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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| JAMES D. MINIDIS et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>MICHAEL MARSH et al.,<br><br>Defendants and Respondents. | B271218, B276559<br><br>(Los Angeles County Super. Ct. No. BC591157) |

APPEALS from orders of the Superior Court of Los Angeles County, Debre K. Weintraub. Affirmed.

Klein & Wilson and Gerald A. Klein for Plaintiffs and Appellants.

Craig A. Huber and Stephen P. Crump for Defendants and Respondents.

Plaintiffs James D. Minidis (James Minidis) and Lynn M. Minidis (collectively, the Minidises[1]) sued defendants Michael Marsh (Marsh) and Mary Dousette (Dousette) (collectively, Defendants) for malicious prosecution. In response, Defendants, pursuant to section 425.16 of the Code of Civil Procedure,[2] filed a special motion to strike the Minidises' lawsuit—a so-called anti-SLAPP motion.[3] The trial court granted Defendants' motion, ruling that the Minidises failed to demonstrate a probability of success on their claim and awarded them attorney fees.

On appeal from the trial court's order granting Defendants' anti-SLAPP motion, the Minidises argue that the trial court was wrong to conclude that they failed to show that Defendants lacked probable cause when they initiated the underlying litigation. We disagree and, accordingly, affirm the orders.

## BACKGROUND

### I. The underlying litigation

In 2001, Defendants sued the Minidises, their accountant Rick Armstrong (Armstrong), and various entities alleging causes of action for breach of contract, fraud, conspiracy, conversion, breach of fiduciary duty, violation of shareholder's rights and an

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[1] The Minidises are the plaintiffs in the case on appeal, but were the defendants in the underlying action. In order to avoid the inevitable confusion that would result from referring to them herein as Plaintiffs, they are referred to as the Minidises throughout this opinion.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[3] SLAPP is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

accounting. The Minidises cross-complained, alleging causes of action for breach of contract, promissory fraud and negligent misrepresentation.

The parties' dispute centered on a commercial transaction negotiated among the Minidises, Defendants and Armstrong in which Defendants invested $320,000 for operating capital in exchange for a minority stake (39 percent) in a business entity to be formed to license the right to sell, own, operate and run a variety of franchise stores based on a "concept-style food operation" developed by James Minidis. Armstrong was a certified public accountant who had provided tax consulting services to Plaintiffs and Defendants and who was to act as the company's operations manager. The parties' goal, as described in their initial 1996 agreement was to open five stores within 12 to 18 months.

In 2001, when no stores had opened and the Minidises had resisted Defendants' demands for an accounting, Defendants filed suit, contending that the money they had provided had been converted by the Minidises and that the Minidises had effectively usurped the business opportunity for themselves.

The case went to trial in the spring of 2005. During trial, among other witnesses, Defendants called Armstrong to testify in their case-in-chief. At that time, he was cross-examined by counsel for the Minidises. Upon the conclusion of Armstrong's testimony, counsel for the Minidises requested that the court order Armstrong to remain on call so he could be recalled as a witness during their case-in-chief. The court so ordered. But when the Minidises sought to have Armstrong appear, he refused to cooperate. Defendants brought the matter to the court's attention, but the court declined to issue a bench warrant. The

Minidises sought to serve Armstrong with another subpoena, but could not locate him and had to rest their case without recalling him to the stand.

While the jury was deliberating, the Minidises obtained information that led them to believe Armstrong had deliberately evaded process and had hidden at a resort in Laguna Beach, California. The Minidises subsequently filed a motion for mistrial, contending that Armstrong had intentionally evaded process and had absented himself from the trial with the aid of Defendants and their counsel. The court denied the motion.

The jury returned a verdict in favor of Defendants on all of their causes of action (on almost every issue before them, the jurors found in favor of Defendants 12-0), awarded them $6,220,700, and found against the Minidises on their cross-complaint. After the trial, the trial court allowed the Minidises to conduct discovery in support of their motion for a new trial based on Defendants' alleged role in making Armstrong unavailable during the Minidises case-in-chief. Ultimately, the court denied the Minidises motion for a new trial on the grounds of insufficiency of the evidence, excessive damages and newly discovered evidence, but granted the motion on the grounds of "irregularity" in the proceedings by an adverse party and surprise "which ordinary prudence could not have guarded against." (Code Civ. Proc., § 657.) We subsequently affirmed the trial court's decision.

On remand, the Minidises, before the retrial, successfully moved for summary judgment against Marsh on standing grounds, arguing that Dousette, not Marsh, executed the parties' agreements and had written the checks providing the investment funds. On Defendants' complaint (which was the only pleading at

issue since the Minidises voluntarily dismissed their cross-complaint), the jury in the second trial found against Dousette and in favor of the Minidises. In January 2013, the trial court entered judgment in favor of the Minidises.

In January 2015, we affirmed the grant of summary judgment against Marsh and the subsequent judgment in favor of the Minidises.

## II. The malicious prosecution litigation

On August 12, 2015, the Minidises filed their malicious prosecution action against Defendants and their attorneys.[4] The Minidises alleged that Defendants filed their complaint without probable cause and then continued to prosecute their claim through the second trial without probable cause.

### A. DEFENDANTS' ANTI-SLAPP MOTION

Defendants filed their anti-SLAPP motion on October 26, 2015. Defendants, in the main, argued that the Minidises could not show a probability of success on their claim for the following reasons: (1) although the jury found in favor of the Minidises in the second trial, there was "no clear favorable termination" in their favor because Marsh was dismissed from the case on procedural grounds and the jury's 9-3 split was "not indicative of an overall rejection of Marsh's claims"; (2) Defendants, not only acted in good faith on the advice of counsel in bringing the underlying litigation but they had probable cause for that lawsuit given their decisive victory in the first trial; and (3) there was no

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[4] Defendants' attorneys also filed an anti-SLAPP motion, which the trial court granted. The Minidises appealed the ruling but subsequently abandoned their appeal.

evidence that Defendants acted with the requisite degree of malice.

Defendants supported their motion with a declaration by Marsh discussing the course of the parties' interactions prior to the filing of their lawsuit against the Minidises, as well as the course of the underlying litigation. Marsh's declaration was supported by a number of documents from the underlying litigation, including copies of their investment checks, as well as orders, pleadings, verdict forms and appellate decisions.

