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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DEMIAN LICHTENSTEIN et al., Plaintiffs, Cross-defendants and Appellants, v. FRED STALLEY, Defendant, Cross-complainant and Respondent.	B347325 (Los Angeles County Super. Ct. No. 25STCV00425)

APPEAL from an order of the Superior Court of Los Angeles County, Gail Killefer, Judge. Affirmed in part and reversed in part.

WDA, Whitney D. Ackerman, Joshua C. Greer, and Duncan McGee Nefcy for Plaintiffs, Cross-defendants and Appellants.

Christopher G. Hook for Defendant, Cross-complainant and Respondent.

Plaintiffs, cross-defendants, and appellants Demian Lichtenstein and Brooke Lichtenstein (Tenants) appeal from an order denying their special motion to strike allegations from the cross-complaint (anti-SLAPP motion; Code Civ. Proc.,[1] § 425.16)[2] filed by defendant, cross-complainant, and respondent Fred Stalley (Landlord). On appeal, Tenants contend that the court erred in denying the anti-SLAPP motion because (1) Landlord's claim for indemnification arose from Tenants' filing of the complaint, which is protected activity under the anti-SLAPP statute, and (2) Landlord has not met his burden to show a probability of prevailing on the merits. Tenants further contend that the trial court erred by awarding to Landlord attorney's fees and costs pursuant to section 128.5.

We conclude that the trial court did not err by denying Tenants' anti-SLAPP motion because Landlord's claim for indemnification does not arise from Tenants' filing of the complaint; the indemnification claim is therefore not protected activity under section 425.16. However, we reverse the trial court's award to Landlord pursuant to section 128.5 of attorney fees and costs. The trial court's summary order did not include the required detailed recitation of the action, tactic, or circumstances justifying sanctions for a frivolous action, and is therefore invalid.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] "SLAPP" stands for strategic lawsuit against public participation. (See *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.) Unless otherwise specified, all subsequent statutory citations are to the Code of Civil Procedure.

FACTS AND PROCEDURAL BACKGROUND

A. *Facts*

On October 8, 2023, Tenants and Landlord entered into a residential lease agreement commencing on October 13, 2023, in which Landlord agreed to rent to Tenants over a two-year period the property located at 1241 Piedra Morada Drive, Pacific Palisades, CA 90272 (the Property), for a monthly payment of $16,500.

The lease agreement utilized a standardized form available from the California Association of Realtors. Under the lease, Tenants were required to provide Landlord with a list of items that were damaged or inoperable within seven days of the commencement of the lease. Tenants were also required to immediately inform Landlord of any damages to the Property. Tenants were responsible for paying for all repairs for damages they caused and for any damages sustained due to their failure to timely report problems. Tenants agreed to pay a security deposit of $33,000. Landlord was entitled to deduct from the security deposit the cost of repairs for which Tenants were responsible and to deduct any rent amounts due.

As relevant here, the lease contained the following provision:

"**29. INSURANCE:**

"[¶]. . . [¶]

"**C.** [**x**] Tenant shall obtain liability insurance, in an amount not less than **$1,000,000.00**, naming [Landlord] as

additional insured for injury or damage to, or upon, the Premises during the term of this agreement or any extension. Tenant shall provide [Landlord] a copy of the insurance policy before commencement of this Agreement, and a rider prior to any renewal."

"**35. MEDIATION:**

"**A.** [With certain exceptions], [Landlord] and Tenant agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to court action. Mediation fees, if any, shall be divided equally among the parties involved. If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action."

"**36. ATTORNEY FEES:** In any action or proceeding arising out of this Agreement, the prevailing party between [Landlord] and Tenant shall be entitled to reasonable attorney fees and costs collectively not to exceed $1,000 (or $_____), except as provided in paragraph 35A."

In June 2024, Tenants vacated the Property. On July 5, 2024, Landlord sent to Tenants a notice regarding the disposition of their security deposit detailing deductions made and outstanding costs. Landlord's deductions included costs for stain removal and re-keying locks. The disposition reflected $272,001.47 in total deductions, which resulted in complete

forfeiture of Tenants' $33,000 security deposit and an outstanding balance of $239,001.47.

