Supreme Court Case No.: S228277
Court of Appeal Case No.: B244841

In the Supreme Court of the State of California

William PARRISH and E. Timothy Fitzgibbons, Plaintiffs and Appellants,

v.

LATHAM & WATKINS LLP and Daniel Schecter, Defendants and Respondents

Review of a Decision by the Court of Appeal Second Appellate District, Division Three Case No. B244841

Application for Leave to File Amicus Curiae Brief and Proposed Brief on Behalf of Mesisca Riley & Kreitenberg LLP in Support of Appellants William Parrish and E. Timothy Fitzgibbons

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TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, Mesisca Riley & Kreitenberg LLP hereby submits this application for leave to file the accompanying proposed brief in support of Appellants William PARRISH and E. Timothy Fitzgibbons, and respectfully urge this court to overrule the Court of Appeal's decision in *Parrish v. Latham & Watkins LLP* (2015) 238 Cal.App.4th 81 (opn. superseded by order granting review) and hold that a finding by the trier of fact that a claim is objectively specious or frivolous undermines any inference of probable cause from the denial of a motion for summary judgment and excepts such denial from the interim adverse judgment rule.

It is also respectfully requested that the California Supreme Court take this opportunity to clarify the application of the interim adverse judgment rule in bench trials where a motion is denied at the close of evidence without any stated reason or opinion and the only act remaining by the trier of fact is to render a judgment and hold that such a denial is either a technical one or insufficient from which to infer probable cause.

Mesisca Riley & Kreitenberg LLP ("MRK") is a private civil litigation firm that has handled malicious prosecution cases including one currently pending entitled *Jack Vaughn, et. al. v. Barbara Darwish, et. al.* Los Angeles Superior Court Case Number BC521721(the "Vaughn Litigation") that is currently on appeal involving a similar issue raised in the *Parrish* matter. The

Vaughn Litigation involves a series of unsuccessful unlawful detainers brought by a landlord and its agents against six tenants.

In the Vaughn Litigation a substantially similar issue exists as that currently before this Court: whether the denial of a motion for judgment by a trial court at the close of the evidence in a bench trial satisfies the interim adverse judgment rule and supports an inference of probable cause where the trial court makes no findings on the record, issues no written order, ultimately finds in favor of the moving defendant on all grounds raised in the motion for judgment and a trial court and court of appeal in a subsequent malicious prosecution action expressly find lack of probable cause for the underlying litigation.

In the Vaughn Litigation, currently on appeal, the trial court granted a motion for judgment on the pleadings as to two of the six plaintiffs on the grounds that the interim adverse judgment rule barred the action. The trial court's ruling was made after the same trial court denied two motions under the anti-SLAPP statute (Code of Civil Procedure §425.16) which denials were appealed and affirmed. In fact, the Court of Appeal expressly found that: "[w]e find that the evidence presented by respondents on the anti-SLAPP motion, if credited, leads to the conclusion that the underlying unlawful detainer actions were initiated and prosecuted without probable cause" and "[a] reasonable attorney would not have considered the actions [of the malicious prosecution defendants] valid under these circumstances." *Vaughn v. Darwish*, No.

B253694, 2015 WL 3397033, (Cal. Ct. App. May 27, 2015), reh'g denied (June 16, 2015), review denied (Sept. 9, 2015).

As counsel of record in the Vaughn Litigation and the pending appeal in that litigation, MRK has an interest in the issue currently before this Court. But MRK also asserts that there is a compelling need to address the application and scope of the interim adverse judgment rule generally, given the confusion that exists as to when and under what circumstances an inference of probable cause may arise. In the *Parrish* matter, the issue is framed as whether a subsequent ruling by the same trial court of objective bad faith undermines the denial of a prior motion for summary judgment. In the Vaughn Litigation the issue is whether an oral denial of a motion for judgment without any stated reason, findings or written order after all evidence has been presented and closing arguments made, should be considered an *interim adverse ruling* from which an inference of probable cause may be made where subsequent rulings including that of the Court of Appeal find no probable cause.[1]

MRK has never before submitted an application to file as amicus curiae. No party or other person contributed to the preparation or financing of this amicus curiae brief. MRK has a substantial interest in the resolution of the

[1] Counsel for defendants Barbara Darwish, David Darwish, Gingko Rose Ltd. and Logerm LLC in the Vaughn Litigation is Roy Weatherup of Lewis Brisbois Bisgaard & Smith LLP who has filed an amicus curiae brief in this matter on behalf of Lawyers Mutual.

