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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LOUIS H. DE HAAS, Plaintiff and Appellant, v. HRAYR SHAHINIAN et al., Defendants and Respondents.	B234726 (Los Angeles County Super. Ct. No. BC452118)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Soussan G. Bruguera, Judge. Affirmed in part, reversed in part.

La Follette, Johnson, De Haas, Fesler & Ames, Louis H. De Haas, in pro. per., and David J. Ozeran for Plaintiff and Appellant.

Baker, Keener & Nahra, Robert C. Baker, Phillip A. Baker, R. Jeffrey Neer, Daniel P. Leonard, and Derrick S. Lowe for Defendants and Respondents Hrayr Shahinian, Individually and Doing Business as Skull Base Institute and Skull Base Medical Group, Inc.

The Raitt Law Firm and G. Emmett Raitt, Jr., in pro. per., for Defendants and Respondents G. Emmett Raitt, Jr., and Raitt & Associates.

Louis H. De Haas appeals a judgment and orders (1) granting special motions to strike brought pursuant to Code of Civil Procedure section 425.16[1] by defendants Hrayr Shahinian, M.D., Skull Base Institute, Skull Base Medical Group, Inc. (collectively, the Shahinian parties), G. Emmett Raitt, Jr., and Raitt & Associates (collectively, Raitt),[2] and (2) awarding prevailing party attorney fees to the Shahinian parties. For the reasons that follow, we affirm the judgment and order as to Raitt, but reverse as to the Shahinian parties.

FACTUAL AND PROCEDURAL HISTORY

I. Medical Malpractice Actions Against Shahinian

A. The Parties

Shahinian is a neurosurgeon. He performed skull-based surgery at Cedars-Sinai Medical Center (Cedars) from August 1996 through December 2005. In 2005, Shahinian terminated his relationship with Cedars and set up his own medical practice.

De Haas is an attorney with the law firm of La Follette, Johnson, De Haas, Fesler & Ames (the La Follette firm). Between 2001 and 2004, the La Follette firm represented Shahinian and Cedars in at least four separate medical malpractice actions arising out of surgery Shahinian performed at Cedars.

B. The Stumfall Action

De Haas and the La Follette firm represented Shahinian and Cedars in a medical malpractice action captioned *Stumfall v. Shahinian, et al.*, Los Angeles County Superior Court Case No. BC357759, filed August 29, 2006 (the *Stumfall* action). The plaintiff dismissed the *Stumfall* action on November 28, 2006.

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[1] All undesignated statutory references are to the Code of Civil Procedure.

[2] Raitt & Associates is now known as The Raitt Law Firm.

C. The Gutierrez Action

On October 25, 2005, Federico Gutierrez filed a medical malpractice action against Cedars, alleging that Cedars and its personnel were negligent in their provision of postoperative care. (*Gutierrez et al. v. Cedars Sinai Health System et al.*, Super. Ct. L.A. County, No. BC341912 (the *Gutierrez* action).) Although Shahinian performed Gutierrez's surgery, he was not named as a defendant in Gutierrez's original complaint. Attorney Donald Fesler and the La Follette firm represented Cedars in the *Gutierrez* action. The La Follette firm did not seek a conflict waiver from Shahinian before accepting representation of Cedars, and Fesler examined Shahinian during a deposition in a manner that Shahinian believed to be "very aggressive . . . with the apparent intent of proving my liability in the matter."

D. The Kotolnick Action

On August 7, 2006, Marc and Lawanna Kotolnick filed a medical malpractice action against Shahinian and Cedars, serving Shahinian and Cedars with the summons and complaint on December 6, 2006. (*Kotolnick et al. v. Shahinian et al.*, Super. Ct. L.A. County, No. BC356557 (the *Kotolnick* action).) Skull Base Medical Group was not named as a defendant in that action. De Haas and the La Follette firm represented Cedars, and Attorney Richard Carroll and the firm of Carroll, Kelly, Trotter, Franzen & McKenna represented Shahinian.

On November 20, 2007, Cedars, through the La Follette firm, filed a motion for summary judgment. The motion asserted, among other things, that Cedars's conduct "in no way caused, or contributed to, any of plaintiffs' alleged injuries and damages."[3] Subsequently, Shahinian filed his own motion for summary judgment. On November 3, 2008, the trial court granted Shahinian's summary judgment motion, finding no evidence that Shahinian acted below the standard of care in his treatment of Kotolnick.

