6th Civil No. H025069

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THOMAS M. SIEBEL,

Plaintiff and Appellant,

vs.

CAROL L. MITTLESTEADT and
E. RICK BUELL,

Defendants and Respondents.

Appeal from Santa Clara Superior Court, No. CV790935
Honorable Gregory H. Ward

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Instead of wrestling with the important policy questions that this appeal raises, the Respondents' Brief seems intent on insinuating that this appeal is really about Siebel's wealth and stature, which supposedly enabled him to strong-arm Christoffers into an unfair settlement that leaves Siebel free to pursue a vengeance suit against defendants.

But Siebel didn't start this fight. Christoffers and her lawyers did, and their willingness—even eagerness—to do so belies the fanciful notion that Christoffers was ever overpowered by Siebel's wealth and stature. In fact, from Siebel's perspective, his and SSI's wealth and stature were what motivated Christoffers' lawsuit. He seeks to prove at trial that Christoffers, with the help of her lawyers, identified a vulnerable period in SSI's development—its initial public offering—and strategically timed a baseless lawsuit to exploit the company's reporting requirements. (Appellant's Appendix ["AA"] 7-11.)

Ultimately, however, the primary question on this appeal is an entirely impersonal one: Whether Siebel met the favorable termination requirement for bringing a malicious prosecution suit.

Defendants' argument against favorable termination seeks a rote application of the rule that ordinarily a defendant who settles a case cannot thereafter sue for malicious prosecution. But defendants never address the rule's underlying reason: That because the settling defendant *avoids* a determination on the merits, the result does not "tend[] to indicate the innocence of the accused." (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 150.) That reason does not apply here because Siebel did *not* avoid a merits determination. Far from it: He fought Christoffers' claims through to a jury verdict and won. His victory is now memorialized in a final judgment

that reflects not only the opinions of two judges and a jury, but also Christoffers' own opinion when she voluntarily dismissed her sex discrimination claims. Defendants offer no rationale for how Christoffers' and Siebel's post-judgment settlement—one in which Siebel retained everything he won—could possibly justify the erasure of these merits determinations.

Siebel has demonstrated favorable termination and has negated probable cause as to all of the Six Counts—he has shown lack of factual probable cause as to what one defendant called "bogus" sex discrimination claims, and lack of legal probable cause as to the remainder of the Six Counts. The judgment therefore must be reversed.

I.

THE JUDGMENT IN THE CHRISTOFFERS ACTION ESTABLISHED SIEBEL'S FAVORABLE TERMINATION.

A. The Reasons For The Favorable Termination Requirement Compel The Conclusion That Siebel Received A Favorable Termination.

1. *Ferreira* and *Mattel* in perspective: *Mattel* is closer to our case, but neither is controlling.

Defendants' argument on favorable termination amounts to nothing more than "*Ferreira* should be followed." (Respondents' Brief ["RB"] 24, citing *Ferreira v. Gray, Cary, Ware & Freidenrich* (2001) 87 Cal.App.4th 409 ("*Ferreira*").) For all the reasons discussed in Siebel's Opening Brief, *Ferreira*'s analysis is too superficial to be persuasive. In any case, its unusual facts—a partially adverse judgment manipulated by settlement into a favorable judgment—are easily distinguishable. (Appellant's Opening Brief ["AOB"] 26-29.)

Siebel's case is much closer to *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179 ("*Mattel*"). Defendants' effort to neutralize *Mattel* erroneously reads the case to say that the claims Mattel settled were different from the claims on which it obtained summary judgment and on which it later based its malicious prosecution action. (RB 36-37.) Not so. Rather, the Court noted *this was Mattel's position*, and that the other side disagreed. (*Mattel*, *supra*, 99 Cal.App.4th at p. 1184.) The key point is that the Court considered the disagreement *irrelevant*, because the settlement rule had "no application to the facts of

this case." (*Id.* at p. 1191.) Rather, what mattered was that "judgment on the merits was entered in favor of" Mattel, thus allowing suit against plaintiff's attorneys, *regardless* of the fact that—as Christoffers did here—the plaintiff "ultimately resolved *his* participation in the underlying action" by a post-judgment settlement. (*Ibid.*, emphasis in original.)

While we believe that *Mattel* should guide the Court here, neither *Ferreira* nor *Mattel* binds this Court. (*In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409 ["there is no 'horizontal stare decisis' within the Court of Appeal"].) That is why the opening brief focuses on policy concerns. The proper question for the Court is, "What *should* the rule be?"

2. What should the rule be?

Defendants offer no satisfactory answer to the question, other than to cite decisions involving *pre-trial* settlements in which the original defendant avoided an adjudication by settling. (See RB 24-25; see also discussion of cases at AOB 22-23.)[1] Those cases are irrelevant. Far from avoiding an adjudication on the merits, Siebel defended himself against defendants' relentless prosecution of Christoffers' meritless claims for over two years—until Christoffers voluntarily dismissed her inflammatory and baseless sex discrimination claims, and two trial judges and a jury adjudicated the rest of her claims in Siebel's favor. (AA 135, 280, 302.)

Siebel's view of what the rule should be focuses on the reasons for the favorable termination requirement. The decisional law reveals that its purpose is to perform two specific and limited gate-keeping functions.

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[1] The most recent case on the subject, *Hurvitz v. St. Paul Fire & Marine Ins. Co.* (2003) 109 Cal.App.4th 918, was filed after Siebel's Opening Brief, but it, too, involves a pre-judgment settlement. (*Id.* at pp. 922-925.)

First, the requirement weeds out all the cases in which the malicious prosecution plaintiff was found guilty (or, in the civil context, liable) in the underlying action:

> "If the accused were actually convicted, the presumption of his guilt or of probable cause for the charge would be so strong as to render wholly improper any action against the instigator of the charge. The thought has also been expressed that the tort action under such circumstances would involve a collateral attack on the criminal judgment." (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 ("*Jaffe*"); see also *Babb v. Superior Court* (1971) 3 Cal.3d 841, 846 [recognizing *Jaffe*'s application to civil proceedings].)

This reason does not apply to Siebel, who neither seeks nor needs a second bite at the apple. He *won*.

Second, the requirement weeds out those cases where the malicious prosecution plaintiff won the underlying action on a technical or procedural ground (see, e.g., *Lackner v. LaCroix* (1979) 25 Cal.3d 747, 751-752 [no favorable termination when action dismissed on statute of limitations grounds]), and thus has not shown that his or her victory "tends to indicate the innocence of the accused" (*Jaffe*, *supra*, 18 Cal.2d at p. 150). Stated more affirmatively: "To show a termination in one's favor, a plaintiff must prove that *the court passed on the merits* of the charge or claim against him in such circumstances as to show one's innocence or non-liability, or show that the proceedings were terminated or abandoned at the instance of the [malicious prosecution] defendant in circumstances that fairly imply the plaintiff's innocence." (1 Harper, et al., The Law of Torts (3d ed. 1986) § 4.4, pp. 4:14-4:15, emphasis added; see also Dobbs, The Law of Torts

(2001) § 434, p. 1225 ["Maybe it would be more accurate to say that a disposition of the [prior] proceedings that *probably entailed some judgment about the merits* will count as a favorable termination," emphasis added].)

This second reason explains why the favorable termination requirement bars cases involving pre-judgment settlements: They occur before a court has finally ruled on the merits and therefore reflect ambiguously on the parties' view of the merits. (*Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1336.) Again, the reason does not apply here. Siebel not only won, but won on the merits.