B. *Tenants' Complaint*

On January 1, 2025, Tenants filed a complaint against Landlord alleging nine causes of action: (1) negligence, (2) premises liability, (3) negligent infliction of emotional distress, (4) breach of the implied warranty of habitability, (5) breach of the implied warranty of quiet enjoyment, (6) breach of the covenant of good faith and fair dealing, (7) breach of contract, (8) nuisance, and (9) constructive eviction.

In the complaint, Tenants alleged that their family moved into the Property several days after executing the lease and resided there until they were constructively evicted on June 12, 2024. Between October 2023 and June 2024, Tenants paid Landlord rent in excess of $130,000.

During the course of their tenancy, Tenants experienced numerous violations of Health and Safety Code section 17920.3 and Civil Code section 1941.1, as a result of Landlord's deliberate and intentional failure to maintain the Property and make necessary repairs. These violations included (1) inadequate heating; (2) defective and dangerous electrical wiring; (3) defective plumbing; (4) fire, health, and safety hazards in the form of an accumulation of weeds, vegetation, junk, dead organic matter, debris, garbage, offal, rodent harborages, stagnant water, and combustible materials; (5) inadequate ventilation; (6) defective and deteriorating flooring and floor supports; (7) insect, vermin, and rodent infestation; (8) mold; (9) deteriorated or ineffective waterproofing of exterior walls, roofs, foundations, and

floors, including broken windows and doors; (10) dilapidation and improper maintenance; (11) nuisance; and (12) failure to maintain mechanical equipment such as vents in good working condition.

Tenants brought these conditions to Landlord's attention on numerous occasions, but Landlord repeatedly failed to make adequate or timely remediation. Landlord's failure to remediate these conditions significantly impacted Tenants' health, safety, and emotional well-being, and resulted in financial loss and damage to Tenants' property.

Landlord placed the burden of addressing repairs on Tenants despite the lease requirement that Landlord maintain the Property and make needed repairs. As a result of the many repairs, the Property "essentially became an active construction site." Tenants' lives were severely disrupted and Ms. Lichtenstein was unable to use her home office. Tenants paid tens of thousands of dollars of their personal funds for repairs, and requested that those costs be applied to future rent payments as part of a repair and deduct arrangement. Landlord only waived one month's rent and reduced another month's rent by $2,500. Landlord did not reimburse Tenants proportionately for their time and money spent on repairs to the Property.

As a result of the hazardous and uninhabitable conditions, Tenants vacated the Property on June 12, 2024. Landlord did not return Tenants' security deposit of $33,000, or provide an itemized list of deductions within 21 days as required by law.

Tenants attached to the Complaint a completed lease checklist, the sales report for the Property, the listing for the Property, and the lease agreement.

C. *Landlord's Answer*

On March 17, 2025, Landlord filed an answer generally denying Tenants' allegations and asserting fourteen affirmative defenses. As relevant here, Landlord's affirmative defenses included that: (1) Tenants failed to inform Landlord of mold at the Property or to mitigate their damages (Second Affirmative Defense); (2) Tenants committed wrongdoing including failing to timely pay rent, failing to permit reasonable inspections and repairs, refusing access to the premises, and making false reports and representations to Landlord (Eleventh Affirmative Defense); and (3) Tenants had unclean hands because they failed to properly maintain the Property, refused access for inspections and repairs, created or exacerbated conditions, and exaggerated damages (Thirteenth Affirmative Defense).

D. *Landlord's Cross-Complaint*

Landlord concurrently filed a cross-complaint for: (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, (3) unjust enrichment, (4) property damage, (5) declaratory relief, and (6) indemnification.

The cross-complaint alleged that Tenants failed to pay rent in full for several months. Landlord filed an unlawful detainer action on May 16, 2024, seeking possession of the Property due to non-payment of rent. Tenants vacated the Property in or around June 2024. Landlord provided a security deposit disposition letter on July 5, 2024, detailing deductions for unpaid rent and damages, and demanding a total balance of $239,001.47. The fourth cause of action for property damage included stain damage

to carpets, damage to cabinetry, unauthorized re-keying of locks, and unauthorized alterations to the Property.

Particularly relevant here is the cross-complaint's sixth cause of action, which states:

SIXTH CAUSE OF ACTION

(Indemnification against all Cross-defendants)

"22. [Landlord] incorporates all preceding paragraphs as though fully set forth herein.

"23. Pursuant to the lease agreement, [Tenants] are responsible for indemnifying [Landlord] for legal fees, repair costs, and any additional damages resulting from their breach.

