Supreme Court
Case Number S228277

Second Civil
B244841

In the Supreme Court of the State of California

WILLIAM PARRISH and E. TIMOTHY FITZGIBBONS,

Plaintiffs and Appellants,

v.

LATHAM & WATKINS, LLP and DANIEL SCHECTER,

Defendants and Respondents.

APPLICATION OF LAWYERS MUTUAL INSURANCE COMPANY TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND RESPONDENTS; DECLARATION OF KIM THURMAN SPIRITO; PROPOSED AMICUS CURIAE BRIEF

Review of the Decision of the Court of Appeal,
Second Appellate District, Division Three,
Affirming the Judgment of the Los Angeles Superior Court
Case Number BC482394, Honorable James R. Dunn, Judge

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Attorneys for Lawyers Mutual Insurance Company, AMICUS CURIAE

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Pursuant to rule 8.520 (f) of the California *Rules of Court*, Lawyers Mutual Insurance Company submits this application seeking leave to file an Amicus Curiae Brief in support of the defendants and respondents. The applicant is Lawyers Mutual Insurance Company, and its sole business is providing professional liability insurance to California lawyers, mainly sole practitioners and those practicing in small firms, and to bar associations throughout the state.

In accordance with its insurance policies, Lawyers Mutual frequently defends malicious prosecution actions. This court's

resolution of the issues before it will have a significant effect on the company's insureds. The proposed Amicus Brief will assist the court in resolving the issues, by presenting additional arguments and authorities supporting the defendants.

This application is based on the attached declaration of Kim Spirito, an officer of Lawyers Mutual Insurance Company.

Dated: March 31, 2016 LEWIS BRISBOIS BISGAARD & SMITH LLP,

Roy G. Weatherup,
Attorneys for Lawyers Mutual Insurance Company, AMICUS CURIAE

DECLARATION OF KIM THURMAN SPIRITO

I, the undersigned Kim Spirito, declare that:

1. I am the Vice President for Loss Prevention and Claims of Lawyers Mutual Insurance Company, which has been providing professional liability insurance to California lawyers since 1978. The company has no other business, and primarily insures sole practitioners and lawyers in small firms, as well as bar associations throughout California.

2. In the 1970s, legal malpractice claims of all types, including malicious prosecution, were escalating. As a result, legal malpractice insurance premiums were increasing rapidly, making liability insurance too expensive for many sole practitioners and attorneys in small firms. Lawyers Mutual was established under the auspices of the State Bar of California, to help make affordable and consistently available legal malpractice insurance for such lawyers.

3. I was admitted to the California Bar in 1982. Thereafter, I was engaged in private practice, specializing in legal malpractice defense. I joined Lawyers Mutual in 1995, and I am now a Vice President of the Company.

4. At all times since I joined Lawyers Mutual, a significant portion of the claims against the company's insureds have been malicious prosecution actions. The company is vitally interested in the outcome of the present case, because the law governing determination of the existence or nonexistence of probable cause affects the litigation of every malicious prosecution action. In addition, it makes a big difference to legal malpractice insurers, including Lawyers Mutual, whether the statute of limitations for malicious prosecution actions against lawyers is one year or two years.

5. The lawyers presenting this application on behalf of Lawyers Mutual have significant experience in defending malicious prosecution actions in California, at the trial court level and on appeal. They have obtained from counsel for the defendants a copy of the record and copies of all of the appellate briefs filed thus far. They have reviewed the record and briefs, and have conducted additional legal research. They believe, as I do, that the proposed amicus brief will assist the court in deciding this case, by presenting argument and authorities not previously presented.

6. Lawyers Mutual does not insure Latham & Watkins or Daniel Schecter in this case. Rather, its interests in the case are based solely on its potential impact on the company and its insureds, with respect to underwriting and claims handling.

7. The proposed amicus brief has been funded solely by Lawyers Mutual. No party or counsel for a party has authored any part of the proposed amicus curiae brief or made any monetary contribution to it. The proposed brief has been prepared solely by Lawyers Mutual and its counsel, and no one else. For the reasons set forth in the proposed amicus brief, I believe that it is in the interests of all California plaintiffs' lawyers, and their professional liability insurers, to affirm the judgment of the Court of Appeal and resolve both legal issues before the court in favor of the defendants.

8. I declare under penalty of perjury that the foregoing is true and correct.

9. Executed at Burbank, California on March 31, 2016.

_____

Kim Thurman Spirito, Declarant

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Attorneys for Lawyers Mutual Insurance Company, AMICUS CURIAE

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This form is being submitted on behalf of Amicus Curiae, Lawyers Mutual Insurance Company.

There are no interested entities or persons that must be listed in this certificate under rule 8.208 of the California *Rules of Court*.

DATED: March 31, 2016

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
Roy G. Weatherup
Attorneys for Lawyers Mutual Insurance Company, AMICUS CURIAE

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AMICUS CURIAE BRIEF OF LAWYERS MUTUAL INSURANCE COMPANY IN SUPPORT OF DEFENDANTS AND RESPONDENTS

INTRODUCTION

After prevailing as defendants in a trade secret action, the present plaintiffs, William Parrish and E. Timothy Fitzgibbons, brought this malicious prosecution case against Latham & Watkins, LLP and Daniel Schecter, a partner in the firm (collectively "Latham & Watkins"). They were the lawyers who represented the plaintiffs in the underlying litigation.

Latham & Watkins moved to strike the present complaint, on two principal grounds. *First*, they argued that probable cause was established with respect to the prosecution of the underlying trade secret litigation, under the interim adverse judgment rule, because the

court had denied a motion for summary judgment made by the defendants. *Second*, Latham & Watkins contended that the malicious prosecution action was barred by the one year provision of *Code of Civil Procedure* section 340.6, the applicable statute of limitations. The trial court granted the motion to strike on the basis of the statute of limitations, and did not reach the effect of the interim adverse judgment rule.

The Court of Appeal affirmed the order striking the complaint. It rejected the trial court's finding that the one year statute of limitations applied, but upheld the trial court's order based on the interim adverse judgment rule, finding that probable cause was established as a matter of law. This court then granted review, ordering briefing on the merits on both the interim adverse judgment rule and the statute of limitations.

Lawyers Mutual Insurance Company, as amicus curiae, submits that both of the issues before the Supreme Court should be decided in favor of defendants. Any departure from the present operation of the interim adverse judgment rule would substantially alter the definition of probable cause for purposes of malicious prosecution in California, leading to an avalanche of new malicious prosecution claims against plaintiffs' lawyers that could not otherwise be maintained. In addition, extending the statute of limitations for malicious prosecution claims against lawyers would create an unwarranted burden on plaintiffs' lawyers and would make underwriting for liability insurance more difficult, resulting in increased premiums.

ISSUES ADDRESSED IN THIS AMICUS CURIAE BRIEF

On October 14, 2015, this court granted review on the following issues:

> 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 340.6?

In light of precedent and policy, these questions should both be answered affirmatively.

