S228277

FILED WITH PERMISSION

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.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 3, CASE NO. B244841
HON. JAMES R. DUNN, JUDGE, SUP. CT. NO. BC482394

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Latham begins its answer to the Petition for Review boldly stating that plaintiffs "have lost twice below" attempting to depict plaintiffs as parties who simply do not know when enough is enough. However, Latham knows full well the extraordinary circumstances leading to the Opinion that is the subject of plaintiffs' petition. Those circumstances are: (1) the Court of Appeal initially issued an unanimous published opinion in plaintiffs favor reversing the anti-SLAPP ruling; (2) because of Justice Croskey's tragic death, the Court of Appeal later granted rehearing and, after Presiding Justice Klein's retirement, issued a new published opinion reaching *the exact opposite result*; (3) In its second opinion, the Court of Appeal rejected the sole basis for the trial court's order granting Latham's anti-SLAPP motion; and (4) the Court of Appeal only reached the result in its second opinion by expressly disagreeing with another published opinion from the Second Appellate District.

Latham, therefore, snatched its present Court of Appeal victory literally from the jaws of defeat and now wants to deny plaintiffs their right for review. But nothing Latham argues serves to explain why review by this Court is not warranted to resolve a direct conflict between two published Court of Appeal opinions, especially when the latter opinion is based on a misreading of one of this Court's earlier opinions.

Further and contrary to Latham's answer, this Court's recent opinion in *Lee v. Hanley* (2015) ___ Cal.4th ___, does not mandate affirmance of the order granting the anti-SLAPP motion. To the contrary, this Court's *Lee* opinion supports the Court of Appeal's conclusion in this case that claims for malicious prosecution claim against lawyers are not governed by Code of Civil Procedure section 340.6. In *Lee*, this Court was very careful to say that section 340.6 applies only to claims that "necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. . . . .:" (Slip Opinion p. 16.) It is this limitation that led this Court to conclude that the plaintiff's conversion claim in Lee was not necessarily barred. (Slip Opinion p. 17.) ("Even though an attorney's conversion of client money may also establish an attorney's duty to act with loyalty and good faith toward a client it does not "necessarily depend on proof that Hanley violated a professional obligation . . . .").

The issue therefore is whether an attorney's liability for malicious prosecution necessarily depends on proof that the attorney violated a professional obligation. And here, the fact that a non-attorney could be liable for malicious prosecution demonstrates that an attorney's liability is not dependent on the attorney violating a professional obligation. This is consistent with the conversion claim involved in *Lee* -- there is no basis to conclude that a malicious prosecution claim against a client may be timely but that same claim arising from the very same conduct may be time barred against the lawyer who represented that client.

In any event, because Latham has elected not to seek review of that aspect of the Court of Appeal's opinion in this case finding that plaintiffs' claims were not time barred, there is no cause for this Court to now resolve this question. Rather, the Court should grant review to resolve the direct conflict in published Court of Appeal opinions concerning the interim adverse judgment rule.

II. ARGUMENT

A. There is a clear ground for review to resolve a direct conflict between two published Court of Appeal opinions from the Second Appellate District. Nothing Latham argues is to the contrary.

As explained in the Petition for Review, in its published opinion in this case, the Court of Appeal expressly rejected *Slaney v. Ranger Insurance Co.* (2004) 115 Cal.App.4th 306, thereby creating a direct conflict among the Courts of Appeal as to when a malicious prosecution plaintiff can establish lack of probable cause when a summary judgment motion in the underlying action is denied. The Court in this case adopted a rigid interpretation of the "interim adverse judgment rule" concluding that the denial of summary judgment in the underlying action conclusively establishes probable cause to initiate and prosecute that action unless the malicious prosecution plaintiff can establish that the evidence submitted in

opposition to the summary judgment motion was the product of "fraud" or "perjury." This case thus fits squarely within California Rule of Court 8.500(b)(1), which provides that review is warranted "When necessary to secure uniformity of decision or to settle an important question of law."

Latham nevertheless argues that review is not warranted because the opinion in this case is supposedly mandated by this Court's decision in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811 (which was decided well before the Court of Appeal issued *Slaney*).