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[3] Our appellate record does not indicate the resolution of that motion.

II. Shahinian's Legal Malpractice Action Against De Haas

On November 21, 2007, Shahinian (individually and doing business as Skull Base Institute) and Skull Base Medical Group sued the La Follette firm and Donald Fesler for breach of fiduciary duty and professional negligence. (*Shahinian et al. v. La Follette Johnson De Haas Fesler & Ames et al.*, Super. Ct. L.A. County, No. BC381174.) On April 16, 2008, the Shahinian parties amended the complaint to add De Haas as a defendant. Raitt represented the Shahinian parties in that action.

As relevant here, the Shahinian parties alleged that De Haas and his firm (1) represented Cedars in the *Kotolnick* action notwithstanding a conflict of interest between Cedars and Shahinian, and (2) filed a motion for summary judgment for Cedars in the *Kotolnick* action, even though that motion was contrary to Shahinian's interests. If the motion were granted, the Shahinian parties alleged, they "would be the only remaining named defendants in the Kotolnick Action, and would be exposed to the damage claims raised by the Kotolnicks." Even if the motion were denied, "the allegations raised in the Motion and in the evidence filed by Cedars in support of the Motion would increase the Shahinian Plaintiffs' exposure to the Kotolnicks by setting forth theories and opinions of Cedars' expert which, if believed by the trier of fact, would increase the Shahinian Plaintiffs' exposure to the Kotolnicks and diminish Cedars' exposure."

Shahinian alleged that De Haas breached his fiduciary duty and committed legal malpractice by failing to obtain Shahinian's written consent to De Haas's representation of Cedars in the *Kotolnick* action and "[p]lacing the interests of Cedars above the interests of the Shahinian Plaintiffs in the Kotolnick Action, while concurrently representing the Shahinian Plaintiffs in other litigation." Shahinian alleged that as a result of these acts and omissions, he suffered emotional distress damages and "[g]eneral damages and special damages in an amount to be proven at the time of trial."

De Haas sought summary judgment against both Skull Base Medical Group and Shahinian.[4] De Haas urged that he could not have breached a duty to Skull Base Medical Group because he had never represented it in any action. Indeed, he said, Skull Base Medical Group had admitted such in its interrogatory responses: In response to an interrogatory seeking identification of each matter in which the La Follette firm represented Skull Base Medical Group, the medical group responded that "At the time the Complaint and First Amended Complaint was [*sic*] filed, Plaintiffs believed that [Skull Base Medical Group] had been represented in the past by [the La Follette firm]. *Plaintiffs have since discovered that is incorrect*[.]" (Italics added.)

As to Shahinian, De Haas sought summary judgment on three separate grounds: (1) the La Follette firm did not owe a duty to Shahinian in the *Kotolnick* matter because he was not a client of the firm during the pendency of that action; (2) Shahinian admitted he did not know whether the La Follette firm disclosed any confidential information in the *Kotolnick* action; and (3) Shahinian could not establish that he suffered any damages as a result of De Haas's alleged misconduct.

The trial court granted both summary judgment motions. The court found there was no evidence that De Haas or his firm had ever represented Skull Base Medical Group, and "[the Shahinian parties] conceded that no attorney-client relationship ever existed between [the attorney defendants] and [Skull Base Medical Group]." As to Shahinian, the court found as follows:

"Defendants argue that they are entitled to summary judgment because they owed no duty to Plaintiff because their representation of Plaintiff had concluded when they undertook the representation at issue in this case. . . .

". . . Defendants point to Gonzale[z] v. Kalu (2006) 140 Cal.App.4th 21, 28[,] which provides that: 'An attorney's representation of a client ordinarily ends when the client discharges the attorney or consents to a withdrawal, the court consents to the

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[4] The summary judgment motion refers to Skull Base Medical Group, Inc. as "SBI," not "SBMG."

attorney's withdrawal, or upon completion of the tasks for which the client retained the attorney.'

"In this Court's original tentative ruling, the Court indicated that Defendants provided no evidence indicating that the scope of the attorney-client relationship between it and Plaintiff was limited to the various representations undertaken, in that the Defendants had failed to adduce retainer agreements, or other evidence defining the scope of the representation. However, a careful examination of the complaint reveals that it clearly defines the prior representations that had occurred and does not allege the existence of any retainer agreement. And, Defendants are not required in their motion to address ancillary issues not framed by the complaint. [Citation.]