issues pending review concerning the ability of litigants to pursue malicious prosecution claims against attorneys who pursue meritless litigation for a malicious purpose but are able to avoid such liability even where a trial court ultimately determines that the litigation pursued was in bad faith or without any legal and factual tenability. Because the interim adverse judgment rule permits an inference that a trial court has made an affirmative determination that probable cause for a claim exists, the rule must be clarified where a trial court eventually determines as a matter of fact that the claim was devoid of factual and legal tenability. This is especially necessary in the case of a bench trial where there is no need for a trial court to make a substantive finding on an oral motion for judgment because the trial court is the ultimate fact finder and necessarily will make such an adjudication.

Given the fact the amount of litigation filed and pursued in the State of California has exponentially increased the filing and pursuit of frivolous cases, there is a need to ensure that a maliciously filed and pursued action can be redressed and that attorneys taking on such litigation cannot avoid responsibility for such decisions based on technicalities or unsupported inferences of probable cause. Accordingly, MRK respectfully requests leave to file the accompanying brief.

ISSUE PRESENTED

Does an inference arise that a claim is supported by probable cause under the interim adverse judgment rule after denial of motion for summary judgment

where a trial court later makes a subsequent finding of "objective speciousness" of the claim or that a reasonable attorney would not believe the claim had merit?

PROCEDURAL HISTORY

A. The *Parrish* Opinions

Plaintiffs William Parrish and Timothy Fitzgibbons (collectively, Plaintiffs) are former officers and shareholders of Indigo Systems Corporation. FLIR Systems, Inc. ("FLIR") acquired Indigo in 2004.[2] After Plaintiffs' employment contracts with Indigo expired in 2006, Plaintiffs began their own business.

FLIR sued the Plaintiffs for, among other things, misappropriation of FLIR's trade secrets. *Superseded Opinion at 88.* Plaintiffs, as defendants in the misappropriation case, brought a motion for summary judgment. The trial court denied the motion. *Superseded Opinion at 89-90.* A bench trial was then conducted at which the trial court found that FLIR had brought the trade secrets action in "bad faith," notwithstanding the prior denial of Plaintiffs' motion for summary judgment. *Superseded Opinion at 90-92.*

The trial court entered judgment in favor of Plaintiffs and awarded sanctions against FLIR pursuant to Civil Code, § 3426.4. The judgment

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[2] *Parrish v. Latham & Watkins,* 238 Cal. App. 4th 81 reh'g denied (July 21, 2015), review granted and opinion superseded, 357 P.3d 769 (Cal. 2015 hereinafter "Superseded Opinion" at 87.

including the sanctions award was affirmed on appeal. Superseded Opinion at 92; see also *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1286.

Thereafter, Plaintiffs brought this malicious prosecution action. *Superseded Opinion at 92.* The attorney defendants filed a special motion to strike pursuant to Code of Civil Procedure Section 425.16. The attorneys argued the claim was time barred and the denial of the motion for summary judgment precluded Plaintiffs from bringing the action under the "interim adverse judgment rule." *Superseded Opinion at 93.* The trial court granted the anti-SLAPP motion solely on the statute of limitation ground. The trial court did not address whether the interim adverse judgment rule conclusively established that the attorney had probable cause to bring the trade secret claim.

The Court of Appeal issued two published opinions related to this matter: Parrish v. Latham & Watkins, LLP (2014) 229 Cal.App.4th 264 (opn. vacated by order granting rehearing, B244841, Sept. 25, 2014 (Parrish I) and Parrish v. Latham & Watkins, LLP (2015) 238 Cal. App. 4th 81 (opn. superseded by order granting review, S228277, Oct. 14, 2015 (Parrish II).

