Case No. S228277
2d Civ. No. B244841

IN THE 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,

FROM THE COURT OF APPEAL'S DECISION JUNE 26, 2015
SECOND APPELLATE DISTRICT, DIVISION THREE

APPEAL FROM LOS ANGELES SUPERIOR COURT BC482394
HON. JAMES R. DUNN

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION.

In this malicious prosecution action, Plaintiffs/Petitioners have lost twice below. Plaintiffs present no grounds for further review of the trial court's dismissal of their action.

In the Superior Court, Plaintiffs lost because they filed after the expiration of the one-year statute of limitations under Code of Civil Procedure section 340.6. The propriety of that ruling was confirmed on August 20, 2015 by this Court's ruling in *Lee v. Hanley* (2015) ___ Cal.4th ___, 2015 Cal. Lexis 5630 (Case No. S 220775), which expressly disapproved *Roger Cleveland Golf Company v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, the sole authority for Plaintiffs' statute-of-limitations argument.

In the Court of Appeal, Plaintiffs lost under Defendants' alternative ground for dismissal, the interim adverse judgment rule.[1] Applying this Court's opinion in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, the Court of Appeal held that Plaintiffs could not establish the "lack of probable cause" element of their malicious prosecution claim because Plaintiffs lost their summary judgment motion in the underlying matter due to the existence of evidence establishing a triable issue of fact.

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[1] Given its statute-of-limitations ruling, the Superior Court had declined to reach the argument regarding the interim adverse judgment rule.

In short, Plaintiffs' malicious prosecution claim is subject to two independent defenses that decisions of this Court show Plaintiffs cannot overcome: the interim adverse judgment rule as pronounced in *Wilson* and the statute of limitations as interpreted in *Lee*. Review should be denied.

II. NO GROUNDS EXIST FOR GRANTING REVIEW.

The Petition addresses only the interim adverse judgment rule. As this Court stated in *Wilson*, that rule precludes a malicious prosecution plaintiff from establishing the required lack of probable cause if, in the underlying case, a defense motion for summary judgment was denied on the merits. (*Wilson*, *supra*, 28 Cal.4th at pp. 820, 823-824.)

Wilson explained why a denial of summary judgment on the merits precludes a malicious prosecution plaintiff from establishing that it was sued with the required "lack of probable cause": "Claims that have succeeded at a hearing on the merits . . . are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness." (*Wilson*, *supra*, 28 Cal.4th at p. 818.) *Wilson* further held that the interim ruling on the merits establishes probable cause, "even if that result [e.g., the denial of summary judgment] is subsequently reversed by the [underlying] trial or appellate court." (*Wilson*, *supra*, 28 Cal.4th at p. 818.)

Plaintiffs do not ask this Court to reconsider *Wilson*. Instead, Plaintiffs primarily ask this Court to consider whether an exception to the interim adverse judgment rule is available only when the "interim adverse

judgment" on the merits in the underlying matter is induced by "fraud or perjury" (as this Court expressly stated in *Wilson, supra*, 28 Cal.4th at pp. 820, 825) or whether that exception should now be expanded to include cases in which the ruling in the underlying matter was induced by a "materially false fact." (Petition at p.1: "Issue Presented.")

This fine question, arising with exceeding rarity, is not an important question of law in general. And even if it might be in some matter, it is not one here. Here, the Court of Appeal's opinion does not depend on—or even address—the proffered distinction between "fraud or perjury" and "materially false facts." The Court of Appeal correctly stated that Plaintiffs made no argument that the relevant portion of the underlying summary judgment ruling was induced by fraud, perjury or materially false facts. And, indeed, Plaintiffs could not make such an argument, because they presented the evidence that resulted in the underlying trial court's denial of summary judgment.

Accordingly, the aspect of the interim adverse judgment rule addressed in the Petition has no relevance to Plaintiffs' loss based on that rule. As detailed in the next section of this Answer, the relevant portion of the Court of Appeal decision makes this conclusion undeniable. Thus, the Petition tenders an issue that is not genuinely presented in this case.