As far as we can determine, no author or court (including *Ferreira*) has offered any rationale for a broader purpose or role for the favorable termination rule than there two reasons establish. Yet defendants, without offering even a hint of a policy-based rationale, seek to set the favorable termination bar higher. For them, it is not enough that the judgment in the Christoffers action "tends to indicate" Siebel's non-liability (*Jaffe*, *supra*, 18 Cal.2d at p. 150), or "probably entailed some judgment about the merits" (Dobbs, *supra*, § 434, p. 1225). Rather, defendants evidently believe the judgment must dispel any possible doubt about the issue. Thus, in their view, whenever a losing plaintiff casts theoretical doubt on a judgment by appealing, the prevailing defendant must defend his favorable judgment to a final appellate decision that vindicates him. (RB 55-56.) That, in turn, necessarily means the defendant must reject any settlement on appeal, no matter how favorable to him, and no matter how strongly the parties express their intent not to modify the defendant's favorable judgment. Nothing in the reasons for the settlement rule justifies imposing such a heavy burden on the malicious prosecution plaintiff.

B. Because Defendants Misconstrue Siebel's Arguments, They Overlook The Importance Of The Judgment In Determining Favorable Termination.

Entry of judgment is a defining moment. Unless overturned or modified on appeal, the judgment stands as "the 'last word' of the rendering court." (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 911 [addressing collateral estoppel], internal quotation marks and emphasis omitted.)

A settlement on appeal does not diminish the judgment's authority. "There will be no inference that the jury or trial court erred." (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 283; see also *In re Sade C.* (1996) 13 Cal.4th 952, 994 [dismissal of abandoned appeal by appellate court does not affect presumption that judgment is correct].) Nor does the settlement affect the judgment's finality. Rather, "the trial court judgment reemerges with sufficient finality to permit the application of collateral estoppel." (*Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 937; see also *Producers Dairy Delivery Co.*, *supra*, 41 Cal.3d at p. 911 [extending *Sandoval*'s reasoning to a situation where the parties settle after an appellate court decision and the time for Supreme Court petition to review has expired].)

Defendants argue that considerations of res judicata and collateral estoppel are irrelevant to the favorable termination analysis, citing *Dalany v. American Pacific Holding Corp.* (1996) 42 Cal.App.4th 822, 829. (RB 30.)[2] *Dalany*, however, was addressing an entirely different issue:

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[2] Defendants also rely on *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 825, but *Wilson* discussed res judicata in the context of

(continued...)

whether a *pretrial* stipulated judgment could serve as a favorable termination. Not surprisingly, the court found that it could not. That the judgment could operate as res judicata did not change its basic nature as a resolution that cast no light on the merits of the plaintiff's claim.

Siebel has no quarrel with *Dalany*. He is not saying that res judicata is the test of a favorable termination. Rather, he is saying that a final judgment on the merits is a favorable termination. To the extent that the judgment has res judicata effect, it underscores the judgment's finality and its significance as the "'last word' of the rendering court" (*Producers Dairy Delivery Co.*, *supra*, 41 Cal.3d at p. 911)—something the parties cannot alter merely by settling afterwards.

Defendants characterize Siebel's argument as saying "that an action can be divided into two separate and distinct parts, *i.e.*, trial and appeal," such that once there is a judgment at the trial court level for the defendant "the ball game has ended, *i.e.*, there is a favorable termination regardless of what happens on appeal." (RB 30-31.) Not quite.

Indisputably, the favorable termination calculus would change if the appellate court reversed the judgment (*Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337, 344-345) or affirms on the merits a judgment originally based on procedural grounds (*Ray v. First Federal Bank* (1998) 61 Cal.App.4th 315, 318-321). Here, however, the appellate court never decided anything because the parties dismissed their appeals.

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[2] (...continued)
probable cause, not favorable termination. *Wilson* held that probable cause could be established on the basis of an interim trial-court ruling in the underlying action, even if that ruling that did not have collateral estoppel effect. (*Ibid.*) That is not Siebel's argument, and the Court's analysis has no bearing here.

Siebel's point is that when the parties settle after judgment and *before* the appellate court rules (especially when, as here, they settle in a way that does not affect the underlying judgment, and they make clear they have no intention to limit malicious prosecution rights), then it is the judgment obtained in the trial court that becomes the favorable termination *of the entire proceeding*. (AOB 23-24.) As the Supreme Court has stated, that final judgment is "'the criterion by which to determine who was the successful party in such proceeding.'" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 685.) Defendants have not provided any convincing reason why *Crowley* should not apply here.[3]

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[3] In a different decision, and in a footnote, the California Supreme Court cited the pre-trial settlement cases when it declined to recognize a new tort of "malicious defense" proposed by legal commentators. (*Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 794, fn. 9.) The Court went on to add in dicta (as defendants acknowledge, RB 25, fn. 92) that even if such a cause of action existed, the *Coleman* plaintiffs "in all probability" would not have prevailed, since they opted to settle *on appeal*. (41 Cal.3d at p. 794, fn. 9.) The Court's reasoning is consistent with the reason for the settlement rule, because the *Coleman* plaintiffs avoided a merits determination *of the appeal*, and it was *the appeal* that they claimed defendants frivolously initiated. *Coleman*'s reasoning does not reach our case, because here the settlement occurred *after* the relevant merits determinations.

C. None Of Defendants' "Fairness" Concerns Justifies Creating New Substantive Limits On Siebel's Right To Bring His Malicious Prosecution Action.

Instead of focusing on policy questions, defendants seek to show in Section V of their brief that it would be somehow unfair to allow Siebel to call them to account for their wrongful conduct. They offer no reasoned basis for this approach, relying instead on insinuations about Siebel's character and motives that are not only unsupported by any record citations but also irrelevant to any issue before the Court.

1. Siebel did not force Christoffers to maintain the attorney-client privilege.

From its first paragraph onward, defendants' brief focuses on Siebel and SSI's wealth and stature, apparently in order to suggest that Siebel somehow bullied Christoffers into settling a meritorious appeal. His motive, defendants divine without any record support, was to avoid what they predict would have been, for him, an embarrassing reversal that would need to be disclosed to shareholders. (RB 56-57.) Apparently lost on defendants is the fact that Siebel saw the litigation through trial and judgment without succumbing to any such concerns. (RB 57.) They do not suggest why these supposed concerns would suddenly move him to settle after judgment.[4]

As we explain in more detail in Section D below, the parties' settlement motivations are irrelevant to the question of whether Siebel

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[4] They also do not acknowledge the inference that Christoffers' willingness to capitulate on appeal on terms entirely favorable to Siebel in exchange for a release from further liability underscores her utter lack of faith in her appeal and legitimate fear of being held accountable for her actions.

obtained a favorable termination. Besides, defendants' speculation about Siebel's motivations ultimately says more about themselves than Siebel. It is an implicit admission that defendants believe that a strategy of publicly embarrassing Siebel, "a senior executive of a multi-billion dollar company with federal securities reporting obligations," would be an effective one. (RB 56.) From Siebel's perspective, that was precisely the strategy behind Christoffers' lawsuit. Siebel seeks to prove at trial that Christoffers, with the help of her lawyers, identified a vulnerable period in SSI's development—its initial public offering—and strategically timed a baseless lawsuit to exploit the company's reporting requirements. (AA 7-11.)

Defendants nevertheless insist that Siebel somehow used his wealth and stature to manipulate Christoffers into agreeing not to waive the attorney-client privilege, and they suggest he will financially ruin her if she breaks her agreement. (RB 42-43.) The record supports no such inference. What it shows is that Christoffers, with the advice of her new counsel who approved the settlement (AA 86), agreed not to cooperate or provide evidence or testimony in any dispute involving SSI or Siebel "unless compelled by lawful subpoena or other order of a court of competent jurisdiction."[5] (AA 74.) The sum total of Christoffers' agreement was that, having obtained her release, she would not surreptitiously meddle in SSI and Siebel's legal affairs, including—but not limited to—this malicious prosecution suit. But nothing prevents her from assisting anyone she chooses, as long as she does so above board—pursuant to subpoena in a deposition or at trial, where she is subject to cross-examination.