However, Latham's argument, if anything, supplies an added reason why review by this Court is warranted. As explained in the Petition for Review, in *Wilson* the sole issue decided by this Court was whether the interim adverse judgment rule applied to the denial of an anti-SLAPP motion in the underlying action. This Court concluded that the adverse interim judgment rule did apply to such orders. It was in the context of explaining that the malicious prosecution plaintiff had made no effort in that case to establish any exception to the interim adverse ruling doctrine that the *Wilson* Court recited the passage on which Latham and the Court of Appeal in this case relied (i.e the passage that "decisions in California and elsewhere established that a trial court judgment or verdict in favor of the plaintiff or prosecutor in the underlying case, unless obtained by means of fraud or perjury, establishes probable cause to bring the underlying action, even though the judgment or verdict is overturned on appeal or by later ruling of the

trial court"). In the Petition for Review, plaintiffs already explained why this passage should not be read as a holding by this Court that fraud and perjury are the only two recognized exceptions to the adverse interim judgment rule regardless of what else transpires in the underlying action. Latham fails to rebut that argument, and ignores that *Wilson* in fact expressly contemplates that actual fraud or perjury is *not* the only recognized exception to the interim adverse judgment rule. In particular, *Wilson* quotes with approval from *Cowles v. Carter* (1981) 115 Cal.App.3d 350, 357, wherein it was stated that "'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." (Emphasis added). In other words, proof of actual fraud or perjury – both of which include an intent element – is unnecessary if, for example, the plaintiff shows materially false facts were presented when summary judgment was denied.

Wilson, 28 Cal. 4th at 818.

Indeed, this case presents a prime example of why the rigid rule adopted by the Court of Appeal and Latham makes no sense and contravenes strong public policy. In the Underlying Action, the trial court rendered express findings, later affirmed by the Court of Appeal in a published decision, that the action was both objectively specious and prosecuted with subjective bad faith. (*FLIR Sys., Inc. v.*

Parrish (2009) 174 Cal.App.4th 1270, 1275.) Based upon these express findings the trial court in the Underlying Action awarded, and the Court of Appeal affirmed, attorney's fees under Civil Code section 3426.4. Importantly, the Court concluded that the denial of summary judgment in that action did not preclude sanctions because the expert declarations submitted in support of the summary judgment opposition were materially false.

As already explained in the Petition, under the decision at issue, if, in the immediate aftermath of a summary judgment denial in the underlying action, the party prosecuting that action becomes aware that there is no probable cause for the continued prosecution of that action then it will know that it nevertheless is insulated from malicious prosecution for that continued prosecution unless it can be established that the evidence submitted in opposition to the summary judgment motion was the product of fraud or perjury. The effect of such a rule is that parties who believe they are being victimized by a maliciously prosecuted action will be deterred from attempting to minimize their damages by moving for summary judgment. They will know that if the motion is denied (whether rightly or wrongly) then they will likely be forever precluded from seeking recovery for malicious prosecution no matter how apparent it is in the aftermath of the summary judgment denial that the underlying action should not be prosecuted.

Latham's effort to argue that *Slaney* is an outlier that does not justify this Court's attention is wishful thinking. The fact that the Court of Appeal in this case

concluded that this Court's decision in *Wilson* compelled it to disagree with *Slaney* reflects why review is so needed. Absent review, courts in this state will be faced with two contradictory decisions on this recurring issue. Malicious prosecution defendants will make the exact argument now being advocated by Latham: that *Wilson* requires the application of the rigid rule it advocates. Only this Court can correct this error and explain that it meant no such thing in *Wilson* and that fraud or perjury are not the only two recognized exceptions to the interim adverse judgment rule.

