Filed 8/28/12 Hindin v. Wehner & Perlman CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

A. TOD HINDIN et al., Plaintiffs and Appellants, v. WEHNER & PERLMAN et al., Defendants and Respondents.	B216500 (Los Angeles County Super. Ct. No. BC190783)
A. TOD HINDIN et al., Plaintiffs and Appellants, v. EDWARD BARRY RUST, JR., et al., Defendants and Respondents.	B223061 (Los Angeles County Super. Ct. No. BC190783)
A. TOD HINDIN et al., Plaintiffs and Appellants, v. WILLIAM MONTGOMERY et al., Defendants and Respondents.	B228056 (Los Angeles County Super. Ct. No. BC190783)

APPEALS from judgments of the Superior Court of Los Angeles County, Carl J. West, Judge. Reversed with directions.

Hillel Chodos for Plaintiffs and Appellants.

Kinsella Weitzman Iser Kump & Aldisert, Dale F. Kinsella, Gregory Aldisert and Jeremiah Reynolds for Defendants and Respondents Wehner & Perlman, LLP; Charles C. Wehner; Charles C. Wehner, a Professional Corporation; Rodney Merill Perlman; Rodney Merill Perlman, a Professional Corporation; Crandall, Wade & Lowe, a Professional Corporation, and James Lawrence Crandall.

Greines, Martin, Stein & Richland, Robin Meadow and Sheila A. Wirkus for Defendants and Respondents Wehner & Perlman, LLP; Charles C. Wehner; Charles C. Wehner, a Professional Corporation; Rodney Merill Perlman; Rodney Merill Perlman, a Professional Corporation.

Sedgwick, Detert, Moran & Arnold, Kevin J. Dunne, Nicholas W. Heldt and Craig S. Barnes for Defendants and Respondents Edward Barry Rust, Jr., Vincent Trosino and James Rutrough.

Munger, Tolles & Olson, Lawrence C. Barth, Lisa J. Demsky, Katherine K. Huang and Allison B. Stein for Defendants and Respondents William Montgomery and Gerald Reynolds.

INTRODUCTION

In this opinion, we consider three appeals brought by plaintiffs A. Tod Hindin; A. Tod Hindin, a professional corporation; Susan Greenberg, as executor of the Estate of David Greenberg; Greenberg & Panish, a professional corporation; Greenberg, Panish & Kaplan, a professional corporation; and Joginder Shah (collectively, the Hindin plaintiffs). The appeals are from judgments entered in a malicious prosecution lawsuit

filed by the Hindin plaintiffs. The lawsuit arose from a judgment in favor of the Hindin plaintiffs and their clients, Kamaljit Singh, Teja Singh, Rajvinder Kaur and Surgit Multani (collectively, the Singh claimants) in a prior federal lawsuit brought against them by State Farm Mutual Automobile Insurance Company (State Farm).[1] The Hindin plaintiffs and the Singh claimants then brought the instant malicious prosecution action against State Farm and certain named State Farm officers and attorneys.

First, the Hindin plaintiffs appeal from a judgment entered in favor of defendants Charles C. Wehner; Rodney Merill Perlman; Wehner & Perlman, a General Partnership; Charles C. Wehner, a Professional Corporation; Rodney Merill Perlman, a Professional Corporation; James Lawrence Crandall; and Genson, Even, Crandall & Wade, a Professional Corporation (collectively, the Wehner defendants) on May 18, 2009. The appeal is *Hindin v. Wehner*, case number B216500, filed June 22, 2009 (*Wehner* appeal).

Second, the Hindin plaintiffs appeal from a judgment entered in favor of defendants Edward Barry Rust, Jr., Vincent Joseph Trosino, and James Elwyn Rutrough (individually and collectively, the Rust defendants) on January 26, 2010. The appeal is *Hindin v. Rust*, case number B223061, filed March 17, 2010 (*Rust* appeal).

Third, the Hindin plaintiffs appeal from a judgment in favor of defendants William A. Montgomery, Jerry [Gerald] Reynolds and Frank Robert Haines[2] (collectively, the Montgomery defendants) on August 17, 2010. The appeal is *Hindin v. Montgomery*, case number B228056, filed October 15, 2010 (*Montgomery* appeal).

We denied the motions to consolidate filed by the defendants in all three appeals. We are considering the appeals together, however, in that they share an extensive procedural history and many of the same facts and legal issues.[3]

---

[1] The Singh claimants and State Farm are not parties to the three appeals.

[2] In its status conference statement filed January 4, 2007, State Farm reported that "Mr. Haines has passed away since the last filing in this Court."

[3] The *Rust* appeal and the *Montgomery* appeal incorporate by reference substantial portions of the record in the *Wehner* appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying lawsuit has been the subject of several prior proceedings before us. We begin with the factual and procedural background we published in *Hindin v. Rust* (2004) 118 Cal.App.4th 1247 at pages 1249 through 1255:

"This case has already been before us several times. At the time of the last appeal, [*Hindin v. Rust* (Feb. 14, 2001, B135446) [nonpub. opn.]], we summarized the case and proceedings to date as follows:

"'[Plaintiffs, i.e., the Hindin plaintiffs and the Singh claimants] appeal from a summary judgment in favor of all [defendants] and from a denial of [plaintiffs'] motion for summary adjudication.

"'Plaintiffs and appellants [the Singh claimants] are individuals . . . who were represented in the underlying litigation by plaintiffs and appellants [the Hindin plaintiffs].**[4]**

"'Defendant and respondent State Farm Mutual Automobile Insurance Company (State Farm) was the insurer and a party involved in the underlying litigation.

"'[The Wehner defendants, the Montgomery defendants and the Rust defendants] were attorneys for or representatives of State Farm in the underlying litigation. . . .**[5]**

"'In November 1988, [the Singh claimants] received an uninsured motorist arbitration award against State Farm in the amount of $34,000.

"'In December 1988, State Farm filed a superior court petition to vacate the arbitration award. State Farm voluntarily dismissed this petition with prejudice in 1991 and paid the award in full.

"'[The Singh claimants] filed a superior court civil suit against State Farm alleging religious and national origin discrimination by State Farm in the handling of their

---

4 "The [Singh claimants] are not parties to this appeal."

5 "[The Montgomery defendants] have joined in State Farm's brief on the appeal before us now."

uninsured motorist claim (bad faith/discrimination). After four years of litigation and into the fourth month of jury trial, in 1993, this case was settled by mutual agreement, including an Agreement by Attorneys Supplemental to Settlement (Attorneys Agreement), for the sum of $30 million. The settlement amount was paid by State Farm.

"'In mid 1993, appellants and State Farm sought judicial clarification of the Attorneys Agreement with respect to the use and publication of certain internal documents produced by State Farm during the bad faith/discrimination litigation. The documents and information were produced through discovery and subpoena, not pursuant to the settlement agreement. The Los Angeles Superior Court ordered that appellants were not precluded by the Attorneys Agreement from copying, publishing and disseminating to third persons any document or information procured from State Farm at or prior to the trial. State Farm did not take further action regarding this order [i.e., the Drake Order] and it became final.

"'Approximately one year after settlement and payment of the $30 million, State Farm obtained information [from Som Rehil] indicating that the [Singh claimants'] insurance claims were, in part, fraudulent. State Farm retained a law firm, which in turn employed investigators, to pursue this information. The investigation produced seven sworn statements from three witnesses, which indicated that the uninsured motorist claims were based on fraud and that appellants had withheld information during the discovery and litigation phases of those claims.

"'The investigation was turned over to the FBI and the Los Angeles District Attorney. The FBI obtained a "body wire" recording of a witness' statement, which corroborated the sworn statements. The FBI agent in charge and the district attorney Investigator both told State Farm representatives that the fraud case appeared well founded and worth prosecuting.

"'In January 1996, in the Arizona Superior Court, State Farm sought to suppress the same documents claiming that [the Hindin plaintiffs] had illegally provided copies to Arizona plaintiff's counsel in violation of the Attorneys Agreement and a Los Angeles

Superior Court confidentiality order.[6] A copy of the Los Angeles Superior Court order was presented in response. Two days thereafter, State Farm withdrew its motion to suppress. The Arizona Superior Court issued sanctions against State Farm for having submitted a motion which was ". . . eminently deniable from the onset . . . ." The Arizona Superior Court found that State Farm's claim of confidentiality was without merit.

"'Three weeks following the imposition of sanctions by the Arizona Superior Court, on February 14, 1996, State Farm filed a federal court action seeking to recover the $30 million payment and return of the internal State Farm documents.

"'Appellants filed motions to dismiss State Farm's restitution action on the grounds that (a) State Farm's claims were barred by res judicata and collateral estoppel; (b) that State Farm's claims were precluded under the litigation privilege (Civ. Code, § 47, subd. (b)); (c) that said claims were time barred; and (d) that the superior court order was controlling with respect to the documents.

"'Counsel for State Farm in the federal court case acknowledged the existence of the Los Angeles Superior Court order and on April 1, 1996 amended its complaint by striking the document claims. In total, 45 days elapsed between the filing of State Farm's federal action and its abandonment of the document claim.

"'State Farm argues that through a "bureaucratic foul-up," the previous Los Angeles Superior Court order was not "brought effectively" to the attention of the lawyers drafting the complaint. State Farm argues that malicious prosecution liability should not be predicated on a "pleading blunder" which was promptly withdrawn. However, State Farm has not referred this court to any evidence in support of its "bureaucratic foul-up—ineffective communication—pleading blunder" argument.

"The federal district court granted appellants' motions to dismiss on the litigation privilege ground. The Ninth Circuit Court of Appeal affirmed the order of dismissal.

---

6 *Zilisch v. State Farm Mutual Automobile Insurance Company* (Civil Action No. CV 93-05652).

