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SUPREME COURT
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Deputy

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

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ARGUMENT

I. NOTHING LATHAM ARGUES JUSTIFIES THE CONCLUSION THAT THE DENIAL OF SUMMARY JUDGMENT IN THE UNDERLYING ACTION CONCLUSIVELY ESTABLISHED THAT ACTION WAS INITIATED AND PROSECUTED WITH PROBABLE CAUSE.

In plaintiffs' opening brief on the merits they explained that 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 a conclusive presumption of probable cause. It is therefore not the case, as the Court of Appeal here held, that actual fraud or perjury are the only recognized exceptions to the interim adverse judgment rule. (OB 15-31.)

In its answer brief, Latham launches its discussion with the platitude that malicious prosecution actions are disfavored (AB 21), as if that were a standalone reason to accept its position. It is not. "[T]he traditional characterization of malicious prosecution as a 'disfavored' cause of action . . . does not warrant abridging established elements of malicious prosecution, or the traditional right of action for it. (*Id.* at pp. 680–681, 34 Cal.Rptr.2d 386, 881 P.2d 1083.)" (*Ray v. First Federal Bank* (1998) 61 Cal.App.4th 315, 320, quoting *Crowley v. Katleman* (1994) 8 Cal.4th 666, 680, fn. 8.)

Next, Latham continues its claim that this Court's *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811 opinion directly held that fraud or perjury are the only exceptions to the interim adverse judgment rule. (AB 22-24.) But as explained in the Opening Brief and ignored by Latham, *Wilson* did not decide or discuss whether there is an exception to the interim adverse judgment rule. *Wilson's* passing reference to fraud and perjury therefore is not a holding that denial of summary judgment conclusively establishes probable cause in every case and every situation, absent fraud or perjury.

Latham next argues that there were two bases for the denial of summary judgment in the underlying action (AB 24-25) and then argues that the first ground for that ruling (the court's determination that plaintiffs here did not establish that their business plan predated their work at FLIR) conclusively established probable cause to initiate and prosecute the underling action. As now explained, nothing Latham argues justifies using either aspect of the summary judgment denial in the underlying case to establish, as a matter of law, lack of probable cause to initiate and prosecute the underlying action.

A. The First Aspect of the Summary Judgment Denial Relating to the Creation of the Business Plan Does Not Support Application of the Adverse Interim Judgment Rule as a Matter of Law.

The portion of the underlying summary judgment order on which Latham first focuses states that "Defendants have failed to sustain their initial burden of proof on the

motion" with respect to whether they created their business plan before joining FLIR. (AA 87.) But as explained in the opening brief and virtually ignored by Latham, there are multiple reasons why this supposed first ground for the summary judgment ruling did not conclusively prove Latham had probable cause to initiate and maintain the underlying action. First, as Justice Klein recognized in her initial and subsequently vacated opinion in this case, Latham (on behalf of FLIR) later abandoned the claim and in doing so recognized that this claim lacked any merit.

Latham also misleadingly suggests that because the underlying trial court referenced that theory in its statement of decision following trial, this theory was litigated though trial. Latham ignores what the trial court said on the issue, however. The Court stated that "At trial, [FLIR] did not dispute the authenticity or credibility of Defendant Fitzgibbons's evidence regarding the 1998-99 'Thermicon' plans." (AA 19.) In other words, the issue of whether the business plan predated plaintiffs' work at FLIR was not an issue that was disputed at trial – no doubt because, as Justice Klein noted in the earlier appellate opinion, plaintiffs had presented conclusive proof on that issue. Moreover, that FLIR (and Latham) did not dispute this evidence was highly relevant to the underlying trial court's finding that FLIR's claims were without factual or legal support, just as it is highly relevant here.

Further, nothing Latham argues now negates the fact that even if it had probable cause based on the business plan allegedly overlapping plaintiff's employment at FLIR (it did not), then that would not preclude plaintiffs from proceeding with a malicious

prosecution action based upon the fact that Latham advanced a legally unsupportable inevitable disclosure theory. To repeat what Latham ignores, 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, supra,* 8 Cal.4th at p. 679.)

Moreover, as Latham itself now recognizes, the Court's denial of summary judgment was based solely on plaintiffs' evidence (or more accurately lack of sufficient evidence to shift the burden) in support of the summary judgment motion. The trial court in the underlying action held plaintiffs had not met their initial moving burden. Nothing more. Such a technical ground for denying summary judgment is an insufficient basis to invoke the adverse interim judgment rule, especially where, as here, the trial court found early in the case that plaintiffs had already made a "compelling case" for summary judgment, but denied the motion out of an abundance of caution because it involved "highly technical" issues.