STATEMENT OF FACTS

1. The Malicious Prosecution Complaint.

Plaintiffs, William Parrish and E. Timothy Fitzgibbons, filed their malicious prosecution complaint on April 6, 2012. [1 Appellants Appendix ("AA") pages 1-7] They alleged that Latham & Watkins prosecuted the underlying trade secret litigation on behalf of FLIR Systems, Inc., and Indigo Systems Corporation (collectively "FLIR") unsuccessfully, although the former plaintiffs were not named as defendants in the present malicious prosecution suit.

It was claimed that Latham & Watkins brought the trade secret action, without probable cause and with malice; that the lawsuit was brought for the purpose of preventing the plaintiffs from succeeding in their new business venture in competition with FLIR; that the plaintiffs prevailed as defendants in the underlying case and secured an order awarding them attorneys' fees and costs; and that their victory in the trade secret litigation was affirmed on appeal in *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270. [1 AA 4-5]

At the time that they filed their malicious prosecution complaint, the plaintiffs were apparently aware of the fact that the applicable statute of limitations was one year. They attempted to avoid the statute by alleging late discovery of their cause of action. In particular, they asserted that the malicious prosecution cause of action against Latham & Watkins was not discovered until FLIR indicated for the first time, at a case management conference in the related malicious prosecution action brought by the plaintiffs against FLIR, that FLIR might invoke the advice of counsel defense. [1 AA 5.] There is nothing in the complaint to indicate how alleged late discovery of a defense of a party to a different case had any effect on the purported cause of action against Latham & Watkins.

2. The Underlying Trade Secret Case.

Mr. Parrish and Mr. Fitzgibbons attempted to extricate themselves from the underlying trade secret litigation by filing a motion for summary judgment, but their motion was denied. [1 AA 87-88] In the summary judgment proceedings, defendants Parrish and Fitzgibbons argued that, prior to their employment with FLIR, they had developed all of the alleged trade secrets and had included them in a written business plan in 1999. [1 AA 87] However, the court could not find, as a matter of law, that there were no other trade secrets that may have misappropriated. [1 AA 87]

The court also denied the summary judgment motion for a second independent reason. It ruled that "plaintiffs have produced sufficient evidence, for example, with the Neikirk and Murphy declarations, to raise a triable issue as to misappropriation of trade secrets." [1 AA 87]

It should be noted that, at the time of denial of summary judgment, the court overruled all of the defendants' objections to the plaintiffs' evidence, except for one irrelevant patent application dispute. [1 AA 88] Among the items of evidence to which objections were overruled were the Murphy and Neikirk declarations. [1 AA 88]

After the denial of summary judgment, FLIR's trade secret case went to trial, culminating in a statement of decision [1 AA 93-117] and a judgment in favor of the defendants. [1 AA 92] In the judgment, the court determined that the defendants were entitled to their reasonable attorneys' fees and costs. [1 AA 92] In its Statement of Decision, the court explained the legal and factual basis for the award. [1 AA 107-117]

The trial judge stated that the award of attorneys' fees and costs was based on *Civil Code* section 3426.4, which is part of California's *Uniform Trade Secrets Act*. [1 AA 107] The court noted that it was

not required to find the plaintiffs' case to be "frivolous" in order to award fees and costs, and it made no such finding. [1 AA 108] The court determined that "bad faith" under *Civil Code* section 3426.4, depends on two factors, whether the plaintiffs' allegations were "specious" and whether the plaintiffs knew, or should have known, that the trade secret claim lacked merit. [1 AA 107-108] The court then explained why FLIR acted in bad faith in filing and prosecuting the trade secret litigation. [1 AA 108-117]

FLIR pursued the trade secret litigation "primarily for the anti-competitive motive" of preventing Mr. Parrish and Mr. Fitzgibbons from attempting to establish a new business in competition with FLIR. [1 AA 108] The plaintiffs downplayed evidence of the defendants' intentions as well as alternative methods of allaying the plaintiffs' suspicions. The plaintiffs did not accept statements made by the defendants that they did not intend to engage in unlawful conduct. [1 AA 109] FLIR did not respond to an invitation from Mr. Parrish and Mr. Fitzgibbons to attend an in-person meeting to discuss FLIR's concerns.

There was inconsistent testimony concerning the views of FLIR's employees concerning the merits of the company's trade secret claims. [1 AA 110-113] FLIR maintained an unreasonable settlement position early in the litigation and did not give sufficient consideration to the defendants' evidence. [1 AA 113-116] In its Statement of Decision, the court noted that the trial consumed more than 40 hours of court time, commencing on December 6, 2007 and ending on December 17, 2007. Nine witnesses testified in person, videotaped testimony from nine other witnesses was received, and 147 trial exhibits were entered into evidence. [1 AA 94]

Citing *Whyte v. Schlage Lock Company* (2002) 101 Cal.App.4th 1443, the court found that the "inevitable disclosure" method of proving misappropriation of trade secrets is not permissible in

California. [1 AA 98] The underlying plaintiffs offered expert testimony to the effect that it would not be possible to develop technology similar to that of the plaintiffs within one year, and claimed that this testimony supported a finding that the defendants threatened to misappropriate trade secrets. [1 AA 104] However, the court found this argument unpersuasive, because the experts testified at trial that there is no valid scientific methodology for predicting future use of trade secrets. [1 AA 104]

Although the court found that the filing and prosecution of the trade secret litigation was "specious," it did not find that it was "frivolous," or that no reasonable lawyer would find the evidence supporting the claim not to be tenable. Rather, the court apparently decided that the evidence was weak and that FLIR should have dismissed it at some point.

In its Statement of Decision, the court did not find that Latham & Watkins brought the trade secret case without probable cause and for the purpose of maliciously injuring the defendants within the meaning of rule 3-200 of the *Rules of Professional Conduct.* Although the court found that California does not recognize the "inevitable disclosure" method of proving a trade secret case, the court did not find that the theory was unsupported "by a good faith argument for an extension, modification or reversal" of existing law, within the meaning of rule 3-200(d).

After the Statement of Decision and the judgment in the trade secret litigation, FLIR appealed. The trial court's judgment in favor of Mr. Parrish and Mr. Fitzgibbons was affirmed in a published opinion, *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270. This decision became final.

3. The Defendants' Successful Motion to Strike.

Latham & Watkins moved to dismiss the malicious prosecution complaint pursuant to *Code of Civil Procedure* section 425.16, the anti-SLAPP statute. [1 AA 54-72] It was claimed that the interim adverse judgment rule barred the action, because the denial of summary judgment early in the underlying trade secret litigation established the existence of probable cause as a matter of law. [1 AA 68-71] As an alternative independent ground for the motion to strike, Latham & Watkins argued that the malicious prosecution action was barred by the one year statute of limitations established by *Code of Civil Procedure* section 340.6. [1 AA 64-68]

The trial court granted the motion made by Latham & Watkins to strike the complaint. [4 AA 1061-1062] It found the lawsuit barred by the one-year statute of limitations under *Code of Civil Procedure* section 340.6, noting that plaintiffs Parrish and Fitzgibbons "knew all they needed to know to file this action" when judgment was entered in their favor in the underlying trade secret litigation. [4 AA 1062] The court did not reach the applicability of the interim adverse judgment rule. [4 AA 1062]

4. The Two Published Court of Appeal Decisions.

From the order granting the motion to strike made by Latham & Watkins, plaintiffs Parrish and Fitzgibbons appealed. The Court of Appeal originally handed down a decision reversing the order, formerly reported at *Parrish v. Latham & Watkins* (2014) 229 Cal.App.4th 264. In this decision, the appellate court ruled that this malicious prosecution was not barred by the interim adverse judgment rule or by a one-year statute of limitations. However, the Court of Appeal subsequently granted rehearing, and handed down a second published decision.