B. THE MINIDISES' OPPOSITION & DEFENDANTS' REPLY

The Minidises opposed the motion. Although they conceded that the underlying lawsuit was subject to the anti-SLAPP statute, the Minidises argued that they were likely to prevail on the merits of their claim, because (1) the underlying litigation was terminated in their favor against both Defendants, not just Dousette, because Marsh was in privity with Dousette; (2) Defendants lacked probable cause to bring the underlying lawsuit in light of their purported bribery of Armstrong not to testify at the first trial; and (3) Defendants' conduct with respect to Armstrong's unavailability for the Minidises case-in-chief in the first trial indicated malice.

The Minidises supported their opposition with a lengthy declaration by James Minidis detailing the parties' business dealings and the course of the underlying litigation. The Minidises also filed a request for judicial notice with respect to a number of documents from the underlying litigation, including 10 volumes of reporter's transcripts from the second trial. In addition, the Minidises submitted evidentiary objections to the Marsh declaration.

The Defendants responded by filing a reply brief, evidentiary objections to James Minidis's declaration, and a request that the trial court take judicial notice of the moving papers supporting the successful anti-SLAPP motion brought by Defendants' lawyers and the trial court's ruling on that motion.

C. THE TRIAL COURT'S RULING

On February 17, 2016, at the hearing on the anti-SLAPP motion, the trial court granted the parties' respective requests for judicial notice, overruled most of the parties' evidentiary objections, and then issued a tentative ruling in favor of the Defendants.

In its tentative ruling, the court focused mainly on the issue of whether Defendants had probable cause to file and prosecute the underlying lawsuit. Among other things, the trial court found that "the verdict in the first trial . . . was obtained by the perjury of Armstrong," thereby negating the inference from the first trial that Defendants had probable cause. However, the trial court also found that, while the Minidises had established that Defendants may have bribed Armstrong, Plaintiffs did not submit "competent and admissible evidence" showing that Defendants' lawsuit lacked probable cause. Specifically, the Minidises failed to present evidence negating Defendants' core claim that the Minidises "used over $320,000 contributed by [Defendants] for purposes unrelated to the concept stores as set forth in the [parties'] agreements." "None" of the facts submitted by the Minidises, according to the trial court, "explain[ed] how the $320,000 was utilized by Minidis." Due to the Minidises' failure on the issue of probable cause for the underlying litigation, the trial court declined to address the issue of Defendants' alleged malice.

After hearing oral argument on the matter, the trial court adopted its tentative ruling. The Minidises timely appealed.

## DISCUSSION

### I. The anti-SLAPP statute and applicable legal principles

#### A. SECTION 425.16

"A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so. ' "While SLAPP suits masquerade as ordinary lawsuits such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right." ' " (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.)

The anti-SLAPP statute "provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) The statute applies to "cause[s] of action against a person *arising from* any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1), italics added.) As used in the statutory scheme, an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: . . . any written or oral statement or writing made before a legislative, executive, or *judicial proceeding*, or any other official proceeding authorized by law." (§ 425.16, subd. (e), italics added.)

B. EVALUATING ANTI-SLAPP MOTIONS

In ruling on a motion under section 425.16, the trial court engages in what is now a familiar two-step process. "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral*, *supra*, 1 Cal.5th at p. 384.)

1. *Step one: "arising from" protected activity*

The moving party's burden at step one is to show "the challenged cause of action arises from protected activity." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e).' " (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

A defendant's burden on the first prong is not an onerous one. A defendant need only make a prima facie showing that plaintiff's claims arise from defendant's constitutionally protected free speech or petition rights. (See *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.) " 'The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish [his or]

her actions are constitutionally protected under the First Amendment as a matter of law.' [Citation.] 'Instead, under the statutory scheme, *a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis*, and then permit the parties to address the issue in the second step of the analysis, if necessary. [Citation.] Otherwise, the second step would become superfluous in almost every case, resulting in an improper shifting of the burdens.' " (*Id.* at p. 458, italics added.)

2. *Step two: probability of prevailing*

"If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral*, *supra*, 1 Cal.5th at p. 384.) The plaintiff must do so with admissible evidence. (*Kreeger v. Wanland* (2006) 141 Cal.App.4th 826, 831.) "We decide this step of the analysis 'on consideration of "the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b).) Looking at those affidavits, "[w]e do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff." ' " (*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 378–379, disapproved in part in *Baral*, at p. 396, fn. 11.)

This second step has been described as a " 'summary-judgment-like procedure.' " (*Baral*, *supra*, 1 Cal.5th at p. 384.) A court's second step "inquiry is limited to whether the [opposing party] has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. [The court] . . . evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law."

(*Id*. at pp. 384–385.) "Only a [claim] that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

C. STANDARD OF REVIEW

"On appeal, we review the trial court's decision de novo, engaging in the same two-step process to determine, as a matter of law, whether the defendant met its initial burden of showing the action is a SLAPP, and if so, whether the plaintiff met its evidentiary burden on the second step." (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266–267.)

## II. The Minidises failed to show a probability of success

On appeal, as below, the Minidises concede that Defendants met their burden of showing that the Minidises' lawsuit arises from activity protected by section 425.16, namely the underlying legal action pursued by Defendants. Consequently, the only issue on appeal is whether the Minidises met their burden of showing a probability of prevailing on their malicious prosecution claim.

A. ELEMENTS OF A MALICIOUS PROSECUTION CLAIM

As our Supreme Court has recently restated, the tort of malicious prosecution "consists of three elements. The underlying action must have been: (i) initiated or maintained by, or at the direction of, the defendant, and pursued to a legal termination in favor of the malicious prosecution plaintiff; (ii) initiated or maintained without probable cause; *and* (iii) initiated or maintained with malice." (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 775, italics added.) Since the "plaintiff in a malicious prosecution action must prove each of the

necessary elements of the tort" (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164), a failure to establish one element is necessarily fatal.

B. THE MINIDISES ESTABLISHED A FAVORABLE TERMINATION ON THE MERITS AGAINST DOUSETTE

" 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort [of malicious prosecution].' [Citation.] Thus, '[i]t is hornbook law that the plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.' " (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341 (*Casa Herrera*).)

"To determine 'whether there was a favorable termination,' we 'look at the judgment as a whole in the prior action . . . .' [Citation.] 'It is not essential to maintenance of an action for malicious prosecution that the prior proceeding was favorably terminated following trial on the merits.' [Citation.] Rather, '[i]n order for the termination of a lawsuit to be considered favorable to the malicious prosecution plaintiff, the termination must reflect the merits of the action and the plaintiff's innocence of the misconduct alleged in the lawsuit.' " (*Casa Herrera*, *supra*, 32 Cal.4th at pp. 341–342.)

