

PARRISH v. LATHAM & WATKINS

S228277

Supreme Court of California

August 5, 2015

Reporter

2015 CA S. Ct. Briefs LEXIS 2141

WILLIAM PARRISH and E. TIMOTHY FITZGIBBONS, Plaintiffs and Appellants, vs. LATHAM & WATKINS, LLP and DANIEL SCHECTER, Defendants and Respondents.

Type: Petition for Appeal

Prior History: 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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Title

Petition for Review

Text

ISSUE PRESENTED

Whether the "interim adverse judgment rule" insulates a law firm from any liability for malicious prosecution because a summary judgment motion was denied in the underlying action unless the malicious prosecution plaintiff can establish the summary judgment denial was procured by actual "fraud" or "perjury," even though (1) the summary judgment denial was unquestionably procured by materially false facts and (2) the underlying action was found to be both objectively and subjectively specious, or in the alternative was the Court correct in [Slaney v. Ranger Insurance Co. \(2004\) 115 Cal.App.4th 306](#) (which the Court of Appeal in this case rejected), so that it is appropriate to examine the circumstances of the underlying action after the [*2] denial of summary judgment to determine whether that action was initiated or prosecuted without probable cause?

INTRODUCTION: WHY REVIEW IS WARRANTED

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

product of "fraud" or "perjury." ¹*Not only is this conclusion directly contrary to Slaney, it is also contrary to Presiding Justice Klein's earlier published opinion in this very case, which was vacated upon grant of rehearing following Justice Croskey's death.*

[*3]

Review is warranted to resolve this direct conflict in the Court of Appeal and to re establish that it is proper to consider circumstances beyond whether there was fraud or perjury in determining whether the earlier denial of summary judgment conclusively establishes probable cause. This case presents a prime vehicle for this Court to establish such a rule. (See Cal. Rules of Court, rule 8.500(b)(1) [Review warranted "When necessary to secure uniformity of decision or to settle an important question of law."])

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

In the Underlying Action, the trial court rendered express findings, later affirmed by the Court of Appeal in a published decision, that the action was both objectively specious and prosecuted with subjective [*4] bad faith. ([*FLIR Sys., Inc. v. Parrish \(2009\) 174 Cal.App.4th 1270, 1275.*](#)) Based upon these express findings the trial court in the Underlying Action awarded, and the Court of Appeal affirmed, attorney's fees under Civil Code section 3426.4. *Importantly, the Court concluded that the denial of summary judgment in that action did not preclude sanctions because the expert declarations submitted in support of the summary judgment opposition were materially false.*

Plaintiffs subsequently initiated this action for malicious prosecution against Latham and one of its partners who prosecuted the underlying action. Latham filed a special motion to strike raising the same argument (among other things) that was rejected in the underlying action, namely that under the interim adverse judgment rule, it had probable cause as a matter of law to initiate and prosecute the Underlying Action because the trial court in the Underlying Action had denied a defense motion for summary judgment. Plaintiffs explained that this argument failed because the trial court and the Court of Appeal in the underlying action each concluded that the actions was prosecuted in bad faith and that the [*5] claims were subjectively and objectively specious and because the evidence submitted in opposition to the summary judgment motion was false and fraudulent.

In its second published opinion in this matter on this issue, the Court of Appeal directly contradicted its earlier published opinion written by Justice Klein only months prior and then proceeded to express reject another published opinion from the Second District ([*Slaney v. Ranger Insurance Co. \(2004\) 115 Cal.App.4th 306.*](#)) In so doing, this Court concluded that unless the evidence submitted in opposition to a summary judgment motion in the underlying action can be labeled as "perjury" or "fraud" (it can be here), then as a matter of law, a ruling in the underlying action denying summary judgment conclusively establishes probable cause such that no malicious prosecution claim can lie. The Court then failed to address Plaintiff's extensive arguments that the evidence submitted in opposition to the summary judgment in the underlying action was the product of fraud or perjury. (See, e.g., AOB at pp. 37-38; ARB at pp. 9-12.)