Plaintiffs' other argument regarding the interim adverse judgment rule is that the Court of Appeal's decision in this case disagrees with *Slaney v. Ranger Insurance Co.* (2004) 115 Cal.App.4th 306. The Petition,

however, fails to acknowledge that the Court of Appeal did not agree with *Slaney* because of that 2004 decision's obvious flaw: a failure to recognize that this Court had issued a decision in 2002—*Wilson*, *supra*, 28 Cal.4th 811—that dictated the opposite result. Indeed, *Slaney* did not cite *Wilson*, let alone acknowledge its pronouncement that the interim adverse judgment rule bars a subsequent malicious prosecution action when, in the underlying case, there was a denial on the merits of a defense motion for summary judgment that was not induced by fraud or perjury.

Rather than following *Wilson*, *Slaney* instead discussed, and implicitly disagreed with, *Roberts v. Sentry Life* (1990) 76 Cal.App.4th 375. Because it overlooked *Wilson*, the *Slaney* decision also overlooked the fact that *Wilson* repeatedly endorsed *Roberts* and its holding that a denial on the merits of a defense motion for summary judgment defeats a subsequent malicious prosecution action unless that summary judgment ruling was induced by fraud or perjury. *Wilson*, *supra*, 28 Cal.4th at p. 819 & fn. 3.

In short, *Slaney* is an erroneous outlier, as the Court of Appeal explained at length in this case. (Slip Op. [attached to Petition] at pp. 19-21.) The Court of Appeal's original opinion in this matter, which it vacated *sua sponte*, also failed to give weight to *Wilson*, an error the Court of Appeal recognized and corrected when it vacated that opinion and issued the opinion that Plaintiffs seek to have reviewed. There is no reason for this Court to devote its limited time to re-explaining the obvious error in *Slaney* when the Court of Appeal has already done so.

In all events, now that *Lee v. Hanley* has rejected *Roger Cleveland Golf Company v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, section 340.6's one-year statute of limitations applies to a claim for malicious prosecution and would bar Plaintiffs' claim. This Court need not devote time to further consideration of a case that will produce the same result regardless of the disposition of the issue raised in the Petition.

III. THE COURT OF APPEAL'S APPLICATION OF *WILSON* TO THIS DISPUTE WOULD BE UNAFFECTED BY ANY PRONOUNCEMENT ON THE PETITION'S PROFFERED ISSUE REGARDING "MATERIALLY FALSE FACTS."

The Court of Appeal's opinion adhered to this Court's holding in *Wilson, supra*, 28 Cal.4th 811. Specifically, the Court of Appeal followed *Wilson*'s holding that a malicious prosecution claim is barred by the interim adverse judgment rule if, in the underlying case, a defense motion for summary judgment was denied based on the existence of a triable issue. (Slip Op. [attached to Petition] at pp. 18-19; *Wilson, supra*, 28 Cal. 4th at pp. 820, 823-825. *See also Roberts, supra*, 76 Cal.App.4th at p. 384 ["a judge's denial of summary judgment accurately predicts that reasonable lawyers would find a case arguably meritorious" and thus preclude a finding of a lack of probable cause].) *Wilson* held that this bar applies "unless the prior ruling is shown to have been obtained by fraud or perjury." (*Wilson, supra*, 28 Cal.4th at pp. 820, 825.)

Plaintiffs argue that when this Court stated that the only exception to the interim adverse judgment rule is where "the prior ruling is shown to have been obtained by fraud or perjury" (*Wilson*, *supra*, 28 Cal.4th at pp. 820, 823-825), this Court meant to include a broader exception for underlying rulings induced by the underlying plaintiffs' presentation of "materially false facts." (Petition, p.1: "Issue Presented.")

But the issue that Plaintiffs proffer regarding the "materially false facts" not amounting to "fraud or perjury" is an issue that was neither addressed by, nor necessary to, the Court of Appeal's opinion in this dispute. Notwithstanding the requirement of Rule of Court 8.204(a)(1)(C), Plaintiffs do not offer any citation to the Court of Appeal's opinion to establish that it hinged on the distinction between "fraud or perjury" and "materially false facts."