In *Parrish v. Latham & Watkins*, formerly reported at (2015) 238 Cal.App.4th 81, the Court of Appeal affirmed the order striking the plaintiffs' malicious prosecution complaint, finding that, under the interim adverse judgment rule, probable cause was established as a matter of law when summary judgment was denied on the ground that there were triable issues of fact in the underlying litigation. However, in dictum, the Court of Appeal adhered to its view that malicious prosecution actions against attorneys are not governed by the one year statute of limitations established by *Code of Civil Procedure* section 340.6, but rather by a longer statute of limitations, which had not expired.

After the second *Parrish* decision in the Court of Appeal, the plaintiffs' petition for review in this court was filed. In an order dated October 14, 2015, this court granted review. The issues to be addressed include both the interim adverse judgment rule and the applicable statute of limitations.

5. The Importance of the Issues Now Before the Supreme Court.

Both of the issues before the Supreme Court in this case are of great importance to lawyers who consider representation of plaintiffs or file lawsuits on behalf of plaintiffs. They are also of great importance to companies that insure plaintiffs' lawyers.

As to the interim adverse judgment rule, the plaintiffs seek to weaken it substantially, redefining the test of probable cause for malicious prosecution in California. Members of the plaintiffs' bar would thereby be exposed to many more malicious prosecution cases, which their insurers would have to defend.

Doubling the time to file a malicious prosecution claim against a lawyer would unduly complicate insurance company underwriting, resulting in increased premiums for policyholders. It would make

viable many cases already barred by the one year statute of limitations.

As explained below, the Supreme Court should follow existing precedent and decide both of the issues now before it in favor of Latham & Watkins. Public policy supports this result.

LEGAL ARGUMENT

I.

The Test of Probable Cause, for Purposes of a Malicious Prosecution Action Against a Lawyer, Is the Existence or Knowledge of Evidence to Support a Claim That at Least One Reasonable Lawyer Would Consider Tenable.

A malicious prosecution plaintiff must establish: 1) that the underlying action against him terminated in his favor; 2) that it was brought without probable cause; and 3) that it was initiated and prosecuted with malice. *Sheldon Appel Company v. Albert & Oliker* (1989) 47 Cal.3d 863, 871. In this case, the existence of probable cause on the part of Latham & Watkins to prosecute the underlying trade secret case is in dispute.

The existence or non-existence of probable cause is a question of law to be determined objectively by the court, while the element of malice relates to the subjective intent or purpose with which the defendant acted in prosecuting the underlying lawsuit. *Sheldon Appel Company v. Albert & Oliker* (1989) 47 Cal.3d 863, 875. As to the underlying plaintiff's lawyer, the court in a malicious prosecution case must determine whether, on the basis of the facts known to the lawyer, the prosecution of the underlying action was legally tenable viewed according to an objective standard. It is irrelevant whether the underlying plaintiff's attorney "subjectively believed that the prior claim was legally tenable." 47 Cal.3d at 881.

In refining the test of tenability the *Sheldon Appel* court adopted the definition of "frivolous" employed in cases where the issue was whether an appeal was frivolous. 47 Cal.3d at 885. It held that a lawyer has probable cause to prosecute a claim unless all reasonable attorneys would agree that the claim is totally and

completely without merit. 47 Cal.3d at 885. This is because plaintiffs and attorneys representing them have the right to present claims that are arguably valid, even if it is extremely unlikely that they will prevail. 47 Cal.3d at 885.

In *Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, the Court of Appeal issued a writ of mandate compelling the trial court to vacate its order denying an attorney's motion for summary judgment, and to enter a new order granting the motion and entering judgment in the attorney's favor. The court held that, where the record in the underlying action was fully developed, the court can and should decide the probable cause question by reference to the facts contained in that record. 42 Cal.App.4th at 62. If those facts establish "an objectively reasonable basis for instituting the underlying action," it is irrelevant whether the underlying plaintiff's attorney was aware of those facts. 42 Cal.App.4th at 62.

In this case, the record of the underlying action shows that the trial court denied the defendants' motion for summary judgment, finding triable issues of fact, such that the plaintiffs had the right to go to trial. The fact that the plaintiffs' evidence was found unpersuasive at trial does not erase the fact that the evidence supported a tenable claim. It cannot be said that no reasonable lawyer would find the evidence sufficient to make the plaintiffs' claim tenable when the judge determined that it was sufficient to require denial of a summary judgment motion.

In *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164-165, the test of probable cause was succinctly summarized, as follows:

> "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.
>
> . . .
>
> "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 lacks 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. [Citation.] 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."

In denying summary judgment, the judge in the trade secret case, found that the plaintiffs had enough evidence to go to trial. The lawyers at Latham & Watkins took the case to trial because they had evidence that made the case tenable in the opinion of at least one reasonable lawyer.

In determining tenability, a lawyer contemplating or prosecuting a plaintiff's claim has no duty to consider contrary

evidence. As this court observed in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 822:

> "A litigant or attorney who possesses competent evidence to substantiate a legally cognizable claim for relief does not act tortiously by bringing the claim, even if also aware of evidence that will weigh against the claim. Plaintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them. They have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious."

If the evidence that existed at the time that the underlying trade secret action was prosecuted is viewed favorably to the plaintiffs in that action, disregarding contrary evidence, it is apparent that the test of tenability was satisfied. Thus, there was probable cause to prosecute the underlying action.

II.

A Plaintiff's Lawyer's State of Mind With Respect to the Merits of the Plaintiffs' Claim Is Not Relevant to the Issue of Probable Cause, Because Probable Cause Is Tested Objectively, Based Solely on the Evidence.

In their brief on the merits, the plaintiffs argue that Latham & Watkins "deceived" the court with respect to the evidence offered in opposition to the defendants' summary judgment motion and that the firm submitted "materially false facts." [Plaintiffs' brief on the merits, pages 10, 15.] By implication, the plaintiffs argue that Latham & Watkins knew, or should have known, that the facts on which the firm relied to establish tenability of their clients' claim were

"materially false" and therefore insufficient to establish probable cause.

The plaintiffs simply ignore the fact that the evidence on which the underlying plaintiffs relied was not weighed by the court until the time of trial. At that time, the judge weighed the plaintiffs' evidence and the conflicting evidence offered by the defendants. The trial judge then made findings in favor of the defendants. When findings are made, the winning litigant can often claim that the other side's evidence was "materially false." However, the trial judge in the underlying case made no finding of falsity.