For purposes of the interim adverse judgment rule, a moving party's failure to satisfy its initial moving burden is no different than a denial of the motion based on a technical defect similar to a moving party's failure to provide an adequate separate statement. The rationale for applying the interim adverse judgment rule is that summary judgment denials tend to "establish[] that the plaintiff has substantiated, or can substantiate, the elements of his or her cause of action with evidence that, if believed,

would justify a favorable verdict." (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 824.) That rationale does not apply, however, when a summary judgment motion is denied on the ground that the moving party has not satisfied its initial moving burden. Such a holding only means that the moving party failed to submit sufficient evidence to support its claim that the action lacked merit. It does not mean that "the plaintiff has substantiated, or can substantiate, the elements of his or her cause of action with evidence that, if believed, would justify a favorable verdict" under *Wilson, supra.* Indeed, in finding that the parties moving for summary judgment had not met their initial moving burden the court does not even consider the opposing parties' evidence. (*Duckett v. Pistoresi Ambulance Service, Inc.* (1993) 19 Cal.App.4th 1525, 1533; *Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 940.)

Thus, a finding that the parties moving for summary judgment have not met their initial burden does not tend to show that a reasonable attorney would find a claim tenable, and probable cause to bring a claim exists, because there is affirmative evidence to support the claim. (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1018 ["[t]he test of determining probable cause is whether any reasonable attorney would have thought the claim to be tenable ... and '[p]robable cause is established by showing that the claim is legally sufficient and can be substantiated by competent evidence.'"].)

Contrary to what Latham argues in a footnote, plaintiffs did not concede that this first ground for denial of the summary judgment was not technical. (AB 27, fn 46.) In the page of plaintiffs' petition for rehearing referenced by Latham, plaintiffs are quoting

the Court of Appeal decision on that issue. Plaintiffs quoted that passage to disagree with it.

In sum, nothing Latham argues establishes that the first ground for the summary judgment denial conclusively established that there was probable cause to initiate and maintain the underlying action.

B. The Second Aspect of the Summary Judgment Denial Relating to Inevitable Disclosure Does Not Support Application of the Adverse Interim Judgment Rule.

As to the second ground for the underlying summary judgment denial, Latham again asserts that when summary judgment is denied in the underlying action, then the one and only exception to the adverse interim judgment rule is that the evidence submitted in opposition to the summary judgment constituted fraud or perjury. According to Latham, the limited nature of this exception "is based on logic and fairness" because "a litigant or lawyer cannot properly draw comfort from a court ruling that the litigant or lawyer knows was induced by deceit." (AB 26.) But Latham cites nothing stating that the interim adverse judgment rule is designed to provide "comfort" to a lawyer or to a litigant. Nor does Latham explain why it should be the case that when a party defeats summary judgment by submitting materially false facts, and the very same judge later holds the action was initiated and prosecuted in objective and subjective bad

faith, and solely for an anticompetitive purpose, the denial of that motion based on those false facts should conclusively establish probable cause.

As explained in the opening brief, a number of Courts have recognized that there is a "materially false facts" exception to the interim adverse judgment rule. (See *Roberts v. Sentry Life Ins.* (1990) 76 Cal.App.4th 375, 384; cited with approval for this point in *Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438; *Cheong Yu Yee v. Cheung* (2013) 220 Cal.App.4th 184, 201; *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1282.)

Latham's assertion that only fraud or perjury are sufficient to erode the conclusive effect of a summary judgment denial contravenes the standard that is used in determining probable cause to begin with. In a nutshell, Latham asks this Court to adopt a standard that rewards a litigant who otherwise maliciously prosecutes an action by insulating it from liability so long as it is successful in convincing at least one judge in the underlying action at some point that there is sufficient evidence to deny summary judgment. Even though it is later determined in that same action by that same judge that the litigant procured that summary judgment denial through the use of false facts on which that party could not reasonably rely.

According to Latham, the reason why such a rule is necessary is to protect litigants who submit false facts in support of a summary judgment opposition without then realizing that the facts are false. Here, of course, plaintiffs have never agreed that Latham and its clients were not aware the facts submitted in opposition to the underlying

summary judgment were false. To the contrary, seeing as the trial court and the Court of Appeal in the underlying action agreed that sanctions were warranted, they found that FLIR was very much aware of the falsity of the expert declarations on which the court relied in denying summary judgment.

Putting aside temporarily the falsity of the evidence submitted by Latham, Latham's present position conflates probable cause (which is the element to which the adverse interim judgment rule relates) with the issue of malice. "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.' (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164-165, 80 Cal.Rptr.2d 66 (*Sangster*).)" (*Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 550-51.)

If Latham had no reasonable basis to believe in the truth of the evidence contained in the expert declarations (and it did not), then that evidence cannot be a basis to find that there was probable cause as a matter of law simply because the declarations were submitted in opposition to a summary judgment motion. If the rule were otherwise, then a party who is victimized by an action that is being maliciously prosecuted against him will be deterred from filing a summary judgment motion in an effort to limit the harm caused by that action. That party will know that if such a summary judgment were filed, then the underlying plaintiff may be able to generate materially false evidence which is sufficient to defeat the summary judgment motion and thereby preclude any future

malicious prosecution action unless actual fraud or perjury is established.

According to Latham, "in the real world . . . almost all defendants will focus on the suit facing them, not positioning for a malicious prosecution action." (AB 38.) Even if Latham's rampant speculation as to "almost all defendants" is accurate (it is not), the rule urged by Latham would by Latham's own admission result in some defendants not filing summary judgment motions in actions they deem frivolous for fear it could irreparably damage their chances of recouping their losses from that frivolous suit in a malicious prosecution action. Thus, in addition to the fact Latham's rule is not supported by the law, it is also bad policy.

