Case No. S228277

Supreme Court of the State of California

WILLIAM PARRISH and E. TIMOTHY FITZGIBBONS,
Plaintiffs and Appellants

vs.

LATHAM & WATKINS, LLP and DANIEL SCHECTER,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 3, CASE NO. B244841
HON. JAMES R. DUNN, JUDGE, SUP. CT. NO. BC 482394

APPLICATION OF ATTORNEY'S LIABILITY ASSURANCE SOCIETY, INC.; BAKER & MCKENZIE; BRYAN CAVE LLP; DLA PIPER LLP (US); FISH & RICHARDSON P.C.; GIBSON, DUNN & CRUTCHER LLP; GREENBERG TRAURIG, LLP; IRELL & MANELLA LLP; MCGUIREWOODS LLP; MORRISON & FOERSTER LLP; O'MELVENY & MYERS LLP; PAUL HASTINGS LLP; REED SMITH LLP; AND SQUIRE PATTON BOGGS (US) LLP; FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF SUPPORTING RESPONDENTS

MUNGER, TOLLES & OLSON LLP
Mark B. Helm (SBN 115711)
Mark.Helm@mto.com
John F. Muller (SBN 300839)
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
Tel: (213) 683-9100
Fax: (213) 687-3702

Attorneys for Attorney's Liability Assurance Society, Inc.

Case No. S228277

Supreme Court of the State of California

WILLIAM PARRISH and E. TIMOTHY FITZGIBBONS,
Plaintiffs and Appellants

vs.

LATHAM & WATKINS, LLP and DANIEL SCHECTER,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 3, CASE NO. B244841
HON. JAMES R. DUNN, JUDGE, SUP. CT. NO. BC 482394

APPLICATION OF ATTORNEY'S LIABILITY ASSURANCE SOCIETY, INC.; BAKER & MCKENZIE; BRYAN CAVE LLP; DLA PIPER LLP (US); FISH & RICHARDSON P.C.; GIBSON, DUNN & CRUTCHER LLP; GREENBERG TRAURIG, LLP; IRELL & MANELLA LLP; MCGUIREWOODS LLP; MORRISON & FOERSTER LLP; O'MELVENY & MYERS LLP; PAUL HASTINGS LLP; REED SMITH LLP; AND SQUIRE PATTON BOGGS (US) LLP; FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF SUPPORTING RESPONDENTS

MUNGER, TOLLES & OLSON LLP
Mark B. Helm (SBN 115711)
Mark.Helm@mto.com
John F. Muller (SBN 300839)
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
Tel: (213) 683-9100
Fax: (213) 687-3702

Attorneys for Attorney's Liability Assurance Society, Inc.

BAKER & MCKENZIE
Peter D. Engstrom (SBN 121529)
peter.engstrom@bakermckenzie.com
Two Embarcadero Center, 11th Floor
San Francisco, California 94111-3802
Tel: (415) 576-3025
Fax: (415) 576-3099

Attorney for Baker & McKenzie

BRYAN CAVE LLP
John W. Amberg (SBN 108166)
jwamberg@bryancave.com
120 Broadway #300
Santa Monica, CA 90401-230
Tel: (310) 576-2280
Fax: (310) 576-2200

Attorney for Bryan Cave LLP

DLA PIPER LLP (US)
Charles L. Deem (SBN 110557)
charlie.deem@dlapiper.com
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: (619) 699-2978
Fax: (619) 764-6678

Attorney for DLA Piper LLP (US)

FISH & RICHARDSON P.C.
John W. Thornburgh (SBN 154627)
thornburgh@fr.com
12390 El Camino Real
San Diego, CA 92130
Tel: (858) 678-5070
Fax: (858) 678-5099

Attorney for Fish & Richardson P.C.

GIBSON, DUNN & CRUTCHER LLP
Kevin S. Rosen (SBN 133304)
krosen@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071-3197
Tel: (213) 229-7635
Fax: (213) 229-6635

Attorney for Gibson, Dunn & Crutcher LLP

GREENBERG TRAURIG, LLP
Jeff E. Scott (SBN 126308)
scottj@gtlaw.com
1840 Century Park East, Suite 1900
Los Angeles, CA 90067
Tel: (310) 586-7700
Fax: (310) 586-7800

Attorney for Greenberg Traurig, LLP

IRELL & MANELLA LLP
Harry Mittleman (SBN 172343)
hmittleman@irell.com
1800 Avenue of the Stars, Suite 900
Los Angeles, CA 90067
Tel: (310) 277-1010
Fax: (310) 203-7199

Attorney for Irell & Manella LLP

MCGUIREWOODS LLP
Leslie M. Werlin (SBN 67994)
lwerlin@mcguirewoods.com
1800 Century Park East, 8th Floor
Los Angeles, CA 90067
Tel: (310) 315-8222
Fax: (310) 315-8210

Attorney for McGuireWoods LLP

MORRISON & FOERSTER LLP
Douglas L. Hendricks (SBN 83611)
dhendricks@mofo.com
Philip T. Besirof (SBN 185053)
pbesirof@mofo.com
Morrison & Foerster LLP
425 Market Street, Suite 3200
San Francisco, CA 94105
Tel: (415) 268-7000
Fax: (415) 268-7522

Attorneys for Morrison & Foerster LLP

O'MELVENY & MYERS LLP
Martin S. Checov (SBN 96901)
mchecov@om.com
400 South Hope Street
Los Angeles, CA 90071
Tel: (213) 430-6000
Fax: (213) 430-6407

Attorney for O'Melveny & Myers LLP

PAUL HASTINGS LLP
Eve M. Coddon (SBN 125389)
evecoddon@paulhastings.com
515 South Flower Street, 25th Floor
Los Angeles, CA 90071
Tel: (213) 683-6150
Fax: (213) 996-3150

Attorney for Paul Hastings LLP

REED SMITH LLP
Kurt C. Peterson (SBN 83941)
kpeterson@reedsmith.com
1901 Avenue of the Stars, Suite 700
Los Angeles, CA 90067-6078
Tel: (310) 734-5201
Fax: (310) 734-5299

Attorney for Reed Smith LLP

SQUIRE PATTON BOGGS (US) LLP
Adam R. Fox (SBN 220584)
adam.fox@squirepb.com
555 South Flower Street, 31st Floor
Los Angeles, CA 90071
Tel: (213) 624-2500
Fax: (213) 623-4581

Attorney for Squire Patton Boggs (US) LLP

APPLICATION OF ATTORNEY'S LIABILITY ASSURANCE SOCIETY, INC. AND THIRTEEN INDIVIDUAL NON-ALAS LAW FIRMS FOR LEAVE TO FILE *AMICI CURAIE* BRIEF IN SUPPORT OF RESPONDENTS

To the Honorable Tani Cantil-Sakauye, Chief Justice:

Attorney's Liability Assurance Society, Inc. ("ALAS"), and thirteen individual non-ALAS law firms with practices in California—Baker & McKenzie; Bryan Cave LLP; DLA Piper LLP (US); Fish & Richardson P.C.; Gibson, Dunn & Crutcher LLP; Greenberg Traurig, LLP; Irell & Manella LLP; McGuireWoods LLP; Morrison & Foerster LLP; O'Melveny & Myers LLP; Paul Hastings LLP; Reed Smith LLP; and Squire Patton Boggs (US) LLP—respectfully move for leave to file a brief as *amici curiae* in support of Respondents.* ALAS insures 216 law firms and approximately 58,800 lawyers and offers insurance against claims for malicious prosecution. Collectively, the thirteen non-ALAS *amici* law firms have extensive experience defending actions against attorneys for malicious prosecution. Both ALAS and the non-ALAS *amici* law firms have been active in various policy issues relating to the legal profession, whether through public commentary, participation in amicus briefs, educational efforts, or otherwise.

Further, ALAS's California attorney insureds and the California attorneys belonging to the non-ALAS *amici* law firms have an interest in vigorously representing their clients without being subjected to the kind of

---

* No party or counsel for a party authored the proposed *amici curiae* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici curiae* and their members, made a monetary contribution intended to fund the preparation or submission of this brief.

hindsight-driven second-guessing that this Court has held is inappropriate in a later malicious prosecution action.

Finally, they have an interest in availing themselves of the repose from malicious prosecution actions that the California Legislature found appropriate to afford attorneys when it enacted Code of Civil Procedure section 340.6—and in avoiding the higher malpractice insurance premiums that would result from application of a longer limitations period.

ALAS and the non-ALAS *amici* law firms believe they have important perspectives to offer on each of the two issues before the Court, either of which is independently dispositive and both of which are important to the profession.

