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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MASSOUD KAABINEJADIAN, Plaintiff and Appellant, v. CHESTER MCGENSY III, et al., Defendants and Respondents.	C072574 (Super. Ct. No. 34201200125779CUPOGDS)

Plaintiff and Appellant Massoud Kaabinejadian, in propia persona, appeals from a judgment dismissing his case against Rabobank, N.A. and its in-house counsel, Chester L. McGensy III (collectively, defendants), following a successful anti-SLAPP[1] motion to strike. This case involves allegations of attorney misconduct in a prior workers compensation matter and civil lawsuit by plaintiff, acting in propia persona, against his former employer, Rabobank. Following the termination of plaintiff's employment, he

[1] SLAPP stands for Strategic Lawsuit Against Public Participation. (See Code Civ. Proc., § 425.16.)

brought an unsuccessful worker's compensation claim and thereafter a civil suit in San Bernardino County for wrongful termination against Rabobank.[2] In the instant case, plaintiff sued Rabobank and McGensy, alleging three causes of action. The first was for abuse of process based on two alleged acts of perjury by McGensy, one during the pendency of the workers compensation matter and the other during the pendency of the wrongful termination case. In a second cause of action, plaintiff claimed intentional infliction of emotional distress (IIED) based on a phone conversation during the pendency of the wrongful termination case in which plaintiff asserts McGensy committed extortion and caused him emotional distress. A third cause of action, against Rabobank for "Respondent [sic] Superior" is based on McGensy's statements and declarations in the abuse of process and IIED causes of action.[3] The trial court granted defendants' special motion to strike, ruling that each of plaintiff's causes of action arose out of protected activity, plaintiff's contention that the communications were illegal was not persuasive, the litigation privilege barred each of plaintiff's causes of action and plaintiff failed to demonstrate a probability of prevailing on the merits. Additionally, the court granted defendants' subsequent post-judgment motions for attorney fees pursuant to Code of Civil Procedure section 425.16, subdivision (c).[4]

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[2] The Fourth District reversed summary judgment against plaintiff, concluding while there was strong evidence plaintiff was terminated for legitimate reasons, there was nevertheless substantial evidence from which a reasonable juror could find those reasons were pretextual. (*Kaabinejadian v. Rabobank, N.A.* (Cal.App.4th Dist. 2018) 2018 WL 2949259, *1.)

[3] This claim necessarily rises and falls with the first two causes of action and we do not discuss it separately herein.

[4] Undesignated section references are to the Code of Civil Procedure in effect at the time of the alleged events.

On appeal, plaintiff contends: (1) the court erred in granting the anti-SLAPP motion because his claims arise from unprotected illegal speech; (2) the litigation privilege is inapplicable because the alleged communications were illegal and he has shown a likelihood of succeeding on his claims sufficient to overcome the anti-SLAPP motion; and (3) the court abused its discretion in awarding attorney fees to defendants.

We conclude that the trial court properly granted the anti-SLAPP motion to strike. Plaintiff's characterization of the litigation communications as perjury and extortion is unpersuasive. Further, plaintiff misapprehends the scope of the *Flatley* illegality exception. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320 (*Flatley*).) Additionally, plaintiff has not demonstrated a probability of prevailing on his claims. And we agree with defendants that the court properly granted their motion for attorney fees, and plaintiff has not carried his burden of showing that the court abused its discretion.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prior Litigation

This case stems from alleged activities in prior litigation between plaintiff and Rabobank. On July 5, 2006, less than six months after plaintiff was hired as a senior vice president and credit administrator for Rabobank, his employment was terminated. Following the termination, on September 20, 2006, plaintiff filed a workers' compensation claim, contending that he suffered severe emotional distress because Rabobank discriminated and retaliated against him based on his national origin. After approximately five years of litigating that claim, the Workers Compensation Appeals Board (WCAB) ultimately ruled against plaintiff. The WCAB concluded that plaintiff did not meet the threshold of compensability for a psychiatric claim under Labor Code section 3208.3, subdivision (d). Plaintiff then filed a petition for reconsideration of the WCAB's ruling and a writ to the Court of Appeal, which were both denied. As part of Rabobank's answer to plaintiff's petition for reconsideration, McGensy signed a

verification of the answer on behalf of Rabobank on September 16, 2011, although the answer was dated September 19, 2011, the same date it was filed.[5] In the verification, McGensy made statements describing reported behavior of plaintiff towards his coworkers, which we discuss in more detail *post*. Plaintiff's petition for reconsideration and writ were both denied.

Following the exhaustion of his appeals on the workers' compensation claim, again representing himself, plaintiff filed a civil complaint in San Bernardino County Superior Court against Rabobank and its employee, Cheryl Walker, on December 1, 2011.[6] In his complaint, plaintiff alleged: (1) national origin discrimination in violation of the California Fair Employment and Housing Act; (2) wrongful termination in violation of public policy; (3) breach of contract; and (4) intentional infliction of emotional distress. Plaintiff then quickly served discovery requests on December 22, 2011. Rabobank and Walker demurred, contending that plaintiff's claims were time-barred. As a result of the pending demurrer, Rabobank and Walker contended that plaintiff's discovery requests were premature and objected to the requests. On February 8, 2012, the trial court sustained the demurrer with leave to amend. Plaintiff then filed his first amended complaint (FAC), alleging the same causes of action, and simultaneously filed motions to compel responses to his discovery requests.

Defendants demurred to the FAC and opposed the motions to compel discovery. In support of her opposition to the motion to compel, Walker submitted a declaration by McGensy dated April 4, 2012. In his declaration, McGensy stated that during the

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[5] The answer was signed by a different attorney. In a subsequent declaration in support of the anti-SLAPP motion, McGensy attested that to his knowledge, "no substantive changes were made to the Answer between the date [he] signed the verification, September 16, 2011, and the date the Answer was filed, September 19, 2011."

[6] Rabobank's outside counsel, Orrick, Herrington & Sutcliffe LLP, represented Walker.

workers' compensation action, plaintiff "required *numerous* Rabobank employees to testify during the trial, and he [] requested and received *voluminous* documents from Rabobank relating to his employment with Rabobank and his termination." (Italics added.)

While the demurrer and motions to compel were pending, on April 10, 2012, McGensy called and spoke with plaintiff on behalf of Rabobank. Plaintiff contends that during that call, McGensy told plaintiff, among other things, that he should withdraw his lawsuit because his case was meritless and told plaintiff that "Rabobank would fight the case since it would cost less money to contest than to settle and that Rabobank had the money and resources to fight plaintiff's case for a long time." Defendants contend that McGensy did not threaten plaintiff, use abusive language, or otherwise speak inappropriately during the phone call.

The parties did not reach a resolution during the phone call, and shortly thereafter, on April 30, 2012, the court sustained Rabobank's demurrer "without leave to amend," dismissed the FAC, and denied plaintiff's motions to compel as moot.