Latham's argument further ignores the genesis for the adverse interim judgment rule - that genesis explains why courts often refer to "fraud or perjury" as exceptions to that rule. To recap what Latham ignores, that rule developed in the context of judgments that were reversed on appeal. Under California law, a judgment that is procured by intrinsic fraud or perjury cannot be successfully vacated for that reason. (*Carpenter v. Sibley* (1908) 153 Cal. 215, 217-18.)

Thus, the issue arose whether a judgment that was procured by fraud or perjury and which could not be vacated would nevertheless conclusively establish probable cause and therefore prevent a malicious prosecution action. It was in that setting that this Court concluded that a judgment that was procured by fraud or perjury would not conclusively establish probable cause. It was not until *Roberts v. Sentry Life Ins., supra,* 76 Cal.App.4th at p. 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 view of that genesis of the adverse judgment rule, the wooden application of that standard Latham proposes in the setting of interim rulings (such as the denial of a motion for summary judgment) is illogical. This case presents a prime example why that is so. If at the trial of the underlying action, after summary judgment is denied, it is determined that the only reason why summary judgment was denied was because of materially false evidence that could not reasonably be relied upon, then there is no reason why the party or lawyer submitting that false evidence should nevertheless be insulated from liability for malicious prosecution.

As to the issue of whether the expert declarations contained materially false evidence, Latham engages in an argument that sounds more like an argument to a jury than to this Court. (AB 29.) This is significant because the issue of whether those expert declarations were materially false (or for that matter fraudulent) is an issue of fact inappropriate for resolution in an anti-SLAPP motion. (See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 819, 820.) "The plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP." (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 735.)

In any event, Latham's characterization of the record in this regard is false.

Latham asserts that the underlying trial court never determined that the expert declarations that were submitted in opposition to the summary judgment were false. (AB 29.) Latham is wrong.

The trial court in the underlying action relied on the expert declarations submitted in opposition to summary judgment 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."].) Those expert declarations submitted in opposition to the summary judgment did in fact suggest that there was a scientific methodology for predicting trade secret misuse – as the Court of Appeal recognized in its opinion.

For instance, Dr. Dean Neikirk, stated that based on his experience and background, he is "not aware of any third party in the infrared market, other than Plaintiff FLIR, that has the requisite technology and capability to produce a high volume of bolometers at yields and costs sufficient to support" Former Employees' business plan. He stated that he knows of no "public domain literature demonstrating that any third party has the ability [to] produce a high volume of TEC-less [vanadium oxide] bolometers at a low cost." He therefore concluded that Former Employees "could not pursue" their business plan without the use of FLIR's trade secrets. The second expert, Daniel Murphy submitted a similar declaration. Mr. Murphy declared: "I am not aware of any third party in the infrared market, other than Plaintiff FLIR, that has the requisite technology and

capability to produce a high volume of microbolometers at low-cost in a short time period. There is no public domain literature demonstrating that any third party has the ability produce a high volume ofTEC-less VOx bolometers at a low cost ... Based on the foregoing, it is my opinion that Defendants could not start a competing business acting as a merchant supplier of micro bolometers (i.e., producing a high volume of TEC-less VOx bolometers at a low cost) without using FLIR's and Indigo's proprietary trade secrets on the design and bulk manufacture of uncooled, TEC-less,vanadium oxide microbolometers." (Sealed Volume AA 217-222.)

In its statement of decision in the underlying action, the trial court referenced the testimony of these same experts and explained that both of these experts "testified at trial that there is no valid scientific methodology for predicting future use of trade secrets." (AA 22.)

In its statement of decision, the court pointed to these materially false expert declarations in support of its conclusion that the underlying action was prosecuted with subjective and objective bad faith. The trial court explained: "Plaintiffs presented expert testimony to argue that only Plaintiffs could develop certain technology in a certain time frame, but did not provide a reasonable scientific basis for that testimony. As noted, Plaintiffs' experts did not address the possibility that Defendants might lawfully acquire third party Raytheon's internal technology, and one expert assumed that Defendants would not innovate at their new company." (AA 31.) The Court added, "Plaintiffs offered expert testimony that unreasonably discounted ways in which Defendants could

have proceeded with their new company lawfully." (AA 31.)

To flesh out that concept, and as recognized by the first published Court of Appeal decision in this action (now depublished) "the factual basis for Latham's theory was expert testimony which considered only publicly available technology, when Latham knew that Former Employees intended to license non-public technology from Raytheon." (229 Cal.App.4th at p. 283.) That echoed the statement of decision in the underlying action, in which, as just noted, the court held "Plaintiffs initiated and maintained the lawsuit in bad faith in that Plaintiffs presented expert testimony to argue that only Plaintiffs could develop certain technology in a certain time frame, but did not provide a reasonable scientific basis for that testimony" and "Plaintiffs' experts did not address the possibility that Defendants might lawfully acquire third party Raytheon's internal technology." (AA 31.) Latham's submission of these materially false expert declarations was especially egregious because one of those experts, Daniel Murphy, worked for Raytheon prior to being engaged by Latham. Latham then had Mr. Murphy specifically exclude from his summary judgment opinion the consideration of non-public information he knew from his time at the company. (Sealed AA 1029 [Computer Disc pages 2534-2535].) In other words, Latham had Mr. Murphy assume away his actual knowledge of critical non-public evidence that Raytheon had the very technology Plaintiffs intended to license in order to start NuCo without any of FLIR's intellectual property. This amounts to, at a minimum, a proffer of knowingly false evidence.

