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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

AMANDA NICOLE TURCHIN,

Plaintiff and Respondent,

v.

COHON & POLLAK, LLP, et al.,

Defendants and Appellants.

B234279

(Los Angeles County  
Super. Ct. No. BC450658)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Coleman A. Swart, Judge. Reversed and remanded with directions.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Bartley M. Becker,  
Allison A. Arabian, Jennifer R. Weatherup for Defendants and Appellants.

Law Offices of Hall & Lim, Timothy A. Hall, Ani Aghajani for Plaintiff and  
Respondent.

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A law firm and its former client asked the trial court to strike a malicious prosecution complaint as a Strategic Lawsuit Against Public Participation (SLAPP). (Code Civ. Proc., § 425.16.)<sup>1</sup> Malicious prosecution actions fall within section 425.16 because they arise from the defendant's exercise of its First Amendment right to petition the government for redress of grievances. The trial court erred by allowing plaintiff's claim to go forward because she failed to show that the underlying lawsuit terminated in her favor, an essential element of a malicious prosecution claim. Defendants declared—and plaintiff did not refute—that the underlying lawsuit was abandoned due to the high cost of litigation and because plaintiff is indigent and judgment-proof. The resulting dismissal did not reflect on the merits of the underlying lawsuit.

## **FACTS**

### **The Employment Action**

Jodi Caden is a principal of various Caden companies (collectively, Caden), an Internet retailer of maternity apparel, including the “Belly Bandit.”<sup>2</sup> Caden contacted the Expecting Models agency, requesting a clean-cut model for a Belly Bandit advertisement. Caden agreed to pay the agency \$800 for a five-hour modeling session with plaintiff Amanda Nicole Turchin. At the photo shoot, Caden discovered that Turchin sports numerous tattoos on her neck, torso and legs. Caden decided to proceed with the session and digitally remove the tattoos from Turchin's photographs. When Caden expressed displeasure to Expecting Models about the tattoos, the agency agreed to reduce its fee. Caden sent \$400 to Expecting Models.

Turchin filed a claim against Caden with the Labor Commission, but the agency would not pursue her claim for unpaid wages. Turchin filed a lawsuit against Caden in

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<sup>1</sup> All statutory references in this opinion are to the Code of Civil Procedure.

<sup>2</sup> The Belly Bandit is described on a federal trademark website as a “Stomach wrap in the nature of a supportive foundation garment made of elastic, durable nylon, spandex, neoprene, cotton, polyester and bamboo fabric used around the midsection to keep stomach in, and also used to reduce post pregnancy swelling, assist weight loss, support the midsection after surgery, and create a slimming effect.”

June 2009, seeking waiting-time penalties of \$24,000 under the Labor Code as an alleged employee of Caden. Turchin eventually received \$400 for her modeling services, but Caden's payment occurred more than 30 days after the photo shoot.

Caden was represented in the employment dispute by defendant Jeffrey Cohon of the law firm of Cohon & Pollak (collectively, the Law Firm) starting in June 2010. The Law Firm continued in this role until it was relieved as counsel in the fall of 2010. Turchin dismissed her employment action in 2012.

### **The Federal Action**

In June 2010, Caden sued Turchin in federal court for trademark infringement or dilution and unfair competition (the Federal Action). Caden was represented by the Law Firm. Caden alleged that Turchin markets her modeling services using the Belly Bandit trademark without a license. A website contains photos of Turchin entitled "belly bandit shoot" and "post partum wrap," and shows the Belly Bandit emblem. Caden asserted that Turchin's trademark infringement is damaging: it has no control over Turchin's activities or the quality of her services; any mistaken association between Turchin and Caden could harm Caden's reputation; and Turchin's use of Caden's intellectual property, artwork, goodwill and reputation could confuse and mislead the public.

Turchin moved to dismiss the Federal Action, claiming that it failed to state a trademark infringement claim. She reasoned that she does not sell maternity products, and only used photos from the Belly Bandit shoot on her website to build a resume and "to obtain clients who are seeking her modeling services." Turchin maintained that her use of Caden's trademark was a "fair use, as she has used the mark in a purely descriptive way to identify the place of the photo."

