

S214058  
Court of Appeal Case No.B242054  
Super.Ct No. BC452239

SUPREME COURT  
**FILED**

OCT 15 2014

Frank A. McGuire Clerk  
Deputy

IN THE CALIFORNIA SUPREME COURT

PATRICIA J. BARRY,

Plaintiff/Appellant/Respondent,

vs.

STATE BAR OF CALIFORNIA,

Defendant/Respondent/Petitioner.

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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,  
Honorable Deirdre Hill Presiding.

**PATRICIA BARRY'S ANSWERING BRIEF  
THE BRIEF IS THE OPENING BRIEF WHICH BARRY  
FILED IN THE COURT OF APPEAL**

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**I**  
**STATEMENT OF APPEALABILITY AND JURISDICTION**

This is an appeal from the award of attorney fees to Defendant STATE BAR OF CALIFORNIA (“Bar”) based on the granting of the Bar’s anti-SLAPP Motion to Strike the Complaint.<sup>1</sup>

On November 04, 2011, the Bar filed and served Notice Of Entry of Order Granting Defendant's Motion to Strike (anti-SLAPP) and Taking Defendant's Motion to Strike and Taking Defendant's Demurrer off Calendar. Appendix in Lieu of Clerk’s Transcript on Appeal (“APP.”) 013. On November 28, 2011, the Bar filed Motion for Attorney Fees. APP. 025. On March 26, 2012, the Court heard oral argument on the motion. See Reporter’s Transcript of Proceedings, (“RT”) March 26, 2012, pp.1-6. The Court took the matter under submission and awarded attorney fees on March 27, 2012. APP.042. On April 19, 2012, the Bar filed and served (mailed) Notice Of Entry of Order Granting Motion for Attorney's Fees Following Grant of Special Motion to Strike. APP.042. On June 18, 2012, Barry filed Notice of Appeal. APP. 047. The appeal is timely with respect to the order awarding attorney fees, and this Court has jurisdiction

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<sup>1</sup>  
In pre-brief submissions, Barry stated she was appealing from both the anti-SLAPP motion and from the award of attorney fees. She is only appealing from the award of attorney fees.

to consider Barry's appeal from the order.

## **II ISSUE BEFORE THE COURT**

If the trial court grants a special motion to strike under Code of Civil Procedure section 425.16 on the ground that the plaintiff has no probability of prevailing on the merits because the court lacks subject matter jurisdiction over the underlying dispute, does the court have the authority to award the prevailing party the attorney fees mandated by section 425.16, subdivision (c)?

Barry takes issue with the framing of the issue because the trial court considered the merits of the lawsuit while at the same time stating it had no subject matter jurisdiction to do so. "Prevailing on the merits" means just that: "Prevailing on the merits". If no subject matter jurisdiction, the merits are never reached because the Court has no legal authority to proceed to the merits if it determines it has no jurisdiction.

The issue of subject matter jurisdiction must be made in a general demurrer. See Code of Civ. Proced. Sec.430.10:

The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:

- (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading.

The anti-SLAPP is a special demurrer addressed to the merits of the case to prove that the lawsuit is based on First Amendment and/or petitioning activity of the defendant which requires a fact analysis. The anti-SLAPP statute, Code of Civil Procedure Section 425.16 specifically so states:

- (b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
- (2) In making its determination, the **court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.** emphasis added.

The Court is conflating two very distinct legal doctrines.

Determination of jurisdiction is a threshold matter having nothing to do with the “merits” of the case.

### **III RELIEF SOUGHT**

That the Court dismiss the petition on the ground it was improvidently granted, or alternatively, affirm the Court of Appeals ruling and award costs to Barry. There was no need to insure uniformity of decision because all Courts regularly grant demurrers for lack of subject matter jurisdiction as should have been done in this case. The ruling does not affect a large class of people or an important issue of law.

Barry has already made it clear what her position is, which is that the Bar is angry that it lost and in a published decision. It should have negotiated away the award of attorney fees when Barry filed the appeal once she made it clear she was only appealing the order of fees, and not the underlying judgment of dismissal. That, in this writer's experience, is what most defense attorneys do once they won the underlying case and the losing party is willing to dismiss the appeal in exchange for waiving the attorney fee award when it is a small award as in this case.

