Filed 6/21/04

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PEGGY J. SOUKUP, Plaintiff and Respondent, v. RONALD C. STOCK, Defendant and Appellant.	B154311 (Super. Ct. No. BC247941) ORDERS MODIFYING OPINION AND DENYING REHEARING PETITION [CHANGE OF JUDGMENT]

The opinion filed May 27, 2004, which was partially certified for publication, is modified in the following particulars which will result in a change in the scope of publication and the judgment.

1. The asterisk footnote on page 1 is deleted and replaced with the following: Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III(C).

2. Delete the bracketed language on page 10. In it place insert: [Part III.C is deleted from publication. See *post* at p. 11 where publication is to resume.]

3. Above the heading for part III.D, insert the following: [The balance of the opinion is to be published.]

4. On page 11 under the heading for part III.D, delete the entirety of the body of the opinion. In its place, insert:

Plaintiff argues that defendant is not entitled to an award of attorney fees pursuant to section 425,16, subdivision (c) because he represented himself on appeal and in the trial court. Section 425.16, subdivision (c) states: "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." We agree with plaintiff that defendant may not recover attorney fees for the time he spent working on this matter. But if defendant secured legal assistance from another lawyer, plaintiff may be liable for those fees.

Our analysis in this regard largely parallels that used by the California Supreme Court in *Trope v. Katz* (1995) 11 Cal.4th 274, 279-282, a decision holding that a lawyer who represented himself in a lawsuit could not recover his attorney fees pursuant to Civil Code section 1717, subdivision (a). As was principally the case in *Trope*, whether an attorney successfully litigating a special motion to strike in pro se may recover section 425.16, subdivision (c) attorney fees is an issue of statutory interpretation. The pertinent rules of statutory interpretation were specified in *Trope* as follows: "We begin as always 'with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent.' (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562 [].) To discover that intent we first look to the words of the statute, giving them their usual and ordinary meaning. (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744 []; *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [].) 'Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.' (*Burden v. Snowden*, *supra*, 2 Cal.4th 556, 562.)" (*Trope v. Katz*, *supra*, 11 Cal.4th at p. 280.) Additionally, in *Trope*, the Supreme Court relied on the general rule that when a law contains judicially

construed terms, it is presumed the Legislature intended those words to have their established legal meanings. (*Id*. at p. 282; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570.)

In *Trope*, the Supreme Court explained the ordinary meaning of the term "attorney fees" as follows: ". . . Black's Law Dictionary defines the word 'fee' generally as 'A recompense for an official or professional service or a charge or emolument or compensation for a particular act or service. A fixed charge or perquisite charged as recompense for labor; reward, compensation, or wage given to a person for performance of services or something done or to be done.' (Black's Law Dict. (6th ed. 1990) p. 614.) It goes on to define the phrase 'attorney fees' as a 'Charge to client for services performed (*e.g.* hourly fee, flat fee, contingency fee).' (*Ibid.*) Similarly, Webster's defines the word 'fee' as 'compensation often in the form of a fixed charge for professional service or for special and requested exercise of talent or of skill.' (Webster's New Internat. Dict., [(3d ed. 1961)] p. 833; see also 5 Oxford English Dict. (2d ed. 1989) p. 797 ['fee' denotes 'a payment,' such as the 'remuneration paid or due to a lawyer, a physician, or (in recent use) any professional man, a director of a public company, etc. for an occasional service'].) Accordingly, the usual and ordinary meaning of the words 'attorney's fees,' both in legal and in general usage, is the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation. An attorney litigating in propria persona pays no such compensation." (*Trope v. Katz*, *supra*, 11 Cal.4th at p. 280.)

Additionally, in *Trope*, the Supreme Court examined its own jurisprudence and that of the Courts of Appeal commencing with *Carriere v. Minturn* (1855) 5 Cal. 435. These decisions consistently held in varying contexts that a lawyer appearing in pro se could not recover attorney fees. In *Trope*, the Supreme Court noted that California courts had refused to award lawyers appearing in pro se their attorney fees in the context of: mortgage agreements (*Patterson v. Donner* (1874) 48 Cal. 369, 380; *Bank of Woodland v. Treadwell* (1880) 55 Cal. 379, 380); inverse condemnation (*City of Long Beach v.*

Stern (1929) 206 Cal. 473, 474); and an interpleader action. (*O'Connell v. Zimmerman* (1958) 157 Cal.App.2d 330, 336-337.)