In most trials, the trier of fact resolves conflicts in the evidence. The "facts" are determined in accordance with the position of the prevailing party, but the losing party's evidence does not disappear. To say that a plaintiff's attorney cannot rely on evidence supporting a plaintiff's case to establish tenability of a claim, and that the attorney believed or should have believed contrary evidence, represents an attempt to inject a subjective element into the determination of probable cause. The ultimate resolution of disputed facts cannot properly be considered. It is irrelevant what a lawyer believed or should have believed. *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 166-167.

A lawyer has the right to accept as true the evidence supporting a claim, even if there is abundant contrary evidence. *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 822. If the plaintiff's evidence, disregarding contrary evidence, is sufficient, such that at least one reasonable lawyer would consider a claim to be tenable, then the claimant and the claimant's lawyer have the right to bring a claim, even if they believe that it is very unlikely to succeed.

III.

In Denying Summary Judgment in the Underlying Trade Secret Litigation, the Court Found That There Were Triable Issues of Fact, and This Determination Establishes That, as a Matter of Law, There Was Probable Cause for the Prosecution of the Underlying Plaintiffs' Case, Under the Interim Adverse Judgment Rule.

The case of *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375 was a malicious prosecution action in which the Court of Appeal affirmed a summary judgment in favor of defendants based on the interim adverse judgment rule. The underlying defendants' motion for summary judgment was denied, although the defendants ultimately prevailed at trial. In the *Roberts* case, the trial court and the Court of Appeal held that the denial of summary judgment showed that the underlying action did not totally lack merit, because that action may have resulted in a judgment for the underlying plaintiff if certain material facts had been decided differently. Under such circumstances, at least one reasonable lawyer representing a plaintiff could have concluded that the underlying case was at least tenable.

This court's decision in *Wilson v. Parker, Covert & Chidester* (2002), 28 Cal.4th 811, arose from an underlying action in which a motion to strike under *Code of Civil Procedure* section 425.16 had been denied. The denial was based on a finding that the original plaintiffs had sufficient evidence to support a prima facia cause of action. On appeal from the denial in the underlying litigation, the Court of Appeal reversed and ordered judgment in favor of the defendants. The victorious defendants then brought a malicious prosecution action against two of the original plaintiffs and their attorneys, but the defendants in the malicious prosecution action filed

demurrers, which were sustained, resulting in dismissal of the malicious prosecution claim.

This court in *Wilson* affirmed the dismissal of the malicious prosecution action, relying on the interim adverse judgment rule. Under this rule, where a plaintiff in the underlying action has secured a judgment or ruling on the merits, probable cause for the plaintiff's case is established, "even if the ruling is overturned on appeal or by later ruling in the trial court." 28 Cal.4th at 817-818. "Claims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial court or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness." 28 Cal.4th at 818. In other words, the earlier judgment or ruling established the existence of a tenable claim, and thus probable cause, as a matter of law.

Code of Civil Procedure section 425.16(b)(3) was enacted in 2005, so as to abrogate the holding of *Wilson* with respect to the interim adverse judgment rule in cases involving denial of motions to strike. However, the legislation did not affect the rule in other cases, such as denial of a summary judgment motion in the underlying case. *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 549-550.

The continued vitality of the interim adverse judgment rule is illustrated by *Paiva v. Nichols* (2008) 168 Cal.App.4th 1007. In this case, the granting of a preliminary injunction conclusively established probable cause to file and prosecute the underlying action, even though the underlying plaintiff was unsuccessful at trial.

In an effort to avoid the interim adverse judgment rule, the plaintiffs cite *Slaney v. Ranger Insurance Company* (2004) 115 Cal.App.4th 306. In *Slaney*, the underlying defendant moved for summary judgment three times, and was successful only on the third attempt. According to its opinion, the record before the Court of Appeal did not include the declarations on which the original denial

was based. 115 Cal.App.4th at 311. The opinion states that the second motion was denied on purely procedural grounds. 115 Cal.App.4th at 312. In granting the third motion, the judge stated that it was unclear why a different judge had denied the first motion for summary judgment. 115 Cal.App.4th at 312. In any event, *Slaney* is distinguishable because it was not clearly shown that the first denial of summary judgment was based on evidence that was sufficient to create a triable issue of fact, unlike the situation in this case. The Court of Appeal in *Slaney* simply accepted the characterization of the facts before the court at the time of the first denial of summary judgment by the judge who later granted summary judgment, rather the prior judge's determination concerning their legal effect.

It is respectfully submitted that *Slaney* should be disapproved. Its reasoning is dubious and its holding is inconsistent with *Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150. In *Clark*, the Court of Appeal followed the interim adverse judgment rule, as explained in *Roberts* and *Wilson,* and found that the underlying action was tenable in view of the first denial of summary judgment, even though a later motion for summary judgment was granted. The holding of *Clark* is preferable to that of *Slaney* and should be followed. *Slaney* should be disapproved.

The record of the present case shows that, in the underlying trade secret litigation, the trial court denied summary judgment after finding that triable issues of fact existed. The plaintiffs here attempt to avoid the interim adverse judgment rule by claiming that "materially false" evidence was offered in opposition to the summary judgment motion. This argument must fail, because the mere fact that a judge finds expert testimony at trial unpersuasive does not make such evidence "materially false" from the beginning. Neither a plaintiff nor a plaintiff's attorney has the duty to weigh favorable evidence against evidence offered by a defendant.

In *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, this court upheld the authority to act as the gate keeper for expert evidence. However, "[c]ourts must also be cautious in excluding expert testimony." 55 Cal.4th at 772. The "gatekeeper role does not involve choosing between competing expert opinions." 55 Cal.4th at 772.

The record of the present case shows that, when he denied summary judgment in the underlying case, objections to the expert evidence by the defendants were overruled. The court certainly had the right to consider the evidence in denying summary judgment. Later, however, the judge was the trier of fact, and rejected the plaintiffs' experts' opinions as lacking in foundation. However, this conclusion of the trier of fact does not make the opinions "materially false" evidence from the beginning of the litigation.

At the trial of the trade secret case, the court was bound by *Whyte v. Schlage Lock Company* (2002) 101 Cal.App.4th 1443, and had to reject the "inevitable disclosure" method of proving misappropriation of trade secrets. However, it was reasonable to present the claim, because it might have been possible for an appellate court in the future to adopt the "inevitable disclosure methodology" that, as the *Whyte* case shows, is followed in many jurisdictions. In *Moradi-Shalal v. Fireman's Fund* (1988) 46 Cal.3d 287, this court overturned the California interpretation of the Uniform Unfair Practices Act and adopted the construction of the statute used in other states that have adopted the same uniform act.

In light of the facts appearing in the record of the present case relating to the underlying case, and in light of the interim adverse judgment rule, this court should hold that probable cause existed for the prosecution of the underlying trade secret lawsuit. Probable cause is determined objectively, and the objective facts show that it existed at all relevant times.

IV.

The Underlying Court's Finding, After Trial, of "Bad Faith," Within the Meaning of the *Uniform Trade Secrets Act*, Was Based on the State of Mind and Conduct of the Officers and Employees of the Corporate Plaintiff, and the Finding Is Irrelevant to the Issue of Probable Cause in the Present Case.