But as explained in this Petition, the Court of Appeal expanded the application of the interim [*6] adverse judgment doctrine well beyond its boundaries. That doctrine simply requires that there be "unfair conduct" which may be but is not limited to fraud or perjury in order to rebut the presumption of probable cause. When a lawyer submits materially false evidence (such as the expert declarations here) to support a legally untenable claim (as the underlying trial court and Court of Appeal found) then there is at least a triable issue of fact whether there has been "unfair conduct" sufficient to rebut the presumption of probable cause and defeat an anti-SLAPP motion. Probable cause is based on an objection test, and thus

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

in order to establish lack of probable cause the malicious prosecution plaintiff need only show either no reasonable law firm would have thought the claim tenable. Yet, under the Court of Appeal's opinion, where the underlying plaintiff survived summary judgment, the malicious prosecution plaintiff must go even further and demonstrate that the law firm secured the summary judgment denial through actual fraud or perjury. This is a significant departure from the law.

The Court's opinion, if allowed to stand, will cause considerable mischief. If, in the immediate aftermath [*7] of a summary judgment denial in the underlying action, the party prosecuting that action becomes aware that there is no probable cause for the continued prosecution of that action then it will know that it could nevertheless be insulated from malicious prosecution for that continued prosecution unless it can be established that the evidence submitted in opposition to the summary judgment motion was the product of fraud or perjury. The effect of such a rule is that parties who believe they are being victimized by a maliciously prosecuted action will be deterred from attempting to minimize their damages by moving for summary judgment. They will know that if the motion is denied (whether rightly or wrongly) then they will likely be precluded from seeking recovery for malicious prosecution no matter how apparent it is in the aftermath of the summary judgment denial that the underlying action should not be prosecuted.

Review is warranted in the interests of justice and to resolve the present conflict in the law created by the Court of Appeal opinion in this case and to re establish that the interim adverse judgment rule is not as rigid as the Court of Appeal held here.

STATEMENT OF FACTS

A. Background.

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

Before leaving their employment with FLIR, Parrish and Fitzgibbons discussed with FLIR the possibility of allowing FLIR to participate in the new business venture, and proposed outsourcing [*9] bolometer production to a third party. (AA 772, 775.) Parrish and Fitzgibbons also offered FLIR a non-controlling interest in their new business venture, but FLIR rejected the offers. Accordingly, on or about January 6, 2006, having completed their non-compete agreements, Parrish and Fitzgibbons ended their employment with FLIR. (*Ibid.*)

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

Fearful of losing sales, customers and revenue, and unwilling to accept competition from Parrish and Fitzgibbons, FLIR, represented by Latham, initiated the malicious and bad faith Underlying Action in June 2006. (AA 300, 773, 776.) The Underlying Action was tried before the [*10] Hon. James Brown in December 2007. On June 13, 2008, Judge Brown issued a 25-page Statement of Decision and entered judgment in favor of Parrish and Fitzgibbons and against Latham's client FLIR. (AA 93.) Judge Brown found that FLIR "initiated and continued to pursue [the] action in bad faith and primarily for the anticompetitive motive of preventing [Parrish and Fitzgibbons] from attempting to create a new business in competition with [FLIR]." (AA 108.)

Judge Brown further held that "[FLIR's] suspicions regarding [Parrish and Fitzgibbons] were not sufficient to justify the filing of the lawsuit on June 15, 2006" and that FLIR and Latham "proceeded on a theory that Defendants would misuse trade secret[s] in the future, [even though] that 'inevitable disclosure' type of theory is not supported by California law." (AA 112.)