The district court found that Turchin inadequately addressed "nominative fair use," and directed the parties to provide additional briefing. Turchin filed a supplemental brief, the Law Firm responded, then Turchin replied to Caden's brief. Before filing the supplemental brief, the Law Firm had a falling out with Caden, which failed to pay legal fees and expressed dissatisfaction with the Law Firm's work. In response, the Law Firm filed a motion to be relieved as counsel in the Federal Action.

On October 19, 2010, the district court allowed the Law Firm to withdraw and directed Caden to obtain new counsel because a corporation cannot represent itself. Caden was cautioned that if new counsel failed to appear within 30 days, the action would be dismissed for failure to prosecute. On the advice of new counsel, who opined that pursuing the trademark litigation was expensive and Caden was unlikely to be able to collect on a judgment against Turchin, Caden did not substitute in new counsel. The district court deemed the Federal Action to be abandoned, dismissed it without prejudice, and entered judgment in favor of Turchin on November 24, 2010. The merits of Turchin's motion to dismiss were not addressed.

### **The Malicious Prosecution Action**

In December 2010, Turchin filed the current action for malicious prosecution against Jodi Caden and the Law Firm. She alleges that the Law Firm wrongfully filed the Federal Action against her on behalf of "Caden Companies LLC," an entity that does not exist. Turchin claims that the Law Firm deployed the Federal Action to intimidate her into dismissing her employment case against Caden. Turchin's attorney informed the Law Firm in writing that the Federal Action lacked legal or factual support.

### **The Anti-SLAPP Motions**

The Law Firm filed a motion arguing that Turchin's malicious prosecution lawsuit should be stricken under the anti-SLAPP statute because there was probable cause to instigate the Federal Action and it acted in good faith. The Law Firm observed that "the District Court never ruled on the merits of the motion to dismiss": the substantive issues became moot when Caden failed to substitute in new counsel. Caden also filed an anti-SLAPP motion, arguing that Turchin cannot prevail because the Federal Action did not terminate in her favor.

Attorney Cohon declared that he uncovered photos from the Belly Bandit shoot on Turchin's website, where they were posted with a copyright symbol, even though Turchin signed a release granting Caden the exclusive right to copyright and publish the photographs. Cohon's experience litigating trademark cases led him to conclude that Turchin misappropriated Caden's trademarked images, creating confusion that Turchin is

affiliated, authorized or sponsored by Caden. Cohon declared that if a trademark holder allows infringements, it could be deemed to have abandoned its rights. Though Cohon inadvertently used the wrong name (suing on behalf of Caden Companies, LLC, instead of Caden Companies, Inc.) this mistake could easily be rectified and there was no doubt about the identity of the plaintiff in the Federal Action.

In opposition to Caden's and the Law Firm's motions to strike, Turchin declared that she was hired by Caden, but was only paid half of her wages 52 days after the photo shoot ended. She used photos from the shoot to promote her services as a model, not to sell belly wraps. Turchin asserted that the Federal Action terminated in her favor when the district court dismissed the case for failure to prosecute; that the Law Firm and Caden lacked probable cause; and that malice can be inferred from (1) the Law Firm's filing of the Federal Action in retaliation for Turchin's efforts to be paid for her modeling work, and (2) Caden's creation of a website accusing Turchin of engaging in vexatious litigation against small companies to force quick but lucrative settlements.

### **THE TRIAL COURT'S RULING**

The trial court found that Turchin's malicious prosecution action falls within the scope of the anti-SLAPP statute, so she must show a probability of prevailing on the merits. The court believed that plaintiff made the necessary showing. It said, "Here, a reading of the underlying complaint and first amended complaint filed by the defendants demonstrate to the court that no reasonable attorney would have thought the alleged claim against plaintiff was tenable. Posting the photo of herself on the website would not have created a likelihood of confusion about the origin of the defendant's goods or services. [¶] Plaintiff may have possibly breached the release agreement she signed on the photo shoot, but [this] did not amount to a trademark infringement claim. This coupled with the fact that plaintiff filed her wage and hour claim prior to the defendant's filing the trademark infringement, there is sufficient evidence to establish the probability of [prevailing]." The Law Firm appealed the denial of its motion to strike.<sup>3</sup>

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<sup>3</sup> Jodi Caden is not a party to this appeal.

After securing a denial of the defense motions to strike, Turchin filed a request for attorney fees, claiming that the Law Firm's motion was frivolous. The Law Firm opposed the attorney fee request. The court stayed its ruling on the attorney fee issue pending the outcome of this appeal.