The award of attorney's fees and costs in the underlying litigation was based on *Civil Code* section 3426.4. This statute provides as follows:

> "If a claim of misappropriation is made in *bad faith*, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award *reasonable attorney's fees and costs* to the prevailing party. Recoverable costs hereunder shall include a reasonable sum to cover the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the prevailing party." (Emphasis added.)

There is no definition of "bad faith" in this statute or in any other portion of the *Uniform Trade Secrets Act*. Moreover, there is nothing in the language of *Civil Code* section 3426.4 to indicate that the statute has any purpose other than to compensate the prevailing party with reasonable attorney's fees and costs, where the losing party has acted with a state of mind constituting "bad faith."

In *Gemini Aluminum Corporation v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, the Court of Appeal affirmed an award of attorney's fees and costs under *Civil Code* section 3426.4,

and provided a definition of "bad faith." A litigant acts in "bad faith" in a trade secret action, if it does so with "both objective speciousness and subjective bad faith." This definition was adopted in the Court of Appeal in the underlying case when it affirmed the judgment and the award of attorney's fees and costs. *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1276-1277.

In both the *Gemini* case and in *FLIR*, the defendants argued that a finding of "bad faith" required a finding that the underlying claim was "frivolous," which is a stricter standard than being merely "specious." The argument was rejected in each case.

In the underlying case here, the trial judge specifically declined to find that the trade secret claim prosecuted by Latham & Watkins was "frivolous." He did find that, as time went on, the case seemed to be progressively weaker and that the underlying plaintiffs should have accepted settlement terms which might have been available. He stated that the plaintiffs should have relied on the promises from Mr. Parrish and Mr. Fitzgibbons that they would not unlawfully misappropriate trade secrets. He weighed all the evidence before him and was persuaded by the defendants' evidence, but he never ruled that the plaintiff's trade secret claim was groundless from the beginning.

The word "specious" is defined in *Black's Law Dictionary* (9th Edition, West, St. Paul, Minnesota, (2009) as "[f]alsely appearing to be true, accurate, or just." From the record, the evidence possessed by Latham & Watkins appeared to support a claim that was not "specious." The record the evidence possessed by Latham & Watkins appeared to support a claim that was "true, accurate, or just," even if there was evidence to the contrary. The claim was tenable, even if it was not likely to succeed. It appears that the judge believed that the term "specious" refers to a weak claim, rather than one that was totally without merit or frivolous.

In *SASCO v. Rosendin Electric, Inc.* (2012) 207 Cal.App.4th 837, the Court of Appeal affirmed an award of attorney's fees and costs in a trade secret action that had been voluntarily dismissed. The appellate court agreed with *Gemini* and *FLIR* that a finding of "bad faith" under *Civil Code* section 3426.4 requires both objective "speciousness" of the plaintiff's claim and subjective "bad faith" in bringing or maintaining the claim. 207 Cal.App.4th at 845. However, the trial court in *SASCO,* as well as the appellate court, applied a somewhat different definition of "speciousness" as the trial judge in the underlying case here. In *SASCO*, the trial court found that "there was a complete lack of evidence supporting *SASCO*'s allegations of trade secret misappropriation." 207 Cal.App.4th at 845. In contrast, the underlying trial judge here made no such finding. Rather, after a long trial, he weighed the evidence and found that the evidence submitted by the defendants should be believed, in preference to that offered by the plaintiffs.

The *SASCO* court noted that *Civil Code* section 3426.4 is "limited to the recovery of attorney's fees and costs in trade misappropriation claims." The statute is simply one remedy provided by the legislature for a specific purpose. A finding of "bad faith" should not be used in any other litigation.

In *Sheldon Appel Company v. Albert & Oliker* (1989) 47 Cal.3d 863, this court established the test of probable cause, which is "whether any reasonable attorney would have thought the claim tenable." 47 Cal.3d at 886. This test is derived from the test of a "frivolous appeal" that this court had announced in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.

Since the "bad faith" finding in the underlying case did not include any finding that the plaintiffs' claim was "frivolous," the finding that the case was "specious" cannot be equated with a finding of lack of probable cause. The definition of probable cause in

Sheldon Appel includes a requirement that a claim be "frivolous," such that no reasonable lawyer would consider it tenable.

The "bad faith" finding of the trial court was made solely with respect to the issue of entitlement to attorney's fees and costs. It is not equivalent to a finding of lack of probable cause in a subsequent malicious prosecution case. Even if the finding reflected the state of mind of the officers and employees of the plaintiffs in the underlying litigation, that state of mind should not be imputed to Latham & Watkins. The state of mind of the lawyers at Latham & Watkins is simply irrelevant to the present malicious prosecution case.

V.

It Would Be Contrary to Public Policy to Create a "Bad Faith" Exception to the Existing Test of Probable Cause in California, Because Such an Exception Would Have a Chilling Effect on Plaintiffs Seeking to Vindicate Their Rights and on Lawyers Representing Them.

In *Babb v. Superior Court* (1971) 3 Cal.3d 841, 847, this court observed that "malicious prosecution is a cause of action not favored by the law," and that such a cause of action should not be encouraged. Issues relating to malice and probable cause should not be litigated in the original action, but only when it has been completed. 3 Cal.3d at 847.

The question before this court in *Babb* was "whether a defendant in a civil action may file a cross-complaint therein seeking a declaratory judgment that the action is being maliciously prosecuted." 3 Cal.3d at 844. The court concluded that "precedent, principle, practicality and policy forbid such a cross-complaint, which entails the risk of discouraging legitimate claimants and, at least in the instant case, pits plaintiff and her attorney against each other as

adversaries." 3 Cal.3d at 844. Thus, this court issued a writ of mandate in *Babb*, commanding the trial court to vacate its order overruling petitioners' demurrer to the cross-complaint, and to sustain that demurrer without leave to amend. 3 Cal.3d at 844-852. In the present case, the plaintiffs are attempting to do what this court held in *Babb* cannot be done by any defendant in a lawsuit. They are attempting to authorize a defendant to litigate, directly or indirectly, the issue of probable cause in the original action.

It seems that the present plaintiffs contend that the "bad faith" finding in the underlying litigation goes beyond establishing the right to attorney's fees and costs. They appear to claim that it establishes lack of probable cause in the present malicious prosecution action or, at a minimum, nullifies the interim adverse judgment rule as a method of establishing the existence of probable cause. For the reasons stated by this court in *Babb*, factual determinations in the original case should not have any effect on a future malicious prosecution action. A motion seeking attorney's fees and costs under *Civil Code* section 3426.4 carries the risk of an award of attorney's fees and costs on the part of a losing plaintiff in a trade secret case. It should not function as a launching pad for a future malicious prosecution action against a plaintiff or the plaintiff's attorneys.

Whenever a defendant prevails at trial, it always appears to that defendant that the plaintiff's evidence was very weak, and perhaps materially false. However, probable cause does not depend on the perceptions of the plaintiff or the plaintiff's attorney, and certainly not on the perceptions of the defendant after the defendant has been victorious at trial. Rather, a litigant or attorney possessing competent evidence to substantiate a claim for relief is entitled to prosecute that claim, however weak it is, notwithstanding substantial contrary evidence. *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 822. They have the right to prosecute the claim even "if they

think it likely the evidence will ultimately weigh against them," as long as the claim is arguably meritorious. 28 Cal.4th at 822.