"24. [Landlord] seeks indemnification for all attorney's fees and litigation costs incurred in defending against the underlying complaint and pursuing this Cross-Complaint."

Among other things, the cross-complaint prayed for relief "[f]or indemnification of all attorney's fees and costs incurred."

Landlord attached to the cross-complaint the lease agreement and the security deposit disposition notice.

E. *Tenants' Anti-SLAPP Motion*

On April 1, 2025, Tenants filed an anti-SLAPP motion seeking to have stricken from the cross-complaint Landlord's sixth cause of action for indemnification, and paragraph 3 of the prayer for relief, which sought indemnification for all attorney's fees and costs incurred. Alternatively, Tenants sought to strike

the cross-complaint's third cause of action for unjust enrichment insofar as it arose from the protected activity identified in the indemnification cause of action.

Tenants alleged that the indemnification claim arose from Tenant's protected petitioning activity—their filing of the complaint, pre-litigation activity, and refusal to indemnify—and that the claim lacked any legally cognizable merit. First, any contractual clause purporting to indemnify Landlord against Tenants' legal action was contrary to public policy under Civil Code section 1953. Second, the doctrine of equitable indemnification was not a valid claim against the injured party. Third, Tenants' lawsuit and complaint were subject to the litigation privilege under Civil Code section 47. Fourth, to the extent that an indemnification provision existed in the lease, a blanket provision calling for Tenants to indemnify Landlord against all claims brought by Tenants would be unconscionable.

Tenants sought attorney's fees and costs for successfully bringing their anti-SLAPP motion.

Tenants concurrently filed counsel's declaration bringing to the court's attention unfavorable case law. Counsel stated that she reviewed *C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal.App.5th 688 (*Mooradian*) and cases citing it. Counsel declared that only one of the citing cases was published, and that case did not involve a claim for indemnification. Tenants also filed a request that the court take judicial notice of the complaint and the cross-complaint.

F. *Landlord's Opposition to Tenants' Anti-SLAPP Motion*

On May 14, 2025, Landlord filed an opposition to Tenants' anti-SLAPP motion. In the opposition, Landlord argued that the indemnification cause of action did not arise from Tenants' filing of their complaint, but rather from Tenants' obligation under the lease to maintain an insurance policy naming Landlord as an additional insured. Landlord claimed that Tenants' suspected failure to obtain or provide insurance coverage resulted in Landlord incurring defense costs and exposure to liability that the insurance policy would have covered. The indemnification claim did not arise from protected activity—it arose from Tenants' breach of the lease agreement. Landlord asserted that he had a probability of success on the merits because he could demonstrate Tenants' breach of the lease had damaged him.

Landlord claimed that as the prevailing party he was entitled to attorney's fees and costs incurred in opposing Tenants' anti-SLAPP motion. Landlord attached to the opposition counsel's affidavit representing that counsel had expended four hours of billable time at $450 per hour opposing the anti-SLAPP motion, and incurred $50 in costs, for a total of $1,850.

G. *Tenants' Reply to Landlord's Opposition*

On May 20, 2025, Tenants filed a reply to Landlord's opposition. In the reply, Tenants argued that Landlord's opposition was an attempt to re-write the cross-complaint's indemnification cause of action. Landlord's indemnification claim

clearly arose from Tenants' filing of the lawsuit, which was protected activity. The indemnification claim was barred by Civil Code sections 47 and 1953. Tenants claimed that Landlord failed to present any evidence to support the cause of action. Courts do not permit plaintiffs/cross-complainants to defeat an anti-SLAPP motion by re-framing a cause of action to avoid the implication that it arises from protected activity. Further, Landlord could not make a prima facie case for relief because the cause of action was barred by the litigation privilege (Civ. Code, § 47) and the prohibition on contractual truncation of residential tenants' rights to sue their landlords (Civ. Code, § 1953). In the cross-complaint Landlord failed to point to any specific provision of the lease to support his claim.

Tenants concurrently filed evidentiary objections to counsel's affidavit in support of Landlord's request for an award of attorney's fees. Tenants objected that Landlord's attorney's fees and costs were not relevant to the issue of whether his claim possessed minimal merit.

