

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PATRICIA J. BARRY

Plaintiff and Appellant,

v.

THE STATE BAR OF CALIFORNIA,

Defendant and Respondent.

SUPREME COURT
FILED

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Deputy

After a Published Decision by the Court of Appeal Second Appellate District, Division Two Case No. B242054, Reversing a Judgment Entered by the Superior Court for the County of Los Angeles, Case No. BC452239, The Honorable Dierdre Hill presiding

PETITION FOR REVIEW

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TABLE OF CONTENTS

	<i>Page</i>
I. ISSUES PRESENTED	3
II. REVIEW IS NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW	3
III. BACKGROUND AND STATEMENT OF THE CASE	4
A. California’s Attorney Disciplinary System	4
B. Ms. Barry’s Stipulated Discipline and Subsequent SLAPP Suit	5
IV. ARGUMENT	6
A. The Anti-SLAPP Statute Is Designed To Prevent Abuse Of The Judicial System	6
B. Ms. Barry’s Suit Was A SLAPP suit	7
C. Ms. Barry’s Case Is Far From Unique	8
D. Lack Of Superior Court Jurisdiction To Interfere With State Bar Court Proceedings Does Not Immunize A SLAPP Plaintiff From Fees Under The Anti-SLAPP Statute	11
V. CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
<i>Bradbury v. Super. Ct.</i> (1996) 49 Cal.App.4th 1108 [57 Cal.Rptr.2d 207].....	8
<i>Briggs v. Eden Council for Hope & Opportunity</i> (1999) 19 Cal.4th 1106 [81 Cal.Rptr.2d 471].....	8
<i>Brown v. Desert Christian Center</i> (2011) 193 Cal.App.4th 733 [122 Cal.Rptr.3d 590].....	13, 14
<i>City of Colton v. Singletary</i> (2012) 206 Cal.App.4th 751 [142 Cal.Rptr.3d 74].....	7, 18
<i>Equilon Enterprises, LLC v. Consumer Cause, Inc.</i> (2002) 29 Cal.4th 53 [124 Cal.Rptr.2d 507].....	8, 16
<i>Fabre v. Walton</i> (2002) 436 Mass. 517 [781 N.E.2d 780]	16
<i>Flatley v. Mauro</i> (2006) 39 Cal.4th 299 [46 Cal.Rptr.3d 606].....	7
<i>Gogri v. Jack in the Box Inc.</i> (2008) 166 Cal.App.4th 255 [82 Cal.Rptr.3d 629].....	12
<i>In re Attorney Discipline System</i> (1998) 19 Cal.4th 582 [79 Cal.Rptr.2d 836].....	4
<i>In re Rose</i> (2000) 22 Cal.4th 430 [93 Cal.Rptr.2d 298].....	4, 5
<i>Kajima Engineering and Construction, Inc. v. City of Los Angeles</i> (2002) 95 Cal.App.4th 921 [116 Cal.Rptr.2d 187].....	8
<i>Law Offices of Andrew L. Ellis v. Yang</i> (2009) 178 Cal.App.4th 869 [100 Cal.Rptr.3d 771].....	13
<i>Obrien v. Jones</i> (2000) 23 Cal.4th 40 [96 Cal.Rptr.2d 205].....	8

<i>People ex rel. Lockyer v. Brar</i> (2004) 115 Cal.App.4th 1315 [9 Cal.Rptr.3d 844].....	16
<i>Prudential-Bache Securities, Inc. v. Super. Ct.</i> (1988) 201 Cal.App.3d 924 [247 Cal.Rptr. 477].....	17
<i>Saleeby v. State Bar</i> (1985) 39 Cal.3d 547 [216 Cal.Rptr. 367].....	4
<i>Sheller v. Super. Ct.</i> (2008) 158 Cal.App.4th 1697 [71 Cal.Rptr.3d 207].....	8
<i>Simmons v. Allstate Ins. Co.</i> (2001) 92 Cal.App.4th 1068, 1074 [112 Cal.Rptr.2d 397].....	15, 16
<i>Simpson Strong-Tie Co., Inc. v. Gore</i> (2010) 49 Cal.4th 12 [109 Cal.Rptr.3d 329].....	7, 18
<i>Singletary v. Local 18 of the Internat. Brotherhood of Electrical Workers</i> (2012) 212 Cal.App.4th 34 [151 Cal.Rptr.3d 107].....	14
<i>Union Oil Co. v. Reconstruction Oil Co.</i> (1935) 4 Cal.2d 541 [51 P.2d 81]	17
<i>Varian Medical Systems, Inc. v. Delfino</i> (2005) 35 Cal.4th 180 [25 Cal.Rptr.3d 298].....	14, 15, 16, 17
<i>Westlake North Property Owners Ass'n v. City of Thousand Oaks</i> (9th Cir. 1990) 915 F.2d 1301 [17 Fed.R.Serv.3d. 1363]	14
<i>Wilcox v. Super. Ct.</i> (1994) 27 Cal.App.4th 809 [33 Cal.Rptr.2d 446].....	7
<i>Willy v. Coastal Corp.</i> (1992) 503 U.S. 131 [112 S.Ct. 1076].....	14