"However, a ' "favorable" termination does not occur merely because a party complained against has prevailed in an underlying action. . . . If the termination does not relate to the merits—reflecting on neither innocence of nor responsibility for the alleged misconduct—the termination is not favorable in the sense it would support a subsequent action for malicious

prosecution.' [Citation.] Thus, a '*technical or procedural* [*termination*] *as distinguished from a substantive termination' is not favorable for purposes of a malicious prosecution claim*." (*Casa Herrera*, *supra*, 32 Cal.4th at p. 342, italics added.)

In *Casa Herrera*, *supra*, 32 Cal.4th 336, the court concluded that a dismissal based on application of the parol evidence rule, a substantive rule of contract law, is a termination on the merits for the purposes of the malicious prosecution rule. (*Id.* at pp. 344–345.) The court distinguished *Robbins v. Blecher* (1997) 52 Cal.App.4th 886 (*Robbins*). "In *Robbins*, the defendants in the malicious prosecution action had filed an alter ego action against the plaintiffs in the malicious prosecution action after obtaining an antitrust judgment against a corporation owned by the plaintiffs." (*Casa Herrera*, at p. 347.) When the antitrust judgment in *Robbins* was reversed on appeal, the defendants voluntarily dismissed the alter ego action as moot. In the resulting malicious prosecution action, the plaintiff contended that dismissal of the alter ego action constituted a favorable termination because the defendants could no longer establish a necessary element in light of the antitrust action reversal. (*Robbins*, at p. 894.) The *Robbins* court held that there was no favorable termination because the dismissal was on technical grounds rather than on the merits. (*Ibid.*)

In *Casa Herrera*, *supra*, 32 Cal.4th 336, our Supreme Court described the dismissal in *Robbins* as necessitated by a loss of standing: "[T]he defendants voluntarily dismissed the action because they 'had simply *lost standing* to pursue' the alter ego action. [Citation.] Thus, in dismissing the action, the defendants had not conceded that the plaintiffs 'had done nothing wrong; they had merely conceded that' they '[were] no longer in a

position to complain of [plaintiffs'] wrongdoing.' [Citation.] *Unlike the dismissal in Robbins, the Court of Appeal in the underlying action in this case did not rely on a technical or procedural defense like lack of standing*. Instead, the court applied a substantive rule of contract law and resolved the action on its merits." (*Casa Herrera*, at p. 348, second italics added.)

In the wake of *Casa Herrera*, *supra*, 32 Cal.4th 336, California courts have held that a dismissal for lack of standing is not a favorable termination on the merits for purposes of a malicious prosecution action. (See, e.g., *Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1591–1592.)

Here, the Minidises met their malicious prosecution elemental burden with respect to the claims brought by Dousette, but not as to those claims brought by Marsh. Before the second trial, Plaintiffs obtained summary judgment against Marsh on technical not substantive grounds, namely a lack of standing. As discussed above, a victory on technical or procedural grounds cannot form the basis of a malicious prosecution action. (See *Casa Herrera*, *supra*, 32 Cal.4th at p. 348; *Hudis v. Crawford*, *supra*, 125 Cal.App.4th at pp. 1591–1592; see also *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1150 ["disposition based on lack of standing is not a favorable termination because it does not shed light on the merits"].) In contrast to their technical victory with respect to Marsh, the jury's verdict in favor of the Minidises on Dousette's claims was a favorable termination on the merits.[5]

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[5] The Minidises, based on dicta in the decision affirming the motion for summary judgment against Marsh, argue that because Marsh and Dousette were in privity they also obtained a verdict on the merits against Marsh. The Minidises are

Defendants argue that, notwithstanding the jury verdict against Dousette, the Minidises failed to meet their burden. Specifically, Defendants argue that because the jury's verdict in the second trial was nine to three, it was not a "resounding victory" for Plaintiffs. Defendants' argument is without merit. The Minidises prevailed on each question put to the jury regarding Plaintiffs' liability. Moreover, the jury's verdict was not nine to three on every issue. While it was nine to three on the breach of contract and concealment claims, the vote was 10 to two against Dousette on her conversion claim and 12 to zero on her fraud/false promise claim. Moreover, on the issue of whether the Minidises acted with oppression, fraud or malice, the jury found that they did not so act by a vote of 12 to zero in their favor.

In short, the Minidises met their burden with respect to the first element of their malicious prosecution claim.

C. THE MINIDISES FAILED TO ESTABLISH THAT DEFENDANTS ACTED WITHOUT PROBABLE CAUSE

As explained by our highest court, "the existence of probable cause is a question of law to be determined as an objective matter. [Citation.] '[T]he probable cause element calls on the trial court to make an objective determination of the

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mistaken. Our prior decision merely noted that as a result of Marsh's interest in the community property monies that Dousette used as the investment funds, he would be barred by principles of res judicata and collateral estoppel from relitigating his claims against the Minidises. Nothing in that decision alters the fact that the Minidises' award of summary judgment against Marsh was based on technical, nonsubstantive grounds, which puts it beyond the reach of a subsequent malicious prosecution action.

"reasonableness" of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the *institution* of the prior action was legally tenable,' as opposed to whether the litigant subjectively believed the claim was tenable. [Citation.] A claim is unsupported by probable cause *only* if ' " 'any reasonable attorney would agree [that it is] totally and completely without merit.' " ' [Citations.] 'This rather lenient standard for bringing a civil action reflects "the important public policy of avoiding the chilling of novel or debatable legal claims." ' [Citation.] The standard safeguards the right of both attorneys and their clients ' " 'to present issues that are arguably correct, even if it is extremely unlikely that they will win.' " ' " (*Parrish v. Latham & Watkins*, *supra*, 3 Cal.5th at p. 776, italics added.) "If the court determines that there was probable cause to institute the prior action, the malicious prosecution action fails, whether or not there is evidence that the prior suit was maliciously motivated." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875.)

In short, the probable cause standard is a demanding one for any malicious prosecution plaintiff: " 'Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which *all* reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 743, fn. 13.)

*1. Probable cause to initiate the underlying litigation*

"Good faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts, is a complete defense to a malicious prosecution claim." (*Bisno v. Douglas Emmett Realty Fund 1988* (2009) 174 Cal.App.4th 1534, 1544.) Reliance on the advice of counsel is an affirmative defense and the burden of establishing it rests on the defendant in an action for malicious prosecution. (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 54 (*Bertero*).) A defendant who advances an affirmative defense on a special motion to strike properly bears the burden of proof on the defense. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676.) A malicious prosecution defendant meets his or her burden by providing their counsel with "specific facts and not merely unleash[ing them] on a hunting expedition." (*Bertero*, at p. 55.)

