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IN THE SUPREME COURT

STATE OF CALIFORNIA

WILLIAM PARRISH and E. TIMOTHY FITZGIBBONS,
Plaintiffs and Appellants,

vs.

LATHAM & WATKINS, LLP and DANIEL SCHECTER,

Defendants and Respondents,

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 3, CASE NO. B244841
HON. JAMES R. DUNN, JUDGE, SUP. CT. NO. BC482394

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INTRODUCTION

Plaintiffs William Parrish and E. Timothy Fitzgibbons ("Plaintiffs") submit this brief in response to the Amicus briefs filed by the multiple Amici supporting the position taken by defendants Latham and Watkins and Daniel Schecter as to one or both of the issues under review by this Court.

The arguments contained in the Amici briefs largely replicate the arguments made by Latham and Watkins in its answer brief. Plaintiffs have already replied to those arguments and will try to avoid undue repetition of the analysis contained in their opening brief on the merits and their reply brief.

As explained, nothing the various Amici argue serve to justify a rule allowing a lawyer to avoid liability for malicious prosecution just because the trial court in the underlying action denied summary judgment based on materially false expert declarations on which the lawyer could not reasonably rely. This is especially true where, as here, in the aftermath of the summary judgment denial, the underlying trial court and the underlying Court of Appeal each concluded that the action had been prosecuted in subjective and objective bad faith and further concluded that the earlier summary judgment denial did not preclude the imposition of sanctions for the prosecution of that action.

As further explained, under this Court's *Lee v. Hanley* (2015) 61 Cal.4th 1225, opinion, Code of Civil Procedure section 340.6 does not apply to a malicious prosecution

claim against an adverse lawyer because such a claim is not dependent upon proof that the lawyer violated professional responsibilities owed as a lawyer. Just because the lawyer's tortious conduct happened to also violate such professional responsibilities in addition to violating common law tort duties does not bring the claim within the scope of section 340.6.

In short, nothing Amici argues justifies affirming the Court of Appeal dismissing this malicious prosecution action under the anti-SLAPP statute.

ARGUMENT

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

Amici asserts that the Court should adopt their broad view of the adverse interim judgment rule by reference to the so-called disfavored status of malicious prosecution claims. (Liability Assurance AC Brief 6; Association of Cal. Defense AC 14; LM AC Brief 23.) It appears to be Amici's view that this status means that the Court should view all legal issues in a way that make it difficult to establish a malicious prosecution claim.

But this Court has already clearly rejected such a view. In *Crowley v. Katleman* (1994) 8 Cal.4th 666, 680, the Court explained:

> Unable to rely on either the facts or the law of *Sheldon Appel*, defendants quote from a preliminary policy statement with which we prefaced the body of the opinion. In that policy statement we reiterated the traditional view that malicious prosecution is a "disfavored cause of action" because of its potentially chilling effect on the public's willingness to resort to the courts for settlement of disputes. (47 Cal.3d at p. 872.) We adhere to that view. (See, e.g., *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1131 [270 Cal.Rptr. 1, 791 P.2d 587].) But we were also fully cognizant of the same view in *Bertero*, where the defendants expressly reminded us that "malicious prosecution is not a tort 'favored by the law' " (13 Cal.3d at p. 53). Nevertheless we warned, "This convenient phrase should not be employed to defeat a legitimate cause of action. We responded to an argument similar to defendants' over 30 years ago, reasoning, '... we should not be led so astray by the notion of a "disfavored" action as to defeat the established rights of the plaintiff by indirection; for example, by inventing new limitations on the substantive right, which are without support in principle or authority ....' " (*Ibid.*, quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 159 [114 P.2d 335, 135 A.L.R. 775]; accord, *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 566-567 [264 Cal.Rptr. 883].)

Thus, the policy statement on which Amici relies provides no basis to conclude that the adverse interim judgment rule should apply under the circumstances here. Rather, that determination should be based on the foundational reasons why that rule exists in the first place. When viewed through this lens, it is evident that Amici's position is as flawed as Latham's position and the Court of Appeal's analysis before it. There is no basis to conclude that the ruling in the underlying action denying the summary judgment motion based on materially false facts conclusively established that there was probable cause to initiate and maintain that action as a matter of law.