The [Singh claimants] and the [Hindin plaintiffs] filed separate malicious prosecution actions against State Farm. These cases were consolidated in the superior court and on this appeal.

"'State Farm filed a motion for summary judgment, which was granted.[7] State Farm did not file a motion for summary adjudication. Appellants' motion for summary adjudication was denied. This appeal followed.' (*Hindin v. Rust* (Feb. 14, 2001, B135446) [nonpub. opn.].)

"After a discussion of legal principles applicable to summary judgment and to the issue of probable cause in malicious prosecution cases, we said: 'From this point forward, we discuss separately the issues as to the [Singh claimants] and [the Hindin plaintiffs]. The issues relating to the documents apply only to the [Hindin plaintiffs].' (*Hindin v. Rust*, *supra*, B135446.)

"'As to the [Singh claimants], we find that there was legal and factual probable cause to bring the underlying federal restitution action and, therefore, affirm the summary judgment on the [Singh claimants'] complaint for malicious prosecution. With respect to the [Singh claimants], the conclusions reached in our independent review coincide with those of the trial court, Hon. James R. Dunn, presiding. This opinion will not be published in the official reports. Therefore, we incorporate by reference, as though set forth in full, Judge Dunn's oral ruling from the bench as it relates to the [Singh claimants]. . . .' (*Hindin v. Rust*, *supra*, B135446.)

"Under the heading 'Attorney Appellants,' we said: 'It cannot in reason be argued that there was probable cause to seek return of the disputed documents. The Los Angeles Superior Court ruled unequivocally that [the Hindin plaintiffs] had the right to retain, copy and disseminate said documents to third persons. In fact, these same documents had

---

7 In our opinion *Hindin v. Rust*, *supra*, B135446, the defendants and respondents listed were State Farm and the Wehner, Rust and Montgomery defendants which "were attorneys for or representatives of State Farm in the underlying litigation." (*Id.* at p. 2.) The Wehner defendants joined in State Farm's motion for summary judgment which was decided by Judge James R. Dunn.

been used in litigation outside California and were virtually in the public domain—so much for confidentiality. Three weeks before filing its federal action, State Farm was sanctioned by the Arizona Superior Court for falsely claiming said documents were confidential.

"'As to the "bureaucratic foul-up" in not "effectively" bringing the Los Angeles Superior Court order to the attention of the lawyers drafting the complaint, the bureaucracy and ineffective communication are internal problems for State Farm. They may be reasons, but they are not excuses. State Farm has ignored the Attorneys Agreement, the Los Angeles Superior Court order specifically determining that [the Hindin plaintiffs] are at liberty to retain, copy and disseminate the disputed documents and, finally, the juxtaposition of the Arizona Superior Court sanctions to the filing of its federal case in California.

"'All of the aforementioned facts militate against any claim of probable cause in the filing of the federal court equitable restitution claim for return of the disputed documents. Each of these events and facts was within the institutional knowledge of State Farm. Claims of bureaucratic foul-up, ineffective communication and pleading blunder are not persuasive.

"'We find that State Farm's federal court claim for equitable restitution to recover the disputed documents was not objectively tenable. Considering the facts known before filing that claim, no reasonable attorney would believe that it was legally or factually tenable. All reasonable attorneys would believe that said claim was totally and completely without merit.

"'State Farm argues that it dismissed its federal claim for equitable restitution promptly upon learning that it was without merit, to wit: 45 days after filing the federal case. Therefore, the public policy encouraging the early dismissal of unmeritorious lawsuits should immunize State Farm from exposure to malicious prosecution liability. (*Sangster v. Paetkau*, [(1998)] 68 Cal.App.4th 151, 165; *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 571 [264 Cal.Rptr. 883].) This argument misses the point. Under the facts existent and institutionally known to State Farm, the equitable restitution

action for return of the disputed documents should not have been filed in the first instance.

"'Furthermore, we cannot hold as a matter of law that the 45-day period between filing and dismissal constitutes "prompt and early dismissal" of an unmeritorious cause, considering the pre-filing facts of this case.

"'As indicated above, State Farm made only a motion for summary judgment,[8] not a motion for summary adjudication. (Compare Code Civ. Proc., § 437c, subd. [(a)] with § 437c, subd. (f)(1).) We find that as to the disputed documents, there is a triable issue of material fact, to wit: was the State Farm federal action to recover the disputed documents initiated with malice? Therefore, the order granting summary judgment with respect to the [Hindin plaintiffs] is reversed.

"'Some clarification may be required. This opinion is not intended in any manner to determine the issue of the existence or absence of malice in filing the federal claim for return of the documents. Nor does it address the probable cause issues vis-à-vis the [Hindin plaintiffs] attendant to claims other than that for return of the disputed documents. Those issues are open for determination upon remand.' (*Hindin v. Rust*, *supra*, B135446.)

"As to the appellants' [i.e., the Hindin plaintiffs'] motion for summary adjudication, we said: 'Appellants' motion for summary adjudication, in effect, sought a judicial determination that State Farm did not have probable cause for instituting its federal court action. Our conclusions regarding probable cause, discussed above, render moot the issue raised by appellants in their appeal from the order denying motion for summary adjudication.' (*Hindin v. Rust*, *supra*, B135446.)

"The appeal from the order denying appellants' motion for summary adjudication was dismissed, the summary judgment as to the [Singh claimants] was affirmed and the

---

8 The Wehner defendants joined in State Farm's motion for summary judgment which was decided by Judge James R. Dunn.

summary judgment as to the [Hindin plaintiffs] was reversed, with the case remanded for further proceedings.

"On remand, the [Hindin plaintiffs] filed an affidavit to disqualify Judge Dunn and the matter was reassigned to the Honorable Frances Rothschild. State Farm then moved for summary adjudication of the restitution claim on the ground that there was probable cause for that claim only. When this motion was granted, the [Hindin plaintiffs] filed a writ petition, contending that the trial court had improperly relied upon the law of the case doctrine in finding probable cause for State Farm's pursuit of its restitution claim against the [Hindin plaintiffs] simply because, in our prior opinion, we had upheld the trial court's finding of probable cause as to the individual claimants (among other issues).[9] We notified the parties that we intended to issue an order requiring the trial court to vacate its prior order and enter a new and different order denying State Farm's motion for summary adjudication because our prior decision had not resolved the probable cause issues relative to the [Hindin plaintiffs]. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180 [203 Cal.Rptr. 626, 681 P.2d 893].)

"The trial court declined to vacate its order granting summary adjudication [of the restitution claim], and State Farm filed opposition to the writ petition, arguing that the [Hindin plaintiffs] had mischaracterized the basis for the trial court's order. According to State Farm, its argument was that its underlying claim depended in part upon showing an objectively tenable basis for seeking to rescind its settlement agreement with the individual claimants and then, in turn, that it had the right to impose a constructive trust on the funds the claimants had paid to their attorneys; in any event, it argued, a de novo review of the evidence supported the trial court's ruling.

"While the writ petition [regarding the summary adjudication of the restitution claim] was still pending, State Farm moved for summary judgment on the ground that the malicious prosecution action, to the extent it was based on the document claim, was

---

9 "The [Hindin plaintiffs] also argued that summary adjudication was improper for failure to completely dispose of the entire (single) malicious prosecution cause of action."

barred by the one-year statute of limitations. It argued that the restitution claim and the document claim were severable; because State Farm withdrew its allegations in support of the document claim in the district court, the federal appeal did not toll the statute of limitations with respect to that claim. The [Hindin plaintiffs] requested and we issued a stay order. We ultimately dissolved the stay and dismissed the writ petition without opinion. Over the [Hindin plaintiffs'] opposition, the trial court determined that the remainder of the [Hindin plaintiffs'] malicious prosecution action was time-barred. Judgment was entered and this appeal followed." (*Hindin v. Rust, supra*, 118 Cal.App.4th at pp. 1249-1255.)

We agreed with the Hindin plaintiffs' argument that "their malicious prosecution action contains but a single cause of action within the meaning of [Code of Civil Procedure] section 437c, subdivision (f)(1) and, therefore, the trial court impermissibly granted State Farm's motion for summary adjudication directed only to the restitution claim." (*Hindin v. Rust, supra*, 118 Cal.App.4th at p. 1255.) We explained that "[s]ection 437c, subdivision (f)(1) provides: 'A party may move for summary adjudication as to one or more causes of action within an action . . . . *A motion for summary adjudication shall be granted only if it completely disposes of a cause of action* . . . .' (Italics added.)" (*Hindin*, *supra*, at p. 1255.) We said that "the [Hindin plaintiffs'] malicious prosecution action sought to vindicate a single primary right—the right to be free from defending against a lawsuit initiated with malice and without probable cause. Although State Farm allegedly breached that right in two ways [by bringing the restitution claim and the document claim], it nevertheless remained a single right." (*Id.* at p. 1258, fn. omitted.) We said that "[i]t follows then that a motion for summary adjudication purporting to establish that some but not all of the multiple grounds for liability asserted in the prior action were brought with probable cause is improper for failure to completely dispose of an entire cause of action as required under subdivision (f)(1) of section 437c." (*Hindin*, *supra*, at p. 1259, fn. omitted.) We further noted that "[s]uch a motion also violates subdivisions (o) and (p)(1) of section 437c. . . . In its motion, . . . State Farm failed to demonstrate that the [Hindin plaintiffs] could not

establish that the federal action was brought without probable cause, a necessary element of their malicious prosecution cause of action." (*Hindin, supra*, at p. 1259, fn. 9.)