Thus, it is clear on the face of the statement of decision that the trial court concluded that the methodology and opinions offered by the very same experts who submitted declarations in opposition to summary judgment were false – so much so that the testimony of these experts supported the imposition of sanctions on the ground that the underlying action was prosecuted with objective and subjective bad faith.

Any doubt as to this issue is laid to rest by the Court of Appeal opinion affirming the judgment including the sanction award, wherein the Court expressly held that the underlying trial court had concluded following trial that the expert declarations submitted in opposition to summary judgment were false. (*FLIR Systems, Inc. v. Parrish, supra,* 174 Cal.App.4th at pp. 1282-83.)

Latham argues that this Court should not consider the underlying appellate opinion because it is hearsay. However, regardless whether the summary of evidence in an appellate opinion may be hearsay, a statement in an appellate opinion is not hearsay for purposes of evaluating the legal effect of the trial court ruling being reviewed by that appellate court. (See *People v. Woodell* (1998) 17 Cal.4th 448, 459 ["because the ultimate question is, of what crime was the defendant convicted, another way to decide this question is to look to a court ruling, including an appellate opinion, for the nonhearsay purpose of determining the basis of the conviction. Specifically, in this case, the trier of fact could look to the opinion to determine whether the basis for the conviction was personal use of the weapon or vicarious liability for someone else who personally used the weapon."].)

Further, Plaintiffs need not rely on evidentiary facts stated in the Court of Appeal opinion concerning the underlying transaction that gave rise to the Underlying Action. Rather, Plaintiffs may offer the opinion for a nonhearsay purpose. This serves to distinguish *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 885, on which Latham relies. (AB 31.)

Latham next asserts that the Court of Appeal in this action was correct and that any evaluation of an interim ruling in view of what later transpired in that very action would be inconsistent with the core principles of the interim adverse judgment rule, which applies even though a ruling or judgment is later reversed on appeal. (AB 32.) Latham is wrong. Just because an underlying judgment can establish probable cause even if it is reversed on appeal does not logically lead to the conclusion there can be no consideration of what occurred in the trial court in the aftermath of an adverse *interim* ruling. An interim ruling is deemed to be evidence of probable cause in the first place based solely on the notion that if a judicial officer agrees that the party prosecuting the underlying claim has sufficient evidence to pursue a claim, then that party must at least have probable cause. That principle, however, is premised on the assumption that the judicial officer was given a fair view of the facts supporting the claim. If the party prosecuting the underlying claim supports a summary judgment opposition with facts it could not reasonably believe are accurate, then there is no reason whatsoever to nevertheless reward that party by conclusively presuming that there was probable cause to initiate and prosecute the action.

This case presents a textbook example of why that is so. Here, in the aftermath of the summary judgment denial, (1) the underlying plaintiff abandoned one of the claims that formed the basis for that ruling and admitted that in fact there was no evidence that plaintiffs here created their business plan while working at FLIR and (2) FLIR was sanctioned because it acted in subjective and objective bad faith by claiming that it was inevitable that plaintiffs would ultimately use FLIR's intellectual property based on false expert evidence. As already explained, it was this very expert evidence that formed the basis for the summary judgment denial.

If a party being sued for malicious prosecution is entitled to shield itself from liability based upon an interim ruling in the underlying action, then there is no reason why the party who was victimized by the underlying suit should not be able to place that interim ruling in context based upon what later happened in the underlying action. If those later events are sufficient to at least create a question of fact whether the party prosecuting the underlying action lacked a good faith belief in the truth of the evidence used to successfully oppose a summary judgment motion, then the summary judgment denial should not be held to establish probable cause as a matter of law. This is precisely what the Court recognized in *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.

Latham accuses the *Slaney* Court of committing a fundamental error by "considering the existence of subjective malice as a relevant factor. . . ." (AB 34.)

However, it is Latham that errs. The fact that a party who is prosecuting the underlying case acts with malice in submitting false evidence in order to defeat summary judgment is relevant to whether that party is entitled to hide behind the summary judgment denial to defeat a malicious prosecution action.

Latham ends its discussion of this issue with an effort to explain why the finding that the underlying action was prosecuted with subjective and objective bad faith under Civil Code section 3426.4 is not inconsistent with a finding that the same action was prosecuted with probable cause. (AB 35-36.) This is an argument that stretches the bounds of reason beyond their breaking point. Semantics aside, Latham continues to ignore that the Court expressly concluded that sanctions under section 3426.4 were not barred under the interim adverse judgment rule due to the denial of summary judgment – the very same argument Latham advances in this action -- *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. (*FLIR Systems, Inc. v. Parrish, supra,* 174 Cal.App.4th at p. 1282.) Thus, regardless of whether a finding that an action is brought in subjective and objective bad faith under section 3426.4 establishes a lack of probable cause as a matter of law, in every action, that finding in the underlying action in this case at least should preclude Latham from asserting that as a matter of law the summary judgment denial conclusively negates the existence of probable cause.