Amici next launches into a discussion of probable cause asserting that standard is an objective one and is based on "'facts on which the defendant acted.'" (Liability Assurance AC 7.) Amici then cautions that it is not relevant "whether the plaintiff or his or attorney was unaware of other evidence that weighed against their claim. . . ." (*Id.* at p. 8.) Based on these principles, according to Amici, the interim judgment rule applies as a matter of law regardless whether the facts submitted in opposition to a summary judgment motion were materially false. A closer examination of Amici's position, however, demonstrates that it actually supports plaintiffs' position rather than Latham's position.

Plaintiffs agree with Amici that the adverse interim judgment rule concerns the probable cause element of the malicious prosecution standard. Plaintiffs also agree that because of this limited purpose, the scope of the adverse interim judgment rule should be construed in a way that is consistent with the standard for determining probable cause. However, plaintiffs disagree with Amici's position that it necessarily follows that, for purposes of determining whether there is probable cause, a litigant or lawyer can simply bury his or her head in the sand as to the facts on which they rely in pressing a claim and assert that no matter how implausible those facts are, probable cause is established.

The determination whether there is probable cause requires an evaluation of both the applicable legal principles and the evidence supporting the plaintiff's claim. Contrary to what Amici seem to argue, in addition to the fact that, in determining probable cause, the particular legal theory being pursued should be examined to determine whether it was

sufficiently viable, there must also be an examination of the known facts to determine whether the lawyer or client could reasonably rely upon them.

As this Court explained in *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292: "'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.'" (Italics added.) "Probable cause exists when a lawsuit is based on facts *reasonably believed to be true*, and all asserted theories are legally tenable under the known facts. [citation] Thus, [the plaintiff] may prevail by making a prima facie showing that any one of the theories in [the underlying action] was legally untenable or based on facts not reasonably believed to be true. (See ibid.) This objective standard of review is similar to the standard for determining whether a lawsuit is frivolous: whether 'any reasonable attorney would have thought the claim tenable.' [citation]" (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885–886, 254 Cal.Rptr. 336, 765 P.2d 498 (Sheldon Appel).)" (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1106; see also *Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 875 ["A litigant lacks probable cause " 'if he [or she] relies upon facts which he [or she] has no reasonable cause to believe to be true, or if he [or she] seeks recovery upon a legal theory which is untenable under the facts known to him [or her].' "]; *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164–65 ["A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which

is untenable under the facts known to him. In making its determination whether the prior action was legally tenable, the trial court must construe the allegations of the underlying complaint liberally in a light most favorable to the malicious prosecution defendant."].)

Viewed in this light, the issue here is whether an attorney who submits materially false expert declarations in opposition to a summary judgment motion is nevertheless entitled to a conclusive presumption of probable cause because the trial court, relying on those false declarations, denies the summary judgment motion – even though the court later concludes the declarations were false and that the action was prosecuted with subjective and objective bad faith. The answer to this inquiry must be "no." At the very least, under these circumstances, a factual question is raised whether the lawyer could reasonably rely upon the expert declarations submitted in opposition to the summary judgment motion. Accordingly, it was improper for the Court of Appeal to conclude that as a matter of law the summary judgment denial conclusively established probable cause and justified granting the anti-SLAPP motion.

This is supported by the policy justification for the interim adverse judgment rule. In *Cowles v. Carter* (1981) 115 Cal.App.3d 350, 357, the Court adopted the following policy explanation for the adverse interim judgment rule: "'Surely, it would be hard law which would render a plaintiff liable in damages for instituting an action, wherein he made a truthful and honest statement of the facts, in the event that, notwithstanding a judge of the superior court was satisfied that upon those facts the plaintiff had a meritorious case, a ruling to that effect should afterwards be set aside. It cannot matter

that the same judge reversed the judgment rendered by him in sanctioning the petition. This should count for neither more nor less than if the judgment of reversal had emanated from a higher court; for the reason that the inquiry, in either event, would be, not whether the plaintiff had in fact a good and valid cause of action, but whether this was apparently true, and it was accordingly the right of the plaintiff to invoke a judicial decision concerning the merits of the case presented for determination....'"