First, as the proposed *amicus* brief explains, Petitioners' arguments, if accepted, would undermine the principles set out by this Court regarding probable cause and the interim adverse judgment rule. By jettisoning the fraud or perjury requirements for the exception to the interim adverse judgment rule, Petitioners would transform malicious prosecution from an intentional tort into one governed by strict liability or negligence principles. Under their formulation, probable cause would be judged not by the facts the attorney defendant knew at the time but by then-unknown facts that later came to light. Petitioners would also have courts assess whether an action was justified based on the final result rather than the circumstances under which the attorney acted. The consequence would be to discourage lawsuits that litigants have a lawful right to bring, and to encourage baseless suits for malicious prosecution.

Second, Petitioners also advance an interpretation of Code of Civil Procedure section 340.6 contrary to this Court's express instructions in *Lee v. Hanley* (2015) 61 Cal.4th 1225, and the intentions of the legislature. Properly interpreted, the one-year limitations period in section 340.6 applies to malicious prosecution actions against attorneys, and this

limitations period begins when judgment is entered in the underlying action.

For the reasons stated above, the Court should grant this application and permit ALAS and the non-ALAS *amici* law firms to file the attached proposed *amici curiae* brief.

DATED: May 13, 2016

Respectfully submitted,

/s/ Mark B. Helm
MUNGER, TOLLES & OLSON LLP
Mark B. Helm (SBN 115711)
John F. Muller (SBN 300839)

Attorneys for Attorney's Liability Assurance Society, Inc.

/s/ Peter D. Engstrom
BAKER & MCKENZIE
Peter D. Engstrom (SBN 121529)

Attorney for Baker & McKenzie

/s/ John W. Amberg
BRYAN CAVE LLP
John W. Amberg (SBN 108166)

Attorney for Bryan Cave LLP

/s/ Charles L. Deem
DLA PIPER LLP (US)
Charles L. Deem (SBN 110557)

Attorney for DLA Piper LLP (US)

/s/ John W. Thornburgh
FISH & RICHARDSON P.C.
John W. Thornburgh (SBN 154627)

Attorney for Fish & Richardson P.C.

/s/ Kevin S. Rosen
GIBSON, DUNN & CRUTCHER LLP
Kevin S. Rosen (SBN 133304)

Attorney for Gibson, Dunn & Crutcher LLP

/s/ Jeff E. Scott
GREENBERG TRAURIG, LLP
Jeff E. Scott (SBN 126308)

Attorney for Greenberg Traurig, LLP

/s/ Harry Mittleman
IRELL & MANELLA LLP
Harry Mittleman (SBN 172343)

Attorney for Irell & Manella LLP

/s/ Leslie M. Werlin
MCGUIREWOODS LLP
Leslie M. Werlin (SBN 67994)

Attorney for McGuireWoods LLP

/s/ Douglas L. Hendricks
MORRISON & FOERSTER LLP
Douglas L. Hendricks (SBN 83611)
Philip T. Besirof (SBN 185053)

Attorneys for Morrison & Foerster LLP

/s/ Martin S. Checov
O'MELVENY & MYERS LLP
Martin S. Checov (SBN 96901)

Attorney for O'Melveny & Myers LLP

/s/ Eve M. Coddon
PAUL HASTINGS LLP
Eve M. Coddon (SBN 125389)

Attorney for Paul Hastings LLP

/s/ Kurt C. Peterson
REED SMITH LLP
Kurt C. Peterson (SBN 83941)

Attorney for Reed Smith LLP

/s/ Adam R. Fox
SQUIRE PATTON BOGGS (US) LLP
Adam R. Fox (SBN 220584)

Attorney for Squire Patton Boggs (US) LLP

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATE STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATE RULES

TREATISES

INTEREST OF *AMICI CURIAE*

Amici are Attorney's Liability Assurance Society, Inc. ("ALAS"), which insures 216 law firms and approximately 58,800 lawyers, as well as thirteen non-ALAS *amici* law firms that practice in California. ALAS offers insurance against claims for malicious prosecution, and the individual non-ALAS firms have extensive experience defending actions for malicious prosecution. It is in the interest of *amici* that this Court define and apply the elements of malicious prosecution consistently and correctly, and that the proper statute of limitations be applied to such actions when they are brought against attorneys. By virtue of their extensive experience with legal malpractice litigation, and particularly actions against attorneys for malicious prosecution, *amici* are uniquely situated to offer a broader perspective on the issues raised by this appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeal properly granted Respondents' anti-SLAPP motion on the ground that Respondents had probable cause to bring the underlying action. This ruling should be affirmed. Alternatively, the Court may affirm the judgment below on an independent ground without reaching the probable cause issue. Specifically, the Court may rule, under *Lee v. Hanley* (2015) 61 Cal.4th 1225, that this action is barred by the one-year limitations period in Code of Civil Procedure section 340.6.

As this Court held in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, an interim adverse judgment on the merits establishes probable cause to bring an action unless the judgment was obtained by fraud or perjury. This rule rests on a straightforward and important principle: subject to the exceptions *Wilson* identifies, an interim adverse judgment on the merits necessarily proves the existence of probable cause. A lawyer has probable cause to prosecute an action when a reasonable

lawyer, based on the facts actually known at the time, would believe that the action was not "totally and completely without merit." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885.) Critically, this standard depends on the facts known by the actual lawyer: it asks how a reasonable lawyer would have acted if aware of the same prima facie evidence. (*Wilson, supra*, 28 Cal.4th at pp. 821-22 and fn. 6.)

In the usual case, an interim judgment on the merits for a lawyer's client necessarily will rest on a determination that there was probable cause to bring the action: in reaching the judgment, a reasonable (as well as disinterested and experienced) lawyer—the court—will have found, based on the facts known to the lawyer defendant, that the action was not totally and completely without merit. The one instance in which this will not be the case is when the court was misled about the facts actually known to the lawyer defendant—that is, when the lawyer knowingly misstated those facts to the court through fraud or subornation of perjury. In that instance, the lawyer cannot be said necessarily to have acted with probable cause, because the interim judgment was not based upon the same facts the lawyer knew at the time.

Petitioners seek to expand the exceptions to the interim adverse judgment rule in violation of this fundamental principle. They argue for an exception to the rule when a judgment was obtained not by fraud or perjury but by "materially false facts"—whether or not the falsity of those facts was known by the lawyer at the time. This rule would impose a sort of strict liability or negligence standard for probable cause, faulting lawyers for facts they did not know at the time they acted.

Such an approach is fundamentally inconsistent with how the probable cause test has been understood and applied by this Court. Malicious prosecution is and always has been an intentional tort—and indeed one with a high threshold for establishing the requisite

intentionality. The tort should not be transformed into one making lawyers guarantors that facts they relied upon to support probable cause will never prove later to be erroneous. Such a rule would discourage lawyers from bringing lawsuits their clients have a right to bring. It would also create a conflict of interest between lawyers and their clients, encouraging lawyers to conduct excessive inquiries that are not for the benefit of their clients.

Petitioners' argument that a later finding of "bad faith" under section 3426.4 of the Uniform Trade Secrets Act shows a lack of probable cause has the issue exactly backwards. Petitioners ignore this Court's statement that unjustified litigation is best deterred by measures, like sanctions, applicable in the initial suit, rather than by a successive action for malicious prosecution. Given this directive, the award of sanctions under section 3426.4 based on a finding of bad faith is a reason why a later malicious prosecution action is unnecessary, not a reason why it should be maintained. In any event, a finding of bad faith under section 3426.4 does not require a finding of fraud or perjury, and thus offers no reason to disturb an interim adverse judgment. And even in the absence of an interim adverse judgment, a finding of bad faith under section 3426.4 does not correspond to a finding of no probable cause.

In this suit, Petitioners do not advance any evidence of fraud or perjury in the underlying action—or, for that matter, even any evidence of materially false facts. Their argument boils down to the assertion, wholly unsupported by the evidence, that two experts falsely claimed that they had applied a "scientific methodology" to assess the likelihood of trade secret misuse. Even the most cursory look at the expert declarations conclusively refutes this claim: they made no such representation.[1] Petitioners really

[1] Portions of the trial court record are contained in sealed volumes of the record on appeal, which were not available to *amici*. In the trial court,

ask this Court to find that Respondents lacked probable cause to bring the underlying action merely because, after trial, the court weighed the evidence in favor of Petitioners. Such a holding would create a back door to this Court's carefully circumscribed standard for probable cause, discouraging lawsuits that litigants and their attorneys have a right to bring, creating a conflict of interest between attorneys and their clients, and encouraging a flood of suits for malicious prosecution.

In any event, this Court need not decide how the interim adverse judgment rule properly should have been applied here. Rather, the Court may affirm on the independent and fully sufficient basis that this action is barred by the one-year limitations period set by Code of Civil Procedure section 340.6.