Statutes

Bus. & Prof. Code, § 6079.5.....	4
Bus. & Prof. Code, § 6125.....	4
Bus. & Prof. Code, § 6064.....	4
Code Civ. Proc., § 425.16.....	6, 7, 17, 18

Rules

Cal. Rules of Court, rule 8.500 3
Cal. Rules of Court, rule 9.12 4


CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court, rule 8.208, Respondent, to the best of its knowledge, is unaware of any entities or persons who have a financial or other interest in the outcome of this proceeding that would be relevant to the question of disqualification under Canon 3E of the Code of Judicial Ethics.

DATED: October 15, 2013

KERR & WAGSTAFFE LLP

By



MICHAEL VON LOEWENFELDT
Attorneys for Respondent
The State Bar of California

To the Honorable Tani Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the Supreme Court of California:

The State Bar of California (the “State Bar”) petitions for review of the decision of the Court of Appeal, Second Appellate District, Division Two filed for publication on August 21, 2013. This case involves the State Bar’s ability to utilize the protections of the Anti-SLAPP statute when faced with baseless, harassing, yet unfortunately all too common litigation by attorneys who either have been disciplined by this Court or are in the process of attorney disciplinary proceedings. The case presents an issue of first impression, and review is necessary to close an enormous loophole in the anti-SLAPP statute created by the Court of Appeal’s opinion.

It is well settled that only this Court has jurisdiction over attorney admission and disciplinary proceedings, and that the superior courts have no power to hear claims arising from such proceedings. Despite this clear law, the State Bar and its officers and employees are bombarded by suits from current or former lawyers who are either threatened with disciplinary proceedings, in the middle of such proceedings, or who have been disciplined by this Court. The instant case – brought by plaintiff Patricia J. Barry to challenge discipline to which she stipulated – is but one example of these cases which seek to chill the activity of State Bar prosecutors and State Bar Court judges and to punish the State Bar and its officers and

employees for performing their public duties as this Court's administrative arm.

Although the claims in this case unquestionably fall within the ambit of the anti-SLAPP statute, the Court of Appeal reversed the anti-SLAPP attorneys' fees awarded to the State Bar. The Court of Appeal held that, because the *reason* Ms. Barry's complaint had no likelihood of success was the superior court's lack of subject matter jurisdiction over State Bar disciplinary measures, the superior court also lacked subject matter jurisdiction to attorneys' fees against Ms. Barry under the anti-SLAPP statute, Code of Civil Procedure section 425.16, subdivision (c)(1).

That reasoning is both erroneous and dangerous. It is erroneous because the superior court always has jurisdiction to determine its own jurisdiction, and it is well settled across a variety of circumstances that a court can sanction or award fees and costs against the plaintiff in an action over which the court has no subject matter jurisdiction. It is dangerous because the Court of Appeal's opinion provides a clear roadmap to any malefactor seeking to evade the anti-SLAPP statute: simply bring the SLAPP action in a forum without subject matter jurisdiction. The purpose, after all, of a SLAPP is not to win, but instead to harass and burden the defendant. Suits that are frivolous because the court has no jurisdiction are no less harassing and burdensome than suits that are frivolous for other reasons.

This petition is timely filed pursuant to California Rules of Court, rule 8.500(e)(1). A copy of the Court of Appeal's published Opinion is attached hereto. The State Bar did not file a petition for rehearing.

I. ISSUES PRESENTED

Are fees and costs under the anti-SLAPP statute recoverable where the reason why a plaintiff has no reasonable probability of prevailing on the merits is the plaintiff's choice to bring the case in a forum that lacks jurisdiction over the dispute? In other words, can a SLAPP plaintiff avoid the penalties provided by the anti-SLAPP statute by filing the SLAPP in a court without jurisdiction?

II. REVIEW IS NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW

Rule of Court 8.500(b)(1) provides that review may be ordered "when necessary ... to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) Here, that question is simple: whether the anti-SLAPP statute can be avoided by filing claims in a court without jurisdiction to grant them. The Court of Appeal's answer – the first of its kind – essentially means that a plaintiff like Ms. Barry can bring a wholly frivolous lawsuit challenging activity protected by the anti-SLAPP statute, yet be free of the penalty for doing so, simply by filing her suit in a court with no jurisdiction to enter judgment for her. That ruling leaves the State Bar essentially unprotected from SLAPP suits by disgruntled or former

attorneys and, more importantly, opens a hole in anti-SLAPP jurisdiction that can be exploited by any plaintiff whose SLAPP lawsuit is jurisdictionally frivolous.