In other words, the reason for the adverse interim judgment rule is that if a neutral third party (the trial judge), after viewing a truthful recitation of the facts, concludes that there is a sufficient basis to submit a claim to the jury, then the underlying plaintiff and his or her counsel should not be second-guessed as to whether there was probable cause to initiate that claim. But the key to this justification is that the trial judge is presented with a "truthful and honest statement of the facts." This is particularly the case when the adverse interim ruling is a summary judgment denial because the facts submitted in opposition to summary judgment must be accepted as true. As this Court has long held, in ruling on a summary judgment motion, "the facts alleged in the affidavits of the party against whom the motion is made must be accepted as true. . . ." (*Eagle Oil & Refining Co. v. Prentice* (1942) 19 Cal.2d 553, 556.) Thus, if it is later determined (as here) that the facts which were accepted as true by the trial court were in fact false, the summary judgment denial should not be conclusive evidence of probable cause.

Under these circumstances the finding by the underlying trial judge that there was evidence sufficient to prosecute the action was tainted by fact that the evidence submitted

in opposition to the summary judgment motion was false. Where the lawyer submitting that false evidence did not have a reasonable basis to believe it was true, then there is no reason to insulate that lawyer from liability for malicious prosecution just because the summary judgment motion was denied.

Nevertheless, according to Amici "if a lawyer in an underlying action relies unknowingly on a false fact, the falsity of that fact is irrelevant in assessing whether the lawyer had probable cause to bring the action." (Liability Assurance AC Brief 11.) In other words, according to Amici, so long as the lawyer subjectively does not know that the facts are false then it does not matter whether the lawyer was unreasonable in submitting those facts in opposing a summary judgment. Under Amici's view, once those false facts were relied upon by the trial court to deny the summary judgment, then the lawyer is absolutely insulated from liability for malicious prosecution.

Amici would thus convert probable cause from an objective standard and into a subjective standard -- just the opposite of what they urge elsewhere in their briefs. The question would become whether the lawyer or litigant subjectively believed the truth of the facts submitted regardless whether a reasonable litigant or lawyer would not have believed they were true. This is precisely why Amici struggle for this Court to recognize that fraud and perjury are the only exceptions to the adverse interim judgment rule. According to them so long as there is an absence of proof that the lawyer subjectively knew that the evidence submitted in opposition to the summary judgment motion was false (and therefore there was fraud or perjury) the fact that a judge relied on that false

evidence and denied the summary judgment motion conclusively establishes probable cause.

Under such a rule, a lawyer is rewarded for not diligently examining the evidence submitted in opposition to a summary judgment motion. Indeed, the less the lawyer knows the better. On the other hand, the underlying defendant who is victimized by a malicious prosecution action will be reluctant to even file a summary judgment motion (and thus cut off his or her damages) knowing that if such a motion were filed, then the underlying plaintiff could simply file a false declaration, claim ignorance that it was false and inoculate itself from liability for malicious prosecution when the motion is denied due to the false evidence.

Taken to its logical extreme, under Amici's position, it is hard to understand why there should even be a fraud or perjury exception to the adverse interim judgment rule. After all, even if fraud or perjury were committed then it is still the case that the underlying trial court viewed the evidence and determined that it was sufficient to present the case to the jury. However, apparently recognizing the horrible optics of such a rule, even Amici does not seek to dispense with the fraud or perjury exceptions to the adverse interim judgment rule. Yet they never explain why, if it's the case that fraud or perjury are exceptions, it is not the case that there should also be an exception for materially false facts on which the lawyer or litigant could not reasonably rely.