In *Parrish I* the court of appeal found that the interim adverse judgment rule did not apply because subsequent rulings by the same trial judge established the action had been filed in bad faith from the get-go. The court of appeal identified the issue thusly: "whether the interim adverse judgment rule applies when there has been a subsequent ruling in the underlying action that the underlying action was, in fact, brought in bad faith". *Parrish I at 279.* The

court of appeal went on to narrow the inquiry to determine whether subsequent rulings by a trial court may "expressly undermine the probable cause inference which would otherwise arise from the interim summary judgment denial." *Id. at 279-280.*

Relying on the analysis in *Slaney v. Ranger Ins. Co.* (2004) 115 Cal.App.4th 306, the court of appeal in *Parrish I* reversed the trial court's order granting the anti-SLAPP motion. *Parrish I, supra, at 279-282.* The court in *Parrish I* recognized the exception established in *Slaney* that "the fact that the jury ultimately found that the denial of the claim was done with malice, and awarded punitive damages, was sufficient to undermine the effect of the prior summary judgment denial". *Id. at 281.*

The attorneys filed a petition for rehearing which was initially denied on September 19, 2014. But on the court's own motion, rehearing was granted on September 25, 2014. On June 26, 2015, the Court of Appeal issued a second decision, *Parrish II* that affirmed the order granting the anti-SLAPP motion in part on the ground that the "interim adverse judgment rule" established probable cause to bring the action.

B. The Vaughn Litigation

The Vaughn Litigation asserts a claim for malicious prosecution against a landlord, its agents and its legal counsel in the filing and pursuit of multiple unlawful detainer actions against six tenants (hereinafter the "Tenant Defendants"). Two of the six Tenant Defendants' claims, Carlos Rodriguez

and Wayne Hart, were tried before the Honorable Amy Hogue as test cases. Both Rodriguez and Hart prevailed at a bench trial.

After plaintiff landlord finished presentation of its evidence, counsel for Rodriguez and Hart made an oral motion for directed verdict that the trial court treated as a motion for judgment. The trial court, however, deferred a ruling on the motion. Rodriguez and Hart then presented their evidence in defense of the unlawful detainer, both plaintiff and defendants rested and closing arguments were made. The trial court then, it the last statement made on the record before taking the matter under submission "denied" the motion for judgment saying she would just "keep going with it". No written ruling or order denying the motion was made by the trial court explaining the denial other than the trial court's statement on the record that she would just "keep going with it." The trial court ultimately found in favor of Rodriguez and Hart on every ground raised in the oral motion for judgment and entered judgment in their favor.

In the Vaughn Litigation, the malicious prosecution defendants filed a motion for judgment on the pleadings asserting that the interim adverse judgment rule precluded the action because the trial court "denied" the motion for judgment in the unlawful detainer trial. The motion for judgment on the pleadings was brought after two anti-SLAPP motions had been denied, appealed and affirmed on appeal by the Court of Appeal in *Vaughn v. Darwish,* No. B253694, 2015 WL 3397033, (Cal. Ct. App. May 27, 2015), reh'g denied (June 16, 2015), review denied (Sept. 9, 2015). The court of appeal in its

opinion expressly found on the issue of probable cause that: "[w]e find that the evidence presented by respondents on the anti-SLAPP motion, if credited, leads to the conclusion that the underlying unlawful detainer actions were initiated and prosecuted without probable cause" and "[a] reasonable attorney would not have considered the actions [of the malicious prosecution defendants] valid under these circumstances." *Id. at 6.*

Notwithstanding the foregoing, the trial court granted the motion for judgment on the pleadings finding the interim adverse judgment rule barred the malicious prosecution action as to Rodriguez and Hart and dismissed their claims. Rodriguez and Hart made a motion for new trial that was denied as well. In the motion for new trial, Rodriguez and Hart referenced the rulings in *Parrish I* and *Parrish II* and the fact a substantially similar issue was being considered by the California Supreme Court.

Rodriguez and Hart timely filed an appeal of the order granting the motion for judgment on the pleadings, the dismissal and the denial of the motion for new trial. The case is now on appeal, *Hart et. al. v. Darwish, et. al.* Court of Appeal Case No. B270513. The record on appeal is scheduled to be filed on May 24, 2016.

LEGAL ARGUMENT

I.

A CLAIM FOR FEES PURSUANT TO CIVIL CODE §3426.4 REQUIRES A FINDING OF OBECTIVE SPECIOUSNESS OR FRIVOLOUSNESS THAT UNDERMINES ANY INFERENCE OF PROBABLE CAUSE

As is evident in the two opinions in *Parrish I and Parrish II,* there is some confusion as to how the interim adverse judgment rule should be applied and the scope of its application. A malicious prosecution plaintiff must establish: 1) that the underlying action against him terminated in his favor; 2) that it was brought without probable cause; and 3) that it was initiated and prosecuted with malice. *Sheldon Appel Company v. Albert & Oliker* (1989) 47 Cal.3d 863, 871.

