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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE RETAIL PROPERTY TRUST,

Plaintiff and Appellant,

v.

ORANGE COUNTY PEOPLE FOR  
ANIMALS et al.,

Defendants and Respondents.

G045556

(Super. Ct. No. 30-2011-00448549)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed and remanded.

Katten Muchin Rosenman, Thomas J. Leanse, Stacey McKee Knight, and Pamela Tsao, for Plaintiff and Appellant.

Ropers, Majeski, Kohn & Bentley, Allan E. Anderson, Timothy L. Skelton, and Kollin J. Zimmermann, for Defendant and Respondent Orange County People for Animals.

Bryan W. Pease; David R. Simon, for Defendant and Respondent Kavita Patel.

The Retail Property Trust (RPT), which owns a shopping mall in Brea, California, challenges an order requiring it to pay attorney fees to defendants Orange County People for Animals (OCPA) and Kavita Patel, after dismissal of its lawsuit seeking to enforce the mall’s “time, place and manner” restrictions on protest activities against them. After RPT filed its lawsuit, defendants responded with special motions to strike the suit as a SLAPP action.<sup>1</sup> Although RPT then voluntarily dismissed the case before the court ruled on the anti-SLAPP motions, the court nonetheless awarded fees to defendants as prevailing defendants on the motions to strike, after concluding RPT could not demonstrate a probability of success on the merits of its lawsuit.

RPT acknowledges that an award of attorney fees can be made to defendants as prevailing parties on an anti-SLAPP motion, even when the lawsuit is voluntarily dismissed before the motion is ruled upon, but asserts the award in this case must be overturned because the trial court erroneously failed to properly assess whether defendants’ anti-SLAPP motions actually would have been granted before making that fee award. RPT contends that had the court engaged in that analysis properly, it would have concluded RPT’s lawsuit did not qualify as a SLAPP action, and thus that the motions to strike – and consequently the fee award as well – should have been denied.

We disagree. RPT’s contention that its lawsuit did not “arise from [defendants’] expressive activity” strains credibility. RPT not only alleged a cause of action for trespass against defendants, seeking damages allegedly caused by their past expressive activity at the mall, but it also sought an injunction, restricting defendants’ rights to engage in such activity in the future. It is difficult to conceive of a lawsuit that might more clearly arise out of expressive activity than did this one.

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<sup>1</sup> “SLAPP” is an acronym for “strategic lawsuit against public participation,” and refers to a lawsuit that both arises out of defendants’ constitutionally protected expressive or petitioning activity, and lacks a probability of success on the merits. (Code Civ. Proc., § 425.16; *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 377.)

And we likewise reject RPT's contention that its lawsuit must be viewed as having a probability of success for purposes of the anti-SLAPP law, because it was purportedly meritorious on the date it was filed, and subsequently lost merit only because of what RPT characterizes as a "material change in [the] law" occurring between the filing date and the hearing date scheduled for the motions to strike. The enforceability of the time, place, and manner restrictions RPT imposed on expressive activities at its Brea shopping mall did not "change" during the pendency of this case, simply because one Court of Appeal issued an opinion announcing its disagreement with a conclusion previously reached by another co-equal Court of Appeal. RPT at all times remained free to argue the first court's conclusion was correct, while the second court's opinion was either legally infirm or factually inapposite. The only thing that actually *changed* was RPT's own perception of the likelihood that defendants' motions to strike would be granted. The trial court did not err in making the fee award.

## I

RPT filed its lawsuit against OCPA and Patel on February 9, 2011. It alleged causes of action for trespass and declaratory relief, and sought both an award of damages caused by defendants' prior acts of alleged trespass, and an injunction restricting defendants' future expressive conduct in RPT's Brea shopping mall. According to the complaint, RPT's shopping mall is private property, and in order to protect its own business interests and those of its tenants, RPT has adopted "time, place and manner" restrictions on expressive activity within the mall. Those restrictions allegedly allow "all forms of expressive activity without regard to the content of the message" but require persons seeking to use the mall for such purposes to: "submit an application[;]" identify each person who is expected to participate in the activity on the application; allow only "approved" persons to actually participate; confine their expressive activities to an "assigned Designated Area[;]" refrain from "imped[ing],

obstruct[ing] or interfer[ing] with any patron or [Merchant;]” and confine their expressive activities to days on which RPT has not chosen to ban such activities.