Judge Brown further held that FLIR "initiated and maintained the lawsuit in bad faith in that [FLIR] did not have a sufficient basis to initiate and maintain the lawsuit and failed to take reasonable measures to allay their fears by learning more about [Parrish and Fitzgibbons'] plans" (AA 114) and that FLIR "knew, or should have known, that they [*11] did not have a sufficient evidentiary basis to initiate the lawsuit." (AA 115.)

He also rejected argument that the earlier denial of summary judgment prevented a finding of bad faith. Importantly, he specifically found that FLIR (and Latham) "opposed the summary judgment motion with expert declarations suggesting that there was a scientific methodology to predict the likelihood of trade secret misuse." ([FLIR Systems, 174 Cal.App.4th at 1282.](#)) Judge Brown relied on these expert declarations in denying summary judgment, specifically citing them as the evidence giving rise to a triable issue. (AA 87 ["plaintiffs have produced sufficient evidence, for example with the Neikirk and Murphy declarations, to raise a triable issue as to misappropriation of trade secrets."].) The trial court in the Underlying Action was deceived by Latham because, as the trial court later found, the idea that there is a scientific methodology to predict the likelihood of trade secret misuse was a "materially false fact" - "[a]t trial, [FLIR's] experts admitted there was no valid scientific methodology to predict trade secret misuse and agreed that no trade secrets were misappropriated. [*12]" ([FLIR Systems, Inc., 174 Cal.App.4th 1272;](#) AA 361, 781-782 [in sealed volume].)

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

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

In response to the lawsuit, Latham filed a special motion to strike under Code of Civil Procedure section 425.16. Latham argued that it satisfied the first prong of the anti-SLAPP statute because a claim for malicious prosecution implicates protected activity. (AA 54.) Latham then argued that Plaintiffs did not have a probability of prevailing on the merits sufficient to satisfy the second prong of the anti-SLAPP statute because Plaintiffs' claims were time barred under the one year statute [*13] of limitations applicable to actions for legal malpractice. (Code Civ. Proc, § 340.6.) Latham claimed this statute applies to all actions against lawyers relating to services they provide, including actions for malicious prosecution brought by a non-client and former adversary. (AA 64.)

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

In their opposition to the motion to strike, Plaintiffs argued they were able to establish a probability of prevailing on the merits because:

There was ample evidence that Latham initiated the underlying action and continued its prosecution without probable cause. This evidence included the same facts that led the trial court and the Court of Appeal in the Underlying Action to conclude that action was both objectively [*14] specious and prosecuted with subjective bad faith. In addition, Plaintiffs subsequently learned that FLIR had admitted that they prosecuted that Underlying Action based upon the advice of Latham. (AA 253-259.)

Plaintiffs also argued that this action was not time barred under Code of Civil Procedure section 340.6 because: (1) the two year statute of limitations contained in section 335.1 applies; (2) the text, history of purpose of section 340.6 demonstrates

that it was not intended to apply to third party actions for malicious prosecution against a lawyer and (3) even if section 340.6 did apply, then Plaintiffs' action was timely under the delayed discovery doctrine because Plaintiffs did not have cause to allege that Latham was responsible for the malicious prosecution of the underlying action until Latham's former clients asserted that they were acting on the advice of their counsel. (AA 259-264.)

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

During the pendency of plaintiffs' appeal, the Court decided [*Roger Cleveland Golf Company, Inc. v. Krane & Smith, APC* \(2014\) 225 Cal.App.4th 660](#), [*15] concluding that Code of Civil Procedures, section 340.6 does not apply to malicious prosecution claims against an adverse lawyer. Thus, the focus of the appeal shifted to Latham's assertion that the denial of summary judgment in the underlying action conclusively established that the action was initiated and prosecuted with probable cause even though the underlying trial court rendered express findings, affirmed by the Court of Appeal in a published decision, that the underlying action was both objectively specious and prosecuted with subjective bad faith and even though those courts concluded that materially false evidence was submitted in opposition to the summary judgment motion. ([*FLIR Sys., Inc. v. Parrish* \(2009\) 174 Cal.App.4th 1270, 1275.](#))

The Court of Appeal in this case initially issued a published decision reversing the anti-SLAPP dismissal and concluding that the denial of summary judgment in the underlying action *did not* conclusively establish probable cause because (1) the underlying trial court and the Court of Appeal each concluded that the underlying action was objectively and subjectively specious and (2) the summary judgment was denied as [*16] a result of materially false expert declarations. That opinion was filed one day before Justice Croskey died and was signed by then Presiding Justice Klein and Justice Kitching, only.