Under *Lee v. Hanley*, *supra*, section 340.6 applies to claims against attorneys that depend on a showing that the attorney, in the course of performing services judged against an attorney-specific standard, violated an obligation that the attorney had by virtue of the attorney's identity as an attorney. This rule does not extend to claims—like sexual battery or garden-variety theft—that would show that the attorney violated an obligation of general application rather than an obligation *unique* to attorneys. *Lee* defined the scope of section 340.6 with attention to the Legislature's goal of controlling the rising costs of malpractice insurance.

Under *Lee*, claims that allege malicious prosecution by attorneys are subject to section 340.6. Attorneys are obligated, by virtue of being

---

however, some of these portions of the record were not sealed in their entirety, but rather were redacted. Instead of bringing a motion to unseal the appellate record, *amici* have simply consulted the redacted trial court record available to the public. Although these redacted trial court records are not part of the appellate record, they give *amici* insight into what is available to the Court but not to *amici*.

attorneys, to not represent clients where the purpose of the representation is to prosecute an action without probable cause and with malice. (Cal. Rules of Prof. Conduct, rule 3-200.) An attorney who violates this obligation necessarily does so while engaged in the performance of services judged by an attorney-specific standard: the reasonable-attorney standard for probable cause.

The fact that non-attorneys are also subject to suits for malicious prosecution does not change the fact that an attorney's obligations are unique. Non-attorneys may not be held liable for malicious prosecution if they relied in good faith on the advice of their attorneys. But attorneys have no comparable defense: their obligations arise from their particular role as attorneys acting on behalf of clients.

In addition, the application of section 340.6 here advances the Legislature's purpose in enacting it: attorney malpractice insurance, including the insurance offered by ALAS, covers suits against lawyers for malicious prosecution.

ARGUMENT

I. STANDARD OF REVIEW

The grant of an anti-SLAPP motion is reviewed de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) In order to survive such a motion, a 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." (*Wilson, supra*, 28 Cal.4th at p. 821.) Accordingly, courts ask 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." (*Ibid.*) Petitioners must meet this standard with respect to each of the two grounds on which Respondents' anti-SLAPP motion sought dismissal of this suit: (1)

Respondents had probable cause to bring the underlying action, and (2) the present action is barred by section 340.6's one-year limitations period.

II. PETITIONERS FAIL TO SHOW RESPONDENTS LACKED PROBABLE CAUSE TO PROSECUTE THE PRIOR ACTION

A. *Malicious Prosecution is a Disfavored Cause of Action*

As this Court explained in *Wilson*, malicious prosecution is a "disfavored" tort for two primary policy reasons. (*Wilson*, *supra*, 28 Cal.4th at p. 817.) First, it has the "'potential to impose an undue 'chilling effect' on the ordinary citizen's willingness to report criminal conduct or to bring a civil dispute to court.'" (*Id.*, quoting *Sheldon Appel*, *supra*, 47 Cal.3d at p. 872.) Second, "as a means of deterring excessive and frivolous lawsuits," malicious prosecution actions have "the disadvantage of constituting a new round of litigation itself." (*Ibid.*)

In light of these policy concerns, the elements of the tort "have historically been carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim." (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 872.) To state a claim for malicious prosecution, a plaintiff must show that the underlying claim was (1) "brought without probable cause" and (2) "initiated with malice." (*Id.* at p. 874.) Whether a claim was brought without probable cause depends on a purely "objective determination of the 'reasonableness' of the defendant's conduct." (*Id.* at p. 878.) Whether a claim was initiated with malice, by contrast, is concerned with the "*subjective* mental state of the defendant in instituting the prior action." (*Ibid.*)

This Court has defined probable cause so that "[o]nly those actions that 'any reasonable attorney would agree [are] totally and completely without merit' may form the basis for a malicious prosecution suit." (*Wilson*, *supra*, 28 Cal.4th at p. 817, quoting *In re Marriage of Flaherty*

(1982) 31 Cal.3d 637, 650.) In other words, "probable cause exists if 'any reasonable attorney would have thought the claim tenable.'" (*Id.*, quoting *Sheldon Appel*, *supra*, 47 Cal.3d at p. 886.) In civil suits like this one, this "rather lenient" standard for probable cause is "equivalent to that for determining the frivolousness of an appeal." (*Ibid.*) Litigants and their attorneys have a "right[] . . . to bring nonfrivolous civil actions, 'even if it is extremely unlikely that they will win.'" (*Id.* at p. 820, quoting *Sheldon Appel*, *supra*, 47 Cal.3d at p. 885.) Indeed, this Court has warned that "[t]he probable cause requirement is essential to assure free access to the courts." (*Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1131.) "[I]f the bringing of a colorable claim were actionable, tort law would inhibit free access to the courts and impair our society's commitment to the peaceful, judicial resolution of differences." (*Ibid.*)

The existence of "probable cause is a legal question to be resolved by the court," which ensures that defendants in a malicious prosecution action are "protected against the danger that a lay jury would mistake a merely unsuccessful claim for a legally untenable one." (*Id.* at p. 817.) In addressing this legal question, this Court has advised that unjustified litigation is best addressed through "the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself." (*Id.*, quoting *Sheldon Appel*, *supra*, 47 Cal.3d at p. 873.)

B. *Probable Cause Is Assessed From the View of a Reasonable Attorney Aware of the Facts Known to the Defendant*

The probable cause inquiry requires application of an objective standard "to the facts on which the defendant acted" in prosecuting the underlying action. (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 878.) Courts ask whether a reasonable lawyer, "on the basis of the facts known to the defendant," would have believed that the action was not frivolous. (*Ibid.*)

Because "probable cause to bring an action depends on the facts known to the litigant or attorney at the time the action is brought," the probable cause inquiry is properly limited to an assessment of the plaintiff's "prima facie case alone" in the underlying action. (*Wilson, supra*, 28 Cal.4th at p. 822 fn. 6.)

For purposes of probable cause, therefore, it is irrelevant if a plaintiff or his or her attorney was unaware of other evidence that weighed against their claim when he or she decided to bring suit. (*Ibid.*) Likewise, attorneys are "not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them." (*Id.* at p. 822.) The probable cause inquiry is confined to an assessment of the facts upon which the malicious prosecution defendant acted.

This Court has accordingly made clear that whether an attorney performed a "reasonable investigation" of facts or an "industrious search of legal authority" has no bearing on the probable cause inquiry. (*Sheldon Appel, supra*, 47 Cal.3d at pp. 882-83, rejecting dictum to the contrary in *Tool Research & Engineering Corp. v. Henigson* (1975) 46 Cal.App.3d 675, 683.) Malicious prosecution is an intentional tort. Consideration of the reasonableness of an attorney's research or investigation would improperly "shift[] the focus of the probable cause inquiry from the objective tenability of the prior claim to the adequacy of the particular defendant's performance as an attorney." (*Ibid.*) This view of the probable cause inquiry would run also afoul of "a consistent line of California decisions" that have precluded actions for negligence against an opponent's attorney. (*Ibid.*) In addition, it would "tend to create a conflict of interest between the attorney and client, tempting a cautious attorney to create a record of diligence" by performing research and factual investigation "not

for the benefit of his client, but simply to protect himself from his client's adversaries in the event the initial suit fails." (*Ibid.*)

Along similar lines, an attorney's subjective belief in the legal tenability of a claim is also irrelevant to probable cause. As *Sheldon Appel* explained, "the distinction between the [malicious prosecution] defendant's knowledge of facts and his subjective assessment of tenability" is critical to the distinction between probable cause and malice. (*Id.* at p. 881.) "The want of probable cause ... is measured by the state of the defendant's *knowledge*, not by his *intent*." (*Id.* at p. 881, quoting *Director General v. Kastenbaum*, (1923) 263 U.S. 25, 27-28.) This rule looks to "the absence of probable cause known to the defendant when he instituted the suit. But the standard applied to defendant's consciousness is external to it. The question is not whether *he* thought the facts to constitute probable cause, but whether *the court* thinks they did." (*Ibid.*)

In short, in assessing probable cause, courts must place themselves in the shoes of the attorney who brought the underlying action and ask whether, on the facts known to the attorney when the attorney brought the action, that action was wholly and completely without merit.

C. *An Interim Judgment Establishes Probable Cause Because it Reflects an Application of the Probable Cause Standard*

The rule that certain non-final judgments on the merits conclusively establish probable cause flows from a straightforward and important principle. These judgments, when properly credited, necessarily found that a reasonable lawyer, on the facts known to the malicious prosecution defendant when he or she brought the underlying action, would have concluded that the underlying action was not frivolous. In other words, the judgments reflect a determination that the probable cause standard has been met. This Court recognized this principle in *Wilson* when it held that such

judgments establish probable cause except when then they are "obtained by means of fraud or perjury." (*Wilson, supra*, 28 Cal.4th at p. 817.)