Here, Defendants raised the advice of counsel defense as part of their anti-SLAPP motion. In his supporting declaration, Marsh stated he conferred with attorneys and relied on their advice at two different stages prior to filing suit. First, he consulted with and relied upon the advice of counsel during the pre-lawsuit, informal dispute resolution phase: "I met with counsel on a number of occasions and provided them with evidence of the negotiations, the agreements we signed, communications between me and Minidis and documentary evidence of the funds we provided to Minidis and his wife. I provided all these materials to counsel and believe I made a full and fair statement of all material facts known to me with respect to this deal and I, in good faith accepted counsel's advice we had a meritorious case. At this point, however, we were simply trying

to figure out what was going on and come up with a way to resolve the matter without filing suit."

Second, after negotiations with the Minidises failed to produce a satisfactory resolution, Marsh again consulted with and relied upon the advice of counsel before filing suit: "[O]nce it became clear the Minidises were refusing to cooperate at all in terms of providing an accounting or attempting to fullfil their contractual obligations, I agreed that filing a lawsuit was the only step left to find out exactly what happened to our money and why no stores had been opened as contemplated in our agreement. . . . [¶] . . . Again, I relied in good faith on the advice of counsel that our causes of action were meritorious."

In opposition to the anti-SLAPP motion, the Minidises did not offer any evidence challenging Defendants' assertion that they consulted and relied on the advice of counsel in bringing their lawsuit. Instead, the Minidises argued that Defendants failed to reveal a purported fact to their counsel: "[t]his is a case where Marsh and Dousette knowingly brought an action they knew could only be won if they could bribe the key witness to commit perjury." The problem with this argument is that there is no evidence to support the Minidises' assertion.

The Minidises rely heavily on evidence relating to the irregularities that occurred in 2005 during the later stages of the first trial, the scope of which was only fully revealed during the second trial in 2012. However, Defendants' lawsuit had been filed in 2001—four years earlier. The Minidises have not directed us to evidence showing that in 2001, Defendants knowingly brought an action they knew could only be won if they could bribe Armstrong.

The Minidises direct us to evidence from the second trial indicating that all of Defendants' investment funds were ultimately properly accounted for and none of those monies were used for improper purposes. However, none of that trial testimony indicates that Defendants were aware in 2001 that all of their investment funds had been used properly for the joint venture. In fact, most of the trial testimony upon which the Minidises rely comes from their expert accountant who was retained by the Minidises' counsel in 2011—a decade *after* Defendants filed suit and six years *after* the jury rendered its verdict in the first trial.

Put a little differently, while there is retrospective evidence that the $320,000 that Defendants invested in the joint venture was ultimately properly accounted for, there is no evidence that Defendants were aware of this fact at the time they filed suit. In fact, the evidence suggests that they were not.

Among the documents the trial court took judicial notice of was a declaration by Thomas A. Brackey II (Brackey), one of Defendants' attorneys from the first trial. Brackey declared that his firm was retained by Defendants in 2000. In addition to providing Brackey with copies of the parties' agreements, Defendants provided him with "evidence demonstrating that they had invested approximately $320,000 to the venture"; moreover, they provided Brackey "with the backs of the checks showing that funds had been diverted into James Minidis's personal . . . venture accounts rather than the appropriate [joint venture] accounts." Defendants also provided Brackey with "evidence showing that the Minidises had failed to open a single store in furtherance of the franchise, failed to issue stock, and failed to create a board which included Dousette as had been

initially agreed upon.' "Subsequent investigation" by Brackey's office "confirmed that each of these things were true.

Brackey stated further that in order to avoid litigation, his firm "requested an accounting on Dousette's behalf pursuant to her rights as a director and shareholder." "Prior to filing suit, the accounting requests were largely ignored." As a result, Brackey and his firm initiated the underlying litigation in 2001 by filing suit on Defendants' behalf. In October 2003, more than two years after Defendants' complaint was filed, the Minidises provided an accounting. Although Defendants and Brackey found the "accuracy of the accounting was questionable," they subsequently dropped the demand for an accounting from their complaint.

Marsh's declaration and the supporting documents attached thereto, tell a story that conforms closely to Brackey's account of the events giving rise to Defendants filing suit in the underlying action. For example, Marsh attaches correspondence beginning in 1999 regarding Defendants' demands for an accounting and the Minidises' refusal to provide one. In addition, Defendants' original complaint from the underlying action discusses not only the unanswered demands for an accounting but also the Minidises' alleged failure to adhere to the "requisite corporate formalities" in discussing the grounds for Defendants' claims against the Minidises.

In their description of the events leading up to Defendants' lawsuit in their malicious prosecution complaint, the Minidises do not mention Defendants' pre-lawsuit demands for an accounting or the Minidises' alleged failure to adhere to corporate formalities. Similarly, in his declaration opposing Defendants' anti-SLAPP motion, James Minidis does not address the corporate formalities issue and barely acknowledges Defendants'

pre-lawsuit demands for an accounting, stating only that "[w]hile the defendants contend I refused to provide an accounting that contention is false and, ultimately, Marsh and Dousette withdrew that frivolous claim."

In sum, we hold that the Minidises failed to show a probability of prevailing on their claim that the Defendants initiated the underlying litigation without probable cause, because the record before us indicates that Defendants relied in good faith on the advice of counsel that they had a legally tenable claim against the Minidises with respect to how their investment funds had been spent.

*2. Probable cause to continue the underlying litigation through the second trial*

Under California law, a person may be liable for malicious prosecution for continuing an action after learning that one, some, or all of their claims may lack probable cause. (See *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1399.) In order to defeat the Minidises' claim that there was no probable cause to continue their claims through a second trial, Defendants also invoked the advice of counsel defense.

In his declaration supporting the anti-SLAPP motion, Marsh stated that because Defendants "believed the initial jury got it right," and because they wanted to minimize the distractions from the Minidises' allegations that the Defendants' attorneys were complicit in Armstrong's nonappearance, the Defendants' switched attorneys. After retaining new counsel, Marsh briefed his new counsel on their claims and the case. Specifically, Marsh stated that he had "*extensive meetings* with counsel and *conveyed much of the same narrative and provided*

*the same documents to new counsel*." (Italics added.) And, as with their prior counsel, Defendants were "advised that [they] had a meritorious case that could be won."[6]

The Minidises take issue with this assertion, arguing that "Marsh knew he bribed Armstrong to testify falsely" and [t]here is not a shred of evidence Marsh ever told his attorneys about bribing Armstrong." There are several problems with such an argument.