Given in part of the foregoing analysis in *Trope*, the Supreme Court concluded: "These pre-1968 cases are significant for two reasons. First, they support our conclusion that the usual and ordinary meaning of the words 'reasonable attorney's fees' is the consideration that a litigant pays or becomes liable to pay in exchange for legal representation. Second, they demonstrate that the words 'attorney's fees' and 'counsel fees,' whether used in a contract or in a statute, had an established legal meaning at the time the Legislature enacted section 1717. In the absence of some indication either on the face of that statute or in its legislative history that the Legislature intended its words to convey something other than their established legal definition, the presumption is almost irresistible that the Legislature intended them to have that meaning. (*Western States Petroleum Assn. v. Superior Court*[, *supra*,] 9 Cal.4th [at p.] 570; *People v. Weidert* (1985) 39 Cal.3d 836, 845-846 [].)" (*Trope v. Katz*, *supra*, 11 Cal.4th at p. 282.)

Trope is directly pertinent to the issue of whether a pro se lawyer who is a defendant may recover section 425.16, subdivision (c) attorney fees. *Trope* addressed the state of the law concerning the statutory and contract rights to attorney fees of a pro se litigant who is a lawyer prior to the 1968 adoption of Civil Code section 1717. (Stats. 1968, ch. 266, p. 578, § 1. [2]) The right of a prevailing defendant to section 425.16, subdivision (c)

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2 When originally adopted in 1968, Civil Code section 1717 provided: "In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements. [¶] Attorney's fees provided by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void. [¶] As used in this section 'prevailing party' means the party in whose final judgment is rendered." (Stats. 1968, ch. 266, p. 578, § 1.)

attorney fees was enacted in 1992 when the special motion to strike remedy was first adopted. Nothing of substance changed in terms of a pro se lawyer's right to recover attorney fees between 1968 when Civil Code section 1717 was adopted and 1992 when section 425.16, subdivision (c) was enacted. The logical force of the analysis concerning a pro se attorney's statutory right to recover legal fees in *Trope* applies equally to the present case. Therefore, in 1992, when the Legislature adopted section 425.16, subdivision (c), the usual and ordinary meaning of the term attorney fees excluded an pro se litigant who was also a lawyer attempting to recoup legal fees. (*Trope v. Katz*, *supra*, 11 Cal.4th at p. 280.) Further, commencing in 1855 in *Carriere v. Minturn*, *supra*, 5 Cal. at page 435, California courts had consistently developed a body of jurisprudence that barred a pro se lawyer from recovering attorney fees. (*Trope v. Katz*, *supra*, 11 Cal.4th at pp. 280-282.) Under these circumstances, in the absence of an expressed different intent, it is presumed the Legislature intended that the term attorney fees in section 425.16, subdivision (c) be given this meaning as in *Trope*. (*Id*. at p. 282; *Western States Petroleum Assn. v. Superior Court*, *supra*, 9 Cal.4th at p. 570.) We have carefully reviewed the committee reports and the Legislative Counsel's Digest prepared in connection with the 1992 adoption of section 425.16, subdivision (c). There is no evidence the Legislature intended to modify the general rule that a pro se litigant who is also a lawyer may not recover attorney fees payable under a statute or a contract.[3]

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3 The Legislative Counsel's Digest for section 425.16 states in relevant part: "This bill would also provide 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 or California Constitution in connection with a public issue, as specified, shall be subject to a special motion to strike, unless the court, after considering the pleadings and supporting and opposing affidavits, determines that there is a probability that the plaintiff will prevail on the claim. This bill would provide that if the court determines that the plaintiff has established a probability that he or she would prevail, neither that determination nor the fact of that determination would be admissible in evidence at any later stage of the case nor would it affect the burden or degree of proof. It would provide for the recovery of attorney's fees and costs by a prevailing defendant on a special motion

Now, there is a difference between Civil Code section 1717, subdivision (a) and section 425.16, subdivision (c). In *Trope*, the Supreme Court explained that Civil Code section 1717, subdivision (a) right to recover attorney fees applies in a case where they are "incurred."[4] The Supreme Court noted: "[B]y its terms [Civil Code] section 1717

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to strike, and by a prevailing plaintiff if the court finds that the motion was frivolous or solely intended to cause unnecessary delay. The bill would specify that these provisions do not apply to any action brought in the name of the people of the State of California by certain state and local prosecutors, and would require all discovery proceedings to be stayed upon the filing of a notice of this special motion, except as specified. The bill would make legislative findings and declarations." (Legis. Counsel's Dig., Sen. Bill No. 1264, 4 Stats. 1992 (1991-1992 Reg. Sess.) Summary Dig., p. 294.) A Senate Committee on Judiciary report stated: "This bill would also allow a prevailing defendant in any motion to strike such a cause of action to recover his or her attorney fees and costs. . . . . [¶] . . . SB 1264 would provide attorney's fees and costs to a prevailing defendant in a motion to strike." (Sen. Com. on Judiciary rep. on Sen. Bill No. 1264 (1991-1992 Reg. Sess.) Feb. 25, 1992, pp. 2, 5.) Other committee reports and analyses contain virtually the same language. (Sen. Rules Com., 3d reading analysis of Sen. Bill No. 1264 (1991-1992 Reg. Sess.) Mar. 13, 1992, p. 2; Assem. Office of Floor Coordinator 3d reading analysis of Sen. Bill No. 1264 (1991-1992 Reg. Sess.) Mar. 26, 1992, p. 1; Sen. Rules Com., 3d reading analysis of Sen. Bill No. 1264 (1991-1992 Reg. Sess.) Mar. 27; 1992, p. 2; Assem. Office of Floor Coordinator 3d reading analysis of Sen. Bill No. 1264 (1991-1992 Reg. Sess.) June 29, 1992, p. 1; Assem. Subcom. on the Admin. of Criminal Justice rep. on Sen. Bill No. 1264 (1991-1992 Reg. Sess.) June 30, 1992, p. 2.) No committee reports state that a pro se defendant who is a lawyer may recover attorney fees.