Next, Amici latch onto an out-of-context passage from *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, to argue that fraud and perjury are the only exceptions

to the adverse interim judgment rule. (Liability Assurance AC Brief 11.) As explained in the opening and reply briefs, however, that is not at all what *Wilson* held. The issue in *Wilson* was whether the denial of an anti-SLAPP motion in the underlying action could support invoking the interim adverse ruling doctrine in the first place. There, this Court answered that question "yes," but that holding is irrelevant in this instance because the court did not consider whether there was evidence in that case sufficient to fit within an exception to that doctrine. In fact, there was not even argument in *Wilson* that an exception to the interim adverse judgment rule applied. Plaintiffs will not repeat their argument here as to why *Wilson* is not controlling.

Nor is it correct that *Wilson* or *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863 held that "if a lawyer in an underlying action relies unknowingly on a false fact, the falsity of the fact is irrelevant in assessing whether the lawyer had probable cause to bring the action." (Liability Assurance AC Brief 11; ASCDC 15.) Nothing in either case cited stands for this proposition. Rather, at most those cases stand for the principle that probable cause is not based on whether the lawyer has performed sufficient research to test whether the underlying claims are tenable. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 882-883.) They do not hold that a lawyer need not have a reasonable basis in the truth of the facts on which he or she relies in order for there to be probable cause based on those facts. Such a rule would be contrary to what this Court in *Soukup, supra,* as well as a number of the cases have held. It is one thing to say that a lawyer need not conduct an investigation as to the facts or legal theories pursued, and

quite another thing to say that the lawyer need not even have a reasonable basis to believe the truth of expert declarations submitted in opposition to a summary judgment motion.

Thus, Amici Lawyers Mutual's argument that "[a] lawyer has the right to accept as true the evidence supporting a claim, even if there is abundant contrary evidence" misses the point. (LM AC Brief 15.) Plaintiffs are not proposing a rule under which a lawyer could be found to lack probable cause even if he or she reasonably believed the truth of the evidence supporting their client's claim. Rather, plaintiffs are proposing a rule under which a lawyer cannot escape liability for malicious prosecution simply because the trial court in the underlying case denied summary judgment due to a materially false expert declaration submitted by the lawyer when he or she did not have a reasonable basis to believe it was true. Amici's argument is at odds with the standard for determining probable cause. A lawyer and a litigant alike cannot establish probable cause by reliance on facts which they have no reasonable basis to believe are true. Since that is the case, the fact that they used those tainted facts to overcome a summary judgment motion should not entitle them to a conclusive presumption of probable cause.

Next Amici argues that there is no support in case law for a "material false facts" exception to the adverse interim judgment rule. (Liability Assurance AC Brief 13-16.) This argument is largely an exercise in semantics as to whether language relied upon by plaintiffs from appellate decisions referencing "materially false facts" or "other unfair conduct" as exceptions to the adverse judgment rule means what those courts stated. The bottom line of what Amici argues is that this language on which plaintiffs rely is

inconsistent with this Court's opinion in *Wilson* supposedly holding that fraud and perjury are the only exceptions to the adverse interim judgment rule. But as explained in detail in plaintiffs' principal briefs, in *Wilson* this Court held no such things. Simply repeating the same argument over and over does not make it so.

Amici next curiously spend several pages attempting to support the expert declarations that were submitted in opposition to the summary judgment motion in the underlying action. (Liability Assurance AC Brief 16.) We say curiously because it is difficult to understand what institutional interest these Amici have in making this very fact specific argument. In any event, plaintiffs have already addressed these very arguments and will not repeat their responses here.

Next Amici argue that the finding of objective and subjective bad faith by the trial court and the Court of Appeal in the underlying action under Civil Code section 3426.4 does not support a finding that the action was initiated and maintained without probable cause. (Liability assurance AC Brief 21.) Amici use this argument as a platform to criticize *Slaney v. Ranger Insurance Co.* (2004) 115 Cal.App.4th 306, and to argue that it cannot be reconciled with *Wilson, supra.* Plaintiffs have also already addressed this argument and will not repeat it here. Of note, however, what Amici and Latham refuse to understand is that if in the very same action the summary judgment motion was denied, the trial court and the Court of Appeal each conclude that (1) the action was initiated and prosecuted with subjective and objective bad faith and (2) the earlier denial of summary judgment does not preclude imposition of sanctions because the evidence submitted in

opposition to that motion was materially false, then that at least would allow a conclusion that the lawyer submitting that false expert evidence did not have a reasonable basis to believe it was true. So long as this is the case, then at the very least under *Slaney* these post-summary judgment denial events are sufficient to overcome an anti-SLAPP motion based on the adverse interim judgment rule.