As to probable cause, we further stated: "Indeed, in this case, we have already determined that State Farm did *not* have probable cause to pursue the document claim in the underlying action." (*Hindin v. Rust, supra*, 118 Cal.App.4th at p. 1259, fn. omitted.) We commented: "However, the trial court is not without procedural devices to deal with the issue of probable cause for the restitution claim. (See, e.g., *DeCastro West Chodorow & Burns, Inc. v. Superior Court* [(1996)] 47 Cal.App.4th [410,] 423 [although motion for summary adjudication was improper for failure to dispose of entire cause of action, defendants could still pursue motion in limine or motion to strike]; *Macy's California, Inc. v. Superior Court* (1995) 41 Cal.App.4th 744, 748, fn. 2 [48 Cal.Rptr.2d 496] .)" (*Hindin, supra,* at pp. 1259-1260.)

We addressed the grant of the summary judgment motion in a footnote: "For all of the reasons stated herein, the motion for summary judgment related to the documents claim was improperly granted. Even if the motion could have been separately asserted, however, the statute of limitations argument was erroneous, as it turned on the claim that the statutory period began to run before the termination of the entire action. Absent an order giving rise to a separate appealable judgment, 'even where a single cause of action has been resolved, an action for malicious prosecution must await a favorable termination of the entire proceeding.' [Citations.]" (*Hindin v. Rust, supra*, 118 Cal.App.4th at pp. 1259-1260, fn. 11.) We reversed the judgment and remanded to the trial court "with instructions (1) to vacate the order granting State Farm's summary judgment motion on statute of limitations grounds and enter an order denying that motion, (2) to vacate the order granting State Farm's motion for summary adjudication of the restitution claim and enter an order denying that motion and (3) for further proceedings consistent with this opinion." (*Id.* at p. 1260.)

On remand, State Farm filed a motion in limine to exclude all evidence related to establishing malicious prosecution of the restitution claim and a motion to strike the allegations of the restitution claim. The trial court granted the motions in December

2004. The trial court stated in its written order that we had previously held "'that there was legal and factual probable cause to bring the underlying federal restitution action' and therefore affirmed summary judgments against the individual non-attorney plaintiffs" in *Hindin v. Rust, supra*, B135446). The trial court found that that ruling was "the law of the case and [was] binding on the remaining plaintiffs [i.e., the Hindin plaintiffs]." The trial court ordered that, given its foregoing determinations, the following portions of the first amended complaint were to be stricken pursuant to Code of Civil Procedure section 436: page 3, line 27 to page 4, line from "'in'" through "'parties,'" and, in their entirety, paragraphs 59, 61 and 62.

The Hindin plaintiffs filed a petition for a writ of mandate to set aside the grants of the motion in limine and the motion to strike. We issued a *Palma* order of our intent to issue a writ. The trial court took no action. We issued an order for a peremptory writ of mandate in November 2006. We stated: "The decision in case number B135466 did not address the probable cause issues as to the [Hindin plaintiffs] with respect to claims other than for return of disputed documents, but left those issues open for determination on remand. Accordingly, the trial court erred in its reliance on the doctrine of the law of the case . . . ." Our writ of mandate directed "the [trial] court to vacate its order granting [the] motions . . . and to reconsider [the] motions without application of the law of the case doctrine."

When the trial court vacated the order as mandated, State Farm renewed its motion in limine and motion to strike. The Rust defendants, as well as the Montgomery defendants, joined in State Farm's motions. The Wehner defendants filed a motion for summary judgment and, in the alternative, joined in State Farm's motions on February 12, 2007.[10] Defendants sought an order striking from the operative complaint

---

[10] The Wehner defendants participated in pleadings for the motions. The supplemental memorandum of points and authorities in support of the motion to strike and motion in limine was signed by counsel for the Wehner defendants, as well as for State Farm, the Rust defendants and the Montgomery defendants.

specified allegations that defendants knew that portions of the restitution claim were false and without merit and, therefore, were without probable cause (Code Civ. Proc., § 436, subd. (a)), and an order in limine to exclude all evidence offered to prove the restitution claim was brought without probable cause. The trial court granted the motion in limine and the motion to strike on August 13, 2007.[11]

Subsequently, the Rust defendants filed a motion for summary judgment or, in the alternative, summary adjudication on June 12, 2009. The Montgomery defendants filed a separate motion for summary judgment or, in the alternative, summary adjudication on June 15, 2009. Ultimately, the trial court granted all the defendants' motions and entered judgments in favor of the respective groups of defendants.

DISCUSSION

A primary reason we consider the Wehner appeal, the Rust appeal and the Montgomery appeal together is that the Hindin plaintiffs set forth facts and make extensive arguments in the Wehner appeal which they then incorporate by reference in the Rust and Montgomery appeals. Prior to the filing of the three appeals, the instant case had been before this court either on appeal or a writ petition in 10 proceedings, beginning in 1998.[12] Three previous trial court judges entered summary judgments in the

---

[11] In its decision on the Wehner defendants' motion for summary judgment, the trial court ruled that the motion in limine and motion to strike were moot as to the Wehner defendants, in that they had prevailed on their separate motion for summary judgment.

[12] We filed opinions in the following appeals: *Hindin v. Rust* (Nov. 30, 1998, B124816) [nonpub. opn.], *Hindin v. State Farm Mutual Automobile Insurance* (Feb. 14, 2001, B135446) [nonpub. opn.], and *Hindin v. Rust*, *supra*, 118 Cal.App.4th 1247 (B160031). We issued writ orders in *Trosino v. Superior Court* (Feb. 3, 1999, B129006), review den. Apr. 14, 1999, S076570; *Hindin v. Superior Court* (Aug. 30, 2001, B152447); *Hindin v. Superior Court* (Oct. 25, 2001 and June 17, 2002, B153606); *Hindin v. Superior Court* (Jan. 11, 2005 and Nov. 1, 2006, B180243); *Hindin v. Superior Court* (Jan. 31, 2006, B188459); *Hindin v. Superior Court* (Oct. 31, 2006, B194604); and *Hindin v. Superior Court* (Apr. 7, 2009, B201769).

instant case in favor of various defendants, and this court reversed the judgments when the Hindin plaintiffs appealed. As we shall explain more fully below, we have previously decided some of the issues raised in the three appeals. We endeavor to clarify these previous decisions in order not only to issue a decision on these appeals, but also to prevent any further duplicative pleadings and trial court rulings in order to avoid future inefficiencies and unnecessary use of judicial resources.

A. *Summary of Contentions*

As to the restitution claim, the Hindin plaintiffs' contentions common to all three appeals include the following: The trial court did not have a proper factual basis for determining on summary judgment that defendants had probable cause to bring the claim against the Hindin plaintiffs, in that there were at least triable issues of fact as to whether State Farm knew the falsity of its claim that it relied on information provided by the Singh claimants as a basis for entering into the settlement agreement. In addition, the trial court did not have a tenable legal basis for applying the determination of probable cause as to the Singh claimants "by extension" to the Hindin plaintiffs in order to impose a constructive trust on their fees received from settlement proceeds, in that the Hindin plaintiffs were bona fide encumbrancers for value. For similar reasons, according to the Hindin plaintiffs, the trial court erred in granting the renewed motion in limine and motion to strike made by the Rust defendants and the Montgomery defendants, and joined in by the Wehner defendants, as an alternative to their motion for summary judgment.

As to the document claim, the Hindin plaintiffs' contentions include the following: This court held in *Hindin v. Rust*, *supra*, B135446 that none of the defendants had probable cause to bring the document claim and that a triable issue of fact remained as to whether defendants acted with malice. The issue of malice should have been submitted

to the jury. Therefore, the trial court erred in finding the Wehner defendants did not act with malice.[13]

As to procedural issues, the Hindin plaintiffs' contentions include the following: The trial court abused its discretion in denying the Hindin plaintiffs' application for permission to complete discovery. The trial court also abused its discretion in sustaining specified evidentiary objections to evidence proffered by the Hindin plaintiffs.

As to the Rust defendants and the Montgomery defendants, the Hindin plaintiffs contend that the trial court erred in determining that, as a barrier to all of the Hindin plaintiffs' contentions, the Rust defendants and the Montgomery defendants could not be held liable for malicious prosecution, in that they did not actively participate in initiating and prosecuting the federal action against the Hindin plaintiffs.

B. *Legal Principles*

1. Standard of Review for Summary Judgment

A defendant's motion for summary judgment should be granted if the admissible evidence in the papers submitted by the parties "show[s] that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003.) "The burden of persuasion remains with the party moving for summary judgment. [Citation.] When the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and

---

13 The Hindin plaintiffs also contend that, contrary to defendants' claims, defendants' dismissal of the document claim in 45 days after they filed the federal action did not preclude liability for malicious prosecution.

cannot reasonably obtain, needed evidence.' [Citation.]" (*Kahn*, *supra*, at p. 1003.) If the defendant meets the burden, "'the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' (Code Civ. Proc., § 437c, subd. (*o*)(2).)" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

We review an order granting summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 860.) We consider "all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) When, as here, the plaintiff is the losing party, "'we view the evidence in the light most favorable to plaintiff[]' [citation], and we 'liberally construe' plaintiff's evidence and 'strictly scrutinize' that of defendant 'in order to resolve any evidentiary doubts or ambiguities in [plaintiff's] favor' [citation]." (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.) "The summary judgment procedure, inasmuch as it denies the right of the adverse party to a trial, is drastic and should be used with caution." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35.)

2. Malicious Prosecution

To succeed "in a malicious prosecution action, the plaintiff, in addition to establishing that the prior action was terminated in its favor, must prove both (1) that the prior action was brought without probable cause and (2) that the action was initiated with malice. [Citation.]" (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 874; accord, *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.) When the trial 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., supra*, at p. 875.) Likewise, when there is probable cause to bring a certain claim as a part of the malicious prosecution cause of action, then the malicious prosecution action fails as to that claim. However, malicious prosecution liability can be imposed if *only one* of several claims upon which the malicious prosecution cause of action is based was brought without probable cause and with malice. (*Bertero, supra*, at pp. 55-57.)

