

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM PARRISH et al.,)	
)	
Plaintiffs and Appellants,)	
)	S228277
v.)	
)	Ct.App. 2/3 B244841
LATHAM & WATKINS et al.,)	
)	Los Angeles County
Defendants and Respondents.)	Super. Ct. No. BC482394
_____)	

To establish liability for the tort of malicious prosecution, a plaintiff must demonstrate, among other things, that the defendant previously caused the commencement or continuation of an action against the plaintiff that was not supported by probable cause. We have held that if an action succeeds after a hearing on the merits, that success ordinarily establishes the existence of probable cause (and thus forecloses a later malicious prosecution suit), even if the result is overturned on appeal or by later ruling of the trial court. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 818 (*Wilson*)). This principle has come to be known as the “interim adverse judgment rule.”

In this case we are asked to decide whether the interim adverse judgment rule applies when a trial court had initially denied summary judgment, finding that a lawsuit had sufficient potential merit to proceed to trial, but concluded after trial that the suit had been brought in “bad faith” because the claim, even if

superficially meritorious, in fact lacked evidentiary support. The Court of Appeal answered that question in the affirmative. We agree and affirm.

I.

A.

This case arises from a trade secrets dispute over the manufacture of microbolometers, devices used in thermal imaging systems to detect infrared radiation. Plaintiffs William Parrish and E. Timothy Fitzgibbons served as officers of Indigo Systems Corporation (Indigo), a company in the microbolometer business. When FLIR Systems, Inc. (FLIR) acquired Indigo, both Parrish and Fitzgibbons joined the FLIR team. Approximately two years later, Parrish and Fitzgibbons left FLIR to start a new, competing venture.

FLIR and Indigo sued Parrish and Fitzgibbons for misappropriation of trade secrets. Among other things, they alleged that Parrish and Fitzgibbons had solicited venture capital for their new business by presenting a business plan that Fitzgibbons had developed while still employed by FLIR. Parrish and Fitzgibbons each moved for summary judgment. Among other things, they argued that Fitzgibbons had developed the business plan for the new venture before he joined Indigo, and that no trade secrets would be misappropriated in the plan's implementation. In their opposition to the summary judgment motions, FLIR and Indigo relied on the declarations of two experts who opined that the business plan could not be implemented "without using FLIR's and Indigo's proprietary trade secrets on the design and bulk manufacture of [certain] microbolometers."

The trial court denied the summary judgment motions. The court concluded that although Parrish and Fitzgibbons had "made a compelling argument that they [were] entitled to judgment," in light of the "highly technical" nature of the case, they had "failed to sustain their burden" of showing that their planned new business was not based on FLIR's and Indigo's intellectual property.

The court pointed in particular to evidence that Fitzgibbons made a presentation to FLIR's board of directors that, FLIR and Indigo argued, overlapped with the plan for his new business. The court explained that it was "unable to find as a matter of law, for purposes of this motion only, that [FLIR and Indigo] own none of the concepts for [Parrish and Fitzgibbons's] new business, that nothing in the [new] business plan made use of [FLIR's and Indigo's] proprietary confidential information, intellectual property, or work product, or that all concepts in the [new] plan were identical to those" contained in a plan drafted by Fitzgibbons before he joined Indigo. The court further concluded that even if Parrish and Fitzgibbons's business was not itself based on FLIR's and Indigo's intellectual property, FLIR and Indigo had "produced sufficient evidence, for example with the [expert] declarations, to raise a triable issue as to misappropriation of trade secrets" in the plan's implementation.

The case proceeded to a bench trial, after which the trial court denied FLIR's and Indigo's requests for relief. The trial court then awarded Parrish and Fitzgibbons their costs and attorney fees under the California Uniform Trade Secrets Act, Civil Code section 3426 et seq., which authorizes cost and fee awards to prevailing defendants "[i]f a claim of misappropriation [was] made in bad faith." (Civ. Code, § 3426.4.) The trial court relied on *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249 (*Gemini*), which held that "'bad faith' for purposes of section 3426.4 requires objective speciousness of the plaintiff's claim, as opposed to frivolousness, and [the plaintiff's] subjective bad faith in bringing or maintaining the claim." (*Id.* at p. 1262.) Here, the trial court concluded that FLIR and Indigo had initiated and pursued the action against Parrish and Fitzgibbons in both subjective and objective bad faith, "primarily for the anticompetitive motive" of preventing Parrish and Fitzgibbons from creating a new business that would compete with that of their former employers. The court

determined that FLIR and Indigo had relied on a legal theory of inevitable misappropriation “not supported by California law,” and “knew, or should have known, that they did not have a sufficient evidentiary basis to initiate the lawsuit [or] continue the lawsuit through trial.” The court also faulted FLIR and Indigo for certain shortcomings of the expert testimony on which they relied. Although the court recognized that it had denied Parrish’s and Fitzgibbons’s motions for summary judgment, it explained that it “had not heard all the evidence or considered witness credibility” at that stage. The court ultimately awarded Parrish and Fitzgibbons more than \$1.6 million in fees and costs.

The Court of Appeal affirmed the award of fees and costs, upholding the trial court’s finding that the suit against plaintiffs had been prosecuted in bad faith. (*FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1274; see also *id.* at pp. 1275–1276, citing *Gemini*.) It also, as relevant here, rejected FLIR and Indigo’s argument that the trial court was estopped from finding bad faith because the trial court had earlier denied a defense motion for summary judgment. (*FLIR Systems*, at p. 1282.) The appellate court explained that at the time the trial court ruled on the summary judgment motion, that court had not yet “heard all the evidence or considered witness credibility.” (*Id.* at p. 1283.) The appellate court noted that the trial court had denied the summary judgment motion in part based on “expert declarations suggesting there was a scientific methodology to predict the likelihood of trade secret misuse,” but at trial, the “experts admitted there was no valid scientific methodology to predict trade secret misuse and agreed that no trade secrets were misappropriated.” (*Id.* at p. 1282.)

B.

Parrish and Fitzgibbons later brought a malicious prosecution claim against FLIR’s and Indigo’s lawyers in the trade secrets case: defendants Latham & Watkins LLP (Latham) and Latham partner Daniel Scott Schecter.

Defendants filed an anti-SLAPP motion under Code of Civil Procedure section 425.16 — that is, a special motion to strike a “strategic lawsuit against public participation (SLAPP).” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.) To prevail on such a motion, a defendant “must establish that the challenged claim arises from [protected] activity.” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*)). If a defendant is able to do so, “the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success.” (*Ibid.*) Defendants argued that Parrish and Fitzgibbons could not establish a probability of success because: (i) the malicious prosecution action was untimely filed; and (ii) the order denying summary judgment in the underlying trade secrets action established probable cause to prosecute that action. Parrish and Fitzgibbons’s opposition brief challenged both points, but did not dispute that the malicious prosecution claim arose from protected activity; namely, from Latham and Schecter’s prosecution of the earlier lawsuit. (See Code Civ. Proc., § 425.16, subd. (e); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734.)

The trial court granted the motion to strike, deeming the action untimely under the one-year statute of limitations set out in Code of Civil Procedure section 340.6, subdivision (a) (section 340.6(a)). The court did not reach the probable cause issue.

Parrish and Fitzgibbons appealed. While their appeal was pending, the Court of Appeal decided *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660. In pertinent part, that case held that the one-year limitations period does not apply to a malicious prosecution suit filed against a former litigation adversary’s attorney. (*Id.* at p. 677.) Instead, the court concluded, a two-year limitations period controls.

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