S228277

IN THE SUPREME COURT
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

OPENING BRIEF ON THE MERITS

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(1) Does the denial of former employees' motion for summary judgment in an action for misappropriation of trade secrets conclusively establish that their former employer had probable cause to bring the action and thus preclude the employees' subsequent action for malicious prosecution, even if the trial court in the prior action later found that it had been brought in bad faith?

(2) Is the former employees' malicious prosecution action against the employer's former attorneys barred by the one-year statute of limitations in Code of Civil Procedure section 304.6?

INTRODUCTION

In its published opinion, the Court of Appeal expressly rejected *Slaney v. Ranger Insurance Co.* (2004) 115 Cal.App.4th 306, 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 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 either "fraud" or "perjury."[1]

This Court should now reestablish that it is proper to consider circumstances beyond whether there was fraud or perjury in determining whether the earlier denial of summary judgment conclusively establishes probable cause. The defendants in this action are a law firm (Latham & Watkins, LLP) and a partner at the firm (Daniel Schechter, collectively with Latham & Watkins, LLP, "Latham") who previously

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[1] In the Opinion, the Court stated that plaintiffs did not assert that the evidence submitted in opposition to the summary judgment was the product of fraud or perjury and, therefore, the Court would not reach that issue. This was inaccurate. Plaintiffs did directly and extensively argue that the denial of summary judgment was obtained in the underlying action through the submission of evidence that was the product of fraud or perjury. (See, e.g., AOB at pp. 37-38; ARB at pp. 9-12.) Indeed, Plaintiffs pointed out this important inaccuracy in their Petition for Rehearing, which was denied.

represented FLIR Systems, Inc. and Indigo Systems Corporation (collectively "FLIR") in an underlying trade secret action styled *FLIR Systems, Inc., et al. v. Parrish, et al.* (the "Underlying Action"). Plaintiffs in this action, William Parrish ("Parrish") and E. Timothy Fitzgibbons ("Fitzgibbons" and collectively with Parrish "Plaintiffs") were the defendants in the Underlying Action.

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.* This decision was subsequently affirmed by the Court of Appeal in a detailed published opinion. (*Id.* at p. 1282 ["Appellants opposed the summary judgment motion with expert declarations suggesting there was a scientific methodology to predict the likelihood of trade secret misuse. The trial court found that respondents made a compelling argument for summary judgment but 'the concepts involved in this action are highly technical.' . . . At trial, appellants' experts admitted there was no valid scientific methodology to predict trade secret misuse and agreed that no trade secrets were misappropriated."])

Plaintiffs subsequently initiated this action for malicious prosecution. Latham then filed a special motion to strike raising the same argument (among other things) that was rejected in the Underlying Action, namely that under the interim adverse judgment rule Latham had probable cause as a matter of law to initiate and prosecute the Underlying Action because the trial court in the Underlying Action had denied a defense motion for summary judgment. Plaintiffs explained that this argument failed because, among other things, the trial court and the Court of Appeal in the underlying action each concluded that the actions was prosecuted in bad faith and that the claims were subjectively and objectively specious. Plaintiffs further explained that the trial court's denial of summary judgment in the underlying case did not establish probable cause because, among other things, the evidence submitted in opposition to the summary judgment motion was false and fraudulent.

In its first published opinion in this matter written by Justice Klein and signed by Justice Kitching, the Court of Appeal agreed with Plaintiffs. The third member of the panel, Justice Croskey did not sign the opinion for health reasons, and passed away shortly after it was issued. Later, however, the Court of Appeal granted rehearing *sua sponte* and withdrew its previous published opinion. The Court of Appeal then issued a second published opinion in this matter on the same issue. In it, the Court of Appeal directly contradicted its earlier published opinion written by Justice Klein only months prior, and in doing so expressly rejected another published opinion from the Second District (*Slaney v. Ranger Insurance Co.* (2004) 115 Cal.App.4th 306). The Court of

Appeal concluded that unless the evidence submitted in opposition to a summary judgment motion in the underlying action can be labeled as "perjury" or "fraud" (it can be here), then as a matter of law, a ruling in the underlying action denying summary judgment conclusively establishes probable cause such that no malicious prosecution claim can lie. The Court of Appeal then failed to address Plaintiffs' extensive arguments that the evidence submitted in opposition to the summary judgment in the underlying action was the product of fraud or perjury. (See, e.g., AOB at pp. 37-38; ARB at pp. 9-12.)

In issuing its second opinion, the Court of Appeal expanded the application of the interim adverse judgment doctrine well beyond it intended boundaries. That doctrine only requires, at most, that there be "unfair conduct" which may be, but is not limited to, fraud or perjury in order to rebut the presumption of probable cause. When a lawyer submits materially false evidence (such as the expert declarations here) to support a legally untenable claim (as the underlying trial court and Court of Appeal found) then there is at least a triable issue of fact whether there has been "unfair conduct" sufficient to rebut the presumption of probable cause and defeat an anti-SLAPP motion. Probable cause is based on an objective test, and thus in order to establish lack of probable cause the malicious prosecution plaintiff need only show either no reasonable law firm would have thought the claim tenable. Yet, under the Court of Appeal's opinion, where the underlying plaintiff survived summary judgment, the malicious prosecution plaintiff must

go even further and demonstrate that the law firm secured the summary judgment denial through actual fraud or perjury. This is a significant departure from the law.

The rule adopted by the Court of Appeal will cause considerable mischief. For instance, 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 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.

Second, the Court of Appeal in this case concluded that the statute of limitations in Code of Civil Procedure section 340.6 did not apply to an adverse party's claim for malicious prosecution against the lawyer who prosecuted the underlying action. In the aftermath of the Court's decision, this Court decided *Lee v. Hanley* (2015) 61 Cal.4th 1225. There, 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. . . . . " (*Id.* at pp. 1236-1237.) *Lee* is therefore not

controlling 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, even if this Court concluded that *Lee* applied to malicious prosecution claims against adverse counsel, that conclusion would not support dismissal of this action because (1) since plaintiffs were entitled to rely upon existing case law that their malicious prosecution claim was governed by a two year statute of limitations, any such conclusion should be given prospective application only and (2) even if section 340.6 were held to control plaintiffs' claims, questions of fact remain whether plaintiffs' malicious prosecution claim was timely under the delayed discovery rule as Plaintiffs were not on notice of their claims against Latham until Latham's former clients asserted in a separate malicious prosecution action filed by Plaintiffs that they were relying on advice of their counsel (Latham) in prosecuting the Underlying Action. That disclosure occurred within the one-year period and thus Plaintiffs' lawsuit was timely.