III. BACKGROUND AND STATEMENT OF THE CASE

A. CALIFORNIA'S ATTORNEY DISCIPLINARY SYSTEM

No one may practice law in California without being an active member of the State Bar of California, admitted to practice by the California Supreme Court. (Bus. & Prof. Code, §§ 6064, 6125.) The California Supreme Court controls both admissions and attorney discipline (including suspension and disbarment). (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557-58 [216 Cal.Rptr. 367].) The Supreme Court's control over these issues is absolute. (*Ibid.*)

The State Bar of California acts as the Supreme Court's administrative arm for purposes of admission, discipline, and regulation of attorneys. (*In re Rose* (2000) 22 Cal.4th 430, 438-446 [93 Cal.Rptr.2d 298]; *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 599-600 [79 Cal.Rptr.2d 836].) Attorney discipline proceedings are prosecuted by the State Bar's Office of Chief Trial Counsel ("OCTC") before the State Bar Court. (Bus. & Prof. Code, § 6079.5; Rules Proc. of State Bar, rule 5.4(16).) The State Bar Court provides trial and appellate proceedings designed to generate a disciplinary *recommendation* to this Court. (Cal. Rules of Court, rule 9.12; Rules Proc. of State Bar, rules 5.111, 5.151,

5.155.) The State Bar Court does not actually impose any discipline. (*In re Rose, supra*, 22 Cal.4th at p. 439.) All State Bar Court *recommendations* are subject to review by this Court, which makes the actual and final disciplinary decision. (*Id.* at pp. 443-45.) In other words, the State Bar does not suspend or disbar attorneys, it only helps this Court by making recommendations. Only this Court has the power to suspend or disbar an attorney. (*Id.* at p. 442.)

B. MS. BARRY'S STIPULATED DISCIPLINE AND SUBSEQUENT SLAPP SUIT

In April 2010, Ms. Barry and the State Bar's Office of Chief Trial Counsel entered into a Stipulation Re Facts, Conclusions of Law and Disposition (basically a plea bargain) resolving two State Bar disciplinary cases against Ms. Barry. (Respondent's Appendix ["RA"] pp. 1-24.) The Stipulation provided for at least 2 months of actual suspension of Ms. Barry's license, and a two year probationary period. (RA p. 4.)

By December 2010, however, Ms. Barry had changed her mind and she filed a petition with this Court seeking to set aside her stipulation and dismiss the charges against her.¹ (RA pp. 25-29.) A week later, she filed this superior court action, which seeks the same relief as well as monetary

¹ This Court denied Ms. Barry's writ and suspended her from the practice of law pursuant to the terms of the stipulation. *Barry on Discipline*, No. S187076 (Cal. 6/29/2011).

damages, a jury trial on the State Bar disciplinary charges, and a host of structural changes to the State Bar. (Appellant's Appendix ["AA"] pp. 1-7.)

The State Bar filed a demurrer to the complaint, as well as a special motion to strike under the anti-SLAPP statute. (AA pp. 8-12.) The superior court granted the motion to strike, and overruled the demurrer as moot. (AA pp. 16-23.) The State Bar then sought \$2,575.04 in attorneys' fees under Code of Civil Procedure section 425.16(c). (AA p. 26.) The superior court granted that fee motion (AA p. 44), and this appeal followed.

IV. ARGUMENT

A. THE ANTI-SLAPP STATUTE IS DESIGNED TO PREVENT ABUSE OF THE JUDICIAL SYSTEM

Enacted in 1992, California's anti-SLAPP statute, Code of Civil Procedure section 425.16, was designed to combat the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).) The Legislature was attempting to prevent such suits from chilling rights "through abuse of the judicial process." (*Ibid.*) As this Court has explained,

"While SLAPP suits masquerade as ordinary lawsuits ... they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right."

(*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 [109 Cal.Rptr.3d 329] [citation omitted].)

The ordinary deterrents to meritless litigation are insufficient to deter SLAPP suits because the purpose of a SLAPP suit is not winning, but rather harassment of the defendant. “Because winning is not a SLAPP plaintiff’s primary motivation, defendants’ traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPP’s.” (*Wilcox v. Super. Ct.* (1994) 27 Cal.App.4th 809, 817 [33 Cal.Rptr.2d 446].) As a result, in addition to early dismissal of SLAPP actions, the anti-SLAPP statute provides for mandatory fees where an anti-SLAPP motion is granted. (Code Civ. Proc., § 425.16, subd. (c)(1).) “The anti-SLAPP statute reflects the Legislature’s ‘strong preference for awarding attorney fees to successful defendants.’” (*City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 782 [142 Cal.Rptr.3d 74] [citations omitted]; see *Flatley v. Mauro* (2006) 39 Cal.4th 299, 312 [46 Cal.Rptr.3d 606] [“the Legislature has directed that the statute ‘be broadly construed.’”].)