"Moreover, at the initial hearing on this motion, Defense counsel stated that no retainer agreement existed and Plaintiff's counsel did not dispute this fact.

"Plaintiff urges that it was his subjective understanding that the attorney-client relationship continued after these representations concluded, and that the authority relied on by Defendants is inapposite because it only deals with the termination of the representation for statute of limitations purposes. Plaintiff cites Foxborough v. Van Atta (1994) 26 Cal.App.4th 217, which he argues . . . indicates that the attorney-client relationship is broader than the representation of a client on a particular subject matter. Although this point is well taken, it does not compel the leap that Plaintiff asks this Court to take — that the relationship continued, *ad infinitum*, until it was affirmatively terminated by counsel or Plaintiff. Rather, the evidence adduced in support of the motion indicates that the matters for which Defendants had been retained had concluded prior to the alleged breach, and that these representations were discrete and finite in nature.

"Therefore, the facts evidence that Plaintiff had the status of a former client when the at-issue representation occurred.

". . . . . .

"The Professional Rules of Conduct, Rule 3-310(e), prohibits the acceptance of adverse employment where confidences were obtained in the first employment which are material to the subsequent employment. Here, Defendants urge that no confidences

obtained from Plaintiff were disclosed in its later representation of Cedars. Further, Defendants urge that no confidences were obtained in any prior action that were material to the later action because they were all separate and unrelated malpractice actions. Defendants have also pointed to Plaintiff's discovery responses in which he was unable to identify any confidences that were shared in the subsequent representation.

"Therefore, Defendants sustained their burden of negating two essential elements of Plaintiff's cause of action and Plaintiff has not adduced credible or relevant evidence tending to demonstrate the existence of a triable issue of fact as to those same elements (duty or breach). Counsel was not required to affirmatively terminate the relationship nor did the relationship continue based solely on the client's subjective expectation that the relationship continued." (Fns. & internal record references omitted.)

III. The Present Malicious Prosecution Action

De Haas filed the present action for malicious prosecution against the Shahinian parties and Raitt on December 29, 2010. The operative complaint alleges that the defendants "had no factual or legal basis for continuing to prosecute the [legal malpractice] action against Mr. De Haas after he was added as a defendant, but did so for the improper purpose of harassing [De Haas] and hoping to obtain a settlement of a meritless action. At no time did Mr. De Haas do anything in his representation of Cedars in the Kotolnick case which breached a fiduciary or other duty owed to the Shahinian Defendants, or which caused damage to the Shahinian Defendants, and there are no facts by which a reasonable person or a reasonable attorney would have believed that Mr. De Haas engaged in conduct constituting a breach of a fiduciary or other duty owed to the Shahinian Defendants. [¶] . . . [De Haas] obtained summary judgment in the Shahinian action against Dr. Shahinian individually and [doing business as] Skull Base Institute on or about January 2, 2009. He obtained a judgment against Skull Base Medical Group, Inc. in the Shahinian action on or about February 20, 2009. An appeal was filed by Dr. Shahinian individually and [doing business as] Skull Base Institute on or about March 9, 2009. Skull Base Medical Group, Inc. was not a party to the appeal. On

August 26, 2009, the appellants in the Shahinian action filed a request to dismiss the appeal as to Mr. De Haas. The appeal was dismissed as to Mr. De Haas on August 27, 2009."

The Shahinian parties and Raitt filed special motions to strike pursuant to section 425.16. They urged that De Haas's malicious prosecution action "arises from conduct in furtherance of their right to freedom of speech in connection with a public issue." Further, they contended, De Haas could not establish that his malicious prosecution action had a reasonable probability of success because he could not show lack of probable cause or malice. They urged that Shahinian reasonably believed De Haas was still his attorney when De Haas filed a motion for summary judgment for Cedars in the *Kotolnick* action, and De Haas "has offered no written evidence, no witness testimony and in fact offers no evidence whatsoever to support his allegation that Defendants acted with 'actual ill will' or with some 'improper ulterior motive.'"

The trial court granted the special motion to strike on June 6, 2011, finding De Haas failed to make a prima facie showing of facts that, if credited, showed Shahinian and Skull Base Medical Group lacked probable cause to sue De Haas for breach of fiduciary duty and professional negligence. In relevant part, the court explained as follows:

"Plaintiff argues Shahinian was a *former* client. In support of this argument, Plaintiff submitted evidence that the Stumfall action was dismissed on November 28, 2006, *before* Cedars was served with the complaint in the Kotolnick action. [Citation.]