Complaint Allegations

Following the dismissal of his San Bernardino County wrongful termination suit, plaintiff filed a complaint in the instant case on June 4, 2012, in Sacramento County Superior Court against both Rabobank and McGensy, for abuse of process and IIED.[7]

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[7] Plaintiff similarly sued Kathaleen Miller, defense counsel for Rabobank's insurance carrier in the workers' compensation action, in San Bernardino County Superior Court for abuse of process based on alleged misrepresentations in a submission to the WCAB and breach of privacy based on the alleged misuse of a medical records subpoena in violation of federal privacy law. (*Kaabinejadian v. Miller* (Sept. 12, 2014, E057627) [nonpub. opn.]. On appeal, the trial court's ruling granting Miller's anti-SLAPP motion to strike was affirmed, the court concluding that Miller's conduct was protected litigation activity and plaintiff could not establish the probability of success on his claims.

In his cause of action for abuse of process, plaintiff asserted McGensy committed two acts of perjury. First, McGensy allegedly perjured himself in the September 16, 2011, verification he signed as part of Rabobank's answer to plaintiff's Petition for Reconsideration in the workers compensation case. More specifically, plaintiff alleged that McGensy lacked personal knowledge of the statements McGensy made in Rabobank's Answer concerning plaintiff's alleged behavior towards coworkers and that McGensy improperly signed his verification three days before the answer was filed. Plaintiff asserts McGensy could not have had personal knowledge of his conduct because McGensy was hired after plaintiff's conduct allegedly took place. Second, plaintiff alleged that McGensy committed perjury in his April 4, 2012 declaration in support of Walker's opposition to plaintiff's motion to compel discovery responses in the wrongful termination case. Specifically, plaintiff alleged that McGensy misrepresented the "quantity of documents tendered to plaintiff" and "misrepresented the number of Rabobank's employees who actually testified during trial" by declaring that plaintiff "requested and received *voluminous* documents from Rabobank relating to his employment with Rabobank and his termination" and "required *numerous* Rabobank employees to testify during the trial." (Italics added.)

Plaintiff's cause of action for IIED is based on McGensy's alleged comments to plaintiff made during the April 10, 2012 phone call. According to plaintiff's complaint, McGensy "belittled, badgered, harassed and intimidated [p]laintiff with the intent to force him from pursuing and/or to withdraw his lawsuit, alleging and advising [p]laintiff among other things that [p]laintiff has been terminated for misconduct from all of [p]laintiff's prior employers, that [p]laintiff's lawsuit then pending against defendant Rabobank, N.A. was without merit since no attorney would take it on a contingency basis and specifically said that Rabobank would fight the case since it would cost less money to contest than to settle and that Rabobank had the money and resources to fight [p]laintiff's case for a long time."

In his declaration in support of his opposition to defendants' anti-SLAPP motion to strike, plaintiff said the following concerning the phone conversation: "[McGensy] started by stating the purpose of his call to be to learn more about the case, but then he proceeded to criticize in a harsh and demeaning tone and demeanor my intentions, causes of action and attacked me verbally for even filing the [San Bernardino] Action. He told me that if my case had any merit, attorneys would have taken my case on a contingency basis. He accused me of having been terminated from all of my prior employers and that I had a history of litigating my termination from my prior employers. He told me that I had no chance in the [San Bernardino] Action since my Worker's Compensation case had already been declined. He told me that it would be best if I dropped my lawsuit and avoid costing myself and Rabobank all these expenses. He told me that it would cost Rabobank less money to fight my case than to settle and that they had the money and resources to fight my case for a long time. He in a loud and aggressive voice shouted at me when we discussed the fact that Rabobank and Cheryl Walker were lying, obstructing justice, withholding evidence and denying me the right to due process." Plaintiff asserted that the phone call lasted approximately 45 minutes.[8]

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[8] In his appellate briefing, plaintiff attempted to add to the facts set forth in the complaint and his declaration filed in opposition to defendants' anti-SLAPP motion. In his opening brief, plaintiff asserted that McGensy made "repeated threats of financial ruin." In his reply brief, plaintiff asserted that McGensy engaged in "persistent threats of financial ruin to Plaintiff during his lengthy 45-minute diatribe." We do not consider plaintiff's factual assertion of "repeated" or "persistent threats of financial ruin" made outside of the pleadings and evidence submitted in opposition to defendants' motion. (§ 425.16, subd. (b)(2) [in making the determination as to whether defendant's act arises from protected conduct, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based"]; see also *Collier v. Harris* (2015) 240 Cal.App.4th 41, 50 (*Collier*) [we review "the parties' pleadings, declarations and other supporting documents to determine what conduct is actually being challenged"].) Factual assertions made for the first time in appellate briefing is not evidence that we can consider. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163 [review of summary judgment].)

Anti-SLAPP Motion to Strike

On July 18, 2012, defendants filed a special anti-SLAPP motion to strike plaintiff's complaint. In their motion, defendants contended that plaintiff's claims arose from protected activity and plaintiff could not demonstrate a possibility of prevailing on the merits of his claims. Additionally, defendants contended that they were entitled to an award of their attorney fees and costs. Plaintiff opposed the motion, arguing that defendants' activities involved illegal communications not entitled to protection under *Flatley, supra*, 39 Cal.4th at pages 316-320.

The trial court agreed with defendants. The court ruled that plaintiff's claims arose from protected activity, his contention that the communications were illegal was not persuasive, the litigation privilege barred each of plaintiff's causes of action and plaintiff failed to demonstrate a probability of prevailing on the merits. The court further found plaintiff's argument that McGensy's communications constituted perjury and extortion unpersuasive. The court noted that McGensy did not concede his conduct was illegal and ruled that plaintiff's allegation of illegality was not otherwise "conclusively established." The court reasoned, "[n]othing presented by [p]laintiff demonstrates that [] McGensy knowingly and falsely presented declarations or affidavits in the civil action such that it could be said that McGensy committed perjury in violation of the Penal Code." Further, the court ruled that "[n]othing in the evidence demonstrates that the phone call could be deemed criminal extortion in any manner. In sum, [p]laintiff has failed to demonstrate that the subject conduct is conclusively illegal such that [d]efendants cannot rely upon [section] 425.16."

The court went on to note that, in connection with the second prong of the anti-SLAPP analysis, the litigation privilege protects "alleged perjured declarations," citing *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1062 (*Rusheen*). Further, the court reasoned that the litigation privilege also applied to the phone call even if McGensy's conduct during the call "violated the rules of professional conduct as it related directly to the

underlying civil action," relying on *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 909-910 (*GeneThera*). The court further found that plaintiff failed to provide any "evidence to demonstrate that the phone call was not logically connected to the lawsuit." Finally, the court ruled that defendants could bring their request for mandatory attorney fees in a separately noticed motion, attaching copies of the billing records to "allow for a more accurate documentation of the fees and a better opportunity for [p]laintiff to challenge said fees."

Motion for Attorney Fees

Defendants subsequently filed a separate motion for attorney fees. Defendants contended that they were entitled to mandatory attorney fees under section 425.16, subdivision (c), because they prevailed on their anti-SLAPP motion to strike and asked for an award in the amount of $28,986.75. Defendants contended that their attorneys' hourly billing rates and the number of hours expended in defending against plaintiff's claims were reasonable under the lodestar analysis. Plaintiff opposed the motion, contending that because of excessive redactions, the billing records defendants provided failed to sufficiently document the fees incurred. Additionally, plaintiff argued that defendants failed to demonstrate that the fees they requested were actually incurred. Finally, plaintiff contended that the amount of fees requested was unreasonable under the lodestar analysis and if awarded, required substantial downward adjustment.