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

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

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Plaintiffs filed a petition for rehearing pointing out that in fact they had extensively argued fraud or perjury in their briefs (see, e.g., AOB at pp. 37-38; ARB at pp. 9-12.) and, in any event, the fact that Latham submitted materially false evidence in opposition to the summary judgment motion and the fact that the underlying trial court and the Court of Appeal concluded that the underlying action was objectively and subjectively specious, were sufficient to establish that the underlying action was not prosecuted with probable cause.

The Court of Appeal denied the Petition for Rehearing and this Petition for Review follows.

ARGUMENT

REVIEW IS NECESSARY FOR THIS COURT TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEAL CREATED BY THE OPINION IN THIS CASE AND TO CONCLUDE THAT "FRAUD" AND "PERJURY" ARE NOT THE ONLY TWO EXCEPTIONS TO THE INTERIM ADVERSE JUDGMENT RULE UNDER WHICH DENIAL OF SUMMARY JUDGMENT IN THE UNDERLYING CASE CONCLUSIVELY ESTABLISHES PROBABLE CAUSE.

The Court of Appeal concluded that, under the interim adverse judgment rule, the summary judgment denial in the underlying action conclusively established probable cause unless plaintiffs could establish [*18] either that the evidence

² The panel which rendered the initial published opinion addressing Latham's Anti-Slapp motion was comprised of Presiding Justice Klein (who authored that opinion and who has since retired), Justice Croskey and Justice Kitching. The panel who rendered the current opinion is Presiding Justice Edmon, Justice Kitching and Justice Pro Tem Egerton.

Latham submitted in opposition to the underlying summary judgment motion was the product of fraud or perjury. The Court reasoned that (1) such a rigid rule was mandated by this Court's opinion in Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th 811 and that (2) the more flexible approach employed by Slaney v. Ranger Insurance Co. (2004) 115 Cal.App.4th 306 was inconsistent with the probable cause requirement of the malicious prosecution standard. As explained, the Court of Appeal was incorrect on both grounds. As an initial matter, however, it is important to understand the genesis and the development of the interim adverse judgment rule.

A. The interim adverse judgment rule.

In order to state a malicious prosecution claim the plaintiff must establish that the underlying action was either initiated or prosecuted without probable cause. For purposes of this Petition it should be remembered that a claim for malicious prosecution is *not limited* to a cause of action that lacked probable cause *when the complaint was filed*. In Zamos v. Stroud (2004) 32 Cal.4th 958, 970, this Court determined [*19] that the standard for probable cause "will apply to the continuation as to the initiation of a suit." Thus, "an attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause." (*Ibid.*) Moreover, "[b]ecause an attorney will be liable only for the damages incurred from the time the attorney reasonably should have caused the dismissal of the lawsuit after learning it has no merit, an attorney can avoid liability by promptly causing the dismissal of, or withdrawing as attorney in, the lawsuit..." (*Id. at pp. 969-970.*)