In short, this Court should reverse the Court of Appeal's opinion in this case and reinstate Plaintiffs' malicious prosecution claim.

STATEMENT OF FACTS

A. Background.

Plaintiffs Parrish and Fitzgibbons are former shareholders and officers of Indigo, a company which manufactures and sells microbolometers. (AA 772, 775.) A microbolometer is a device used in connection with infrared cameras, night vision, and thermal imaging. (*Ibid.*) In 2004, FLIR purchased Indigo for approximately $185 million, acquiring Indigo's patents, technology and intellectual property. FLIR manufactures and sells infrared cameras, night vision and thermal imaging systems that use microbolometers. Immediately after the sale, Parrish and Fitzgibbons went to work for FLIR. However, late in 2005 as they approached the end of their non-compete agreements with FLIR, Parrish and Fitzgibbons decided that they would start a new company to mass produce bolometers after completing their non-compete agreements. The new company was based on a business plan previously developed by Fitzgibbons in 1998, while he was self-employed and before he joined Indigo in September 1999. (*Ibid.*)

Before leaving their employment with FLIR, Parrish and Fitzgibbons discussed with FLIR the possibility of allowing FLIR to participate in the new business venture, and proposed outsourcing bolometer production to a third party. (AA 772, 775.) Parrish and Fitzgibbons also offered FLIR a non-controlling interest in their new business venture, but FLIR rejected the offers. Accordingly, on or about January 6, 2006, having

completed their non-compete agreements, Parrish and Fitzgibbons ended their employment with FLIR. (*Ibid.*)

As part of their new business venture, which would compete with FLIR for market share, Parrish and Fitzgibbons entered into business discussions with Raytheon Corporation ("Raytheon"). (AA 772, 775.) Raytheon is a major American defense contractor and an industrial corporation with core manufacturing concentrations in defense systems and defense and commercial electronics. Parrish and Fitzgibbons' negotiations with Raytheon involved the new business venture acquiring licensing, technology and manufacturing facilities from Raytheon, and selling goods to Raytheon. (*Ibid.*)

Fearful of losing sales, customers and revenue, and unwilling to accept competition from Parrish and Fitzgibbons, FLIR, represented by Latham, initiated the malicious and bad faith Underlying Action in June 2006. (AA 300, 773, 776.) The Underlying Action was tried before the Hon. James Brown in December 2007. On June 13, 2008, Judge Brown issued a 25-page Statement of Decision and entered judgment in favor of Parrish and Fitzgibbons and against Latham's client FLIR. (AA 93.) Judge Brown found that FLIR "initiated and continued to pursue [the] action in bad faith and primarily for the anticompetitive motive of preventing [Parrish and Fitzgibbons] from attempting to create a new business in competition with [FLIR]." (AA 108.)

Judge Brown further held that "[FLIR's] suspicions regarding [Parrish and Fitzgibbons] were not sufficient to justify the filing of the lawsuit on June 15, 2006" and

that FLIR and Latham "proceeded on a theory that Defendants would misuse trade secret[s] in the future, [even though] that 'inevitable disclosure] type of theory is not supported by California law." (AA 112.)

Judge Brown further held that FLIR "initiated and maintained the lawsuit in bad faith in that [FLIR] did not have a sufficient basis to initiate and maintain the lawsuit and failed to take reasonable measures to allay their fears by learning more about [Parrish and Fitzgibbons'] plans" (AA 114) and that FLIR "knew, or should have known, that they did not have a sufficient evidentiary basis to initiate the lawsuit." (AA 115.)

He also rejected the argument that the earlier denial of summary judgment prevented a finding of bad faith. Importantly, he specifically found that FLIR (and Latham) "opposed the summary judgment motion with expert declarations suggesting that there was a scientific methodology to predict the likelihood of trade secret misuse." (*FLIR Systems,* 174 Cal.App.4th at 1282.) Judge Brown relied on these expert declarations in denying summary judgment, specifically citing them as the evidence giving rise to a triable issue. (AA 87 ["plaintiffs have produced sufficient evidence, for example with the Neikirk and Murphy declarations, to raise a triable issue as to misappropriation of trade secrets."].) The trial court in the Underlying Action was deceived by Latham because, as the trial court later found, the idea that there is a scientific methodology to predict the likelihood of trade secret misuse was a "materially false fact" -- "[a]t trial, [FLIR's] experts admitted there was no valid scientific methodology to predict trade secret misuse and agreed that no trade secrets were

misappropriated." (*FLIR Systems, Inc.*, 174 Cal.App.4th 1272; AA 361, 781-782 [in sealed volume].)

Additionally, Judge Brown found "[t]he lawsuit caused business harm" to Parrish and Fitzgibbons. (AA 116.) Based on his finding of bad faith, Judge Brown awarded Parrish and Fitzgibbons attorneys' fees and costs under the Uniform Trade Secrets Act. (AA 117.) Thereafter, the Court of Appeal affirmed the judgment and Judge Brown's finding that FLIR initiated and maintained the lawsuit in bad faith. (*FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270; AA 282.) Plaintiffs later initiated this malicious prosecution action.

B. Latham's Motion To Strike And Plaintiffs' Subsequent Appeal.

In response to Plaintiffs' malicious prosecution claim, Latham filed a special motion to strike under Code of Civil Procedure section 425.16. Latham argued that it satisfied the first prong of the anti-SLAPP statute because a claim for malicious prosecution implicates protected activity. (AA 54.) Latham then argued that Plaintiffs did not have a probability of prevailing on the merits sufficient to satisfy the second prong of the anti-SLAPP statute because Plaintiffs' claims were time barred under the one year statute of limitations applicable to actions for legal malpractice. (Code Civ. Proc., § 340.6.) Latham claimed this statute applies to all actions against lawyers relating to

services they provide, including actions for malicious prosecution brought by a non-client and former adversary. (AA 64.)

Latham also argued that plaintiffs would not be able to establish a probability of prevailing on their malicious prosecution claim because, in the Underlying Action, Parrish and Fitzgibbons had moved for summary judgment as to the claims against them and the trial court in the Underlying Action court had denied that motion. Based on this denial, Latham argued Plaintiffs were precluded from establishing that the Underlying Action was initiated and prosecuted without probable cause. (AA 68.)

In their opposition to the motion to strike, Plaintiffs argued they were able to establish a probability of prevailing on the merits for multiple reasons.