The Court of Appeal recognized that the Superior Court denied summary judgment in the underlying matter for at least two reasons. The Court of Appeal further expressly recognized that, as to one of those reasons, Plaintiffs were not contending that anything that could cause a concern (whether "fraud or perjury" or "materially false facts") had induced that conclusion. Specifically, an independent basis for the denial of summary judgment was that the evidence presented by Plaintiffs (specifically, the allegedly misappropriated business plan, a business plan owned by Defendants' client FLIR and an earlier business plan created by Plaintiffs) was sufficient to establish that there was a triable issue of material fact with respect to trade secret misappropriation. The Court of

Appeal recognized that Plaintiffs—unsurprisingly—have never argued that the evidence that they presented was fraudulent, perjurious or materially false. Accordingly, there would be no impact on the Court of Appeal's analysis if this Court were to issue the Petition's requested directive that the interim adverse judgment rule does not apply if the underlying summary judgment ruling was dependent on "materially false facts."

The Court of Appeal's discussion confirms that fact:

> 5. *The Interim Adverse Judgment Rule Applies; The Trial Court's Summary Judgment Denial Establishes Probable Cause and Precludes Former Employees' Malicious Prosecution Claim*
>
> The trial court in the Underlying Action, viewing the evidence in the light most favorable to Latham's clients as the non-moving parties, concluded it could not grant Former Employees' defense motion for summary judgment on the trade secret claim. Though it acknowledged Former Employees had made a "compelling argument" for summary judgment, the court ruled that, "[f]ollowing a review of the [1999 business plan submitted, the 2004 plan presented to FLIR, and the new business plan], the court is unable to find as a matter of law, for purposes of this motion only, that [FLIR] own[s] none of the concepts for [Former Employees'] new business, that nothing in the [new] business plan made use of [FLIR]'s proprietary confidential information, intellectual property, or work product, or that all concepts in the [new] plan were identical to those in the 1999 plan." Accordingly, the court found Former Employees had "failed to sustain their burden of proof on the motion."
>
> Former Employees do not contend Latham obtained this ruling through fraud or perjury. Rather, they argue the court's statement that Former Employees "failed to sustain

their burden of proof on the motion" establishes the motion was denied on a technical ground that does not trigger the interim adverse judgment rule. (See *Wilson, supra*, 28 Cal.4th at p. 823.) We disagree. As our Supreme Court stated in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, "the party moving for summary judgment bears the [ultimate] burden of persuasion that there is *no triable issue of material fact* and that he is entitled to judgment as a matter of law." (Italics added [by Court of Appeal].) Former Employees sought to meet that burden by demonstrating the new business plan was based on a prior business plan Fitzgibbons prepared in 1999, as opposed to the 2004 plan Former Employees developed at Indigo and presented to FLIR. As the trial court noted in its written ruling, FLIR disputed this contention in opposing summary judgment by citing the purportedly different business plans, while arguing the plans were substantively the same. [Footnote omitted] Consistent with that contention, the trial court concluded, after comparing the 1999, 2004 and new business plans, that it was "unable to find as a matter of law . . . that [FLIR] own[s] none of the concepts for [Former Employees'] new business, that nothing in the [new] business plan made use of [FLIR]'s proprietary confidential information, intellectual property, or work product, or that all concepts in the [new] plan were identical to those in the 1999 plan." Though the court framed its conclusion in terms of Former Employees' failure to sustain their burden as the moving party, the necessary implication of the court's ruling is that the evidence raised a triable issue of material fact. (See *Aguilar*, at p. 850.) This is not a "technical ground," but rather an acknowledgement that FLIR's claim had some conceivable merit. (Wilson, *supra*, 28 Cal.4th at p. 823.)

(Slip Op. [attached to Petition] at pp. 18-19 [emphasis added].)

When the Court of Appeal stated, "Former Employees do not contend Latham obtained this ruling through fraud or perjury," the Court was expressly referencing the ruling referenced in the preceding sentences, specifically that Plaintiffs "had 'failed to sustain their burden of proof on the motion'" because the business plan evidence that Plaintiffs themselves had submitted was itself sufficient to create a triable issue.