The trial court issued a minute order granting defendants' motion for mandatory attorney fees; however, the court agreed with plaintiff that the amount of fees requested was excessive and reduced the award. In its written ruling, the court explained it was not persuaded by plaintiff's arguments that the billing records were insufficient and that defendants failed to show that they actually incurred the fees. Specifically, the court noted that "[d]efendants were not required to produce billing records in order to recover their fees," citing *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320 (*Christian Research Inst.*). Additionally, the court ruled that defendants' attorney's

declaration stating that the fees were actually billed to defendants was sufficient to prove that they were incurred. Finally, in ruling that the amount of fees defendants requested was excessive, the trial court rejected the attorney's declaration "on information and belief" that the fees charged were " 'consistent with the prevailing market rate for attorneys at comparable law firms' " in the Northern California area. The court disregarded the declaration on information and belief as hearsay and ruled that defendants "failed to demonstrate that the hourly rates charged by their attorneys are reasonable."

The court then relied on its own experience in the Sacramento area legal community to calculate the reasonable rates for defendants' three attorneys based on their relative experience as follows: "Patricia Gillette, partner at $500/hr (reduced from $787.50/hr); Kristen Jacoby, senior associate at $350/hr (reduced from $585/hr); and Craig Wickersham at $300/hr (reduced from $405/hr)." The court also reduced the total number of hours awarded from 63.2 hours to 45 hours because the motion did not "involve particularly complex issues but rather the straightforward issue of whether [p]laintiff could assert claims against [d]efendants based on [d]efendants' litigation activities in other cases," a "well settled" issue in California case law. Additionally, the court found that the billing records disclosed duplicative work among the three attorneys. The court ruled that a reduction in hours to the following was appropriate: "2 hours for Attorney Gillette at $500/hr (reduced from 5.9 hours), 3 hours for Attorney Jacoby at $350/hr (reduced from 6.2 hours) and 40 hours for Attorney Wickersham at $300/hr (reduced from 51.1 hours)." Accordingly, the court awarded defendants a total of $14,050.00 in fees pursuant to section 425.16, subdivision (c), an approximate 50 percent reduction.

The court declined plaintiff's request for a statement of decision in connection with its ruling, citing *In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 981 (*In re Marriage of Falcone*) and *Gorman v. Tassajara Development Corp.* (2009) 178

Cal.App.4th 44, 65, for the proposition that "a trial court is not required to issue a statement of decision for an attorney fee award."

DISCUSSION

I. The Anti-SLAPP Motion to Strike

A. The Anti-SLAPP Statute

"To combat lawsuits designed to chill the exercise of free speech and petition rights (typically known as strategic lawsuits against public participation, or SLAPPs), the Legislature has authorized a special motion to strike claims that are based on a defendant's engagement in such protected activity." (*Park v. Board of Trustees of the California State University* (2017) 2 Cal.5th 1057, 1060 (*Park*).) Thus, section 425.16 provides, inter alia, that "[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." (§ 425.16, subd. (b)(1).) Subdivision (e) of section 425.16 provides in pertinent part: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law."

A special motion to strike involves a two-step process: " 'First, the defendant must establish that the challenged claim arises from activity protected by section 425.16.' [Citation.] '[H]owever, it is not enough to establish that the action was filed in response to or in retaliation for a party's exercise of the right to petition. [Citations.] Rather, the

claim must be *based on* the protected petitioning activity.' " (*Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1161-1162 (*Sheley*).) In other words, "[a] claim arises from protected activity when that activity *underlies or forms the basis* for the claim." (*Park, supra*, 2 Cal.5th at p. 1062, italics added.) "[T]he 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." (*Id*. at p. 1063.) Courts thus "consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (*Ibid*.)

"Second, '[i]f the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success.' [Citation.] The plaintiff must do so with admissible evidence. [Citation.] This second step has been described as a ' " 'summary-judgment-like procedure.' " ' [Citation.] A court's second step 'inquiry is limited to whether the [plaintiff] has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment.' [Citation]" (*Sheley, supra*, 9 Cal.App.5th at p. 1162.) "[A] plaintiff need only establish their cause of action has 'minimal merit.' " (*Cuevas-Martinez v. Sun Sand Salt, Inc.* (2019) ___ Cal.App.4th ___, ___; 2019 WL 2385161, *4 (*Cuevas-Martinez*).)

" 'Only a [claim] 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.] [¶] 'On appeal, we review the trial court's decision de novo, engaging in the same two-step process to determine, as a matter of law, whether the defendant met its initial burden of showing the action is a SLAPP, and if so, whether the plaintiff met its evidentiary burden on the second step.' " (*Sheley, supra*, 9 Cal.App.5th at p. 1162.)

1. The "Arising From" Prong

a. Protected Activity

Plaintiff contends that his causes of action did not arise from an act in furtherance of the right of petition. We disagree.

To satisfy the "arising from" requirement, the defendant must "demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the . . . categories described in [section 425.16,] subdivision (e)." (*Park, supra*, 2 Cal.5th at p. 1063.) However, a "[d]efendant does not have to 'establish [his] actions are constitutionally protected under the First Amendment as a matter of law." (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281 (*Birkner*).) Rather, "a defendant need only make a prima facie showing that the underlying activity falls within the ambit of the statute." (*Flatley, supra*, 39 Cal.4th at p. 317; see also *Birkner,* at p. 281.) As we have noted, in ruling on this prong, "courts should consider the elements of the challenged claim *and what actions by the defendant supply those elements and consequently form the basis for liability*." (*Park*, at p. 1063, italics added.) In other words, we determine whether a claim is *based on* protected activity. (*Sheley, supra*, 9 Cal.App.4th at pp. 1161-1162.) In doing so, we "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); see also *Collier, supra*, 240 Cal.App.4th at p. 50.) We accept plaintiffs' *evidence* as true for purposes of our analysis. (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 733, italics added.)

As noted, section 425.16, subdivision (e), expressly defines an " 'act in furtherance of a person's right of petition'" to include "any written or oral statement or writing made before a . . . judicial proceeding, or any other official proceeding authorized by law" and "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body." (§ 425.16, subd. (e)(1), (2).) We

agree with the trial court that all of McGensy's statements alleged by defendant as the basis for his claims fall squarely within section 425.16, subdivision (e)(1) and (2).

Plaintiff alleges the tort of abuse of process in his first cause of action. Abuse of process, arises when the court's process is used to accomplish a purpose for which it was not designed. (*Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009, 1019 (*Drum*).) This tort "has been 'interpreted broadly to encompass the entire range of " 'procedures' " incident to litigation." (*Rusheen, supra*, 37 Cal.4th at p. 1057.) The elements of a cause of action for this tort are: "(1) an ulterior motive; and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings." (*Ibid*.) Plaintiff based his abuse of process claim on the allegations that McGensy perjured himself in signing a verification and declaration in previous litigation with plaintiff. This purported perjury is the willful act asserted to establish the second element. However, California courts have repeatedly held that "anti-SLAPP protection for petitioning activities applies not only to the filing of lawsuits, but extends to conduct that relates to such litigation, including statements made in connection with . . . litigation. [Citation.] Indeed, courts have adopted 'a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16.' " (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537 (*Kolar*).) Consistent with this expansive view, as we next discuss, numerous courts have held that litigation-related statements are protected and within the scope of section 425.16, subdivision (e), even those statements that are false or perjurious.