First, there was ample evidence that Latham initiated the Underlying Action and continued its prosecution without probable cause. This evidence included the same facts that led the trial court and the Court of Appeal in the Underlying Action to conclude that action was both objectively specious and prosecuted with subjective bad faith. In addition, Plaintiffs subsequently learned of FLIR's assertion it had prosecuted the Underlying Action based upon the advice of Latham. (AA 253-259.)

Second, Plaintiffs also argued that this action was not time barred under Code of Civil Procedure section 340.6 because: (1) the two year statute of limitations contained in section 335.1 applies; (2) the text, history of purpose of section 340.6 demonstrates that it was not intended to apply to third party actions for malicious prosecution against a lawyer and (3) even if section 340.6 did apply, then Plaintiffs' action was timely under the

delayed discovery doctrine because Plaintiffs did not have cause to allege that Latham was responsible for the malicious prosecution of the underlying action until Latham's former client (FLIR) asserted it had acted on the advice of their counsel in filing and prosecuting the Underlying Action. (AA 259-264.)

The trial court granted the motion to strike on statute of limitations grounds only and declined to address Latham's probable cause argument. Plaintiffs then appealed.

During the pendency of plaintiffs' appeal, the Court of Appeal decided *Roger Cleveland Golf Company, Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, concluding that Code of Civil Procedure section 340.6 does not apply to malicious prosecution claims against an adverse lawyer. Thus, the focus of the appeal shifted to Latham's assertion that the denial of summary judgment in the underlying action conclusively established that the action was initiated and prosecuted with probable cause even though the underlying trial court rendered express findings, affirmed by the Court of Appeal in a published decision, that the underlying action was both objectively specious and prosecuted with subjective bad faith and even though those courts concluded that materially false evidence was submitted in opposition to the summary judgment motion. (*FLIR Sys., Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1275.)

The Court of Appeal in this case initially issued an unanimous published decision reversing the anti-SLAPP dismissal and concluding that the denial of summary judgment in the underlying action *did not* conclusively establish probable cause because (1) the underlying trial court and the Court of Appeal each concluded that the underlying action

was objectively and subjectively specious and (2) the summary judgment was denied as a result of materially false expert declarations. That opinion was filed one day before Justice Croskey died and was signed by then Presiding Justice Klein and Justice Kitching, only.

Latham petitioned for rehearing in part on the ground that the Opinion was signed by only two Justices. That Petition was denied. However, shortly thereafter, the Court granted rehearing on its own initiative.

Following further briefing and argument, the Court of Appeal issued an opinion authored by Justice Kitching, which is directly contrary to its earlier opinion.[2] The Court of Appeal concluded that the denial of summary judgment in the Underlying Action conclusively established probable cause and further incorrectly found that Plaintiffs had not argued on appeal that the evidence submitted in opposition to that summary judgment motion was the product of fraud or perjury.

Plaintiffs filed a petition for rehearing pointing out that in fact they had extensively argued fraud or perjury in their briefs across many pages (see, e.g., AOB at pp. 37-38; ARB at pp. 9-12) and, in any event, the fact that Latham submitted materially false evidence in opposition to the summary judgment motion and the fact that the underlying trial court and the Court of Appeal concluded that the underlying action was objectively

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[2] The panel which rendered the initial opinion was comprised of Presiding Justice Klein (who authored that opinion and who has since retired), Justice Croskey and Justice Kitching. The panel who rendered the current opinion is Presiding Justice Edmon, Justice Kitching and Justice Pro Tem Egerton.

and subjectively specious, were sufficient to establish that the underlying action was not prosecuted with probable cause.

The Court of Appeal denied the Petition for Rehearing and Plaintiffs then sought review by this Court.

ARGUMENT

I. BECAUSE THE SUMMARY JUDGMENT DENIAL IN THE UNDERLYING ACTION WAS PROCURED BY LATHAM'S SUBMISSION OF MATERIALLY FALSE FACTS, IT DID NOT CONCLUSIVELY ESTABLISH PROBABLE CAUSE TO INITIATE AND MAINTAIN THE UNDERLYING ACTION UNDER THE INTERIM ADVERSE JUDGMENT RULE.

The Court of Appeal concluded that under the interim adverse judgment rule the summary judgment denial in the Underlying Action conclusively established probable cause unless Plaintiffs could establish that the evidence Latham submitted in opposition to the underlying summary judgment motion was the product of fraud or perjury.

The Court reasoned that (1) such a rigid rule was mandated by this Court's opinion in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811 and that (2) the more flexible approach employed by *Slaney v. Ranger Insurance Co.* (2004) 115 Cal.App.4th

306 was inconsistent with the probable cause requirement of the malicious prosecution standard. As explained, the Court of Appeal was incorrect on both grounds. As an initial matter, however, it is important to understand the genesis and the development of the interim adverse judgment rule.

A. The Interim Adverse Judgment Rule.

In order to state a malicious prosecution claim the plaintiff must establish that the underlying action was either initiated or prosecuted without probable cause. For purposes of this Petition it should be remembered that a claim for malicious prosecution is *not limited* to only those causes of action that lacked probable cause *when the complaint was filed.* In *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970, this Court determined that the standard for probable cause "will apply to the continuation as [well as] to the initiation of a suit." Thus, "an attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause." (*Ibid.*) Moreover, "[b]ecause an attorney will be liable only for the damages incurred from the time the attorney reasonably should have caused the dismissal of the lawsuit after learning it has no merit, an attorney can avoid liability by promptly causing the dismissal of, or withdrawing as attorney in, the lawsuit...." (*Id.* at pp. 969-970.)

"California courts have held that victory at trial, though reversed on appeal, conclusively establishes probable cause to bring the underlying action. (*Wilson, supra,* 28

Cal.4th at p. 817, 123 Cal.Rptr.2d 19, 50 P.3d 733, citing *Bealmear v. So. Cal. Edison Co.* (1943) 22 Cal.2d 337, 340, 139 P.2d 20; *Carpenter v. Sibley* (1908) 153 Cal. 215, 218, 94 P. 879; *Holliday v. Holliday* (1898) 123 Cal. 26, 32, 55 P. 703; *Cowles v. Carter* (1981) 115 Cal.App.3d 350, 356, 359, 171 Cal.Rptr. 269; *Fairchild v. Adams* (1959) 170 Cal.App.2d 10, 15, 338 P.2d 191; see also *Crescent Live Stock Co. v. Butchers' Union* (1887) 120 U.S. 141, 149–151, 7 S.Ct. 472, 30 L.Ed. 614.) The rationale is that approval by the trier of fact, after a full adversary hearing, sufficiently demonstrates that an action was legally tenable. (*Cowles, supra,* at p. 358, 171 Cal.Rptr. 269.)" (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1052.)