Typically, "[c]laims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness." (*Id.* at p. 818.) For instance, if a court denies an anti-SLAPP motion on the ground that the plaintiff has made a prima facie case, it must have concluded that the claim was "legally sufficient and can be substantiated by competent evidence." (*Id.* at p. 821.) This conclusion presumptively "establishes probable cause to bring the claim, for such an action clearly is not one that 'any reasonable attorney would agree . . . is totally and completely without merit.'" (*Ibid.* quoting *Sheldon Appel, supra*, at p. 885.) Likewise, on a motion for summary judgment, a "trial court's conclusion that issues of material fact remain for trial 'necessarily impl[ies] that the judge"—a reasonable (as well as disinterested and experienced) lawyer—"finds at least some merit in the claim.'" (*Id.* at p. 819, quoting *Roberts v. Sentry Life Ins.*, (1999) 76 Cal.App.4th 375, 383.) Thus, the trial court's conclusion, unless disregarded, "compels [the] conclusion that there is probable cause, because probable cause is lacking only in the *total absence* of merit." (*Ibid.*)

These interim judgments, however, will necessarily reflect that the probable cause standard was satisfied only if they were reached based on the prima facie evidence known by the malicious prosecution defendant at the time the defendant brought the underlying action. In the normal course, an interim judgment will be made on those facts: the lawyer in the underlying action will marshal the evidence supporting his or her client's prima facie case. However, as *Wilson* recognized, there is a circumstance where this will not be the case: when the ruling "is shown to have been obtained by fraud or perjury." (*Id.* at p. 820.)

Adoption of this standard for an exception to the interim adverse judgment rule makes perfect sense in light of the rule's purpose. Fraud and perjury connote knowledge of false evidence. (E.g. *Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 452 [stating that "the fraud exception requires 'knowing use of false and perjured testimony'"]; see also POB at p. 24 [defining fraud and perjury as "knowing submission of false evidence"].) If an attorney knowingly misleads the court and thereby obtains an interim judgment, the court's ruling will not be based on the evidence known to the attorney—it will be based on a view of the evidence as misrepresented by the fraud or perjury. In that circumstance, the judgment will not reflect a determination of whether, *on the facts known to the defendant*, a reasonable lawyer would have believed the claim legally tenable.

D. *Petitioners' Effort to Broaden the Exception to the Interim Adverse Judgment Rule Ignores the Policy Underlying the Rule and Is Foreclosed by this Court's Precedents*

Petitioners seek to expand the exceptions to the interim adverse judgment rule to circumstances where a judgment is procured not by fraud or perjury but by "materially false facts." This proposal does not merely run afoul of this Court's formulation in *Wilson* that fraud and perjury are the only exceptions to the interim adverse judgment rule, it contravenes the important principle beneath that rule: probable cause must be determined based on the facts known by the malicious prosecution defendant in bringing the underlying suit, not based on facts the defendant did not know.

Under *Wilson* and *Sheldon Appel*, if a lawyer in an underlying action relies unknowingly on a false fact, the falsity of that fact is irrelevant in assessing whether the lawyer had probable cause to bring the action. This is because the falsity of the fact has no bearing on the question of whether, on the facts known to the lawyer, a reasonable lawyer would have believed

the claim legally tenable. For the same reason, whether a lawyer relied unknowingly on a materially false fact is also irrelevant in assessing whether an interim adverse judgment in the lawyer's favor establishes that the lawyer brought the action with probable cause. If the lawyer did not know of the material falsity of the fact, then the court that issued the judgment stood in the lawyer's shoes in finding that the claim was legally tenable: it reached this conclusion on the same facts that were known to the lawyer, likewise unaware of their falsity. By contrast, a court will not stand in the lawyer's shoes if the lawyer knowingly misled the court by misrepresenting or concealing evidence.

Contrary to this Court's precedents, Petitioners' proposal would transform malicious prosecution from an intentional tort into one governed by strict liability or negligence principles. Malicious prosecution serves "to protect an individual's interest 'in freedom from unjustifiable and unreasonable litigation,'" and, in turn, to dissuade attorneys and litigants from intentionally bringing such litigation. (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 878, quoting 1 Harper et al., The Law of Torts § 4.2, p. 407.) This interest is not served by faulting lawyers, on strict liability, for facts they did not know. As *Sheldon Appel* explained, this interest also would not be served if an attorney's failure to conduct a "reasonable investigation" of facts could give rise to a finding that the attorney brought an action without probable cause. (*Id.* at p. 883.) Such a requirement would be "fundamentally incompatible with the objective nature of the probable cause determination," as it would shift the focus of that inquiry "from the objective tenability of the prior claim to the adequacy of the particular defendant's performance as an attorney," as judged by a negligence standard. (*Ibid.*) It would also "create a conflict of interest between the attorney and client, tempting a cautious attorney to create a record of diligence . . . not for the benefit of his client." (*Ibid.*) Moreover, by

encouraging judicial second-guessing of interim judgments, Petitioners' rule would endanger the public's constitutional interest in "free access to the courts." (*Pacific Gas & Elec. Co.*, *supra*, 50 Cal.3d. at p. 1131.)

The interests that underlie the tort are instead served by looking to the facts known by litigants and their lawyers and asking if they reasonably could have believed that litigation was justifiable on those facts.

E. *Petitioners' Position Finds No Support In Case Law*

Faced with this conceptual and precedential hurdle, Petitioners give no explanation for how their exception comports with this Court's definition of probable cause. Instead, they rely almost entirely on loose language from a single Court of Appeal decision, *Roberts v. Sentry Life Insurance*, (1999) 76 Cal.App.4th 375, decided five years before *Wilson*. *Roberts*, of course, is not binding on this Court. The decision stated, in language endorsed by *Wilson*, that "denial of defendant's summary judgment [motion] in an earlier case normally establishes there was probable cause to sue, thus barring a later malicious prosecution suit." (*Roberts*, *supra*, 76 Cal.App.4th at p. 384; see also *Wilson*, *supra*, 28 Cal.4th at pp. 814-15.) *Roberts* then stated, in a discussion not endorsed in *Wilson*, that if a denial of summary judgment was "induced by materially false facts," then finding probable cause based on this denial "might" be wrong. (*Roberts*, *supra*, 76 Cal.App.4th at p. 384.) *Roberts* did not address whether a judgment "induced by materially false facts" is necessarily different from a judgment obtained by means of fraud or perjury. Nor did *Roberts* give any reason an exception broader than the one adopted in *Wilson* would be appropriate given the purposes of the probable cause standard.[2]

---

[2] Plaintiffs also point to one other Court of Appeal decision, *Cheong Yu Yee v. Cheung* (2013) 220 Cal.App.4th 184, which cited the "materially false

Petitioners also suggest, erroneously, that this Court "expressly endorsed" that "falsity is sufficient to avoid the presumption of probable cause" in *Zamos v. Stroud* (2004) 32 Cal.4th 958. (POB at p. 20.) In fact, it did no such thing. *Zamos* noted that the defendant in that case had invoked *Roberts* before the Court of Appeal, arguing that the denial of a summary judgment motion in the underlying action established probable cause. (*Zamos*, *supra*, at p. 973, fn. 10.) *Zamos* also noted that *Wilson* had cited *Roberts* "with approval" (*ibid.*), which, as described above, *Wilson* did only in finding that the denial of a defense motion for summary judgment in a prior case normally establishes probable cause. But *Zamos*, like *Wilson*, did not address the merits of the language in *Roberts* regarding "materially false facts." The arguments under *Roberts* were not part of the petition for review in *Zamos* and, accordingly, this Court stated it would not decide them. (*Ibid.* ["As defendants did not petition for review on this issue, we need not decide whether the Court of Appeal correctly decided it."].)

In another tack, Petitioners claim that the "materially false facts" language from *Roberts* is consistent with language from a 1908 decision by this Court, *Carpenter v. Sibley* (1908) 153 Cal. 215, that Petitioners claim states a more comprehensive principle than *Wilson*. *Carpenter* stated that a criminal conviction establishes probable cause for the prosecution of the person convicted unless "the conviction was procured by fraud, perjury, or subornation of perjury, or other unfair conduct" by the prosecutor. (*Id.* at p. 218.) Petitioners contend that *Carpenter* found that unfair conduct "may be enough to rebut the presumption of probable cause" arising from an interim adverse judgment. (POB at p. 20.)

---

facts" language in *Roberts*. (*Id.* at p. 201.) *Yee* did not, however, apply this language or address its viability under *Wilson*.