In *Rusheen, supra*, 37 Cal.4th at page 1048, our Supreme Court held that the trial court properly granted an anti-SLAPP motion on an abuse of process claim arising from the plaintiff's execution of a default judgment procured through the filing of allegedly false declarations of service. (*Id.* at p. 1065.) In addressing the first prong of the anti-SLAPP analysis, the court explained that " '[a] cause of action "arising from" [a] defendant's litigation activity may appropriately be the subject of a section 425.16

motion to strike.' " [Citations.] The court explained that " '*[a]ny* act' includes communicative conduct such as the filing, funding, and prosecution of a civil action [citation]," including "qualifying acts committed by attorneys in representing clients in litigation." (*Id.* at p. 1056, italics added.) Similarly, in *Summerfield v. Randolph* (2011) 201 Cal.App.4th 127, the court held that allegedly false affidavits filed in support of litigation constitute protected activity. (*Id.* at p. 136.) In *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, the court held that "whether or not a defendant's statements were false does not determine whether they constitute protected activity for purposes of the SLAPP statute" because the statute "pertains to '*any* written or oral statement or writing made in connection with an issue under consideration or review by a judicial body.' " Likewise, in this case, plaintiff's claims arise from the protected litigation-related activities of filing a verification with an answer and an attorney declaration, even if the statements counsel made therein contained falsehoods. These activities are thus protected under section 425.16.

Plaintiff's cause of action for IIED is also based on litigation-related activities. The elements of a cause of action for IIED are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) severe emotional suffering; and (3) actual and proximate causation of the emotional distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-51.) Plaintiff based his IIED claim on his allegation concerning the statements McGensy made during the April 10, 2012 phone call. It appears that this is the conduct plaintiff asserts satisfies the "outrageous conduct" requirement in the first element.

Plaintiff asserts in his complaint and his declaration in opposition to defendants' anti-SLAPP motion to strike that during the phone conversation, McGensy intentionally caused plaintiff emotional distress by telling plaintiff, in substance: (1) all of his previous employers had terminated him for misconduct; (2) he had a history of litigating his termination from previous jobs; (3) his case was meritless as evidenced by the fact

that no attorney would take it on a contingency basis; (4) he had no chance to win his lawsuit; (5) Rabobank would fight the case since it would cost less money to contest than to settle; and (6) Rabobank had the money and resources to fight plaintiff's case for a long time. Plaintiff also asserted that McGensy had a "harsh and demeaning tone" during the conversation and "attacked [him] verbally." When the conversation turned to allegations that Rabobank and Walker were lying, McGensy "shouted at [plaintiff] in a loud and aggressive voice." According to plaintiff's complaint, he was "belittled, badgered, harassed and intimidated" by McGensy. Although omitted from his complaint, plaintiff asserted in his declaration submitted in opposition to the anti-SLAPP motion that McGensy "told [plaintiff] it would be best if [plaintiff] dropped [his] lawsuit and avoid costing myself and Rabobank all these expenses."[9]

Settlement discussions are protected speech within section 425.16, subdivision (e)(2). (*Optional Capital, Inc. v. Akin Gump Straus, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 114 (*Optional Capital*); *GeneThera, supra*, 171 Cal.App.4th at pp. 905-906.) Because plaintiff elected to represent himself in this lawsuit, McGensy communicated with him as opposing counsel.[10]

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[9] In McGensy's declaration in support of defendants' anti-SLAPP motion, he did not deny saying the things plaintiff alleges he said in the complaint. However, he declared that he did not threaten plaintiff, raise his voice or use abusive language. He said he called defendant because although he thought their pending demurrer would be successful, he thought plaintiff would appeal the ruling. He declared, "The purpose of the call was to find a reasonable resolution to the Civil Action and not drag out the continuing litigation between the parties."

[10] In his appellate briefing, plaintiff asserts that McGensy had "knowledge of the special vulnerability of Plaintiff as a Pro Per." It is well-settled that litigants representing themselves are held to the same standards as lawyers, and a litigant appearing in pro per is entitled to no greater consideration than attorneys. (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639.) "[R]equiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975,

Plaintiff asserts that no offer was made to settle the case during the phone conversation and McGensy was never going to make an offer to settle. Thus, according to plaintiff, because there was no "bona fide or legitimate attempt to settle," the communication was not protected. On this point, he relies on *Monex Deposit Co. v. Gilliam* (C.D. Cal. 2010) 680 F.Supp.2d 1148 (*Monex*), asserting it stands for the proposition that communication that is not a "bona fide settlement discussion or offer but rather misconduct" takes any such communication out of the protection of section 425.16. Plaintiff's reliance on *Monex* is misplaced because it does not stand for the proposition asserted. The district court in *Monex* never even used the term, "bona fide settlement discussion." *Monex* involved prelitigation communication and the evidence established that counsel made a settlement demand when *future litigation* was not contemplated in good faith and was not under serious consideration. (*Monex*, at pp. 1161-1162 [litigation privilege applies to prelitigation communication only when it relates to litigation that is contemplated in good faith and under serious consideration].) Plaintiff also relies on *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408 (*Furhman*), another case involving a prelitigation demand for settlement where the court noted the litigation privilege applies only when "the communication has some relation to a proceeding *that is contemplated in good faith and under serious consideration*." (*Fuhrman*, at pp. 421-422.) The instant case is different. We are not faced with a situation where the prospect of future litigation is questionable and a prospective plaintiff makes a demand. Here, the communication was by defendants during pending litigation.

As the court in *GeneThera* observed, "[a]n attorney's communication with opposing counsel on behalf of a client regarding pending litigation directly implicates the right to petition and thus is subject to a special motion to strike." (*GeneThera, supra*, 171

985.) For this reason and the reason that a factual assertion made only in appellate briefing is not evidence, we reject plaintiff's claim about McGensy's knowledge of "his special vulnerability of Plaintiff as a Pro Per."

Cal.App.4th at pp. 907-908.) Thus, *any* conversation during which an attorney seeks to achieve a resolution to litigation, whether by making an offer, negotiating proposed settlement grounds or pointing out to the opposing party the deficiencies in the opposing party's case and the cost of litigation in hope of achieving a dismissal, are within the scope of section 425.16, subdivision (e)(1) and (2).

We conclude that the speech forming the basis of plaintiff's claims in his first two causes of action is within the scope of section 425.16, subdivisions (e)(1) and (2).

b. The *Flatley* Exception

Plaintiff contends that his claims are not based on protected litigation-related activity because McGensy's statements and declarations were illegal misconduct under *Flatley.* In *Flatley*, our Supreme Court held "where a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but *either the defendant concedes*, *or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law*, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Flatley, supra*, 39 Cal.4th at p. 320, italics added.) This is because a defendant whose assertedly protected activity is "illegal as a matter of law" is not protected by constitutional guarantees of free speech and petition. (*Id*. at p. 317.) To be illegal in this context requires that the conduct be a violation of criminal law. (*Aron v. WIB Holdings* (2018) 21 Cal.App.5th 1069, 1083; *Collier, supra*, 240 Cal.App.4th at p. 55) In *Flatley*, the court concluded that "based on the specific and extreme circumstances of the case," the defendant's conduct therein, which amounted to criminal extortion as a matter of law, was not entitled to the protection of the anti-SLAPP. (*Id*. at pp. 328, 332-333 & fn. 16.)