This presumption of probable cause is often referred to as the "interim adverse judgment rule." Prior to 1990, the cases concerning whether the resolution of the underlying action precluded the malicious prosecution plaintiff from claiming absence of probable cause were in the context of underlying judgments in favor of the malicious prosecution defendant that were either reversed on appeal or were challenged in the malicious prosecution action. It was in that setting that it was recognized that if the underlying judgment was procured by fraud of a type that was not sufficient to actually vacate that judgment (i.e. it intrinsic and not extrinsic fraud), then that fraud nevertheless may be sufficient to establish lack of probable cause. In *Carpenter v. Sibley* (1908) 153 Cal. 215, 217-18, this Court explained:

> The rule that only extrinsic fraud may be made the basis of an action to set aside a judgment is a rule founded in necessity. It is to the interest of the state that there should be an end to litigation. If it were permitted that a

> litigant could maintain an action to overthrow a judgment upon the ground that perjured testimony had been employed against him, or upon any other ground than extrinsic fraud, litigation would have no end. *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. But this is very far from saying that, because the law denies to a litigant this particular form of redress for such an injury, it denies him any redress whatsoever. Certainly, if a man has procured an unjust judgment by the knowing use of false and perjured testimony, he has perpetrated a great private wrong against his adversary. If that judgment is in the form of a judgment of criminal conviction, it would be obnoxious to every one's sense of right and justice to say that, because the infamy had been successful to the result of a conviction, the probable cause for the prosecution was thus conclusively established against a man who had thus been doubly wronged. Therefore, while it may be true that 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 a remedy for the private wrong thus committed. So we find it laid down that the general rule now is 'that if the declaration or complaint shows a conviction of the plaintiff, *yet if it be averred that the conviction was procured by fraud, perjury, or subornation of perjury, or other unfair conduct on the part of the defendant, the presumption of probable cause is effectually rebutted.*' 13 Ency. Pl. & Prac. p. 449, and note; *Spring v. Before*, 12 B. Mon. (Ky.) 555; *Ross v. Hixon*, 46 Kan. 550, 26 Pac. 955, 12 L. R. A. 760, 26 Am. St. Rep. 123; *Crescent Live Stock Co. v. Butchers' Union, supra.*

(Italics added.)

It was not until *Roberts v. Sentry Life Ins.* (1990) 76 Cal.App.4th 375, 384, that a California court first recognized that interim rulings that do not resolve the underlying action in its entirety may also establish probable cause. And in the context of its discussion of this rule, the *Roberts* Court did not hold that fraud or perjury were the only exceptions to the interim adverse judgment rule. Rather, the Court referred broadly to "materially false facts" as one, but not the only, exception to the rule. In particular, the *Roberts* Court concluded that:

> [D]enial of defendant's summary judgment in an earlier case normally establishes there was probable cause to sue, thus barring a later malicious prosecution suit.[Fn] We say 'normally' rather than 'conclusively' because there may be situations where denial of summary judgment should not irrefutably establish probable cause. *For example*, if denial of summary judgment was induced by materially false facts submitted in opposition, equating denial with probable cause might be wrong. Summary judgment might have been granted but for the false evidence. (For that matter, a jury verdict also might be induced by materially false testimony, raising a good argument that no conclusive presumption of probable cause should arise.)" (*Ibid, emphasis added.*)

The use of the words "for example" and "materially false facts" makes clear fraud and perjury are not the exclusive exceptions to the interim averse judgment rule. This is reinforced by *Cheong Yu Yee v. Cheung* (2013) 220 Cal.App.4th 184, 200-01, where the Court held:

> Certain non-final rulings on the merits may serve as the basis for concluding that there was probable cause for prosecuting the underlying case on which a subsequent malicious prosecution action is based. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817-818, 123 Cal.Rptr.2d 19, 50 P.3d 733.) This is based on the notion that '[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, 123 Cal.Rptr.2d 19, 50 P.3d 733.) Thus, for instance, the denial of a nonsuit motion and a subsequent plaintiff's jury verdict has been found sufficient to constitute probable cause, even though the trial court or appellate court later reverses that verdict. (*Cowles v. Carter* (1981) 115 Cal.App.3d 350, 356, 171 Cal.Rptr. 269; see *Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1052 "1053, 79 Cal.Rptr.3d 822 [designer's success before Board of Patent Appeals and Interferences established probable cause, notwithstanding the fact that designer's victory was reversed by appellate court].) Similarly, the denial of a defense summary judgment motion 'normally establishes there was probable cause to sue, thus barring a later malicious prosecution suit.' (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 384, 90 Cal.Rptr.2d 408 (*Roberts*); see also *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973, fn. 10, 12

> Cal.Rptr.3d 54, 87 P.3d 802 [The denial of summary judgment normally precludes the trial court from finding that the lawsuit was frivolous for purposes of a malicious prosecution claim].) '

(*Cheong Yu Yee v. Cheung* (2013) 220 Cal.App.4th 184, 200-01.)

Thus, under *Roberts* - when the adverse interim judgment is based on the denial of a pre-trial motion – a subsequent determination that the earlier denial was based on "materially false facts" is sufficient to avoid the presumption of probable cause. It is therefore not the case, as the Court of Appeal here held, that fraud or perjury are the single and only recognized exception to the interim adverse judgment rule. Indeed, the recognition that falsity is sufficient to avoid the presumption of probable cause was expressly endorsed by this Court in *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973, fn. 10. There, the Court concluded that the denial of summary judgment in the underlying action did not conclusively establish probable cause under *Roberts* because there was a showing that the evidence which was introduced to create a triable issue of material fact was false.

Indeed in *Carpenter v. Sibley*, the very case where this Court recognized that extrinsic fraud was not necessary to avoid the interim judgment rule, there is also recognition that a "private wrong" such as "unfair conduct" on the part of the malicious prosecution defendant may be enough to rebut the presumption of probable cause. Nevertheless, in its second published opinion here, the Court of Appeal incorrectly concluded that "the Supreme Court's decision in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 123 Cal.Rptr.2d 19, 50 P.3d 733 (*Wilson*) is controlling and

mandates a finding of probable cause under the interim adverse judgment rule." (*Parrish v. Latham & Watkins* (Cal. Ct. App., June 26, 2015, B244841) 2015 WL 3933988, at *6.)