It has admitted in documents filed in this court that it is worried about itself as an institution, and not the public interest.



**IV**  
**STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT**

Plain and simple, the Court ruled in its order on the anti-SLAPP motion that it had no subject matter jurisdiction over any of the causes of the action in the complaint. APP.021, Yet it ruled on the merits of the case by granting the Bar's anti-SLAPP motion and then awarding attorney fees. APP.023 The Bar filed both a demurrer and anti-SLAPP motion on May 31, 2011. APP. 008, 011. Danielle Lee, Dep. Trial Counsel, ("Lee") defended the lawsuit. In the demurrer, Lee demurred to all causes of action leading with the argument that the Court did not have (subject matter) jurisdiction over the complaint and over each and every cause of action. APP.009-010 Neither Barry nor Lee requested the Court to determine whether it had jurisdiction before ruling on the anti-SLAPP motion. Nor did the Court – although alerted by the demurrer – take it upon itself to address first the demurrer which given its ruling on jurisdiction would have mooted the anti-SLAPP motion.

The Court did the reverse of what it should have done. It ruled – adversely to Barry – on the merits of the anti-SLAPP motion although at the same time stating in the body of its order that it did not have jurisdiction over any of the causes of action adopting the arguments of the Bar on this issue. The anti-SLAPP motion goes to the very substance and merits of the

lawsuit – indeed, the two prong analysis requires the plaintiff to marshal her evidence and **prove** she has a likelihood of prevailing on the merits – nonetheless, the Court still granted the anti-SLAPP motion. The Court ruled that the demurrer was moot. APP.013:24-26.

Lee filed a Motion for Attorney fees. APP.025. Jurisdiction can be raised at any time. Barry raised the issue in her opposition to Motion for Attorney Fees. APP.027. Lee filed a reply addressing the issue of jurisdiction. Barry also argued the issue at the hearing on fees. RT 2-3. Judge Hill promised that she would review the file again and that her decision would come in the mail. RT 4:1-2. The decision came in the mail ordering fees but with no explanation or justification as to how the Court had jurisdiction to order the fees, having divested itself of all subject matter jurisdiction. APP. 044.

Either the Court has subject matter jurisdiction or it does not. If no jurisdiction, then the anti-SLAPP ruling cannot stand, and the order awarding attorney fees should be reversed. Since Barry does not challenge the judgment of dismissal, the dismissal still stands.

## **V STANDARD OF REVIEW**

The district court's decision whether there is subject matter jurisdiction is reviewed *de novo*. See *Atwood v. Fort Peck Tribal Court*

*Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008). *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002); *Pillow v. Bechtel Const., Inc.*, 201 F.3d 1348, 1351 (11th Cir. 2000). When an appeal presents purely a question of law, the standard is de novo review. See e.g.: *County of Contra Costa v. Kaiser Foundation Health Plan Inc.* (1996) 47 Cal.App.4th 237, 241.

**VI**  
**FACTS RELEVANT TO ISSUE ON APPEAL**

1. On December 30, 2010, Barry filed a complaint alleging causes of action against the Bar for Violation of State Bar Rule 2-400( c); Civ. C. Sec.51.9, Sexual Harassment Based on Professional Relationship; violation of § 6085 Bus. & Prof.(e); Article I, Secs. 1, 3, 8, California Constitution; Civ. C. Sec.52.1, Bane Act; 14<sup>th</sup> Amendment - Due Process Clause based on Inherent Bias of State Bar Proceeding and Its Officials.

APP.001

2. On May 31, 2011, the Bar filed demurrer and anti-SLAPP motion. APP.008, 011.

3. Barry filed an opposition and requested a stay pending Supreme Court ruling on her Petition for Writ of Certiorari.

4. On October 19, 2011, the Court granted the anti-SLAPP motion and ruled that the demurrer was moot. APP.013-023.

5. In the order granting the anti-SLAPP motion, the Court ruled

it had no subject matter jurisdiction. APP.021

6. The Bar filed a motion for attorney fees on November 28, 2011. APP.025

7. Barry filed an opposition in which she argued that the Court could not award attorney fees because it had ruled that it had no subject matter jurisdiction. APP.027

8. In its tentative ruling on the motion for fees, the Court ruled that Barry's argument was nonsensical and that the Court had authority to award fees.