This expansive reading of *Carpenter* cannot survive this Court's decisions in *Wilson* and *Sheldon Appel* nearly a century later. The only "unfair conduct" that may rebut the presumption of probable cause that arises from an interim adverse judgment is conduct that would have prevented the ruling court from assessing the legal tenability of the underlying claim on the basis of the facts known to the defendant in the malicious prosecution action. In other words, this Court's precedents make clear that only fraud and perjury amount to "unfair conduct" cognizable under *Carpenter* as an exception to the interim adverse judgment rule.

Indeed, California courts have construed *Carpenter* in this manner since it was issued. *Carpenter* recognized "the established rule" that a guilty verdict is conclusive evidence of probable cause to bring a charge unless the judgment was "procured by fraud at the instance or instigation of the defendants." (*Carpenter*, *supra*, 153 Cal. at p. 217, citing *Holliday v. Holliday* (1898) 123 Cal. 26.) There was no argument in *Carpenter* that the guilty verdict at issue was procured by "unfair conduct" other than fraud or perjury. Instead, the Court addressed the argument that, even though evidence had been introduced that the judgment had been obtained by subornation of perjury, only a showing of "extrinsic fraud which would justify an action to set aside the judgment" could rebut the presumption of probable cause arising from that judgment. (*Ibid.*) *Carpenter* held that, even though "the fraud alleged in this complaint is not such a fraud as would support an action for the setting aside of a judgment, it is still a fraud which will support an action" for malicious prosecution. (*Id.* at p. 218.) *Carpenter*'s language regarding "unfair conduct," therefore, was not applied beyond fraud and perjury.

After *Carpenter*, California courts continued to state the exception to the interim adverse judgment rule as applying only to knowing fraud, and have cited *Carpenter* on that basis. (E.g., *Black v. Knight* (1919) 44

Cal.App. 756, 770; *Bullock v. Morrison* (1931) 118 Cal.App. 112, 114; *Eustace v. Dechter* (1942) 53 Cal.App.2d 726, 732; *Kachig v. Boothe* (1971) 22 Cal.App.3d 626, 639; *Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1053.) Indeed, as a 1939 decision stated, "it is apparent that the 'other unfair conduct on the part of the defendant'" referenced in *Carpenter* "must amount to fraud" in order to vitiate probable cause. (*Norton v. John M.C. Marble Co.* (1939) 30 Cal.App.2d 451, 455, quoting *Carpenter*, *supra*, 153 Cal. at p. 217.) Petitioners do not identify a single decision that has applied the "unfair conduct" language in *Carpenter* to find acts other than fraud or perjury sufficient to overcome the presumption of probable cause arising from an interim adverse judgment.

Petitioners also invoke a statement, quoted in *Wilson*, from *Cowles v. Carter* (1981) 115 Cal.App.3d 350: "it would be hard law which would render a plaintiff liable in damages for instituting an action, wherein he made a *truthful and honest statement of the facts*, in the event that, notwithstanding a judge of the superior court was satisfied that upon those facts the plaintiff had a meritorious case, a ruling to that effect should afterwards be set aside." (*Cowles*, *supra*, 115 Cal.App. at p. 357 (italics added); see also *Wilson*, *supra*, 28 Cal.4th at p. 822.) Petitioners suggest that this passage somehow states that, if an interim adverse judgment relies on a fact later shown to be false, then the judgment does not establish probable cause. (POB at p. 23.) But this Court of Appeal decision refers to an "honest" statement of the facts, i.e., one that was not knowingly false. *Cowles* does not speak to situations where the facts were false for reasons unknown to the underlying plaintiff.

F. *Petitioners Do Not Make a Prima Facie Case that An Exception to the Interim Adverse Judgment Rule Applies*

Petitioners argue that this Court should not credit, as establishing probable cause, the trial court's conclusion that FLIR had "produced

sufficient evidence, for example with [two declarations], to raise a triable issue as to misappropriation of trade secrets."[3] Petitioners assert, primarily, that the trial court's judgment on this ground was procured by "materially false facts." But Petitioners also assert, without any elaboration, that they have "directly and extensively argue[d]" that the trial court's ruling was obtained through "the submission of evidence that was the product of fraud or perjury." (POB at p. 2 fn. 1; see also *id.* at p. 10, 19-20.)

At no point in their briefing to this Court have Petitioners even attempted to explain what evidence was fraudulent or perjured. The closest Petitioners get to such an explanation is to cite four pages from their briefing before the Court of Appeal. (*Id.* at p. 14.) These pages reveal that Petitioners' argument that the plaintiffs in the underlying action, FLIR and Indigo (collectively "FLIR"), submitted fraudulent or perjured evidence is identical to their argument that FLIR submitted evidence that was "materially false." This argument, in turn, relies almost entirely on a passage of the Court of Appeal decision in the underlying action, as opposed to any specific record evidence or trial court findings. Petitioners quote a portion of the decision that claims FLIR "opposed the summary judgment motion with expert declarations suggesting that there was a scientific methodology to predict the likelihood of trade secret misuse." (AOB at p. 37, quoting *FLIR Sys., Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1282; see also ARB at pp. 11-12.) In purported contrast, once again as stated by the Court of Appeal decision, at trial the same experts "admitted there was no valid scientific methodology to predict trade secret misuse." (AOB at p. 37.) Petitioners imply, therefore, albeit without any citation to actual evidence in the record before this Court, that FLIR

---

[3] AA 0087.

submitted expert declarations that were fraudulent—and materially false: specifically because the declarations allegedly claimed that there was a "scientific methodology" to predict the likelihood of trade secret misuse, even though the declarants later stated they believed no such "scientific methodology" existed.

Even if Petitioners were correct on the facts—and they are not—this argument would not disturb the conclusion that the trial court necessarily found that Respondents had probable cause to present this theory of trade secret misappropriation. Petitioners have not made any argument that Respondents had *knowledge* that the expert declarations were false and nevertheless submitted them to the trial court. Yet Respondents' knowledge is critical: if the declarations were false but their falsity was unknown to the Respondents, then the trial court's decision was based on the facts known by the Respondents. Accordingly, Petitioners have made no showing that the interim adverse judgment does not establish probable cause, and it plainly does. The judgment reflects a determination, based on the facts known by the Respondents, that a reasonable lawyer would have found the action legally tenable.

In any event, even the most cursory look at the expert declarations themselves wholly refutes Petitioners' characterization of the facts.[4] The expert declarations, which together span a total of five pages, do not purport to rely on any "scientific methodology" that would predict trade

---

[4] As discussed *supra*, *amici* have consulted the redacted trial court record, when possible, for public information contained in the sealed appellate record. In the trial court record, one of the two declarations contained no redactions. In the second, three of the eight paragraphs were redacted. (See *FLIR Sys., Inc. v. Parrish*, Case No. 1220581, Compendium of Declarations in Support of Plaintiffs' Combined Opposition to Defendants Motions for Summary Judgment or in the Alternative, Summary Adjudication, at pp. 14-15 and 18-20 (Mar. 7, 2007).)

secret misuse. Instead, both experts stated that they were unaware of any entity, other than FLIR, that could produce microbolometers at the cost, volume, yield, and speed necessary to implement Petitioners' business plan. The experts offered this "opinion" based on their "experience and background" and their "review of materials in the action," including materials in the public domain regarding the design of microbolometers.

The trial court, moreover, did not find that the declarations claimed any "scientific methodology" could predict trade secret misappropriation. Indeed, in a motion to strike the declarations, Petitioners argued that the declarations employed "a complete lack of scientific methodology."[5] In the Court of Appeal, Petitioners later reversed course by arguing that the declarations necessarily represented that they were based on a scientific methodology that would predict trade secret misuse; they reasoned that the declarations should have been admitted as expert testimony only if they made such a representation.[6] But Petitioners do not renew that claim before this Court, as it is plainly incorrect: under California law, expert testimony is admissible whenever the expert has knowledge and experience "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801.) There is no requirement that they be based on some kind of "scientific methodology." In short, nothing in the declarations themselves nor in the trial court's ruling show that the declarations falsely claimed that a "scientific methodology" could predict trade secret misuse.[7]

---

[5] *FLIR Sys., Inc. v. Parrish*, Case No. 1220581, Defendants' Motion to Strike Expert Declarations of Murphy and Neikirk, at p. 4 (Mar. 14, 2007).

[6] AOB at pp. 37-39.

[7] In their reply brief, Petitioners assert that one of the experts "assume[d] away his actual knowledge of critical non-public evidence that Raytheon had the very technology Plaintiffs intended to license." (RB at p. 19.) On

The Petitioners' actual complaint with the declarations has been clear throughout this litigation. They do not contend that the declarations were "false," but that the facts they stated did not warrant finding trade secret misappropriation as a matter of law. In their motion to strike the declarations, Petitioners made this argument by claiming that the declarations could support only an inevitable disclosure theory of liability.[8] Petitioners renewed the same argument in their motion for summary judgment.[9] FLIR has repeatedly responded that it was not pursuing an inevitable disclosure theory, but instead had presented specific evidence sufficient to give rise to the inference of misappropriation.