As now explained, the Court of Appeal was mistaken, as this Court did not consider, let alone decide, this issue in *Wilson*.

B. *Wilson* Does Not Support The Court Of Appeal's Conclusion.

The issue in *Wilson* was whether the denial of an anti-SLAPP motion in the underlying action could support invoking the interim adverse ruling doctrine in the first place. There, this Court answered that question "yes," but that holding is irrelevant in this instance because the court did not consider whether there was evidence in that case sufficient to fit within an exception to that doctrine. In fact, there was not even argument in *Wilson* that an exception to the interim adverse judgment rule applied.

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 the Court of Appeal in this case relied. That passage provides: "For the above reasons, we conclude the Kuzmich court's denial of the defendants' motion to strike under section 425.16 established probable cause to bring the Kuzmich action. Plaintiffs in the present malicious prosecution action have not attempted to show that that ruling was obtained by fraud or perjured testimony. Probable cause therefore existed as a matter of law for initiation of

Kuzmich, negating a necessary element of the malicious prosecution action. As the Court of Appeal also concluded, the demurrers to that cause of action were therefore properly sustained." (*Id.* at p. 30.)

Thus, contrary to what the Court of Appeal held, *Wilson* does *not* hold that fraud or perjury are the only permissible exceptions to the interim adverse judgment rule. Further, because the issue of additional exceptions to the interim adverse judgment rule was not considered in *Wilson*, the opinion has no bearing on the issue. "It is well settled that language contained in a judicial opinion is '"to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not there considered. [Citation.]"' [Citations.]" (*People v. Banks* (1993) 6 Cal.4th 926, 945.) "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.' [Citation.]" (*Canales v. City of Alviso* (1970) 3 Cal.3d 118, 128, fn 2.)

For example, in *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 64-65, the court referenced a solid line of cases containing unequivocal language that the trial court lacks jurisdiction to proceed pending an express determination of the defendant's competency. But the *Marks* court concluded that language was not controlling since "[d]espite their imperative tenor . . . none of the cited authorities squarely addressed a question of the trial court's jurisdiction to proceed notwithstanding an erroneous failure to hold a competency hearing." (See *People v. Myers* (1987) 43 Cal.3d 250, 273-274 [even though the court in an earlier opinion retroactively applied a new principle of law, that

case did not stand for the proposition that such retroactive application was appropriate since that was not an issue raised or resolved]; *McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, 1277 [manner in which the Court of Appeal earlier calculated maximum recovery under MICRA was not controlling since in that case there was no consideration of whether the method of calculation was proper.])

Indeed, *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 p. 818.)

Thus, *Wilson* cannot be read as holding that the only exceptions to the adverse interim judgment rule are actual fraud or perjury. Nor is there any other basis to accept the Court of Appeal's restrictive interpretation of the law.

C. The Court Of Appeal's Conclusion Is At Odds With The Moorings Of The Probable Cause Element Of The Malicious Prosecution Standard.

Contrary to the Court of Appeal's conclusion, there is no rationale why the knowing submission of false evidence is necessary in order for there to be an exception to a rule relating to the probable cause element of malicious prosecution.

> The probable cause element of a malicious prosecution action requires an objective judicial determination of the "reasonableness" of the defendant's prior lawsuit. The existence or absence of probable cause is a question of law to be determined by the trial court from the facts. The question for the trial court is whether, on the basis of the facts known to the defendant, the prosecution of the prior action was legally tenable. (*Sheldon Appel*, supra, 47 Cal.3d at pp. 868, 875, 886; *Leonardini v. Shell Oil Co.*, supra, 216 Cal.App.3d at p. 567.) When the prior action was objectively reasonable, the malicious prosecution defendant is entitled to prevail regardless of his or her subjective intent. "... If the court determines that there was probable cause to institute the prior action, the malicious prosecution action fails, whether or not there is evidence that the prior suit was maliciously motivated. [Citations.]" (*Sheldon Appel*, supra, 47 Cal.3d at p. 875.)
>
> In analyzing the issue of probable cause in a malicious prosecution context, the trial court must consider both the factual circumstances established by the evidence and the legal theory upon which relief is sought. A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him. In making its determination whether the prior action was legally tenable, the trial court must construe the allegations of the underlying complaint liberally in a light most favorable to the malicious prosecution defendant. (*Leonardini v. Shell Oil Co.*, supra, 216 Cal.App.3d at p. 571.) In all cases, probable cause is to be determined by an objective standard. If any reasonable attorney would have thought the claim made in the prior action tenable, then it is not lacking in probable cause and the defendant is entitled to judgment in the malicious prosecution action regardless of what the defendant's subjective belief or intent may have been. (*Sheldon Appel*, supra, 47 Cal.3d at pp. 878-

879, 885-886; *Leonardini v. Shell Oil Co.*, supra, 216 Cal.App.3d at pp. 568-569.)

(*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164-66.)

Accordingly, under this standard, the issue is whether (1) after a reasonable inquiry Latham had a reasonable basis to believe that the facts (i.e. the expert declarations) it submitted in opposition to the underlying summary judgment motion were true and (2) even if it did have such a reasonable basis to believe in their truth, then whether Latham had a reasonable basis to believe that those facts supported a legally tenable claim.

Here, the trial court and the Court of Appeal in the Underlying Action have already effectively determined that no reasonable attorney could believe that the expert declarations submitted in opposition to the summary judgment motion created a legally tenable claim. The trial court and the Court of Appeal in the Underlying Action did so through the imposition and affirmance of a sanction order under Civil Code section 3426.4. That section "require[s] objective speciousness of the plaintiff's claim and its subjective misconduct in bringing or maintaining a claim for misappropriation of trade secrets. (*Stilwell, supra,* 1989 U.S. Dist. Lexis 5971, accord, *Alamar Biosciences, Inc. v. Difco Laboratories, Inc.* (E.D.Cal. Feb. 23, 1996, No. CIV S 94 1856 DFL PAN) 1996 U.S. Dist. Lexis 18239 (Alamar); *VSL Corporation v. General Technologies, Inc.* (N.D.Cal. Jan. 5, 1998, No. C 96 20446 RMW(PVT)) 1998 U.S. Dist. Lexis 7377.)" (*Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1261-62.)