B. MS. BARRY’S SUIT WAS A SLAPP SUIT

An anti-SLAPP motion requires the court to engage in a two-step process. First, the court must decide whether the defendant “has made a threshold showing that the challenged cause of action is one arising from protected activity,” that is, that the particular causes of action to be stricken

are covered by the anti-SLAPP statute. (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [124 Cal.Rptr.2d 507].) Once the court determines that the defendant has made that prima facie showing, as here, the burden shifts to the plaintiff to “demonstrate[] a probability of prevailing on the claim.” (*Ibid.*)

Each prong was clearly met here. The State Bar disciplinary proceedings Ms. Barry was suing to stop (and seek damages for) were clearly protected by the right to petition. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [81 Cal.Rptr.2d 471]; *Kajima Engineering and Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929 [116 Cal.Rptr.2d 187]; *Bradbury v. Super. Ct.* (1996) 49 Cal.App.4th 1108, 1113 [57 Cal.Rptr.2d 207].) As the Court of Appeals recognized, Ms. Barry clearly had no probability of prevailing on her claims, because only this Court has oversight concerning State Bar Court proceedings. (*Obrien v. Jones* (2000) 23 Cal.4th 40, 48 [96 Cal.Rptr.2d 205]; *Sheller v. Super. Ct.* (2008) 158 Cal.App.4th 1697, 1710 [71 Cal.Rptr.3d 207].)

C. MS. BARRY’S CASE IS FAR FROM UNIQUE

Regrettably, Ms. Barry is not the first, nor will she be the last of the State Bar’s constituency to seek to interfere with this Court’s original jurisdiction over attorney admissions and discipline and with State Bar’s function as this court’s administrative arm by filing suit against the State

Bar, and its officials and employees. The following list of cases, which are the subject of the State Bar's request for judicial notice ("RJN") demonstrate the regularity with which the State Bar is sued over its actions in attorney admissions and discipline:

1. *Alexander, Jon v. State Bar, et al*, San Francisco Sup. Ct., Case No. CGC-12-525073, filed October 12, 2012 (RJN, Exs. A-B).
2. *Brown, James Earl v. Guitierrez, et al.*, Los Angeles Sup. Ct., Case No. BC369840, filed April 23, 2007 (RJN, Exs. C-D).
3. *Chavarela, Nicholas v. State Bar et al.*, Orange County Sup. Ct. Case No. 30-2009-00311346, filed October 4, 2009, Fourth Dist. Ct. of App. Case No. G043727 (RJN, Exs E-F).
4. *Dickson, Lorraine v. State Bar, Board of Governors, Streeter, Kim, et al.*, Los Angeles Sup. Ct., Case No. BC470523, filed September 28, 2011(RJN, Exs. G-H).
5. *Dydzak, Daniel v. Dunn, Joseph, et al.*, Orange County Sup. Ct., Case No 30-2012-00558031, filed May 2, 2012 (RJN, Exs. I-J).
6. *Fletcher, Michael v. State Bar et al.*, Los Angeles Sup. Ct., Case No. BS129414, filed November 24, 2010 (RJN, Exs. K-L).
7. *Foley, Natalia v. State Bar, B. Rodriguez*, Los Angeles Sup. Ct., Case No. BC445288, filed September 9, 2010 (RJN, Exs. M-N).
8. *Gjerde, Sean v. State Bar, et al.*, Sacramento Co. Sup. Ct., Case No. 34-2012-00134070, filed October 19, 2012 (RJN, Exs. O-P).
9. *Gottshalk, Ronald v. Public Defender et al*, Orange County Sup. Ct., Case No. 30-2010-00359752-CU-NP-CJC, filed April 5, 2010 (RJN, Exs. Q-R).
10. *Henschel, Bradford v. State Bar, et al.*, Los Angeles Sup. Ct., Case No. BC379051, filed December 4, 2007, Second Dist. Ct. of App., Case Nos. B206984, B213595 (RJN, Exs. S-T).
11. *Joseph, Joel v. the State Bar of California*, Los Angeles Sup. Ct., Case No. SC103749, filed June 26, 2009, Second Dist. Ct. of App., Case No. B221236 (RJN, Exs. U-V).