First, as a preliminary matter, it is correct that an advice of counsel defense fails when it can be shown that the malicious prosecution defendant failed to advise counsel of "specific relevant *facts*." (*Bertero*, *supra*, 13 Cal.3d at p. 54, italics added.) Here, the Minidises accuse Defendants of failing to inform their new counsel of the purported truth of an unproved allegation.

Second, Marsh never admitted to bribing Armstrong. In fact, he steadfastly denied doing so under oath at the second trial and in his declaration supporting the anti-SLAPP motion.

Importantly, Armstrong denied on the witness stand that Marsh had bribed him with a share of the proceeds from the expected judgment in exchange for his testimony.[7]

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[6] Although Marsh was ultimately dismissed from the case and was not a party at the second trial, his dismissal did not occur until 2011—more than three years after we affirmed the trial court's new trial order. In other words, because Marsh remained a party well into preparations for the second trial, he had the necessary personal knowledge to offer competent testimony about Defendants' discussions with their new trial counsel and their reliance on counsel's advice.

[7] In addition, Defendants' trial attorney from the first trial testified that he did not bribe Armstrong.

Finally, and most importantly, there was no determination by the trial court that Defendants or their counsel had bribed Armstrong. This point merits some amplification because the Minidises repeatedly argue on appeal that the verdict in the first trial was "obtained by bribery, fraud and perjury."

Unarguably, the trial court did not order a new trial based on an express determination that Defendants had committed bribery, fraud or perjury in connection with the prosecution of their claims. Significantly, the trial court's finding was far more limited and circumspect: the trial court found only that that a new trial was required due to an "irregularity" in the proceedings caused by Defendants and which resulted in "surprise" to the Minidises.

Demonstrably, the trial court's evidentiary sanction was commensurate with a finding of only an irregularity, not with a finding of bribery, fraud or perjury. The sanction imposed on Defendants was as follows: the court finding merely "that it was more likely to be true than not true that Mr. Marsh *participated* in the non-appearance of witness Armstrong." (Italics added.) In other words, the trial court did not find that Marsh was the instigator or driving force behind Armstrong's nonappearance or that he accomplished that nonappearance through bribery or that Armstrong perjured himself during the first trial. Rather, the trial court concluded only that Marsh played an undefined role in Armstrong's nonappearance.

Not only was the evidentiary sanction consistent with a finding of irregularity rather than bribery, fraud or perjury, but it was also relatively mild and quite narrow. The trial court could have imposed far more serious and far-reaching evidentiary sanctions for Marsh's participation in Armstrong's

nonappearance if it felt that such sanctions were warranted. For example, the trial court could have sharply limited Marsh's testimony at the second trial (see *Dwyer v. Crocker National Bank* (1987) 194 Cal.App.3d 1418, 1431 [limiting plaintiff's testimony due to discovery abuse]) or even precluded Marsh from testifying at all. (*Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 119 [prohibiting party from testifying due to discovery abuse].) But it did not. In the second trial, Defendants were free to re-introduce *all* of the evidence that they had relied upon in the first trial—evidence which had led the jury in that trial to find decisively in their favor on multiple causes of action.

In addition, although the Minidises concurrently moved for a new trial on the grounds that the Defendants' evidence was insufficient to support the verdict, the trial court specifically denied that motion. When a trial court rules on a motion for a new trial based on the insufficiency of the evidence, the judge acts as "a thirteenth juror." (*Norden v. Hartman* (1952) 111 Cal.App.2d 751, 758.) The "powers of a trial court in ruling on a motion for new trial are plenary. The California Supreme Court has held that the trial court, in ruling on a motion for new trial, has the power 'to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact' [citation], that the court sits as 'an independent trier of fact' [citation] and that it must 'independently assess[ ] the evidence supporting the verdict.' " (*Barrese v. Murray* (2011) 198 Cal.App.4th 494, 503.) In fact, the trial court's latitude is so wide that it "may grant a new trial even though there [is] sufficient evidence to sustain the jury's verdict on appeal, so long as the court determines the weight of the evidence is against the verdict." (*Candido v. Huitt* (1984) 151 Cal.App.3d 918, 923.)

Critically, in this case, the trial court explained its ruling on the Minidises' new trial motion as follows: "after weighing the evidence, the Court is convinced from the entire record, including reasonable inferences therefrom, that the Jury could not [have] arrived at a different verdict." By denying the Minidises' new trial motion based on a claimed insufficiency of the evidence, the trial court found that Defendants had presented sufficient evidence to support the jury's verdict and, in so doing, the court implicitly found that Defendants' claims had a probable cause basis.[8]

Instead of offering evidence showing that Marsh failed to disclose certain "specific relevant facts" to his new counsel (*Bertero*, *supra*, 13 Cal.3d at pp. 54, 55), the Minidises offered only unsubstantiated allegations. Since it is not reasonable to infer from the evidence presented by the parties that Marsh failed to advise his new attorneys of all material facts, including

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[8] Although we have not found a case so stating, it appears from the language of section 657 of the Code of Civil Procedure and from the relevant case law interpreting that section that when a trial court is reviewing a motion for a new trial based on a purported insufficiency of the evidence it utilizes the same burden of proof as that used by the jury (i.e., in a civil trial, depending on the claim, either the preponderance of the evidence standard or the clear and convincing evidence standard). (See generally, *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750–751 [discussing distinction between, on the one hand, motions for nonsuit, directed verdict and JNOV, and, on the other hand, motions for new trial].

those relating to Armstrong's nonappearance at the first trial,[9] there is no factual dispute as to whether Defendants relied in good faith on the advice of counsel. Accordingly, Defendants' showing defeats the Minidises' "continuing" claim as a matter of law.

In sum, we hold that the Minidises failed to show a probability of prevailing on their claim that the Defendants both initiated and continued the underlying litigation without probable cause, because the Defendants showed that in both instances they relied in good faith on the advice of counsel. Since the Minidises failed to meet their burden with respect to the lack of probable cause element of their malicious prosecution claim, we need not consider whether they met their burden with respect to the last element of their claim, malice. (*Sangster v. Paetkau*, *supra*, 68 Cal.App.4th at p. 164.)

Since the Minidises do not challenge the amount of the attorney fees awarded to Defendants, we also affirm the fee award.