Plaintiff contends that the *Flatley* illegality exception applies to the conduct in this case, arguing that McGensy committed perjury and extortion. However, plaintiff cites no authority extending *Flatley* to the situation at issue here, where (1) the defendant does not

concede the illegality or (2) the evidence does not "conclusively establish" illegality "as a matter of law." Indeed, court after court has recognized that the *Flatley* exception is a "narrow" one to be applied only in those two circumstances. (*Optional Capital, supra*, 18 Cal.App.5th 95, at p. 115, fn. 7 ["A long line of cases have concluded in the wake of *Flatley* that its exception for illegal conduct is a 'very narrow' one"]; *Collier, supra*, 240 Cal.App.4th at p. 54; *Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1478 ["the exception for illegal activity is very narrow and applies only in undisputed cases of illegality"]; *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 384, 386 [characterizing the *Flatly* circumstances as "narrow" and also concluding this was not "one of those *rare cases* in which there is uncontroverted and uncontested evidence that establishes the crime as a matter of law"].)

We agree with the trial court that defendants did not concede the alleged illegality. Nor does the evidence conclusively establish that McGensy engaged in illegal conduct as a matter of law. Contrary to plaintiff's argument, the record does not contain conclusive evidence of criminal conduct bringing these litigation-related activities within the ambit of *Flatley*.

Plaintiff cites *Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1464 (*Kappel*), for the proposition that a false declaration under oath is illegal misconduct, and further contends that allegation is sufficient to demonstrate a probability of success on his abuse of process claim. *Kappel* was not a SLAPP case. In *Kappel* an attorney sued a process server and his employers after the process server's failure to serve the attorney with a malpractice action resulted in a default judgment against the attorney. The process server had executed a false declaration stating that he had personally served the attorney. (*Kappel*, at pp. 1461-1462.) On appeal, the court reversed the trial court's order sustaining a demurrer, concluding that the attorney's complaint pleaded the tort of abuse of process. (*Id*. at p. 1464.) In this context, the court reasoned, "[w]hen, as here, plaintiff alleged that a false declaration of service was executed, the allegation does not involve

merely an absence of care, it is potentially an intentional act, i.e., conscious wrongdoing. If the false execution is intentional, it cannot be regarded as a technical mishap." It is this quotation upon which plaintiff relies. We agree with the quote as far as it goes, but it has nothing to do with the application of *Flatley*.

Regarding plaintiff's perjury allegations, not only is the evidence of perjury nonconclusive, but as we discuss in more detail *post*, plaintiff has not demonstrated a probability of prevailing on the abuse of process cause of action grounded on the alleged perjury. We also reject plaintiff's claim of extortion during the phone conversation as the *Flatley* crime.

Regarding the phone call, plaintiff fails to discuss the elements of extortion. Penal Code section 518 in effect at the time of the phone call provided in pertinent part: "Extortion is the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear." Penal Code section 519 in effect at the time of the phone call defined the term "fear" within the meaning of Penal Code section 518. "Fear, such as will constitute extortion, may be induced by *a threat*, either: [¶] 1. To do an *unlawful injury* to the person or property of the individual threatened or of a third person; or, [¶] 2. To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or, [¶] 3. To expose, or to impute to him, or them any deformity, disgrace or crime; or, [¶] 4. To expose any secret affecting him or them." (Italics added.) Only threats that fall within one of these four categories are extortionate. (*People v. Umana* (2006) 138 Cal.App.4th 625, 639.) Based on plaintiff's own complaint and declaration, there is no evidence of the requisite threat here.

There was nothing extortionate about telling plaintiff all of his previous employers had terminated him for misconduct, he had a history of litigating his termination from previous jobs, his case was meritless as evidenced by the fact that no attorney would take it on a contingency basis and he had no chance to win his lawsuit. This leaves only McGensy's statements that Rabobank would fight the case since it would cost less money

to contest than to settle, it had the resources to do so and "it would be best" if plaintiff dropped his lawsuit to avoid the litigation cost both he and Rabobank would incur. Plaintiff asserts this was a threat to financially ruin him. Thus, at best, this was a threat to do some injury to plaintiff under Penal Code section 519, subdivision 1. However, under that provision, the threat must be to do an *unlawful* injury. And it is well-settled that threatening to do something that a person has a legal right to do is not a threat to commit an unlawful injury. (*People v. Kaufman* (2017) 17 Cal.App.5th 370, 394, citing *People v. Schmitz* (1908) 7 Cal.App. 330, 370; see CALCRIM No. 1830; 2 Witkin et al., Cal. Criminal Law (4th ed. 2012) Crimes Against Property, § 122, p. 166.)

Here, defendants had the right to fully defend and litigate the San Bernardino case and use their resources to do so. The phone conversation at issue here strikes us as the kind of conversation opposing counsel often have with each other in attempting to resolve litigation. Based on plaintiff's evidence, McGensy did nothing more than share with plaintiff his cost-benefit analysis of litigating the matter and point out it would be better if plaintiff dismissed the case. This is something McGensy was entitled to do. Nothing McGensy said during the phone conversation was extortionate within the meaning of Penal Code sections 518 and 519. Nor did the manner in which McGensy allegedly spoke with plaintiff make the conversation extortionate. As the *Flatley* court cautioned, "our opinion should not be read to imply that *rude, aggressive, or even belligerent* prelitigation negotiations, whether verbal or written, that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion." (*Flatley, supra*, 39 Cal.4th at p. 332, fn. 16, italics added.) Here, that the conversation is alleged to have involved rude, aggressive or belligerent communication employed to *defend* a lawsuit does not make what was said criminal extortion. Thus, the alleged extortion has not been conclusively established as a matter of law and consequently, the *Flatley* exception does not apply.

We conclude that the trial court correctly determined that defendants satisfied the threshold burden of showing each of plaintiff's claims arose from protected petitioning activity, and the court appropriately moved on to the second prong of the anti-SLAPP analysis.

2. The "Probability of Prevailing" Prong

Turning to the second prong of the analysis, we conclude that plaintiff did not demonstrate a probability of success on his claims. As already mentioned, "if a court ruling on an anti-SLAPP motion concludes the challenged cause of action arises from protected petitioning, it then 'determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741.) To satisfy this prong, " 'the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' " (*Ibid*.) The showing must be based on the pleadings and admissible evidence, which can be presented through affidavits or declarations. (*Sheley*, *supra*, 9 Cal.App.5th at p. 1162.) Courts consider the evidentiary submissions of both the plaintiff and defendant. (*Aron v. WIB Holdings,*, *supra*, 21 Cal.App.5th at p. 1085, citing *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) The court does not weigh the credibility or comparative probative strength of competing evidence, but it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. (*Wilson*, at p. 821.) As noted, this second step is "summary-judgment-like" in nature. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384; *Sheley*, at p. 1162.) And "a plaintiff need only establish their cause of action has 'minimal merit.' " (*Cuevas-Martinez, supra*, __ Cal.App.4th ___, ___; 2019 WL 2385161, *4, *6.)

a. The Litigation Privilege

Defendants contend that plaintiff cannot show a probability of prevailing on the merits because his causes of action are based on statements which are protected by the litigation privilege. The trial court agreed and so do we.