H. *Hearing on the Anti-SLAPP Motion*

On May 27, 2025, the trial court held a hearing on Tenants' anti-SLAPP motion. The court issued a tentative ruling prior to the hearing that is not contained in the record on appeal. Based on arguments made at the hearing, however, we understand that in its tentative ruling, the court accepted Landlord's characterization of the indemnification claim as based on paragraph 29(C) of the lease—the provision requiring Tenants to obtain liability insurance for damage to the Property and to add

Landlord as an additional insured.[3] Tenants argued that this was not the substance of the indemnification claim. The insurance provision was not mentioned anywhere in the cross-complaint. Tenants argued that Landlord first characterized the claim as breach of the lease for failure to obtain insurance in the opposition to Tenants' motion. Landlord could not rephrase a claim to avoid being subject to an anti-SLAPP motion.

Tenants' counsel further contended that there was a factual issue regarding the provisions of the lease. Counsel quoted the court's tentative ruling: " 'Moreover, paragraph 34 of the lease states that the prevailing party in any action or proceeding arising out of the lease is entitled to attorney fees and costs. This means that if [Tenants] lose the action, then [Landlord] can seek "indemnification for all attorney fees and litigation costs incurred in defending" the action.' " Tenants' counsel argued that paragraph 36 of the lease (relating to attorney's fees) plainly states that Landlord could not seek indemnification for all attorney fees and costs. Paragraph 36 limits the amount that Tenants would reimburse to Landlord to $1,000 unless Landlord

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[3] At the hearing, Tenants' counsel quoted from the tentative ruling as follows: " 'Therefore, [Tenants'] obligation to indemnify defendant arises not from [Tenants] having filed this action, but from [Tenants] entering into a lease with [Landlord] and agreeing to comply with the lease's terms and [Tenants'] subsequent breach of the lease and failure to indemnify defendant.' " Counsel further quoted the tentative ruling as stating: " 'While the court does not analyze the merits of [Landlord's] claim in the first step of the anti-SLAPP, the court notes that paragraph 29 of the lease agreement requires the [Tenants] to obtain insurance and requires [the Landlord] be added as an additional insured."

has complied with the mediation requirement in paragraph 35(A). The issue of compliance with paragraph 35(A) was not raised in the cross-complaint and was not before the court. There was no basis for awarding all attorney fees and costs to Landlord.

Tenants' counsel stated that the tentative ruling referenced the litigation privilege, but did not recognize that the litigation privilege can apply to contract claims as well as tort claims. Counsel indicated that the court had not analyzed whether Civil Code section 1953 applied.

Landlord's counsel requested that the court reconsider awarding Landlord attorney's fees under section 425.16, subdivision (c).[4] The anti-SLAPP provision provides that a prevailing party is entitled to fees pursuant to section 128.5 when an anti-SLAPP motion is frivolous or causes unnecessary delay. Counsel argued that Tenants' motion mischaracterized the pleadings. Counsel stated that Tenants continued to assert the sixth cause of action arose from the filing of the lawsuit when, in fact, it was a claim that Tenants breached a provision of the lease by failing to obtain insurance. Landlord asserted that Tenants failed to address *Mooradian* and *Gumarang v. Braemer on Raymond, LLC* (2025) 110 Cal.App.5th 370 (*Gumarang*), which held that contractual indemnity-based provisions do not arise from protected activity.[5] Tenants instead relied on cases like

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[4] We infer that the court denied the request for attorney fees in its tentative ruling.

[5] Landlord's opposition did not discuss or even cite *Mooradian* and *Gumarang*. As set forth above, Tenants' counsel acknowledged *Mooradian* as unfavorable case law in counsel's declaration to the court filed concurrently with Tenants' anti-SLAPP motion.

Long Beach Unified School Dist. v. Margaret Williams, LLC (2019) 43 Cal.App.5th 87 (*Williams*), which involved indemnity obligations in the context of public interest litigation, as opposed to private disputes like the landlord-tenant dispute in this case. Landlord argued that the anti-SLAPP motion was a tactical maneuver made in bad faith that justified an award of attorney fees and costs.

Tenants' counsel responded that there is no separate public interest requirement associated with section 425.16, subdivision (e)(1) and (e)(2) that would distinguish this case from *Williams*. Regardless, in this case the activity did arise from an issue of public interest—public health and safety.

The court took the matter under submission.

I. *Trial Court's Ruling*

The trial court summarily denied Tenants' anti-SLAPP motion in a terse written ruling, and granted Landlord's request for attorney fees and costs in the amount of $1,850.00.[6] The court did not adopt its tentative ruling or provide an explanation for its decision.