C. Nothing Latham Argues Entitles a Party to Continue a Malicious Prosecution After an Interim Ruling and Nevertheless Avoid Liability.

Finally, Latham argues that it should be insulated from liability even if it continued to maliciously prosecute the underlying action after the underlying summary judgment ruling. (AB 38.) Initially, Latham argues that this argument should not be addressed on appeal because it was raised for the first time on appeal. (AB 39.) But plaintiffs' anti-SLAPP opposition in this action specifically quoted the trial court in the underlying action as holding "'[FLIR] did not have a sufficient basis to initiate *and maintain* the lawsuit.'" (AA 258, quoting underlying trial court.) Plaintiffs' complaint also specifically pled that Latham lacked probable cause because it "initiated and *maintained* and prosecuted the lawsuit on a legal theory that Plaintiffs would misuse trade secrets in the future." (AA 5, emphasis added.) Moreover, the factual basis for this argument is identical to the argument why the adverse interim judgment rule should not apply. The underlying trial court and Court of Appeal each concluded that the underlying action was prosecuted in subjective and objective bad faith. This argument simply asks that if the Court were to rule that even the denial of summary judgment in the underlying action established probable cause at that point, then the Court should limit that holding and allow plaintiffs to proceed with their case relating to Latham's tortious conduct after that summary judgment ruling was rendered.

Latham next tries to justify its conduct in continuing to prosecute the underlying action when it was clear that there was no legal or factual basis to do so. According to Latham, the underlying trial court simply weighed the evidence and ruled against its client. (AB 39-40.) But that is hardly the full story. As already described, Latham's client conceded that its business plan theory of liability had no factual merit and the underlying trial court and the Court of Appeal each concluded that the inevitable disclosure theory of liability was factually and legally brought in subjective and objective bad faith. At the very least, sufficient facts exist to allow plaintiffs to overcome an anti-SLAPP motion with respect to Latham's continued prosecution of the underlying action.

II. NOTHING LATHAM ARGUES NEGATES THAT THIS MALICIOUS PROSECUTION ACTION WAS TIMELY FILED.

As explained in their Opening Brief on the Merits, plaintiffs' malicious prosecution claim against Latham is timely because (1) this Court's opinion in *Lee v. Hanley* (2015) 61 Cal.4th 1225 establishes Code of Civil Procedure § 340.6 does not govern this claim (OB 31-33); (2) even if § 340.6 governs this claim, it should not be applied retroactively (OB 33-39); and (3) questions of fact remain whether Plaintiffs reasonably did not discover that a malicious prosecution claim existed against Latham until FLIR asserted its "advice of counsel" defense (OB 40-42).

Latham responded that (1) *Lee v. Hanley* supports to application of § 340.6 here (AB 42-46); (2) public policy supports application of § 340.6's one-year statute of limitations to this action (AB 46-51); (3) application of the one-year statute of limitations should be applied retrospectively and prospectively (AB 51-58); and (4) the delayed discovery rule does not apply (AB 58-60). As discussed below, these arguments fail.

A. Because the Duty to Refrain from Filing an Action Maliciously and Without Probable Cause Applies to Lawyers and Non-lawyers Alike, under this Court's Analysis in *Lee*, Section 340.6 Does Not Apply to Malicious Prosecution Claims Against Lawyers.

Code of Civil Procedure § 340.6 establishes a one-year statute of limitations period for "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services." In *Lee, supra,* this Court concluded that "section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In 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." (61 Cal.4th at pp. 1236-

1237.)

This Court elaborated further:

> Nor does section 340.6(a) necessarily apply whenever a plaintiff's allegations, if true, would entail a violation of an attorney's professional obligations. The obligations that an attorney has by virtue of being an attorney are varied and often overlap with obligations that all persons subject to California's laws have. For example, everyone has an obligation not to sexually batter others (see Civ.Code § 1708.5, subd. (a)), but attorneys also have a professional obligation not to do so in the particular context of the attorney-client relationship (see Cal. Rules of Prof. Conduct, rule 3–120). For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation.

(61 Cal.4th at p. 128.)

The obligation not to maliciously bring a claim without probable cause is not limited to attorneys and is therefore not reliant on the professional rules applicable solely to lawyers. (*Slaney v. Ranger Ins. Co., supra,* 115 Cal.App.4th at p. 318 [elements of tort].) Lawyers and non-lawyers alike can be liable for malicious prosecution: attorneys, parties to litigation, or even an "aider and abetter" of the malicious prosecution can be potentially liable. (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 264 ["There does not appear to be any good reason not to impose liability upon a person who inflicts harm by aiding or abetting a malicious prosecution which someone else has instituted."]; see also *Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1371-1372 ["One may be civilly liable for malicious prosecution without personally signing the complaint initiating the . .