"Plaintiff contends the issue of whether Shahinian was a former client was conclusively established against Shahinian in the underlying action when his motion for summary judgment was granted. However, 'the existence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact. . . .' [Citation.]

"Moreover, in support of the argument Shahinian was a client at the same time De Haas represented Cedars in the Kotolnick action, there is evidence of 'special circumstances showing or requiring a continuation' of the attorney-client relationship

between De Haas and Shahinian after dismissal was entered in the Stumfall action. [Citation.] Specifically, Shahinian presented evidence LaFollette Johnson DeHaas, Fesler & Ames ('LaFollette Johnson') represented him in four separate medical malpractice actions from 2001 through 2004. Shahinian declared because LaFollette Johnson represented him in the four actions, he 'considered LaFollette Johnson to be' his 'attorneys and expected that they would represent' him in the future should he be 'sued for medical malpractice again.' Shahinian presented evidence LaFollette Johnson represented him in the Stumfall action, filed on August 29, 2006. Shahinian declared he never terminated his attorney-client relationship with LaFollette Johnson or any of its members or employees. Moreover, Shahinian declared no one at LaFollette Johnson even told him they were no longer his attorneys. [Citation.]

"At the ***very least***, Shahinian was a former client at the time De Haas represented Cedars in the Kotolnick action.

"California Rules of Professional Conduct, Rule 3-310(E) provides: 'A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.'

"Shahinian presented evidence he was never asked by LaFollette Johnson for a written waiver of conflicts and he was never told LaFollette Johnson's representation of Cedars in the Gutierrez action was adverse to his interest. In addition, Shahinian presented evidence LaFollette Johnson failed to ask him for a waiver of conflicts until after they filed their motion for summary judgment in the Kotolnick action. After Shahinian refused to execute the waiver, LaFollette Johnson withdrew from its representation of Cedars in the Kotolnick action. Shahinian declared LaFollette Johnson and De Haas never told him that their representation of Cedars in the Kotolnick action would be adverse to his interests.

"Plaintiff contends LaFollette Johnson did not use confidential information obtained from Shahinian. . . .

". . . . . .

"The fact that Shahinian was not aware of any confidential information De Haas may have accessed in order to bring the summary judgment motion is not conclusive proof that De Haas did not use any confidential information obtained from Shahinian when representing Cedars. Clearly, De Haas obtained and/or had access to confidential information through his representation of Shahinian in prior medical malpractice cases. As argued by Shahinian, such information would include Shahinian's habits, customs and practices as a doctor and surgeon, his financial situation, his motives, his approach to litigation, his strengths and weaknesses as a witness, and other confidential information that was naturally revealed during the course of the attorney-client relationship.

"In addition to the evidence De Haas took an adverse position against Shahinian in the Kotolnick action by representing Cedars and filing the motion for summary judgment, there is evidence De Haas used a declaration from expert Mark Bruley to support the summary judgment and expose Shahinian to potential liability. . . . Ultimately, Bruley's declaration was used to shift the blame from Cedars arguably at the expense of Shahinian. [Citation.]

"Moreover, the fact that Shahinian obtained summary judgment in the Kotolnick action does not preclude a finding that Shahinian suffered harm as a result of the summary judgment filed by De Haas." (Fns. & internal record references omitted.)

With regard to malice, the court found that De Haas failed to make a prima facie showing of facts that, if credited, showed Shahinian and Skull Base Medical Group pursued their claims against De Haas with malice. It said: "As noted above, Plaintiff failed to show Shahinian and [Skull Base Medical Group] lacked probable cause in initiating and pursuing the underlying action. Moreover, there is no admissible evidence to suggest the underlying action was initiated and pursued with malice as opposed to negligence. [¶] Plaintiff argues Shahinian filed 'frivolous complaints' with the State Bar and testified he was 'angry' with De Haas over his representation of Cedars. However, the Court cannot consider the State Bar complaints, let alone determine they were frivolous. [Citation.] In addition, the fact that Shahinian may have been angry at one

point is not enough to establish malice. [¶] Based on the foregoing, Defendants' special motions to strike are granted." (Fns. & internal record reference omitted.)