12. *Kay, Philip E. v. State Bar, et al.*, San Francisco Sup. Ct, Case No. CGC-10-496869, filed February 16, 2010, First Dist. Ct. Appeal, Case No. A129515, Cal. Supreme Court Case No. S198578 (RJN, Exs. W-X).
13. *Kay, Philip E. v. State Bar, et al.*, San Francisco Sup. Ct., Case No. CV 10-502372, filed August 6, 2010, First Dist. Ct. Appeal, Case Nos. A132643, A134111, A137989 (RJN, Exs. Y-Z).
14. *Kay, Philip E. v. State Bar, et al.*, San Francisco Sup. Ct., Case No. CGC-11-510717, filed May 4, 2011, First Dist. Ct. Appeal, Case Nos. A134205, A137989 (RJN, Exs. AA-BB).
15. *Kay, Philip E., Robin Kay, Chris Enos v. State Bar, et al.*, San Francisco Sup. Ct., Case No. CGC-11-514255, filed September 4, 2011 (RJN, Exs. CC-DD).
16. *Missud, Patrick v. State Bar of California*, San Francisco Sup. Ct., Case No. CGC-13-533811, filed September 3, 2013 (RJN, Ex. EE).
17. *Morris, Gregory A. v. State Bar of California, et al.*, San Francisco Sup. Ct., Case No. CGC 06-450766, filed November 29, 2006 (RJN, Exs. FF-GG).
18. *Morris, Gregory A. v. State Bar of California, et al.* San Francisco Sup. Ct. , Case No. CGC 08-471504 (RJN, Exs. HH-II).
19. *Morrowatti, Nasrin v. State Bar of California*, Los Angeles Sup. Ct., Case No. BC 347921, filed February 23, 2006, Second Dist. Ct. Appeal, Case No. B196392 (RJN, Exs. JJ-KK).
20. *Oxman, Brian v. Chang, Alec, et al.*, Los Angeles Sup. Ct., Case No. BC516601, filed July 29, 2013 (RJN, Ex. LL).
21. *Scurrah, Robert v. State Bar et al.*, Orange County Sup. Ct., Case No. 30-2012-00595756, filed September 5, 2012 (RJN, Exs. MM-NN).
22. *Spadaro, Charlotte v. Phyllis Williams, The State Bar of California*, San Bernardino Co. Sup. Ct., Case No. CIVRS1203310, filed April 30, 2012 (RJN, Exs. OO-PP).
23. *Taylor, Swazi v. State Bar*, Los Angeles Sup. Ct., Case No. BC476842, filed January 18, 2012 (RJN, Exs. QQ-RR).

24. *Viriyapanthu, Paul v. The State Bar of California, Viveros*, Orange County Sup. Ct., Case No. 30-2010-00418393, filed October 15, 2010 (RJN, Exs. SS-TT).

In sum, in the last six years alone the State Bar has been sued more than 20 times in superior court – in some cases by the same disgruntled disciplined attorney filing suit over and over again, despite this Court’s original jurisdiction over attorney admissions and discipline. In all of these cases, the State Bar is subject to the normal burdens of litigation – evidentiary preservations, discovery, including depositions, document productions and propounded written discovery, and motion practice – until such time as the case is dismissed, all for a case where the superior court lacks jurisdiction.²

D. LACK OF SUPERIOR COURT JURISDICTION TO INTERFERE WITH STATE BAR COURT PROCEEDINGS DOES NOT IMMUNIZE A SLAPP PLAINTIFF FROM FEES UNDER THE ANTI-SLAPP STATUTE

While not questioning the superior court’s finding that Ms. Barry’s case falls within the anti-SLAPP statute, the Court of Appeal held that the superior court’s lack of power to review disciplinary proceedings also

² This list, moreover, is not exhaustive. The State Bar is also routinely sued by individuals who file complaints with the State Bar regarding either their own attorney or sometimes opposing counsel, and when they are dissatisfied with the resolution of their complaint, they, too, file suit in the superior court. Disciplined attorneys, unsuccessful applicants, and members of the public alike all file suit in federal court challenging the State Bar’s performance of its function as this court’s administrative arm in attorney admissions and discipline.

meant the superior court had no power to award anti-SLAPP fees.³ That holding misconstrues the nature of an anti-SLAPP fee and cost award.

As discussed above, the purpose of the anti-SLAPP statute is to deter and penalize baseless lawsuits that arise from protected activity. Ms. Barry's argument, accepted by the Court of Appeal, that fees cannot be awarded against her for abusing the judicial process as long as her abusive conduct takes the form of a suit where there is a lack of power to grant the relief she seeks is wholly inconsistent with the Legislative intent behind the anti-SLAPP statute.

Although no prior published anti-SLAPP case specifically dealing with the limits on superior court power over State Bar disciplinary proceedings, analogous case law supports an award of fees and costs here.

First, anti-SLAPP law is clear that fees can be awarded even if the case is voluntarily dismissed before the anti-SLAPP motion is heard. It is settled law that a trial court loses jurisdiction over an action if the plaintiff enters a voluntary dismissal. (*Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 261 [82 Cal.Rptr.3d 629].) In that circumstance, the trial court has no jurisdiction to adjudicate an anti-SLAPP motion. It does,

³ The Court of Appeal's decision was supported by Ms. Barry's paradoxical argument that the claim she herself brought below was not one over which the court had jurisdiction. As a result of the Court of Appeal's ruling, Ms. Barry is subject to no sanction whatsoever for her deliberate filing of a claim she admits was baseless.

however, have the power to award anti-SLAPP fees and costs even though it has no jurisdiction over the underlying merits:

Upon the proper filing of a request to voluntarily dismiss a matter, the trial court loses jurisdiction to act in the case, “except for the limited purpose of awarding costs and statutory attorney fees.” . . . Thus, here, when plaintiff dismissed its case at a time when defendants’ anti-SLAPP motion was pending, the trial court continued to have jurisdiction over the case only for the limited purpose of ruling on the defendants’ motion for attorney fees and costs.