At the summary judgment stage, faced with these arguments, the trial court agreed with FLIR that the declarations presented a triable issue of fact. After trial, the trial court weighed the evidence differently, emphasizing that FLIR had not sufficiently addressed the possibilities that Petitioners would be able to meet their business plans through innovation or by licensing non-public technology—topics that neither of the expert declarations in question purports to address. (*FLIR Sys., Inc. v. Parrish*, (June 13, 2008, No. 1220581) 2008 WL 2472248, at ¶ 43.)

---

this basis, Petitioners conclude that the expert's testimony was a "proffer of knowingly false evidence." (*Ibid.*) But Petitioners cite to no evidence that the expert in fact had any "actual knowledge" about this non-public evidence. In any event, the expert testified only about public evidence, so his testimony could not have been false on the ground Petitioners asserts.

[8] *FLIR Sys., Inc. v. Parrish*, Case No. 1220581, Defendants' Motion to Strike Expert Declarations of Murphy and Neikirk, at p. 4 (Mar. 14, 2007).

[9] *FLIR Sys., Inc. v. Parrish*, Case No. 1220581, Defendant Parrish's Reply Brief in Support of Motion for Summary Judgment, or, in the Alternative, Summary Adjudication, at pp. 5-9 (Mar. 14, 2007); *FLIR Sys. Inc. v. Parrish*, Case No. 1220581, Defendant Fitzgibbons's Reply Brief in Support of Motion for Summary Judgment, or, in the Alternative, Summary Adjudication, at pp. 6-9 (Mar. 14, 2007).

The result after trial does not show that the summary judgment ruling was procured through fraud or perjury—or for that matter even through "false" facts. The court's function at summary judgment is to determine whether there are issues for trial. At trial, the factfinder plays a much different role: it assesses the believability of the evidence, weighs different pieces of evidence against one another, and applies the law to the facts. That an expert opinion is ultimately found at trial to have limited persuasive value does not negate the fact that it was evidence upon which an attorney could have relied in making a claim. Any other conclusion would violate this Court's directive that attorneys and their clients "'have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win.'" (*Wilson, supra*, 28 Cal.4th at p. 817, quoting *Sheldon Appel, supra*, 47 Cal.3d at p. 885.)

G. *The Finding of Bad Faith Under the UTSA in the Underlying Action Does Not Alter This Analysis*

Petitioners contend that, notwithstanding the foregoing, the imposition of sanctions under Civil Code section 3426.4 in the prior action shows Respondents initiated the action without probable cause. The Court of Appeal properly rejected this argument, which is exactly backwards.

This Court has made clear that the problem of unjustified litigation is best addressed through measures that facilitate resolution of the initial lawsuit and apply sanctions within that initial lawsuit. (*Wilson, supra*, 28 Cal.4th at p. 817.) Section 3426.4 is just such a measure. By availing themselves of this procedure, Petitioners obtained an award of nearly $1.7 million to cover their attorneys' fees and costs in litigating the underlying action. As a result, the need to compensate these Petitioners through a later malicious prosecution action is far less than in cases where sanctions were not already awarded. For this reason, it would be perverse and paradoxical to have the award of sanctions under section 3426.4 form the basis for

establishing a subsequent malicious prosecution action, rather than for showing it was unnecessary.

In any event, a finding of bad faith under section 3426.4 does not compel a finding that probable cause was lacking. As explained above, an interim adverse judgment on the merits conclusively establishes probable cause unless that ruling was obtained by fraud or perjury. A finding of bad faith under section 3426.4 does not require a finding of fraud or perjury, much less a finding that the relevant interim judgment was obtained by fraud or perjury. In the absence of such a finding, there is no reason to disregard an interim judgment, as the judgment will still reflect a determination, based on the facts known by the malicious prosecution defendant, that the action was legally tenable. In this case, moreover, the trial court's order imposing sanctions under section 3426.4 did not find fraud or subornation of perjury.

Petitioners attempt to evade this conclusion by invoking *Slaney v. Ranger Ins. Co.* (2004), 115 Cal.App.4th 306. In *Slaney*, the Second District held that the denial of a summary judgment motion does not establish probable cause when it is followed by the grant of a renewed motion as well as certain findings that "support inferences of lack of probable cause and malice," including a finding of bad faith. (*Slaney, supra*, 115 Cal.App.4th at p. 321.) But as the Court of Appeal held below, *Slaney* cannot be reconciled with "the interim adverse judgment rule's core principles as articulated in *Wilson*." (*Parrish v. Latham & Watkins* (2015) 238 Cal.App.4th 81, 100.) Indeed, *Slaney* did not cite *Wilson*, and instead relied primarily on a pre-*Wilson* Court of Appeal decision that did not apply or recognize the interim adverse judgment rule. (*Slaney, supra*, 115 Cal.App.4th at p. 321, citing *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179.)

Slaney represents precisely the sort of reasoning *Wilson* has instructed courts to avoid. The Second District did not ask whether probable cause existed based on the prima facie evidence known to the malicious prosecution defendant in the underlying action. Instead, *Slaney* looked to how the court and the jury in the underlying action weighed the evidence presented over the course of the litigation. This approach is contrary to *Wilson*'s holdings that plaintiffs and their attorneys "have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious," and that plaintiffs and their attorneys "are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them." (*Wilson*, *supra*, 28 Cal.4th at p. 822.) Perhaps because it used this improperly retrospective approach, *Slaney* failed to recognize that the denial of a summary judgment motion, in the absence of fraud or perjury, necessarily reflects a determination that a reasonable lawyer confronted with the prima facie evidence would have believed that the action was not frivolous.

In addition, *Slaney* confused the probable cause standard by failing to recognize that malice, a measure of subjective intent, is wholly irrelevant to the probable cause inquiry. To the extent that Petitioners argue that a finding of bad faith vitiates probable cause as evidence of malice, that argument is foreclosed by *Sheldon Appel*.

Even in instances where a malicious prosecution defendant cannot point to an interim judgment in its favor, a finding of bad faith under section 3426.4 will not necessarily show that the action was brought without probable cause. The probable cause inquiry asks whether, at the time a suit is brought, a reasonable lawyer would believe that it was not frivolous. By contrast, the "objective speciousness" inquiry under section 3246.4 asks whether, at the close of the litigation, the claim was

"superficially fair, just, or correct" but "without substance in reality." (*Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1261-62.)

There are two important differences between these standards. First, a claim need not be frivolous in order to be completely without merit for purposes of section 3426.4. (*Id.*; see also *SASCO v. Rosendin Electric, Inc.* (2012) 207 Cal.App.4th 837, 846.) Second, there may be probable cause to bring a claim based on the prima facie evidence, even if the evidence is ultimately so one-sided as to render the action specious under section 3426.4. (*Gemini*, *supra*, 95 Cal.App.4th at pp. 1261-62.) A finding of bad faith under section 3426.4 is not a proxy for a finding of no probable cause.

H. *Petitioners Offer No Evidence Supporting Their Claim That Respondents Continued the Suit Without Probable Cause*

Petitioners also suggest, without explanation, that Respondents "continued [their] prosecution" of this suit without probable cause and that, on this basis, Petitioners' malicious prosecution action should be allowed to proceed. As elsewhere, Petitioners are short on details, both as a matter of fact and as a matter of law. They state only that the evidence supporting this assertion "include[s] the same facts" underlying the bad faith determination under section 3426.4 in the trial court. (POB at p. 12.)

This argument falls far short of Petitioners' burden. The trial court's opinion speaks to continuation only in finding that FLIR continued its lawsuit after letters from Petitioners notified them "of problems in [FLIR's] case." (*FLIR Sys, Inc. v. Parrish*, *supra*, 2008 WL 2472248, at ¶ 79.) The trial court did not state that these letters revealed that FLIR had no prima facie case or that its claims were frivolous; it simply noted the communications, which are "a factor in the section 3426.4 analysis." (*Ibid.*) Petitioners, moreover, do not explain how or when the letters established a lack of probable cause. Instead, Petitioners imply the letters

undermined Respondents' argument that Petitioners' business plan was developed while they were employees at FLIR. (POB at pp. 29-30.) But Petitioners then claim that Respondents "abandoned" that argument. (POB at p. 30.) If that is correct, then Respondents could not have continued to prosecute this argument without probable cause. Petitioners' continuation argument, therefore, fails on its own terms.