Following the grant of the special motions to strike, the Shahinian parties made a motion for attorney fees pursuant to section 425.16, subdivision (c)(1). The court granted the motion, awarding the Shahinian parties fees and costs of $35,559. De Haas timely appealed from the judgment and attorney fee award.

STANDARD OF REVIEW

"Code of Civil Procedure section 425.16 provides that a cause of action arising from a defendant's act in furtherance of a constitutionally protected right of free speech may be stricken unless the plaintiff is likely to prevail on the merits. (Code Civ. Proc., § 425.16, subd. (b)(1).) The analysis of an anti-SLAPP motion under this section is two-fold: the trial court decides first '"whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." [Citation.]' (*Jarrow* [*Formulas, Inc. v. LaMarche* (2003)] 31 Cal.4th [728,] 733.)" (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1104 (*Cole*).)

To establish a probability of prevailing, the plaintiff "'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548; accord, *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 274.) For purposes of this inquiry, 'the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' (*Wilson v. Parker, Covert &*

Chidester [(2002)] 28 Cal.4th [811,] 821 [(*Wilson*)].) In making this assessment it is 'the court's responsibility . . . to accept as true the evidence favorable to the plaintiff . . . .' (*HMS Capital, Inc. v. Lawyers Title Co*. [(2004)] 118 Cal.App.4th [204,] 212.) The plaintiff need only establish that his or her claim has 'minimal merit' (*Navellier v. Sletten* [(2002)] 29 Cal.4th [82,] 89) to avoid being stricken as a SLAPP. (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 738 ['the anti-SLAPP statute requires only "a minimum level of legal sufficiency and triability" [citation]'], quoting *Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 438, fn. 5.)" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*).)

We review an order granting an anti-SLAPP motion de novo, applying the same two-step procedure as the trial court. (*Cole*, *supra*, 206 Cal.App.4th at pp. 1104-1105.) We look at the pleadings and declarations, accepting as true the evidence that favors the plaintiff and evaluating the defendant's evidence "'"only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citation.] The plaintiff's cause of action needs to have only '"minimal merit" [citation]' to survive an anti-SLAPP motion." (*Id.* at p. 1105.)

De Haas does not dispute that the first prong of the anti-SLAPP motion—protected activity—is met. Thus, we are concerned on appeal with only the second prong: De Haas's likelihood of prevailing on his cause of action for malicious prosecution.

DISCUSSION

To prevail in this malicious prosecution action, De Haas must demonstrate that the underlying legal malpractice action against him "'(1) was commenced by or at the direction of the defendant[s] and was pursued to a legal termination favorable to [De Haas]; (2) was brought without probable cause; and (3) was initiated with malice. [Citation.]' (*Soukup*, *supra*, 39 Cal.4th at p. 292.)" (*Cole*, *supra*, 206 Cal.App.4th at p. 1105.) The first element, favorable termination, clearly is met, as De Haas obtained

summary judgment in the legal malpractice action. What is at issue in this appeal, therefore, is whether De Haas has made a prima facie showing that the underlying action was brought without probable cause and with malice. We consider these issues below.

I. Probable Cause

"'The question of probable cause is "whether, as an objective matter, the prior action was legally tenable or not." [Citation.]' ([*Soukup*, *supra*,] 39 Cal.4th [at p.] 292.) Probable cause 'is "'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.'" [Citations.]' (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 55.)

"'Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed. "[T]he standard of probable cause to bring a civil suit [is] equivalent to that for determining the frivolousness of an appeal (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637), i.e., probable cause exists if 'any reasonable attorney would have thought the claim tenable.' (*Sheldon Appel* [*Co. v. Albert & Oliker* (1989) 47 Cal.3d 863,] 886 [(*Sheldon Appel* Co.)].) This rather lenient standard for bringing a civil action reflects 'the important public policy of avoiding the chilling of novel or debatable legal claims.' (*Id*. at p. 885.) Attorneys and litigants . . . '"have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . ."' (*Ibid*., quoting *In re Marriage of Flaherty*, *supra*, at p. 650.) Only those actions that '"any reasonable attorney would agree [are] totally and completely without merit"' may form the basis for a malicious prosecution suit. (*Ibid*.)" (*Wilson*[, *supra*, 28 Cal.4th at p.] 817.)' (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1047-1048.)