(*Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 876, 879 [100 Cal.Rptr.3d 771].)

This rule is directly analogous to the situation presented here.

Although the reason why jurisdiction is lacking differs, the result is precisely the same – the court has no power to reach the merits, but does have the power to award fees and costs.

Second, a jurisdictional dismissal generally does not eliminate the power to reach incidental issues such as costs or fees. Thus, in *Brown v. Desert Christian Center* (2011) 193 Cal.App.4th 733 [122 Cal.Rptr.3d 590], a premises liability and negligence action was dismissed for lack of subject matter jurisdiction after the defendant proved that the claim was within the exclusive jurisdiction of the workers’ compensation system. (*Id.* at p.739.) Like Ms. Barry, the plaintiff urged that the court had no jurisdiction to award costs once it dismissed his case for lack of jurisdiction. Although the trial court accepted that argument, the Court of

Appeal reversed, holding that the court's jurisdiction to decide its own jurisdiction necessarily included an award of costs incidental to a jurisdictional dismissal.

[T]he trial court's finding that defendant prevailed on the merits of its jurisdictional defense did not operate as a double-edged sword that brought a complete victory in the lawsuit but, with the same stroke, extinguished the trial court's power to award costs incurred in achieving that victory. . . [T]he trial court's power to award costs *survived* as an *incident of* the resulting judgment of dismissal.

(*Id.* at p. 741 [emphasis in original]; *cf. Singletary v. Local 18 of the Internat. Brotherhood of Electrical Workers* (2012) 212 Cal.App.4th 34, 47 [151 Cal.Rptr.3d 107] [reviewing for abuse of discretion decision not to award sanctions for filing of action without jurisdiction].)

Federal cases apply the same rule, recognizing that “there are some circumstances in which federal courts may impose attorney’s fees or costs, even where the court eventually proves to be without subject-matter jurisdiction.” (*Willy v. Coastal Corp.* (1992) 503 U.S. 131, 136 [112 S.Ct. 1076].) “Thus, even if a court does not have jurisdiction over an underlying action, it may have jurisdiction to determine whether the parties have abused the judicial system and whether sanctions are appropriate to remedy such abuse.” (*Westlake North Property Owners Ass’n v. City of Thousand Oaks* (9th Cir. 1990) 915 F.2d 1301, 1303 [17 Fed.R.Serv.3d. 1363].)

The Court of Appeal cited *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180 [25 Cal.Rptr.3d 298], in support of its decision to

determine that lack of subject matter jurisdiction excludes a frivolous lawsuit from the protection of the anti-SLAPP statutory scheme. *Varian* involved a matter that went to trial while the appeal of the denial of an anti-SLAPP motion was pending. *Id.* at 187-188.

The plaintiffs prevailed. *Varian Medical Systems, Inc., supra*, 35 Cal.4th at p. 188. The Court of Appeal dismissed the anti-SLAPP appeal as moot. *Ibid.* In the appeal from the judgment, the Court of Appeal affirmed the trial court's decision to go forward with the trial while the appeal of the anti-SLAPP denial was pending, finding that the denial of an anti-SLAPP motion was a matter separate from the merits of the lawsuit, and the subsequent trial had "no direct impact on the appeal from the order" denying the motion. *Ibid.* It held that the stay was discretionary, because if the stay was automatic it would encourage the filing of meritless anti-SLAPP motions as a trial delay strategy. *Ibid.*

This Court granted review *solely* on the issue of whether the denial of an anti-SLAPP motion automatically stays the trial court proceedings. *Varian Medical Systems, Inc., supra*, 35 Cal.4th at p. 188.

This Court reiterated that the purpose of the anti-SLAPP statute was to end meritless lawsuits that seek to deplete defendants' energy and resources early and without great cost. *Varian Medical Systems, Inc., supra*, 35 Cal.4th at p. 192, *citing Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1074 [112 Cal.Rptr.2d 397], and *Equilon Enterprises,*

LLC, supra, 29 Cal.4th at p. 65. In context, the anti-SLAPP statute allows the trial court to evaluate the merits of a lawsuit using a summary judgment-like procedure at an early stage of the litigation. *Varian Medical Systems, Inc., supra*, 35 Cal.4th at p.192, citing *Simmons, supra*, 92 Cal.App.4th at p. 1073.

Because the granting of an anti-SLAPP motion results in a dismissal of the lawsuit, this Court determined that such a dismissal would be irreconcilable with a judgment for the plaintiffs on the merits after a trial court proceeding. *Varian Medical Systems, Inc., supra*, 35 Cal.4th at p. 193. The Court pointed out that the trial court proceeding was inherently inconsistent with the appeal because the appeal seeks to avoid that very proceeding, observing that:

“[t]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights.”... [“The protections afforded by the anti-SLAPP statute against the harassment and burdens of litigation are in large measure lost if the petitioner is forced to litigate a case to its conclusion before obtaining a definitive judgment through the appellate process”].