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[9] An inference of full and fair disclosure by Marsh to his new attorneys is supported by the transcript of the second trial, which shows that Defendants' new lawyers were well prepared for the testimony concerning Armstrong's nonappearance. For example, at the second trial, Defendants' new lawyers cross-examined a number of witnesses with knowledge of Armstrong's nonappearance, including Armstrong, his ex-wife, and his daughter. The new trial counsel cross-examined those witnesses with documents and/or their prior deposition testimony. In other words, the trial transcript shows that Defendants' new counsel was aware of Armstrong's nonappearance and the resulting fallout and was prepared to address it at trial.

## DISPOSITION

The orders are affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

I concur:

CHANEY, J.

ROTHSCHILD, P. J., concurring and dissenting:

I agree with the majority that the summary judgment that James Minidis and Lynn Minidis (collectively the Minidises) obtained against Michael Marsh (Marsh) on lack-of-standing grounds was not a decision on the merits of Marsh's causes of action and, for that reason, the Minidises cannot establish the favorable termination element of their malicious prosecution claim against Marsh. (See maj. opn. *ante*, at p. 12.) I therefore concur in part II.B of the majority's discussion and would affirm the order granting the anti-SLAPP motion as to Marsh.

I disagree with the majority's analysis and conclusion with respect to Mary Dousette (Dousette). Because the Minidises have made a prima facie factual showing supporting their malicious prosecution cause of action against Dousette, and Dousette has failed to establish her defense of advice of counsel, I would reverse the order granting the anti-SLAPP as to Dousette. I therefore respectfully dissent from part II.C of the opinion and the disposition. (See maj. opn. *ante*, at pp. 15-26.)

## I. Factual Summary[1]

The Minidises are entrepreneurs who, prior to meeting Marsh and Dousette, operated restaurant franchises through a business called California Pride Foods.

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[1] In accordance with the standards for evaluating anti-SLAPP motions and our de novo standard of review, this factual summary is based upon the pleadings and evidence submitted in support of and in opposition to the anti-SLAPP motion, and assumes the truth of evidence favorable to the plaintiffs. (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.)

In 1996, Marsh and Dousette formed a partnership with James Minidis (Minidis)[2] and Rick Armstrong (Armstrong), an accountant, to develop and operate a restaurant franchise business they called "Café Concepts": Marsh and Dousette were to provide $1,000,000 in financing to open the first five stores; Minidis would operate the business; and Armstrong would serve as the controller. Because Marsh did not want his name to appear on documents concerning the business, Dousette (Marsh's wife), signed documents and wrote the checks. Dousette ultimately contributed $320,000 to the venture.

Café Concepts suffered what Minidis described as "serious setbacks" (boldface and capitalization omitted), including the failure to secure a lease at a particular location in Irvine after lengthy negotiations. Minidis later found a location for a Café Concepts restaurant at a Bakersfield mall, which Marsh was "excited about." The landlord, however, "refused to let the start-up company [Café Concepts] sign the lease and insisted" that Minidis's "other company" sign the lease. When Minidis learned that an anchor tenant at the Bakersfield mall had vacated the premises, he concluded that restaurants at that mall "were doomed to fail" and terminated the lease at a cost to Café Concepts of $30,000.

Marsh also held an interest in Fast Trak, Inc., a business that sold Bonjour Bagels restaurant franchises. Bonjour Bagels was a "struggling" business, and Marsh asked Minidis for help. Although Minidis believed that Bonjour Bagels "was beyond saving," he agreed to have Café Concepts purchase the assets of Bonjour Bagels, which would be held in a new entity called Bonjour Bagels & Coffee, Inc. (BBC). Because Marsh did not

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[2] References to the singular "Minidis" are to James Minidis. By doing so, I mean no disrespect to Lynn Minidis.

want his Fast Trak associates to know that he was involved as a buyer in the asset sale, Marsh insisted that his name not appear on any documents. Minidis was named the president of BBC and Armstrong handled the accounting for both BBC and Café Concepts.

BBC ultimately failed, and Café Concepts never opened a restaurant.

Marsh believed that the Minidises had diverted their funds to Minidis's California Pride Foods venture, "wrote checks that had nothing to do with [their] deal, failed to issue stock, and failed to create a board." In August 2001, Marsh and Dousette sued the Minidises and Armstrong for breach of contract, fraud, and breach of fiduciary duty, among other causes of action. They sought damages and an accounting, among other relief. Marsh and Dousette subsequently dismissed the request for an accounting after the Minidises provided an accounting in 2003.

Prior to trial, Marsh and Dousette dismissed Armstrong from the case.

Marsh testified at trial that he knew nothing about the Bakersfield lease, which he claimed Minidis obtained for a separate project, and that the $30,000 charge for terminating the lease was money that Minidis had stolen from Dousette. Indeed, Marsh testified that Minidis "had confessed . . . to stealing Dousette's money for the Bakersfield lease and BBC."

Marsh also denied that he had anything to do with BBC, as evidenced by the fact that his name did not appear on any BBC documents.

Marsh and Dousette called Armstrong in their case in chief. Armstrong "provided favorable testimony" for Marsh and Dousette and "falsely accused" the Minidises "of cheating Marsh and Dousette."

The court ordered Armstrong to be on call to return to court in the Minidises' defense case. When called, however, Armstrong failed to appear. When the court asked the parties and counsel if they knew of Armstrong's location, Marsh and his attorneys indicated they did not know his whereabouts.

The jury returned a verdict for Marsh and Dousette for more than $6 million.

The Minidises later learned that when Armstrong failed to return to court to appear as a witness in their defense case, he had been staying at a hotel in Laguna Beach because Marsh or his attorneys told him it would be best for him to be unavailable for a few days. Although the court had asked Marsh and his lawyers about Armstrong's whereabouts, they did not inform the court. Based on testimony of others who had spoken to Armstrong, the Minidises further learned that Marsh had approached Armstrong prior to dismissing him from the case and told him that if he sided with Marsh in the lawsuit, Marsh would cover Armstrong's legal fees, dismiss him from the lawsuit, and give him a percentage of any recovery.

The Minidises moved for a new trial on various grounds. The court rejected the Minidises' arguments that the evidence was insufficient to support the verdict or that the damages were excessive, but granted the motion on the grounds of irregularity in the proceedings and surprise. In granting a motion for evidentiary sanctions heard concurrently with the new trial motion, the court also found "that it [was] more likely to be true than not true that . . . Marsh participated in the non-appearance of witness Armstrong." This court affirmed the court's rulings in *Dousette v. Cafe Concepts, Inc.* (Nov. 19, 2008, B188118) [nonpub. opn.] [2008 WL 4926846]. In our opinion, we explained that the "surprise" "was Armstrong's failure to appear," and

the "irregularity in the proceedings" was "Marsh's complicity in Armstrong's failure to appear."