According to RPT’s complaint, these restrictions “are substantially similar to those considered and approved by the Court of Appeal in *Union of Needletrades, Industrial & Textile Employees, AFL-CIO v. Superior Court* [(1997)] 56 Cal.App.4th 996 [(UNITE)].” However, RPT does not attach a copy of its time, place, and manner restrictions to its complaint, or incorporate them by reference into the complaint. OCPA is alleged to be a “non-profit animal advocacy organization,” and Patel is alleged to be its “agent and/or representative.” These defendants allegedly trespassed at RPT’s shopping mall on various occasions by engaging in expressive activity “in the narrow corridor in front of Barkworks [a pet store]” without completing an application or otherwise complying with RPT’s time, place, and manner restrictions. Although the shopping mall’s “management staff informed [d]efendants that the [m]all’s common areas were private property subject to time, place and manner rules[, d]efendants refused to comply.”

RPT’s complaint sought an award of general and special damages against defendants based upon their past acts of trespass, a judicial declaration that its time, place, and manner restrictions are “lawful and reasonable” and that defendants are required to comply with them, and an injunction prohibiting defendants from engaging in future conduct that violates RPT’s time, place and manner restrictions.

On the same day it filed its complaint, RPT also filed an ex parte application for a temporary restraining order (TRO) prohibiting defendants from “[e]ngaging in expressive activity or otherwise entering onto the private property or the privately owned common areas of the [m]all without first submitting an application . . . and obtaining [RPT’s] permission or consent prior to entering the . . . [m]all.” RPT did provide a copy of its time, place and manner restrictions as an exhibit to one of the declarations filed in support of the TRO, but did not acknowledge the restrictions treated

“[q]ualified [l]abor [a]ctivity” differently than other types of expressive activity. To the contrary, RPT simply claimed, in conclusory fashion, that its restrictions “do not distinguish among certain types of speech or make distinctions based upon its potential impact on the listener.”

Although RPT’s application for a TRO certainly highlighted *UNITE, supra*, 56 Cal.App.4th 996, it did not rely exclusively on that case. Instead, RPT cited numerous cases, both state and federal, pertaining to the issue of free speech activities within public shopping malls. However, two cases that were not cited by RPT in connection with its application for a TRO are *Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469 (*Snatchko*), and *United Bhd. of Carpenters and Joiners Local 586 v. N.L.R.B.* (9th Cir. 2008) 540 F.3d 957 (*Carpenters Local 586*), both of which questioned the validity and persuasive effect of *UNITE*.

RPT’s omission of these cases cannot be construed as inadvertent, since not only was RPT’s counsel also counsel on the losing side of both *Snatchko* and *Carpenters Local 586*, but RPT’s written time, place, and manner restrictions explicitly reflect they were “updated . . . to comply with” both cases. Moreover, our record reveals counsel for defendants had pointed out to RPT, more than three months before RPT filed its complaint and sought its TRO, that the *Snatchko* court had rejected the reasoning employed in *UNITE*.

Since the TRO was sought on an ex parte basis, neither defendant appeared before the court in connection with it, and the court issued the requested TRO that same day. The court also scheduled a hearing for February 24, 2011, to consider issuance of a preliminary injunction. The parties later stipulated to continue the preliminary injunction hearing until March 17, 2011.