Ibid., citing *People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317 [9 Cal.Rptr.3d 844] (*Brar*) and *Fabre v. Walton* (2002) 436 Mass. 517 [781 N.E.2d 780, 784]. In that regard, the Court found that the denial of an anti-SLAPP motion was no different from the denial of a motion to compel arbitration. *Varian Medical Systems, Inc., supra*, 35 Cal.4th at p. 193, citing

Prudential-Bache Securities, Inc. v. Super. Ct. (1988) 201 Cal.App.3d 924, 925 [247 Cal.Rptr. 477].) The Court found that an anti-SLAPP motion goes “to the merits of the issues involved in the main action” to the extent it addresses the “probability...the plaintiff will prevail on the claim.” (*Varian Medical Systems, Inc., supra*, 35 Cal.4th at p. 193, citing *Union Oil Co. v. Reconstruction Oil Co.* (1935) 4 Cal.2d 541, 542-545 [51 P.2d 81] and Code Civ. Proc. § 425.16, subd. (b)(1) [Emphasis added].) In particular, this Court observed that the statute’s legislative history supported this conclusion: “[b]ecause we must follow the Legislature’s intent, we agree with *Mattel, supra*, 99 Cal.App.4th 1179, 121 Cal.Rptr.2d 794, and hold that an appeal from the denial of an anti-SLAPP motion automatically stays further trial court proceedings on the merits.” *Varian Medical Systems, Inc., supra*, 35 Cal.4th at p. 195. This Court determined that this conclusion furthered the legislative intent of the anti-SLAPP statute because the benefit of avoiding a trial court’s refusal to stay an action pending the appeal of an anti-SLAPP denial outweighed the potential to encourage meritless anti-SLAPP motions as a trial delay tactic. *Ibid.* In contrast here, upholding the Court of Appeal’s determination would encourage those individuals who seek to harass by filing frivolous lawsuits to file in a court that lacks jurisdiction, knowing they would be insulated from the protections that the anti-SLAPP statute affords – a discovery stay, early resolution of the lawsuit, and attorneys’ fees to the prevailing party.

These rules all support the award of fees here. As discussed above, the purpose of the anti-SLAPP statute is to prevent and remedy abuse of the judicial system. (*Simpson Strong-Tie Co., supra*, 49 Cal.4th at p. 21; Code Civ. Proc., § 425.16, subd. (a).) The mandatory award of attorney fees to a defendant who is sued in a meritless SLAPP action is an important part of that Legislative purpose. (*City of Colton, supra*, 206 Cal.App.4th at p. 782.) There is no basis for concluding that the court cannot carry out that Legislative directive when the means by which the judicial system was abused was a lawsuit where the superior court clearly lacked the power to grant the relief sought.


V. CONCLUSION

With the anti-SLAPP statute, the Legislature enacted a speedy mechanism for dismissing SLAPP suits and sanctions providing a monetary protection for defendants for the cost of doing so. The Court of Appeal's novel decision opened a large gap in that statutory scheme, allowing plaintiffs to file SLAPP suits without fear of paying defense fees and costs so long as they file in a court where they cannot win (because the court has no jurisdiction). Such suits are models of the baseless litigation the anti-SLAPP statute is intended to address. The State Bar respectfully requests this Court to grant review to correct this error of law.

DATED: October 15, 2013

Respectfully submitted,

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By 
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Attorneys for Respondent
THE STATE BAR OF
CALIFORNIA

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rules of Court, rules 8.204(c)(1) and 8.504(d)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 5,309 words.

DATED: October 15, 2013

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By


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Attorneys for Respondent
**THE STATE BAR OF
CALIFORNIA**

Filed 8/21/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

PATRICIA J. BARRY,

Plaintiff and Appellant,

v.

THE STATE BAR OF CALIFORNIA,

Defendant and Respondent.

B242054

(Los Angeles County
Super. Ct. No. BC452239)

APPEAL from an order of the Superior Court of Los Angeles County. Deirdre Hill, Judge. Reversed.

Patricia J. Barry, in pro. per., for Plaintiff and Appellant.

Kerr & Wagstaffe and Michael von Loewenfeldt; State Bar of California Office of General Counsel, Starr Babcock, Lawrence C. Yee, and Danielle A. Lee for Defendant and Respondent.