The standard for determining probable cause is an objective one. The trial court must "make an objective determination of the '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." (*Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 878.) The California Supreme Court has explained that, "while our decisions do indicate that in some cases the defendant's subjective belief may be relevant to the probable cause issue, in all of the cases the 'belief' in question related to the defendant's belief in, or knowledge of, a given state of facts [on which the defendant's claim was based], and not to the defendant's belief in, or evaluation of, the legal merits of the claim." (*Id.* at p. 879, italics omitted.) "Generally, a claim is legally tenable if the claim is (1) legally sufficient, and (2) substantiated by competent evidence. [Citations.]" (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 357.)

Whether probable cause exists is a question of law, to be decided by the court. (*Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 875.) However, "[w]hen there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, . . . the jury must resolve the threshold question of the defendant's factual knowledge or belief." (*Id.* at p. 881.) Thus, "'"'whenever the good faith of the defendant, or his knowledge or belief in an existing state of facts, is an element in determining whether there was probable cause, the court should submit that question to the jury.'"'" (*Id.* at pp. 879-880.) In such circumstances, "a jury must be told that '"[i]f a person initiating a judicial proceeding does not have *an actual and honest belief in the validity of the claim asserted by him* then he does not have

. . . probable cause to initiate such proceedings."' [Citation.]" (*Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Ins. Corp.* (2003) 114 Cal.App.4th 906, 912-913.)9

The element of malice is a question of fact to be decided by the jury. (*Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 874.) "The 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action, and . . . the defendant's motivation is a question of fact to be determined by the jury." (*Ibid*.)

C. *The Document Claim*

1. Probable Cause for Document Claim

The Wehner defendants, the Rust defendants and the Montgomery defendants mistakenly present arguments as if this court has never made a holding binding as to them that they brought the document claim without probable cause. The trial court made rulings necessary to its grants of summary judgments based upon its similar mistaken conclusion.[14]

---

[14] In its written decision granting the Wehner defendants' motion for summary judgment, for example, the trial court misinterpreted our holding and wrote that we "made no findings of the [Wehner defendants'] probable cause to bring the document claim on behalf of State Farm." The trial court interpreted our previous opinions as not preventing the Wehner defendants "from introducing evidence of their lack of knowledge of the Drake Order" to support their assertion that probable cause existed. The trial court made a finding of fact, based upon the declarations of each of the Wehner defendants, that the Wehner defendants' evidence demonstrated that "prior to filing the complaint in the Federal Action, the [Wehner defendants] were not aware of the Drake Order or the August 31, 1993 post-settlement hearing in the Singh [bad faith/discrimination] action in which the court had ruled that the Singh claimants and the [Hindin plaintiffs] could use or disseminate the State Farm documents without any restriction." Consideration of the propriety of the trial court's fact finding process with respect to probable cause for the document claim is not necessary to the resolution of this appeal. As we previously noted, however, "'"'whenever the good faith of the defendant, or his knowledge or belief in an existing state of facts, is an element in determining whether there was probable cause, the court should submit that question to the jury.'"'" (*Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at pp. 879-880.)

In *Hindin v. Rust, supra*, B135446, we held that probable cause did not exist to bring the document claim against the Hindin plaintiffs. (*Id.* at pp. 7-8.) Our holding applied to all defendants who brought the motion for summary judgment. That group included not only State Farm as a corporate entity, but also the Wehner defendants, the Rust defendants and the Montgomery defendants. We were very clear on the issue. We quote the relevant portion of our opinion as follows in hopes that defendants will never raise the issue again:

"It cannot in reason be argued that there was probable cause to seek return of the disputed documents. The Los Angeles Superior Court ruled unequivocally that attorney appellants had the right to retain, copy and disseminate said documents to third persons. In fact, these same documents had been used in litigation outside California and were virtually in the public domain . . . . Three weeks before filing its federal action, State Farm was sanctioned by the Arizona Superior Court for falsely claiming said documents were confidential.

"As to the 'bureaucratic foul-up' in not 'effectively' bringing the Los Angeles Superior Court order [i.e., the Drake order] to the attention of the lawyers drafting the complaint, the bureaucracy and ineffective communication are internal problems for State Farm. They may be reasons, but they are not excuses. State Farm has ignored the Attorneys Agreement, the Los Angeles Superior Court order [i.e., the Drake order] specifically determining that [the Hindin plaintiffs] are at liberty to retain, copy and disseminate the disputed documents and, finally, the juxtaposition of the Arizona Superior Court sanctions to the filing of its federal case in California.

"All of the aforementioned facts militate against any claim of probable cause in the filing of the federal court equitable restitution claim for return of the disputed documents. Each of these events and facts was within the institutional knowledge of State Farm. Claims of bureaucratic foul-up, ineffective communication and pleading blunder are not persuasive.

"We find that State Farm's federal court claim for equitable restitution to recover the disputed documents was not objectively tenable. Considering the facts known before

filing that claim, no reasonable attorney would believe that it was legally or factually tenable. All reasonable attorneys would believe that said claim was totally and completely without merit.

"State Farm argues that it dismissed its federal claim for equitable restitution promptly upon learning that it was without merit, to wit: 45 days after filing the federal case. Therefore, the public policy encouraging the early dismissal of unmeritorious lawsuits should immunize State Farm from exposure to malicious prosecution liability. [Citations.] This argument misses the point. Under the facts existent and institutionally known to State Farm, the equitable restitution action for return of the disputed documents should not have been filed in the first instance.

"Furthermore, we cannot hold as a matter of law that the 45-day period between filing and dismissal constitutes 'prompt and early dismissal' of an unmeritorious cause, considering the pre-filing facts of this case.

"As indicated above, State Farm made only a motion for summary judgment, not a motion for summary adjudication. (Code Civ. Proc., § 437c, subd. (1) vis-à-vis § 437c, subd. (f)(1).) We find that as to the disputed documents, there is a triable issue of material fact, to wit: was the State Farm federal action to recover the disputed documents initiated with malice? Therefore, the order granting summary judgment with respect to the [Hindin plaintiffs] is reversed." (*Hindin v. Rust*, *supra*, B135446, at pp. 7-8.)

The Wehner defendants, the Rust defendants and the Montgomery defendants, as well as the trial court, mistakenly interpreted our reference to State Farm as not including the remaining defendants. In our opinion, however, we identified the remaining defendants as the agents and representatives of State Farm. Thus, our use of "State Farm" throughout the discussion did not require that we list all defendants. When considered in context, the application of our holding to all defendants can be readily inferred.[15]

---

[15] For example, before identifying each of the defendants by name in the opinion, we stated that "all [Hindin plaintiffs] appeal from a summary judgment in favor of all

We had no reason to reach a decision only as to State Farm, the corporate entity, in that the summary judgment motion was brought by *all* of the defendants. We concluded that there was no probable cause to bring the document claim. In explaining our decision, we stated that each of the relevant "events and facts was within the *institutional* knowledge of State Farm" (connoting that *all* of the defendants were encompassed within that knowledge) and that the claims *all* of the defendants presented in their moving papers concerning "bureaucratic foul-up, ineffective communication and pleading blunder are not persuasive." (*Hindin v. Rust*, *supra*, B135446, at p. 7, italics added.) On that ground, we reversed the grant of the summary judgment motion as to *all* of the defendants, not just the corporate entity.[16]

Further, we expressly stated which matters our holding did *not* address: "Some clarification may be required. This opinion is not intended in any manner to determine the issue of the existence or absence of malice in filing the federal claim for return of the documents. Nor does it address the probable cause issues vis-à-vis the [Hindin plaintiffs] attendant to claims other than that for return of the disputed documents. Those issues are open for determination upon remand." (*Hindin v. Rust*, *supra*, B135446, at p. 8.) Never once in the opinion did we indicate that our holding and/or the matters we did not address applied to some, but not *all*, of the defendants. If defendants took issue with our

---

[defendants]." (*Hindin v. Rust*, *supra*, B135446, at p. 2.) In addition, at this point in the trial court proceedings, there had been no separate motion for summary judgment by a designated group of defendants, as is the case in the instant three appeals.

16 In the instant appeals, defendants assert that this court could not properly impute State Farm's "institutional knowledge" of the Drake Order and the *Zilisch* action to the Montgomery defendants. As support, they cite *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 595, as holding that an officer is not liable for the acts of his corporation solely because of his position within the company. They also cite the court's statement in *Godwin v. City of Bellflower* (1992) 5 Cal.App.4th 1625 that "[w]e find no principle in the law of agency to support a holding that an agent must be charged with knowledge of facts given to a principal business entity . . . [and] there is no principle of agency law imputing the knowledge of one agent to all others." (*Id.* at p. 1631.) The time period in which to appeal this issue has expired.

including them as having "the institutional knowledge of State Farm," the time within which to raise the issue has long since expired.

We had opportunity in a subsequent order and a published appellate decision to acknowledge our holding as to lack of probable cause to bring the document claim. We issued an order granting a peremptory writ on November 1, 2006, which stated in part: "The decision in case number B135466 [issued February 14, 2001] did not address the probable cause issues as to [the Hindin plaintiffs] with respect to claims other than for return of disputed documents, but left those issues open for determination on remand." Again we did not mention any limitation of our holding as to the document claim to only State Farm, as a corporate entity, or to any other defendants. In our published opinion in *Hindin v. Rust*, *supra*, 118 Cal.App.4th 1247, we reiterated: "[W]e have already determined that State Farm did *not* have probable cause to pursue the document claim. . . ." (*Id.* at p. 1259, fn. omitted.)

2. Malice as to the Document Claim

The Hindin plaintiffs contend that the trial court improperly usurped the role of the jury when the court made the finding that the Wehner defendants did not act with malice in bringing the document claim. We agree.