Tenants timely appealed.

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[6] The trial court's ruling states: "Plaintiffs' special motion to strike is denied. *Defendant's request for attorney's fees is denied.* Defendant's request for attorney's fees and costs is granted, and the court awards Defendant $1,850.00 in fees and costs." (Italics added.) The parties appear to be in agreement that the court ordered attorney fees and costs.

DISCUSSION

A. *Anti-SLAPP Motion*

1. Legal Principles

"Section 425.16 provides, '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).)" (*Mooradian*, *supra*, 43 Cal.App.5th at p. 697.)

"Pursuant to section 425.16, subdivision (e), an ' "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, (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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public

issue or an issue of public interest.' " (*Mooradian*, *supra*, 43 Cal.App.5th at pp. 697–698.)

"In ruling on a motion under section 425.16, the trial court engages in a two-step process. 'First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If 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.' (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) 'Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, italics omitted (*Navellier*).) If the moving party fails to demonstrate that any of the challenged claims for relief arise from protected activity, the court properly denies the motion to strike without addressing the second step (probability of success). (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80–81; *Trilogy at Glen Ivy Maintenance Assn. v Shea Homes, Inc.* (2015) 235 Cal.App.4th 361, 367.)" (*Mooradian*, *supra*, 43 Cal.App.5th at p. 698.)

" 'A claim arises from protected activity when that activity underlies or forms the basis for the claim.' (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062–1063 (*Park*).) Thus, '[t]he defendant's first-step burden is to identify the activity each challenged claim rests on and demonstrate that that activity is protected by the anti-SLAPP statute. A "claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability

is asserted." ' (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 884 (*Wilson*); accord, *Park*, at p. 1060.) ' "[T]he mere fact that an action [or claim] was filed after protected activity took place does not mean the action [or claim] arose from that activity for the purposes of the anti-SLAPP statute." ' (*Park*, at pp. 1062–1063; see *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 621 ['a claim does not "arise from" protected activity simply because it was filed after, or because of, protected activity, or when protected activity merely provides evidentiary support or context for the claim'].) 'To determine whether a claim arises from protected activity, courts must "consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." ' (*Wilson*, at p. 884; accord, *Park*, at p. 1063.)" (*Mooradian*, *supra*, 43 Cal.App.5th at p. 698.)

"We review de novo an order granting or denying a special motion to strike under section 425.16 (*Wilson*, *supra*, 7 Cal.5th at p. 884; *Park*, *supra*, 2 Cal.5th at p. 1067), considering the parties' pleadings and affidavits describing the facts on which liability or defenses are predicated. (§ 425.16, subd. (b)(2); see *Navellier*, *supra*, 29 Cal.4th at p. 89; see also *San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, 94.)" (*Mooradian*, *supra*, 43 Cal.App.5th at p. 699.)

2. <u>Analysis</u>

Tenants contend that the trial court erred in denying their motion to strike Landlord's indemnification claim, arguing the claim arises from their filing of the lawsuit, which is protected

activity under the anti-SLAPP statute. (See *Trapp v. Naiman* (2013) 218 Cal.App.4th 113, 120 [" '[f]iling a lawsuit is an act in furtherance of the constitutional right of petition' "].) Landlord asserts that the activity underlying the claim is Tenants' breach of the lease agreement—damaging the Property and failing to obtain liability insurance—which are not a protected activities under section 425.16. We agree with Landlord.

"A claim for contractual indemnity is akin to a claim for breach of contract." (*Gumarang*, *supra*, 110 Cal.App.5th at p. 382.) "A breach of contract claim can arise from protected activity" but only "if the action allegedly breaching the contract is itself protected." (*Bonni* [*v. St. Joseph Health System* (2021)] 11 Cal.5th [995,] 1025.) " 'Typically, a pleaded cause of action states a legal ground for recovery supported by specific allegations of conduct by the [cross-]defendant on which the [cross-complainant] relies to establish a right to relief. If the supporting allegations include conduct furthering the [cross-]defendant's exercise of the constitutional rights of free speech or petition, the pleaded cause of action "aris[es] from" protected activity, at least in part, and is subject to the special motion to strike authorized by section 425.16(b)(1).' (*Baral*, *supra*, 1 Cal.5th at pp. 381–382.)" (*Pech v. Doniger* (2022) 75 Cal.App.5th 443, 458.) " '[A]n indemnitee seeking to recover on an agreement for indemnification must allege the parties' contractual relationship, the indemnitee's performance of that portion of the contract which gives rise to the indemnification claim, the facts showing a loss within the meaning of the parties' indemnification agreement, and the amount of damages sustained[.]' " (*Mooradian*, *supra*, 43 Cal.App.5th at pp. 699–700, quoting *Four*

Star Electric, Inc. v. F & H Construction (1992) 7 Cal.App.4th 1375, 1380.)