Finally, with respect to the interim adverse judgment rule, Latham argues that the Court of Appeal concluded that the denial of summary judgment in the underlying action was premised upon an alternative ground that was not tainted by materially false evidence submitted by Latham and its clients. (Answer 6-9.) This aspect of the summary judgment ruling focused on the aspect of FLIR's claim alleging that Parrish and Fitzgibbons were improperly using FLIR's property because aspects of the idea for the business plan they were pursuing were (allegedly) created while Parrish and Fitzgibbons were working for FLIR. The Court of Appeal concluded:

> Former Employees sought to meet that burden [of moving for summary judgment] 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.[Fn 8] 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, 107 Cal.Rptr.2d 841, 24 P.3d 493.) 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, 123 Cal.Rptr.2d 19, 50 P.3d 733.)

(*Parrish v. Latham & Watkins* (Cal. Ct. App., June 26, 2015, B244841) 2015 WL 3933988, at *9.)

For several reasons, this aspect of the underlying order denying summary judgment did not establish as a matter of law that plaintiffs in this action could not possibly prevail on any aspect of their malicious prosecution claim against Latham and therefore did not justify the granting of Latham's anti-slapp motion.

First, in its current opinion, the Court of Appeal did not acknowledge what Presiding Justice Klein expressly recognized in her earlier opinion:

> We emphasize here the complete change in theory on FLIR's cause of action for misappropriation of trade secrets. As pleaded in the complaint in the underlying action, FLIR had alleged that Former Employees' business plan itself was FLIR's trade secret, as it allegedly had been developed by Former Employees when at FLIR for FLIR's benefit-and that Former Employees' assertions that the plan had been independently developed by Fitzgibbons prior to joining Indigo were unworthy of belief.[Fn 6.] But Latham had been given documentation showing that the business plan had, in fact, been developed prior to Fitzgibbons joining Indigo, and had further been told that Former Employees were negotiating to license technology for their new venture from Raytheon. Latham now pursued the theory that if Former Employees' new business venture involved the mass production of TEC-less vanadium oxide microbolometers to go to market within three years, Former Employees must be planning to use FLIR's intellectual property, because Latham was informed that such production could not be achieved in that time frame [Fn 7] without the use of FLIR's intellectual property.

(*Parrish v. Latham & Watkins* (2014) 176 Cal.Rptr 596, 601 [vacated upon grant of rehearing].)

Thus, the Court of Appeal earlier recognized that Latham ultimately jettisoned this theory and instead focused entirely on the discredited and factually meritless inevitable disclosure theory as to which sanctions were ultimately

imposed. "[T]he natural assumption [is] that one does not simply abandon a meritorious action once instituted." (*Minasian v. Sapse* (1978) 80 Cal.App.3d 823, 827.) Thus, the fact that this claim was abandoned by Latham precludes Latham from claiming probable cause as to it.

But, even if there were probable cause as to this separate aspect of the underlying claim, that would not establish that there was probable cause as to the independent aspect of the underlying claim relating to whether these plaintiffs would inevitably have to use FLIR's intellectual property in manufacturing the bolometers. Under controlling precedent of this Court, the no-probable-cause element of malicious prosecution is satisfied so long as probable cause was lacking as to *at least one* aspect of the underlying claim, even if it existed as to other aspects of that claim. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 679 ["For all these reasons the Court of Appeal was correct in concluding that 'The holding in *Bertero* is controlling.' Under the rule of that decision, the complaint in the case at bar states a cause of action for malicious prosecution even though it does not allege that every one of the grounds asserted in the will contest lacked probable cause. And under the rule of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937, the Court of Appeal was also correct in concluding that it was bound by *Bertero* to reverse the judgment dismissing the action."])

B. This Court's recent *Lee v. Hanley* does not dictate affirmance of the order granting Latham's motion to strike.

Finally, in an effort to avoid review, Latham argues that this Court's recent *Lee v. Hanley* (2015) __ Cal.4th ___ opinion dictates affirmance. As explained below, Latham is mistaken. As an initial matter, however, it bears mention that Latham has not sought to raise an additional issue for review under California Rule 8.500(a)(2) challenging the aspect of the Court of Appeal's opinion holding that Code of Civil Procedure section 340.6 is not a basis to uphold the anti-SLAPP ruling.