The trial court ruled that the Wehner defendants had probable cause to initiate the document claim against the Hindin plaintiffs. The trial court acknowledged that ruling was a sufficient basis to determine that malicious prosecution liability could not be established with respect to the document claim. The trial court, however, went on to make a finding that there was no evidence that the Wehner defendants acted out of "ill will" or that they had deliberately misused the legal system for personal gain or satisfaction at the expense of the Hindin plaintiffs.[17] With respect to the document claim, the trial court stated that "[t]he evidence demonstrates that there is no triable issue with

---

[17] The trial court's malice analysis addressed, but did not expressly differentiate between, the restitution claim and the document claim.

respect to whether the [Wehner defendants] had knowledge of the Drake Order prior to filing the lawsuit . . . . [Their] ignorance of the Drake Order (or even their potential negligence in not reviewing the file—a determination which the Court need not make here) does not equate to malice."

As previously stated, "[t]he 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action, and . . . the defendant's motivation is a question of fact to be determined by the jury." (*Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 874.) A defendant initiated the underlying lawsuit with malice if the defendant acted out of "hostility or ill will, or for some [improper] purpose other than to secure relief" (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 452), or if the defendant lacked an honest, good faith belief in the validity of the lawsuit (*Bertero v. National General Corp.*, *supra*, 13 Cal.3d at pp. 53-54). Lawsuits are brought with an improper purpose if "'(1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.'" (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 383.)

There is rarely direct evidence of malice, such as an express written or oral statement by the defendant. Malice is usually proven by circumstantial evidence and inferences drawn from the evidence. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 225; *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 218.)

We agree with the Wehner defendants that, without more, malice cannot be inferred solely from a court's determination of absence of probable cause. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498.) As this court previously explained, however, "[w]hile after *Sheldon Appel* a lack of probable cause, standing alone, does not support an inference of malice, malice may still be inferred when a party *knowingly* brings an action without probable cause." (*Swat-Fame, Inc. v. Goldstein*

(2002) 101 Cal.App.4th 613, 634, italics added, disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7 and *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973.) Where lack of probable cause arises from the defendant's knowledge that the relevant material facts alleged are false, lack of probable cause will support an inference of malice. (*Drummond v. Desmarais, supra*, 176 Cal.App.4th at p. 452; see 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 511, pp. 760-762.) "[M]alice may be shown by proof of lack of good faith upon the part of an accuser," which may be inferred from the accuser's "indifference toward the knowledge of others who have acted for him in his dealing with the accused." (*Baker v. Gawthorne* (1947) 82 Cal.App.2d 496, 500.) Malice also may be shown by evidence that the defendant "either 'relie[d] upon facts which he ha[d] no reasonable cause to believe to be true,' or was pursuing a theory that was 'untenable under the facts known to him.' [Citation.]" (*Drummond, supra*, at p. 453.)

As previously stated, malice is usually proven by circumstantial evidence and inferences drawn from the evidence. (*Daniels v. Robbins, supra*, 182 Cal.App.4th at p. 225; *HMS Capital, Inc. v. Lawyers Title Co., supra*, 118 Cal.App.4th at p. 218.) Inferences can reasonably be drawn from evidence in the record which creates a dispute as to whether the Wehner defendants, as well as the Rust defendants and the Montgomery defendants, were actively involved in the federal action for the improper purpose of retrieving the documents, stopping their use by litigants in other lawsuits against State Farm, and forcing the Hindin plaintiffs to disgorge any profits they may have derived in whole, or in part, from the lawful control over the documents and the dissemination rights granted to the Hindin plaintiffs by the Drake Order. The evidence in the record includes the declarations of each of the Wehner defendants stating that he did not know about the Drake Order or the *Zilish* sanctions prior to initiating the federal action. The record also includes the declarations by the various Hindin plaintiffs and documentary evidence which presented evidence of the history of the interactions among defendants during the 16-month investigation period and the history of the damaging effects on State Farm's interest arising from use of the documents by the Hindin plaintiffs and others in other

lawsuits.[18] The record includes evidence of various meetings and discussions involving the Montgomery defendants and/or the Wehner defendants for several months prior to filing the federal action. A reasonable inference would be that all of these defendants were aware of at least the Drake order, interpreting the settlement agreement as allowing the retention and use of the documents by the Hindin plaintiffs. The conflicting evidence and inferences demonstrate that a triable issue of material fact exists with respect to malice for the jury to consider.

Also the 1985 General Executive Memo 132, signed by Rust, sets forth the procedural requirements for civil litigation by State Farm, including the executives and departments which must review and approve proposed litigation before it is filed. While the memo may not be direct evidence that any one of defendants had knowledge of the claims in the federal action or actively participated in initiating and/or maintaining the federal action, it can be used as circumstantial evidence, and when considered with other evidence, a jury could draw reasonable inferences concerning defendants' knowledge and/or active participation prior to the filing of the federal complaint.

3. Reversal Required

As we discussed above, in our 2001 opinion in *Hindin v. Rust, supra*, B135446, we held that defendants lacked probable cause to bring the document claim and that a triable issue of material fact remained as to the malice element of the malicious prosecution cause of action. For the foregoing reasons, we conclude that the triable issue of material fact regarding malice has not yet been properly resolved for the Wehner defendants, the Rust defendants and the Montgomery defendants. The summary judgment for the Wehner defendants must be reversed. The summary judgments entered

---

[18] One example is statements under oath by originally-named defendant Frank Haines, State Farm's Claims Vice President, that the bad faith claim was settled to stem the flow of State Farm's confidential internal documents which had been and were being ordered to be produced by the trial judge, William Drake. Haines stated that it was his decision to enter into the settlement agreement that ended the bad faith lawsuit.

for the Rust defendants and the Montgomery defendants must also be reversed, given our holding, *post*, that whether the Rust defendants and the Montgomery defendants actively participated in initiating and maintaining the federal action to the extent required to impose liability on them for malicious prosecution is at least a triable issue of material fact for determination by a jury.

D. *The Restitution Claim*

The Hindin plaintiffs claim that the trial court erred in determining the Wehner defendants had probable cause to bring the restitution claim for the $18 million in legal fees the Hindin plaintiffs received from the settlement proceeds. We disagree.

The trial court cited the new evidence of fraud by the Singh claimants as the basis for the court's determination that State Farm had probable cause to bring the restitution claim against the Singh claimants. We affirm the trial court's ruling. The ruling is consistent with our holding in *Hindin v. Rust*, *supra*, B135446, at page 6, that State Farm had probable cause to bring the restitution claim against the Singh claimants and the oral ruling of Judge James R. Dunn from the bench which we incorporated by reference in that opinion. More specifically, the trial court found that the new evidence of fraud established that the Singh claimants were involuntary trustees of the settlement proceeds. Civil Code section 2224 states, "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." (See also Civ. Code, § 2223; *Estrada v. Garcia* (1955) 132 Cal.App.2d 545, 552 [only conditions necessary to create a constructive or involuntary trust are those stated in Civil Code section 2224].)

The evidence does not, however, support a conclusion that the Hindin plaintiffs were involuntary trustees under the definition in Civil Code section 2224. Defendants conceded that the Hindin plaintiffs had not obtained the funds paid to them as attorney's fees by fraud or participated in any way in the alleged fraud by the Singh claimants. The trial court acknowledged, "State Farm never alleged a claim for *fraud* against [the Hindin

plaintiffs]." Nevertheless, the trial court concluded, "so long as State Farm had probable cause to allege fraud against the Singh claimants, State Farm also had probable cause to seek a constructive trust on the attorney fees procured as the result of the alleged fraud of the Singh claimants."

The Hindin plaintiffs claim that the trial court's "by extension" ruling is not a legally tenable basis for imposing a constructive trust on their attorney's fees, in that they were bona fide encumbrancers. They assert that it was well-established law, when the federal action was filed in 1996, that a constructive trust does not lie against a bona fide creditor, notwithstanding that the debtor obtained the money paid to the creditor by fraudulent or other wrongful means. (*City of Hope Nat. Medical Center v. Superior Court* (1992) 8 Cal.App.4th 633, 636-637.) In general, probable cause to bring a civil action is determined based upon the law in effect at the time the challenged action was filed. (See *Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1466-1467.)

The Hindin plaintiffs provide authorities confirming this was the law in 1996. They cite the statement in *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657 that "the same equitable considerations justifying restitution may constitute a defense to a restitution claim. . . . Likewise, a bona fide purchaser is generally not required to make restitution. (Rest., Restitution, . . . § 13.)" (*First Nationwide Savings, supra*, at p. 1663.) According to the Restatement of Restitution, section 74, the Hindin plaintiffs point out, "[a] person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final . . . ." (Rest., Restitution, § 74, com. h., pp. 302-303.)

The Hindin plaintiffs rely on Comment h to section 74 of the Restatement of Restitution as support that fees paid to an innocent attorney out of a judgment are not subject to restitution if the judgment is reversed. Comment h states: "h. *Restitution from attorney . . . of judgment creditor*. An attorney . . . who receives payment from the judgment debtor . . . and who pays it to the judgment creditor before reversal is not liable if the judgment was valid before reversal and if he had no knowledge of any fraud used in

securing it. Under the same conditions, he is under no duty to repay money which he received on account of the judgment creditor and which he retains as payment for services . . . (see Illustration 20) since he received the money as a bona fide purchaser. . . ." (Rest., Restitution, § 74, com. h., p. 311.) Illustration 20 is as follows: "A obtains a valid judgment against B for $3000. B pays the amount of the judgment to C, A's attorney. At A's direction C expends $1000 to satisfy A's creditors and retains $2000 as compensation for his services in this suit and in previous ones. Upon reversal of the judgment, B is not entitled to restitution from C." (*Id.*, com. h., illus. 20, p. 312.)