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[5] Christoffers' new counsel for purposes of settlement, Susan Christian, certified that she "reviewed this Agreement with Debra S. Christoffers and that she has indicated that she understands its terms and effect and that she enters into it knowingly and voluntarily." (AA 86.)

2. The hypothetical outcome of Christoffers' appeal is irrelevant to the historical fact that there is a final judgment on the merits in Siebel's favor.

Defendants argue that if Siebel truly wanted to save his favorable termination, he should have defended Christoffers' appeal to an appellate decision—which, they claim, he would have lost. (RB 56.) Their argument fails at several levels:

a. It is based on assertions regarding jury instructional error in the trial of Christoffers' fraud claims. Defendants cite nothing in the record that supports their assertions—because there is nothing. This Court should therefore disregard their argument. (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29-30; Cal. Rules of Court, rule 14(a)(1)(C) and (2)(C).)

b. Christoffers' fraud claims (Counts 7 and 8) are not among the Six Counts that make up Siebel's malicious prosecution claims. A hypothetical reversal on those two counts would not affect his favorable termination on the Six Counts at issue here. (See discussion at AOB 20.)

c. The favorable termination element is not concerned about the hypothetical outcome of an appeal; rather, it focuses on "historical fact." (*Ray*, *supra*, 61 Cal.App.4th at p. 320.) The irrelevance of an abandoned appeal appears from the fact that if Christoffers had not appealed at all, Siebel indisputably would have had a favorable termination. (Prosser, Law of Torts (4th ed. 1971) § 119, p. 838; *Feld v. Western Land & Development Co.* (1992) 2 Cal.App.4th 1328, 1334.) Christoffers could not erase that favorable termination by doing functionally the same thing—appealing then dismissing her appeal. That action, even if pursuant to a settlement, does not vacate the judgment, let alone reverse it. (See I.B, *ante*; see also

AOB 24.) Siebel's non-liability remains the final, adjudicated, historical fact.

Having walked away from her appeal after giving Siebel everything he won below, Christoffers could not deny that the litigation terminated favorably to Siebel, and her attorneys can be in no better position. They are bound by their client's decision not to prosecute her appeal just as if she had not appealed in the first place. Indeed, any other result would allow malicious prosecutors to immunize themselves by frivolously appealing and then extracting nuisance-value settlements. For example, a losing plaintiff could offer to drop her appeal for a dollar. Even assuming the defendant had the financial wherewithal to respond to the appeal, a favorable termination rule that forced him to turn down that offer and rack up further defense fees to defend his judgment to a final appellate resolution would unjustifiably waste judicial and litigant resources. To paraphrase one appellate court, it would be a "sad day" if a litigant were "virtually compel[led]" to "continue his litigation in order to place himself in the best posture" for a malicious prosecution action. (*Oprian*, *supra*, 220 Cal.App.3d at pp. 344-345.) Yet that is the rule defendants advocate. (RB 55-56.)

It is ironic that defendants, who paint themselves and Christoffers as oppressed victims of Siebels' wealth and stature, advocate a rule that could put malicious prosecution actions out of the reach of all but the wealthy. Defendants' rule would require a prospective malicious prosecution plaintiff to see an appeal through to conclusion before suing. Since chances are that only the wealthy could afford such a luxury, the rule would create an imbalance of power: The threat of malicious prosecution could no longer "place restraint on a would-be plaintiff while furnishing protection to

a wrongfully sued defendant" (*Norton v. Hines* (1975) 49 Cal.App.3d 917, 922) in any situation in which the plaintiff has the resources to pursue an appeal but the defendant does not. Under the rule defendants propose here, economic necessity could force a victorious but impecunious defendant to forfeit a malicious prosecution rather than face the cost of even a frivolous appeal by the plaintiff. That the positions happen to be reversed here does not lessen the potential of defendants' rule to foster abuse of the weak by the powerful.

3. Like any tort victim, Siebel has the right to seek damages for injuries suffered at defendants' hands.

The only support defendants cite for their claim that Siebel "suffered no economic damages" is the judgment in the Christoffers action. (RB 57.) But Siebel was the *defendant* in that action. All the judgment could do was exonerate him. The point of his malicious prosecution action is to recover the damages he incurred defending himself against a baseless suit.

Likewise unsupported is defendants' claim that Siebel "did not spend a dime" defending himself in the Christoffers action. (RB 55.) The absence of a record citation for this claim is sufficient reason for the Court to disregard it. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1249 ["Of course, we cannot consider on appeal evidence that is not in the record"].) And even if the claim were true, any amounts paid by insurance would be irrelevant in light of the collateral source rule. (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 10 [defendants may not "avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance"]; Evid. Code, § 1155.) Additionally, Siebel seeks not just defense fees, but compensation for loss of substantial personal time spent defending himself,

as well as punitive damages. (AA 17-18; see *Babb*, *supra*, 3 Cal.3d at p. 848, fn. 4 [listing range of damages potentially recoverable for malicious prosecution]; *Crowley*, *supra*, 8 Cal.4th at p. 693 [identifying compensable monetary, psychological, and reputational harms]; *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50-51, 59 [same].)

Defendants also rely on the fact that "there was no judgment against Mittlesteadt and Buell in the trial court." (RB 57.) True, but irrelevant. It is well settled that non-party attorneys may be sued for malicious prosecution. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 886 [attorneys may be liable for malicious prosecution where they have no probable cause to bring suit on behalf of their client].) Defendants had both a civilly enforceable duty and an ethical duty not to misuse the courts by bringing an unjustifiable and oppressive suit against Siebel. (*Norton*, *supra*, 49 Cal.App.3d at p. 922; Bus. & Prof. Code, § 6068, subd. (c) [it is attorney's duty "(t)o counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just"]; Cal. Rules of Prof. Conduct, rule 3-200 ["member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is . . . [t]o bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person"].)

D. At A Minimum, There Are Triable Issues Of Fact Warranting Further Discovery.

In Section VI of their brief, defendants argue there is no need for Siebel to take additional discovery to determine the facts and circumstances underlying the Christoffers settlement. (RB 58.) Siebel agrees, but for a different reason. In his view, settlement after an entirely favorable

judgment is irrelevant to the favorable termination question. (See Section B, *ante*.)

If, however, the Court concludes that there is some middle ground—if it agrees that a post-judgment settlement is substantially different from a pre-judgment settlement, but nevertheless believes that a post-judgment settlement should play some role in determining whether there was a favorable termination—then the correct disposition of this appeal is a reversal with a direction to allow additional discovery regarding the circumstances of the settlement. Siebel must have the opportunity to show that, as a factual matter, the settlement in the Christoffers action had no bearing on the merits of Siebel's judgment. Siebel has already done this to some extent by showing that the parties settled in such a way that Siebel obtained every penny of his cost judgment. (AA 68-69.) And, to make it perfectly clear there was no compromise of that judgment, the parties added a provision that nothing in the settlement was intended to modify his favorable termination.[6] The agreement reflects an unstated understanding that Siebel was agreeing to a settlement only so that he could immediately proceed against those who he believes are the real culprits—Christoffers' attorneys—without wasting the parties' and court's time and money on a useless appeal.