9. Barry argued the issue of jurisdiction at the hearing on the motion for fees. RT 2-3.

10. The Court stated it would look again at the file and mail the decision. RT 4:1-2.

11. The Court did mail an order affirming the award of attorney fees but did not explain how it had jurisdiction to do so. APP.044.

**VII  
ARGUMENT  
THE COURT HAVING DIVESTED ITSELF OF SUBJECT MATTER  
JURISDICTION COULD NOT RULE ON THE ANTI-SLAPP  
MOTION AND AWARD ATTORNEY FEES.**

" 'Lack of jurisdiction' is a term used to describe situations in which a court is without authority to act. (*Abelleira v. District Court of Appeal (1941)* 17 Cal.2d 280, 288-291 [109 P.2d 942, 132 A.L.R. 715].) In its most fundamental sense, lack of jurisdiction means an

entire absence of power to hear the particular subject matter of the case. (*Id.*, at p. 288.) The term also relates to the court's inability to render judgments against individuals who have not properly been made parties to an action. (*Ibid.*) *Colin v. Posio* (1993) 16 Cal. App. 4th 1451.

Having ruled it was divested of jurisdiction, the only act the Court could take was to sustain the demurrer without leave to amend solely on the ground that it lacked jurisdiction. Thus, the ruling on the anti-SLAPP motion is void and the Court lacked jurisdiction to award attorney fees. Danielle Lee had filed the same challenges, demurrer and anti-SLAPP motion, to the complaint in *Kay v. State Bar of California*, No. CGC 10-496869 filed in San Francisco Superior Court. Phil Kay was an attorney (who is now deceased) suing the Bar as Barry was doing. Lee knew how San Francisco Superior Court Judge Goldsmith had proceeded in the *Kay* action. He ruled first on the demurrer, found he had no subject matter jurisdiction, and then ruled that the anti-SLAPP motion was moot. See order filed July 29, 2010, in the *Kay* case at APP.034-035. Lee should have alerted both Judge Hill and Barry about the issue of jurisdiction raised in her demurrer and request Judge Hill to rule first on the demurrer and then the anti-SLAPP motion. She did not.<sup>2</sup>

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There can be no question that ruling on the anti-SLAPP motion is a ruling on the merits, and in particular, whether the plaintiff is likely to prevail. "Section 425.16 posits instead a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, *subd. (b)(1)*.) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, *subdivision (e)*' [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.[Citations.] "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute--i.e., that arises from protected speech or petitioning *and* lacks even minimal merit--is a SLAPP, subject to being stricken under the statute." [Citation.]The court must "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based" in making its determination. (§ 425.16, *subd. (b)(2)*.)" *Prediwave Corporation v. Simpson Thacher & Bartlett LLP*.(2009) 179 Cal.

Nonetheless, Judge Hill did rule that the Court had no subject matter jurisdiction over the causes of action but that ruling was made in her ruling on the anti-SLAPP motion which motion she granted while deeming the demurrer moot, when she should have done the reverse. APP. 021

In *Elwood v. Drescher*, 456 F.3d 943, 948 (9th Cir. 2006), a case on which Barry's disciplinary proceeding was based, the award of attorney fees to the jurists was reversed because the district court dismissed for lack of jurisdiction. Since the case was dismissed for lack of jurisdiction, the Court ruled, there was no prevailing party. Only a prevailing defendant is entitled to attorney fees under Sec.425.16( c). This means on the merits, not just a dismissal for lack of jurisdiction.

The Bar's demurrer should have been sustained without leave to amend for lack of jurisdiction over the entire action and all causes of action, and the anti-SLAPP motion deemed moot.

Barry may raise the issue of lack of jurisdiction at any time. She did so in her opposition to the Bar's Motion for Attorney Fees.

*"Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal. (DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal.3d 517, 520, fn. 1)" National Union Fire Insurance Company of Pittsburgh, Pa. V. Stites Professional Law*

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App. 4th 1204.