The Court of Appeal in the current opinion at issue did not explain how an action already held to have been initiated and prosecuted in subjective and objective bad faith can later be held as a matter of law to have been initiated and prosecuted with probable cause. Instead, the Court of Appeal engaged in a discussion of why it disagrees with *Slaney v. Ranger Insurance Co.* (2004) 115 Cal.App.4th 306, in which the Court concluded that the events in an action following the denial of a summary judgment were sufficient to rebut the presumption of probable cause.[3] Directly contrary to the published opinion previously issued by the Court of Appeal and drafted by Presiding Justice Klein, the Court of Appeal stated: "the hindsight approach employed in *Slaney* is inconsistent with the principle that plaintiffs and their attorneys 'have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious.' (*Wilson, supra,* 28

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[3]In *Slaney*, the underlying action was an insurance bad faith case by Roberts against Ranger Insurance, which included a cross-complaint by Ranger Insurance against Roberts and Slaney for conspiracy to commit fraud. Slaney had moved for summary judgment in the underlying action, but the motion was denied when the trial court in the underlying action found "[a] triable controversy exists." (*Id.* at 312.) Thereafter, Slaney brought a renewed summary judgment motion in the underlying action, which was granted on the grounds that the cause of action was "without any substantive basis in law and/or fact." (*Id.* at 312-313, 321.) Additionally, Roberts' case-in-chief against Ranger Insurance went to trial, and the jury found Ranger Insurance denied coverage in bad faith and with malice. (*Id.* at 313.)

Later, in the malicious prosecution action by Slaney, Ranger Insurance argued in its anti-SLAPP motion that denial of the first summary judgment motion precluded Slaney from showing lack probable cause. The *Slaney* Court rejected that argument, affirming the trial court's ruling that the subsequent finding in the underlying action that the cross-complaint was "without any substantive basis in law and/or fact", along with the jury verdict for Roberts in the case-in-chief, was "sufficient to offset the first denial of the motion for summary judgment and support inferences of lack of probable cause and malice." (*Id.* at 321.)

Cal.4th at p. 822, 123 Cal.Rptr.2d 19, 50 P.3d 733, citing *Sheldon Appel, supra*, 47 Cal.3d at p. 885, 254 Cal.Rptr. 336, 765 P.2d 498.)" (*Parrish v. Latham & Watkins* (Cal. Ct. App., June 26, 2015, B244841) 2015 WL 3933988, at *11.)

However, and contrary to the Court of Appeal's conclusion, what transpired in the Underlying Action in the aftermath of the summary judgment is highly relevant to determining whether the underlying action was initiated or prosecuted without probable cause. For example, in the immediate aftermath of the summary judgment denial, the party prosecuting the underlying action may discover that its claim has no arguable merit and that it is both objectively and subjectively specious. Nevertheless, and in order to cause harm to the underlying defendant (i.e. quash anticompetitive efforts), this party may continue to prosecute the underlying action. But under the Court of Appeal's rigid holding, so long as the party prosecuting the underlying action could establish that the evidence it submitted in opposition to the summary judgment motion was not the product of fraud or perjury, then that summary judgment denial conclusively establishes probable cause and the malicious prosecution action will forever fail – even though the underlying plaintiff clearly and knowingly continued to prosecute that action in the absence of probable cause.

Here, it was actually determined in the Underlying Action itself the lawsuit was pursued in bad faith, was objectively and subjectively specious and that the earlier denial of summary judgment did not insulate the underlying plaintiff from sanctions because the evidence that had been submitted in opposition to the summary judgment motion was

materially false. Nevertheless, the Court of Appeal concluded plaintiffs could not possibly prevail on their malicious prosecution action. This cookie cutter approach to the interim adverse judgment rule is inconsistent with the development of that rule and the underpinnings of the no probable cause element of the malicious prosecution standard and is not supported, let alone required, by this Court's previous decisions.

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 or maintained.

Finally, Latham argued in its Answer to the Petition for Review 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 the Court's 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."])

In sum, the Court of Appeal erroneously concluded that the denial of summary judgment in the underlying action conclusively established that Latham had probable cause to initiate and prosecute the underlying action.

II. THIS COURT'S RECENT *LEE V. HANLEY* OPINION DOES NOT SUPPORT AFFIRMING THE ORDER GRANTING LATHAM'S MOTION TO STRIKE.

This Court has also asked the parties to address whether plaintiffs' malicious prosecution action against Latham is barred by the one-year statute of limitations set forth in Code of Civil Procedure section 304.6. In *Lee v. Hanley* (2015) 61 Cal.4th 1225, 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. . . ." (*Id.* at pp. 1236-1237.) 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. . . . ." (*Id.* at p. 1229.) 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.*)

This Court elaborated that "[i]n this context, a 'professional obligation' is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the Rules of Professional Conduct. By contrast, as the Court of Appeal observed, section 340.6(a) does not bar a claim for wrongdoing 'for example, garden-variety theft' that does not require proof that the attorney has violated a professional obligation, even if the theft occurs while the attorney and the victim are discussing the victim's legal affairs." (*Id* at p. 1237.)

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.

A. If This Court Were To Conclude That Section 340.6 Applies To Malicious Prosecution Actions Against Adverse Counsel, Then That Decision Should Not Be Given Retroactive Effect.

In *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874 the Court concluded that Code of Civil Procedure section 340.6 -- which had previously only been applied to actions by clients against the lawyers who had represented them -- also applies to actions for malicious prosecution against lawyers by former adverse parties whom the lawyers had never represented. (*Id.* at pp. 881-882.)

As described above, in *Lee* this Court adopted a narrower view of section 340.6 concluding that it applied when the plaintiff's claim necessarily is based upon the lawyer's violation of his or her professional responsibilities. If this Court now concludes that section 340.6 applies to claims for malicious prosecution against adverse counsel, then plaintiff would urge this Court to agree with *Silas v. Arden* (2012) 213 Cal.App.4th 75 and hold that conclusion should be applied prospectively only.

In *Silas, supra,* 213 Cal.App.4th 75, the court considered a virtually identical issue as involved here. Both *Silas* and this case involve statutes of limitations that began to run

before *Vafi* was decided and at a time when "the prevailing view, as evidenced by judicial decisions, including *Stavropulos [v. Superior Court* (2006) 141 Cal.App.4th 190], was the two-year statute of limitations of section 335.1 applied to malicious prosecution actions." (*Id.* at p. 89.)