Tenants are correct that the indemnification claim in Landlord's cross-complaint does not expressly reference paragraph 29(C) of the lease, which is the paragraph that requires Tenants to obtain liability insurance for damage to the Property and to name Landlord as an additional insured. Despite this shortcoming, an examination of the language of the indemnification claim in the context of the overall cross-complaint leads us to conclude that the claim seeks indemnification from loss arising from Tenants' damage to the Property and Tenants' failure to obtain insurance. Further, the indemnification sought would shield Landlord from legal fees and financial damages arising from such property damage, rather than indemnification from all legal action Tenants have initiated against Landlord regardless of which party prevails.

First, paragraph 22 of the indemnification claim incorporates all of the preceding allegations in the cross-complaint. The preceding allegations include that Tenants damaged the Property by staining carpets, damaging cabinetry, and re-keying locks, which are violations of the lease.

Second, paragraph 23 expressly states that Tenants are responsible for indemnifying Landlord "for legal fees, repair costs, and any additional damages *resulting from their breach*." (Italics added.) This limits the claim to indemnification for legal fees, repair costs, and damages resulting from Tenants' breach of the lease. The indemnification claim does not encompass legal fees, repair costs, and other damages that do not arise from Tenants' breach.

Third, the reference to the "underlying complaint" in paragraph 24 (i.e., "Cross-Complainant seeks indemnification for all attorney's fees and litigation costs incurred in defending against the underlying complaint and pursuing this Cross-Complaint.") does not broaden the category of legal fees, repair costs, and damages for which Landlord seeks indemnification to include damages that were not caused by Tenants' breach or that would not be covered by the agreed-upon liability insurance. In the answer, Landlord asserted multiple affirmative defenses to the complaint based on Tenants' alleged breaches of the lease—including that Tenants caused damage to the Property and failed to take action to mitigate damages. The indemnification claim encompasses only legal fees, repair costs, and damages relating to the causes of action in the complaint upon which Landlord ultimately prevails based on the affirmative defense that Tenants breached the lease.

The facts showing a loss within the meaning of the parties' indemnification agreement are an element of an indemnity cause of action. Here, the indemnity claim arises from the loss that Tenants allegedly caused by damaging the Property and failing to obtain required insurance naming Landlord as an additional insured, which is not protected activity under section 425.16. The published cases following our Supreme Court's decision in *Park*, which clarified that the "arising from protected activity" analysis requires an examination of the elements of a claim, are consistent with our conclusion.

In *Mooradian*, *supra*, 43 Cal.App.5th at page 693, homeowners and a structural engineer entered into a contract that included an indemnity provision under which homeowners agreed to indemnify, defend, and hold harmless the engineer

from and against all costs or liability "arising in whole or in part from errors, omissions or inaccuracies in any Project related information or documents provided by, or through [homeowners], or any other person or entity, acting on [homeowners'] behalf." Homeowners sued the engineer for fraud and negligent breach of contract. (*Id*. at p. 694.) The engineer filed a cross-complaint against homeowners for indemnity under the contract provision. (*Id*. at p. 695.) Homeowners then moved to strike the engineer's cross-complaint pursuant to section 425.16. (*Id*. at p. 696.) The trial court denied homeowner's anti-SLAPP motion because the court concluded that homeowners failed to establish the engineer's indemnity claim arose from an act in furtherance of the homeowners' right of petition or free speech. (*Id*. at p. 697.)