Based on the Supreme Court's opinion in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, the court in *Parrish II* declined to apply the exception to the interim adverse judgment rule recognized in *Slaney, supra* that a trial court's subsequent determination that a claim lacked probable cause is sufficient to defeat application of the interim adverse judgment rule. The court of appeal in *Parrish II* found that "[c]ontrary to the *Slaney* court's conclusion, the fact that the trial court or jury later rejects a plaintiff's claim and, after weighing the competent evidence, finds the claim was brought with malice, does not negate other evidence which, standing alone, establishes the existence

of probable cause." *Parrish II at 101.* But bringing a claim "with malice" is really not the issue. The issue is whether the rejection of a plaintiff's claim by a trier of fact made on the basis the claim was brought in "objective" bad faith – or "objective speciousness" should standing alone, undermine any "inference" of probable cause resulting from a prior denial of a motion for summary judgment. The "bad faith" element in Civil Code §3426.4 was not defined by the legislature. Thus, the rule regarding "objective speciousness" as a basis for determining "bad faith" under section 3426.4 was initially created by the federal court in *Stilwell Development, Inc. v. Chen* (C.D. Cal. Apr. 25, 1989, No. CV86 4487 GHK), 1989 WL 418783, 1989 U.S. Dist. Lexis 5971 and then adopted by the Fourth District Court of Appeal in *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal. App. 4th 1249, 1261. The *Gemini* court acknowledged that under *Stilwell* "the claim must have been without substance in reality, if not frivolous".

Courts have defined "frivolous" under Code of Civil Procedure section 128.5 as a claim where "[a]ny reasonable attorney would agree it is totally and completely without merit. [Citation.]" *In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1220–1221. It has long been held that the "any reasonable attorney" standard is an objective inquiry made as a matter of law. *See, e.g., Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 32. Thus, the standard to determine "objective speciousness" is similarly determined as a matter of law and does not require the weighing of evidence.

In addition to the foregoing objective inquiries made as a matter of law, however, Civil Code §3426.4 also requires an improper purpose, or in other words, "subjective bad faith on the part of the attorney or party to be sanctioned. [Citation.]" *Gemini Aluminum Corp., supra at 1262.* The inquiry concerning subjective bad faith 'involves a factual inquiry into the plaintiff's subjective state of mind [citations]: Did he or she believe the action was valid? What was his or her intent or purpose in pursuing it?' ". *Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1072.

Once the court finds that a claim is objectively specious and that the plaintiff made it for an improper purpose, "there is no further requirement that the court also find a lack of 'subjective belief in the merits of its case.' " *Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc.* (2015) 236 Cal. App. 4th 243, 267.[3] Thus, a finding of objective speciousness of the claim renders any subjective belief as to the merits of the claim irrelevant. A finding that a claim is frivolous, on the other hand, is an actual determination that a reasonable attorney would not believe the claim had merit and thus, any subjective belief in the merits of the claim is ineffectual. The *Cypress* case adopted the definition of "objective speciousness" set forth in *FLIR Sys. Inc. v.*

[3] The *Cypress* court relied in part on Employer *FLIR Sys., Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, in which the court of appeal affirmed the judgment against FLIR on the misappropriation of trade secrets action and award of attorney fees.

Parrish, supra that there is a "complete lack of evidence to support the claim".[4] *Cypress, supra, at 261.*

But the court in *Parrish II* refused to acknowledge or analyze the impact of such objective findings by the trial court in its holding that there are only two recognized exceptions to the interim adverse judgment rule: (1) where a summary judgment motion was decided on procedural or technical grounds and (2) a summary judgment motion was decided as a result of fraud or perjury. The court found neither exception applied. *Parrish II, supra*, 238 Cal.App.4th at 97-102. The problem with *Parrish II's* narrow view is that neither exception would address the factual situation at issue in this case, when a trier of fact ultimately determines the claim is objectively specious (i.e. without any tenability at all legal or factual) or frivolous (i.e. no reasonable attorney would have brought the claim). Moreover, the *Parrish* court did not acknowledge that such a determination is not the result of "weighing" competing evidence and deciding that evidence presented was simply not enough to prove by a preponderance that the plaintiff should prevail. Rather, it

[4] The Cypress court dismissed as illogical the rule's reference the action could "superficially appear to have merit" and found such language "superfluous" because "there is no logical reason to require that the action 'superficially appear[ ] to have merit.' " *Id.* Thus, there is no inherent conclusion made by a trier of fact that a claim has superficial merit when a trier of fact finds a claim is "objectively specious".