In early March, OCPA filed its opposition to RPT’s request for preliminary injunction, arguing RPT’s time, place, and manner restrictions were unconstitutional on three bases: first, because they discriminate based on content, as they specifically

distinguish between the treatment of labor and non-labor speech – a fact RPT had not previously acknowledged in describing the restrictions to the court; second, because they effectively provide RPT with “unbridled discretion” to restrict expressive activity at the mall; and third, because they impose unreasonable restrictions on expressive activity at the mall. Like RPT, OCPA relied upon an array of cases in support of its position, and OCPA’s array included one case, *Best Friends Animal Society v. Macerich Westside Pavilion Property LLC* (2011) 193 Cal.App.4th 168 (*Best Friends*), which had just been decided days before, and which cogently explained the impropriety of time, place, and manner restrictions that explicitly discriminate between labor and non-labor speech – an issue that had not been addressed in *UNITE*, the case RPT had relied upon in its complaint.

Moreover, OCPA’s opposition also pointed out that *UNITE* had been “heavily criticized and largely discredited,” citing not only the newly decided *Best Friends* decision, but also *Snatchco* and *Carpenters Local 586*. In fact, OCPA referred to *Best Friends* as merely “the final nail in *UNITE*’s coffin.” OCPA also pointed out that another court had concluded, in 2009, that *Savage v. Trammel Crow Co.* (1990) 223 Cal.App.3d 1562 – a second case heavily relied upon by RPT in its points and authorities – had been “undermined, if not overruled, by *Fashion Valley Mall, [LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850 (*Fashion Valley Mall*)].” (Quoting *Klein v. San Clemente* (9th Cir. 2009) 584 F.3d 1196, 1207.) Patel filed her own opposition to the requested preliminary injunction, in which she joined the arguments made by OCPA, and made additional points.

In its reply brief, RPT contended (among other things) that *UNITE* was “better reasoned” than *Best Friends* and that in any case, the significance of *Best Friends* had been “blatantly overstate[d]” by defendants.<sup>2</sup>

While the motion for preliminary injunction was pending, defendants OCPA and Patel each filed a special motion to strike RPT’s lawsuit on the basis it constituted a SLAPP suit. On March 17, 2011, the court held the hearing on the requested preliminary injunction, and declined to issue it. The court’s minute order specified two distinct justifications for its refusal: First, that RPT’s time, place, and manner restrictions improperly discriminated based on the content of speech, citing both *Snatchko* and *Best Friends*; and second, that the restrictions improperly gave RPT “unfettered discretion” to ban expressive speech, citing *H-CCH Associates v. Citizens for Representative Government* (1987) 193 Cal.App.3d 1193, 1211 (*H-CCH*) [“regulating authority may not adopt rules which preclude the exercise of free expression in an appropriate place, even on the ground another place is available”], disapproved on other grounds in *Fashion Valley Mall, supra*, 42 Cal.4th at p. 869.)

In early April, the parties stipulated to an extended briefing schedule in connection with defendants’ special motions to strike. Although the court rejected their stipulation, it entered its own order continuing the hearing date on the motions from April 21, 2011, to May 12, 2011. On April 25, 2011, RPT voluntarily dismissed its lawsuit, without prejudice.

On May 17, 2011, both OCPA and Patel filed motions for attorney fees incurred in defending RPT’s lawsuit. Both defendants argued RPT’s lawsuit had qualified as a SLAPP suit, and that RPT had chosen to dismiss it just prior to the deadline for filing its opposition, in recognition of the fact the special motions to strike would be

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<sup>2</sup> RPT would have some reason to be instantly familiar with *Best Friends*, as its counsel at both the trial and appellate level herein also represented the unsuccessful mall plaintiff in that case.

granted. In its opposition to the fee motions, RPT claimed, as it continues to assert in this appeal, that its lawsuit did not qualify as a SLAPP suit at the time it was filed, because at that point, the case law pertaining to enforcement of time, place, and manner restrictions at shopping malls supported enforcement of its time, place, and manner restrictions. However, in RPT's view, the *Best Friends* decision represented a "change in law" pertaining to the enforceability of such restrictions, and thus, despite the initial merit of its lawsuit, RPT voluntarily dismissed the suit "due to [that] recent change in law."