*Corporation*, (1991) 235 Cal. App. 3d 1718

Barry raised the issue at oral argument. RT 2-4. The Court stated it would review the file again and issue a ruling. RT 4:1-2. The Court issued a ruling but was silent on how it had jurisdiction to award attorney fees when it had already ruled it had no subject matter jurisdiction. APP. 044

In the *Elwood v. Drescher* case, Barry did not raise the jurisdictional issue in the district court or in the Ninth Circuit. One of the judges on the Ninth Circuit panel did so. Barry believes it was Judge Thomas.

While not raised by the parties, we must *sua sponte* consider whether the district court lacked jurisdiction to award attorneys' fees to the state defendants. [citation] Where a claim is dismissed for lack of subject matter jurisdiction, the defendant is not a prevailing party within the meaning of § 1988, and the district court accordingly lacks jurisdiction to award attorneys' fees. *Elwood v. Drescher*, *supra*.

The Court then discussed the various grounds on which the judges were dismissed and ruled that dismissal for all of them was based on lack of jurisdiction or in two instances, because the Court declined to take jurisdiction. It reversed the award of attorney fees to those jurists. (But still according to the Bar Barry was guilty of moral turpitude – right up there with rapists, murderers, and thieves – for winning this published decision and reversing three sizable awards of attorney fees on behalf of her clients.)

This has been the uniform reasoning of both state and federal courts,

that when a court dismisses for lack of jurisdiction, it cannot award attorney fees because the Court never reaches the merits of the lawsuit and thus, there is no prevailing party. For example, in *in Re Homer Lee Knight; Donzelle Knight, Debtors*, 207 F.3d 1115 (9<sup>th</sup> Cir. 1999), the Ninth Circuit reversed an order of attorney fees based on ERISA where the bankruptcy judge had dismissed the adversary lawsuit based on lack of jurisdiction.

The Ninth Circuit noted:

CSCAC [Carpenters Southern California Administrative Corporation] argues on appeal that, if the district court lacked subject matter jurisdiction under ERISA to hear its claim, it similarly lacked jurisdiction to the statute's cost- and fee-shifting provision, section 502(g)(1), 29 U.S.C. § 1132(g)(1) We have never directly considered a court's authority to award costs under section 502(g)(1) when the court lacked subject matter jurisdiction over the action in the first place. Nevertheless, CSCAC's contention that a court may not apply section 502(g)(1) when it lacks subject matter jurisdiction is supported by our case law as well as the unanimous conclusions of the other courts that have squarely addressed the issue. *Id.*, at 1117.

The Court discussed a case where it had reversed an order of attorney fees awarded pursuant to 42 U.S.C. Sec.1988 for the same reason:

In *Branson v. Nott*, 62 F.3d 287 (9<sup>th</sup> Cir. 1995), we indicated that lack of subject matter jurisdiction over a suit precluded a district court from applying the fee-shifting provision of the substantive statute under which the suit was brought. We explained the logic of this proposition by noting that "fee shifting provisions cannot themselves confer subject matter jurisdiction" that is otherwise absent. *Id.* at 292-93 (quoting *W.G. ex rel. D.G. v. Senatore*, 18 F.3d 60, 64 (2<sup>d</sup> Cir. 1994)).

Branson involved a district court's reliance on the civil rights fee-



shifting provision, 42 U.S.C. § 1988, to award attorneys' fees to the successful defendants in a civil rights action brought under 42 U.S.C. § 1983. We reversed the district court's award:

Because the district court lacked subject matter jurisdiction over [the] purported civil rights claim in the first instance, it also lacked the power to award attorney's fees under the civil rights attorney fee statute. By itself, § 1988 does not provide the district court with jurisdiction to grant an attorney fee award where subject matter jurisdiction to hear the underlying § 1983 claim is lacking . . . .