In *Stavropoulos,* referenced in *Silas,* the Court thoroughly summarized California law on the subject and reasoned:

> The Legislature is deemed to be aware of judicial decisions already in existence and to have enacted or amended a statute in light thereof. (*Estate of McDill* (1975) 14 Cal.3d 831, 839, 122 Cal.Rptr. 754, 537 P.2d 874.) When a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it. (*City of Long Beach v. Workers' Comp. Appeals Bd.* (2005) 126 Cal.App.4th 298, 318, 319, 23 Cal.Rptr.3d 782; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007, 55 Cal.Rptr.2d 760, 920 P.2d 705.) Prior to the enactment of section 335.1 and the amendment of section 340, subdivision (3), judicial decisions consistently held that for purposes of limitations malicious prosecution is to be grouped with injuries to the person. (*Storey v. Shasta Forests Co., supra,* 169 Cal.App.2d at pp. 769, 770, 337 P.2d 887; *Dept. of Mental Hygiene v. Hsu, supra,* 213 Cal.App.2d at pp. 826, 827, 29 Cal.Rptr. 244.) Since nothing contained in the legislative materials generated at the time section 335.1 was enacted and section 340, subdivision (3), was amended suggests the Legislature intended to overrule these decisions, we presume the Legislature was aware of this judicial construction and approved of it. (*People v. Harrison* (1989) 48 Cal.3d 321, 329, 256 Cal.Rptr. 401, 768 P.2d 1078 [where a statute is framed in the language of an earlier enactment on the same subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction].) *We therefore conclude that the Legislature intended the phrase 'injury to, or for the death of, an individual caused by the wrongful act or neglect of another' to be interpreted as embracing all infringements of personal rights, including malicious prosecution, and intended the two-year limitations period set forth in section 335.1 to apply to malicious prosecution actions.*

(*Stavropoulos v. Superior Court, supra,* 141 Cal.App.4th at pp. 193-97, italics added.)

Stavropoulos followed this Court's decision in *Laird v. Blacker* (1992) 2 Cal.4th 606, 609 wherein this Court's analysis reflected that Section 340.6 relates to legal malpractice actions by clients against their counsel. The California Supreme Court stated: Section 340.6 provides that the statute of limitations for legal malpractice commences when the *client* discovers, or should have discovered, the cause of action. The period is tolled during the times, inter alia, (I) the *client* "has not sustained actual injury," (ii) the negligent attorney continues to represent the *client,* (iii) the attorney willfully conceals facts constituting the negligence, or (iv) the plaintiff is under a disability that "restricts the plaintiff's ability to commence legal action. (*Ibid.*, emphasis added; see also *Knoell v. Petrovich* (1999) 76 Cal.App.4th 164.)

In that same vein, in *Knoell* the Court *rejected* the proposition that a non client plaintiff could invoke the tolling provisions of Section 340.6 with respect to defamation and tortious interference claims against a lawyer which arose in the performance of professional services. (*Id.* at p. 169.) The court noted "Appellant has cited no authority for the novel claim that a third party (i.e., a non-client) may invoke Code of Civil Procedure section 340.6 to toll the statute of limitations when suing an attorney for defamation." (*Ibid.*)

Thus, as of June 13, 2008 when the statute in this action allegedly began to run, a litigant analyzing the statute of limitations for a malicious prosecution claim against a lawyer would reasonably conclude that there was a two year statute of limitations

applicable to his or her claim, not a one year statute. This did not change (as to malicious prosecution claims against lawyers) until 2011 when *Vafi* was decided.

Here, as in *Silas,* the statute of limitations period commenced at a time when the *Stavropoulous* analysis was the only reported California law on the subject. As *Silas* teaches, litigants such as plaintiffs were entitled to rely upon that decision in calculating the date by which they were required to file a malicious prosecution action against lawyers. The *Silas* Court explained:

> At the time *Silas* commenced her action in 2008, the prevailing view, as evidenced by judicial decisions, including *Stavropulous,* was the two-year statute of limitations of section 335.1 applied to malicious prosecution actions. More than three years after Silas commenced her action, and more than five years after the cause of action accrued with the favorable termination of the malpractice action in her favor, the Court of Appeal in *Vafi* interpreted Code of Civil Procedure section 340.6 to apply malicious prosecution actions against attorneys. Even assuming *Vafi* correctly decided the issue, and although malicious prosecution actions are disfavored, as *Vafi* noted, there is no reason to apply Code of Civil Procedure section 340.6, subdivision (a) here, where in the face of the unforeseen change wrought by *Vafi, Silas's* reliance on a two-year statute was manifestly reasonable.

(*Silas,* 213 Cal.App.4th at p. 90.)

The *Silas* Court's conclusion that the analysis in *Vafi* should be given prospective application only was unquestionably correct. On a number of occasions this Court has analyzed the question whether its decisions should be given retroactive or prospective application. (See *Woods v. Young* (1991) 53 Cal.3d 315, 330 [decision regarding tolling of statute of limitations by reason of intent to sue notice, given prospective application only]; *Camper v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 688 [decision that time to file WCAB petition for review is not extended by the provisions of Code of Civil

Procedure section 1013, given prospective application only]; *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305 [case dispensing with claimant's third party action against insurer under Royal Globe given prospective application only]; *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973 [The Court's earlier *Foley v. Interactive Data Corp* (1988) 47 Cal.3d 654, decision, which dispensed with actions for tortious breach of employment contract, given retroactive effect]; *Laird v. Blacker* (1992) 2 Cal.4th 606, 620 [retroactive application where Court's statute of limitation decision "does not... represent a departure from generally accepted principles."])

Of this Court's decisions, the closest fit to the present case is *Woods.* There, the issue presented was what effect a notice of intent to sue under Code of Civil Procedure section 364 had on the statute of limitations for medical malpractice. The Courts of Appeal had created two lines of authorities as to whether and under what circumstances such a notice tolled the statute of limitations. The Court concluded that neither line of decisions effectuated the Legislature's intent and held that a notice of intent to sue tolled the statute of limitations only if it was served in the last 90 days of the limitations period. The Court then faced the question whether to accord its decision retroactive effect.

The Court detailed:

"Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the

administration of justice, and the purposes to be served by the new rule."

(*Id.* at p. 330.)

In *Woods,* the Court applied this standard to conclude its decision should be given prospective application only. The *Silas* Court correctly concluded that this same treatment should be given to the *Vafi's* conclusion that an action for malicious prosecution against a lawyer is governed by the one year limitation period contained in Code of Civil Procedure section 340.6 and not the two year period contained in 335.1.