It is not the case that it would be "contrary to public policy to create a 'bad faith' exception to the existing test of probable cause. . ." as Amici argues. (LM AC Brief 23.) Rather, as explained above, such a rule already exists – as it should. If a litigant or attorney has no basis to reasonably believe the facts they use to assert probable cause, then they should not be able to rely upon those facts any more than they would be able to rely upon facts that were fraudulently submitted or facts which constituted perjury. Nothing in *Babb v. Superior Court* (1971) 3 Cal.3d 841, 847, on which Amici relies (LM AC Brief 23-24) is to the contrary. There, this Court simply held that a defendant in a civil action may not file a cross-complaint therein seeking a declaratory judgment that the action is being maliciously prosecuted. The Court based this conclusion on the fact the requirement that the underlying action be favorably terminated before the malicious prosecution action is filed. (*Id.* at pp. 847-849.) That issue has nothing whatsoever to do with the issue presently under review.

Finally, Amici argue that there is no basis to conclude that, if the summary judgment denial established probable cause at that point, it would still be the case that Latham lacked probable cause to continue to prosecute the action after that time.

(Liability Assurance AC Brief 24-25.) Amici simply give short shrift to the fact that the trial court and the Court of Appeal in the underlying action each concluded that the action was initiated and prosecuted with subjective and objective bad faith. If it is the case that the denial of a summary judgment establishes probable cause at that point (it is plaintiffs' position here that it does not), then it is necessarily the case that such findings in the underlying action at least are sufficient to allow the malicious prosecution plaintiffs to withstand an anti-SLAPP motion as to the continued prosecution of the action in the aftermath of that summary judgment denial.

II. NOTHING AMICI ARGUE ESTABLISHES THAT CODE OF CIVIL PROCEDURE SECTION 340.6 APPLIES TO MALICIOUS PROSECUTION ACTIONS AGAINST LAWYERS.

Amici argue that this Court's opinion in *Lee v. Hanley* (2015) 61 Cal.4th 1225 establishes Code of Civil Procedure § 340.6 governs malicious prosecution claims against lawyers. (LACBA 13; Liability Assurance 26.) They are mistaken.

This Court was very clear in *Lee* that section 340.6 applies when attorneys are sued due to the fact they violated a "professional obligation" which this Court defined as being "an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the

obligations embodied in the Rules of Professional Conduct." (*Id.* at p. 1237.) However, this Court expressly held that the mere fact that a lawyer's conduct happens to also violate a rule of professional conduct in addition to violating general standards of tort law, does not render section 340.6 applicable. This Court explained:

> By contrast, as the Court of Appeal observed, section 340.6(a) does not bar a claim for wrongdoing—for example, garden-variety theft—that does not require proof that the attorney has violated a professional obligation, even if the theft occurs while the attorney and the victim are discussing the victim's legal affairs. Section 340.6(a) also does not bar a claim arising from an attorney's performance of services that are not "professional services," meaning "services performed by an attorney which can be judged against the skill, prudence and diligence commonly possessed by other attorneys." (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 64, 72 Cal.Rptr.2d 359 (*Quintilliani*).)

(*Id.* at pp. 1236-1237.)

Accordingly, and belied by the volume of briefing submitted on this issue, the question here is very straight forward. Is a cause of action for malicious prosecution against a lawyer based on the lawyer's violation of his or her professional obligations or is it based on a violation of a general duty of care that applies to lawyers and nonlawyers alike?

Viewed from this perspective, it is evident that section 340.6 does not apply to malicious prosecution causes of action under this Court's analysis in *Lee*. While it is true, as Amici argues, that a lawyer's conduct in maliciously prosecuting an action may violate several cannons of professional responsibility, that is not the reason why the lawyer's conduct is actionable in the first place.