While courts do not normally look to the circumstances or motivations affecting a *pre-judgment* settlement (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 29), the reasons for that reluctance do not exist in

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[6] "Nothing in this Agreement is intended to modify, or does modify, the final termination of the Action entered in favor of Siebel for purposes of pursuing claims against Buell or Mittlesteadt, or otherwise prevent Siebel from pursuing any claims against Buell or Mittlesteadt that he may have related to the Judgment in this Action." (AA 74.)

a post-judgment context where there has been a final merits determination by a judge or jury. If a post-judgment settlement matters at all, it can only be because the settlement reflects the parties' assessment that the judgment is somehow infirm and does not "tend[] to indicate the innocence of the accused." (*Jaffe*, *supra*, 18 Cal.2d at p. 150.) But if Siebel's presumptively correct judgment can be undermined in this way, it should be *defendants'* burden to show why, by offering something more than the mere fact of the settlement itself and bald speculations about the parties' motives. And Siebel must have the right to respond.

E. Siebel Received A Favorable Termination As To Christoffers' Sex Discrimination Claims.

Christoffers voluntarily dismissed her three sex discrimination claims (Counts 2-4) before trial. (AA 304.) No matter what this Court decides as to the other Six Counts, Siebel received a favorable termination as to these three claims. (AOB 19-21.)

When Christoffers voluntarily dismissed her sex discrimination claims on the eve of trial, she implicitly conceded their lack of merit. (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185 [voluntary dismissal of action is an implicit concession of its lack of merit], disapproved on other grounds in *Sheldon Appel Co.*, *supra*, 47 Cal.3d at pp. 882-883.) This inference is bolstered by evidence of her own counsel's admission the claims were "bogus." (AA 423-424.) Christoffers' dismissal therefore operated as a partial favorable termination upon which Siebel could properly predicate his malicious prosecution action. (*Crowley*, *supra*, 8 Cal.4th at pp. 685-686 [partial favorable termination may support malicious prosecution claim]; *Sierra Club Foundation v. Graham* (1999) 72

Cal.App.4th 1135, 1152-1153 [following *Crowley* to recognize partial termination of severable claims]; see also cases at AOB 19-20.)

Defendants respond that Christoffers' sex discrimination claims were not independently actionable, because they are bundled with the other Six Counts into the same primary right—in their words, "the improper treatment and termination of Christoffers as an employee of SSI." (RB 32.) However, our Supreme Court has rejected the primary rights analysis in the context of favorable termination law. (*Crowley*, *supra*, 8 Cal.4th at pp. 685-686.) The correct question is whether the claims at issue are "severable." (*Sierra Club Foundation*, *supra*, 72 Cal.App.4th at p. 1153.) They are.

The remainder of Christoffers' Six Counts pertain to an employer's duty to pay accrued compensation (Count 1) and the employer's liability for inducing an employee to move by false representations (Counts 5, 6). The sex discrimination claims (Counts 2-4) arise from an entirely distinct set of facts involving Christoffers' on-the-job treatment. (AA 178.) Christoffers could have brought these claims in a separate suit. (*Kim v. Regents of University of California* (2000) 80 Cal.App.4th 160, 168-169 [terminated employee's age discrimination claims did not relate back to filing of complaint based on claims of breach of covenant of good faith and fair dealing and failure to pay overtime; wrongful conduct described in discrimination claim did not arise out of same set of facts that supported other claims]; see also *Tabaz v. Cal Fed Finance* (1994) 27 Cal.App.4th 789, 792-794 [test of severability is whether there could have been separate actions brought on claims that form basis of malicious prosecution suit].)

In a footnote, defendants misconstrue Siebel's argument as saying he "admits there can be no partial favorable termination" because Christoffers'

sex discrimination claims were "merged into the judgment." (RB 33, fn. 104.) Not so. When Christoffers dismissed her sex discrimination claims, they remained suspended outside the action awaiting resolution of the rest of the action. That resolution happened after the jury reached its verdict exonerating Siebel when the court wrapped the dismissals into the final judgment on the verdict. (AA 142-143, fn. 2.) Regardless of what happened in the appeal of Christoffers' *other* claims (she could not have appealed her sex discrimination claims since she had dismissed them), that final judgment remains undisturbed as to her sex discrimination claims. Indeed, it would have remained undisturbed even if Christoffers had pursued her appeal, obtained a reversal, and then had prevailed on other claims after a new trial, because the ultimate judgment would still reflect the voluntary dismissal of the severable sex discrimination claims.

Defendants respond by citing *Dalany v. American Pacific Holding Corp.*, *supra* (RB 32, fn. 103), but *Dalany* did not consider the severability question presented here. Dalany obtained summary adjudication of some of the claims against him, but then entered into a stipulated judgment as to the entire action. (42 Cal.App.4th at pp. 825-826.) The Court "reject[ed] Dalany's suggestion that his success in achieving summary adjudication as to some of the causes of action in the cross-complaint prior to entry of the stipulated judgment gave rise to a favorable termination, at least as to those claims." (*Id.* at p. 829.) But the Court never considered (nor was it apparently asked to consider) whether the summarily adjudicated claims were severable, such as to independently support a subsequent malicious prosecution action. (*Id.* at pp. 828-829.) For all that appears from the opinion, the dismissed claims could have been nothing more than alternative theories supporting a single cause of action, as defendants erroneously claim is true of the relationship between Christoffers' sex

discrimination claims and the other Six Counts. A case is not authority for a proposition not considered. (*In re Chavez* (2003) 30 Cal.4th 643, 656.)

Defendants next argue that any malicious prosecution claim based on the sex discrimination claims is time-barred. It is not. A cause of action for malicious prosecution based on a voluntarily dismissed claim does not arise until there has been a judgment in the action. (*Jenkins v. Pope* (1990) 217 Cal.App.3d 1292, 1299-1300 [no malicious prosecution action on fraud claim voluntarily deleted from complaint until judgment entered on whole action].) This is consistent with the partial resolution of litigation in other contexts. For example, a plaintiff who wins summary adjudication of certain claims does not have a final judgment upon which it can execute (nor can defendant appeal from it) until judgment is entered on the action as whole. (Code Civ. Proc., § 437c, subd. (k); see generally 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 239, p. 654.)

Accordingly, Siebel's cause of action based on Christoffers' sex discrimination claims arose not on January 30, 1998, when Christoffers dismissed them (AA 304), but on October 8, 1998, when the judgment was entered (AA 134). The statute of limitations clock stopped on December 16, 1998, when Christoffers appealed (AA 317); began again on November 2, 1999 when remittitur issued after the appeals were dismissed; and stopped with the filing of this malicious prosecution action on July 6, 2000 (AA 3).[7] (See *Bob Baker Enterprises, Inc. v. Chrysler Corp.* (1994) 30 Cal.App.4th 678, 683-684 [describing stop/start nature of one-year statute of limitations for malicious prosecution actions]; *White v. Lieberman* (2002) 103 Cal.App.4th 210, 216-217 [clock re-starts on issuance of remittitur after

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[7] The remittitur date appears on the Court's on-line docket for *Christoffers v. Siebel Systems, Inc., et al.*, C.A. Nos. A086839 and A085371.

appeal].) Thus, the statute of limitations ran for a little over ten months—well under the one-year limit.

II.

DEFENDANTS DID NOT HAVE PROBABLE CAUSE FOR ANY OF THE SIX COUNTS.

Defendants' probable cause argument fails to address this threshold barrier: Defendants only moved for summary *judgment*, not summary *adjudication*. (AA 35-36.) Thus, if the Court finds there are triable issues on probable cause as to *even one* of the Six Counts, it must reverse. (See AOB 18.) As we now show, there are in fact triable issues as to *all Six*.