is "the absence of evidence" altogether that controls. *Cypress, supra 236 Cal. App. 4th at 260.*

In effect, a determination of objective speciousness is a statement by the trier of fact *that no evidence or law supports the claim.* A determination that a claim is frivolous is a statement that no reasonable attorney could believe the claim had merit. Such determinations completely destroy the factual and legal basis for a denial of a prior motion for summary judgment and certainly completely undermine any "inference" that might be made from such a denial that the claim was supported by probable cause when it was filed so as to avoid a subsequent malicious prosecution claim.

II.

THERE IS A NEED FOR THIS COURT TO ADDRESS THE APPLICABILITY OF THE INTERIM ADVERSE JUDGMENT RULE WHERE A DISPOSITIVE MOTION IS DENIED AT THE CONCLUSION OF A BENCH TRIAL, IT CANNOT BE DETERMINED ON WHAT GROUNDS THE MOTION WAS DENIED AND THE TRIER OF FACT ULTIMATELY ENTERS JUDGMENT IN FAVOR OF THE MOVING PARTY

The exceptions to the interim adverse judgment rule as stated in *Wilson, supra* are reiterated by the court in *Parrish II.* But they both are inapplicable when there is a denial of a dispositive motion, other than a motion for summary judgment, such as a motion for judgment in a bench trial. This is

especially true where the denial is made by the trial court solely because it is poised to make a final adjudication on the merits of the claim. Thus, at the time of the denial the only act left to be done is entry of a judgment. Such a determination may have more to do with judicial economy and court resources, than any ruling on the merits of such a motion from which it could be inferred the trier of fact concluded the claims were supported by probable cause.

This is especially problematic when there is no written ruling or exposition on the record by a trial court concerning any ruling on the motion. When there are no grounds for any such denial articulated there is no basis to infer that the trial court has made a determination that there is sufficient support for any particular claim to survive the motion or that the claim is supported by probable cause. Unlike in a motion for summary judgment/adjudication, where evidence is presented and a written order with an explanation of the findings made is required, it cannot be ascertained whether an adjudication on the merits or one based on non-technical or non-procedural grounds has been made where a motion for judgment at the end of a bench trial is denied without any findings or written ruling.

The rationale that has been identified by courts as the basis for the inference made in the interim adverse judgment rule does not necessarily exist where an oral motion for judgment in a bench trial is brought and the trial court ultimately enters judgment in favor of the moving defendant. In applying the interim adverse judgment rule to the denial of a pretrial summary judgment

motion, as is the case in this litigation, courts have focused the inquiry on whether "no reasonable attorney would have thought" the claim had merit. *Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 67. Courts have concluded that when a trial court finds triable issues of material fact in the underlying case, probable cause may be inferred so that a malicious prosecution action should not proceed. *Id.* at 67-69.

The Court of Appeal in *Parrish* II relied on the notion that the subsequent rulings of the trial court that the litigation was filed in objective bad faith (that goes to the inception of the litigation) to support an award of sanctions did not negate other evidence presented in opposing the summary judgment motion filed by Plaintiffs. The court in *Parrish II* in effect found that the evidence presented in opposition to the motion for summary judgment "standing alone" would establish probable cause. *Parrish II at 101.* Quoting *Wilson, supra* the court in *Parrish II* pointed out: "A litigant or attorney who possesses competent evidence to substantiate a legally cognizable claim for relief does not act tortiously by bringing the claim, *even if also aware of evidence that will weigh against the claim.* Plaintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them." [emphasis added by the *Parrish* court] Such an analysis is difficult if not impossible to apply in the case of an oral motion *in a bench trial* where there is no evidence presented in

a formal motion and no ruling or findings are made by the trial court from which an inference of probable cause can be made-- especially where the denial is an election by the trial court to simply rule on the merits of the case instead of ruling on a motion for judgment and ultimately finds in favor of the moving defendant on each and every ground raised in the oral motion for judgment.