The trial court granted the fee motions. The court explained that while it agreed with RPT's contention that its lawsuit had a "probability of success" on the date it was filed – noting the TRO had issued at that time – "subsequent case law (the *Best Friends* decision) changed the course of this lawsuit." However, the court explained that RPT "has not persuaded the court that 'probability of success' should be measured at the time the lawsuit was filed, as opposed to when the Anti-SLAPP motion . . . was to be heard." The court awarded fees of \$73,196 to OCPA, and fees of \$47,030.83 to Patel.

## II

RPT contends the court erred in awarding fees to defendants, because such an award is appropriate only after the court determines that a defendant's special motion to strike *would have been granted* absent plaintiff's voluntary dismissal of the complaint. (*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218 (*Pfeiffer*) ["The fee motion is wholly dependent upon a determination of the merits of the SLAPP motion"].) RPT asserts the court here neither did, nor properly could, make that determination, and thus the fee award was improper. We do not agree.

A special motion to strike an action as a SLAPP is governed by Code of Civil Procedure section 425.16 (section 425.16.) Subdivision (b)(1) of section 425.16 requires a two-step process for determining whether a defendant's motion to strike should be granted. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving

defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Then, only if the court finds that such a showing has been made, does the burden shift to plaintiff to demonstrate "there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1); *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567-568.)

Our review of an anti-SLAPP order is conducted on a de novo basis. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 ["Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal"]; *Jespersen v. Zubiante-Beauchamp* (2003) 114 Cal.App.4th 624, 629.) Consequently, our review of whether this case would have been adjudged a SLAPP action if RPT had not dismissed it, is likewise conducted on a de novo basis.<sup>3</sup>

We do not presume the merit of the motions to strike, simply because RPT dismissed the case while they were pending (*Pfeiffer, supra*, 101 Cal.App.4th at p. 218 [the court "must, upon defendant's motion for a fee award, rule on the merits of the SLAPP motion even after the matter has been dismissed prior to the hearing on that motion"]), but if we conclude the motions would have been granted absent a prior

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<sup>3</sup> In light of this standard of review, we need not address RPT's contention the trial court "erred in determining that it lacked discretion to deny [d]efendants' [m]otions for [a]ttorney [f]ees." How the trial court would have ruled on the anti-SLAPP motions is not a matter of discretion. And once the trial court determines the anti-SLAPP motion would have been granted absent plaintiff's voluntary dismissal of the case, it is obligated to make an award of attorney fees to the moving defendant. (Code Civ. Proc., § 425.16, subd. (c)(1) ["a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs"].)

dismissal of the case, it follows that the moving party is entitled to an award of fees. (*Liu v. Moore* (1999) 69 Cal.App.4th 745, 752 [“Persons who threaten the exercise of another’s constitutional rights to speak freely and petition for the redress of grievances should be adjudicated to have done so, not permitted to avoid the consequences of their actions by dismissal of the SLAPP suit when a defendant challenges it”].)

### III

RPT first claims its lawsuit did not satisfy the initial part of the anti-SLAPP analysis, because the causes of action alleged did not, in its view, arise out of defendants’ protected activity. Rather, RPT characterizes the lawsuit as arising out of “a controversy regarding the validity of [its time, place, and manner restrictions]; not [defendants’] acts of protest.” Even if we accepted that as a sincere distinction, we cannot view it as a material one. Defendants’ efforts to engage in protest activity at RPT’s Brea mall, and RPT’s effort to restrict such efforts, are but two sides of the same dispute. RPT’s desire to establish the validity of its time, place, and manner restrictions in this case was merely a function of its desire to restrict defendants’ acts of protest at the mall. This dispute was not an abstract intellectual inquiry.

But even if we had to pick one of those sides as representing the more accurate description of RPT’s lawsuit, we would pick defendants’. RPT did not confine its complaint to the request for a court ruling on the validity of its time, place, and manner restrictions. It also stated a cause of action for damages against defendants based on their past protest activity, and sought an injunction to specifically control their future activity as well. Neither of those things is a necessary aspect of a complaint that merely seeks to resolve an abstract controversy about the validity of RPT’s time, place, and manner restrictions.