A. By Failing To Respond To Siebel's Argument, Defendants Concede There Are Triable Issues Of Fact As To The *Factual* Tenability Of Christoffers' Sex Discrimination Claims (Counts 2-4).

1. Siebel presented triable issues regarding factual probable cause.

Siebel adduced abundant evidence that Christoffers and her attorneys knew Christoffers' sex discrimination claims were, as one of the defendants put it, "bogus." (AA 423-424; AOB 37-38.) Defendants did not respond to any of this evidence in their papers below, nor do they make any argument on appeal. (AA 55-56, 643-645; RB 46-47.) Indeed, they have not even mentioned factual tenability, which is an essential component of probable cause. (*Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 512.)

Defendants' failure to address this issue is a concession that Siebel has raised triable issues of fact in response to their motion. (Code Civ. Proc., § 437c, subd. (p)(2); see *Sheldon Appel Co.*, *supra*, 47 Cal.3d at p. 881 [when "there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must

determine what facts the defendant knew before the trial court can determine" probable cause].) That alone requires reversal.

Instead of addressing the factual tenability of Christoffers' claims, defendants argue that the trial court's denial of Siebel's summary adjudication motion as to Count 3 established probable cause as a matter of law as to all three sex discrimination counts. (AA 55-56; RB 46-47.) Defendants rely on *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 384 and *Wilson v. Parker, Covert & Chidestar*, *supra*, 28 Cal.4th at pp. 819, 825, but both of these decisions note exceptions where the ruling in the underlying action was obtained by "materially false facts" (*Roberts*, *supra*, 76 Cal.App.4th at p. 384) or "fraud or perjury" (*Wilson*, *supra*, 28 Cal.4th at pp. 819, 825). That is just what Siebel's evidence shows.[8] (See summary of evidence at AOB 37-38.)

2. At a minimum, Siebel is entitled to a continuance so that he can conduct further discovery on the issue of factual probable cause.

Defendants' rhetorical flourish—accusing Siebel of seeking discovery "to prolong a lawsuit in the vain hope that he will extract some kind of Perry Mason confession" (RB 60)—does not detract from the showing Siebel has already made regarding both the existence of triable issues and his justification for further discovery. Whether Siebel's

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[8] Indeed, the existence of substantial questions about defendants' lack of factual probable cause is precisely why their demurrer was overruled in the trial court. (AA 24-25 ["By pleading language such as '. . . defendant Mittlesteadt knew that the charges set forth above were without merit, objectively baseless, and were fabricated in order to extract a substantial settlement at a critical juncture for SSI given its pending IPO . . . ,' Plaintiff has sufficiently pled specific facts showing a lack of probable cause by defendants Mittlesteadt and Buell"].)

discovery will be in vain or not has yet to be seen, since defendants' motion barred him from deposing any of the three key players: the defendants themselves and Christoffers.

3. The trial court's discretionary denial of sanctions in the Christoffers action has no bearing on Siebel's right to bring his malicious prosecution action.

Finally, defendants argue that there was probable cause as a matter of law because of Judge Turrone's discretionary post-trial order declining to impose Government Code section 12965 sanctions against Christoffers for bringing frivolous sex discrimination claims. (RB 47; AA 314 ["While not an easy call, this Court *declines to exercise its discretion* and award attorney's fees to defendant under Government Code §12965," emphasis added].) But Judge Turrone was not asked to make, and he did not make, any findings as to whether Christoffers or her attorneys committed fraud or perjury, which is what Siebel believes he can show. Since the ruling did not adjudicate the issue Siebel seeks to litigate, it cannot bar his action.

Moreover, to simply state defendants' argument is to refute it. A trial court's *discretionary* fees ruling in a summary sanctions proceeding is no substitute for a malicious prosecution judgment rendered after a full examination of the facts claimed to show probable cause, in light of the proper legal standard.[9] (*Wright v. Ripley* (1998) 65 Cal.App.4th 1189, 1195-1196 [sanctions orders, which are based on discretionary considerations, do not determine substantive elements of malicious

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[9] Judge Turrone implicitly recognized this when he wrote: "Simply said, this Court *cannot conclude from a reading of the record* that plaintiff's action was 'frivolous, unreasonable or without foundation.'" (AA 314, emphasis added.)

prosecution]; cf. *Crowley*, *supra*, 8 Cal.4th at pp. 687-689 ["it does not follow that the Legislature intended to substitute this remedy (i.e., discretionary sanctions) for the cause of action for malicious prosecution"].)

Because of their discretionary nature, sanctions awards may be "influenced by factors extrinsic to a malicious prosecution case." (*Wright*, *supra*, 65 Cal.App.4th at p. 1195.) For example, "trial courts may be more reluctant to charge litigants or attorneys appearing before them with bad faith than juries to whom such persons are total strangers." (*Crowley*, *supra*, 8 Cal.4th at p. 689, fn. 12.) That happened here. As part of his ruling, Judge Turrone remarked he was reluctant "to adopt a hindsight logic." (AA 314.) His ruling therefore should not preclude Siebel from being able to present his case to a jury, whose job is to engage in a retrospective analysis of the facts and come to a definitive conclusion regarding defendants' conduct.

* * * * *

Because defendants essentially concede that Siebel has presented triable issues on factual probable cause as to Christoffers' sex discrimination claims, and because defendants did not move for summary adjudication of any particular Count (assuming they could have, see AOB 18, fn. 5), the Court should stop here and reverse the judgment. (See discussion at AOB 18.) Nevertheless, we brief the remaining probable cause issues below to show that they, too, are meritless.

B. There Was No Legal Probable Cause To Prosecute Counts 1 And 6 Because It Is Firmly Settled That Non-Employers Cannot Be Sued For Tortious Discharge.

Three of Christoffers' claims against Siebel were for tortious discharge, i.e., termination of her employment in violation of various public polices: Count 1 (wrongful termination in violation of public policy against avoiding paying compensation); Count 4 (wrongful termination in violation of public policy against sex discrimination); and Count 6 (wrongful termination in violation of Labor Code section 970). At the time of Christoffers' action, however, only Count 4 had a probable-cause basis, for reasons we discuss in section 3, below. As to Counts 1 and 6, there was no such basis.

Probable cause to bring an action depends "upon it being arguably tenable, i.e., not so completely lacking in apparent merit that no reasonable attorney would have thought the claim tenable." (*Wilson*, *supra*, 28 Cal.4th at p. 824, emphasis omitted; see also *Sheldon Appel Co.*, *supra*, 47 Cal.3d at p. 886.) "[F]rom the legal perspective," an action is tenable "if it is supported by existing authority or the reasonable extension of that authority." (*Arcaro v. Silva & Silva Enterprises Corp.* (1999) 77 Cal.App.4th 152, 156, citing *Sheldon Appel Co.*, *supra*, 47 Cal.3d at p. 886.) From the factual perspective, an action is tenable if it is supported by "evidence sufficient to uphold a favorable judgment or information affording an inference that such evidence can be obtained for trial." (*Puryear v. Golden Bear Ins. Co.* (1998) 66 Cal.App.4th 1188, 1190, 1195.)

Neither the facts nor the law supported Christoffers' action against Siebel personally for tortious discharge as to either Count 1 or Count 6.

1. Only an employer can terminate an employee, wrongfully or otherwise.

Christoffers alleged in Counts 1 and 6 that Siebel personally terminated her employment at SSI in violation of various public policies. But Siebel was not Christoffers' employer—he was the chief executive officer of her employer, as Christoffers and her attorneys well knew. (AA 174.)