The Hindin plaintiffs have presented no authority that attorney's fees would not be subject to restitution after reversal of the judgment if the fees were paid pursuant to the attorney's contingent fee agreement with his or her client. Neither have the Wehner defendants presented authority definitively applying a constructive trust to obtain restitution from funds paid to an attorney pursuant to a contingent fee agreement prior to the 1996 filing of the federal action. However, the Wehner defendants have provided sufficient authority to show that the constructive trust theory had some basis in law in 1996 and was a reasonable, even if novel, theory of recovery.

As we discussed previously, to determine probable cause, the trial court must "determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable" (*Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at p. 878), that is, "'"whether any reasonable attorney would have thought the claim tenable"'" (*Zamos v. Stroud*, *supra*, 32 Cal.4th at p. 971). The standard for probable cause, however, is lenient in recognition of "'the important public policy of avoiding the chilling of novel or debatable legal claims.'" "Only those actions that '"any reasonable attorney would agree [are] totally and completely without merit"' may form the basis for a malicious prosecution suit." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817.)

In its discussion of probable cause in *Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d at page 872, the California Supreme Court cited the Restatement Second of Torts, sections 653-681B. Comment f of section 675, regarding the existence of probable

cause, underscores that probable cause may exist even if an attorney makes a claim which is not supported by existing case law, but has some reasonable basis for seeking a modification or extension of the law. Comment f states in pertinent part: "To hold that the person initiating civil proceedings is liable unless the claim proves to be valid, would throw an undesirable burden upon those who by advancing claims not heretofore recognized nevertheless aid in making the law consistent with changing conditions and changing opinions. There are many instances in which a line of authority has been modified or rejected. To subject those who challenge this authority to liability for wrongful use of civil proceedings might prove a deterrent to the overturning of archaic decisions." (Rest.2d Torts, § 675, com. f, p. 460.)

Although the Wehner defendants did not identify any case law directly on point with the facts of the instant case, they cited authorities which provide a reasonable basis for applying a constructive trust theory here: *Pena v. Toney* (1979) 98 Cal.App.3d 534, *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, and the Restatement (Third) of the Law of Restitution and Unjust Enrichment, Tentative Draft No. 1, April 1, 2006, section 18, comment g, illustration 15. The *Pena* and *Weiss* cases were current law in 1996. Each involved impressing a constructive trust on payment an innocent attorney received for legal services rendered where the attorney received the payment from a party who obtained it as an involuntary trustee under Civil Code sections 2223 and 2224. The cited Restatement example was not in effect in 1996. However, it shows the law regarding recovery of fees paid under a contingent fee agreement developed in a manner consistent with the theory advanced by defendants.

In *Pena v. Toney*, *supra*, 98 Cal.App.3d 534, the court affirmed the propriety of imposition of a constructive trust on property a lawyer claimed his client gave him as payment for legal services rendered. The client had wrongfully obtained money from the plaintiff and purchased the automobile with the money. The court ruled that, in the absence of proof that the lawyer was a bona fide purchaser, he held the automobile in a constructive trust for the plaintiff. (*Id.* at p. 542.)

In *Weiss v. Marcus*, *supra*, 51 Cal.App.3d 590, the court affirmed that attorney Weiss had stated a cause of action for imposition of a constructive trust on settlement proceeds received by attorney Marcus and his law firm as payment for legal services. Attorney Weiss had been discharged by his client and replaced by attorney Marcus, who represented the client when a settlement was reached with the opposing party and was paid by the party's insurers. (*Id.* at p. 595 and fn. 4.) The court ruled that the contingent fee agreement Weiss had originally entered into with the client created an attorney's lien on the funds in the amount of the reasonable value of the legal services Weiss provided prior to his discharge and the lien survived the discharge. (*Id.* at pp. 597-598.) According to the *Weiss* court, attorney Marcus and his law firm were involuntary trustees of the amount owed to Weiss. The *Weiss* court relied upon the definition of involuntary trustee set forth in Civil Code section 2224: "'One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.'" (*Weiss*, *supra*, at p. 600.)

Section 18 of the Tentative Draft No. 1, issued in 2001, of the Restatement Third of Restitution and Unjust Enrichment[19] addressed whether an attorney is a bona fide creditor of his or her client, such that his or her fees cannot be subject to a constructive trust, if the fees were obtained pursuant to a contingent fee agreement rather than a fee-for-service agreement. Section 18, comment *g.*, *Affirmative defenses*, states in pertinent part: "If the judgment creditor employs funds received in satisfaction of a judgment to pay his or her bona fide creditors (§ 71), the latter take such payments free of the judgment debtor's restitution claim on the subsequent reversal of the judgment. See Illustration 14. A bona fide creditor of the judgment creditor might, of course, be a lawyer as well as a bank. Note, however, that *a lawyer who receives a share of a*

---

19 The 2001 tentative draft was superseded in 2011 by the final version of the Restatement Third of Restitution and Unjust Enrichment. The provisions we discuss here are substantially the same in the final version.

judgment pursuant to a contingent-fee arrangement does not take the money as a bona fide creditor of the judgment creditor, notwithstanding that the lawyer takes the money in good faith. Between lawyer and client, in such circumstances, the lawyer assumes the risk of nonrecovery: this makes the lawyer, not the client's creditor, but the assignee pro tanto of the client's judgment. Vis-à-vis the judgment debtor, therefore, the lawyer stands in the position of the judgment creditor. See Illustration 15." (Italics added.) Illustration 15 states: "Same facts as Illustration 14, except that another $50,000 of A's judgment is paid to D, A's lawyer, pursuant to a contingent-fee agreement between A and D. Although D had no knowledge of A's fraud and took the fee in good faith, B is entitled to restitution from D of $50,000 with interest." The facts in Illustration 15 parallel the circumstances applicable to the Hindin plaintiffs.

The principle that an attorney who has a contingent fee agreement assumes the risk of not receiving a fee if there is no recovery is supported by California law that was in effect when the federal action was filed in 1996. For example, according to the court in *Bandy v. Mt. Diablo Unified Sch. Dist.* (1976) 56 Cal.App.3d 230, a contingent fee contract gives an attorney an equitable interest in any recovery his or her client receives in the contract amount, but a cause of action for the attorney to enforce the lien does not accrue until the contingency occurs (e.g., until the client obtains a recovery). (*Id.* at pp. 234-235.) According to *Siciliano v. Fireman's Fund Ins. Co.* (1976) 62 Cal.App.3d 745, if the contingent fee attorney is discharged prior to the recovery, the attorney can recover the reasonable value of his or her services provided prior to discharge, but again, the attorney's cause of action does not accrue until the contingency occurs. (*Id.* at pp. 752, 757.) Thus, the attorney assumes the risk of obtaining no payment.

The flexibility accorded to a trial court in imposing a constructive trust was well-established at time the federal action was filed in 1996. Imposition of a constructive trust is an equitable remedy within the discretion of the trial court. (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 877-878.) Civil Code section 2223 and 2224 state the conditions necessary to create a constructive trust. (*Id.* at p. 878.) However, "'[i]n order to provide the necessary flexibility to apply an equitable doctrine to

individual cases, these sections state general principles for a court's guidance rather than restrictive rules. [Citation.] Thus, it has been pointed out that "a constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled." [Citations.]'" (*Ibid.*)

As the foregoing discussion shows, the Hindin plaintiffs have not cited determinative authority for their claim that State Farm's constructive trust claim was barred by law. Rather, applicable law provided underpinnings for State Farm's constructive trust theory to recover the Hindin plaintiffs' attorney's fees. Thus, there is no basis to conclude that State Farm's constructive trust theory was totally without merit. "Only those actions that '"any reasonable attorney would agree [are] totally and completely without merit"' may form the basis for a malicious prosecution suit." (*Wilson v. Parker, Covert & Chidester*, *supra*, 28 Cal.4th at p. 817.) We agree with the trial court that defendants had probable cause to bring the restitution claim against the Hindin plaintiffs.

The Hindin plaintiffs also contend that summary judgment was not justified, in that there remains a triable issue of material fact as to an essential element of State Farms' cause of action, that is, whether State Farm relied on a belief that the Singh claimants' claims were not fraudulent as a basis for entering into the $30 million settlement. The contention is one that would apply if the Singh claimants were appealing from the trial court's ruling that all defendants had probable cause to bring the restitution claim against them. However, it is not relevant to determination of probable cause to bring the restitution claim against the Hindin plaintiffs.[20] We dealt with the reliance evidence issues in reaching our holding that all defendants had probable cause to bring the restitution claim with respect to the Singh claimants. (*Hindin v. Rust*, *supra*, B135446.)

---

20 See also our discussion, *post*, regarding the orders granting the motion to strike and the motion in limine.

E. ***The Motions in Limine and Motion To Strike***

In an effort to eliminate the issue of malicious prosecution as to the restitution claim, the Rust defendants and the Montgomery defendants sought "an order *in* limine to exclude at trial any evidence offered to prove that any portion of State Farm's federal court lawsuit seeking restitution of funds previously paid in settlement of the bad faith action was brought without probable cause, or constituted malicious prosecution, other than the portion of that suit seeking return of State Farm's documents."

The trial court issued an order striking specified allegations that defendants knew that portions of the restitution claim were false and without merit and therefore, were without probable cause. (Code Civ. Proc., § 436, subd. (a).) The trial court also issued an order in limine to exclude all evidence offered to prove the restitution claim was brought without probable cause.

We review a ruling on a motion in limine for abuse of discretion. (*Ulloa v. McMillin Real Estate & Mortgage, Inc.* (2007) 149 Cal.App.4th 333, 338.) Thus, we reverse a ruling on a motion in limine "only where the trial court exceeded the bounds of reason . . . by making an arbitrary, capricious or patently absurd determination." (*Ceja v. Department of Transportation* (2011) 201 Cal.App.4th 1475, 1481.) If the exclusion of evidence pursuant to a motion in limine "is proper on any theory, the exclusion must be sustained." (*Id.* at p. 1483.)