“[T]he statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. (*City of Cotati* (2002) 29 Cal.4th 69,

78 (*Cotati*.) As long as the protected act is not merely “incidental” to the cause of action, the cause of action will be construed as arising from it for purposes of the anti-SLAPP law. (*Martinez v. Metabolife International, Inc.* (2003) 113 Cal.App.4th 181, 188 (*Martinez*.)

Here, it is defendants’ protest activities at the Brea mall, rather than their mere disagreement with RPT’s time, place, and manner restrictions, which are at the center of RPT’s lawsuit. RPT’s trespass cause of action is squarely based on defendants’ past acts of speech and expressive conduct within the Brea mall. It is those very acts that constituted the alleged trespass and gave rise to RPT’s claim of damages. And RPT’s declaratory relief cause incorporates the entirety of its trespass cause of action by reference, and then alleges that based upon defendants’ past expressive conduct, RPT “is informed and believes . . . that [d]efendants contend that they do not have to comply with, or conform their conduct to, [RPT’s restrictions],” and that it is “informed and believes that [d]efendants dispute that the [restrictions] are lawful.” What RPT then asks for is a judicial declaration that its time, place, and manner restrictions are enforceable “against each and every one of the [d]efendants.” It is beyond dispute that defendants’ protected activity constituted the “gravamen or principal thrust” of both causes of action. (*Martinez, supra*, 113 Cal.App.4th at p. 193.)

Neither *Cotati, supra*, 29 Cal.4th 69, nor *City of Alhambra v. D’Ausilio* (2011) 193 Cal.App.4th 1301 (*Alhambra*), requires a contrary result. In *Cotati*, the parties disputed the validity of a rent stabilization ordinance applicable to mobile home parks. (*Cotati, supra*, 29 Cal.4th at p. 71.) Owners of some mobile home parks sued the city in federal court to challenge the ordinance, and the city reacted by filing its own action in state court. The owners then claimed that the city’s state court action arose out of their own pursuit of the federal action – which qualified as protected petitioning activity – and thus constituted a SLAPP action. The Supreme Court disagreed, explaining that while the owners’ filing of the federal action may have triggered the city’s

decision to file its own action in state court, the claims stated in the state court suit were not *based on* the federal court action. Instead, the court concluded that both actions arose out of the parties' underlying controversy about the enforceability of rent stabilization ordinance. (*Id.* at p. 78.) Significantly, nobody in *Cotati* claimed the underlying controversy itself arose out of or implicated anyone's exercise of protected speech or petitioning rights.

Here, in contrast to *Cotati*, the parties' dispute about the enforceability of RPT's time, place, and manner restrictions arose directly out of defendants' protected activity. The two goals expressed in RPT's complaint were (1) to recover damages allegedly caused by defendants' past expressive conduct; and (2) to restrict such conduct in the future. It is that conduct, rather than the abstract dispute, which gave rise to the RPT's causes of action.<sup>4</sup>

In *Alhambra*, the parties had allegedly entered into a binding settlement of an earlier dispute, and as part of that settlement, the defendant had agreed he would not "represent, participate, or advocate . . . 'in any matter involving the [city] and/or its agents[.]'" (*Alhambra, supra*, 193 Cal.App.4th at p. 1304.) The City of Alhambra sued defendant for declaratory relief after he engaged in protest activity that the city viewed as a violation of the agreement. The appellate court concluded the city's cause of action did not arise from the protest activity itself, which the city did not allege was independently

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<sup>4</sup> RPT's reliance on *City of Riverside v. Stansbury* (2007) 155 Cal.App.4th 1582, is similarly misplaced. In that case, the plaintiff's cause of action sought declaratory relief to ascertain the validity of defendants' proposed ballot initiative pertaining to eminent domain. Applying the analysis relied upon in *Cotati*, the court concluded the parties' dispute about the validity did not arise out of protected activity: "By its declaratory relief action, the [c]ity was simply asking for guidance as to the constitutionality of the proposed initiative. Indeed, the [c]ity did nothing to limit respondents' activities in connection with the initiative, nor did the [c]ity, by its action, otherwise impact respondents' First Amendment rights." (*Id.* at pp. 1590-1591.) Of course, in the instant case, impacting defendants' First Amendment rights is exactly what RPT intended to accomplish.