While the inference of probable cause works fairly in the context of summary judgment where the moving party must present a dispute of fact to prevail, the same is not true where a motion for judgment during the course of a bench trial is made where the trial court defers a ruling on the motion until after all the evidence is presented, denies the motion without any findings of fact or law and the only additional act in the litigation is the issuance of a judgment that is in favor of the moving defendant. Moreover, as is the case in the Vaughn Litigation, any determination of lack of probable cause in a pre-trial setting in a subsequent malicious prosecution action such as a denial of an anti-SLAPP motion or a court of appeal affirming such a denial is simply more support for the notion the claim lacked probable cause and no inference otherwise can be supported.

Courts have focused on circumscribing malicious prosecution claims "so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim" *Sheldon Appel Co. v. Albert & Oliker supra* 47 Cal.3d at

872. But there is the opposite concern that a broad application of the interim adverse judgment rule will serve to eliminate valid claims for malicious prosecution without justification.

Because an essential element of malicious prosecution is the determination by the trier of fact whether the underlying action lacked probable cause, an attorney defendant in a malicious prosecution action can use a ruling by a trial court that is not articulated or distilled into a written order as a bar to the action even though there is no basis from which it may be inferred from such a ruling that the trial court concluded probable cause exists.

The problem really stems from language in the *Wilson* case. *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811. In *Wilson,* the Supreme Court, addressing the effect of the denial of an anti-SLAPP motion on probable cause, made a statement that lumped together motions for summary judgment and motions for nonsuit:[5]

> Denial of a defense summary judgment motion on grounds that a triable issue exists, *or of a nonsuit,* while falling short of a determination of the merits,

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[5] The Supreme Court in *Wilson* held that the merits-based denial of a special motion to strike establishes there is probable cause to file a malicious prosecution lawsuit just as does an order denying a summary judgment motion. However, the October 2005 amendment to the anti-SLAPP statute (Code of Civil Procedure §425.16 (b)(3)) legislatively abrogated that part of the Wilson opinion. *Hutton v. Hafif* (2007) 150 Cal. App. 4th 527, 547.

> establishes that the plaintiff has substantiated, or can substantiate, the elements of his or her cause of action with evidence that, if believed, would justify a favorable verdict." *Wilson, supra, 28 Cal.4th at 824* [emphasis added].

But the *Wilson* court went on to explain that it may be inferred that a judge finds at least "some merit in the claim" from a trial court's "*conclusion that issues of material fact remain for trial*". *Id. at 819.* In the context of a motion for non-suit, however, the implications are not as clear. For example in *Cheong Yu Yee v. Cheung* (2013) 220 Cal.App.4th 184, 200-01, the Fourth District acknowledged that the denial of a nonsuit motion *together with* a subsequent plaintiff's jury verdict was sufficient to establish probable cause. In the *Yee* case the judge denied a motion for nonsuit "at the close of the plaintiffs' case" and then permitted the case to go to the jury that in turn, ruled in favor of the plaintiff. Under such circumstances, the appellate court held it may be inferred that the trial court made a decision that the claims were sufficiently tenable to go to the jury. *See also, Cowles v. Carter* (2d Dist. 1981) 115 Cal. App. 3d 350, 359 ["If the trial judge denies a motion for non-suit and permits a question of fact to go to the jury, he has, of necessity, decided that there is sufficient evidence to permit the jury to determine that issue. If the jury then makes a determination contrary to the defendant in the initial action, we feel that the dual action of the court and the jury is a sufficient determination of

probable cause to prevent the defendant from instituting malicious prosecution proceedings even though such verdict be overthrown by the trial judge or on appeal".]

But such inferences cannot be made where a motion for judgment in a bench trial is made after plaintiff's case in chief, the ruling is deferred until after all the evidence has been presented by both sides and closing arguments given and the motion is then orally denial without explanation concurrently with taking the matter under submission for issuance by the trial court of a judgment. Even more compelling, what happens if that same trial judge after taking the matter under submission finds in favor of the defendant who moved for judgment on all grounds raised in the motion for judgment?

The purpose of the interim adverse judgment rule is to give "effect" to the "conclusion that issues of material fact remain for trial" because it "serves the policy expressed in Sheldon Appel to discourage dubious malicious prosecution suits.' " *Wilson, supra* 28 Cal.4th at 819. This policy, however, is not served where there is no basis to determine that a trial court has, in fact, reached any conclusion that "material facts remain for trial" in the case of a pro forma denial of a motion for judgment in a bench trial where the judgment ultimately is in favor of the moving defendant. This is especially true where in the subsequent malicious prosecution action, as is the case in the Vaughn Litigation, the trial court expressly found a lack of probable cause to deny defendants' anti-SLAPP motions and the court of appeal affirmed the denial

similarly finding no reasonable attorney would have considered the unlawful detainer claims asserted valid. *Vaughn v. Darwish*, No. B253694, 2015 WL 3397033, (Cal. Ct. App. May 27, 2015), reh'g denied (June 16, 2015), review denied (Sept. 9, 2015).