Since Siebel was not a party to Christoffers' employment contract, he could not terminate it—tortiously or otherwise. It has long been settled that, as a matter of law, a defendant cannot be held liable for breaching a contractual duty arising from a contract to which he is not a party. (See *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 576 [insurance company's agents are not parties to insurance contract and therefore cannot be held liable for breach of implied covenant of good faith and fair dealing]; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 665 [explaining that duty on which tortious discharge is based is a creature of the employer-employee relationship]; *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245 [same for constructive tortious discharge].)

Indeed, less than two weeks after Christoffers' complaint was filed, a Court of Appeal announced, "[T]here is *no law we know of* to support the notion that anyone other than the employer can discharge an employee." (*Weinbaum v. Goldfarb, Whitman & Cohen* (1996) 46 Cal.App.4th 1310, 1315, emphasis added [non-employer cannot be liable for wrongful termination on conspiracy theory].) Rather, the governing law was and is that the tort of "wrongful termination in violation of public policy" arises "'from a breach of duty *growing out of the [employment] contract.*'"

(*Foley*, *supra*, 47 Cal.3d at pp. 667-668, quoting *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 175.) In *Weinbaum*'s words: "There is nothing in *Foley or in any other case* we have found to suggest that this tort imposes a duty of any kind on anyone *other than the employer*." (46 Cal.App.4th at p. 1315, emphases added.)

Cases after *Weinbaum* have universally agreed that there is no way that individuals who are not themselves employers can be liable for tortious discharge. (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 38, 53-55 [no liability for doctor in medical group that fired other doctor]; *Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 575-576 [no liability for company paymaster]; *Jacobs v. Universal Development Corp.* (1997) 53 Cal.App.4th 692, 703-704 [no liability for managerial employees].)

2. At a minimum, defendants are liable for continuing to prosecute Counts 1 and 6 after *Weinbaum*.

Any arguable probable cause defendants may have had to initiate Christoffers' suit vanished two weeks after filing the complaint upon publication of the *Weinbaum* decision. At that point, there was an unequivocal judicial pronouncement that no law supported Christoffers' tortious discharge claims against a non-employer. By nevertheless continuing to litigate Christoffers' tortious discharge claims—without once suggesting that they sought an extension of or change in the law—defendants exposed themselves to malicious prosecution liability: "One who takes an active part in the initiation, *continuation*, or procurement of civil proceedings against another is subject to liability." (Rest.2d Torts, § 674, emphasis added; see also *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1131, fn. 11 ["A person who

is injured by groundless litigation may seek compensation from any person who procures or is actively instrumental in putting the litigation in motion or participates *after the institution of the action*"]; Dobbs, *supra*, § 436, p. 1230, fn. 19 [although a lawyer is not liable for filing a lawsuit that subsequently is shown to have no merit, "[o]nce investigation shows facts that eliminate reasonable grounds for suit, however, the lawyer must not continue the litigation"]; 1 Harper, et al., *supra*, § 4.3, p. 4:13 ["Not only to instigate criminal proceedings but continuing to prosecute such proceedings maliciously after learning of their groundless nature will result in liability, although they had been begun in good faith and with probable cause"].)[10]

3. An arguable statutory exception under FEHA to the rule that only employers can terminate employees established probable cause only as to Christoffers' FEHA claims.

Defendants nevertheless argue that "California law as to supervisor liability for employment-related torts was, at best, unclear, and, in fact,

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[10] At the time *Weinbaum* was decided, the Restatement rule and *Pacific Gas* language provided defendants with ample warning that they would continue to litigate these claims at their peril. Very recently—and well after the Christoffers action ended—the Second District, Division Seven rejected the Restatement view, holding that an attorney need only have probable cause at the time he or she files the underlying suit; the attorney is thereafter immune from liability for continuing to prosecute the lawsuit even if the attorney later learns there is no probable cause. (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 627-629; *Vanzant v. DaimlerChrysler Corp.* (2002) 96 Cal.App.4th 1283, 1290-1291; see also *Morrison*, *supra*, 103 Cal.App.4th at p. 514 [Fourth Dist., Div. Three: following *Swat-Fame*].) The issue is now before the Supreme Court in *Zamos v. Stroud* (No. S118032, review granted 9/17/03 [Issue presented (per Supreme Court's website): "When there was probable cause to initiate a prior lawsuit, can an attorney be held liable for malicious prosecution for continuing to prosecute the lawsuit after discovering facts showing that the lawsuit has no merit?"]).

weighed in favor of imposing such liability." (RB 48.) This statement is true only as to one of Christoffers' tortious discharge claims (Count 4), not all three.

All of defendants' supporting authorities derive from specific language in one statute, California's Fair Employment and Housing Act ("FEHA," Government Code section 12900 et seq.). (RB 48-49, fn. 137.) Until recently, it was unsettled whether individual agents of employers could be statutorily liable *under FEHA* for employment discrimination, including discriminatory firing. FEHA's language suggested they could by including "agents" in the definition of "employer."[11]

In *Reno v. Baird* (1998) 18 Cal.4th 640 our Supreme Court scrutinized FEHA's specific language and held, as a matter of statutory interpretation, that individuals who were not themselves employers could *not* be liable for employment discrimination, or for wrongful termination in violation of FEHA's discrimination prohibition. (*Id.* at p. 663 ["we conclude that individuals who do not themselves qualify as employers may not be sued under the FEHA for alleged discriminatory acts"], 664 ["Because plaintiff may not sue Baird as an individual supervisor under the FEHA, she may not sue her individually for wrongful discharge in violation of public policy"].)

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[11] FEHA prohibits "an employer" from discriminating against an employee for "refus[ing] to hire or employ the person or . . . refus[ing] to select the person for a training program leading to employment, or . . . bar[ring] or . . . *discharg[ing] the person from employment* or from a training program leading to employment, or . . . discriminat[ing] against the person in compensation or in terms, conditions, or privileges of employment." (Gov. Code, § 12940, subd. (a), emphasis added.) FEHA elsewhere defines "employer" as including "any person regularly employing five or more persons, or *any person acting as an agent of an employer*, directly or indirectly." (Gov. Code, § 12926, subd. (d), emphasis added.)

Defendants' supporting cases all involve pre-*Reno* claims under FEHA against employers and agents. At most, this gave defendants a tenable legal basis for alleging that Siebel, as an SSI agent, terminated Christoffers in violation of FEHA's prohibition against discrimination (Count 4).[12] But there was and is no equivalent statutory hook for Count 1 (wrongful termination to avoid paying compensation) or Count 6 (wrongful termination in violation of Labor Code section 970). (*Phillips*, *supra*, 63 Cal.App.4th at p. 576, fn. 6 [FEHA's "specific language" cannot support an argument for non-employer liability for wrongful termination in other contexts].) Defendants implicitly recognize this, because they do not even attempt to argue that the narrow, statutory-language based FEHA analysis can be reasonably extended to Christoffers' other tortious discharge claims. (RB 48-52.)

Because Counts 1 and 6 were not supported either "by existing authority or the reasonable extension of that authority," they were legally untenable. (*Arcaro, supra*, 77 Cal.App.4th at p. 156.) And because these claims could not be supported by "evidence sufficient to uphold a favorable judgment or information affording an inference that such evidence c[ould] be obtained for trial"—since there was no factual basis for suing Siebel as the employer—they were factually untenable. (*Puryear, supra*, 66 Cal.App.4th at p. 1190 [no basis for alleging corporate officer's personal liability; thus, no reasonable attorney could have believed officer could

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[12] As we showed above, however, there are triable issues as to whether defendants had any factual basis for prosecuting claims that alleged Siebel discriminated against Christoffers because of her sex.

have been successfully sued].) Either way, Counts 1 and 6 lacked probable cause.[13]

C. There Was No Factual Or Legal Basis For Suing Siebel Under Labor Code Section 970 (Counts 5 and 6), Because Christoffers Never Changed Her Residence In Reliance On Any Employer Promise.