"The existence of probable cause is determined by an objective test. To make a prima facie case of a lack of probable cause in response to the anti-SLAPP motion, [plaintiff] must submit substantial evidence showing no reasonable attorney would have thought the [underlying] action was tenable in light of the facts known to [defendants] at the time the suit was filed ([*Wilson*,] *supra*, 28 Cal.4th at pp. 817, 822, fn. 6; *Ross v. Kish*

(2006) 145 Cal.App.4th 188), or that [defendants] continued pursuing the lawsuit after they had discovered the action lacked probable cause. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 966-970.) 'Only those actions that any reasonable attorney would agree are totally and completely without merit may form the basis for a malicious prosecution suit. [Citations.]' (*Id*. at p. 970.)

"'However, '[w]here there is no dispute as to the facts upon which an attorney acted in filing [or prosecuting] the prior action, the question of whether there was probable cause to institute [or continue prosecuting] that action is purely legal. (*Sheldon Appel Co*., *supra*, 47 Cal.3d at pp. 868, 881; *Downey Venture v. LMI Ins. Co*. (1998) 66 Cal.App.4th 478, 496.) If there is a dispute as to such facts, that dispute must be resolved by the trier of fact before the objective standard can be applied by the court. (*Sheldon Appel Co*., *supra*, at p. 881; *Downey Venture v. LMI Ins. Co*., *supra*, at p. 496, fn. 25.)' (*Ross v. Kish*, *supra*, 145 Cal.App.4th at p. 202.)" (*Mendoza v. Wichmann* (2011) 194 Cal.App.4th 1430, 1449-1450.)

A. Shahinian's Claims Against De Haas

De Haas contends that no reasonable attorney would have thought Shahinian's professional negligence or breach of fiduciary duty claims were tenable because Shahinian did not suffer any damages as a result of De Haas's alleged conduct in the *Kotolnick* action. For the following reasons, we agree.

Damages are an essential element of causes of action for professional negligence and breach of fiduciary duty.[5] "'If the allegedly negligent conduct does not cause

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[5] The elements of a claim for professional negligence are: (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.)

The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by

damage, it generates no cause of action in tort. [Citation.] The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence.' (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200; cf. *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal.App.4th 579, 591 ['In the legal malpractice context, the elements of causation and damage are particularly closely linked']; 4 Mallen & Smith, Legal Malpractice (2012 ed.) § 37:15, p. 1509 ['Causation connects the element of fault to the fact of injury. . . . [T]he question may be whether the claimed damage was caused by the alleged wrongful conduct. The opposite perspective is whether the alleged misconduct . . . caused legally cognizable damage.'].)" (*Filbin v. Fitzgerald*, *supra*, 211 Cal.App.4th at p. 165.) Stated differently, "[t]o prevail in a legal malpractice action, '[s]imply showing the attorney erred is not enough.' [Citation.] The plaintiff must also establish that, but for the alleged malpractice trial, settlement of the underlying lawsuit would have resulted in a better outcome." (*Id.* at p. 166.)

Further, a plaintiff suing for legal malpractice "may not, as a general rule, recover emotional distress damages." (*Levine v. Smith* (2006) 145 Cal.App.4th 1131, 1137.) "The Courts of Appeal have held, outside the criminal defense context, that an attorney's duty to his or her client generally is to protect economic interests. [Citations.] It may be foreseeable that a client who is the victim of legal malpractice will suffer emotional distress. But the lawyer's obligation to the client, at least absent knowledge of any unusual susceptibility, is economic; the lawyer does not assume an obligation to protect the client's emotional state. [Citations.]" (*Friedman v. Merck & Co*. (2003) 107 Cal.App.4th 454, 472-473.)

In the present case, Shahinian's breach of fiduciary duty and professional negligence claims against De Haas were based on De Haas's representation of Cedars in the *Kotolnick* action, and specifically De Haas's filing of a motion for summary judgment on Cedars's behalf. Shahinian alleged that if the motion were granted, "the Shahinian

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the breach. (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 174; *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1534.)

Plaintiffs would be the only remaining named defendants in the Kotolnick action"; even if the motion were denied, "the allegations raised in the Motion and in the evidence filed by Cedars in support of the Motion would increase the Shahinian Plaintiffs' exposure to the Kotolnicks by setting forth theories and opinions of Cedars' expert which, if believed by the trier of fact, would increase the Shahinian Plaintiffs' exposure to the Kotolnicks and diminish Cedars' exposure."

