer*, at pp. 386-387; see also *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 671-672.) *Palmer* had rejected the trial court's reasoning that "the action did not *arise* out of [the MRL notice provision], but arose out of an unlawful detainer action . . . ." (*Palmer*, at p. 386.) According to the *SC Manufactured Homes* court, both of these cases involved "classic landlord/tenant disputes." (*SC Manufactured Homes*, *supra*, 148 Cal.App.4th at p. 679.)

To the contrary, the *SC Manufactured Homes* court cited *MHC Financing*, *supra*, 125 Cal.App.4th 1372, in which this court rejected an award of attorney fees under the MRL in a lawsuit by a mobilehome park owner challenging a local rent control ordinance as preempted by the MRL. In *MHC Financing*, the court reasoned in part, "[T]he phrase

'any action arising out of the provisions of [the MRL]' in Civil Code section 798.85 encompasses only those actions directly involving the application of MRL provisions in specific factual contexts addressed by the MRL, such as actions by mobilehome park residents against management for failing to maintain physical improvements in common facilities in good working order. . . . Although [the plaintiff's] declaratory relief claims—that the MRL preempts certain provisions of Ordinance 412—*relate* to the MRL, they do not *arise out of* the MRL because they do not involve application of MRL provisions to a particular factual context addressed by the MRL." (*MHC Financing*, at pp. 1397-1398.)

Here, Hall's causes of action are based on alleged material representations and actions by defendants' representatives or agents that were intended to cause, or resulted in, severe emotional distress and also induced plaintiffs to purchase homes in the park or enter into lease agreements to their detriment. Hall alleges several of the underlying representations and actions violate the MRL; that defendants violated the MRL by increasing the space rent in an effort to force plaintiffs to remove their units so defendants could change their business model and convert the park to some other real estate development. Hall alleges defendants implemented new rules regarding the removal of existing units upon termination that also violated the MRL, as well as the plaintiffs' rental agreements. She alleges defendants informed plaintiffs that their rent would be increased to \$850, a rent increase assertedly violating the MRL, if the plaintiff was unable to demonstrate the park was his or her primary residence. Hall alleged defendants issued invoices to plaintiffs reflecting an illegal rent was due, which was an

"intentional violation of the MRL . . . ." Hall alleged plaintiffs were required to sign a rental agreement that violated the MRL and prevented them from selling their unit. Hall alleges defendants began conditioning approval of mobile home sales on the plaintiffs' execution of an unconscionable 70-page rental agreement that was alleged to violate "many provisions" of the MRL and other statutory provisions. She alleged that as a direct result of defendants' conditioning mobilehome sales on execution of this new lease, plaintiffs lost sales and feared future sales would be prevented, and suffered a loss in value of their homes. Each of these allegations is incorporated by reference into all of the causes of action.

In our view, Hall's lawsuit is more like the claim made in *Del Cerro, supra*, 87 Cal.App.4th 943, than those presented in *SC Manufactured Homes* or *MHC Financing*. That is, while Hall did not bring causes of action to enforce the MRL, her claims were based on assertedly illegal acts by defendants, namely, intentional violations of MRL provisions pertaining to the relationship between the homeowner plaintiffs and defendants. Thus, the action falls within the category of a complaint presenting a "dispute . . . within the scope of the MRL" or whose foundation is "grounded in the MRL." (*SC Manufactured Homes, supra*, 148 Cal.App.4th at p. 676.) We cannot say Hall's action merely arises out of fraudulent or negligent misrepresentations, and at the same time ignore the nature of the alleged representations. Thus, we conclude Hall's action is a "lawsuit brought by residents arising from their tenancy" (*SC Manufactured Homes*, at p. 678) that warrants an attorney fee award under the MRL.

Because we uphold the trial court's order awarding attorney fees as authorized by the MRL, we need not reach Hall's remaining challenges to the order.

*V. Attorney Fees and Costs on Appeal*

"Statutory authorization for the recovery of attorney fees incurred at trial necessarily includes attorney fees incurred on appeal unless the statute specifically provides otherwise." (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134.) This rule applies with respect to Civil Code section 798.85 in the MRL. (*Del Cerro, supra*, 87 Cal.App.4th at p. 951.) Defendants are entitled to attorney fees and costs incurred on appeal.

## DISPOSITION

The appeal is dismissed to the extent it challenges the February 4, 2011 order awarding defendants attorney fees under Code of Civil Procedure section 425.16. The judgment is reversed and the matter remanded to the trial court with directions to (a) enter a dismissal of the action without prejudice; (b) enter an order awarding defendants \$19,133.75 in attorney fees and costs under the Mobilehome Residency Law; and (c) determine the amount of attorney fees and costs on appeal recoverable by defendants.

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O'ROURKE, J.

WE CONCUR:

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BENKE, Acting P. J.

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NARES, J.