4 Civil Code section 1717, subdivision (a) provided in 1995 when *Trope* was decided and now: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶] Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract. [¶] Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit. [¶] Attorney's fees

applies only to contracts specifically providing that attorney fees 'which are *incurred* to enforce that contract' shall be awarded to one of the parties or to the prevailing party. (Italics added.) To 'incur' a fee, of course, is to 'become liable' for it (Webster's New Internat. Dict. (3d ed. 1961) p. 1146), i.e., to become obligated to *pay* it. It follows that an attorney litigating in propria persona cannot be said to 'incur' compensation for his time and his lost business opportunities." (*Trope v. Katz*, *supra*, 11 Cal.4th at p. 280, orig. italics.) The word "incurred" does not appear in section 425.16, subdivision (c). But the omission of the term "incurred" or a synonym in section 425.16, subdivision (c) does not change our conclusion. The common understanding of the language "attorney fees" plus the consistently developed decisional authority as plainly explicated in *Trope* provide the most logical basis for deducing that the Legislature intended to allow *represented* defendants who special motions to strike are granted to recover their "legal fees" but no one else. (*Id*. at pp. 280-282.) It seems unlikely that if the word "incurred" did not appear in Civil Code section 1717, subdivision (a), the Supreme Court would have reached the conclusion that a pro se attorney could recover her or his contractual attorney fees. Such an unlikely conclusion would have contravened the Supreme Court's determination of the "usual and ordinary meaning of the words 'attorney fees'[]" and the pre-Civil Code section 1717, subdivision (a) jurisprudence which denied fees to pro se litigants who were lawyers. (*Id.* at pp. 280.) The absence of the word "incurred' in section 425.16, subdivision (c) does not mean the Legislature intended that a pro se litigant such a defendant is entitled to recover his attorney fees.

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provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void."

Further, we recognize that post-*Trope* Court of Appeal decision in other contexts are not entirely consistent. Two decisions by our colleagues in the Division Three of the Fourth Appellate District have held that a pro se litigant who is a lawyer can recover sanctions in the form of attorney fees. (*Laborde v. Aronson* (2001) 92 Cal.App.4th 459, 467-469 [§ 128.7 sanctions]; *Abandonato v. Coldren* (1995) 41 Cal.App.4th 264, 268-269 [former § 128.5 sanctions].) Other decisions have held that attorney fees are unavailable to a self-represented attorney in the discovery sanctions context. (*Kravitz v. Superior Court* (2001) 91 Cal.App.4th 1015, 1016-1022 [discovery sanction]; *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1175-1182 [discovery sanction]; see *Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 629 [self-represented attorney's right to § 1021.5 private Attorney General fees is doubtful].) We need not address these potential conflicting decisions. We simply rely on the logic expressed in *Trope* concerning what the words "attorney fees" mean.

Our analysis is subject to an exception. If defendant was assisted by another lawyer, attorney fees may still be recoverable. In *Mix v. Tumanjan Development Corp.* (2002) 102 Cal.App.4th 1318, 1321-1326, a pro se litigant who was an attorney retained a law firm to assist him during the litigation. We held that the attorney could not recover Civil Code section 1717, subdivision (a) fees for his own work. But we held that the attorney could recover Civil Code section 1717, subdivision (a) contract attorney fees for services provided to him by the law firm. The same rule applies if defendant received the assistance of another lawyer in the present lawsuit. This issue can be litigated upon issuance of the remittitur as permitted by rule 870.2(c) of the California Rules of Court.

IV. DISPOSITION

The order denying the special motion to strike under Code of Civil Procedure section 425.16 is reversed. Defendant, Ronald C. Stock, is to recover his costs and

attorney fees only as specified in the body of this opinion incurred on appeal and in the trial court from plaintiff, Peggy J. Soukup.

5. The rehearing petition is denied.

TURNER, P.J.	ARMSTRONG, J.	MOSK, J.