When Shahinian amended his breach of fiduciary duty and professional negligence complaint to add De Haas as a defendant on April 16, 2008, both the *Kotolnick* action and Cedars's motion for summary judgment in that action were still pending. Several months later, Shahinian filed his own motion for summary judgment in *Kotolnick*, urging that the *Kotolnick* plaintiffs had failed to adduce any evidence of medical malpractice on his part. The trial court granted Shahinian's motion on November 3, 2008, and entered judgment for Shahinian and against the Kotolnicks the same day.

Because the trial court granted summary judgment for Shahinian in the *Kotolnick* action, Shahinian could not have suffered any actual damages as a result of De Haas's alleged malpractice. In other words, as De Haas correctly asserts, whatever *potential* damages or increased exposure Shahinian faced as a result of Cedars's summary judgment motion never ripened into *actual* damages because judgment was granted for Shahinian. Thus, even if De Haas's representation of Cedars in the *Kotolnick* action breached a duty to Shahinian—an issue we do not reach—that breach of duty could not constitute actionable legal malpractice or breach of fiduciary duty. Because no reasonable attorney could have concluded otherwise, there was no probable cause to pursue Shahinian's action against De Haas.

Shahinian appears to assert that damages were not an essential element of his cause of action for legal malpractice, urging that the resolution of the *Kotolnick* litigation in his favor "is beside the point." Shahinian does not cite any legal authority in support of this assertion, however, and we are not aware of any. To the contrary, all of the authority of which we are aware consistently states that damages are an essential element of a cause of action for legal malpractice.

Shahinian also contends that he was not required to show misuse of confidential information in order to prove breach of fiduciary duty—rather, "it should have been clear to Appellant that his representation of Cedars in the *Kotolnick* matter would inevitably result in the use of confidential information about Shahinian." Perhaps so, but misuse of confidential information goes to the issue of breach, not of damages. Shahinian does not cite any authority for the proposition that damages are not an element of a breach of fiduciary duty claim, nor does he identify any damages he suffered as a result of the alleged breach.[6] He thus has not shown probable cause to pursue the breach of fiduciary duty claim.[7]

B. Skull Base Medical Group's Claims Against De Haas

De Haas contends that Skull Base Medical Group's claims "lacked merit from the inception, because Skull Base Medical Group had never been represented in *any* litigation by either Mr. De Haas or the La Follette firm." Indeed, De Haas says, "the very basis for the claim against Mr. De Haas was Mr. De Haas's alleged conduct in the Kotolnick action (specifically the filing of the motion for summary judgment on behalf of Cedas-Sinai Medical Center using the declaration of Mark Bruley), yet Skull Base Medical Group was not a party to the Kotolnick action. . . . Furthermore, Skull Base Medical Group admitted in verified discovery responses that it had never been a client of the La Follette firm, that it did not suffer any damages as the result of any act on the part of Mr. De Haas, and that having discovered its error in regard to the foregoing, it would dismiss its complaint."

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[6] At oral argument, for the first time, Shahinian cited authority supporting his claim that an attorney's breach of fiduciary duty may give rise to recovery of emotional distress damages. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070.) Although this may be true in theory, damages must be identified and quantified, and Shahinian has never done so.

[7] Because we find Shahinian never had a colorable legal malpractice claim against De Haas because he did not suffer any damages, we do not reach De Haas's alternative argument, that Shahinian was a former, not a current, client.

Neither Shahinian nor Raitt contends on appeal that Skull Base Medical Group was ever a client of De Haas or the La Follette firm. Shahinian urges, however, that there was probable cause to believe that Skull Base Medical Group was a third party beneficiary of the attorney-client relationship between Shahinian and De Haas. Thus, he says, Skull Base Medical Group's case against De Haas was not so lacking in merit as to support a malicious prosecution case against them.

We do not agree. Whatever the merits of a third party beneficiary theory on the present facts, a third party beneficiary cannot assert greater rights than the primary claimant. (E.g., *Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 895; *Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 888.) Because Shahinian did not have a colorable legal malpractice claim against De Haas, Skull Base Medical Group could not have one either.