In the trial court, plaintiffs had argued that section 340.6 does not apply to malicious prosecution claims against lawyers and in any event even if it did apply then their malicious prosecution claim was still timely under the delayed discovery doctrine. The trial court rejected these arguments and granted Latham's anti-SLAPP motion solely on the ground that plaintiffs could not prevail on their malicious prosecution claim because it was supposedly time barred under section 340.6. Because of this ruling, the trial court did not reach the interim adverse judgment rule that had been raised by Latham.

The Court of Appeal later agreed with plaintiffs that section 340.6 did not apply to malicious prosecution claims (relying on its recent opinion in *Roger Cleveland Golf Company, Inc. v. Krane & Smith*, APC (2014) 225 Cal.App.4th

660). As described, however, the Court concluded that plaintiffs' claims were barred by the interim adverse judgment rule.

In the aftermath of the Court of Appeal's opinion, this Court filed *Lee v. Hanley* (Cal., Aug. 20, 2015) 2015 Daily Journal D.A.R. 9636. There, the plaintiff filed an action for conversion seeking recovery of fees and costs that had she had deposited with her former lawyer. The defendant lawyer argued that the plaintiff's claims were time barred under Code of Civil Procedure section 340.6. This Court concluded that section 340.6 applied to claims that "necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. . . . .:" (Slip Opinion p. 16.) This Court concluded that section 340.6 did not necessarily apply to the plaintiff's claim because the "the complaint can . . . be construed to allege a claim for conversion whose ultimate proof at trial may not depend on the assertion that Hanley violated a professional obligation." (*Ibid.*)

The same is true here. An attorney's liability for malicious prosecution is not dependent on proof that the attorney violated a professional obligation. Just as with the conversion claim in *Lee*, the very fact that a non-attorney can be liable for malicious prosecution demonstrates that an attorney's liability is not dependent on the attorney violating a professional obligation. There is therefore no basis to conclude that a malicious prosecution claim against a client may be timely but that same claim arising from the very same conduct may be time barred against the

lawyer who represented that client. In any event, because Latham has elected not to seek review of that aspect of the Court of Appeal's opinion in this case finding that plaintiffs' claims were not time barred, there is no cause for this Court to now resolve this question. Rather, the Court should grant review to resolve the direct conflict in published Court of Appeal opinions concerning the interim adverse judgment rule.

Moreover, the application of *Lee* to this case would not be a matter for this Court to consider in the first instance. If this Court grants this Petition and ultimately reverses on grounds that the Court of Appeal improperly applied the interim adverse judgment rule, the application of *Lee* would be an issue to be first considered in the trial court on remand. Doing so would be consistent with *Lee*, wherein this Court did not ultimately decide whether section 340.6 barred the conversion claim, noting that "without any development of the facts, we cannot conclude that section 340.6(a) necessarily bars Lee's claim." (Slip Opinion pg. 17) Moreover, even if *Lee* applies to this case and the statute of limitations for the claim is one-year, Plaintiffs would still be entitled to appellate review by the Court of Appeal of the trial court's decision on the anti-SLAPP that due to the "discovery rule" their claim is timely even under a one-year statute. In short, the statute of limitations issue in this case is not ripe for review by this Court.

III. CONCLUSION

For the foregoing reasons and for the reasons explained in the petition for review, plaintiffs respectfully urge this Court to grant review.

Dated: September 4, 2015

EAGAN AVENATTI, LLP
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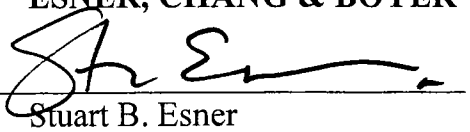
By: 
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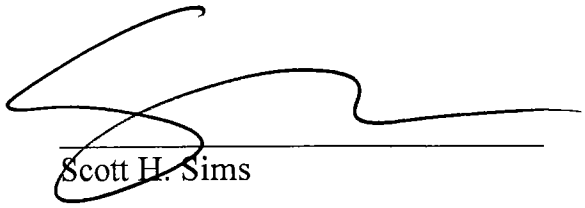

Scott H. Sims

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I am employed in the County of Orange, State of California and over the age of eighteen years. I am not a party to the within action. My business address is 520 Newport Center Drive, Newport Beach, CA 92660.

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