### **DISCUSSION**

The court may strike a cause of action arising from the defendant's exercise of its constitutional rights to petition or free speech. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Denial of a motion to strike is an appealable order. (§ 425.16, subd. (i).) Review is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

A malicious prosecution action affects First Amendment rights because it "arises from an underlying lawsuit, or petition to the judicial branch." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735.) Turchin's lawsuit falls within the scope of the anti-SLAPP statute, as a matter of law. (*Barak v. The Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 661.) The only issue on appeal is whether Turchin demonstrated a probability of prevailing on her claim by presenting evidence in opposition to defendants' anti-SLAPP motion that, if credited, would be sufficient to support a judgment in her favor. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820; *Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1047.) In making this determination, we must "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

"The tort of malicious prosecution is disfavored 'both because of its 'potential to impose an undue 'chilling effect' on the ordinary citizen's willingness . . . to bring a civil dispute to court' [citation] and because, as a means of deterring excessive and frivolous lawsuits, it has the disadvantage of constituting a new round of litigation itself.'" (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 966.) A malicious prosecution claim has three elements. Plaintiff must plead and prove that the underlying lawsuit (1) was commenced by or at the direction of the defendant and pursued to a legal termination in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice. (*Id.* at p. 965;

*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.) Defendants dispute the existence of all three elements of the tort. The trial court focused on probable cause (and arguably malice), but did not address the favorable termination element.

Termination in favor of plaintiff is a strictly enforced essential element of a malicious prosecution action. (*StaffPro, Inc. v. Elite Show Services, Inc.* (2006) 136 Cal.App.4th 1392, 1400.) It does not require victory at trial but must reflect the merits of the action. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 741.) “If resolution of the underlying litigation ‘leaves some doubt as to the defendant’s innocence or liability[, it] is *not* a favorable termination,” and bars a malicious prosecution action. (*Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1855.)

If the complaint in the underlying action was not decided on the merits, the court must review the reasons why it was dismissed. (*Contemporary Services Corp. v. Staff Pro, Inc.* (2007) 152 Cal.App.4th 1043, 1057.) A termination by dismissal is favorable to the plaintiff in a malicious prosecution action “‘when it reflects “the opinion of someone, either the trial court or the prosecuting party, that the action lacked merit or if pursued would result in a decision in favor of the defendant.”’” (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 881.) “The focus is not on the malicious prosecution plaintiff’s opinion of his *innocence*, but on the opinion of the dismissing party.” (*Ibid.*) If a dismissal is on technical or procedural grounds (as opposed to substantive grounds) it is not a favorable termination. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 342; *Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750.)

Turchin alleges in her complaint that the district court’s dismissal of the Federal Action was a termination in her favor. The evidence shows that the Federal Action was dismissed without prejudice for failure to prosecute, because Caden did not substitute in new counsel after the Law Firm withdrew from representation. In federal court, “‘a dismissal without prejudice is *not* a decision on the merits’”: it does not alter the legal relationship between the parties; does not confer prevailing party status; and the plaintiff is free to refile his complaint. (*Oscar v. Alaska Dept. of Educ. and Early Dev.* (9th Cir. 2008) 541 F.3d 978, 981-982, italics added.)

In state court, there is authority holding that a dismissal for failure to prosecute “does reflect on the merits of the action, and that reflection is favorable to the defendant in the action. The reflection arises from the natural assumption that one does not simply abandon a meritorious action once instituted.” (*Minasian v. Sapse* (1978) 80 Cal.App.3d 823, 827 (*Minasian*)). This “natural assumption” allows a malicious prosecution claim to survive a demurrer, but may be refuted at a later stage of the litigation: “Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.” (*Id.* at p. 828.)

Jodi Caden declared that she retained new counsel to represent the Caden companies after becoming dissatisfied with the Law Firm, which withdrew from both the employment dispute involving Turchin and the Federal Action alleging trademark infringement. Caden’s new attorney “advised us not to pursue the matter based on the likely high cost of litigating the dispute and the relatively low likelihood of collecting any judgment or award against the indigent Plaintiff Turchin as well as the existence of a potential fees award against Caden Companies should Caden Companies ultimately not prevail. Thus, [Caden] ultimately decided not to pursue the matter for financial and business reasons as opposed to any reasons tied to the relative factual and legal merits of Caden Companies’ claims against Turchin.”