New facts invariably arise after a denial of summary judgment. If litigants could evade an interim adverse judgment merely by invoking such facts, the interim adverse judgment rule would have no consequence. The threshold for showing that new facts warrant ignoring such a judgment, therefore, must be high. The new facts would need to show that, even though a reasonable lawyer believed the action was not frivolous at the time of the interim adverse judgment, no reasonable lawyer could continue to hold such a view given the new facts. This high bar would be met, for instance, if a plaintiff's prima facie evidence consisted only of testimony by a single witness and, following an interim judgment in the plaintiff's favor, the plaintiff's lawyer was informed by the witness that the testimony was false. Petitioners do not come close to making such a showing.

III. PETITIONERS' CLAIMS ARE BARRED BY SECTION 340.6'S ONE-YEAR STATUTE OF LIMITATIONS

An alternative and fully sufficient basis to affirm the judgment below is that the claim is barred by the statute of limitations.[10] Code of

---

[10] Although the Court need not decide the probable cause issue if it affirms on the basis of the statute of limitations defense, it has the option to decide that issue as well in order to "secure uniformity of decision" and "settle an important question of law." (Cal. Rules of Court, rule 8.500(b); see also *Manco Contracting Co. (W.W.L.) v. Bezdikian* (2008) 45 Cal.4th 192, 204 & fn. 9 ["Our resolution of the statute of limitations question is an independent, alternative ground for affirming the decision of the Court of Appeal."].)

Civil Procedure section 340.6(a) provides: "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiffs discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission." As set forth below, this statute bars Petitioner's claims.

A. *Under Lee v. Hanley, Section 340.6 Applies to Actions that Depend on Proof of Certain Attorney-Specific Misconduct*

In *Lee v. Hanley*, *supra*, 61 Cal.4th 1225, this Court carefully defined the scope of section 340.6 after closely examining the statute's language and legislative history. *Lee* identified two guiding policy considerations from section 340.6's legislative history. First, *Lee* found the legislature had sought to ensure that the applicable limitations period would "turn on the conduct alleged and ultimately proven, not on the way the complaint was styled." (*Id.* at p. 1236.) Second, *Lee* found that the legislature "ma[de] clear that its primary purpose was to address the growing cost of malpractice lawsuits," particularly in light of "rising legal malpractice insurance premiums." (*Ibid.*) Based on these two considerations, *Lee* concluded that section 340.6 applies only to claims that "depend on proof that the attorney violated a *professional* obligation." (*Ibid.*)

Lee elucidated this standard in some detail. It held that section 340.6 "applies to a claim when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation—that is, an obligation the attorney has *by virtue* of being an attorney—in the course of professional services." (*Id.* at p. 1229.) *Lee* defined "professional services" as "services performed by an attorney which can be judged against the skill, prudence and diligence commonly possessed by other attorneys." (*Id.* at p. 1237, quoting *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 64.)

Under *Lee*, therefore, section 340.6 applies when proving a claim depends on showing that an attorney, in the course of performing services judged against an attorney-specific standard, violated an obligation the attorney had by virtue of the attorney's identity as an attorney.

Lee enumerated several circumstances where section 340.6 would not apply under this standard. First, a claim against an attorney for "garden-variety theft" does not trigger section 340.6 "even if the theft occurs while the attorney and the victim are discussing the victim's legal affairs." (*Ibid.*) The obligation not to engage in garden-variety theft is not an obligation that attorneys have by virtue of being an attorney, and it is not judged against an attorney-specific standard based on the skill, prudence, and diligence commonly possessed by attorneys. Likewise, a claim that an attorney "sexually battered his client while the attorney was providing legal advice" also does not trigger section 340.6. (*Id.* at 1238.) Even though attorneys have a "professional obligation not to [sexually batter others] in the particular context of the attorney-client relationship," this obligation is not one that attorneys have by virtue of being an attorney, and it is not an obligation judged against an attorney-specific standard: "everyone has an obligation not to sexually batter others," not just attorneys. (*Ibid.*)

On similar reasoning, *Lee* held that the claim before it did not necessarily trigger section 340.6. The Court explained that the claim, which alleged wrongdoing in an attorney's failure to return client funds, could be styled as a simple claim for conversion. (*Id.* at p. 1240.) The claim did not "necessarily depend on proof" that the lawyer had violated a professional obligation, even though the allegations, if true, might have established that he had violated such an obligation. (*Ibid.*) *Lee* emphasized that future factual development might show that section 340.6 applied, depending on the theory of liability pursued. (*Ibid.*) If, for instance, the claim turned on proof that the lawyer kept the money "pursuant to an

unconscionable fee agreement" or that the lawyer "did not properly preserve client funds," then 340.6 might apply. (*Ibid.*) In those circumstances, the claim would necessarily require a showing that the lawyer violated an attorney-specific obligation judged according to a professional standard.

B. *Because This Suit Depends on Proof Respondents Violated an Obligation Unique to Attorneys and Judged According to an Attorney-Specific Standard, Section 340.6 Applies*

The Court of Appeal held that section 340.6 did not apply under *Roger Cleveland Golf Co. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, a decision expressly disapproved in *Lee*. (*Lee, supra*, 61 Cal.4th at p. 1239.) *Roger Cleveland* read section 340.6 "as a professional negligence statute," parting ways with two other Court of Appeal decisions that had found section 340.6 applied to malicious prosecution claims against attorneys: *Cheong Yu Yee v. Cheung* (2013), 220 Cal.App.4th 184, and *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874. (*Roger Cleveland, supra*, 225 Cal.App.4th at pp. 676-77.) *Lee* rejected the basis for the holding in *Roger Cleveland*, and sided with the very cases that decision deviated from. *Lee* concluded that section 340.6 "applies not only to actions for professional negligence but to any action alleging wrongful conduct, other than actual fraud, arising in the performance of professional services." (*Lee, supra*, 61 Cal.4th at p. 1236.) In reaching this conclusion, *Lee* invoked *Yee* and *Vafi* as examples of actions where section 340.6 applied based on "the conduct alleged and ultimately proven." (*Ibid.*)

The allegations in this action—that Respondents prosecuted the underlying action on behalf of FLIR without probable cause and with malice—necessarily depend on proof that, in the course of performing services judged against an attorney-specific standard, Respondents violated an obligation they had by virtue of being attorneys. As reflected in Rule of

Professional Conduct 3-200, attorneys are obligated not to represent clients under circumstances where the attorney knows, or should know, that the purpose of the representation is to prosecute an action "without probable cause and for the purpose of harassing or maliciously injuring any person." (Cal. Rules of Prof. Conduct, rule 3-200(A).) An attorney who violates this obligation, moreover, necessarily does so while engaged in the performance of services judged against an attorney-specific standard: whether an attorney has probable cause to prosecute an action on behalf of a client depends on how a reasonable attorney would have acted.

The fact that non-attorneys may be subject to liability for malicious prosecution does not change this analysis. It is true that everyone has an obligation, as a potential litigant, not to bring lawsuits that lack probable cause motivated by malice. This obligation, however, is substantially narrower than the obligation attorneys have, by virtue of being attorneys, not to bring such actions on behalf of their clients. Most tellingly, a litigant is not subject to suit for malicious prosecution if the litigant proves that he or she relied on "advice of counsel" in good faith after full disclosure of the facts. (*Bertero v. Nat. Gen. Corp.* (1974) 13 Cal.3d 43, 53-54; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1556.) Attorneys have no comparable defense: they cannot rely on the fact that the *client* thought the action had merit. Rather, it is the attorney's responsibility, by virtue of being an attorney acting on behalf of a client, not to bring actions that no reasonable attorney would have brought under the circumstances.

For this reason, the standard governing attorneys who bring baseless lawsuits is fundamentally different from the one governing non-attorneys. Whether an attorney has probable cause to bring a lawsuit is judged "against the skill, prudence and diligence commonly possessed by other attorneys." (*Lee*, *supra*, at p. 1237, quoting *Quintilliani*, *supra*, 62 Cal.App.4th at p. 64.) In contrast, non-attorneys are not required to have

the skill, prudence, or diligence of an attorney but may rely on an attorney instead. The obligation of an attorney not to bring baseless lawsuits is therefore not the generalized obligation applicable to everyone—analogous to the obligation everyone has not to steal or commit sexual battery—but the very specialized obligation applicable only to attorneys that triggers the limitations period of section 340.6 under *Lee*.

The conclusion that malicious prosecution claims are subject to the one-year limitation period is further underscored by the fact that malicious prosecution claims are covered by the same kind of insurance covering attorney malpractice—including the malpractice insurance offered by *amici* ALAS. Subjecting such claims to section 340.6, therefore, is consistent with the Legislature's aim of controlling "rising legal malpractice insurance premiums." (*Lee*, *supra*, at p. 1236.)