If there is evidence of prosecution of a lawsuit for an improper purpose, then such evidence may be relevant to the question of malice. Nonetheless, such evidence is not relevant to the issue of probable cause, which depends on an objective assessment of the evidence, not a plaintiff's or the plaintiff's attorney's state of mind or purpose in prosecuting a claim.

If there is "bad faith" on the part of a plaintiff or the plaintiff's attorney, and if such a state of mind is deemed relevant to establishing lack of probable cause in a future malicious prosecution case, then almost every successful defendant will be in a position to bring a malicious prosecution action. All that would need to be alleged is that the plaintiffs' evidence was materially false and that the plaintiff and the plaintiff's attorney knew or should have known that the evidence was false.

The dominant public policy of California is to allow prosecution of all tenable claims that plaintiffs desire to prosecute. This policy is found in *Wilson* and many other decisions of California appellate courts. Any relaxation of the requirements of establishing probable cause objectively should be rejected.

VI.

Even Though the Supreme Court Could Decide the Present Case Solely on the Basis of the Interim Adverse Judgment Rule, It Should Reach and Decide the Statute of Limitations Issue, So As to Assure Uniformity of Decision.

As indicated above, the interim adverse judgment rule conclusively establishes that Latham & Watkins had probable cause to

prosecute the underlying action on behalf of its clients. Thus, on this ground alone, this court could affirm the judgment of the Court of Appeal, notwithstanding the erroneous dictum relating to the statute of limitations. Under rule 8.156 (b) (3) of the *Rules of Court*, the Supreme Court "need not decide every issue the parties raise or the court specifies."

Even though this court could decide the case based solely on the interim adverse judgment rule, Lawyers Mutual Insurance Company respectfully submits that the court should also decide the statute of limitations issue on which review was granted. Presumably, this court found that the issue of statute of limitations for malicious prosecution actions against lawyers is "an important issue of law" or an issue as to which it is "necessary to secure uniformity of decision." Rule 8.500 (b) (1).

In *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874 and *Yee v. Cheung* (2013) 220 Cal.App.4th 184, the Courts of Appeal held that malicious prosecution actions against lawyers are governed by the one year provision of *Code of Civil Procedure* section 340.6, the legal malpractice statute of limitations. Nonetheless, in *Roger Cleveland Golf Company v. Krane & Smith* (2014) 225 Cal.App.4th 660, 676-677, the Court of Appeal stubbornly refused to follow *Vafi* and *Yee*. Instead, it found that malicious prosecution actions against lawyers are governed by a two year statute of limitations. In its second opinion in this case, the Court of Appeal relied on the *Roger Cleveland Golf Company* case in opining that the plaintiff's case would not be barred by the statute of limitations if it survived the interim adverse rule.

In their brief on the merits in this court, the plaintiffs continue to argue that their malicious prosecution cause of action is not barred by *Code of Civil Procedure* section 340.6. They claim that the issue is unsettled.

Determination of the applicable statute of limitations as to lawyers sued for malicious prosecution is a vitally important issue for all plaintiffs' lawyers and for all companies that insure plaintiffs' lawyers for professional liability. This court should reach and decide the issue.

VII.

This Action Is Governed by the One Year Statute of Limitations Established by *Code of Civil Procedure* Section 340.6, Because the Plaintiffs' Cause of Action Accrued When Judgment Was Entered in the Trial Court in the Underlying Action, and Then Expired.

In their brief on the merits, the plaintiffs appear to argue that it is unjust to hold their malicious prosecution cause of action barred by the statute of limitations. However, where applicable, the statute of limitations must be enforced.

"An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." *Code of Civil Procedure* section 22. In California, there is but one form of a civil action. *Code of Civil Procedure* section 307. Civil actions, without exception, may be commenced only within the time periods prescribed in the *Code of Civil Procedure* and "after the cause of action shall have accrued," unless in special cases a different statutory limitation exists. *Code of Civil Procedure* section 312. See also, *Norgart v. Upjohn Company* (1999) 21 Cal.4th 383, 397- 398.

Several basic principles should guide any statute of limitations analysis. Fundamentally, statutes of limitation "promote justice and give security and stability to human affairs." *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 899; *Jolly v. Eli Lilly Company* (1988) 44

Cal.3d 1103, 1112. In doing so, they afford repose to litigants. *Gutierrez*, 39 Cal.3d at 899. In particular, statutes of limitations promote the diligent prosecution of claims by plaintiffs and protect defendants from being forced to defend against stale claims where facts are obscured through the passage of time, memories have faded, evidence has been lost, and witnesses cannot be located. *Gutierrez*, 39 Cal.3d at 898; *Jolly*, 44 Cal.3d at 1112. Thus, courts have recognized that "the policy behind statutes of limitations is as meritorious as the policy of trying cases on their merits." *Krusesky v. Baugh* (1982) 138 Cal.App.3d 562, 566; *Norgart v. Upjohn Company* (1999) 21 Cal.4th 393, 396 397.

The effect of the widespread recognition of the merits of statutes of limitation is that "unlike laches, they are enforced regardless of personal hardship." *California State Automobile Association Inter Insurance Bureau v. Cohen* (1975) 44 Cal.App.3d 387, 394 (overruled on other grounds in *Spear v. California State Automobile Association* (1992) 2 Cal.4th 1035, 1039). As this court observed in *Norgart v. Upjohn Company*, statutes of limitation apply "conclusively across the board," and they apply to all causes of action regardless of merit. This is a necessary "price of the orderly and timely processing of litigation." *Norgart*, 21 Cal.4th at 410, quoting *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 103.

A malicious prosecution cause of action accrues at the time that judgment is entered at the trial court level in the underlying litigation. *Gibbs v. Haight, Dickson, Brown & Bonesteel* (1986) 183 Cal.App.3d 716, 719. At that time, a victorious defendant has secured a favorable termination. If the lawsuit has been prosecuted without probable cause and with malice, the defendant knows or should know about it.

In pertinent part, *Code of Civil Procedure* section 340.6 (a) provides that "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the *performance of*

professional services shall be commenced within *one year* after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission." (Emphasis added.)

As applied to the present case, the meaning of this statute is plain. The filing and prosecution of a lawsuit by a lawyer represents conduct in the performance of professional services for that lawyer's client.

In *Bergstein v. Stroock, Stroock & Lavan* (2015) 236 Cal.App.4th 793, 818-821, the Court of Appeal held that the one year provision of *Code of Civil Procedure* section 340.6 applies to alleged wrongful conduct of lawyers in aiding and abetting the alleged wrongful conduct of the lawyers' clients' adversaries' lawyer. The court rejected the argument that the statute applies only to actions for professional negligence. 236 Cal.App.4th at 819. The *Bergstein* court noted that the one year provision in *Code of Civil Procedure* section 340.6 had been applied to malicious prosecution actions, and that its plain meaning required application to all actions based on the performance of professional services, except for actual fraud. 236 Cal.App.4th at 819-822.