. proceeding."].)

Further, the elements for a malicious prosecution cause of action are no different whether the defendant is an attorney or a non-attorney. No matter who the defendant is, the plaintiff must establish the defendant's claim was terminated in favor of the plaintiff, that the claim was brought without probable cause, and that the claim was initiated with malice. (*Slaney, supra,* 115 Cal.App.4th at p. 318.) These elements are a "generally applicable *nonprofessional* obligation." (*Lee, supra,* 61 Cal.4th at p. 1238, emphasis added.)

Thus malicious prosecution claims are entirely distinct from claims for breach of fiduciary duty or legal malpractice, which can be brought only against lawyers.

In their Answer Brief, Latham cites *Lee, supra,* and argues that "Section 340.6 applies if the claim depends on (1) misconduct 'in the course of providing professional services' and (2) misconduct that 'violate[s] a professional obligation,' which is 'an obligation the attorney has by virtue of being an attorney.'" (AB 42.) Latham, citing *Lee* once more, then argues that "these requirements prevent Section 340.6 from applying to claims that have nothing to do with a lawyer's provision of professional services." (AB 42.) Latham then concludes that § 340.6 applies to a malicious prosecution claim because an attorney liable for malicious prosecution would also violate Rules of Professional Conduct 3-200. (AB 43-44.)

But *Lee* directly refutes this reasoning and conclusion: "Nor does section 340.6(a) necessarily apply whenever a plaintiff's allegations, if true, would entail a violation of an

attorney's professional obligations. The obligations that an attorney has by virtue of being an attorney are varied and often overlap with obligations that all persons subject to California's laws have." (61 Cal.4th at p. 1238.) Therefore, the fact that Latham *also* violated Rules of Professional Conduct 3-200 by maliciously prosecuting the underlying case against Plaintiffs is irrelevant to whether or not § 340.6's one-year statute of limitations applies. Rather, the determining factor is "whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." (*Ibid.*) As a malicious prosecution claim implicates the violation of a generally applicable nonprofessional obligation to not maliciously bring a claim without probable cause, § 340.6's one-year statute of limitations does not apply, and instead the general two-year statute of limitations applies, rendering Plaintiffs' claim timely.

B. Evenly Applying The Two-Year Statute of Limitations to All Malicious Prosecution Claims Does Not Violate Public Policy.

Latham argues that public policy supports applying § 340.6's one-year statute of limitations to this case because "[l]awyer liability for malicious prosecution was part and parcel of the concern with the cost and availability of legal services that led the Legislature to adopt [§ 340.6]." (AB, pp. 46-49.) Latham goes to great lengths to assert that malicious prosecution claims against lawyers must have been on the forefront of the

Legislature's mind when it enacted section 340.6. This claim is belied by that section's legislative history.

The Legislature enacted § 340.6 in order to reduce the costs of legal malpractice insurance. (*Cheong Yu Yee, supra,* 220 Cal.App.4th at p. 197; see *Lee, supra,* 61 Cal.4th at pp. 1233-1236 ["The Legislature enacted section 340.6(a) in 1977 amid rising legal malpractice insurance premiums."].) In other words, the policy rationale was to reduce the costs of insuring against lawyer negligence. The legislative history of § 340.6 never once mentions malicious prosecution actions nor is there any indication the legislature intended to reduce the costs of insuring against malicious prosecutions actions, which unlike legal malpractice actions require a showing of *malice*. Thus even assuming an insurance policy covering legal malpractice also covers malicious prosecution (which is highly questionable), there is no indication the legislature intended to reduce that portion of the insurance premium attributable to insuring against malicious prosecution as opposed to legal malpractice. More importantly, insurers generally do not indemnify attorneys for their acts of malicious prosecution. (Ins. Code § 533; *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 503-506.)

Applying the same statute of limitations period to attorneys as to everyone else for malicious prosecution claims would not disrupt the concerns expressed by the Legislature in enacting § 340.6.[1] That is the case for at least three reasons. One, there would be no

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[1] In fact, creating special rules for attorneys is disfavored. (*Trope v. Katz* (1995) 11 Cal.4th 274, 277 [an attorney litigant cannot recover attorney fees under Civ. Code, §

open-ended liability, as the limitations period would merely be extended by one year. Two, the cost of insuring against legal malpractice (as opposed to malicious prosecution) would be unaffected. Three, the overall effect on insurance premiums paid by lawyers would be negligible as insurers do not generally indemnify attorneys for malicious prosecution acts and the extension of the limitations period is by one year only.

Further still, even though malicious prosecution is a "disfavored" cause of action, it is "intended to protect an individual's interest in freedom from unjustifiable and unreasonable litigation." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 878.) Here, it is already established Latham prosecuted the claim against Plaintiffs without probable cause. The mere fact malicious prosecution causes of action are "disfavored" does not warrant abridging the claim here. (*Ray v. First Federal Bank, supra,* 61 Cal.App.4th at p. 320.)

Therefore, applying the same two-year statute of limitations period to all malicious prosecution defendants would not contravene the policy animating § 340.6.