Plaintiff and appellant Patricia J. Barry (plaintiff) appeals from the trial court's order awarding \$2,575.04 in attorney fees under Code of Civil Procedure section 425.16, subdivision (c)¹ to defendant and respondent The State Bar of California (the State Bar) as the prevailing defendant on a special motion to strike² plaintiff's complaint. In her complaint, plaintiff sought to vacate a stipulation she had entered into with the State Bar regarding two disciplinary actions against her. The trial court concluded that all of plaintiff's causes of action arose from the State Bar disciplinary proceedings -- a protected activity under section 425.16. The trial court further concluded that plaintiff had no reasonable probability of prevailing on her claims because, among other reasons, the court had no subject matter jurisdiction over State Bar disciplinary matters. The trial court granted the anti-SLAPP motion and awarded attorney fees to the State Bar as the prevailing party on that motion.

Plaintiff challenges the attorney fee award on jurisdictional grounds, arguing that the trial court's lack of subject matter jurisdiction precluded it from awarding attorney fees under section 425.16.³ We agree and reverse the order awarding attorney fees.

BACKGROUND

In April 2010, plaintiff and the State Bar's Office of Chief Trial Counsel entered into a stipulation resolving two State Bar disciplinary cases against plaintiff. In December 2010, plaintiff sought to revoke the stipulation by filing a petition with the California Supreme Court to set aside the stipulation and dismiss the disciplinary charges against her. After the Supreme Court denied plaintiff's petition, she filed the instant

¹ All further statutory references are to the Code of Civil Procedure unless otherwise stated.

² The special motion to strike is commonly referred to as an anti-SLAPP motion.

³ Plaintiff abandoned her appeal of the order granting the anti-SLAPP motion and the judgment of dismissal based on that order. Her appellate challenge is limited to the order awarding attorney fees.

action, seeking the same relief as well as monetary damages and a jury trial on the State Bar disciplinary charges.

The State Bar filed a demurrer, as well as an anti-SLAPP motion. The trial court granted the anti-SLAPP motion, finding that the State Bar had met its burden of demonstrating that each of plaintiff's causes of action arose from State Bar disciplinary proceedings -- a protected activity under section 425.16. The trial court further found that plaintiff failed to establish a reasonable probability of prevailing on the merits because, among other reasons, the trial court lacked jurisdiction to adjudicate plaintiff's claims. The trial court then granted the State Bar's motion for \$2,575.04 in attorney fees as the prevailing party under section 425.16, subdivision (c), and this appeal followed.

DISCUSSION

Section 425.16, subdivision (c) mandates an award of attorney fees and costs to a defendant who prevails on an anti-SLAPP motion.⁴ (§ 425.16, subd. (c); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) Whether or not the trial court had jurisdiction to award attorney fees pursuant to section 425.16, subdivision (c) is a question of law that we review de novo. (*Brown v. Desert Christian Center* (2011) 193 Cal.App.4th 733, 737 (*Brown*).

The trial court properly determined that it did not have subject matter jurisdiction over the claims alleged in plaintiff's complaint. The power to discipline attorneys in California is an "expressly reserved, primary, and inherent power" of the California

⁴ Section 425.16, subdivision (c) provides: "(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5. [¶] (2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, 11130.5, or 54690.5."

Supreme Court. (*Obrien v. Jones* (2000) 23 Cal.4th 40, 48; *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557; Bus. & Prof. Code, § 6100.) Although the State Bar Act originally allowed any court to administer attorney discipline, “in 1951, the State Bar Act was amended to exclude superior courts and appellate courts from exercising such jurisdiction, leaving the Supreme Court as the sole judicial entity with jurisdiction over attorney discipline. (Bus. & Prof. Code, §§ 6087, 6100; *Jacobs v. State Bar* (1977) 20 Cal.3d 191, 196.) Thus, in California, the inherent judicial power of the superior court does *not* extend to attorney disciplinary actions. That power is exclusively held by the Supreme Court and the State Bar, acting as its administrative arm. [Citation.]” (*Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1710.)

“[I]n the absence of subject matter jurisdiction, a trial court has no power ‘to hear or determine [the] case.’ [Citation.]” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196.) The trial court’s lack of subject matter jurisdiction in this case precluded it from ruling on the State Bar’s anti-SLAPP motion, an adjudication that necessarily involved a determination of the merits of plaintiff’s claims. “Section 425.16 . . . establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation [¶] [G]ranted a motion to strike under section 425.16 results in the dismissal of a cause of action on the merits” (*Varian Medical*, at pp. 192-193.)

The procedural posture of the instant case distinguishes it from *Brown, supra*, 193 Cal.App.4th 733, on which the State Bar relies as support for the attorney fees award under section 425.16. *Brown* involved the dismissal of an action based on lack of subject matter jurisdiction after the trial court determined that the matter came within the exclusive jurisdiction of the workers’ compensation system. (*Brown*, at p. 737.) At issue was the defendant’s request for costs pursuant to section 1032 as the prevailing party in the action. The appellate court in *Brown* concluded that a trial court has the authority “to decide in the first instance whether it has jurisdiction of the subject matter and the parties, and whether it also has jurisdiction to act in a particular manner. . . .” [Citations.]” (*Brown*, at p. 740.) After concluding that the trial court had properly