It was specifically held in *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874 and again in *Yee v. Cheung* (2013) 220 Cal.App.4th 184, that the one year provision of *Code of Civil Procedure* section 340.6 applies to all malicious prosecution actions against lawyers. These cases relied on the plain meaning rule and on the obvious fact that a plaintiff's lawyer bringing an action and prosecuting it to judgment is performing a professional service.

In *Roger Cleveland Golf Company v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 676-683, the Court of Appeal refused to follow *Vafi* and *Yee*. It relied heavily on a view of legislative history that the court claimed to have discovered more than 35 years after

Code of Civil Procedure section 340.6 was enacted. 225 Cal.App.4th at 680-682. In particular, the court limited the scope of the statute to legal malpractice claims brought by clients, and specifically found that malicious prosecution actions were not covered in spite of the plain language of the statute.

The *Roger Cleveland Golf Company* case was specifically repudiated and disapproved by this court in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239. This court held that the *Roger Cleveland Golf Company* decision improperly limited *Code of Civil Procedure* section 340.6 as applying only to professional negligence cases. 61 Cal.4th at 1239.

In their brief on the merits, the plaintiffs apparently still refuse to accept the holding of *Vafi* and *Yee*, and claim that, in spite of *Lee*, a malicious prosecution case may not involve a violation by a lawyer of his or her professional responsibilities. [Brief on the Merits, page 33.] They offer no authority for the proposition that a malicious prosecution claim against the lawyer can ever arise out of something other than the performance of professional services for a plaintiff or cross-complainant.

The plaintiffs' case cannot be saved from the statute of limitations by a refusal to apply the holding of *Vafi* and its progeny. This is because the plain meaning rule has consistently required application of *Code of Civil Procedure* section 340.6 to malicious prosecution actions against lawyers.

As a fall back position, the plaintiffs argue that, even if *Vafi* and *Yee* properly construe *Code of Civil Procedure* section 340.6 as applying to malicious prosecution actions against lawyers, there are two reasons why the holding should not be applied in this case. *First*, they contend that the holding of *Vafi* should not be applied "retroactively" to them. *Second*, they assert that there was delayed

discovery of their purported malicious prosecution action against Latham & Watkins. Neither of these arguments has any merit.

The lack of "retroactivity" argument is based on *Silas v. Arden* (2012) 213 Cal.App.4th 75, in which the Court of Appeal held that *Vafi* should not be "retroactively" applied to the case before it. This was because the plaintiff had relied on the earlier "prevailing view" that all prosecution actions were governed by a two year statute of limitations under *Code of Civil Procedure* section 335.1. The *Silas* court cited *Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th190. However, the defendant in *Stavropoulos* was not a lawyer, and there was no occasion for the court to consider the statute of limitations for malicious prosecution against a lawyer. Thus, the reasoning of *Silas* is unsound, as the Court of Appeal held in *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 194-198. As to the issue of "retroactivity" *Yee* should be followed and *Silas* should be disapproved.

Unlike the plaintiff in *Silas*, the plaintiffs here cannot truthfully allege that they relied on *Stavropoulos* in failing to bring their malicious prosecution action against Latham & Watkins within one year. Rather, their complaint specifically alleges that the plaintiffs delayed filing because the "discovery" of their cause of action did not occur until the law firm's clients raised the advice of counsel defense in the separate malicious prosecution against those clients. There is no mention in the complaint of reliance on the *Stavropoulos* or any other case.

In *McGee v. Weinberg* (1979) 97 Cal.App.3d 798, the plaintiff brought a legal malpractice action against the attorney who represented her in a 1963 divorce. She claimed that the legal malpractice statute of limitations did not begin to run until she learned that there might have been legal malpractice. The trial court sustained the defendant lawyer's demurrer without leave to amend, and the

Court of Appeal affirmed. The *McGee* court held that the statute of limitations begins to run when the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to her or his investigation. 97 Cal.App.3d at 803. "Knowledge of facts is what is critical, not knowledge of legal theories." 97 Cal.App.3d at 802.

In this case, the claim of late discovery has no more merit than the claim of the plaintiff in *McGee*. It is true that an exception to the general rule for accrual of a cause of action is the discovery rule. *Norgart v. Upjohn* (1999) 21 Cal.4th 383, 398. With the discovery rule, the statute of limitations may be tolled under certain circumstances. This court has observed that the purpose behind the discovery rule is to protect plaintiffs who are blamelessly ignorant of the possibility that someone's wrongful conduct caused their injuries. *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 97, 99-100. In *Jolly v. Eli Lilly Company* (1988) 44 Cal.3d 1103, the court explained the discovery rule as follows: "the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." *Jolly v. Eli Lilly Company* (1988) 44 Cal.3d 103, 1110.

Under *Jolly*, once a plaintiff has reason to sue "based on the knowledge or suspicion of negligence, the statute [of limitations] starts to run as to all potential defendants." (Emphasis in original.) *Bristol Myers Squibb Company v. Superior Court* (1995) 32 Cal.App.4th 959, 966, disapproved on the other grounds in *Norgart v. Upjohn Company* (1999) 21 Cal.4th 383, 410, fn. 8, and *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 803. The limitations period commences when the plaintiff is aware of his or her injury and has "'suspicion of wrongdoing.'" 32 Cal.App.4th at 964. At that point, there is a duty to investigate and to protect the potential plaintiff's rights. 32 Cal.App 4th at 966.

Although *Bristol Myers Squibb* has been disapproved in certain respects, its central holding pertaining this case remains the law. When judgment was entered in the underlying case, Mr. Parrish and Mr. Fitzgibbons were under a duty of inquiry as to FLIR and all other potential defendants, such as Latham & Watkins, as to any possible malicious prosecution cause of action. They apparently filed a timely malicious prosecution action against FLIR, but the statute of limitations expired against Latham & Watkins. The discovery rule never applied.

An important case illustrating the operation of the discovery rule is *Miller v. Bechtel Corporation* (1983) 33 Cal.3d 868. In *Miller*, the plaintiff was a divorced wife who filed an action to set aside a portion of a property settlement agreement on the ground that her former husband and other defendants misrepresented the value of certain stock that had been community property. The trial court granted summary judgment in favor of the defendants on the basis of the statute of limitations, and this court affirmed. In particular, the court ruled that, when the wife and her attorney became aware of facts which would lead a reasonably prudent person to investigate, they were charged with knowledge of the matters which would have been revealed by investigation. In *Miller*, as in the present case, the statute of limitations ran out.

There is simply no merit to the contention that the one year statute of limitations running against their claimed cause of action against Latham & Watkins was tolled by late discovery. The late discovery rule applies to late discovery of facts, not late discovery of legal theories or legal grounds for defense. Once the plaintiffs secured entry of judgment in their favor in the underlying litigation, they were on notice of the existence of any malicious prosecution cause of action against any possible defendant. They knew who sued them and who represented the plaintiffs. As the judge observed when

he granted the motion to strike filed by Latham & Watkins, Mr. Parrish and Mr. Fitzgibbons knew everything they needed to know.