As this Court has explained on several occasions, malicious prosecution actions serve twin purposes. "'The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice.' [Citation.]" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 677.) *In Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50–51, this Court elaborated:

> The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings. In recognition of the wrong done the victim of such a tort, settled law permits him to recover the cost of defending the prior action including reasonable attorney's fees (*Stevens v. Chisholm* (1919) 179 Cal. 557, 564 [178 P. 128]; *Eastin v. Bank of Stockton* (1884) 66 Cal. 123, 125-126 [4 P. 1106]), compensation for injury to his reputation or impairment of his social and business standing in the community (*Ray Wong v. Earle C. Anthony, Inc.* (1926) 199 Cal. 15, 18 [247 P. 894]; *Lerner v. Glickfeld* (1960) 187 Cal.App.2d 514, 526 [9 Cal.Rptr. 686]), and for mental or emotional distress (Singleton v. Perry (1955) 45 Cal.2d 489, 495 [289 P.2d 794]).
>
> The judicial process is adversely affected by a maliciously prosecuted cause not only by the clogging of already crowded dockets, but by the unscrupulous use of the courts by individuals "... as instruments with which to maliciously injure their fellow men." (*Teesdale v. Liebschwager* et al. (1919) 42 S.D. 323, 325 [174 N.W. 620].)

Although these twin policy goals may also be furthered by rules of professional conduct, they are not dependent on such rules. As Justice Mosk explained in his

dissenting opinion in *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 354–55:

> The tort of malicious prosecution serves two distinct purposes. First, the tort is one aspect of a body of law intended to deter frivolous or malicious lawsuits. (See generally, Note, Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis (1979) 88 Yale L.J. 1218, 1221–1232, cited in *Sheldon Appel, supra,* 47 Cal.3d at p. 873, 254 Cal.Rptr. 336, 765 P.2d 498.) Similar objectives are also served by court rules and statutes that authorize court-imposed sanctions against parties and their attorneys for asserting frivolous or vexatious claims, and by ethics rules that subject attorneys to professional discipline for advocating such claims on behalf of their clients. (See *Brennan v. Tremco, Inc.* (2001) 25 Cal.4th 310, 314–315, 105 Cal.Rptr.2d 790, 20 P.3d 1086; *Sheldon Appel, supra,* 47 Cal.3d at pp. 873–874, 254 Cal.Rptr. 336, 765 P.2d 498; see generally, *Wade, supra,* 14 Hofstra L.Rev. at pp. 433–436; 1 Mallen & Smith, Legal Malpractice (2010 ed.) § 6:17, p. 804 (Mallen & Smith) ["the most useful and meaningful tests [of probable cause in a malicious prosecution action] derive from an examination of an attorney's ethical and professional obligations to a client"].)
>
> Second, the tort action for malicious prosecution is "intended to protect an individual's interest 'in freedom from unjustifiable and unreasonable litigation' [citation]...." (*Sheldon Appel, supra,* 47 Cal.3d at p. 878, 254 Cal.Rptr. 336, 765 P.2d 498; see also *Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740, 62 Cal.Rptr.3d 155, 161 P.3d 527; *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50–51, 118 Cal.Rptr. 184, 529 P.2d 608 (*Bertero*); *Hufstedler, supra,* 42 Cal.App.4th at p. 65, 49 Cal.Rptr.2d 551.) "Frivolous lawsuits cause appreciable harm to many persons, and in many ways. The person against whom the groundless suit is brought is subjected to serious harassment and inconvenience, pecuniary loss through necessary attorney's fees, deprival of time from his business or profession, and, in some cases, harm to reputation and even physical damage to person or property." (*Wade, supra,* 14 Hofstra L.Rev. at p. 433.) The tort remedy permits the party so injured to obtain compensation from the litigants or attorneys who investigate frivolous claims with malice. (*Sheldon Appel, supra,* 47 Cal.3d at p. 871, 254 Cal.Rptr. 336, 765 P.2d 498.)