1. A long-established, essential element of a Labor Code section 970 claim is change of residence.

From the beginning of her litigation, Christoffers admitted that she never moved her residence to accept employment with SSI. (AA 269; see also RB 52.) As a matter of law, therefore, her Labor Code section 970 claims (Counts 5 and 6) lacked probable cause.

Labor Code section 970 prohibits anyone from "influenc[ing], persuad[ing], or engag[ing] any person *to change from one place to another* in this State" for purposes of employment, through knowingly false representations. (Emphasis added.) Defendants argue that this language does not specifically require a change in residence (RB 53), but they fail to cite the California Supreme Court decision that definitively construed this language thirty years ago: "The words 'to change from one place to another' import temporary as well as permanent relocation *of residence*, *as*

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[13] Contrary to defendants' assertion, *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137 is not a "good example" of the "uncertainty in the law" at the time. (RB 51, fn. 144.) Rather, *Gould* is a good example of why there was *no* uncertainty in areas other than FEHA. In *Gould*, plaintiff sued his *company* for wrongful termination to avoid paying accrued compensation. (31 Cal.App.4th at pp. 1143-1144, 1146-1150.) He also sued two managerial employees, but only for slander and defamation. (*Id.* at pp. 1143-1144, 1153-1154.) *Gould* therefore cannot be read to support Christoffers' Count 1 against Siebel.

contrasted with a mere change in the site of employment." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 239, emphasis added.)

A change of residence has always been key to the "public purpose" of the statute, which is "to protect the community from the harm inflicted when a fraudulently induced employment ceases and the former employee is left in the community without roots or resources and becomes a charge on the community." (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 180, citing *Tyco Industries, Inc. v. Superior Court* (1985) 164 Cal.App.3d 148, 159.) Indeed we have not found a single section 970 case where a court held that a change in employment alone without a change in residence, was sufficient to sustain a section 970 claim—including the only decision defendants cite (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514).[14]

Christoffers did not change her residence, and her termination did not leave her rootless in a strange community. Defendants therefore had no factual or legal predicate for prosecuting Christoffers' Labor Code claims.

2. The trial court's summary overruling of Siebel's demurrer as to Counts 5 and 6 did not establish probable cause.

Defendants argue that Judge Forcum's summary overruling of Siebel's demurrers to the Labor Code claims in the Christoffers action

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[14] E.g., *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 635-637 (relocation from New York to Los Angeles); *Schultz v. Spraylat Corp.* (C.D.Cal. 1994) 866 F.Supp. 1535, 1537 (California to Washington); *Seubert, supra*, 223 Cal.App.3d at p. 1517 (Pennsylvania to California); *Funk v. Sperry Corp.* (9th Cir. 1988) 842 F.2d 1129, 1133 (Pennsylvania to California); *Tyco Industries, supra*, 164 Cal.App.3d at pp. 151-152 (Illinois to California); *Munoz v. Kaiser Steel Corp.* (1984) 156 Cal.App.3d 965, 969 (Texas to Southern California).

established probable cause. But the court's one-line ruling is not accompanied by any rationale (AA 280), and a ruling "for reasons that cannot be determined" does not establish probable cause. (*Wilson*, *supra*, 28 Cal.4th at p. 823.)

Defendants speculate that Judge Forcum accepted their argument that Labor Code section 970's express language did not require a change in residence, and that a sentence from *Seubert* permitted their interpretation. (AA 59, 280; RB 53-54.) But if that was what Judge Forcum did, he was indisputably wrong.

Placing the sentence from *Seubert* in context with its three following sentences makes clear that the court was considering *only* a *change in residence*, not simply a change in employment:

> "The apparent purpose of sections 970 and 972 is to protect potential employees from being solicited to change employment by false representations concerning the nature or duration of employment. The statutory scheme is particularly addressed to preventing employers from *inducing potential employees to move to a new locale* based on misrepresentations of the nature of the employment. [Citation.]
>
> "The precise situation sought to be avoided by section 970 occurred here. Seubert was *induced to move to California* [from Pennsylvania] based on false representations concerning the nature of the regional sales manager position." (223 Cal.App.3d at p. 1522, emphases added.)

The context directly refutes, rather than supports, defendants' position and Judge Forcum's ruling. Indeed, the only decision to cite *Seubert* on this subject cites it for the proposition that "an employee must establish that the employer induced him or her to relocate or change residences." (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1392 [affirming summary judgment of section 970 claim where "(t)here was no such evidence" that plaintiff changed residence].)

An unexplained ruling so palpably contrary to a uniform, long-standing body of law vindicates the court's caution in *Roberts*, *supra*, 76 Cal.App.4th 375. There, considering the effect of a trial court's prior summary judgment denial, the court refused to go farther than to hold that it "normally" establishes probable cause to sue: "We say 'normally' rather than 'conclusively' because there may be situations where denial of summary judgment should not irrefutably establish probable cause." (*Id.* at pp. 383-384.) Although *Roberts* was speaking of factual issues, there is no reason to accord any greater infallibility to legal rulings. Our Supreme Court suggested as much in *Wilson*, when it left open the possibility that if the trial court's ruling in the underlying action were the result of an "unreasonable" or "irrational[]" error, it would not establish probable cause.[15] (28 Cal.4th at pp. 818, 822.)

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[15] That *Wilson* only suggested, but did not expand upon, this exception is neither surprising nor significant. The Court was focused on a question of procedure, not substance: Could an interim ruling by a trial court (in *Wilson*, the denial of an anti-SLAPP motion) establish probable cause for purposes of a later malicious prosecution suit? The Court held that it could. But the Court was not presented with the question posed here: Whether an interim ruling that is patently erroneous nevertheless conclusively establishes probable cause. The answer must be "no." Such a ruling says nothing about whether "any reasonable attorney would have thought the claim tenable." (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 886.)

Underscoring the error in Judge Forcum's ruling is the fact that a later judge in the Christoffers action (Judge Parsons) heard defendants' same argument in opposition to Siebel's summary adjudication motion and rejected it, ruling that "[a]s a matter of law, [Siebel] cannot be liable to [Christoffers]" because she "did not move or relocate her residence upon accepting a position with [SSI]." (AA 297.)

Given the long-established body of law to the contrary, no reasonable attorney could believe that someone who did not change residence had a viable Labor Code 970 claim. Defendants therefore lacked probable cause to bring Christoffers' claim.

III.

CHRISTOFFERS' POSSIBLE ASSERTION OF THE ATTORNEY-CLIENT PRIVILEGE DOES NOT BAR SIEBEL'S MALICIOUS PROSECUTION ACTION AGAINST HER ATTORNEYS.

A. There Is No Special Immunity For Mittlesteadt And Buell Simply Because Christoffers May Claim The Attorney-Client Privilege.

Defendants claim that "[w]henever an attorney-defendant is prevented from disclosing facts potentially material to his or her defenses as a result of the attorney-client privilege, the action must be dismissed in the interest of due process." (RB 40.) If that were true, whole segments of the population—doctors, psychotherapists, lawyers, spouses—could with impunity commit torts jointly with their patients, clients and spouses, as long as their cohorts refused to waive the privilege. That cannot be the law.