We conclude that the trial court did not abuse its discretion. The Rust defendants and the Montgomery defendants presented substantively the same basis for their motion in limine and motion to strike as the Wehner defendants presented for their claim that probable cause existed. The Hindin plaintiffs challenge the trial court's orders on the motions on substantively the same grounds as they challenged the trial court's determination of probable cause for the Wehner defendants to bring the restitution claim against them. For the reasons discussed above for upholding the trial court's determination of probable cause for the restitution claim as to the Wehner defendants, we conclude that the trial court properly granted the motions in limine brought by the Rust defendants and the Montgomery defendants to exclude evidence as to that issue.

F. ***Active Participation by the Rust Defendants and the Montgomery Defendants***

The Hindin plaintiffs contend that the trial court erred in ruling that the Hindin plaintiffs failed to meet their burden to establish that a triable issue of material fact existed as to an essential element of their cause of action—that the Rust defendants and the Montgomery defendants authorized, directed or participated in the initiation and/or prosecution of the federal action. We agree with the Hindin plaintiffs.

An officer or director of a corporation cannot be held liable for tortious conduct "'"in which he does not personally participate, of which he has no knowledge, or to which he has not consented . . . unless he authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct."'" (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1379, quoting *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 503-504.) An officer or director may be found to have actively participated in tortious conduct if he "'specifically authorized, directed or participated in the allegedly tortious conduct'" or if he "knew about and allowed the tortious conduct to occur." (*PMC, Inc.*, *supra*, at p. 1380) All officers and directors who are shown to have done so, "are liable for the full amount of the damages suffered." (*Id.* at pp. 1381-1382.)

As to the intentional tort of malicious prosecution, an officer or director may be liable "'without personally signing the complaint initiating the . . . proceeding.' [Citation.] . . . '"[T]he test of liability in an action for malicious prosecution is whether the [officer or director] was actively instrumental or was the proximate and efficient cause of maliciously putting the law in motion."'" (*Bernstein v. Maimes* (1954) 126 Cal.App.2d 468, 475.) Whether an officer or director actively participated in instigating or prosecuting the allegedly malicious lawsuit is a question of fact. (*Id.* at p. 475.)

The Hindin plaintiffs claim that, in *Hindin v. Rust* (Nov. 30, 1998, B124816) [nonpub. opn.], this court previously determined that Rust had actively participated in the alleged tortious conduct enough to be held personally liable. The issue in our opinion was whether the trial court erred in ruling that there was no basis for personal jurisdiction

over Rust in the California court. We held that Rust had sufficient "minimum contacts for the assertion of specific jurisdiction over him in this matter."[21] (*Id.* at p. 19.)

We applied the standard articulated in *Seagate Technology v. A.J. Kogyo Co.* (1990) 219 Cal.App.3d 693 at pages 703 to 704 that, as to a corporate officer who is allegedly an intentional tortfeasor, "[a]n act taken by [the] corporate officer may subject the officer to in personam jurisdiction. *The act must be one for which the officer would be personally liable* and the act must in fact create contact between the officer and the forum state." (Italics added.) Thus, we identified evidence in the record that would be relevant to determining whether Rust was personally liable for malicious prosecution. But we did not make any determination as to whether Rust was liable. Rather, we acknowledged the difference between a liability determination and the determination of jurisdiction over Rust. We cited the principle that "'"[t]he jurisdiction issue . . . is preliminary to, and independent of, any determination of the merits of [plaintiff's] claims."'" (*Hindin v. Rust*, *supra*, B124816, at p. 14, quoting *Cassiar Mining Corp. v. Superior Court* (1998) 66 Cal.App.4th 550, 559.)

Our analysis of the evidence in *Hindin v. Rust*, *supra*, B124816, demonstrates, however, that there is sufficient evidence to raise a triable issue of material fact as to Rust's personal liability on the basis of his role in initiating and prosecuting the federal action. We wrote that "the undisputed evidence in this record shows that Rust knew about the alleged malicious lawsuit before it was filed; he had the authority to prevent it from being filed, and failed to exercise such authority, and instead, permitted others to file the lawsuit. Rust was undisputably one of the 'policymakers who direct and ultimately control corporate conduct.' (*Seagate Technology v. A.J. Kogyo Co.*, *supra*, 119 Cal.App.3d at p. 702.)" (*Hindin v. Rust*, *supra*, B124816, at pp. 19-21.)

---

[21] We also held that Rust did not meet his subsequent burden to "'"present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."' (*Hall v. LaRonde* [(1997)] 56 Cal.App.4th [1342,] 1347.)" (*Hindin v. Rust*, *supra*, B124816, at pp. 19-21.)

We stated that "[i]n the instant case, there is evidence in our record establishing that Rust had prior knowledge of the lawsuit, its procedural and substantive issues, and had the authority to approve or disapprove of its filing; it cannot be said on the instant record that he became involved in the filing of the federal lawsuit only after the fact or that his conduct involved merely ratifying conduct previously undertaken by others without his involvement, direction or knowledge. As stated by the court in *Seagate Technology*, 'a corporate officer is under no compulsion to take action unreasonably injurious to third parties.' ([*Seagate Technology v. A.J. Kogyo Co., supra*,] 219 Cal.App.3d at p. 702.) Thus, there is sufficient uncontroverted evidence in our record that Rust personally participated in the alleged wrongful conduct; Rust's conduct was not limited to merely approving actions undertaken by others without his prior knowledge or authorization." (*Hindin v. Rust*, *supra*, B124816, at p. 17.)

In our 1998 opinion, we summarized the evidence, including the following: In "the affidavit of Rust, . . . he stated that . . . he learned that State Farm had obtained evidence indicating that it had been defrauded in 1993 when State Farm paid $30 million to settle the Singh discrimination lawsuit; he instructed State Farm's general counsel to review State Farm's option, leaving it to the judgment of the general counsel to select the appropriate course of conduct to best serve State Farm and its policyholders; he 'was not consulted about filing of [*State Farm v. Hindin*]. I did not direct anyone at State Farm, or acting on its behalf, to file that Action. I did not play any role in selecting the person to be sued or the theories on which to sue. The decision to bring [that lawsuit] was not made by me nor was my approval sought or required.' Rust further avers that the [Hindin] plaintiffs have misinterpreted State Farm's General Executive Memorandum 132 as indicating he played a role in the decision to file the Hindin lawsuit; rather, that Memorandum states that an action on behalf of State Farm must generally be approved by a member of the President's Office, which refers to ten executives, including himself." (*Hindin v. Rust*, *supra*, B124816, at pp. 7-8, fn. omitted.)

In our 1998 opinion, we wrote that in "the deposition testimony of Rust," he "testified that with respect to the institution of the *State Farm v. Hindin* action, he told

State Farm's General Counsel William Montgomery to 'review the facts, to seek appropriate input from whatever sources he felt were appropriate, and to proceed accordingly,' and that if Montgomery 'felt it was appropriate to file a lawsuit, he could have.'" (*Hindin v. Rust*, *supra*, B124816, at pp. 8-9.)

We also summarized information from Montgomery's deposition, as follows: "Montgomery, who reported directly to Rust, admitted in his deposition that he 'may have discussed the possibility of filing such a lawsuit with Mr. Rust at a much earlier time,' within a one and a half year period prior to the case being filed. Montgomery also admitted that prior to the filing of *State Farm v. Hindin*, he gave Rust legal advice regarding filing of the suit, and that he usually reports contemplated litigation to Rust; about a month before the *State Farm v. Hindin* suit was filed he reported the contemplated litigation to Rust, explaining to him what State Farm was going to do both procedurally and substantively; if Rust disagreed with the filing of the lawsuit, he could have directed him not to file the suit." (*Hindin v. Rust*, *supra*, B124816, at p. 9.)

The Rust defendants assert that, if the 1998 opinion was binding as to anyone, it was binding only as to Rust and not as to Trosino or Rutrough. As we previously stated, our jurisdiction determinations were not binding on the issue of personal liability of any party. The evidence used in the determinations, however, was sufficient to create a triable issue of fact regarding active participation of each party concerned in bringing the federal action.

The Hindin plaintiffs point out that Trosino and Rutrough later moved to quash their subpoenas. The trial court similarly determined they actively participated in initiating and prosecuting the federal action to the extent necessary to render them subject to specific jurisdiction. The court denied their motions to quash. Rutrough and Trosino then petitioned this court for a writ of mandate to vacate the trial court's order. (*Trosino v. Superior Court* (Feb. 3, 1999, B129006).) We denied the writ petition. The California Supreme Court subsequently denied their petition for review. (*Trosino v. Superior Court* (Apr. 14, 1999, S076570).)

Montgomery was State Farm's General Counsel and Reynolds was Assistant General Counsel and reported to Montgomery. A reasonable inference is that Reynolds' involvement and participation was consonant with that of Montgomery. In deposition testimony, Rutrough, Trosino and Montgomery identified Montgomery as the person who authorized the filing of the federal action. Montgomery testified that he was present at the January 26, 1996 meeting concerning filing the proposed federal complaint. After he attended the January 26, 1999 meeting, he wrote a note to Rust and Trosino that, at the meeting, outside counsel was authorized to file the federal complaint.