C. *Prospective Application of Section 340.6 to Malicious Prosecution Suits Against Attorneys Would be Improper*

As a "general rule," "judicial decisions are given retroactive effect." (*Laird v. Blacker* (1992) 2 Cal.4th 606, 620.) Petitioners contend that this general rule should not apply, if the Court rules that section 340.6 governs, because Petitioners "relied" on the view that a two-year limitations period governed under Code of Civil Procedure 335.1. (POB at p. 38.)

But a party's reliance on a rejected view of the law is relevant only if the party was "reasonable" in so relying. (*Laird*, *supra*, 2 Cal.4th at p. 620; *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 982-87.) In the usual case, if a plaintiff "cannot claim reliance on a prior decision of this [C]ourt or . . . a consistent line of decisions from the Courts of Appeal making [this Court's] contrary holding 'unforeseeable,'" then the general rule favoring retroactivity will apply. (*Planning & Conservation League v. Dept. of Water Resources* (1998) 17 Cal.4th 264, 274.)

As Respondents make clear in their brief, Petitioners could not have reasonably relied on the view that a two-year limitations period applied to this suit. Petitioners cannot identify a single precedent applying a two-year statute of limitations to malicious prosecution actions against lawyers.

D. *This Suit is Barred Under Section 340.6*

Finally, Petitioners argue that, even if section 340.6 applies, they satisfied the statute's one-year period.[11] In particular, Petitioners argue that the limitations period did not begin to run until they learned FLIR might assert an advice-of-counsel defense in the prior malicious prosecution action brought against it. Petitioners claim that, before learning of this potential defense, they were unaware that the filing of the underlying action "was prompted by advice from [Respondent]." (POB at p. 41.)

Petitioners misapprehend the import of the advice-of-counsel defense. As discussed above, this defense protects past plaintiffs from potential liability for malicious prosecution if they show that they relied on the advice of their counsel in good faith and after fully informing counsel of the facts. (*Bertero*, *supra*, 13 Cal.3d at pp. 53-54; *Sosinsky v. Grant*, *supra*, 6 Cal.App.4th at p. 1556.) But whether the *client* relied on the advice of counsel has no effect on whether the *attorney* is liable for bringing an objectively untenable claim. An attorney is required to satisfy the probable cause standard whether or not the client relied upon the attorney's advice. Whether Petitioners had a claim against Respondents therefore did not depend in any way upon whether Respondents' client relied upon their advice.

---

[11] Under section 340.6, the limitations period commences when "the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission."

California courts have consistently held, including under section 340.6, that a cause of action for malicious prosecution accrues "at the conclusion of the litigation in favor of the party allegedly prosecuted maliciously." *Yee*, *supra*, 220 Cal.App.4th at p. 193 (quoting *Babb v. Superior Court* (1971) 3 Cal.3d 841, 846); see also *Roger Cleveland*, *supra*, 225 Cal.App.4th at p. 668 (citing *Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.* (1988) 202 Cal.App.3d 330, 334-35.) Petitioners offer no reason not to apply this rule here.

CONCLUSION

The Court of Appeal's ruling that Respondents' anti-SLAPP motion should have been granted should be affirmed. In the alternative, the Court should hold that Respondents' anti-SLAPP motion should have been granted on the ground that this action is barred by section 340.6.

DATED: May 13, 2016

Respectfully submitted,

/s/ Mark B. Helm
MUNGER, TOLLES & OLSON LLP
Mark B. Helm (SBN 115711)
John F. Muller (SBN 300839)

Attorneys for Attorney's Liability Assurance Society, Inc.

/s/ Peter D. Engstrom
BAKER & MCKENZIE
Peter D. Engstrom (SBN 121529)

Attorney for Baker & McKenzie

/s/ John W. Amberg
BRYAN CAVE LLP
John W. Amberg (SBN 108166)

Attorney for Bryan Cave LLP

/s/ Charles L. Deem
DLA PIPER LLP (US)
Charles L. Deem (SBN 110557)

Attorney for DLA Piper LLP (US)

/s/ John W. Thornburgh
FISH & RICHARDSON P.C.
John W. Thornburgh (SBN 154627)

Attorney for Fish & Richardson P.C.

/s/ Kevin S. Rosen
GIBSON, DUNN & CRUTCHER LLP
Kevin S. Rosen (SBN 133304)

Attorney for Gibson, Dunn & Crutcher LLP

/s/ Jeff E. Scott
GREENBERG TRAURIG, LLP
Jeff E. Scott (SBN 126308)

Attorney for Greenberg Traurig, LLP

/s/ Harry Mittleman
IRELL & MANELLA LLP
Harry Mittleman (SBN 172343)

Attorney for Irell & Manella LLP

/s/ Leslie M. Werlin
MCGUIREWOODS LLP
Leslie M. Werlin (SBN 67994)

Attorney for McGuireWoods LLP

/s/ Douglas L. Hendricks
MORRISON & FOERSTER LLP
Douglas L. Hendricks (SBN 83611)
Philip T. Besirof (SBN 185053)

Attorneys for Morrison & Foerster LLP

/s/ Martin S. Checov
O'MELVENY & MYERS LLP
Martin S. Checov (SBN 96901)

Attorney for O'Melveny & Myers LLP

/s/ Eve M. Coddon
PAUL HASTINGS LLP
Eve M. Coddon (SBN 125389)

Attorney for Paul Hastings LLP

/s/ Kurt C. Peterson
REED SMITH LLP
Kurt C. Peterson (SBN 83941)

Attorney for Reed Smith LLP

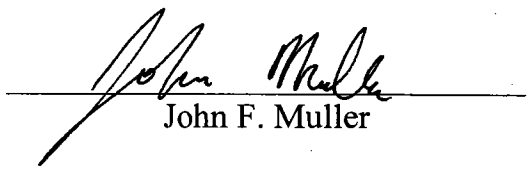
/s/ Adam R. Fox
SQUIRE PATTON BOGGS (US) LLP
Adam R. Fox (SBN 220584)

Attorney for Squire Patton Boggs (US) LLP

CERTIFICATE OF WORD COUNT

According to the word count function in Microsoft Office Word 2010, this brief, including footnotes but excluding portions excludable under Rule 8.520(c)(3), contains 9,933 words.

DATED: May 13, 2016



John F. Muller

PROOF OF SERVICE

I, Michelle Godfrey, declare as follows:

I am over the age of 18 and am not a party to this action. I am employed in the County of Los Angeles. My business address is 355 South Grand Avenue, 35th Floor, Los Angeles, CA 90071.

On May 13, 2016, I served true copies of the attached document described as

APPLICATION OF ATTORNEY'S LIABILITY ASSURANCE SOCIETY, INC. AND THIRTEEN INDIVIDUAL NON-ALAS LAW FIRMS FOR LEAVE TO FILE *AMICI CURAIE* BRIEF IN SUPPORT OF RESPONDENTS

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

I enclosed the documents in sealed envelopes addressed to the persons at the addresses listed in the Service List and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Michelle Godfrey

Michelle Godfrey

SERVICE LIST

Clerk, Court of Appeal Second Appellate District, Division 3 300 S. Spring Street Second Floor, North Tower Los Angeles, CA 90013	Court of Appeal Case No. B244841
Michael J. Avenatti, Esq. EAGEN AVENATTI, LLP 5200 Newport Center Drive, Suite 1400 Newport Beach, CA 92660	Attorneys for Plaintiffs and Appellants William Parrish and E. Timothy Fitzgibbons
Stuart B. Esner, Esq. ESNER, CHANG & BOYER 234 E. Colorado Blvd., Suite 750 Pasadena, CA 91101	Attorneys for Plaintiffs and Appellants William Parrish and E. Timothy Fitzgibbons
J. Michael Hennigan, Esq. Michael H. Swartz, Esq. McKOOL SMITH HENNIGAN, P.C. 865 S. Figueroa Street, Suite 2900 Los Angeles, CA 90017	Attorneys for Defendants and Respondents Latham & Watkins, LLP and Daniel Schechter
Brian J. Panish, Esq. Adam K. Shea, Esq. Kevin R. Boyle, Esq. PANISH, SHEA & BOYLE LLP 11111 Santa Monica Blvd., Suite 700 Los Angeles, CA 90025	Attorneys for Plaintiffs and Appellants William Parrish and E. Timothy Fitzgibbons
Hon. James R. Dunn Los Angeles County Superior Court 111 N. Hill Street, Dept. 26 Los Angeles, CA 90012	Trial Judge – Superior Court Case No. BC482394
Frederick R. Bennett III Los Angeles County Superior Court 111 N. Hill Street, Rm. 546 Los Angeles, CA 90012	Court Counsel Los Angeles Superior Court