But just because a malicious prosecution action may serve a similar object as those served by the Rules of Professional conduct does not mean that the action is dependent on proof that the lawyer violated a Rule of Professional Conduct (as this Court in *Lee* held was necessary).

As explained in plaintiffs' merits briefs, the obligation not to maliciously bring a claim without probable cause is not limited to attorneys and is therefore not reliant on the professional rules applicable solely to lawyers. (*Slaney v. Ranger Ins. Co.* (2004) 115 Cal.App.4th 306, 318 [elements of tort].) Lawyers and nonlawyers alike can be liable for malicious prosecution: attorneys, parties to litigation, or even an "aider and abetter" of the malicious prosecution can be potentially liable. (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 264 ["There does not appear to be any good reason not to impose liability upon a person who inflicts harm by aiding or abetting a malicious prosecution which someone else has instituted."]; see also *Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1371-1372 ["One may be civilly liable for malicious prosecution without personally signing the complaint initiating the . . . proceeding."].)

In response to this truth, Amici asserts that a malicious prosecution claim is "worlds apart" from the claims for theft and sexual assault referenced by this Court in *Lee* as examples of claims that are outside the reach of section 340.6 even though they also involve violations of professional duties when committed by lawyers on clients. (LACBA 17-18.) According to Amici this is the case because "malicious prosecution goes to the very heart of what attorneys are trained to do. . . ." (LACBA 17.) In other

words, it seems to be Amici's position that a lawyer's ethical responsibilities owed to adverse parties concerning the prosecution of meritless claims somehow deserves a higher place in the pantheon of lawyer responsibilities then the lawyer's ethical responsibility not to steal money from a client and not to take sexual advantage of a client. Needless to say, no authority is cited for this startling proposition.

Indeed, this Court's concluding discussion in *Lee* directly undermines Amici's claim. There, this Court explained:

> Lee's complaint may be construed to allege that Hanley is liable for conversion for simply refusing to return an identifiable sum of Lee's money. Thus, at least one of Lee's claims does not necessarily depend on proof that Hanley violated a professional obligation in the course of providing professional services. Of course, Lee's allegations, if true, may also establish that Hanley has violated certain professional obligations, such as the duty to refund unearned fees at the termination of the representation (Cal. Rules of Prof. Conduct, rule 3–700(D)(2)), just as an allegation of garden-variety theft, if true, may also establish a violation of an attorney's duty to act with loyalty and good faith toward a client. But because Lee's claim of conversion does not necessarily depend on proof that Hanley violated a professional obligation, her suit is not barred by section 340.6(a).

(*Lee, supra,* 61 Cal.4th at p. 1240.)

A lawyer's duty to return an unearned fee concerns core obligations owed by a lawyer every bit as much as the duty not to prosecute a meritless action. Yet, this Court directly concluded that fact was not sufficient to bring the claim with section 340.6. If a client's claim against his or her own lawyer based on facts that fit within the Rules of Professional Conduct does not fall within section 340.6 then it is also the case that a claim by an adverse party against the lawyer does not fall with that statute just because that

conduct also happens to violate Rules of Professional Conduct as well as violating common law tort duties.

Moreover, it is not the case that simply because malicious prosecution actions have been found to arise from constitutionally protected petitioning activity and therefore fall within the anti-SLAPP statute that it is necessarily the case that a malicious prosecution action against a lawyer arises from the performance of professional services under section 340.6. (See ASCDC Amicus Brief 12.) As already explained, lawyers and nonlawyers alike could be liable for malicious prosecution and a malicious prosecution action against a nonlawyer fits within the anti-SLAPP statute every bit as much as an action against a lawyer. Even Amici does not argue that a malicious prosecution action against a nonlawyer therefore arises out of the performance of professional services. Accordingly, the mere fact that the anti-SLAPP statute has been held to apply to malicious prosecution actions does not prove that section 340.6 necessarily applies.