Employing the *Park* elements analysis, the Court of Appeal affirmed the trial court's order denying homeowners' anti-SLAPP motion, reasoning: "To be sure, a cause of action arising from [homeowners'] litigation activity directly implicates the right to petition and is subject to a special motion to strike. . . . [¶] [However,] [t]he filing of [homeowners'] first amended complaint is not the wrongful act forming the basis for [homeowners'] liability as alleged in [engineer's] cross-claims. Rather, the alleged wrongful act that forms the basis for the express indemnity cause of action is [homeowners'] failure to indemnify, defend and hold harmless [engineer] in breach of [the parties'] agreement, including to indemnify [engineer] from any liability arising from the use of the EPS [expanded polystyrene] panels selected by [homeowners] or [homeowners'] representative . . . ." (*Mooradian*, *supra*, 43 Cal.App.5th at pp. 700–701.)

In *Gumarang*, 110 Cal.App.5th at page 375, a business owner entered into a lease for commercial premises with a

landlord. The lease contained an indemnification clause that provided: " 'Except for [landlord's] gross negligence or willful misconduct, [business owner] shall indemnify, protect, defend and hold harmless the Premises, [landlord] and its agents,[including management] . . . from and against any and all claims, loss of rents and/or damages, liens, judgments, penalties, attorneys' and consultants' fees, expenses and/or liabilities arising out of, involving, or in connection with, the use and/or occupancy of the Premises by [business owner].' " After business owner spent months renovating, the property was destroyed in a fire, which the fire department determined was likely an accident caused by an electrical failure in an interior wall. (*Id*. at p. 376.) Business owner sued landlord and management for damages. (*Ibid*.) Landlord and management filed cross-claims for contractual indemnity, breach of contract, and declaratory relief, all arising from allegations that business owner agreed under the terms of the lease to defend and indemnify landlord and its agents against any claims arising out of business owner's use or occupancy of the property. (*Id*. at p. 377.) Business owner's insurance company agreed to defend landlord, but not management. (*Id*. at p. 378.) Business owner moved to strike the cross-complaint pursuant to section 425.16, claiming that the indemnity claim arose from his "protected activity of filing the underlying lawsuit because [landlord and management sought] to hold him liable for suing [m]anagement to recover damages from the destruction of the [p]roperty." (*Id*. at p. 380.) Landlord moved to dismiss all cross claims, but management opposed business owner's anti-SLAPP motion. (*Ibid*.) The trial court denied the anti-SLAPP motion with respect to business owner's indemnity claim. In so doing, the court did not analyze whether

the claim arose from protected activity, instead denying the anti-SLAPP motion on the basis that business owner was unlikely to prevail as to that claim.

The Court of Appeal analyzed the elements of the indemnity claim and concluded that it was business owner's "alleged breach of the [l]ease's indemnity provision by refusing to defend and indemnify [m]anagement against claims arising out of [business owner's] use or occupancy of the [p]roperty that gives rise to [the indemnity claim]." (*Gumarang*, *supra*, 110 Cal.App.5th at p. 385.)

Both *Mooradian* and *Gumarang* distinguished *Lennar Homes of California, Inc. v. Stephens* (2014) 232 Cal.App.4th 673 (*Lennar*) and *Williams, supra*, 43 Cal.App.5th 87, upon which Tenants rely. In both *Lennar* and *Williams*, the Courts of Appeal affirmed trial court orders granting special motions to strike first party contractual indemnity claims in cross-complaints that effectively barred the plaintiff anti-SLAPP movants from obtaining meaningful recovery in their lawsuits against defendants.

In *Lennar*, *supra*, 232 Cal.App.4th at page 677, a builder attempted to enforce indemnity clauses in contracts with home buyers, and sought to recover attorney fees and costs incurred in defending a class action lawsuit brought by some of the buyers. The trial court granted buyers' anti-SLAPP motion. (*Id*. at p. 679.) On appeal, the builder did not contest that the indemnity claim arose from the protected activity of filing the class action lawsuit with respect to the named class action plaintiffs, but disputed that a spouse who was not a named plaintiff had also been acting in furtherance of her right to petition. (*Id*. at p. 680.) The Court of Appeal affirmed,

concluding that the spouse was also acting in furtherance of her right to petition and that, as to the spouse, the builder's indemnity claim arose from the class action lawsuit because "but for" the class action the builder's claim would have no basis. (*Id.* at p. 684.) *Lennar* is readily distinguishable. First, the court did not decide the issue of whether the case arose from the filing of the class action lawsuit, as that issue was conceded. Second, the case was decided prior to the Supreme Court's decision in *Park*, and did not employ the elements analysis to determine whether the indemnity claim arose from protected activity.