1717 because to "construe the statute otherwise, [the court] would in effect create two separate classes of pro se litigants—those who are attorneys and those who are not—and grant different rights and remedies to each].)

C. Even If § 340.6 Applies, It Should Be Applied Here Prospectively Only.

Even though courts generally give judicial decisions a retroactive effect, courts refrain from doing so "when a judicial decision changes a settled rule on which the parties below have relied" and "considerations of fairness and public policy [] require that a decision be given only prospective application." (*Silas v. Arden* (2012) 213 Cal.App.4th 75, 88, quoting *Claxton v. Waters* (2004) 34 Cal.4th 367, 378.) "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." (*Claxton, supra,* 34 Cal.4th at pp. 378-379.) Further, "[r]etroactive application of an unforeseeable procedural change is disfavored when such application would deprive a litigant of 'any remedy whatsoever.'"

Here, Plaintiffs reasonably relied on the holding of *Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190 in concluding that the statute of limitations period for a malicious prosecution action is two years. The issue in *Stavropoulos* was whether the one-year limitations period in Code of Civ. Proc. § 340, subd. (c) or the two-year limitations period in Code of Civ. Proc. § 355.1 applies to malicious prosecution actions. (141 Cal.App.4th at p. 193.) The court concluded that the Legislature "intended the two-year limitations period set forth in section 335.1 to apply to malicious prosecution actions." (*Id.* at p. 197.) The court did not qualify its holding.

Subsequent courts have acknowledged that *Stavropoulos* held that "section 335.1 governs claims for malicious prosecution generally" and that section 335.1 "typically applies to claims for malicious prosecution." (*Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 889; *Cheong Yu Yee v. Cheung, supra,* 220 Cal.App.4th at p. 193.) One published decision even held that § 335.1 applies to a malicious prosecution claim against an attorney. (*Roger Cleveland Golf Company, Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 676.)[2] In fact, the Court of Appeal in this case twice determined that § 340.6 does not apply to a malicious prosecution claim. (*Parrish v. Latham & Watkins* (2014) 229 Cal.App.4th 264, 277 (superseded opinion); *Parrish v. Latham & Watkins* (2015) 238 Cal.App.4th 81, 94-95, review granted.)

If a Court of Appeal panel comprised of three appellate Justices concluded that section 340.6 did not apply to a malicious prosecution claim against a lawyer, how can a litigant be deemed to be unreasonable in reaching that same conclusion – especially in the absence of any contrary authority? Indeed, it is ironic for Latham to argue that plaintiffs were nevertheless unreasonable in concluding that section 340.6 did not apply in light of that same conclusion being reached in *Roger Cleveland Golf.*

Moreover, applying § 340.6's one-year limitations period in a malicious prosecution claim against an attorney prospectively is exactly what the court did in *Silas,*

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[2] While this Court disapproved of the *Roger Cleveland* holding in *Lee, supra,* the *Roger Cleveland* holding supports the reasonableness of Plaintiffs' belief the two-year limitations period applied.

supra. The court concluded "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." (213 Cal.App.4th at p. 89.)

This case law history establishes it was reasonable for Plaintiffs to believe its malicious prosecution claim against Latham was governed by a two-year limitations period. It would not be reasonable for Plaintiffs to assume an exception applied to a holding made without exceptions. Until the *Vafi* opinion was published in March 2011, Plaintiffs had no reasonable basis for believing that the one-year statute of limitations period might apply. As Plaintiffs' claim expired on August 11, 2010, according to the trial court (AA 1062), there was then no authority governing the applicable statute of limitations period for their malicious prosecution claim other than *Stavropoulos*, which confirmed a two-year limitations period for malicious prosecution claims.

Further supporting limiting the applicability of § 340.6's one-year limitations period is the fact that the change in law is a procedural one that would likely result in depriving Plaintiffs of any remedy against Latham for its malicious prosecution.

Latham argues the limitations period should be applied retroactively because there was no "settled prior law on which they could have reasonably relied" and because Plaintiffs "offered no evidence that they actually relied on any contrary settled prior

law."[3] (AB 53-58.) These arguments clearly fail.

First, there is case law supporting Plaintiffs belief: *Stavropoulos, supra.* As discussed above, the *Stavropoulos* holding, providing without exception or qualification that a two-year limitations period applied to malicious prosecution claims, established a reasonable basis for Plaintiffs to believe a two-year limitations period applied to their claim. Latham argues that there was no exact case on point, but that is not what the law requires. The law requires a reasonable basis for the party's belief, and that has been established here.

In support of its argument, Latham adopts the dicta of the court in *Cheong Yu Yee* that disagreed with the *Silas* court's decision not to apply § 340.6's one-year limitations period retroactively. The *Cheong Yu Yee* court stated that the language of § 340.6 was "clear and unambiguous" that § 340.6 would govern a malicious prosecution claim against an attorney. (220 Cal.App.4th at p. 197, fn. 9.) The conclusion that the language of § 340.6 is "clear and unambiguous" was contradicted, however, by this Court's holding in *Lee, supra,* that the proper test to determine applicability of § 340.6 is not merely whether the defendant is an attorney, but instead whether the cause of action implicates

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[3] Latham also argues Plaintiffs waived the "prospective application" argument by not raising it in the trial court. Appellate courts have discretion to hear pure questions of law for the first time on appeal. Here, the issue is "a pristine issue of law" and requires no factual determinations for adjudication. Further, Latham has not demonstrated any prejudice by the argument not being raised in the trial court. (*Allen v. Stoddard* (2013) 212 Cal.App.4th 807, 811 [determining a statute of limitations issue for the first time on appeal].)