The litigation privilege presents a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing in the second step of the anti-SLAPP analysis. (*Flatley, supra*, 39 Cal.4th at p. 323; *Optional Capital, supra*, 18 Cal.App.5th at p. 115.) The privilege is found in Civil Code section 47, subdivision (b), which provides in pertinent part that "a privileged publication or broadcast is one made [¶] . . . [¶] in any judicial proceeding [or] . . . in any other official proceeding authorized by law." The privilege thus " 'applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved. [Citations.] [¶] The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' " (*Rusheen, supra*, 37 Cal.4th at p. 1057.) Thus, as long as the communication has "*some* relation to judicial proceedings" it is absolutely immune from tort liability by the litigation privilege. (*Ibid.*; *GeneThera, supra*, 171 Cal.App.4th at p. 909, italics added.)

Courts have recognized the several purposes of the litigation privilege. The privilege affords litigants and witnesses free access to the courts without fear of being harassed subsequently by derivative tort actions. (*Rusheen, supra*, 37 Cal.4th at p. 1063; *Optional Capital*, *supra*, 18 Cal.App.5th at p. 115.) It promotes the effective judicial proceedings by encouraging open channels of communication and the presentation of evidence without the external threat of liability. (*Flatley, supra*, 39 Cal.4th at p. 321; *Rusheen*, at p. 1063; *Optional Capital*, at p. 115.) And it encourages zealous advocacy

by attorneys to protect their clients' interest. (*Flatley*, at p. 321; *Rusheen*, at p. 1063; *GeneThera*, *supra* 171 Cal.App.4th at p. 909; *Optional Capital*, at p. 116.) It has been recognized that in order to achieve the purpose of curtailing derivative lawsuits, our high court has given the litigation privilege a broad interpretation. (*Action Apartment Association, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241 (*Action Apartment Association*).)

The privilege is " 'absolute in nature,' " and applies to "*all* publications," regardless of maliciousness. (*Optional Capital, supra*, 18 Cal.App.5th at p. 116.) " ' "Any doubt about whether the privilege applies is resolved in favor of applying it." ' " (*Ibid.*) "There is a strong public policy in favor of allowing publications in the course of judicial proceedings regardless of their perceived content." (*GeneThera*, *supra*, 171 Cal.App.4th at p. 909.) Thus, "a communication need not itself be 'accurate' or 'truthful' for the privilege to attach." (*Ibid.*) "The privilege has been applied specifically in the context of abuse of process claims alleging the filing of false or perjurious testimony or declarations." (*Rusheen, supra*, 37 Cal.4th at p. 1058 [noting that "[t]he litigation privilege has been applied in 'numerous cases' involving 'fraudulent communication or perjured testimony' "]; *Flatley, supra*, 39 Cal.4th at p. 322.)[11] It also applies to

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[11] Plaintiff asserts that the litigation privilege does not apply to cases involving perjury, twice quoting out of context part of our high court's opinion in *Action Apartment Association, supra*, 41 Cal.4th 1232. As plaintiff notes, the court wrote: "Each of the above mentioned statutes [various criminal offenses] is more specific than the litigation privilege and would be significantly or wholly inoperable if its enforcement were barred when in conflict with the privilege. The crimes of perjury and subornation of perjury would be almost without meaning if statements made during the course of litigation were protected from prosecution for perjury by the litigation privilege." (*Id.* at p. 1246, fns. omitted.) *Action Apartment Association* is of no help to defendant. Our high court's discussion related to criminal prosecutions of state laws. As the court observed, the litigation privilege does not apply to the criminal prosecution of state criminal offenses. (*Ibid.*)

settlement discussions and other communications by attorneys on behalf of their clients. (*GeneThera*, at p. 909 [settlement letter to opposing counsel was protected by litigation privilege, even if the letter was "substantively at variance with the Rules of Professional Conduct"].) This is true even where the settlement discussions contain a "veiled threat," because such a communication is " 'part of the adversary system, and, as such, is to be anticipated in the course of' " heated battle " 'between adverse parties to proceedings considered to be within the context of ' judicial proceedings." (*Furhman, supra*, 179 Cal.App.3d at pp. 420-421 [addressing a prelitigation demand letter].)

In an attempt to defeat the litigation privilege defense, plaintiff contends that neither his abuse of process nor his IIED causes of action are based on communicative conduct. Instead, plaintiff asserts the claims are based on noncommunicative conduct which is not protected by the privilege. This argument is absurd and we reject it as such.

All of the specific acts alleged by plaintiff in his complaint were communications related to litigation activities. Because the communications here are protected by the litigation privilege, plaintiff cannot meet his burden of demonstrating a probability of success on any of his causes of action. (*Flatley, supra*, 39 Cal.4th 299, 323; *Optional Capital, supra*, 18 Cal.App.5th at pp. 115, 119.) But even if the litigation privilege does not apply, plaintiff has still failed to show a probability of prevailing on his causes of action.

b. The Abuse of Process Cause of Action—Perjury

Defendant makes no attempt to review the elements of his abuse of process claims and discuss the evidence that specifically relates to each element. Nor does he set forth the elements related to perjury, which underlies his claims.

The second element of abuse of process is "a willful act in the use of process not proper in the regular conduct of the proceedings." (*Drum, supra*, 107 Cal.App.4th at p. 1019.) The willful act plaintiff asserts is McGeny's alleged perjury. The elements of perjury are: (1) a willful statement; (2) made under oath; (3) of any material matter; and

(4) which the declarant knows to be false. (*People v. Trotter* (1999) 71 Cal.App.4th 436, 439, citing Pen. Code, § 118, subd. (a); see also CALCRIM Nos. 2640 & 2641.)

Information is material if it is probable that it would influence the outcome of the proceedings. (*People v. Pierce* (1967) 66 Cal.2d 53, 61; *People v. Rubio* (2004) 121 Cal.App.4th 927, 933; see also CALCRIM Nos. 2640 & 2641.)

Perjury is a specific intent crime. (*People v. Post* (2001) 94 Cal.App.4th 467, 481; *People v. Story* (1985) 168 Cal.App.3d 849, 853.) The " 'willful[ ]' " element of perjury "requires proof the defendant made [the] statement 'with the consciousness that he did not know that it was true, and *with the intent that it should be received as a statement of what was true in fact*.' " (*People v. Hagen* (1998) 19 Cal.4th 652, 663-664, italics added.)

(1) The Claim Based on the Verification

Plaintiff asserts that McGensy committed perjury in statements related to the verification and answer to plaintiff's Motion for Reconsideration in the worker's compensation case. Plaintiff's focus is on statements in the answer concerning his conduct related to other employees. At one point in his briefing, he asserts that McGensy "attested repeatedly to having personal knowledge" of these events when he was not employed by Rabobank until three or more years after the events were alleged to have taken place. Later in his briefing, plaintiff asserted that McGensy attested "under penalty of perjury (and WITHOUT any qualification such as verifying on 'information and belief') as to the truth and veracity of Claims of misconduct committed by Plaintiff." In his reply brief, plaintiff asserts McGency attested that he "in fact" had personal "percipient knowledge."