"California courts have held that victory at trial, though reversed on appeal, conclusively establishes probable cause to bring the underlying action. (Wilson, supra, 28 Cal.4th at p. 817, 123 Cal.Rptr.2d 19, 50 P.3d 733, citing Bealmear v. So. Cal. Edison Co. (1943) 22 Cal.2d 337, 340, 139 P.2d 20; Carpenter v. Sibley (1908) 153 Cal. 215, 218, 94 P. 879; Holliday v. Holliday (1898) 123 Cal. 26, 32, 55 P. 703; Cowles v. Carter (1981) 115 Cal.App.3d 350, 356, 359, 171 Cal.Rptr. 269; Fairchild v. Adams (1959) 170 Cal.App.2d 10, 15, 338 P.2d 191; [*20] see also Crescent Live Stock Co. v. Butchers' Union (1887) 120 U.S. 141, 149-151, 7 S.Ct. 472, 30 L.Ed. 614.) "The rationale is that approval by the trier of fact, after a full adversary hearing, sufficiently demonstrates that an action was legally tenable. (Cowles, supra, at p. 358, 171 Cal.Rptr. 269.)" (Plumley v. Mockett (2008) 164 Cal.App.4th 1031, 1052.)

This presumption of probable cause is often referred to as the "interim adverse judgment rule." Prior to 1990, the cases concerning whether the resolution of the underlying action precluded the malicious prosecution plaintiff from claiming absence of probable cause were in the context of underlying judgments in favor of the malicious prosecution defendant that were either reversed on appeal or were challenged in the malicious prosecution action. It was in that setting, that it was recognized that if the underlying judgment was procured by fraud of a type that was not a sufficient to actually vacate that judgment (i.e. it intrinsic and not extrinsic fraud), then that fraud nevertheless may be sufficient to establish lack of probable cause. In Carpenter v. Sibley (1908) 153 Cal. 215, 217-18, [*21] this Court explained:

The rule that only extrinsic fraud may be made the basis of an action to set aside a judgment is a rule founded in necessity. It is to the interest of the state that there should be an end to litigation. If it were permitted that a litigant could maintain an action to overthrow a judgment upon the ground that perjured testimony had been employed against him, or upon any other ground than extrinsic fraud, litigation would have no end. Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. But this is very far from saying that, because the law denies to a litigant this particular form of redress for such an injury, it denies him any redress whatsoever. Certainly, if a man has procured an unjust judgment by the knowing use of false and perjured testimony, he has perpetrated a great private wrong against his adversary. If that judgment is in the form of a judgment of criminal conviction, it would be obnoxious to every one's sense of right and justice to say that, because the infamy had been successful to the result of a conviction, the probable cause for the prosecution was thus conclusively established [*22] against a man who had thus been doubly wronged. Therefore, while it may be true that the fraud alleged in this complaint is not such a fraud as would support an action for the setting aside of a judgment, it is still a fraud which will support an action for a remedy for the private wrong thus committed. So we find it laid down that the general rule now is 'that if the declaration or complaint shows a conviction of the plaintiff, *yet if it be averred that the conviction was procured by fraud, perjury, or subornation of perjury, or other unfair conduct on the part of the defendant, the presumption of probable cause is effectually rebutted.*' 13 Ency. Pl. & Prac. p. 449, and note; Spring v. Before, 12 B. Mon. (Ky.)

555;*Ross v. Hixon*, 46 Kan. 550, 26 Pac. 955, 12 L. R. A. 760, 26 Am. St. Rep. 123;*Crescent Live Stock Co. v. Butchers' Union*, *supra*.

(Italics added.)

It was not until *Roberts v. Sentry Life Ins.* (1990) 76 Cal.App.4th 375, 384, that a California court first recognized that interim rulings that do not resolve the underlying action in its entirety may also establish probable cause. And in the context [*23] 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 an exception to the rule. In particular, the *Roberts* Court concluded that:

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

The use of the words "for example" makes clear fraud and perjury are not the exclusive exceptions to the interim adverse judgment rule. This is reinforced [*24] by the recent opinion in *Cheong Yu Yee v. Cheung* (2013) 220 Cal.App.4th 184, 200-01, where the Court held:

Certain non-final rulings on the merits may serve as the basis for concluding that there was probable cause for prosecuting the underlying case on which a subsequent malicious prosecution action is based. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817-818, 123 Cal.Rptr.2d 19, 50 P.3d 733.) This is based on the notion that '[c]laims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.' (*Id. at p. 818, 123 Cal.Rptr.2d 19, 50 P.3d 733.*) Thus, for instance, the denial of a nonsuit motion and a subsequent plaintiff's jury verdict has been found sufficient to constitute probable cause, even though the trial court or appellate court later reverses that verdict. (*Cowles v. Carter* (1981) 115 Cal.App.3d 350, 356, 171 Cal.Rptr. 269; see *Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1052 [*25] "1053, 79 Cal.Rptr.3d 822 [designer's success before Board of Patent Appeals and Interferences established probable cause, notwithstanding the fact that designer's victory was reversed by appellate court].) Similarly, the denial of a defense summary judgment motion 'normally establishes there was probable cause to sue, thus barring a later malicious prosecution suit.' (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 384, 90 Cal.Rptr.2d 408 (*Roberts*); see also *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973, fn. 10, 12 Cal.Rptr.3d 54, 87 P.3d 802 [The denial of summary judgment normally precludes the trial court from finding that the lawsuit was frivolous for purposes of a malicious prosecution claim].)

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

Thus, under *Roberts* - when the adverse interim judgment is based on the denial of a pre trial motion - a subsequent determination that the earlier denial was based on "materially false facts" is sufficient to avoid the presumption of probable cause. It is therefore not the case, as the Court of Appeal in this case held, that fraud [*26] or perjury are the single recognized exception to the interim adverse judgment rule. Indeed, the recognition that falsity is sufficient to avoid the presumption of probable cause was expressly endorsed by this Court in *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973, fn. 10. There, the Court concluded that the denial of summary judgment in the underlying action did not conclusively establish probable cause under *Roberts* because there was a showing that the evidence which was introduced to create a triable issue of material fact was false.

Indeed in *Carpenter v. Sibley*, the very case where this Court recognized that extrinsic fraud was not necessary to avoid the interim judgment rule, there is also recognition that a "private wrong" such as "unfair conduct" on the part of the

malicious prosecution defendant may be enough to rebut the presumption of probable cause. Nevertheless, in its second published opinion here, the Court of Appeal incorrectly concluded that “the Supreme Court’s decision in [Wilson v. Parker, Covert & Chidester \(2002\) 28 Cal.4th 811, 123 Cal.Rptr.2d 19, 50 P.3d 733](#) (Wilson) is controlling and mandates a finding of probable cause [*27] under the interim adverse judgment rule.” (Parrish v. Latham & Watkins (Cal. Ct. App., June 26, 2015, B244841) 2015 WL 3933988, at *6.)

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

B. Wilson does not support the Court of Appeal’s conclusion.

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

It was in the context of explaining that the malicious prosecution plaintiff had made no effort in that case to establish any exception to the interim adverse ruling doctrine that the *Wilson* Court recited the passage on which the Court of Appeal in this case relied. That passage provides: “For the above reasons, we conclude [*28] the Kuzmich court’s denial of the defendants’ motion to strike under section 425.16 established probable cause to bring the Kuzmich action. Plaintiffs in the present malicious prosecution action have not attempted to show that that ruling was obtained by fraud or perjured testimony. Probable cause therefore existed as a matter of law for initiation of Kuzmich, negating a necessary element of the malicious prosecution action. As the Court of Appeal also concluded, the demurrers to that cause of action were therefore properly sustained.” (*Id.* at p. 30.)