Here, because the plaintiffs in this suit relied upon the application of the two years statute of limitations (under which, as explained below, this action was timely), the trial court erroneously concluded that *Vafi* applies here.[2]

In *Cheong Yu Yee v. Cheung* (2013) 220 Cal.App.4th 184, the Fourth Appellate District, Division One agreed with the analysis in *Vafi* that section 340.6 applied to malicious prosecution actions against lawyers and then, in a footnote, concluded that the plaintiff in that case had waived its right to argue that *Vafi* should be given prospective application only because that argument was raised for the first time at oral argument and was not argued in the briefs. (*Id.* at p. 197, fn 9.)

The Court then went on to reason, in dicta, that "[i]n any event, we question the holding in Silas since, as stated in the text of this opinion, the language of section 340.6 is clear and unambiguous. Contrary to the Silas court's suggestion that *Vafi* effected a change in 'settled law,' no court had previously held that the two-year statute of limitations in section 335.1 applied to malicious prosecution actions against attorneys.

The *Silas* court relied on *Stavropoulos, supra,* 141 Cal.App.4th 190, 45 Cal.Rptr.3d 705 in stating that 'the prevailing view ... was [that] the two-year statute of limitations of section 335.1 applied to malicious prosecution actions.' However, the defendant in Stavropoulos was not an attorney. *Stavropoulos* thus does not address which statute of limitations applies to malicious prosecution actions against attorneys." (*Id.* at p. 197, fn. 9.)

This dicta from the Fourth District does undermine the Second District's *Silas* opinion. As explained above, contrary to *Cheong Yu Yee,* it is not the case that *Stavropoulos* is the only support for the conclusion that section 340.6 does not apply to malicious prosecution actions. Rather, there is ample additional authority (discussed above) that section 340.6 was intended to apply to actions by former clients against their lawyers and was not intended to apply to cases such as this by third party, non clients against lawyers.

Further, as reflected by the analysis employed by this Court in *Lee*, it is decidedly not true that prior to *Vafi,* a litigant attempting to determine the statute of limitations applicable to a cause of action for malicious prosecution should reasonably have been expected to conclude that if the malicious prosecution defendant was a lawyer, then section 340.6 applies. Accordingly, even if this Court agrees with *Vafi* and *Cheong Yu Yee* and concludes that section 340.6 applies to malicious prosecution actions against lawyers, then it should conclude that this rule applies prospectively only and therefore does not apply to this action.

B. Even If Section 340.6 Applies, Plaintiffs' Malicious Prosecution Action Is Timely Because They Commenced This Action Within One Year Of Discovering "The Facts Constituting The Wrongful Act," And Through The Use Of Reasonable Diligence Should Not Have Discovered Those Facts Earlier.

"On its face, section 340.6(a) states 'two distinct and alternative limitation periods: one year after actual or constructive discovery, or four years after occurrence (the date of the wrongful act or omission), whichever occurs first.' " (*Samuels v. Mix,* (1999) 22 Cal.4th 1, 7.) The *Samuels* Court continued: "[I]n accordance with section 340.6(a)'s plain language, defendant, if he is to avail himself of the statute's one-year-from-discovery limitation defense, has the burden of proving, under the 'traditional allocation of the burden of proof' (*Fukuda v. City of Angels, supra,* 20 Cal.4th at p. 820, 85 Cal.Rptr.2d 696, 977 P.2d 693, citing Evid.Code, § 500), that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Id.* at pp. 8-9.)

Here, Latham did not and cannot meet its burden of showing Section 340.6's discovery rule does not apply. Plaintiffs did not discover the "facts constituting the wrongful act or omission" giving rise to a malicious prosecution claim against Latham until FLIR asserted the "advice of counsel" in the Parrish v. FLIR Malicious Prosecution Action on May 6, 2010. (AA 280, 773, 776.) Latham's argument that the "wrongful act

or omission" was the "filing and prosecution of the underlying action" was mistaken. (AA 64-66.) For the statute to accrue, plaintiffs Parrish and Fitzgibbons had to know of the "fact constituting the wrongful act or omission." Knowing that Latham filed the Underlying Action was not enough, as Parrish and Fitzgibbons had to know the "fact" that Latham maliciously filed the Underlying Action without probable cause.

Until FLIR asserted the "advice of counsel" defense in the Underlying Action, Parrish and Fitzgibbons were not aware of facts supporting the notion that Latham, as opposed to FLIR, filed the Complaint maliciously, in bad faith and without probable cause. (AA 773, 776.) That is, prior to that time, Parrish and Fitzgibbons did not know that FLIR's malicious and bad faith filing of the Underlying Action was prompted by advice from Latham such that Parrish and Fitzgibbons had a good faith belief that Latham too had acted maliciously in filing the Underlying Action, and did so without probable cause. (*Ibid.*)

Moreover, Parrish and Fitzgibbons could not reasonably have discovered this information any earlier, as all communications between FLIR and Latham were attorney-client privileged. (*Ibid.*) In short, prior to FLIR's assertion of the advice of counsel defense, there was no way for Parrish and Fitzgibbons to know that FLIR filed the Underlying Action at the urging of Latham, and no way for Parrish and Fitzgibbons to know what information and documents (truthful or untruthful) FLIR provided to Latham.

Hence, Parrish and Fitzgibbons have made a prima facie showing that Section 340.6's discovery rule applies and Latham cannot meet its burden of showing Section

340.6's discovery rule does not apply. Even though Latham is free to argue at trial that Parrish and Fitzgibbons knew, or should have known, of facts constituting the wrongful act or omission prior to the time FLIR asserted the advice of counsel defense, that is a question for the jury that should not have been resolved in an anti-SLAPP Motion.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully urge this Court to conclude that plaintiffs have a probability of prevailing on their malicious prosecution claim and that the Court of Appeal therefore erroneously affirmed the trial court's order dismissing plaintiffs' action under Code of Civil Procedure section 425.16. Plaintiffs thus request that the Court overturn the decision by the trial court and remand this case for further proceedings consistent with this Court's opinion.

Dated: December 14, 2015

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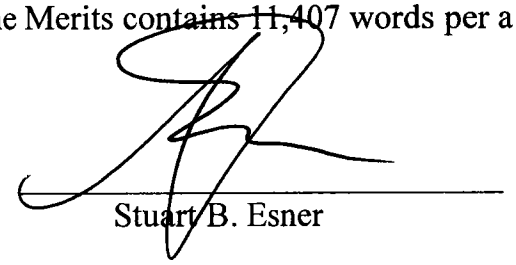

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