II. Malice

The malice element of malicious prosecution "'relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will *or* some *improper* ulterior motive.' (*Downey Venture v. LMI Ins. Co.*[, *supra*,] 66 Cal.App.4th [at p.] 494; see *Albertson v. Raboff* (1956) 46 Cal.2d 375, 383 ['[t]he malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward plaintiff but exists when the proceedings are instituted primarily for an improper purpose'].) Malice 'may range anywhere from open hostility to indifference. [Citations.] Malice may also be inferred from the facts establishing lack of probable cause.' (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1465-1466.)" (*Soukup, supra*, 39 Cal.4th at p. 292.)

"[A] lack of probable cause in the underlying action, by itself, is insufficient to show malice. [Citations.]" (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 225.) However, "proof of malice can consist of evidence a party *knowingly* brings an action

without probable cause." (*Id*. at p. 226.) Further, "malice can be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause." (*Ibid*.) "Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence. [Citation.]" (*HMS Capital, Inc. v. Lawyers Title Co*., *supra*, 118 Cal.App.4th at p. 218.)

In the present case, De Haas made a prima facie showing of malice as to Shahinian and Skull Base Medical Group. As we have already said, these parties initiated the legal malpractice action against De Haas without probable cause. Further, they did so *before* the underlying medical malpractice action against Shahinian had been resolved—and failed to dismiss it even after the medical malpractice action was resolved in Shahinian's favor.

Further, De Haas introduced evidence, in the form of Shahinian's deposition testimony, that Shahinian was extremely angry over what he perceived to be his attorney's betrayal. That testimony was as follows:

"Q. . . . What were you unhappy about in *Stumfall*?

"A. Well, obviously, because it was simultaneous, and because of the way the *Gutierrez* case had — had evolved, and me feeling that . . . I'm getting sold out by my own attorneys, obviously, I was very angry when I received this notice from Duke DeHaas. After everything that was happening with the situation with *Gutierrez*, I was very angry to see that Duke DeHaas wanted to defend me after everything they had done to hurt me. So I was very angry about that, and I — I — that's why I generated letters and called and said, 'You need' — they need to — to forward this case to Dick Carroll or somebody that — I mean, if I can't trust attorneys who were my attorneys, who have vigorously and successfully defended me in the past on eight different occasions, and then now they are selling me out, how can I trust the same attorneys now to defend me? So I was very angry about that, and I was angry that they . . . were so insensitive, and that risk management at Cedars — that it was even an issue with risk management, with the amount of conflict that I had had over the years with Cedars, and now with the amount of conflict that I was having with LaFollette, I was shocked that they — that it was even an

issue. So I was very angry about that. . . . Was I happy with the outcome? You know, I don't know. The end justifies the means, but I was very angry during that time." (Italics added.)

We reach a different result as to Raitt. Although Raitt had no probable cause to litigate the suit on behalf of Shahinian and Skull Base Medical Group after discovering the medical group was not De Haas's client, in neither his opposition to the special motions to strike nor his appellant's opening brief has De Haas identified any evidence that Raitt pursued the underlying action with malice. Further, Raitt's declaration is to the contrary; it states: "Prior to commencing the Shahinian Malpractice Action, I had had no dealings whatsoever with DeHaas or his firm. To my knowledge I had never represented a plaintiff in an action defended by DeHaas or his firm, I had never represented a plaintiff in an action prosecuted by DeHaas or his firm, and I had never met nor spoken with DeHaas or any other member of his firm. Although I believe, and believed, that DeHaas and his firm had breached their fiduciary duties to Shahinian, I bore them no ill will and did not commence or continue the action with any purpose other than to vindicate my clients' rights."

Because there is no evidence that Raitt prosecuted the underlying case with malice, the trial court correctly concluded that De Haas lacked probable cause to bring the present malicious prosecution action against him.

III. Attorney Fees

The trial court awarded the Shahinian parties attorney fees and costs of $35,559 pursuant to section 425.16, subdivision (c)(1), which permits an award of fees and costs to a "*prevailing defendant* on a special motion to strike." Having reversed the trial court's grant of the Shahinian parties' special motion to strike, these parties are no longer prevailing defendants. We thus reverse the attorney fee award. (*Panakosta Partners, LP v. Hammer Lane Management, LLC* (2011) 199 Cal.App.4th 612, 639.)

DISPOSITION

The judgment and award of attorney fees for Shahinian, individually and doing business as Skull Base Institute, and Skull Base Medical Group are reversed. The judgment for Raitt and Raitt & Associates is affirmed. De Haas is awarded his costs on appeal, payable by Shahinian. Raitt is awarded his costs on appeal, payable by De Haas.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.