During the second round of litigation, the trial court granted the Minidises' motion for summary judgment against Marsh based on lack of standing because Marsh did not sign the agreements and the checks upon which his claims were based.

At the second trial, Dousette did not call Armstrong to testify. Upon the questioning by Minidises' counsel, Armstrong testified that he had accounted for all monies Dousette invested in the Café Concepts venture and that there had been "no improper use of funds." He further testified that he considered Marsh to be a part owner of BBC and that Marsh had agreed that Café Concepts funds could be used for BBC. Armstrong also testified that Minidis had obtained the Bakersfield lease for Café Concepts, and that the $30,000 payment for the lease termination had been properly reported as a Café Concepts expense and disclosed to Marsh.

The jury returned defense verdicts for the Minidises on each of Dousette's claims. On Dousette's fraud claim, the jury voted 12-0 in the Minidises' favor. We affirmed the judgment in *Dousette v. Minidis* (Jan. 30, 2015, B247436) [nonpub. opn.].

In 2015, the Minidises filed the underlying action for malicious prosecution. Marsh and Dousette answered the complaint and filed their anti-SLAPP motion. The anti-SLAPP motion was supported by Marsh's declaration in which he states he "firmly believed the Minidises had breached their agreement with [him and Dousette] and redirected [their] investment funds towards their own separate businesses." Marsh pointed to checks that were deposited into California Pride Foods and checks that were "written and cashed without the consent of a second party to [their] agreement." Marsh denied that he told Armstrong

to not appear for trial, and stated that he never agreed to give Armstrong an interest or stake in the outcome of the litigation.

Marsh further states that after the trial court granted the Minidises' motion for new trial, Marsh retained new counsel to whom he "conveyed much of the same narrative and provided the same documents . . . and was once more advised that [he] had a meritorious case that could be won."

The Minidises opposed the anti-SLAPP motion with Minidis's declaration, material parts of which are summarized above, and the reporter's transcript of the second trial, among other exhibits.

## II. Discussion

I agree with the majority's discussion of anti-SLAPP principles and our standard of review, as described in part I of the discussion section of the majority's opinion. As the majority observes, the parties do not dispute that Marsh and Dousette have met their burden under the first prong of the anti-SLAPP analysis to show that the Minidises' malicious prosecution action arises from protected activity. (Maj. opn. *ante*, at p. 11.)

Under the second prong of the anti-SLAPP analysis, the Minidises have the burden of demonstrating a probability of prevailing on the claim. (See Code Civ. Proc., § 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) To do so, however, they "need only establish that [their] claim has 'minimal merit.' " (*Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at p. 291.) In making this determination, the "court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff 's evidence as true, and evaluates the

defendant's showing only to determine if it defeats the plaintiff 's claim as a matter of law." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385.)

The elements of a cause of action for malicious prosecution are the initiation or maintenance of an action with malice and without probable cause, and the pursuit of that action to a legal termination on the merits in favor of the malicious prosecution plaintiff. (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 775 (*Parrish*); *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341.) An action has probable cause if, on the basis of the facts known to the defendant, the institution and maintenance of the action is legally tenable. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 878.) "Probable cause . . . must exist for every cause of action advanced in the underlying action." (*Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at p. 292.)

One who pursues litigation based upon the "[g]ood faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts, [has] a complete defense to a malicious prosecution claim." (*Bisno v. Douglas Emmett Realty Fund 1988* (2009) 174 Cal.App.4th 1534, 1544.)

The majority concludes that the Minidises have failed to establish the requisite minimal merit for their malicious prosecution claim as to Dousette for two reasons: The trial court's finding, made in connection with the Minidises' motion for new trial, that sufficient evidence supported the jury's verdict established probable cause; and Dousette established the advice of counsel defense to malicious prosecution. For the reasons that follow, I disagree with both conclusions.

***A.***

Reliance on the trial court's finding that the jury's verdict in the first trial was supported by sufficient evidence invokes the so-called interim adverse judgment rule. Under this rule, " 'a trial court judgment or verdict in favor of the plaintiff . . . in the underlying case, unless obtained by means of fraud or perjury, establishes probable cause to bring the underlying action, even though the judgment or verdict is overturned on appeal or by later ruling of the trial court.' [Citation.] This rule reflects a recognition that " '[c]laims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.' " (*Parrish*, *supra*, 3 Cal.5th at p. 776.)

Here, the interim adverse judgment the majority relies upon is the trial court's rejection of the Minidises' argument, presented in their motion for new trial in the first trial, that the evidence was insufficient to justify the verdict.

Even if we assume that the interim adverse judgment rule generally applies to a trial court's finding that a verdict was supported by sufficient evidence, that rule does not apply when the evidence supporting the verdict was "procured by certain improper means," such as fraud or perjury. (See *Parrish*, *supra*, 3 Cal.5th at pp. 776, 778.) As our Supreme Court has explained, although "plaintiffs and their attorneys have 'the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious' [citation], they have no right to mislead a court about the merits of a claim in an attempt to procure a favorable ruling, and such a ruling can provide no reliable indication that the claim was objectively tenable." (*Id.* at p. 778.) Thus, a jury's

verdict that is based upon fraudulent or perjured evidence cannot be relied upon to establish probable cause for the action; and the court's determination that such evidence was sufficient to support the verdict in the first trial is not inconsistent with the possibility that the second trial was brought without probable cause.

The majority points out that Marsh never admitted to bribing Armstrong, and Armstrong denied being bribed. (Maj. opn. *ante*, at p. 22.) The majority further states that the trial court never determined that Marsh or Dousette bribed Armstrong. (*Ibid.*) These points are accurate, but irrelevant. At this stage, if Dousette relies upon the interim adverse judgment rule to argue that the Minidises cannot establish probable cause, the Minidises need only show that their claim of perjury and bribery has minimal merit to proceed. The facts that the persons accused of such wrongdoing have not admitted the improprieties and the court has not made such a finding, is not dispositive.