In *Williams*, *supra*, 43 Cal.App.5th at pages 90–92, a construction manager sued a school district for retaliatory termination of her contract with the district. The manager claimed that she was fired after she made efforts to enforce compliance with environmental hazard regulations at a district construction site. (*Id.* at pp. 92–94.) The district filed a cross-complaint alleging the manger breached an indemnity provision in the contract by refusing to defend the district against her retaliatory firing lawsuit. (*Ibid.*) Manager moved to strike the cross-complaint, and the trial court granted the motion. (*Id.* at p. 96.)

On appeal, the court affirmed the trial court's order. (*Williams*, *supra*, 43 Cal.App.5th at pp. 97–100.) The Court of Appeal correctly described the Supreme Court's *Park* analysis, but then relied upon *Lennar* without further discussion, concluding that "[h]ere, the District's cross-claims for defense and indemnity likewise would have no basis without the Underlying Action in which it seeks to be defended and indemnified." (*Id.* at p. 98.) Alternatively, the Court of Appeal held that even if it had not concluded that the district's indemnity claim arose from

manager's filing of the lawsuit, which was protected activity pursuant to section 425.16, subdivision (e)(1), it would conclude that the indemnity claim arose from manager's refusal to fund the defense of her own litigation, which was "protected conduct in furtherance of petitioning in connection with an issue of public interest" under section 425.16, subdivision (e)(4) because the allegations concerned "an environmental hazard at a construction site for a public school, violations of the state's requirements for remedying that hazard, and a public school district's punishment of resistance to those violations." (*Id.* at p. 99.)

Williams is distinguishable from this case because it relied on *Lennar's* reasoning without engaging in an analysis of the elements of the indemnity claim, and because Tenants' breach of the lease is not an issue of public interest that would qualify Tenants' activity for protection pursuant to section 425.16, subdivision (e)(4).

For all of the forgoing reasons, we conclude that the trial court did not err in denying Tenants' anti-SLAPP motion.

B. *Attorney's Fees*

Tenants also challenge the trial court's award to Landlord of attorney's fees and costs in the amount of $1,850. We agree with Tenants that the order was improper and must be reversed.

"A trial court is required to award costs and attorney fees to a plaintiff who prevails in defending against an anti-SLAPP motion 'pursuant to [s]ection 128.5' upon a finding that the motion was 'frivolous or . . . solely intended to cause unnecessary delay.' (§ 425.16, subd. (c)(1).) The reference to section 128.5 means that ' "a court must use the procedures and apply the

substantive standards of section 128.5 in deciding whether to award attorney fees under the anti-SLAPP statute." ' (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 199, quoting *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1392.)" (*Rudisill v. California Coastal Com.* (2019) 35 Cal.App.5th 1062, 1070 (*Rudisill*).)

"Section 128.5 similarly provides for an award of 'reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay.' (§ 128.5, subd. (a).) Frivolous means 'totally and completely without merit or for the sole purpose of harassing an opposing party.' (§ 128.5, subd. (b)(2).) To meet this standard, a party requesting the award must show that 'any reasonable attorney would agree the motion was totally devoid of merit.' (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450 (*Gerbosi*).)" (*Rudisill*, *supra*, 35 Cal.App.5th at p. 1070.)

"An order imposing expenses shall be in writing and shall recite in detail the action or tactic or circumstances justifying the order." (§ 128.5, subd. (c).) We review a trial court's ruling ordering attorney fees for a frivolous anti-SLAPP motion for abuse of discretion. (*Gerbosi*, *supra*, 193 Cal.App.4th at p. 450.)

In this case, the trial court issued a summary order granting to Landlord attorney's fees and costs. The court offered no justification for its order. Because the order does not recite any conduct or circumstances upon which the court justified issuance of the sanctions as section 128.5 requires, it is invalid and must be reversed. (*First City Properties, Inc. v. MacAdam* (1996) 49 Cal.App.4th 507, 514.)

DISPOSITION

The trial court's order denying plaintiff, cross-complainant, and appellant Demian and Brooke Lichtenstein's special motion to strike is affirmed. We reverse the trial court's order awarding attorney's fees and costs to defendant, cross-complainant, and respondent Fred Stalley.

The parties are ordered to bear their own costs on appeal.

NOT TO BE PUBLISHED.

MOOR, J.

WE CONCUR:

BAKER, Acting P. J.

KIM (D.), J.