wrongful; it arose instead from the parties' disagreement concerning the legal effect of their agreement: "While appellant's protected speech activities may have alerted the [c]ity that an actual controversy existed regarding the legality of section 3.8, the speech itself does not constitute the controversy. The [c]ity did not sue appellant because he engaged in protected speech; the [c]ity sued him because it believed he breached a contract which prevented him from engaging in certain speech-related conduct and a dispute exists as to the scope and validity of that contract." (*Id.* at p. 1308.)

In this case, there is no assertion defendants were subject to some independent contractual or legal obligation to refrain from expressive activity at RPT's mall. Their alleged wrongful conduct was simply their engagement in protected conduct that RPT found to be objectionable, and which it sought to curtail. We consequently conclude there is no basis to hold that RPT's action arose out of anything other than protected conduct for purposes of the anti-SLAPP law.

#### IV

RPT's final argument is that the court erred in concluding it did not have a probability of prevailing on its complaint for purposes of the anti-SLAPP law. According to RPT, the court's error was in evaluating the lawsuit's probability of success as of the date of the anti-SLAPP hearing, rather than as of the date the lawsuit was filed. This distinction is significant to RPT, because it claims it had a "strong likelihood of prevailing on the merits" when it filed the lawsuit, but then a "material change in the law" undermined its position thereafter.

We need not address RPT's assertion about the required timeframe for the court's assessment of the merits of its case, because we reject its underlying premise: i.e., that the law applicable to its complaint actually changed in any significant way between the date it filed its complaint and date the court court's ruling on defendants' attorney fees motions.

As RPT acknowledges in its opening brief on appeal, it specifically relied on *UNITE* in commencing its lawsuit against defendants. In fact, RPT explicitly identified the *UNITE* decision in its complaint, alleging that its time, place, and manner restrictions for the Brea mall were “substantially similar to those . . . approved” in *UNITE*. RPT then claims that the law governing time, place, and manner restrictions in shopping malls changed when “Division Two of the Second Appellate District of the California Court of Appeal issued its decision in *Best Friends* . . . discrediting the precedent . . . on which [RPT] relied in commencing the action.”

There are several flaws in RPT’s claim. First, and most fundamentally, while one court of appeal may disagree with a decision previously published by another, as the *Best Friends* court disagreed with the *UNITE* decision, it has no power to “discredit” the decisions of other appellate courts. As explained in *Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 659, footnote 5, “[a]s a court of equal dignity, we are certainly free to disagree with our colleagues in [a different court of appeal] and may even decline to follow them. However, principles of stare decisis do not permit us to ‘overrule’ their decision . . . . (*Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347, 353-354 [under principles of stare decisis only a court of superior jurisdiction may overrule courts exercising inferior jurisdiction, and noting that ‘[d]isagreements at the Court of Appeal level are common’].)” The mere fact the court in *Best Friends* disagreed with *UNITE* did not “change” the law, and RPT at all times remained free to rely on *UNITE* and argue that it was the better reasoned or more factually apt case.

Second, in making its assertion, RPT simply fails to acknowledge that the validity of the *UNITE* decision had already been called into question in at least two cases – *Snatchko* and *Carpenters Local 586* – decided well before it filed its lawsuit. Moreover, it is beyond dispute that RPT was aware of those cases, since it actually cited both of them within the text of its time, place, and manner restrictions – explicitly

claiming the restrictions had been “updated” to comply with those two decisions.<sup>5</sup> And of course, the *Best Friends* decision itself relies upon *Snatchko* as the basis for its rejection of *UNITE*’s analysis of the propriety of designated protest areas within malls (*Best Friends, supra*, 193 Cal.App.4th at p. 177), and relies on *Carpenters Local 586* as the basis for its rejection of *UNITE*’s analysis of the propriety of “blackout days” (*id.* at pp. 179-180). Thus, the *Best Friends* decision did not itself break new ground on those issues. For RPT to suggest that, at the time it filed its lawsuit, *UNITE* simply embodied the current state of the law governing time, place, and manner restrictions – and that the *Best Friends* decision then changed that law abruptly and unexpectedly – is not consistent with the prior existence of these other cases.