There is simply no basis to infer from such circumstances that the trial court reached any conclusion, much less a conclusion that probable cause exists. To the contrary, valid, meritorious claims will be barred without just cause thereby providing a loophole for litigants and their attorneys. It will also have a chilling effect on the bringing of such oral dispositive mid-trial motions, the purpose of which are to facilitate adjudications expeditiously.

In evaluating the application of the interim adverse judgment rule the issue should not be whether a litigant and his or her attorney should be required, "on penalty of tort liability, to attempt to predict how a trier of fact will weigh competing evidence". *Wilson, supra* 28 Cal.4th at 822. Rather, it should be whether the interim ruling standing alone provides a clear and unambiguous basis to infer that a court has, in fact, determined that the claim has some merit. Where there is no written order and no oral statement on the record by the trial court as to why a dispositive motion for non-suit, motion for judgment or other pre-trial motion is denied, the inference cannot be made and any such ruling should not serve as a basis to impose the interim adverse judgment rule to bar a valid and meritorious malicious prosecution action

especially where the moving party ultimately prevails in the underlying litigation.

CONCLUSION

The interim adverse judgment rule as it currently exists is problematic. The issue is not whether a "bad faith" exception to the rule based on subjective "bad faith" of a claim should be imposed as argued by some of the amicus curiae. Rather, the issue is whether a determination of "objective speciousness" or "frivolousness" of a claim that necessarily requires a finding the claim was never supported by any law or fact and no reasonable attorney would believe the claim had merit, should be sufficient to override the inference of probable cause from the denial of a dispositive motion.

In addition, the application of the only recognized "exceptions" to the rule do not apply to many factual scenarios where it is simply unjustified to infer a trier of fact has made a determination a claim is supported by probable cause. While such an inference could be reasonable where a trier of fact finds a triable issue of fact exists in denying a motion for summary judgment, there is no similar inference to be made where a motion made during a bench trial is denied at the close of evidence and there is no stated ruling or explanation for the denial. Wherefore, it is requested that this honorable court overrule the opinion in *Parrish II* and hold:

(1) A finding by the trial court of "objective speciousness" and/or frivolousness of a claim for misappropriation of trade secrets as a

basis for the award of attorney fees under Civil Code §3426.4 undermines any inference of probable cause from the denial of motion for summary judgment under the interim adverse judgment rule; and

(2) There is no inference of probable cause under the interim adverse judgment rule to be made from the denial of a motion made during a bench trial after all the evidence has been presented and the only act left for the trier of fact is to enter a judgment.

The Supreme Court has an opportunity to circumscribe the application of the doctrine so that valid and meritorious malicious prosecution claims can be adjudicated notwithstanding prior interim rulings for which no stated reason or written order exists from which to infer a conclusion by the trial court that probable cause for the claims asserted exists.

Dated: May 26, 2016

Respectfully Submitted,
MESISCA RILEY & KREITENBERG LLP

By: _____
DENNIS P. RILEY
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Attorneys for Applicant
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CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.520(c)]

Counsel of Record hereby certifies that pursuant to Rule 8.520(c) of the California Rules of Court, this application and proposed brief is produced using 13-point Roman type including footnotes and contains approximately 5,727 words including footnotes. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: May 26, 2016

Respectfully Submitted,
MESISCA RILEY & KREITENBERG LLP

By: _____
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, SHIREE MAGEE, am employed in the aforesaid County, State of California; I am over the age of 18 years and not a party to the within action; my business address is 644 S. Figueroa Street, Suite 200, Los Angeles, California 90017.

On May 31, 2016, I served **MESISCA RILEY & KREITENBERG LLP'S APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED BRIEF IN SUPPORT OF APPELLANTS WILLIAM PARRISH AND E. TIMOTHY FITZGIBBONS** on the interested parties in this action by placing a true and correct copy thereof, enclosed in a sealed envelope, addressed as follows:

(See Attached Service List)

_X_ (BY MAIL)

_X_ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

_X_ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 31, 2016, at Los Angeles, California.

SHIREE MAGEE

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