The verification signed by McGensy reads in pertinent part: "I have read the foregoing ANSWER TO PETITION FOR RECONSIDERATION, and know the contents thereof. The matters stated in it are true of my own knowledge, except for those matters

therein stated on information and belief, and as to those matters, I believe them to be true."

The portion of the answer plaintiff focuses upon addresses credibility issues related to Walker's testimony during the worker's compensation trial. It includes the following: "Applicant's assertion that there is a conflict in Ms. Walker's testimony about whether or not he was terminated because he was threatening co-workers is immaterial and irrelevant. The Minutes of Hearing and Summary of Evidence . . . actually state. . . : 'Witness was not terminated because he threatened other employees.' Although this testimony appears to be in conflict with her prior declaration both assertions are actually correct. Two valued employees of Defendant Rabobank resigned their employment stating that they were doing so because of threats made by Applicant. Such information certainly formed a basis for the decision of his manager to terminate Applicant. Shortly thereafter, other employees told their supervisors that they were also planning to leave the employment of Rabobank because of Applicant (not because of threats, but because of inability to work with him). This information also formed the basis for the decision of Applicant's manager to terminate Applicant's employment. Therefore applicant was both terminated because of threats and not because of threats. [¶] This non-existent conflict created by the confusion of Applicant's own actions should not undermine the substantial evidence that supports Judge Petty's determination that Ms. Walker's testimony about not receiving any claim by Applicant related to an industrial injury before his termination is credible."

First, we note that we find no evidence that McGensy "attested repeatedly to having personal knowledge" of the facts asserted in the above passage. Nor is there any evidence that he attested to having "percipient knowledge."

Second, plaintiff has made no attempt to show why the question of whether McGensy had personal knowledge of the facts asserted in the above passage from the Answer as opposed to asserting those facts on information and belief was material to the

issue of whether the WCAB should have granted his motion for reconsideration. He has not demonstrated how it is probable that informing the WCAB of McGensy's lack of personal knowledge or that such facts were stated on information and belief probably would have influenced the outcome of the motion for reconsideration. The motion was made on the grounds that the evidence heard by the worker's compensation judge did not justify findings of fact and the judge's findings of fact did not support the decision. The passage containing the statements plaintiff focuses upon was written under the following heading in the answer: "Response to 'Compelling and Substantial Credible Evidence Refuting Ms. Walker's Credibility as a Witness." Plaintiff asserted in his motion that Walker's testimony " 'could never be considered as truthful and credible.' " Much of the above passage from the Answer contains argument offering an explanation about an apparent conflict in the evidence the worker's compensation judge heard. Argument is not a factual assertion subject to the perjury statute. Moreover, whether McGensy had personal knowledge because he was present when the events described in the answer took place (i.e., percipient witness) or whether he had merely read about those events in the record of the worker's compensation proceeding or in Rabobank's file hardly seems material to the motion for reconsideration.

Furthermore, read in context, nothing in the above passage suggests that McGensy had personal knowledge because he was present when the events described therein took place or that the WCAB would have so believed. This is strong circumstantial evidence demonstrating a lack of intent to lead the WCAB to believe he had such personal knowledge. In other words, the showing of the required specific intent is lacking.

Having failed to establish the materiality and specific intent elements of perjury, plaintiff has failed to establish the willful act element required of his abuse of process cause of action.

We also note that plaintiff has failed to establish the ulterior motive element of abuse of process. The verification was filed in the regular course of the worker's

compensation litigation, solely for the purpose of defending Rabobank and more specifically, opposing plaintiff's motion for reconsideration. Thus, plaintiff has shown no improper ulterior motive.

For the above reasons, plaintiff has failed to demonstrate his cause of action for abuse of process grounded on the verification and answer to his motion for reconsideration has minimal merit.

(2) The Claim Based on the Declaration

Plaintiff alleged that McGensy misrepresented the "quantity of documents tendered to plaintiff" and "misrepresented the number of Rabobank's employees who actually testified during trial." Plaintiff asserts that the following from McGensy's declaration in support of Walker's opposition to plaintiffs' motion to compel discovery in the wrongful termination case was false and amounted to perjury: "During the pendency of [plaintiff's] worker's compensation action, he required *numerous* Rabobank employees to testify during the trial, and he has requested and received *voluminous* documents from Rabobank relating to his employment with Rabobank and his termination." (Italics added.)

Again, plaintiff points out that the events described took place before McGensy was hired, and therefore he could not have had personal knowledge. But McGensy's declaration clearly stated his date of hire and stated the facts set forth in the declaration were based on his personal knowledge "and/or my examination of records that are kept by Rabobank in the regular course of business." He went on to explain that he was responsible for maintaining Rabobank's file on plaintiff's worker's compensation case and that he was familiar with the regular practices of Rabobank's legal department concerning the maintenance of legal documents. Nothing McGensy said in the declaration would lead one to believe that he had personal knowledge of the number of documents and witnesses. And his disclosure of his hiring date in the declaration, shows he did not have the specific intent to mislead the court into believing he had personal

knowledge. Moreover, whether he had personal knowledge or whether he obtained that information from reviewing Rabobank's files was not material to issue to be decided.

Plaintiff also asserts that McGensy's use of the word "numerous" to describe the number of witnesses and the word "voluminous" to describe the number of documents was perjurious. We disagree.

Five witnesses from Rabobank were called by plaintiff during the worker's compensation matter. This, in our view, could be considered "numerous" and thus, plaintiff cannot establish that the statement was false. In the declarations related to defendants' anti-SLAPP motion, McGensy attested that "greater than 100 pages of documents had been provided plaintiff" in the worker's compensation litigation and plaintiff admits that he received 154 pages of documents. Websters Digital Learning Dictionary Unabridged includes several definitions of "voluminous," one of which is "numerous." (<http://unabridged.merriam-webster.com/unabridged/voluminous> [as of June 26, 2019], archived at <https://perma.cc/ZG9U-VT7J>.) Thus, plaintiff cannot establish that the use of the word "voluminous" in this context made the statement false.

We conclude that plaintiff has failed to demonstrate that his cause of action for abuse of process grounded on the declaration has minimal merit.

c. The IIED Cause of Action

Plaintiff cannot demonstrate a probability of success on his IIED claim either. Specifically, he has not made a showing of the first element of outrageous conduct. Outrageous conduct is conduct "so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.) As we have said, the phone conversation described by plaintiff strikes us as the kind of conversation opposing counsel sometimes have. Even "veiled threats" sometimes happen in "heat of battle between adverse parties to proceedings." (*Fuhrman, supra*, 179 Cal.App.3d at pp. 420-421.) And our high court has recognized that, "rude, aggressive [and] belligerent" speech might occur during case resolution discussions.

(*Flatley, supra*, 39 Cal.4th at p. 332, fn. 16.) We conclude that the conversation described by plaintiff does not rise to the level of outrageous conduct. Consequently, he has failed to show that his cause of action for IIED has minimal merit.

II. Attorney Fees

Defendants requested $28,986.75 in attorney fees. The trial court awarded $14,050.00. Plaintiff contends that the court abused its discretion in awarding defendants attorney fees. Specifically, plaintiff contends that the trial court's award was not supported by "sufficient proof of the reasonableness, necessity and proper basis for such fees" and the trial court simply "split the baby." Further, plaintiff argues that because the trial court declined to issue a Statement of Decision in connection with its attorney fees award, we must reverse on this basis alone. We disagree.