The evidence before us in the 1998 opinion included the verified complaint, Rust's affidavit and deposition testimony excerpts and excerpts from deposition testimony by Montgomery, and it is substantively the same as the evidence before us in regard to the *Rust* appeal and the *Montgomery* appeal. We conclude that the foregoing facts are a sufficient basis to submit the question of active participation to the jury for determination. Our opinion in *Hindin v. Rust*, *supra*, B124816, that Rust actively participated in initiating the federal action and the trial court's subsequent ruling as to Trosino and Rutrough's participation, albeit in the context of imposing jurisdiction, provide further support for the conclusion as it relates to the Rust defendants. The Montgomery defendants held positions as legal counsel to State Farm and were answerable to Rust. Thus, the grant of the motions for summary judgment made by the Rust defendants and the Montgomery defendants cannot stand, in that there remain triable issues of fact relevant to whether they actively participated in instigating and/or maintaining the federal action.[22]

---

[22] The Rust defendants argue that the Hindin plaintiffs forfeited the issue of whether the Rust defendants actively participated, in that the Hindin plaintiffs failed to cite to any relevant evidence in the record to show any triable issue of fact. (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230 ["On review of a summary judgment, the appellant has the burden of showing error . . . ."].) We do not deem the issue forfeited, in that the facts and arguments from the *Wehner* appeal by the Hindin plaintiffs were incorporated in the *Rust* appeal by reference.

G. *Completion of Discovery*

The Hindin plaintiffs contend that the trial court erred in denying their April 2007 application to conduct additional discovery to defend against defendants' motions for summary judgment. The Hindin plaintiffs maintain that, as of August 26, 1999, they had four months of discovery remaining and they have never been permitted to complete the discovery. As the Hindin plaintiffs explain, their completion efforts have been held in abeyance by the continuum of defendants' motions for summary judgment or summary adjudication and the resulting appellate proceedings from August 1999 to the time the trial court entered the judgments at issue in this appeal.

As support for the merits of their discovery application, the Hindin plaintiffs offer a report and recommendation made in June 2001 by the discovery referee agreed upon by all parties, Retired Judge Bonnie Lee Martin. The referee recommended that the Hindin plaintiffs be allowed to depose listed individuals on issues relevant to State Farm's then-pending motion for summary adjudication regarding the restitution claim as to both the Singh claimants and the Hindin plaintiffs. (We note that the recommendation does not mention discovery related to the document claim.)

In any event, at the time the Hindin plaintiffs made the application to conduct further discovery, they were faced with a new situation. Instead of one motion for summary judgment by all defendants, the Hindin plaintiffs were faced with summary judgment motions by groups of defendants and grounds that had not been asserted in defendants' prior summary judgment motions over the preceding years. Code of Civil Procedure section 437c, subdivision (h), provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is

due." The statute evinces a policy to allow additional reasonable discovery to a litigant who is at risk of dire consequences—losing his or her case before trial has commenced.

For the reasons discussed above with respect to probable cause for the restitution claim, evidence concerning the facts known to defendants concerning the Singh claimants is not relevant to the issue of probable cause as to the Hindin plaintiffs. Nevertheless, our foregoing conclusions reveal the need for further proceedings to make factual findings on the existence of malice in bringing the document claim. Also, it is undisputed that the Hindin plaintiffs have never been allowed to complete the period of discovery established by applicable law. For these reasons, we conclude that to deny the Hindin plaintiffs the opportunity to complete discovery would be an abuse of discretion. Therefore, the trial court's order denying the Hindin plaintiffs' application for further discovery is vacated.[23]

---

[23] The Rust defendants submitted a request for judicial notice of two documents from the trial court's record. The Rust defendants explain that they are documents the Hindin plaintiffs filed in opposition to a motion for summary judgment by State Farm, which motion is not at issue in the *Rust* appeal, the *Wehner* appeal, or the *Montgomery* appeal. The documents are (1) The Hindin plaintiffs' memorandum of points and authorities in opposition to State Farm's motion for summary judgment re: malice, and (2) The Hindin plaintiffs' reply to State Farm's separate statement of additional material facts in opposition to State Farm's motion for summary judgment re: malice. The Rust defendants assert that the documents contradict the Hindin plaintiffs' arguments that the trial court erred in granting the Rust defendants' motion for summary judgment and in denying the Hindin plaintiffs' application to conduct further discovery.

We deny the Rust defendants' request for judicial notice, in that the two documents were not before the trial court when the trial court issued the summary judgment in favor of the Rust defendants, are not relevant to the three appeals being considered here, and including them in any part of the record in the three appeals before us would create a substantial danger of confusing the issues. (Evid. Code, §§ 352, 459, subd. (d); *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418.)

H. *Evidentiary Rulings*

In the *Wehner* and *Rust* appeals, the Hindin plaintiffs contend that the trial court erred in sustaining objections to certain evidence the Hindin plaintiffs offered in opposition to the summary judgment motions by the Wehner and Rust defendants.[24]

We review a "trial court's evidentiary rulings made in connection with a summary judgment motion for abuse of discretion. [Citation.]" (*Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 467.) An evidentiary ruling may be erroneous, but it is not reversible unless the error results in a miscarriage of justice prejudicial to the party offering the evidence. (Cal. Const., art. VI, § 13; *Easterby v. Clark* (2009) 171 Cal.App.4th 772, 783.) "'[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.]" (*Easterby*, *supra*, at p. 783.)

In any event, the Hindin plaintiffs have forfeited their right to challenge many of the evidentiary rulings. In their opening briefs in the *Wehner* appeal, as well as in the *Rust* appeal, the Hindin plaintiffs state that "the trial court abused its discretion by sustaining wholesale objections to the [Hindin plaintiffs'] evidence. It is not feasible to list and discuss all of the objections sustained by the trial court in this brief but a few examples follow[.]"

We are "'not inclined to act as counsel for . . . appellant[s] and furnish a legal argument as to how the trial court's rulings . . . constituted an abuse of discretion.' [Citation.]" (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)

---

24 We note that, in the *Rust* appeal, the Hindin plaintiffs incorporate by reference the arguments in their opening brief in the *Wehner* appeal challenging evidentiary rulings. However, the trial court's rulings were specific to the group of defendants that raised the objections, so the challenge to the trial court's rulings in one appeal may have no applicability to a different appeal. We note as well that the Hindin plaintiffs do not raise any objections to the trial court's evidentiary rulings specific to the *Montgomery* appeal.

As appellants, the Hindin plaintiffs were required to submit briefs which identified each point and supported it by argument. (Cal. Rules of Court, rule 8.204(a)(1)(B).) Accordingly, we treat the Hindin plaintiffs' contentions concerning all evidentiary rulings as forfeited, except those "few examples" identified by the Hindin plaintiffs and supported by adequate argument in their opening briefs. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Mansell*, *supra*, at pp. 545-546.)

One of the "examples" concerning an objection raised by the Rust defendants merits discussion. The evidence at issue was a memorandum handwritten by Montgomery, State Farm's General Counsel, dated January 12, 1996, which stated: "cc's Ed [¶] Vince [¶] At a meeting today attended by Jim Rutrough, Frank Haines and me, among others, we authorized our California Attorneys to file suit in federal court against the Singh Claimants and their lawyers. I can provide further details if you wish. [¶] Bill."

The trial court ruling was very specific that "[t]he memo can be introduced for the purpose of showing that the recipients listed (Defendants Rust and Trosino) received it. However, it cannot be used to show that Rust and Trosino *authorized the filing* of suit. It also cannot be used to show that Defendant Rutrough (who purportedly attended this meeting) 'authorized' the filing." The trial court ruled that, for the latter two purposes, the memo was inadmissible hearsay (Evid. Code, § 1200, subds. (a), (b)), and no exception to the hearsay rule applied.

In claiming that the trial court erred in sustaining the *Rust* defendants' objections to the memo, the Hindin plaintiffs put forth a number of purposes for which, they claim, the memo would be admissible. It is clear, however, that the trial court's ruling does not preclude the use of the memo for all purposes. It only precludes use of the memo to show defendants Rust, Trosino or Rutrough authorized the filing of the federal suit.

As to all of the "examples" the Hindin plaintiffs addressed, they have presented no arguments demonstrating that any error was prejudicial to them, that is, no reasons why "'it is reasonably probable that a result more favorable to [them] would have been reached in the absence of the error.'" (*Easterby v. Clark*, *supra*, 171 Cal.App.4th at

p. 783.) Their arguments are directed to error in making the ruling. Given that both error and prejudice due to the error must be shown in order to obtain reversal of a judgment, the Hindin plaintiffs' challenges to evidentiary rulings are without merit.

I. ***Motion To Strike the Cost Bill and To Tax Costs***

In the *Wehner* appeal, the Hindin plaintiffs contend that the trial court erred in denying their motion to strike the cost bill filed by the Wehner defendants and to tax costs. The Wehner defendants' cost bill sought $46,132.92 to be added to the judgment entered in favor of the Wehner defendants. After a hearing on the motion in November 2009, the trial court allowed $44,348.52 in costs against the Hindin plaintiffs and declined to tax costs.

In view of our conclusion that the judgment in favor of the Wehner defendants must be reversed, it follows that the trial court's order allowing costs to the Wehner defendants must be vacated. The issue has become moot.

SUMMARY OF CONCLUSIONS

As more specifically stated in our foregoing discussion, we affirmed our previous holding that, as to all defendants, probable cause did not exist to bring the document claim. There remains a triable issue of material fact for the jury to determine, namely, malice. There also remains a triable issue of material fact as to whether the Rust defendants and/or the Montgomery defendants actively participated in instigating and/or maintaining the federal action. Probable cause existed to bring the restitution claim against the Hindin plaintiffs; no triable issue of material fact exists as to that claim.

We also concluded that the trial court must vacate its order denying the April 2007 application by the Hindin plaintiffs to conduct additional discovery. We found no merit to the Hindin plaintiffs' claims of error with regard to evidentiary rulings.

DISPOSITION

The judgments in each of the three appeals are reversed and the matters are remanded for further proceedings consistent with this opinion. The parties are to bear their own costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.