Defendants cite no authority that supports any blanket immunity for those entrusted with privileged information. California allows suits against attorneys, even when their clients are not joined. (See, e.g., *Morrison*, *supra*, 103 Cal.App.4th at p. 511; *Mattel*, *supra*, 99 Cal.App.4th at pp. 1190-1191; *Ferreira*, *supra*, 87 Cal.App.4th at p. 413; see generally *Norton*, *supra*, 49 Cal.App.3d at p. 922 [explaining rationale for allowing malicious prosecution suits against lawyers independently of clients].) Nothing in the case law suggests that a plaintiff's right to sue a lawyer for malicious prosecution depends on whether the lawyer's client waives the privilege.

To be sure, suing the lawyer when the client chooses not to waive the privilege may make the plaintiff's case more difficult to prove. (Code Civ. Proc., § 2017, subd. (a) [discovery available for relevant matter that is "not privileged"].) But that is not the same as the rule defendants advocate: outright *dismissal* of the case against them before meaningful discovery has occurred. Defendants succeeded in cutting off discovery before Siebel had a chance to take their or Christoffers' depositions to test the scope of the privilege defendants claim bars this action.

Defendants counter that Siebel will not gain anything from deposing Christoffers, because he has already prevented her from waiving the privilege in the settlement agreement. (RB 42-43.) They suggest that waiving the privilege would breach the agreement and subject her to an immediate and oppressive suit by Siebel. (*Ibid.*) Not so.

As we explained in Section I.C.1, all Christoffers agreed to was not to cooperate with either side to this dispute unless "compelled by lawful subpoena or other order of a court of competent jurisdiction." (AA 74.) Properly called to testify, she is free to do as she pleases—on the record. Except for that one limitation, she is like any other client whose attorneys have been sued. Indeed, she is in a better position, since Siebel and SSI have released her from liability for her part in the Christoffers action. (AA 72.) Siebel has the right to depose her to see what she will do. But her choice either way does not determine whether Siebel has a right to sue her attorneys.

Implicit in defendants' erroneous argument that Siebel has somehow strong-armed Christoffers into maintaining the privilege is the assumption that, but for the settlement agreement, Christoffers would waive the privilege in order to help defendants. That is hardly self-evident. For

instance, if Christoffers originally told defendants that her claims were false, she might well decide to claim the privilege rather than expose herself to criminal liability for perjury. She also might have any number of personal reasons for not wanting waive the privilege—among them the understandable desire to have nothing further to do with anyone who was involved in her ill-fated lawsuit. None of these reasons provides any basis for giving defendants blanket immunity for whatever wrongdoing Siebel can prove.

B. The Narrow Public-Policy Exception Defendants Rely On Does Not Apply Here.

Defendants' only authority is three decisions that carve out a narrow public-policy exception to the general rule that a defendant's assertion of a privilege does not limit the plaintiff's right to sue: *Solin v. O'Melveny & Meyers* (2001) 89 Cal.App.4th 451, *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, and *Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019. But those cases are nothing like this one. In each, the appellate court was moved by the fundamental unfairness of allowing clients (or their shareholders or assignees) to sue *their own attorneys* for bad advice without allowing the attorneys to give their own versions of what was said. (*Solin*, *supra*, 89 Cal.App.4th at pp. 463-464; *McDermott, Will & Emery*, *supra*, 83 Cal.App.4th at pp. 383-384; *Kracht*, *supra*, 219 Cal.App.3d at p. 1024 & fn. 6.) The courts refused to countenance such an end run around Evidence Code section 958, which would otherwise require the plaintiffs to waive the privilege in order to maintain their suit: "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." (*Ibid.*)

Unlike the plaintiffs in those cases, Siebel never had a lawyer-client relationship with defendants (*Solin*), nor does he stand in the shoes of someone who did (*McDermott*, *Kracht*). He is not suing his own lawyers for malpractice while simultaneously trying to "gag [them] in defending the charge by preventing full disclosure of all matters counseled upon." (*Solin*, *supra*, 89 Cal.App.4th at p. 464.) He is simply a plaintiff who, like any plaintiff, seeks to prove through non-privileged or waived-privileged evidence that he was injured by the defendants' torts. The potential for abuse of the privilege that gave rise to the narrow public policy exception in *Solin*, *McDermott* and *Kracht* is not present here.

C. At A Minimum, There Must Be Discovery Before There Can Be Any Evaluation Of Whether Siebel Can Prove His Case.

In Section VI of their brief, defendants argue that "the depositions of Christoffers, Mittlesteadt and/or Buell will not yield any . . . evidence, because communications between Christoffers and Mittlesteadt and/or Buell are subject to the attorney-client privilege." (RB 60.) But their argument begs the question. No one knows what the depositions will yield until they are taken, particularly since Christoffers herself has yet to claim the attorney-client privilege.[16] Besides, as Siebel explained in his Opening Brief, there are a number of theories under which he may be able to obtain

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[16] Christoffers' attorney wrote counsel for both sides that her client "will not waive the attorney-client privilege," but the letter nowhere indicates that Christoffers will not submit to a deposition. (AA 104.) Siebel is entitled to depose Christoffers under oath to determine exactly what she will testify to. If nothing else, she can testify to the factual basis for her complaint allegations, which is not privileged. (AOB 46, citing *Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 349.)

evidence: waiver of the privilege; no privilege for discovery of underlying facts; crime-fraud exception.[17] (AOB 46-48.)

As to the crime-fraud exception, defendants counter that Siebel is not entitled to discovery because he has not made "a *prima facie* showing as to application of this exception." (RB 60, fn. 170.) Siebel disagrees. He *has* made such a showing by offering Buell's admission that the sex discrimination claims were "bogus" and Chrisotoffers and Mittlesteadt's history of filing at least one other meritless sex discrimination action that Christoffers admitted was brought on Mittlesteadt's advice that a lawsuit would "get attention and get a quick settlement." (AA 5, 340, fn. 2, 521-522, 595-596.) Siebel could not make more of a showing because the trial court improperly denied him the chance to take discovery. (Cf. *State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 632, 647-649 [court determined crime/fraud exception applied after reviewing supporting evidence obtained *after* "extensive discovery"].) It abused its discretion by doing so. (Code Civ. Proc., § 437c, subd. (h); *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633-635.)

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[17] Defendants argue that Siebel's burden on summary judgment is to produce facts, not allegations, that create a triable issue. (RB 41, fn. 121.) But when seeking a continuance for further discovery to show the existence of triable facts, allegations contained in affidavits are sufficient. (Code Civ. Proc., § 437c, subd. (h); see AA 420-430 [Cannata affidavit].) In the same footnote, defendants also argue that they have no burden to demonstrate why they need privileged information to defend themselves and that *Solin* sets forth no such requirement. What *Solin* demonstrates, however, is that there can be no prima facie dismissal of a case based on a defendant's mere assertion of privilege without full evidentiary exploration of the basis for that privilege. (*Solin*, *supra*, 89 Cal.App.4th at pp. 460-461.) There has been no opportunity for that exploration here. (AOB 46.)

CONCLUSION

"The tort of malicious prosecution is designed to place restraint on a would-be plaintiff while furnishing protection to a wrongfully sued defendant. It naturally follows that the same general principles should apply to the attorney representing the litigant initiating the action." (*Norton*, *supra*, 49 Cal.App.3d at p. 922.)

Siebel presented more than enough in opposition to defendants' summary judgment motion to show that those restraints failed here and that he is entitled to the protection afforded by a malicious prosecution action. He established a favorable termination in the form of a now-final judgment on the merits that entirely vindicates him. He established triable issues as to whether defendants knowingly prosecuted baseless sex discrimination claims against him, and he established the lack of any legal basis for the other counts. Defendants have identified no public policy reason entitling them to dismissal before meaningful discovery has taken place.

The judgment must be reversed.

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Respectfully submitted,

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