A. Award of Attorney's Fees for Prevailing Parties in Anti-SLAPP Motions

In general, an award of attorney fees and costs is mandatory when a defendant prevails on an anti-SLAPP motion to strike. Section 425.16, subdivision (c), provides, in pertinent part: "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." By its express terms, the anti-SLAPP statute must be broadly construed to serve the legislative purpose of reimbursing prevailing defendants for expenses incurred in extricating themselves from baseless lawsuits. (§ 425.16, subd. (a); *Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 446.) "[F]ee awards should be fully compensatory" and "absent circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for *all* the hours *reasonably spent*, including those relating solely to the fee." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133 (*Ketchum*).)

While an award of fees under section 425.16 is mandatory, the trial court possesses broad authority to determine the reasonable amount of attorney fees. (*Ketchum, supra*, 24 Cal.4th at p. 1131; *Christian Research Inst., supra*, 165 Cal.App.4th at p. 1321.) Accordingly, we review a fee award under this section for abuse of

discretion, which may be shown "when the award shocks the conscience or is not supported by the evidence." (*Jones v. Union Bank of Calif.* (2005) 127 Cal.App.4th 542, 549-550 (*Jones*).)

Our Supreme Court has noted that an experienced trial judge is the best judge of the value of the professional services rendered for cases in the court's community. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (*PLCM*).) While the trial court's judgment is subject to review, we will not disturb the court's determination "absent a showing that it is manifestly excessive in the circumstances." (*Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 782.) "Accordingly, there is no question our review must be highly deferential to the views of the trial court." (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239 (*Nichols*).)

In assessing an attorney fee award, we resolve conflicts in the evidence in favor of the prevailing party, and the trial court's resolution of any factual issue is conclusive. (*Christian Research Inst., supra*, 165 Cal.App.4th at p. 1322.) However, the trial court's exercise of its discretion must be based upon proper utilization of the lodestar adjustment method, both to determine the lodestar figure and to analyze the factors that might justify application of a multiplier. (*Nichols*, *supra*, 155 Cal.App.4th at pp. 1239-1240; see also *PLCM, supra*, 22 Cal.4th at p. 1095 ["The fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate."].)

"[T]he court *may* require [a] defendant[ ] to *produce records sufficient to provide* " '*a proper basis for determining how much time was spent on particular claims*.' " [Citation.] The evidence should allow the court to consider whether the case was overstaffed, how much time the attorneys spent on particular claims, and whether the hours were reasonably expended." (*Christian Research Inst., supra*, 165 Cal.App.4th at p. 1320, italics added.) Here, defendants provided billing records, the three attorneys' resumes, and an attorney declaration stating that the fees were actually billed to

defendants in the amount of $28,986.75. These records provided a basis for determining how much time was spent on plaintiff's claims. Accordingly, the court properly ruled that the billing records and declaration defendants provided were sufficient to support a fee award. While plaintiff continues to complain about the "heavily redacted billing records," he cites no case law to support his contention that redacted billing records are inadequate, particularly in a case such as this one where the court disregarded defendants' lodestar calculation of the reasonable attorney rates and hours expended, performed its own assessment and awarded a lesser amount than that requested by defendants.

Even though the court agreed with plaintiff that the amount of fees requested was excessive and reduced the award by a little over 50 percent, plaintiff challenges the amount of the award on appeal. He contends, with much hyperbole but scant evidence, that "this case involves attorney work 'gone wild' from a billing standpoint" and the trial court made a "random 50% 'King Soloman' award" instead of exercising its discretion. Plaintiff argues there should have been a much more substantial reduction of the fees requested. However, plaintiff fails to address the trial court's independent lodestar analysis and focuses solely on defendants' fees motion and billing records.

The court disregarded as hearsay the defense attorney's declaration "on information and belief" that the fees charged are " 'consistent with the prevailing market rate for attorneys at comparable law firms' " in the Northern California area. The court then proceeded to rely on its own experience in the Sacramento area legal community to calculate the reasonable rates and reasonable billable hours for defendants' three attorneys, substantially cutting both the attorneys' rates and hours, and then awarded defendants a total of $14,050.00 in fees pursuant to section 425.16, subdivision (c). The court reduced the total number of hours awarded from 63.2 hours to 45 hours based on the nature of the work and additionally found that some of the billed hours disclosed duplicative work between defendants' attorneys. The court reduced a partner's rate from $787.50 per hour to $500 per hour, a senior associate's rate from $585 per hour to $350

per hour and an associate's rate from $400/h to $300/hr. The court did not simply "split the baby."

Plaintiff fails to explain how the court's calculation of the lodestar was unreasonable and thus, fails to carry his burden on appeal of showing an abuse of discretion. To show that the trial court's decision was arbitrary or irrational, plaintiff must do more than make unsupported assertions such as, "there is no justification to have a partner . . . and two allegedly experiences [*sic*] associates . . . churning up billable time in this case." Rather, he must show that the court's calculation of the lodestar amounted to an abuse of discretion by showing that the court's lodestar calculation and corresponding fee award "shocks the conscience or is not supported by the evidence." (*Jones, supra*, 127 Cal.App.4th at pp. 549-550.)

B. Statement of Decision on Attorney Fee Award

Plaintiff also contends that the trial court erred in failing to issue a statement of decision upon his request, and as a result, the attorney fee award "must be reversed in total on this ground alone." This claim lacks merit.

California appellate courts have expressly held that "[a] trial court is not required to issue a statement of decision for an attorney fee award." (*In re Marriage of Falcone, supra*, 203 Cal.App.4th at p. 981; see also *Gorman v. Tassajara Development Corp., supra*, 178 Cal.App.4th at p. 65; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294.) This rule applies to anti-SLAPP fee awards. (*Ketchum, supra*, 24 Cal.4th at p. 1140; *Christian Research Inst., supra*, 165 Cal.App.4th at p. 1323.) Accordingly, we find no error in the trial court's decision.[12]

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[12] We note that, while the trial court was not required to issue a statement of decision, it did issue a detailed three-page minute order thoroughly explaining the reasons for its attorney fee award and the details of its lodestar calculation. The minute order, together with the rest of the record, is more than sufficient to support our "informed scrutiny" of

C. Fees and Costs on Appeal

Defendants request attorney fees and costs on appeal. Section 425.16 "includes fees and costs incurred in defending an unsuccessful appeal of an order granting a special motion to strike." (*GeneThera, supra*, 171 Cal.App.4th at p. 910.) As noted, "the provision for fees and costs 'is broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extricating [himself or itself] from a baseless lawsuit.' " (*Ibid.*; see also *Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 Cal.App.4th 15, 20.) Accordingly, we award defendants their attorney fees and costs on appeal.

DISPOSITION

The judgment is affirmed. McGensy and Rabobank shall recover their attorney fees and costs on appeal. (§ 425.16, subd. (c); see also Cal. Rules of Court, rule 8.278(a)(1) & (5).)

/s/
MURRAY, J.

We concur:

/s/
RAYE, P. J.

/s/
DUARTE, J.

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the award, which appears to be plaintiff's primary concern in requesting a statement of decision.