Thus, contrary to what the Court of Appeal held, *Wilson* does not hold that fraud or perjury are the only permissible exceptions to the interim adverse judgment rule. Further, because the issue additional exceptions to the interim adverse judgment rule were not considered in *Wilson*, the opinion has no bearing on the issue. “It is well settled that language contained in a judicial opinion is “to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not there considered. [Citation.]” [Citations.]” ([People v. Banks \(1993\) 6 Cal.4th 926, 945.](#)) [*29] “Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” [Citation.]” ([Canales v. City of Alviso \(1970\) 3 Cal.3d 118, 128, fn 2.](#))

For example, in [People v. Superior Court \(Marks\) \(1991\) 1 Cal.4th 56, 64-65.](#) the court referenced a solid line of cases containing unequivocal language that the trial court lacks jurisdiction to proceed pending an express determination of the defendant’s competency. But the *Marks* court concluded that language was not controlling since “[d]espite their imperative tenor . . . none of the cited authorities squarely addressed a question of the trial court’s jurisdiction to proceed notwithstanding an erroneous failure to hold a competency hearing.” (See [People v. Myers \(1987\) 43 Cal.3d 250, 273-274](#) [even though the court in an earlier opinion retroactively applied a new principle of law, that case did not stand for the proposition that such retroactive application was appropriate since that was not an issue raised or resolved]; [McAdory v. Rogers \(1989\) 215 Cal.App.3d 1273, 1277](#) [*30] [manner in which the Court of Appeal earlier calculated maximum recovery under MICRA was not controlling since in that case there was no consideration of whether the method of calculation was proper.]

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

C. The Court of Appeal’s conclusion is at odds with the moorings of the probable cause element of the malicious prosecution standard.

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

The probable cause element of a malicious prosecution action requires an objective judicial determination of the “reasonableness” of the defendant’s prior lawsuit. The existence or absence of probable cause is a question of law to

be determined by the trial court from the facts. The question for the trial court is whether, on the basis of the facts known to the defendant, [*31] the prosecution of the prior action was legally tenable. (*Sheldon Appel, supra, 47 Cal.3d at pp. 868, 875, 886*; *Leonardini v. Shell Oil Co., supra, 216 Cal.App.3d at p. 567.*) When the prior action was objectively reasonable, the malicious prosecution defendant is entitled to prevail regardless of his or her subjective intent. "... If the court determines that there was probable cause to institute the prior action, the malicious prosecution action fails, whether or not there is evidence that the prior suit was maliciously motivated. [Citations.]" (*Sheldon Appel, supra, 47 Cal.3d at p. 875.*)

In analyzing the issue of probable cause in a malicious prosecution context, the trial court must consider both the factual circumstances established by the evidence and the legal theory upon which relief is sought. A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him. In making its determination whether the prior action was legally tenable, the trial court must construe [*32] the allegations of the underlying complaint liberally in a light most favorable to the malicious prosecution defendant. (*Leonardini v. Shell Oil Co., supra, 216 Cal.App.3d at p. 571.*) In all cases, probable cause is to be determined by an objective standard. If any reasonable attorney would have thought the claim made in the prior action tenable, then it is not lacking in probable cause and the defendant is entitled to judgment in the malicious prosecution action regardless of what the defendant's subjective belief or intent may have been. (*Sheldon Appel, supra, 47 Cal.3d at pp. 878-879, 885-886*; *Leonardini v. Shell Oil Co., supra, 216 Cal.App.3d at pp. 568-569.*)

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

Accordingly, under this standard, the issue is whether (1) Latham had a reasonable basis to believe that the facts (i.e. the expert declarations) it submitted in opposition to the underlying summary judgment motion were true and (2) even if it did have such a reasonable basis to believe in their truth, then whether Latham had a reasonable basis to believe that those facts supported a legally [*33] tenable claim.