The late discovery rule does not avail the plaintiffs. The argument that their malicious prosecution cause of action against Latham & Watkins was somehow tolled by late discovery is totally without merit.

The plaintiffs' malicious prosecution cause of action is barred by the one year statute of limitations established by *Code of Civil Procedure* section 340.6. The plain meaning of the statute dictates the holding that the one year statute applies to all cases including malicious prosecution actions against lawyers, arising from their professional services other than actual fraud. The plain meaning rule has always dictated this result, and there is no proper basis for finding the authoritative decision of *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874 not to be applicable to this case. Furthermore, the claim of delayed accrual is without merit, as the trial court judge observed when he granted the motion to strike made by Latham & Watkins.

Any cause of action for malicious prosecution against Latham & Watkins is clearly time barred.

VIII.

Any Weakening of the One Year Statute of Limitations Established by *Code of Civil Procedure* Section 340.6 Would Have a Devastating Impact on Lawyers and Their Insurers.

In their brief on the merits, the plaintiffs seek to have the existing one year statute of limitations for malicious prosecution actions against lawyers be extended to two years. Such a change in the law is highly undesirable, for reasons of public policy. It would

be detrimental to all lawyers who represent plaintiffs and to companies who provide professional liability insurance to them.

Rising legal malpractice insurance claims caused an insurance crisis in the 1970s. The enactment of *Code of Civil Procedure* section 340.6 was designed to ameliorate the situation. "One of the purposes that the Legislature had in enacting section 340.6, as evidenced by the legislative history of the provision, was an attempt to reduce the costs of legal malpractice insurance." *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 197. It has long been recognized that malicious prosecution actions have a significant impact on attorney malpractice insurance premiums, and also raise the costs of practicing law. *Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 35 -36; *Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 641, footnote 5. In fact, the *Lossing* court went so far as to state that malicious prosecution litigation "is a substantial reason for skyrocketing premiums for legal malpractice insurance." 207 Cal.App.3d at 41, footnote 5.

Doubling the length of time that a victorious defendant can sue the plaintiff's lawyer for malicious prosecution would increase the number of such disfavored lawsuits and would result in reviving many cases now barred under the prevailing interpretation of *Code of Civil Procedure* section 340.6. Lawyers would be sued who have no reason to think that malicious prosecution claims could still be pursued against them. Insurance companies would bear the burden of defending the actions for which premiums had not been charged. For the future, underwriting would be difficult, where a significant type of risk would be in effect for a two year period rather than one. Precedent and policy both require continuation of the present prevailing interpretation of *Code of Civil Procedure* section 340.6. There is no valid reason for change.

IX.

Conclusion.

The Supreme Court should affirm the order granting the motion to strike filed by Latham & Watkins for two independent reasons. The plaintiff's malicious prosecution cause of action is barred under the interim adverse rule, because the denial of the defendants' motion for summary judgment in the underlying trade secret litigation established probable cause as a matter of law. In addition, the cause of action is barred by the one year provision of *Code of Civil Procedure* section 340.6, the applicable statute of limitations.

Any departure from existing law on the two issues before the Supreme Court would have undesirable effects on the members of the legal community and on companies that provide legal malpractice insurance, such as Lawyers Mutual Insurance Company.

Respectfully submitted,

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AMICUS CURIAE

CERTIFICATE OF COMPLIANCE

I, the undersigned, Roy G. Weatherup, hereby certify the following:

I am a partner in the law firm of Lewis Brisbois Bisgaard & Smith LLP, attorneys of record for Amicus Curiae, Lawyers Mutual Insurance Company.

This certificate of compliance is submitted in accordance with rule 8.204 of the California *Rules of Court*.

The foregoing document, namely, AMICUS CURIAE BRIEF OF LAWYERS MUTUAL INSURANCE COMPANY IN SUPPORT OF DEFENDANTS AND RESPONDENTS, was produced with a computer. It is proportionately spaced in 14-point Times New Roman typeface. The document contains 9,910 words, including footnotes but not including other portions excluded by rule 8.204.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this certificate was executed on March 31, 2016, at Los Angeles, California.

_____

Roy G. Weatherup

CALIFORNIA STATE COURT PROOF OF SERVICE

Supreme Court case number S228277

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to the action. My business address is 633 West 5th Street, Suite 4000, Los Angeles, CA 90071.

On March 31, 2016, I served the following document(s):
APPLICATION OF LAWYERS MUTUAL INSURANCE COMPANY TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND RESPONDENTS; DECLARATION OF KIM THURMAN SPIRITO; PROPOSED AMICUS CURIAE BRIEF

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

The documents were served by the following means:

☒ (BY U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and:

☒ Placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

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

Executed on March 31, 2016, at Los Angeles, California.

Jessie Dave

SERVICE LIST

Parrish v. Latham & Watkins

S228277

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Division Three
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The Honorable James R. Dunn
Los Angeles Superior Court
111 North Hill Street
Los Angeles, California 90012

Supreme Court
Case Number S228277

Second Civil
B244841

In the Supreme Court of the State of California

WILLIAM PARRISH and E. TIMOTHY FITZGIBBONS,

Plaintiffs and Appellants,

v.

LATHAM & WATKINS, LLP and DANIEL SCHECTER,

Defendants and Respondents.

SUPPLEMENTAL PROOF OF SERVICE OF APPLICATION OF LAWYERS MUTUAL INSURANCE COMPANY TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND RESPONDENTS; DECLARATION OF KIM THURMAN SPIRITO; PROPOSED AMICUS CURIAE BRIEF

Review of the Decision of the Court of Appeal,
Second Appellate District, Division Three,
Affirming the Judgment of the Los Angeles Superior Court
Case Number BC482394, Honorable James R. Dunn, Judge

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CALIFORNIA STATE COURT PROOF OF SERVICE

Supreme Court case number S228277

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to the action. My business address is 633 West 5th Street, Suite 4000, Los Angeles, CA 90071.

On March 31, 2016, I served the following document(s):
APPLICATION OF LAWYERS MUTUAL INSURANCE COMPANY TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND RESPONDENTS; DECLARATION OF KIM THURMAN SPIRITO; PROPOSED AMICUS CURIAE BRIEF

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

Mr. J. Michael Hennigan
Mr. Michael H. Swartz
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300 South Grand Avenue, Suite 2900
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The documents were served by the following means:

☒ (BY U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and:

☒ Placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

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

Executed on March 31, 2016, at Los Angeles, California.

Jessie Dave

CALIFORNIA STATE COURT PROOF OF SERVICE

Parrish v. Latham & Watkins

Supreme Court case number S228277

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to the action. My business address is 633 West 5th Street, Suite 4000, Los Angeles, CA 90071.

On March 31, 2016, I served the following document(s): **SUPPLEMENTAL PROOF OF SERVICE OF APPLICATION OF LAWYERS MUTUAL INSURANCE COMPANY TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND RESPONDENTS; DECLARATION OF KIM THURMAN SPIRITO; PROPOSED AMICUS CURIAE BRIEF.**

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S228277

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