The Court ruled that the facts in the case before it

....closely parallel those in *Branson*. Here, the district court held that it lacked subject matter jurisdiction over the case (which we must accept as given, since the decision has not been appealed). Nevertheless, the district court relied on authority under ERISA to award costs to a successful defendant. Under the logic of *Branson*, even though the district court may have had the authority to impose sanctions under Rule 11 or award "just costs" under 28 U.S.C. § 1919, the court had no authority to apply the fee-shifting provision of ERISA.[fn 2 omitted.]

The same rationale is applied in cases by state courts of appeal. In *Goldstein v. Beck*, 2006 Cal. App. Unpub. LEXIS 11570, this Court denied attorney fees because the Court had dismissed for lack of subject matter jurisdiction. It also ruled that even if the Court had jurisdiction, neither party was the prevailing party based on several statutes offered by the parties to support that claim:

In this appeal from an order dismissing the action for lack of subject matter jurisdiction, we conclude that the trial court had no jurisdiction to award attorney fees and costs, and even if it did the trial court correctly found that neither party was the prevailing party

for purposes of an award of attorney fees and costs pursuant to *Civil Code section 1717* or for purposes of an award of costs pursuant to *Code of Civil Procedure section 1032*. We further conclude that Beck's settlement offer was ineffective to trigger the cost-shifting of *Code of Civil Procedure section 998*. Having deferred a ruling on plaintiff's motion to dismiss part of the appeal, we now deny that motion. We affirm the order dismissing the action for lack of subject matter jurisdiction.

Cf. *National Union Fire Insurance Company of Pittsburgh, Pa., v.*

*Stites Professional Law Corporation* (1991) 235 Cal. App. 3d 1718:

*Lack of Subject Matter Jurisdiction Was Not Waived Nor Was Stites Barred From Raising the Issue in the Trial Court*

National asserts that the arbitrators' implied determination that they had jurisdiction to resolve the fee dispute was binding on the trial court and Stites waived any objection to the arbitrators' jurisdiction by failing to contest it in the arbitration proceedings. That contention fails. Jurisdiction means different things in different situations. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 287 [109 P.2d 942, 132 A.L.R. 715].) (Lack of "jurisdiction" in its "strict sense" refers to a court's or other tribunal's power or authority over the subject matter of or the parties to a dispute. (*Id.* at p. 288.) Subject matter jurisdiction, in his case meaning the arbitrators' authority or power to adjudicate a certain type of fee dispute, cannot be conferred by consent, waiver, or estoppel. [Citations.] *Id.*, at 1724.

The Court reasoned that since the arbitrators had no jurisdiction over this particular kind of dispute under Busi & Prof C. Sec.6200, it could not deny an attorney fee award or rule on Attorney Stites' billings and professional conduct.

Thus, this Court should declare the anti-SLAPP motion moot and reverse the order of attorney fees.

**VIII  
CONCLUSION**

The trial court ruled it had no subject matter jurisdiction and yet proceeded to grant the anti-SLAPP motion and award attorney fees. Barry raised the issue of jurisdiction in her opposition to the motion for attorney fees. She argued the issue at the hearing on the motion for fees. Yet, the trial court failed to make any ruling on this issue and affirmed the tentative ruling awarding attorney fees to the Bar.

Barry requests that the Court either dismiss the petition because it was improvidently granted or alternatively, affirm the court of appeal published decision and award costs on appeal to her.

DATED: September 29, 2014

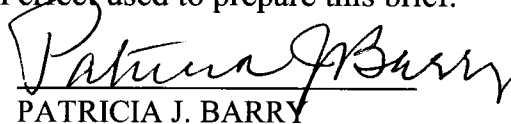
  
PATRICIA J. BARRY

**CERTIFICATE OF COMPLIANCE**

Counsel of Record certifies that the brief is produced using 13-point Roman font including footnotes and contains approximately 3,668 words.

Counsel relies on the word count of Word Perfect used to prepare this brief.

DATED: September 29, 2014

  
PATRICIA J. BARRY

NOTICE OF NO RELATED CASES

This writer is unaware of any cases in this Court which have a  
relation to this case.

DATED: September 29, 2014

  
PATRICIA J. BARRY

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San Francisco, CA 94105

**PRIORITY MAIL:**  
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DANIELLE ADORACION LEE, TRIAL  
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\_\_\_\_\_  
PATRICIA J. BARRY