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

The Court of Appeal did not explain how an action initiated and prosecuted in subjective and objective bad faith can, as a matter of law, been found as a matter of [*34] law to nevertheless have been initiated and prosecuted with probable cause. Rather, the Court engaged in a discussion of why it disagrees with *Slaney v. Ranger Insurance Co. (2004) 115 Cal.App.4th 306*, in which the Court concluded that the events in an action following the denial of a summary judgment were sufficient to rebut the presumption of probable cause.³

[*35]

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

Later, in the malicious prosecution action by Slaney, Ranger Insurance argued in its anti-SLAPP motion that denial of the first summary judgment motion precluded Slaney from showing lack probable cause. The *Slaney* Court rejected that argument, affirming the trial court's ruling that the subsequent finding in the underlying action that the cross-complaint was "without any substantive basis in law

Directly contrary to the published opinion previously issued by the Court and drafted by Presiding Justice Klein, the Court of Appeal stated: "the hindsight approach employed in *Slaney* is inconsistent with the principle that plaintiffs and their attorneys "have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious." (*Wilson, supra, 28 Cal.4th at p. 822, 123 Cal.Rptr.2d 19, 50 P.3d 733*, citing *Sheldon Appel, supra, 47 Cal.3d at p. 885, 254 Cal.Rptr. 336, 765 P.2d 498.*)" (Parrish v. Latham & Watkins (Cal. Ct. App., June 26, 2015, B244841) 2015 WL 3933988, at *11.)

However, and contrary to the Court of Appeal's conclusion, what transpired in the underlying action in the aftermath of the summary judgment is highly relevant to determining whether the underlying action was initiated or prosecuted without probable cause. For example, in the immediate aftermath of the summary judgment denial, the party prosecuting the underlying action may discover that its claim has no arguable merit and that it is both objectively and subjectively specious. Nevertheless, and in order to cause harm to the underlying [*36] defendant, this party may continue to prosecute the underlying action. Under the Court of Appeal's rigid holding in this case, so long as the party prosecuting the underlying action could establish that the evidence it submitted in opposition to the summary judgment motion was not the product of fraud or perjury, then that summary judgment denial conclusively establishes probable cause and the malicious prosecution action will forever fail - even though the underlying plaintiff clearly and knowingly continued to prosecute that action in the absence of probable cause.

Here, it was actually determined in the underlying action itself that the underlying claims were pursued in bad faith, were both objectively and subjectively specious and that the earlier denial of summary judgment did not insulate the underlying plaintiff from sanctions because the evidence that had been submitted in opposition to the summary judgment motion was materially false. Nevertheless, the Court of Appeal concluded plaintiffs could not possibly prevail on their malicious prosecution action. This cookie cutter approach to the interim adverse judgment rule is inconsistent with the development of that rule and the [*37] underpinnings of the no probable cause element of the malicious prosecution standard, and is not supported, let alone required, by this Court's previous decisions.

The effect of such a rule is that parties who believe they are being victimized by a maliciously prosecuted action will be deterred from attempting to minimize their damages by moving for summary judgment. They will know that if the motion is denied (whether rightly or wrongly) then they will likely be precluded from seeking recovery for malicious prosecution no matter how apparent it is in the aftermath of the summary judgment denial that the underlying action should not be prosecuted or maintained.

Review should therefore be granted so that this Court can re-establish the approach employed in *Slaney* (and in Justice Klein's original opinion in this case), which advances the purposes for the interim adverse judgment rule and the probable cause requirement and which prevents defendants from getting a "free pass" as to a malicious prosecution claim even when they have prosecuted an action in bad faith knowing that the claim is subjectively and objectively specious.

CONCLUSION

For the foregoing reasons, plaintiffs [*38] respectfully urge this Court to grant review.

Dated: August 4, 2015

**EAGAN AVENATTI, LLP, PANISH, SHEA & BOYLE, LLP
ESNER, CHANG & BOYER**

By: /s/ [Signature]

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Attorneys for Plaintiffs and Appellants William Parrish and E. Timothy Fitzgibbons

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/s/ [Signature]

and/or fact", along with the jury verdict for Roberts in the case-in-chief, was "sufficient to offset the first denial of the motion for summary judgment and support inferences of lack of probable cause and malice." (*Id. at 321.*)

Michael J. Avenatti

PROOF OF SERVICE

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

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