"an obligation the attorney has *by virtue of* being an attorney." (61 Cal.4th at p. 337.)[4]

Latham's second argument is there is no evidence Plaintiffs actually relied on any contrary settled law. This argument ignores the tolling agreement Plaintiffs entered into with Latham. (AA 208-212.) By the time Plaintiffs entered into the agreement, the first year of the limitations period had already passed. As Latham agrees, reasonableness is a question for the jury. (AB, p. 57.) A jury could conclude this agreement evidences that Plaintiffs relied on the established law that a two-year statute of limitations period applied to all malicious prosecution claims. It is improper for a court to adjudicate questions of fact at this stage in the litigation and a defendant can only succeed by defeating a plaintiff's evidence submitted as a matter of law. (*Anderson v. Geist* (2015) 236 Cal.App.4th 79, 86.) Latham has not done so.

Therefore, even if § 340.6's one-year limitations period applies to Plaintiffs' claim, it should not be applied retrospectively as Plaintiffs reasonably relied on the holding of *Stavropoulos* that malicious prosecution claims are governed by a two-year statute of limitations.

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[4] The reasoning in *Cheong Yu Yee* is more consistent with the reasoning of the *Lee* dissent that "any claim against an attorney" should be governed by § 340.6. (61 Cal.4th at p. 345 (dis. opn. of Corrigan, J.).)

D. Even If § 340.6 Applies, Plaintiffs Did Not Discover Evidence Latham Acted With Malice Until FLIR Raised The "Advice of Counsel" Defense.

Section 340.6 provides that the one-year limitations period does not begin to run until the plaintiff discovers the facts constituting the wrongful act. To establish a malicious prosecution claim, the plaintiff must show the defendant acted with malice. (*Slaney, supra,* 115 Cal.App.4th 306, 318.) This burden requires the plaintiff to "plead and prove actual ill will or some improper ulterior motive." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 224.) Further, it is improper to impute a client's malice to his or her attorney. (*Id.* at p. 225; *Zeavin v. Lee* (1982) 136 Cal.App.3d 766, 773 ["[T]he attorney is not the insurer of his client's conduct."].)

Here there was no evidence supporting the conclusion that Latham acted against Plaintiffs maliciously until FLIR raised an "advice of counsel" defense in the underlying action. (AA 773, 776.) Therefore, even if the applicable limitations period is one year, Plaintiffs' claim was timely as the period did not begin to run until May 6, 2010 when FLIR first raised the defense; with the period being tolled starting on April 5, 2011. (AA 208, 773.)

Latham argues Plaintiffs had all the facts they needed to bring a claim against Latham from the Santa Barbara court's Statement of Decision concluding the action had been prosecuted in bad faith. (AB, pp. 58-59.) Even though the Statement of Decision

may establish a lack of probable cause for the claim, it does not provide any evidence for establishing that Latham acted maliciously. Further, the Santa Barbara court's Statement of Decision concluding FLIR brought its claim against Plaintiffs in bad faith did not mention Latham once. The entire analysis was focused on actions taken by FLIR. (See AA 107-116.) Therefore, the Statement of Decision provided Plaintiffs no evidentiary basis for establishing that Latham, as opposed to FLIR, acted maliciously.

Latham also argues the Statement of Decision was sufficient to provide Plaintiffs with the evidence necessary to bring a malicious prosecution claim against Latham because malice can be inferred. (AB, p. 59.) This argument ignores the fact that "the absence of any affirmative evidence of malice on the part of the attorneys precludes a successful malicious prosecution action against them." (*Daniels, supra,* 182 Cal.App.4th 204, 227, fn. 7.) Further, as defendants in a malicious prosecution action are protected by the anti-SLAPP statute, a mere inference of malice might not be sufficient to prevent the claim from being dismissed at the early stages of litigation, thereby necessitating Plaintiffs discover "affirmative" evidence of malice prior to bringing a claim.

Plaintiffs also argued in their opening brief that they were unable to discover evidence of Latham's malice due to the Attorney-Client Privilege. (OB, p. 41.) *Latham does not respond to this argument.* A contention raised in an appellant's brief to which the respondent makes no reply will be deemed submitted on the appellant's brief. (*California Ins. Guarantee Ass'n v. Workers' Comp. Appeals Bd.* (2005) 128 Cal.App.4th 307, 316, fn. 2.)

Therefore, because there was no evidence that Latham maliciously prosecuted Plaintiffs without probable cause until FLIR raised its "advice of counsel" defense, Plaintiffs claim was timely.

CONCLUSION

For the foregoing reasons and for the reasons explained in plaintiffs' opening brief on the merits, the dismissal of this action under the anti-SLAPP statute should be reversed.

Dated: May 4, 2016

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