With respect to this independent basis for denying summary judgment, as the Court of Appeal correctly stated in the above-quoted passage, Plaintiffs' only argument was that this aspect of the ruling was technical and somehow not a consideration of the merits. (Appellants' Reply Brief, pp. 4-5 ["because the primary basis for the summary judgment denial in the underlying action was on technical grounds (the failure of the moving parties to sustain their initial moving burden) and was not on the merits, the interim adverse judgment rule does not apply."].) Plaintiffs do not seek review of the rejection of their argument on this issue.

Accordingly, the Opinion does not address, let alone hinge on, the issue that Petitioners ask this Court to address. Review should be denied.

IV. THIS COURT'S RECENT RULING IN *LEE V. HANLEY* DICTATES AFFIRMANCE OF THE DISMISSAL ON STATUTE OF LIMITATIONS GROUNDS.

Should this Court conclude, notwithstanding the foregoing, that it should grant review regarding the interim adverse judgment rule, then Petitioners request that the Court also grant review with respect to

application of Code of Civil Procedure section 340.6's statute of limitations, the alternative basis for dismissal of Plaintiffs' claim. Given the procedural history of this matter, review of this additional issue would be a matter of fundamental fairness and would be necessary to avoid any uncertainty about the impact of this Court's opinions in *Lee v. Hanley*, *supra*, and in this matter.

In the Superior Court, Defendants successfully invoked *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, to establish that that the one-year statute of limitations under Code of Civil Procedure section 340.6 applied and barred Plaintiffs' malicious prosecution claim. (4 AA 1061-1062.) Based on *Roger Cleveland*, *supra*, 225 Cal.App.4th 660, the Court of Appeal held that Section 340.6 did not apply, but then affirmed the dismissal based on the interim adverse judgment rule. (Slip Op. [attached to Petition] at pp. 13, 18-19.)

Subsequent to the Court of Appeal's opinion, however, this Court issued *Lee v. Hanley*, *supra*, __ Cal.4th ___, expressly rejecting *Roger Cleveland*'s analysis of section 340.6. (*Lee*, slip op. at p. 16.) In *Lee*, this Court also cited with approval both *Vafi*, *supra*, 193 Cal.App.4th at 881-883, and *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 195-196, for their application of Section 340.6 to malicious prosecution claims. (*Lee*, slip op. at p. 11.) With *Lee* now endorsing *Vafi* and *Yee*, and rejecting *Roger Cleveland*, any further review in this matter should have this Court confirm that it has now resolved that Section 340.6 applies to malicious prosecution claims and that the dismissal in this matter was therefore proper.

Absent that further review, the parties and courts would be faced with potential issues in further proceedings below. For example, one might wonder whether reversal of the Court of Appeal's interim-adverse-judgment-rule-based affirmance of the Superior Court would send the case back to the Superior Court for further consideration of the statute of limitations issue based on *Lee v. Hanley, supra*, or whether a reversal should (erroneously in Defendants' view) be understood to suggest that the trial court should enter a new order denying Defendants' anti-SLAPP motion—even though the only decision supporting Plaintiffs on the statute of limitations was *Roger Cleveland, supra*, which this Court rejected in *Lee v. Hanley, supra*.

V. CONCLUSION.

Plaintiffs have presented no proper grounds for review. If this Court feels otherwise, it should also grant review on the application of Section 340.6 so that further proceedings in this matter can be properly conducted.

August 25, 2015

MCKOOL SMITH HENNIGAN, P.C.
J. Michael Hennigan
Michael Swartz

By: _____
Michael Swartz

Attorneys for Defendants and Respondents
LATHAM & WATKINS LLP and DANIEL SCHECTER

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), the attached Petition for Review was produced using 13-point Times New Roman type style and contains fewer than 3000 words not including the tables of contents and authorities, caption page, or this Certification page, as counted by the word processing program used to generate it.

Dated: August 25, 2015

MCKOOL SMITH HENNIGAN, P.C.

By_____

Michael Swartz

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I declare as follows:

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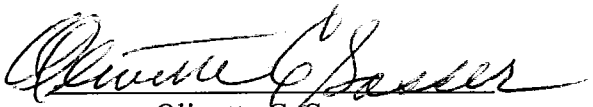

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