The third problem with RPT’s claim that *Best Friends* changed the law is that the only new ground broken in *Best Friends* is its conclusion that a mall’s time, place, and manner restrictions cannot be viewed as “content neutral” if they distinguish between “qualified labor activity” and other types of expression – as RPT’s restrictions at issue in this case also did. But this conclusion did not represent a “change” in the law from what had been decided in *UNITE*, because *UNITE* did not address that issue. It is well-settled that cases are not authority for propositions not addressed therein. (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1039, quoting *Fricker v. Uddo & Taormina Co.* (1957) 48 Cal.2d 696, 701.) And in any event, the *Best Friends* decision relies upon existing cases (including *Carpenter’s Local 586*) to support its conclusion on that point. (*Best Friends, supra*, 193 Cal.App.4th at p. 184.) Thus, *Best Friends* was not establishing new law on the issue of whether time, place, and manner restrictions that distinguish “qualified labor activity” from other speech are “content neutral,” but was instead merely applying existing law to a factual situation not previously addressed in the cases.

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<sup>5</sup> RPT did not, however, cite either of those cases in connection with its request for a TRO to enforce its restrictions.

And fourth, it bears repeating that however abrupt the arrival of the *Best Friends* decision may have seemed to the trial court, the idea that a mall's time, place, and manner restrictions that treat "qualified labor activity" differently than other types of expression would not be considered as content neutral, should not have been a surprise to RPT. According to the *Best Friends* opinion, that contention was first made to the trial court in the *Best Friends* case back in 2008, and since the counsel representing RPT herein also represented the mall in *Best Friends*, it was certainly on notice of the potential problem. RPT's decision to proceed with its lawsuit herein, without even acknowledging that the time, place, and manner restrictions it sought to enforce against defendants did not afford their protest activity the same consideration given to "qualified labor activity," appears to have been a conscious and informed choice. Under these circumstances, it is difficult to view RPT as having been victimized by a change in the law it could not have reasonably anticipated when it filed suit.

Finally, while we acknowledge the trial court's fee ruling reflects a finding that RPT's lawsuit had a "a probability of success" at the time of filing, and that the court viewed the *Best Friends* decision as having "changed the course of this lawsuit," we note that analysis is actually inconsistent with the court's own earlier minute order denying RPT's motion for a preliminary injunction. In that earlier order, the court gives *two reasons* for denying the preliminary injunction: First, it concluded that RPT's time, place, and manner restrictions were presumptively unconstitutional because they discriminate based on content – a conclusion it found to be supported by both *Best Friends* and *Snatchko*; and second, it concluded the restrictions were unconstitutional because they improperly give RPT "unlimited discretion" to regulate expressive conduct – a conclusion it found to be supported by *H-CCH, supra*, 193 Cal.App.3d 1193. Thus, the court's minute order denying the preliminary injunction demonstrates it *did not* base its determination that RPT's time, place, and manner restrictions were unenforceable entirely on *Best Friends*.

Based on the foregoing, we conclude defendants' special motions to strike RPT's lawsuit against them as a SLAPP action would have been granted, absent RPT's decision to voluntarily dismiss the lawsuit prior to the hearing on the motions. It follows that the trial court did not err by awarding attorney fees to defendants as prevailing parties on those motions.

V

The order awarding attorney fees to Patel and OCPA is affirmed. Because these defendants are also entitled to an award of additional fees incurred in responding to this appeal (*Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 461; *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424), we remand this case to the trial court with directions to determine the appropriate amount of those additional fees on motion by Patel and OCPA. Defendants are entitled to their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

MOORE, J.