The district court did not address the merits of the Federal Action, which it dismissed on technical grounds “without prejudice” because the corporate plaintiff lacked legal counsel and could not represent itself. There is thus no judicial determination of “guilt” or “innocence.” The salient opinion is that of Caden, which allowed the dismissal to be entered. Caden decided not to proceed with the Federal Action because it is financially unwise to litigate against a defendant who is judgment-proof. This is not an expression that the Federal Action lacked merit; indeed, Caden expressed confidence in the merits of its case.

In her declaration in opposition to the anti-SLAPP motion, Turchin neither denied nor challenged Caden’s sworn affidavit that the Federal Action was abandoned because litigation is costly and Turchin is indigent. Turchin cited *Minasian* for the proposition



that a dismissal for failure to prosecute reflects a “natural assumption” about the merits of the case. However, *Minasian* is a pleading case, and does not assist a plaintiff on an anti-SLAPP motion when the defendant has presented “circumstances explaining the failure to prosecute.” (*Minasian, supra*, 80 Cal.App.3d at p. 828.)

Faced with evidence that Caden had legitimate financial reasons for abandoning suit, on the advice of a new attorney, Turchin had to counter defendants’ reasons with contrary evidence. She did not do so. She does not deny that she is judgment-proof. Plaintiff has no evidence to submit to a jury to satisfy the “favorable termination” element of a malicious prosecution claim. (Compare *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1400, wherein a malicious prosecution plaintiff presented evidence that the defendant failed to appear for two depositions in the underlying lawsuit and submitted interrogatory answers indicating that “she had incurred no damages,” showing that her case lacked merit.)

“Here, the record shows defendants could not afford to pursue the matter, not that they lost faith in the merit of their claims. The record does not show defendants sustained any adverse rulings in the case, or otherwise had reason to believe their claims would be unsuccessful.” (*Contemporary Services Corp. v. Staff Pro. Inc., supra*, 152 Cal.App.4th at p. 1057.) “It would be a sad day indeed if a litigant and his or her attorney could not dismiss an action to avoid further fees and costs, simply because they were fearful such a dismissal would result in a malicious prosecution action. It is common knowledge that costs of litigation, such as attorney’s fees, costs of expert witnesses, and other expenses, have become staggering. The law favors the resolution of disputes. ‘This policy would be ill-served by a rule which would virtually compel the plaintiff to continue his litigation in order to place himself in the best posture for defense of a malicious prosecution action.’” (*Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337, 344-345.) “Clearly the dismissal was not on the merits and resulted from a practical decision that further litigation was too expensive to pursue.” (*Id.* at p. 345.)

Finally, Caden’s decision to abandon the Federal Action *after* the Law Firm withdrew from representation does not amount to a concession by the Law Firm that the case lacked merit. An attorney is not the insurer of his client’s conduct and the actions of a former client cannot be imputed to the attorney. (*Zeavin v. Lee* (1982) 136 Cal.App.3d 766, 772.) While the dismissal of an underlying case “could be treated as a concession on [the client’s] part that her action lacked merit in her opinion[,] [t]here was no such allegation of a similar concession by her respondent attorney or of facts constituting an allegation of lack of probable cause on his part.” (*Id.* at pp. 771-772.) The “natural assumption” announced in the *Minasian* case regarding the voluntary abandonment of an action does not extend to a lawyer who is not responsible for the client’s unilateral decision to abandon her case. (*Zeavin v. Lee*, at p. 772.)

In sum, Turchin failed to establish an essential element of a malicious prosecution claim—a favorable termination in her favor. This is a sufficient reason for ruling that Turchin cannot prevail on the merits of her case. We need not address the elements of probable cause or malice. (*StaffPro, Inc. v. Elite Show Services, Inc.*, *supra*, 136 Cal.App.4th at pp. 1397-1398.)

### **DISPOSITION**

The order denying defendants’ motion to strike is reversed. The case is remanded with directions to the trial court to (1) enter an order granting the motion of Jeffrey Cohon and the law firm of Cohon and Pollak, and (2) hold a hearing to determine the amount of attorney fees and costs to which defendants are entitled in the trial court and on appeal. (§ 425.16, subd (c)(1); *Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 161-162; *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1580; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499-1500.)

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.