Here, the Minidises produced evidence that Armstrong testified during the first trial favorably for Dousette and "falsely accused [the Minidises] of cheating Marsh and Dousette." With the complicity of Marsh, Armstrong then failed to appear when recalled to testify in the Minidises' defense case, effectively depriving the jury and the court of the evidence that the Minidises eventually evoked from Armstrong in the second trial.[3]

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[3] Although our record does not include the transcript of the first trial, in a prior appeal that did include that transcript, we explained that "Armstrong's testimony went to the entirety of the case which included liability of [the Minidises] for the claims made by [Marsh and Dousette]," and that Marsh's misconduct "prejudiced [the Minidises] and deprived them of a fair trial."

The Minidises also produced additional evidence that Marsh had promised to share any recovery with Armstrong, then dismissed him from the case, thus supporting an inference of bribery.

The Minidises have thus supported their claim that the evidence upon which the jury based its verdict in the first trial—the same evidence the court found was sufficient to support that verdict—was perjurious and fraudulent. If the Minidises' evidence is credited, as it must be at this stage of the proceedings, then the interim adverse judgment rule does not prevent this malicious prosecution case.

Having rejected the majority's reliance on the interim adverse judgment rule, the question remains whether the Minidises have satisfied their burden of showing that their malicious prosecution action has the requisite "minimal merit" necessary to defeat the anti-SLAPP motion. According to Minidis's declaration, the essence of Dousette's claims was that the Minidises diverted Dousette's investments in Café Concepts to the Bakersfield lease and BBC, which Dousette believed concerned the Minidises' separate projects. To prove these claims at the first trial, the Minidises presented evidence that Marsh testified falsely about his knowledge of the Bakersfield lease and involvement in BBC. Marsh also made a deal with Armstrong whereby Marsh dismissed Armstrong from the complaint and promised him a percentage of any recovery Marsh obtained in the case. Armstrong, in testifying at trial, then "falsely accused [the Minidises] of cheating Marsh and Dousette." With the complicity of Marsh and his counsel, Armstrong thereafter absented himself from the trial to avoid further examination by the Minidises' counsel. After the dealings between Marsh and Armstrong came to light and the case was retried, Armstrong testified that there

had been no improper use of Dousette's funds, that Marsh had agreed that Café Concepts funds could be used for BBC, and that Marsh understood that the Bakersfield lease was for Café Concepts.

Dousette did not submit a declaration in support of the anti-SLAPP motion and Marsh, in his declaration, did not refer to the Bakersfield lease or to BBC. Nor does Marsh identify any fraudulent misrepresentation that could have supported Dousette's fraud cause of action. Neither Marsh nor Dousette submitted a declaration in reply to the Minidises' evidence.

Assuming, as we must, that the facts set forth in the Minidises' evidence are true, the Minidises have adequately established that Dousette's claims depended upon false testimony by Marsh and Armstrong, and that Armstrong's favorable testimony was procured by promising Armstrong an interest in the outcome and ultimately secured by abetting his absence from trial. Under these circumstances, the Minidises established the requisite prima facie showing that at least one of Dousette's claims was prosecuted without probable cause. (See *Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 886; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 671.) Pursuing a claim that depends upon false testimony and the kind of conduct that Marsh engaged in with Armstrong is also sufficient to support the element of malice. (See *Soukup v. Law Offices of Herbert Hafif, supra,* 39 Cal.4th at p. 292 [malice may also be inferred from the facts establishing lack of probable cause]; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1409 [same].)

***B.***

I also reject the majority's second reason—that Dousette has established the defense of advice of counsel.

As noted above, a party who pursues litigation based upon the "[g]ood faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts, [has] a complete defense to a malicious prosecution claim." (*Bisno v. Douglas Emmett Realty Fund 1988*, *supra*, 174 Cal.App.4th at p. 1544.) The party asserting the defense has the burden of proving it. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 54; *Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 877.) In the anti-SLAPP context, a moving party who relies on an affirmative defense to show that the plaintiff cannot establish a probability of prevailing must present "evidence that defeats the plaintiff's claim as a matter of law." (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676; see also *Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270, 1277). Dousette has failed to meet that burden.

Dousette did not submit her own declaration to support the advice of counsel defense. In her respondent's brief, referring to the second trial, she points to paragraph 26 of Marsh's declaration, in which Marsh states: "I had extensive meetings with counsel and conveyed much of the same narrative and provided the same documents to new counsel and was once more advised that I had a meritorious case that could be won." Even if we treat this statement about Marsh's meetings with counsel and counsel's advice to Marsh as having been also made to Dousette, the evidence does not establish the advice of counsel defense as a matter of law. First, the vague statement that Marsh or Dousette "conveyed much of the same narrative and provided

the same documents to new counsel" does not actually identify any particular information that they provided to counsel. Giving them the benefit of the doubt, the "narrative" appears to refer to the statements in the declaration preceding paragraph 26, which communicate that Marsh and Dousette provided $320,000 to the Minidises and identifies various ways in which the Minidises failed to fulfill their obligations to Marsh and Dousette, including the diversion of their money to another Minidis venture, the failure to open a store, and issue corporate stock.

Although Marsh states that he did not tell Armstrong not to appear at trial and had not agreed to give Armstrong an interest in any recovery in the lawsuit, there is, as the trial court found, "sufficient evidence that the verdict in the first trial . . . was obtained by the perjury of Armstrong" and that Marsh had "bribed" Armstrong "to offer evidence favorable to Marsh and Dousette." Thus, Marsh's declaration merely establishes, at most, that factual issues exist concerning Marsh's alleged bribery, Armstrong's alleged perjury, and the truth as to what Marsh and Dousette told their attorneys about the Armstrong issues. Thus on an anti SLAPP motion, Dousette cannot establish the advice of counsel defense as a matter of law.

The majority faults the Minidises for failing to offer "evidence showing that Marsh failed to disclose certain 'specific relevant facts' to his new counsel," and concludes that "it is not reasonable to infer from the evidence presented by the parties that Marsh failed to advise his new attorneys of all material facts, including those relating to Armstrong's nonappearance at the first trial." (Maj. opn. *ante*, at pp. 25-26.) This incorrectly places on the Minidises the burden of proving that Marsh and Dousette failed to inform their attorneys of all material facts. Because advice of counsel is an affirmative defense, the test

is not whether the Minidises produced evidence to show that Marsh and Dousette failed to disclose material facts to their counsel, but whether the evidence establishes as a matter of law that Dousette actually did provide all the relevant facts to his attorneys. For the reasons discussed above, Dousette failed to do so.

For the foregoing reasons, I would affirm the order granting the anti-SLAPP motion as to Marsh, and reverse the order as to Dousette.

ROTHSCHILD, P. J.