Next, Amici asserts that somehow lawyers are treated differently than nonlawyers when it comes to malicious prosecution, referencing the fact that clients may be able to rely upon an advice of counsel defense. (LACBA 18) Amici's point is less than clear. The mere fact that a client may be able to assert advice of counsel as a defense, has nothing to do with the issue whether a lawyer's potential liability for malicious prosecution arises out of his or her professional responsibilities or whether that potential liability is dependent upon a general duty of care.

Contrary to what Amici argues, this Court's recent opinion in *Flores v. Presbyterian Intercommunity Hosp.* (2016) 63 Cal.4th 75, serves to demonstrate why section 340.6 does not apply here. (ASCDC AC Brief 8.)

In *Flores*, this Court held that Code of Civil Procedure section 340.5 which applies to actions "against a health care provider based upon such person's alleged professional negligence" applied to an action against a Hospital brought by a patient who was injured when a Hospital employee failed to follow physician orders to raise the rails on her bed. In concluding that the plaintiff's claim was for "professional negligence," this Court explained that "if the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under section 340.5." (*Id.* at p. 458.)

However, this Court continued that "section 340.5 does not extend to negligence in the maintenance of equipment and premises that are merely convenient for, or incidental to, the provision of medical care to a patient. Arguably every part of a hospital's plant would satisfy such a standard, since the medical care of patients is, after all, the central purpose for which any hospital is built. (See *Murillo, supra,* 99 Cal.App.3d at p. 57, 160 Cal.Rptr. 33.) Even those parts of a hospital dedicated primarily to patient care typically contain numerous items of furniture and equipment—tables, televisions, toilets, and so on—that are provided primarily for the comfort and convenience of patients and visitors, but generally play no part in the patient's medical diagnosis or treatment. *Although a*

defect in such equipment may injure patients as well as visitors or staff, a hospital's general duty to keep such items in good repair generally overlaps with the 'obligations that all persons subject to California's laws have' (Lee, supra, 61 Cal.4th at p. 1238, 191 Cal.Rptr.3d 536, 354 P.3d 334), and thus will not give rise to a claim for professional negligence." (*Id.* at pp. 458–59, italics added.)

Under this same analysis, section 340.6 has no application to malicious prosecution claims such the one brought here. Under *Flores*, if it was a Hospital visitor that fell off the bed because the rails were not up (and not a patient), then section 340.5 would not apply because the Hospital's duty of care would not be based upon its professional obligations. Applied here, the issue is whether an attorney's liability for malicious prosecution exists only because of the lawyer's professional responsibilities as reflected in the Rules of Professional Conduct, or whether that potential liability exists because of a general duty of care that applies to lawyers and nonlawyers alike. As already explained, the latter is the case.

Finally, Amici argues that there are policy justifications for treating a lawyer more favorably than a client for purposes of the statute of limitations as to malicious prosecution claims making arguments such as "attorneys bear a greater share of malicious prosecution risk than their clients." (LACBA 23.) Amici overlook that there is absolutely nothing in the Legislative history of section 340.6 indicating that the Legislature weighed these supposed policy justifications and determined that lawyers should be treated more favorably when it comes to malicious prosecution claims.

Moreover, this argument ignores the fact that the issue here does not concern a rule making it harder to prove that a lawyer maliciously prosecuted an action. The issue here concerns whether there should be a significantly shorter statute of limitations as to lawyers than as to their clients for the very same conduct. Under such a rule, the potential liability for lawyers for malicious prosecution will remain the same. The only thing that would be different would be that the victims of their tortious conduct might not be able to successfully recover because they erroneously believed they had the same amount of time to sue both the adverse party and that party's lawyer. Nothing Amici argues justifies such disparate treatment.

CONCLUSION

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

Dated: August 10, 2016

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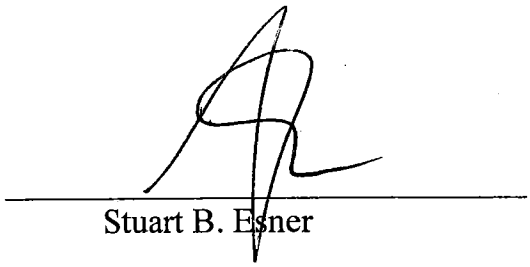

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